HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

AB (A PSEUDONYM)
First Appellant

CD (A PSEUDONYM)
Second Appellant

and

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION
Respondent

AMENDED SUBMISSIONS OF THE RESPONDENT

PART I — FORM OF SUBMISSIONS

1 These submissions are ~~not~~ in a form suitable for publication on the internet.

PART II — STATEMENT OF ISSUES

2 Section 162(1) of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (the **IBAC Act**) empowers the Independent Broad-based Anti-corruption Commission (**IBAC**) to transmit a special report to the Parliament of Victoria "on any matter relating to the performance of [IBAC]'s duties and functions".

3 Section 162(3) provides that, if IBAC intends to include in such a report "a comment or an opinion which is adverse to any person", IBAC must first provide the person "a reasonable opportunity to respond to the adverse material" and then "fairly set out each element of the [person's] response in [IBAC's] report".

4 In this matter, IBAC sought to comply with that obligation by providing to the Appellants a draft of the report proposed to be transmitted to Parliament (the **Draft Report**), and an opportunity to respond to the proposed adverse comments and opinions in the Draft Report before its transmission. The issue in the proceedings has been, relevantly, whether providing the Draft Report was sufficient compliance with s 162(3) or whether, quite apart from the content of the Draft Report, s 162(3) required IBAC to give the Appellants the transcripts of other witness examinations and other documents relied on by IBAC.

5 Subject to the doubt explained in paragraph 9 below, the issue for this Court is the meaning of the expression "adverse material" in s 162(3).

6 The Appellants' position on the meaning of that term has been as follows:

6.1 The expression "adverse material" includes the evidence or information, on which IBAC may rely or has relied in forming its proposed adverse comments or opinions (the **underlying evidence**).

6.2 It follows from that construction of "adverse material" that IBAC cannot discharge the obligation in s 162(3) by giving an affected person a draft report containing the proposed adverse comments and opinions and the substance of the underlying evidence, but must give the person the underlying evidence itself (the **Appellants' corollary**).

7 The Court of Appeal held that "adverse material" means the adverse comments or opinions that IBAC intends to include in the report to be transmitted to Parliament. Therefore s 162(3) does not require the disclosure of the underlying evidence itself. Rather, IBAC can discharge the obligation in s 162(3) by providing a draft report containing the proposed adverse comments and opinions and the substance or gravamen of the matters IBAC took into account in formulating those comments or opinions.

8 IBAC respectfully submits that the Court of Appeal was correct.

9 However, the precise issue between the parties – and indeed whether there continues to be any issue at all within the grant of special leave – is now quite unclear. That is because it is unclear whether the Appellants continue to embrace the Appellant's corollary (see paragraph 6.2 above), as they have done throughout the proceeding. If the Appellants have abandoned that corollary, as parts of their current submissions suggest, there is no apparent difference between the approach of the Appellants and that of the Court of Appeal to the nature of the overall obligation imposed by s 162(3); and the construction of "adverse material" is, accordingly, academic.

10 The latter part of the Appellants' submissions focuses on whether the Draft Report in fact sufficiently disclosed the substance of the matters that IBAC considered in formulating the proposed adverse comments and opinions. Those submissions are consistent with the Court of Appeal's approach to the overall obligation imposed by s 162(3), referred to at paragraph 7 above. More importantly, the Appellants were refused special leave to appeal on that factual question. They should not now be permitted to re-agitate it.

11 These submissions are structured as follows:

11.1 First, in the context of addressing the relevant facts, the submissions address the history of the proceeding, in so far as that history assists in making sense of the parties' current forensic positions.

11.2 Secondly, the submissions address the status of the Appellants' corollary.

11.3 Thirdly, the submissions address the meaning of "adverse material" in s 162(3), on the assumption that the meaning of that term has continuing utility.

11.4 Fourthly, the submissions address the question of relief.

PART III — SECTION 78B NOTICE

12 No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV — FACTS

13 IBAC agrees with the summary in paragraphs 5 to 12 of the Appellants' submissions (**AS**).[1]

14 However, to understand the issues presented by this appeal, it is necessary to appreciate in more detail the history of the proceeding.

