SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2020 0180
S EAPCR 2025 0045
S EAPCR 2025 0065

ANTONIOS MOKBEL — Applicant

v

THE KING — Respondent

JUDGES:	McLEISH, KENNEDY and KAYE JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	2–4 September 2025
DATE OF JUDGMENT:	3 October 2025
MEDIUM NEUTRAL CITATION:	[2025] VSCA 243
JUDGMENT APPEALED FROM:	*DPP v Mokbel* (Supreme Court of Victoria, 18 April 2011) (Conviction); [2012] VSC 255 (Whelan J) (Sentence); *Mokbel v The King* [2024] VSC 725 (Fullerton J) (Reference Determination)

CRIMINAL LAW – Appeal – Conviction – Seven prosecutions relating to drug trafficking – Guilty pleas entered to charges in three prosecutions in exchange for discontinuation of remaining prosecutions – Barrister registered as police informer and informing on applicant – Other clients persuaded to give evidence against applicant – Breaches of barrister's professional duties – Barrister and police shared common purpose of ensuring applicant charged with and convicted of serious offences – Applicant convicted and exhausted rights of appeal without knowing of misconduct – Whether substantial miscarriage of justice – Leave to appeal granted – Appeal allowed in part.

CRIMINAL LAW – Appeal – Conviction – Whether common purpose of barrister and State police undermined administration of justice – Barrister secured cooperation of clients to act as witnesses against applicant – Breaches of professional duties to clients – Method used to obtain evidence grossly improper – Fundamental departure from proper processes for trial – State conviction involving substantial miscarriage of justice – Order for acquittal – Common purpose not infecting Commonwealth prosecution – No fundamental departure from proper processes for trial – Misconduct having capacity to affect result in Commonwealth prosecution – Conviction not inevitable – Commonwealth conviction involving substantial miscarriage of justice – Order for retrial – Further State conviction unaffected – *Baini v The Queen* (2012) 246 CLR 469; *Awad v The Queen* (2022) 275 CLR 421; *Karam v The King* [2023] VSCA 318, applied.

CRIMINAL LAW – Appeal – Conviction – Whether common purpose of barrister and State police undermined appearance of administration of justice – Whether fair-minded observer might reasonably apprehend that accused might have been deprived of fair trial – Test not applicable where Court has found guilty pleas did not involve substantial miscarriage of justice – *R v Szabo* [2001] 2 Qd R 214, distinguished.

CRIMINAL LAW – Appeal – Conviction – Guilty pleas – Integrity of pleas impugned by non-disclosure of misconduct of barrister and police – Non-disclosure affecting assessment of strength of prosecution case on subject charges and charges discontinued by agreement – Whether prosecutions could not in law have proceeded – Affront to justice – Whether non-disclosure had capacity to affect outcome of prosecutions – Whether issuable question of guilt – *Peters [No 2] v The Queen* (2019) 60 VR 231; *Karam v The King* [2023] VSCA 318; *Honeysett v DPP (NSW)* [2023] NSWCCA 215, applied – Leave to appeal granted – Appeal allowed in part.

CRIMINAL LAW – Appeal – Conviction – Guilty pleas – Integrity of pleas impugned by non-disclosure of misconduct of barrister and police in connection with applicant's extradition – Whether reasonable prospect of permanent stay of prosecutions on grounds of misconduct – No reasonable prospect of stay – *Strickland v DPP (Cth)* (2018) 266 CLR 325; *Ballard v The King* [2024] VSCA 26, applied.

CRIMINAL LAW – Appeal – Conviction – Guilty pleas – Integrity of pleas impugned by non-disclosure of misconduct of barrister and police – Whether non-disclosure had capacity to affect outcome of prosecutions – Whether evidence improperly obtained – Evidence would have been excluded from trials of subject charges and discontinued charges – *Evidence Act 2008*, s 138.

CRIMINAL LAW – Appeal – Second or subsequent appeal – Principles governing leave – Whether fresh evidence 'compelling' – *Criminal Procedure Act 2009*, s 326C(3)(b)(iii)(A) – Whether fresh evidence can be 'highly probative in the context of the issues in dispute at the trial of the offence' where no trial following plea of guilty – Statutory context points to wider meaning – Context of issues in dispute at prospective trial includes plea – Issues in dispute extend to question whether integrity of plea impugned – *Van Beelen v The Queen* (2017) 262 CLR 565; *Roberts v The Queen* (2020) 60 VR 431; *Karam v The King* [2023] VSCA 318, applied – Leave to appeal granted.

CRIMINAL LAW – Appeal – Jurisdiction – Crown appeal from reference determination under *Criminal Procedure Act 2009*, s 319A(5) – Where Crown respondent to substantive appeal – No express conferral of right of appeal on Crown – Parties not joining issue on question whether Crown has right of appeal – *Director of Public Prosecutions v State of Victoria* [2025] VSCA 41, referred to – Crown may be applicant or respondent to appeal against reference determination – Court sufficiently satisfied of jurisdiction to hear and determine respondent's application for leave to appeal.

CRIMINAL LAW – Appeal – Reference determination – Judge found former Director of Public Prosecutions breached prosecutorial duty of disclosure on 4 September 2012 – Director informed of possibility of barrister's informing against applicant on 1 June 2012 – Before reference judge applicant argued breach from 1 June 2012 encompassing duty to make further inquiries – *Edwards v The Queen* (2021) 273 CLR 585; *Eastman v Director of Public*

Prosecutions (ACT) [No 13] [2016] ACTCA 65; *Marwan v Director of Public Prosecutions (NSW)* (2019) 278 A Crim R 592, referred to – Whether judge erred by not finding breach of duty on 1 June 2012 – Alleged breach not put to Director in cross-examination – Substantial departure from rule in *Browne v Dunn* – Failure to put allegation to Director meant judge could not reach informed conclusion – Leave to appeal refused.

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Counsel

Applicant:	Mr T Game SC with Ms J Condon KC, Dr J R Murphy and Ms E Fargher
Respondent:	Mr D Glynn with Mr T Wood and Mr S Thomas

Solicitors

Applicant:	Stephen Andrianakis & Associates
Respondent:	Ms A Hogan, Solicitor for Public Prosecutions

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PART A: INTRODUCTION

1 On 18 April 2011 the applicant pleaded guilty in the Supreme Court to multiple drug offences arising out of three police investigations. As part of an agreement reached with the Director of Public Prosecutions ('the DPP'), prosecutions on various other charges for drug offences were discontinued. The applicant was sentenced to 30 years' imprisonment, with an effective non-parole period of 22 years.

2 The applicant sought leave to appeal against the convictions on the basis of matters concerning his extradition to Australia to face the charges. This Court refused leave to appeal on 17 May 2013 and an application to the High Court for special leave to appeal was dismissed on 13 December 2013.[1]

3 The applicant had been on trial on another drug charge commencing in February 2006. On 20 March 2006, after evidence had concluded, he failed to answer bail and absconded. He was convicted upon a jury verdict and sentenced to 12 years' imprisonment with a non-parole period of 9 years on those charges.[2]

4 The applicant was arrested in Greece on 5 June 2007 and extradited to Australia on 16 May 2008 to face the charges referred to above, together with two murder charges.

5 Since 16 September 2005, Ms Nicola Gobbo, who was the applicant's barrister at various relevant times, assisted Victoria Police in different ways to obtain evidence and intelligence against the applicant. This included a period until January 2009 during which Ms Gobbo was registered by Victoria Police as a human source. She was motivated by a desire to ensure that the applicant was charged with and convicted of serious offences.[3] Her conduct during this period included disclosure of privileged and confidential information to police, obtained from the applicant or from other clients about the applicant, and provision of information about the applicant's activities and movements and those of his associates. Victoria Police were complicit in this conduct and shared Ms Gobbo's motivating purpose.

6 Ms Gobbo also assisted Victoria Police in pursuing a strategy of charging his criminal associates and encouraging them to 'roll', or cooperate in their investigations against the applicant. Her conduct in this respect included providing intelligence to enable police to arrest and charge her other clients and advising those clients to cooperate with police.

7 The conduct of Ms Gobbo and Victoria Police was not known to the applicant or his lawyers when he pleaded guilty to the charges with which the Court is now concerned.

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1 *Mokbel v The Queen* (2013) 40 VR 625; *Mokbel v The Queen* [2013] HCATrans 321.

2 On 11 February 2010, this Court refused leave to appeal against this conviction: *R v Mokbel* (2010) 30 VR 115. On 10 December 2010, the High Court refused special leave to appeal: *Mokbel v The Queen* [2010] HCATrans 329.

3 *Mokbel v DPP* [2024] VSC 725 [852] (Fullerton J) ('Reference determination').

Nor was it known during the extradition proceedings or when the applicant sought to have the criminal proceedings stayed on various grounds.

8 In February 2016, the DPP informed the Chief Commissioner of Victoria Police of his intention to disclose matters relating to Ms Gobbo to various persons whose convictions may have been affected by her conduct, including the applicant. Victoria Police and Ms Gobbo commenced proceedings seeking to prevent that disclosure ('the disclosure proceedings'). Those proceedings were unsuccessful.[4]

9 The applicant then sought leave to bring a second appeal against the above convictions. The Commonwealth Director of Public Prosecutions ('the CDPP') conceded the appeal in respect of the 2006 conviction. This Court granted leave to bring a second appeal, allowed the appeal and quashed the conviction.[5] The sentences imposed on the remaining convictions, from 2011, were subsequently reduced so that the applicant is currently serving a term of 26 years' imprisonment, with a non-parole period of 20 years on those charges.[6]

10 The matters now before the Court concern the balance of the application for leave to bring a second appeal, namely in respect of the 2011 convictions.

11 On 6 May 2022, the Court referred an initial 21 matters in the form of questions for determination by a judge in the Trial Division pursuant to s 319A of the *Criminal Procedure Act 2009* (the '*CPA*'); eventually, 25 matters were referred. After a hearing lasting some 66 sitting days, the reference judge gave judgment answering those questions. Both the applicant and the respondent seek leave to appeal aspects of those answers, as part of the applicant's proposed second appeal against conviction.

12 The applicant seeks to have the 2011 convictions quashed and verdicts of acquittal entered in their place.

13 For the reasons that follow, the applicant should be granted leave to bring a second appeal in respect of the 2011 convictions. As explained in greater detail below, in that second appeal, two of the convictions should be set aside, but the appeal should be dismissed in respect of the third. There should be an acquittal on one of the charges on which the appeal succeeds and an order for a trial on the other, subject to the DPP's decision whether to continue to prosecute that charge.

14 The applicant advances two proposed grounds of appeal. The first alleges that Ms Gobbo's conduct so impugned the integrity of the applicant's pleas of guilty, and the consequent convictions, and so compromised the administration of justice, as to cause in each case a substantial miscarriage of justice. The second ground alleges a substantial miscarriage of justice by reason of fundamental breaches of the prosecution's duty of disclosure. It will be convenient to address those grounds sequentially, and in the course of doing so, to consider the proposed appeals in respect of aspects of the reference determination.[7]

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4 *AB v CD* [2017] VSC 350; *AB v CD* [2017] VSCA 338; *AB v CD* (2018) 93 ALJR 59; [2018] HCA 58.
5 *Mokbel v Director of Public Prosecutions (Cth)* [2020] VSCA 325.
6 *Mokbel v The King* (2023) 375 FLR 290; [2023] VSCA 40.
7 The grounds are set out at [507] below.

15 Before describing the factual background at greater length, we shall refer to the statutory provisions governing second and subsequent appeals, in order to identify the matters which the applicant must address in support of the relief he seeks, and the requirements for appeals in respect of the reference determination.

PART B: LEAVE TO BRING SECOND APPEAL

16 The applicant applies for leave to bring a second appeal pursuant to s 326A of the *CPA*. By that provision, a person convicted of an indictable offence who has exhausted their right of appeal against conviction may appeal to this Court against that conviction if the Court grants leave to appeal. Section 326C(1) provides that the Court may grant leave to appeal if it is satisfied that there is 'fresh and compelling evidence that should, in the interests of justice, be considered on an appeal'.

17 The parties accept, inevitably, that the evidence concerning the assistance given by Ms Gobbo to Victoria Police is 'fresh' in the relevant sense. They differ as to whether the evidence is 'compelling'. Section 326C(3)(b) defines 'compelling' as follows:

> (3) In this section, evidence relating to an offence of which a person is convicted is—
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> …
>
> (b) ***compelling*** if—
>
> (i) it is reliable; and
>
> (ii) it is substantial; and
>
> (iii) either—
>
> (A) it is highly probative in the context of the issues in dispute at the trial of the offence; or
>
> (B) it would have eliminated or substantially weakened the prosecution case if it had been presented at trial.

18 In *Roberts v The Queen*, the meaning of 'compelling' was explained as follows:

> [T]he words 'reliable', 'substantial', and 'highly probative' are to be given their ordinary meanings. In *Van Beelen*,[8] the High Court observed (of the equivalent South Australian provision):
>
> > Nothing in the scheme of the CLCA or the extrinsic material provides support for a construction of the words 'reliable', 'substantial' and 'highly probative' in other than their ordinary meaning. Understood in this way, each of the three limbs of sub-s (6)(b) has work to do, although commonly there will be overlap in the satisfaction of each. The criterion of reliability requires the evidence to be credible and provide a trustworthy basis for fact finding. The criterion of substantiality requires that the evidence is of real significance or

8 *Van Beelen v The Queen* (2017) 262 CLR 565 ('*Van Beelen*').

> importance with respect to the matter it is tendered to prove. Plainly enough, evidence may be reliable but it may not be relevantly 'substantial'. Evidence that meets the criteria of reliability and substantiality will often meet the third criterion of being highly probative in the context of the issues in dispute at the trial, but this will not always be so. *The focus of the third criterion is on the conduct of the trial. What is encompassed by the expression 'the issues in dispute at the trial' will depend upon the circumstances of the case.* Fresh evidence relating to identity is unlikely to meet the third criterion in a case in which the sole issue at the trial was whether the prosecution had excluded that the accused's act was done in self-defence. On the other hand, fresh evidence disclosing a line of defence that was not apparent at the time of trial may meet the third criterion because it bears on the ultimate issue in dispute, which is proof of guilt.
>
> … [T]he Victorian statute raises as a further alternative to the final component of 'compelling' evidence, that which would have eliminated or substantially weakened the prosecution case if it had been presented at trial.[9]

The evidence must be 'compelling'

19 The question in the present case concentrates on sub-para (iii) of the definition of 'compelling'.

Submissions

20 The respondent accepted that, to the extent that the applicant relies on findings made by the reference judge, those findings were made on the basis of evidence that was 'reliable' and 'substantial'.

21 The applicant submitted that the evidence is 'highly probative in the context of the issues in dispute at the trial',[10] which extends to the underlying question whether the applicant received a fair trial according to law.[11] He submitted that the fresh evidence is probative of the nature and extent of illegalities and improprieties in the investigation, extradition and prosecution of the applicant. He points out that the issue is not whether the evidence is highly probative of an issue at the trial, but whether it is highly probative in the context of the issues at trial.

22 In respect of two of the three convictions,[12] the applicant also submitted that the evidence would have 'eliminated or substantially weakened the prosecution case'[13] if it had been presented at trial. He submitted that the evidence would have required the exclusion of the evidence of Mr Bickley, Mr Cooper and Mr Thomas (all pseudonyms), or would have drastically undermined their credibility, and that of the informant in one matter, Detective Senior Sergeant Paul Rowe. In respect of all three matters,[14] the

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9 (2020) 60 VR 431, 441–2 [46]–[47] (Osborn and T Forrest JJA and Taylor AJA) ('*Roberts*') (citations omitted, emphasis added), quoting *Van Beelen* (2017) 262 CLR 565, 577 [28] (Bell, Gageler, Keane, Nettle and Edelman JJ). See also *Bromley v The King* (2023) 416 ALR 570, 573 [8] (Gageler CJ, Gleeson and Jagot JJ), 624 [218] (Edelman and Steward JJ); [2023] HCA 42.

10 *CPA*, s 326C(3)(b)(iii)(A).

11 *Roberts* (2020) 60 VR 431, 453 [91] (Osborn and T Forrest JJA and Taylor AJA).

12 Named 'Quills' and 'Orbital', as described below.

13 *CPA*, s 326C(3)(b)(iii)(B).

14 The third matter being 'Magnum', described below.

applicant submitted that the fresh evidence would also have given rise to the prospect of a stay.

23 Finally, the applicant submitted that, if the Court is satisfied that the evidence is fresh and compelling, it will almost always follow that it is in the interests of justice that it be considered on appeal.[15] The applicant referred to the statement of the High Court when rescinding special leave to appeal in respect of the disclosure proceedings, that the maintenance of the integrity of the criminal justice system demanded that the propriety of the relevant convictions be re-examined in light of the information that had come to light.[16]

24 The respondent accepted that this Court should follow its own previous decisions to the effect that the concept of 'issues in dispute at the trial' extends to the underlying question whether the applicant received a fair trial according to law.[17] The respondent formally submitted, however, that those decisions are incorrect and that it is necessary that the evidence be capable of going to the proof or disproof of issues in dispute at the trial.[18]

25 The respondent submitted that, in any event, s 210(1) of the *CPA* provides that a 'trial' commences when the accused pleads not guilty on arraignment in the presence of the jury panel in accordance with s 217. It was submitted that, because the applicant pleaded guilty to the charges in question, no trial ever commenced. The respondent submitted that the applicant therefore cannot satisfy sub-para (iii)(A) of the definition of 'compelling'. The respondent relied on the statement of Vandongen JA in *Vella v Western Australia [No 2]*,[19] to the effect that the requirement that fresh evidence be 'highly probative in the context of the issues in dispute at the trial of the offence' in the equivalent Western Australian provision was incapable of being satisfied in a case where an accused pleaded guilty, because there was no 'trial' in that context.

26 As to sub-para (iii)(B), the respondent submitted that the applicant had failed to show that the evidence of the identified witnesses 'would' have been excluded. It was submitted that the applicant had not identified how the impugned evidence was 'obtained' within the meaning of s 138 of the *Evidence Act 2008*, nor had he established that the evidence was obtained unlawfully or improperly or 'in consequence' of an impropriety or contravention of the law. In other words, the applicant is said not to have articulated a causal connection between impropriety or illegality in around 2005 and 2006 and the putative giving of evidence at a trial commencing in 2011. The respondent made extensive submissions as to why it was contended that the evidence in question would not have been excluded under s 138.

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15 *Roberts* (2020) 60 VR 431, 461 [137] (Osborn and T Forrest JJA and Taylor AJA); *Karam v The King* [2023] VSCA 318 [169] (Beach, McLeish and Kennedy JJA) ('*Karam*').

16 *AB (a pseudonym) v CD (a pseudonym)* (2018) 93 ALJR 59, 62 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

17 *Roberts* (2020) 60 VR 431, 453 [91] (Osborn and T Forrest JJA and Taylor AJA).

18 *Baker v The King* (2022) 68 VR 76, 106 [104] (Emerton ACJ, Priest and Niall JJA).

19 [2025] WASCA 70 [226] ('*Vella*').

27 In reply submissions, the applicant contested the respondent's construction of sub-para (iii)(A) and the application of s 138 of the *Evidence Act* in the context of sub-para (iii)(B).

28 The applicant drew attention, in particular, to the fact that the determinative question in a second or subsequent appeal is whether there has been a substantial miscarriage of justice: s 326D. This reflects the position in respect of a first appeal, as to which it is not in doubt that an appeal lies, and may succeed, notwithstanding that the accused has pleaded guilty.

29 The applicant also referred to s 326E(1)(c)(ii), which expressly recognises that a second or subsequent appeal may be brought, and may succeed, 'in the case of a plea of guilty'.

Does the test in sub-paragraph (iii)(A) require there to have been a trial?

30 The respondent's construction of sub-para (iii)(A) must be rejected. The construction depends on a literal reading of the provision. That reading is not supported by the statutory text, context or purpose, all of which indicate the wider construction for which the applicant contended.

31 First, the text of sub-para (iii)(A) is not necessarily restricted to trials that have actually taken place. It is capable of embracing trials that would have taken place, if not for a plea of guilty. The issues may have been in dispute at a trial of the offence, or they may have been going to be in dispute at such a trial. In either case, they are aptly described as 'issues in dispute at the trial'. Nothing in the language of sub-para (iii)(A) prevents the issues in dispute at the trial from being identified as at a point before any trial has commenced.

32 Secondly, the context points strongly to the wider meaning. Sub-para (iii)(B) is expressed in the subjunctive and clearly contemplates a hypothetical scenario. It readily accommodates evidence that would have weakened the prosecution case if presented at trial, whether or not a trial has actually occurred. The inquiry is into the effect on the prosecution case, not an effect on a trial. It would be anomalous if sub-paras (iii)(A) and (B) applied to different subject matter, with only the latter provision applying in a case where there has been no trial. That would give rise to an arbitrary difference between appeals after conviction by a jury and appeals after a guilty plea.

33 Thirdly, the provisions for second and subsequent appeals are intended to enable the remedying of substantial miscarriages of justice: s 326D. There is no apparent reason why that purpose would be confined to convictions after trial, and there is no textual indication to that effect. To the contrary, as the applicant noted, s 326E(1)(c)(ii) expressly contemplates an appeal after a plea of guilty. The respondent's construction is at odds with principles of statutory construction that favour a remedial provision having a broad operation and require a grant of jurisdiction to a court to be construed generously. The respondent's construction would give sub-para (iii)(A) a markedly more confined operation than its words are capable of conveying. Given that the provisions for second and subsequent appeal are intended to enable such appeals after

a guilty plea, a construction of sub-para (iii)(A) that promotes that purpose should be preferred.[20]

34 Specifically, the respondent's construction would mean that (in cases where sub-para (iii)(B) does not apply) there could be no second appeal in a case where there is fresh, reliable and substantial evidence that is highly probative in the context of the issues that would have been in dispute at the trial if the applicant had not pleaded guilty. The respondent advanced no rationale for excluding the application of sub-para (iii)(A) in those circumstances.

35 It is significant that the South Australian provisions considered by the High Court in *Van Beelen*, the construction of which has guided this Court in its approach to s 326C, contain no equivalent to sub-para (iii)(B). The respondent's approach therefore suggests that, in South Australia, there can be no second appeal in a case where an accused has pleaded guilty. There is no such suggestion in *Van Beelen*. Rather, the High Court stated that the 'evident intention' of the provisions is that 'the Full Court have jurisdiction to remedy any substantial miscarriage of justice' if, 'following an unsuccessful … appeal, further fresh and compelling evidence is discovered'.[21]

36 We are conscious that our conclusion differs from the view expressed by Vandongen JA in *Vella*. We are not, of course, bound by that *obiter dictum*, which the other two members of the court did not address, but we would respectfully note that the Western Australian Court of Appeal does not appear to have had the benefit of full argument on the point, in any event.

Meaning of 'highly probative in the context of the issues in dispute' where there has not been a trial

37 As noted earlier, the respondent accepted (subject to a formal submission to the contrary) that we should proceed on the basis that 'issues in dispute at the trial' extends to the underlying question whether the applicant received a fair trial according to law.[22] In *Van Beelen*, the High Court said of the South Australian equivalent of sub-para (iii)(A):

> The focus of the third criterion is on the conduct of the trial. What is encompassed by the expression 'the issues in dispute at the trial' will depend upon the circumstances of the case.[23]

38 The treatment of the fair trial question as falling within the provision was explained in *Karam* as follows:

> We accept that this interpretation gives a broad meaning to the expression 'issues in dispute at the trial'. However, it would be surprising if the provision for second and subsequent appeals did not allow for an appeal where highly

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20 *Interpretation of Legislation Act 1984*, s 35(a).

21 *Van Beelen* (2017) 262 CLR 565, 576 [27] (Bell, Gageler, Keane, Nettle and Edelman JJ).

22 *Roberts* (2020) 60 VR 431, 453 [91] (Osborn and T Forrest JJA and Taylor AJA).

23 *Van Beelen* (2017) 262 CLR 565, 577 [28] (Bell, Gageler, Keane, Nettle and Edelman JJ); see *Roberts* (2020) 60 VR 431, 441–2 [46]–[47] (Osborn and T Forrest JJA and Taylor AJA); *Karam* [2023] VSCA 318 [169] (Beach, McLeish and Kennedy JJA).

> probative fresh evidence brings the fairness of a trial into question, unless it can be shown that, had the evidence been presented at trial, it would have eliminated or substantially weakened the prosecution case. That construction would have the anomalous result that the availability of an appeal seeking to establish serious departures from proper trial processes, which by definition amount to a substantial miscarriage of justice in and of themselves, would depend on demonstrating a further matter, namely a substantial effect of those departures on the strength of the prosecution case.[24]

39 The same rationale justifies construing the statutory language as extending to the fairness of a plea. Just as the fairness of a trial is part of the 'context' of the issues in dispute at that trial, in a case where there has been no trial because the applicant pleaded guilty, the plea is part of the 'context' of the issues in dispute at that prospective trial. And just as the 'issues in dispute' can extend to the question whether the trial was fair according to law, in a case where there has been no trial because the applicant pleaded guilty, the 'issues in dispute' can extend to the question whether the integrity of the plea was impugned. That question arises in the context of the issues that are in dispute in the prospective trial, until the applicant pleads guilty.

40 Accordingly, if there is evidence that the plea was not fully informed in a material respect, or that there was a failure to perform prosecutorial disclosure obligations, that evidence may, depending on its strength and significance, be highly probative in the context of the issues that were in dispute before the matter had reached trial.

41 Senior counsel for the applicant submitted that 'highly probative' means 'of real significance' or 'of importance'.[25] That submission is consistent with the Court's conclusion in *Roberts* that evidence was highly probative in that case because it raised a 'serious question as to the fairness of the trial' and a 'serious issue' as to the reliability of evidence 'central to the trial'.[26]

Conclusion as to leave to bring second appeal

42 Turning to the merits of the present leave application, we accept that the evidence of Ms Gobbo's conduct was probative in the context of the issues in dispute at the trial of the relevant offences that would have taken place, had the applicant not pleaded guilty. The evidence reflected in the findings of the reference judge is in effect axiomatically 'probative', by virtue of having been accepted after extensive hearings. It is evidence squarely concerned with the integrity of the plea and is therefore probative in the 'context' of the issues that were in dispute until the plea was entered.

43 The question whether the evidence is 'highly' probative depends on the strength of the fresh evidence in light of the end to which it is proposed to be directed, namely proof of the substantial miscarriage of justice which is alleged. In this case, the inquiry must address whether the fresh evidence raises a serious question as to the integrity of the applicant's respective convictions. For reasons which will become apparent, we are

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24 *Karam* [2023] VSCA 318 [170] (Beach, McLeish and Kennedy JJA).

25 In written submissions, the applicant submitted that 'highly probative' meant 'has a real or material bearing on the determination of a fact in issue which, in turn, may rationally affect the ultimate result in a case'.

26 *Roberts* (2020) 60 VR 431, 434 [12], 452 [86], 461 [137] (Osborn and T Forrest JJA and Taylor AJA).

satisfied that it does. In each of the three cases, the evidence raises a real question as to whether the administration of justice was compromised and whether the applicant's guilty pleas were tainted by the conduct of Ms Gobbo and Victoria Police and the non-disclosure of that conduct to the applicant or the Court. In the case of Quills, there is an additional real question as to the admissibility of the evidence of Mr Bickley, upon which the prosecution critically relied. That question is also relevant to the Orbital matter.

44 The result is that the fresh evidence is 'compelling' as defined. In the circumstances, it is not necessary to decide whether the evidence 'would have' eliminated or substantially weakened the prosecution case if it had been presented at trial, within sub-para (iii)(B). However, we observe that the respondent conceded that, if the evidence of Mr Bickley was excluded in the Quills trial, this would, in effect, 'eliminate' the prosecution case in that matter.[27]

45 In our view, for the very reasons that the evidence in this case is seen to be 'compelling', it is in the interests of justice that the evidence be considered on an appeal. The respondent does not contest that conclusion, once the evidence is found to be 'compelling'.[28] Nor does the respondent invite us to refuse leave on a discretionary basis, once that conclusion is reached.

PART C: LEAVE TO APPEAL AGAINST REFERENCE DETERMINATION

46 It is now convenient to address the law governing the applications for leave to appeal against aspects of the reference determination.

47 Sections 319A(5) and (6) of the *CPA* provide:

> (5) If the Court of Appeal gives leave, the Court of Appeal may hear and determine an appeal against a reference determination as part of the appeal or application for leave to appeal to which the reference determination relates.
>
> (6) Unless the Court of Appeal otherwise determines in accordance with subsection (5), a reference determination is taken to be a determination of the Court of Appeal in the appeal or application for leave to appeal to which the reference determination relates.

48 In respect of the criteria for a grant of leave, the Court said in *Karam*:

> The section is silent as to the nature of … an appeal [from a reference determination] and the grounds upon which the Court may determine whether or not to grant leave to appeal. As to the ground of leave, it is plain that the question of leave is at the discretion of the Court. At the least, it can be expected that it must be shown that the grounds upon which leave to appeal is sought are reasonably arguable.[29] That is not to say that the existence of reasonable grounds will always warrant a grant of leave. It will also be necessary to show

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27 For completeness, we record our opinion, based on our reasoning in the substantive appeal, that the fresh evidence would not have satisfied sub-para (iii)(B) in the case of Magnum.

28 *Van Beelen* (2017) 262 CLR 565, 578 [30] (Bell, Gageler, Keane, Nettle and Edelman JJ).

29 Cf *Raad v The Queen* (2006) 15 VR 338.

> that the ground upon which the applicant seeks leave to appeal against a reference determination is one which, by reason of its relationship to proposed grounds in a substantive appeal, might reasonably have a bearing on the conviction or sentence sought to be appealed. Leave is likely to be refused if success on the proposed appeal against the reference determination would not materially advance the prospects of success of the proposed substantive appeal.[30]

49 In *Karam*, the parties argued a proposed appeal against a reference determination application on the basis that the proposed appeal was an appeal by way of rehearing, and the Court proceeded on that basis.[31] The parties urge the same course in this matter.

Submissions

50 The applicant submitted that s 326A(5) of the *CPA* permits both appeals against a particular finding in a reference determination and an appeal against a failure to make a particular finding. The subject matter of the proposed appeal by the applicant is the finding of the reference judge that the DPP was in breach of his duty of disclosure from 1 June 2012, rather than from 4 September 2012.

51 The parties submitted that the Court is required to conduct a real review of the matter in issue. They relied on the observation in *Fox v Percy*[32] that the appellate court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind that it has neither seen nor heard the witnesses and making due allowance in that respect.[33]

52 The applicant contended that his proposed appeal against the reference determination goes to the significance of the breach of the DPP's duty of disclosure, including whether it was so serious as to constitute a fundamental irregularity in the applicant's trials. It was submitted that the difference in dates when the DPP was in breach of his duty is potentially significant, including because, at the earlier date, the applicant had not been sentenced and could therefore have sought to change his plea based on the information which the DPP should have provided.

53 The respondent seeks leave to appeal in respect of three findings of the reference judge, namely:

(a) a finding that the respondent had conceded that there would have been reasonable grounds for the applicant to have sought a stay of the prosecutions;

(b) a failure to assess the strength of the prosecution case on the Orbital charge separately from that in respect of the Quills charge and failing to find that the case in respect of the Orbital charge would have remained strong even if Mr Bickley's evidence had been excluded; and

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30 [2023] VSCA 318 [144] (Beach, McLeish and Kennedy JJA).
31 Ibid [145]–[148].
32 (2003) 214 CLR 118.
33 Ibid 127 [25] (Gleeson CJ, Gummow and Kirby JJ), citing *Warren v Coombes* (1979) 142 CLR 531, 551 (Gibbs ACJ, Jacobs and Murphy JJ); *Lee v Lee* (2019) 266 CLR 129, 148–9 [55] (Bell, Gageler, Nettle and Edelman JJ, Kiefel CJ agreeing at 134 [1]).

(c) a finding that there was a joint criminal enterprise committed by Ms Gobbo and four police officers who had formed an agreement by 20 April 2006 that, upon his arrest, Mr Cooper would be denied independent legal assistance before deciding to admit his guilt and agreeing to assist police on 22 April 2006, in circumstances where the respondent was denied procedural fairness and the finding was erroneous because there was no proper evidentiary basis to find that the five individuals had entered the agreement by 20 April 2006.

Jurisdiction

54 A preliminary issue arises with respect to the respondent's proposed appeal against these aspects of the reference determination. The only identified source of a right to appeal against a reference determination is s 319A(5). The provision does not identify the party or parties who may appeal. It provides only that, with leave, the Court may hear and determine an appeal against a reference determination 'as part of the appeal or application for leave to appeal to which the reference determination relates'. In other words, the appeal against a reference determination is heard as part of the applicant's proposed substantive appeal.

55 This language is not especially apt to confer a right of appeal (with leave) upon the respondent. In general, the clearest language is required in order to confer a right of appeal in a criminal case on the Crown.[34] Far from containing such language, s 319A(5) envisages any appeal against a reference determination being heard and determined 'as part of' an applicant's substantive appeal, which readily sits with an applicant's appeal against a reference determination but less comfortably with a respondent's appeal.

56 In light of these considerations, the Court sought short written submissions from the parties as to its jurisdiction to hear the respondent's application for leave to appeal against the reference determination, and any such appeal. The respondent filed submissions contending that the Court had jurisdiction, and the applicant informed the Court that it took 'no issue' with those submissions.

57 There is no issue, therefore, between the parties in respect of jurisdiction. This does not relieve the Court of the need to be satisfied as to its jurisdiction, but it does mean that the issue of jurisdiction need not be finally determined. As explained in *Director of Public Prosecutions v State of Victoria*:[35]

> While jurisdiction cannot be conferred by consent, … the level of scrutiny a court applies to the question of jurisdiction when orders are made by consent is less than when jurisdiction is in issue between the parties.[36] In a consent matter, 'very slight inquiry may be adequate'.[37]

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34 *R v Snow* (1915) 20 CLR 315, 322 (Griffith CJ); *Lacey v A-G (Qld)* (2011) 242 CLR 573, 582–4 [17]–[20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

35 [2025] VSCA 41 [18] (Beach, McLeish and Kennedy JJ).

36 Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) 38–9.

37 *Federated Engine Drivers' & Firemen's Association of Australasia v The Broken Hill Pty Co Ltd* (1911) 12 CLR 398, 428 (Barton J).

58 Among the points made by the respondent, one suffices to give the Court the requisite satisfaction that it has jurisdiction. The provisions for reference determinations apply not only to second and subsequent appeals brought by convicted persons under pt 6.4 of the *CPA*, but also to appeals under pt 6.3: s 319A(1). Part 6.3 relevantly provides for appeals to the Court of Appeal from the County Court and the Trial Division of the Supreme Court, including appeals against conviction (div 1), appeals against sentence by offenders (div 2) and by the DPP (div 3), and interlocutory appeals by a party to a proceeding for the prosecution of an indictable offence (div 4). The fact that there can be a reference determination in an appeal brought by the DPP under div 3 or div 4 strongly suggests that s 319A(5) confers a right of appeal (with leave) on both parties in that circumstance. It would be anomalous if it were only the DPP who had that right, in that context. Yet that would be the result if the provision were construed as giving a right of appeal only to the applicant in the appeal to which the reference determination relates.

59 Put differently, if s 319A(5) were construed as not conferring a right of appeal on the Crown in a reference determination relating to a second or subsequent appeal under pt 6.4, then nor would it confer a right of appeal on an offender the subject of a sentence appeal by the DPP or an interlocutory appeal brought by the DPP. Again, there is no apparent reason why that would have been the parliamentary intention, and the result would run counter to the presumption governing statutory interpretation of provisions conferring rights of appeal in criminal proceedings.

60 In short, because the appeal to which a reference determination relates is not necessarily an appeal brought by an offender, the respondent to that appeal is not necessarily the Crown. In the circumstances, giving the remedial provision in s 319A(5) its full effect, we are sufficiently satisfied that s 319A(5) does not have a differential operation, and that the Court therefore has jurisdiction to hear and determine the respondent's proposed appeal against the reference determination.

Leave to appeal

61 It is convenient to defer consideration of the respective applications for leave to bring an appeal against the reference determination. That is principally because, as indicated above, one issue germane to the question of leave is whether the ground of the proposed appeal is one which, by reason of its relationship to proposed grounds in the substantive appeal, might reasonably have a bearing on the conviction sought to be appealed in that appeal.[38]

PART D: FACTUAL FOUNDATION OF THE SUBSTANTIVE APPEAL — THE REFERENCE DETERMINATION

62 The reference determination runs to more than 500 pages, addressing numerous specific questions. The reference judge determined not only what assistance Ms Gobbo provided to Victoria Police in respect of investigations and prosecutions concerning the applicant, but identified breaches of Ms Gobbo's obligations in respect of the applicant and others, and the knowledge of Victoria Police of those breaches.

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[38] See [48] above.

63 We will outline, in some detail, the findings of the reference judge under the following headings:

(a) police operations concerning the applicant: charges subject of the proposed appeal;[39]

(b) police operations concerning the applicant: charges discontinued in plea deal;

(c) Ms Gobbo's assistance to police — 'rolling' potential witnesses (Quills and Orbital);

(d) Ms Gobbo's assistance to police — Magnum;

(e) Ms Gobbo's assistance to police — extraditing the applicant;

(f) Ms Gobbo acting as the applicant's lawyer;

(g) Ms Gobbo acting as the lawyer for potential witnesses;

(h) duties owed by Ms Gobbo to the applicant and potential witnesses;

(i) duties owed to the Court;

(j) breaches of duties owed by Ms Gobbo to clients;

(k) breaches of duties owed to the Court;

(l) common purpose of Ms Gobbo and Victoria Police;

(m) unlawfulness and impropriety;

(n) specific unlawfulness and impropriety in respect of 'rolling' potential witnesses;

(o) whether Victoria Police took steps to ensure lawfulness and propriety;

(p) knowledge of Victoria Police;

(q) importance of improperly or unlawfully obtained evidence;

(r) timing of knowledge of police and prosecutors as to possible effect on prosecutions or extradition;

(s) breaches of duty of disclosure;

(t) specific effects of non-disclosure;

(u) would the applicant have pleaded guilty anyway?; and

[39] This extends to the specific relationship between two of those investigations.

(v) the applicant's ability to properly evaluate the proposed plea bargain.[40]

Convictions sought to be appealed

64 The applicant seeks leave to bring a second appeal in respect of convictions relating to three drug offences, to which it is convenient to refer by use of the names of the relevant police operations, namely Quills, Orbital and Magnum.

65 The convictions followed pleas of guilty in April 2011 to two State charges of trafficking not less than a large commercial quantity of MDMA (Quills) and methylamphetamine (Magnum) respectively,[41] and a Commonwealth charge of incitement to import a commercial quantity of MDMA[42] (Orbital). The pleas were entered pursuant to an agreement with the prosecution by which further charges relating to other State drug offences, the subject of police operations Kayak, Landslip, Matchless and Spake, were discontinued.

66 The applicant was also the subject of other police operations, namely Macaw (concerning the murder of Michael Marshall — the applicant was extradited from Greece to face this charge; the trial was discontinued on 3 April 2009) and Gotta (concerning the murder of Lewis Moran — the applicant was extradited from Greece to face this charge also; he was acquitted by jury verdict on 25 September 2009). The applicant was also the subject of further investigation, concerning a suspected attempt to pervert the course of justice, which was designated 'Landslip 2' although it did not constitute a distinct police operation.

67 We will set out below more details in respect of the three operations which gave rise to the convictions sought to be appealed, and the four prosecutions which were discontinued when the applicant pleaded guilty to charges brought in the first three operations. It is convenient, however, to first outline the procedural history which puts the various charges in their context. The position was helpfully summarised by this Court in a bail application brought by the applicant earlier this year:

> Following a trial in early 2006, the applicant was found guilty of one charge of being knowingly concerned in the importation into Australia of a prohibited import, namely a traffickable quantity of cocaine. This offence is referred to by the parties as the 'Plutonium' offence.
>
> On 31 March 2006, he was sentenced for the Plutonium offence by Gillard J to 12 years' imprisonment with a non-parole period of nine years. ...[43]
>
> The applicant breached his bail prior to the completion of the Plutonium trial and fled the country. The trial concluded, and sentence was delivered, in the applicant's absence. He was arrested in Greece on 5 June 2007 ...

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40 The reference also extended to other matters to which we need not refer, including findings as to the maintaining of records, and whether there was a wider course or pattern of conduct on the part of Victoria Police.

41 Contrary to s 71 of the *Drugs, Poisons and Controlled Substances Act 1981*.

42 Contrary to s 11.4(1) of the *Criminal Code* (Cth).

43 *R v Mokbel* [2006] VSC 119; *R v Mokbel* (2010) 30 VR 115.

> At the time that he absconded, the applicant had been charged with the Orbital offence but not the Quills offence. Both offences were alleged to have been committed in 2005. The Magnum offence was alleged to have been committed on various dates between 2006 and 2007 after the applicant had absconded and before his arrest in Greece.
>
> Following his arrest in Greece, extradition proceedings were instituted by the Commonwealth Attorney-General.[44] The applicant fought these proceedings in the Greek courts, and also by way of an application to the European Court of Human Rights and by proceedings in the Federal Court of Australia.
>
> The applicant was extradited in May 2008 to face trial on nine matters comprising two charges of murder and seven drug [prosecutions] being Quills, Orbital, Magnum, Kayak, Landslip, Matchless and Spake, and to serve the Plutonium sentence imposed on him in March 2006.
>
> Following his extradition, the applicant made three unsuccessful stay applications based upon alleged impropriety or illegality in the extradition process.[45]
>
> The two murder prosecutions against the applicant failed. One resulted in an acquittal in September 2009 and the other resulted in a nolle prosequi in April 2009.
>
> A global plea deal was then negotiated with respect to the outstanding drug offences and the applicant pleaded guilty to Quills, Orbital, and Magnum on 18 April 2011.
>
> Thereafter, the applicant sought unsuccessfully to change his pleas on the basis of arguments directed to the validity of search warrants arising out of practices adopted by the police.[46]
>
> The applicant's plea hearing in the Quills, Orbital, and Magnum matters commenced before Whelan J (as his Honour then was) on 24 May 2012 and on the same day a nolle prosequi was entered in respect of the other four drug matters (Kayak, Landslip, Matchless and Spake).[47]

Police operations concerning the applicant: charges subject of the proposed appeal

Quills

68 In December 2004, Victoria Police commenced the Quills investigation into the use of pill presses to press MDMA powder into tablet form at a factory in Coburg and at a

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44 The Quills, Orbital, Magnum, Kayak, Landslip, Matchless and Spake offences, amongst others, were included in the extradition request: Reference determination [18].

45 *Mokbel v DPP* (2008) 26 VR 1; *DPP v Mokbel (Orbital & Quills - Ruling No 1)* [2010] VSC 331; *R v Mokbel (Magnum - Ruling No 2 - Stay)* [2011] VSC 128.

46 *R v Mokbel* (2012) 35 VR 156.

47 *Mokbel v The King* [2025] VSCA 62 [9] (Emerton P, Osborn JA and Jane Dixon AJA).

private garage at Craigieburn. The applicant was a target of this operation. The other targets included Mr Bickley.[48]

69 In April 2005 Victoria Police learnt of a 'parallel investigation'[49] by the Australian Federal Police (the 'AFP') into the importation of a range of precursor chemicals, including for the manufacture of MDMA in tablet form. This became known as Operation Orbital (see below). From that point there was an exchange of information between Victoria Police and the AFP.[50]

70 The applicant absconded in the course of the Plutonium trial, before being charged with any offence arising from the Quills investigation; he had, however, been charged by the AFP in the course of the Orbital investigation with incitement to import prohibited drugs, including a large quantity of MDMA powder.[51]

71 The applicant was extradited from Greece, having been charged with the Quills offence of trafficking a large commercial quantity of MDMA.[52]

Orbital

72 As part of the Orbital investigation, the AFP charged the applicant with two counts of incitement to import prohibited drugs, namely 1000 kilograms of MDMA powder and 200 litres of benzyl methyl ketone. He was extradited from Greece to face these charges.

