



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

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PETER DAMIEN CARNE
Respondent

APPELLANT'S REPLY

Part I: Publication

1. This reply is not suitable for publication on the internet in unredacted form. With the redaction of footnote 45, it is suitable for publication.

Part II: Reply

2. The issues for determination in this appeal are whether:
 - (a.)the report which was prepared for and submitted to the PCCC attracts parliamentary privilege under ss 8 and 9 of the Parliament Act;¹
 - (b.)the certificate issued under s 55 of the Parliament Act (**certificate**) involves an occasion of the exercise of an “undoubted privilege”² so that, once the Court has recognised the existence of the privilege, it should not inquire beyond the certificate;³
 - (c.)the Commission has the power to report under s 64 of the Act about its investigation of suspected “corrupt conduct” even if the conduct, once investigated, is not found to be “corrupt conduct;⁴ and
 - (d.)privilege prevents the Court from considering whether the respondent was afforded procedural fairness⁵ and, if not, whether he was afforded procedural fairness.⁶ It is submitted a notice of contention is required to raise this issue.⁷

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3. Respectfully, the respondent’s argument is based on two propositions that could never be accepted:

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- (a.) *First*, the respondent attempts to re-define the contest as one that is about whether the report can be “made public”.⁸ On his case, parliamentary privilege does not arise. But re-defining the issue in this way does not fix upon any part of a process outside of the parliament – in that way the argument lacks content. It is impossible to challenge publication by tabling in the parliament without infringing the privilege (**part 1**).

¹ AS [2], [22], [24]-[67]; Reply [4]-[9]; Speaker [9]-[42]; Cth [6]-[38]; RS [12]-[25], [39]-[44], [73]-[83], [89]-[96].

² *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162 (Dixon CJ for the Court).

³ AS [2], [22], [32]-[33], [40], [47]-[49]; Reply [9]; Cth [29], [35], [38]; RS [75]-[79].

⁴ AS [3], [23], [68]-[89]; Reply [14]; Speaker [38]; RS [26], [46]-[72].

⁵ Reply [11]-[12]; Speaker [13]-[16], [27]; Cth [39]; Cth Supp Subs [4]-[14]; RS [84], [89]-[96].

⁶ Reply [13]; RS [85]-[88].

⁷ *High Court Rules 2004* (Cth), r 42.08.5; Cf RS [85], footnote 42.

⁸ RS [1], [12b], [13], [14b], [23], [24], [37], [39], [46], [72], [74], [91].

(b.) *Second*, the respondent mischaracterises the report as performing an “adjudicative” or a “judicial or quasi-judicial” function.⁹ That characterisation calls in aid arguments about the role of investigative bodies that this Court has rejected.¹⁰ The report does not make any final determination and it does not bind anyone (**part 2**).

4. **Part 1: whether the report is “made public” is the wrong inquiry.** The respondent submits that even if the report is privileged, his “primary point” is that it cannot be “made public”.¹¹ Respectfully, the reference to the report being “made public” is a euphemistic way of describing when the PCCC chooses to table the report by providing it to the Speaker. It exposes in the starkest way the respondent’s direct challenge to the internal workings of the parliament. Tabling is something that is done in the parliament.
5. The respondent accepts that the “presentation” or “submission” of the report was privileged under s 9(2)(c).¹² But he does not confront s 9(2)(d) which privileges “a document tabled in, or presented or submitted to a committee” (emphasis added). Although entirely unsupported by the text, context and purpose of s 9,¹³ the respondent argues that s 9(2)(d) “calls for an actual (or deemed) tabling”.¹⁴ Regardless of whether the report is “made public”, it is part of the “proceedings in the Assembly”.¹⁵
6. The flaw in the respondent’s reasoning is also exposed by the reality that tabling is not the only way that a report can be “made public” by a parliamentary committee.¹⁶ A committee may also, for example, “authorise publication” by the government printer.¹⁷ Nor is it correct that the “internal affairs” or processes of the parliament are dealt with only in Standing Orders rather than statute.¹⁸ It follows that s 69 of the Act does not

⁹ Cf RS [14a], [30]-[31], [67]-[69], [70], [72] (“adjudicative”) and RS [26], [30]-[31], [68] (“judicial”).
¹⁰ See, for example, *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 (**Today FM**) at [55]-[59] (French CJ, Hayne, Kiefel, Bell and Keane JJ), [63]-[64] (Gageler J); *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 (**Balog**) at 633, 635 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

¹¹ RS [23].

¹² RS [14b], [37]. See also Notice of Appeal, ground 1 at CAB 61.

¹³ See generally AS [41]-[46] (the existence of the privilege), [52]-[56] (the purpose of the privilege).