15 The range of procedural rights claimed by the Appellants has narrowed considerably since the inception of this proceeding: **see CA [51]-[54] (CAB 91-92)**. However, relevantly to this appeal, the parties have consistently been divided on whether IBAC was required to give the Appellants the transcripts of other witness examinations and other documents on which IBAC had relied.

16 The meaning of "adverse material" assumed significance in that regard because, and to the extent that, that meaning determined the matters to which the Appellants had to be given a reasonable opportunity to respond and thereby affected the nature of the overall obligation imposed by s 162(3).

17 ***At first instance***, the Appellants submitted that:

17.1 "adverse material" meant the proposed adverse comments and opinions, and the underlying evidence; and

17.2 it followed that s 162(3) required IBAC to give the Appellants the underlying evidence itself: **PJ [133], [136]; CA [168] (CAB 52-53, 54; 123)**.

18 The particulars of the breach of s 162(3) alleged in the Amended Originating Motion for Judicial Review, with respect to AB, were relevantly that:[2]

> (ii) The First Plaintiff has not been provided with the transcripts from other witness examinations which are relied upon in reaching adverse findings in relation to the First Plaintiff.

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[1] The summary in **AS [9]** requires some minor corrections. On 14 December 2021, IBAC agreed to provide AB with a copy of the transcript of his examination, together with copies of all documents shown to him during his examination. On 17 December 2021, IBAC refused to provide AB with the transcripts of examinations of other persons referred to in the draft report or copies of the reports and other documents cited and relied on in the draft report. See **PJ [11]; CA [41]-[42] (CAB 11; 89)**.

[2] **CA [53] (CAB 91-92)**.

(iii) The First Plaintiff has not been provided with other documents cited and relied upon in the Draft Report.

19 The primary judge dismissed the Appellants' case. Relevantly:

19.1 his Honour accepted the Appellants' submission that "adverse material" meant the proposed adverse comments and opinions and the underlying evidence before IBAC: **PJ [147] (CAB 57)**; but

19.2 on the other hand, his Honour rejected the Appellants' corollary: there was no obligation on IBAC to disclose the underlying evidence itself; it was sufficient for IBAC to give the relevant person a draft report containing the proposed adverse comments and opinions along with the substance of the underlying evidence: **PJ [151], [154] (CAB 58-59, 60)**.

20 ***Before the Court of Appeal***, the Appellants advanced the same case as at first instance. The Appellants submitted that the primary judge had correctly construed "adverse material" as meaning the proposed adverse comments and opinions and the underlying evidence,[3] but had erred in finding that the "obligations contained in s 162(3) are satisfied where a person is provided with the substance or gravamen of the adverse material against them".[4]

21 The Appellants also advanced a new, alternative argument before the Court of Appeal, an argument that was not reliant on the Appellants' corollary:[5]

> … if it is accepted that the obligation under s 162(3) of the IBAC Act only requires IBAC to provide the Applicants with the gravamen or substance of the adverse material … then the learned primary judge erred in finding that the Draft Special Report contained the substance and gravamen of the adverse material.

22 The Court of Appeal refused the Appellants leave to appeal, holding that:

22.1 the expression "adverse material" in s 162(3) refers to the adverse comments and opinions that IBAC intends to include in the special report: **CA [122]-[139] (CAB 113-116)**;

22.2 s 162(3) does not require IBAC to disclose the underlying evidence itself – the provision of a draft report is capable of providing a reasonable opportunity to respond to the proposed adverse comments and opinions, provided that the draft report contains "the substance or gravamen of the matters that IBAC took into

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3 **CA [114]-[121]**.

4 Written case for the Applicants dated 14 October 2022, paragraph 42 (**RBFM 13**). See also Application for leave to appeal dated 14 October 2022, Ground 1(8)-(9) (**CAB 73**).

