HIGH COURT OF AUSTRALIA

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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

REPLY SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH SEEKING LEAVE TO INTERVENE

Filed on behalf of the Attorney-General of the Commonwealth (seeking leave to intervene) by:

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Date of this document: 30 March 2023

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II LEAVE TO FILE REPLY

2. On 28 March 2023, the Court directed that the Attorney-General of the Commonwealth (**Commonwealth**) have leave to file submissions in reply to the Respondent's submissions contending that the Crime and Corruption Commission (**Commission**) failed to observe the requirements of procedural fairness in preparing the report (**Report**) (RS [84]-[88]).

3. These submissions in reply are filed pursuant to that grant of leave. They are therefore limited to the procedural fairness issue. If granted leave to intervene, the Commonwealth will respond to other aspects of the Respondent's submissions in oral argument.

PART III THE PROCEDURAL FAIRNESS ARGUMENT IMPEACHES OR QUESTIONS PROCEEDINGS IN PARLIAMENT

4. The Respondent's procedural fairness contention is premised on the Court finding, contrary to his principal argument, that parliamentary privilege does attach to the Report (RS [84]). He says that the Court can declare that the Commission failed to observe the requirements of procedural fairness in preparing the Report "regardless of whether the report is privileged" (RS [84]).

5. The primary judge's undisturbed factual finding was that the Commission prepared the Report for the purpose of submitting it to the Parliamentary Crime and Corruption Committee, being a committee of the Legislative Assembly of Queensland (**Assembly**).[1] The preparation of the Report therefore formed part of proceedings in the Assembly, as defined by s 9 of the *Parliament of Queensland Act 2001* (Qld) (**Parliament Act**). To impugn the fairness of the process by which the Report was prepared is to impeach or question proceedings in the Assembly in a very direct way, because it is to ask the Court to declare those proceedings were unlawful.

6. To say that a declaration that procedural fairness was not observed in preparing the Report would not "cut across any privilege that might be found to attach to the Report" because it does not "seek to impeach anything that Parliament has done" (RS [88a], emphasis added) is to misconceive the scope of parliamentary privilege. Section 8 of the Parliament Act protects "proceedings in the Assembly" from being impeached or questioned in any court.

[1] TJ [141] (CAB 50). See also TJ [120]-[121], [130] (CAB 45-46, 48).

Those proceedings are not limited to things that "Parliament has done". Rather, the Parliament Act expressly provides that "proceedings in the Assembly" include things that may be done by non-parliamentarians, such as giving evidence before the Assembly or one of its committees,[2] and things that may be done outside of Parliament altogether, relevantly including preparing a document that is to be presented or submitted to the Assembly or its committees.[3] To treat parliamentary privilege as confined to things that "Parliament has done" is to ignore the Parliament's own definition of the extent of its privileges. It is also to ignore a key purpose of parliamentary privilege, being to protect and facilitate Parliament's ability to obtain information from persons outside of the Assembly.[4]

10 7. The conclusion stated above is consistent with the authorities. In *Carrigan v Cash*, which concerned the operation of s 16 of the *Parliamentary Privileges Act 1987* (Cth), a Full Court of the Federal Court held that "there was no occasion for the primary judge 'to determine the extent of the rights of procedural fairness'"[5] in the preparation and provision of a report that the primary judge had found was prepared for purposes of, or incidental to, the transacting of the business of a House of Parliament.[6] Similarly, in *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* (***CJC v PCJC***), the Queensland Court of Appeal held that Art 9 of the *Bill of Rights 1688* (UK) precluded the Court from determining whether the Parliamentary Criminal Justice Commissioner had failed to observe the requirements of procedural fairness when reporting to the committee of
20 the Assembly, because that report had been prepared for the purpose of, and incidental to, presenting a document to a committee of the Assembly.[7]

8. The Respondent's reliance on *Ainsworth v Criminal Justice Commission*[8] (***Ainsworth***) is misconceived (RS [88(b)]). That case is not authority for the proposition that a document prepared for the purpose of being submitted to Parliament, and that is therefore subject to parliamentary privilege, can be challenged on the ground of a denial of procedural fairness. There are several reasons why that is so.

