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)
First Appellant

CD (A PSEUDONYM)
Second Appellant

and

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION
Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT

PART I — FORM OF SUBMISSIONS

1 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 procedural history

2 The relevant failure to comply with s 162(3), alleged in the Appellants' Amended Originating Motion of 8 February 2022, was that IBAC had not provided the Appellants with transcripts of other witness examinations and other documents cited and relied on in IBAC's draft report: **CA [53]-[54] … CAB 91-92**.

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

3.1 "adverse material" in s 162(3) means the proposed adverse comments and opinions and the underlying evidence;

3.2 therefore, IBAC can only meet the s 162(3) obligation by giving an affected person the underlying evidence (the **Appellants' corollary**); and

3.3 IBAC breached s 162(3) by failing to give the Appellants the underlying evidence: **PJ [133], [136] … CAB 52-54**; **CA [168] … CAB 123**.

4 The primary judge accepted the Appellants' construction of "adverse material", but dismissed their case (because the Draft Report contained the proposed adverse comments and opinions and the substance of the underlying evidence): **PJ [147], [151], [154], [168]-[171] … CAB 58-60, 64-66**.

5 Before the ***Court of Appeal***, the Appellants advanced the same case as at first instance and a new, alternative argument, not reliant on the corollary: namely, that the Draft Report – or, more precisely, five passages in the Draft Report identified in argument – did not disclose the substance of the underlying evidence on which those passages were based.

6 The Court of Appeal:

6.1 rejected the Appellants' construction of "adverse material" and its corollary (holding that IBAC need only give an affected person a draft report containing the proposed adverse comments and opinions and "the substance or gravamen of the matters that IBAC took into account in formulating those comments and opinions"): **CA [122]-[139], [167] … CAB 113-116, 123**; and

6.2 rejected the Appellants' alternative argument (holding that, with one exception, the Draft Report contained the substance of the matters considered by IBAC in formulating its adverse comments and opinions and finding, in relation to the sole exception, that it was premature to conclude that there had been a breach of s 162(3)): **CA [167]-[185] … CAB 123-127**.

7 The Appellants sought ***special leave to appeal*** on two grounds. Proposed Ground 1 concerned the construction of "adverse material". Proposed Ground 2 concerned the

Court of Appeal's conclusion that the Draft Report sufficiently disclosed the substance of the evidence on which IBAC based the proposed adverse comments and opinions: **ASBFM 5**. The grant of special leave was limited to Ground 1: **RBFM 83**; **CAB 136**.

The meaning of "adverse material" is academic

8 The Appellants appear to have abandoned the corollary and accepted the conclusion reached by the Court of Appeal, and advanced by IBAC on this appeal, as to the nature of the overall obligation in s 162(3): **RS [25]-[32]**.

8.1 The Court of Appeal held that it was sufficient for IBAC to give an affected person a draft report containing the proposed adverse comments and opinions and the substance of the underlying evidence: see paragraph 5.2 above.

8.2 The Appellants appear to accept that it is sufficient for IBAC to give the affected person the proposed adverse comments and opinions and the substance of the underlying evidence: **AS [2], [36], [41], [47]**; **Reply [2.1]**. A draft report is capable of discharging that obligation: cf **AS [44]-[47]**; **Reply [9], [12]**. The Appellants accepted as much below: **CA [81], [85], [87], [168] … CAB 99-103, 123**; and their submissions in this Court appear to proceed on the same basis: **AS [57]-[60]**.

9 Accordingly, the meaning of "adverse material" is academic. This Court's decision on that issue could not have any consequences for the parties.

If the meaning of "adverse material" is not academic, the Court of Appeal's construction should be preferred

10 The natural and ordinary reading of s 162(3) is that "adverse material" picks up, and is a shorthand for, the earlier reference in the subsection to "a comment or an opinion which is adverse to any person". That is supported by:

10.1 the text of the provision, including its use of the definite article: **RS [37]-[39]**; *Central Queensland Services* (2017) 249 FCR 154 at 161-162 [31]-[32] (Tracey and Reeves JJ): **JBA v 4 Tab 17**;

10.2 the evident purpose of s 162(3): **RS [60]-[62]**; cf **AS [44]-[47]**; **Reply [9], [12]**; see also the Statement of Compatibility at p 6305: **JBA v 5 Tab 31**;

10.3 s 166 and, more generally, the careful scheme for protecting the identity of witnesses and the confidentiality of witness examinations and other underlying evidence: **RS [52]-[54], [60]-[61]**; **CA [14]-[31] … CAB 80-87**; see, eg, ss 115, 117-118, 119A-120, 127, 132A, 133(4)-(5): **JBA v 1, Tab 3**; and

10.4 authorities on procedural fairness in contexts involving possible reputational damage by publication of a report of an investigation or inquiry: *Pergamon Press* [1971] 1 Ch 388 at 400 (Lord Denning), 405 (Sachs LJ), 407 (Buckley LJ): **JBA v 4 Tab 22**; *Annetts* (1990) 170 CLR 596 at 608 (Brennan J): **JBA v 3 Tab 6**;

Ainsworth (1992) 175 CLR 564 at 571, 579, 581 (Mason CJ, Dawson, Toohey and Gaudron JJ), 592-593 (Brennan J): **JBA v 3 Tab 5**.

11 There is no room in this context for any presumption that, because the Act did not repeat the phrase "a comment or opinion which is adverse to a person", the Act necessarily meant something distinct when it used the phrase "the adverse material": **RS [45]-[51]**; *Murphy* (1988) 165 CLR 19 at 27 (Deane, Dawson and Gaudron JJ): **JBA v 3 Tab 9**; Explanatory Memorandum at p 30: **JBA v 5 Tab 30**; Statement of Compatibility at p 6305: **JBA v 5 Tab 31**; Second Reading Speech at p 6308: **JBA v 5 Tab 31**.

12 The Appellants' submission that s 162(3) picks up (inter alia) the concept of "adverse material" in administrative law should be rejected: **RS [40]-[44]**; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [14], [17] (the Court): **JBA v 3 Tab** 7.

10 **The disposition of the appeal**

13 Depending on how this Court resolves the issues identified above, the appeal should be disposed of as follows.

14 If the appeal is academic, special leave should be revoked or the appeal dismissed.

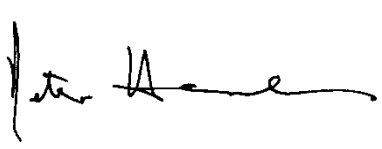
15 If the appeal is not academic, and the Court of Appeal's construction is correct, the appeal should be dismissed.

16 If the appeal is not academic, and the Appellants' construction is correct, then the relief sought by the Appellants is inappropriate and it should also be refused.

16.1 The Appellants should not be permitted to re-agitate before this Court the factual question on which they were refused special leave – namely, whether the Draft Report sufficiently disclosed the substance of the evidence on which the proposed
20 adverse comments and opinions were based: **RS [64]-[66]**.

16.2 Nor should the Appellants be given the relief foreshadowed in the special leave application, which was premised on two grounds of appeal – one of which has been excluded from the current appeal.

Dated: 7 December 2023



Peter Hanks **Frances Gordon** **Jack Maxwell**

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