5 Application for leave to appeal dated 14 October 2022, Ground 2 (**CAB 73**). See also Written case for the Applicants dated 14 October 2022, paragraphs 42-44 (**RBFM 13-14**).

account in formulating those comments and opinions": **CA [167] (CAB 123)**. **See also CA [71]-[75], [164]-[166] (CAB 97-99, 122-123)**;[6] and

22.3 as to the Appellants' new alternative argument (see paragraph 21 above), subject to one exception,[7] the Draft Report did contain "the substance or gravamen of the matters that IBAC took into account in formulating those comments and opinions": **CA [167]-[185] (CAB 123-128)**.

23 The Appellants sought ***special leave to appeal*** from the decision of the Court of Appeal on two grounds.

23.1 Proposed Ground 1 concerned the construction of "adverse material".

23.2 Proposed Ground 2 concerned whether the Court of Appeal was correct to find that the Draft Report sufficiently disclosed the proposed adverse comments and opinions and the substance of the matters that IBAC considered in formulating those comments and opinions.

24 Kiefel CJ and Gordon J granted special leave, but only on Ground 1.[8]

PART V — ARGUMENT

A THE STATUS OF THE APPELLANTS' COROLLARY

25 Before turning to the meaning of "adverse material", it is necessary to clarify the precise issue between the parties and whether there continues to be any issue at all within the grant of special leave. That is because it is unclear whether the Appellants continue to embrace the Appellant's corollary described in paragraph 6.2 above, as they have done throughout the proceeding.

26 If the Appellants' corollary continues to form part of their construction argument, then IBAC submits that this Court should reject the Appellants' construction and dismiss the appeal: see paragraphs 33 to 63 below.

27 However, parts of the Appellants' submissions suggest that the Appellants have abandoned the corollary:

27.1 The Appellants accept that it is open to IBAC "to discharge its duty in s 162(3) by disclosing only the substance of evidence or information on which it has relied in

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6 That was consistent with the Appellants' oral argument before the Court of Appeal, which focussed on the content of the Draft Report and, essentially, whether it contained sufficient information, conceding that the provision of a sufficiently detailed draft report could discharge the obligation in s 162(3): **CA [81], [85], [87], [168] (CAB 99, 100, 100-103, 123)**.

7 The one exception is identified at **CA [177] (CAB 125)**, where the Court of Appeal made the point that it remained open to the current Appellants to ask IBAC for further details or to amend the Draft Report.

8 *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2023] HCATrans 103, lines 608-609 (**RBFM 83**).

forming its (provisional) adverse comments or opinions": **AS [36]**. **See also AS [41], [47], [49]**. It is unclear why that could not be done via a draft report.

27.2 The latter part of the Appellants' submissions focuses on whether the Draft Report in fact sufficiently disclosed the substance of the matters that IBAC considered in formulating the proposed adverse comments and opinions: **AS [57]-[60]**. Those submissions appear to proceed on the assumption that IBAC can discharge the obligation in s 162(3) by the provision of a sufficiently detailed draft report.[9]

28 If the Appellants have abandoned the corollary, it follows that they accept that the provision of a draft report is capable of satisfying the obligation in s 162(3). The issue would then become the sufficiency of the content of the relevant draft report. The factual question of the sufficiency of the Draft Report in this case is not before the Court on the appeal: see paragraphs 23 to 24 above and paragraph 66 below.

29 Indeed, if the Appellant agrees[10] with the Court of Appeal that it is sufficient for IBAC to provide a draft report containing the proposed adverse comments and opinions and the substance or gravamen of the matters IBAC took into account in formulating those comments and opinions, then there is no live controversy between the parties before the Court.

30 In particular, the meaning of "adverse material" would be academic, because it would not affect the nature of the overall obligation in s 162(3). This Court's decision on that issue could have no practical utility for the parties or, indeed, for anyone else. The point is well illustrated by the Appellants' submission at **AS [47]**:

> The only way to ensure fairness is to construe s 162(3) as requiring IBAC to give an affected person the opportunity to comment on the substance of the adverse information or evidence on which IBAC relies in forming its provisional adverse comments or opinions about a person – whether or not, as a contingent fact, that is information that IBAC considers appropriate for inclusion in a public-facing report under s 162(1).