73 On 6 April 2009, the applicant was committed to stand trial on the first of the two Orbital charges (referred to below as 'the Orbital charge').[53]

74 Around July 2009, the DPP assumed conduct of the Orbital trial from the CDPP.[54]

75 On 5 October 2009, the DPP applied to present a joint Quills/Orbital presentment/indictment, which was opposed by the applicant.[55] The Court was provided with the document and it was ultimately filed by consent.[56]

76 The applicant filed an application for a permanent stay of the joint Quills/Orbital presentment. The application was heard by Whelan J over multiple dates in November and December 2009 and in February, March, April, May, June and August 2010. On 5 August 2010, Whelan J refused the application.[57]

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48 Reference determination [190].
49 Ibid [191].
50 Ibid.
51 Ibid [195].
52 Ibid [205]–[206].
53 Ibid [220]. By that time, he had been discharged in respect of the second charge on the basis that one of the informer witnesses was not available to give evidence: ibid [220] n 199.
54 Ibid [213]–[214], [217], [220].
55 Ibid [222]. Strictly speaking, the applicant was presented on the State charge in Quills, and indicted on the Commonwealth charge in Orbital.
56 *R v Mokbel* (2012) 35 VR 156, 166 [54] (Whelan J).
57 Ibid [223]–[224]; *DPP v Mokbel (Orbital & Quills – Ruling No 1)* [2010] VSC 331.

77 On 18 April 2011, as part of plea negotiations with the DPP which commenced in early April 2011, the joint presentment/indictment including the Orbital and Quills offences was filed. The applicant was arraigned and pleaded guilty to both offences.[58]

78 The reference judge found that

> it became increasingly obvious as the Quills and Orbital investigations unfolded, when the briefs of evidence were being prepared and, finally, when the prosecution strategy was being developed that there would be considerable forensic advantages to the prosecution were an order made for joinder of the two counts on one indictment.[59]

The reference judge was satisfied that the relationship between the two cases was such that, in an evidentiary sense, the investigations the subject of the two operations were (or proved to be) mutually reinforcing.[60]

79 In particular, the reference judge found that, in light of that relationship, Ms Gobbo's assistance or attempted assistance in the investigation and prosecution of the applicant in Operation Quills (referred to below) also assisted police in the prosecution of the applicant for the Orbital offence.[61]

Magnum

80 Operation Magnum commenced on 19 April 2007. It concerned the applicant's alleged control of a large-scale criminal enterprise manufacturing and distributing methylamphetamine while he was overseas.[62]

81 On 19 June 2007, the applicant was charged with a drug trafficking offence arising out of Operation Magnum. Nine co-offenders were also charged. Between 6 March 2009 and September 2011 they each pleaded guilty and were sentenced.[63]

82 The prosecution brief of evidence in Magnum included thousands of hours of intercepted telephone conversations between the applicant and his associates in which he was recorded directing the drug trafficking operations from overseas.[64]

83 On 23 October 2009, the applicant was committed to stand trial in the Supreme Court on the Magnum offence. It was intended to be the second of the drug trials to be prosecuted, after the Quills/Orbital prosecution.[65]

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58 Reference determination [226].
59 Ibid [1219].
60 Ibid.
61 Ibid [1221].
62 Ibid [243].
63 Ibid [246].
64 Ibid [249].
65 Ibid [250].

84 On 23 March 2011, the applicant abandoned a pre-trial challenge to the validity of the telephone interception warrants that generated the recorded telephone conversations which were relied upon by the prosecution in Magnum.[66]

85 On 5 April 2011, Whelan J refused an application for a permanent stay of the Magnum prosecution.[67]

86 On 18 April 2011, the applicant was arraigned and entered a plea of guilty to the Magnum offence along with the Quills and Orbital offences.[68]

Police operations concerning the applicant: charges discontinued in plea deal

Kayak

87 The Kayak operation commenced in October 2000. On 24 August 2001, the applicant was arrested and charged by Victoria Police with three drug trafficking offences arising from Operation Kayak: one count of trafficking in a drug of dependence in a quantity no less than the commercial quantity (MDMA) and two counts of trafficking in a drug of dependence, respectively methylamphetamine and cocaine.[69]

88 On the same date, the applicant was charged by the AFP with being knowingly concerned in the importation of cocaine. That offence was ultimately prosecuted by the CDPP in 2006 in the Plutonium trial, which commenced before Gillard J in February 2006.[70]

89 On 15 February 2005, the applicant was committed to stand trial on the Kayak offences. The prosecution case depended largely on incriminating tape-recorded conversations in which the applicant was alleged to have participated with a police informer.[71]

90 The applicant left the jurisdiction before the Kayak trial commenced. He was extradited to stand trial on the Kayak offences.[72]

91 On 18 April 2011, after the plea negotiations which had commenced in early April 2011 culminated in the applicant pleading guilty to the Quills, Orbital and Magnum offences, the respondent informed the Court that a nolle prosequi would be entered for the Kayak offences. The nolle prosequi was formally entered on 24 May 2012.[73]

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66 Ibid [252].
67 Ibid [253]; *R v Mokbel (Magnum – Ruling No 2)* [2011] VSC 128 [31], referring to *Mokbel (Orbital & Quills – Ruling No 1)* [2010] VSC 331.
68 Reference determination [254].
69 Ibid [132], [134].
70 Ibid [135].
71 Ibid [137].
72 Ibid [140]–[141].
73 Ibid [143].

Landslip

92 Operation Landslip was established in 2001 to investigate the manufacture of methylamphetamine at a clandestine laboratory in Pascoe Vale between February 2001 and February 2002.[74]

93 As will be explained later, Mr Cooper was arrested on 13 February 2002 and charged as a result of this investigation. In July 2007, he signed a witness statement implicating the applicant in the manufacture of methylamphetamine at the Pascoe Vale laboratory. Mr Thomas had also signed a statement implicating the applicant in this offending, in July 2006. Ms Gobbo acted for Mr Cooper and Mr Thomas in relation to these matters. Her role in the production of these statements was not disclosed to the applicant at any time before the negotiations which resulted in him pleading guilty to the Quills, Orbital and Magnum offences.[75]

94 On 20 June 2007, following the applicant's arrest in Greece on 5 June 2007, a warrant was issued for his arrest on a charge of conspiracy to traffic in a commercial quantity of methylamphetamine. The applicant was extradited for that offence and other offences that related to Operation Landslip, including conspiracy to manufacture a commercial quantity of methylamphetamine.[76]

95 The applicant was committed to the Supreme Court to stand trial for the latter offence. It was intended that this would be the last of the drug trials to be prosecuted.[77]

96 On 18 April 2011, the respondent informed the Court that a nolle prosequi would be entered for the Landslip offence. The nolle prosequi was formally entered on 24 May 2012.[78]

Matchless

97 Operation Matchless was established in January 2003 to investigate the manufacture of methylamphetamine in a clandestine laboratory in Rye by Mr Cooper and his brother for three separate drug trafficking syndicates: one associated with the applicant's brother Milad Mokbel; one associated with the applicant with the assistance of his brother Kabalan Mokbel; and a third associated with others, including Mr Thomas who was working for Carl Williams.[79]

98 On 11 April 2003 Mr Cooper was arrested and charged with manufacturing a commercial quantity of methylamphetamine at the Rye laboratory. At that time, there was insufficient evidence to charge the applicant with that offending.[80]

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74 Ibid [153].
75 Ibid [154], [159]–[160], [165].
76 Ibid [161]–[163].
77 Ibid [163].
78 Ibid [164].
79 Ibid [174].
80 Ibid [176].

99 Following a contested committal hearing on 22 March 2005, Mr Cooper was committed to the County Court for sentence on a plea of guilty to the Matchless offence.[81]

100 In July 2007 Mr Cooper signed a witness statement implicating the applicant in the Matchless offence.[82]

101 In July 2006 Mr Thomas signed a witness statement also implicating the applicant (and others) in the Matchless offence.[83]

102 On 20 June 2007, following the applicant's arrest in Greece on 5 June 2007, a warrant was issued in the Melbourne Magistrates' Court for his arrest on a charge of trafficking in a large commercial quantity of methamphetamine between 1 September 2002 and 11 April 2004, being the Matchless offence. That offence also formed part of the extradition request.[84]

103 In June 2009, Mr Cooper and Mr Thomas gave evidence for the prosecution at the applicant's committal proceeding for the Matchless offence.[85]

104 On 19 June 2009 the applicant was committed to the Supreme Court for trial on that offence, where he indicated that he would plead not guilty.[86]

105 Again, on 18 April 2011, the respondent informed the Court that a nolle prosequi would be entered for the Matchless offence. The nolle prosequi was formally entered on 24 May 2012.[87]

106 As with Landslip, the role played by Ms Gobbo in Mr Cooper and Mr Thomas giving evidence against the applicant was not disclosed to him at any time before the negotiations which resulted in him pleading guilty to the Quills, Orbital and Magnum offences.[88]

Spake

107 Operation Spake was commenced in late August 2006 to investigate the manufacture of methylamphetamine at clandestine laboratories in Toolern Vale and Springvale in 2003 after Mr Cooper provided information upon his arrest on 22 April 2006 and agreed to assist police. Mr Cooper signed a witness statement implicating the applicant in that offending in July 2007.[89]

108 Mr Thomas had previously signed a witness statement in July 2006 implicating the applicant (and others) in the Spake offences.[90]

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81 Ibid [178].
82 Ibid [179].
83 Ibid [180].
84 Ibid [181]–[182].
85 Ibid [183].
86 Ibid [184].
87 Ibid [185].
88 Ibid [186].
89 Ibid [229], [231].
90 Ibid [232].

109 In addition, Mr Bickley told police that the applicant sourced chemicals and equipment for the drug manufacturing enterprises through him.[91]

110 On 19 June 2007, following his arrest in Greece on 5 June 2007, a warrant was issued in the Melbourne Magistrates' Court for the applicant's arrest for trafficking in a large commercial quantity of methylamphetamine and trafficking in MDMA on various dates between 19 December 2003 and 19 March 2006, being the two Spake offences.[92]

111 The applicant was extradited for the Spake offences. At a committal hearing in March 2009, Mr Cooper and Mr Bickley gave evidence and were cross-examined. On 6 March 2009 the applicant was committed for trial.[93]

112 The Spake charges were also the subject of a nolle prosequi that was formally entered on 24 May 2012.[94]

113 Once again, the role played by Ms Gobbo in Mr Cooper giving evidence against the applicant in respect of the Spake offences, and in Mr Thomas and Mr Bickley agreeing to implicate the applicant, was not disclosed to him at any time before the negotiations which resulted in him pleading guilty to the Quills, Orbital and Magnum offences.[95]

Ms Gobbo's assistance to police — 'rolling' potential witnesses (Quills and Orbital)

114 As will be seen, the applicant places particular reliance on assistance Ms Gobbo gave to Victoria Police as part of an overarching strategy to charge the criminal associates of the applicant and encourage them to give evidence or 'roll' against him. This included providing intelligence to police against her other clients so that they could be arrested and charged, and she could then give purportedly independent legal advice to those persons encouraging them to cooperate with police.

Mr Cooper

115 Ms Gobbo was retained by Mr Cooper:

(a) in relation to the Landslip charge from 14 November 2002 until no later than 23 February 2007 (date of sentence);

(b) in relation to the Matchless charge from at least 26 September 2003 (bail application) until no later than 23 February 2007; and

(c) after he was charged in relation to a clandestine laboratory in Strathmore from 22 April 2006 until no later than 23 February 2007.[96]

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91 Ibid [233].
92 Ibid [235].
93 Ibid [236]–[237].
94 Ibid [238].
95 Ibid [239].
96 Ibid [699]–[701].

116 Ms Gobbo assisted in 'rolling' Mr Cooper and in maintaining his continued cooperation as a witness against the applicant in six ways:[97]

(a) she identified Mr Cooper to Victoria Police as a vulnerable and valuable target to incriminate the applicant;

(b) she provided intelligence and assistance that was essential to Mr Cooper being arrested 'red-handed' in the clandestine drug laboratory at Strathmore in April 2006, so that he would be most predisposed to cooperating with police;[98]

(c) she advised police how to approach Mr Cooper following his arrest, including how best to conduct an interview with him;

(d) on Mr Cooper's arrest, Ms Gobbo was contacted by police to provide him with legal advice, and when she attended the police station, she advised him to cooperate with police;

(e) she was involved in the statement-taking processes that followed; and

(f) she was involved in an extended process of maintaining Mr Cooper's resolve to give evidence against the applicant in accordance with his statements.[99]

117 Among other things, in the lead-up to Mr Cooper's arrest, Ms Gobbo provided intelligence to her handlers which 'informed the techniques of persuasion and the interview strategy ultimately employed by Victoria Police'.[100] On 18 April 2006, she suggested a 'soft approach' upon Mr Cooper's arrest. She provided information about Mr Cooper's children and his relationship with them and said that Mr Cooper thought positively of Detective Sergeant Dale Flynn, the police officer responsible for managing Mr Cooper after his arrest in April 2006. The information provided by Ms Gobbo was helpful to investigators and was conveyed in a meeting held on the same day to develop an interview strategy for Mr Cooper's arrest and to discuss the 'sales pitch' and process of 'rolling' him.[101]

118 The reference judge found that Ms Gobbo cooperated with Mr Flynn, and that she continued to speak with Mr Cooper and visit him in custody, with the knowledge of Mr Flynn, while registered as an informer. Mr Flynn had a discussion with Mr Cooper that lasted over two hours, in which he sought to persuade him to agree to assist police, and Ms Gobbo actively assisted in that process.[102]

119 The reference judge found that a competent lawyer would almost certainly have advised Mr Cooper, on his arrest, that by agreeing to assist police, the sentence which would be imposed on him in the County Court would be discounted. The lawyer might have advised Mr Cooper that he should agree to assist police and that he should do so on that night. However, it was equally (if not more) likely that a competent lawyer would not

97 Ibid [325].
98 Ibid [328].
99 Ibid [332].
100 Ibid [344].
101 Ibid.
102 Ibid [332], [346].

have given Mr Cooper advice that night to assist police, or to agree to participate in an interview, without the lawyer first being fully apprised of all the circumstances, and having the opportunity to fully research the weight of the evidence against Mr Cooper.[103]

120 The reference judge did not accept that Ms Gobbo's advice to Mr Cooper on the night of his arrest and thereafter was attributable to friendship.[104]

Mr Bickley

121 Mr Bickley was arrested on 15 August 2005 as part of Operation Quills. He made a largely 'no comment' record of interview on his arrest. Ms Gobbo was retained by Mr Bickley to appear on a bail application following his arrest. She did not appear when his bail application was ultimately heard on 6 September 2005 due to a conflict of interest in respect of another client.[105]

122 In late September 2005, Ms Gobbo identified Mr Bickley as a person who had 'something big' on the applicant.[106] On 13 December 2005, Victoria Police asked Ms Gobbo to assist in 'rolling' Mr Bickley.[107]

123 Ms Gobbo received a brief of evidence in Quills in late December 2005 and was retained to advise Mr Bickley in the Quills matter as at that date.[108] She shared with Mr Rowe, the informant, the 'full complement of her instructions from Mr Bickley on his arrest' in the Quills operation.[109]

124 In mid-March 2006, Ms Gobbo devised a plan with her handlers to transfer a phone from Mr Cooper to Mr Bickley on the instructions of Mr Cooper, who wanted the phone because Mr Bickley had access to pill presses and MDMA powder. Ms Gobbo kept her handlers informed as the plan progressed.[110]

125 On 13 June 2006, Mr Bickley was arrested for allegedly conspiring with Mr Cooper to manufacture a large commercial quantity of MDMA. That arrest was based solely on a covertly recorded conversation the two men had on 24 April 2006, after Mr Cooper's arrest and agreement to assist police. Ms Gobbo was retained to act for Mr Bickley. Thereafter she provided advice in his pending plea proceeding, settled his case, and assisted in preparing his plea to the Quills offending. Ms Gobbo did not appear on the plea on 9 May 2007, at which Mr Bickley was represented by Mr Philip Dunn QC.[111]

126 On Mr Bickley's June 2006 arrest, Ms Gobbo advised him to agree to assist police by incriminating the applicant in the Quills offence.[112]

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103 Ibid [350], [356].
104 Ibid [339].
105 Ibid [193], [703].
106 Ibid [365].
107 Ibid [366].
108 Ibid [705].
109 Ibid [706].
110 Ibid [327(b)], [360].
111 Ibid [201], [707].
112 Ibid [361].

127 Between January 2007 and May 2008, Ms Gobbo informally provided Mr Bickley with advice. She gave him ad hoc advice about his legal affairs during his plea proceedings. The reference judge found that, at the least, the evidence supported the proposition that Mr Bickley reasonably believed Ms Gobbo was one of his lawyers at that time.[113]

128 The reference judge rejected a contention by the respondent that Mr Bickley would have cooperated with police irrespective of any involvement of Ms Gobbo on his arrest, or the advice she gave him after his arrest.[114]

129 She also did not accept the respondent's proposition that an independent lawyer would have given Mr Bickley the advice Ms Gobbo gave him (namely, to participate in the interview and assist police). A competent lawyer would have advised Mr Bickley that by agreeing to assist police, any sentence would be discounted. They might also have advised him that he should agree to assist police, and that he should do so that night, to maximise his prospects of being released on bail. But, as with Mr Cooper, it was equally likely that a competent lawyer would not have given Mr Bickley advice to assist police that afternoon or to participate in an interview, without the lawyer first being apprised of all the circumstances, including having researched the weight of the evidence against Mr Bickley.[115]

130 Ms Gobbo did not assume the role of 'handling' Mr Bickley as a witness. In contrast to her ongoing involvement in managing Mr Cooper, by the time Mr Bickley engaged other lawyers to represent him in the plea proceeding, she was not in regular contact with him.[116]

Mr Thomas

131 Between September 2004 and August 2006, Ms Gobbo was retained by Mr Thomas in relation to the murders of Jason Moran and Pasquale Barbaro. She ceased to act for Mr Thomas in those matters on 8 August 2006.[117]

132 After Ms Gobbo's registration as an informer on 16 September 2005, she identified Mr Thomas to police as someone who (together with Mr Cooper) had information that had the potential to 'put [the applicant] away for a long time'. Ms Gobbo was referring to what she knew of Mr Thomas and Mr Cooper 'cooking' drugs for the applicant (in respect of either Matchless or Landslip).[118]

133 Detective Sergeant Stuart Bateson and Detective Inspector James O'Brien visited Mr Thomas at Barwon Prison on three occasions between 22 February 2006 and 23 March 2006. Ms Gobbo was in regular telephone contact with Mr Thomas at that time, including immediately preceding the second police visit. On 19 March 2006, she

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113 Ibid [708]–[709].
114 Ibid [371]–[377].
115 Ibid [389], [392].
116 Ibid [395].
117 Ibid [711], [713].
118 Ibid [397]–[398].

visited Mr Thomas in prison, after which she reported to her handlers that he was '99 per cent likely' to make a statement to assist police.[119]

134 Ms Gobbo's role in persuading Mr Thomas to make statements implicating the applicant in drug offending was significant. She was instrumental in Mr Thomas's decision to assist police in their pursuit of the applicant and, with her encouragement and persistence, Mr Thomas was prepared to do so.[120]

135 The reference judge found that, in view of Mr Thomas' particular circumstances in early to mid-2006, when he inevitably faced a very lengthy term of imprisonment, a competent, independent lawyer would have given the same advice to Mr Thomas as Ms Gobbo did, to mitigate his sentence.[121]

136 Ms Gobbo attended the St Kilda Road police station on the evening of 18 July 2006 to read Mr Thomas's statements. She was shown all his statements then in existence in various investigations into drugs, homicides and other matters. She was asked to comment on their accuracy, and made amendments and annotations on them in red pen. On 19 July 2006, Mr Thomas signed statements in the Matchless, Quills and Spake matters. The reference judge found that Ms Gobbo's attendance at the St Kilda Road police station was entirely in the interests of assisting Victoria Police in her role as an informer, and her assistance as such was significant.[122]

137 In June and July 2007, Ms Gobbo was in very regular contact with Mr Thomas, reporting to her handlers that she was fielding calls from him daily.[123]

138 Ms Gobbo also assisted police by managing Mr Thomas for a period of time after he signed his statements in July 2006, but not beyond October 2007.[124]

Ms Gobbo's assistance to police — Magnum

139 The Magnum investigation was conducted entirely when the applicant was outside the jurisdiction, having absconded from the Plutonium trial. Ms Gobbo gave no information to police that was relevant to the investigation and was not in contact with the applicant during that time.[125]

140 The applicant relied on information Ms Gobbo provided to police after he was arrested and primarily after the prosecution commenced. The information overwhelmingly did not find its way to the police involved in the prosecution.[126]

141 The judge found that, while Ms Gobbo provided a valuable insight into the applicant's general attitude to the position in which he found himself, it was difficult to reach a positive finding that the information probably assisted in the prosecution for the

119 Ibid [399].
120 Ibid [402].
121 Ibid [403].
122 Ibid [406], [409].
123 Ibid [410].
124 Ibid [411].
125 Ibid [477].
126 Ibid [478]–[479], [482].

Magnum offending. Ms Gobbo's conduct was, however, a blatant attempt to undermine the integrity of the prosecution process.[127]

Ms Gobbo's assistance to police — extraditing the applicant

142 On numerous occasions between 6 June 2007 and 21 March 2008 Ms Gobbo relayed information to her handlers, including contents of discussions that she had with the applicant, and the applicant's proposed actions to resist extradition and information about his defence strategies.[128]

143 Ms Gobbo provided Victoria Police with updates concerning the applicant's strategy in Australian court proceedings he brought in respect of his extradition. She also attempted to assist Victoria Police in the extradition of the applicant.[129]

144 Ms Gobbo and Victoria Police actively worked together in an attempt to undermine the integrity of the extradition process, by Ms Gobbo relaying information to Victoria Police from her client and by Victoria Police receiving and disseminating that information.[130]

145 Ms Gobbo was making every attempt to assist Victoria Police in having the applicant returned to the jurisdiction to be prosecuted for a large array of serious drug charges, two charges of murder and an attempt to pervert the course of justice. Ms Gobbo was intent on assisting Victoria Police to realise that objective.[131]

146 It could not be shown, however, that any of the information that Ms Gobbo provided to her handlers ultimately assisted Victoria Police in securing the applicant's extradition. Ashleigh McDonald, the acting director of the Extradition Unit in the Attorney-General's Department, was not aware of the source of information relayed to her, much less that it had originated from the applicant's Australia-based lawyer. Nor could it be established that the information Ms Gobbo relayed to her handlers (including privileged information) was taken into account by the Greek prosecutor's office in their conduct of the extradition proceedings.[132]

147 On the other hand, by concealing from the applicant information about her role as an informer, Ms Gobbo denied him the opportunity of relying on that fact to seek to challenge his extradition in the Greek courts.[133]

148 The reference judge did not decide whether the applicant would or might have been extradited if Ms Gobbo's role as an informer to Victoria Police had been disclosed to the applicant or the Supreme Court of Greece. She found, however, that the extradition

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127 Ibid [481]–[482].
128 Ibid [495].
129 Ibid [496]–[497].
130 Ibid [501].
131 Ibid [502], [506].
132 Ibid [503]–[506].
133 Ibid [510].

process would very likely, if not certainly, have 'looked different' if Ms Gobbo's role had been fully disclosed to the Greek courts.[134]

Ms Gobbo acting as the applicant's lawyer

Relationship before the applicant absconded (20 March 2006)

149 The evidence did not establish the existence of a general or blanket retainer of Ms Gobbo by the applicant before he absconded in March 2006.[135]

150 Ms Gobbo was retained as the applicant's lawyer in the Plutonium and Kayak trials from September 2001 until 23 March 2006.[136]

151 Ms Gobbo was also engaged to represent the applicant after his arrest on the original two Orbital charges on 25 October 2005.[137]

152 The reference judge was not persuaded that Ms Gobbo had been retained to act for the applicant in the Matchless offence before he absconded.[138]

153 The applicant's concern that Mr Bickley might implicate him in the manufacture of MDMA pills, the subject of Quills, did not lead him to request legal services of any kind from Ms Gobbo. While Ms Gobbo was a conduit for the flow of information between Mr Bickley and the applicant, it was not shown that this was pursuant to any lawyer/client relationship.[139]

154 It was also not established that the applicant retained Ms Gobbo in relation to investigations involving Mr Thomas (in particular, Operation Macaw) before the applicant absconded in March 2006.[140]

155 In summary, before he absconded, the applicant was only in a lawyer/client relationship with Ms Gobbo in relation to Orbital, Kayak and Plutonium. Those three retainers were unilaterally terminated by the applicant when he absconded.[141]

Relationship during extradition process

156 Ms Gobbo was retained by the applicant during the extradition process after his arrest in Greece in June 2007 until his extradition to Australia in May 2008.[142] The retainer related principally to the extradition, but appears to have extended to general discussions about various matters in which the applicant sought Ms Gobbo's view as a lawyer (including Magnum, as discussed below). The retainer did not extend to Ms Gobbo providing specific advice, nor did the applicant seek any specific advice

134 Ibid [522]–[523].
135 Ibid [585], [587].
136 Ibid [546].
137 Ibid [550].
138 Ibid [593].
139 Ibid [596]–[597].
140 Ibid [598].
141 Ibid [599]–[600].
142 Ibid [601].

from her, concerning the nature or strength of the evidence in respect of any of the new drug charges he was due to face (Quills, Landslip, Matchless and Spake), or the strategies to be employed in defending the charges.[143]

157 On 20 May 2008, Ms Gobbo informed the applicant that she could not act for him in any of the proceedings before the courts in which Mr Cooper, Mr Bickley and Mr Thomas were named as witnesses, namely Quills, Landslip, Matchless and Spake.[144]

158 Otherwise, the lawyer/client relationship continued into 2008, albeit with a decreasing need for Ms Gobbo to have regular contact with Dr Mirko Bagaric (who was retained to advise after the applicant's arrest in Greece in June 2007) or the applicant.[145]

159 The applicant continued to seek Ms Gobbo's advice and legal counsel from time to time, even after the Australian challenges to the extradition process concluded unsuccessfully, and while the applicant was awaiting the outcome of his ongoing challenges to his extradition in Greece.[146]

160 It was also not shown that the retainer extended to the Magnum offences. However, in January 2008, the applicant and Ms Gobbo discussed the brief of evidence in Magnum, giving the appearance that she was providing him with legal advice concerning Magnum. The applicant could therefore reasonably have believed that she was, in fact, one of his lawyers at the time.[147]

161 The reference judge was not satisfied that Ms Gobbo's retainer to appear for the applicant in relation to Orbital and Kayak, which predated his absconding, was reinstated during this period.[148]

Relationship after the applicant's return to Australia

162 After the applicant's return to Australia, the evidence does not support the existence of a general lawyer/client relationship between the applicant and Ms Gobbo. There were instead a series of limited retainers entered into from May 2008.[149]

163 As from 20 May 2008, the lawyer/client relationship that had subsisted until that point was effectively terminated. There were, however, a number of telephone contacts between Ms Gobbo and the applicant after that time.[150]

164 The reference judge found that the extent of telephone contact in the eight month period between May 2008 and January 2009 demonstrated the existence of an agreement between the applicant and Ms Gobbo that she provide him with legal advice at his request, but only by telephone and when she was free to do so. She was not retained to

143 Ibid [601], [632]–[633].
144 Ibid [604].
145 Ibid [618], [624].
146 Ibid [625].
147 Ibid [627].
148 Ibid [633].
149 Ibid [614]–[615].
150 Ibid [650], [654]–[665].

advise him about the full range of criminal matters before the courts on an ongoing basis or to consider and read briefs of evidence for the purposes of such advice. There were, in effect, a series of ad hoc retainers concerning the applicant's current court matters, including how he should, or might, approach the evidence against him, but she was free to refuse his calls if she was busy.[151]

Relationship between Ms Gobbo's deregistration as an informer (13 January 2009) and the applicant's plea of guilty (18 April 2011)

165 The above relationship between the applicant and Ms Gobbo was current and continuing at the time of her deregistration as an informer in January 2009, and it continued until 30 June 2009. Their contact included calls up to his last attempted call to her from prison, on 25 August 2010. There were a significant number of calls after 30 June 2009 when Ms Gobbo ceased to hold a practising certificate. A lawyer/client relationship between Ms Gobbo and the applicant did not endure after that point.[152]

166 There was, however, no evidence that the change in Ms Gobbo's status was communicated to the applicant. The reference judge held that the fact that he continued to contact her after 30 June 2009 with the same pattern of regularity was strongly probative that he held the reasonable belief that she was a lawyer from whom he could seek legal advice on the same terms as previously. That state of affairs continued until towards the end of 2010. They had regular and lengthy telephone conversations in late December 2009, and in January, February and April 2010.[153]

167 The applicant did not seek any advice from Ms Gobbo in the course of his plea negotiations in April 2011.[154]

Ms Gobbo acting as the lawyer for potential witnesses

168 The reference judge addressed the question whether Ms Gobbo was acting for any of the persons who became witnesses against the applicant (including whether such persons reasonably believe that she was so acting) during any of the periods that she was assisting (or attempting to assist) Victoria Police in investigating and prosecuting them.

Mr Cooper

169 As mentioned, Ms Gobbo was retained by Mr Cooper:

(a) in relation to the Landslip charge from 14 November 2002 until no later than his sentencing on 23 February 2007;[155]

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151 Ibid [671], [675].
152 Ibid [681]–[682], [686].
153 Ibid [687], [694].
154 Ibid [695].
155 Ibid [699].

(b) in relation to the Matchless charge from at least 26 September 2003 until no later than 23 February 2007;[156]

(c) in relation to the Strathmore laboratory from 22 April 2006 until no later than 23 February 2007.[157]

Mr Bickley

170 Ms Gobbo was retained by Mr Bickley to appear on a bail application following his arrest in Operation Quills on 15 August 2005. She was under that retainer when Detective Sergeant Steve Mansell, a colleague of Mr Rowe, proposed that she become a police informer on 31 August 2005. Ms Gobbo did not appear when Mr Bickley's bail application was ultimately heard on 6 September 2005.[158]

171 The reference judge found that Ms Gobbo was under a retainer to advise Mr Bickley in the Quills matter when she told her handlers in December 2005 that she had been speaking with him about that brief and that she was scheduled to meet with him to discuss it.[159]

172 Ms Gobbo was also retained to act for Mr Bickley when he was arrested in June 2006. She gave him advice by telephone on two occasions that day including about a potential bail variation. From that time, she was engaged to represent him. She provided advice in his pending plea hearing, settled his case and ultimately assisted in preparing his plea to the Quills offending. She did not appear in his plea hearing on 9 May 2007, in which Mr Bickley was represented by Mr Dunn QC.[160]

173 The reference judge also found that Ms Gobbo gave Mr Bickley ad hoc advice about his legal affairs during his plea proceedings. At the very least, Mr Bickley reasonably believed that Ms Gobbo was one of his lawyers at that time.[161]

Mr Thomas

174 Between September 2004 and August 2006 Ms Gobbo was retained by Mr Thomas in relation to the murders of Jason Moran and Pasquale Barbaro, including representing him at mentions, a bail application and his arraignment on 29 June 2006.[162]

175 Ms Gobbo ceased acting for Mr Thomas in relation to the Moran and Barbaro murders on 8 August 2006.[163]

176 Ms Gobbo was also acting as one of Mr Thomas's lawyers when she made a legal prison visit to him in December 2006.[164]

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156 Ibid [700].
157 Ibid [701].
158 Ibid [703].
159 Ibid [704]–[705].
160 Ibid [707].
161 Ibid [709].
162 Ibid [711]–[712].
163 Ibid [713].
164 Ibid [715].

Duties owed by Ms Gobbo to the applicant and potential witnesses

177 The following account of the duties owed by Ms Gobbo is drawn from the findings of the reference judge on this issue.[165]

178 The duties Ms Gobbo owed to her clients included:

(a) a duty to act in their best interests ('the best interests duty');

(b) a duty to exercise reasonable skill and care in the provision of legal advice and/or legal representation ('the duty to exercise reasonable skill and care');

(c) a duty of confidentiality; and

(d) a duty of loyalty.[166]

179 The duty to exercise reasonable skill and care included a duty to endeavour at all times to protect her client's interests in the course of carrying out their instructions in the matters in which she was retained to advise and appear.[167]

180 These duties were variously sourced in contract, tort and equity, and under the *Victorian Bar Inc Practice Rules 2005* ('Victorian Bar Rules').[168]

Best interests duty

181 The best interests duty derived from the following provisions of the Victorian Bar Rules:

> 10. A barrister has the privilege of asserting and defending a client's rights and of protecting the client's liberty or life by the free and unfettered statement of every fact and the use of every argument and observation that can legitimately lead to that end according to the principles and practice of the law.
>
> 11. A barrister must seek to advance and protect the client's interests to the best of the barrister's skill and diligence, uninfluenced by the barrister's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the barrister or any other person, and always in accordance with the law including these Rules.
>
> …
>
> 149. A barrister representing a person charged with a criminal offence should endeavour to protect that person from being convicted, except by a competent tribunal and upon admissible evidence sufficient to support a conviction for the offence charged. A barrister must not invent facts to assist in advancing the defence case.

165 Ibid [724]–[769].
166 Ibid [725].
167 Ibid [738].
168 Ibid [726].

182 The scope of this duty was dictated by the scope of the retainer(s) in which she agreed to act as a lawyer and in which she delivered legal services or advice.[169]

183 Ms Gobbo only owed a duty to the applicant and others to act in their best interests when there was an extant lawyer/client relationship.[170]

Duty to exercise reasonable skill and care

184 The duty to exercise reasonable skill and care may arise under contract and in tort.[171] In either event, the content of the duty is to 'exercise that degree of care and skill to be expected of a member of the profession having expertise appropriate to the undertaking of the function specified in the retainer'.[172] The terms of the retainer again determine the scope and content of the duty. Ordinarily, any matter which fairly and reasonably arises in the course of carrying out a client's instructions falls within the scope of the lawyer's retainer and the lawyer's duty to exercise reasonable skill and care.[173]

Duty of confidentiality

185 In the disclosure proceedings, Ginnane J described the duty of confidentiality as follows:[174]

> Whereas duties of loyalty are most aptly described in the language of fiduciary obligation; duties of confidentiality are 'sourced from an amalgam of contract law and equity stemming from the peculiar relationship of lawyer and client'. Trust and confidence in the lawyer are however closely intertwined. The Victorian Bar Rules included this statement of principle:
>
> > A Barrister's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between barrister and client.[175]
>
> The Rules also provided:
>
> > A barrister must not disclose (except as compelled by law) or use in any way whether during or after the cessation of the relationship of barrister and client, confidential information obtained by the barrister concerning any persons' business or personal affairs unless or until:
> >
> > (a) The information has been published so as to become public knowledge;
> >
> > (b) The information is later obtained by the barrister from another person

169 Ibid [735].
170 Ibid [734].
171 See *Badenach v Calvert* (2016) 257 CLR 440, 457 [57] (Gageler J).
172 Ibid, citing *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, 53–4 [147] (Malcolm AJA), 117 [362] (McPherson AJA) and *Rogers v Whitaker* (1992) 175 CLR 479, 483 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).
173 Reference determination [737].
174 *AB v CD* [2017] VSC 350, [118]–[123] (original citations).
175 Victorian Bar Rules, r 62.

who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister; [or]

(c) The person has consented to the barrister disclosing or using the information generally or on specific terms.[176]

Rule 92 provided:

A barrister must refuse to accept or retain a brief or instructions to appear before a court:

(a) If the barrister has information which is confidential to any other party in the case other than the prospective client, and:

(i) The information may, as a real possibility, be material to the prospective client's case; and

(ii) The party entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case[.]

Rule 92 sets out a number of situations that make it untenable for a barrister to accept a brief, including in circumstances:

(q) where to do so would compromise the barrister's independence, involve the barrister in conflict of interest, or otherwise be detrimental to the administration of justice.

In limited circumstances, a barrister may be entitled by law to breach the client's confidence. [Ms Gobbo] relied on the general principle that there could be no confidence in an iniquity and justified her informing as so critical to the prevention of serious crimes as to warrant disclosure. The terms of the Bar Rules include such an exception, replicating in part the common law exception:

A barrister whose client threatens the safety of any person may, notwithstanding [their duty of confidence], if the barrister believes on reasonable grounds that there is a risk to any person's safety, advise the police or other appropriate authorities.

The exception reflects the particularly Australian common law exception to … an equitable duty of confidence as stated in the decision of *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)*:

Any principle of the kind I am now considering will be applied in equity where there is no reliance on contractual confidence. That principle, in my view, is no wider than one that information will lack the necessary attribute of confidence if the subject matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.[177]

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176 Ibid r 63.

177 (1987) 14 FCR 434, 456 (Gummow J).

186 The duty of confidentiality protects from disclosure information that a reasonable person in the position of the recipient of the information would have realised was imparted in confidence, including information imparted by a client to their lawyer in a social context.[178]

187 A communication between a lawyer and prospective client that meets the other requirements of privilege will be privileged prior to settling the terms of a retainer and may subsist even if no retainer is ever entered into.[179] The communication will be privileged if it is confidential and provided to the lawyer in their professional capacity, where the intention of the person making the communication is to seek legal advice or the provision of legal services in a way that is fairly referable to a relationship of lawyer and client.[180]

188 The duty of confidentiality attaches at the time the relevant information is imparted in confidence and continues as long as the information retains its confidential character.[181]

Duty of loyalty

189 The duty of loyalty encompasses a positive duty on a lawyer (for the benefit of the client):

(a) to avoid a conflict of interest (the 'no conflict' rule); and,

(b) not to profit from the lawyer/client relationship (the 'no profit' rule).[182]

190 The applicant focused his case on the 'no conflict' rule, which he submitted was breached persistently when Ms Gobbo's personal interests in meeting her obligations and responsibilities as a police informer were permitted to dominate over and divide the loyalty she owed her clients as a fiduciary. The applicant did not rely on breach of the 'no profit' rule.[183]

191 Ms Gobbo was bound under the Victorian Bar Rules and principles of equity not to act in a position of conflict in her dealings with them. Equity requires that 'fiduciaries give undivided loyalty to the persons whom they serve'.[184] The fiduciary duty arises from the characteristics of trust, confidence and vulnerability that typify a lawyer/client relationship.[185]

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178 Reference determination [744].

179 *Minter v Priest* [1930] AC 558, 573 (Viscount Dunedin), cited with approval in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd [No 2]* (2009) 180 FCR 1, 7 [19] (Finkelstein J) ('*Brookfield Multiplex'*).

180 *Brookfield Multiplex* (2009) 180 FCR 1, 7 [19] (Finkelstein J).

181 Reference determination [751].

182 Ibid [754].

183 Ibid [756].

184 *Breen v Williams* (1996) 186 CLR 71, 108 (Gaudron and McHugh JJ) ('*Breen*'). See also *Chan v Zacharia* (1984) 154 CLR 178, 198–9 (Deane J); *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 29–30 [67]–[69] (Gageler J); *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 46–7 [196]–[203] (Spigelman CJ, Sheller and Stein JJA) ('*Beach Petroleum*').

185 *Breen* (1996) 186 CLR 71, 108 (Gaudron and McHugh JJ).

192 The test for identifying a breach of the 'no conflict' rule was set out by Osborn JA in *Karam v The King*.[186] The reference judge adopted the following summary from the respondent's submissions in the present matter:[187]

> There will be a 'conflict'— ie there will be a breach of the no conflict rule — if there is a 'real and sensible possibility' that the *personal interests* of the fiduciary divide the loyalty of the fiduciary with the result that he or she could not properly discharge their duties to the beneficiary.[188]
>
> Whether a conflict arises is an objective question.[189] It requires the identification of the 'conflicting duty or interests'.[190] The identification of those duties and interests must be done with specificity.[191] Otherwise, no sensible and practical appraisal can be made of whether there is a real and sensibility possibility of conflict.[192]

193 The reference judge noted that the respondent accepted that the prevailing law in Victoria is that the duty of loyalty may survive the end of the lawyer/client relationship,[193] in accordance with the reasons of Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd* ('*Spincode*').[194] This is in contrast to authority in other Australian states[195] and the United Kingdom[196] to the effect that any fiduciary duties owed by a lawyer to a client come to an end with the termination of the retainer, and the only surviving duty relates to the preservation of the confidentiality of information imparted during the course of the retainer.[197]

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186 [2022] VSC 808 (the '*Karam reference determination*').

187 Reference determination [760].

188 *Maguire v Makaronis* (1997) 188 CLR 449, 465 (Brennan CJ, Gaudron, McHugh and Gummow JJ). See also *Karam reference determination* [2022] VSC 808 [455]–[457] (Osborn JA); *Break Fast Investments Pty Ltd v Rigby Cooke Lawyers (a firm)* [2022] VSCA 118 [55]–[56], [71] (Kyrou, McLeish and Walker JJA) ('*Break Fast Investments*').

189 *Coope v LCM Litigation Fund Pty Ltd* (2016) 333 ALR 524, 542 [109] (Payne JA, Gleeson JA agreeing at 526 [1], Leeming JA agreeing at 526 [2]); [2016] NSWCA 37.

190 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 200–1 [83] (McHugh, Gummow, Hayne and Callinan JJ).

191 Ibid 200–1 [82]–[83].

192 *Break Fast Investments* [2022] VSCA 118 [55(c)–(d)], [71] (Kyrou, McLeish and Walker JJA).

193 Reference determination [763].

194 (2001) 4 VR 501.

195 See *Beach Petroleum* (1999) 48 NSWLR 1, 47–8 [204]–[207] (Spigelman CJ, Sheller and Stein JJA); *Belan v Casey* [2002] NSWSC 58 [16]–[21] (Young CJ in Eq); *Kallinicos v Hunt* (2005) 64 NSWLR 561, 582 [76] (Brereton J).

196 *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, 235 (Lord Millett, Lord Browne-Wilkinson agreeing at 226, Lord Hope of Craighead agreeing at 226, Lord Clyde agreeing at 227, Lord Hutton agreeing at 227).

197 See also *ACN 092 675 164 Pty Ltd (in liq) v Suckling* (2018) 56 VR 448, 462 [63] (Riordan J), referring to *Cooper v Winter* [2013] NSWCA 261 [92]–[102] (Ward JA, McColl JA agreeing at [1], Barrett JA agreeing at [2]); *Maxwell-Smith v S & E Hall Pty Ltd* (2014) 86 NSWLR 481, 486–7 [24] (Barrett JA, Beazley P agreeing at 483 [1], McColl JA agreeing at 483 [2]); *Re IPM Group Pty Ltd* [2015] NSWSC 240 [32] (Black J); *Técnicas Reunidas SA v Andrew* [2018] NSWCA 192 [36] (Leeming JA, Bathurst CJ agreeing at [1], White JA agreeing at [86]).

194 In *Spincode*, Brooking JA expressed the view that a lawyer could be restrained from acting on the basis that it would amount to a breach of the lawyer's fiduciary duty of loyalty to a former client:

> I think it must be accepted that Australian law has diverged from that of England and that the danger of misuse of confidential information is not the sole touchstone for intervention where a solicitor acts against a former client. That danger can and usually will warrant intervention, but it is not the only ground. …
>
> … there is an equitable obligation of 'loyalty', which forbids not only the concurrent holding of two inconsistent engagements by different clients *in the same matter* but also the holding of two successive inconsistent engagements. … Once the contract of retainer comes to an end the solicitor does, it is true, cease to have active duties to perform for the former client. But why should we not say that 'loyalty' imposes an abiding negative obligation not to act against the former client in *the same matter*? The wider view, and the one which commends itself to me as fair and just, is that the equitable obligation of 'loyalty' is not observed by a solicitor who acts against a former client *in the same matter.* [198]

Duties owed to the Court

Ms Gobbo's duties to the Court

195 The reference judge found that it was only her retainers in relation to the Plutonium trial, the Orbital and Kayak offences and a restraining order retainer[199] that involved Ms Gobbo appearing in court for the applicant, before he absconded in March 2006.[200]

196 Ms Gobbo appeared for each of Mr Cooper, Mr Bickley and Mr Thomas from time to time in court proceedings, largely limited to applications for bail.[201]

197 Ms Gobbo, 'as an officer of the court concerned in the administration of justice … [had] an overriding duty to the court, to the standards of [her] profession, and to the public'.[202] The duty extended to her conduct outside of court.[203]

198 The reference judge referred to the description of the content of the duty in *Bolitho v Banksia Securities Ltd:*[204]

> (a) A lawyer must be candid with the court and not mislead the court in any way.

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198 (2001) 4 VR 501, 521–2 [52]–[53] (emphasis added).

199 The restraining order retainer concerned an application to vary a restraining order made in 2001 to allow for the release of restrained property to fund the applicant's trials: Reference determination [553].

200 Ibid [776].

201 Ibid.

202 *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid).

203 *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56, 60 [13] (Ipp J, Steytler J agreeing at 62 [23]).

204 Reference determination [773].

(b) A lawyer must not corrupt the administration of justice, which requires them to conduct cases with due propriety and not to further any dishonest conduct on the part of the client. A lawyer must not assert a case they know is false, connive at or attempt to substantiate a fraud, or assist in any way in dishonourable or improper conduct. If a client insists on a lawyer conducting the case improperly, the lawyer must withdraw.