¹⁴ RS [14b]. RS footnote 5 is the only reference to s 9(2)(d) of the Parliament Act.

¹⁵ The submission (at RS [37]) that the issue of privilege was not before the courts below and was not put in issue by the parties is untenable. Davis J held the report was privileged and the matter was litigated on that basis. See also Notice of Appeal, grounds 1 to 3 at CAB 61.

¹⁶ Cf RS [39].

¹⁷ Parliament Act, s 50. The power is non-exhaustive: s 50(4).

¹⁸ Cf RS [20], last sentence. See, for example, Parliament Act, ss 48-59.

concern the “conditions for reporting publicly”;¹⁹ it is a procedural tabling provision.²⁰

7. Once that is understood, the respondent’s submission that s 69 of the Act plays a special role relating to the report being “made public” (let alone its privileged status) must be rejected.²¹ For similar reasons, the Court should not accept that the report cannot be privileged because, on the respondent’s case, it is beyond power.²²

8. The respondent also misapprehends the correct order of analysis to determine the existence of the privilege.²³ The Commission does not contend that the Parliament Act has “superiority” over the Act or that the Act should be ignored. Because the Parliament Act establishes the general rules of parliamentary privilege, it is necessary to consider it first (like any question of privilege).²⁴ The Parliament Act and the Act should then be construed so that they can be read harmoniously,²⁵ and to determine whether the Act abrogates, modifies, or affects the privilege.²⁶ But nothing in s 69 of the Act alters the scope of the privilege confirmed in ss 8 and 9 of the Parliament Act.

9. Once the Court has identified the existence of an undoubted privilege,²⁷ it should not judge the occasion of its exercise. By issuing the certificate under the Parliament Act, the PCCC has judged that the report falls in an established category of privilege. It is not for the courts to inquire into the exercise of that privilege.²⁸ Even if the Court could inquire beyond the certificate, the respondent’s attack on the certificate is without foundation.²⁹ Despite being raised in the respondent’s grounds of appeal below, *McMurdo and Mullins JJA* did not disturb *Davis J*’s consistent factual findings.³⁰

10. **Part 2: the report does not perform any adjudicative or judicial function.** The respondent mischaracterises the report as performing an “adjudicative” or a “judicial or quasi-judicial” function.³¹ The Commission’s report does not adjudicate criminal

¹⁹ Cf RS [82].

²⁰ AS [62]-[64]; Explanatory Note to the Crime and Misconduct Bill 2001, p 27.

²¹ Cf RS [14b], [24], [39], [82]-[83]. See also AS [60]-[67].

²² RS [95], [96]. See AS [54].

²³ RS [24]. See also RS [20], [22], [43].

²⁴ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*) at [70] (McHugh, Gummow, Kirby and Hayne JJ).

²⁵ See AS [65]. See also *Project Blue Sky* (1998) 194 CLR 355 at [70].

²⁶ *Acts Interpretation Act 1954* (Qld), s 13B. See also AS [36].

²⁷ Or an “orthodox” privilege, to use the language of the Cth [7]. See also Cth [38].

²⁸ See RS [75]-[79]. See also AS [40], [47]-[51].

²⁹ RS [75]-[78].

³⁰ Notice of Appeal, ground 3 at CAB 61; AS [48], [49]. The respondent does not appeal the findings.

³¹ Cf RS [14a], [30]-[31], [67]-[69], [70], [72] (“adjudicative”) and RS [26], [30]-[31], [68] (“judicial”).

guilt.³² As the trial judge found, the Commission’s views do not bind anyone and do not finally conclude anything.³³ *Balog* does not assist the respondent because it was decided “as a matter of construction” of the act in question.³⁴ And even then, the anti-corruption commission could make findings as to whether there was sufficient evidence to warrant prosecution and publish reports in the parliament.³⁵

11. **Procedural fairness.** If the Court deals with the issue, the Court should not make a declaration that the respondent was denied procedural fairness. The preparation of the report was part of the “proceedings in the Assembly”.³⁶ As explained in *Warsama*, an allegation of a denial of procedural fairness in the preparation of a report given to the parliament puts the conclusions in the report directly in issue.³⁷

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12. It is no answer to say that the report was prepared by the Commission.³⁸ There can be no clearer case of impeachment than a declaration that the preparation of a privileged document was procedurally unfair or *ultra vires*.³⁹ The declaration would “detract from the authority and cogency of the report by raising doubts about the validity of the conclusions it contains”.⁴⁰ It also undermines any decision of the PCCC to table it. The question is therefore not justiciable and the Court should not decide it.⁴¹ The Commission adopts the Speaker’s submissions as to why Brennan J’s reasons in *Ainsworth v Criminal Justice Commission* do not permit the declaration sought.⁴²

13. However, if the Court does consider the procedural fairness argument, the Court should reject it. The respondent was afforded an opportunity to make submissions about the

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³² See *Today FM* (2015) 255 CLR 352 at [55]-[59] (French CJ, Hayne, Kiefel, Bell and Keane JJ), [63]-[64] (Gageler J).

