



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

NO B66 OF 2022

BETWEEN:

**CRIME AND CORRUPTION COMMISSION**

Appellant

and

**PETER DAMIEN CARNE**

Respondent

**APPELLANT'S OUTLINE OF ORAL SUBMISSIONS**

**Part I: INTERNET PUBLICATION**

1. This outline of oral submissions is in a form suitable for publication on the internet.

**Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT**

2. **Introduction.** The short, ultimate answer to why the majority's orders cannot stand is that, as certified by the Chair of the PCCC (s 55, *Parliament Act*), the 'preparing' of the report (s 9(2)(e)), and 'presentation or submitting' of it to the PCCC (s 9(2)(c)), and the report itself (s 9(2)(d)), were 'proceedings in the Assembly', and could not be 'impeached or questioned' by the declaratory relief granted by the majority: *Parliament Act* ss 8(1), 9(1) and (2), 48 and 55: **JBA 2, 506-507, 528-529 and 533-534; AS [48], [50]; AR [5]**.
3. However, the respondent asserts (**RS [13], [23], [37], [74]**), and the majority below accepted (**CAB 85; [80], [81]**), that parliamentary privilege was not engaged because the Commission did not have the power to make the report. To address the error in the majority reasoning and meet the respondent's defence of that reasoning in this court, it is necessary first to address those facts and the operation of the Act.
4. **Events leading to the litigation.** The parties agreed facts (**RFM, 7 – 12**) which are summarised in **AS [6]-[15]; CAB 87 – 89**.
5. **The *Crime and Corruption Act*.** The anonymous complaint (s 36) that led to the investigation (s 35 (1)(a)) fell within the definition of 'corrupt conduct' in s 15: **JBA 1, 68, 66, 49 – 50**. Corruption includes suspected corruption in the context of a complaint and a corruption investigation (s 22): **JBA 1, 53**. The Commission also had to have regard to its 'prevention function' when conducting that investigation (s 24(g)): **JBA 1, 56**.
6. The Commission's 'purposes' (s 4(1)(b) and 7), 'prevention functions' (ss 23 and 24 esp 24 (b), (d), (f), (g) and (i)) and 'corruption functions' (ss 33, 34(d), 35(f)(ii) and (g) and 46A) under the Act (**JBA 1, 45, 46, 47, 56, 57, 64 – 66, 78, 79**) gave it power for investigating and dealing with the complaint: **AS [70]–[73], [80] – [89]**.
7. Section 64 of the Act empowered the Commission to prepare a report in 'performing its functions' (s 64(1)) including with 'recommendations' (s 64(2)(a)), 'an objective summary' (s 64(2)(b)) and 'comments' on that objective summary: **JBA 1, 94, 95; AS [74], [75], [86] – [89], cf CAB 67-69, 72, 80-82, [6], [15], [19], [26], 56], [58]-**

