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

PETER DAMIEN CARNE

Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH SEEKING LEAVE TO INTERVENE

Filed on behalf of the Attorney-General of the Commonwealth (seeking leave to intervene) by:

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) applies for leave to intervene in this proceeding to make submissions in support of the Appellant in relation to the first ground of appeal. These submissions constitute that application (rule 42.08A).

PART III WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. The Court should grant leave to intervene because the Commonwealth's interests will be "affected substantially by the outcome of the proceeding in this Court".[1] The first ground of appeal concerns the interpretation and application of ss 8 and 9 of the *Parliament of Queensland Act 2001* (Qld) (**the Parliament Act**), which define the privileges of the Legislative Assembly of Queensland (**the Assembly**).[2] This Court's determination of the issues raised by that ground will have direct implications for s 16 of the *Parliamentary Privileges Act 1987* (Cth) (**the Privileges Act**), which is "materially indistinguishable"[3] from ss 8 and 9 of the Parliament Act. In particular:

   3.1. Both regimes contain a statutory re-statement of Art 9 of the *Bill of Rights 1688* (UK), and provide that parliamentary privilege attaches to "proceedings" in the Assembly/ Parliament.[4]

   3.2. Both regimes define such "proceedings" in almost identical terms – namely, all words spoken and acts done in the course of, or for purposes of or incidental to, transacting the business of the Assembly/Parliament or a committee.[5]

   3.3. Both regimes then provide, in similar terms, a non-exhaustive list of acts that form part of the proceedings in the Assembly/Parliament, including presenting or submitting a document to a committee,[6] and preparing a document for the purposes of, or incidental to, presenting or submitting a document to a committee.[7]

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1 *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37 at [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), endorsing *Levy v Victoria* (1997) 189 CLR 579 at 600-605 (Brennan CJ).
2 See *Constitution of Queensland 2001* (Qld) s 9.
3 See *Erglis v Buckley (No 2)* [2006] 2 Qd R 407 at [30] (McPherson JA).
4 Parliament Act s 8(1)-(2); Privileges Act s 16(1)-(2).
5 Parliament Act s 9(1); Privileges Act s 16(2).
6 Parliament Act s 9(2)(c); Privileges Act s 16(2)(b).
7 Parliament Act s 9(2)(e); Privileges Act s 16(2)(c).

4. Cases dealing with parliamentary privilege frequently draw on case law from other jurisdictions.[8] In those circumstances, there is no doubt that a judgment of this Court concerning the interpretation and operation of ss 8 and 9 of the Parliament Act will influence (and probably govern) the interpretation and operation of s 16(1) and (2) of the Privileges Act. That will affect the Commonwealth's interests, for it is quite commonly a party to proceedings in which the application of parliamentary privilege is in issue,[9] and parliamentary privilege issues also arise in non-litigious contexts. That interest extends to the specific question raised by this case concerning whether judicial review of reports prepared by statutory bodies for their supervising parliamentary committees is consistent with parliamentary privilege, because a number of Commonwealth statutes require or authorise the preparation and provision of reports of a similar kind.[10]

5. If granted leave to intervene, the Commonwealth makes the submissions below in order to assist the Court in the determination of the first ground of appeal. The Commonwealth makes no submissions on the power of the Commission to make reports, and no submissions concerning the scope of s 64 of the *Crime and Corruption Act 2001* (Qld) (**the CC Act**). If permitted to supplement these submissions with oral argument, the Commonwealth will do so as succinctly as possible and will avoid repetition.

PART IV ISSUES PRESENTED BY THE APPEAL

Introduction and summary

6. The central question raised by this appeal is whether parliamentary privilege is capable of attaching to a report prepared for a committee of the Assembly in the course of a purported, but invalid,[11] performance of a statutory function.