(c) If a lawyer discovers that a witness intends or is likely to give false testimony, they are duty bound not to present that individual as a credible witness. A lawyer must not produce a witness statement which they know to be false, or where they know that the witness does not believe it to be true in all respects. If the lawyer is put on inquiry as to the truth of the facts stated in the statement, they should, where practicable, check whether those facts are true. If a lawyer discovers that a witness statement they have served is incorrect, they must inform the other parties immediately.

(d) It is a breach of duty for a lawyer to have a conflict of interest in representing a client, not only in respect of the fiduciary relationship with the client, but also to the court. The duty to the court arises from the court's concern that it should have the assistance of independent legal representation for the litigating parties. The integrity of the justice system and the concomitant preservation of public confidence in the administration of justice are both dependent on lawyers acting with perfect good faith, untainted by divided loyalties of any kind.

(e) A lawyer must exercise their judgment in the presentation of cases. They must advance only those points that are reasonably arguable. Mere mistake or error of judgment is not a breach of duty to the court, but misconduct, default or negligence of a serious nature may be a breach of that duty, and sufficient to justify an appropriate order.[205]

199 The judge also referred to the obligation in r 4 of the Victorian Bar Rules 'not to engage in conduct which is … prejudicial to the administration of justice; or likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute'.[206]

Victoria Police's duties to the Court

200 The reference judge referred to the obligations of legal practitioners representing the respondent and Victoria Police, and the obligations of members of Victoria Police admitted to legal practice who gave evidence. In addition, she referred to a police officer's statutory obligation to the public whom they serve, the institution they represent and the values they seek to uphold in the public interest, and their sworn duty to discharge all duties imposed upon them faithfully and according to law (that is, without affection, malice or ill-will). The judge held that this extended to a duty to the

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205 (2021) 69 VR 28, 84–5 [1319] (John Dixon J) (citations omitted), citing DA Ipp, 'Lawyers' Duties to the Court' (1998) 114 (January) *Law Quarterly Review* 63.

206 Reference determination [774].

Court (as part of the administration of justice) not to act contrary to the fundamental tenets of that oath.[207]

DPP's duties to the Court

201 The DPP was a member of the Bar at the relevant time and therefore owed the same duties to the Court as Ms Gobbo.

202 Prosecutors acting on behalf of the DPP, including those who appeared in the applicant's sentence and appeal proceedings, also owed duties under common law and the applicable professional rules to fairly assist the Court to arrive at the truth and to place all relevant material and submissions before the Court.[208]

Breaches of duties owed by Ms Gobbo to clients

Breaches of duties to the applicant

203 The reference judge set out in a schedule the instances in which the respondent conceded that Ms Gobbo disregarded the applicant's legal professional privilege and instances in which she communicated confidential information about him to her handlers, in breach of her duty of confidentiality.[209]

204 Over the course of her dealings with the applicant and his criminal associates, Ms Gobbo 'flagrantly and repeatedly' breached rr 11 and 149 of the Victorian Bar Rules.[210] She also breached her best interests duty from the time she agreed to act as an informer against each of her clients, and continued to act in breach of that duty when she relayed information to police about her clients in a manner adverse to their interests. The breaches were 'deliberate and repeated'.[211]

205 In relation to the applicant, the breaches commenced from the date of Ms Gobbo's registration as an informer on 16 September 2005 and continued for the duration of her registration.[212]

206 Ms Gobbo also breached her duties to exercise reasonable skill and care, and to act in the best interests of the applicant and her other clients, by agreeing to inform against them while under a retainer to them.[213]

207 Ms Gobbo further breached her duties to act in the best interests of the applicant, and to exercise reasonable skill and care, by failing to reveal to him the nature and extent of her relationship with Victoria Police.[214]

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207 Ibid [778]–[779], [784].
208 Ibid [785]–[786].
209 Ibid [790], annexure C.
210 Ibid [793]–[795]. Rules 11 and 149 are set out above at [181].
211 Ibid [795]–[796].
212 Ibid [797].
213 Ibid [798].
214 Ibid [799].

208 In respect of the duty of loyalty as articulated by Brooking JA in *Spincode*, the scope of the duty that Ms Gobbo owed to the applicant after March 2006 was limited to not acting in any capacity that would be in conflict with his interests in the three matters in respect of which she had been retained by him until 20 March 2006 (that is, Orbital, Kayak and Plutonium) or in relation to his extradition until late in 2007. She would only have been in breach of the 'no conflict' rule if, when acting for another client, she had acted inconsistently with the applicant's interests in those specific matters. There is no evidence that she did so.[215]

209 Similarly, Ms Gobbo was not under a continuing duty of loyalty to the applicant while he was absent from the jurisdiction after the retainers were terminated when she continued to assist police as an informer in their ongoing pursuit of him, including by informing against Mr Cooper and Mr Bickley so that they might 'roll' against him.[216]

210 However, Ms Gobbo breached her duty of loyalty to the applicant in the following ways:

(a) from when she first provided Victoria Police with information about the applicant in relation to Orbital (28 October 2005), when she provided information to Victoria Police about the applicant's instructions for his defence in Orbital, and until she ceased to act for him in connection with Orbital after he absconded on 20 March 2006;

(b) from the point when, as an informer, she first provided Victoria Police with information concerning the applicant in connection with Kayak (16 September 2005) until she ceased to act for him in connection with Kayak (23 March 2006);

(c) from when she first provided Victoria Police with information about the applicant in connection with Plutonium (12 December 2005), until 23 March 2006; and

(d) when, as an informer, she provided Victoria Police with information about the applicant in connection with his extradition (10 June 2007) until she ceased to act for him in relation to the extradition towards the end of 2007.[217]

211 In addition, by accepting the ad hoc retainers in which she agreed to advise the applicant about current and pending criminal matters after his extradition, Ms Gobbo owed the applicant a duty of loyalty. There was a 'real and sensible possibility' that Ms Gobbo's personal interests, in her continuing role as a registered informer after the applicant's extradition to Australia, divided her loyalty so that she could not properly discharge her duty of loyalty to the applicant.[218]

Breaches of duties to other clients

212 Ms Gobbo was in breach of her duty to act in the best interests of Mr Cooper and Mr Bickley, and the duty of care she owed to them, by masquerading as an independent

215 Ibid [807].
216 Ibid [808].
217 Ibid [810].
218 Ibid [813]–[814].

legal adviser upon their arrests, when she was, and had been, acting on behalf of Victoria Police as a registered informer.[219]

213 Ms Gobbo breached the duty of loyalty that she owed to Mr Cooper arising out of her retainer to act for and advise him in relation to the Matchless and Landslip charges, by providing information to Victoria Police over many months before April 2006, that facilitated his arrest at the Strathmore laboratory. Those breaches materialised when she was first retained by Mr Cooper in relation to the Strathmore matter on 22 April 2006 and continued when she advised him to admit his guilt in that matter, until her retainer ceased when he was sentenced in February 2007.[220]

214 The reference judge did not identify breaches of the duty of confidentiality that Ms Gobbo owed to Mr Cooper.[221]

215 Ms Gobbo breached the duty of loyalty that she owed to Mr Bickley from when he first retained her on his arrest on 13 June 2006 for the alleged conspiracy with Mr Cooper to manufacture MDMA until that retainer ceased.[222] As an informer, Ms Gobbo provided detailed information to Victoria Police that Mr Bickley and Mr Cooper had discussions regarding the proposed drug manufacturing, and she gave information to Victoria Police in relation to how Mr Bickley might respond to his arrest. Accordingly, when Ms Gobbo gave advice to Mr Bickley on the day of his arrest to assist police, she was in breach of the 'no conflict' rule.[223]

216 Ms Gobbo also breached her duty of loyalty to Mr Bickley arising from the Quills retainer (and her duty to act in his best interests) from when she was first retained in that matter in August 2005 until the sentence hearing in February 2007, on each occasion that she assisted Victoria Police in its investigation or prosecution of him, namely when:

(a) on 16 September 2005, she informed police of arrangements in relation to Mr Bickley's bail application;

(b) on 4 November 2005, she supplied police with Mr Bickley's mobile phone number;

(c) on 9 November 2005, she provided information about Mr Bickley's legal funding arrangements;

(d) on 20 March 2006, she told police about Mr Bickley's vehicles and his concerns about surveillance; and

(e) on 4, 7, 9 and 13 June 2006, she provided investigators with 'arrest tips' and her assessment of the likelihood of Mr Bickley assisting police if he were arrested

219 Ibid [801].
220 Ibid [815].
221 Ibid [832].
222 See [125] above.
223 Ibid [816]–[817].

and granted bail. She also gave them information that he had access to a pill press.[224]

217 Ms Gobbo breached legal professional privilege in respect of Mr Bickley (in addition to the breaches of the duty of loyalty identified above):

(a) on 28 November 2005, she had a one-hour meeting with Mr Bickley at his request about the AFP's interest in him in making a statement against the applicant in the Orbital matter. Ms Gobbo alerted Victoria Police to arrangements for that meeting and relayed the contents of the meeting after it concluded; and

(b) on 6 May 2007, in advance of Mr Bickley's plea hearing, Ms Gobbo had a detailed conversation, followed by a series of email exchanges, with Mr Rowe about that hearing. The entire course of the correspondence was designed to avoid her being subpoenaed to give evidence on Mr Bickley's behalf. Ms Gobbo discussed Mr Bickley's detailed instructions on the Quills matter with Mr Rowe before they were provided to Mr Dunn QC, who was representing Mr Bickley.[225]

218 Ms Gobbo also breached her duty of loyalty to Mr Thomas and her duty to act in his best interests, in that, while under obligations as a police informer:

(a) she was instrumental in Mr Thomas's decision to assist police in their pursuit of the applicant;

(b) she had a significant role in persuading Mr Thomas to make statements implicating the applicant in drug offending;

(c) she provided encouragement to Mr Thomas to make those statements, and acted with persistence in doing so.[226]

Breaches of duties owed to the Court

Breaches of Ms Gobbo's duties to the Court

219 Ms Gobbo acted in breach of her duties to the Court:

(a) when she appeared in a proceeding or signed documents filed with the Court in a proceeding in breach of the 'no conflict' rule; and

(b) when she breached the 'no conflict' rule in pre-trial proceedings relating to the Kayak trial and in appearances in the Magistrates Court in the Orbital proceeding.[227]

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224 Ibid [818]–[819].
225 Ibid [833].
226 Ibid [820]–[823].
227 Ibid [841].

Breaches of Victoria Police's duties to the Court

220 The reference judge found that the surreptitious use by Victoria Police of Ms Gobbo as an agent of police, during the arrests and interviews of Mr Cooper and Mr Bickley, deprived each of them of the advice of an independent lawyer and was an exercise of police powers of arrest in bad faith and in a way capable of undermining the administration of justice.[228]

Breaches of DPP's duties to the Court

221 This matter is dealt with later in these reasons.[229]

Common purpose of Ms Gobbo and Victoria Police

222 Ms Gobbo's registration as an informer by Victoria Police in September 2005, and her subsequent deployment and use until she was deregistered in January 2009, was pursuant, in large part, to a common purpose on the part of Victoria Police and Ms Gobbo to ensure that the applicant was charged with and convicted of serious offences.[230]

223 On 16 September 2005, members of the Source Development Unit of Victoria Police ('the SDU') met with Ms Gobbo over three hours to assess the potential value of the information she could provide as an informer. Each police officer in attendance knew that Ms Gobbo was the applicant's lawyer. Ms Gobbo revealed or discussed the applicant's attitude to his current charges and different ways to set him up or have him locked up, and other ways of applying pressure to him that might result in him pleading guilty.[231]

224 From the date of Ms Gobbo's registration in September 2005 until March 2006, she provided the SDU with information and intelligence about the applicant and his criminal associates.[232]

225 In arresting Mr Cooper and Mr Bickley in April and June 2006, the primary focus of police was not to bring them to account, but to encourage them to give evidence against the applicant. On 20 April 2006, Ms Gobbo discussed with her handlers the tactics and timing of the arrest of Mr Cooper and said that 'the whole aim of it is … from my point of view … the Mokbels'.[233]

226 Ms Gobbo's eagerness to assist police in their pursuit of the applicant was reignited after he was arrested in Greece in June 2007. At that time and throughout the extradition process, she relayed information she received as the applicant's lawyer to the SDU in

228 Ibid [849].
229 See [317]–[324] below.
230 Ibid [852], [874]–[875].
231 Ibid [856]–[857], [859].
232 Ibid [860].
233 Ibid [861], [863].

pursuit of the objective she shared with Victoria Police that the applicant be returned to the jurisdiction and prosecuted to conviction.[234]

227 The singular focus of Victoria Police, at the time of Ms Gobbo's registration, was to obtain information and intelligence about the applicant with a view to assisting the ongoing investigation into his drug manufacturing and trafficking enterprises, and Ms Gobbo's driving motivation was to provide information and intelligence to advance those investigations.[235]

Unlawfulness and impropriety

228 The reference judge was asked to decide whether the investigations, extradition or prosecution of the applicant involved conduct by Victoria Police and/or Ms Gobbo that was improper or unlawful or otherwise undermining of the administration of justice, or the appearance of the administration of justice. The judge treated 'unlawful' and 'improper' as having the meanings derived from the expressions 'in contravention of an Australian law' and 'improperly' in s 138 of the *Evidence Act*.[236]

229 The judge found that, at a global level, once it was found that Ms Gobbo and Victoria Police shared a common objective that the applicant should be convicted and imprisoned, and that it was agreed that she would act as an informer for police to achieve that objective, it followed that such conduct had a tendency to undermine the appearance of the administration of justice.[237]

230 Moreover, the judge found that the propositioning and registration of Ms Gobbo as an informer by Victoria Police, in order that she might inform against the applicant (a client who had the legal right and expectation that she would act conscientiously and in his best interests) was grossly improper, and a serious departure from the norms to which society would expect Victoria Police to adhere.[238]

231 The respondent conceded, and the judge accepted, that Victoria Police members were complicit in the following breaches by Ms Gobbo of her fiduciary duty of loyalty, and knowingly assisted in her 'dishonest and fraudulent design':[239]

(a) the initial breach of the duty of loyalty arising out of the circumstances in which Ms Gobbo gave Mr Cooper advice following his arrest;

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234 Ibid [864].
235 Ibid [867].
236 Ibid [878].
237 Ibid [890].
238 Ibid [895].
239 *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2 (Lord Selbourne LC, James LJ agreeing at 255, Mellish LJ agreeing at 256); *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, 575–6 [250], 582 [274] (Peter Gibson J). See also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 163 [174] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 361–3 [259]–[269] (Finn, Stone and Perram JJ); *Break Fast Investments* [2022] VSCA 118 [114]–[119] (Kyrou, McLeish and Walker JJA).

(b) the initial breach of the duty of loyalty in connection with the circumstances in which Ms Gobbo gave Mr Bickley advice following his arrest; and

(c) the ongoing breach of the duty of loyalty owed to the applicant in connection with the extradition retainer, arising out of the circumstances in which Victoria Police continued to receive information from Ms Gobbo in relation to the extradition process.[240]

232 The judge also found that Ms Gobbo's multiple breaches of her duty of loyalty to the applicant, and to those of her clients who gave evidence against him, was grossly improper, and the nature and extent of Victoria Police's complicity in that course of conduct was also grossly improper.[241]

233 In consequence of that deliberate and persistent course of conduct, public confidence in the administration of criminal justice in Victoria was undermined.[242]

234 The multiple occasions on which Ms Gobbo divulged confidential information (contained in annexure C of the reference determination) were neither occasional, accidental, nor random. They were systematic and repeated. To the extent that members of Victoria Police knowingly assisted Ms Gobbo in breaching her duty of confidentiality, that conduct by Victoria Police was improper.[243]

235 In respect of the extradition, Ms Gobbo was acting in breach of her fiduciary duty of loyalty and in breach of her contractual duties to act in the applicant's best interests and to exercise reasonable skill and care, when she provided him with legal advice while simultaneously informing Victoria Police about her discussions with him and his lawyers as well as his instructions. To the extent that Victoria Police encouraged that conduct, it was complicit in her improper conduct.[244]

236 In that respect, the relevant agreed facts included the fact that, while Ms Gobbo represented to the applicant that she was assisting him, she assisted Victoria Police by providing information to them about the applicant, lied to the applicant about what she knew and did not know relevant to the strength of the charges against him, and told Victoria Police she had formed the view that the applicant's Greek solicitor and Dr Bagaric were not doing a good job, while she told the applicant that Dr Bagaric was doing a good job. Victoria Police knew of each of these matters.[245]

237 The reference judge was unable to conclude that Ms Gobbo's conduct was or would have been irrelevant to the framing of a challenge to the extradition request under s 40 of the *Extradition Act 1988* (Cth). All that could be said was that the factual record relating to the applicant's extradition was materially deficient and the applicant was

240 Reference determination [900], [902].
241 Ibid [903].
242 Ibid [904].
243 Ibid [906], [909]–[910].
244 Ibid [915].
245 Ibid [916].

denied the opportunity to seek a remedy in the Australian courts based on a complete and accurate factual record.[246]

238 In conclusion, the judge found that Victoria Police assisted Ms Gobbo's breaches of fiduciary duty, as demonstrated by the fact that Victoria Police: asked Ms Gobbo on 31 August 2005 to 'get on board' in a conversation about the applicant; formalised that proposal in long conversations with her on 31 August and 16 September 2005 in which they elicited further information from her about the applicant; and then engaged in a regular and organised process by which Ms Gobbo was provided with the encouragement and facilities to continue to inform on the applicant.[247]

Specific unlawfulness and impropriety in respect of 'rolling' potential witnesses

239 The reference judge made findings in respect of specific conduct encompassed within the previous section of these reasons, namely the 'rolling' of potential witnesses against the applicant. The specific issue is whether the process by which those persons became witnesses against the applicant involved conduct by Victoria Police and/or Ms Gobbo that was improper or unlawful or otherwise undermining of the administration of justice, or the appearance of the administration of justice.

240 It should be borne in mind that, in respect of Mr Cooper, the respondent seeks leave to appeal the reference judge's finding that Ms Gobbo and four Victoria Police officers were parties to a joint criminal enterprise to attempt to pervert the course of justice in respect of the arrest of Mr Cooper in April 2006, by denying him independent legal advice before deciding to admit his guilt and agreeing to assist police on 22 April 2006.

Mr Cooper

241 The applicant submitted before the reference judge that the evidence established that Ms Gobbo and the officers in question agreed to participate in and give effect to a joint criminal enterprise to commit the common law offence of attempting to pervert the course of justice.[248] A person is guilty of attempting to pervert the course of justice when that person engages in conduct that has the tendency to pervert the course of justice and does so with that intention.[249]

242 In *R v Rogerson* ('*Rogerson*'), Brennan and Toohey JJ explained what is comprehended by perverting the course of justice:

> The course of justice consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual

246 Ibid [931].
247 Ibid [934].
248 Ibid [943]. In so far as the applicant also alleged a joint criminal enterprise to commit the common law offence of perverting the course of justice, and not just an attempt to do so, there was a fundamental difficulty, namely whether the object of the agreement could actually have prevented a court doing justice when Mr Cooper's plea was heard and determined in February 2007. The reference judge was unable to find that Mr Cooper's ultimate decision to plead guilty in 2007, in fact, impaired the capacity of the sentencing court to do justice: at [949]–[955].
249 Ibid, citing *Meissner* (1995) 184 CLR 132, 140–1 (Brennan, Toohey and McHugh JJ) ('*Meissner*').

> circumstances of the case. The course of justice is perverted (or obstructed) by impairing (or preventing the exercise of) the capacity of a court or competent judicial authority to do justice. The ways in which a court or competent judicial authority may be impaired in (or prevented from exercising) its capacity to do justice are various. Those ways comprehend … erosion of the integrity of the court or competent judicial authority, hindering of access to it, deflecting applications that would be made to it, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions.[250]

243 The judge found that the applicant had made out the common law offence of attempting to pervert the course of justice,[251] as follows:

(a) Ms Gobbo's attendance at the St Kilda Road police station on the afternoon of Mr Cooper's arrest on 22 April 2006, and her conduct from the time she arrived there until she left at 9:00pm, together with the conduct of the relevant police officers, allowed for a finding that they were party to an agreement that, upon his arrest, Mr Cooper would be denied independent legal advice before making the ultimate decision to admit his guilt and agreeing to assist police.[252]

(b) That conduct, compounded by the fact that Victoria Police and Ms Gobbo concealed from Mr Cooper the role that she had played in strategising his arrest, denied Mr Cooper access to the necessary information to make an informed decision whether to admit his guilt when he was before the sentencing court in February 2007.[253]

(c) It was contemplated that Mr Cooper's lawyer, who represented him on the plea hearing, would be deceived as to the true circumstances of Mr Cooper's arrest and the circumstances in which he agreed to be interviewed by police and admit his guilt.[254]

(d) Ms Gobbo's conduct on the night of Mr Cooper's arrest far exceeded the bounds of 'reasoned argument or advice'. It was advice which was at all times motivated by her desire to advance the interests of Victoria Police. Her role in overcoming Mr Cooper's resistance was 'probably decisive'. She herself said that she 'push[ed] him over the line'.[255]

(e) The agreement to which the five persons were party by 20 April 2006, and in which they variously participated after that date up to and including the late evening of 22 April 2006, had as its object that:

(i) improper pressure would be applied to the exercise of Mr Cooper's free will and voluntary choice to admit his guilt to police on 22 April 2006 (and to agree to assist police), and

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250 (1992) 174 CLR 268, 280 (Brennan and Toohey JJ) (citation omitted); see also 277 (Mason CJ).
251 Reference determination [1010]–[1018].
252 Ibid [1010].
253 Ibid [1011].
254 Ibid [1012].
255 Ibid [1016].

(ii) when Mr Cooper ultimately pleaded guilty after that date, he would do so without learning of the role that Ms Gobbo had played before his arrest and on the night of his arrest.[256]

244 The judge found that the conduct of the parties to the agreement had the objective tendency to pervert the course of justice. The parties intended to act, and did in fact act, with the requisite intention that the course of justice should be perverted in the sense discussed above.[257]

245 This finding as to a joint criminal enterprise on the part of the relevant officers and Ms Gobbo, in respect of the treatment of Mr Cooper, is the subject of ground 3 of the respondent's proposed appeal against the reference determination.

Mr Bickley

246 The reference judge did not accept that the applicant had proved the existence of a joint criminal enterprise between Ms Gobbo and the relevant officers to attempt to pervert the course of justice in Ms Gobbo's dealings with Mr Bickley. There was no allegation that it was agreed that improper pressure would be applied to Mr Bickley to enter a guilty plea to any of the charges. After Mr Bickley agreed to assist police, he was released without charge.[258]

Mr Thomas

247 There were equally insurmountable difficulties with the applicant's case that Ms Gobbo (alone) perverted or attempted to pervert the course of justice in relation to Mr Thomas. Ms Gobbo's role in persuading Mr Thomas to make statements implicating the applicant was significant, and she was instrumental in his decision to assist police in their pursuit of the applicant. Ms Gobbo thereby acted in breach of her duties to Mr Thomas (including by failing to disclose to him her role as an informer), but given that Mr Thomas almost inevitably faced a very long term of imprisonment for his involvement in multiple murders, a competent 'uninformed' and 'unconflicted' lawyer would probably have given him the same advice (to assist police) if he wanted to mitigate his sentence.[259]

Whether Victoria Police took steps to ensure lawfulness and propriety

248 The next issue is whether Victoria Police took steps to ensure that Ms Gobbo's conduct and its use of Ms Gobbo were not improper or unlawful and did not otherwise risk undermining the administration of justice.

249 Advice was obtained from Mr Gerard Maguire of counsel on 4 October 2011, not to enable Victoria Police to reflect on the legality or propriety of Ms Gobbo's registration

256 Ibid [1017].
257 Ibid [1018].
258 Ibid [1021].
259 Ibid [1023]–[1024].

as an informer, but to guide Victoria Police as to how to respond to a proposed subpoena in the prosecution of Mr Paul Dale, in which Ms Gobbo was a potential witness.[260]

250 In the course of providing that advice, Mr Maguire expressed the unsolicited opinion that there might be real problems for the administration of justice in respect of Ms Gobbo's previous use as an informer against her clients. Victoria Police did not take any immediate action on receipt of that advice.[261]

251 On 19 March 2012 Assistant Commissioner Graham Ashton engaged former Chief Commissioner Neil Comrie to prepare a report on the processes and procedures of Victoria Police in managing Ms Gobbo.[262]

252 Superintendent Stephen Gleeson was engaged to assist Mr Comrie. Mr Gleeson's concerns about the role of Ms Gobbo as a police informer escalated as he reviewed more material, which he considered he was duty-bound to report. A progress report prepared by Mr Gleeson dated 30 April 2012 and titled 'Human Source Review – Update of 1/5/12' was sent to Assistant Commissioner Jeff Pope and Findlay McRae (executive director of legal services for Victoria Police) on that date.[263]

253 In that report, Mr Gleeson expressed concerns about the inadequacies of the initial risk assessment process conducted by the SDU in November 2005 concerning the use of Ms Gobbo, and the 'ever escalating level of risk' over the use of her as an informer. In that context, he advised that he was securing legal advice from the Victorian Government Solicitor's Office.[264] The resulting advice, dated 6 June 2012, was co-signed by Managing Principal Solicitor David Ryan, and came to be known as the 'Ryan advice'.[265]

254 The Ryan advice stated that the relay of information known to be subject to legal professional privilege between a lawyer who is a human source and Victoria Police to assist in the prosecution of the lawyer's client amounts to a conspiracy which undermines the criminal justice system.[266]

255 On 22 June 2012 Mr Gleeson wrote to Mr Pope advising that he had identified records that raised significant issues of concern regarding the use of Ms Gobbo, which were outside the scope of Mr Comrie's review. He stated that full consideration of the matters would require substantial further investigation and consultation with various other parties. In the 'out of scope' report, he concluded that 'Ms Gobbo's conduct may have compromised rights to a fair trial to those concerned and that there were concerns her conduct and the conduct of Victoria Police could suggest they had undermined the justice system'.[267]

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260 Ibid [1046].
261 Ibid [1047]–[1048].
262 Ibid [298], [1049].
263 Ibid [299]–[301].
264 Ibid [1053].
265 Ibid [1054].
266 Ibid [1054].
267 Ibid [302], [1052].

256 Mr Comrie's review was completed on 30 July 2012 and the report was presented to Chief Commissioner Kenneth Lay. In one section of the report it was observed, as Mr Ryan had, that the exchange of information, known to be subject to legal professional privilege between a lawyer who is a human source, and police, to assist in the prosecution of the lawyer's client, amounts to a conspiracy which undermines the justice system.[268]

257 The respondent accepted that senior members of Victoria Police should have sought legal advice concerning the proposed use of Ms Gobbo in September 2005.[269] Advice should have been sought:

(a) in relation to Ms Gobbo's use as an informer generally, given her position as a criminal defence barrister;

(b) in relation to the legal implications of Ms Gobbo acting for Mr Cooper following his arrest in April 2006; and

(c) in discussions in 2007 and late 2008 concerning the proposal that Ms Gobbo transition to becoming a witness in light of her role as a registered informer.[270]

258 The reference judge also found that legal advice should have been obtained:

(a) during the preparation of a document ('the SWOT analysis') in December 2008 for the attention of Deputy Commissioner Simon Overland, which identified the organisational risk of disclosing Ms Gobbo's then current role as an informer; and

(b) upon receipt of Mr Maguire's advice in October 2011.[271]

259 Officer Black[272] prepared the SWOT analysis in late 2008 at the request of Superintendent Anthony Biggin (who managed the SDU from 2006). The document was always intended for Mr Overland. The purpose of the document was to assess the strengths, weaknesses, opportunities and threats associated with Ms Gobbo being transitioned to a witness.[273]

260 On 31 December 2008, Officer Black completed the SWOT analysis. The report identified 'weaknesses' and 'threats' posed by Ms Gobbo's potential transition to a prosecution witness and the inevitable exposure of her role as an informer. These included:

- Possible [Office of Public Integrity ('OPI')] / Government review into legal/ethical implications

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268 Ibid [304], [1051].
269 Ibid [1057].
270 Ibid [1058].
271 Ibid [1059].
272 A pseudonym.
273 Reference determination [1147]–[1148].

- Judicial review of police actions in tasking and deploying one of their own

…

- OPI Review – Serving barrister assisting Police; Consideration of unsafe verdicts & possible Appeals; Prosecutions current (MOKBEL) & future?[274]

261 The reference judge found that the ultimate responsibility for the failure to obtain legal advice lay with Mr Overland. She found that Mr Overland was informed by Mr O'Brien of Ms Gobbo's proposed registration as an informer on 12 September 2005, and that he should have directed at that time that legal advice be obtained.[275]

262 The judge did not find that, when Mr Overland was told by Mr O'Brien on 12 September 2005, consideration was being given to registering Ms Gobbo as an informer, Mr Overland deliberately did not obtain legal advice as to the legality and propriety of that proposal. However, she did find that, after September 2005, Mr Overland deliberately ignored the views of others that legal advice should be obtained.[276]

263 The judge was satisfied that Mr Overland deliberately did not seek legal advice, in order to avoid being advised that it would be improper and potentially unlawful to continue to use Ms Gobbo as an informer because of the risk it posed to the integrity of the administration of criminal justice, and to avoid being told that her past use would inevitably be disclosable if she were transitioned to a witness.[277]

264 The respondent conceded that other steps taken during the course of the management of Ms Gobbo as an informer between September 2005 and January 2009, which were directed to ensuring that her use as an informer was not improper or unlawful, were largely unsuccessful.[278]

265 The respondent also accepted that Ms Gobbo was not effectively discouraged or prevented by her handlers from engaging in conduct which would put her in conflict with the interests of her clients against whom she was informing.[279]

266 The reference judge concluded that:

(a) none of Ms Gobbo's handlers ever prevented her from representing Mr Cooper while at the same time working with Victoria Police to strategise his arrest;

(b) her handlers and the investigators did not actively prevent her from representing Mr Cooper on his arrest and giving him advice at that time;

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274 Ibid [1151].
275 Ibid [1083].
276 Ibid [1092]–[1093].
277 Ibid [1094].
278 Ibid [1095].
279 Ibid [1099].

(c) nobody stopped Ms Gobbo from advising Mr Bickley by telephone on the day of his arrest; and

(d) nobody stopped Ms Gobbo or advised her against representing Mr Thomas while she was acting with police to encourage him to assist police.[280]

Knowledge of Victoria Police

267 A further aspect of the issue just canvassed is when Victoria Police knew, or when ought it have known, that the use of Ms Gobbo in relation to the applicant or persons who became witnesses against him was, or might have been, improper, unlawful or otherwise undermining of the administration of justice (or its appearance).

268 In answering this question, the reference judge treated 'actual knowledge' as extending to wilfully shutting one's eyes to the obvious and wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make. She used 'constructive knowledge' to refer to knowledge of circumstances which would indicate the facts to an honest and reasonable person, and knowledge of circumstances which would put an honest and reasonable person on inquiry.[281]

269 The respondent conceded that Victoria Police ought to have known that its planned use of Ms Gobbo as a registered informer may have been improper (but not unlawful) around the time of her registration. Mr Overland knew of and permitted Ms Gobbo's registration as a human source to target the applicant and his syndicate, knowing that she represented several of its members, including the applicant.[282]

270 The respondent also conceded that, once the advice was received from Mr Maguire in October 2011, Victoria Police had actual knowledge that its use of her may have been improper, and that, after receiving Mr Kellam's report in February 2015,[283] Victoria Police knew that its use of Ms Gobbo had in fact been improper.[284]

271 The reference judge found that it must have been apparent to Victoria Police sometime between 31 August 2005 and 16 September 2005 that there were grave risks of illegality in taking the unprecedented step of propositioning, and then registering, a practising criminal barrister as a police agent. By not seeking legal advice as to the proposed registration of a practising criminal barrister as a police agent, Victoria Police wilfully and recklessly failed to make such inquiries as an honest person would have made. The judge did not, however, impute to Victoria Police any deliberate strategy to avoid obtaining legal advice in order to obtain the advantage of having someone as close to the applicant as Ms Gobbo prepared to inform against him.[285]

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280 Ibid [1100].
281 Ibid [1105].
282 Ibid [1111]–[1112].
283 See [305]–[306] below.
284 Reference determination [1117].
285 Ibid [1120]–[1124].

272 Victoria Police as an institution was found as to have known of the risk of illegality from the date of an initial SDU risk assessment on 23 November 2005, and in any event from the date of the SWOT analysis on 31 December 2008.[286]

273 The risk assessment of 23 November 2005 recorded that:

(a) Ms Gobbo was then acting for members of the 'Mokbel criminal cartel', including the applicant;

(b) Ms Gobbo's sole motivation was 'to be rid of' the clients in that category;

(c) Ms Gobbo was well-positioned to obtain tactically viable intelligence in relation to the criminal activities of the 'Mokbel cartel', the majority of which would come from the very person on whom she was informing, which would often be her clients, including the applicant;

(d) Because of Ms Gobbo's occupation and position, if compromised, the handling of her as a source would come under 'extreme scrutiny' which 'could cause embarrassment and criticism' of Victoria Police.[287]

274 The reference judge found that, at the time of the risk assessment, Victoria Police knew that its continued use of Ms Gobbo may be unlawful.[288]

275 The judge also found that Mr O'Brien knew that the use of Ms Gobbo may be unlawful when he first proposed to Mr Overland that she be used as an informer. Mr O'Brien's apparent indifference to concerns raised by a colleague about the propriety of using Ms Gobbo's assistance, and his express preference to wait and assess the worth of that assistance, amounted to wilfully shutting his eyes to the obvious risks of illegality, and a wilful and reckless failure to make such inquiries as an honest and reasonable person would have made, including by seeking legal advice, or raising the matter again with Mr Overland and urging him to do so.[289]

276 The judge also found that a number of senior members of Victoria Police unilaterally redacted a range of documents that would have been susceptible to disclosure in curial proceedings, in order to conceal Ms Gobbo's involvement in numerous investigations that resulted in charges being laid against a number of people.[290]

277 She found that, in its determination to preserve the secrecy of its prolonged use of Ms Gobbo as an informer, Victoria Police engaged in active deception of the courts and agencies in the Victorian system of justice, and other institutions and agencies.[291]

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286 Ibid [1127] referring to [1106].
287 Ibid [1129]–[1131].
288 Ibid [1133].
289 Ibid [1143].
290 Ibid [1420].
291 Ibid [1426].

Importance of improperly or unlawfully obtained evidence

278 The reference judge found that the respondent had accepted that if full disclosure had been made:

(a) there would have been reasonable grounds for the applicant to have made an application for a stay of proceedings in each of Quills, Orbital, Magnum, Kayak, Landslip, Matchless and Spake prosecutions;[292]

(b) there would have been reasonable grounds to seek the exclusion of evidence under s 138 of the *Evidence Act* (on the basis of impropriety) in some of those cases.[293]

279 The first of those findings is the subject of ground 1 of the respondent's proposed appeal against the reference determination.

280 The reference judge did not decide whether a stay would have been granted or whether particular evidence would have been excluded under s 138 of the *Evidence Act*.[294]

281 She did, however, identify evidence that may have been excluded on the basis of having been improperly or unlawfully obtained, and also considered whether the strength of the prosecution cases against the applicant would have been adversely impacted if that had happened.[295]

282 In addressing these issues, the judge proceeded on the basis that, in the case of the Quills and Orbital prosecutions, evidence in one case would have been evidence in the other.[296] This is the subject of ground 2 of the respondent's proposed appeal against the reference determination.

283 In respect of Quills and Orbital, the judge concluded that, because Mr Bickley was an important witness in both matters (less so in Orbital), and because of the decision to prosecute the applicant on a single presentment/indictment containing both charges, the prosecution would have remained viable (in the sense that the applicant would have had a case to answer) if Mr Bickley's evidence had been excluded, but it would have been significantly weakened.[297]

284 Ground 2 of the respondent's proposed appeal against the reference determination also takes issue with the finding that the Orbital prosecution would have remained viable if Mr Bickley's evidence had been excluded, contending instead that the case would have remained 'strong'.

285 In the case of Landslip, the applicant was only charged on 20 June 2007 after Mr Cooper decided in April 2006 to assist police by signing statements implicating the applicant in that offending. The respondent accepted that, without Mr Cooper's evidence, the

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292 Ibid [1227].
293 Ibid [1228].
294 Ibid [1229].
295 Ibid [1230].
296 Ibid [1233].
297 Ibid [1235]–[1247].

prosecution case would have been significantly weakened. The respondent did not suggest that, in the absence of Mr Cooper's evidence, there was sufficient evidence to commit the applicant for trial.[298]

286 In respect of the Matchless prosecution, the judge reached the same conclusion.[299]

287 In the case of Spake, Mr Cooper was a central witness. On the prosecution case, he made arrangements for the manufacture of methylamphetamine at a property in Toolern Vale at the applicant's direction. Although the owner of that property made eight separate statements implicating the applicant, nominating him as the principal of a drug manufacturing enterprise, neither Mr Bickley nor Mr Cooper could corroborate that evidence. There was no forensic evidence directly linking the applicant with the property, or a second rural property to which it was alleged that the applicant moved the operation.[300]

288 The judge did not find that there would have been insufficient evidence to proceed, had the evidence of Mr Cooper and Mr Bickley been excluded. However, the prosecution case would again have been significantly weakened. Mr Bickley's evidence supported the prosecution case against the applicant in a general sense and Mr Cooper's evidence was available to prove that the applicant was an overseer for the drug manufacturing operations at the two rural properties.[301]

289 In respect of Magnum and Kayak, the position was entirely different. The applicant accepted that disclosure of Victoria Police's use of Ms Gobbo as an informer would not have resulted in any evidence relied on by the prosecution being liable to exclusion in either case. The strength of the prosecution cases based on the admissible evidence in proof of the Magnum and Kayak offences would have remained unchanged.[302]

Timing of knowledge of police and prosecutors as to possible effect on prosecutions or extradition

Victoria Police

290 It follows from the reference judge's finding that Victoria Police knew or ought to have known, at the time of Ms Gobbo's registration in September 2005, that her use as an informer may be improper, that Victoria Police must also be taken to have known that some or all of the prosecutions of the applicant, both current or pending, may have been adversely affected as a result of Ms Gobbo's conduct.[303]

291 That possibility crystallised with the publication of the SWOT analysis in December 2008 or January 2009, after which Victoria Police is to be taken to have known that the

298 Ibid [1248], [1251]–[1252].
299 Ibid [1253].
300 Ibid [1254]–[1257].
301 Ibid [1257]–[1258].
302 Ibid [1260].
303 Ibid [1266].

past and pending prosecutions of the applicant would be likely to be adversely affected by the use of Ms Gobbo as an informer.[304]

292 Victoria Police took no steps of any kind to notify the Court or the applicant that his prosecutions or extradition may have been adversely affected by its previous use of Ms Gobbo as an informer, until proceedings were initiated in the Supreme Court in June 2016.[305]

293 By January 2009, Mr Overland knew that Ms Gobbo's use by Victoria Police as an informer had transgressed proper legal bounds, or had probably done so, at the least by breaching the duty of loyalty she owed to clients against whom she was informing. No steps were taken at the time to notify the courts or the applicant of that fact.[306]

294 Victoria Police is also to be taken to have had knowledge that the process of the applicant's extradition may have been adversely affected by Ms Gobbo's use as an informer, given the central role she played in 'rolling' the witnesses whose evidence was critical to a large number of the charges upon which extradition was sought.[307]

295 Victoria Police took no steps, on receipt of Mr Maguire's advice in November 2011, to notify the courts or the applicant of Ms Gobbo's role as an informer, despite Mr Maguire signalling, in clear terms, the potential for her role to have adversely affected the applicant.[308]

296 As mentioned, on 19 March 2012, Mr Comrie was engaged by Mr Ashton to undertake a confidential review of Ms Gobbo's use as an informer.[309]

297 On 1 June 2012, there was a meeting involving the DPP, Mr McRae and others.[310] That meeting is the subject of the applicant's proposed appeal against the reference determination, and it is convenient to defer consideration of it for that reason.

298 On 6 June 2012, Mr Ryan provided his advice to Mr McRae.[311]

299 Mr McRae gave evidence that he attended a meeting on 6 June 2012 at which Mr Gleeson, who was assisting Mr Comrie, discussed the contents of Mr Ryan's advice with Stephen Lee (Assistant Victorian Government Solicitor).[312]

300 On 22 June 2012, Mr Gleeson sent Mr Pope his 'out of scope' report in which he advised that he had identified significant issues of concern regarding the use of Ms Gobbo which were beyond the scope of Mr Comrie's review.[313]

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304 Ibid [1267].
305 Ibid [1275].
306 Ibid [1268].
307 Ibid [1269].
308 Ibid [1270].
309 Ibid [1289].
310 Ibid [1294].
311 Ibid [1299]; see [254] above.
312 Ibid [1301].
313 Ibid [1302]; see [255] above.

301 On 22 August 2012, Mr McRae and Mr Gleeson met with Mr Pope and discussed whether Victoria Police was required to make further disclosure to the DPP, as a result of what Mr Gleeson had identified as Ms Gobbo's ongoing dialogue with the applicant and Victoria Police during the course of his extradition.[314]

302 On 23 August 2012, Mr McRae attended a meeting with Mr Ashton and Mr Pope. His notes recorded that the meeting addressed 'further disclosure to DPP regarding activities of [Ms Gobbo]' and that it was 'agreed that DPP should be informed that [Victoria Police] is examining information passed to police regarding potentially her own clients ...[315]

303 On 4 September 2012, a further meeting with the DPP was convened, attended by Mr McRae, Mr Gleeson and Mr Gardner (manager of the police and advice directorate at the Office of Public Prosecutions). Mr Gleeson provided to the DPP an overview of Mr Comrie's report and his own 'out of scope' report. Mr Gleeson raised the issue of the applicant's extradition proceedings as an example of the potential adverse influence of Ms Gobbo.[316]

304 The reference judge referred to steps taken by Victoria Police to bring order to the SDU records and to identify the scope of potential conflicts identified as a result. She also described a series of exchanges between Victoria Police and the DPP's office. She found that, at the end of 2014, Victoria Police and the DPP were 'deadlocked' as to what steps should be taken.[317]

305 In April 2014, Victoria Police referred the matter of Ms Gobbo's use as an informer to the Independent Broad-based Anti-corruption Commission ('IBAC') and an investigation into Victoria Police's conduct in their dealings with Ms Gobbo commenced. IBAC commissioned the Hon Murray Kellam AO QC to inquire into Victoria Police's use of Ms Gobbo as an informer between 2005 and 2009.[318]

306 IBAC produced Mr Kellam's report in February 2015. The conclusions reached in the report were described by the reference judge as 'damning'.[319] Mr Kellam identified nine individuals including the applicant whose cases may have been affected by Victoria Police's use of Ms Gobbo as an informer.[320]

307 On about 13 February 2015, a copy of Mr Kellam's report was sent to the DPP.[321]

308 Following receipt of Mr Kellam's report, the DPP undertook an independent review of the records of his office relating to Ms Gobbo. On 10 March 2016, the DPP notified Mr Ashton that he proposed to disclose Ms Gobbo's role to the applicant and others potentially affected by her conduct in accordance with draft disclosure letters.[322]

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314 Ibid [1306].
315 Ibid [1308].
316 Ibid [1311]–[1312].
317 Ibid [1314]–[1337],
318 Ibid [41], [307], [1338].
319 Ibid [1340].
320 Ibid [41], [307]; annexure A.
321 Ibid [1341].
322 Ibid [1276].

309 On 21 May 2015, Mr McRae, Assistant Deputy Commissioner Patton, Mr Gardner and the DPP attended a meeting at which the DPP advised that the review of his records, in relation to nine individuals referred to in Mr Kellam's report, was being conducted by Dr Sue McNicol SC, and that he would await her report before advising the Victorian Attorney-General of his position. That occurred in March 2016.[323]

310 The reference judge found that Victoria Police took progressive and ever more focused attempts, after Mr Comrie's report of July 2012, to have the DPP take on the responsibility of disclosing Ms Gobbo's role to the applicant, without success, until Mr Kellam's report prompted the DPP to undertake his own review of the records in 2015. Nevertheless, there were many occasions, from the provision of Mr Maguire's advice in November 2011, on which Victoria Police failed to take appropriate steps to address the issue of Ms Gobbo's role as an informer, and to alert the Court and the applicant of the potential impact of her conduct on the applicant's extradition and prosecutions.[324]

DPP

311 The time at which the DPP had actual or constructive knowledge of the impact, or potential impact, of the use of Ms Gobbo as an informer is examined in the following section of these reasons.