31 That is precisely the effect of the Court of Appeal's construction of s 162(3), despite the differences between the Court of Appeal and the Appellants on the meaning of "adverse material".

32 If the Appellants' construction of s 162(3) is in substance the same as that adopted by the Court of Appeal, then IBAC submits that the appeal should be dismissed (or special leave revoked).

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[9] See also n 6 above.

[10] See **AS [36]**. See also **AS [41], [47], [49]**.

B THE MEANING OF "ADVERSE MATERIAL"

33 This part of IBAC's submissions assumes that, as part of their construction argument, the Appellants embrace the corollary referred to above: namely, that IBAC cannot use a draft report to discharge its obligation under s 162(3), but must disclose to an affected person the underlying evidence itself. Without that assumption, the dispute over the meaning of "adverse material" is academic: see paragraphs 25 to 32 above.

34 The competing constructions put by the parties to this appeal are as follows:

34.1 Court of Appeal's construction: "Adverse material" means the adverse comments and opinions that IBAC intends to include in the special report. IBAC submits that this construction is correct.

34.2 Appellants' construction: "Adverse material" means both the proposed adverse comments and opinions and the underlying evidence.

35 In summary, IBAC's position is as follows, based on the matters of text, context and purpose elaborated below:

35.1 The point of s 162(3) is to give a person who may be the subject of an adverse comment or opinion an opportunity to respond to the proposed comment or opinion before it is transmitted to Parliament, in an attempt to persuade IBAC why that comment or opinion should not be transmitted and, in any event, to have their response set out in the report eventually transmitted.

35.2 The "adverse material", to which the opportunity to respond must be given, is the proposed adverse comments and opinions.

35.3 The required opportunity may be provided by the provision of a draft report, provided that the draft report discloses "the substance or gravamen of the matters that IBAC took into account in formulating those comments and opinions": **CA [167]**.

B.1 Text

36 Section 162(3) provides as follows:

> (3) If the IBAC intends to include in a report under this section a comment or an opinion which is adverse to any person, the IBAC must first provide the person a reasonable opportunity to respond to the adverse material and fairly set out each element of the response in its report.

37 The word "material" is a "linguistic chameleon".[11] Its meaning depends on the context in which it is used. The *Macquarie Dictionary* provides a range of definitions of wide

[11] *BVC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 565 at [63] (Wigney J).

import, including "the substance or substances of which a thing is made or composed", "any constituent element of a thing", and "information, ideas, or the like on which a report, thesis, etc. is based".[12] It would be a mistake to begin the construction of s 162(3) simply by selecting a definition from that range without regard to the statutory context: **cf AS [21]**.[13]

38 The immediate context is s 162(3) itself. The provision has two clauses: the first clause sets out when IBAC's obligations arise, while the second clause specifies what IBAC's obligations are. On a natural reading, "adverse material" picks up – and is a shorthand for – the earlier reference in the same subsection to "a comment or an opinion which is adverse to any person". That is supported by the use of the definite article – "the adverse material" – which suggests a reference back to something already identified in the provision: **CA [127] (CAB 114)**.[14]

39 The Appellants attempt to explain the definite article in two ways, neither of which is convincing.

39.1 The Appellants submit that an article was required and the definite article ("the") was better than the alternatives: **AS [24]**. But several alternatives would have more clearly conveyed the meaning proposed by the Appellants: "any adverse materials", "all adverse material", "adverse material",[15] or "material on which the comment or opinion is based".

39.2 The Appellants submit that, on their construction, the definite article can still be understood to refer back to the comment or opinion already mentioned in s 162(3), as "the hinge for the identification of the adverse 'material' …": **AS [25]**. That submission does not explain the definite article so much as explain it away. On the Appellants' construction, the definite article refers to a class of things distinct from the comment or opinion already mentioned: namely, the underlying evidence.