7. The Court of Appeal held, by majority, that parliamentary privilege could not attach in those circumstances. In doing so, the majority proceeded on the unexplained assumption that the

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8 For example, in *Rowley v O'Chee* [2000] 1 Qd R 207 at 218-222, McPherson JA cited numerous English cases concerning Art 9 of the *Bill of Rights 1688* and authority regarding the privileges of the New South Wales Parliament in the course of interpreting the Privileges Act. The Court of Appeal's decision below is another example where *Rowley v O'Chee* [2000] 1 Qd R 207 was applied in interpreting the Parliament Act: see [154] (CAB 103). See also *Erglis v Buckley (No 2)* [2006] 2 Qd R 407 at [30] (McPherson JA), [98] (Jerrard JA).

9 See, eg, *In the Matter of OPEL Networks Pty Ltd (In Liq)* (2010) 77 NSWLR 128; *Re Commonwealth (Department of Immigration and Border Protection)* (2017) 271 IR 43; *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223; *Carrigan v Cash* [2017] FCAFC 86; *Habib v Commonwealth* [2008] FCA 1494; *Burt v Commonwealth* [2023] FCA 55.

10 See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 204; *Auditor-General Act 1997* (Cth) ss 17-18A; *Public Governance, Performance and Accountability Act 2013* (Cth) s 46.

11 While ground 2 challenges the Court of Appeal's holding that the report was invalid, the Commonwealth does

report could only attract privilege if its preparation and provision to the Parliamentary Crime and Corruption Committee (**PCCC**) were authorised by the CC Act.[12] That assumption was wrong. The majority should have held that parliamentary privilege applied to the report as a result of an orthodox application of ss 8 and 9 of the Parliament Act. There is no basis for reading those provisions down such that privilege does not attach to a report because its preparation was in some respect *ultra vires* a statutory power. Indeed, to interpret ss 8 and 9 of the Parliament Act in that way would seriously undermine parliamentary privilege.

8. The Court of Appeal majority should have approached the issue by first determining whether the report formed part of "proceedings in the Assembly", having regard to the definitions in s 9 of the Parliament Act. In light of the trial judge's undisturbed findings that the report was "as a matter of fact"[13] prepared for the purpose of, or incidental to, transacting business of the PCCC (and was "in fact"[14] delivered to the PCCC), that question could only be answered in the affirmative.[15] It followed that neither the preparation of the report, nor its provision to the PCCC or tabling in the Assembly, could be impeached or questioned in a court.

9. Yet that is precisely what the Court of Appeal did when it inquired into the lawfulness of the preparation and delivery of the report and found them *ultra vires*. It then compounded that impeachment by declaring that the report was not a report for the purposes of s 69(1) of the CC Act, thereby intruding into a matter that was within the exclusive cognisance of the Assembly.

A. The Parliament Act, not the CC Act, governs the application of parliamentary privilege

10. Contrary to the Respondent's submission to the Court of Appeal,[16] it is ss 8 and 9 of the Parliament Act, and not the processes in s 69 of the CC Act (concerning the tabling of certain reports), that govern the application of parliamentary privilege.

11. Section 9(1)(a) of the *Constitution of Queensland 2001* (Qld) contemplates that the Assembly will "define" its own privileges. This is what the Assembly has done through the enactment of ss 8 and 9 of the Parliament Act.[17]

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not seek to be heard on that ground.

12 QCA [15], [81] (CAB 68, 85).

13 TJ [141] (CAB 50). See also TJ [120], [121], [130] (CAB 45-46, 48).

14 TJ [141] (CAB 50). See also TJ [122] (CAB 46).

15 Having regard to s 9(2)(e) (as to the preparation of the report) and 9(2)(c) and (d) (as to its presentation or submission to the PCCC and status thereafter).

16 This submission was explained and rejected by Freeburn J, in dissent: QCA [168]-[173] (CAB 106-107).

17 See, concerning an earlier statutory provision to the same effect, *Criminal Justice Commission v Parliamentary*

12. Section 8(1) of the Parliament Act relevantly provides that "proceedings in the Assembly can not be impeached or questioned in any court". This is, essentially, a restatement of Art 9 of the *Bill of Rights 1688*. Indeed, s 8(2) of the Parliament Act expressly declares that s 8(1) is intended to have the same effect as Art 9 had in relation to the Assembly immediately before the commencement of that subsection.