AFP

312 The AFP did not know that any prosecution including Orbital, or the extradition of the applicant in relation to Orbital, may have been adversely affected by Victoria Police's use of Ms Gobbo until 26 February 2016, when an officer of the CDPP's office advised an AFP officer that Mr Kellam's report referred to the applicant. The AFP was not in a position to seek to notify the applicant or the courts because that information was confidential and communicated on the basis that it could not be further disseminated.[325]

CDPP

313 By 6 September 2011, at least one officer of the CDPP knew that Ms Gobbo, acting as a registered human source, had informed with respect to a number of high-level criminals, although such persons were not at that time identified as her clients.[326]

314 On 3 November 2011, an officer of the CDPP received a copy of the advice of Mr Maguire dated 4 October 2011. That advice drew attention to the use of Ms Gobbo as an informer against the applicant, while acting for him in a legal capacity.[327]

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323 Ibid [1342].
324 Ibid [1343].
325 Ibid [1265].
326 Ibid [1262]; *Karam reference determination* [2022] VSC 808 [518], [520] (Osborn JA).
327 *Karam reference determination* [2022] VSC 808 [533], [536] (Osborn JA).

315 In September 2017, the CDPP sought and was granted leave to intervene in the disclosure proceedings.[328] Thereafter, the CDPP pursued disclosure of Ms Gobbo's status.

316 On 3 December 2018, following orders of the High Court,[329] the CDPP disclosed Ms Gobbo's identity as an informer to the applicant and others.[330]

Breaches of duty of disclosure

DPP

317 At the 1 June 2012 meeting the DPP was informed that Ms Gobbo had been a registered informer for Victoria Police. The DPP was told that she had been working in that capacity for an extended period. The details concerning the circumstances in which she was registered, or the duration of her registration, were not supplied. The DPP was told that there were concerns held by Victoria Police about the integrity of the convictions of those whom Ms Gobbo had represented and informed against and, in that connection, the applicant's name was mentioned.[331]

318 By 4 September 2012, the DPP had actual knowledge that:

(a) Ms Gobbo had been a registered informer for Victoria Police for an extended period of time;

(b) Victoria Police was in possession of records that related to Ms Gobbo's role as an informer;

(c) Ms Gobbo may have provided information to Victoria Police concerning her clients, including the applicant, in breach of legal professional privilege; and

(d) Ms Gobbo may have provided privileged information to Victoria Police in relation to the applicant's extradition, in breach of legal professional privilege.[332]

319 The reference judge found that the DPP had an obligation, at 4 September 2012, to convey to the Court the information that he then had at his disposal.[333]

320 The use of a practising criminal barrister as a registered informer by Victoria Police was unprecedented. The judge held that this fact alone ought to have alerted the DPP to the very real risk that Ms Gobbo's deployment as an agent of Victoria Police, while practising as a criminal barrister, would give rise to obvious conflicts of interest that would or might undermine an accused person's right to a fair trial if the accused had been a client against whom she was informing.[334]

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328 [2017] VSCA 338 [12]–[13] (Ferguson CJ, Osborn and McLeish JJA).
329 *AB (a pseudonym) v CD (a pseudonym)* (2018) 93 ALJR 59.
330 Reference determination [1264].
331 Ibid [1372]–[1373].
332 Ibid [1374].
333 Ibid [1380].
334 Ibid [1385].

321 The reference judge found that it was not reasonably open to the DPP to have made no inquiries at all of Victoria Police after 4 September 2012 as to the progress of the ongoing review of police holdings, or not to have sought further clarification from police concerning the information he was provided on that day.[335]

322 The DPP's ongoing duty of disclosure obliged him to revisit his decision in September 2012 not to disclose information then available to him, in 2013 and again in 2014, and to interrogate whether that decision continued to be defensible. That included a duty to take proactive steps to be better informed about the information he was given to understand was in the possession of Victoria Police. The reference judge found that the DPP 'should have done more'.[336]

323 The reference judge found that the breach by the DPP of his duty of disclosure was the result of an error of judgment.[337]

324 The judge did not find that the DPP was in breach of his disclosure obligations as a result of inaction after 1 June 2012. This is the subject of the applicant's proposed appeal against the reference determination. In any event, the judge found that what the DPP learned at that meeting, combined with what he learned three months later on 4 September 2012 meeting, did enliven his prosecutorial duty of disclosure.[338]

Victoria Police

325 It was not until 2016 that Victoria Police took steps to notify the Court or the applicant that the prosecution and/or extradition of the applicant may have been, or was likely to have been, adversely affected by Victoria Police's use of Ms Gobbo as an informer.[339]

326 In failing to take those steps, Victoria Police was in breach of its disclosure obligations. Senior police officers knew this, including those who held the rank of Assistant Commissioner and Deputy Commissioner at various points between September 2005 and June 2016.[340]

327 Victoria Police adopted a deliberate strategy to conceal Ms Gobbo's identity. That strategy resulted in numerous breaches of the duty of disclosure. The reference judge rejected the respondent's submission that Victoria Police held the honest belief on reasonable grounds that Ms Gobbo's role as an informer, and the role she played in that capacity to inform against the applicant and those who gave evidence against him, was immune from disclosure.[341]

328 Victoria Police used Ms Gobbo against a range of individuals and adopted a deliberate strategy to conceal her identity as an informer. Her role in the prosecution of the

335 Ibid [1386].
336 Ibid [1394].
337 Ibid [1391].
338 Ibid [1396].
339 Ibid [1399].
340 Ibid [1400].
341 Ibid [1402]–[1403].

applicant and others was deliberately and persistently concealed from the Court (and until 2012 from the DPP) by Victoria Police, in breach of its disclosure obligations.[342]

329 Ms Gobbo's cavalier attitude to her ethical obligations, and her willingness to work with police in securing the assistance of Mr Thomas (including by attending the St Kilda Road police station and suggesting amendments to his statements) set the tone for what became an entrenched tolerance for persistent, repeated and serious breaches of her ethical obligations to her clients.[343]

Specific effects of non-disclosure

330 The delay in disclosure has had the effect of the inevitable impoverishment of the evidence caused by the passing of time. Although a number of critical factual findings were documentary, witnesses were frequently unable to recall particular events or conversations.[344]

331 The audio recordings of the initial conversations between Mr Mansell, Mr Rowe and Ms Gobbo in August 2005 were lost, and Mr Mansell is now deceased. Those recordings would have been most material to the applicant's case.[345]

332 Although the applicant has been able to demonstrate, from other evidence, that Ms Gobbo decided to become an informer in order to convict him, he has been deprived of a potential additional evidentiary advantage of underscoring those findings with additional findings of fact based on the contemporaneous audio recordings.[346]

333 In the absence of Mr Mansell, there is no evidence as to whether he was 'unilaterally' motivated to make the approach to Ms Gobbo to become an informer, or whether he did so after discussions with other officers who had had considerable dealings with her by September 2005.[347]

334 The contemporaneous emails between Dr Bagaric, who represented the applicant in respect of the extradition proceedings in Australia, and Ms Gobbo were not able to be recovered. Access to those records would have provided an 'additional evidential dimension' to the nature and extent of Ms Gobbo's breaches of her duty to the applicant as his lawyer at that time.[348]

335 The procedural disadvantages suffered by the applicant as a result of the breaches of the duty of disclosure (apart from the fact that the applicant suffered a significant procedural disadvantage when engaged in plea negotiations in 2011, which is dealt with later in these reasons) include the following:

(a) Between 2008 and 2012, the applicant made various applications to stay the Quills, Orbital and Magnum prosecutions. He was unaware that he could have

342 Ibid [1414], [1418].
343 Ibid [1433].
344 Ibid [1439]–[1440].
345 Ibid [1441]–[1442].
346 Ibid [1443].
347 Ibid [1444].
348 Ibid [1446].

advanced arguments relating to the role of Ms Gobbo as an informer against him and the conduct of Victoria Police in relation to that role.

(b) The applicant was not able to apply for the exclusion of certain evidence on the basis of arguments relating to the role of Ms Gobbo and the conduct of Victoria Police.

(c) The applicant was not able to challenge his convictions without discharging the onus to obtain leave to bring a second appeal.

(d) The applicant was not able to advance arguments during his extradition proceedings arising from the role of Ms Gobbo.[349]

336 As a result of the non-disclosure, the applicant was also deprived of the opportunity to mount arguments based on Ms Gobbo's duplicity and have them assessed by the Greek courts. In those proceedings, the applicant would only have had the burden of proving facts giving rise to the prospect of an unfair trial in Australia, in order to endeavour to resist his extradition.[350]

337 In respect of the Federal Court proceeding in which the applicant's extradition was challenged, he lost the ability to exercise his legal rights vigorously and in a timely manner, and to have the courts determine those rights with a full and accurate factual record.[351]

Would the applicant have pleaded guilty anyway?

338 The respondent accepted that if disclosure of Ms Gobbo's status and conduct as an informer had been made to the applicant prior to 18 April 2011, the applicant would not have pleaded guilty to the Quills, Orbital and Magnum offences on that date, and he would have applied to have aspects of the evidence on those and other charges against him excluded, or the proceedings stayed.[352]

339 The applicant initially offered to plead guilty to the Magnum charge only. That trial was due to commence on 2 May 2011. His counsel, Mr Peter Faris QC, advised him that he had 'no defence'.[353]

340 In the conference where the applicant received that advice, he decided to agree to a global plea on the Magnum, Orbital and Quills offences, having been told that the respondent would accept such a plea.[354]

341 The evidence in Magnum comprised recorded telephone intercept and listening device material in which the applicant was in dialogue with various co-offenders, including the principal witness against him.[355]

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349 Ibid [1448].
350 Ibid.
351 Ibid [1450].
352 Ibid [1458].
353 Ibid [1465]–[1470].
354 Ibid [1472]–[1473].
355 Ibid [1466].

342 There were obvious attractions to the offer of a global plea to the three charges (Magnum, Orbital and Quills) on the basis of a nolle prosequi for the other four prosecutions. There were also obvious significant sentencing advantages arising from such a plea.[356]

343 The judge found, however, that the plea deal may not have had the same level of attraction if the applicant had been advised that the case against him in two of the remaining prosecutions (Matchless and Landslip) would have been significantly weakened if Mr Cooper's evidence was excluded, and that it was open to him to contest both sets of charges at trial for that reason.[357]

344 Moreover, the applicant may properly have been advised that the prosecution case in respect of the Spake offences would potentially have been weakened if the evidence of both Mr Cooper and Mr Bickley were excluded.[358]

345 The applicant may also have been advised that there was a legitimate basis to go to trial on the Quills and Orbital charges, and that an application to stay the further prosecution of the Magnum offence was also open to him.[359]

346 The judge was not able to reach a positive finding that, if the applicant had full disclosure of the circumstances in which he had been investigated and extradited to stand trial for the Magnum offence, his conduct of the plea negotiations reflected how he would have approached that trial or the other charges upon which he was extradited.[360]

The applicant's ability to properly evaluate the proposed plea bargain

347 The reference judge found that, without disclosure of Ms Gobbo's role as an informer, and full disclosure of the manifold ways she assisted Victoria Police to prosecute him, the applicant was in no position to properly assess whether it was in his best interests to agree to the terms of the plea bargain proposed by the prosecution in April 2011.[361]

348 The applicant was not able to fully assess the strengths and weaknesses of the prosecution cases against him in relation to Quills and Orbital, or of the prosecution cases relating to Landslip, Matchless and Spake, because Ms Gobbo's role and conduct in connection with the way Victoria Police investigated and prosecuted Mr Cooper and Mr Bickley (and to a lesser extent Mr Thomas) were not disclosed to the applicant.[362]

349 The judge stated that it was at least 'open to find' that with full disclosure, the applicant may have made a different assessment of the prospects of an application to stay the Magnum prosecution, which would have ultimately informed his decision whether to plead to that offence.[363] Arguably, if Ms Gobbo's involvement in the extradition process

356 Ibid [1474].
357 Ibid [1475].
358 Ibid [1476].
359 Ibid [1477].
360 Ibid [1481].
361 Ibid [1484].
362 Ibid [1485].
363 Ibid [1488].

had been disclosed, the applicant would have been better positioned to assess the prospects of having the Magnum prosecution stayed.[364] The judge did not assess the prospects of a stay being granted.

350 The applicant advanced no submission before the judge relating to the Kayak offences.

PART E: REFERENCE DETERMINATION APPLICATIONS

Applicant's ground 1 — DPP's breach of duty

351 The applicant's proposed appeal against the reference determination seeks to challenge the reference judge's 'failure to find that the then Victorian Director of Public Prosecutions was in breach of his duty of disclosure to the Court' from 1 June 2012 rather than from 4 September 2012, as the judge found.

352 It is convenient to start with the question of leave to appeal. The respondent submitted that the point raised by the application would not advance the matters that this Court is required to deal with on the substantive appeal, because the respondent had already conceded that, well before 1 June 2012, the prosecution (which included Victoria Police) was in breach of its duty of disclosure concerning the conduct by Victoria Police and Ms Gobbo in the investigation and compilation of evidence in support of the charges against the applicant. The respondent submitted that leave to appeal should therefore be refused on the ground of futility.

353 We do not consider that the proposed appeal would be futile on these grounds. The application concerns the potential duty of the DPP at a point before the applicant was sentenced. The unique position of the DPP in the system of criminal justice means that a breach of duty on his part cannot simply be equated with breaches of the same duty by Victoria Police. The finding sought by the applicant potentially bears on the impact of the overall circumstances on the administration of justice, or its appearance.

354 However, leave to appeal should be refused for another reason. To explain why that is so, it is necessary to say more about the substance of the matter.

The findings of the reference judge

355 In reaching the conclusion that the DPP's duty of disclosure had been activated from 4 September 2012, the judge considered the evidence relating to the meeting with the DPP on 1 June 2012, which was attended by Douglas Fryer (Acting Assistant Commissioner of Crime Command), Mr Gardner and Mr McRae. In her findings concerning the content of that meeting, the judge accepted the evidence of Mr Fryer and Mr McRae as to what was conveyed to the DPP.[365]

356 In particular, the judge was satisfied that, at the meeting on 1 June 2012, the DPP was informed that Ms Gobbo had been a registered informer for Victoria Police, and was told that she had been working in that capacity for an extended period. Details

364 Ibid [1487].
365 Ibid [1371].

concerning the circumstances in which she was registered as an informer, and the duration of her registration, were not supplied or asked for at the meeting. The judge was satisfied that the DPP was informed that there were concerns held by Victoria Police about the integrity of convictions of those whom Ms Gobbo had represented and informed against, and 'in that connection, the applicant's name was mentioned'.[366]

357 By the time of the meeting on 4 September 2012, which was attended by Mr Gleeson, Mr McRae and Mr Gardner, Victoria Police had received the case review by Mr Comrie, which identified appreciable risks that had been involved in utilising Ms Gobbo as a source, and the 'out of scope' report by Mr Gleeson dated 22 June 2012 (which went beyond Mr Comrie's review and raised concerns about the manner in which Ms Gobbo had been utilised as a human source). The advices of Mr Ryan and Mr Maguire were also available.[367]

358 The judge concluded that, on the basis of the information the DPP had been given at the 1 June 2012 meeting and what was relayed to him at the 4 September 2012 meeting, the DPP had actual knowledge by 4 September 2012 of the following facts:

(a) Ms Gobbo had been a registered informer for Victoria Police for an extended period of time;

(b) Victoria Police was in possession of records that related to Ms Gobbo's role as an informer;

(c) Ms Gobbo may have provided information to Victoria Police concerning her clients, including the applicant, in breach of legal professional privilege; and

(d) Ms Gobbo may have provided privileged information to Victoria Police in relation to the applicant's extradition, in breach of legal professional privilege.[368]

359 In cross-examination, Mr McRae confirmed that no additional information was given to the DPP in the meeting, other than the fact that police had concerns about Ms Gobbo's security.

360 Based on her findings, the judge concluded that, as at 4 September 2012, the DPP had an obligation to disclose that information to the Court, including while the review of Victoria Police's records was ongoing and empirical evidence to support Mr Gleeson's conclusions was not immediately at hand.[369]

361 The judge observed:

> The very use of a practising criminal barrister as a registered informer by Victoria Police was unprecedented. That fact alone ought to have alerted the Director to the very real risk that her deployment as an agent for Victoria Police whilst simultaneously practising as a criminal barrister would give rise to obvious conflicts of interest that would, or might, undermine an accused's right

366 Ibid [1372]–[1373].
367 Ibid [1363].
368 Ibid [1374].
369 Ibid [1380].

to a fair trial if the accused had been a client against whom she was informing.[370]

362 In response to a submission by the respondent that, regardless of what had occurred at the 1 June 2012 meeting, the DPP did not possess sufficient knowledge of the circumstances of Ms Gobbo's use as an informer by Victoria Police to require him to take further steps as at that date, the judge stated:

> I have not found that the Director was in breach of his disclosure obligations as a result of inaction after the 1 June 2012 meeting. I have, however, found that what he learned at that meeting, combined with what he learned three months later at the 4 September 2012 meeting, did enliven his prosecutorial duty of disclosure.[371]

363 It is to the first sentence that the applicant's application for leave to appeal is directed.

Applicant's submissions

364 The applicant submitted that the judge's reasons do not explain why she was not prepared to find that the DPP was in breach of his duty of disclosure as and from 1 June 2012, either by not disclosing the information to the Court, or by not making further inquiries at that time. The judge reached her conclusions as to the state of the DPP's knowledge at 4 September 2012 partly on the basis of the evidence of Mr Fryer and Mr McRae as to what had been disclosed to the DPP at the 1 June 2012 meeting.

365 The applicant submitted that the information that was conveyed to the DPP at the meeting on 1 June 2012 was so unusual and extraordinary that it required action even without making any further inquiries. It was submitted that the question whether the DPP was in breach of his duty of disclosure as from 1 June 2012 required an assessment, not just of what was known at that date, but also what was knowable to the DPP at that time. It was submitted that, where the prosecution is put on notice of potentially disclosable information, the duty to disclose includes, in an appropriate case, a duty to inquire.

366 The applicant pointed to the evidence of Mr Fryer that the sole purpose of the meeting on 1 June 2012 was to advise the DPP that Ms Gobbo had been a registered human source and that she had a potential conflict of interest relating to her clients. Mr Fryer gave evidence that discussion at the meeting centred around the significant conflict of interest of Ms Gobbo being a human source and a criminal barrister. Mr McRae gave evidence that on the topic of the potential conflict of interest, he specifically mentioned the applicant's name.

367 The applicant submitted that the very use of a practising criminal barrister as a registered human source should have alerted the DPP to the very real risk of an obvious conflict of interest that might undermine an accused person's right to a fair trial, if the accused had been a client against whom Ms Gobbo was informing. It was submitted that this was relevant to the DPP's obligation to disclose information to the Court, and to make further inquiries, as at 4 September 2012, and also as at 1 June 2012.

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370 Ibid [1385].
371 Ibid [1396].

368 Further, it was submitted, the DPP would have been aware that in March 2012 the applicant had applied to Whelan J to change his pleas of guilty. In that context, the timing of the meeting on 1 June 2012 was of particular significance, as the applicant had not yet been sentenced. As a consequence of the failure of the DPP to disclose the information that he received at the meeting on 1 June 2012, the applicant lost the opportunity to apply to change his pleas of guilty before he was sentenced one month later on 3 July 2012.

Respondent's submissions

369 The respondent submitted that the applicant had changed his position concerning the meeting on 1 June 2012 since the reference determination. In any event, there was no merit in the point.

370 The respondent submitted that the applicant did not contend before the reference judge that, following the meeting on 1 June 2012, the DPP should have disclosed to the applicant, or the Court, the information he received at the meeting. Rather, the applicant had submitted that the DPP ought to have made further inquiries and taken other steps. Accordingly, the only question raised by this ground of the applicant's s 319A(5) application was said to be whether, based on the unchallenged facts found by the reference judge, the DPP breached a 'duty to inquire' as and from 1 June 2012.

371 The respondent submitted that there is little authority that supports the existence of any general obligation on the prosecution to make 'reasonable inquiries'. While acknowledging that a duty to inquire may arise in relation to prior convictions of a particular witness or person involved in a case, the respondent submitted that the authorities otherwise give little guidance as to when an 'appropriate case' to found the duty might be established.[372] It was further submitted that if a wide-ranging duty to inquire was enlivened on 1 June 2012, it might have involved postponing the sentencing of the applicant for an indefinite period.

372 The respondent further submitted that, if there is a broader prosecutorial duty to inquire, no such duty was engaged as a consequence of the 1 June 2012 meeting. At that time, Mr Comrie's review had commenced, but was not completed, Mr Gleeson had not obtained Mr Ryan's advice, and Mr Gleeson had not provided his 'out of scope' report. The evidence of Mr Fryer was that Mr McRae had spoken at the conclusion of the meeting about those present having a further meeting concerning the matter.

373 Taking those matters into account, the respondent submitted that, as and from the 1 June 2012 meeting, there was no obligation on the DPP to make further inquiries. At that point, he had no reason to believe that Victoria Police would do anything other than what they had indicated, bearing in mind the processes, including Mr Comrie's review, that were then underway.

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372 *Visser v DPP (Cth)* [2020] VSCA 327 [84] (McLeish, Emerton and Osborn JJA) ('*Visser*'); *Eastman v DPP (ACT) [No 13]* [2016] ACTCA 65 [343] (Osborn, Whelan and Priest AJJ) ('*Eastman*').

Applicant's reply

374 In reply, the applicant submitted that the duty of disclosure is not as inflexible as the respondent submitted. In an appropriate case it involves a requirement that the prosecution take steps, and make inquiries, as part of the performance of that duty.[373] It was submitted that the respondent's conception of the duty of disclosure would deny it much of its utility, which would be counterproductive to the attainment of justice.

375 The applicant further submitted that his case before the reference judge was not limited to a contention that the DPP was only obliged to make inquiries. Rather, the case was that the DPP, being armed with significant information, was required to do something about that information, and that by effectively doing nothing about it, the DPP breached the duty of disclosure. The applicant contended that the information conveyed to the DPP at the meeting on 1 June 2012 was not inherently vague or ambiguous. The DPP was told that Ms Gobbo (a well-known criminal barrister) had been a registered police informer, and that there were concerns about the integrity of convictions. In that context, the applicant's name was specifically mentioned.

Analysis and conclusion

376 The first question is whether the applicant sought a finding by the reference judge that the DPP's duty of disclosure was enlivened by the information conveyed to him at the 1 June 2012 meeting.

377 In the written closing submissions on behalf of the applicant before the reference judge, it was contended that, based on the evidence of Mr McRae and Mr Fryer concerning the meeting on 1 June 2012, it should be concluded that the DPP was in breach of the duty of disclosure from that date. The applicant accepted that the duty of disclosure (including to make inquiries) did not prescribe what should have been done, but submitted that it was not sufficient, to comply with that duty, for the DPP 'to sit back and do nothing' while the applicant was sentenced and pursued his appeal avenues. The duty required the DPP to do more, for example: by promptly inquiring further as to the information that he received at the meeting on 1 June; by preventing the applicant's prosecutions from progressing to sentence, and determination on appeal and special leave to appeal; or, alternatively, by taking steps to ensure that a public interest immunity claim was made over any information that was proposed not to be disclosed.

378 In those circumstances, it is clear that the applicant did ultimately contend before the reference judge that, as a consequence of the information conveyed to him on 1 June 2012, the DPP's duty of disclosure (including to make inquiries) was enlivened. It is true that the applicant did not contend before the judge that the duty required the DPP to immediately inform the Court (and thus the applicant) of the information then conveyed to him. However, the applicant did contend that, in order to discharge that duty, the DPP was required to take proactive steps such as those identified in the written submissions.

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373 *AJ v The Queen* (2011) 32 VR 614, 620 [22] (Weinberg and Bongiorno JJA, Buchanan JA agreeing at 615 [1]) ('*AJ*'); *R v Garofalo* [1999] 2 VR 625, 637 [70] (Ormiston JA, Charles JA agreeing at 642 [89]).

379 It is well-established that it is fundamental to a fair trial of an accused person that the prosecution make full disclosure of all relevant material of which it is aware or to which it has access.[374]

380 In *Edwards v The Queen*,[375] Edelman and Steward JJ stated the principles as follows:

> Prior to 2001, prosecution disclosure in New South Wales was governed by a patchwork of common law obligations, prosecution guidelines, and statutory and ethical rules. The common law required, and still requires, disclosure of all material that, on a sensible appraisal by the prosecution: (i) is relevant or possibly relevant to an issue in the case; (ii) raises or possibly raises a new issue that was not apparent from the prosecution case; and (iii) holds out a real (as opposed to fanciful) prospect of providing a lead in relation to evidence concerning (i) or (ii). Further, since the disclosure can occur prior to any crystallisation of the defence case, or any refinement of the prosecution case, expressions in relation to common law disclosure rules, such as 'an issue in the case' or 'all relevant evidence of help to the accused', must be given a broad interpretation.[376]

381 It is further recognised that, in an appropriate case, the obligation of the prosecution to make disclosure may include, or involve, an obligation to make necessary inquiries.[377]

382 In *Eastman,* the Court of Appeal of the Australian Capital Territory described that duty in the following terms:

> Fairness dictates that the prosecution must disclose to the defence any information in its possession which may assist the defence, either by undermining the Crown case or by providing exculpatory material. An aspect of that duty requires the prosecution to inquire into information which may affect the credibility of potential Crown witnesses, if there is sound reason to suspect that material exists which might impinge upon credibility or reliability. And again, fairness requires that material gleaned from those inquiries which may cast doubt on the credibility or reliability of those witnesses whose credit is investigated must be disclosed to the defence. That said, the prosecution is under no duty to investigate speculative or tenuous suspicion.[378]

383 The respondent submitted that no authority supports the existence of a prosecutorial duty to inquire 'at large'. It was submitted that the duty arose only in an 'appropriate case,' such as where the prosecution should disclose, and inquire about, prior convictions of a prosecution witness or other facts going to the credibility of a prosecution witness.

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374 *Roberts* (2020) 60 VR 431, 444 [56] (Osborn and T Forrest JJA and Taylor AJA).

375 (2021) 273 CLR 585.

376 Ibid 600–1 [48] (citations omitted); see also *Visser* [2020] VSCA 327 [36] (McLeish, Emerton and Osborn JJA); *Eastman* [2016] ACTCA 65 [331]–[333] (Osborn, Whelan and Priest AJJ).

377 *R v Garofalo* [1999] 2 VR 625, 637 [70] (Ormiston JA, Charles JA agreeing at 642 [89]); *AJ* (2011) 32 VR 614, 620 [22] (Weinberg and Bongiorno JJA, Buchanan JA agreeing at 615 [1]). See also *Nelson v The King* [2025] VSCA 226 [56] (Niall CJ, Priest and Lyons JJA) ('*Nelson*').

378 [2016] ACTCA 65 [343] (Osborn, Whelan and Priest AJJ).

384 There is persuasive support for that submission in the judgment of Leeming JA in *Marwan v Director of Public Prosecutions (NSW)*.[379] But we need not decide the point, because the matter was ultimately put on the basis that the DPP had breached his duty of disclosure by failing to inform the Court of what was disclosed to him at the meeting on 1 June 2012. In focusing the submission in that way, the applicant did not seek to rely on any broader obligation to make inquiries.

385 When it comes to the substance of the argument, this Court necessarily views the matter with the considerable benefit of hindsight. The DPP was, on the evidence, given very limited information that was vague and incomplete. If the suggestion that Ms Gobbo had been an informer was true, precipitate action might place her in grave danger. The DPP knew that steps were being taken to ascertain the true position and, in particular, the extent of what had happened. There was some sense in awaiting the outcome of that process before deciding what action to take. On the other hand, the suggestion was that the criminal process may have been thoroughly corrupted in a case in which the accused was awaiting sentence. The suggestion, while profoundly disturbing, was credible. In our view, a serious issue arises whether the DPP's duty of disclosure required more than to await the outcome of further inquiries by Victoria Police.

386 The difficulty for this Court in addressing that issue is that no such contention, specific to the meeting on 1 June 2012, was put to the DPP when he gave evidence before the judge. The thrust of questioning of the DPP was directed to his duty after the meeting on 4 September 2012, by which stage there was much more information at hand. Counsel for the applicant must be taken to have decided not to put a case along the lines we have outlined above to the witness. The DPP was the critical witness, if such a case were to be advanced, which makes the course taken by the cross-examiner telling. This was a very substantial departure from the rule in *Browne v Dunn*.[380]

387 It was not a mere technical departure. If the issue was to be agitated, the critical question was why the DPP did not consider, as at 1 June 2012, that his duty of disclosure had been activated. In the absence of that question being directed to the DPP, the reference judge could not reach an informed conclusion about it.

388 In circumstances where the DPP eschewed any recollection of the meeting itself, and placed weight on the notes of Mr Gardner, which the judge did not accept,[381] it might be said that the DPP was not, in any event, likely to have been in a position to give evidence of his response to what happened at the meeting and that, in these circumstances, the fact that he was not asked about that response is not an impediment to this Court addressing the legal implications of the DPP's participation in the meeting. But even without recalling the details of the meeting, it cannot be gainsaid that the DPP might have meaningfully addressed the contention now sought to be advanced, had he been given that opportunity when he gave his evidence.

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379 (2019) 278 A Crim R 592, 601–3 [45]–[60] (RA Hulme J agreeing at 606 [78]); [2019] NSWCCA 161; see also *Ho v The King* [2023] NSWCCA 245 [88]–[92] (Wilson J, Beech-Jones CJ at CL agreeing at [1], RA Hulme AJ agreeing at [135]) and *Nelson* [2025] VSCA 226 [52]–[66] (Niall CJ, Priest and Lyons JJA).

380 (1893) 6 R 67, 70–1 (Lord Herschell LC, Lord Morris agreeing at 78–9), 76–7 (Lord Halsbury).

381 Reference determination [1371].

389 It may further be observed that the finding sought by the applicant is a very serious one that, if made, would reflect adversely on the conduct of the holder of an important public office central to the justice system. On balance, even though the respondent was ultimately on notice, the fact that it was not put to the DPP when he gave evidence that he had failed in his duty in the manner now alleged leads us to refuse leave to raise the point now by way of appeal.

390 We therefore refuse the applicant leave to appeal against the reference determination.

Respondent's ground 1 — reasonable grounds for stay application

391 Ground 1 of the respondent's appeal is that the reference judge erred in concluding that there would have been reasonable grounds for the applicant to have made an application for a stay in each of the Quills, Orbital, Magnum, Kayak, Landslip, Matchless and Spake prosecutions, because the reference judge reached that conclusion on the basis that the respondent had made a concession which the respondent did not make.[382]

392 At the outset, the applicant submitted that the respondent was urging the Court in the substantive appeals to decide that it was not enough for the applicant to show that there was a reasonable argument for a stay, but he needed to establish that he would have succeeded in a stay application. The applicant submitted that the Court would therefore need to decide the strength of the putative stay application for itself, and the proposed appeal based on the alleged concession as to reasonable grounds lacked utility. For that reason, it was submitted that leave to appeal on this ground should be refused.

393 In reply submissions, the respondent accepted that, if its argument as to the prospects of a stay were accepted, the finding as to a concession about a reasonable argument was 'beside the point'. Further, to the extent that the applicant was now asking the Court to find that there was a 'reasonable prospect' of a stay, and not only a reasonable argument, again the concession was immaterial and the Court could decide the issue for itself.

394 In the circumstances, it is going to be necessary for us to evaluate the prospects of the applicant obtaining a stay of his respective prosecutions for ourselves. This significantly limits the significance of the concession which the judge attributed to the respondent. But the issue of a possible stay (whether on the grounds of the extradition process or by virtue of the improper common purpose) is central to the applicant's case, and while we shall decide that for ourselves on the rehearing, it is possible that a Crown concession in that regard could bear on our evaluation. For that reason, we will grant leave to appeal on this ground.

Submissions

395 Question 14 before the reference judge asked what effect full disclosure and/or exclusion of evidence would have had on each of the seven prosecutions and the prospect of a stay of each of them. On the respondent's account before us, during closing submissions before the judge, an issue arose as to how she could properly answer question 14, without traversing the boundaries of her role under the referral. In that

382 Cf Reference determination [1227], [1478].

context, the respondent had submitted that the question should be approached by reference to whether the applicant would have had a reasonable argument that each of the prosecutions identified in question 14 should be stayed, without assessing the likelihood of that argument succeeding. The respondent submitted that the sense in which 'reasonable argument' was thus used was to identify an argument that would not have necessarily failed.

396 The respondent submitted that the applicant had subsequently put an argument to the reference judge about the existence of a reasonable argument in relation to all the charges, by reference to the conduct of the extradition. In response, the respondent had observed that it was difficult to address that submission, because the applicant had not identified the actual conduct relied on. Nevertheless, the respondent had accepted that, if particular conduct could be identified, and the relevance of that conduct explained by reference to each particular prosecution, the applicant may be able to construct a reasonable argument in favour of a stay application in each prosecution.

397 In this Court, the respondent submitted that it did not make any concession in response to the applicant's refined case. Further, at no point did the applicant clarify the 'conduct' relating to the extradition that he relied upon for the existence of any reasonable argument in support of a stay.

398 Accordingly, it was submitted, the reference judge erred in recording that the respondent had conceded the existence of a reasonable argument in relation to a stay on all charges by reference to a 'common argument' concerning the extradition.[383] Further, it was submitted that the judge erred in failing to recognise that the respondent had drawn a distinction in its submissions between Orbital, Magnum and Kayak (on the one hand), and the other charges that were the subject of the global plea deal.

399 In response, the applicant submitted that the respondent did make the concession recorded by the reference judge. The applicant submitted in the alternative that the finding that there were reasonable arguments for a permanent stay was plainly open and, indeed, such a finding was inevitable.

400 In respect of the first point, in closing submissions the applicant had accepted that the judge should not positively conclude whether a stay would or would not have been granted; rather, the judge should make an assessment of the effect which disclosure would have had on the prospect of a stay of any of the prosecutions. The applicant had submitted that, on the basis of the conduct of the extradition, the judge should find that there would be a realistic prospect of a stay application succeeding in all matters; and on the basis of the conduct of Victoria Police and Ms Gobbo unrelated to the extradition, disclosure would have powerfully improved the applicant's prospects of a stay in Quills, Orbital, Landslip, Matchless and Spake, and added something to his stay argument on Magnum.

401 The applicant further noted that in the respondent's written closing submissions, it had been submitted that the appropriate approach to question 14 was by reference to whether the applicant would have had a reasonable argument that each of the matters identified in question 14 should be stayed, without assessing the likelihood of that argument

383 Ibid.

succeeding. Thus, it was the respondent who introduced the idea that the applicant had a reasonable argument. The respondent had not sought to resist a finding that a stay argument would have been reasonable. If the respondent did not accept that conclusion, it was incumbent on it to make such a submission explicitly.

402 The applicant submitted that it was in that context that the reference judge noted that, if the applicant had been informed of the conduct of Victoria Police and Ms Gobbo in relation to the extradition, he could have presented an argument for a stay, based on the way in which that conduct had risked implicating the Australian Government in an abuse of the Greek courts' processes, and the erosion of the duties of mutual trust and respect that underpin the international law of extradition.[384] That observation, in part, was relied on to support the applicant's submission that it was inevitable that the reference judge would have determined that there were reasonable arguments for a stay, even without any concession by the respondent. It was also relevant to that finding that the judge concluded that she was unable to reach a positive finding that the applicant's conduct, in the context of the plea negotiations in April 2011, could fairly reflect how he might have approached the pending Magnum trial if he had full disclosure of the circumstances in which he had been investigated and extradited to stand trial for that offence.[385]

403 In reply, the respondent submitted that it did not concede, before the reference judge, the existence of a reasonable argument (or a reasonable prospect) in relation to the bases for a stay relied on by the applicant. The respondent had done no more than endorse the applicant's submission that question 14 did not require the judge to decide whether a stay would, or would not, have been granted. The respondent had submitted that the applicant had failed to articulate any such reasonable argument.

Analysis

404 This ground of appeal must be upheld. In the context in which the issue was discussed before the reference judge, it could not be concluded that the respondent conceded that there would have been reasonable grounds for the applicant to have made an application for a stay of each of the seven prosecutions.

405 In written submissions before the judge the applicant submitted as follows:

> This aspect of [Question 14] does not ask the Court to positively conclude whether a stay would, or would not, have been granted. Rather, it asks for an assessment of the [effect] that disclosure would have had on the prospect of the stay in any of the matters.
>
> <u>A common basis for a stay — the conduct of the extradition</u>
>
> Although any stay application would have had to be considered referable to the facts and circumstances of each individual matter, … disclosure would have given rise to a common argument contributing to the prospect of a stay on each matter — the conduct of the extradition.

384 Ibid [1479].
385 Ibid [1481].

> The argument would have been that — in combination with the conduct in Australia that preceded and followed it … — the conduct of Victoria Police and Ms Gobbo in relation to the extradition 'constituted an affront to justice, and that accordingly it would undermine public confidence in the system of justice, should the court permit the prosecution before it of an accused brought into its jurisdiction in such circumstances.'
>
> ….
>
> The Applicant's stay argument based on his extradition would have been grounded in a set of factual circumstances never before seen in Australian legal history and, at least arguably, a level of moral obloquy and illegality similarly unprecedented. …
>
> Taking into account the broad and evaluative criterion for the grant of a stay, … it cannot be concluded that any such stay application brought on the basis of full disclosure in relation to the extradition would have failed ... .
>
> Rather, the Court should find that there would be a realistic prospect of such a stay succeeding.
>
> Additional bases for a stay — pre- and post-extradition conduct by VicPol and Gobbo
>
> …
>
> The extent to which disclosure [of] Victoria Police and Ms Gobbo's conduct unconnected with the extradition would have improved the prospect of a stay … would have varied depending on the extent to which the conduct was connected to the particular matter.
>
> … it may be accepted that this additional argument added little to the prospect of a stay on Magnum, as other than extradition, Victoria Police and Ms Gobbo did not engage in a great deal of unlawful, improper or otherwise disclosable conduct on Magnum that would have contributed to a stay argument. A similar conclusion might be reached on Kayak.
>
> However, on Quills and Orbital (the application to stay would have been a joint application because the trial was joint), the additional disclosure would have powerfully improved the prospects of the stay application. …
>
> So too on Landslip, Matchless and Spake the way in which Ms Gobbo was used to 'roll' Crown witnesses in aid of the prosecutions would have powerfully improved the prospect of a stay of those matters.

406 In its written response, the respondent quoted from the above submissions and continued:

> The respondent does not oppose [the applicant's] approach to answering [Question 14] …
>
> The respondent submits [that] the safer and more pragmatic approach would be for the parties and the Court to approach this question by reference to whether the applicant would have had a *reasonable argument* that each of the matters …

should be stayed, without assessing the likelihood of that argument succeeding. That, of course, is a preliminary question on the applicant's approach in any event. … [This would involve identifying] an argument that counsel for the applicant could, consistent with their ethical obligations, have advanced in favour of the applicant's interests had they had the opportunity to do so at a trial.

Prospect of stay by reference to extradition

The applicant makes a 'common argument' in relation to each of the matters … based on the conduct of the extradition. …

[The applicant's submissions do not] identify precisely what 'conduct' of the extradition is to be relied upon for the purpose of this proposed stay application in each matter.

Again, that makes it very difficult for the respondent to fairly respond to those submissions. The respondent accepts, however, that if particular conduct could be identified, and the relevance of that conduct could be explained by reference to each particular matter, the applicant may be able to construct a reasonable argument in favour of a stay application on each matter.

Additional bases for stay application

The respondent accepts that if the applicant establishes that there is a reasonable argument in favour of a stay by reference to the extradition … in relation to a particular matter it is possible that, some of the matters identified by the applicant in answer to Questions 1A, 9 and 11 could theoretically contribute to that existing argument on Quills, Landslip, Matchless and Spake.

The respondent does not accept the same is true in relation to Orbital. … [T]here is no reason why the trials [of Orbital and Quills] could not be severed.

…

The applicant also concedes that the additional conduct would not materially affect the prospect … of a stay on the Kayak or Magnum charges. …

To the extent the Court considers it appropriate to consider the question of prospects on this Question, it ought to positively conclude that any additional disclosure would not have had any effect on the prospect of a stay on the Kayak, Magnum or Orbital charges. There is simply no conduct that could be identified that would bear on that question …

407 In written reply submissions before the judge, the applicant stated that he had 'focused on what effect exclusion of evidence *would* have on the Crown case, and the prospect of a stay', but added that the 'mere availability of a tenable exclusionary argument (without any firm view as to whether it would succeed) reduced the strength of the Crown case'.

408 In the course of submissions by counsel for the respondent, the judge indicated that she did not wish to assess the prospects of a stay, and suggested that it was appropriate to go no further than to determine whether 'a stay application was open on reasonable grounds'. Counsel for the applicant then stated 'we don't go further than that'. Counsel

for the respondent also agreed with that approach, and reserved the respondent's right to maintain 'in the appropriate forum' that there would have been 'no prospect of it being granted'.

Conclusion

409 In the context of the submissions made before the reference judge, it is clear that the respondent did not make any express concession that there would have been reasonable grounds for the applicant to have made an application for a stay of proceedings in any of the seven prosecutions.

410 Nor can such a concession be implied. In his written submissions, the applicant did contend that there were such reasonable grounds in respect of Magnum and Kayak, based solely on the issues relating to the conduct of the extradition. The respondent did not expressly meet that argument. In its written submissions, it accepted that if the applicant established that there was a reasonable ground in favour of a stay in relation to a particular matter by reference to the extradition, then it was possible that some of the matters identified by the applicant in answer to questions 1A, 9 and 11 could 'theoretically contribute' to the existing arguments on Quills, Landslip, Matchless and Spake (but not on Orbital). However, the respondent submitted that any additional disclosure would not have had any effect on the prospect of a stay on the Kayak, Magnum or Orbital charges. This fell well short of the concession attributed to the respondent.

411 Ground 1 of the respondent's appeal against the reference determination must therefore be upheld.

Respondent's ground 2 — separate treatment of Orbital

412 The respondent's second proposed ground of appeal against the reference determination contends that the reference judge erred by failing to assess the strength of the prosecution case on Orbital separately from Quills, and by failing to find that the prosecution case on Orbital, assessed in that way, would have remained strong even if Mr Bickley's evidence had been excluded.

413 The substance of referral question 14 has been set out in connection with the first ground of the respondent's appeal against the reference determination.[386]

Judge's reasons

414 The judge set out the text of referral question 14 but omitted the words 'each of' in that part of the question that asked about the effect of full disclosure and/or exclusion of evidence on 'the strength of each of' the seven prosecution cases.[387]

386 See [395] above.

387 The words had been added to the question by way of amendment to the order referring matters to the reference judge.

415 The judge considered that she needed to identify the evidence that may have been liable to exclusion and, if excluded, whether the strength of the prosecution cases would have been adversely affected.[388] She then stated:

> Finally, although the parties structured their proposed answers by analysing *each* of the prosecution cases referred to in the framing of the question, having regard to the way I have answered referral question 13, I propose to approach the Orbital and Quills prosecutions on the basis that the evidence in one case would have been evidence in the other. This is consistent with the expectations of the prosecution were the matters to have proceeded to trial. Any assessment of the prospect of the prosecution changing its approach and electing to proceed on separate indictments following the disclosure of Ms Gobbo's conduct and the conduct of Victoria Police is speculative. In any event, that analysis is beyond the reach of this referral question.[389]

416 The judge recorded that the respondent sought a finding that, even without Mr Bickley's evidence, the prosecution case in respect of the Quills offence was still 'viable'.[390] Further, the respondent sought a finding that the prosecution case in respect of Orbital would have 'remained strong'.[391]

417 The judge concluded:

> Because Mr Bickley was an important witness in both of the individual counts on the indictment (although far less so in Orbital), and because of the decision to prosecute the applicant on a single indictment containing both counts, in light of the structure of the prosecution case, as reflected in the filed Operation Quills and Orbital summary of prosecution opening, I am satisfied that the prosecution would have remained 'viable' (in the sense that the applicant would have had a case to answer) had Mr Bickley's evidence been excluded, but it would have been significantly weakened.[392]

Respondent's submissions

418 The respondent submitted that question 14 required the judge to consider what effect full disclosure and/or the exclusion of evidence would have had on the strength of the prosecution case in Orbital. An analysis of the strength of each prosecution case was necessary because of the words 'each of' in question 14.

419 However, as a result of finding that the evidence in one case would have been evidence in the other,[393] the judge did not separately assess the strength of the prosecution case in Orbital. Instead, the judge found that the prosecution case on Quills and Orbital (considered together) would have been 'significantly weakened' if Mr Bickley's

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388 Reference determination [1230].
389 Ibid [1233] (emphasis in original).
390 As mentioned, the respondent took a different position before this Court: see [44], [420]. See also [420] below.
391 Reference determination [1246].
392 Ibid [1247] (citation omitted).
393 Ibid [1233].

evidence were excluded.[394] It was submitted that the judge failed to answer the question and to engage with a substantial and clearly articulated argument.