40 The Appellants contend that their construction should be preferred because it picks up the "well-established meaning" of "adverse material" in administrative law: **AS [19]-[20]**. That contention is unpersuasive, for three reasons.

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12 *Macquarie Dictionary Online*, definition of "material".

13 *Federal Commissioner of Taxation v BHP Billiton Ltd* (2011) 244 CLR 325 at 340 [49] (French CJ, Heydon, Crennan and Bell JJ).

14 *Tamas v Victorian Civil and Administrative Tribunal* (2003) 9 VR 154 at 157-158 [8]-[9] (Callaway JA; Ormiston JA agreeing), 165-166 [44] (Eames JA; Ormiston JA agreeing); *Central Queensland Services Pty Ltd v Construction, Forestry, Mining and Energy Union* (2017) 249 FCR 154 at 162 [32] (Tracey and Reeves JJ).

15 See, for example, *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591 (the Court): "[The opportunity to be heard] would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material" (emphasis added).

41 ***First***, as the Court of Appeal observed, the starting point in determining the meaning of "adverse material" must be the proper construction of the IBAC Act, not a general principle of administrative law: **CA [65]-[66], [128] (CAB 94-95, 114)**.[16]

42 ***Secondly***, the Appellants' construction does not correspond to the asserted meaning of "adverse material" in administrative law. The Appellants say that, in administrative law, "adverse material" means the underlying information or evidence that may be relied on in reaching a decision: **AS [19]**. Yet on the Appellants' construction, "adverse material" is an omnibus expression for both the underlying information or evidence and the proposed decision which has been reached.

43 ***Thirdly***, the Court of Appeal's construction of "adverse material" is consistent with the governing principle of procedural fairness in the present context, as articulated by Brennan J in *Annetts v McCann*:[17]

> Personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory inquiry unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made.

44 That statement of principle makes clear that it is the finding itself (a) which enlivens the rules of procedural fairness, (b) which poses the risk of reputational harm that those rules are intended to address, and (c) to which the affected person is entitled to respond. The Court of Appeal's construction applies the same logic to s 162(3).

45 Lastly, the Court of Appeal's construction leaves meaningful work to be done by the requirement that there be "reasonable opportunity to respond". No aspect of its construction of "adverse material" assumes that an affected person must not or will not receive sufficient information to give the person a reasonable opportunity to respond to that material, but the sufficiency of what has been provided can be assessed by considering whether a reasonable opportunity has been given: **cf AS [48]**.

B.2 Context

46 Two aspects of the statutory context support the Court of Appeal's construction: ss 162(2) and (4); and s 166.

47 Sections 162(2) and (4) provide as follows:

> (2) If the IBAC intends to include in a report under this section adverse findings about a public body, the IBAC must give the relevant principal officer of that public

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[16] *Kioa v West* (1985) 159 CLR 550 at 614 (Brennan J); *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 326 (Brennan J).

[17] *Annetts v McCann* (1990) 170 CLR 596 at 608 (Brennan J) (emphasis added). See also at 600-601 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 571, 579, 581 (Mason CJ, Dawson, Toohey and Gaudron JJ), 592-593 (Brennan J); *Mahon v Air New Zealand Ltd* [1984] AC 808 at 820-821, 828-829 (Lord Diplock).

> body an opportunity to respond to the adverse material and fairly set out each element of the response in its report.
>
> …
>
> (4) If the IBAC intends to include in a report under this section a comment or an opinion about any person which is not adverse to the person, the IBAC must first provide that person with the relevant material in relation to which the IBAC intends to name that person.

48 Sections 162(2) and (4) follow the same structure as s 162(3). The most plausible reading of the provisions is that the drafter used "material" in each subsection "as a convenient label to refer back to the subject matter which enlivens IBAC's obligations in each subsection": **CA [132] (CAB 115)**.