³³ TJ [54], [153]-[154] at CAB 22, 52-53. See also the report (at [16]) in the Respondent’s Further Materials filed 10 March 2023 (**RFM**) at 37; *Today FM* (2015) 255 CLR 352 at [81] (Gageler J).

³⁴ *Balog* (1990) 169 CLR 625 at 634, 635 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); Cf RS [67]-[68].

³⁵ *Balog* (1990) 169 CLR 625 at 633, 635 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

³⁶ Parliament Act, s 9(2)(e). For the avoidance of doubt, the Commission relies on the preparation of the report as being privileged: AS [2], [22], [35], [38]-[50], [52]; Cf Speaker [6b]. The Commission adopts the Speakers submissions at [28]-[41].

³⁷ *Warsama v Foreign and Commonwealth Office* [2020] QB 1076 at [83]-[84] (Lord Maldon CJ, Coulson and Rose LJ); see also *Carrigan v Cash* [2017] FCAFC 86 at [36] (Dowsett, Besanko and Robertson JJ).

³⁸ Cf RS [88].

³⁹ *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8 (**Criminal Justice Commission**) at [23] (McPherson JA). See also TJ [176] at CAB 57.

⁴⁰ *Criminal Justice Commission* [2002] 2 Qd R 8 at [23] (McPherson JA); see also [33]-[34] (Williams JA) and [40]-[42], [51] (Chesterman J).

⁴¹ See also Speaker [40], [41].

⁴² (1992) 175 CLR 564 at 587 (Brennan J); Speaker [13]-[16].

draft report.⁴³ He was given an extension of time to respond and he made confidential submissions.⁴⁴ The substance of the allegations and adverse comments against the respondent were clear from the draft report.⁴⁵ The Foreword did not contain any new adverse comment the substance of which was not already in the draft report. A fair opportunity to be heard did not require the Commission to “quote chapter and verse”⁴⁶ or to disclose all material.⁴⁷ In the context of the Act,⁴⁸ that was all that was required.⁴⁹

14. **Reporting power.** The respondent’s construction permits no power to report under s 64 (which he accepts is a general reporting power) in relation to the Commission’s corruption functions. There is no warrant to do so and it is contrary to ss 63 and 64.⁵⁰

10 15. **Costs.** The Commission has made an open offer to the respondent that, regardless of the outcome of the appeal, the parties bear their own costs of this appeal and the costs orders below in the respondent’s favour remain undisturbed. That offer balances the respondent’s concerns with the actuality that the respondent has a private interest in the appeal and that he commenced and continued these proceedings below. If it is not accepted, the Commission seeks its costs. The public importance of an appeal is not enough to deprive a successful party of a compensatory costs order.⁵¹

Dated 31 March 2023

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⁴³ The Commission’s cover letter and the draft report is in the RFM at 28-57.
⁴⁴ Statement of Agreed Facts [25] at RFM 9; Statement of Agreed Facts [27] at RFM 58-62.
⁴⁵ [Redacted].
⁴⁶ *In re Pergamon Press Ltd* [1971] 1 Ch 388 at 400 (Lord Denning MR) cited in *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 316 (Gibbs CJ).
⁴⁷ *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [140] (McHugh J); *AB* [2022] VSCA 283 at [164]-[175] (Emerton P, Beach and Kyrou JJA).
⁴⁸ Act, s 71A combined with ss 66, 67.
⁴⁹ *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 (*VEAL*) at [27], [29] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); *AB (a pseudonym) and CD (a pseudonym) v Independent Broad-based Anti-Corruption Commission* [2022] VSCA 283 (*AB*) at [164]-[175] (Emerton P, Beach and Kyrou JJA).
⁵⁰ AS [69]-[89]; Cf RS [26]-[72].
⁵¹ *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [49] (Gaudron and Gummow JJ).

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ANNEXURE TO THE APPELLANT'S REPLY SUBMISSIONS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Appellant sets out below a list of the provisions and statutes referred to in its reply submissions.

No.	Description	Version	Provisions
State and Territory			
1.	<i>Acts Interpretation Act 1954</i> (Qld)	Current	s 13B
2.	<i>Crime and Corruption Act 2001</i> (Qld)	Current	ss 63, 64, 66, 67, 71A.
3.	<i>Parliament of Queensland Act 2001</i> (Qld)	Current	ss 8, 9, 48 - 59
Statutory Instruments			
4.	<i>High Court Rules 2004</i> (Cth)	Current	r 42.08.5