SUPREME COURT OF SOUTH AUSTRALIA

(Court of Appeal: Civil)

A JUDICIAL OFFICER v THE JUDICIAL CONDUCT COMMISSIONER AND THE JUDICIAL CONDUCT PANEL

[2022] SASCA 42

Judgment of the Court of Appeal

(The Honourable President Livesey, the Honourable Justice Lovell and the Honourable Justice Doyle)

5 May 2022

MAGISTRATES - GENERALLY - DISCIPLINARY AND RELATED MATTERS - ACTIONS AGAINST MAGISTRATES

ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF REVIEW - PROCEDURAL FAIRNESS - GENERALLY

ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF REVIEW - JURISDICTIONAL MATTERS

STATUTES - ACTS OF PARLIAMENT - INTERPRETATION - GENERAL APPROACHES TO INTERPRETATION

CONSTITUTIONAL LAW - OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION - GENERAL MATTERS - NATURE AND SCOPE OF COMMONWEALTH POWERS - SEPARATION OF POWERS

The applicant is a judicial officer, serving as a magistrate. By letters dated 7 May and 31 May 2021, the judicial officer was notified by the Judicial Conduct Commissioner (the **Commissioner**) of eight complaints made against him. Following a preliminary investigation, the Commissioner reported to the Attorney-General that an inquiry into his conduct was necessary and recommended the appointment of a judicial conduct panel to inquire into and report on the complaints. On 24 June 2021, the Attorney-General constituted a judicial conduct panel (the **Panel**) under *the Judicial Conduct Commissioner Act 2015* (SA) (the **Act**).

By Originating Application for Judicial Review filed on 15 November 2021, the judicial officer sought review of the recommendation made by the Commissioner to the Attorney-General, and of

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Applicant: A JUDICIAL OFFICER Counsel: MR J WELLS QC WITH MR C JACOBI - Solicitor: D'ANGELO LAWYERS

First Respondent: THE JUDICIAL CONDUCT COMMISSIONER Counsel: MR M WAIT SC WITH MR T SIMPSON - Solicitor: CROWN SOLICITOR (SA)

Second Respondent: THE JUDICIAL CONDUCT PANEL Counsel: MR T BESANKO

Hearing Date/s: 23/12/2021

File No/s: CIV-21-12691

the subsequent decisions made by the Panel to inquire into the matters referred to it and to permit a legal representative of a witness to appear.

On 23 November 2021, the applicant issued a notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) raising constitutional issues regarding the validity and interpretation of the Act (the ***Kable* challenge**).

Held (Livesey P, Lovell and Doyle JJA) dismissing the application for judicial review:

1. The judicial officer was given sufficient notice of the impugned complaints to enable meaningful participation in the preliminary examination. The contention that there was no preliminary examination of complaint 8 by the Commissioner must be rejected. Ground 1 is dismissed.

2. The Commissioner's letter dated 10 June 2021 fairly summarised the "specific incident" and the other conduct comprising complaint 8. The judicial officer's complaint that there has been a denial of procedure fairness must be rejected. The essential nature of the conduct was identified in a manner that fairly framed the scope of the referral by the Attorney and the inquiry by the Panel. Ground 2 is dismissed.

3. The Panel's decision to permit a limited right of appearance to counsel for witness A was not beyond jurisdiction. It was open to the Panel to find that counsel for witness A was a person whose presence was reasonably required for the purposes of or in connection with the performance by the Panel of its functions. Ground 3 is dismissed.

4. The issues raised by the judicial officer in his *Kable* challenge fail at the threshold. The case for the judicial officer depended on a construction of the Act which has been rejected and was contrary to the evidence.

Act of Settlement 1701 (UK) 12 & 13 Wm III c 2; *Acts Interpretation Act 1915* (SA) s 22A; *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA) s 16; *Colonial Leave of Absence Act 1782* (UK); *Commonwealth Constitution* s 72; *Competition and Consumer Act 2010* (Cth) s 86(2); *Constitution Act 1856* (SA) ss 30, 31; *Constitution Act 1934* (SA) s 84; *Constitution Act 1934* (SA) ss 74, 75; *Courts Administration Act 1993* (SA) ss 27A, 27C; *Independent Commission Against Corruption Act 2012* (SA); *Judicial Commission Act 2020* (NT); *Judicial Commission of Victoria Bill 2010* (Vic); *Judicial Commissions Act 1994* (ACT); *Judicial Conduct Commissioner Act 2015* (SA) ss 3, 4, 5, 6, 7, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33; *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ); *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 20; *Judicial Officers Act 1986* (NSW); *Judiciary Act 1903* (Cth) ss 68(2), 78B; *Legal Profession Practice Act 1958* (Vic) s 28; *Legislation Interpretation Act 2021* (SA) s 55; *Magistrates Court Act 1991* (SA); *Maralinga Tjarutja Land Rights Act 1984* (SA) s 21; *Migration Act 1958* (Cth) s 429; *Ombudsman Act 1972* (SA) ss 13, 16, 19; *Parliamentary Commission of Inquiry Act 1986* (Cth) s 5; *Parliamentary Commission of Inquiry Act 1986* (Cth); *Parliamentary Commission of Inquiry (Repeal) Act 1986* (Cth) s 6; *Parliamentary Committees Act 1991* (SA); *Public Service Act 1979* (NSW) s 85; *Remuneration Act 1990* (SA) s 11; *Royal Commissions Act 1917* (SA) ss 6, 13, 16, 16B; *South Australian Local Government Grants Commission Act 1992* (SA) s 16; *Supreme Court Act 1935* (SA) s 39; *Uniform Civil Rules 2020* (SA) r 32.2, referred to.
Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; *Annetts v McCann* (1990) 170 CLR 596; *Arafura Seafood Products Pty Ltd v Landos* [1988] FCA 340; *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee & Ors* (1945) 72 CLR 37; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *Attorney-General for the Northern Territory & Anor v Emmerson* (2014) 253 CLR 393; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; *B, RD v Channel Seven Adelaide Pty Ltd* (2008) 103 SASR 478; *Baker v The Queen* (2004) 223 CLR 513; *Bannerman v Mildura Fruit Juices Pty Ltd* (1984) 2 FCR 581; *Barry v Queensland Nursing Council* [2001] QDC 146; *Bond v Australian Broadcasting Tribunal (No 2)* (1988) 19 FCR 494; *Bond v Sulan* (1990) 26 FCR 580; *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Bronze Wing International Pty Ltd v SafeWork NSW* [2017] NSWCA 41; *Brown v The Queen* (1986) 160 CLR 171; *Bruce v Cole* (1998) 45 NSWLR 163; *Cabassi v Vila* (1940) 64 CLR 130; *Cheatle v The Queen* (1993) 177 CLR 541; *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; *Clyne v NSW Bar Association* (1960) 104 CLR 186; *Connell v*

National Companies and Securities Commission (1989) 14 ACLR 765; *Cooper Brookes (Wollongong) Pty Ltd v The Commissioner of Taxation of the Commonwealth of Australia* (1981) 147 CLR 297; *Copartnership Farms v Harvey-Smith* [1918] 2 KB 405; *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201; *Dainford Ltd v ICAC* (1990) 20 ALD 207; *Dawkins v Lord Rokeby* (1873) LR 8 QB 255; *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Ell v Alberta* (2003) 1 SCR 857; *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10; *Etherton v Public Service Board* [1983] 3 NSWLR 297; *Fingleton v Christian Ivanoff Pty Ltd* (1976) 14 SASR 530; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510; *Gardiner v Land Agents Board* (1976) 12 SASR 458; *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 122 FCR 78; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245; *Hamilton v Oades* (1989) 166 CLR 486; *Hammond v The Commonwealth* (1982) 152 CLR 188; *Hargreaves v Bretherton* [1959] 1 QB 45; *In the matter of Lisa Jane Barrett (No 2)* [2021] SASCFC 38; *Jones v Director of Public Prosecutions (UK)* [1962] AC 635; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Karakatsanis v Racing Victoria Ltd* (2013) 42 VR 176; *Karounos v Corporate Affairs Commission (SA)* (1989) 50 SASR 484; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *Kiao & Ors v West & Anor* (1985) 159 CLR 550; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Knight v Victoria* (2017) 261 CLR 306; *Kronen v Commercial Motor Industries Pty Ltd* (2018) 264 FCR 408; *Kuczborski v Queensland* (2014) 254 CLR 51; *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540; *Lambert v Weichelt* (1954) 28 ALJR 282; *Lee v Evans* (1964) 112 CLR 276; *Lee v NSW Crime Commission* (2013) 251 CLR 196; *Mann v O'Neill* (1997) 191 CLR 204; *Marrinan v Vibart* [1963] 1 QB 528; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 95 ALJR 292; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475; *Moore v Lambeth County Court Registrar* [1969] 1 WLR 141; *More v Weaver* [1928] 2 KB 520; *Moss v Brown* [1979] 1 NSWLR 114; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441; *National Companies & Securities Commission v News Corp Ltd* (1984) 156 CLR 296; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569; *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146; *O'Connor v Waldron* [1935] AC 76; *Owners of "Shin Kobe Maru" v Empire Shipping* (1994) 181 CLR 404; *Plaintiff M61/2020E v Commonwealth* (2010) 243 CLR 319; *Pollentine & Anor v Bleijie & Ors* (2014) 253 CLR 629; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *PT Bayan v BCBC Singapore* (2015) 258 CLR 1; *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor* (2012) 249 CLR 398; *Question Of Law Reserved (No 1 of 2018)* (2018) 275 A Crim R 400; *R (on the application of Bourgass) v Secretary of State for Justice* [2016] AC 384; *R v Moss; Ex parte Mancini* (1982) 29 SASR 385; *R v Solicitors' Disciplinary Tribunal; Ex parte L (a solicitor)* [1988] VR 757; *Re JN Taylor Holdings Limited (In Liq)* [2007] SASC 193; *Re Minister for Immigration and Multicultural Affairs; ex parte S20/2002* (2003) 198 ALR 59; *Re Question of Law Reserved (No. 1 of 2019)* (2019) 135 SASR 226; *Revis v Smith* (1856) 18 CB 126; *Romeo v Asher* (1991) 29 FCR 343; *Rondel v Worsley* [1969] 1 AC 191; *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431; *Russell v Duke of Norfolk* [1949] 1 All ER 109; *S v The Queen* (1989) 168 CLR 266; *Seaman v Netherclift* (1876) 2 CPO 53; *Shaw Stockbroking Ltd v Australian Stock Exchange* (1998) 16 ACLC 827; *Smith v New South Wales Bar Association* (1992) 176 CLR 256; *Sorby v Commonwealth* (1983) 152 CLR 281; *South Australia v Totani* (2010) 242 CLR 1; *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486; *Tajjour v New South Wales* (2014) 254 CLR 508; *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361; *The Queen v The Australian Broadcasting Tribunal & Ors; Ex parte Hardiman* (1980) 144 CLR 13; *Traill v McRae* (2002) 122 FCR 349; *Trapp v Mackie* [1979] 1 All ER 489; *Valente v R* (1985) 2 SCR 673; *Wainohu v New South Wales* (2011) 243 CLR 181; *Watson v M'Ewan* [1905] AC 480; *Wentworth v NSW Bar Association* (1992) 176 CLR 239; *Willis v Sir George Gipps* (1846) 13 ER 536; *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, considered.

A JUDICIAL OFFICER v THE JUDICIAL CONDUCT COMMISSIONER AND THE JUDICIAL CONDUCT PANEL
[2022] SASCA 42

Court of Appeal – Civil Application for Review – Judicial Review

LIVESEY P:

Introduction

1 The applicant is a judicial officer, serving as a magistrate.

2 The applicant challenges a number of decisions made by the Judicial Conduct Commissioner (the **Commissioner**) and the judicial conduct panel. He seeks orders in the nature of certiorari or prohibition, together with declarations, effectively putting a stop to the inquiry being conducted by the Panel into allegations that he engaged in sexual and other misconduct. The application for judicial review was heard by the Court of Appeal.[1]

3 For the reasons that follow, none of the grounds have been made out, the *Kable* challenge fails[2] and the application for judicial review must be dismissed.

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1 See s 29(1) of the *Judicial Conduct Commissioner Act 2015* (SA).
2 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***).

Background facts

4 Pursuant to s 29(1) of the *Judicial Conduct Commissioner Act 2015* (SA) (the **Act**) any application for judicial review of a decision under that Act must be made to the Court of Appeal.

5 The matter was called over before the Court of Appeal during November with a view to convening a hearing just before Christmas 2021. At these callovers a "party access" order was made,[3] the representation of the parties was resolved, and the material to be put before the Court of Appeal was agreed.

6 In support of the application for judicial review, the applicant provided a Statement of Facts, Issues and Contentions dated 15 November 2021, supported by an affidavit from the applicant's instructing solicitor exhibiting the documents regarded as relevant to the application.

7 For the purposes of the application the parties effectively treated the statement of facts and the affidavit as agreed.

8 In order to understand the applicant's contentions, it is first necessary to set out the factual background.

The preliminary investigation

9 On 7 May 2021, the Commissioner notified the applicant of a series of complaints which were listed as complaints numbered 1 to 7. The applicant was invited to respond to what was described as a "preliminary investigation" within the meaning of the Act.

10 It is not necessary to address the substance of complaints 1 to 7 because they did not feature in the application for judicial review.

11 By a further letter dated 31 May 2021, the Commissioner notified the applicant of a further complaint, complaint numbered 8, which was investigated on the Commissioner's "own initiative".[4] It concerned an alleged incident involving [REDACTED] and the applicant [REDACTED] in a Court building on 18 July 2014 (the **specific incident**). The substance of the complaint was that the

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[3] Pursuant to r 32.2 of the *Uniform Civil Rules 2020* (SA).
[4] Pursuant to s 12(8) of the Act.

applicant [REDACTED]. The applicant was told that the incident was witnessed by Ms B.

12 The Commissioner advised that the witness reported the incident and made notes of it. It was alleged that [REDACTED] later told the witness that the applicant "often treated her in that way and it made her uncomfortable". She "claimed to have raised it with [the applicant] but it made no difference". Again, the Commissioner sought a response.

13 On 3 June 2021, the applicant's solicitor responded to the complaints, effectively denying all allegations of misconduct.

The recommendation and referral

14 On 10 June 2021, the Commissioner reported to the Attorney-General, advising that she had conducted a preliminary examination "of the complaints" and that "an inquiry into the conduct is necessary and justified, and that if established, the conduct may warrant consideration of removal of [the applicant] by the Governor".

15 The Commissioner recommended the appointment of a judicial conduct panel to "inquire into and report" on the eight complaints concerning the conduct of the applicant.

16 Complaint 8 was addressed in the 10 June 2021 letter by naming [REDACTED] Ms C and confining the time period to 2012 to 2020, adding that [REDACTED].

17 The Commissioner explained that she put the "essence of all the allegations", meaning complaints numbered 1 to 8, to the applicant who either denied the allegations or asserted that his conduct "was, in effect, innocuous".

18 The applicant's solicitor and the Chief Magistrate, the applicant's head of jurisdiction, were informed of the Commissioner's recommendations by separate letters dated 10 June 2021.

19 As will be seen, to the extent that it was suggested in the letter dated 31 May 2021 that the judicial officer often treated the complainant in a particular way, this was referred to by the applicant as "the **conclusionary allegation**". To the extent that details regarding complaint 8 in the 10 June 2021 letter to the Attorney-General were not included in the 31 May 2021 letter to the applicant, these were referred to as "the **omitted allegations**".

Constitution of the Judicial Conduct Panel

20 On 24 June 2021, the Attorney-General constituted a judicial conduct panel comprising the Hon Justice Kelly, then the President of the Court of Appeal, the Hon David Bleby QC, a retired Supreme Court Judge, and Dr Christopher Moy (the **Panel**).

21 On 9 July 2021, the applicant was informed by letter from counsel assisting the Panel that the Panel had been constituted and disclosure was made of witness statements relating to complaints numbered 1 to 8. These included a statement provided by Ms C dated 7 June 2021, together with the earlier statement of the witness, Ms B, dated 28 May 2021. A request was made that the applicant respond by 26 July 2021 as to whether any parts of the statements were disputed. A directions hearing was proposed for 9 August 2021.

22 By a further letter from counsel assisting dated 16 July 2021, the view of the Panel was conveyed that it proposed to permit complainants to be legally represented "at any hearing they are required or invited to attend" and that it would give consideration to whether complainants could be present, in person or through legal representatives if and when the applicant gave evidence. The applicant was told that some of the complainants may require that a Witness Assistance Officer be present when they give evidence and that submissions would be made about that at the directions hearing on 9 August 2021.

23 The applicant was advised that the Chief Justice had informed the Panel that he had not approved any guidelines pursuant to s 23(3)(c) of the Act regarding the manner in which the Panel must call meetings and conduct business at those meetings.

24 On 4 August 2021, counsel assisting the Panel sent the applicant's solicitors a letter which enclosed, amongst other letters, the letter from the Commissioner to the Attorney-General dated 10 June 2021.

The 9 August 2021 directions hearing

25 The Panel conducted a directions hearing on 9 August 2021 at which, amongst other matters, counsel for the applicant raised issues concerning the "matters" the subject of inquiry and suggested that there had not been any explicit referral of those matters to the Panel by the Attorney-General as s 23 of the Act required.

26 Counsel for the applicant also raised the difference between the issues the subject of the preliminary examination, the notification of complaint 8 to the applicant (as set out in the letter dated 31 May 2021) and the recommendation made in relation to complaint 8 (as set out in the letter to the Attorney-General dated 10 June 2021), indicating an intention to write to the Commissioner about that. The submission was that because not all of the detail in the 10 June letter was contained in the 31 May letter, there was "either or both of a failure to notify in accordance with the Act or a failure of procedural fairness". It was submitted that because the Commissioner had treated all complaints as one complaint "there has been a failure in relation to all".[5]

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5 Transcript of the Panel hearing dated 9 August 2021, p 20.

27 Counsel for the applicant opposed the proposed course of allowing witnesses to be legally represented. No ruling was made about that issue.

Correspondence with the Commissioner following the 9 August 2021 directions hearing

28 On the day of the directions hearing, correspondence was sent by the applicant to the Commissioner addressing the scope of her recommendation and of the preliminary examination.

29 On 12 August 2021, the Commissioner replied. First, she explained that she collected the complaints together as a matter of convenience so as to “consider their combined force”. The Commissioner reiterated the point made in her 10 June 2021 letter, that she had not thereby denied herself “the power to make different decisions with respect to disposition of individual complaints”, emphasising that no reference to s 13(4) of the Act was made.

30 Secondly, as for complaint 8, the Commissioner explained that her letter dated 31 May 2021 was based on information from the witness Ms B, and that by the time of the 10 June 2021 letter she had received further information. The Commissioner indicated that both letters addressed the specific incident, and both referred to “other occasions … of a similar ilk”.

31 The Commissioner expressed the view that she was “not required by s 12(3) of the Act to provide more detail” because she was “undertaking only a preliminary investigation; there was no final determination of [the applicant’s] rights or interests” and, in addition, she did “not intend to undertake a fresh preliminary examination of complaint 8”.

32 Ultimately, on 20 August 2021, the Attorney-General made an instrument explicitly referring to the Panel all of the matters the subject of the recommendation made by the Commissioner in her letter to the Attorney dated 10 June 2021.

Submissions concerning the additional matters in complaint 8

33 On 13 September 2021, the applicant contended before the Panel that it lacked jurisdiction to entertain the Attorney-General’s referral where “so much” of the Commissioner’s recommendation concerning complaint 8 was not notified to the applicant or made the subject of a preliminary examination.

34 Counsel explained the basis for that argument by reference to the scope of the power contained in s 23(1) of the Act. Counsel contended that it was necessary to identify “conduct” that could be made the subject of inquiry. It was submitted that this requirement was not satisfied concerning the allegation about the applicant “often” treating Ms C in a particular way, together with the failure to specify the allegations concerning the period between 2012 and 2020. Counsel emphasised the absence of notice regarding the essential facts underlying these allegations which, it was submitted, was required by the principles of procedural

fairness (and reference was made to s 23(3)(b) of the Act). These oral submissions were supported by written submissions.

35 Counsel assisting the Panel subsequently provided written submissions dated 30 September 2021 and the Applicant made written submissions in reply dated 18 October 2021.

36 The Panel gave written reasons for its determination on 27 October 2021 that it would inquire into all of the matters the subject of the referral, including all of the allegations made by Ms C.

37 It will be necessary to return to the reasons given for the ruling made on 27 October 2021.

The private hearing decision

38 A further directions hearing was listed for 9 November 2021. Before that hearing, correspondence was sent by the solicitor for a witness who had made a complaint to the Commissioner which had been included in the Commissioner's recommendation. In that correspondence, it was indicated that counsel for the witness would seek, if permitted, to take objections during cross-examination, to re-examine the witness if necessary or appropriate and to make submissions to the Panel regarding such issues as may arise in relation to the witness's evidence. These included submissions on matters of evidence or procedural fairness, as well as to the findings that might be made about the witness's evidence.

39 As will be seen, the Panel did not rule on all of these contentions.

40 On 9 November 2021, following the receipt of written submissions from the applicant, the Panel heard oral argument on whether the witness was entitled, by leave, to be represented. Counsel assisting and counsel for the witness contended in favour of that entitlement, whereas counsel for the applicant opposed it.

41 Following argument, the Panel determined to permit the representation of the witness during her evidence and otherwise deferred for later consideration any entitlement of that witness to later participate in the hearing process. Although no reasons were published, the Panel indicated that it accepted the submissions of counsel assisting the Panel.

The application for judicial review

42 Shortly after the last-mentioned hearing, the applicant filed an application for judicial review on 15 November 2021.

43 By that application, the following recommendations by the Commissioner dated 10 June 2021 and decisions by the Panel dated 27 October and 9 November 2021 were challenged:

1. The recommendations made by the Judicial Conduct Commissioner to the Attorney-General dated 10 June 2021.

2. The decision of the Judicial Conduct Panel dated 27 October 2021 to inquire into the conduct of Referral from the Attorney-General entirely, and further, to inquire into the omitted allegations and conclusionary allegations.

3. The decision of the Judicial Conduct Panel dated 9 November 2021 to permit a witness to be legally represented, and to defer its consideration of whether it would permit that counsel to take further part in the proceedings.

44 The applicant sought the following orders:

1. An order in the nature of certiorari quashing the recommendations of the Judicial Conduct Commissioner dated 10 June 2021 entirely, or otherwise in relation to complaint 8.

2. An order in the nature of prohibition prohibiting further inquiry by the Judicial Conduct Panel into the Referral entirely, or otherwise in relation to the omitted allegations and conclusionary allegations purportedly part of complaint 8.

3. A declaration that:

    a. The recommendations made by the Judicial Conduct Commissioner dated 10 June 2021 are invalid by reason of:

        i. the failure to notify the Applicant of the omitted allegations contrary to s12(3) of the *JCC* Act, or to conduct a preliminary examination into those allegations contrary to s13 of the *JCC* Act; and

        ii. the failure to accord procedural fairness to the Applicant contrary to s21 of the *JCC* Act;

    b. The proposed inquiry into the conduct the subject of the Referral is wholly invalid, by reason that it is based on a Referral which is invalid or invalid [sic], alternatively, is invalid to the extent it is a purported inquiry into conclusionary or omitted allegations;

    c. [The] witnesses before the Judicial Conduct Panel are not entitled to be legally represented, or to participate in the Inquiry process otherwise than as witnesses.

Hearings before the Court of Appeal and notice pursuant to s 78B of the *Judiciary Act 1903* (Cth)

45 During the course of the callovers earlier mentioned, the Court was informed that the Commissioner was no longer the Hon Ann Vanstone QC. Following Commissioner Vanstone's resignation, the Hon Bruce Debelle AO QC was appointed on an interim basis. The Commissioner would be represented by the Solicitor-General who would, in addition, present argument in support of the decisions made by the Panel.

46 Counsel assisting the Panel appeared, but took no active role.[6]

47 In addition, the applicant sought an interim "party access" order. This interim order was not opposed.[7] The purpose of the order was to ensure the confidentiality of the identities of the applicant and the various complainants, together with confidentiality concerning the allegations made by the various complainants. In support of this approach, the applicant sought the closure of the Court during those parts of the hearing before the Court of Appeal at which details of the allegations were aired. As it turned out, counsel for witness A did not oppose that course.

48 It will be necessary to return to the ongoing operation of any party access orders.

49 The applicant issued a notice dated 23 November 2021 pursuant to s 78B of the *Judiciary Act 1903* (Cth) raising what it was contended were constitutional issues, effectively mounting what was described as a "*Kable* challenge".[8] That notice is in the following terms:

> 1. The Applicant for Judicial Review in Action No. CIV-21-01269, moves the Appeal Division of the Supreme Court of South Australia for orders in the nature of Certiorari and Prohibition, and for declaratory relief, in respect of:
>
>   (a) decisions made by the Judicial Conduct Commissioner ("**JCC**") pursuant to the *Judicial Conduct Commissioner Act, 2015* (SA) (the ***JCC Act***) and;
>
>   (b) decisions made by a Judicial Conduct Panel ("**JCP**") appointed by the Attorney-General pursuant to s.21 of the JCC Act, to inquire into matters concerning the conduct of the applicant, a judicial officer.
>
> 2. The proceedings are subject to an interim party access order pursuant to r 32.2 of the *Uniform Civil Rules, 2020* (SA), which restricts to the parties only the availability of the Originating Application and all supporting documentation including interlocutory applications and material.
>
> 3. Out of an abundance of caution, the information provided in this s78B Notice is, as far as possible, restricted so as to preserve the anonymity of the parties, and the confidentiality of the information. To that end, the applicant requests that all recipients of this Notice accept a self-imposed obligation of confidentiality except to the extent necessary to consider the Notice and to obtain instructions for a Response.
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> 4. With these restrictions in mind, but in order to provide the information required by s.78B of the *Judiciary Act 1903*, there is Attachment to this Notice containing an extract from the Originating Application for Review setting out the Issues (Part 2), Grounds of Review (Part 3) and the Orders sought (Part 4). It has been redacted in part.

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[6] This was said to be in accord with the "*Hardiman* principle", see *The Queen v The Australian Broadcasting Tribunal & Ors; Ex parte Hardiman* (1980) 144 CLR 13, 35 (Gibbs, Stephen, Mason, Aickin and Wilson JJ).

[7] Made pursuant to r 32.2 of the *Uniform Civil Rules 2020* (SA).