49 The Appellants make two criticisms of that reasoning.

50 ***First***, the Appellants submit that the use of different language – for example, "adverse material" rather than simply "that comment or opinion" – suggests that Parliament intended a different meaning: **AS [27]**. But the presumption that different words used within an Act have different meanings is of limited force and must yield to the context.[18] That is particularly so if there is some doubt as to the care exercised by the drafter in the choice of words,[19] as is the case here:

50.1 There are inexplicable differences in the language of s 162(2) and (3): "adverse findings" instead of "a comment or an opinion which is adverse"; "must give" instead of "must first provide"; and "an opportunity" instead of "a reasonable opportunity".

50.2 The extrinsic materials further suggest a lack of care in the choice of words in s 162. The relevant explanatory memorandum states that s 162(3) allows for an opportunity to respond to "adverse findings", while s 162(2) allows for an opportunity to respond to "adverse material": **see CA [139] (CAB 116)**.[20]

51 ***Secondly***, the Appellants submit that s 162(4) supports their construction. It is said that "the relevant material in relation to which the IBAC intends to name that person" must be understood as a reference to the underlying evidence, on which the non-adverse comment or opinion is based: **AS [28]**.

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[18] *King v Jones* (1972) 128 CLR 221 at 266 (Gibbs CJ).

[19] *Murphy v Farmer* (1988) 165 CLR 19 at 27 (Deane, Dawson and Gaudron JJ); *Accident Towing & Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529 at 539-540 (McGarvie J).

[20] Explanatory Memorandum for the Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011 (Vic), p 30. See also Victoria, Legislative Assembly, *Debates*, 8 December 2011, p 6305 (Andrew McIntosh).

51.1 But that is an unnatural reading of the text: one does not make a comment about a person "in relation to" the material supporting that comment.

51.2 Moreover, the Appellants' construction makes no sense: why would s 162(4) require IBAC to disclose underlying evidence, when the relevant person has no right to respond to either that material or the non-adverse comment or opinion itself?

51.3 The purpose of the provision is simply to notify the person of the proposed inclusion of a comment or opinion. The Court of Appeal's construction is consistent with that purpose.[21]

52 Section 166(1) prohibits "a person who receives … a draft or part of a proposed report or information contained in a proposed report or draft or part of a proposed report, before the report is published by the IBAC in accordance with section 162 or 165", from disclosing "any information contained in the proposed report or draft or part of the proposed report", subject to specified exceptions.[22]

53 Section 166(1) strongly suggests that "adverse material" in s 162(3) is confined to the adverse comments or opinions in a draft report: **CA [135] (CAB 115)**.

53.1 Section 166(1) contemplates that what a person will receive under s 162(3) is a draft report or part thereof and automatically protects the confidentiality of such a draft. By contrast, s 166(1) makes no reference to any underlying evidence separate from a draft report. If s 162(3) were intended to require the disclosure of the underlying evidence itself, one would have expected s 166 to encompass that evidence: **CA [134] (CAB 115)**.

53.2 That is particularly so given that the IBAC Act otherwise adopts "a careful and detailed approach" to the protection of confidential information: **CA [135] (CAB 115)**.[23] Given the lengths to which the IBAC Act goes to protect the confidentiality of particular categories of information, it would be anomalous and highly improbable for Parliament to have intended s 162(3) to require IBAC to disclose a category of information or documents beyond the information proposed to be included in the report without expressly protecting the confidentiality of that information or those documents.

54 Section 166(1) thus weighs strongly against the proposition that s 162(3) requires IBAC to disclose the underlying evidence.

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[21] *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 (Dixon CJ).

[22] Section 165 concerns IBAC's annual reports. Sections 165(2)-(4) are substantively identical to s 162(2)-(4).

[23] IBAC Act, ss 40, 42(1), 45-50, 59(4), 117-118, 162(5)-(8), 163(4)-(5), 184, 194.

55 The Appellants attempt to explain s 166(1) as follows:

55.1 Section 166(1) automatically protects draft reports because "every draft report will reflect IBAC's preliminary work product, which is inherently unsuitable for wider dissemination": **AS [33]**.