13. The meaning of "proceedings in the Assembly" is defined inclusively in s 9 of the Parliament Act. Section 9(1) provides that "Proceedings in the Assembly include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee." Without limiting s 9(1), s 9(2) then specifies certain matters that are included within the phrase "proceedings in the Assembly". These include: presenting or submitting a document to a committee (paragraph (c)); a document tabled in, or presented or submitted to a committee (paragraph (d));[18] and preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (c) (paragraph (e)).

14. The principle that legislation will not be interpreted to diminish the privileges of the Parliament unless that intention is manifested by "unmistakeable language"[19] applies to ss 8 and 9 of the Parliament Act. That principle, which is a manifestation of the principle of legality,[20] has long been recognised as applicable to parliamentary privilege.[21] It applies even where common law rights or privileges have been expressed in statutory form,[22] in which case the common law privilege informs the construction of the statutory expression of the right or privilege.[23]

15. Applying that principle, it is apparent that s 69 of the CC Act does not curtail the privileges of the Assembly that are recognised in ss 8 and 9 of the Parliament Act. Section 69 specifies processes for certain reports of the Commission to be tabled in the Assembly, depending on

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Criminal Justice Commissioner [2002] 2 Qd R 8 (***CJC v PCJC***) at [21] (McPherson JA).

18 Subject to the exception in s 9(3), which is not presently relevant.

19 Eg *Hammond v Commonwealth* (1982) 152 CLR 188 at 200 (Murphy J).

20 See, eg, *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Baker v Campbell* (1983) 153 CLR 52 at 123 (Dawson J).

21 *Duke of Newcastle v Morris* (1870) LR 4 HL 661 at 668, 671-672, 674, 677 and *Re Parliamentary Privilege Act 1770* [1958] AC 331 at 350, cited in *CJC v PCJC* [2002] 2 Qd R 8 at [26] (McPherson JA). See also *Hammond v Commonwealth* (1982) 152 CLR 188 at 200 (Murphy J); *Aboriginal Legal Service (WA) v Western Australia* (1993) 9 WAR 297 at 304 (Rowland J).

22 *Tassell v Hayes* (1987) 163 CLR 34 at 41 (Mason, Wilson and Dawson JJ) (right to trial by jury); *Meteyard v Love* (2005) 65 NSWLR 36 at [66]-[68] (Basten JA; Beazley and Santow JJA agreeing) (client legal privilege); *Gemmell v Le Roi Homestyle Cookies Pty Ltd (in liq)* (2014) 46 VR 583 at [43], [50] (Ashley JA; Neave JA and Almond AJA agreeing).

23 *Mallard v The Queen* (2005) 224 CLR 125 at [6] (Gummow, Hayne, Callinan and Heydon JJ) (prerogative of mercy).

whether the Assembly is sitting or not. There is nothing in the text or context of s 69, and certainly not unmistakeable language, to suggest that the ordinary operation of parliamentary privilege is confined in such a way that it can only apply to a document prepared by the Commission for the Assembly or its committee if it is a report prepared in accordance with s 69 or the provisions of the CC Act more broadly.[24] It is therefore ss 8 and 9 of the Parliament Act that determine whether the Commission's report was subject to parliamentary privilege.

B. The Court of Appeal failed to apply ss 8 and 9 of the Parliament Act

16. The majority in the Court of Appeal erred in interpreting ss 8 and 9 of the Parliament Act as if they are subject to the unexpressed proviso that parliamentary privilege does not extend to acts that are, or are alleged to be, beyond statutory power. Attempts to read unexpressed provisos into equivalent provisions in order to limit the scope and effect of parliamentary privilege have properly been rejected in the past.[25] They should likewise have been rejected here, the majority's unexplained assumption that parliamentary privilege could not apply to a report that is not authorised by the CC Act being inconsistent with the statutory text, context and purpose of ss 8 and 9 of the Parliament Act.

17. ***Statutory text:*** Section 9(1) expressly includes within the definition of "proceedings in the Assembly" "all words spoken and acts done" in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee. The word "all" speaks strongly against the proposition that an unidentified subset of words or acts do not form part of those proceedings even when they fall within s 9(2).