420 In this Court, counsel for the respondent conceded that, without the evidence of Mr Bickley, there would have been no viable prosecution case in Quills. However, the prosecution case in Orbital without Mr Bickley was said to be in a different category, in light of the following matters:

(a) no evidence from the Quills brief appeared on the Orbital brief;

(b) Mr Bickley did not give evidence at the Orbital committal;

(c) the key evidence in Orbital largely consisted of telephone intercepts of Mr Mokbel's interactions with undercover operatives;

(d) Mr Mokbel's record of interview with AFP officers was highly inculpatory. He made a number of admissions. His explanation for the interactions with undercover operatives lacked credibility;

(e) although Mr Bickley's evidence would have provided a further basis for the jury to reject Mr Mokbel's account, Mr Bickley's evidence was not necessary for that purpose because the account was so implausible;

(f) apart from the evidence of Mr Bickley, the applicant did not identify material in the Orbital brief that was arguably improperly or unlawfully obtained.

421 The respondent submitted that the prosecution case on Orbital would be 'weakened, but not to any significant extent' and that it remained 'strong'.

422 The respondent submitted that it would be necessary for this Court to assess the strength of the Orbital prosecution, without the evidence of Mr Bickley, because that was relevant to the 'compelling' criterion in relation to the application for leave to appeal the Orbital conviction, and relevant to the appropriate order if a new trial was ordered.

423 In that context, counsel for the respondent conceded that, if the judge's reasons would not prevent this Court from considering the strength of the Orbital case for itself, there would be 'no point' in resolving this ground of the respondent's proposed appeal against the reference determination.

Applicant's submissions

424 The applicant submitted that proposed ground 2 should fail for three reasons:

(a) the ground proceeded on a false and illogical premise, namely, that it was the 'agreed approach of the parties' that question 14 required the Court to assess the strength of the prosecution cases on Quills and Orbital separately. Quills and Orbital were the subject of a joint presentment/indictment and were not separate cases;

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394 Ibid [1247].

(b) the proposed ground wrongly assumed that, because the reference judge did not adopt the respondent's preferred approach to question 14, there was a constructive failure to exercise jurisdiction. It is not a constructive failure to exercise jurisdiction if a judge correctly apprehends a party's argument, but does not accept it, or chooses to approach the issue by another means;

(c) the proposed ground had limited utility to the appeal, as the reference judge's finding could not prevent the Court forming its own views about the strength of the Orbital case, in deciding the appropriate orders if the appeal succeeded.

Respondent's reply submissions

425 The respondent submitted in reply that, if the Court accepted that it may be necessary to form its own view about the strength of the Orbital case without the evidence of Mr Bickley, either for the purpose of deciding the orders to be made or in relation to the 'compelling' criterion for the grant of leave to appeal, it would be unnecessary to resolve this proposed ground of the appeal against the reference determination.

Oral submissions

426 Senior counsel for the applicant accepted in oral submissions that the judge's approach did not foreclose this Court from considering the strength of the Orbital prosecution, to the extent it needs to look at each case individually.

427 Senior counsel also ultimately accepted that there was still a viable prosecution case in Orbital without the evidence of Mr Bickley, but submitted that his evidence was an important part of the prosecution case.

Consideration

428 The judge's finding that the 'prosecution would have remained "viable" … had Mr Bickley's evidence been excluded' is capable of being understood in two ways.[395] On one view, it appears to address the prosecution cases of Orbital and Quills jointly. That is consistent with the judge's general approach and her opening observation that Mr Bickley was important 'in both of the individual counts on the indictment', together with her references to the 'single indictment' and the 'structure of the prosecution case' as reflected in the joint summary of prosecution opening.[396]

429 However, the finding may also be read as concerning Quills alone, based on the clear distinction the judge made between Quills and Orbital, namely that Mr Bickley was 'far less' important in Orbital.[397] To read the 'viable' finding as encompassing the same conclusion about both prosecutions sits somewhat uncomfortably with this marked distinction.

395 Ibid [1247].
396 Ibid.
397 Ibid.

430 On either view, however, the judge did not consider the prosecution case in respect of Orbital individually.

431 It is unnecessary to consider the matter further. Since both parties accepted that this Court may assess the strength of the Orbital case for itself, proposed ground 2 serves no purpose. Leave to appeal will therefore be refused in respect of this ground.

Respondent's ground 3 — joint criminal enterprise

432 Ground 3 of the application by the respondent for leave to appeal against the reference determination is directed to the conclusion by the reference judge that on or before 20 April 2006, there was a joint criminal enterprise formulated between Mr O'Brien, Mr Flynn, Officer Smith, Officer White, and Ms Gobbo, that upon his arrest Mr Cooper would be denied independent legal advice before making his decision to admit his guilt and agreeing to assist police on 22 April 2006.[398]

433 There are two aspects to the proposed ground. The first contends that the respondent was denied procedural fairness because the judge developed a case based on evidence to which the respondent was not given an opportunity to respond, and the rule in *Browne v Dunn* was contravened. The second contention is that the finding was erroneous because there was no proper evidentiary basis to find that the five individuals had entered the agreement by 20 April 2006.

434 At the relevant time, Mr O'Brien and Mr Flynn were each members of the Major Drug Investigation Division (MDID) and were members of the Purana Task Force investigating multiple 'gangland murders'.[399] As officer in charge of the Purana Task Force, Mr O'Brien had direct oversight over Ms Gobbo as a registered informer, including the role that she played in the arrests of Mr Cooper in 2006 and Mr Bickley in 2007. Mr Flynn was involved in the arrest of Mr Cooper. He was the informant in the Landslip and Matchless matters and he 'managed' Mr Cooper over the course of Mr Cooper providing assistance to Victoria Police in their pursuit of the applicant. Officers White, Smith, and Green were each members of the SDU.[400] Officer White supervised Ms Gobbo's handlers, and Officers Smith and Green were each Ms Gobbo's handlers.

Leave to appeal

435 The applicant submitted that the proposed ground was of limited utility, such that leave to appeal should be refused, for the following reasons:

(a) The respondent only sought to overturn the ultimate finding of the reference judge, not her subsidiary findings as to the various acts of the persons involved in improperly pressuring Mr Cooper to 'roll'.

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398 Ibid [1010], [1017]–[1018].

399 Ibid [105].

400 The applicant did not allege that Officer Green was party to the joint criminal enterprise: ibid [943].

(b) As a result, even if the Court overturned the judge's findings of a joint criminal enterprise, it would still find that the conduct of Ms Gobbo and the relevant police officers, in 'rolling' Mr Cooper, was improper or illegal.

(c) The precise label applied to what occurred concerning Mr Cooper was not significant; what was relevant was that the plainly wrongful conduct, in 'rolling' Mr Cooper, was done not to bring him to account, but to gather evidence against the applicant.

(d) In any event, the applicant's written case placed limited reliance on the finding.

436 There is force in these submissions. It is not apparent that success on this proposed ground would have any bearing on the substantive appeal, in circumstances where the underlying findings, including as to the grossly improper character of the relevant conduct, are not challenged. In a real sense, it is only whether the label of criminality attaches to those findings which is in issue.

437 On balance, however, leave should be granted. We are not able to exclude the possibility that the characterisation of this conduct may bear on the ultimate disposition of this factually complex set of appeals. We are also conscious that the impugned finding is a very serious one, including because it has been made against police officers.[401]

Findings of the reference judge concerning joint criminal enterprise

438 The reference judge recorded that the applicant had submitted that the evidence established that Ms Gobbo and the relevant police members had agreed to participate in and give effect to a joint criminal enterprise to commit the common law offence of perverting the course of justice. The judge found that she could not find that Mr Cooper's decision to plead guilty in 2007 actually impaired the capacity of the sentencing court to do justice, as would be required to establish a joint criminal enterprise to commit the completed offence of perverting the course of justice. The judge therefore instead considered whether the applicant had made out his case of a joint criminal enterprise to attempt to pervert the course of justice.[402]

439 The judge referred to the evidence relating to a meeting on 18 April 2006 at which Mr Flynn, Mr O'Brien and Officer White were said to have discussed the strategy that would be deployed when interviewing Mr Cooper to best achieve the objective of him agreeing to 'roll' against the applicant and his associates. The judge then stated:

> That evidence is capable of informing the question whether Ms Gobbo's attendance on the night of Mr Cooper's anticipated arrest was also discussed. In my view, the applicant's rendering of that evidence was incomplete. As the following summary makes clear, I have supplemented that evidence and assessed it for its probative weight in supporting the applicant's case.

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401 The Court's jurisdiction in a reference determination appeal extends to reviewing findings of fact, and not only judgments or orders as is usual in conventional appeals: cf *O'Bryan v Lindholm* (2024) 74 VR 496; *Moorabbin Transit Pty Ltd v Bekhit* (2016) 50 VR 563.

402 Reference determination [943], [950], [955]–[956].

440 Mr Flynn and Mr O'Brien agreed in their evidence that, at the meeting, Officer White shared with them Ms Gobbo's insights as to how the post-arrest interview with Mr Cooper should be pitched. Officer White had obtained those insights during a discussion he had with Ms Gobbo earlier that day. Neither Mr Flynn nor Mr O'Brien agreed with the proposition, put to them in cross-examination, that there was discussion concerning the use of Ms Gobbo to encourage Mr Cooper to 'roll' in the interview phase.[403]

441 The judge was unable to accept that either Mr Flynn or Mr O'Brien could have had any expectation at the meeting that Ms Gobbo would make herself unavailable on the occasion of Mr Cooper's arrest. She reasoned that this followed from Officer White's evidence that on some occasion before 18 April 2006, in discussions with Ms Gobbo, it was clear to him that she would definitely attend when contacted by Mr Cooper after his arrest, because Ms Gobbo had told Officer White that 'she was going to turn up whether he liked it or not'. Officer White in his evidence said that in view of Ms Gobbo's intransigence on that issue, he had 'surrendered to the inevitable', and accepted that she would receive Mr Cooper's call on his arrest and would inevitably position herself as his lawyer.[404]

442 Officer Smith gave evidence that, by 20 April 2006, he understood that Ms Gobbo would be the person to provide Mr Cooper with legal advice when he was arrested.[405] The judge set out an extract from a recorded conversation between Ms Gobbo and Officers Green, Smith and White on 20 April 2006 in which Ms Gobbo stated that, on his arrest, Mr Cooper would 'ring no one else but me'.[406] In the course of that conversation, Officers White, Green and Smith discussed with Ms Gobbo her role after Mr Cooper's arrest. The judge noted that, although neither Mr Flynn, nor Mr O'Brien, were present during the discussions, it was not a 'sheer coincidence' that those discussions occurred the day after Officer White had met with Mr Flynn and Mr O'Brien and discussed with them Mr Cooper's pending arrest.[407]

443 In those circumstances, the judge considered that it was 'inconceivable' that Officer White did not inform Mr O'Brien and Mr Flynn about Ms Gobbo's intransigence at the end of the strategy meeting, either on 18 or 19 April 2006, or at the latest on 20 April 2006.[408] The judge declined to accept the evidence of Mr O'Brien that Officer White had led him to believe that Ms Gobbo was going to make up an excuse as to why she could not attend on Mr Cooper after his arrest. The judge also rejected Mr O'Brien's evidence that he was 'blindsided' when Ms Gobbo turned up at the St Kilda Road police station on the night of 22 April 2006.[409]

444 The judge then set out the events of 22 April 2006 that preceded Mr Cooper's arrest at 2:20 pm. Officer Smith telephoned Ms Gobbo to advise her of Mr Cooper's imminent arrest, which effectively put her on 'standby'. He advised her to leave her telephone

403 Ibid [979].
404 Ibid [980–[982].
405 Ibid [984].
406 Ibid [985].
407 Ibid [985]–[986].
408 Ibid [987].
409 Ibid [988]–[990].

switched on and in the car. After that telephone call, Officer Smith informed Mr O'Brien that he had made contact with Ms Gobbo.[410]

445 The judge then set out the chronology of events on 22 April 2006, in particular:

- At 2:20 pm, Mr Cooper and his co-accused, Mr Ahec, were arrested at the Strathmore laboratory.
- By 3:40 pm, they had been transported to the St Kilda Road police station.
- At 4:10 pm, Ms Gobbo was informed by Mr Flynn that Mr Cooper was in the custody of Victoria Police.
- At 4:14 pm, Mr Flynn commenced the first interview with Mr Cooper, which was a 'no comment' interview. The interview concluded at 4:19 pm.
- By 4:22 pm, Ms Gobbo arrived at the St Kilda Road police station.
- At 4:44 pm, Ms Gobbo spoke with Mr Cooper in the interview room. There was no objective evidence as to what was discussed. The overwhelming inference was that, even at that stage, Ms Gobbo was working as an agent for police in seeking to encourage Mr Cooper to admit his guilt and assist police.
- At 6:30 pm, Ms Gobbo sent a text message to Officer Smith stating that Mr Cooper had told her that there were two handguns at the Strathmore laboratory.
- At 6:50 pm, Mr Cooper was taken to a conference room at the St Kilda Road police station at which Mr Flynn, Mr O'Brien and Officer Smith encouraged him to assist police. Following that meeting, Ms Gobbo and Mr Flynn met with Mr Cooper.
- Subsequently Mr Cooper asked to speak to Ms Gobbo again. At 7:15 pm, Ms Gobbo entered the conference room, and Mr Flynn, Ms Gobbo and Mr Cooper remained there until 9:00 pm. During that time, Mr Flynn continued to seek to persuade Mr Cooper to admit his guilt. Ms Gobbo, purportedly acting as Mr Cooper's independent legal representative, also encouraged Mr Cooper to take that course.
- At 9 pm, Mr Cooper agreed to cooperate with police and participate in a second interview in which Mr Rowe (of the MDID) was present. The interview concluded at 11:27 pm.[411]

446 The judge noted that at no time did Mr Flynn and Mr O'Brien challenge or question Ms Gobbo's attendance at St Kilda Road police station on the evening of 22 April. In his evidence Mr Flynn stated that he had a genuine belief that Ms Gobbo could play 'two different roles', namely, that of an informer and that of independent legal counsel.[412]

447 The judge then referred to difficulties concerning the evidence relating to the diaries of Mr Flynn, Mr Rowe and Mr O'Brien concerning the evening in question. She found

410 Ibid [996]–[997].
411 Ibid [1000].
412 Ibid [1004]–[1005].

that there was an arrangement between at least Mr Flynn and Mr Rowe to purposefully omit, sanitise or minimise any record of Ms Gobbo's involvement with police on the night of Mr Cooper's arrest.[413]

448 Under the subheading 'My findings', the reference judge concluded:

> In my view, Ms Gobbo's attendance at the St Kilda Road police station on the afternoon of Mr Cooper's arrest and her conduct from the time she arrived until she finally left at 9:00pm, together with the conduct of each of Officer Smith, Officer White, Mr Flynn and Mr O'Brien, allow for a finding that they were party to an agreement that upon his arrest Mr Cooper would be denied independent legal advice before making the ultimate decision to admit his guilt and agree to assist police.[414]

449 The judge considered that that conduct, compounded by the fact that Victoria Police and Ms Gobbo concealed from Mr Cooper the role that Ms Gobbo played in strategising his arrest, had denied Mr Cooper access to the information necessary for him to make an informed decision whether to admit his guilt when he came before the Court for sentencing in February 2007.[415]

450 The judge concluded as follows:

> In my view, Ms Gobbo's conduct on the night of Mr Cooper's arrest far exceeded the bounds of 'reasoned argument or advice', even if persuasively delivered. It was advice which was at all relevant times motivated by her desire to advance the interests of Victoria Police. Although there are no records of what was said in the course of the interview in which she participated and which culminated in Mr Cooper's decision to admit his guilt and assist police, I am satisfied that Ms Gobbo's role in overcoming Mr Cooper's resistance was probably decisive. By her own admission, she 'push[ed] him over the line'. There is no other finding open to me but that Mr Cooper's interests, which should have been primary and paramount, were subordinate to the interests of Victoria Police on whose behalf Ms Gobbo acted.
>
> I am well satisfied that the agreement to which each of the five nominated individuals were party by 20 April 2006, and in which they variously participated after that date up to and including the late evening of 22 April 2006, had, as its object, that improper pressure would be applied to the exercise of Mr Cooper's free will and voluntary choice to admit his guilt to police on 22 April 2006 (and agree to assist police) and that when he ultimately pleaded guilty after that date he would do so without learning of the role Ms Gobbo played before his arrest and the role she played on the night of his arrest.
>
> Although each of the parties to the agreement participated in that agreement in different ways, I am satisfied their conduct had the objective tendency to pervert the course of justice. I am also satisfied they intended to act, and did in fact act, with the requisite intention (formed at the time they each entered into the agreement) that the course of justice should be perverted in the sense I have discussed above. To repeat, in determining whether conduct constitutes an

413 Ibid [1007]–[1008].
414 Ibid [1010].
415 Ibid [1011].

> attempt to pervert the course of justice, it is irrelevant whether the conduct succeeded in achieving that objective. It is the tendency of the conduct viewed objectively that is decisive.[416]

451 It is important to observe that the judge correctly approached this issue, as we must, on the basis that the considerations outlined in *Briginshaw v Briginshaw*[417] applied.[418]

Respondent's submissions — procedural fairness

452 The respondent noted that neither the agreed facts, nor the applicant's proposed answers to the referral questions, referred to a joint criminal enterprise to attempt to pervert the course of justice. It was submitted that the applicant did not seek such a finding. The applicant had not put to any witness that they had engaged in a joint criminal enterprise to pervert the course of justice. The judge acknowledged that she considered that the manner in which the applicant had relied on the evidence relating to the meeting on 18 April 2006 (at which Mr Flynn, Officer White and Mr O'Brien discussed the strategy to be deployed in interviewing Mr Cooper) had been incomplete, and the judge had supplemented that evidence in assessing its probative weight in supporting the applicant's case.[419] The judge then placed substantial weight on meetings in the four days before the arrest of Mr Cooper on 22 April 2006.

453 The respondent observed that, after the lay evidence in the reference determination had concluded, on 24 May 2024, the judge directed the parties to consider approximately 25 questions and summaries in final submissions. That was the first occasion on which the judge referred to the possibility that the applicant might seek a finding that Ms Gobbo and officers of Victoria Police committed an offence of perverting the course of justice. On 21 June 2024, the applicant filed closing submissions, seeking for the first time a finding that Ms Gobbo and officers of Victoria Police committed the offence of perverting the course of justice, or attempting to do so.

454 On 5 July 2024, the respondent filed written closing submissions, contending that the applicant's approach constituted procedural unfairness. It was submitted that the applicant had failed to identify critical matters and facts with any degree of precision, and had given no previous notice to witnesses or the respondent that he would seek serious criminal findings against those witnesses. That resulted in procedural unfairness in four ways:

(a) The applicant bore the onus of proof and had made forensic decisions to advance his case in a particular way, to which the respondent responded.

(b) No police witnesses other than Mr Overland had been questioned by the applicant about the findings of criminality that he would seek.

(c) Having found that the applicant did not make out his case in relation to the criminality which he alleged, the judge identified an additional body of evidence

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416 Ibid [1016]–[1018], referring to [958]–[960] and *Meissner* (1995) 184 CLR 132, 140–1 (Brennan, Toohey and McHugh JJ).

417 (1938) 60 CLR 336, 362 (Dixon J).

418 Reference determination [71]–[72], [945].

419 Ibid [978]. See [439] above.

that the parties had not relied on and concluded substantially on the basis of that evidence that there had been a joint criminal enterprise to attempt to pervert the course of justice.[420]

(d) That finding was contentious and had not been sought based on evidence identified by the applicant.

455 The respondent emphasised that it was not until closing submissions that the applicant agitated for a finding that Officers White and Smith, Mr Flynn and Mr O'Brien had engaged with Ms Gobbo in a joint criminal enterprise to pervert the course of justice, by 'rolling' Mr Cooper and Mr Bickley, and by having Ms Gobbo pretend to Mr Cooper that she was acting in his best interests when, in fact, she was acting as a covert agent of the police. It was submitted that the rule in *Browne v Dunn* required the applicant to put that allegation to each of the four police witnesses. The failure to do so was compounded by the fact that the applicant's case had to be 'supplemented' with additional evidence that the judge identified in the course of deliberations.[421]

Applicant's submissions — procedural fairness

456 The applicant submitted that he had asserted the wrongfulness of Ms Gobbo and Victoria Police's actions in 'rolling' Mr Cooper, albeit that the extent of that wrongfulness could not be definitively characterised until evidence was heard. The circumstances of Mr Cooper's arrest, and the steps taken to secure his assistance as a witness against the applicant, had always been in issue. Further, the terms of question 9 itself put the respondent on notice that the lawfulness of Victoria Police and Ms Gobbo's conduct was at issue, by asking whether the process by which witnesses were 'rolled' was 'improper or unlawful or otherwise undermining of the administration of justice'. Before the reference determination hearing commenced, the applicant had filed a document seeking a finding that the conduct of Ms Gobbo and Victoria Police in 'rolling' Mr Cooper (among other prosecution witnesses) met that description.

457 The applicant referred to an order made by the reference judge after the filing of the proposed answers, requiring the release of various documents to the applicant from the Office of the Special Investigator, including a 'statement of material facts' ('SOMF') prepared by the special investigator in support of his recommendation to charge Ms Gobbo and various police members with attempting to pervert the course of justice. In *Re Mokbel (Ruling No 1)*,[422] the reference judge noted that the SOMF was a detailed synthesis of an extensive body of evidence in support of what was said to have been the detailed planning and implementation of a joint criminal enterprise to pervert the course of justice by an agreement that Mr Cooper become a prosecution witness against the applicant. The reference judge found that there was a legitimate forensic purpose in the applicant having the SOMF to assist him to present his case.

458 It was submitted that it was clearly in contemplation that the applicant would ultimately urge the judge to make such a finding. Each of the police officers in question sought and was granted a certificate pursuant to s 128 of the *Evidence Act*. Each of them was

420 Ibid [978]–[987].
421 Ibid [978].
422 [2024] VSC 26.

examined or cross-examined at length on the factual basis of the special investigator's recommendation, namely, their involvement with Ms Gobbo in the circumstances surrounding Mr Cooper's arrest and the steps taken to ensure that he provided evidence implicating the applicant.

459 The applicant submitted that the prospect that the 'rolling' of Mr Cooper involved a perversion of the course of justice was directly raised in the questioning of Mr Overland. In addition, after the close of evidence and before oral and written submissions, the judge identified a number of topics for the parties' consideration, and foreshadowed that the applicant might make a case that Ms Gobbo and Victoria Police perverted the course of justice.

460 In closing written submissions (dated 21 June 2024), the applicant submitted that the Court should find that Ms Gobbo, together with the four police officers, agreed to participate in a joint criminal enterprise by which Ms Gobbo pretended to Mr Cooper that she was acting in his best interests, when in truth she was acting as a covert agent of the police, with the intent of persuading Mr Cooper to admit his guilt and give evidence against other suspected offenders (including the applicant). The respondent resisted that submission, in writing and orally.

461 In addition, the applicant referred to an invitation by the judge on the second-last day of the hearing (10 July 2024) for the respondent to address the issue of a joint criminal enterprise. The judge referred to the applicant's submissions and identified the issue as to 'whether or not there was complicity of a criminal kind' between Ms Gobbo and the four officers in question. In response, counsel for the respondent stated that he was satisfied with the submissions that he had already made on that point. Counsel for the applicant submitted before us that the respondent then had the opportunity to contend that there was an issue relating to *Browne v Dunn*, but did not do so.

462 The applicant submitted that, in the circumstances, it was a significant exaggeration to contend that the reference judge developed a new case for the applicant. The respondent was always on notice that a finding of illegality was sought. At least by the time the SOMF was relied on, the respondent ought to have known that a finding of attempting to pervert the course of justice would be sought.

463 The applicant accepted that it was not put to any of the police officers, other than Mr Overland, in specific terms, that they had engaged in a joint criminal enterprise to attempt to pervert the course of justice. But this was said not to have breached the rule in *Browne v Dunn*. Each of the officers who was found to be part of the joint criminal enterprise was subject to extensive questioning during the reference determination hearing.

464 Counsel submitted that, in essence, it was put to each individual that there was a plan that Ms Gobbo would be present at the St Kilda Road police station, for the purpose of giving Mr Cooper legal advice in circumstances in which she masqueraded as an independent lawyer, so that Mr Cooper would trust that advice, and ultimately admit his guilt and agree to assist police in relation to the incrimination of the applicant.

Procedural fairness — analysis and conclusion

465 The questions whether the respondent was accorded procedural fairness in respect of the findings of the judge concerning the joint criminal enterprise, and whether the rule in *Browne v Dunn* was observed, are different but interrelated.

466 Three points are clear, namely:

(a) At the outset of the hearing before the reference judge, the applicant made it clear that he sought a finding of improper and unlawful conduct by Ms Gobbo and Victoria Police in the latter's use of Ms Gobbo as an informer in respect of the applicant, and in particular, her role in causing clients for whom she acted to become witnesses for the prosecution against the applicant.

(b) Counsel for the applicant cross-examined police witnesses about the legality or propriety of their conduct, particularly in the period between 18 April and 22 April 2006.

(c) In determining the existence of a joint criminal enterprise in respect of Mr Cooper, the judge relied on a path of reasoning different to that contended for by the applicant in final submissions, but which accorded with the line of questions put to key prosecution witnesses in cross-examination (as outlined below).

467 Before the commencement of evidence before the reference judge, the parties were asked to provide proposed answers to the referred questions. In his proposed answers, the applicant contended that Ms Gobbo's registration and conduct as a human source was done pursuant, at least in part, to a common purpose on the part of Ms Gobbo and Victoria Police to ensure that the applicant was charged and convicted of serious crimes, even if otherwise than by a fair trial. It was also contended that each of the Quills, Orbital and Magnum investigations and prosecutions, including the process by which persons became (and remained) witnesses against the applicant, involved conduct by Victoria Police and/or Ms Gobbo which was 'improper or unlawful or otherwise undermining of the administration of justice (or its appearance)'.

468 The applicant in this Court has identified aspects of the cross-examination of each of the four officers in which they were questioned about the lawfulness or propriety of their conduct in the process by which Mr Cooper became a witness on behalf of the prosecution. In particular:

- Officer Smith agreed that the purpose of the meeting with Mr O'Brien and Mr Flynn on 19 April 2006 had been to inform them of intelligence that Ms Gobbo had provided that would assist them in having Mr Cooper, her client, cooperate with police. Officer Smith agreed in cross-examination that in his conversation with Ms Gobbo on 20 April 2006, they discussed the likelihood that, on his arrest, Mr Cooper would call Ms Gobbo, his counsel. Officer Smith was asked directly in cross-examination if he was concerned about the legality of what Ms Gobbo and Victoria Police were then doing in having Ms Gobbo present to provide legal advice to Mr Cooper, in circumstances in which she had informed against him. Officer Smith was asked about his legal and ethical

concerns about Ms Gobbo giving Mr Cooper legal advice in those circumstances.

- Officer White, in cross-examination, was taken to SDU records of the meeting on 20 April 2006. It was put to him that by then he had abandoned the idea of any strategy to avoid Ms Gobbo being present on the night of Mr Cooper's arrest because, in fact, he really wanted her to be present and to give Mr Cooper legal advice. It was also put to Officer White that it was his expectation by 20 April that Ms Gobbo would attend when Mr Cooper was arrested and that she would give him legal advice. Officer White was asked whether on 22 April 2006 Ms Gobbo was part of the strategy that had been designed to ensure that Mr Cooper was 'rolled' on that night and that he would assist police. Officer White was also asked whether he understood that Ms Gobbo's role, in orchestrating Mr Cooper's arrest and then giving him legal advice, would be unlawful.
- Mr Flynn and Mr O'Brien were both questioned in cross-examination about the meetings on 18 or 19 April 2006. They both agreed that Officer White had shared with them Ms Gobbo's insights as to how the interview with Mr Cooper after his arrest should be pitched. It was put directly to each of them in cross-examination that they discussed using Ms Gobbo to encourage Mr Cooper to 'roll' in his interview.
- Mr O'Brien was cross-examined about Ms Gobbo's inability to provide independent legal advice to Mr Cooper on 22 April 2006. He agreed that it must have been plain that she was unable to do so in circumstances where she was a human source, and that she was obviously conflicted. He also accepted in cross-examination that he knew when Ms Gobbo turned up to the St Kilda Road police station to give advice to Mr Cooper that this was wrong.
- Mr Flynn, in cross-examination about his conduct on 22 April 2006, accepted that a practising criminal barrister, who was also a registered human source, was not capable of giving independent advice to any person. He agreed that Ms Gobbo was then incapable of providing independent legal advice to Mr Cooper.

469 It is clear that each of the four police officers who were held to be parties to the joint criminal enterprise was cross-examined, in some detail, about their conduct in the period between 18 April and 22 April 2006. Officer White and Officer Smith were asked directly about the legality of their conduct. While such questions were not put to Mr Flynn and Mr O'Brien, each of them was questioned about the wrongfulness of the conduct in which they were involved, in particular discussing the use of a practising criminal barrister, acting at the same time as a registered human source, to provide legal advice to a person suspected of a criminal offence, with the purpose of encouraging him to cooperate with police.

470 In written submissions before the judge, the applicant put the case as follows:

- The agreement between Ms Gobbo and the relevant officers to 'roll' Mr Cooper could be inferred from discussions that took place between 16 September 2005 and 18 April 2006.

- Discussions between Ms Gobbo and her handlers between 26 February 2006 and 20 April 2006 revealed clearly that Ms Gobbo anticipated that she would be present on Mr Cooper's arrest.
- The agreement could further be inferred from the coordinated conduct of all the parties on 22 April 2006, including the facts that: Ms Gobbo was called by Officer Smith as soon as he learned of Mr Cooper's impending arrest; later that day, Officer Smith called Ms Gobbo within one minute of learning of Mr Cooper's arrest; Ms Gobbo then made contact with investigators and drove to the police station; Officer White authorised Ms Gobbo to meet with Mr Cooper on his arrest; Ms Gobbo attended and provided Mr Cooper with legal advice to cooperate with Victoria Police, including by becoming a witness against the applicant and others; and when Ms Gobbo attended on 22 April, she assisted Mr Flynn to 'push Mr Cooper over the line'.

471 In its written closing submissions before the reference judge (dated 5 July 2024), the respondent submitted that it was potentially unfair to the persons against whom the findings of improper or unlawful conduct were sought, that they had not had any advanced notice that very serious criminal findings were sought against them in the proceeding. It was contended that it was not put directly to the witnesses in cross-examination that they had engaged in criminal conduct related to the events surrounding the arrest of Mr Cooper. The respondent made detailed submissions contending that there was no criminal or unlawful conduct engaged in as alleged by the applicant.

472 Following receipt of the written submissions, the judge convened a hearing on 10 July 2024. As we have already mentioned, the judge in that hearing referred to the submissions that had been made as to whether there had been 'complicity of a criminal kind' between Ms Gobbo and the four officers, and expressed the view that she could resolve this matter on the written submissions, unless the parties wanted to say something further. Counsel for the respondent stated that the submissions filed on behalf of the respondent were sufficient.

473 It is clear from the foregoing that, throughout the proceeding before the reference judge, the respondent was on notice that the applicant would seek findings of unlawful or improper conduct engaged in by Ms Gobbo and members of Victoria Police, that included their joint conduct in procuring Mr Cooper to admit his guilt and to agree to cooperate with police as a witness against the applicant. That proposition was foreshadowed in the proposed answers provided by the applicant before the commencement of the hearing. In varying forms, the proposition as to improper or unlawful conduct was put to each of the police officers in cross-examination. The proposition that those officers and Ms Gobbo had engaged in a joint criminal enterprise was explicitly advanced in written submissions at the conclusion of the hearing. In the circumstances, that was sufficient to fulfil the requirement of procedural fairness in respect of the ultimate contention, that the four officers and Ms Gobbo had engaged in a joint criminal enterprise in respect of the evidence of Mr Cooper.

474 As to the second aspect of this part of the case, the rule in *Browne v Dunn* is grounded in fairness.[423] It also serves the purpose of enabling the tribunal of fact to have available the response of the witness to the proposition ultimately put on behalf of the party undertaking the cross-examination.[424]

475 There is no hard and fast rule as to the content of the matters which are required to be put in cross-examination in order to satisfy the obligation under *Browne v Dunn*. That depends on the evidence given by the witness in question, and the nature and the content of the proposition which the party cross-examining that witness intends to put (either in evidence through another witness or in final address).[425]

476 The content of the obligation under *Browne v Dunn* was described by Redlich JA in *R v Morrow* in the following terms:

> It is not always clear how far counsel must go in putting their case to avoid complaint that they have not met the minimum obligations arising under the rule. The extent of the obligation will be informed by the nature of the case to be presented by the cross-examiner. If it involves no more than a denial of the evidence of the witness, the 'puttage' may be of relatively short compass. Plainly the extent of the obligation will differ where a positive case is to be subsequently advanced. If the 'essential elements of the eventual case' are not put to the witness who may cast doubt on them, a fair trial may be jeopardised and adverse comment expected. But it will often be a matter of impression and interpretation as to whether what counsel has put sufficiently conveys the substance of the evidence subsequently to be given. Bald 'puttage' will be sufficient only where it can be said that no unfairness arises from the absence of any further identification of the substance of the matters in controversy.
>
> Where detail in support of an allegation is known to the cross-examiner and is to be the subject of evidence, there must be sufficient puttage of that detail so that it can be said that the witness was given an adequate opportunity to respond, not only to the allegation but to its essential features which may include the time, place and circumstances of the occurrence.[426]

477 Failure to comply with the 'rule' may affect the weight given to evidence that is contradictory of, or inconsistent with, the evidence of the relevant witness, or it may affect the question whether any adverse finding should be made to which the evidence of the witness would be relevant.[427]

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423 *Browne v Dunn* (1893) 6 R 67, 70–1 (Lord Herschell LC, Lord Morris agreeing at 78–9), 76–7 (Lord Halsbury); *Bulstrode v Trimble* [1970] VR 840, 847 (Newton J) ('*Bulstrode*'); *Rees v Bailey Aluminium Products Pty Ltd* (2008) 21 VR 478, 488 [21] (Ashley and Redlich JJA and Coghlan AJA).

424 *R v Morrow* (2009) 26 VR 526, 539 [48] (Redlich JA, Nettle JA agreeing at 528 [1]–[2], Lasry AJA agreeing at 550 [88]).

425 *Browne v Dunn* (1893) 6 R 67, 79 (Lord Morris); *Reid v Kerr* (1974) 9 SASR 367, 373 (Wells J); cf *R v Coswello* [2009] VSCA 300 [48]–[55] (Williams AJA, Buchanan JA agreeing at [1]).

426 (2009) 26 VR 526, 539–40 [49]–[50] (Nettle JA agreeing at 528 [1]–[2], Lasry AJA agreeing at 550 [88]) (citation omitted).

427 *Bulstrode* [1970] VR 840, 848 (Newton J); *R v Birks* (1990) 19 NSWLR 677, 689–90 (Gleeson CJ, McInerney J agreeing at 692), citing *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219, 236–7 (Mahoney JA).

478 In the context of a criminal trial, the application of *Browne v Dunn* must be adjusted, and appropriately qualified, by the consideration that criminal proceedings are not only adversarial, but are also accusatorial in nature.[428] In the present case, that proposition is of lesser moment, as the proceeding before the reference judge was not a criminal trial, but it remains true that the finding that was sought was criminal in character.

479 Applying those principles, it is evident that sufficient questions were put in cross-examination to Officer Smith and to Officer White that their conduct, in particular between 19 April and 22 April 2006, was unlawful. While it was not put to either witness that they had engaged in a joint criminal enterprise to attempt to pervert the course of justice, the questions addressed to each of them were directed to the fundamental elements of a joint criminal enterprise, and in terms that put each of them on notice of the proposition that they had each engaged in unlawful — that is, criminal — conduct in respect of their actions with Ms Gobbo directed to securing Mr Cooper's cooperation as a witness against the applicant. Those propositions were sufficient to satisfy the underlying requirements of the rule in *Browne v Dunn*, because they gave each witness a fair opportunity to respond to the propositions that would underly the submission ultimately made that they were parties to a joint criminal enterprise.

480 The position is not as clear in respect of Mr Flynn or Mr O'Brien. The questions directed to each of them were confined to the proposition that they had each been engaged in the interview of Mr Cooper in circumstances where they well understood that Ms Gobbo's role as a human source was inconsistent with her purporting to give independent, objective legal advice to Mr Cooper, and that they discussed using Ms Gobbo to encourage him to cooperate with police. It might be fairly maintained that that line of questioning, at the least, put each of them on notice that it would ultimately be submitted that they had acted improperly in securing or permitting Ms Gobbo to attend on the night in question to purportedly give advice to Mr Cooper for the purpose of securing his cooperation with police. However, the questions did not fairly put them on notice that it might be contended that they were parties to a joint criminal enterprise of the kind ultimately submitted by the applicant.

481 The failure of counsel on behalf of the applicant to put those propositions directly to Mr Flynn or Mr O'Brien did not preclude the judge from making the factual findings upon which she concluded that there was a joint agreement between the four officers and Ms Gobbo, on the night in question, that upon the arrest of Mr Cooper, Ms Gobbo would attend the police station, and, while purporting to advise him as an independent legal representative acting in his best interest, would induce him to cooperate with police, make admissions against his own interest, and agree to act as a witness against the applicant. Each of the four police witnesses in question — including Mr Flynn and Mr O'Brien — was sufficiently on notice that that factual proposition was being advanced on behalf of the applicant in the proceeding.

482 In that regard, it is relevant that after the applicant had filed his written submissions, the respondent did not contend that any of the four police witnesses should be recalled so that it could be specifically put to them that they were each parties to the joint criminal

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428 *MWJ v R* (2005) 222 ALR 436, 440 [18] (Gleeson CJ and Heydon J), 449 [41] (Gummow, Kirby and Callinan JJ); *Hofer v The Queen* (2021) 274 CLR 351, 361–2 [28]–[29] (Kiefel CJ, Keane and Gleeson JJ).

enterprise the applicant alleged. Nor did the respondent take up the invitation of the judge to make further submissions once the applicant had explicitly sought the finding which the judge ultimately made.

483 The respondent's submissions as to procedural fairness also took issue with the path of reasoning taken by the judge in reaching the conclusion as to the joint criminal enterprise.

484 In written submissions before the judge, the applicant had placed greater emphasis on the earlier communications between Victoria Police and Ms Gobbo as the basis for the finding of the joint criminal enterprise. In her reasons, the judge considered that the applicant's 'rendering' of the evidence was incomplete, and indicated that she had supplemented that evidence and assessed its probative weight in evaluating the applicant's case.[429] That evidence had 'not been adequately identified by the applicant in his submissions'.[430] In that context, the judge considered in some detail various meetings that took place between police members, and between police members and Ms Gobbo, between 18 April and 22 April 2006, and the conduct of the parties involved leading up to and following the arrest of Mr Cooper on 22 April.

485 Certainly, in that way, the judge placed greater weight on the evidence of the meetings and activities that occurred over those four days than the applicant had sought. Nevertheless, as explained above, the cross-examination of each of the police officers questioned the conduct of the officers, and their meetings with Ms Gobbo, during that period. In those circumstances, it could not be fairly maintained that the judge embarked on some sort of frolic of her own in reaching the conclusion that, based on the conduct of the parties on those dates, they had engaged in a joint criminal enterprise as contended by the applicant.

486 The judge indicated at the outset of her reasons that she might find it necessary in answering the questions referred to her to refer to relevant evidence to which neither party had referred. In such a scenario, she considered that the requirements of procedural fairness were met if the parties had the opportunity to address the evidence in question in the course of proposing how the questions should be answered.[431] In the context of a hearing in which the judge was required to answer specific questions by reference to evidence adduced before her, in particular whether the process by which persons became witnesses against the applicant involved conduct by Victoria Police and/or Ms Gobbo that was improper or unlawful (question 9), we do not consider that approach to have been in error.

487 For those reasons, we are not persuaded that the respondent was denied procedural fairness in respect of the judge's conclusion that there was a joint criminal enterprise to attempt to pervert the course of justice on the part of Mr O'Brien, Mr Flynn, Officers Smith and White, and Ms Gobbo in that, upon his arrest, Mr Cooper would be denied independent legal advice before making the decision to admit his guilt and agree to assist police.

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429 Reference determination [978].
430 Ibid [966].
431 Ibid [73], [965].

Respondent's submissions — no proper evidentiary basis

488 The respondent next submitted that there was no proper evidentiary basis to find that the five individuals concerned had entered into an agreement, by 20 April 2006, to attempt to pervert the course of justice. It was submitted that the evidence did not establish any agreement to which Mr Flynn and Mr O'Brien, in particular, were a party. The judge accepted that it was not part of Mr Flynn's strategy that Ms Gobbo be called into the police station on the night of Mr Cooper's arrest. Although the police officers might have discussed the approach to interviewing Mr Cooper by 19 April 2006, there was no basis for any finding that each of them formed an agreement with Ms Gobbo that she would place improper pressure on Mr Cooper to agree to such a plea.

489 In that respect, the respondent noted that the judge found that, at least before 20 April 2006, police might have hoped or expected that Ms Gobbo would not be involved in Mr Cooper's arrest, and they anticipated that they could secure his assistance without her involvement.[432] It was submitted that the unchallenged evidence at the reference determination hearing was that, if Ms Gobbo had not turned up to the police station on the night of the arrest, police would have taken no different approach to Mr Cooper.

Applicant's response — proper evidentiary basis

490 The applicant drew attention to the reference judge's finding that the primary focus of police, in arresting Mr Cooper and Mr Bickley in April and June 2006 respectively, was not to bring them to justice, but to encourage them to give evidence against the applicant.[433] The judge also concluded that the singular focus of Victoria Police at the time of Ms Gobbo's registration as an informer was to obtain information and intelligence about the applicant with a view to furnishing that information to the Purana Task Force, and that Ms Gobbo's driving motivation was to provide information and intelligence to police in order to advance both investigations.[434]

491 At the first meeting on 18 April 2006 between Ms Gobbo and Officers White and Smith, Ms Gobbo suggested that police take a soft approach to Mr Cooper in order for him to 'roll'. Later that day, Officer White, Mr O'Brien and Mr Flynn met to develop an interview strategy for Mr Cooper's arrest. At a meeting the next day, Officer White, Mr O'Brien and Mr Flynn each expected that Ms Gobbo would attend when contacted by Mr Cooper after his arrest. On 20 April 2006, Ms Gobbo met with Officers White and Smith, and they understood or expected that Ms Gobbo would attend when Mr Cooper was arrested.

492 The judge set out the events of 22 April 2006 in significant detail and concluded that the existence of the relevant agreement could be inferred from those events.

493 Accordingly, the applicant submitted that there was a sufficient evidentiary basis for the judge's finding that an agreement of the kind asserted was entered into by 20 April 2006.

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432 Ibid [987].
433 Ibid [863].
434 Ibid [867].

Respondent's reply — no proper evidentiary basis

494 In reply, the respondent submitted that the applicant had not identified evidence of necessary elements of a joint criminal enterprise, including whether the five nominated individuals had all interacted by 20 April 2006. It was submitted that key elements relating to the formation of the agreement (including whether it was to seek Mr Cooper's cooperation against others, as compared with a binding admission of his own guilt), were not established.

Proper evidentiary basis — analysis and conclusion

495 At the relevant time, the principles relating to joint criminal liability were founded in the common law.[435] The principles were uncontroversial and may be summarised in short compass.

496 In essence, at common law, where two or more persons committed an offence pursuant to a joint criminal enterprise between them, each person would be liable for the criminal acts of the others. In order to establish liability by participation in a joint criminal enterprise, the prosecution was required to prove beyond reasonable doubt each of the following four elements, namely that:

(a) two or more persons reached an agreement or understanding to pursue a joint criminal enterprise that remained in existence when the particular offence was committed;

(b) the accused person participated in that joint criminal enterprise in some way;

(c) in accordance with the agreement, one or more parties to the agreement performed all of the acts necessary to commit the offence charged, in the circumstances necessary for the commission of that offence; and

(d) at the time of entering into the agreement, the accused had the state of mind required for the commission of the relevant offence.[436]

497 In order for a particular participant in the criminal enterprise to be liable, that participant must have had the requisite intention that the crime be committed at the time of the agreement.[437]

498 The agreement constituting the joint criminal enterprise need not be express, and may

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435 See now *Crimes Act 1958*, ss 323–324C.

