HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 10 Nov 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M63/2023
File Title:	AB (a pseudonym) & Anor v. Independent Broad-based Anti-c
Registry:	Melbourne
Document filed:	Form 27E - Reply
Filing party:	Appellants
Date filed:	10 Nov 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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

REPLY

PART I FORM OF SUBMISSIONS

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

PART II REPLY

The appellants' position, and the issues in dispute

2. IBAC seeks to manufacture uncertainty in the appellants' position, where no such uncertainty exists. The appellants' position in their special leave application, and on this appeal, has been clear. And reflects an aspect of their case that was advanced below (acknowledging that their case has narrowed over the course of the proceedings).

2.1. **Special leave application**: The applicants identified question 1 as being whether "adverse material" in s 162(3) of the Act "only refer[s] to the comment or opinion (as the VSCA) held, or does it include the material on which the comment or opinion was based (as the primary judge held)".[1] The primary judge held that it is sufficient for IBAC to provide "the substance or the gravamen" of the adverse material (i.e., the requirement is to give the substance of the adverse information or evidence, rather than the particular document in which it may be embodied).[2] The applicants accepted this, albeit noting that the information or evidence "cannot in all cases be clinically divorced from the context in which it appears".[3] Indeed, the applicants expressly argued that their construction of "adverse material" reflected or was expressive of what would impliedly be required by application of common principles of construction, and cited Australian and English case law requiring the

1 ASBFM 4 [4]. See also 5 [9].
2 CAB 58 [151].
3 ASBFM 7 [17].

provision of the substance of the adverse information or evidence.[4] The applicants maintained that position, consistently, at the oral hearing of the application.[5]

2.2. **Court of Appeal**: Consistently, in the proceedings below, the applicants sought leave to advance a ground of appeal (ground 12), which embraced the primary judge's construction of "adverse material" but contended that the primary judge erred in finding that the draft special report did disclose the substance of the adverse information or evidence.[6] In oral submissions before the Court of Appeal, counsel for the appellants provided examples of the inadequacies.[7]

3. The appeal is not confined to an abstract question of the proper construction of "adverse material": cf. **RS [9], [23**]. The ground that the appellants were granted special leave to advance on appeal must be read together with their claim for relief.[8] The appellants have always contended that, if their construction of "adverse material" was vindicated, then the Court of Appeal (as well as the primary judge) ought to have held that the respondent has not disclosed such "adverse material" to them for comment as required by s 162(3), and that the relief sought ought therefore to be granted.[9]

4. An appeal to this Court is from orders, not reasons,[10] and its jurisdiction is to make such order as the court below – here the Court of Appeal – should have made. It would make no sense to construe the limited grant of special leave so as only to permit "academic" debate as to the construction of "adverse material." The appellants' case, consistently with its approach below, is to seek to persuade the Court that: (1) the primary judge's, rather than the Court of Appeal's, construction of "adverse material" is correct; (2) if and only if that premise is accepted, the Court of Appeal ought to have granted the appellants the relief that they sought in light of the failure of the respondent to disclose such material.

5. IBAC's suggestion, buried in a footnote, that there is an "inadequate evidentiary foundation" for this Court to conclude that it failed to disclose the "adverse material" (as construed by the appellants) to the appellants, should be rejected.

---

4 ASBFM 9-10 [25]-[26].
5 See, for example, RBFM 70.18-22; 72.113-119.; 74.184-190.
6 RBFM 73, ground 2. See also RBFM 13, [42]-[44].
7 CAB 100 [85]-[87], 118 [148]-. See also CAB 116 [141], 117 [143].
8 See also RBFM 80.479-521, 82.572-577.
9 See, in particular, ASBFM 10 [27].
10 See *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural* Affairs (2023) 97 ALJR 674, [34]. See also, e.g., *Perara-Cathcart v The Queen* (2017) 260 CLR 595, [142].

5.1. *First*, as the appellants have already explained, the failure of IBAC to disclose to the appellants the substance of the information or evidence on which it has relied in support of adverse comments or opinions about them in the draft report is apparent from a cursory review of various paragraphs of the draft report. Conspicuously, IBAC has failed to answer those submissions directly. If any answer could be given, the respondents could give it in a book of further materials.

5.2. *Secondly*, if however IBAC is implying that it was somehow unfair for the appellants to advance ground 12 in the Court of Appeal – which suggestion would have been resisted – then it ought to have made that complaint below. It did not.

5.3. *Thirdly*, if IBAC wished to contend in this proceeding that the Court of Appeal was right to refuse leave to appeal (including on ground 12) but should have done so for a different or additional reason to that which it in fact gave (i.e. some asserted unfairness), then it needed to file a notice of contention.[11] It has not done so.