18. Specifically in the context of s 9(2)(e), which includes within the definition of "proceedings in the Assembly" "preparing a document for the purposes of", relevantly, "presenting or submitting a document to … a committee", the only qualification on the application of privilege is that the relevant words are spoken or the acts are done for the stated purpose. Whether particular words or acts were done for that purpose is a question of fact, which calls for an examination of the "subjectivity or intention" of the person who did the act.[26] The

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24 Justice Freeburn, in dissent, took the same view: QCA [167]-[173] (CAB 106-107).

25 *Rann v Olsen* (2000) 76 SASR 450 at [51]-[54], [94]-[101], [106]-[108], [113], [124]-[125] (Doyle CJ, with whom Mullighan J agreed), [236]-[245], [250]-[251] and [255]-[256] (Perry J), [393] (Lander J); *R v Theophanous* (2003) 141 A Crim R 216 at [65]-[69] (the Court).

26 *Rowley v O'Chee* [2000] 1 Qd R 207 at 220 (McPherson JA); *Carrigan v Cash* [2016] FCA 1466 at [44] (White J), affirmed by *Carrigan v Cash* [2017] FCAFC 86 (Dowsett, Besanko and Robertson JJ).

assessment of whether the requisite purpose exists does not invite any exclusion or limitation by reference simply to the legality of what was done.

19. ***Context and purpose:*** Sections 8 and 9 of the Parliament Act were enacted against the backdrop of centuries of case law concerning parliamentary privilege. It has long been recognised that parliamentary privilege may apply to an act that would otherwise have been unlawful (had it been permitted to be questioned or impeached in court proceedings).[27] To read ss 8 and 9 as if they are subject to an unexpressed proviso that only a lawful act is capable of attracting the privilege is inconsistent with that history, and is to diminish the privilege as it exists in respect of the Assembly by something other than "unmistakeable language".[28]

20. As has been noted, not only is s 8(1) of the Parliament Act expressed in terms nearly identical to Art 9 of the Bill of Rights 1688, but s 8(2) expressly declares it to have the same effect as Art 9. Article 9 has long been understood to protect and facilitate the performance of the constitutional role and functions of the legislature.[29] It is "one of the most important functions of a House in a legislature under the Westminster system" to:

> obtain information as to the state of affairs in their jurisdiction so that they can, where necessary, criticise the ways in which public affairs are being administered and public money is being spent …. [T]he obtaining of information concerning the administration of government is part of the business of [Parliament].[30]

21. Parliamentary privilege advances the performance of the above function by ensuring that a person who participates in parliamentary proceedings can do so knowing, at the time of that participation, that what they say cannot "later be held against them in the courts", thereby ensuring that such a person is not inhibited in providing information to the Parliament or in otherwise participating in parliamentary proceedings.[31] This is the "basic concept

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27 *Bradlaugh v Gossett* (1884) 12 QBD 271 at 278-280, 284 (Stephen J); *Pepper v Hart* [1993] AC 593 at 638G (Lord Browne-Wilkinson); *Re Thompson, Ex Parte Nulyarimma* (1998) 136 ACTR 9 at [85] (Crispin J). See also the discussion of the House of Lord's decision to reverse the judgment in *Eliot's Case* in Erskine May, *Parliamentary Practice* (25th ed, 2019) at [12.4]. Defamatory statements are unlawful as they involve an actionable tort, yet they are the archetypal area of operation of parliamentary privilege.

28 *Hammond v Commonwealth* (1982) 152 CLR 188 at 200 (Murphy J).

29 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 332D (Lord Browne-Wilkinson) (***Prebble***); *Rann v Olsen* (2000) 76 SASR 450 at [171]-[172] (Doyle CJ); *Carrigan v Cash* [2016] FCA 1466 at [12] (White J). QCA [142] (Freeburn J) (CAB 101); Enid Campbell, *Parliamentary Privilege* (2003) at 1.

30 *Egan v Willis* (1998) 195 CLR 424 at [102], [107] (McHugh J).