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2 Parliament Act s 9(2)(a).
3 Parliament Act ss 9(2)(c) and (e).
4 See CS [20]-[21], citing *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 334A-C (Lord Browne-Wilkinson); *Rowley v O'Chee* [2000] 1 Qd R 207 at 224 (McPherson JA); *In the Matter of OPEL Networks Pty Ltd (In Liq)* (2010) 77 NSWLR 128 at [116]-[118] (Austin J); *Sportsbet Pty Ltd (ACN 088 326 612) v New South Wales (No 3)* (2009) 262 ALR 27 at [21(1)] (Jagot J).
5 [2017] FCAFC 86 at [36] (Dowsett, Besanko and Robertson JJ).
6 *Carrigan v Cash* [2016] FCA 1466 at [69]-[71], [74] (White J).
7 [2002] 2 Qd R 8 at [23] (McPherson JA), [34] (Williams JA), [51] (Chesterman J); see also [6.1] and [6.3] (McPherson JA).
8 (1992) 175 CLR 564.

9. *First*, the respondent in *Ainsworth* did not argue that the preparation of the report in issue in that case formed part of the proceedings in Parliament attracting parliamentary privilege. No doubt because the point was not argued, the Court in *Ainsworth* made no finding as to whether the report at issue in that case was prepared for a purpose that attracted parliamentary privilege.[9] The Court was not asked to make such a finding, because the respondent's submission concerning parliamentary privilege was limited to the submission that the report:[10]

> on being printed, attracted the immunities and privileges of a report tabled in and printed by order of the Legislative Assembly. (The respondent based some of its argument on the immunities and privileges attaching to a report tabled and printed by order of the Legislative Assembly but the character of the Report in that respect is immaterial to the making of the declaration to which, in my view, the appellants are entitled.)

10. The argument summarised above reflected the terms of s 2.18(4) of the *Criminal Justice Act 1989* (Qld), which provided that, once printed, a report was "deemed for all purposes to have been tabled in and printed by order of the Legislative Assembly" and was "granted all the immunities and privileges of a report so tabled and printed".[11] The temporal focus of the argument – ie that privilege was attracted when the report was printed – explains why Brennan J said that the privilege argument was "immaterial" to any declaration concerning the fairness of the process by which the report was prepared, for that declaration concerned matters anterior to the event (the printing of the report) that attracted the privileges and immunities of the Assembly (cf RS [88.b]).

11. It is probable that the reason it was not argued in *Ainsworth* that the preparation of the report itself attracted parliamentary privilege is that the report in issue had been prepared after the Deputy Premier, as chairman of a sub-committee of Cabinet, requested the Commission to prepare the report.[12] It was "common ground between the parties" that the report was produced "to advise the Government as to areas of likely difficulty in the implementing of a policy to introduce gaming machines",[13] that being part of the Commission's function in relation to the administration of criminal justice under s 2.14(1)(a). While the performance of that statutory function attracted an obligation to furnish the report to the officers identified in s 2.18(1) – the Chair of the Parliamentary Committee, the Speaker and the Minister – that did not mean that the report was prepared for the purpose of being submitted to the Parliament or a committee thereof, as opposed to the "common ground" purpose of advising

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9 *Ainsworth* (1992) 175 CLR 564 at 571 (Mason CJ, Dawson, Toohey and Gaudron JJ), 586-587 (Brennan J).
10 *Ainsworth* (1992) 175 CLR 564 at 587 (Brennan J) (emphasis added).
11 *Ainsworth* (1992) 175 CLR 564 at 571.
12 *Ainsworth* (1992) 175 CLR 564 at 586 (Brennan J).
13 *Ainsworth* (1992) 175 CLR 564 at 587 (Brennan J) (emphasis added).

the Government. Indeed, Brennan J was dismissive of that notion, stating that "[t]he function of reporting to the Parliamentary Committee can hardly have been the function on which the Commission entered".[14]

12. *Second*, and no doubt as a consequence of the matters discussed above, the respondent in *Ainsworth* did not argue that to grant a declaration of a denial of procedural fairness (as opposed to a declaration that the report was void) would impugn proceedings in Parliament.[15] To the contrary, in response to questions from the Court as to whether it could make a declaration that the findings in the report were the result of a process that denied procedural fairness, the respondent conceded that this could be done.[16] As Helman J put it in *Criminal Justice Commission v Dick*, "[t]he declaration to which the appellants were found to be entitled [in *Ainsworth*] … concerned acts and omissions of the commission in preparing and making the report. It was not argued – and so did not fall to be decided – that parliamentary privilege or immunity could successfully be claimed for those acts or omissions".[17]