55.2 Section 166(1) does not automatically protect the underlying evidence, for two reasons. First, such material is not necessarily confidential (for example, the material may be in the public domain): **AS [34]**. Secondly, the confidentiality of that material can be protected in other ways, such as by "gisting" or by the use of confidentiality notices: **AS [32], [36]**.

56 Those explanations should be rejected:

56.1 The contents of a draft report are not inherently more confidential than underlying evidence. A draft report may contain substantial information that is in the public domain (for example, where IBAC has conducted public examinations).[24] Indeed, underlying evidence, produced in the context of a scheme that privileges privacy, will ordinarily raise more significant confidentiality issues than a draft report, because the draft report will be confined to what IBAC considers appropriate to put into the public domain, subject to discharging the duty in s 162(3).

56.2 It would be equally possible for the alternatives identified by the Appellants to be used to protect the confidentiality of draft reports, assuming that those alternatives are available at the end of an investigation. The Appellants cannot explain why, on their construction, Parliament automatically protected the contents of draft reports while leaving it to IBAC to protect underlying documents on a case-by-case basis.

57 More generally, the Appellants' submissions on s 166(1) betray a misunderstanding of the overall obligation imposed by s 162(3) on the Court of Appeal's construction. At **AS [34] and [37]**, the Appellants complain about the "unattractive bluntness" of the Court of Appeal's construction of "adverse material" and say that:

> … there is no basis for supposing that Parliament would wish that information on which provisional adverse comments etc. in a draft report [are based] must not be disclosed to such persons about whom those adverse comments are proposed to be made.

58 But that submission is misconceived. On the Court of Appeal's construction, IBAC must provide a person with both the proposed adverse comments and opinions and the substance of the information that IBAC considered in formulating those comments or opinions: **CA [167] (CAB 123)**.

59 Finally, the Appellants suggest that confidentiality cannot affect the content of procedural fairness in the present context, because IBAC has a discretion as to whether to transmit a

[24] IBAC Act, s 117.

special report under s 162(1) and "[t]he duty [to afford procedural fairness] prevails over the discretionary power": **AS [38]**. That argument is contrary to authority. If a decision-maker considers confidential information in the due exercise of a discretionary power, the content of procedural fairness must be moulded to accommodate the public interest in maintaining the confidentiality of that information.[25]

B.3 Purpose

60 The principal purpose of s 162(3) is "to protect a person's reputation from the publication in a special report of comments or opinions which are adverse to that person": **CA [137] (CAB 115-116)**. A further purpose of s 162(3) is to enhance the accuracy and quality of special reports.[26] The Court of Appeal's construction of "adverse material" promotes those purposes by requiring that the relevant person be given a reasonable opportunity to respond to proposed adverse comments and opinions before their publication. The Court of Appeal's construction of "reasonable opportunity to respond" promotes those purposes by ensuring that the relevant person is given the substance or gravamen of the underlying information or evidence.

61 Moreover, the Court of Appeal's construction promotes the purpose of s 162(3) consistently with other interests protected by the Act, including confidentiality and the workability of investigations and their outcomes.

62 The Appellants make various submissions about why the Court of Appeal's construction is at odds with the purposes of s 162(3): **AS [43]-[49]**. Those submissions are difficult to follow. Nothing put by the Appellants undermines what is said at paragraph 60 above or explains why the Appellants' construction better promotes the purposes of s 162(3).

B.4 Case law

63 None of the authorities in analogous investigative contexts suggests that fairness requires that a person whose reputation may be damaged by published comments of an investigative body be given the underlying evidence itself: **cf AS [50]**. It is generally sufficient if the investigative body gives the person the substance of that evidence.[27] The authorities recognise provision of a draft report or similar document as a means of

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[25] See, for example, *Chief Commissioner of Police v Nikolic* (2016) 338 ALR 683 (Chief Commissioner of Police's power under s 33(1) of the *Racing Act 1958* (Vic) to exclude a person from a racecourse).