The meaning of "adverse material"

IBAC's atextualism

6. The significance of the definite article "the" in IBAC's construction, and its response to the appellants' explanation of it, are both overstated: see **RS [38], [39.2]**. The problem for IBAC is that its argument focuses on one word ("the") abstracted from the rest of the statutory text. It puts to one side the ordinary and contextually-recognised meaning of the word "material": **RS [38]**. It also puts to one side the fact that the Parliament has used the words "adverse material" instead of referring explicitly to a reasonable opportunity to respond to a "finding," "comment" or "opinion": **RS [50]**.

7. IBAC is forced to invite the Court to proceed on the basis that the Parliament was not careful in the text which it enacted: **RS [50], [50.1], [50.2]**. The differences in language that IBAC points to in **RS [50.1]** are, however, either peripheral (the difference between give and provide), insubstantial (opportunity and reasonable opportunity) or readily understood as deliberate (findings as opposed to mere comments or opinions). The array of supposed differences cannot readily explain the much more substantive difference between referring to a "comment", "finding" or "opinion" on the one hand, and "material" on the other. Meanwhile, pointing to any infelicity in the explanatory memorandum, as

[11] *High Court Rules 2004* (Cth), r 42.08.5.

pointed to in **RS [50.2]**, is unimportant: a discrepancy between the explanatory memorandum and the text is no reason to undermine the relevance of the text.

8. As for **RS [39.1]**, obviously enough, IBAC's construction could have been more clearly conveyed too. That different drafting would have been preferable is always the case where there is a legitimate constructional issue in the courts. The appellants' construction far better fits the text that was enacted, and the apparent purpose of the provision.

Adverse material and procedural fairness

9. When information adverse to a person may be part of the reason for making a decision against their interests, they are to be provided an opportunity to respond — to what? Does
10 it include the information or evidence in support of the finding, or only the relevant adverse finding and any context that IBAC thinks fit to include in a public-facing report? The answer is clearly the former.

10. Ordinarily, a person is entitled to deal with "adverse information that is credible, relevant and significant to the decision to be made".[12] That means they must be "informed of the nature and content of adverse material".[13] Section 162(3) avoids doubt that relevant persons must be afforded an opportunity to comment on such material, before an adverse comment or opinion based on such material is expressed to Parliament.

11. **RS [43]-[44]** is an incomplete statement of what procedural fairness would require here, as IBAC relies upon a case about a statutory power to make findings (*Annetts v McCann*[14])
20 whereas the power here is not specifically to make findings but simply to prepare and transmit a report relating to the performance of its duties and functions.

Purpose

12. There is no real disagreement between the parties about the purposes of s 162: see **RS [60]**. It is obvious that the appellants' construction better achieves those purposes: cf **RS [62]**. If a person is entitled to respond to underlying evidence, they will be better equipped to persuade IBAC not to include the comment or opinion that is adverse to them. IBAC's construction would confine the notice given to an individual affected by a comment or opinion to what it is appropriate to tell not the individual but the public: see **RS [56.1]**. What is appropriate to go to the public is not the right countervailing consideration or lens

---

12 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [15].
13 *Commissioner for Australian Capital Territory v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591.
14 (1990) 170 CLR 596 at 607-610.

of analysis to weigh against the individual's interests in meeting the tentative views against them. That is why the appellants' position better promotes the purposes of the provision, over and above the Court of Appeal's position: cf **RS [58]**.

13. As to s 162(4). **RS [51.2]** proceeds on a false basis that a relevant person can do nothing with the material given to them. And the limited purpose in **RS [51.3]** is plucked from thin air. The citation is to no extrinsic material, but to the case of *Commissioner for Railways (NSW) v Agalianos*.[15] It is a purpose which the respondent has constructed on the foundation of the incorrect submission in **RS [51.2]**.

Confidentiality

14. It is pointless to ask, and impossible to answer, whether or not a draft report is "more" confidential than underlying evidence (cf **RS [56.1]**), divorced from the detail of the evidence. Parliament has understandably proceeded on the basis that a draft report is always confidential: it reflects IBAC's preliminary (not final) thinking (cf **RS [56.2]**).[16] However, as the appellants have explained, the same does not apply to evidence. There can be no universal answer as to the confidentiality of information or evidence or the need to protect it. And there are other means to protect the confidentiality of particular information or evidence (and the person who gave it), as the appellants have explained.

15. **RS [59]** misses the point. IBAC is under no duty to prepare and transmit a report. It has a discretionary choice whether or not to do so. This sets it apart from many other statutory contexts where a repository of power is under a duty to exercise that power.

Dated: 10 November 2023

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

Christopher Tran
Castan Chambers
T: (03) 9225 7458
E: christopher.tran@vicbar.com.au

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

Counsel for the appellants

15 (1955) 92 CLR 390, 397 (Dixon CJ).

16 Even information that is "constructed solely from materials in the public domain" will still have the necessary quality of confidence in equity if it is information to which "the skill and ingenuity of the human brain" has been applied. See *Del Casale v Artedomis (Aust) Pty Ltd* (2007) 165 IR 148 at [103].