



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

AB (A PSEUDONYM) & ANOR
Appellants

and

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION
Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Internet Publication

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

Part II: Propositions to be advanced in oral argument

The CoA's construction

1. The CoA construed "adverse material" in s 162 of the IBAC Act, informed by its view of the contextual significance of s 166, such that it does not extend beyond material in the draft report: **J [135]; [164]**.
2. The CoA's construction is unattractive. It entails that the measure of fairness that a person gets depends on what IBAC chooses, in its discretion, to include in a public-facing report. It also incorrectly assumes that IBAC will or must discharge its duty in s 162(3) by providing a draft report or extract thereof. The implication of the CoA's construction, despite what it says at **J [164]**, is that IBAC could discharge its duty under s 162(3) only by giving an opportunity to respond to a "bare" comment.
3. There is a real, and not academic, dispute as to the correctness of the CoA's construction. Cf. **Reply [9], [30]-[31]**.

The proper construction of "adverse material"

4. The appellants' construction of "adverse material" avoids the problems with the CoA's construction, and coheres to what the common law would imply but for any statutory modification: *NCSC* (1984) 156 CLR 296 (JBA #10) at 315-316, 324; *Pergamon Press* [1971] 1 Ch 388 (JBA #22) at 399-400, 407.
5. The appellants' construction fits the text, in particular: (a) the ordinary meaning of "material"; (b) the use of different language within each of s 162(2)-(4) to describe the trigger for the duty (in (3), intention to include "*comment or opinion*" that is adverse) and the duty (in (3), to provide opportunity to respond to adverse "*material*"); and (c)

implications from the text and structure of s 162(2)-(4). The use of the definite article “the” is equivocal: cf. AS [23]-[25]; RS [38]-[39]; Reply [6]

Confidentiality

6. The appellants’ construction does not produce any problem of confidentiality. The potential interest of a witness (and of IBAC) in the confidentiality of evidence can be dealt with in various ways under the IBAC Act.

Purpose

7. The appellants’ construction of “adverse material” not only promotes fairness, but it assists to ensure that any adverse comment that IBAC includes in a special report published to Parliament will be reliable: *Woodman* [2022] VSC 684 (JBA #29) at [68].
8. Given that: (a) IBAC is not required to publish a report to Parliament under s 162, let alone one with any particular content; and (b) IBAC has other powers available that may be exercised as appropriate including referral to law enforcement etc. (ss 41, 164), it is not jarring to conclude that if IBAC cannot or is not prepared to accord what is standard incident of fairness to a person in the appellants’ position, then IBAC cannot include the adverse comment in a special report to be published under s 162(1).

Relief

9. If the appellants’ construction of “adverse material” is correct, it is obvious on the face of the draft report that s 162(3) has not been complied with. At AS [58]-[59], the appellants have set out examples, to which IBAC has provided no answer. The appellants do not exceed the grant of leave by explaining why, on their construction, in light of the evidence, the appeal (from orders) should succeed. The limited grant of leave precluded the appellants from appealing on an additional basis that, even if the CoA was right on “adverse material”, s 162 was not complied with.

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Nick Wood
Owen Dixon Chambers
T: (03) 9225 6392
E: nick.wood@vicbar.com.au



Christopher Tran
Banco Chambers
T: (02) 9365 0686
E: christopher.tran@banco.net.au



Ben Bromberg
Castan Chambers
T: (03) 9225 8444
E: ben.bromberg@vicbar.com.au