[8] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

5. The nature of matter arising under *the Constitution* or involving its interpretation is as follows:

 5.1. to the extent that s 24 of the *JCC Act* is to be construed as deeming a Judicial Conduct Panel to be a Royal Commission acting under, and pursuant to, the *Royal Commissions Act 1917* (SA), (subject only to such qualifications and modifications as are required by the *JCC Act*, either expressly, or by necessary implication), the section is invalid as inconsistent with the essential judicial independence of –

  (a) the Court of which the applicant is a member, and

  (b) every other State Court that may exercise the judicial power of the Commonwealth pursuant to investment by laws made by the Commonwealth Parliament.

 5.2. to the extent that s 23(1) and s 23(3)(a) of the *JCC Act*, are to be construed as authorising an inquiry into matters concerning the conduct of a judicial officer despite the absence of a sufficient notice to the judicial officer of the essential facts alleged to constitute that conduct, the section is invalid as inconsistent with the essential judicial independence of –

  (a) the Court of which the applicant is a member, and

  (b) every other State Court that may exercise the judicial power of the Commonwealth pursuant to investment by laws made by the Commonwealth Parliament.

50 Before addressing the contentions made to the Court of Appeal, it is first helpful to outline some of the debate that surrounded the implementation of the Act, together with the provisions of the Act relevant to this application.

The *Judicial Conduct Commissioner Act 2015* (SA) – the debate

51 The South Australian Bill was preceded by considerable debate concerning the necessity for a formal judicial complaints handling process.[9] This debate intensified after the Chief Justice of the High Court of Australia, the Hon Susan Kiefel AC, announced the outcome of an independent inquiry into allegations by former associates regarding alleged sexual harassment by the Hon Dyson Heydon AC QC.[10]

52 In the course of this long-running debate, whether "judicial accountability" interferes with "judicial independence" has been closely considered. The debate

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[9] See, eg, John Doyle 'Accountability: Parliament, the Executive and the Judiciary' (Conference Paper, AIAL Forum, 18-19 June 1998); HP Lee, *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) ch 2 p 41; HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2012) 150. For later consideration of these issues, see Ronald Sackville 'Judicial ethics and judicial misbehaviour: Two sides of the one coin?' (2015) 89 *Australian Law Journal* 244; Gabrielle Appleby, Suzanne Le Mire, Andrew Lynch and Brian Opeskin, 'Contemporary challenges facing the Australian judiciary: An empirical interruption' (2019) 42(2) *Melbourne University Law Review* 299, 357.

[10] François Kunc, 'Current Issues – Reflecting on Recent Events' (2020) 94 *Australian Law Journal* 651, 651.

generally reflects a growing expectation that there should be greater accountability. As the Hon Robert Nicholson AO explained in 1993:[11]

> It is probably fair to say that at the present time it is an expectation of the citizen that all aspects of government ought to be highly accountable. It is probably also fair conjecture that the same citizen would characterise the judicial branch of government as in need of greater accountability.

53 The proposition that the judiciary is not accountable has been widely rejected.[12] The Hon John Doyle AC QC described this view as "misconceived". This misconception "stems from the imprecision of the term accountability. In truth accountability is a concept the content of which varies according to the context in which it is being considered".[13]

54 In the context of judicial decision-making, John Doyle explained that accountability is significant when considering that Judges must "transact their business" in public, provide full reasons for all decisions they make and accept individual responsibility for their decisions. Most judicial decisions are subject to a full review of their legality and merits, as well as public comment. Whilst he acknowledged that a judge's security of tenure distinguishes the judiciary from other branches of government, he highlighted that "judicial decision-making must be independent of the parties, of the executive government and of external influences generally, and seen to be independent".[14]

55 One concern has been whether judicial accountability mechanisms may undermine confidence in judicial independence.[15] Whilst "judicial independence" is prized, it is necessary to identify with some precision what that concept entails. The Hon Len King AC QC described "the freedom of the judge from pressure or influence in the making of his decisions in his courtroom… [as] the undoubted kernel of judicial independence".[16]

56 The Hon Marilyn Warren AC QC characterised judicial independence as the core principle that "the decider of the case [be] free from influence":[17]

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11 RD Nicholson, 'Judicial Independence and Accountability: Can They Co-exist?' (1993) 67 *Australian Law Journal* 404, 413.

12 See, eg, RD Nicholson, 'Judicial Independence and Accountability: Can They Co-exist?' (1993) 67 *Australian Law Journal* 404, 413; John Doyle 'Accountability: Parliament, the Executive and the Judiciary' (Conference Paper, AIAL Forum, 18-19 June 1998); James Spigelman, 'Seen to be done: The principle of open justice – Part II' (2000) 74 *Australian Law Journal* 378, 378.

13 John Doyle 'Accountability: Parliament, the Executive and the Judiciary' (Conference Paper, AIAL Forum, 18-19 June 1998) 21-22.

14 John Doyle 'Accountability: Parliament, the Executive and the Judiciary' (Conference Paper, AIAL Forum, 18-19 June 1998) 10-12.

15 See, eg, Irving R Kaufman, 'Chilling Judicial Independence' (1979) 88 *Yale Law Journal* 681, 715–16; Enid Campbell, 'Suspension of Judges from Office' (1999) 18 *Australian Bar Review* 63, 73–4.

16 Len King, 'Minimum Standards of Judicial Independence' (1984) 58 *Australian Law Journal* 340, 341.

17 Marilyn Warren, 'Does judicial independence matter?' (2011) 85 *Australian Law Journal* 481, 482.

> This means, free from influence from the government of the day, the parties before the court, the media, other judges' opinions and, even, the predispositions and predilections of the individual judge or judges deciding the case before the court.

57 Judicial independence has also been explained as freedom from interference with "a judge's capacity impartially and efficiently to hear and determine according to law all disputes presented for judgment".[18]

58 The essence of "judicial independence" concerns the ability of judges to decide cases impartially, in accordance with the law.[19] That independence is "traditionally, and properly, protected by strong constitutional restraints on how judges may be removed and requirements that their renumeration may not be arbitrarily reduced".[20] However, it is important not to cast the principle of judicial independence "too widely".[21] As Justice Kunc has explained, extra-curially:[22]

> … there is much about the selection, functioning, education, management and even, in some respects, disciplining of judges that has nothing to do with judicial independence.

59 The concept of judicial independence must not therefore be confused with judicial accountability, which encompasses "legal, public and informal (or professional) accountability".[23]

60 While historically a judge may be removed by Parliament, the threshold for removal is "very high".[24] Indeed, the process is "extremely rare" and "difficult to implement".[25] Although the threshold for removal must be high so as to "ensure that judges are free from political interference",[26] the difficulty then encountered when disciplining judges for misbehaviour and incapacity that does not reach this bar has been criticised as inadequate.[27] Appleby and Le Mire have argued

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[18] François Kunc, 'Current Issues – Thinking about Judicial Independence' (2020) 94 *Australian Law Journal* 651, 656.

[19] RE McGarvie, 'The ways available to the judicial arm of government to preserve judicial independence' (1992) 1 *Journal of Judicial Administration* 236, 237.

[20] François Kunc, 'Current issues – Thinking about Judicial Independence' (2020) 94 *Australian Law Journal* 651, 656.

[21] RE McGarvie, 'The ways available to the judicial arm of government to preserve judicial independence' (1992) 1 *Journal of Judicial Administration* 236, 237.

[22] François Kunc, 'Current issues – Thinking about Judicial Independence' (2020) 94 *Australian Law Journal* 651, 656.

[23] RD Nicholson, 'Judicial Independence and Accountability: Can They Co-exist?' 67 *Australian Law Journal* 404, 413, citing S Shetreet, 'Judicial Accountability: A Comparative Analysis of the Models and Recent Trends' (1986) *International Legal Practitioner* 38; RE McGarvie, 'The Operation of the New Proposals in Australia' in *The Accountability of the Australian Judiciary: Procedures for Dealing with Complaints Concerning Judicial Officers* (Australian Institute of Judicial Administration, 1989) 13, 16-18.

[24] Australian Law Reform Commission, *Judicial Impartiality – Ethics, Professional Development and Accountability* (Background paper JI5, April 2021) 20.

[25] Australian Law Reform Commission, *Judicial Impartiality – Ethics, Professional Development and Accountability* (Background paper JI5, April 2021) 20; John Doyle 'Accountability: Parliament, the Executive and the Judiciary' (Conference Paper, AIAL Forum, 18-19 June 1998) 9.

[26] Australian Law Reform Commission, *Judicial Impartiality – Ethics, Professional Development and Accountability* (Background paper JI5, April 2021) 20.

[27] Australian Law Reform Commission, *Judicial Impartiality – Ethics, Professional Development and Accountability* (Background paper JI5, April 2021) 20.

"[p]roblematic judicial behaviour is rare … Yet the rarity of such behaviour does not undermine the need for an appropriate system to deal with complaints when they do arise".[28]

61 Before the introduction of the Act, complaints of misconduct were generally dealt with by the head of the jurisdiction of the judicial officer. However, those complaints processes have been criticised as discretionary and informal, lacking independence, lacking disciplinary procedures and permanent administrative structures.[29] The Hon Wayne Martin AC QC pointed out that:[30]

> neither I nor any other Head of Jurisdiction has appropriate facilities or mechanisms for the conduct of such investigations, and there may well be situations in which it may be alleged either by the complainant or the judicial officer that the Head of Jurisdiction has a conflict of interest in the conduct of such investigation.
>
> (footnote omitted)

62 It is in this context that judicial commissions have been introduced in a number of Australian jurisdictions, including most recently in the Northern Territory.[31]

63 After the Act commenced operation, in April 2021 the Australian Law Reform Commission published background paper JI5 "Judicial Impartiality – Ethics, Professional Development and Accountability", which from page 17 addressed responses to judicial incapacity and misconduct. The Australian Law Reform Commission identified existing responses as limited.[32] They required a range of institutional structures "to enhance judicial impartiality and to ensure that mechanisms to protect it remain effective".[33]

The *Judicial Conduct Commissioner Act 2015* (SA) – the Second Reading

64 On 18 March 2015, the Attorney-General presented his Second Reading speech to the House of Assembly, explaining:[34]

> This Bill concerns the establishment of a transparent, formal and partly independent mechanism for dealing with complaints made against a judicial officer, be they derived internally or externally to the judicial system. There is no current system at all to deal with these matters, the only recourse being correspondence with the head of the jurisdiction of the judge in question. This has been justified in the past in the name of the undoubted

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[28] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 5.

[29] Law Council of Australia, *Principles underpinning a Federal Judicial Commission* (Policy Statement, December 2020) 3-4.

[30] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (Report, December 2009) [6.33].

[31] See *Judicial Commission Act 2020* (NT).

[32] Australian Law Reform Commission, *Judicial Impartiality – Ethics, Professional Development and Accountability* (Background paper JI5, April 2021) 23.

[33] Australian Law Reform Commission, *Judicial Impartiality – Ethics, Professional Development and Accountability* (Background paper JI5, April 2021) 24.

[34] South Australia, *Parliamentary Debates*, House of Assembly, 18 March 2015 (John Rau, Attorney-General).

> constitutional principle of the independence of the judiciary. That argument can be taken too far.
>
> While it is absolutely clear that the functions of the judiciary as a decision-making institution should not be subjected to the will of the Executive, it by no means follows that any individual member of the judiciary should be immune from examination as to performance, or examination as to conduct in the performance of their duties – or in their extra judicial behaviour – that does not relate directly to the performance of the judiciary as an independent arm of government.

65 The Attorney-General's speech demonstrates that the Australian jurisdictions have responded in different ways to the growing awareness that complaints against judicial officers should not be handled, or at least not solely handled, by the relevant head of jurisdiction.

66 The Attorney-General explained that in 1987 New South Wales established the *Judicial Officers Act 1986* (NSW) which introduced a Judicial Commission with an annual budget of around $6 million.[35] Apart from dealing with complaints against the judiciary, the Commission develops sentencing statistics and compiles and updates the judicial "Bench Book". It also addresses judicial education.

67 The Australian Capital Territory introduced a *Judicial Commissions Act* in 1994, operating under the Attorney-General.[36] The Victorian *Judicial Commission of Victoria Bill* was introduced in 2010 but never enacted.[37] The Bill proposed a scheme similar to that operating in New South Wales.

68 In 2012, the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) was introduced. By this legislation, complaints against federal judges were dealt with by ad hoc Judicial Commissions appointed by resolution of both Houses of Parliament. Membership of these Commissions is judicial rather than parliamentary.

69 All of these developments were carefully reviewed by the Law Reform Commission of Western Australia in 2012.[38] Whilst the Commission recommended the type of commission operating in New South Wales, those recommendations have not yet been reflected in legislation.[39]

70 The Attorney-General explained that in late 2012 the Western Australian Law Reform Commission estimated that New South Wales had around

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35 South Australia, *Parliamentary Debates*, House of Assembly, 18 March 2015 (John Rau, Attorney-General).
36 *Judicial Commissions Act 1994* (ACT).
37 *Judicial Commission of Victoria Bill 2010* (Vic).
38 Law Reform Commission of Western Australia, *Complaints Against Judiciary* (Discussion Paper, September 2012).
39 Complaints about members of the Western Australian Judiciary must be made in writing to the Chief Justice of Western Australia.

300 judicial officers, Victoria 243 and Western Australia 135. At the same time, South Australia had around 84 judicial officers.[40]

71 In those circumstances, the view taken was that the New South Wales model was not appropriate for South Australia. Rather, South Australia followed the New Zealand model of a single Judicial Commissioner.[41]

The *Judicial Conduct Commissioner Act 2015* (SA) – relevant provisions

72 The long title to the Act emphasises that it is concerned to provide for the appointment of a Judicial Conduct Commissioner to examine complaints in relation to the conduct of judicial officers.

73 The need for balance between the enhancement of public confidence in the judicial system, and protecting the impartiality and integrity of that system, is reflected in the objects of the Act:[42]

> **3—Objects**
>
> (1) The objects of this Act are to enhance public confidence in the judicial system and to protect the impartiality and integrity of the judicial system by—
>
> (a) providing for the appointment of a Judicial Conduct Commissioner to receive and determine complaints regarding the conduct of judicial officers; and
>
> (b) providing a fair process for dealing with such complaints that recognises and protects judicial independence; and
>
> (c) enhancing the existing mechanisms for removal of judicial officers where they are unable or unwilling to appropriately discharge their duties.
>
> (2) No power or discretion vested in the Commissioner or any other person by this Act may be exercised so as to impugn the independence of the judiciary.

74 By s 4(1) the terms "complainant" and "complaint" are defined as follows:

> ***complainant*** means a person who makes a complaint under section 12(1);
>
> ***complaint*** means a complaint under section 12 about the conduct of a judicial officer and includes a referral by the Attorney General under section 12(6), a referral by a jurisdictional head under section 12(7) and a complaint initiated by the Commissioner under section 12(8);

75 The term "judicial officer" means a person appointed to hold or act in a "judicial office" which is defined to mean:[43]

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40 South Australia, *Parliamentary Debates*, House of Assembly, 18 March 2015 (John Rau, Attorney-General).

41 *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ).

42 *Judicial Conduct Commissioner Act 2015* (SA), s 3.

43 *Judicial Conduct Commissioner Act 2015* (SA), s 4(1).

(a) the office of Judge of the Supreme Court;

(b) the office of Master of the Supreme Court, District Court Judge or any other Judge;

(c) any other office involving the exercise of judicial functions that may only be occupied by a Judge or Master or by a person with other legal qualifications;

(d) the office of Magistrate;

(e) any other office involving the exercise of judicial functions that may only be occupied by a Magistrate or by a person with other legal qualifications;

(f) the office of special justice;

(g) any other office prescribed by the regulations,

76 The "conduct of a judicial officer" that may be the subject of a complaint under the Act is defined by s 4(2) as follows:

(2) For the avoidance of doubt (and without limiting the types of conduct that may be the subject of a complaint under this Act) **conduct of a judicial officer** that may be the subject of a complaint under this Act includes—

(a) any act or omission of such an officer—

(i) whether occurring in the course of carrying out functions as a judicial officer or not; and

(ii) whether resulting from an illness or incapacity or not; and

(b) any acts of victimisation by a judicial officer.

77 Likewise, for the avoidance of doubt, by s 5(1) the Act is to apply in addition to, and without derogating from, any other Act or law relating to judicial conduct or to the removal of a judicial officer. Sub-section s 5(2) provides that the Act applies to the conduct of a judicial officer, whether occurring before or after the commencement of the Act.

78 As can be seen, the Act is not solely concerned with conduct by a judicial officer in the course of carrying out the functions of a judicial officer, including what may be described as the administrative functions of a judicial officer. Conduct by a judicial officer not connected with, but whilst appointed to, judicial office is at least potentially captured. Presumably, conduct occurring before appointment to judicial office is not captured. Conduct after judicial service is completed does not appear to be captured either. By contrast, where the relevant conduct results from "illness or incapacity" that conduct is captured regardless whether the onset of the illness or incapacity predates appointment to judicial office.

79 Central to the operation of the Act is the role of the Commissioner. The functions of the Commissioner are defined by s 6(1) as follows:

> (1) The functions of the Commissioner are—
>
> (a) to receive and deal with complaints made in accordance with this Act in relation to the conduct of judicial officers; and
>
> (b) to perform any prescribed functions; and
>
> (c) to perform other functions conferred on the Commissioner by this or any other Act.

80 That the Commissioner is independent of the Executive and the Parliament is made clear by s 6(2):

> (2) The Commissioner is not subject to the direction of any person in relation to any matter, including—
>
> (a) the manner in which functions are carried out or powers exercised under this or any other Act; and
>
> (b) the priority that the Commissioner gives to a particular matter in carrying out functions under this or any other Act.

81 Similarly, that the Commissioner is intended to be independent of the judiciary, and must not undermine the independence of the judiciary, is reflected in s 6(3):

> (3) It is not a function of the Commissioner to challenge or call into question the legality or correctness of any instruction, direction, order, judgment, or other decision given or made by a judicial officer in relation to any legal proceedings.

82 By s 6(4), the Commissioner has all the powers necessary for the carrying out of his or her functions and s 6(5) provides examples of the things the Commissioner may do for the purposes of exercising powers and functions under "Part 3—Complaints". Those things include obtaining relevant court documents and transcript and requiring a person to furnish information or produce books and documents. The Commissioner may also examine, copy and take extracts from books and documents, as well as take possession of them, where they have been produced by a person under s 6(5)(c).

83 The Commissioner is appointed by the Governor pursuant to s 7 of the Act for a term not exceeding seven years on conditions determined by the Governor.[44] Whilst the Commissioner may be reappointed, he or she cannot be reappointed for a term exceeding 10 years in total.[45] Eligibility for appointment is governed by the following criteria under s 7(3):

> (3) A person is only eligible for appointment as the Commissioner if the person—
>
> (a) is a legal practitioner of at least 7 years standing (taking into account, for that purpose, periods of legal practice and judicial service within and outside the

[44] *Judicial Conduct Commissioner Act 2015* (SA), s 7(1).
[45] *Judicial Conduct Commissioner Act 2015* (SA), s 7(2).

State) or a former judge of the High Court of Australia, the Federal Court of Australia or the Supreme Court or any other court of a State or Territory of the Commonwealth; and

(b) is not a judicial officer or member of an Australian Parliament.

84 A person may only be appointed Commissioner if, following a referral by the Attorney-General of the proposed appointment to the Statutory Officers Committee established under the *Parliamentary Committees Act 1991* (SA), the appointment is approved by that Committee, or it fails within seven days of referral to notify the Attorney-General in writing that it does not approve the appointment.[46]

85 If the person was immediately before appointment a judicial officer, leave and other entitlements may be taken to be a continuation of service as a judicial officer.[47]

86 The Commissioner may be removed by the Governor on the address of both Houses of Parliament.[48] The Commissioner may be suspended by the Governor for a contravention of a condition of appointment, or for misconduct, or for a failure or incapacity to carry out official duties satisfactorily.[49] However, except as provided by s 7, the Commissioner may not be removed or suspended from office, nor will the office of the Commissioner become vacant.[50]

87 By s 11, the Commissioner may delegate a function or power under this or any other Act except a prescribed function or power and, indeed, a function or power delegated may, if the instrument of delegate so provides, be further delegated.[51]

88 Complaints are addressed by Part 3 of the Act. Because the applicant's argument in this case turns on the manner in which the complaints relating to him were handled by the Commissioner, it is appropriate to set out ss 12 and 13 in their entirety. Division 1 addresses the making of complaints and comprises s 12:

12—Making of complaints

(1) Subject to subsection (2), a person may make a complaint to the Commissioner about any conduct of a judicial officer.

(2) A person who is subject to an order under section 39 of the *Supreme Court Act 1935* prohibiting him or her from instituting proceedings (or proceedings of a particular class) may not make a complaint under this Act.

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[46] *Judicial Conduct Commissioner Act 2015* (SA), s 7(4).
[47] *Judicial Conduct Commissioner Act 2015* (SA), s 7(6).
[48] *Judicial Conduct Commissioner Act 2015* (SA), s 7(9).
[49] *Judicial Conduct Commissioner Act 2015* (SA), s 7(10).
[50] *Judicial Conduct Commissioner Act 2015* (SA), s 7(15).
[51] *Judicial Conduct Commissioner Act 2015* (SA), s 11(2).

(3) Subject to subsections (4) and (4a), the Commissioner must give notice to the judicial officer and the relevant jurisdictional head of a complaint under subsection (1).

(4) If section 15 applies to a complaint, the Commissioner must not give any notices under subsection (3) on receipt of the complaint but may give such notices if consideration of the complaint under this Act is resumed following the referral under section 15.

(4a) The Commissioner may, if the Commissioner thinks fit, determine not to give any notices under subsection (3) in relation to a complaint until the Commissioner has determined whether the complaint is one that must be dismissed under section 17(1).

(5) A complaint under subsection (1) must—

(a) be in writing; and

(b) identify the judicial officer who is the subject of the complaint; and

(c) identify the complainant; and

(d) set out the matters to which the complaint relates; and

(e) include any other material, and be verified in any manner, required by the Commissioner.

(6) The Attorney General may, by notice in writing, refer to the Commissioner any matters regarding the conduct of a judicial officer.

(7) A jurisdictional head may, by notice in writing, refer to the Commissioner any matters regarding the conduct of a judicial officer in relation to whom he or she would be the relevant jurisdictional head (in accordance with the definition in section 4).

(8) The Commissioner may, on his or her own initiative, treat as a complaint any matters concerning the conduct of a judicial officer.

89 It can be seen that there are four mechanisms by which the jurisdiction of the Commissioner is enlivened:

- The first is a complaint made to the Commissioner;[52]
- The second is a referral made by the Attorney-General;[53]
- The third is a referral made by the jurisdictional head;[54] and

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52 *Judicial Conduct Commissioner Act 2015* (SA), s 12(1).

53 *Judicial Conduct Commissioner Act 2015* (SA), s 12(6).

54 *Judicial Conduct Commissioner Act 2015* (SA), s 12(7). The terms "jurisdictional head" and "relevant jurisdictional head" are defined in s 4(1) by reference to Part 5A of the *Courts Administration Act 1993* (SA). If the judicial officer the subject of complaint is a jurisdictional head, the relevant jurisdictional head is the Chief Justice. Otherwise, the "relevant jurisdictional head" is the jurisdictional head "who has power to issue requirements to that judicial officer in accordance with Part 5A". By s 27A of Part

- The fourth is where the Commissioner "on his or her own initiative" treats as a complaint any matters concerning the conduct of a judicial officer.[55]

90 Division 2 addresses the "preliminary examination" which the Commissioner must make of "each complaint". It will be recalled that the term "complaint" is defined by s 4(1) to include each of the four mechanisms by which the Commissioner's jurisdiction may be enlivened under s 12. Section 13 provides:

> **Division 2—Preliminary examination of complaint**
>
> **13—Preliminary examination of complaints**
>
> (1) Subject to subsection (6), the Commissioner must conduct a preliminary examination of each complaint received to determine whether—
>
> (a) the complaint is one that should be referred to the Office for Public Integrity in accordance with section 15; or
>
> (b) there are grounds for exercising a power under this Act to dismiss the complaint.
>
> (2) The Commissioner may conduct a preliminary examination in any manner the Commissioner thinks fit (but the Commissioner must act in accordance with the principles of procedural fairness).
>
> (3) In conducting a preliminary examination, the Commissioner may make such inquiries into the complaint as he or she thinks appropriate and may—
>
> (a) require further information from the complainant (and may require that such further information be verified in any manner required by the Commissioner); and
>
> (b) consult the relevant jurisdictional head.
>
> (4) The Commissioner may determine to deal with a series of complaints relating to a particular judicial officer as if they were a single complaint (and may do so even if the Commissioner has previously dealt with any of those complaints or is in the course of dealing with any of those complaints).
>
> (5) Subject to sections 14 and 15, the Commissioner must conduct a preliminary examination as efficiently and expeditiously as is practicable.
>
> (6) If, before conducting a preliminary examination of a complaint, the Commissioner determines that the complaint is one that must be dismissed under section 17(1), the Commissioner may dismiss the complaint without conducting a preliminary examination.
>
> (7) If the Commissioner exercises the power under subsection (6) to dismiss a complaint, the Commissioner is not required to give any notification in

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5A of the *Courts Administration Act 1993* (SA), the "jurisdictional head" of a court means "the judicial officer who has primary responsibility for the administration of the court". Those responsibilities are spelled out in s 27C.

[55] *Judicial Conduct Commissioner Act 2015* (SA), s 12(8).

> relation to the complaint to the judicial officer who is the subject of the complaint or to the relevant jurisdictional head but must give any complainant written notification stating—
>
> (a) that the Commissioner has exercised that power; and
>
> (b) the grounds on which the Commissioner is satisfied that the complaint is one that must be dismissed under section 17(1).

91 It is convenient to address some features of this statutory scheme for the receipt and assessment of complaints against judicial officers.

92 As was seen in s 5, these rights to make a complaint or a referral do not derogate from any other Act or law relating to the conduct or removal of a judicial officer. A complainant or the Attorney-General may, if they wish, address complaints or concerns to the relevant judicial officer or head of jurisdiction, before or instead of, making a formal complaint under s 12(1) or a referral under s 12(6). Likewise, the jurisdictional head may think it appropriate to address the judicial officer directly. Whether these informal avenues are appropriate would obviously depend upon a range of considerations, not the least of which might include the seriousness of the matter concerned, the ostensible credibility of any complaint and the extent to which an informal approach is likely to be heeded or effective.

93 A person subject to a vexatious litigant order under s 39 of the *Supreme Court Act 1935* (SA) may not make a complaint under s 12(1).[56]

94 The Commissioner is generally obliged to notify the judicial officer and the relevant jurisdictional head of any complaint.[57] That obligation does not apply in two situations.

95 First, no notice can be given where the Commissioner reasonably suspects that a complaint relates to conduct that involves "corruption in public administration" within the *Independent Commission Against Corruption Act 2012* (SA). Instead, it must be managed under s 15.[58] The Commissioner may give notice if consideration of the complaint is resumed under the Act following the s 15 referral.