436 *McAuliffe v The Queen* (1995) 183 CLR 108, 113–4 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ) ('*McAuliffe*'); *Gillard v The Queen* (2003) 219 CLR 1, 36–7 [110]–[111] (Hayne J, Gummow J agreeing at 15 [31]); *R v Clarke* [1986] VR 643, 653 (Crockett, McGarvie and Southwell JJ); *McEwan v The Queen* (2013) 41 VR 330, 336–7 [32]–[33] (Redlich and Coghlan JJA and Dixon AJA) ('*McEwan*'); *Tangye v The Queen* (1997) 92 A Crim R 545, 556–7 (Hunt CJ at CL, McInerney J agreeing at 562, Sully J agreeing at 562) ('*Tangye*').

437 *Osland v The Queen* (1998) 197 CLR 316, 350 [93] (McHugh J); *McEwan* (2013) 41 VR 330, 337 [35] (Redlich and Coghlan JJA and Dixon AJA).

be inferred from all the circumstances.[438] Further, the agreement may be reached only just before the carrying out of the act or acts constituting the offence in question.[439]

499 In determining whether there was a joint criminal enterprise between the four police and Ms Gobbo that on his arrest, Mr Cooper would be denied independent legal advice before deciding to admit his guilt and agree to assist police, it is relevant to take into account the context in which the various discussions took place in the period between 18 April and 20 April 2006. The judge concluded that the primary objective of Victoria Police in the arrest of Mr Cooper was to induce him to give evidence against the applicant.[440] Further, the judge concluded that the evidence left no room for doubt that the singular focus of Victoria Police, when Ms Gobbo was registered as a police informer, and Ms Gobbo's driving motivation at that time, was that she would provide information and intelligence about the applicant.[441]

500 It is also relevant that for some time before Mr Cooper's arrest on 22 April 2006, Ms Gobbo had been retained by him in relation to the Landslip and Matchless charges. In addition, she had played an important role in assisting police in respect of Mr Cooper, including by identifying him as a vulnerable and valuable target to incriminate the applicant, by providing intelligence and assistance that was essential to Mr Cooper being arrested 'red-handed' in the clandestine drug laboratory at Strathmore in April 2006, and by advising police how best to approach him after his arrest.[442]

501 It was in that context that the various meetings and discussions took place between 18 April and 22 April 2006. Without rehearsing the content of those meetings, which we have already summarised,[443] a number of points are of significant note. In particular, on 18 April 2006 (four days before Mr Cooper's arrest and three days after the laboratory in Strathmore was located based on the information provided by Ms Gobbo), a meeting took place between Mr Flynn, Officer White and Mr O'Brien, in which they discussed the strategy that would be deployed when interviewing Mr Cooper to persuade him to 'roll' against the applicant and his associates.[444] At that meeting, Mr O'Brien, Mr Flynn and Officer White developed an interview strategy for Mr Cooper's arrest and discussed the 'sales pitch' and the process of 'rolling him'. The information provided by Ms Gobbo was discussed in that meeting and was of assistance to the three police officers.[445] Importantly, the judge held that she was unable to accept that either Mr Flynn or Mr O'Brien could have had any expectation at that meeting (or the subsequent meeting on 19 April) that Ms Gobbo would make herself unavailable on the occasion of Mr Cooper's arrest.

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438 *McAuliffe* (1995) 183 CLR 108, 114 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ); *Tangye* (1997) 92 A Crim R 545, 556 (Hunt CJ at CL, McInerney J agreeing at 562, Sully J agreeing at 562); *Guthridge v The Queen* (2010) 27 VR 452, 461 [99] (Neave and Redlich JJA and Coghlan AJA) (*'Guthridge'*).

439 *Guthridge* (2010) 27 VR 452, 461 [100] (Neave and Redlich JJA and Coghlan AJA); *R v Lowery [No 2]* [1972] VR 560, 561 (Smith J).

440 Reference determination [863].

441 Ibid [867].

442 Ibid [325].

443 See [439]–[446] above.

444 Reference determination [978].

445 Ibid [344(b)] .

502 Officer Smith gave evidence that it was his understanding that Ms Gobbo would provide Mr Cooper with legal advice when he was arrested.[446] Neither Mr Flynn nor Mr O'Brien were present at the conversation between Officers Green, Smith and White and Ms Gobbo on 20 April 2006, in which Ms Gobbo stated that on his arrest, Mr Cooper would 'ring no one else but me'. However, the judge was unable to accept that it was a matter of 'sheer coincidence' that those discussions had taken place the day after Officer White had met with Mr Flynn and Mr O'Brien and discussed with them the impending arrest of Mr Cooper. Accordingly, she considered it 'inconceivable' that on either 18 April or 19 April 2006, or at the latest on 20 April 2006, Officer White did not inform Mr O'Brien and Mr Flynn about Ms Gobbo's determination to attend after the arrest of Mr Cooper.[447]

503 In determining the question whether the relevant joint criminal enterprise was in place by 20 April, it was relevant for the judge to take into account the events that occurred two days later on 22 April 2006 following the arrest of Mr Cooper. We have already summarised the events of that day.[448]

504 The findings by the judge as to the events of 22 April 2006 support her conclusions that by 20 April Mr O'Brien and Mr Flynn were aware that Ms Gobbo would attend the police station on the arrest of Mr Cooper. The findings also support the judge's rejection of the evidence of Mr O'Brien that he was 'blindsided' when Ms Gobbo attended the police station on the night of Mr Cooper's arrest.

505 Those findings are of critical importance in the context of the earlier findings to which we have referred, namely that the primary objective of police in arresting Mr Cooper was to induce him to give evidence against the applicant, and that the focus of both police and Ms Gobbo, in the latter's registration as a police informer, was to provide evidence to police against the applicant. The combination of those factors, in our view, is ample to support the conclusion that, in the context of the events that occurred between 18 April and 22 April 2006, it may be inferred that, by 20 April 2006, there was in place an agreement between Mr O'Brien, Mr Flynn, Officer Smith and Officer White, and Ms Gobbo that upon his arrest Mr Cooper would be denied independent legal advice (that is, independent of Ms Gobbo) before making his decision to admit his guilt and agreeing to assist police on 22 April 2006.

506 It follows that there was a proper evidentiary basis for the judge's finding, and this aspect of the respondent's third ground must also fail.

PART F: SUBMISSIONS ON SUBSTANTIVE APPEAL

Applicant's submissions

Proposed grounds of appeal

507 The applicant advances the following proposed grounds of appeal:

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446 Ibid [984].
447 Ibid [987].
448 Ibid [1000]. See [445] above.

1. By reason of the following matters, the integrity of the Applicant's pleas of guilty and convictions in each of Quills, Orbital and Magnum, were so impugned, and the proper administration of justice so compromised, as to occasion, in each case, a substantial miscarriage of justice:

   (a) his long-time 'barrister', Nicola Gobbo, was at relevant times a registered informer for Victoria Police, and her conduct as an informer was primarily directed to achieving the conviction and imprisonment of her client, the Applicant;

   (b) consistently with that design, Ms Gobbo did in fact inform on the Applicant while concurrently communicating with him in respect of, and advising him on, his criminal matters and his extradition;

   (c) Victoria Police and/or Ms Gobbo improperly and/or unlawfully obtained evidence and/or intelligence against the Applicant, which evidence and/or intelligence was used, and/or was useful, in his criminal matters and his extradition.

2. Each of the Applicant's convictions in the Quills, Orbital and Magnum matters was occasioned by a substantial miscarriage of justice by reason of fundamental breaches of the Prosecution's duty of disclosure.

508 Although the arguments on the two proposed grounds of appeal tended to intersect, it is convenient at this point to deal with each ground separately.

Ground 1 — administration of justice

509 The primary way the applicant put his case on ground 1 was that the departure from the prescribed processes for the trial of each of the Quills, Orbital and Magnum charges was so serious and fundamental as to constitute a substantial miscarriage of justice, without requiring an inquiry into the inevitability or otherwise of conviction. Such an inquiry would only be necessary on the applicant's alternative case, namely if the Court did not accept the fundamental character of the departures from the ordinary processes for trial. In that scenario, the applicant submitted that it was not inevitable that he would have been convicted, had those departures not occurred.

510 The applicant submitted that the authorities support the proposition that a plea of guilty will not preclude an appeal against conviction based on the impropriety or illegality of police conduct, where that conduct has corrupted the processes of criminal justice. It was submitted that the courts are especially concerned in cases where a plea of guilty has been accepted but the court has been denied knowledge of the true circumstances of the case, and cases where the accused person was not in possession of all the material

facts. The applicant relied on *Meissner,*[449] *Honeysett v Director of Public Prosecutions (NSW)*,[450] *Rogerson*,[451] *R v Inns*,[452] *O'Sullivan v The Queen*,[453] and *R v Maltese*.[454]

511 The applicant submitted that the grossly improper plan of Victoria Police and Ms Gobbo, involving the use by Victoria Police of a practising criminal defence barrister to inform against her clients, necessarily involved a complete incompatibility with counsel's role. Victoria Police and Ms Gobbo's conduct fundamentally subverted a basic requirement of a fair trial. It was further submitted that Victoria Police deliberately and consistently concealed its use of Ms Gobbo in this way from the DPP until June 2012 and thereby denied the DPP true knowledge of relevant facts when, in support of the applicant's extradition, he signed solemn undertakings to prosecute the applicant.

512 Importantly, it was submitted that the conduct of Victoria Police deprived the applicant of the knowledge that was necessary for him to make a free choice in respect of his pleas, which were accepted by Whelan J on the implicit premise that the applicant had full disclosure of all relevant matters. In this way, his guilty pleas were impugned.

513 The applicant submitted that the extradition process was an important illustration of the manner in which the deception and non-disclosure concerning Ms Gobbo's role was instrumental in extracting his pleas of guilty in the three matters. In particular, unbeknown to the applicant, who previously made three unsuccessful stay applications on the basis of asserted impropriety or irregularity in the extradition processes, there was another, and much stronger, basis upon which he could have argued for a stay of the proceedings, namely, that the mechanism by which he came to be in the jurisdiction had involved a grave impropriety involving his barrister in the extradition proceedings informing on him before and during those proceedings. The conduct of Victoria Police and Ms Gobbo was said to have affected the extradition process, in respect of both the administration of justice in Greece, and the applicant's proceedings in the Federal Court attempting to restrain the extradition.

514 The applicant submitted that his pleas of guilty cannot be disentangled from the unlawful and improper means by which the pleas were secured, nor from the grave and prolonged non-disclosure that prevented the applicant and the courts from knowing of those matters.

515 The applicant submitted that it was critical that Victoria Police's registration and deployment of Ms Gobbo was motivated, in large part, by a common purpose to ensure that the applicant was charged with and convicted of serious offences.[455] The pursuit and achievement of that common purpose in the way it was done had a tendency to

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449 (1995) 184 CLR 132, 141–2 (Brennan, Toohey and McHugh JJ), 157 (Dawson J).

450 [2023] NSWCCA 215 [2], [41] (Beech-Jones CJ at CL, Fagan J agreeing at [64], Dhanji J agreeing at [65]) ('*Honeysett*').

451 (1992) 174 CLR 268, 280 (Brennan and Toohey JJ).

452 (1974) 60 Cr App R 231, 233 (Lawton LJ for the Court).

453 (2002) 128 A Crim R 371, 394 [40], [42] (Sheller JA, Grove JA agreeing at 396 [48], 396 [52]); [2002] NSWCCA 98.

454 (2004) 150 A Crim R 97, 102 [18] (Buddin J, Simpson J agreeing at 103 [21], Bell J agreeing at 103 [22]); [2004] NSWCCA 408.

455 Reference determination [852]–[875].

undermine the administration of justice, or its appearance, and the propositioning and registration of Ms Gobbo to inform against the applicant was grossly improper and constituted a dishonest design by Ms Gobbo to which Victoria Police was a party.[456]

516 A central component of the unlawful design of Victoria Police and Ms Gobbo against the applicant was to 'roll' his associates against him. In the case of the arrest of both Mr Cooper and Mr Bickley, the primary focus of police was not to bring them to justice, but to encourage them to give evidence against the applicant. In both cases, Ms Gobbo had provided intelligence and information that assisted in their arrest, and she provided legal advice to them on their arrest, after which each of them provided statements implicating the applicant.

517 The applicant also relied on the judge's findings:

(a) that Victoria Police as an institution had knowledge of the illegality of its conduct in respect of Ms Gobbo;[457]

(b) as to the involvement or knowledge of individual members of Victoria Police, including those in senior command;[458] and

(c) that Mr Overland deliberately did not seek legal advice at the time to avoid being advised that it would be improper and potentially unlawful to continue to use Ms Gobbo as an informer.[459]

518 The applicant relied on the specific breaches by Ms Gobbo of her duties to the applicant, the effect of which was to deny him access to information that he could have used to apply to stay the criminal proceedings against him, to exclude evidence, or to resist extradition.[460] Ms Gobbo breached her duty to Mr Bickley and Mr Cooper to act in their best interests.[461] On multiple occasions Ms Gobbo breached her duty of confidentiality to her clients.[462] Victoria Police was complicit in Ms Gobbo's breaches of her duty to the applicant, and to Mr Cooper and Mr Bickley.[463]

519 The applicant made detailed submissions in support of the proposition that the effect of the improper conduct by Ms Gobbo and Victoria Police was that police unlawfully and improperly obtained evidence which was significant in the prosecutions of the charges against him.

520 The applicant observed that, after Mr Cooper's arrest, Ms Gobbo advised him to make full and frank admissions and to cooperate with the police, in circumstances in which she was acting as agent of Victoria Police. That advice far exceeded the bounds of reasoned argument or advice, and at all relevant times Ms Gobbo was motivated by her

456 Ibid [890], [894]–[895], [904] and [936].
457 Ibid [935]–[936], [1106], [1121], [1127], [1133].
458 Ibid [1061], [1083], [1091], [1116], [1143]–[1145], [1160], [1269].
459 Ibid [1094].
460 Ibid [799].
461 Ibid [801].
462 Ibid [910].
463 Ibid [900]–[936].

desire to advance the interests of Victoria Police.[464] Her conduct relating to Mr Cooper's arrest constituted a breach of her fiduciary duty which was grossly improper and unlawful and in which Victoria Police were complicit. Further, Ms Gobbo continued to have an ongoing role in the assistance that Mr Cooper gave to the police by managing him as a witness.

521 The conduct of Victoria Police and Ms Gobbo leading up to and on the day of Mr Bickley's arrest, and the circumstances in which he came to give evidence that inculpated the applicant in the Quills and Orbital matters, amounted to a breach of her fiduciary duty of loyalty which was grossly improper and in which Victoria Police was complicit. It was submitted that the conduct engaged in by Victoria Police to secure Mr Bickley's assistance was dishonest and deceitful. In particular, their decision to arrest Mr Bickley for an alleged conspiracy with Mr Cooper to manufacture MDMA was used as leverage to try to persuade him to assist police, in circumstances in which it was never intended that Mr Bickley would be charged with that offence.

522 The applicant also relied on the finding that Ms Gobbo's role in persuading Mr Thomas to make statements implicating the applicant in drug offending was significant. Ms Gobbo was instrumental in Mr Thomas's decision to assist police in their pursuit of the applicant.

523 The applicant further submitted that these matters bore upon the issue of the appearance of the administration of justice in this case. It was submitted that a miscarriage of justice had occurred because a fair-minded observer might suspect that justice miscarried in this case because of the deceptive conduct of the accused's counsel. The applicant relied on the decisions in *Williams v Spautz*,[465] *HCF v The Queen*,[466] and *R v Szabo*.[467]

524 The applicant also relied on the conclusion of the reference judge that, because Quills and Orbital were investigated and indicted jointly, it would be speculative to disaggregate those two prosecutions into a separate presentment and indictment. The applicant relied on the judge's finding that, if Mr Bickley's evidence had been excluded, the prosecution in each case would have remained viable, but would have been significantly weakened.

525 In respect of the Orbital charge, the applicant submitted that it was based significantly on evidence in the form of recordings and statements detailing the applicant's dealings with undercover agents in June 2005. The cogency of that evidence, it was submitted, was largely dependent on the prosecution's ability to exclude, beyond reasonable doubt, the version of events provided by the applicant in his record of interview. The applicant submitted that Mr Bickley's evidence would be integral to the prosecution's ability to do so. Without his evidence, the prosecution case on the Orbital charge would be substantially weakened. Senior counsel for the applicant accepted, however, that the prosecution case in Orbital was viable, even without Mr Bickley's evidence.

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464 Ibid [1016].
465 (1992) 174 CLR 509, 520 (Mason CJ, Dawson, Toohey and McHugh JJ).
466 (2023) 97 ALJR 978; [2023] HCA 35.
467 [2001] 2 Qd R 214 ('*Szabo*').

526 The applicant submitted that, even if he was unsuccessful in having Mr Bickley's evidence excluded under s 138 of the *Evidence Act*, and his evidence was admitted in the Quills and Orbital trials, the reliability and credibility of his evidence would have been open to strenuous attack. In those circumstances, the evidence of the informant, Mr Rowe, would also be challenged. His credibility as a witness would be tarnished in light of his dealings with Ms Gobbo, and his conduct of the investigation would be heavily criticised.

527 The applicant accepted that the Magnum charge was in a different category, in that Ms Gobbo did not contribute to the collecting of any evidence of that offending. However, in the reference determination, the applicant identified eleven instances in which Ms Gobbo attempted to assist Victoria Police in respect of the Magnum prosecution. While there was little evidence of significance in the Magnum matter that could be excluded as a result of Ms Gobbo's involvement and conduct, it was submitted that the applicant would have had reasonable grounds upon which to apply for a stay of the Magnum prosecution because of the conduct of Ms Gobbo and Victoria Police, specifically in respect of the extradition and the non-disclosure to the Australian government, or the Greek courts, of the grossly improper role played by Ms Gobbo, with Victoria Police, in respect of the Quills and Orbital prosecutions.

528 The applicant also noted that the reference judge found that, at the least, the prosecution case on the Landslip and Matchless charges would have been significantly weakened without Mr Cooper's evidence against the applicant, and that the prosecution case on the Spake charges would have been significantly weakened without the evidence of Mr Bickley and Mr Cooper.

529 The applicant placed considerable reliance on the judge's finding that the applicant had been in no position to properly assess whether it was in his best interests to agree to the plea bargain proposed by the prosecution.[468] The respondent had accepted that the applicant could not fully assess the strengths and weaknesses of the prosecution cases in Quills and Orbital, or in Landslip, Matchless and Spake. The applicant submitted that the judge made a finding that the applicant may have made a different assessment of the prospects of an application to stay the Magnum prosecution, had there been full disclosure.[469]

530 In conclusion on ground 1, the applicant submitted that the departure from the prescribed processes for trial was so serious and fundamental as to constitute a substantial miscarriage of justice. Victoria Police and Ms Gobbo embarked on an improper and unlawful design to convict Ms Gobbo's client, the applicant, knowing of the risk that that conduct might be unlawful. Ms Gobbo's assistance was crucial to securing evidence against the applicant on the Quills and Orbital joint prosecution (and in other matters relating to the global plea deal), and to putting pressure on him to plead guilty, as he ultimately did. Ms Gobbo was further implicated in Magnum by her involvement in the applicant's extradition, which would have provided the applicant with a reasonable argument to stay all prosecutions against him.

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468 Reference determination [1484].

469 Ibid [1488].

531 The applicant submitted that the guilty pleas were liable to be set aside for fraud. The cases against the applicant had been put together by dishonest means and the courts had been misled over a period of years, culminating in the guilty pleas. This directly and dramatically attacked the administration of justice.

532 As mentioned earlier, the applicant submitted in the alternative that it could not be shown that the convictions were inevitable, had the dishonest conduct of Ms Gobbo and Victoria Police not occurred.

Ground 2 — non-disclosure

533 The applicant pointed out that Mr Maguire warned Victoria Police in his advice of 4 October 2011 that the actions of police and Ms Gobbo might have a 'collateral effect' in relation to the applicant's sentencing. At this time, the applicant was pursuing the application before Whelan J to change his plea.

534 In support of ground 2, the applicant submitted that Victoria Police was in breach of its duty of disclosure to him from the moment Ms Gobbo was registered as a police informer. Victoria Police did not take steps to disclose that matter until 2016. Senior police officers knew that Victoria Police was in breach of its duty of disclosure to the Court at various times between September 2005 and June 2016. The judge did not accept that members of Victoria Police held the honest belief on reasonable grounds that Ms Gobbo's role as informer was immune from disclosure. To the contrary, Mr Overland deliberately did not seek legal advice, so as to avoid being told that Ms Gobbo's past use would inevitably be disclosable if she were transitioned to being a witness.

535 The applicant further relied on the finding that on 4 September 2012, the DPP breached his duty of disclosure, while the applicant's applications for leave to appeal his convictions were pending in this Court, and the DPP breached his ongoing duty of disclosure by failing to make further inquiries after that point. Further, if the applicant were to succeed on his application to appeal against the reference determination under s 319A(5), it would be established that the DPP was in breach of his duty of disclosure before the applicant was convicted and sentenced, when it would still have been open to him to apply to the Court to change his plea. Unlike the position after conviction, it would only have been necessary to persuade the Court that it was in the interests of justice to allow the application, without establishing a substantial miscarriage of justice.

536 In addition, the applicant relied on the findings that the CDPP was aware of Ms Gobbo's use as a police informer by at least by 3 November 2011, when his office obtained a copy of Mr Maguire's advice. From at least that time, the CDPP was in possession of information that cast a shadow over the integrity of the proceedings against the applicant.

537 The applicant submitted that the breaches by Victoria Police, the DPP and the CDPP of their duties of disclosure involved such a serious departure from the prescribed processes for trial as to constitute a substantial miscarriage of justice. In support of that proposition, the applicant relied on statements of principle in the authorities, including

Baini v The Queen, [470] *A J v The Queen*,[471] *Kalbasi v Western Australia*[472] and *Mallard v The Queen*.[473]

538 The applicant pointed out that the difficulty in demonstrating how a breach of the duty of disclosure would, or would not, have affected the outcome of a trial, is compounded when the breach has only been revealed many years later. He referred to a number of findings of the reference judge as to the loss of evidence, including the inability of witnesses to recall important points, the loss of documents and emails, the inadequacy of police diary notes and records, the loss of two initial recorded conversations between Victoria Police and Ms Gobbo, and the death of Mr Mansell, the police officer who, with Mr Rowe, proposed that she become a police informer.

539 The applicant submitted that the matters which were not disclosed were, at the least, potentially significant. As submitted under ground 1, the breach of the duty of disclosure denied the applicant the opportunity to:

(a) apply for a stay of the proceedings as an abuse of process;

(b) mount arguments in the Greek courts in opposition to extradition, and in the Federal Court, to restrain the extradition;

(c) apply to stay the proceedings following extradition on the basis of Ms Gobbo's conduct, including her involvement in the extradition;

(d) apply to exclude improperly or unlawfully obtained evidence;

(e) cross-examine key witnesses; and

(f) have his first appeal against conviction take into account the matters which should have been disclosed.

540 The applicant referred to the reference judge's findings about the capacity of the undisclosed evidence to bear on the decision by the applicant to plead guilty to the Quills, Orbital and Magnum charges. The judge concluded that the applicant was in no position to properly assess whether it was in his best interests to agree to the terms of the plea bargain proposed by the prosecution. In particular, he was not able to fully assess the strengths and weaknesses of the prosecution cases against him in relation to Quills and Orbital, and he may have had a different assessment of the prospects of an application to stay the Magnum prosecution.

541 Finally, the applicant submitted that the breach of duty of disclosure was protracted and repeated, despite a number of opportunities to rectify it.

542 For those reasons, it was submitted that the non-disclosure went to the root of the trial of the applicant, and to his guilty pleas to the Quills, Orbital and Magnum charges.

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470 (2012) 246 CLR 469, 480 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

471 (2011) 32 VR 614, 620 [22] (Weinberg and Bongiorno JJA, Buchanan JA agreeing at 615 [1]).

472 (2018) 264 CLR 62, 119–20 [156] (Edelman J).

473 (2005) 224 CLR 125, 133 [17], 135 [23] (Gummow, Hayne, Callinan and Heydon JJ), 156 [83]–[84] (Kirby J).

543 Alternatively, it was submitted that this Court could not be satisfied — just as the reference judge was not — that the applicant would have pleaded guilty to each of the Quills, Orbital and Magnum charges, even if he had had full and timely disclosure. In that respect, the applicant referred to the fact that the judge was unable to reach a positive finding that the applicant's conduct in the context of the plea negotiations in April 2011 fairly reflected how he might have approached those negotiations if he had had the benefit of full disclosure.

Disposition

544 The applicant finally submitted that, if the Court were to allow his appeal and set aside his convictions, it would be unjust to have him stand trial again, and orders for acquittal were appropriate.[474] The applicant relied on the delay since the alleged offences (which was a product of the prosecution's breach of its obligations of disclosure), the fact that the applicant had served the majority of his non-parole period and a large portion of his total effective sentence, the difficult circumstances in which he had undergone imprisonment (including the infliction of a serious brain injury), the debasement of the criminal justice system that had occurred, and the public expense.

545 In any event, it was contended, the evidence in Quills and Orbital, excluding that of Mr Bickley, was not sufficiently cogent to justify a retrial. The applicant accepted that there was cogent admissible evidence in the case of Magnum.

Respondent's submissions

546 The respondent noted the following findings by the reference judge in respect of the scope of Ms Gobbo's lawyer/client relationship with the applicant:

(a) When Ms Gobbo was registered as an informer in September 2005, she was retained by the applicant only in relation to Orbital, Kayak and Plutonium.

(b) Those retainers were terminated unilaterally by the applicant when he absconded on 20 March 2006.

(c) Ms Gobbo was not retained at all by the applicant between March 2006 and June 2007.

(d) Ms Gobbo was retained by the applicant on a limited basis, only in relation to his extradition, between June 2007 and May 2008.

(e) After the applicant returned to Australia in May 2008, the evidence did not support the existence of a general or blanket retainer; rather, there were a series of limited retainers on an ad hoc basis.

(f) By 30 June 2009, the 'ad hoc' retainers had ceased.

474 *DPP (Nauru) v Fowler* (1984) 154 CLR 627, 630 (Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ); *Mokbel v The Queen* (2021) 289 A Crim R 1, 3 [7] (Maxwell P); [2021] VSCA 94.

(g) There was no finding that the lawyer/client relationship continued after 30 June 2009, and no finding that Ms Gobbo had any role in giving the applicant legal advice in connection with his plea negotiations in 2011.

Ground 1 — administration of justice

547 The respondent relied on the duties Ms Gobbo owed to the applicant as identified by the reference judge, namely the best interests duty, the duty to exercise reasonable skill and care, and the duties of confidentiality and loyalty.

548 As to breaches of those duties, the respondent submitted that:

(a) Ms Gobbo breached the best interests duty from the time she agreed to act as an informer against the applicant while she was under a retainer to him;

(b) Ms Gobbo continued to act in breach of that duty, when she relayed information to police about the applicant in a manner adverse to his interests, while at the same time acting under retainer to him; and

(c) Ms Gobbo breached her duty to act in the applicant's best interests and to exercise reasonable skill and care by failing to reveal to him the nature and extent of her relationship with Victoria Police, which deprived him of the opportunity to use that information to seek a stay of the proceedings or the exclusion of evidence, or to resist extradition.[475]

549 The respondent submitted that the scope of the duty of loyalty that Ms Gobbo owed to the applicant after March 2006 was limited to not acting in any capacity that would be in conflict with matters in which she was retained to act. Accordingly, it was submitted that Ms Gobbo did not breach the 'no conflict' rule, in respect of the applicant, in acting for Mr Cooper, Mr Bickley and Mr Thomas in respect of Quills, Matchless or Landslip (in which she had never been retained by the applicant). The respondent referred to the finding by the reference judge that Ms Gobbo did not owe a continuing duty of loyalty to the applicant arising from his previous retainers, including when he was absent from the jurisdiction and when she continued to assist police as an informer in their ongoing pursuit of him, in particular by informing against Mr Cooper and Mr Bickley in order that they might 'roll' against the applicant.

550 The respondent accepted that Ms Gobbo breached the duty of loyalty in three ways:

(a) She breached the duty that arose from the Orbital retainer from the point when, as an informer, she first provided Victoria Police with information about the applicant in connection with Operation Orbital (which it was accepted occurred on 28 October 2005) until she ceased to act for the applicant in connection with Orbital when he absconded in March 2006.

(b) She acted in breach of the duty of loyalty that arose from the extradition proceedings when, as an informer, she provided Victoria Police with information

475 Reference determination [808].

about the applicant in connection with the extradition, until she ceased to act for him in connection with the extradition.

(c) In relation to the ad hoc retainers, she acted in breach of the duty of loyalty as a result of her continuing role as a registered informer.

551 Specifically, it was submitted that because Ms Gobbo was not retained by the applicant between March 2006 and May 2007, she did not owe any duty of loyalty to him during that period.

552 In respect of the impropriety of the conduct of Ms Gobbo and Victoria Police, the respondent made the following submissions:

(a) To the extent that Ms Gobbo acted in connection with the investigation, extradition or prosecution of the applicant, and in doing so breached a duty she owed him as a client, she acted improperly but not unlawfully.

(b) The propositioning and registration of Ms Gobbo by police, so that she might inform against the applicant (a client), was grossly improper and a serious departure from the norms to which society would expect Victoria Police to adhere. By failing to obtain legal advice about their proposal to Ms Gobbo, Victoria Police acted wilfully and recklessly, but it could not be imputed that there was a deliberate strategy at that point to avoid obtaining such advice. At the relevant time (August to September 2005), Ms Gobbo was not retained by the applicant in connection with Quills, Orbital or Magnum.

(c) The multiple breaches by Ms Gobbo of her duty of loyalty to the applicant were grossly improper and the complicity by Victoria Police in that course of conduct was also grossly improper. To the extent that a member of Victoria Police knowingly assisted Ms Gobbo in breaching her duty of confidentiality, that was improper. However, the judge did not find that any breaches of the duty of loyalty by Ms Gobbo involved unlawful conduct by her or by Victoria Police.

553 The respondent submitted that, in general, there are two broad categories of case in which it has been held that a substantial miscarriage of justice has occurred despite a plea of guilty. The first category is where the applicant establishes that the plea was not attributable to a genuine consciousness of guilt.[476] It was submitted that the authorities do not suggest that non-disclosure of a material fact alone is sufficient to establish that an accused has not made a free choice in the relevant sense. Further, it was submitted, the mere fact that the applicant was not in a position to properly assess whether it was in his best interests to agree to the terms of the plea bargain proposed by the prosecution in April 2011, was insufficient. It is necessary also to show that there was an 'issuable

476 *Peters v The Queen [No 2]* (2019) 60 VR 231, 242 [39] (Maxwell P, Kaye and McLeish JJA) ('*Peters [No 2]*'); *Meissner v The Queen* (1995) 184 CLR 132, 157 (Dawson J); *Honeysett* [2023] NSWCCA 215 [38]–[41] (Beech-Jones CJ at CL, Fagan J agreeing at [64], Dhani J agreeing at [65]).

question of guilt' in the matter. Counsel referred to *Peters v The Queen [No 2]*,[477] *Jamieson v The Queen*,[478] *R v Zelukin*,[479] and *Monaghan v The King*.[480]

554 The respondent contended that the circumstances do not disclose that the applicant did not entertain a genuine consciousness of guilt in the relevant sense. In particular, the applicant had not submitted that he did not understand the nature of the charges, that he did not intend to admit that he was guilty of the charges, that his plea was induced by intimidation, improper inducement or fraud, or that he received inadequate legal advice. Nor did the evidence point to such circumstances. Ms Gobbo had ceased to act for the applicant nearly two years before he pleaded guilty. She did not give him any advice in relation to the plea negotiations. He received independent legal advice from experienced senior and junior counsel. There was no finding that the applicant's lawyers were deliberately deceived as to the character and strength of the prosecution case. In any event , the fact that the applicant was not in a position to properly assess whether it was in his best interests to agree to the plea bargain, and 'not in possession of all of the facts' would not suffice to satisfy the first category of case described above.[481]

555 The respondent submitted that the second category of substantial miscarriage of justice comprised cases in which an applicant can establish that, as a matter of law, they could not have been convicted of the offence at trial, including because a stay would have been granted. Counsel referred to *R v Asiedu*,[482] *R v Togher*,[483] and *R v Wilson*.[484]

556 The respondent accepted that an applicant may also discharge that onus by establishing that, before the entry of a guilty plea, there was an irregularity or error in connection with the prosecution which was 'fundamental'. In such a case, the convicted person's guilt would be cancelled by the fact that they ought never to have been required to enter a plea at all. The respondent referred to the decision of the High Court in *Director of Public Prosecutions v Smith*.[485]

557 However, the respondent submitted that the authorities do not support the proposition that an applicant may establish a fundamental error or irregularity amounting to a substantial miscarriage of justice, merely by showing that there would have been a 'realistic prospect' of a stay in respect of the charges to which he or she pleaded guilty.

558 The respondent submitted that a stay of prosecution is only granted in rare and exceptional circumstances, as a matter of last resort. By reference to the judgement of Gageler J in *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)*,[486] it was submitted that an applicant for a permanent stay must identify a material connection between the relevant unlawfulness (or impropriety) and the conduct of the proceedings against the applicant. It was submitted that none of the submissions advanced on behalf of the applicant engaged with that requirement, and in particular, the applicant's

477 (2019) 60 VR 231, 242 [39]–[41] (Maxwell P, Kaye and McLeish JJA).
478 [2017] VSCA 140 [44], [78]–[79] (Ashley, Osborn and Santamaria JJA).
479 [2003] NSWCCA 262.
480 [2022] VSCA 247.
482 [2015] 2 Cr App R 8, 107–8 [30]–[32] (Lord Hughes for the Court) ('*Asiedu*').
483 [2001] 1 Cr App R 33 ('*Togher*').
484 [2016] 1 NZLR 705, 741 [104] (Arnold J for William Young, Glazebrook, Arnold and Blanchard JJ).
485 (2024) 98 ALJR 1163; [2024] HCA 32.
486 (2018) 266 CLR 325 ('*Strickland*').

submissions did not articulate how particular conduct could have affected the prosecution of the Quills, Orbital or Magnum charges. Accordingly, it was submitted that the applicant had not demonstrated that there was a realistic prospect that those charges would have been stayed, if appropriate disclosure had been made at the time.

559 The respondent then turned to each of the three particulars to proposed ground 1.

560 The contention in the first particular that Ms Gobbo was the 'long-time barrister' of the applicant was said to be imprecise because it did not sufficiently describe the point (or points) in time at which it applied. This was critical, because the lawyer/client relationship between Ms Gobbo and the applicant was not stable, and its nature and extent varied over time.

561 Specifically, the respondent noted that Ms Gobbo played no role as the applicant's lawyer in connection with the pleas which are the subject of the current appeal.

562 As to the second particular relied on in support of ground 1 — that Ms Gobbo informed on the applicant while she was concurrently communicating with him in respect of, and advising him on, his criminal matters — the respondent submitted that Ms Gobbo was not the applicant's lawyer in any capacity, or communicating with him at all when she assisted Victoria Police in relation to Mr Cooper's arrest in April 2006 and Mr Bickley's arrest in June 2006.

563 The respondent submitted that there was an imprecision in the reference, in particular, to the applicant's 'criminal matters'. It was submitted that in order to be relevant to ground 1, the particular must be directed specifically to the convictions under appeal.

564 In relation to the third particular — improper and unlawful obtaining and use of evidence and/or intelligence against the applicant — the respondent submitted that it was necessary to distinguish between the conduct of Victoria Police (which did not owe specific duties to the applicant), and Ms Gobbo (who did owe duties to her clients).

565 Next, with one exception (the finding of an attempt to pervert the course of justice relating to Mr Cooper), it was submitted that none of Ms Gobbo or Victoria Police's conduct was unlawful. Accordingly, the analysis should be conducted by reference to whether their conduct was 'improper' within the meaning of s 138 of the *Evidence Act*. On that basis, the respondent noted that the reference judge accepted that the following conduct was improper in the sense that that term is used in s 138 of the *Evidence Act*:

(a) the propositioning and registration of Ms Gobbo as an informer by Victoria Police in order that she might inform against the applicant;

(b) Ms Gobbo's acting in connection with the investigation, extradition or prosecution of the applicant in breach of duties she owed to the applicant as a client and/or to the Court;

(c) Ms Gobbo's multiple breaches of duty of loyalty to the applicant, and to those of her clients who gave evidence against him (in particular, Mr Bickley and Mr Cooper);

(d) Victoria Police's knowing assistance to Ms Gobbo in breaching her duty of confidentiality.

566 The respondent submitted that those findings must be viewed in the context of the other findings by the reference judge. In particular, Ms Gobbo was never retained by the applicant in relation to Quills or Magnum. She was not retained by the applicant in relation to Orbital until after he had been charged (25 October 2005), and her retainer ceased after he absconded on 20 March 2006. Thereafter, she was not retained again in relation to Orbital.

567 Accordingly, it was submitted that the applicant had failed to identify how any conduct of Victoria Police or Ms Gobbo affected any of the convictions in respect of the Quills, Orbital and Magnum charges.

568 It was submitted that, although Ms Gobbo owed duties to the applicant arising out of the extradition retainer, none of her breaches of those duties could have had any possible effect on the conduct of the prosecution of any of the Quills, Orbital or Magnum charges. Ms Gobbo's involvement in the extradition process would not have provided the applicant with a reasonable argument for a stay of the prosecutions against him. The only actual effect of the assistance provided by Ms Gobbo, in relation to the extradition process, was said to be to have deprived the applicant of information that might have enabled him to resist his extradition. But there was no finding by the reference judge that the applicant would not have been extradited on any of the Quills, Magnum or Orbital charges (or any other charge), or that there was a reasonable prospect that the applicant would not have been extradited on those charges, if not for Ms Gobbo's breaches of duty. The judge found only that, with full disclosure, the extradition proceeding would have 'looked different'.[487]

569 In respect of the Quills conviction, the respondent accepted that it might be possible for the applicant to draw a link between the circumstances in which Victoria Police arrested Mr Bickley in June 2006, and the anticipated giving of evidence by him at the Quills trial some time after April 2011. However, the reference judge accepted that the advice given by Ms Gobbo to Mr Bickley was advice that was open to a competent lawyer to give. Further, Ms Gobbo did not appear for Mr Bickley on his plea hearing in the conspiracy matter. His agreement to give an undertaking in terms acceptable to the prosecution, on some date between 28 March 2007 and 17 April 2007, was submitted not to have been based on advice given by Ms Gobbo. Finally, the respondent observed that the reference judge was not satisfied that Ms Gobbo ever assumed the role of 'handling' Mr Bickley as a witness.

570 The respondent conceded, however, that the prosecution could not have proceeded in the Quills matter in the absence of Mr Bickley's evidence.

571 In respect of the Orbital conviction, the respondent again accepted that it may be possible for the applicant to draw a link between some specific conduct of Ms Gobbo or Victoria Police and how the Orbital trial might have been conducted if the applicant

487 Reference determination [523].

had not pleaded guilty. However, it was submitted that the matters raised at [569] above were relevant here also.

572 Further, it was submitted that continuation of the Orbital prosecution did not erode public confidence in the administration of justice. The Orbital investigation was conducted by the AFP. Ms Gobbo did not assist that investigation. The applicant was charged by the AFP on 25 October 2005, and he made significant admissions in his record of interview. He was committed to stand trial in March 2009 without any involvement of Victoria Police. Mr Bickley was not arrested until June 2006. The police briefs did not include any statements from Mr Cooper, Mr Bickley or Mr Thomas, and at the committal hearing no evidence from Quills was involved. After the committal, the depositions were filed and served, and again they did not contain statements from Mr Cooper, Mr Bickley or Mr Thomas.

573 The respondent submitted that, although Ms Gobbo relayed information to her Victoria Police handlers relating to Orbital between 28 October 2005 and 29 January 2009, there was no evidence or finding that any of that information was disseminated to any of the investigating officers of the AFP. Further, that information was already evident from the applicant's record of interview. In addition, it was agreed that the office of the CDPP did not have any relevant knowledge about Ms Gobbo's role as an informer, and the AFP did not know that any prosecution, or the extradition of the applicant in relation to the Orbital charge, might have been adversely affected by Victoria Police's use of Ms Gobbo as an informer. It was submitted that, to the extent that there was any improper conduct relating to the Orbital charge, that concern could be addressed by the application of s 138 of the *Evidence Act*. Finally, it was submitted that if Mr Bickley's evidence had been excluded, a permanent stay would not have been warranted on the basis that the prosecution was foredoomed to failure. On the contrary, the reference judge found that she was satisfied that the Orbital prosecution would have remained viable in that case.

574 For those reasons, it was submitted that the applicant would not have been entitled to a permanent stay of the Orbital charge to which he pleaded guilty.

575 In respect of the Magnum charge, the respondent submitted that there was no basis on which the improper conduct of Ms Gobbo or Victoria Police might have affected a trial. As the reference judge noted, the Magnum investigation was conducted entirely during the period in which the applicant was outside the jurisdiction, Ms Gobbo gave no information to police that was relevant to the investigation, and she was not in contact with the applicant or any co-accused during that time. There was no evidence that any information provided by Ms Gobbo to the SDU was ever relayed to any investigator or prosecutor, and none of Mr Cooper, Mr Bickley or Mr Thomas implicated the applicant in relation to the Magnum charge.

576 Accordingly, it was submitted, the applicant would not have obtained a permanent stay of the Magnum prosecution. Indeed, it was submitted that at no point did the applicant have a realistic prospect of obtaining such a stay. The applicant had been advised by independent senior counsel that he had no defence. There was nothing to preclude a fair trial of the charge. Ms Gobbo had no involvement in the police investigation and her conduct and its non-disclosure could not have had any effect on the evidence to be led.

577 It was submitted that the judge's finding that, by reason of the non-disclosure of Ms Gobbo's conduct, the applicant was not in a position to properly assess whether it was in his best interests to accept the plea deal, was not sufficient to make out a substantial miscarriage of justice.[488] It was necessary to establish that the non-disclosure would have impacted the outcome of the criminal process. Reliance was placed on *Edwards v The Queen*[489] and *Brawn v The King*.[490]

578 As to the applicant's submissions about the appearance of the administration of justice, relying on the decision in *Szabo*,[491] the respondent submitted that this took the case no further. It was necessary to evaluate all the circumstances of the trial in question.[492] The inquiry into what an ordinary fair-minded citizen in the position of the applicant might suspect needed, in that context, to take account of this Court's own evaluation of the facts.[493]

Ground 2 — non-disclosure

579 The respondent submitted that, in order that a relevant non-disclosure constitutes a substantial miscarriage of justice, it must be demonstrated: first, that there was a breach of the duty; secondly, that the breach of the duty had the capacity to affect the result in the trial; and thirdly, that conviction was not, nonetheless, inevitable. The respondent relied on *Karam*.[494]

580 The respondent submitted that a breach of the duty of disclosure, without more, is not a fundamental irregularity amounting to a substantial miscarriage of justice. It was said that no authority supported such a position. In *Karam*, the Court rejected the submission that it was not necessary for Mr Karam to establish that breaches of the duty of disclosure may have affected the result of his trials.[495] The applicant's primary case could not succeed unless he could show that the non-disclosure had the capacity to affect the result of the trials.

581 The respondent submitted that, in essence, the applicant's alternative case on ground 2 was based on the reference judge's conclusion that she was unable to reach a positive finding that the applicant's conduct, in the context of the plea negotiations in April 2011, could fairly reflect how he might have approached those negotiations if he had had the benefit of full disclosure. The respondent submitted that the principles identified by this court in *Karam*[496] are not applicable in circumstances where an applicant has pleaded guilty. Based on the English authorities of *R v Early,*[497] *Togher*[498] and *Asiedu*[499]

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488 Ibid [1484]–[1485].
489 (2021) 273 CLR 585.
490 (2025) 99 ALJR 872, 875–7 [5]–[12] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ); [2025] HCA 20 ('*Brawn*').
491 See [523] above.
492 *Karam* [2023] VSCA 318 [352]–[353] (Beach, McLeish and Kennedy JJA).
493 Ibid [350], [352]–[354].
494 Ibid [216], [364]–[368].
495 Ibid [364].
496 [2023] VSCA 318 [216], [362]–[368] (Beach, McLeish and Kennedy JJA).
497 [2003] 1 Cr App R 19.
498 [2001] 1 Cr App R 33.
499 [2015] EWCA Crim 714.

it was submitted that non-disclosure would only be relevant to establishing that a conviction should be quashed, following a guilty plea, if that non-disclosure was of material that would have grounded a successful application for a permanent stay. The respondent submitted that this proposition is consistent with the position in Australia. As Dawson J observed in *Meissner*, a person might plead guilty for all manner of reasons such as to avoid worry, inconvenience and expense, to avoid publicity, or in the hope of obtaining a more lenient sentence.[500] A plea on such grounds still amounts to an admission of all the elements of the offence. This was said to reinforce why a breach of non-disclosure obligations, falling short of grounding a successful stay application, will not establish a substantial miscarriage of justice. Accordingly, it was submitted that ground 2 must fail.