13. In circumstances where there was both: (i) no finding that the report at issue in *Ainsworth* had been prepared for a purpose that attracted parliamentary privilege; and (ii) no argument that, as a result, a declaration of a denial of procedural fairness would question or impeach proceedings in Parliament, *Ainsworth* is not authority for the proposition that such a declaration can be made even with respect to a report that has been found to form part of "proceedings in the Assembly".[18]

14. Finally, and for completeness, it is relevant to note that when *Ainsworth* was decided the privileges of the Assembly were provided for in s 40A of the *Constitution Act 1867* (Qld)[19] and were expressed by reference to those of the House of Commons. Section 40A did not include the extended definition of "proceedings in Parliament" which would later be enacted in the *Parliamentary Papers Act 1992* (Qld)[20] and subsequently adopted (with minor

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14 *Ainsworth* (1992) 175 CLR 564 at 588 (Brennan J). See also *CJC v PCJC* [2002] 2 Qd R 8 at [19] (McPherson JA).

15 In oral argument, the respondent's focus was on establishing that "[a] declaration that a report to which parliamentary privilege and immunity attached was void would be impugning or interfering with the proceedings of Parliament": (1992) 175 CLR 564 at 569 (emphasis added). See also *Criminal Justice Commission v Dick* [2000] QSC 272 at [9].

16 See *Ainsworth* (1992) 175 CLR 564 at 569 (responding to Mason CJ). See also *Criminal Justice Commission v Dick* [2000] QSC 272 at [8].

17 *Criminal Justice Commission v Dick* [2000] QSC 272 at [9].

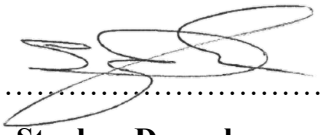
18 *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13].

19 Introduced by s 3 of the *Constitution Amendment Act 1978* (Qld).

20 *Parliamentary Papers Act 1992* (Qld) s 3. Like s 9 of the Parliament Act, s 3(2) of the *Parliamentary Papers Act 1992* (Qld) included an extended definition of "proceedings in Parliament" which encompassed "[a]ll … acts done in the course of, or for the purposes of or incidental to, transacting business of … a committee",

modifications) in s 9 of the Parliament Act. Accordingly, the Court in *Ainsworth* had no occasion to construe the definition of "proceedings in the Assembly" that is now in issue.[21]

Dated: 30 March 2023



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including (among other things) "preparing a document for the purposes of, or incidental to" presenting or submitting a document to a committee (see ss 3(3)(c) and (e)). As explained in the second reading speech, a purpose of the *Parliamentary Papers Act 1992* (Qld) was to ensure "Privilege is extended to words spoken or acts done in all aspects of the Parliament's business, including business before the House, Committee or an inquiry": Queensland, *Parliamentary Debates,* Legislative Assembly, 21 May 1992 at 5438 (emphasis added).

21 This was recognised in *Criminal Justice Commission v Dick* [2000] QSC 272 at [7] (Helman J). See also *CJC v PCJC* [2002] 2 Qd R 8 at [21] (McPherson JA), [29] (Williams JA).

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ANNEXURE TO THE ATTORNEY-GENERAL OF THE COMMONWEALTH'S REPLY SUBMISSIONS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Commonwealth Attorney-General sets out below a list of the particular constitutional provisions and statutes referred to in his reply submissions.

	Commonwealth	**Provision(s)**	**Version**
1.	*Parliamentary Privileges Act 1987* (Cth)	s 16	Current
	State and Territory	**Provision(s)**	**Version**
2.	*Constitution Amendment Act 1978 (Qld)*	s 3	As passed
3.	*Criminal Justice Act 1989* (Qld)	ss 2.14, 2.18	As passed
4.	*Parliament of Queensland Act 2001* (Qld)	ss 8-9	Current
5.	*Parliamentary Papers Act 1992* (Qld)	s 3	As passed
	United Kingdom		
6.	*Bill of Rights 1688* (UK)	Art 9	Current
	Statutory Instruments		
7.	*High Court Rules 2004* (Cth)	r 42.08.5	Current