96 Second, the Commissioner may, "if the Commissioner thinks fit", not give notice until the Commissioner has determined whether the complaint must be dismissed under s 17(1),[59] which provides:[60]

> **17—Mandatory dismissal of complaint**

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56 *Judicial Conduct Commissioner Act 2015* (SA), s 12(2).
57 *Judicial Conduct Commissioner Act 2015* (SA), s 12(3).
58 *Judicial Conduct Commissioner Act 2015* (SA), s 12(4).
59 *Judicial Conduct Commissioner Act 2015* (SA), s 12(4a).
60 *Judicial Conduct Commissioner Act 2015* (SA), s 17(1).

(1) The Commissioner must dismiss the complaint if he or she is of the opinion that—

(a) the complaint is not within the Commissioner's jurisdiction; or

(b) the complaint has no bearing on judicial functions or judicial duties; or

(c) the complaint—

(i) has been made for an improper purpose (including an attempt to harass or intimidate a judicial officer in the appropriate exercise of his or her duties); or

(ii) is otherwise frivolous, vexatious, or not in good faith; or

(d) the subject matter of the complaint is trivial; or

(e) the complaint is about a judicial decision, or other judicial function, that is or was subject to a right of appeal or right to apply for judicial review or dealing with the complaint would otherwise require the Commissioner to exercise functions referred to in section 6(3); or

(f) the person who is the subject of the complaint is no longer a judicial officer.

97 A complaint must conform to certain minimum manner and form requirements prescribed by s 12(5).

98 On receipt of a complaint, the Commissioner is obliged to conduct a "preliminary examination" under s 13(1). That is required at the outset to determine whether the complaint should be referred to the Office for Public Integrity under s 15, or whether there are grounds for exercising a power to dismiss. Those assessments will presumably be undertaken at the same time as the Commissioner considers whether notice can or should be given under s 12(3). Dismissal of a complaint may be required where one of the mandatory dismissal criteria is satisfied under s 17(1), or dismissal may be discretionary under s 16:[61]

16—Discretionary dismissal of complaint

(1) The Commissioner may determine to dismiss a complaint without taking any further action if satisfied that further consideration of the complaint would, in all the circumstances, be unjustified.

(2) Without limiting the operation of subsection (1), reasons why further consideration of a complaint would, in all the circumstances, be unjustified, may be, or include, all or any of the following that apply to the complaint:

(a) that the complaint has been resolved to the complainant's satisfaction following an explanation from the judicial officer who is the subject of the complaint;

[61] *Judicial Conduct Commissioner Act 2015* (SA), s 16.

(b) that the complaint is genuine and made in good faith, but is based on a misunderstanding;

(c) that the Commissioner, having started the preliminary examination required by section 13, has concluded that there is no reasonable prospect of there being available to him or her information that would enable the complaint to be substantiated;

(d) that the Commissioner has requested further information from the complainant and the complainant has refused to provide such information or has failed to provide such information within a reasonable time;

(e) that the Commissioner has previously considered the subject matter of the complaint;

(f) that the Commissioner has determined that the subject matter of the complaint could not, if substantiated, warrant the taking of any action under this Act.

(3) The fact that a complaint has been resolved to the complainant's satisfaction because of an apology by the judicial officer who is the subject of the complaint is not, by itself, a reason why further consideration of a complaint would, in all the circumstances, be unjustified.

(4) If the Commissioner exercises his or her power to dismiss a complaint under this section, he or she must give any complainant, the judicial officer who is the subject of the complaint and the relevant jurisdictional head written notification stating—

(a) that the Commissioner has exercised that power; and

(b) the grounds on which he or she is satisfied that further consideration of the complaint would, in all the circumstances, be unjustified.

99 Where a mandatory dismissal criterion is satisfied under s 17(1), the Commissioner may dismiss the complaint without conducting (or perhaps, completing) a preliminary examination.[62] In that event the complainant, and not the judicial officer, may be notified of the matters set out in s 13(7).

100 In the context of this application, it is important to understand how the Commissioner may conduct a preliminary examination under s 13. First, the only explicit constraints on the way a preliminary examination is to be conducted are set out in ss 13(2) and 13(5); apart from acting in accordance with the “principles of procedural fairness”, the Commissioner “may conduct a preliminary examination in any manner the Commissioner thinks fit” but, subject to ss 14 and 15, the examination must be conducted “as efficiently and expeditiously as is practicable”.

101 Secondly, when conducting a preliminary examination the Commissioner may make “such inquiries … as he or she thinks appropriate”.[63] These inquiries

62 *Judicial Conduct Commissioner Act 2015* (SA), s 13(6).
63 *Judicial Conduct Commissioner Act 2015* (SA), s 13(3).

may extend to requiring the complainant to provide or verify information, or consulting with the relevant jurisdictional head.[64]

102 Once the preliminary examination has been conducted, the Commissioner must refer the complaint to the relevant jurisdictional head unless the complaint was referred by that jurisdictional head under s 12(7), or a power under the Act to dismiss the complaint has been exercised.[65] On referral of the complaint to the relevant jurisdictional head, the Commissioner may, under s 18(2):

> **Division 3—Action after preliminary examination**
>
> **18—Referral of complaint to relevant jurisdictional head**
>
> (1) …
>
> (2) …
>
> (a) recommend that the relevant jurisdictional head take specified action in relation to the complaint so referred; or
>
> (b) advise the relevant jurisdictional head that—
>
> (i) in the opinion of the Commissioner, the complaint is not able to be satisfactorily dealt with by the taking of any action by the relevant jurisdictional head; and
>
> (ii) the Commissioner intends to make a report on the complaint to the Parliament in accordance with section 19 or make a recommendation to the Attorney General under section 20.

103 Where the referral must be made to the Chief Justice because the complaint relates to a jurisdictional head, the Chief Justice may, under s 18(2a):

> (2a) … take action in relation to the complaint by—
>
> (a) making recommendations to the jurisdictional head the subject of the complaint (including, for example, recommendations as to caseloads, record keeping, medical examinations or counselling); or
>
> (b) counselling the jurisdictional head the subject of the complaint in relation to any conduct that has the potential to undermine public confidence in the court.

104 Within 28 days after referral (or such other period as may be agreed with the Commissioner), the relevant jurisdictional head must give the Commissioner written notification of the action taken.[66] Similarly, where the Commissioner has made recommendations under s 18(2a)(a), the Chief Justice must within 28 days (or such other period as may be agreed with the Commissioner) give the Commissioner written notification of the action taken.[67] It may be noticed that

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64 *Judicial Conduct Commissioner Act 2015* (SA), s 13(3).
65 *Judicial Conduct Commissioner Act 2015* (SA), s 18(1).
66 *Judicial Conduct Commissioner Act 2015* (SA), s 18(3).
67 *Judicial Conduct Commissioner Act 2015* (SA), s 18(3a).

s 18(2a)(a) only applies to the Chief Justice. The Commissioner may also make a report to the Attorney-General in relation to any action taken under s 18.[68]

105 The Commissioner must give written notification to the complainant of any action taken under s 18(3), as well as to the judicial officer the subject of the complaint regarding any action taken under s 18.[69]

106 The Commissioner may make a report to Parliament under s 19(1), if:

> **19—Immediate report to Parliament**
>
> (a) the complaint—
>
> (i) consists of a referral by the relevant jurisdictional head under section 12(7); or
>
> (ii) has been referred to the relevant jurisdictional head under section 18 but is not, in the Commissioner's opinion, able to be satisfactorily dealt with by the taking of any action by the relevant jurisdictional head; and
>
> (b) the judicial officer who is the subject of the complaint is a Judge who is liable to be removed from office, pursuant to the *Constitution Act 1934* or any other Act or law, on an address from both Houses of Parliament; and
>
> (c) the Commissioner is of the opinion that—
>
> (i) there should be immediate consideration by the Parliament of such removal; and
>
> (ii) it is unlikely that an inquiry by a judicial conduct panel would provide additional information that should be available to the Parliament in considering such removal.
>
> (2) A copy of the report must be delivered to the President of the Legislative Council and the Speaker of the House of Assembly.
>
> (3) The President of the Legislative Council and the Speaker of the House of Assembly must, on the first sitting day after receiving a report, lay it before their respective Houses.
>
> (4) The Commissioner must also give a copy of the report to any complainant, to the judicial officer who is the subject of the complaint, to the relevant jurisdictional head and to the Attorney General.

107 As has been seen in this matter, under s 20(1) the Commissioner may recommend to the Attorney-General that a judicial conduct panel be appointed "to inquire into, and report on, any matters concerning the conduct of a judicial officer". That step may only be taken if the requirements of s 20(1) are satisfied:

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68 *Judicial Conduct Commissioner Act 2015* (SA), s 18(4).
69 *Judicial Conduct Commissioner Act 2015* (SA), s 18(5).

20—Recommendation to appoint judicial conduct panel

(1) The Commissioner may recommend to the Attorney-General that he or she appoint a judicial conduct panel to inquire into, and report on, any matters concerning the conduct of a judicial officer if—

(a) the complaint—

(i) consists of a referral by the relevant jurisdictional head under section 12(7); or

(ii) has been referred to the relevant jurisdictional head under section 18 but—

(A) has not, in the Commissioner's opinion, been satisfactorily dealt with by the relevant jurisdictional head within the period referred to in section 18(3); or

(B) is not, in the Commissioner's opinion, able to be satisfactorily dealt with by the taking of any action by the relevant jurisdictional head; and

(b) the Commissioner is of the opinion that—

(i) an inquiry into the conduct is necessary or justified; and

(ii) if established, the conduct may warrant consideration of removal of the judicial officer (under this or any other Act).

108 The Commissioner is obliged to give reasons with any recommendation made under s 20,[70] and written notice must be given of any action taken: to any complainant, to the judicial officer and to the relevant jurisdictional head.[71] The Commissioner must, at the request of the Attorney-General, make any relevant files kept by the Commissioner available to the Attorney-General.[72]

109 Part 4 of the Act addresses the formation and operation of judicial conduct panels. On receipt of a recommendation from the Commissioner under s 20, the Attorney-General may, "at any time", appoint a judicial conduct panel, see s 21:

Part 4—Judicial conduct panels

21—Appointment of judicial conduct panels

(1) The Attorney General may, at any time, appoint a judicial conduct panel to inquire into, and report on, any matters concerning the conduct of a judicial officer that have been the subject of a recommendation by the Commissioner under section 20.

(2) Before appointing a panel, the Attorney General must consult the Chief Justice of the Supreme Court about the proposed membership of the Panel (or, if the matters to

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70 *Judicial Conduct Commissioner Act 2015* (SA), s 20(2).
71 *Judicial Conduct Commissioner Act 2015* (SA), s 20(3).
72 *Judicial Conduct Commissioner Act 2015* (SA), s 20(4).

be inquired into and reported on concern the conduct of the Chief Justice, the next most senior available Judge of the Supreme Court).

(3) A judicial conduct panel consists of the following persons appointed by the Attorney General:

(a) 2 members who are eligible judicial officers, 1 of whom should be an eligible judicial officer who is, or has been, of equal or higher seniority than the judicial officer the subject of the complaint (if such a judicial officer is reasonably available for appointment to the panel and would not have a conflict of interest or otherwise be unsuitable for appointment);

(b) a lay member (not being an eligible judicial officer or a legal practitioner).

(4) The presiding member of a judicial conduct panel will be a member appointed under subsection (3)(a) designated by the Attorney General in the instrument of appointment as the presiding member of the panel.

(5) The appointment of a judicial officer as a member of a judicial conduct panel does not affect his or her tenure of judicial office, rank, title, status, precedence, salary, annual or other allowances, or other rights or privileges as a judicial officer (including matters relating to superannuation), and, for all purposes, service by a judicial officer as a member of a panel must be taken to be service as a judicial officer.

(6) In this section—

eligible judicial officer means—

(a) a current or former judicial officer of this State; or

(b) a former judge of the High Court of Australia, the Federal Court of Australia or the Supreme Court or any other court of a State or Territory of the Commonwealth; or

(c) a current judge of the Federal Court of Australia or the Supreme Court or any other court of a State or Territory of the Commonwealth if the jurisdictional head of the relevant Court concurs.

110 The functions and procedures of judicial conduct panels are addressed by s 23. Under the Act, the business of judicial conduct panels is conducted in "meetings" rather than in hearings. As will be seen, whilst the panel must act in accordance with the principles of procedural fairness and hold all meetings in private, the procedure for calling meetings and conducting business at those meetings is to be "determined by the panel":[73]

23—Functions and procedures of panel

(1) A judicial conduct panel must inquire into, and report on, the matters concerning the conduct of a judicial officer referred to it by the Attorney-General on the recommendation of the Commissioner and may inquire into, and report on, any other

[73] *Judicial Conduct Commissioner Act 2015* (SA), s 23.

matters concerning the conduct of the judicial officer that arise in the course of its dealing with the referral from the Attorney General.

(2) The procedure for the calling of meetings of a judicial conduct panel and for the conduct of business at those meetings is, subject to this Act, determined by the panel.

(3) A judicial conduct panel must, however—

(a) act in accordance with the principles of procedural fairness; and

(b) hold all meetings of the panel in private; and

(c) call meetings and conduct business at those meetings in accordance with any guidelines approved by the Chief Justice of the Supreme Court.

(4) All 3 members of a judicial conduct panel must be present at a meeting of the panel.

(5) The presiding member presides at a meeting of a judicial conduct panel and has a deliberative vote only.

(6) A decision supported by a majority of the votes cast at a meeting of a judicial conduct panel is the decision of the panel.

(7) A judicial conduct panel must cause full and accurate minutes to be kept of the proceedings of each meeting of the panel.

111 The powers of a judicial conduct panel appointed under the Act are set out in s 24. The panel is vested with the powers of a commission under the *Royal Commissions Act 1917* (SA) (***RCA***), and that Act applies as if the panel were a commission acting under a commission of inquiry issued by the Governor:

24—Powers of panel

(1) For the purposes of an inquiry under this Part, a judicial conduct panel has the powers of a commission as defined in the *Royal Commissions Act 1917* and that Act applies as if—

(a) the judicial conduct panel were a commission as so defined; and

(b) the subject matter of the inquiry was set out in a commission of inquiry issued by the Governor under that Act.

(2) Without limiting subsection (1), a judicial conduct panel may require the judicial officer to undergo 1 or more medical examinations for the purpose of assisting in determining whether proper cause exists for removing the judicial officer from office.

112 Certain provisions of the *RCA* are of particular relevance to this application for judicial review, being sections 13, 16 and 16B which apply as if the panel were a commission:

13—Right of audience

Unless the commission otherwise directs, any person giving evidence before the commission may, subject to anything prescribed, be represented before the commission by counsel or solicitor.

…

16—Statements made by witness not admissible in evidence against him

A statement or disclosure made by any witness in answer to any question put to him by the commission or any of the commissioners shall not (except in proceedings for an offence against this Act) be admissible in evidence against him in any civil or criminal proceedings in any court.

…

16B—Protection to commissioners and witnesses

(1) A commissioner has, in relation to the exercise of his functions as commissioner, the same protection and immunities as a judge of the Supreme Court.

(2) Subject to this Act, a witness before the commission has the same protection and immunities as a witness in proceedings before the Supreme Court.

(3) Counsel appearing before the commission has the same protection and immunities as counsel appearing in proceedings before the Supreme Court.

113 Once its inquiry is completed, the panel must provide to the Attorney-General a report in conformity with s 25, copied to the Commissioner, to any complainant, to the judicial officer and to the relevant jurisdictional head.[74] The Attorney must lay the report before each House of Parliament:[75]

25—Report by panel

(1) A judicial conduct panel must provide a report to the Attorney General at the conclusion of its inquiry.

(2) The report must set out—

(a) the panel's findings of fact; and

(b) the panel's opinion as to whether removal of the judicial officer is justified; and

(c) the reasons for the panel's conclusion.

(3) A copy of the report must be provided to the Commissioner, to any complainant, to the judicial officer who is the subject of the report and to the relevant jurisdictional head.

[74] *Judicial Conduct Commissioner Act 2015* (SA), s 25(3).
[75] *Judicial Conduct Commissioner Act 2015* (SA), s 25.

(4) The Attorney-General must cause a copy of the report to be laid before each House of Parliament.

114 Where the judicial conduct panel concludes that removal of the judicial officer is justified, s 26 confers the power to do so on the Governor unless it is necessary to convene an address from both Houses of Parliament:

26—Removal of judicial officer

(1) Subject to subsection (2), if a judicial conduct panel concludes that removal of a judicial officer is justified, the Governor may remove the judicial officer from office.

(2) If the judicial officer is a judge who is liable to be removed from office, pursuant to the *Constitution Act 1934* or any other Act or law, on an address from both Houses of Parliament, subsection (1) does not apply (but the judge may be removed from office on such an address from both Houses of Parliament under the *Constitution Act 1934* or other Act or law).

115 The Commissioner is obliged to report annually to the President of the Legislative Council and to the Speaker of the House of Assembly under s 27 and, by s 28, at the request of the Attorney-General, the Commissioner must provide the Attorney-General with specified information about the exercise of the Commissioner's functions under the Act.

116 Section 29 requires that any application for judicial review of a decision under the Act be made to the Court of Appeal.

117 Section 30 confers immunity from liability on the Commissioner and any member of the Commissioner's staff or member of a judicial conduct panel, for "any act or omission in good faith in the exercise or purported exercise of powers or functions under this or any other Act".

118 Whilst s 31 provides that no obligation to maintain secrecy applies "for the purposes of a complaint under this Act", s 32 sets out on the manner by which the disclosure of information "obtained in the course of the administration" of the Act is restrained:

31—No obligation on persons to maintain secrecy

No obligation to maintain secrecy or other restriction on the disclosure of information applies for the purposes of a complaint under this Act, except an obligation or restriction designed to keep the identity of a confidential source of information relating to the enforcement or administration of the law secret.

32—Confidentiality, disclosure of information and publication of reports

(1) A person engaged or formerly engaged in the administration of this Act must not disclose information obtained in the course of the administration of this Act except—

(a) for the purposes of the administration or enforcement of this Act; or

(b) for the purposes of a criminal proceeding or a proceeding for the imposition of a penalty; or

(c) as authorised or required by the Commissioner; or

(d) as otherwise authorised or required by this Act or regulations under this Act or any other Act or law.

Maximum penalty: $10 000 or imprisonment for 2 years.

(2) The Commissioner is only to authorise or require information to be disclosed if of the opinion that the disclosure is in the public interest (but a person to whom an authorisation or requirement is directed need not inquire into the basis of the authorisation or requirement).

(3) The Commissioner may, if of the opinion that it is in the public interest to do so, cause a report on a complaint, or a statement about a complaint or a decision to dismiss a complaint, to be published in such manner as the Commissioner thinks fit.

(4) Information that has been disclosed under this section for a particular purpose must not be used for any other purpose by—

(a) the person to whom the information was disclosed; or

(b) any other person who gains access to the information (whether properly or improperly and whether directly or indirectly) as a result of that disclosure.

Maximum penalty: $10 000 or imprisonment for 2 years.

(5) A notification required to be given by the Commissioner under this Act to a judicial officer who is the subject of a complaint or the relevant jurisdictional head in relation to a complaint must not disclose the identity of any complainant unless—

(a) the complainant has consented to the complainant's identity being so disclosed; or

(b) subject to subsections (6) and (7), the Commissioner is of the opinion—

(i) in the case of a notification required to be given to the judicial officer the subject of the complaint—that the disclosure of the complainant's identity is necessary to ensure that the judicial officer can properly respond to the complaint; or

(ii) in the case of a notification required to be given to the relevant jurisdictional head—that the disclosure of the complainant's identity is necessary to ensure that the relevant jurisdictional head can properly exercise their responsibilities in relation to the complaint.

(6) Before disclosing the identity of a complainant in accordance with subsection (5)(b), the Commissioner must give the complainant written notification that the Commissioner intends to disclose the complainant's identity (and providing reasons for the determination) and must allow the complainant a reasonable opportunity to make submissions to the Commissioner in relation to the determination or to withdraw the complaint.

(7) If the complainant notifies the Commissioner that the complainant wishes to withdraw the complaint, the Commissioner must determine to take no further action in respect of the matter the subject of the complaint.

119 By s 33 it is an offence for a person to publish information or evidence relating to a complaint, except "as authorised by the Commissioner or a court":

33—Publication of information and evidence

(1) A person must not, except as authorised by the Commissioner or a court, publish, or cause to be published information or evidence relating to a complaint.

Maximum penalty:

(a) in the case of a body corporate—$150 000;

(b) in the case of a natural person—$30 000.

(2) In this section—

publish means publish by—

(a) newspaper, radio or television; or

(b) Internet or other electronic means of creating and sharing content with the public or participating in social networking with the public; or

(c) any similar means of communication to the public.

The applicant's grounds for judicial review

120 It is now convenient to address each of the three grounds relied on by the applicant before addressing the *Kable* challenge and the question of ongoing confidentiality.

121 In overview, the applicant contended that the Commissioner acted without jurisdiction and beyond power when making recommendations to the Attorney-General on 10 June 2021. The applicant contended that the Panel lacks jurisdiction to inquire into the matters the subject of the Attorney-General's referral dated 20 August 2021. Finally, the applicant contended that the Panel lacks jurisdiction to permit a witness, other than the applicant, to be represented by counsel and the ruling made on 9 November 2021 which permitted witness B to be represented was beyond jurisdiction.

Ground 1: The recommendations by the Commissioner dated 10 June 2021 are invalid

122 The applicant contended that the Commissioner acted without jurisdiction and beyond power when making her recommendations to the Attorney-General on 10 June 2021, ostensibly pursuant to s 20 of the Act. The applicant described "conduct" and "complaint" as the "two organising conceptions" around which the Act is designed. The applicant contended that these conceptions are inter-related

because a "complaint" is, in essence, an allegation about the "conduct of a judicial officer" within s 12(1).

123 The applicant highlighted the role of the preliminary examination under s 13, contending that the exercise of the power to conduct it is "conditioned on an express requirement to accord procedural fairness". The applicant also contended that the receipt and notification of a complaint and the conduct of the preliminary examination give effect to one of the primary objects of the Act: "providing a fair process for dealing with … complaints that recognises and protects judicial independence".[76]

124 At the heart of the applicant's contentions on this ground was the proposition that any recommendation by the Commissioner to the Attorney-General that a panel "inquire into, and report on, any matters concerning the conduct of a judicial officer"[77] can only be made after the conduct identified "in or from the complaint" has been the subject of both notification to the judicial officer and a preliminary examination.

125 It is in connection with what the applicant described as the Commissioner's "gate-keeper role" that consideration is necessarily given to dismissal,[78] referral to the jurisdictional head, or advising the jurisdictional head that it is intending to make a recommendation to the Attorney-General.[79] More particularly, that gate-keeper role must be performed before any complaint about conduct is recommended for inquiry by a judicial conduct panel.

126 The applicant contended that, in addition, it is necessary that the Commissioner be satisfied that the conduct "may warrant consideration of removal" pursuant to s 20(1)(b)(ii).

127 Against this background the applicant addressed the facts. It is not necessary to do other than outline the applicant's key contentions.

128 The applicant commenced with "the **conclusionary allegation**". This was the allegation, additional to the specific incident notified as complaint 8 in the letter dated 31 May 2021, which was described in "an entirely general and conclusionary" manner: namely, that in the period "he often treated [Ms C] in that way". As well, the applicant contended that complaint 8 contained "the **omitted allegations**" which spanned the period 2012 to 2020, underpinned the conclusionary allegations and which had not been notified to the applicant as s 12(3) required.

129 At the outset it is appropriate to observe that, whatever the terminology, these submissions amounted to the same point: the applicant was not given proper notice

[76] *Judicial Conduct Commissioner Act 2015* (SA), s 3(1)(b).
[77] *Judicial Conduct Commissioner Act 2015* (SA), s 20(1).
[78] *Judicial Conduct Commissioner Act 2015* (SA), s 18(1)(b).
[79] *Judicial Conduct Commissioner Act 2015* (SA), s 18(2)(b)(ii).

of the conduct to be examined by the Commissioner and which was then the subject of recommendation by the Commissioner and inquiry by the Panel. At times, the submissions simply amounted to a complaint that inadequate detail or particulars had been given to the applicant about aspects of complaint 8, other than the specific incident, about which no complaint was made.

130 The applicant contended that these failings were followed by a failure to undertake the exercise contemplated in a preliminary examination, namely, to make some assessment of their veracity and seriousness in light of the response of the judicial officer. Each of these was said to be separate failures to comply with the statutory pre-conditions for the exercise of the power to recommend. As the power to make a recommendation was contingent upon both giving notice and the proper conduct of a preliminary examination,[80] the applicant contended non-compliance led to invalidity of the subsequent exercise of power,[81] being the recommendation acted upon by the Attorney-General to appoint a judicial conduct panel. The applicant contends that these failings:[82]

> Undermine… the relationship between the executive and the judiciary and in particular a stated object of the Act (to provide a fair process for dealing with complaints that recognises and protects judicial independence: s 3(1)(b)). They entirely undermine the essential scheme embodied in ss 13-20.

131 Finally, and in any event, the applicant contended that there was a failure to accord him procedural fairness in respect of the conclusionary and the omitted allegations.

132 The applicant submitted that he was entitled to notice so that he might be heard on, for example, whether a power of dismissal should be exercised,[83] as well as whether there was a sufficient basis to justify an inquiry.[84] The applicant contended that the principles of procedural fairness conditioned the exercise of the Commissioner's recommendation power,[85] and the denial of his opportunity to put submissions to the Commissioner prejudiced his rights and interests. Moreover, the applicant contended that as the obligation to accord him procedural fairness was "statutory there is no separate question of materiality" and the statute excluded

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80 See ss 18(1) and 20(1)(a)(ii) of the *Judicial Conduct Commissioner Act 2015* (SA): "having conducted the preliminary examination".

81 *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510, [62]-[63] (Kiefel CJ, Bell, Gageler and Keane JJ) these provisions "imposed essential preliminaries to the exercise of those functions" which is "made clear by both the express terms and the structure of the provisions as sequential steps in an integrated process". See also the discussion in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [61]-[66] and [83] (McHugh, Gummow, Kirby and Hayne JJ), and following, regarding similar circumstances.

82 Applicant's written submissions dated 8 December 2021, [16].

83 *Judicial Conduct Commissioner Act 2015* (SA), ss 16 and 17.

84 *Judicial Conduct Commissioner Act 2015* (SA), s 18(1)(b).