31 *Prebble* [1995] 1 AC 321 at 334A-C (Lord Browne-Wilkinson). While Lord Browne-Wilkinson expressed these principles by reference to things said by members of parliament and witnesses before committees, their application is not limited to that narrow context, and they have been applied in determining claims of parliamentary privilege in respect of documents created or retained for parliamentary purposes: *Rowley v O'Chee* [2000] 1 Qd R 207 at 224 (McPherson JA); *In the Matter of OPEL Networks Pty Ltd (In Liq)* (2010)

underlying article 9".[32] The "law has been long settled" that "the need to ensure that the legislature can exercise its power freely on behalf of its electors, with access to all relevant information" is the preeminent interest which the privilege secures.[33]

22. It would be contrary to that interest to read down ss 8 and 9 of the Parliament Act in such a way that parliamentary privilege attaches only to lawful or *intra vires* acts, because the effect would inevitably be to introduce uncertainty into the minds of parliamentarians, parliamentary witnesses and others preparing documents for submission to Parliament as to whether their activities might be impugned by courts if there were to be a later finding that their actions lacked lawful authority. The authorities caution against introducing such uncertainty, and exceptions to the operation of parliamentary privilege have been rejected for this very reason.[34]

23. The majority's approach would also introduce uncertainty of an additional kind, for it raises questions (not addressed in the judgment) as to what kinds of non-compliance with the CC Act will deny the operation of parliamentary privilege. Would that be limited to jurisdictional errors? And, if different errors have different consequences, by what process of construction is that result achieved? Such questions find no answer in the statutory text, nor in the common law concerning parliamentary privilege.

24. ***Relevance of the statutory regime***: To construe ss 8 and 9 of the Parliament Act in the manner described above is not to say that the applicable statutory regime (here the CC Act) is irrelevant to determining whether privilege attaches to the acts of a statutory body. To the contrary, where acts of a statutory body are in issue, the statute will often assist in ascertaining the purpose for which the body has acted (the ascertainment of that subjective purpose being "informed by an objective consideration of the circumstances",[35] of which the applicable statutory regime forms part). For example, where a statutory body's functions include reporting to its supervisory parliamentary committee, that will often assist in identifying the purpose for which a report was prepared in a particular case. That is not to assume that statutory bodies will always act regularly or lawfully. It is simply to

77 NSWLR 128 at [116]-[118] (Austin J); *Sportsbet Pty Ltd (ACN 088 326 612) v New South Wales (No 3)* [2009] FCA 1283 at [21](1) (Jagot J).

32 *Prebble* [1995] 1 AC 321 at 334A, 336H (Lord Browne-Wilkinson).

33 *Prebble* [1995] 1 AC 321 at 336H (Lord Browne-Wilkinson), cited in *Rowley v O'Chee* [2000] 1 Qd R 207 at 218-219 (McPherson JA).

34 See *Rann v Olsen* (2000) 76 SASR 450 at [124] (Doyle CJ); *Prebble* [1995] 1 AC 321 at 334B-C (Lord Browne-Wilkinson).

35 *Carrigan v Cash* [2016] FCA 1466 at [44] (White J), affirmed in *Carrigan v Cash* [2017] FCAFC 86 (Dowsett, Besanko and Robertson JJ), citing *Rowley v O'Chee* [2000] 1 Qd R 207 at 220 (McPherson JA).

acknowledge that the legal framework in which a statutory body functions will commonly – as a factual matter – illuminate the reason particular things were done.

C. The proper approach to determining whether something is privileged

25. In light of the above, the question whether an act forms part of "proceedings in the Assembly" must be the first inquiry. It is impermissible to commence by inquiring into whether the relevant act was lawful, because to do so risks the court doing the very thing that is prohibited by parliamentary privilege: namely, impeaching a matter that forms part of proceedings in the Assembly (with the impeaching occurring before the Court has considered whether it is examining proceedings in the Assembly).

26. That very point was explained by Chesterman J in *CJC v PCJC*.[36] That case concerned a report prepared by the Parliamentary Commissioner under the predecessor to the CC Act, which was challenged on the ground that the Commissioner had denied the Commission procedural fairness. Justice Chesterman expressly recognised that "inquiring into the lawfulness of the Commissioner's report in order to determine whether it and the process by which it was made are privileged" would "question a parliamentary proceeding which is forbidden by art 9." His Honour correctly recognised that: [37]

> [t]he starting point is not … to question whether the parliamentary proceeding is lawful to see whether it qualifies for privilege. Such an approach would have the consequence that parliamentary privilege could be abrogated by the mere assertion of unlawfulness attaching to some aspect of the parliamentary proceedings sought to be challenged.

