

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

AB (A PSEUDONYM) & ANOR

APPELLANTS

AND

INDEPENDENT BROAD-BASED ANTI-CORRUPTION
COMMISSION

RESPONDENT

AB (a pseudonym) v Independent Broad-based Anti-corruption Commission
[2024] HCA 10
Date of Hearing: 7 December 2023
Date of Judgment: 13 March 2024
M63/2023

ORDER

1. *Appeal allowed.*
2. *Set aside orders 1 and 4 made by the Court of Appeal of the Supreme Court of Victoria on 15 December 2022 and, in their place, order that:*
 - (a) *the application for leave to appeal be granted;*
 - (b) *orders 1 and 2 made by Ginnane J on 4 October 2022 be set aside and in their place:*
 - (i) *note the undertaking given by the respondent to the High Court of Australia on 7 December 2023 that it will not transmit to the Parliament of Victoria a report pursuant to the Independent Broad-based Anti-corruption Commission Act 2011 (Vic) containing the proposed comment or opinion set out in the sixth paragraph on page 32 of the appellants' Book of Further Materials filed in the High Court of Australia;*

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(ii) *order that each party pay their own costs of the proceedings; and*

(iii) *order that the proceedings otherwise be dismissed;*

(c) *each party pay their own costs of the application for leave to appeal to the Court of Appeal; and*

(d) *the appeal otherwise be dismissed.*

3. *The respondent pay the appellants' costs of the appeal to this Court.*

On appeal from the Supreme Court of Victoria

Representation

N M Wood SC with C J Tran and B Bromberg for the appellants (instructed by Slater & Gordon Lawyers)

P J Hanks KC and F I Gordon KC with J S Maxwell for the respondent (instructed by Independent Broad-based Anti-corruption Commission)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

AB (a pseudonym) v Independent Broad-based Anti-corruption Commission

Statutes – Construction – Procedural fairness – Reasonable opportunity to respond – Where Independent Broad-based Anti-corruption Commission ("IBAC") conducted investigation into allegations of unauthorised access to and disclosure of internal email accounts – Where IBAC provided redacted draft special report containing proposed adverse findings against appellants – Where IBAC refused to provide evidentiary material for proposed adverse findings – Where s 162(3) of *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) relevantly provided that, if IBAC intends to include in report "a comment or an opinion which is adverse to any person", then IBAC must first provide person reasonable opportunity to respond to adverse material – Whether "adverse material" in s 162(3) referred to proposed adverse comments or opinions in report, or evidentiary material upon which proposed adverse comments or opinions based – Whether provision of substance or gravamen of adverse material sufficient to comply with obligation under s 162(3) – Whether substantive relief warranted where findings unaffected by misconstruction of s 162(3).

Words and phrases – "adverse comment or opinion", "adverse finding", "adverse material", "evidentiary material", "reasonable opportunity", "reasonable opportunity to respond", "special report", "substance or gravamen".

Independent Broad-based Anti-corruption Commission Act 2011 (Vic), s 162(3).

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND
BEECH-JONES JJ. Section 162(3) of the *Independent Broad-based Anti-
corruption Commission Act 2011* (Vic) ("the IBAC Act") provides that, if the
Independent Broad-based Anti-corruption Commission ("IBAC") intends to
include in a special report "a comment or an opinion" which is adverse to any
person, then IBAC must first provide that person a reasonable opportunity to
respond to the "adverse material" and fairly set out each element of the response
in its report.

2 The principal issue raised by this appeal is whether the "adverse material"
referred to in s 162(3) is the proposed adverse comments or opinions in the special
report or whether it is the evidentiary material upon which those proposed adverse
comments or opinions are based. The Court of Appeal of the Supreme Court of
Victoria found that it was the former.¹ For the reasons that follow, the correct
construction is the latter although, as conceded by the appellants, the obligation to
provide adverse material may be satisfied by the provision of the substance or
gravamen of the underlying material rather than the underlying material itself.

3 As the Court of Appeal erred in its construction of s 162(3), a further issue
arises as to whether any relief should be granted to the appellants in light of the
limited grant of special leave to appeal to this Court and the fact that many of the
Court of Appeal's findings are not affected by its incorrect construction of s 162(3).
For the reasons that follow, in light of an undertaking proffered by IBAC to this
Court in relation to one part of its draft special report and the balance of the Court
of Appeal's findings, no substantive relief is warranted.

Background

4 Between 2019 and 2021, IBAC conducted an investigation into allegations
of unauthorised access to, and disclosure of, internal email accounts of a "public
body" within the meaning of s 6(1) of the IBAC Act.

5 The second appellant, CD, is a registered organisation under the *Fair Work
(Registered Organisations) Act 2009* (Cth). The first appellant, AB, is a senior

1 *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2022]
VSCA 283 ("AB") at [126] per Emerton P, Beach and Kyrou JJA.