85 *Plaintiff M61/2020E v Commonwealth* (2010) 243 CLR 319, [74] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

"any issue of implication".[86] In other words, the applicant was contending that the statute had in some way obviated the "common law principle of statutory interpretation" that there is a "threshold of materiality" in the event of non-compliance[87] or here, that a denial of procedural fairness must be material before it can give rise to relevant jurisdictional error. Alternatively, the applicant contended that, if materiality remained an issue, the possibility of a different decision could not be excluded as a matter of reasonable conjecture.[88]

133 In the circumstances, the applicant submitted that the recommendations made by the Commissioner to the Attorney-General "were wholly invalid".

134 For the first respondent, the Solicitor-General made three submissions. First, he contended that the Commissioner gave the judicial officer notice of the conclusionary and omitted allegations. Secondly, the obligation to give notice imposed by s 12(3) applied only to a complaint made under s 12(1) and this did not apply to complaint 8 which was an "own initiative" complaint. Thirdly and finally, any deficiency in notice did not invalidate the Commissioner's recommendation. It was emphasised that the judicial officer did not raise any issue with respect to notice pursuant to s 12(3) before the Panel.

Determination of Ground 1

135 It is convenient to commence with the Commissioner's letter to the judicial officer dated 7 May 2021. By that letter, the Commissioner notified the judicial officer of seven complaints concerning four women. Two comprised a referral by the relevant jurisdictional head, apparently pursuant to s 12(7) of the Act.

136 The Commissioner advised that she was undertaking preliminary examinations and the purpose of her letter was to give the judicial officer an opportunity to respond prior to concluding the preliminary examinations. She then outlined the substance of each complaint. Whilst some concerned allegations of a sexual nature, not all were. The Commissioner informed that she had determined to deal with the series of complaints as if they were a single complaint under s 13(4) of the Act. She reminded the judicial officer that there was no obligation to make any comment but that she would take into account what, if anything, was said when determining "what is to happen next". A response was requested within 14 days.

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86 Cf, *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, [36] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

87 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, [31] (Kiefel CJ, Gageler, Keane and Gleeson JJ), citing *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, [29]-[30] (Kiefel, Gageler and Keane JJ).

88 As to which the applicant bears the onus, see *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, [38]-[40] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

137 The Commissioner concluded by drawing the judicial officer's attention to ss 32 and 33 of the Act, authorising the judicial officer to disclose the contents to retained legal advisers or to family members for the purposes of taking counsel.

138 Following this letter, on 13 May 2021 the Chief Magistrate, the relevant jurisdictional head, referred to the Commissioner what has been described as the "specific incident" on 18 July 2014.

139 The Commissioner then wrote the letter to the judicial officer dated 31 May 2021.[89] She notified the judicial officer that another allegation had been referred to her and, pursuant to s 12(8) of the Act, she was treating it as a complaint on her own initiative. The specific incident on Friday, 18 July 2014 was then outlined, as was the identity of the witness. In the course of describing the complaint, the statement was made that Ms C had reported that the judicial officer "often treated [her] in that way and it made her uncomfortable". On one occasion Ms C claimed to have raised it with the judicial officer, "but it made no difference". The judicial officer was invited to respond to the allegation.

140 Whilst the Commissioner was prepared to provide more time for the judicial officer to respond to her letters dated 7 and 31 May 2021, she emphasised that she was not making any findings about any of the allegations and did not wish to protract the matter.

141 The judicial officer's solicitors responded to the Commissioner by letter dated 3 June 2021, taking a number of points. Most of those points are not presently relevant and need not be addressed. In addition, comprehensive responses were made to the complaints although, in some respects, the judicial officer had no recollection of events which were said to have occurred some years previously. In respect of some of the matters, issue was taken with whether there was anything "remotely sexual" about them. A number of factual disputes were outlined.

142 So far as complaint 8 is concerned, the judicial officer responded briefly, but any impropriety was denied. As with the other complaints, the lack of any relevant connection with judicial or administrative work was emphasised and the Commissioner was invited to dismiss the complaint.

143 In her letter of response dated 10 June 2021, the Commissioner addressed various of the matters raised by the solicitors for the judicial officer. On the question of procedural fairness, she explained:

> Your client contends that he has been denied procedural fairness. I understand that this rests principally on the fact that I have provided to you only a summary of each complaint, rather than the statements I hold. In my view, the extent of the obligations cast on me by the principles of procedural fairness is informed by the scope of the task I am to perform. I do not accept that I am required to provide the relevant statements to you. Rather, I see decisions about that as falling to a judicial conduct panel, if convened. In my opinion, the

[89] Addressed to the judicial officer's solicitor.

> comprehensive nature of your client's responses to the allegations tends to demonstrate that he has been adequately apprised of them.

144 The Commissioner took issue with the judicial officer's assertion that none of the allegations related to judicial or administrative work. The Commissioner expressed the view that, whilst the responses provided context to the conduct, they did not render it, if established, excusable. The Commissioner then said:

> My preliminary examination is now complete.

145 The Commissioner explained that she had considered whether a referral to the relevant jurisdictional head, the Chief Magistrate, pursuant to s 18 of all or any of the complaints, with a recommendation to take specified action, would be adequate. The Commissioner said that she did not consider that the Chief Magistrate would be able to satisfactorily deal with the complaints and pointed out that some of them had previously been brought to the attention of her or her deputy. In those circumstances:

> I am of the opinion that an inquiry into the conduct is necessary and justified and that if established, the conduct might warrant consideration of removal of your client from the magistracy. I intend to make a recommendation to the Attorney-General to appoint a judicial conduct panel. I referred the complaints to the Chief Magistrate with this advice.

146 On the same day, the Commissioner sent the letter dated 10 June 2021 to the Attorney-General, the Hon Vickie Chapman MP, recommending that she appoint a judicial conduct panel to inquire into and report on the eight complaints.

147 In the course of the letter to the Attorney-General, Ms C was named and the conduct was said to have occurred in the Magistrates Court building and spanned 2012 to 2020. [REDACTED]. Whilst this might have been deduced it effectively confined the relevant period. The role of the witness Ms B was outlined. The Commissioner informed the Attorney-General that it was alleged the complainant told the judicial officer, [REDACTED]. The 2014 specific incident was then outlined, as was the way in which the incident was addressed at the time: Ms C said that she did not then wish to "pursue the matter".

148 On 24 June 2021, the Attorney-General appointed the Panel.

149 There was then correspondence during which statements and other information were provided to the solicitors for the judicial officer. It is not necessary to address that correspondence in any detail.

150 Even if there was some defect in connection with the statutory requirements regarding notice, procedural fairness and the conduct of a preliminary examination, these must be confined to complaint 8 and what were described as the conclusionary and omitted allegations. The Commissioner's correspondence made it clear that she was not denying herself the power to make different decisions with respect to different complaints.

151 Any defect of the kind described by the applicant concerning complaint 8 cannot detract from the processes employed in respect of complaints 1 to 7 inclusive, including the recommendation that a judicial conduct panel be convened to inquire into those complaints.

152 That said, the parties are at odds concerning the content of the statutory obligations to give notice and to afford procedural fairness under the Act.

153 In a sense, the legislation is unhelpful in that the obligation to give notice simply applies to "a complaint under sub-section (1)". That is, on one view of it, the same complaint, or the same material embodying the complaint, as may be received by the Commissioner under s 12(1). That literal approach must however yield to the intended operation and effect of the statutory scheme.

154 It is evident that the obligation to give notice is intended to enable the judicial officer to provide a response which will furnish the Commissioner with information relevant to the preliminary examination conducted under s 13 and, as a result, to assist the Commissioner when evaluating whether to exercise any of a range of statutory powers. These include any of the dismissal powers under ss 16 or 17, and the powers to make a referral to the relevant jurisdictional head under s 18, to make an immediate report to Parliament under s 19, or to recommend to the Attorney-General that a judicial conduct panel be appointed under s 20.

155 The statutory obligations to give notice and to afford procedural fairness do not arise in the air. They arise in the statutory context of the intended operation and effect of Part 3 of the legislative scheme. In some cases, it may be convenient to provide the complaint as received by the Commissioner to the judicial officer. In most cases, however, a fair summary should be sufficient to convey the essence of the allegations the subject of a complaint.

156 The obligation to give notice under s 12 is best seen as an incident of the obligation to afford procedural fairness under s 13. The question is whether the notice enabled adequate participation by the judicial officer,[90] given the "duty which the service of the notice imposes".[91] In this case, and central to evaluating the approach taken by the Commissioner, is whether the judicial officer was sufficiently apprised of the complaint to enable him to give a meaningful response and, thereby, to furnish the Commissioner with information directed to what the Commissioner was required to decide.[92]

157 The obligation of the Commissioner to afford procedural fairness embodied in s 13(2) during a preliminary examination ought not be confused with the

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[90] *R (on the application of Bourgass) v Secretary of State for Justice* [2016] AC 384, [100] (Lord Reed JSC, with whom Lord Neuberger of Abbotsbury PSC, Baroness Hale of Richmond DPSC, Lord Sumption and Lord Hodge JJSC agreed).
[91] *Bannerman v Mildura Fruit Juices Pty Ltd* (1984) 2 FCR 581, 591 (Davies J).
[92] *Traill v McRae* (2002) 122 FCR 349, 380-381 (Sackville, Kenny and Allsop JJ).

obligation of the judicial conduct panel to afford procedural fairness embodied in s 23(3)(a) during an inquiry.

158 Whilst the same procedural fairness principles are invoked, what is required to satisfy them will necessarily vary with the nature of the statutory task to which they apply.[93] The obligations of fairness applicable at the stage of preliminary examination are less stringent than might apply in the execution of an investigative function,[94] and certainly less than that required by a prosecutorial or disciplinary body.[95] The Commissioner was not required to make findings about, still less determine, any of the complaints. Rather, she was required to evaluate them in connection with her preliminary examination. That required the Commissioner to evaluate each complaint and each response and decide which statutory power might appropriately be exercised.

159 The recommendation to appoint a judicial conduct panel, in the circumstances of this case, necessarily required the formulation of an opinion by the Commissioner that the complaint satisfied one or more of the requirements of s 20(1)(a) and, in addition, that an inquiry was "necessary or justified",[96] as well as whether, if established, the conduct was of a kind that "may warrant consideration of removal of the judicial officer".[97]

160 Each of these matters was addressed by the Commissioner in her letter dated 10 June 2021,[98] which was drawn after considering the submissions made by the judicial officer.

161 Those submissions had been made by the judicial officer with the benefit of notice of all complaints by letters dated 7 May and 31 May 2021.

162 As for complaint 8, the judicial officer was furnished with information sufficient to identify that the person the subject of the complaint was [REDACTED], the identity of a witness and, importantly, the general nature of the conduct about which a response was sought. In addition, the letter dated 31 May 2021 made it clear that the complaint was not confined to the specific incident but extended to other, similar incidents involving Ms C in the Magistrates Court building.

163 The absence of some of the detail set out in the letter to the Attorney-General dated 10 June 2021 does not detract from the proposition that the judicial officer was furnished with a fair summary of the conduct encapsulated in complaint 8. In this case, and as the Commissioner explained in her letter to the Attorney-General

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93 *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ) as approved by *Kiao & Ors v West & Anor* (1985) 159 CLR 550, 613 (Brennan J).
94 *Bond v Sulan* (1990) 26 FCR 580.
95 *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 122 FCR 78, [144] (Weinberg J).
96 *Judicial Conduct Commissioner Act 2015* (SA), s 20(1)(b)(i).
97 *Judicial Conduct Commissioner Act 2015* (SA), s 20(1)(b)(ii).
98 Sent from the applicant's solicitor to the Commissioner.

dated 10 June 2021, she had "put the essence" of the allegations to the applicant. That was sufficient.

164 It is of no moment that the summary was in one respect conclusionary in nature, or that it omitted a detailed description of every detail available to the Commissioner. The judicial officer was fairly placed in a position to respond and to provide the Commissioner with information to be evaluated for the purposes of undertaking the preliminary examination.

165 In any event, there is no reason to regard any omission in this case as amounting to jurisdictional error unless it can be said that the suggested breach of the obligation to afford procedural fairness was material: the Act is "ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance".[99] The Act provides no basis to exclude the concept of materiality from the assessment of procedural fairness and jurisdictional error. The applicant's contention to the contrary must be rejected. As the Commissioner later said in her letter dated 12 August 2021, it is difficult to see how the provision of "greater detail" would have changed the applicant's position. There was in this case no material breach.

166 Finally, there is no reason to doubt that the Commissioner conducted a preliminary investigation into complaint 8; indeed, that is what her 10 June 2021 letter said she had done. Though there were only a few days between receipt of the applicant's response dated 3 June 2021 and Ms C's statement dated 7 June 2021, and the making of the recommendation on 10 June 2021, there is no basis to go behind the Commissioner's statement that she had completed her preliminary examination. As has been seen, that must be done efficiently and expeditiously, and in accordance with the principles of procedural fairness, but in any manner thought fit by the Commissioner pursuant to ss 13(2) and 13(5). The contention that there was no preliminary examination by the Commissioner of complaint 8 must be rejected.

167 It is strictly unnecessary to address the balance of the responses made on behalf of the first respondent by the Solicitor-General. However as these were argued it is appropriate to address them.

168 The Solicitor-General argued that the obligation to give notice under s 12(3) only applies to a complaint made by a complainant under s 12(1). Emphasis was given to the terms of s 12(8) and the absence of any reference to the term "a complaint under subsection (1)" which is found in s 12(3):

> (8) The Commissioner may, on his or her own initiative, treat as a complaint any matters concerning the conduct of a judicial officer.

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[99] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, [29] (Kiefel CJ, Gageler and Keane JJ); *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, [31] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

169 This submission must be rejected. The concept of a “complaint” is central to the operation of Part 3. It is one of the four mechanisms by which the jurisdiction of the Commissioner is enlivened and the conduct of a judicial officer is to be evaluated. The other mechanisms for evaluating the conduct of a judicial officer are the “referrals” available to each of the Attorney-General under s 12(6) and the relevant jurisdictional head under s 12(7) and the “own initiative” complaint under s 12(8).

170 It is telling that the mechanism available to the Commissioner in the exercise of “his or her own initiative” is to “treat” any matters concerning the conduct of a judicial officer “as a complaint”. Whilst the intention that a “complaint” under s 12(8) should be treated as if it were a complaint made under s 12(1) might have been made clearer, any uncertainty is resolved by three considerations.

171 The first is that this construction is open on the text of s 12. To “treat as a complaint” any matters considered under s 12(8) literally means that they must be treated as a complaint, and the only complaint recognised by s 12 is one made under s 12(1). An own initiative “complaint” is therefore to be treated like any other complaint under s 12 including, for example, that it be in the form required by s 12(5) where the complainant is effectively the Commissioner.

172 The second consideration is related to the first. The use of the device “treat as a complaint” must be considered in the context of the Act as a whole. As has been seen, the definition of “complaint” in s 4(1) includes each of the four mechanisms recognised by s 12. Given the usual effect of a definition,[100] there was no need to include the device if it was not intended to have some effect. One might ask what purpose is served by having the Commissioner “treat” matters arising under s 12(8) “as a complaint” when they are defined by s 4(1) to be a complaint. Rather, meaning and effect must be given to these words.[101] When that is done, it is clear that the device of treating “as a complaint any matters concerning the conduct of a judicial officer” was intended to have the additional effect, for the purposes of s 12, of equating an own initiative complaint with a complaint made under s 12(1).

173 The third consideration is one of operation and effect. The alternative construction denies the judicial officer the benefit of the s 12(3) statutory notice provision. There seems to be no good reason why that should be so. On the contrary, there is every reason to think that a judicial officer ought be given the benefit of notice of an own initiative complaint at the earliest opportunity. As with

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[100] That is, definitions in a statute ordinarily do “no more than define the meaning to be assigned to [a] word … as used in the Act”, see *Gibb v Commissioner of Taxation (Cth)* (1966) 118 CLR 628, 635 (Barwick CJ, McTiernan and Taylor JJ); also see *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54, 69 (Windeyer J), *Hurstville City Council v Hutchison 3G Australia Pty Ltd* (2003) 200 ALR 308, [63] (Mason P, with whom Handley and McColl JJA agreed); *Moreton Bay Regional Council v Mekpine Pty Ltd* (2016) 256 CLR 437, [61] (French CJ, Kiefel, Bell and Nettle JJ).

[101] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [71] (McHugh, Gummow, Kirby and Hayne JJ), citing *Commonwealth v Baume* (1905) 2 CLR 405 and *R v Berchet* (1688) 1 Show KB 106.

a complaint received under s 12(1), an own initiative complaint under s 12(8) may carry with it very serious implications for the judicial officer. This is not a case where the statutory language is so intractable that the alternative, preferable construction is foreclosed. Indeed, this is a case where both the "inconvenience … or improbability" of the suggested result strongly favours the construction which better accords with the intended operation and effect of the statutory scheme:[102]

> But there are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute.

174 Whilst notice may be given in connection with the conduct of the preliminary examination, as part of the requirement to afford procedural fairness under s 13 developed below, the preferable construction is that which ensures that the judicial officer has the benefit and certainty of statutory notice at the outset of the process.

175 Notwithstanding the scope for implication as a matter of procedural fairness there is no good reason why the legislature should be taken to have excluded statutory notice, or otherwise left the question of notice as a matter for implication.

176 In these circumstances, the text and operation of s 12 within the Act as a whole demonstrate that the Commissioner was required to give notice to the judicial officer under s 12(3) when acting under s 12(8). Certainly, that was the approach adopted by the Commissioner in this case, as can be seen from her letter dated 12 August 2021, where she described the detail that s 12(3) required that she give to the applicant concerning the own initiative complaint.

177 In any event, it ought be implied as a matter of necessary implication that notice was required to be given to the judicial officer as a concomitant of the obligation to afford procedural fairness in connection with the preliminary examination of any complaint under s 13(2), including that which the Commissioner determines to treat as a complaint under s 12(8) of the Act. The implied obligation to afford procedural fairness arises because the potential consequences for the judicial officer are so significant.[103]

178 Referrals under ss 12(6) and 12(7) which are not treated as complaints by the Commissioner under s 12(8) are, as has been seen, defined as "complaints" under s 4(1) and they are, at the least, subject to the implication just mentioned together with the obligation to afford procedural fairness under s 13(2).

179 Finally, the Solicitor-General submitted that any failure to give notice did not invalidate what the Commissioner later did, including her recommendation that the Attorney-General convene a judicial conduct panel. Essentially, the

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[102] *Cooper Brookes (Wollongong) Pty Ltd v The Commissioner of Taxation of the Commonwealth of Australia* (1981) 147 CLR 297, 320 (Mason and Wilson JJ).
[103] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

submission was that notice under s 12(3) was separate from the conduct of a preliminary examination under s 13(1). It was submitted that there is nothing in the text to suggest that s 12(3) notice is an "essential preliminary" to the performance of a preliminary examination under s 13(1) and, in turn, a recommendation made to the Attorney-General under s 20.[104] It was submitted that the Parliament should not be taken to intend "such a highly inconvenient result" where procedural fairness was required expressly by ss 13(2) and 23(3)(a) and impliedly by ss 18 and 19 of Part 3 of the Act.

180 This contention tends, with respect to the parties, to highlight the way in which aspects of this case were argued at a high level of abstraction. For example, for the applicant it was suggested at times that no notice at all had been given. This was put separately to the question whether the applicant had been given procedural fairness. For the first respondent, it was submitted that notice under s 12 was not required because procedural fairness must be given under s 13 and before the Panel. That submission seemed to concede that some notice must be given.

181 In a sense both submissions failed to grapple with the proposition that notice is usually an essential feature of procedural fairness.

182 Sections 12 and 13 must be read together. They must usually operate together. The obligation to afford procedural fairness does not, as earlier indicated, arise in the air. The requirements of procedural fairness vary according to the circumstances.[105] The extent of the notice required under s 12 will usually be dictated by what is necessary to afford the judicial officer procedural fairness for the purposes of the proper conduct of the preliminary examination under s 13. If no notice was given under ss 12 or 13, the Commissioner's exercise of power may have been called into question. However, and as earlier indicated, the notice given to the judicial officer was in this case sufficient to enable meaningful participation in the preliminary examination, thereby satisfying the requirements of both ss 12 and 13.

183 Ground 1 must be dismissed.

Ground 2: The ruling of the Panel on 27 October 2021 to inquire was wrong in law

184 The applicant challenged the ruling made by the Panel on 27 October 2021. The Panel held that it had jurisdiction to inquire into complaint 8 and what were described as the conclusionary and omitted allegations, because the Panel found that relevant "conduct" was identified, and it rejected the contention that there had

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[104] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 389-390 (McHugh, Gummow, Kirby and Hayne JJ).

[105] *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504 (Kitto J); *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [85] (Allsop CJ, Middleton and Foster JJ).

been no preliminary examination of these allegations, describing this contention as "narrow and pedantic".[106]

185 By Ground 2.1 the applicant relied on Ground 1 for the proposition that as the Commissioner's recommendation was invalid, so too must be the Attorney-General's referral by the letters dated 24 June and 20 August 2021. The applicant submitted that a jurisdictional requirement to be determined is whether there was a valid referral,[107] even though it may extend beyond matters of pure fact to legal conclusions.[108]

186 By Ground 2.2 the applicant maintained that because the referral of complaint 8, and what were described as the conclusionary and omitted allegations, did not identify relevant "conduct" there is no jurisdiction in the Panel to inquire pursuant to s 23 of the Act. The applicant called in aid the ruling of the Full Court of the Supreme Court of Victoria in *R v Solicitors' Disciplinary Tribunal; ex parte L (a solicitor)* to the effect that without identifying "any transaction or material facts which the secretary has considered and which has led to the formation of his opinion, … it is not possible to say what is "the matter" or matters referral of which is approved".[109]

187 By Ground 2.3 the applicant contended that there can be no s 23 inquiry without procedural fairness, and he has been denied procedural fairness in respect of "the essential facts" underpinning the conclusionary and omitted allegations.[110] That is, the allegations must be specific enough to enable the applicant to contest the facts upon which they are based.[111] The applicant submitted that he must be afforded "an opportunity to deal with relevant matters adverse to his interests".[112] That is to say, the applicant must be given an opportunity to meet the case against him by explaining or controverting (by cross-examination, presenting evidence of his own, and by addressing the Panel) in relation to the specific case.[113] The

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[106] Ruling of the Panel dated 27 October 2021, [18].
[107] *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* & Ors (1945) 72 CLR 37, 81 (Dixon J).
[108] Compare *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 148 (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651 (Gummow J); *Re Minister for Immigration and Multicultural Affairs; ex parte S20/2002* (2003) 198 ALR 59, [125] (Kirby J). By way of example, one would not suppose that a Panel could proceed to inquire into a referral on the domestic skills of a judicial officer, or a referral based on a recommendation from a person other than the Commissioner, or where the referral is based on a recommendation where there was neither notification nor a preliminary examination.
[109] *R v Solicitors' Disciplinary Tribunal; Ex parte L (a solicitor*) [1988] VR 757, 765 (Murphy, Fullagar and Southwell JJ).
[110] *Smith v New South Wales Bar Association* (1992) 176 CLR 256.
[111] *Etherton v Public Service Board* [1983] 3 NSWLR 297, 306[F]-[G] (Hunt J); *Barry v Queensland Nursing Council* [2001] QDC 146, [43] (McGill DCJ).
[112] *Kioa & Ors v West & Anor* (1985) 159 CLR 550, 628-629 (Brennan J).
[113] *Etherton v Public Service Board of New South Wales & Anor* [1983] 3 NSWLR 297, 306[F]-[G] (Hunt J); *Barry v Queensland Nursing Council* [2001] QDC 146, [43] (McGill DCJ); *R v Solicitors' Disciplinary Tribunal; Ex parte L (a solicitor)* [1988] VR 757.

applicant cited *S v The Queen* which addressed procedural fairness in criminal proceedings:[114]

> …the accused was effectively denied an opportunity to test the credit of the complainant by reference to surrounding circumstances such as would exist if the acts charged had been identified in relation to some more precise time or by reference to some other event or surrounding circumstance.

188 By Grounds 2.4 to 2.6 inclusive, the applicant contended that the "incidental" jurisdiction conferred on the Panel by s 23(1) to inquire into and report on "any other matters concerning the conduct of the judicial officer that arise" does not confer jurisdiction where these matters are already known, but not "referred or validly referred". The applicant also submitted that this "incidental" power is not available because they have not "emerged" or otherwise come to light in the course of dealing with the referral.[115]

189 Finally, underlying this aspect of the case was a debate about the effect of s 24 of the Act and whether the Panel had purported to find that it was to be equated with, or otherwise to conduct the inquiry as, a Royal Commission. The applicant submitted that this was a "misconceived parallel" which "distorts fundamentally" the character of an inquiry conducted by a panel under the Act.

190 There were a number of aspects to the applicant's contention regarding the suggestion that the Panel was acting as a Royal Commission. First, the applicant contended that s 24 (earlier set out) does not employ the statutory technique for establishing a body as a Royal Commission.[116] Secondly, the applicant said that the inquiry required under the Act is not of "the roving kind" that might be conducted by a Royal Commission because the potentially serious sanctions require that the judicial officer be given a full opportunity to explain or refute or controvert any allegation made.[117] The conduct of a Royal Commission involves a different standard and a lesser content of procedural fairness than applies to a panel considering whether to remove a judicial officer under the Act.[118]

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[114] *S v The Queen* (1989) 168 CLR 266, 286 (Gaudron and McHugh JJ).

[115] Compare *Jones v Director of Public Prosecutions (UK)* [1962] AC 635.

[116] Contrast, for example, s 19 of the *Ombudsman Act 1972* (SA) and s 21(14)(a) of the *Maralinga Tjarutja Land Rights Act 1984* (SA) with each of: s 11 of the *Remuneration Act 1990* (SA) (especially s 11(2)); s 84 of the *Constitution Act* 1934 (SA); s 16 of the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* (SA); s 16 of the *South Australian Local Government Grants Commission Act 1992* (SA).

[117] *Gardiner v Land Agents Board* (1976) 12 SASR 458, 471 (Walters J); *Etherton v Public Service Board* [1983] 3 NSWLR 297, 303D, 305F (Hunt J); *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 122 FCR 78, [117]-[120], [142] (Weinberg J); *Arafura Seafood Products Pty Ltd v Landos* [1988] FCA 340.

[118] *Bond v Australian Broadcasting Tribunal (No.2)* (1988) 19 FCR 494, 510 (Wilcox J); *Dainford Ltd v ICAC* (1990) 20 ALD 207; *Romeo v Asher* (1991) 29 FCR 343. And also: *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 323-324 (Mason, Wilson and Dawson JJ); *Connell v National Companies and Securities Commission* (1989) 14 ACLR 765, 771 (O'Bryan J); *Karounos v Corporate Affairs Commission (SA)* (1989) 50 SASR 484, 488 (King CJ); *Bond v Sulan* (1990) 26 FCR 580; *Shaw Stockbroking Ltd v Australian Stock Exchange* (1998) 16 ACLC 827, 841-2 (Bryson J); Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) [8.150].