Disposition

582 The respondent conceded that if the appeal were to be allowed because the applicant established that a permanent stay would have been granted in respect of any of the Quills, Orbital or Magnum charges, then a new trial on that charge would not be appropriate. However, if an appeal were to be allowed for some other reason, a new trial might be appropriate.

583 In particular, it was submitted that it would be appropriate to order that there be a new trial of the relevant charge if the appeal was allowed on any of the following bases: that the applicant was deprived of the opportunity of making reasonable arguments in favour of the exclusion of evidence or an application for a permanent stay; that the applicant had a reasonable prospect of having evidence excluded or being granted a permanent stay; or that there was a breach of the duty of disclosure (unless the applicant established that a permanent stay would have been granted).

584 The respondent submitted that there was an underlying public interest in the prosecution of very serious charges, the offending alleged was very serious and the applicant's guilt or otherwise had never been determined by a jury. It was submitted that there was no oppression in the applicant facing a trial for the first time. Rather, the conduct of Ms Gobbo and Victoria Police having been exposed, a retrial would vindicate the integrity of the criminal justice system.

585 In respect of the Quills charge, the respondent submitted that, if the Court does not positively conclude that the evidence of Mr Bickley would be excluded at a trial, then a new trial should be ordered. However, if the Court concludes that the evidence of Mr Bickley would necessarily be excluded, the appropriate order would be an acquittal.

586 In respect of Orbital, it was submitted that the appropriate order would be that there should be a new trial. The applicant was committed to trial on Orbital without any evidence of Mr Bickley. There were said to be no circumstances that would render a retrial unjust.

587 It was further submitted that the appropriate order in relation to Magnum would be a new trial. The applicant had accepted that there is sufficient cogent evidence to support

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500 (1995) 184 CLR 132, 157.

such a trial. The prosecution case on the Magnum charge was said to be strong, and there were no circumstances that would render a trial unjust.

PART G: DISPOSITION OF SUBSTANTIVE APPEAL

Legal principles

588 On leave being granted under s 326C(1), the question for decision is whether the Court is satisfied that there has been a substantial miscarriage of justice.[501]

589 The principles governing the identification of a substantial miscarriage of justice under a first appeal, as provided by s 276(1) of the *CPA*, are applicable also to the identification of a substantial miscarriage of justice under a second appeal.[502]

590 The Court in *Karam* derived the following principles from the High Court's decisions in *Baini v The Queen*[503] and *Awad v The Queen*:[504]

> It follows from the above that this Court is required to:
>
> (a) determine whether the appellant has established an error in connection with the conviction under appeal;
>
> (b) if so, determine whether that error is 'fundamental' or a 'serious departure' from proper trial processes, so as necessarily to have resulted in a substantial miscarriage of justice;
>
> (c) if that has not been shown, determine whether the appellant has established that the error may have affected the result of the trial;
>
> (d) if so, there will be a substantial miscarriage of justice unless the respondent establishes that the conviction was inevitable.[505]

591 In submissions in the present matter, the applicant principally invoked the second of the four questions in *Karam*, namely whether there had been a fundamental departure from the proper process for trial. In the alternative, the applicant contended that there was an error or irregularity in the proper processes for trial which could have affected the result, and the respondent could not show that the convictions were inevitable.

592 The respondent contended in writing that, where there has been a guilty plea, the third and fourth questions in *Karam* have no role to play, because only a 'fundamental' error can justify setting aside a conviction following a guilty plea. In oral submissions,

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501 *CPA*, s 326D(1).

502 *Karam* [2023] VSCA 318 [176]–[177] (Beach, McLeish and Kennedy JJA).

503 (2012) 246 CLR 469.

504 (2022) 275 CLR 421.

505 [2023] VSCA 318 [216] (Beach, McLeish and Kennedy JJA). The word 'may' in the third limb of the test has the sense of 'has the capacity to': *Awad v The Queen* (2022) 275 CLR 421, 433 [31] (Kiefel CJ and Gleeson J), 445 [78] (Gordon and Edelman JJ); see also *Brawn* (2025) 99 ALJR 872, 876 [10] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ); [2025] HCA 20; *MDP v The King* (2025) 99 ALJR 969, 980–1 [33] (Gordon and Steward JJ), 983 [46], 985–6 [62] (Edelman J), 989 [79], 991 [89], 993 [107] (Gleeson, Jagot and Beech-Jones JJ) [2025] HCA 24.

however, the respondent accepted that this placed the matter too highly, and that the third and fourth questions in *Karam* could have a role to play in a case of non-disclosure.

593 The present case differs from *Karam* in a critical respect, namely that the applicant pleaded guilty. It has been held that cases decided under earlier criminal appeal provisions, where conviction followed a guilty plea, are a useful guide to the application of the above principles.[506] It is therefore convenient to approach the questions in *Karam* through the lens of that case law.

594 The Court in *Peters [No 2]* summarised the effect of the cases as follows:

> Although the categories of miscarriage of justice are of course not closed, two kinds of situation have emerged repeatedly in the cases. As articulated by Avory J in *R v Forde*, they are, first, where the applicant did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it, and secondly, where the applicant could not in law have been convicted of the offence charged on the facts alleged.
>
> The first of these cases can be described as challenging the integrity of the plea in the sense that it was not really attributable to a genuine consciousness of guilt. Of itself, that will ordinarily only suffice to warrant a new trial if, in addition to doubt attaching to the integrity of the plea, it is shown that there was an 'issuable question of guilt', meaning a genuine issue as to the guilt of the accused.
>
> The second kind of circumstance does not involve merely an arguable case as to the guilt or otherwise of the accused. It involves a relatively narrow class of case in which the material relied upon by the Crown was insufficient at law to sustain a conviction on the charge in question. In this situation, the focus is not on the integrity of the plea but on the conviction itself. The conviction involves a miscarriage of justice because the facts alleged simply could not support a conviction, or the charge in question was not known to the law.[507]

595 In the first category in *Peters [No 2]*, the plea is not really attributable to a genuine consciousness of guilt. That may include a case where the plea was not fully informed, whether due to a breach of disclosure obligations or for some other reason, or where it was induced by unfair pressure.[508]

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506 *Gurappaji v The Queen* [2018] VSCA 187 [5] (Priest, Beach and Weinberg JJA); *Peters [No 2]* (2019) 60 VR 231, 241 [37] (Maxwell P, Kaye and McLeish JJA).

507 (2019) 60 VR 231, 241–2 [38]–[40] (Maxwell P, Kaye and McLeish JJA) (citations omitted). See also *Jamieson v The Queen* [2017] VSCA 140 [44(6)], [78]–[88] (Ashley, Osborn and Santamaria JJA); *Monaghan v The King* [2022] VSCA 247 [24] (McLeish, T Forrest and Kennedy JJA).

508 *R v Favero* [1999] NSWCCA 320 [16] (Sully J, Hidden J agreeing at [23], Greg James J agreeing at [24]); *R v Inns* (1974) 60 Cr App R 231, 233 (Lawton LJ for the Court); *Meissner* (1995) 184 CLR 132, 141–2 (Brennan, Toohey and McHugh JJ), 148 (Deane J), 157 (Dawson J).

596 In such cases it is well-established that the applicant must establish that there is an 'issuable question of guilt' or a 'real question as to guilt'.[509]

597 That is consistent with the requirement, in a case of non-disclosure, that the applicant must demonstrate that the non-disclosure could have led to a different outcome. At the same time, the applicant need not show that non-disclosure would have led to a different verdict.[510] The test has also been expressed as whether the non-disclosure could realistically have affected the reasoning of the jury to its verdict.[511] In the context of a guilty plea, this formulation asks whether the non-disclosure could realistically have affected the result. This is the question raised by the third step in *Karam*.

598 In the second category in *Peters [No 2]*, there is a miscarriage of justice because the material relied upon by the Crown was insufficient at law to sustain a conviction on the relevant charge. In such a case the vice in the conviction is 'fundamental' in the sense in which that term is used in the second question in *Karam* and the conviction must be set aside.

599 The applicant placed considerable reliance on the decision of the New South Wales Court of Criminal Appeal in *Honeysett*. In that case, police fabricated evidence, including by preparing knowingly false statements, planting a knife at the alleged crime scene and committing perjury at the trial. The Court held that these actions were a 'shocking perversion of the course of justice', and a form of 'fraud' sufficient to establish a miscarriage of justice.[512]

600 The applicant in *Honeysett* put his case on the basis that his guilty plea was not made with a free choice — seemingly in the first category referred to above.[513] The Court did not address whether, in the circumstances, there needed to be shown an 'issuable question of guilt'. Plainly, when the whole case was concocted, there was no doubt that the applicant was not guilty. No crime had been committed.

601 *Honeysett* fits more readily into the second category, because the dishonest conduct of the police created a legal obstacle to the case proceeding to trial at all.[514] In the United Kingdom, a similar analysis was applied in *Asiedu*:

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509 *R v Murphy* [1965] VR 187, 191 (Sholl J); *O'Sullivan v The Queen* (2002) 128 A Crim R 371, 375 [9], [11] (Sheller JA, Grove J agreeing at 396 [48], Simpson J agreeing at 396 [52]); [2002] NSWCCA 98; *R v Toro-Martinez* (2000) 114 A Crim R 533, 538 [26] (Spigelman CJ, Newman J agreeing at 545 [66], Adams J agreeing at 545 [67]); [2000] NSWCCA 216; *Weston (a pseudonym) v The Queen* (2015) 48 VR 413, 444 [109(5)] (Redlich JA); *Jamieson v The Queen* [2017] VSCA 140 [44(6)], [78]–[88] (Ashley, Osborn and Santamaria JJA); *Monaghan v The King* [2022] VSCA 247 [24] (McLeish, T Forrest and Kennedy JJA); *R v Zelukin* [2003] NSWCCA 262 [31] (Beazley JA, Hidden JA agreeing at [66], Carruthers AJ agreeing at [67]); *R v Davies* (1993) 19 MVR 481, 485 (Badgery-Parker J, Wood J agreeing at 481, Mathews J agreeing at 481).

510 *AJ* (2011) 32 VR 614, 620 [22] (Weinberg and Bongiorno JJA, Buchanan JA agreeing at 615 [1]); *Asare v The King* [2025] VSCA 222 [55]–[56] (Priest, Beach and Walker JJA) ('*Asare*'); *Brawn* (2025) 99 ALJR 872, 874 [3] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

511 *Asare* [2025] VSCA 222 [55]–[56] (Priest, Beach and Walker JJA); *Brawn* (2025) 99 ALJR 872, 874 [3] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

512 *Honeysett* [2023] NSWCCA 215 [44] (Beech-Jones CJ at CL, Fagan J agreeing at [64], Dhanji J agreeing at [65]).

513 Ibid [36].

514 The Court appeared to explain its conclusion by reference to the second category: ibid [41], [44].

> The second situation in which a plea of guilty will not prevent an appeal is where, even if on the admitted or assumed facts the defendant was guilty, there was a legal obstacle to his being tried for the offence. That will be true in those cases, rare as they are, where his prosecution would be stayed on the grounds that it is offensive to justice to bring him to trial. Such cases are generally described, conveniently if not entirely accurately, as cases of 'abuse of process'. The classical example of such is *R v Horseferry Road Magistrates' Court Ex p Bennett* … [1994] AC 42; and later [1995] 1 Cr App R 147, where the defendant had been charged in England after being illegally routed here from a foreign country with which there was no extradition treaty. His committal for trial was quashed and the prosecution was stayed. In the subsequent similar case of *R v Mullen (Nicholas)* … [2000] QB 520, where the prosecution had proceeded to conviction after trial, that conviction was quashed. As this court there said, at … 540:
>
> > … for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe.
>
> By parity of reasoning, if the trial process should never have taken place because it is offensive to justice, a conviction upon a plea of guilty is as unsafe as one following trial.[515]

602 The court applied this reasoning to the circumstance of non-disclosure, as follows:

> Non-disclosure is not by itself an abuse of the process of the court. It is a failure of duty on the part of the prosecution as a whole. It may in some cases be serious. A conviction after trial may be unsafe if material was left undisclosed, especially (but not only) if it provided a defence; *R v Barkshire* [2011] EWCA Crim 1885 and *R v Bard* [2014] EWCA Crim 463, cited to us, were examples. But non-disclosure does not by itself amount to a circumstance making it unfair to put the defendant on trial at all and it does not afford grounds for a stay. The remedy for non-disclosure will ordinarily be orders for the defendant to be provided with the necessary material, and such order as will ensure that he is not unfairly damaged by its late delivery. Usually the trial can proceed fairly. Sometimes, if the material emerges late, a retrial may be necessary if the defendant seeks it; in others he may judge that he will be better served by continuing the trial and making a point of the Crown's failures. But there is nothing akin to the kind of misbehaviour which characterises either the *Ex p Bennett* type of case, or others of *gross executive misconduct of a kind which makes it offensive to justice to put the defendant on trial at all*.[516]

603 To similar effect, it was said in *Tredget v The Queen*:

> There is a distinct category of cases which do not depend on the circumstances in which the plea was entered or indeed upon whether the accused is innocent or guilty, but instead arise when 'there (is) *a legal obstacle to his being tried for the offence, for instance because the prosecution would be stayed on the grounds that it is offensive to justice to bring him to trial*. Such cases are generally described, conveniently if not entirely accurately, as cases of 'abuse of process'; in these circumstances 'a conviction upon a plea of guilty is as

515 [2015] 2 Cr App R 8, 104 [21] (Lord Hughes for the Court).
516 Ibid [27] (emphasis added).

unsafe as one following trial' (see *Asiedu* at [21]). By way of example, entrapment, if made out, can amount to unfairness which would render it an abuse of process to try the defendant (see *Asiedu* at [25]). So, one example of a case coming within this second category is when an abuse of process is established such that renders it unfair to try the defendant at all. As Lord Woolf CJ observed in *R v Togher* [2001] 1 Cr App R 33 at [31],

> Certainly, if it would be right to stop a prosecution on the basis that it was an abuse of process, this Court would be most unlikely to conclude that if there was a conviction despite this fact, the conviction should not be set aside.

The court in *Togher* at 161 approved what it described as the 'broad' approach adopted in *R v Mullen* [2000] QB 520, per Rose LJ:

> ... for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe. Indeed the Oxford Dictionary gives the legal meaning of 'unsafe' as 'likely to constitute a miscarriage of justice'.[517]

604 In a case of this kind, fraud or other conduct (including conduct amounting to abuse of process) will suffice to mean that there was a legal obstacle to conviction, in that the matter ought not to have gone to trial. As such, in that circumstance, there is no occasion to ask whether there was an 'issuable question of guilt'. The trial simply should not have proceeded. As explained above, this is the basis on which *Honeysett* was decided.

605 In the present case, the applicant placed emphasis on the judge's finding that the registration and deployment of Ms Gobbo by Victoria Police was largely motivated by a 'common purpose' to ensure that the applicant was charged with and convicted of serious offences.[518] This was said to be a critical distinction between the case and all others in which Ms Gobbo's conduct had been examined.

606 There were three main strands to the applicant's case. First, in respect of ground 1, the pursuit of the identified common purpose, in particular by the 'rolling' of Ms Gobbo's clients Mr Bickley and Mr Cooper (and to a lesser extent, Mr Thomas), and its ongoing non-disclosure to the Court, constituted a fraud on the Court and undermined the processes for trial. The pursuit of the common purpose undermined the administration of justice, or its appearance. The trials could never have lawfully proceeded.

607 Secondly, by ground 2, the non-disclosure of this common purpose and all the attendant circumstances to the applicant impugned the integrity of his guilty pleas. The applicant accepted that it was necessary, on this part of the argument, to show a 'real question' to be tried as to his guilt in each case, but no more, and submitted that this had been established.

608 Thirdly, in connection with both grounds, the manner in which the evidence of Mr Bickley and Mr Cooper had been obtained meant that it would have been excluded at trial under s 138 of the *Evidence Act*. The fact that the applicant was unaware of this circumstance further undermined the integrity of his pleas in the Quills and Orbital

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517 [2022] EWCA Crim 108 [160] (Fulford LJ for the Court) (emphasis added); see also *R v Maguire* [2009] EWCA Crim 462 [4] (Hughes LJ for the Court).

518 Reference determination [852].

matters. It also affected all of his pleas because this weakness in the evidence impacted the prosecution cases in Matchless, Landslip and Spake as well. In that way, the applicant was unaware of the strength of the prosecutions which the DPP discontinued as part of the plea deal.

609 Within this framework, the applicant also submitted that Ms Gobbo's involvement in his extradition would have founded a reasonable argument, or reasonable prospects, for a stay of all prosecutions against him. It was submitted that this again sufficed to establish a substantial miscarriage of justice, and that non-disclosure of the conduct that would have founded an application for such a stay impugned the applicant's guilty pleas.[519]

610 The applicant's primary submission was that each of the three strands identified above established a fundamental departure from the proper processes for trial, so as to constitute a substantial miscarriage of justice. Alternatively, each was an irregularity that had the capacity to affect his convictions, satisfying the third *Karam* test. In circumstances where the respondent could not establish that the convictions were inevitable, that sufficed for the appeals to succeed.

611 The respondent, among other submissions, contended that it was necessary that the applicant identify the breaches of duty by Ms Gobbo and the consequences of those breaches in the respective prosecutions. It was also submitted that it was necessary that the applicant demonstrate that the conduct of Ms Gobbo and Victoria Police would have led to a permanent stay of the prosecutions if an application had been made upon full disclosure. This submission was made in respect of both grounds of appeal.

612 The applicant submitted in reply that the respondent's contentions in this last respect placed too much weight on English decisions which use the language of abuse of process — whereas the notion of substantial miscarriage of justice was broader, including cases like *Honeysett* where a conviction was an 'affront to justice'.[520]

613 That submission should be accepted, in so far as the English cases could be seen to require demonstration of an abuse of process. In the Victorian context, it would suffice to show that the proceeding would have been stayed, whether on the ground of abuse of process or some other basis. We defer, for now, the question whether it also suffices, as the applicant submits, that there would have been a reasonable argument, or reasonable prospects, that the prosecution should be stayed.

614 The application of these principles to the facts of this case resolves into the following questions.

(a) Was there a substantial miscarriage of justice in respect of each conviction by reason of the common purpose and dishonest design of Ms Gobbo and Victoria Police undermining the administration of justice, or its appearance (including because the prosecutions would have been stayed based on Ms Gobbo's involvement in the extradition process, or because evidence essential to the prosecutions would have been excluded under s 138 of the *Evidence Act*)?

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519 *Karam* [2023] VSCA 318 [273] (Beach, McLeish and Kennedy JJA).

520 [2023] NSWCCA 215 [2] (Beech-Jones CJ at CL, Fagan J agreeing at [64], Dhanji J agreeing at [65]).

(b) Was the integrity of the applicant's guilty pleas impugned as a result of him not having been informed of Ms Gobbo's role assisting police (including in relation to the applicant's extradition) and her breaches of duty to Mr Bickley and Mr Cooper?

(c) If yes to (b), was there an issuable question of guilt in respect of the charges?

615 In respect of each conviction, the first question corresponds to the second category referred to in *Peters [No 2]* and broadly to ground 1. The second and third questions correspond to the first category in *Peters [No 2]* and broadly to ground 2. In either case, affirmative answers would establish a substantial miscarriage of justice requiring that the conviction be set aside.

Ground 1 — administration of justice: analysis and conclusions

The common purpose

616 The conclusion of the reference judge that Victoria Police and Ms Gobbo shared a common purpose of ensuring that the applicant was charged with and convicted of serious offences, from her registration as an informer in September 2005 until she was deregistered in January 2009 is not in doubt. As the judge found, this conduct was grossly improper on the part of all concerned, and involved multiple breaches of Ms Gobbo's professional obligations.[521]

617 The judge further concluded, and again it is not in doubt, that this conduct had a tendency to undermine the appearance of the administration of justice, and that public confidence in the administration of criminal justice in Victoria was undermined.[522]

618 The applicant contends that the administration of justice was undermined, not only in this general way, but in respect of each of the criminal prosecutions in issue in this appeal. To make good that argument, the applicant must establish a connection between the common purpose and its implementation, and the subsequent convictions sufficient to establish a substantial miscarriage of justice. The respondent contends, in that context, that by the time of the pleas of guilty, Ms Gobbo was no longer involved, either as the applicant's lawyer or as an informer, such that no sufficient connection existed. The applicant submits that the 'die was cast' at an earlier stage and that, in effect, the well was poisoned long before Ms Gobbo stepped back from her role as an informer.

619 There are two main ways in which the applicant contends that the common purpose of Victoria Police and Ms Gobbo infected the applicant's convictions. The first is the way in which Ms Gobbo and Victoria Police worked together to secure the cooperation of Ms Gobbo's clients, in particular Mr Bickley and Mr Cooper, as witnesses against the applicant. The second is the assistance Ms Gobbo provided for the purpose of assisting police in the extradition of the applicant, which is said to have given him reasonable grounds for having the prosecutions stayed.

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521 Reference determination [895], [903].

522 Ibid [890], [904].

620 It is not necessary to rehearse again the details of this conduct. Ms Gobbo provided intelligence as a registered informer that was essential to Mr Cooper being arrested 'red-handed' at the Strathmore laboratory and she advised police how best to interview him. She advised Mr Cooper, as his lawyer, to cooperate with police on the day of his arrest. She subsequently helped to maintain Mr Cooper's resolve to give evidence against the applicant in accordance with statements he had made to police with her involvement. The judge found that Ms Gobbo's role was 'probably decisive' in overcoming Mr Cooper's resistance to cooperating with police.[523] This conduct was undertaken as part of a joint criminal enterprise to attempt to pervert the course of justice.

621 However, the reference judge was unable to assess the extent to which the evidence of Mr Cooper was of any weight in the Quills and Orbital matters,[524] and Mr Cooper gave no evidence in respect of Magnum.[525] The significance of his evidence rather lay in the Landslip and Matchless prosecutions, which would have been significantly weakened without his evidence, and the same was true in Spake, where Mr Cooper was a central witness.[526]

622 We will address separately the application of s 138 of the *Evidence Act* in respect of the evidence of Mr Cooper, and Mr Bickley. In the meantime, despite the existence of the joint criminal enterprise regarding the evidence of Mr Cooper, the applicant has not established that its impact on the administration of justice extended to the three prosecutions under appeal so as to conclude that the convictions amount to a substantial miscarriage of justice.

623 A separate issue is whether the connection between the joint criminal enterprise and the Landslip, Matchless and Spake prosecutions, which was not disclosed to the applicant, impugned the integrity of his guilty pleas. We will return to that issue when we address the second of the three questions we identified earlier in these reasons. First, it is necessary to consider the conduct of Ms Gobbo and Victoria Police regarding Mr Bickley and its effect on each of the three successful prosecutions.

Quills

624 In the case of Mr Bickley, the judge declined to find a joint criminal enterprise. Ms Gobbo's involvement in Mr Bickley's cooperation with police was less extensive than in the case of Mr Cooper, in that she did not help to maintain Mr Bickley's resolve.[527] But there was an additional impropriety, in that, with Ms Gobbo's assistance, police procured Mr Cooper to have a recorded conversation with Mr Bickley which formed the basis for police to arrest Mr Bickley for a conspiracy to import MDMA, in circumstances where no such charge was ever laid or intended to be laid. Mr Bickley

523 Ibid [1016].
524 Ibid [1245], [1247].
525 Ibid [1260].
526 Ibid [1251]–[1254], [1257].
527 Ibid [395].

was told by police that he would be charged and this was used as leverage by police to pressure him to assist police.[528]

625 Ms Gobbo advised Mr Bickley on his arrest to assist police.[529]

626 Mr Bickley then made a 'can say' statement implicating the applicant in the Quills offending.[530] Ms Gobbo was retained by Mr Bickley in relation to the Quills matter from his arrest until he was sentenced in February 2007. Throughout that period she was a registered police informer.[531]

627 The conflicted role of Ms Gobbo in relation to Mr Bickley, and the involvement of Victoria Police in that state of affairs, in pursuit of a common purpose to deceive Mr Bickley into giving evidence against the applicant, involved a fundamental debasement of Ms Gobbo's professional obligations and infected the Quills prosecution as a whole. The evidence Mr Bickley was expected to give against the applicant at the trial of that matter was the fruit of the grossly improper manner in which Mr Bickley's cooperation was secured (even leaving aside the use of Mr Cooper to help lay the foundation for the spurious conspiracy allegation against Mr Bickley). Without the evidence of Mr Bickley, the prosecution of the applicant in the Quills matter could not have proceeded. It would be a profound affront to the administration of justice if the Quills matter had proceeded to trial in those circumstances.

628 It follows that, in the Quills matter, the applicant pleaded guilty to a charge that should not have proceeded to trial. In the language used in *Honeysett* and *Asiedu*, it was offensive, and an affront, to justice to put the applicant on trial on the Quills charge.[532] There was a fundamental departure from the proper processes for trial. Consequently, his conviction involved a substantial miscarriage of justice and must be set aside.

Orbital

629 It follows from our conclusion in respect of the Quills matter that there could be no joint trial of the Quills and Orbital charges. That does not necessarily mean, however, that the Orbital trial could not have proceeded alone.

630 The applicant submitted that Mr Bickley was important to the prosecution in Orbital, in the following ways:

(a) to rebut the account given by the applicant in his record of interview. Although the prosecution may have been able to make a submission about this account, Mr Bickley would be able to give evidence about his dealings with the applicant in relation to drug activities that significantly undermined this account;

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528 Ibid [386]–[387].

529 The judge recorded the applicant's submission to that effect at [361] and her subsequent discussion of the advice an independent lawyer would have given assumed acceptance of that submission: ibid [378].

530 Ibid [384].

531 Ibid [707]–[709], [818].

532 [2023] NSWCCA 215 [2] (Beech-Jones CJ at CL, Fagan J agreeing at [64], Dhanji J agreeing at [65]); [2015] 2 Cr App R 8, 107 [27] (Lord Hughes for the Court).

(b) to explain that the applicant was involved in an enterprise in producing ecstasy. This would enable the prosecution to link his orders for MDMA (the subject of Orbital) with his enterprise of pill production (the subject of Quills); and

(c) to support the prosecution case that the reason the applicant withdrew from the arrangement with undercover operatives, the subject of the Orbital charge, was that he knew, or suspected, that police were involved. Mr Bickley could support that case by giving evidence that, around this time, the applicant asked him during a conversation whether he was wearing a wire (demonstrating his concern about police surveillance).

631 The applicant submitted that the only evidence as to the applicant being in the business of drug trafficking came from Mr Bickley. At the same time, the applicant's concession that the Orbital prosecution remained viable without the evidence of Mr Bickley confirmed that such evidence was not essential to the Orbital prosecution.

632 The position in respect of Orbital is more complex than Quills. Mr Bickley was not charged with respect to the Orbital offending, but he was prepared to provide evidence undermining the account the applicant had given to police. Importantly, the Orbital investigation was conducted by the AFP and the charge was initially prosecuted by the CDPP. There was no statement of Mr Bickley in the prosecution brief when the applicant was committed to stand trial on the Orbital charge on 6 April 2009.[533]

633 It was only later that Victoria Police became involved and the DPP took over the Orbital prosecution, around July 2009.[534]

634 The applicant was charged with the Orbital offending on 25 October 2005.[535] From that point until he absconded on 20 March 2006, the applicant was represented in the matter by Ms Gobbo.[536] In that capacity, while registered as a police informer, she breached her duties to the applicant.[537] On 28 November 2005, she had met with Mr Bickley to discuss the AFP's interest in obtaining his assistance and she had advised him to speak with them. She later told her handlers what was said at the meeting.

635 After the DPP took over the Orbital prosecution, a joint presentment/indictment with the Quills charge was provided to the Court along with submissions in support of joinder of the trials.[538] As mentioned, the joint presentment/indictment was ultimately filed by consent. Subsequently the DPP filed a summary of prosecution opening. The prosecution case on the Orbital charge relied upon evidence in the Quills brief, including that of Mr Bickley, to show that the applicant was in the business of manufacturing MDMA when he was alleged (in Orbital) to have sought to import MDMA powder from which pills would be pressed.[539]

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533 Ibid [220], [1205], [1208(b)].
534 Ibid [220], [1207].
535 Ibid [214].
536 Ibid [550], [599].
537 Ibid [795], [799], [810(c)].
538 Ibid [209], [222].
539 Ibid [209].

636 The evidence of Mr Bickley, as we will explain, was inadmissible in the Orbital trial. But it does not necessarily follow that, by reason of the conduct of Ms Gobbo and Victoria Police, it would have been an affront to justice for the Orbital trial to have proceeded. In particular, there is a disconnection between Ms Gobbo's breaches of duty to Mr Bickley by virtue of her relationship with Victoria Police and her disclosing of information to them in that context, and the investigation and prosecution of the matter, until around July 2009, by the Commonwealth authorities. By that stage, Ms Gobbo was not acting in relation to Orbital. There is no suggestion that those authorities were made aware of the improper communications between Ms Gobbo and Victoria Police. There was no finding that the CDPP knew of Ms Gobbo's conduct before 3 November 2011 when his office received a copy of Mr Maguire's advice (after the applicant had pleaded guilty but before sentence). The grossly improper conduct of Ms Gobbo and Victoria Police, while still seeking to pursue their common purpose of securing the applicant's conviction, is a step removed from the Orbital case.

637 Although the evidence of Mr Bickley was significant in the Orbital matter, the applicant was committed for trial without reliance on it. There is also no suggestion that Ms Gobbo's breaches of her duties to the applicant, before 23 March 2006, affected the prosecution of the Orbital matter after Victorian authorities took it over in about July 2009. The applicant accepted before us that the prosecution case in Orbital would have remained viable without the evidence of Mr Bickley, but submitted that it would have been significantly weaker.

638 In the circumstances, the pursuit of the improper common purpose of Ms Gobbo and Victoria Police did not fundamentally infect the Orbital prosecution. It would not have undermined the administration of justice if the Orbital charge had proceeded to trial, and no substantial miscarriage of justice has been established on that account. The second test in *Karam* is not satisfied and the applicant's primary case in support of ground 1 therefore fails. Mr Bickley's evidence was tainted, however, and it will be necessary to consider the application of s 138 of the *Evidence Act* in that regard.

639 The applicant's alternative case rests on the proposition that there was an irregularity that had the capacity to affect his convictions, satisfying the third test in *Karam*.[540] In the context of ground 1, that is put principally on the basis of non-disclosure to the Court. We address that issue in connection with ground 2 and accept that the non-disclosure had the capacity to affect the result. Our reasoning applies here also.[541] In short, the applicant succeeds on the first ground of appeal, in his alternative case, in respect of the Orbital conviction.

Magnum

640 The case of Magnum is different again. The evidence of Mr Bickley, and Mr Cooper, had no bearing on that charge. Nor is there any indication that the common purpose of Victoria Police and Ms Gobbo affected that prosecution. While Ms Gobbo provided

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540 See [610] above.

541 The applicant did not distinctly contend that the exclusion of evidence under s 138 of the *Evidence Act* bears on this issue, and we do not need to decide that question. We note, however, that where there has been a guilty plea the intention of the prosecution to rely on evidence that is inadmissible is not readily described as an error or irregularity in the conviction. The real vice lies in the non-disclosure.

information to police after the applicant was arrested, that information overwhelmingly did not find its way to police involved in the prosecution.[542] The most that could be said was that Ms Gobbo attempted to undermine the integrity of the prosecution. A trial in the Magnum matter would not have undermined the administration of justice. No fundamental defect in the processes for trial of the Magnum offence has been shown.

641 The applicant also put this part of his case on the basis of non-disclosure to the Court, being non-disclosure of the misconduct of Ms Gobbo and Victoria Police. In our view, that does not advance his case on this ground. Once it is established that the trial could have proceeded with proper disclosure to the applicant, it follows that there would have been proper disclosure to the Court, and the point adds nothing.[543] The absence of proper disclosure to the applicant is, however, relevant to the integrity of his guilty pleas. We shall consider in connection with ground 2 whether the applicant has shown that the non-disclosure gave rise to a substantial miscarriage of justice because, in the terms of the third test set out in *Karam*, there was an error or irregularity that had the capacity to affect the result.

Stay based on the extradition process

642 It is now necessary to consider whether the trial of any of the three convictions would have undermined the administration of justice by virtue of Ms Gobbo's conduct in relation to the applicant's extradition. The applicant submitted that it would suffice to show a realistic prospect for a stay of the prosecutions on that basis. He put the argument primarily in the context of the guilty pleas and the lack of disclosure of the potential to seek a stay on this ground. But the prospect of a stay could also bear on whether the holding of a trial would have undermined the administration of justice. We therefore turn to consider the potential for a stay to have been ordered by virtue of the conduct of the extradition.

643 We have summarised earlier in these reasons the assistance which Ms Gobbo gave to police in connection with the extradition process.[544] The judge found that she was 'making every attempt' to assist Victoria Police in having the applicant returned to the jurisdiction for prosecution on serious charges including murder.[545] However, the judge also found that it could not be shown that any of the information that Ms Gobbo provided to her handlers ultimately assisted in securing the applicant's extradition.[546]

644 The judge identified a more indirect potential effect of Ms Gobbo's conduct on the extradition process, namely that by concealing from the applicant information about her role as an informer (even while the extradition process was under way), she denied him the opportunity of relying on that fact to challenge his extradition in the Greek courts.[547] The respondent submitted that this did not bear on the extradition because the Greek

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542 Ibid [477]–[482].

543 The applicant referred to the loss of evidence in the period preceding the eventual disclosure: see [538] above. It was not submitted that this was a distinct basis for a stay. The matters were raised as considerations relevant to assessing the impact of non-disclosure.

544 See [142]–[145] above.

545 Ibid [502].

546 See [146] above; Reference determination [503]–[504].

547 Ibid [510].

courts were not required to do more than confirm that the Australian charges alleged conduct that would, if done in Greece, be criminal under Greek law.

645 The reference judge accepted that this was so.[548] But she did not consider it a complete answer to the applicant's claim that the extradition process had been undermined. This was the subject of expert evidence and conclusions by the reference judge. Ms Theodosia Papazikou gave evidence that, had the Supreme Court in Greece been made aware of Ms Gobbo's dual role as an informer for Victoria Police and one of the applicant's lawyers advising him during the extradition process, the Court 'might have likely' asked for more information in order to decide whether there was a barrier to extradition. The Court could have sought assurances that no tainted evidence would be used in the Victorian court.[549] In general, it was 'very likely' that the Supreme Court's deliberations would have been wider, and it was impossible to say whether there would be found to be a barrier to extradition.[550]

646 The judge did not regard the evidence of the other expert witness, Mr Georgios Pyromallis, as contradicting those conclusions.[551] She observed that the matters referred to her for determination did not include whether the applicant would have been extradited had there been disclosure of Ms Gobbo's dual role. She was only able to find that the extradition process 'would very likely, if not certainly, have "looked different"' in that scenario.[552] At the same time, the judge recorded the concession ultimately made by the applicant's counsel that it was 'very unlikely that extradition would not have been granted on some charges were the Australian government in a position to give assurances in respect of those charges'.[553]

647 The applicant contended that, had the dual role of Ms Gobbo in respect of the extradition been known, the prosecutions would have been permanently stayed, on the basis that the conduct of Victoria Police and Ms Gobbo in relation to the extradition constituted such an affront to justice that it would undermine public confidence in the system of justice, if the Court were to permit the prosecution before it of an accused person brought into the jurisdiction in such circumstances. As noted at [642] above, the applicant contended that it was sufficient to show a realistic prospect of a stay.

648 The applicant submitted that the stay application would have been based on the fact that the actions of Victoria Police and Ms Gobbo relating to the extradition undermined the basic safeguards afforded by legal professional privilege as well as other duties Ms Gobbo owed to the applicant. Further, the conduct of Victoria Police and Ms Gobbo risked implicating the Australian Government in an abuse of the Greek courts' processes and an erosion of the duties of mutual trust and respect that underpin the international law of extradition. While the submissions would not have involved any assertion that the Australian Government acted unlawfully, there would have been a firm foundation for the proposition that the conduct of the State through Victoria Police significantly undermined the position taken by Australia in the extradition processes.

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548 Reference determination [513]–[514].
549 Ibid [519].
550 Ibid [520].
551 Ibid [521].
552 Ibid [522]–[523].
553 Ibid [516].

649 A permanent stay of criminal proceedings will only be granted in circumstances which are rare or exceptional.[554] The principles were summarised in *Ballard v The King*, as follows:

> [A] court should stay criminal proceedings only if, having regard to all the circumstances, the continuation of the proceedings would involve unacceptable injustice or unfairness, or if their continuation would be so unfairly and unjustifiably oppressive as to constitute an abuse of process. In order to justify a permanent stay the circumstances must be exceptional, a permanent stay being a measure of last resort. There must be a fundamental defect going to the root of the trial of such a nature that nothing that the trial judge could do in the conduct of the trial could relieve against its unfair consequences. To obtain a stay, an accused person must demonstrate that the circumstances are such that any trial necessarily will be unfair, so that a conviction would bring the administration of justice into disrepute. The court must have regard to the substantial public interest in having those charged with serious criminal offences brought to trial as well as the fundamental right of an accused to a fair trial and the need to maintain public confidence in the administration of justice. A court's power to grant a permanent stay stems from the court's inherent jurisdiction to protect the integrity of its processes where the administration of justice so requires.[555]

650 To similar effect, Kiefel CJ, Bell and Nettle JJ said in *Strickland*:

> Certainly, as this Court has stated repeatedly, a permanent stay of a criminal prosecution is an extraordinary step which will very rarely be justified. There is a powerful social imperative for those who are charged with criminal offences to be brought to trial and, for that reason, it has been said that a permanent stay of prosecution should only ever be granted where there is such a fundamental defect in the process leading to trial that nothing by way of reconstitution of the prosecutorial team or trial directions or other such arrangements can sufficiently relieve against the consequences of the defect as to afford those charged with a fair trial. But, as this Court has also stated, there is, too, a fundamental social concern to ensure that the *end* of a criminal prosecution does not justify the adoption of any and every *means* for securing a conviction and, therefore, a recognition that in rare and exceptional cases where a defect in process is so profound as to offend the integrity and functions of the court as such, it is necessary that proceedings be stayed in order to prevent the administration of justice falling into disrepute.[556]

651 In *R v Mullen*,[557] the English Court of Appeal applied those principles in the context of an accused person who had been arrested in Zimbabwe and deported to the United Kingdom for trial. The Court held that the accused person's conviction should be set aside on the grounds that the prosecution constituted an abuse of process. Rose LJ, delivering the judgment of the Court, stated:

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554 *Hermanus (a pseudonym) v The Queen* (2015) 44 VR 335, 342 [39] (Priest JA, Maxwell P agreeing at 336 [1]).

555 [2024] VSCA 26 [47] (Priest and Walker JJA and Croucher AJA) (citations omitted); see also *Canning v The King* [2025] VSCA 215 [59] (Priest, Beach and Walker JJA).

556 (2018) 266 CLR 325, 370 [106] (citations omitted); see also 409–11 [249]–[254] (Edelman J).

557 [2000] QB 520.

> In summary, therefore, the British authorities initiated and subsequently assisted in and procured the deportation of the defendant, by unlawful means, in circumstances in which there were specific extradition facilities between this country and Zimbabwe. In so acting, they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law.
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> Finally, the events leading to the deportation as now revealed in the summary for disclosure were concealed from the defendant until last year.
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> …
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> In these circumstances, we have no doubt that the discretionary balance comes down decisively against the prosecution of this offence. This trial was proceeded by an abuse of process which, had it come to light at the time, as it would have done had the prosecution made proper voluntary disclosure, would properly have justified the proceeding then being stayed.[558]

652 In the present matter, the judge found that, after the applicant's arrest in June 2007, Ms Gobbo made every attempt to assist Victoria Police in the ultimate objective of having him returned to the jurisdiction to be prosecuted for the charges against him.[559] At the same time, Ms Gobbo was retained by the applicant in respect of the extradition processes and the judge was satisfied that there was a lawyer/client relationship between the applicant and Ms Gobbo during that period.[560]

653 The reference judge was unable to answer, with the necessary degree of certainty, 'whether the administration of justice in Greece was undermined by Ms Gobbo's duplicitous dealings with the applicant during the extradition process', but accepted that 'it may have been'.[561] She acknowledged that there was force in a submission made by the respondent to the effect that information about Ms Gobbo's conduct was not relevant to the applicant's challenge to his extradition in the Federal Court. However, the judge was unable to conclude that Ms Gobbo's conduct was, or would have been, irrelevant to framing a challenge to the extradition request under s 40 of the *Extradition Act*. She also noted that the applicant had been denied the opportunity to seek a remedy in the Australian courts based on a complete and accurate factual record.[562]

654 The involvement of Ms Gobbo, as a registered informer, in attempts to secure the applicant's extradition despite being retained by him to challenge the extradition, would have weighed in favour of an application for a stay of each of the prosecutions, including Magnum. However, the fact that the specific conduct of Ms Gobbo has not been shown to have affected the administration of justice in Greece, or the outcome of the extradition proceedings, weakens the argument that the conduct of a criminal trial after the applicant's extradition would necessarily have been unfair, so that a conviction would bring the administration of justice into disrepute.

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558 Ibid 535–6.
559 Reference determination [502].
560 Ibid [632]
561 Ibid [919].
562 Ibid [928]–[931].

655 Moreover, there were a number of factors that would have weighed heavily against a stay of the proceedings based on the conduct of Ms Gobbo and Victoria Police in the extradition processes. They include:

(a) As already noted, the judge could not be satisfied that any of the information that Ms Gobbo provided to her handlers ultimately assisted in the extradition processes.[563]

(b) The charges on which the applicant was to be extradited were particularly serious, including two charges of murder, and charges of trafficking not less than a large commercial quantity of prohibited substances.[564] The public interest in having those matters brought to trial was very high.

(c) The applicant himself had brought about the circumstances which required him to be extradited, in that, during the trial on the Plutonium charges, and while on bail on the Orbital and Kayak charges, he had breached bail, and absconded. This militates strongly against a conclusion that it would be unfair for his trials to proceed.

656 In light of those considerations, and the relatively weak grounds for suggesting that the misconduct had any ultimate effect on the outcome of the extradition processes, we consider it highly unlikely that a stay application would have been upheld on the basis that the circumstances of the extradition of the applicant were such that it would have constituted an affront to justice for his prosecution on the various charges to proceed. The applicant has not shown that there were reasonable prospects of a stay on that basis. We therefore do not strictly need to decide whether satisfaction to that standard would suffice to establish a serious miscarriage of justice, as the applicant contended. But it is hard to see how it could be concluded that, just because there was a realistic prospect that a court would have ordered a stay, the trial ought not in law to have proceeded. To reach that conclusion, it would need to be shown that a court would have ordered a stay.

657 It follows that the extradition process does not afford a basis for concluding that the applicant's prosecutions should not have proceeded to trial, or that his guilty pleas in those prosecutions gave rise to a substantial miscarriage of justice.

658 We shall return to the possibility of a stay in connection with ground 2, and the consequences of the applicant having pleaded guilty without knowing that there was an available argument for a stay based on Ms Gobbo's role in the extradition.

659 We shall also return to s 138 of the *Evidence Act* shortly. For present purposes, we simply note that the premise of that provision is that the trial will take place, but subject to the possible exclusion of evidence. It is possible, however, that the practical effect of excluding evidence under s 138 would be that the trial cannot proceed, in which case a guilty plea would give rise to a substantial miscarriage of justice. In the case of the evidence of Mr Bickley, that would be so in respect of Quills, but not (for the reasons we have given) in respect of Orbital and Magnum.

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563 Ibid [503]–[506], [930].

564 Ibid [17]–[20].

660 Section 138 might also be able, in principle, to provide a path to concluding that one or more of the prosecutions ought not to have proceeded if the evidence of Mr Cooper were to be excluded. That scenario would arise if Mr Cooper's evidence were of such significance that, like that of Mr Bickley in Quills, the prosecution would lack sufficient strength to proceed without it. But that is not the case, as we shall briefly explain.