[26] *Woodman v Independent Broad-based Anti-corruption Commission* [2022] VSC 684 at [68] (Ginnane J).

[27] The Appellants cite *In re Pergamon Press Ltd* [1971] 1 Ch 388 at 400 (Lord Denning) and 407 (Buckley LJ) and *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 315 (Gibbs CJ) and 324 (Mason, Deane and Dawson JJ). To those authorities may be added: *Mahon v Air New Zealand Ltd* [1984] AC 808 at 820-821, 828-829 (Lord Diplock); *Clements v Bower* (1990) 2 ACSR 573 at 584 (Neasey J; Cox J agreeing).

discharging that obligation.[28] The authorities thus favour the Court of Appeal's construction over the Appellants' construction.

C RELIEF

64 The specific relief sought by the Appellants is in the following terms:

> A declaration be made that the respondent has failed to provide the appellants with a reasonable opportunity to respond to the adverse material in accordance with s 162(3) of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).
>
> An order in the nature of prohibition be made restraining the respondent from transmitting a special report substantially in the form of the draft report provided by the respondent to the appellants to either House of Parliament and from publishing it by any other means, including on its website, until such time as the [respondent] has complied with s 162(3) of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

65 That relief could only follow automatically from the determination of the ground of appeal in the Appellants' favour if the Appellants continue to embrace the corollary described in paragraph 6.2 above: that is, if the Appellants submit that the provision of the Draft Report was necessarily – and regardless of its contents – incapable of satisfying the obligation in s 162(3) because of the meaning of "adverse material" in s 162(3).

66 Otherwise, the relief would only be justified if the Court determined that the content of the Draft Report was insufficient: that is, that the Draft Report did not contain the adverse comments and opinions and the substance or gravamen of the information that IBAC considered in formulating those comments and opinions. So much appears to be acknowledged in **AS [51]-[60]**.

66.1 But the Appellants were refused special leave to agitate precisely that point, and should not be permitted to agitate it under the guise of its asserted relevance to the question of the availability of relief assuming success on the single ground of appeal.[29]

66.2 Put another way, **AS [51]-[60]** address the substance of Proposed Ground 2 in the special leave application.

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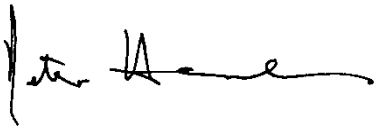
[28] See, for example, *Brooks v Easther* [2017] TASFC 12 at [21]-[27], [38] (the Court); *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations* (2011) 195 FCR 318 at 365 [77] (the Court); *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 63 FCR 163 at 183-190 (Einfeld J).

[29] A further reason why the ground should not be agitated in this Court is that there is an inadequate evidentiary foundation for its consideration. At no stage until the oral argument in the Court of Appeal was there any articulation of the precise way in which it was said that the content of the Draft Report was deficient, and therefore no opportunity for IBAC to put on evidence as to what further information IBAC has and whether disclosure of further information would raise particular confidentiality concerns. See Respondent's Response to the Application for Special Leave dated 7 February 2023, paragraphs 7-8, 36.1 (**RBFM 17, 24**); *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2023] HCATrans 103, lines 423-466 (**RBFM 79-80**).

PART VI — TIME ESTIMATE

67 IBAC estimates that up to 1.5 hours will be required for its oral argument.

Dated: 27 October 2023



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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

AB (A PSEUDONYM)
First Appellant

CD (A PSEUDONYM)
Second Appellant

and

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION
Respondent

ANNEXURE TO THE AMENDED SUBMISSIONS OF THE RESPONDENT

Pursuant to Practice Direction No 1 of 2019, the Respondent sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Independent Broad-based Anti-corruption Commission Act 2011* (Vic)	Compilation 41 – 1 September 2023 (current)	ss 40, 42, 45-50, 59, 117-118, 162-163, 165, 184, 194
2.	*Racing Act 1958* (Vic)	Compilation 160 – 21 October 2015	s 33(1)