Determination of Ground 2

191 It is convenient to begin with the issue about s 24 of the Act and the ruling made by the Panel about the powers of a Royal Commission. It may be accepted that, as the applicant submitted:[119]

> … the Panel is neither a Royal Commission nor a standard disciplinary tribunal: it is a statutory body fixed with the task of carrying out a disciplinary function (inquiring into whether identified conduct is misconduct, and ultimately 'constitutional' misbehaviour), and holding the delicate balance between judicial independence (protections from vexation and executive influence) and accountability.

192 Section 24 provides:

> (1) For the purposes of an inquiry under this Part, a judicial conduct panel has the powers of a commission as defined in the *Royal Commissions Act 1917* and that Act applies as if—
>
> (a) the judicial conduct panel were a commission as so defined; and
>
> (b) the subject matter of the inquiry was set out in a commission of inquiry issued by the Governor under that Act.
>
> (2) Without limiting subsection (1), a judicial conduct panel may require the judicial officer to undergo 1 or more medical examinations for the purpose of assisting in determining whether proper cause exists for removing the judicial officer from office.

193 The actual ruling by the Panel was that "in conducting the inquiry, the Panel is sitting as an inquisitorial body exercising the powers of a Royal Commission conferred on it by s 24(1) of the Act".[120] There can be no complaint about this ruling. The Panel did not rule that it was acting or purporting to act as a Royal Commission.

194 In so far as the applicant relied on a written submission made by counsel assisting to the effect that the Panel was, "in effect a quasi-Royal Commission",[121] that reliance was misplaced. Counsel referred to the powers of a Royal Commission under s 24 of the Act and, more importantly, the Panel's ruling did not suggest that it was acting as a Royal Commission.

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[119] Applicant's written submissions dated 8 December 2021, [24].
[120] Panel ruling of 27 October 2021, [31].
[121] Written submissions of counsel assisting the Panel dated 30 September 2021, [86]. The submission was that the Panel was "charged with inquiring into the matters referred to it by the Attorney-General and any others that come to its attention during the inquiry. Such an approach is often how Royal Commissions, which are inquisitorial in nature and are established by the Executive to inquire into matters, make findings of fact for the Executive and usually make recommendations, proceed", citing *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 152 CLR 25, 53 (Gibbs CJ); *Setka v Gregor* [2011] FCAFC 64, [12] (Tracey J); *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106, [325] (von Doussa J).

195 As for Ground 2.1, as the Commissioner's recommendation was valid there is no basis, on account of that recommendation, to invalidate the Attorney-General's referral.

196 Ground 2.1 must be rejected.

197 As for Ground 2.2, the Commissioner's letter dated 10 June 2021 adequately set out the specific incident and the other conduct concerning Ms C for the purposes of framing both the preliminary examination and recommendation, together with the referral and the inquiry to be conducted by the Panel.

198 What is involved in the evaluation of a referral to a Panel made under s 23(1) is, to an extent, a matter of degree. If it could be said that what emerges at the inquiry was not considered in the preliminary examination, then it may be arguable that the process has miscarried. It is conceivable that if something wholly new and different emerges it may be necessary to invite the Commissioner to embark on a preliminary examination of that new issue. Alternatively, variations in what was considered in the preliminary examination might be addressed by the flexible exercise of the powers available to the judicial conduct panel. Neither issue is presently apparent in this case.

199 It must be recalled that, by the time of the Panel's ruling in this case, the statements in the possession of the Commissioner had all been supplied to the judicial officer. There is no suggestion that, for example in the case of complaint 8, conduct materially additional to or materially different from that set out in the letter dated 31 May 2001 (the s 12(3) notice), the recommendation or the referral was identified in that material. Likewise, it is not suggested that a new complainant has emerged, or any new, materially different conduct has been identified.

200 The decision in *R v Solicitors' Disciplinary Tribunal; ex parte L* is distinguishable.[122] The case addressed a different legislative scheme. There, a full misconduct hearing by the Tribunal could only proceed where the secretary of the Law Institute had first conducted an investigation and formed the opinion that the solicitor had engaged in misconduct, and the secretary had obtained the approval in writing of three members of the Council. It was in that context that the generic approval and referral concerning "misconduct" was struck down because it failed to "identify any transaction or material facts", leading to the understandable concern that approval could not "be given to a roving examination".[123]

201 By contrast, in this case the essential nature of the alleged "conduct" was adequately identified. There is to be no "roving inquiry".

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122 *R v Solicitors' Disciplinary Tribunal; Ex parte L (a solicitor*) [1988] VR 757.

123 *R v Solicitors' Disciplinary Tribunal; Ex parte L (a solicitor)* [1988] VR 757, 765 (Murphy, Fullager and Southwell JJ).

202 Ground 2.2 must also be rejected.

203 For the reasons just given, the complaint in Ground 2.3, that there has been a denial of procedural fairness, must likewise be rejected. The essential nature of the conduct has been identified in a manner that fairly frames the scope of the inquiry.

204 The submission that the applicant must be given an opportunity to meet the case against him and the analogy drawn with *S v The Queen*,[124] overlook the early stage at which the applicant has chosen to mount his challenge. These features of procedural fairness are inapposite to the conduct of a preliminary examination. The evaluation of what is "fair" thereafter must take account of the likely scope for the judicial officer to respond. Here, that means that the judicial officer will see the statements as well as the evidence given by any complainant or witness well before being required to cross-examine, call supportive evidence or put submissions to the Panel as part of the inquiry. The judicial officer will be able to prepare a considered response well before the Panel determines what action it will take under s 24, or what report it will make under s 25 of the Act.

205 Ordinarily one would expect that procedural fairness would require that the Panel furnish the judicial officer with any further statements on which it may act, including any supplementary statements. That would include making available to the judicial officer materials which are arguably favourable to the judicial officer, even if the Panel does not propose to adduce them.

206 Finally, it is unnecessary to finally rule on the scope of the incidental power contained in s 23(1). Nonetheless it is doubtful whether the jurisdiction in the Panel arising under s 23(1) requires that the "other matters concerning the conduct of a judicial officer" be wholly new. As earlier explained, to some extent the evaluation of a referral under s 23(1) raises questions of degree, and the same may be said of "any other matters … that arise in the course of its dealing with the referral". One would not ordinarily read this provision conferring jurisdiction on the Panel as narrowly as the applicant suggests.[125] Rather, Parliament may be taken to have intended that the incidental power was designed to ensure that all matters that arise concerning the conduct of a judicial officer will be addressed.

207 That this must be done fairly may be accepted. Whether matters arising should be addressed by means of another preliminary examination or by the adoption of fair and flexible procedures before the Panel is not a matter arising for decision on this application.[126]

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[124] *S v The Queen* (1989) 168 CLR 266, 286 (Gaudron and McHugh JJ).

[125] Cf, *Owners of "Shin Kobe Maru" v Empire Shipping* (1994) 181 CLR 404, 421 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *PT Bayan v BCBC Singapore* (2015) 258 CLR 1, [29] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

[126] If a preliminary examination is required one would not think that it should unduly delay a panel given the Commissioner's power to deal with a series of complaints as if they were a single complaint, and

208 Ground 2 must be dismissed.

Ground 3: The ruling of the Panel on 9 November 2021 to permit a witness to be legally represented was wrong in law

209 The applicant contended that the Panel has no jurisdiction to permit a witness (other than the applicant) to be represented by counsel, whether when giving evidence or at any other time; and the Panel acted beyond its jurisdiction in granting leave to the witness to be represented by counsel when giving evidence.

210 The applicant commenced with the proposition that the Panel is required by s 23(3)(b) of the Act to conduct the inquiry in private meeting, thereby precluding the presence of counsel for a witness at any time, and the presence of a witness other than when giving evidence. The applicant contended that no power is conferred on the Panel by the Act, whether expressly or impliedly, or by reference to the *RCA*, to permit otherwise.

211 The applicant submitted that it is a necessary, but not a sufficient, condition of a private meeting that it is not open to the public, citing *SZAYW v MIMIA*:[127]

> Obviously, in order for a hearing to be in private it is necessary that it not be in public. However, it is not sufficient. A hearing would not be in private if, for example, a Tribunal member decided to invite a group of his or her acquaintances to be present. In such a case the hearing would not be open to the general public, but the applicant's entitlement to privacy would be disregarded. "Public" and "private" are words that are used in contrast, but they do not cover the entire range of possibilities.

212 The applicant also submitted that the concept of a private meeting requires that only those "whose presence is reasonably required for the purposes of or in connection with the performance of the [Panel's] functions" may be present. This may include: 'parties' or persons attending on behalf of 'parties', those assisting a party in the presentation of the case (including a witness when giving evidence), interpreters, security officers, and necessary administrative staff such as court reporters.[128] It requires the exclusion of witnesses when they are not giving evidence.[129]

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the need for efficiency and expedition, see *Judicial Conduct Commissioner Act 2015* (SA) ss 13(4) and 13(5).

[127] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486 (***SZAYW v MIMIA***), [23] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ), citing *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42]. See also, *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10, 26 (Mason CJ) in the context of an arbitration.

[128] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486, [25] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ); *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10, 26 (Mason CJ), 40 (Toohey J).

[129] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486, [25] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ). There is no such requirement at common law for a trial held in public: *Moore v Lambeth County Court Registrar* [1969] 1 WLR 141, 142 (Edmund Davies LJ, with whom Willmer LJ agreed).

213 The applicant emphasised the difference between the privacy of the meeting and the confidentiality of what is said and done at that meeting. The applicant submitted that the former refers to who may be present, whereas the latter refers to what use may be made by those present of what occurs there.[130] The Act maintains the distinction.[131]

214 Finally, the applicant raised the concern that there was no immunity for witnesses and counsel attending meetings of the Panel, cf s 30 of the Act. In particular, the applicant contended that the Panel had already determined that it "is not a disciplinary body or a tribunal or a court" and therefore, he contended, immunity does not apply.[132] Accordingly, said the applicant, the Panel has thereby excluded the absolute privilege which attaches to all statements made in the course of judicial proceedings;[133] whether made by parties,[134] witnesses,[135] legal representatives,[136] members of the jury,[137] or by the judge,[138] and which also applies to statements made in the course of quasi-judicial proceedings, ie proceedings of tribunals recognised by law and which act "in a manner similar to that in which a Court of justice acts".[139]

215 These considerations were said to support the conclusion that legal representation could not be permitted.

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130 *Esso Australia Resources Ltd & Ors v Plowman & Ors* (1995) 183 CLR 10, 28 (Mason CJ), 42 (Toohey J); *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486, [7] (Gleeson CJ, Cummow, Hayne, Callinan and Crennan JJ).

131 Contrast, *Judicial Conduct Commissioner Act 2015* (SA) s 23(3)(b) and ss 32, 33.

132 Panel ruling of 27 October 2021, [33].

133 *Mann v O'Neill* (1997) 191 CLR 204, 211-213 (Brennan CJ, Dawson, Toohey and Gaudron JJ).

134 See *Cabassi v Vila* (1940) 64 CLR 130, 140 (Starke J); *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 263-264 (Kelly CB, Martin, Bramwell, Channell, Pigott and Cleasby BB, Byles, Keating, Brett and Grove JJ); *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431, 446, (Fry LJ), 451 (Lopes LJ).

135 *Revis v Smith* (1856) 18 CB 126, 140-144; *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 263-264 (Kelly CB, Martin, Bramwell, Channell, Pigott and Cleasby BB, Byles, Keating, Brett and Grove JJ); *Seaman v Netherclift* (1876) 2 CPO 53, 56-57 (Cockburn CJ), 61 (Amphlett JA), *Watson v M'Ewan* [1905] AC 480, 486 (Earl of Halsbury LC); *Hargreaves v Bretherton* [1959] 1 QB 45, 51-54; *Marrinan v Vibart* [1963] 1 QB 528, 534-536 (Sellers LJ). See also *Cabassi v Vila* (1940) 64 CLR 130, 140 (Starke J).

136 *Munster v Lamb* (1883) 11 QBD 588, 599, 603-604 (Brett MR). See also *Cabassi v Vila* (1940) 64 CLR 130, 140 (Starke J); *Clyne v NSW Bar Association* (1960) 104 CLR 186, 200-201(Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ); *More v Weaver* [1928] 2 KB 520, 522 (Scrutton LJ); *Rondel v Worsley* [1969] 1 AC 191, 229 (Lord Reid), 252 (Lord Morris of Borth-y-Gest), 266-267, 271 (Lord Pearce).

137 *Bushell's Case* (1670) 89 ER 2. See also *Cabassi v Vila* (1940) 64 CLR 130, 140 (Starke J); *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431, 451 (Lopes LJ).

138 See *Cabassi v Vila* (1940) 64 CLR 130, 140 (Starke J); *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 263-264; *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431, 446 (Fry LJ), 451 (Lopes LJ); *More v Weaver* [1928] 2 KB 520, 522 (Scrutton LJ, with whom Lawrence and Greer LJJ agreed).

139 *Copartnership Farms v Harvey-Smith* [1918] 2 KB 405, 408 (Sankey J). See also *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431, 442 (Lord Esher MR); *O'Connor v Waldron* [1935] AC 76, 81 (Lord Atkin); *Trapp v Mackie* [1979] 1 All ER 489, 491 (Lord Diplock), 497 (Lord Fraser of Tullybelton).

216 For the second respondent, the Solicitor-General submitted that s 23(2) of the Act confers a power on the Panel to determine the procedure for the conduct of business at the meetings of the Panel. That power, it was submitted, plainly embraces determining who is to be present at meetings and who may be represented by counsel. The Panel has determined to permit the judicial officer to be present at meetings of the Panel and to permit him to be legally represented. It was submitted that a hearing conducted in private is observed where there is present only those "persons whose presence is reasonably required for purposes of or in connection with the performance of the Tribunal's functions".[140]

217 It was also submitted that, if procedural fairness requires that a witness be permitted to have a legal representative present, and for that representative to participate to an extent in the examination of the witness, that legal representative is therefore reasonably required. The example was given of a statutory investigation by the National Companies and Securities Commission of suspected offending, where the High Court considered that the statutory mandate to observe the rules of natural justice in that case required that each witness called to give evidence be permitted to be legally represented, with freedom for that legal representative to participate in the examination of the witness and for provision of a transcript of the witness' evidence.[141]

218 Nonetheless, it was also submitted that the people whose presence is reasonably required is not exhausted by reference to the concept of procedural fairness. For example, where a person appearing before the Panel wishes someone to be present for moral support, that person is also reasonably required, provided there are no reasonable grounds for excluding the person. That approach was adopted by the High Court in respect of the girlfriend of an applicant who was present to support that applicant in private proceedings before the Refugee Review Tribunal.[142]

219 Finally, the Solicitor-General submitted that s 24(1) of the Act met any concern regarding representation or any asserted limitation in the immunity of witnesses and counsel attending meetings of the Panel. On the basis of s 24, s 13 of the *RCA* provides a right of representation to a witness, subject to any direction to the contrary. Sections 16B(2) and (3) of the *RCA* provide the same protection and immunity for witnesses and counsel as would apply in proceedings before the Supreme Court.

Determination of ground 3

220 The submissions of the Solicitor-General should be accepted.

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[140] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486, 497 [25] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

[141] *National Companies and Securities Commission v News Corp Ltd* (1984) 156 CLR 296, 325-6 (Mason, Wilson, Dawson JJ).

[142] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486, [26] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

221 The Panel's decision to permit a limited right of appearance to counsel for witness A was not beyond jurisdiction.

222 The operation of s 24 of the Act, and the application of ss 13 and 16B of the *RCA*, are decisive. The Panel's ruling was perfectly consistent with the provisions of the *RCA* in so far as they applied to the Panel. Effect must be given to the words in s 24(1): "and that Act applies …".[143] The effect of s 24 is not confined to the powers of a commission; the *RCA* applies, and the provisions of the *RCA* apply, to the Panel as if the Panel were a commission. There is in any event no good reason to conclude that the immunity from liability provided by s 30 of the Act abrogates the common law privilege and immunities attaching to statements made in judicial and quasi-judicial proceedings. Abrogation requires clear language, which is absent from s 30 of the Act.[144]

223 Regardless of s 24, it was open to the Panel to find that counsel for witness A was a person whose presence was reasonably required for the purposes of or in connection with the performance by the Panel of its functions. In this case that may be regarded as a corollary of the need to afford the witness procedural fairness. In other cases, other kinds of assistance may be given where the witness reasonably requires assistance. It is not hard to imagine cases involving a witness who cannot reasonably participate without assistance. If the witness is not given assistance the witness might, on that account, be said to have been denied procedural fairness. Whether that latter kind of assistance is properly to be confined to an aspect of procedural fairness may be doubted.[145] The question under the Act will usually be whether assistance to the witness is reasonably required for the purposes of, or in connection with, the performance by the Panel of its functions in the course of a private hearing.[146]

224 The Panel's statement that it "is not a disciplinary body or a tribunal or a court" cannot be taken out of context. That statement was not directed to whether the common law privileges and immunities applied or were abrogated. It was not directed to the question whether a witness should be legally represented, and it cannot overcome the clear effect and operation of s 24 of the Act. That statement was confined to an analysis of the extent to which procedural fairness was required to be given under s 23 of the Act. It does not therefore detract from the Panel's

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[143] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [71] (McHugh, Gummow, Kirby and Hayne JJ).

[144] See, for example, *Lee v NSW Crime Commission* (2013) 251 CLR 196, [27] (French CJ); *Wentworth v NSW Bar Association* (1992) 176 CLR 239, 252 (Deane, Dawson, Toohey and Gaudron JJ). In relation to the privilege against self-incrimination, see *Hammond v The Commonwealth* (1982) 152 CLR 188; *Sorby v Commonwealth* (1983) 152 CLR 281 and *Hamilton v Oades* (1989) 166 CLR 486.

[145] Cf, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 95 ALJR 292, where a failure to translate *ex tempore* reasons did not amount to a denial of procedural fairness.

[146] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486, [25] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

status as a tribunal acting in the course of quasi-judicial proceedings for the purposes of the privileges and immunities described in *Mann v O'Neill*.[147]

225 The preliminary nature of the Panel's ruling to permit representation must also be emphasised. One may readily expect that concerns about the material made available to the complainants or other witnesses, and their counsel, including concerns about whether that material may be used in other proceedings or processes, can be evaluated by the Panel. The processes before the Panel cannot be permitted to be used as a 'stalking-horse' for later proceedings or processes involving the complainants. If necessary, concerns such as these can be addressed by appropriate rulings following submissions from the relevant participants, utilising the powers available under ss 23 and 24 of the Act, as well as s 16A of the *RCA*.

226 Ground 3 must be dismissed.

The *Kable* challenge

227 The applicant's *Kable* challenge commenced with the contention that the Panel has ruled in connection with the inquiry it is conducting under s 23(1) that the effect of s 24(1) of the Act is that it is conducting itself as a Royal Commission for the purposes of the *RCA*. In addition, the applicant contended that the Panel has accepted submissions that procedural fairness does not "therefore" require the giving of particulars which might limit the scope of the inquiry, the cases decided in a disciplinary or criminal context being inapposite.

228 The applicant contended that, on the construction of ss 23 and 24 of the Act which has been accepted by the Panel, those sections impair the independence and impartiality of the Magistrates Court, inconsistently with the conferral on a State Court of federal jurisdiction. The applicant said two consequences follow. First, this enlivens the application of s 22A of the *Acts Interpretation Act 1915* (SA), or following 1 January 2022, s 55 of the *Legislation Interpretation Act 2021* (SA) and, secondly, that ss 23 and 24 are invalid should the construction of those sections prove intractable despite the operation of s 22A or s 55.[148]

229 The following propositions were regarded by the parties as common ground.

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[147] *Mann v O'Neill* (1997) 191 CLR 204, 211-213 (Brennan CJ, Dawson, Toohey and Gaudron JJ).

[148] *Brown v The Queen* (1986) 160 CLR 171, 206 (Deane J); *Cheatle v The Queen* (1993) 177 CLR 541, 562-563 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia & Anor* (2012) 249 CLR 398, [16] (French CJ); *Kronen v Commercial Motor Industries Pty Ltd* (2018) 264 FCR 408, [53]-[54] (White, Perry and Charlesworth JJ); *Question Of Law Reserved (No 1 of 2018)* (2018) 275 A Crim R 400, [7] (Hinton J, with whom Lovell J agreed); *Re Question of Law Reserved (No. 1 of 2019)* (2019) 135 SASR 226, [7] (Stanley J, with whom Nicholson and Doyle JJ agreed).

230 The constitutional principle enunciated in *Kable* has undergone considerable refinement since that case was decided. In *Attorney-General (NT) v Emmerson* the joint reasons stated the principle in the following terms:[149]

> The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.
>
> (footnotes omitted)

231 The Magistrates Court of South Australia, constituted under the *Magistrates Court Act 1991* (SA), is a court that exercises the judicial power of the Commonwealth pursuant to investment by laws made by the Commonwealth Parliament.[150]

232 It is fundamental to the character of a Court within the Australian judicial system that, as an institution, it is in fact and appearance, independent and impartial.[151]

233 The test for independence and impartiality of a judicial tribunal is one of perception.[152]

234 The principles of judicial independence are fundamental common law principles enshrined in the *Magistrates Court Act 1991* (SA) (the ***MCA***).[153]

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[149] *Attorney-General for the Northern Territory & Anor v Emmerson* (2014) 253 CLR 393 (***Attorney-General (NT) v Emerson***), [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); see also *Knight v Victoria* (2017) 261 CLR 306, [5] (Kiefel CJ, Bell, Gageler, Keane, Gordon and Edelman JJ); *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83, [16] (French CJ, Kiefel, Bell and Keane JJ); *Pollentine & Anor v Bleijie & Ors* (2014) 253 CLR 629, [42] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[150] See, eg, s 68(2) of the *Judiciary Act 1903* (Cth); s 86(2) of the *Competition and Consumer Act 2010* (Cth).

[151] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [3] (Gleeson CJ, McHugh, Gummow and Hayne J), [79]-[82] (Gaudron J), [144] (Kirby J); *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, 147-148 (Gageler SC), [3] (Gleeson CJ), [26]-[29] (McHugh, Gummow, Kirby, Hayne, Callinan, Heydon JJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67-69 (Gleeson CJ), [64] (Gummow, Hayne and Crennan JJ), [238]-[242] (Callinan J); *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 25 (Gaudron J); *Wainohu v New South Wales* (2011) 243 CLR 181, [44]-[48], [68] (French CJ and Kiefel J), [104]-[105] (Gummow, Hayne, Crennan and Bell JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [39] (French CJ, Kiefel and Bell JJ), [122]-[125], [128]-[129] (Gageler J); *Question of Law Reserved (No 1 of 2018)* (2018) 275 A Crim R 400, [59]-[62] (Hinton J, with whom Lovell J agreed).

[152] *Valente v R* (1985) 2 SCR 673, [22] (Dickson CJC, Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ); *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, 148 (Gageler SC), [29] (McHugh, Gummow, Kirby, Hayne, Callinan, and Heydon JJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [66] (Gummow, Hayne, and Crennan JJ).

[153] *Fingleton v Christian Ivanoff Pty Ltd* (1976) 14 SASR 530, 548 (Wells and Sangster JJ)

235 Whether the Act is inconsistent with the judicial independence of the Magistrates Court, because it substantially impairs the institutional integrity of the court,[154] "requires discernment of the relevant minimum characteristics of an independent and impartial tribunal exercising… jurisdiction" under the *MCA*.[155] No exhaustive statement of what constitutes the minimum in all cases is possible.[156] It is a functional principle necessitating an inquiry into the legal and practical operation of the impugned law.[157] The "boundary of State legislative power is crossed when the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the State court as an institution [is] not free of government influence in administering the judicial functions invested in the court".[158]

236 Judicial independence is secured by a combination of institutional arrangements and safeguards,[159] including procedures for dealing with complaints against judicial officers.[160]

237 From these propositions the applicant developed the submission that ordinary, reasonable and informed members of the public might be led to conclude that the Magistrates Court, as an institution, is not free of, and might be subject to, Executive Government influence in administering the judicial functions invested in it. That is said to be so for two reasons.

238 First, the Executive Government retains the power and ability to instigate the investigation of a complaint against a magistrate by a process which is said to be inherently unfair and oppressive, to control the nature and extent of the inquisition, and to choose the inquisitors. These features, it was submitted, impair the independence of the Magistrates Court.

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[154] *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, 148 (Gageler SC); *Bruce v Cole* (1998) 45 NSWLR 163, 167[C]-[G] (Spigelman CJ).

[155] *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, [30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

[156] *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, [30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [63]-[64] (Gummow, Hayne and Crennan JJ); *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 252 CLR 38, [67]-[68] (French CJ); but see, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 98 (Toohey J), 108 (Gaudron J), 119 (McHugh J), 133-134 (Gummow J).

[157] *Kuczborski v Queensland* (2014) 254 CLR 51, [231] (Crennan, Kiefel, Gageler and Keane JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, [107] (Gummow, Hayne, Crennan and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1, [74] (French CJ), [213] (Hayne J); *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, [14] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

[158] *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, [30], [65] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ), citing McHugh J in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 119.

[159] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [43] (Gummow, Hayne and Crennan JJ) – eg, the judicial oath; removal only by the Governor on the address of both Houses of the Parliament; remuneration fixed by an independent tribunal.

[160] *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, [3] (Gleeson CJ).

239 Secondly, and as a result, a magistrate might be induced to compromise his or her judicial oath (to do right "without fear or favour") by avoiding the risk of making fearless decisions – which might induce a (false) allegation against that magistrate (including a "smear" allegation – ie, an allegation without particulars as to time, place or conduct) but which the process would inquire into. It was submitted that this results in the impairment of impartiality in members of that Court.

240 Key features of the Act relied upon in support of these contentions are that the Commissioner is not constrained to make recommendations pursuant to s 20(1) which are confined to complaints notified to the judicial officer under s 12, nor made the subject of a preliminary examination under s 13. In addition, the Panel is empowered to conduct inquiries "as" a Royal Commission, established by the Executive and, as a result, it is not required to demand particulars of complaints or of any other matters arising in connection with the Panel's incidental jurisdiction under s 23(1).

241 The applicant contended that, in contrast to s 20(2)(a) of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth),[161] the Panel is not required by the principles of procedural fairness,[162] or otherwise, to refrain from inquiring into matters such as unparticularised 'smear' allegations.