27. The Full Federal Court took the same approach in *Carrigan v Cash*,[38] which concerned a challenge to the exercise of a non-statutory power. The Court found that once it was accepted that the subject matter of the proceeding was privileged, it was neither necessary nor appropriate to address the appellant's claim that the process involved a breach of her privacy. The Court explained that "[i]t is not permissible to start with a view as to what protection was due to the appellant and thereafter to consider the terms of s 16".[39]

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36 [2002] 2 Qd R 8.

37 *CJC v PCJC* [2002] 2 Qd R 8 at [47] (Chesterman J). Justice Williams approached the issue in the same way at [29]-[34]. In contrast, McPherson JA began with a detailed analysis of the alleged errors although, importantly, his Honour recognised (at [19]) that by doing so (and thereby addressing the lawfulness of the report and investigation first) he "may already have gone further than the law allows."

38 [2017] FCAFC 86.

39 [2017] FCAFC 86 at [33].

28. In this case, the Court of Appeal erred because it started its analysis by examining the lawfulness of the Commission's report and then, having found it to be unlawful, it simply assumed that parliamentary privilege could not attach to that report (apparently because it assumed that it was s 69 of the CC Act that provided the requisite nexus between the report and the Assembly).[40]

29. In fact, having regard to s 9(2)(e) of the Parliament Act, the Court's first task was to ascertain the purpose for which the report was prepared. As already explained, that is a question of fact. The trial judge's undisturbed factual finding that the report was prepared with the intention of being delivered to the PCCC, being a finding supported by the evidentiary certificate issued under s 55 of the Parliament Act,[41] should have resulted in the conclusion that the report (and the Commission's acts in preparing the report) were "proceedings in the Assembly", such that it could not be impeached or questioned in any court.[42] Nothing else was required. That the report had also been presented or submitted to the PCCC simply provided another indisputable basis upon which the report fell within the definition of "proceedings in the Assembly".[43]

D. No appropriative act was required

30. Contrary to the Respondent's submission in the Court of Appeal, no "appropriative act" by the Assembly was required for the report to attract privilege. The majority did not address that submission and Freeburn J (correctly) rejected it.[44] It is not clear whether the Respondent seeks to re-agitate that argument in this appeal and no notice of contention has been filed.[45] If the argument is advanced, it should not be accepted.

31. As has been explained, for parliamentary privilege to attach to the report, all that is required is that it falls within the definition of "proceedings in the Assembly". In this case, it does so because it falls within s 9(2)(c) and (e) of the Parliament Act (for the reasons just addressed). Neither paragraph requires, whether expressly or by implication, that the Assembly or the committee must have taken some step in response (or must have invited or caused the document to be prepared) before parliamentary privilege will attach. Consistently with that

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40 QCA [81] (CAB 85).
41 An evidentiary certificate, if uncontradicted, is to be received as correct unless there is something to suggest the contrary: *CJC v PCJC* [2002] 2 Qd R 8 at [22] (McPherson JA).
42 Parliament Act, s 9(2)(c) and (e); QCA [149]-[151] (Freeburn J) (CAB 102).
43 Parliament Act, s 9(2)(c) and (d); QCA [149]-[151] (Freeburn J) (CAB 102).
44 QCA [152]-[160] (CAB 102-104).
45 *High Court Rules 2004* (Cth) r 42.08.

submission, numerous cases have found that parliamentary privilege has attached to documents even when there has been no "appropriative act" by Parliament.[46]

32. The cases that have suggested or found that an "appropriative act" is required should be confined to their facts, which are far removed from the present matter (the documents in question having been prepared by persons with no pre-existing relationship to Parliament).[47] Both as a matter of principle, and having regard to the text of s 9(2)(e) of the Parliament Act, it is not necessary that any document that is actually prepared for the purpose of being presented or submitted to the Assembly or a committee thereof, be the subject of an "appropriative act" before it will attract parliamentary privilege. There is no need to imply any such requirement to avoid abuse of the privilege because, if a document is prepared by a person who is otherwise unconnected with the business of Parliament, and the Court concludes that that person was seeking to "manufacture" the application of the privilege to that document "by the artifice of planting the document upon a Parliamentarian",[48] it would follow that the Court would not be persuaded that the document was in fact prepared for a purpose that attracts parliamentary privilege.

