



HIGH COURT OF AUSTRALIA

13 March 2024

AB (A PSEUDONYM) & ANOR v INDEPENDENT BROAD-BASED ANTI-CORRUPTION
COMMISSION
[2024] HCA 10

Today, the High Court unanimously allowed in part an appeal from the Court of Appeal of the Supreme Court of Victoria concerning the proper construction of s 162(3) of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

Between 2019 and 2021, the Independent Broad-based Anti-corruption Commission ("IBAC") conducted an investigation into allegations of unauthorised access to, and disclosure of, internal email accounts of a public body (the second appellant). In 2021, IBAC provided AB, a senior officer and employee of the second appellant, with a redacted version of its draft special report ("the Draft Report"), which contained proposed findings adverse to the appellants. AB subsequently requested from IBAC documents relied upon to support the proposed adverse findings. In response to this request, IBAC provided some documents, but refused to provide others. Section 162(3) of the Act relevantly provided that if "the IBAC intends to include in a report ... 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".

Before the primary judge, the appellants sought declaratory relief to the effect that IBAC failed to comply with its obligation under s 162(3) of the Act to provide the appellants with a "reasonable opportunity" to respond to the "adverse material". The appellants also sought an order restraining IBAC from transmitting the Draft Report to the Parliament of Victoria and otherwise publishing it. The primary judge found that "adverse material" in s 162(3) meant "the material upon which IBAC's adverse comments or opinions ... were based". His Honour also held that, to comply with s 162(3), it was sufficient if IBAC provided the "substance or gravamen of the adverse material" without providing the evidentiary material on which the findings were based. In refusing the appellants leave to appeal, but upholding a notice of contention filed by IBAC, the Court of Appeal (Emerton P, Beach and Kyrou JJA) found that the primary judge had erred in construing the phrase "adverse material". Their Honours held that "adverse material" in s 162(3) referred to the adverse comment or opinion that IBAC proposed to publish in its Draft Report and not the material upon which the comment or opinion was based. Their Honours also found that the Draft Report included the "substance or gravamen" of the matters IBAC took into account. The Court of Appeal concluded that IBAC had complied with s 162(3).

The High Court held that the Court of Appeal erred in its construction of "adverse material". That phrase as used in s 162(3) refers to evidentiary material said by IBAC to justify a "comment or ... opinion which is adverse to any person". Compliance with s 162(3) requires an affected person to be afforded a "reasonable opportunity" to respond to that evidentiary material, which, in most cases, will be satisfied by affording a reasonable opportunity to respond to the "substance or gravamen" of the material. However, the Court also found that the Court of Appeal was correct to find that, subject to one exception, IBAC had complied with s 162(3) of the Act. That exception was the subject of an undertaking by IBAC to the Court that IBAC would not transmit to the Parliament of Victoria a report containing the one adverse comment or opinion which failed to comply with s 162(3). The Court held, therefore, that no substantive relief was warranted.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.