242 In response, the Solicitor-General made four submissions.

243 First, the guarantee of tenure, security of appointment and remuneration required by s 72 of the *Commonwealth Constitution* does not apply to the courts of the States or Territories. For example, while s 72 of the *Constitution* denies the ability of the Commonwealth to legislate for the appointment of federal acting judges, or judges appointed for a term, the States and Territories may validly appoint acting judges or judges appointed for a fixed, renewable term.[163]

244 Accordingly, the invocation of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) (the ***JMIPC Act***) by the Magistrate is said to be incapable of assisting him. The constitutionally-entrenched requirements of *Act of Settlement 1701* (UK) tenure differ from what might be the minimum necessary for a State Supreme Court, much less a State inferior court. Moreover, it was submitted that, as the Commonwealth Parliament has sought to legislate in a manner "extending beyond compliance with constitutional imperatives" by enacting the *JMIPC Act* so as to further the fact and appearance of judicial independence, its provisions do not represent the constitutional

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161 See also, *Parliamentary Commission of Inquiry Act 1986* (Cth), s 5(2).

162 Because the requirements of procedural fairness are often far less demanding in the context of broad inquiries that are inquisitive where the giving of particulars will often be seen as prejudicing the investigation.

163 Unless perhaps a series of acting rather than full appointments was so extensive as to the distort the character of the court itself: *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [97] (Gummow, Hayne and Crennan JJ); *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, [30], [65] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

minimum.[164] The balance struck by one legislature, operating in a different constitutional context, between competing principles of judicial independence, fairness and accountability, cannot relevantly bear on the constitutionality of the balance struck by another.

245 Secondly, both the *Kable* principle[165] and judicial independence[166] are rooted in history. At the time of Federation, in South Australia and other States, the Supreme Court judges were able to be removed by the Governor for "misbehaviour",[167] as well as by address of both Houses of Parliament.[168] The existence of the separate power to remove for misbehaviour was accepted by the Privy Council prior to Federation,[169] and existed until the amendment of the *Constitution Act 1934* (SA) by the Act.[170]

246 This process of dismissal was "unquestionably constitutional"[171], despite being initiated directly by the Executive Government of the day rather than an independent office-holder and a "highly qualified independent Panel"[172]. While attracting an obligation of procedural fairness,[173] the decision-making by the Governor-in-Council validly operated without any of the "carefully designed protections now enshrined in the [Act]", which operate to ensure independence from the Executive, screen out unmeritorious complaints at an early stage, afford the judicial officer procedural fairness, and ensure that proceedings are conducted in private.

247 Thirdly, and relatedly, magistrates were "historically public servants" and, in common with other public servants, held office at the pleasure of the Executive Government.[174] It is "only in relatively recent times that the terms of appointment of judicial officers in inferior courts have come to resemble those governing the appointment of judges of Supreme Courts".[175]

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[164] *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, [33] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

[165] *Baker v The Queen* (2004) 223 CLR 513, [47]-[48] (McHugh, Gummow, Hayne and Heydon JJ); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [97]-[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[166] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [42] (Gummow, Hayne and Crennan JJ).

[167] *Constitution Act 1934* (SA), s 74; *Constitution Act 1856* (SA), s 30.

[168] *Constitution Act 1934* (SA), s 75; *Constitution Act 1856* (SA), s 31.

[169] *Willis v Sir George Gipps* (1846) 13 ER 536, in which the House of Lords upheld the removal of Justice Willis from the New South Wales Supreme Court pursuant to a comparable provision (being s 2 of the *Colonial Leave of Absence Act 1782* (UK)).

[170] Hansard, House of Assembly, Wednesday 18 March 2015, p 581 (The Hon J R Rau, Attorney-General).

[171] Respondent's written submissions dated 17 December 2021, [76].

[172] Respondent's written submissions dated 17 December 2021, [76].

[173] *Willis v Sir George Gipps* (1846) 13 ER 536.

[174] *R v Moss; Ex parte Mancini* (1982) 29 SASR 385.

[175] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [83] (Gummow, Hayne and Crennan JJ).

248 Fourthly, the High Court has held that "less stringent conditions" are necessary to ensure the security of tenure of inferior courts,[176] on the historical basis that the independence and impartiality of inferior courts has chiefly been achieved and enforced by the availability of the supervisory and appellate jurisdictions of the State Supreme Courts. It was submitted that as this Court ought not decide the matter on any hypothetical basis, and given that the application of the Act in its operation to superior courts could be severed,[177] it is for the applicant to demonstrate that the Act is invalid in its operation to inferior courts.

Determination of the *Kable* challenge

249 The issues raised by the applicant in his s 78B Notice fail at the threshold.

250 The High Court has cautioned against constitutional adjudication adopting, in effect, the "most draconian construction" available,[178] or otherwise doing so in a "factual vacuum".[179]

251 The case for the applicant depends on a construction of the Act which has been rejected: the Panel is not acting as a Royal Commission. In addition, the contention that the recommendations of the Commissioner "need not be confined to allegations that have been notified to the judicial officer or made the subject of a preliminary examination" is not open; it is based on a construction of the Act which has been rejected.

252 The applicant's case otherwise posits a scenario which is not reflected in the evidence. It is, in significant respects, contrary to the evidence. The judicial officer has been given both notice and procedural fairness under ss 12 and 13 of the Act. The Panel has gone no further than a ruling that it has been vested with the powers of a Royal Commission under the *RCA*, as a body to which that Act applies, as if the Panel were a commission with a commission of inquiry.[180] Whether procedural fairness requires the giving of particulars which delimit the scope of the inquiry is not the issue. Apart from the potential exercise of the incidental "power" under s 23(1), the inquiry has been fairly framed by the recommendation of the Commissioner and by the referral of the Attorney-General concerning the alleged conduct of the applicant in his capacity as a judicial officer.

253 It is common ground that procedural fairness must be given during the preliminary examination as well as during the inquiry. It is not suggested that the Panel cannot, by the flexible exercise of its powers in a private meeting, ensure that the judicial officer will have adequate notice of the case he must meet, for

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[176] *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, [63] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ), citing *Ell v Alberta* (2003) 1 SCR 857, [31] (McLachlin CJC, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ).

[177] *Knight v Victoria* (2017) 261 CLR 306, [32]-[37] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ); *Tajjour v New South Wales* (2014) 254 CLR 508, [176] (Gageler J); *Lambert v Weichelt* (1954) 28 ALJR 282, 283.

[178] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, [71], [77] (French CJ).

[179] *Tajjour v New South Wales* (2014) 254 CLR 508, [175] (Gageler J).

[180] *Judicial Conduct Commissioner Act 2015* (SA), s 24.

example by giving copies of all relevant statements and, if necessary, by granting an adjournment on the completion of the evidence of a witness. That may be permitted to allow the judicial officer to prepare for cross-examination or otherwise to enable evidence to be gathered or for some other response to be made.[181]

254 There are more fundamental problems with the challenge made by the judicial officer.

255 The independence and impartiality of the judiciary is both recognised and protected by the Act.[182] It is far from obvious that any provision of the Act, or its likely operation can, whether directly or indirectly, affect or influence "the making of … decisions in [the] courtroom … the undoubted kernel of judicial independence".[183] The postulated relationship between the operation of the Act and the feared effect on judicial independence and impartiality is at best tangential if not tenuous.

256 The independence of the Commissioner and of the judicial conduct panel is critical to the operation of the Part 3 scheme. These cannot be conflated with the "Executive Government". First, the Commissioner is not subject to the direction of any person in relation to any matter.[184] Secondly, the independence of a judicial conduct panel is ensured by the requirements that the Attorney-General consult with the Chief Justice of the Supreme Court about the proposed membership of the Panel,[185] and that two members be current or former judicial officers, one being of equal or higher seniority than the judicial officer the subject of the complaint.[186]

257 In *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs,* the High Court accepted that the selection of judicial officers to conduct commissions of inquiry is consistent with the maintenance of their independence from the Executive Government:[187]

> A judge who conducts a Royal Commission may have a close working connection with the Executive Government yet will be required to act judicially in finding facts and applying the law and will deliver a report according to the judge's own conscience without regard to the wishes or advice of the Executive Government except where those wishes or advice are given by way of submission for the judge's independent evaluation. The terms of reference of the particular Royal Commission and of any enabling legislation will be significant.

258 The degree of independence from the Executive Government is more pronounced in the case of a judicial conduct panel than a Royal Commission. Once established, only the presiding member may dissolve the Panel: there is no power

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181 *Moss v Brown* [1979] 1 NSWLR 114, 129-130 (Moffit P, Reynolds and Hutley JJA).
182 *Judicial Conduct Commissioner Act 2015* (SA), ss 3(2) and 6(3).
183 Len King, 'Minimum Standards of Judicial Independence' (1984) 58 *Australian Law Journal* 340, 341.
184 *Judicial Conduct Commissioner Act 2015* (SA), s 6(2).
185 *Judicial Conduct Commissioner Act 2015* (SA), s 21(2).
186 *Judicial Conduct Commissioner Act 2015* (SA), s 21(3).
187 *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

in the Attorney-General or Executive Government to dissolve the panel or to replace any member of it.[188] The Government cannot address the panel.

259 The Attorney-General cannot appoint or suspend the Commissioner. That power lies with the Governor, and suspension is only available on limited grounds and subject to Parliamentary oversight.[189] The Commissioner may only be removed from office by the Governor on an address of both Houses of Parliament, which represents a security of tenure comparable to that of a Supreme Court judge.[190]

260 The Executive Government does not have the power to "control the nature and extent of the inquisition",[191] or the inquiry. The Attorney-General's role under ss 21(1) and 23(1) of the Act is confined to determining which "matters concerning the conduct of a judicial officer that have been the subject of a recommendation by the Commissioner under section 20 [to appoint a panel]" should be referred to a panel. In the exercise of this power the Attorney-General cannot expand the referral beyond the recommendation made by the Commissioner. The Attorney-General is constrained: she or he may refer, or decline to refer, all or one or more matters recommended by the Commissioner.

261 Judicial independence and impartiality are not confined to independence and impartiality from the Executive.[192] Within the scope of the *Kable* principle, freedom from Government influence[193] has been described as being of "particular significance"[194] and judicial independence "refers not only to independence from the Executive, it refers to independence from other sources of influence".[195]

262 Whilst there may inevitably arise some risk of "false" or "smear"[196] allegations against judicial officers, that was so before the Act. Unlike the previous system for the removal of judges, under the Act the Commissioner is now required when conducting a preliminary examination to dismiss any complaint that in his or her opinion "has been made for an improper purpose (including an attempt to harass or intimidate a judicial officer in the appropriate exercise of his or her duties)".[197]

263 It has not been suggested that an allegation that does not amount to "conduct" could be made the subject of recommendation, referral or inquiry. If an allegation

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[188] *Judicial Conduct Commissioner Act 2015* (SA), s 22.
[189] *Judicial Conduct Commissioner Act 2015* (SA), ss 7(10), (11), (12) and (13).
[190] *Judicial Conduct Commissioner Act 2015* (SA), s 7(9).
[191] As it was put by the judicial officer.
[192] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [74] (Gummow, Hayne and Crennan JJ).
[193] *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, [30], [65] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
[194] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245, [156] (Wheeler JA).
[195] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [74], [75] (Gummow, Hayne and Crennan JJ).
[196] An allegation without particulars as to time, place or conduct.
[197] *Judicial Conduct Commissioner Act 2015* (SA), s 17(1)(c)(i).

of conduct is made without particulars there is ample power in the Commissioner to exercise the discretion to dismiss under s 16(2)(c), for example where there is no reasonable prospect of there being available information that would enable the complaint to be substantiated, or under s 16(2)(d), where the complainant fails to give further information as required.

264 The existence of these provisions represents an important protection available to judicial officers, guarding against the risk of unparticularised "smear" allegations.

265 It cannot be suggested that the process embodied in the Act is necessarily unfair. For example, administrative bodies often operate without being bound by any specified onus or standard of proof.

266 The historical processes for the removal of judicial officers before the Act, whether by the Governor or by Parliament, operated in a similar manner. The Parliamentary Commissions of Inquiry in relation to the conduct of the Hon Lionel Murphy QC,[198] and the conduct of the Hon Angelo Vasta QC,[199] provide examples. That a similar approach operates under the Act, given the additional protections which include the requirement that meetings be conducted in private, cannot undermine independence or impartiality.

267 Nonetheless, as the common law principles established in *Briginshaw* reflect "common sense notions", they may properly be taken into account by the Panel.[200] The Panel may determine that it will make findings to its comfortable or reasonable satisfaction, analogous to the civil standard under *Briginshaw* principles, commensurate with the seriousness of the allegations it is being invited to determine and the seriousness of the consequences it is being asked to countenance.

268 Ultimately, the ordinary, reasonable and well-informed member of the public would regard the independence and impartiality of the judiciary as having been enhanced by the capacity of the Act to expose the behaviour of judicial officers to scrutiny by independent statutory officers who are bound by requirements to afford procedural fairness. Those officers are empowered to make findings and a range

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198 *Parliamentary Commission of Inquiry Act 1986* (Cth); *Parliamentary Commission of Inquiry (Repeal) Act* 1986 (Cth), s 6.

199 First report of the "Parliamentary Judges Commission of Inquiry – Justice Angelo Vasta" (1989) before Rt Hon Sir Harry Talbot Gibbs (presiding member), Hon Sir George Hermann Lush, Hon Michael Manifold Helsham, to advise the Legislative Assembly whether any behaviour of the Honourable Mr Justice Angelo Vasta, since his appointment as a judge of the Supreme Court either of itself or in conjunction with other behaviour, warrants his removal from office as a judge of the Supreme Court.

200 *Briginshaw v Briginshaw* (1938) 60 CLR 336 (***Briginshaw***); *Karakatsanis v Racing Victoria Ltd* (2013) 42 VR 176, 189 [35]-[39] (Osborn JA, with whom Beach JA agreed); *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540, [26] (Warren CJ, Osborn JA and Gimane AJA); *Bronze Wing International Pty Ltd v SafeWork NSW* [2017] NSWCA 41, [127] (Leeming JA, with whom Basten and Gleeson JJA agreed).

of recommendations including referral to the relevant jurisdictional head or, where necessary, for removal.

269 Parliament's purpose is reflected in the objects of the Act; to enhance public confidence in the judicial system and to protect the impartiality and integrity of the judicial system by "enhancing the existing mechanisms for removal of judicial officers where they are unable or unwilling to appropriately discharge their duties".[201] Were it otherwise, a range of potential misbehaviours by judicial officers, including sexual misconduct, nepotism, bullying and discrimination, might appear to go unchecked, which could only erode confidence in the judiciary and, potentially, detract from the imperative of upholding judicial independence and impartiality and, more broadly, public confidence in the administration of justice.

Continued restraints on access and confidentiality?

270 The applicant contended that the interim party access order should continue. The Solicitor-General submitted that the order should be varied so that it is confined to information tending to identify a complainant or other witness to conduct the subject of inquiry, as well as to information tending to identify the conduct the subject of inquiry.

271 Generally, it is in the public interest that proceedings in this Court be conducted in public and subjected to public scrutiny.[202]

272 An order restricting access to a filed document under r 32.2 of the *Uniform Civil Rules 2020* (SA) may be made "where the Court reasonably believes a departure from open justice to be necessary in order to serve the ends of justice".[203]

273 When making this determination, the Court will take into account the relevant legislative context.[204] Section 23(3)(b) of the Act provides that meetings before a panel are private. Sections 32 and 33 are directed to maintaining confidentiality over, and restricting the publication of, information relating to a complaint or obtained in the course of the administration of the Act.

274 The Act does not, however, assume that there is to be any blanket of confidentiality. At the conclusion of a panel's inquiry, s 25(4) requires that the Attorney-General lay the report produced by the panel before each House of Parliament. Sections 32 and 33 also expressly contemplate that the Commissioner may authorise the disclosure or publication of information where that would be in the public interest.

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[201] *Judicial Conduct Commissioner Act 2015* (SA), s 3(1)(c).
[202] *In the matter of Lisa Jane Barrett (No 2)* [2021] SASCFC 38, [8], [15] (Livesey P, Blue and Bleby JJ); *B, RD v Channel Seven Adelaide Pty Ltd* (2008) 103 SASR 478, [15]-[16] (Doyle CJ, with whom White and Layton JJ agreed); *Re JN Taylor Holdings Limited (In Liq)* [2007] SASC 193, [5]-[6] (Debelle J).
[203] *In the matter of Lisa Jane Barrett (No 2)* [2021] SASCFC 38, [15] (Livesey P, Blue and Bleby JJ).
[204] *In the matter of Lisa Jane Barrett (No 2)* [2021] SASCFC 38, [9] (Livesey P, Blue and Bleby JJ).

275 It is important to recognise that some information has already been made public. Given that Chief Justice Kourakis has made a public statement, it is now public knowledge that the Panel was established to inquire into complaints of misconduct made against the judicial officer,[205] whose identity was thereafter publicised.

276 Nonetheless as the Act assumes that proceedings before the Panel will be conducted in private (subject to the Commissioner authorising disclosure), the public interest appears to support an order which maintains confidentiality in the identities of the complainants and witnesses, as well as in the alleged conduct. It will be a matter for the judicial officer to demonstrate whether the public interest requires that there be any further constraint on access or disclosure.

Conclusion

277 For these reasons the application for judicial review should be dismissed.

278 The parties should be heard regarding the form of any orders, including orders as to access and confidentiality.

[205] Statement by the Honourable Chris Kourakis, Chief Justice of South Australia, dated 1 July 2021. See also, South Australia, *The South Australian Government Gazette*, No 45, 1 July 2021, 2463.

279 **LOVELL AND DOYLE JJA:** We agree with Livesey P that the judicial officer's application for judicial review should be dismissed.

280 We gratefully adopt Livesey P's summary of the relevant provisions of the *Judicial Conduct Commissioner Act 2015* (SA) (**the JCC Act**), and overview of the factual context in which the matters of dispute have arisen.

281 The judicial officer, a magistrate, challenges three decisions, namely: (i) the 10 June 2021 recommendation by the Judicial Conduct Commissioner (**the Commissioner**) to the Attorney-General that she appoint a judicial conduct panel to inquire into, and report on, eight complaints concerning the conduct of the judicial officer (Ground 1); (ii) the 27 October 2021 decision of the Judicial Conduct Panel (**the Panel**) appointed by the Attorney-General to inquire into the matters concerning the conduct of the judicial officer contained in the Attorney-General's referral (Ground 2); and (iii) the 9 November 2021 decision of the Panel to permit a witness to be legally represented (Ground 3).

282 The judicial officer has also challenged the validity of the JCC Act on the ground that, as purportedly construed by the Panel, it infringes the principles enunciated in *Kable v Director of Public Prosecutions (NSW)*.[206]

283 As the focus of the judicial officer's submissions was upon the treatment of complaint 8 by the Commissioner and the Panel, we propose to commence our reasons with an overview of the factual background relating to that complaint. We then propose to deal with each of the challenges to the impugned decisions separately, before addressing the *Kable* challenge.

Factual background in relation to complaint 8

284 On 7 May 2021, the Commissioner notified the judicial officer of complaints 1 to 7, informed him that she was conducting a preliminary investigation under the JCC Act, and invited him to respond to those complaints.

285 On 13 May 2021, the Chief Magistrate referred an additional matter to the Commissioner. It involved an alleged incident that occurred on 18 July 2014, [REDACTED] in the court building where the judicial officer worked. The incident involved the judicial officer [REDACTED]. The behaviour was directed towards a female employee (Ms C) who was [REDACTED]. It was witnessed by another female employee (Ms B), who was also [REDACTED].

286 The Chief Magistrate's letter referring this matter to the Commissioner attached some "notes" from Ms B in which she described the incident, and reported a subsequent conversation with Ms C in which Ms C had said that the judicial officer "often treated her in this way and it made her feel uncomfortable".

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[206] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

287 On 31 May 2021, the Commissioner wrote to the judicial officer's solicitor in relation to this additional complaint, which she described as complaint 8. She explained that, pursuant to s 12(8) of the JCC Act, she was, on her own initiative, treating it as a complaint. The Commissioner's letter then described complaint 8 in the following terms:

> [REDACTED]

288 The Commissioner's letter invited the judicial officer to respond to this complaint.

289 It can be seen that the Commissioner's letter mentioned both a specific allegation ('**the specific incident**'), and a more general allegation that the judicial officer "often treated her in that way". This general allegation of what was, in effect, a course of conduct was referred to by the judicial officer in the course of his submissions before this Court as '**the conclusionary allegation**'. The Commissioner did not attach to her letter, or otherwise provide to the judicial officer, the notes prepared by Ms B.

290 By letter from his solicitor dated 3 June 2021, the judicial officer made various observations about the procedure that had been adopted by the Commissioner, and complained of a lack of procedural fairness. He then responded to each of the complaints about his conduct. His response to complaint 8 was as follows:

> [REDACTED]

291 The documents before this Court also include a statement from Ms C dated 7 June 2021. It can be inferred, and the parties accept, that the Commissioner received a copy of this statement on or about that date, and in any event prior to making her 10 June 2021 recommendation to the Attorney-General.

292 [REDACTED]

293 [REDACTED]

294 The Commissioner did not provide the judicial officer with a copy of Ms C's statement, or otherwise disclose its existence to the judicial officer, until after the Attorney-General, upon the recommendation of the Commissioner, had established the Panel. Indeed, there was no communication between the Commissioner and the judicial officer between 3 June 2021 and 10 June 2021.

295 As summarised above, Ms C's statement included a general allegation of a course of conduct that extended beyond the specific incident. However, the judicial officer contends that the general allegation included in this statement extended beyond the allegation notified in the Commissioner's letter of 31 May 2021, and refers to this additional component of the allegations as '**the omitted allegations**'. As we understand the judicial officer's contention, it is that the

omitted allegations extended beyond the conclusionary allegation because the conclusionary allegation was (or was taken to be) confined to the period of time up to and including July 2014, whereas the omitted allegations covered the entire period from 2012 to 2020.

296 On 10 June 2021, the Commissioner wrote letters to each of the judicial officer's solicitor, the Chief Magistrate and the Attorney-General.

297 In her 10 June 2021 letter to the judicial officer's solicitor, the Commissioner rejected the judicial officer's complaint that he had been denied procedural fairness. She wrote that procedural fairness did not, at that stage, require that he be given more than a summary of each complaint; and that his entitlement to be provided with the statements she held was a matter that might be addressed by any judicial conduct panel that might be established.

298 After referring to some other matters, the Commissioner wrote that "[m]y preliminary examination is now complete". She explained that she did not consider that a referral to the relevant jurisdictional head under s 18 of the JCC Act would be adequate, and that in her opinion an inquiry under s 20 of the JCC Act was necessary and justified. She said that she intended to make a recommendation to the Attorney-General to appoint a judicial conduct panel, and had referred the complaints to the Chief Magistrate with this advice.

299 In her 10 June 2021 letter to the Chief Magistrate, the Commissioner wrote that she had finished her preliminary examination under s 13 of the JCC Act of the allegations made against the judicial officer. Her summary of the complaints that followed included the following in relation to complaint 8:

> Complaint 8 July 2014
>
> [REDACTED]

300 The Commissioner mentioned that she had signed statements from the alleged victim of each incident except complaint 6. She also summarised the judicial officer's response to the complaints, including his denial of complaint 8. She concluded by advising the Chief Magistrate that, pursuant to s 18(2)(b)(ii) of the JCC Act, it was her opinion that the complaints were not able to be satisfactorily dealt with by the Chief Magistrate taking action, and that she intended to make a recommendation to the Attorney-General to appoint a judicial conduct panel to inquire into and report on the conduct of the judicial officer.

301 In her 10 June 2021 letter to the Attorney-General, the Commissioner recommended that the Attorney-General appoint a judicial conduct panel to inquire into and report on the eight complaints concerning the conduct of the judicial officer. The Commissioner went on to explain that she had conducted a preliminary examination of the complaints, and in the case of each had determined that they were not able to be satisfactorily dealt with by the Chief Magistrate, that

an inquiry into the conduct was necessary and justified, and that, if established, the conduct may warrant consideration of removal of the judicial officer.

302 The Commissioner's letter then set out each of the complaints. It included the following in relation to complaint 8:

> Complaint 8 2012 – 2020
>
> [REDACTED]

303 The Commissioner's letter concluded by stating that she had put the essence of each of the allegations to the judicial officer through his solicitors; and that in the case of some he had denied them, and in the case of others he had admitted some of the conduct but had said it was, in effect, innocuous. The Commissioner's letter concluded:

> You will see that the complaints raise allegations of varying seriousness. In my opinion each is credible, and each is worthy of inquiry by a panel. If some or all are substantiated they could be viewed as demonstrating inappropriate conduct and the engendering of inappropriate relationships in the workplace over a long period of time. In my opinion they could justify removal.
>
> I am compiling a file for the panel in the event that my recommendation to you is accepted.

304 On 24 June 2021, the Attorney-General appointed the Panel. On 9 July 2021, the judicial officer was informed by letter from Counsel Assisting the Panel that this had occurred, and was provided with copies of witness statements relating to complaints 1 to 8 (including the statement from Ms C in relation to complaint 8).

305 On 20 August 2021, the Attorney-General made an instrument referring to the Panel, for it to inquire into and report on, all of the matters concerning the conduct of the judicial officer that had been the subject of the Commissioner's recommendation in her letter dated 10 June 2021. Whilst this referral did not occur until after the Panel had already convened, no point has been taken about the timing of the referral.

306 The early procedural steps taken by the Panel have been outlined in the reasons of Livesey P, and need not be repeated. It is convenient to move straight to our analysis of the grounds of review relied upon by the judicial officer.

Ground 1: the Commissioner's recommendation to the Attorney-General

307 The judicial officer challenges the validity of the Commissioner's recommendation to the Attorney-General pursuant to s 20(1) of the JCC Act that she appoint a judicial conduct panel, on the bases that:

- the judicial officer was not notified of the omitted allegations (contrary to s 12(3) of the JCC Act);

- the judicial officer was not accorded procedural fairness in respect of the conclusionary allegation or the omitted allegations (contrary to s 13(2) of the JCC Act); and

- there was no preliminary examination of the omitted allegations (contrary to s 13(1) of the JCC Act).

308 The judicial officer contends that, as a consequence, the Commissioner's recommendation to the Attorney-General that she appoint a judicial conduct panel was wholly invalid as being beyond jurisdiction, or alternatively, invalid in respect of the conclusionary allegation and omitted allegations.

The requirement of notice under s 12(3) of the JCC Act

309 Under s 12(3) of the JCC Act,[207] the Commissioner must give notice to the judicial officer, and to the relevant jurisdictional head, of "a complaint under subsection (1)".

310 The subject matter of complaint 8 was referred to the Commissioner by the Chief Magistrate. The Commissioner decided, on her own initiative under s 12(8) of the JCC Act, to treat it as a complaint concerning the conduct of a judicial officer.