33. An "appropriative act" might be relevant in deciding whether parliamentary privilege attaches to a document prepared by an outsider if that document was not prepared for the purposes of transacting business mentioned in s 9(2)(a) or (c) of the Parliament Act, and therefore does not fall within s 9(2)(e). In such a case, while the document would not have been privileged at the time it was created (because, for example, it was created for a purpose entirely unrelated to parliamentary proceedings), it might still attract privilege at some subsequent point if a step is taken that engages one of the other paragraphs of s 9(2).

34. But that situation is far removed from this case. When a document is prepared by a person or body (including a statutory body such as the Commission) in the course of complying with a reporting relationship with Parliament, that document is prepared for a purpose that enlivens s 9(2)(e). Nothing more is required for that document to form part of "proceedings in the Assembly", which is unsurprising given that the report is provided to the PCCC so as to provide it with the information it needs to discharge its functions.[49]

35. In any event, even if more was required, it was present in this case. The evidentiary certificate signed by the Chairman of the PCCC under s 55 of the Parliament Act certified

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46 See, eg, *Carrigan v Cash* [2016] FCA 1466; *Carrigan v Cash* [2017] FCAFC 86; *Mauloni v Fraser* [2007] 1 Qd R 563; *In the Matter of OPEL Networks Pty Ltd (in liq)* (2010) 77 NSWLR 128.

47 *Rowley v O'Chee* [2000] 1 Qd R 207 at 221 (McPherson JA); *Erglis v Buckley* [2005] QSC 25 at [37], affirmed in *Erglis v Buckley (No 2)* [2006] 2 Qd R 407.

48 *Rowley v O'Chee* [2000] 1 Qd R 207 at 221 (McPherson JA).

49 CC Act s 292(c).

that the report was a document prepared for the purposes of, or incidental to, transacting the business of the PCCC under s 9(2)(c) of the Parliament Act (engaging s 9(2)(e)), and that the report had been presented or submitted to the PCCC (engaging s 9(2)(c) and (d)).[50] There being no evidence to the contrary, it is clear beyond argument that the report formed part of the "proceedings in the Assembly". The certificate conveyed the PCCC's recognition of the report as part of its proceedings.

E. The relief sought would impeach proceedings in the Assembly

E.1 Declaratory relief

36. The Commission's conduct in preparing the report, the submission of that report to the PCCC and the report itself all forming part of "proceedings in the Assembly", they cannot be impeached or questioned in a court without contravening parliamentary privilege. Yet that is what the majority in the Court of Appeal did when it found that "[t]he report is beyond the Commission's power to report which is conferred by s 64" of the CC Act.[51] That is a serious interference with parliamentary privilege, for "[n]o more potentially destructive form of challenge"[52] could have been brought to the report than one which nullified the Commission's report as beyond power.

37. The majority in the Court of Appeal compounded that impeachment by declaring that the Commission's report was not a report for the purposes of s 69(1) of the CC Act.[53] Section 69 specifies processes for certain reports of the Commission to be tabled in the Assembly. That process operates automatically for reports on public hearings,[54] but for other reports the process requires the PCCC to give a direction that the report be given to the Speaker.[55] Whether the PCCC gives such a direction is "entirely at the discretion of the PCCC"[56] and, thus, within the Assembly's exclusive cognisance.[57]

38. The making of a declaration that the Commission's report was not a report for the purposes of s 69(1) of the CC Act infringed the principle of exclusive cognisance and the principle of "non-intervention" by which the courts and Parliament are "astute to recognise their