661 As already indicated, the reference judge found that, without Mr Cooper's evidence, the prosecution cases in Landslip, Matchless and Spake would have been significantly weakened.[565] She was unable to assess whether his evidence was of any weight in the Quills matter, in which the prosecution opening made no reference to it.[566] The same conclusion seems to have been reached in respect of Orbital.[567]

662 In relation to Orbital, Mr Cooper provided statements implicating the applicant. We have already noted that the Orbital investigation was conducted by the AFP and the charge was initially prosecuted by the CDPP. There was no statement of Mr Cooper in the prosecution brief when the applicant was committed to stand trial on the Orbital charge on 6 April 2009.[568]

663 Even if Mr Cooper's evidence would have been excluded under s 138, therefore, this alone would not have sufficed to show that the prosecution in Orbital (or Quills) could not have proceeded.[569]

The appearance of the administration of justice

664 The applicant rested his case, not only on the undermining of the administration of justice, but on the appearance of that effect. He relied on the decision of the Full Court of the Queensland Court of Appeal in *Szabo*. This involved asking whether a fair-minded person in the position of the accused or a member of the public might reasonably apprehend that, because of the conduct of defence counsel, the accused might have been deprived of a fair trial.[570] This argument only arises, given our earlier conclusions, in respect of Magnum.

665 The test in *Szabo* looks at whether the fair-minded person might consider that an accused might have been deprived of a fair trial. Because the applicant pleaded guilty, there was no trial against which to measure the potential effect of the misconduct this case has revealed. The fair-minded person is instead presented with the question whether the applicant might not have been fairly convicted on the basis of his guilty plea.

666 In *Karam*, this Court noted the anomaly involved in an appellate court, having had the benefit of extensive findings of fact in relation to the relevant misconduct and its effect on the convictions under appeal, and having formed its own conclusion as to whether

565 Ibid [1251]–[1253], [1257].
566 Ibid [1245].
567 Ibid [1245], [1247].
568 Ibid [220], [1205], [1208(b)].
569 Mr Cooper was not to give evidence in respect of Magnum.
570 [2001] 2 Qd R 214, 217 [15] (Davies JA), 228 [60] (Thomas JA, de Jersey CJ agreeing at 215 [2]). See also *Karam* [2023] VSCA 318 [347] (Beach, McLeish and Kennedy JJA)

that misconduct gave rise to a substantial miscarriage of justice, then embarking on an inquiry as to whether a fair-minded person might none the less suspect, in effect, that this conclusion was wrong.[571] That is especially so, given that the ordinary fair-minded citizen is taken to be familiar with the circumstances of the case.[572]

667 The Court's conclusion is at its heart an answer to a legal question. That answer requires legal analysis such as we have undertaken in these reasons. The applicant's argument would, however, have the Court apply a distinct test involving a wholly different analysis.

668 It is anomalous to think that a fair-minded person might consider that an accused person might not have been fairly convicted on the basis of their guilty plea, if this Court has reviewed the factual and legal issues and concluded that the conviction could fairly stand. The legal principles we have set out, and the Court's application of them, would be supplanted with a fair-minded observer test. Nothing in *Szabo* or the other case law to which we have referred justifies that course in a case where the accused has pleaded guilty.

669 This branch of the applicant's argument therefore fails as a matter of principle.

670 In any event, we do not accept that a fair-minded person in the position of the applicant or a member of the public might reasonably apprehend that the applicant might have been unfairly convicted on the basis of his plea to the Magnum charge, notwithstanding that, as later explained, we have concluded to the contrary.

Stay based on exclusion of evidence under s 138

671 Separate arguments were addressed to the application of s 138 of the *Evidence Act* to the evidence of Mr Bickley and Mr Cooper. This issue arises in two ways. The first, in connection with ground 1, is that a trial ought not to have proceeded if the exclusion of evidence under s 138 would have meant that the prosecution had no case. As a result, a conviction based on a guilty plea would have constituted a substantial miscarriage of justice. That would be so in the case of Quills, if the evidence of Mr Bickley were to be excluded.

672 Secondly, the applicant's lack of knowledge as to the effect of s 138 on the various prosecutions might bear on the integrity of his plea. That would be so at least in the case of any prosecution that might be significantly weakened by the exclusion of the evidence of Mr Bickley or Mr Cooper (namely Quills, Orbital, Landslip, Matchless and Spake).

673 We therefore turn to consider the application of s 138.

674 The question whether the evidence of Mr Bickley and Mr Cooper would have been excluded under s 138 of the *Evidence Act*, on the trial of the applicant on any of the charges he faced, depends on an assessment of the nature and gravity of the joint illegality or impropriety that was involved in Ms Gobbo acting as a registered informer

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571 *Karam* [2023] VSCA 318 [349]–[350] (Beach, McLeish and Kennedy JJA).

572 Ibid [352]. See also *Szabo* [2001] 2 Qd R 214, 228 [60] (Thomas JA, de Jersey CJ agreeing at 215 [2]).

to Victoria Police concerning the applicant, and in particular her conduct, in which Victoria Police was complicit, in breaching her fundamental duties to her clients, including the applicant, Mr Bickley and Mr Cooper.

675 In considering Ms Gobbo's breach of duties to the applicant it must be kept in mind that she was retained as his lawyer in the Plutonium and Kayak trials from September 2001 until 23 March 2006,[573] and that she was engaged to represent him in relation to the Orbital charges following his arrest on those charges on 25 October 2005.[574] Further, a lawyer/client relationship between Ms Gobbo and the applicant was reinstated in June 2007 in the immediacy of the extradition process, and that relationship continued until the applicant's extradition to Australia in May 2008.[575]

676 After Mr Bickley's arrest on 15 August 2005 for his involvement in offences that were the subject of the Quills prosecution, Ms Gobbo was retained by him to appear on a bail application.[576] Ms Gobbo was subsequently briefed to act on behalf of Mr Bickley in the Quills matter in late December 2005, and that retainer continued during 2006, and included her role in advising Mr Bickley, in settling his case, and assisting in the preparation of his plea.[577]

677 As has been seen, in acting for Mr Bickley, Ms Gobbo was in breach of her duty to act in her client's best interests, and in breach of the duty of care she owed to him, by masquerading as his independent legal advisor after his arrest, when in fact she was acting on behalf of Victoria Police as a registered informer.[578] In respect of the Quills retainer, Ms Gobbo breached her duty of loyalty to Mr Bickley arising from that retainer from the time she was first retained (in August 2005) until Mr Bickley's sentencing hearing (in February 2007).[579] We have referred to specific instances of those breaches earlier in these reasons.[580]

678 As we have also recorded, on Mr Bickley's arrest, Ms Gobbo advised him to agree to assist police by incriminating the applicant in the Quills offence.[581] The judge considered that a competent lawyer might not have given Mr Bickley such advice without first ascertaining all the circumstances, and researching the weight of the evidence against him.[582]

679 We have referred above to the fact that Ms Gobbo was retained by Mr Cooper for substantial periods in relation to the Landslip and Matchless charges and the charges relating to the clandestine laboratory in Strathmore.[583]

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573 Ibid [546].
574 Ibid [550]; see also [599].
575 Ibid [624].
576 Ibid [703].
577 Ibid [705], [707].
578 Ibid [801].
579 Ibid [818].
580 See [216] above.
581 See [215] above.
582 Reference determination [389], [392].
583 See [115] above.

680 Ms Gobbo assisted in 'rolling' Mr Cooper, and in maintaining his continued cooperation as a witness against the applicant, as described at [116] above.

681 Again, the judge considered that a competent lawyer might not have given Mr Cooper advice to assist police, or to agree to participate in an interview, on the night of his arrest without the lawyer first being fully apprised of all the circumstances, and without the opportunity to fully research the weight of the evidence against Mr Cooper.[584]

682 Ms Gobbo acted in breach of her duty to act in the best interests of Mr Cooper, and the duty of care that she owed to him, by masquerading as an independent legal advisor on his arrest, when she was, in fact, acting on behalf of Victoria Police as a registered informer.[585]

683 Turning to the conduct of Victoria Police, in arresting both Mr Cooper and Mr Bickley in April and June 2006 respectively, the primary focus of Victoria Police was not to bring them to account for their criminal actions, but to encourage them to give evidence against the applicant.[586] Victoria Police members were complicit in the breach by Ms Gobbo of her duty of loyalty when she advised Mr Cooper and Mr Bickley after their arrests.[587]

684 The multiple occasions on which Ms Gobbo divulged confidential information about her clients were neither occasional, accidental nor random. They were systematic and repeated.[588] As we have mentioned, the judge found that the deliberate and consistent course of conduct engaged in by Ms Gobbo, with the complicity of Victoria Police, was calculated to undermine the public's confidence in the administration of criminal justice in Victoria.[589] Critically, the improper conduct was motivated by a common purpose to achieve the conviction of the applicant. As the applicant submitted, this targeting of the applicant is a feature that distinguishes this case from others in which Ms Gobbo's conduct has been examined.

685 The question then is whether, in view of the findings made by the judge to which we have referred, the evidence of Mr Cooper and Mr Bickley would have been excluded from any of the pending trials of the applicant on the basis of having been illegally or improperly obtained pursuant to s 138 of the *Evidence Act*.

686 Section 138 relevantly provides:

> **Exclusion of improperly or illegally obtained evidence**
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> (1) Evidence that was obtained—
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> (a) improperly or in contravention of an Australian law; or

584 Reference determination [350], [356].
585 See [212] above.
586 Reference determination [863].
587 Ibid [900], [902].
588 Ibid [910].
589 See [233] above.

(b) in consequence of an impropriety or of a contravention of an Australian law—

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

…

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

687 In the context of s 138, the term 'impropriety' has been defined to involve conduct that is clearly inconsistent with minimum standards which society would expect and require of a person entrusted with a position of responsibility.

688 In *Ridgeway v The Queen*, Mason CJ, Deane and Dawson JJ, in considering the content of the term 'impropriety' in the context of the common law discretion, in respect of conduct of police, stated:

> It is neither practicable nor desirable to seek to define with precision the borderline between what is acceptable and what is improper in relation to such conduct. The most that can be said is that the stage of impropriety will be reached in the case of conduct which is not illegal only in cases involving a degree or harassment or manipulation which is clearly inconsistent with minimum standards of acceptable police conduct in all the circumstances …[590]

[590] (1995) 184 CLR 19, 37 ('*Ridgeway*').

689 In *Robinson v Woolworths Ltd*,[591] the New South Wales Court of Appeal was concerned with conduct of officers of the Department of Health undertaking a program of 'compliance testing' that was designed to identify businesses that would sell cigarettes to persons under the age of 18 years. Basten JA, in considering the word 'impropriety' in the context of s 138 of the *Evidence Act*, stated:

> [T]he identification of impropriety requires attention to the following propositions. First, it is necessary to identify what, in a particular context, may be viewed as 'the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement'. Secondly, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be 'quite inconsistent with' or 'clearly inconsistent with' those standards.[592]

690 It has been recognised that the terms in which s 138 is expressed derive significantly from the principles which applied to the common law discretion to exclude evidence that had been illegally or improperly obtained. Those principles were developed in a series of decisions of the High Court that include *Bunning v Cross*,[593] *Cleland v The Queen*,[594] *R v Ireland*,[595] and *Ridgeway*.

691 The common law discretion, and s 138, are based on the recognition by the law that the admission of evidence, which has been obtained by unlawful or improper means, necessarily creates a tension between two important, but competing, principles of public policy, namely, on the one hand, the conviction of persons who commit serious criminal offences, and, on the other hand, the undesirability of the courts countenancing unlawful conduct or significant impropriety, particularly by those involved in the administration of justice.[596] The latter consideration is particularly concerned with the public interest in deterring police conduct involving acts of illegality or impropriety, protecting individual rights, and maintaining the legitimacy and integrity of the judicial system.[597]

692 We are satisfied that the conduct by which we have found that the impugned evidence in this case is said to have been 'obtained' met the description of 'impropriety' in s 138(1). In some respects, it might also have been obtained 'in contravention of' the law (noting the judge's finding of a joint criminal enterprise, and Ms Gobbo's breaches of the Victorian Bar Rules made under the *Legal Practice Act 1996*).

693 The respondent submitted that any application to exclude the evidence of Mr Bickley or Mr Cooper under s 138 would fail because the evidence could not be shown to have been 'obtained' improperly or in contravention of the law, or in consequence of an impropriety or such a contravention. It was submitted that the evidence under

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591 (2005) 64 NSWLR 612.
592 Ibid 618–9 [23] (Barr J agreeing at 627 [82]).
593 (1978) 141 CLR 54 ('*Bunning*').
594 (1982) 151 CLR 1.
595 (1970) 126 CLR 321 ('*Ireland*').
596 *Bunning* (1978) 141 CLR 54, 74 (Stephen and Aickin JJ); *Ireland* (1970) 126 CLR 321, 335 (Barwick CJ, McTiernan J agreeing at 336, Windeyer J agreeing at 336, Owen J agreeing at 336, Walsh J agreeing at 336).
597 *Johnston (a pseudonym) v The King* (2023) 306 A Crim R 247, 277 [204] (Beach and T Forrest JJA and J Forrest AJA); [2023] VSCA 49 ('*Johnston*').

consideration was not any witness statement provided before trial, but rather was the oral evidence that the witness would have given at trial. By that stage, the witnesses had received independent legal advice. The respondent submitted that, when looking to the way in which this evidence was 'obtained', the Court needed to take account of intervening facts such as the receipt of such independent advice, and the giving of undertakings to give evidence against the applicant, proffered by the witnesses to sentencing courts in other proceedings.

694 The respondent submitted that it was insufficient to show that 'but for' the conduct of Ms Gobbo and Victoria Police, the evidence would not have been obtained. The applicant needs to prove a causal link between the impropriety or contravention of the law, on the one hand, and the eliciting of the evidence in court, on the other.

695 We do not accept that the operation of s 138 in this case is so limited. As has been seen, the misconduct of Ms Gobbo and Victoria Police led directly and contemporaneously to Mr Cooper and Mr Bickley agreeing to cooperate with police by making statements implicating the applicant in serious criminal offending. That set the stage for all that followed. As the applicant submitted, the 'die was cast'. Moreover, the impropriety continued by virtue of the ongoing failure of Victoria Police and the DPP to disclose what had happened. This undermined the foundation on which subsequent independent legal advice was provided. In any event, that advice was necessarily predicated on the fact that Mr Cooper and Mr Bickley had already cooperated with police and were hardly in a position to contest the charges or not to give the impugned evidence.

696 We are satisfied that the evidence meets the criteria in s 138(1). We therefore turn to the balancing exercise required by sub-s (3).

697 In *Ridgeway*, Mason CJ, Deane and Dawson JJ described the common law balancing exercise in the following terms:

> As Barwick CJ pointed out in *R v Ireland*, in a judgment with which the other four members of the Court agreed, the rationale of the discretion is that convictions obtained by means of unlawful conduct 'may be obtained at too high a price'. In its exercise, a trial judge must engage in a balancing process to resolve 'the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law'. The basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes. In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of 'high public policy' relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty.[598]

698 Although s 138 of the *Evidence Act* involves, essentially, the same balancing exercise between the two competing aspects of public policy, there are two principal differences between the common law discretion and s 138.

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598 *Ridgeway* (1995) 184 CLR 19, 31.

699 First, s 138 alters the burden of proof that applied at common law. Under s 138, the onus is on the accused to establish the relevant impropriety on the balance of probabilities. Once that impropriety is established, the burden then shifts to the prosecution to establish, under s 138(3), that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been illegally or improperly obtained in that way.[599]

700 Secondly, s 138 is not expressed as a discretion, but in mandatory terms. That is, evidence that was obtained unlawfully or improperly must be excluded, unless the prosecution establishes that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence in the particular case was obtained.

701 In undertaking the balancing exercise, the courts have given particular weight to the gravity of the illegality or impropriety, and whether the illegality or impropriety was deliberate or reckless, which are factors prescribed by s 138(3)(d) and (e).

702 In *Pollard v The Queen*, a case concerning the admissibility of a police interview of an accused, Deane J stated the principles in the following terms:

> The weight to be given to the public interest in the conviction and punishment of crime will vary according to the heinousness of the alleged crime or crimes and the reliability and unequivocalness of the alleged confessional statement. The weight to be given to the principal considerations of public policy favouring the exclusion of the evidence will vary according to other factors of which the most important will ordinarily be the nature and the seriousness of the unlawful conduct engaged in by the law enforcement officers. In that regard, a clear distinction should be drawn between two extreme categories of case. At one extreme are cases in which what is involved is an 'isolated and merely accidental non-compliance' with the law or some applicable judicially recognized standard of propriety. In such cases, particularly if the alleged offence is a serious one, it would ordinarily be quite inappropriate to exclude evidence of a voluntary confessional statement on public policy grounds. The critical question in those cases will be whether the evidence should or should not be excluded on the ground that its reception would be unfair to the accused. At the opposite extreme are cases where the incriminating statement has been procured by a course of conduct on the part of the law enforcement officers which involved deliberate or reckless breach of a statutory requirement imposed by the legislature to regulate police conduct in the interests of the protection of the individual and the advancement of the due administration of criminal justice. Such cases manifest 'the real evil' at which the discretion to exclude unlawfully obtained evidence is directed, namely, 'deliberate or reckless disregard of the law by those whose duty it is to enforce it'. In such cases, the principal considerations of public policy favouring exclusion are at their strongest and

599 *Kadir v The Queen* (2020) 267 CLR 109, 137 [47] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) (*'Kadir'*).

> will ordinarily dictate that the judicial discretion be exercised to exclude the evidence.[600]

703 Section 138 is not confined to evidence obtained by or in consequence of misconduct of those engaged in law enforcement.[601] In the present case, the evidence in issue was derived as a result of the combined and joint conduct of both Victoria Police and of Ms Gobbo, who was then a duly admitted legal practitioner and a practising member of the Victorian Bar. The degree of impropriety involved in the compilation of evidence against the applicant comprised the totality of the impropriety of the conduct of members of Victoria Police in their investigation and compilation of evidence against the applicant, together with the impropriety of the conduct engaged in by Ms Gobbo who breached the most fundamental duties of, and ethical principles that apply to, every legal practitioner and to every member of the Victorian Bar.

704 As counsel acting for the applicant, and for other relevant clients, including Mr Cooper, Mr Bickley and Mr Thomas, Ms Gobbo was subject to important duties, both to the clients and to the system of justice. As de Jersey CJ stated in *R v Szabo*:

> Litigants see members of the Bar conducting themselves as officers of the Court, owing a special duty to the Court. Just as the Court expects fearlessly independent presentation by counsel, so the client expects that subject to counsel's supervening duty to the Court, counsel will with fearless independence promote the client's cause.[602]

705 Allied to that obligation, and as an aspect of the fiduciary relationship between Ms Gobbo and her clients, was the obligation of loyalty owed by Ms Gobbo to each of her clients, the central aspect of which required that she avoid any conflict of interest between her role as counsel for the clients and any other role that she then undertook.[603] As the reference judge noted, the 'no conflict' rule also found its expression in the Victorian Bar Rules.

706 The duty owed by counsel to a client necessarily involves and includes maintenance of the confidentiality of communications made by the client to counsel. That aspect of the relationship is of utmost importance in enabling clients to have full confidence that communications made by them to their legal representatives will be respected.

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600 (1992) 176 CLR 177, 203–4 (citations omitted); see also *Bunning* (1978) 141 CLR 54, 79 (Stephen and Aickin JJ); *Kadir* (2020) 267 CLR 109, 133 [37] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ); *Parker v Comptroller-General of Customs* (2007) 243 ALR 574, 592 [65] (Basten JA, Mason P agreeing at 575 [1], Tobias JA agreeing at 576 [2]); [2007] NSWCA 348; *Johnston* (2023) 306 A Crim R 247,271–2 [155]–[158] (Beach and T Forrest JJA and J Forrest AJA).

601 *Kadir* (2020) 267 CLR 109, 125 [12]–[13] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

602 [2000] 2 Qd R 214, 215 [5].

603 See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 102–3 (Mason J); *Maguire v Makaronis* (1997) 188 CLR 449, 465 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Breen v Williams* (1996) 186 CLR 71, 93 (Dawson and Toohey JJ); *Nangus Pty Ltd v Charles Donovan Pty Ltd* [1989] VR 184, 185–6 (Young CJ); *Beach Petroleum* (1999) 48 NSWLR 1, 46–8 [192]–[205] (Spigelman CJ, Sheller and Stein JJA).

707 That aspect of the relationship was considered by the High Court in the often cited case of *Tuckiar v The King*.[604] In that case, the appellant was charged with, and convicted of, murder. The evidence adduced on behalf of the prosecution included two different accounts given by the appellant of the circumstances in which he fatefully injured the deceased, a police officer, with a spear. One such account exculpated the appellant, and the second account inculpated him in the offence. After the jury pronounced its verdict of guilt, the appellant's counsel disclosed to the judge, in open court, that he had had an interview with the appellant, who told him that the correct account was the second version of the events, namely, the version which implicated him in the murder of the police officer.

708 In their joint reasons, Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ strongly criticised the conduct of counsel, stating:

> Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to acquittal from any charge which the evidence fails to establish that he committed, and it is not incumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as fairly arise on the proofs submitted. The subsequent action of the prisoner's counsel in openly disclosing the privileged communication of his client and acknowledging the correctness of the more serious testimony against him is wholly indefensible. It was his paramount duty to respect the privilege attaching to the communication made to him as counsel, a duty the obligation of which was by no means weakened by the character of his client, or the moment at which he chose to make the disclosure. … Our system of administering justice necessarily imposes upon those who practice advocacy duties which have no analogies, and the system cannot dispense with their strict observance.[605]

709 The duties owed by counsel to a client are subject to, and co-ordinate with, strict and important obligations of counsel to the Court and to the system of justice. In *Ziems v Prothonotary of the Supreme Court of New South Wales*, Kitto J stated:

> [A] barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations.[606]

710 In determining the degree of impropriety engaged in by Ms Gobbo, it needs to be borne in mind that the principles of confidentiality and loyalty, to which we have referred, are of central importance to the proper administration of justice. Each person who is charged with a criminal offence is entitled to be represented by counsel who is entirely independent, objective and free of any conflict of interest. The accused person must be confident that counsel acts, and will continue to act, solely in his or her best interests,

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604 (1934) 52 CLR 335; see also *Baker v Campbell* (1983) 153 CLR 52, 114 (Deane J); *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 64–5 [35] (Gleeson CJ, Gaudron and Gummow JJ).

605 *Tuckiar v The King* (1934) 52 CLR 335, 346–7.

606 (1957) 97 CLR 279, 298.

subject, of course, to the ethical constraints that apply to each practitioner. In that way, each accused person is able to confide in counsel, and obtain appropriate, objective advice from counsel, in full confidence that such discussions will remain confidential. That process is of utmost importance in ensuring that each person charged with a criminal offence is properly and sufficiently represented in the legal process.

711 As we have discussed, the conduct of Ms Gobbo in respect of the applicant, Mr Cooper and Mr Bickley flagrantly breached the most fundamental duties which she owed to each of those three clients. Ms Gobbo pursued a purpose, shared with Victoria Police, of securing the conviction and imprisonment of the applicant by exploiting her lawyer/client relationships in a grossly improper manner. Her conduct was, and hopefully will always remain, entirely unprecedented, unique and extraordinary. Axiomatically, the degree of impropriety involved in that conduct was of the highest order.

712 As we have also noted, the degree of impropriety involved in the compilation of evidence against the applicant consisted of the totality of the impropriety of the conduct both of members of Victoria Police in their investigation and compilation of evidence against him, together with the impropriety of the conduct engaged in by Ms Gobbo.

713 The impropriety was deliberate (s 138(3)(e)). The members of Victoria Police, and in particular the senior members, who dealt with Ms Gobbo, were either well aware at the time of the magnitude of the breaches by her of her fundamental duties, or ought to have been aware of them. It may be accepted that the conduct of police was driven by a desire to solve serious crime and bring serious criminal offenders to justice. However, in view of the degree of impropriety involved in the process, it could not be accepted that the ends justified the means.

714 The extent of the impropriety by Ms Gobbo and Victoria Police constituted more than the sum of the individual parts. The impropriety of police, and particularly senior officers, in engaging with Ms Gobbo was aggravated by the circumstance that they were abetting fundamental breaches by her of her duties to the client and to the system of justice. We refer, in that context, to the judge's finding as to a joint criminal enterprise regarding Mr Cooper, which we have upheld.

715 Ms Gobbo, as a practising member of the Victorian Bar, must have known and been aware of the gross breaches by her of her duties, and must also have been aware that, by engaging with police as she did, she was abetting them in the violation of their responsibilities to the system of justice. Taken together, then, the overall impropriety, involved in the conduct of the relevant members of Victoria Police and particularly of Ms Gobbo, constituted a most serious and gross form of impropriety for the purposes of s 138 of the *Evidence Act*.

716 On the other hand, the offending that was the subject of the various charges was particularly serious.

717 Charge 1 on the joint presentment/indictment (the Quills charge) was to the effect that between 1 February 2005 and 15 August 2005, the applicant trafficked in a drug of dependence, namely MDMA (ecstasy) in a quantity that was not less than a large commercial quantity applicable to that drug of dependence. The maximum prescribed

sentence for that offence was life imprisonment. It was alleged that the applicant was the principal or head of a business enterprise in 2005 that involved the large scale preparation and pressing of ecstasy pills from ecstasy powder on two pill presses at a factory in Coburg, and later at a third pill press in a private garage in premises in Craigieburn. In total, it was alleged that in excess of 30 kilograms of MDMA was pressed into ecstasy pills on those three presses. At the time, a large commercial quantity for ecstasy, under s 71 of the *Drugs, Poisons and Controlled Substances Act 1981*, was 1 kilogram.

718 The second charge on the presentment/indictment (the Orbital charge) alleged that between 29 June 2005 and 13 July 2005, the applicant incited the commission of the offence of importation of a prohibited import, namely a commercial quantity of MDMA into Australia, contrary to s 233B(1) of the *Customs Act 1901* (Cth).[607] The maximum prescribed sentence for that offence was 10 years' imprisonment.[608] As we have noted, the offending had allegedly been committed by the applicant placing an order with a police undercover operative to import a large quantity of MDMA powder, in communications that took place in late June 2005. It was alleged that the applicant ordered 100 kilograms of MDMA powder initially at a price equivalent to $1.2 million.

719 The Landslip charge alleged that the applicant between February 2001 and early 2002 conspired to traffick, by manufacture, a commercial quantity of methylamphetamine, contrary to s 79(1) of the *Drugs, Poisons and Controlled Substances Act*. The maximum prescribed sentence for that offence was 25 years' imprisonment.

720 The Matchless charge alleged that the applicant between 1 September 2002 and 11 April 2003 trafficked a large commercial quantity of methylamphetamine at Rye, contrary to s 71 of the *Drugs, Poisons and Controlled Substances Act*. The maximum prescribed sentence for that offence was life imprisonment.

721 The Spake charges alleged that the applicant:

(a) between 19 December 2003 and 19 March 2006 trafficked a large commercial quantity of methylamphetamine at Toolern Vale, contrary to s 71 of the *Drugs, Poisons and Controlled Substances Act*. The maximum prescribed sentence for that offence was life imprisonment; and

(b) between 19 December 2003 and 1 October 2004 trafficked methylamphetamine at Kerrie, contrary to s 71AC of the *Drugs, Poisons and Controlled Substances Act*. The maximum prescribed sentence for that offence was 15 years' imprisonment.

722 There is no suggestion that evidence of Mr Bickley or Mr Cooper bore on the prosecutions in Kayak or Magnum.

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607 Since repealed by *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth) sch 1 item 61.

608 Pursuant to s 11.4(5)(a) of the *Criminal Code* (Cth) the maximum penalty was 10 years if the offence incited was punishable by life imprisonment. Pursuant to s 235(2) of the *Customs Act 1901* (Cth) the offence of importing narcotic goods into Australia carried a penalty of life imprisonment.

723 Plainly, the offending alleged against the applicant was of a most serious kind. At the time of the offending, the widespread proliferation of drugs was, and still is, a disastrous blight on modern society. The trafficking and consumption of prohibited substances has been, and is, a primary cause of widespread social dislocation, violent offending, mental and physical ill-health, and tragedy in our community. Those who have been, and are, involved in the importation and trafficking of such substances, motivated purely by profit, are engaged in conduct that can only be described as evil.

724 The question then is whether, taking those matters into account, it should be concluded that, as a consequence of the gross and unprecedented wrongdoing involved in the procuring of the evidence of Mr Bickley and Mr Cooper, the evidence of those two witnesses would have been excluded in the trial of the Quills, Orbital, Landslip, Matchless or Spake charges.

725 The importance of the evidence in the proceedings (s 138(3)(b)) has already been canvassed. In short:

(a) in Quills, the evidence of Mr Bickley was critical to the case proceeding, but the judge was unable to assess the importance of the evidence of Mr Cooper;

(b) in Orbital, the case would have been significantly weakened without Mr Bickley's evidence (although it was far less important than in Quills), and the judge seems again to have been unable to assess the importance of the evidence of Mr Cooper;

(c) in Landslip, which did not involve Mr Bickley, the prosecution case would have been significantly weakened without Mr Cooper's evidence;

(d) in Matchless, Mr Bickley was likewise not involved, but the prosecution case would have been significantly weakened without Mr Cooper's evidence;

(e) in Spake, the prosecution case would have been significantly weakened if the evidence of both Mr Bickley and Mr Cooper was excluded, but the judge does not appear to have made a finding about the exclusion of the evidence of only one or the other of them.

726 All of the considerations we have mentioned, and in particular the gravity of the impropriety (s 138(3)(d)) and the nature of the relevant offences (s 138(3)(c)), weigh necessarily in the balance in determining the admissibility of the evidence of Mr Bickley and Mr Cooper under s 138 of the *Evidence Act*. However, applying the principles to which we have referred, the undesirability of admitting evidence obtained in the egregious and improper way in which the evidence of Mr Bickley and Mr Cooper was obtained through the efforts of Victoria Police and Ms Gobbo, in pursuit of a common purpose targeting the applicant in a manner fundamentally at odds with Ms Gobbo's professional obligations, clearly outweighs the desirability of admitting that evidence. To place material obtained in that way before a jury in a criminal trial would undermine fundamental principles of our criminal justice system and contaminate the due administration of justice in this State.

727 For those reasons, it must be concluded that the evidence of both Mr Bickley and Mr Cooper would have been excluded from the prosecutions on the Quills, Orbital, Landslip, Matchless and Spake charges, had the matters proceeded to trial and applications under s 138 been made with full knowledge of the circumstances.

728 It follows that this is an alternative ground for upholding the appeal on ground 1 in respect of Quills. The trial could not have proceeded if the evidence of Mr Bickley was excluded, as it should have been. In those circumstances, the applicant pleaded guilty to a charge which should not in law have proceeded, and there has been a substantial miscarriage of justice as a result.

729 For reasons already given, the exclusion of the evidence of Mr Bickley and Mr Cooper in the Orbital prosecution does not mean that the trial in that matter could not have proceeded. We shall further consider the effect of our conclusion regarding s 138 in that matter, and in Landslip, Matchless and Spake, in the context of ground 2.

Conclusion

730 Ground 1 must be upheld in respect of the Quills conviction, on the applicant's primary case, and in respect of Orbital on his alternative case, but it fails in respect of Magnum.[609]

Ground 2 — non-disclosure: analysis and conclusions

731 We described earlier in these reasons the content of the prosecutorial duty of disclosure.[610] The question presented by ground 2 is whether the integrity of the applicant's guilty pleas was impugned as a result of him not having been informed of Ms Gobbo's role assisting police and her breaches of duty to Mr Bickley and Mr Cooper, and, if so, whether there was an issuable question of guilt in respect of the prosecution in question.

Integrity of the pleas

732 In this context, it is not necessary for the applicant to establish that the various applications and submissions he could have made, had he been fully informed of the relevant circumstances, would have succeeded. The issue is the integrity of the plea, which in turn raises the question whether the decision to plead guilty was properly informed.

733 The judge found that, without disclosure of Ms Gobbo's role as an informer and the conduct she undertook in that capacity, the applicant was in no position to properly assess whether it was in his best interests to agree to the plea deal with the prosecution in April 2011.[611] The respondent accepted before the judge that, as a result of the non-

609 See [628], [639] and [641] above.
610 See [379]–[382] above; see also *Asare* [2025] VSCA 222 [53] (Priest, Beach and Walker JJA).
611 Reference determination [1484].

disclosure, the applicant was unable to fully assess the strengths and weaknesses of the prosecution cases against him in Quills, Orbital, Landslip, Matchless and Spake.[612]

734 Those findings suffice to impugn the integrity of the guilty pleas in Quills and Orbital. They have the same effect on the plea in Magnum, even though the non-disclosure did not directly affect it. The applicant pleaded guilty to Magnum as part of a deal in which the DPP was not proceeding with Landslip, Spake and Matchless, but the applicant was unaware that the prosecution cases in those matters were significantly weaker than they appeared.

735 The lost prospect of an application under s 138 of the *Evidence Act* to exclude the evidence of Mr Bickley and Mr Cooper is plainly an important integer in ascertaining the impact of the non-disclosure. The prospect of seeking a stay based on the extradition is less weighty. Even assuming that the applicant would have made such an application, we have indicated our unfavourable view of its prospects. If this was the only consequence of the non-disclosure, it would have been more difficult to establish that the integrity of the plea was undermined as a result.

Issuable question of guilt

736 The conclusion that the non-disclosure of the conduct of Ms Gobbo and Victoria Police impugned the integrity of the applicant's guilty pleas in the three cases means that the pleas were not really attributable to a genuine consciousness of guilt, by reason of not having been fully informed. The next question is whether the applicant has established an 'issuable question of guilt' or a 'real question' as to his guilt, so as to be able to have his convictions set aside despite the pleas of guilty.[613]

737 In the case of Quills, the question is academic, as we have already upheld ground 1 in that case. Plainly, however, the same reasoning would uphold ground 2. The respondent's concession that the Quills prosecution could not have proceeded without the evidence of Mr Bickley necessarily acknowledges that the prosecution case raised an issuable question of guilt, at the very least.

738 In the case of Orbital, there was an issuable question of guilt because Mr Bickley's evidence ought to have been excluded. That evidence was important to the prosecution case because it sought to undermine the account of the allegedly offending conduct given by the applicant in his police interview. Mr Bickley would have given evidence to the effect that the applicant was worried about being under police surveillance, which on the prosecution case was why he withdrew from the proposed importation. In the absence of his evidence, the case against the applicant in Orbital was viable but

612 Ibid [1485].

613 We note a submission made by the applicant, in the context of the appeal regarding the DPP's duty of disclosure in June 2012, to the effect that he had lost the opportunity of applying to withdraw his plea before Whelan J, who was then yet to pass sentence. Assuming that to be so, it would not alter our analysis. The premise for the argument, that the test for deciding a change of plea application at trial is less strict than the test for overturning a conviction based on a guilty plea on appeal, is correct but its application is misconceived. Reliance on the trial test in the context of an appeal would serve to undermine that very difference. See generally, *White v The Queen* (2022) 110 NSWLR 163, 184–6 [62]–[65] (Bell CJ, Button and N Adams JJ).

weakened. That entails that there was a real question about the applicant's guilt. The appeal against the conviction in Orbital must be upheld on ground 2.

739 In respect of Magnum, the applicant pointed to what was submitted to have been a finding by the reference judge to the effect that the applicant may have had a different assessment of the prospects of an application to stay the Magnum prosecution, had there been full disclosure. It was submitted that the applicant's decision-making in respect of Magnum would have been very different if he had understood the true circumstances. The judge did not go so far, however. In careful language, she noted that she had not been asked to assess the prospects of a stay, but that it was 'at least open to find' that with full disclosure the applicant may have made a different assessment of the prospects of an application to stay the Magnum prosecution. This observation does not entail any assessment of the strength of the prosecution case in Magnum.

740 In this context, the applicant pointed to the pressure he was under, in various respects, in reaching the plea deal. The gist of this submission seemed to be that his decision to plead guilty did not serve as an acknowledgment of the overwhelming case against him in Magnum. We accept that, even without evidence of specific pressure on an accused, it would be erroneous to seek to draw conclusions as to whether there was an issuable question of guilt from the conduct of an accused who has pleaded guilty without full knowledge of relevant facts.

741 Senior counsel for the applicant finally pointed to evidence the applicant had given before the reference judge, to the effect that the case in Magnum was strong but not overwhelming. The applicant had said 'there were holes in it, left, right and centre' which he could 'easily' point out.

742 However, the applicant has not indicated what the 'holes' were.

743 The prosecution case in Magnum was, in the view of the applicant's senior counsel who had been briefed for the trial, 'very strong'.[614] The judge considered that this reflected the fact that the evidence comprised recorded telephone intercept and listening device material in which the applicant was in communication with various co-offenders including the principal prosecution witness. Indeed, senior counsel had advised the applicant that he had 'no defence', an assessment with which his instructing solicitor agreed in her evidence before the reference judge.[615] The applicant does not take issue with that analysis.

744 The judge also found, and the applicant accepted, that disclosure of the misconduct of Ms Gobbo and Victoria Police would not have resulted in the exclusion of any evidence in respect of Magnum.[616]

745 In our opinion, the applicant has fallen well short of establishing that there was a real question as to his guilt in the Magnum matter. Accordingly, there was no 'issuable question' in that regard, and his appeal against the Magnum conviction must be dismissed, at least on the primary basis on which the appeal was advanced.

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614 Ibid [1472].
615 Ibid [1466].
616 Ibid [1260].

746 The applicant's alternative case rested on the contention that the convictions could not be said to have been inevitable. As we understood the submission, it relied on the fact that, with full disclosure, the applicant would not have pleaded guilty but would have pursued interlocutory applications which would, or might, have weakened the prosecution cases against him. In particular, those applications would have sought a stay based on the misconduct that attached to the extradition proceedings, and exclusion of evidence under s 138.

747 This submission only falls for consideration in respect of Magnum, since we have upheld the appeal in respect of Quills and Orbital on the primary case.

748 There are two insuperable difficulties with the secondary submission.

749 First, the question of inevitability does not arise unless the applicant has first established that (in this case) the non-disclosure had the capacity to affect the result of the trial.[617]

750 Secondly, the fact that the applicant might, or would, not have pleaded guilty but would have embarked on interlocutory applications, does not of itself establish a possible effect on the outcome of the trial. The focus is on the trial and its outcome, not only the plea.

751 In the case of Magnum, the applicant has not established any issuable question of guilt. The case did not rely on the evidence which we have found would have been excluded under s 138 of the *Evidence Act*. We have rejected the argument that there were reasonable prospects of a stay based on the extradition proceedings and have found that there is no indication that the common purpose of Victoria Police and Ms Gobbo affected the Magnum prosecution.[618] In the end, the applicant has not shown that full disclosure would have had the capacity to affect the outcome of the Magnum prosecution including at any trial if he were ultimately to plead not guilty.

752 The alternative case therefore fails.

Conclusion

753 Ground 2 succeeds in respect of Quills and Orbital, but fails in respect of Magnum.

Disposition

754 It follows that the convictions in Quills and Orbital must be set aside. In such a case, s 326E(1) of the *CPA* requires the Court to do one of the things listed in that provision, relevantly including ordering 'a new trial', or entering a judgment of acquittal.

755 The parties agreed that, if the conviction in Quills could not proceed with the evidence of Mr Bickley, there should be an order for acquittal on that charge. We agree.

756 In the case of Orbital, the position is less clear.

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617 *Karam* [2023] VSCA 318 [216] (Beach, McLeish and Kennedy JJA); see [590] above.

618 See [640] above.

757 The applicant submitted that it would be unjust to have him stand trial again, and an acquittal should be ordered.[619] The applicant relied on the delay since the alleged offences (which was a product of the prosecution's breach of its obligations of disclosure), the fact that the applicant has served the majority of his non-parole period and a large portion of his total effective sentence, the difficult circumstances in which he has undergone imprisonment (including the infliction of a serious brain injury), the debasement of the criminal justice system that has occurred, and the public expense.

758 The respondent submitted that there was an underlying public interest in the prosecution of the Orbital charge, which had never gone to trial. It was submitted that there was no oppression in the applicant facing a trial for the first time. Rather, the conduct of Ms Gobbo and Victoria Police having been exposed, a trial with full disclosure would vindicate the integrity of the criminal justice system. The respondent submitted that there were no circumstances that would render an order for a trial unjust.

759 This Court addressed a similar question after the Plutonium conviction was set aside, in the *Mokbel Plutonium Disposition*.[620] Although the Court was divided as to the result, the principles to be applied are not in doubt. The majority referred to *Fowler*,[621] in which the High Court described the power to order a new trial as discretionary, and stated that the appellate court is required to decide whether the interests of justice require that there be a new trial. The majority identified two matters which *Fowler* requires the appellate court to consider:

(a) first, whether the admissible evidence given at the original trial was sufficiently cogent to justify a conviction; and

(b) secondly, whether there were any circumstances that might render it unjust to the accused to make him stand trial again.[622]

760 The High Court noted, in relation to the second matter, that it took account of the public interest in the administration of justice, and not only the interests of the individual accused.[623]

761 The first matter focuses on the strength of the prosecution case at the original trial. It appears to put out of account any enhancements the prosecution might seek to make to its case on a new trial.

762 In the present case, however, in light of the fact that the applicant pleaded guilty and there was no 'original trial', the first matter must be understood a little differently. The appellate court in that situation must look at the admissible evidence that would have been given if there had been a trial.

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619 *DPP (Nauru) v Fowler* (1984) 154 CLR 627, 630 (Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ) ('*Fowler*'); *Mokbel v DPP (Cth)* (2021) 289 A Crim R 1, 3 [7] (Maxwell P); [2021] VSCA 94 ('*Mokbel Plutonium Disposition*').

620 (2021) 289 A Crim R 1, 9 [41] (Beach and Osborn JJA); [2021] VSCA 94.

621 Ibid.

622 *Fowler* (1984) 154 CLR 627, 630 (Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ).

623 Ibid; see also *R v A2* (2019) 269 CLR 507, 534 [84]–[87] (Kiefel CJ and Keane J).

763 This Court in the *Mokbel Plutonium Disposition* referred to this Court's earlier decision in *R v Thomas [No 3]*,[624] in which it was said that the Court must be careful not to usurp the functions of the properly constituted prosecutorial authorities, which are entrusted with responsibilities and discretions to act in the public interest in the initiation and conduct of criminal prosecutions.[625] In that regard, it is important not to set aside too readily the system of trial by jury where there is evidence capable of supporting a conviction.[626] In the ordinary course, the decision to continue a prosecution in those circumstances is a matter for the executive rather than the courts.[627]

764 For reasons we have already given, the evidence in the Orbital prosecution, excluding that of Mr Bickley, and any evidence of Mr Cooper, was sufficient to justify a prosecution. It has also not been shown that a trial in the Orbital matter would necessarily be unfair, despite the passing of time and the loss of some evidence.[628] To the extent that such an argument is available, it could be advanced before trial. Similarly, with full disclosure, an argument for a stay based on the conduct of Ms Gobbo and Victoria Police in respect of the extradition could also be advanced (albeit that we have held that, on the material before this Court, such an argument would not have reasonable prospects of success).

765 As to the specific matters raised by the applicant, including the delay and attendant loss of evidence, the serving of most of his non-parole period and a large portion of his total effective sentence, and his treatment in prison, in our opinion they are all considerations which may be weighed by the prosecuting authorities in deciding whether to continue the prosecution. We do not consider them sufficiently weighty to justify this Court usurping that prosecutorial function.

766 For these reasons, we will make an order for a new trial on the Orbital charge.

PART H: CONCLUSIONS

Leave to appeal against reference determination — applicant

767 The applicant will be refused leave to appeal against the reference determination.

Leave to appeal against reference determination — respondent

768 The respondent will be granted leave to appeal against the reference determination on proposed grounds 1 and 3.

769 Leave will be refused on ground 2.

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624 (2006) 14 VR 512.

625 Ibid 517 [27] (Maxwell P, Buchanan and Vincent JJA); *Mokbel Plutonium Disposition* (2021) 289 A Crim R 1, 10 [45] (Beach and Osborn JJA).

626 Ibid.

627 *Mokbel Plutonium Disposition* (2021) 289 A Crim R 1, 11 [49] (Beach and Osborn JJA), citing *Walker v The Queen* [2014] VSCA 177 [48] (Osborn JA, Weinberg JA agreeing at [1], Priest JA agreeing at [56]).

628 See especially [538] above.

770 As to ground 1, the appeal succeeds. The finding of the reference judge made at [1227] and repeated at [1478] of the reference determination, as to the making of a concession by the respondent, should be set aside.

771 The appeal fails in respect of ground 3.

Substantive appeal

772 The applicant will be granted leave under s 326A of the *CPA* to bring a second appeal against his convictions on the Quills, Orbital and Magnum charges.

773 The appeal will be allowed in respect of the convictions on the Quills and Orbital charges. The appeal will be dismissed in respect of the conviction on the Magnum charge.

774 The convictions on the Quills and Orbital charges will be set aside. Judgment of acquittal will be entered on the Quills charge. We will order a new trial on the Orbital charge.

Consequential orders

775 We will invite submissions from the parties to address the question of sentence, as provided by s 326E(3), and the position regarding bail.