311 The first issue is whether a complaint which arises in this way is a complaint which attracts the s 12(3) obligation to give the judicial officer (and relevant jurisdictional head) notice of the complaint. In our view, a complaint arising in this way does not attract this obligation; it is not "a complaint under subsection (1)".

312 Under s 12, there are three different mechanisms through which an allegation about a judicial officer's conduct might come to the attention of the Commissioner. It may come to the Commissioner's attention through a complaint made under s 12(1), through a referral from the Attorney-General under s 12(6), or through a referral from the relevant jurisdictional head under s 12(7). The Commissioner may also, on his or her own initiative under s 12(8), treat as a complaint any matters concerning the conduct of a judicial officer.

313 For other purposes under the JCC Act, such as the requirement that the Commissioner undertake a preliminary examination (s 13(1)), all of these mechanisms give rise to a "complaint". However, that occurs by reason of the definition of "complaint" that appears in s 4(1) of the JCC Act:

> ***complaint*** means a complaint under section 12 about the conduct of a judicial officer and includes a referral by the Attorney-General under section 12(6), a referral by a jurisdictional head under section 12(7) and a complaint initiated by the Commissioner under section 12(8).

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[207] And subject to ss 12(4) and (4a), which are not presently relevant.

314 The fact that an allegation becomes a complaint for various purposes under the Act (by reason of the operation of s 12(8) (or, for that matter, ss 12(6) or (7)), in combination with the definition of "complaint") does not mean that, for the purposes of s 12(3), it is "a complaint under subsection (1)". Taking the words of s 12(3) literally, it seems that, for whatever reason, the legislature has seen fit to include a requirement of notice that applies to complaints made under s 12(1), but does not apply to complaints arising through the mechanisms contemplated by ss 12(6), (7) or (8).

315 As the Solicitor-General, who appeared for the first respondent, frankly acknowledged, it is difficult to discern a sound policy reason for differentiating in this way between the species of complaints, or the mechanisms through which they arise. Once the preliminary examination has commenced, the Act does not differentiate between them; all complaints are treated the same way. There would be no difficulty, and much sense, in subjecting complaints that arise through the mechanisms contemplated by ss 12(6), (7) or (8) to the same notice requirement under s 12(3).

316 However, as the Solicitor-General went on to submit, it is difficult to avoid the literal effect of the language used in s 12(3), which is to confine its operation to complaints of a particular type; namely, those made under s 12(1).

317 It is noteworthy that the operation of s 12(5) (which sets out the prescribed content of a complaint) is also expressed to be confined to complaints made under s 12(1). It is significant in this respect that s 12(5)(c) requires that the complaint include identification of "the complainant". In circumstances where "complainant" is defined in s 4(1) to mean "a person who makes a complaint under section 12(1)", there would, on a literal approach to the construction of the section, be no complainant in the case of a complaint that arose through the mechanisms of ss 12(6), (7) or (8). Indeed, even putting the literal effect of the definition of "complainant" to one side, there may not be any person who could sensibly be considered a complainant in respect of a complaint that arises under ss 12(6), (7) or (8).

318 The structure of s 12 also provides some support for an interpretation that differentiates in a limited way between complaints made under s 12(1), and complaints that arise through the mechanisms of ss 12(6), (7) or (8) and the operation of the definition of "complaint". We say this because the two provisions which appear to differentiate between these species of complaints appear in ss 12(3) and (5), and hence after reference to the s 12(1) species of complaints, but before reference to the ss 12(6), (7) and (8) species of complaints.

319 To construe s 12(3) in this literal way would not mean that there would be no obligation at all to provide a judicial officer with notice of a complaint that arises under ss 12(6), (7) or (8). To the contrary, and as developed later in these reasons, the express obligation of procedural fairness that applies to the preliminary

examination of all complaints under s 13(2) will ordinarily require that notice of the complaint be provided to the judicial officer.[208]

320 We acknowledge that s 12(3) also serves to ensure that notification of a complaint made under s 12(1) is provided to the relevant jurisdictional head. While there would be no need to ensure that the relevant jurisdictional head is provided with notice of a complaint which he or she had referred to the Commissioner under s 12(7), a literal construction of s 12(3) would mean that there is no obligation to ensure that the relevant jurisdictional head is provided with notice of complaints arising under s 12(6) (by way of referral from the Attorney-General) or s 12(8) (on the initiative of the Commissioner). While it is difficult to conceive of any good reason for differentiating between complaints in this way, we do not think this curiosity in the drafting of the legislation justifies straining for some alternative construction of s 12(3). That is particularly so bearing in mind that the Commissioner must inform the relevant jurisdictional head of the complaint upon its dismissal (s 16(4), s 17(3)), or otherwise upon completion of the preliminary examination (s 18(1)).[209]

321 Finally, it is difficult to see how the text of s 12 could otherwise be construed in a manner that would be both coherent, and not do impermissible violence to the language used. It might be argued that s 12 contemplates that referrals under ss 12(6) or (7) could be treated by the Commissioner as "own initiative" matters under s 12(8), and thus be not only treated "as a complaint" (which is what s 12(8) provides) but also a complaint under s 12(1). However, to construe s 12 in this manner would involve stretching the language used in that section, and would be difficult to reconcile with the existence and terms of the definition of "complaint" in s 4(1).

322 Bearing in mind all of the above, and despite the lack of any obvious rationale for differentiating between complaints received under s 12(1), and complaints arising under ss 12(6), (7) or (8), we consider that s 12(3) does require this differentiation. For that reason, we have concluded that the requirement of notice under s 12(3) does not apply to a complaint that arises under s 12(8), and so did not apply to complaint 8 (including the omitted allegations) in the present case.

323 The first limb of the judicial officer's argument thus fails, although it will be necessary to return to the adequacy of the notice provided of complaint 8 (including the omitted allegations) in the context of the judicial officer's more general complaint of a failure to accord procedural fairness in the preliminary examination that followed. It will be seen in that context that we are satisfied that the judicial officer was provided with adequate notice of complaint 8 (including the so-called omitted allegations). It follows that, even if, contrary to the view we

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[208] That is, subject to exceptional cases, such as those contemplated by s 12(4) (complaints which are referred to the Office for Public Integrity) or s 12(4a) (complaints which are dismissed).

[209] Noting that s 18(1)(a) excludes complaints consisting of a referral from the relevant jurisdictional head under s 12(7) from this obligation, which provides some support for the limited differentiation between the species of complaints that appears to be contemplated by s 12(3).

have expressed, the Commissioner was required to notify the judicial officer of complaint 8 under s 12(3), that requirement was satisfied.

Procedural fairness in the context of a preliminary examination

324 Under s 13(1) of the JCC Act, the Commissioner must conduct a preliminary examination of each complaint. Under s 13(2), the Commissioner may conduct the preliminary examination in any manner he or she thinks fit, but must act in accordance with the principles of procedural fairness.

325 The judicial officer contends that he was not accorded procedural fairness in respect of the conclusionary or omitted allegations, contrary to the express requirement of s 13(2) of the JCC Act.

326 Both parties accepted in their submissions that the content of the obligation to accord procedural fairness under s13(2) is to be informed by the nature of the statutory task and the statutory context within which it falls to be performed.[210]

327 In contending for a broader, or more onerous, obligation of procedural fairness, the judicial officer sought to emphasise the significance of the preliminary examination in determining the course of a complaint about the conduct of the judicial officer, and the significance of the potential outcomes to the judicial officer. The judicial officer emphasised the need for the Commissioner to consider the appropriateness of various alternative exercises of her powers under the JCC Act. In particular, once seized of a complaint, the Commissioner must determine whether the complaint qualifies for mandatory dismissal of the complaint under s 17, or discretionary dismissal of the complaint under s 16. The Commissioner must also consider whether the complaint is one that should be referred to the Office for Public Integrity under s 15. Assuming the complaint is not dealt with in one of these ways, the Commissioner must then consider whether the complaint should be referred to the relevant jurisdictional head (s 18), be the subject of an immediate report to Parliament (s 19), or be the subject of a recommendation to the Attorney-General that he or she appoint a judicial conduct panel to inquire into, and report on, the relevant conduct of the judicial officer (s 20).

328 The judicial officer contended that, having regard to the nature and importance of the preliminary examination, it requires that the judicial officer be given proper notice of the allegation(s) the subject of complaint; and it requires an opportunity for the properly informed participation of the judicial officer.

329 While we accept the general effect of this submission, it is also necessary to keep in mind, as the first respondent emphasises, the 'preliminary' nature of the examination. The preliminary examination does not result in any adverse determination of the judicial officer's substantive rights. Assuming the complaint

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[210] See, for example, *TCL Air Conditioners (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [85] (Allsop CJ, Middleton and Foster JJ), and *Kioa v West* (1985) 159 CLR 550 at 612-613 (Brennan J).

is not referred to the Office for Public Integrity or dismissed, the Commissioner must either refer it to the relevant jurisdictional head with a recommendation that he or she take further action (s 18(2)(a)), make a report to Parliament (s 19(1)), or recommend to the Attorney-General that he or she appoint a judicial conduct panel (s 20(1)). It is significant that each of these steps would likely encompass their own requirement of procedural fairness. In the case of an inquiry by a judicial conduct panel, that obligation is made express by s 23(3)(a).

330 Further, the JCC Act expressly provides that the Commissioner must conduct the preliminary examination "as efficiently and expeditiously as is practicable" (s 13(5)). By its nature, the preliminary examination serves a triage function. But it does not require that the Commissioner make any findings of fact, or otherwise undertake any detailed evaluation of the evidence, in order to determine whether a complaint has been substantiated.

331 Having regard to the above, we consider that the obligation of procedural fairness under s 13(2) is, consistently with the nature and context of the preliminary examination itself, fairly rudimentary in nature. In the present case, it required that the judicial officer be given notice of the general nature of the conduct the subject of complaint, in terms sufficient to enable him to respond, and to participate in the preliminary examination, in a meaningful way. However, we do not think that it required notice with the level of particularity or precision that might be required by a prosecutorial or disciplinary decision.[211] Nor do we think that the Commissioner's obligation of procedural fairness required that she provide the judicial officer with the evidence she had in her possession, and in particular the statements of the complaints (or, in the case of complaint 8, the notes of Ms B or the statement of Ms C).

332 Applying this conclusion as to the content of the obligation of procedural fairness to the case at bar, and in particular complaint 8, it was sufficient that the Commissioner provided the judicial officer with notice of the complaint in terms that permitted the judicial officer to understand the general nature of the complaint, and to respond in a meaningful way to that complaint. Here, that required notification of the general nature of both the specific incident, and of the course of similar conduct that was alleged to have occurred.

333 In our view, the notice given by the Commissioner of complaint 8 in her letter to the judicial officer's solicitor dated 31 May 2021 satisfied this requirement. The allegation concerning the specific incident was described with some specificity. Indeed, we do not understand there to be any complaint about the adequacy of this aspect of the notice provided of complaint 8. Rather, the complaint as to the inadequacy of the notice related to the so-called conclusionary and omitted allegations.

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[211] Such as in *R v Solicitors' Disciplinary Tribunal; ex parte L* [1988] VR 757; *Etherton v Public Service Board* [1983] 3 NSWLR 297; *Gardiner v Land Agents Board* (1976) 12 SASR 458. See later discussion of these cases in the context of the Panel's inquiry into the matters referred to it.

334 As to the conclusionary allegation, the complaint is that the notice was given in terms that were too general; that an allegation that the judicial officer "often treated her in that way" was not sufficient to permit a meaningful response by the judicial officer.

335 We accept that the course of conduct allegation was expressed in very general terms. But it was not devoid of relevant detail. It was to be understood in light of the alleged specific incident, [REDACTED]. While the letter of 31 May 2021 did not give a timeframe for the course of conduct, it could be inferred from the date given for the specific incident that it covered a period that included July 2014.

336 In our view, this was adequate notice, for the purposes of the preliminary examination, of the course of conduct allegation (referred to by the judicial officer as the conclusionary allegation). It gave the judicial officer a sufficient opportunity to respond to the substance of the allegation, and hence gave the Commissioner the material she needed in order to make a properly informed decision as to the exercise of her powers consequent upon her preliminary examination. The notice made it plain that the Commissioner was conducting a preliminary examination under s 13(1) of the JCC Act, and so gave the judicial officer an opportunity to make any response to the allegations or submissions as to what course the Commissioner might take following the completion of that examination.

337 We also consider that a similar analysis applies to the so-called omitted allegations. It is true that by the time the Commissioner completed her preliminary examination, and made her 10 June 2021 recommendation to the Attorney-General, she had received some additional detail in relation to the alleged course of conduct. She received that additional detail through her receipt of Ms C's statement. However, upon close examination, we do not think there was anything in that additional detail (which the judicial officer contends constituted 'the omitted allegations') that required further notification to the judicial officer.

338 In terms of the nature of the conduct said to constitute the course of conduct, we do not think that the statement added much, if anything, of significance. As reflected in the summary of the course of conduct aspect of complaint 8 that was included in the Commissioner's 10 June 2021 letter to the Attorney-General, Ms C's statement [REDACTED]. We do not think it would have added in any material way to the notification to have included, as the Commissioner did in her summary of the course of conduct in her 10 June 2021 recommendation to the Attorney-General, that the course of conduct alleged against the judicial officer involved [REDACTED]. As explained earlier, the fact that the alleged course of conduct involved behaviour of this type was already apparent from the notice provided in the Commissioner's letter of 31 May 2021.

339 We accept that the statement of Ms C, and the summary included in the Commissioner's 10 June 2021 recommendation to the Attorney-General, included specification of a time period that extended [REDACTED]. The judicial officer

contended that the Commissioner's notification of complaint 8 in her letter of 31 May 2021 did not inform him of this timeframe for the course of conduct allegation, and indeed had suggested a time period that concluded with the specific incident in July 2014. We are not sure that the 31 May 2021 notification was confined in this way. While the Commissioner's 10 June 2021 letter to the Chief Magistrate described the [REDACTED], thus appearing to confine the course of conduct to the period before the specific incident, this confinement of the period was not a feature of the 31 May 2021 notification of the course of conduct allegation to the judicial officer. In that notification, the Commissioner did not specify any particular timeframe for the course of conduct allegation, other than it including the specific incident which was said to have occurred on 18 July 2014.

340 We accept that it might have been preferable had the Commissioner given the judicial officer notice of the duration of the course of conduct, once she became aware of it through her receipt of Ms C's statement. However, we do not think that her failure to do so involved any failure to accord procedural fairness. In circumstances where the judicial officer had been informed of the specifics of the specific incident, and the general nature of the conduct the subject of the allegations, we do not think the specification of the precise period of time over which the course of conduct was alleged to have occurred was an essential aspect of the notice that the judicial officer required in order to have the opportunity to respond in a meaningful way. Indeed, in circumstances where the judicial officer's response was to deny both the specific and general allegations, and indeed to deny that [REDACTED], it is difficult to see what would have been achieved by then specifying a time period that extended through to early 2020.

341 Put another way, we do not think that there were, as a matter of substance, any omitted allegations. While Ms C's statement provided some limited additional detail, including a more precise (and apparently more extended) time period for the course of conduct, it did not significantly add to the information that was already available to the Commissioner and that had been notified to the judicial officer through her letter of 31 May 2021. In our view, the judicial officer was given adequate notice of the course of conduct allegation. His allegation of a failure to provide adequate notification of the so-called conclusionary or omitted allegations must be rejected.

The preliminary examination of the omitted allegations

342 The judicial officer contends that the omitted allegations were never the subject of a preliminary examination as required by s 13 of the JCC Act.

343 Insofar as this contention was predicated upon a failure to provide adequate notice of the omitted allegations, or otherwise accord the judicial officer procedural fairness in respect of those allegations, then it goes no further than the contentions already addressed under the previous heading, and must be rejected.

344 However, the judicial officer also contends that the Commissioner failed to undertake the exercise contemplated by a preliminary examination; namely, to

notify the judicial officer of the allegation the subject of complaint, and then make some assessment of the veracity and seriousness of the allegations for the purpose of determining, in light of the response from the judicial officer, which of a number of available powers should be exercised. The judicial officer contends that the Commissioner could not have done so on the basis of the general nature of the notice given to the judicial officer, and hence correspondingly general nature of his response. Implicit in this is a contention that in the absence of disclosure of the detail contained in Ms C's statement, and hence without the benefit of the judicial officer's response to the same, there cannot have been a preliminary examination of the omitted allegations in the sense contemplated and required by s 13(1). The judicial officer also contends that in circumstances where the Commissioner had, at most, three days to consider the detail of Ms C's statement,[212] this supported an inference that the Commissioner had not undertaken a preliminary examination of the omitted allegations.

345 We do not accept the judicial officer's contentions. As to the absence of any notification and response in relation to the omitted allegations, we have already addressed this issue. We are satisfied that the omitted allegations did not add in any significant way to the alleged course of conduct, and the judicial officer was notified of, and responded to, that allegation. We also see no difficulty in the Commissioner having made her recommendation to the Attorney-General that she appoint a judicial conduct panel to inquire into the complaints, including complaint 8, no more than three days after receipt of Ms C's statement. There can be no contest that the Commissioner received and read that statement. Having done so, it was obviously relevant and significant that the Commissioner had a direct account of the alleged conduct from the person who was the subject of that conduct. But having read that statement, and having appreciated that it accorded in general terms with the complaint of which the judicial officer had already been notified, the Commissioner was in a position to conclude her preliminary examination and make the decision she did. In the circumstances, there is no basis to go behind the Commissioner's statement in her three letters dated 10 June 2021 that she had undertaken and completed her preliminary examination of the complaints, including complaint 8. She was entitled to reach the view that she expressed in the concluding section of her recommendation to the Attorney-General; namely, that each of the complaints, including complaint 8, was credible, and if established might justify removal, and that, as such, they were worthy of inquiry by a judicial conduct panel.

Conclusion

346 For the reasons set out, the judicial officer has not established that that there was any failure to notify him of the omitted allegations or to otherwise accord him procedural fairness in respect of either the conclusionary or omitted allegations.

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[212] That is, from the date of the statement (7 June 2021) to the date of the Commissioner's recommendation to the Attorney-General (10 June 2021).

Nor has the judicial officer established that the Commissioner failed to undertake a preliminary examination of the omitted allegations.

347 In the circumstances, there is no basis for impugning the Commissioner's 10 June 2021 recommendation to the Attorney-General that she appoint a judicial conduct panel to inquire into, and report on, the complaints (including complaint 8). Ground 1 of the judicial officer's application for review must be rejected.

348 It follows that there is no need for us to express any views in relation to the other matters addressed by the parties in their submissions in relation to Ground 1; namely, whether there is any basis for the judicial officer's submission that a breach of the obligation to accord procedural fairness under s 13(2) of the JCC Act was not subject to a requirement of materiality,[213] whether any breach of the obligation to accord procedural fairness was material, whether any failure to accord procedural fairness (including any deficiency in the notice provided) would result in the invalidity of the recommendation made by the Commissioner to the Attorney-General, and whether the recommendation in relation to complaint 8 was severable from the recommendations made in respect of the rest of the complaints such the latter might be valid even if the former was invalid.

Ground 2: the Panel's decision to inquire and report

349 The judicial officer challenges the Panel's jurisdiction under s 23(1) of the JCC Act to inquire into the matters concerning the conduct of the judicial officer contained in the referral by the Attorney-General to the Panel, or in the alternative to inquire into the conclusionary and omitted allegations. He does so on the bases that:

- the Panel has no jurisdiction to inquire into matters that are contained in an invalid referral (Ground 2.1);
- the Panel only has jurisdiction to inquire into referred matters that concern the "conduct" of a judicial officer, and the conclusionary and omitted allegations do not identify "conduct" (Ground 2.2);
- in the absence of notice as to the essential facts of the conclusionary and omitted allegations, the Panel cannot accord procedural fairness to the judicial officer and cannot therefore inquire into those allegations (Ground 2.3); and
- insofar as the conclusionary and omitted allegations, and the allegations in the written statement of Ms C, are not contained in a valid recommendation or referral, they do not constitute "other matters concerning the conduct of

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[213] *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441.

the judicial officer that arise in the course of its dealing with the referral" for the purposes of s 23(1) of the JCC Act (Grounds 2.4, 2.5 and 2.6).

350 Before addressing these various limbs of the judicial officer's challenge to the Panel's jurisdiction, it is appropriate to makes some observations about the nature of the Panel's task under s 23 of the JCC Act.

The Panel's task under the JCC Act

351 The Panel's task under the JCC Act is to inquire and report. Under s 23(1):

> A judicial conduct panel must inquire into, and report on, the matters concerning the conduct of a judicial officer referred to it by the Attorney-General on the recommendation of the Commissioner and may inquire into, and report on, any other matters concerning the conduct of the judicial officer that arise in the course of its dealing with the referral from the Attorney-General.

352 Under s 23(2), the procedure for the calling of meetings by the Panel, and for the conduct of business at those meetings, is, subject to the JCC Act, to be determined by the Panel. However, under s 23(3), the Panel must act in accordance with the principles of procedural fairness (s 23(3)(a)) and must hold its meetings in private (s 23(3)(b)). While s 23(2)(c) also requires that the Panel proceed in accordance with guidelines approved by the Chief Justice of the Supreme Court, it is common ground that the Chief Justice has not approved any guidelines.

353 Under s 25 of the JCC Act, the Panel must provide a report to the Attorney-General at the conclusion of its inquiry (s 25(1)). The report must set out the Panel's findings of fact, its opinion as to whether the removal of the judicial officer is justified, and its reasons for that conclusion (s 25(2)). A copy of the report must be provided to the Commissioner, any complainant, the judicial officer and the relevant jurisdictional head (s 25(3)). The Attorney-General must cause a copy of the report to be laid before each House of Parliament (s 25(4)). Under s 26(1), if the Panel concludes that removal of the judicial officer is justified, the Governor may remove him from office.

354 Under s 24(1) of the JCC Act, the Panel has the powers of a commission as defined in the *Royal Commissions Act 1917* (SA). While the judicial officer contends that the Panel is not a Royal Commission, and is not to conduct its inquiry as though it were a Royal Commission, this was not contested by the first respondent in this Court.

355 In its ruling of 27 October 2021 (in which it rejected the judicial officer's challenge to its jurisdiction to inquire into certain aspects of Ms C's allegations), the Panel said:[214]

> In conducting the inquiry, the Panel is sitting as an inquisitorial body exercising the powers of a Royal Commission conferred on it by s 24(1) of the Act.

[214] Ruling dated 27 October 2021, at [31].

356 The Panel later added:[215]

> The Panel is a statutory commission of inquiry established by the Act. Its task is to inquire into the matters referred to it, and any others concerning the conduct of the judicial officer the subject of the inquiry (as it considers appropriate to inquire into), and to find facts and report those facts to the Attorney-General with a recommendation. It is not a disciplinary body or a tribunal or a court. The obligation of the Panel under s 23(3)(a) of the Act to afford procedural fairness must be considered in that context. Critically, the obligation in s 23(3)(a) cannot be interpreted as extending to or modifying the express obligation of the Panel in the words of s 23(1).

357 Properly understood, we do not think the Panel ruled that it was to conduct its inquiry as though it were a Royal Commission, as opposed to conducting its inquiry exercising the powers of a Royal Commission. In our view, the limit of the point being made by the Panel was that it had an inquisitorial function, and that this informed the content of its obligation to accord procedural fairness. Understood in this way, we agree with the views expressed by the Panel.

358 It would appear that some confusion on this topic has arisen from the Panel's subsequent ruling, on 9 November 2021, permitting Ms A to be represented by counsel. This ruling is the subject of challenge under Ground 3. In announcing this ruling, the Honourable President Kelly, on behalf of the Panel, said that the Panel relied upon the submissions that had been made by Counsel Assisting the Panel, and counsel for Ms A. As the judicial officer points out, those submissions might, in some respects, be construed as going further than contending that the Panel had the powers of a Royal Commission, and might be construed as having included a contention to the effect that the Panel was, in effect, deemed to be a Royal Commission. The judicial officer contends that this submission was inherent in Counsel Assisting's reliance upon s 13 of the *Royal Commission Act*, which provides that, unless the commission directs otherwise, a person giving evidence before a commission may be legally represented.

359 To the extent that there is any confusion as to how the Panel understands its task, it is our view that s 24(1) does not make the Panel a commission under the *Royal Commission Act*, or require or permit it to conduct its inquiry as though it were such a commission. The operation of s 24(1) is confined to the conferral upon the Panel of the powers of such a commission. The reference in s 24(1)(a) to the *Royal Commissions Act* applying as if the Panel were a commission is a mere drafting technique to achieve the intended conferral of powers. It does not make the Panel, or deem the Panel to be, a commission under the *Royal Commissions Act* for any broader purpose, or in any broader sense.

Ground 2.1: no jurisdiction to inquire into matters contained in an invalid referral

360 The judicial officer contends that the Panel had no jurisdiction to inquire into, and report on, matters contained in an invalid referral. He contends that the

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[215] Ruling dated 27 October 2021, at [33].

Attorney-General's referral of the complaints about his conduct to the Panel was invalid because it was founded upon an invalid recommendation by the Commissioner to the Attorney-General. This argument of invalidity was confined to the matters addressed under Ground 1, and it follows from our rejection of that ground of review that there is also no merit in Ground 2.1.

Ground 2.2: referral does not identify "conduct"

361 Under s 23(1) of the JCC Act, the Panel's function is to inquire into, and report on, the matters concerning the "conduct" of a judicial officer referred to it by the Attorney-General. The "conduct of a judicial officer" that may be the subject of a complaint (and hence, it would seem, a recommendation to the Attorney-General and a referral to a Panel) is defined in broad and non-exhaustive terms in s 4(2) of the JCC Act.

362 In contending that the referral of the conclusionary and omitted allegations to the Panel does not identify "conduct", the judicial officer's complaint is not one as to the nature of the conduct the subject of those allegations. Rather, the judicial officer contends that those allegations lack the specificity which he contends is required to constitute conduct that may be referred to a judicial conduct panel.

363 The Attorney-General's 20 August 2021 referral was drafted in terms that referred to all of the matters concerning the conduct of the judicial officer that were the subject of the Commissioner's 10 June 2021 recommendation. The terms of the referral, and the conduct to which it related, are thus to be determined by reference to the terms of the Commissioner's 10 June 2021 recommendation.

364 The judicial officer contends that, so far as the conclusionary and omitted allegations are concerned, the recommendation did not identify any "conduct" at all. Rather, it merely set out subjective conclusions as to unidentified facts and occasions.

365 We do not accept this characterisation of the description in the Commissioner's recommendation of the course of conduct allegation (which the judicial officer refers to as the conclusionary and omitted allegations). The alleged course of conduct was not so vague and generalised as to not amount to "conduct" for the purposes of a referral under s 23(1) of the JCC Act. As we explained earlier, the recommendation included an allegation of a course of conduct consisting of [REDACTED].