- [59]. [67]-[68]. The combined operation of ss 64 and 69 is that the Commission might prepare such a report for the purpose of submitting it to the PCCC so it can consider whether to give a direction.
8. The respondent during the investigation had the protection of s 332(1) of the *Act*, including remedial orders to cease the investigation under s 334, but never sought such relief at that time (**JBA 1, 362, 364; AS [56]**, see also **CAB 55-57**).
  9. Against that statutory architecture, there was nothing ‘adjudicative’, ‘judicial’ or ‘quasi-judicial’ in the Commission’s investigation or report: *Today FM* at [58]-[59] and [63]-[64], [81]: **JBA 4, 859 at 885-887, 893-894; AR [10]**; cf **RS [67], [68], [72]**), cf **CAB 74-75, 80, [34], [56]**. *Balog* was decided on the proper construction of the limits of ICAC’s reporting powers, being materially different to those under consideration here: *Balog* at 631, 633-635: **JBA 4, 895 at 901, 903-905; AR [10]**.
  10. The objective purpose of s 49 of the Act (**JBA 1, 82**) is to deal with the situation where the Commission decides prosecution or disciplinary action should be considered. Its terms are calibrated to that situation. It does not limit the general reporting power in s 64 of the Act: **AS [76] – [78]; AR [14]**.
  11. **The question of privilege must start with the *Parliament Act*.** The ‘preparing’ of the report for (s 9(2)(e)), ‘presentation or submitting’ of it to the PCCC (s 9(2)(c)), and the report itself (s 9(2)(d)) were ‘proceedings in the Assembly’. As such, the report could not be ‘impeached or questioned’ (s 8(1)): **JBA 2, 506, 507; AS [41] – [51]; AR [5]**; cf **RS [95]**. Because of the matters in paragraph 7 above, no issue of an “appropriate act” arose here: **AS [39]**.
  12. Such preparation for and presentation to a committee is an ‘established privilege’, both by the terms of s 9 and at common law (as preserved by s 8(2)): *Miller* at [66]-[67] (**JBA 6, 2077 at 2115**), *Criminal Justice Commission* at [23], [33]-[34], [48] (**JBA 6, 1796 at 1810, 1812, 1816**); **AS [43]**.
  13. If a court is satisfied that an established privilege arises, it leaves the occasion of its exercise to the parliament: *Richards* at 162 (**JBA 5, 1382 at 1387**), *Egan* at [27], [78], [147], [179] (**JBA 4, 908 at 930, 950, 983, 993**); **AS [32] – [33]; AR [9]**. The Chair of the PCCC, as an ‘authorising person’ (s 48(b)), certified those s 9 matters (ss 55(1), (2)(b), (d) and (n)): **JBA 2, 528, 533, 534; AS [40], [47]; AR [9]**.

14. If it is appropriate or necessary, in any event, there were undisturbed findings of fact to that effect by Davis J: **CAB 46**, TJ[121], **49**, TJ[138], **50**, TJ[141]; **AS [16], [17], [48]**; **AR [9]**.
15. Moreover, the inquiry as to whether delivery of the report was authorised is irrelevant to the threshold inquiry of whether parliamentary privilege applies: *Criminal Justice Commission* at [47], see also [35] and [25] (**JBA6, 1796 at 1815-1816, 1812, 1810; AS [37], [38]**); *Rann* at [124]: **JBA 7, 2130 at 2154; AS [54]; AR [7]**); cf **CAB 85. [80]-[81]**.
16. **Section 69 of the Act concerns tabling, not privilege.** A report under s 64 of the Act is contemplated by the machinery provisions in s 69 (**JBA 1, 98**): an ‘other report’ for which a direction is given under s 69(1)(b). In this case, it will apply to the report if a direction is given, the consideration of which is in abeyance.
17. Section 69 does not modify, but rather harmonises the operation of ss 8 and 9 of the *Parliament Act* (**AS [62] – [64], [65]; AR [6] - [8]**) regarding the tabling and publishing of reports when the Assembly is sitting and when it is not: ss 53(c)(ii) and 59, *Parliament Act*, **JBA 2, 532, 536**. Section 69 makes tabling the report mandatory once given to the Speaker (s 69(4)). Further, if the Assembly is not sitting, s 69(4)-(7) of the Act *requires* the report to be ‘taken to have been tabled’ and published, supplementing as was necessary, the discretionary tabling provision in s 59(2) of the *Parliament Act*: cf **CAB 81, [66]**.
18. Tabling, including ‘taken to have been tabled’ occur in parliament. The respondent’s challenge about the report being ‘made public’ is not something running in parallel with parliamentary privilege, but rather is a direct challenge to it and the publication of the report under the processes of the parliament: **AR [3(a)] and [4]-[7]**.
19. ***Ainsworth* does not affect the operation of the *Parliament Act*.** Whether the preparation of the report was privileged was neither argued nor decided in *Ainsworth*: **JBA 4, 751 at 774**; see also **Cth RS, [11], AR [12]**.
20. **There was no denial of procedural fairness.** The substance of the adverse allegations and comments were clear from the draft report given to him: **AR [13]**.

Dated: 6 June 2023



Peter Dunning KC