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50 TJ [123] (CAB 46). See also QCA [79] (CAB 85).
51 QCA [68] (CAB 82).
52 *CJC v PCJC* [2002] 2 Qd R 8 at [23] (McPherson JA).
53 QCA [69], [82] (CAB 82, 85-86).
54 CC Act s 69(1)(a).
55 CC Act s 69(1)(b).
56 QCA [167] (Freeburn J, in dissent) (CAB 106).
57 *Alley v Gillespie* (2018) 264 CLR 328 at [108] (Nettle and Gordon JJ), citing *R v Chaytor* [2011] 1 AC 684 at [63]. See also *Bradlaugh v Gossett* (1884) 12 QBD 271 at 282; *Halden v Marks* (1995) 17 WAR 447 at 463D (Rowland, Murray and Anderson JJ).

respective constitutional roles".[58] It did so because it was, in substance, a declaration that the Commission's report was not a report which the PCCC could direct be given to the Speaker to be tabled in the Assembly. But that was a matter for the judgment of the PCCC, not for the Court. As Dixon CJ said in *R v Richards; Ex parte Fitzpatrick and Browne*,[59] in a statement endorsed in *Egan v Willis*:[60]

> It is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.

E.2 Procedural fairness

39. Having found that the Commission's report was *ultra vires*, the majority in the Court of Appeal did not proceed to determine the Respondent's contention that, in preparing the report, the Commission failed to observe the requirements of procedural fairness. While the Respondent contended during the special leave hearing that he intended to raise this issue again in this Court, no notice of contention has been filed. In those circumstances, it appears that this issue is not before the Court. If, however, the point is raised in the Respondent's submissions, the Commonwealth seeks leave to file submissions in reply on that point.

F. The first ground of appeal should be upheld

40. It follows from the principles outlined above that the first ground of appeal should be upheld. As an intervener, no costs order for or against the Commonwealth should be made.

PART V ESTIMATED HOURS

41. The Commonwealth seeks 30 minutes to present oral argument.

Dated: 24 February 2023

.....	.....	.....
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[58] See *Prebble* [1995] 1 AC 321 at 332-335 (Lord Browne-Wilkinson) and like observations in *Rann v Olsen* (2000) 76 SASR 450 at [116]-[124], [171]-[172], [177]-[179], [242]-[244]; *R v Theophanous* (2003) 141 A Crim R 216 at [66] (Winneke ACJ, Vincent and Eames JJA); *Halden v Marks* (1995) 17 WAR 447 at 462; *Carrigan v Cash* [2016] FCA 1466 at [12] and [76] (White J); *Carrigan v Cash* [2017] FCAFC 86 at [23].

[59] (1955) 92 CLR 157 at 162 (Dixon CJ, on behalf of the Court).

[60] (1998) 195 CLR 424 at [27] (Gaudron, Gummow and Hayne JJ), [66] (McHugh J).

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: **CRIME AND CORRUPTION COMMISSION**
Appellant

and

PETER DAMIEN CARNE
Respondent

ANNEXURE TO THE ATTORNEY-GENERAL OF THE COMMONWEALTH'S SUBMISSIONS

10 Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Commonwealth Attorney-General sets out below a list of the particular constitutional provisions and statutes referred to in his submissions.

	Commonwealth	**Provision(s)**	**Version**
1.	*Auditor-General Act 1997* (Cth)	ss 17-18A	Current
2.	*Law Enforcement Integrity Commissioner Act 2006* (Cth)	s 204	Current
3.	*Parliamentary Privileges Act 1987* (Cth)	s 16	Current
4.	*Public Governance, Performance and Accountability Act 2013* (Cth)	s 46	Current
	State and Territory		
5.	*Constitution of Queensland 2001* (Qld)	s 9	Current
6.	*Crime and Corruption Act 2001* (Qld)	ss 64, 69, 292(c)	Current

7.	*Parliament of Queensland Act 2001* (Qld)	ss 8-9, 55	Current
United Kingdom			
8.	*Bill of Rights 1688* (UK)	art 9	Current
Statutory Instruments			
9.	*High Court Rules 2004* (Cth)	rr 42.08; 42.08A	Current