366 In contending that the course of conduct allegation lacked the requisite specificity to qualify as "conduct" that might be the subject of a valid referral, the judicial officer relies upon the decision of the Victorian Court of Appeal in *R v Solicitors' Disciplinary Tribunal; ex parte L*.[216]

[216] *R v Solicitors' Disciplinary Tribunal; ex parte L* [1988] VR 757.

367 In that case, the Victorian Court of Appeal held that approval of a referral of a general allegation of misconduct to the Solicitors' Disciplinary Tribunal was made in terms that were so wide and vague as not to define the "matter" referred, with the result that the Tribunal had no jurisdiction to hear and determine the matter. As the Court explained:[217]

> … the approval in writing must be an approval to refer specific items of identified alleged misconduct to the full hearing, and not merely to refer general allegations of misconduct, without any means of saying what are the material facts alleged by the secretary to constitute each matter of misconduct which is approved for referral.

368 In our view, the reasoning of the Court in that case is readily distinguishable given the statutory framework that governed the approval and referral that was made, and the terms in which it was made. Under s 28(2) of the *Legal Profession Practice Act 1958* (Vic), the secretary of the Law Institute was empowered to investigate any question concerning the alleged misconduct of a solicitor. Section 28(4) provided that if, after completing the investigation, the secretary "is of the opinion that the solicitor is guilty of misconduct", then he may refer the matter to a preliminary hearing of the Tribunal (s 28(4)(a)), refer the matter to a summary hearing (s 28(4)(b)), or "if he has the approval in writing of three members of the Council so to do, refer the matter to a full hearing of the Tribunal" (s 28(4)(c)).

369 The referral under s 28(4)(c) of that statutory regime thus differed from the referral in the present case in that it was predicated upon not only an investigation, but an opinion by the secretary that the practitioner was guilty of misconduct, and the approval in writing of three members of the Council. It also differed from the referral in the present case in that it was a referral not to investigate and report, but rather to conduct a full hearing of the Tribunal. Given those features of the referral, it is not surprising that the legislative regime was held to demand a degree of specificity as to the misconduct the subject of the approval and referral.

370 Further, the approval and referral that occurred in that case was entirely devoid of specificity. It was drafted in terms that referred merely to "misconduct" within the meaning of certain statutory provisions. As the Court said:[218]

> It does not identify any transaction or material facts which the secretary has considered and which has led to the formation of his opinion, and it is not possible to say what is "the matter" or matters referral of which is approved.
>
> Approval cannot effectively be given to a roving examination of all of the activities of the solicitors named, for an undefined period, because otherwise the secretary's sifting process during his investigation would be a waste of time.

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[217] *R v Solicitors' Disciplinary Tribunal; ex parte L* [1988] VR 757 at 764 (Murphy, Fullagar and Southwell JJ).

[218] *R v Solicitors' Disciplinary Tribunal; ex parte L* [1988] VR 757 at 765 (Murphy, Fullagar and Southwell JJ).

371 Given the nature of the hearing that was to follow from the referral, some specificity was required:[219]

> The particulars must be such as will enable the solicitor to know precisely what is the case which is being put against him and how it is being put, so that he may cross-examine witnesses, lead evidence and make submissions relevant to the matter …
>
> The "matter" cannot be left under the overall cloak of misconduct, which is so wide as to allow of innumerable assertions, and to embrace as it does any conduct which could reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency …
>
> In many cases also, as in the present case, it will be quite insufficient to say non-compliance with some particular section.

372 Contrasting the present case, the recommendation and referral were not predicated upon any opinion of guilt of misconduct. And upon referral, the Panel's task under the JCC Act was to inquire and report. Bearing in mind the relatively low threshold for the recommendation and referral, and the inquisitorial nature of the first stage of the Panel's task, we do not accept that the conduct the subject of a referral needed to be identified with the specificity and precision that might be required of a complaint in a disciplinary tribunal, let alone an information in a criminal court. To the contrary, and as expressly contemplated by the Panel's power under s 23(1) to inquire into and report on other matters that arise in the course of it dealing with a referral, the JCC Act contemplates a more flexible approach to the identification of the conduct the subject of the referral. In our view, the course of conduct allegation was identified with sufficient particularity for the purposes of a referral under s 23(1) of the JCC Act.

373 Approaching the same issue from a different perspective, and as the Panel observed in its ruling,[220] the referral should not be read so as to confine the Panel's investigation to the precise description of that conduct in the referral, divorced from any additional detail or information relating to that alleged conduct. Rather, the Panel's task should be approached flexibly both in terms of the specificity of the conduct required in the referral, and in the scope of the inquiry into that conduct.

374 We would reject the judicial officer's challenge to the Panel's jurisdiction under Ground 2.2.

Ground 2.3: inability of the Panel to accord procedural fairness

375 The judicial officer contends that, in the absence of notice of the essential facts of the conclusionary and omitted allegations referred to the Panel in complaint 8, the Panel cannot comply with the requirement, under s 23(3)(a) of the

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[219] *R v Solicitors' Disciplinary Tribunal; ex parte L* [1988] VR 757 at 768 (Murphy, Fullagar and Southwell JJ) (omitting citations).

[220] Ruling dated 27 October 2021, at [28], [31].

JCC Act, that it accord to the applicant procedural fairness, and thus cannot inquire into those allegations.

376 In arguing that the notice provided of the so-called conclusionary and omitted allegations was inadequate, the judicial officer contends that procedural fairness required that the allegations be specific enough to enable the judicial officer to contest the facts upon which the allegations are based; and to address the matters adverse to his interests (including by seeking to controvert or explain, through means such as cross-examination, presenting evidence of his own, or making submissions to the Panel). He relies in this respect upon cases including in *Etherton v Public Service Board*[221] and *Gardiner v Land Agents Board.*[222]

377 Even accepting that the Panel had an inquisitorial function, the judicial officer contends that the lack of specificity in the conclusionary and omitted allegations meant that the Panel's inquiry would become a "roving inquiry" of the nature that might be undertaken by a commission under the *Royal Commission Act*.

378 The judicial officer contends that in the present case, the facts underpinning the course of conduct allegation have not been disclosed, and, it would seem, will not be disclosed, given Counsel Assisting's indication that he had spoken to Ms C and that she had said that the conduct happened a long time ago and that she did not have any specific examples of past conduct.[223] He complained that assurances of notice, and of opportunities to cross-examine, call evidence and make submissions, were not an answer. Those assurances did not address the judicial officer's inability to call evidence in response to, and to otherwise meet and address, the course of conduct allegation given the vague and general terms in which it had been notified.

379 The authorities upon which the judicial officer relies are distinguishable. In the case of *Etherton v Public Service Board*[224] the plaintiff was charged with a breach of discipline within the meaning of s 85(e) of the *Public Service Act 1979* (NSW) (which provided for a breach in circumstances where a member of the public service is "negligent, careless, inefficient or incompetent in the discharge of his duties"). Prior to his disciplinary hearing, the particulars of charge notified to the plaintiff were confined to an allegation that he failed to carry out his duties as a senior district officer of the Department of Youth and Community Services in a satisfactory manner. The background and context indicated that there may have been "any number of bases for the charge against the plaintiff" (including through his own acts or omissions, through his failure to train or supervise his subordinates, or through his vicarious responsibility for acts or omissions of a subordinate of

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[221] *Etherton v Public Service Board* [1983] 3 NSWLR 297 at 305-307 (Hunt J); applied in *R v Solicitors' Disciplinary Tribunal; ex parte L* [1988] VR 757.

[222] *Gardiner v Land Agents Board* (1976) 12 SASR 458 at 471 (Walters J).

[223] Albeit, noting that Counsel Assisting also indicated that his conversation with Ms C was cut short, and that he intended to ask her again in due course whether she was able to provide any further detail of the allegations she had made.

[224] *Etherton v Public Service Board* [1983] 3 NSWLR 297.

which he had no knowledge).[225] In those circumstances, the lack of specificity in the charge prevented the plaintiff from properly preparing for his disciplinary hearing.

380 In *Gardiner v Land Agents Board*[226] there was again a complete lack of specificity in the notification provided to the appellant land salesman prior to an inquiry that led to the disqualification of his registration. He was notified merely of an inquiry into whether, in respect of a particular transaction, he had been "guilty of dishonesty or conduct indicating that he was not a fit and proper person" to act as a land agent, manager or salesmen.

381 It is apparent that the judicial officer in the present case was provided with greater specificity of the matters to be inquired into, and reported on, than was the case in the authorities relied upon by the judicial officer.

382 In our view, the course of conduct allegation was expressed with sufficient detail and precision to appropriately define the parameters of the inquiry,[227] and to enable the judicial officer to respond and participate in the inquiry into the impugned aspect of complaint 8. He now knows the identity of Ms C, and is in a position to cross-examine her and to consider whether there is any evidence he might wish to call in order to address her allegations.

383 It is also relevant, as the Panel pointed out in its ruling,[228] that the judicial officer will be entitled to procedural fairness, and hence a right to be heard, at both the inquiry and reporting stages of the Panel's statutory task. The opportunity to be heard at the reporting stage will extend to making submissions following the receipt of evidence and the submissions of Counsel-Assisting, and may include an ability to seek leave to present further evidence or to re-examine witnesses. We accept the prospect of procedural fairness at a later stage of a statutory task cannot always be relied upon as an answer to an allegation of a failure to accord procedural fairness at an earlier stage of that task. However, in cases such as the present, the prospect of procedural fairness at a later stage may nevertheless inform (and, more particularly, lessen) the content of the obligation at an earlier stage.

384 We are also unable to accept the judicial officer's contention that to permit the inquiry to proceed on the basis of the allegations as they currently stand would leave him in jeopardy of findings about a course of conduct without any ability or opportunity to address the facts upon which it is based; and hence in jeopardy of findings with potentially significant adverse consequences without any proper opportunity to address the allegations made against him. As the first respondent submitted, this contention conflates the subject matter of the inquiry with the

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[225] *Etherton v Public Service Board* [1983] 3 NSWLR 297 at 306-307 (Hunt J).

[226] *Gardiner v Land Agents Board* (1976) 12 SASR 458.

[227] Subject to the Panel's incidental jurisdiction under s 23(1) to expand the inquiry to include "any other matters concerning the conduct of the judicial officer that arise in the course of it dealing with the referral".

[228] Ruling dated 27 October 2021, at [35].

findings that may be made. Findings of fact made by the Panel may only be based upon evidence received and accepted by the Panel. If the Panel receives no evidence, or insufficient evidence, to support a particular finding of fact, there would be no basis for that fact to be found. However, an apparent deficiency of evidence prior to the Panel beginning its inquiry is not a basis for precluding the Panel from inquiring into a matter referred to it by the Attorney-General.

Grounds 2.4, 2.5 & 2.6: discretion to inquire into matters arising

385 In its ruling dated 27 October 2021, the Panel concluded that there had been a valid recommendation by the Commissioner to the Attorney-General, and referral by the Attorney-General to it, of the allegations made by Ms C. For the reasons we have given, we agree that the allegations made by Ms C (including the course of conduct allegation) were adequately identified in the referral to the Panel, and hence were properly before the Panel. As such, the Panel considered that it was permitted, and required, by that referral to inquire into, and report on, the full breadth of the allegations made by Ms C.

386 The Panel went on to express the view that even if some aspect or detail of Ms C's complaint was not adequately included within the referral, then it considered that it was nevertheless within the Panel's discretion to inquire into, and report on, those allegations given its discretion under s 23(1) of the JCC Act to do so in relation to "any other matters concerning the conduct of the judicial officer that arise in the course of its dealing with the referral from the Attorney-General". The Panel considered that it was appropriate that it inquire into, and report on, the full breadth of the allegations made by Ms C, given: the close connection between any omitted part of those allegations and the allegations validly included within complaint 8; the potential seriousness of the allegations; and the ability of the Panel to ensure that the judicial officer has an appropriate opportunity to participate in the inquiry through responding to the allegations, cross-examining Ms C and adducing any evidence of his own, and in due course making any submissions as to the findings or recommendations that the Panel should make.

387 The judicial officer challenges this alternative basis for the Panel's jurisdiction to inquire into, and report on, the conclusionary and omitted allegations. On the premise that those allegations were before the Commissioner, but had not been included, or adequately identified, in the recommendation and referral, he contended that the allegations were not matters that arose in the course of the Panel dealing with the referral from the Attorney-General.

388 While the matter does not strictly arise for our consideration, we agree with the Panel's approach to its incidental jurisdiction to inquire into, and report on, matters that arise in the course of its dealing with a referral. In our view, given the nature of the Panel's function in the overall scheme of the JCC, and its ability (indeed obligation) to accord the judicial officer procedural fairness in respect of matters brought within the inquiry through the Panel's exercise of its incidental

jurisdiction, there is no reason to construe that jurisdiction narrowly. The Panel's reasons for invoking that jurisdiction (to the extent necessary) in respect of the allegations made by Ms C were sound.

389 There is some superficial attraction to the judicial officer's contention that a matter that was before the Commissioner, but was not included, or not validly included, within the relevant recommendation and referral, cannot be said to "arise" (in the sense that it emerges, or comes to light) during the course of the Panel's inquiry. It has some literal force from a temporal perspective. But that force dissipates if the issue is approached from the perspective of the Panel's inquiry, rather than more broadly, or in the abstract. Even though the Commissioner may have been aware of an allegation at an earlier point in time, it might nevertheless, from the perspective of the Panel's inquiry, "arise" at some later point in time.

390 For the reasons we have given, Grounds 2.4, 2.5 and 2.6 do not require determination by this Court. But in our view, the Panel's reasoning and conclusion on the issue they raise were sound.

Ground 3: the Panel's decision to permit a witness to be legally represented

391 Ms A is the complainant in respect of complaints 4 and 5 referred by the Attorney-General to the Panel. The judicial officer contended before the Panel that it lacked jurisdiction to permit Ms A to be represented by counsel. In its 9 November 2021 ruling, the Panel rejected that contention. It ruled that Ms A would be permitted to be represented by counsel while giving her evidence, and that her counsel would be permitted to take objections during cross-examination and to re-examine Ms A if necessary or appropriate. The Panel did not consider it necessary to determine whether Ms A might be entitled to any broader representation, for example in cross-examining any other witnesses or in making submissions on behalf of Ms A. It deferred the issue of broader representation for further consideration if and when it arose.

392 The judicial officer challenges this ruling. He contends that the Panel has no jurisdiction to permit a witness (other than the applicant) to be represented by counsel when giving evidence, or at any other time, and that the Panel acted beyond its jurisdiction in granting leave to Ms A to be represented by counsel when giving her evidence. In support of this contention, the judicial officer relies upon the requirement of s 23(3)(b) of the JCC Act that the Panel conduct its inquiry in private meeting, and the absence of any power conferred on the Panel, whether under the JCC Act or the *Royal Commission Act*, to permit otherwise.

393 It is to be accepted that s 23(3)(b) of the JCC Act requires that the Panel conduct its inquiry in private meeting, and that there is no express power conferred upon the Panel under the JCC Act by which it might permit a legal representative of a witness to attend a meeting of the Panel. However, that is not the end of the matter. Under s 23(2) of the JCC Act, it is for the Panel to determine the procedure for the calling of, and conduct of business at, its meetings. When exercising its

discretion as to how it conducts its meetings, the Panel must of course observe the requirements that it act in accordance with the principles of procedural fairness (s 23(3)(a)) and hold its meetings in private (s 23(3)(b)). But as both parties acknowledged in their submissions, the requirement that the Panel hold its meetings in private does not mean that no-one else may attend those meetings. Rather, as the High Court held in *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs*,[229] it requires that attendance at those meetings be confined to persons whose presence is reasonably required for the purposes, or in connection with the performance, of the Panel's functions.

394 In *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs*, the applicant contended that the Refugee Review Tribunal, in permitting some other applicants with a common cause (and common migration agent) to be present during the hearing of a review of the decision to refuse his application for a protection visa, failed to comply with the requirement of s 429 of the *Migration Act 1958* (Cth) that the hearing be "in private". In rejecting this contention, the Court said:[230]

> The concept of privacy is imprecise, and is not to be equated either with secrecy or isolation. Where, as in s 365, the Act requires that evidence be given "in public", then the requirement is satisfied if, subject to any relevant provisions of the Act, and to the exercise of a Tribunal's express or implied powers, the proceedings are open to the public in the sense that members of the public who wish to be present may attend and observe what is going on. Obviously, in order for a hearing to be in private it is necessary that it not be in public. However, it is not sufficient. A hearing would not be in private if, for example, a Tribunal member decided to invite a group of his or her acquaintances to be present. In such a case the hearing would not be open to the general public, but the applicant's entitlement to privacy would be disregarded. "Public" and "private" are words that are used in contrast, but they do not cover the entire range of possibilities[231]. Furthermore, the question whether proceedings are taking place in public is not the same as the question whether there are present at the proceeding persons who, vis-à-vis an applicant, are to be regarded as members of the public[232]. The group of onlookers, in the example just given, would, vis-à-vis an applicant, properly be regarded as members of the public, but the hearing would not be open to the public because ordinary members of the public, other than members of the group of onlookers specially invited to be present, would be excluded.

395 The Court later added:[233]

> It was accepted on both sides that s 429 was enacted to benefit or protect applicants in at least two respects. It is in the nature of proceedings of the kind in question that an applicant may make allegations that could expose the applicant to a risk of reprisals, either in Australia or abroad, if they were made public. A related consideration is that applicants should feel uninhibited in presenting their cases to the Tribunal. Since the requirement of

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[229] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486.
[230] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486 at [23] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).
[231] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [42].
[232] cf *Lee v Evans* (1964) 112 CLR 276; *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201.
[233] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486 at [25]-[26] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

> privacy is for the benefit of an applicant, it is not open to the Tribunal member to allow anyone to be present at the hearing so long as it is not open to the general public. On the other hand, persons whose presence is reasonably required for purposes of or in connection with the performance of the Tribunal's functions are clearly within the contemplation of the statute as persons who may be present at the hearing. Obvious examples may include interpreters, security officers, necessary administrative staff and witnesses, although privacy may require the exclusion of witnesses when they are not giving evidence.
>
> Subject to the powers of the Tribunal earlier mentioned, it is consistent with the statutory purpose, and with common use of language, to treat the concept of privacy as embracing, not only agents of an applicant, but also persons whom an applicant desires to be present and thus to be made privy to what occurs at a hearing. The girlfriend referred to earlier in these reasons provides an example. If one of the applicants wanted her to be with him for moral support, and the Tribunal member had no reasonable grounds for objecting to her presence during that applicant's evidence, then her presence would not destroy the privacy of the occasion. It is unnecessary for present purposes to examine the extent of a Tribunal member's powers to exclude such a person. No such issue arises in the present case. A meeting between A and B does not cease to be private if, by mutual consent, one is accompanied by a friend or supporter. There may be cases where a Tribunal member would feel a need to impose some requirement of confidentiality upon an applicant's friend or supporter but, again, that issue does not arise in this case.

396 Applying that approach to the present case, the focus of the inquiry by the Panel is upon the alleged conduct by the judicial officer. As such, the requirements of procedural fairness and privacy exist, primarily at least, to protect the interests of the judicial officer during the course of that inquiry. At the same time, we do not think these considerations are the only ones that inform the Panel’s discretion as to how it conducts its meetings, and the determination of persons whose presence is reasonably required for the purposes of the Panel fulfilling its functions.

397 The purpose and function of the Panel is to conduct an inquiry for the purpose of preparing a report of the type contemplated by s 25(2). While it must do so in a manner that respects the obligations of procedural fairness and privacy, it must also do so in a manner that will enable it to ascertain the relevant facts and form the opinions that must be set out in its report. It must do so that in a manner that is fair to those who are required to attend the meetings, including complainants and other witnesses who give evidence.

398 In our view, it is consistent with the purpose and function of the Panel, and the nature of the inquiry it is required to undertake, that the Panel have power to permit a witness to attend with a legal representative. Some support for this view may be found in the decision to permit the appearance of legal representatives for witnesses, albeit in the different (but analogous) context of a statutory investigation of suspected offences, in *National Companies and Securities Commission v News Corp Ltd.*[234]

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[234] *National Companies and Securities Commission v News Corp Ltd* (1984) 156 CLR 296 at 325-326 (Mason, Wilson and Dawson JJ).

399 The reasoning of the Court in *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* acknowledges that the attendance of an agent of a participant in a hearing is not necessarily inconsistent with the privacy of that hearing. While their Honours did not directly address the possibility of an agent of a witness, the permissibility of that possibility seems to us to be entirely consistent with the general effect of their reasons.

400 Whether it is appropriate to permit a particular witness to be legally represented during a meeting, and if so for what purpose and to what extent, can only be determined on a case by case basis. It is sufficient for present purposes to state that we are satisfied that the Panel was empowered to permit witnesses to be legally represented, and that it was appropriate to exercise that power in favour of permitting Ms A to be legally represented by counsel while giving her evidence, and permitting her counsel to take objections during cross-examination and to re-examine Ms A if necessary or appropriate. No error has been identified in the Panel's ruling to this effect on 9 November 2021.

401 We conclude this section of our reasons by addressing s 13 of the *Royal Commission Act*. That section provides:

> **13 – Right of audience**
>
> Unless the commission otherwise directs, any person giving evidence before the commission may, subject to anything prescribed, be represented before the commission by counsel or solicitor.

402 In submissions made to the Panel, Counsel Assisting argued that this section was a potential source of power on the part of the Panel to permit counsel to appear for Ms A. While apparently not intending to embrace a submission that the Panel was a commission under the *Royal Commission Act*, the argument was that s 13 reflected a power on the part of a commission that was conferred upon the Panel through the operation of s 24(1) of the JCC Act. The Solicitor-General maintained that argument before this Court, contending that to the extent that the Panel did not otherwise have power to order that a witness be represented during a meeting of the Panel, that power was conferred through the operation of s 24(1) of the JCC Act and s 13 of the *Royal Commission Act*.

403 As we have concluded that the Panel otherwise had power to permit a witness to be represented, it is not necessary to decide this issue. However, having heard argument on the issue, we do not accept that s 13 of the *Royal Commission Act* contains any power that is picked up through the operation of s 24(1) of the JCC Act.

404 The intention and effect of s 24(1) of the JCC Act is to pick up those powers that are in terms conferred upon a commission under the *Royal Commission Act*. Obvious examples of those powers appear in ss 10 and 11 of the *Royal Commission Act*.

405 Section 13 of the *Royal Commission Act*, on the other hand, is a provision governing the conduct of hearings before a commission, rather than a provision that confers or sets out the powers of a commission. It is a provision that provides the legal representatives of a witness with a right of audience, subject to the commission directing otherwise, rather than a provision that confers a power to permit legal representatives to attend hearings.

406 In circumstances where there are several expressly identified powers under the *Royal Commission Act* that were plainly intended to be picked up by s 24(1) of the JCC Act, we see no reason to stretch the work to be done by this section to include what might be said to be powers that are implicit in the machinery of a commission conducting an inquiry under the *Royal Commission Act*. To the extent that s 13 of that Act might be said to include an implicit power to permit the legal representatives of witnesses to appear at hearings, we do not think s 24(1) operates to pick up that implicit conferral of power. Certainly it would be a curious consequence were s 13 to be applied in its terms to an inquiry conducted by the Panel. The default right of appearance for legal representatives of all witnesses sits comfortably with the fact that much of the business of commissions under the *Royal Commission Act* is conducted in public.[235] It would not sit comfortably with the private nature of the inquiry to be conducted by the Panel.

The *Kable* challenge

407 The starting point, and indeed central premise, for the judicial officer's *Kable*[236] challenge is that the Panel has ruled that the JCC Act is to be construed so that: (a) by reason of s 24(1) of the JCC Act, the Panel is a commission for the purposes of the *Royal Commission Act*; and (b) procedural fairness does not, therefore, require the giving of particulars which might limit the scope of the inquiry.

408 From this starting point, the judicial officer contends that acceptance of the Panel's construction of the JCC Act, and of its consequences for procedural fairness, renders ss 23 and 24 of the JCC Act invalid because it would impair the independence and impartiality of the Magistrates Court, being a State Court conferred with federal jurisdiction. In elaborating upon this contention, the judicial officer argued that ordinary, reasonable and informed members of the public might be led to conclude that the Court, as an institution, is not free from, and might be subject to, executive government influence in administering the judicial functions invested in it. They might be led to this conclusion because:

- the executive government retains the power and ability to instigate the investigation of a complaint against a magistrate by a process which is inherently unfair and oppressive, to control the nature and extent of the

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235 Noting that under s 6 of the *Royal Commission Act*, a commission may take evidence in public or in private.

236 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

inquisition, and to choose the inquisitors, thereby impairing the independence of the Court; and

- by reason of the oppressive process, a magistrate might be induced to compromise his or her judicial oath (to do right 'without fear or favour') by avoiding the risk of making fearless decisions, which might induce a (false) allegation against that magistrate (including a 'smear' allegation without particulars as to time, place or conduct) but which the process would inquire into, thereby impairing the impartiality of the Court.

409 For the reasons earlier given, we have rejected the starting point for the judicial officer's *Kable* challenge. The Panel did not rule that it was a commission for the purposes of the *Royal Commission Act*. Further, and in any event, we have explained why, in our view, s 24(1) of the JCC Act does not make the Panel, or deem it to be, a commission for the purposes of the *Royal Commission Act*. It confers the Panel with the powers of a commission under the *Royal Commission Act*, but does not require or permit it to conduct its inquiry as though it were a commission under that Act.

410 The judicial officer's conception of the Panel's obligations of procedural fairness underpinning his *Kable* challenge is also misconceived. While we have concluded that the judicial officer was provided with adequate notice of the allegations made against him (for the purposes of both the preliminary examination conducted by the Commissioner and the referral to the Panel for it to inquire and report), this was not a consequence of the Panel being entitled to conduct its inquiry as though it were a roving inquiry of the kind that might be undertaken by a commission under the *Royal Commission Act*. Rather, it was because we were satisfied that the referral adequately identified the complaints (including both the specific allegation and the course of conduct allegation the subject of complaint 8) which the Panel was required to inquire into, and report upon.

411 Having rejected the starting point, and central premise, of the judicial officer's *Kable* challenge, there is no occasion for us to give any further consideration to that challenge. The judicial officer's submissions do not engage with the view we have taken of the operation of the JCC Act, and the implications this has for the nature of the task to be undertaken by the Panel and its obligation to accord procedural fairness. On this view, while the JCC Act, through the Panel, operates to promote accountability on the part of judicial officers, we do not consider that it operates to impair the impartiality or independence of judicial officers or the courts of which they are members.

Conclusion

412 For the reasons given, we would dismiss the judicial officer's application for judicial review.