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officer of CD and an employee of the public body. During the investigation, AB gave evidence to IBAC in a private examination.

6 On 6 December 2021, IBAC provided AB with a redacted version of its draft special report prepared under Pt 7 of the IBAC Act and requested his response by 20 December 2021 ("the Draft Report").² Part 4 of the Draft Report contained proposed findings adverse to AB (and others) in relation to the unauthorised access and disclosure of information and reasons for those findings. Part 5 of the Draft Report contained proposed findings adverse to the appellants (and others) in relation to the workplace culture of the public body and reasons for those findings.

7 On 12 December 2021, AB's solicitor replied to IBAC seeking an extension of time in which to respond, the transcript of his examination, transcripts of the examinations of other witnesses referred to in the Draft Report and copies of other documentary material relied upon to support the proposed adverse findings. On 14 December 2021, IBAC agreed to the extension of time and provided the transcript of AB's examination as well as copies of the documents shown to him during his examination. However, IBAC did not agree to provide the transcripts of the other witness examinations or the other requested documents.³

8 In January 2022, AB commenced proceedings in the Supreme Court of Victoria. CD was later joined as a plaintiff. The appellants sought declaratory relief to the effect that IBAC had failed to comply with s 162(3) of the IBAC Act and an order, described as being "in the nature of prohibition" but in substance an injunction, restraining IBAC from transmitting the Draft Report to each House of Parliament and otherwise publishing it.⁴

2 AB [2022] VSCA 283 at [4] per Emerton P, Beach and Kyrou JJA.

3 AB (*a pseudonym*) v Independent Broad-based Anti-corruption Commission [2022] VSC 570 at [11] per Ginnane J; AB [2022] VSCA 283 at [41]-[42] per Emerton P, Beach and Kyrou JJA.

4 AB (*a pseudonym*) v Independent Broad-based Anti-corruption Commission [2022] VSC 570 at [18] per Ginnane J.

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The decisions below

9 Before the primary judge, Ginnane J, the appellants contended, inter alia, that IBAC had contravened s 162(3) of the IBAC Act by failing to provide them with a reasonable opportunity to respond to the adverse findings in the Draft Report. His Honour construed the reference to "adverse material" in s 162(3) as meaning "the material upon which IBAC's adverse comments or opinions contained in the Draft Report were based".⁵ However, his Honour did not accept that, to comply with s 162(3), IBAC had to provide that evidentiary material to the appellants, but instead found it was sufficient if IBAC provided "the substance or gravamen of the adverse material".⁶ His Honour concluded that the redacted version of the Draft Report contained the "substance of the adverse material upon which the adverse comments or opinions about the [appellants] ... were based".⁷ His Honour also found that, by providing the appellants an opportunity to respond to the Draft Report, IBAC afforded them the reasonable opportunity referred to in s 162(3).⁸

10 The appellants sought leave to appeal from the primary judge's decision. Their application for leave to appeal to the Court of Appeal raised various grounds that invoked s 162(3), including a contention that, even if s 162(3) could be complied with by providing the "substance and gravamen of the adverse material", the primary judge erred in concluding that was included in the Draft Report. This contention was confined to adverse comments or opinions set out in five passages in Pt 5 of the Draft Report.⁹

5 *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2022] VSC 570 at [147] per Ginnane J.

6 *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2022] VSC 570 at [151], [154] per Ginnane J.

7 *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2022] VSC 570 at [168], [171] per Ginnane J.

8 *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* [2022] VSC 570 at [173], [175]-[176] per Ginnane J.

9 See *AB* [2022] VSCA 283 at [87] per Emerton P, Beach and Kyrou JJA.

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11 The Court of Appeal refused the appellants leave to appeal. The Court upheld a notice of contention filed by IBAC to the effect that the primary judge erred in construing the phrase "adverse material". The Court concluded that "adverse material" in s 162(3) refers to "a comment or an opinion which is adverse to any person" and not the material upon which the comment or opinion was based.¹⁰ The Court then rejected all the grounds of appeal contending that s 162(3) was not complied with.¹¹ The Court found, inter alia, that "pt 5 of the draft report sets out the terms of the comments and opinions that are adverse to the [appellants] and also the substance or gravamen of the matters that IBAC took into account in formulating those comments and opinions".¹² Whether the Court of Appeal's reasons for making that finding followed from its construction of "adverse material" in s 162(3) and how the Court otherwise construed the provision was a matter of debate in this Court. Those issues are addressed below.

12 The appellants applied for special leave to appeal to this Court. They contended that the Court of Appeal erred, firstly, in construing the phrase "adverse material" in s 162(3) and, secondly, in concluding that they were afforded a reasonable opportunity to respond to the "adverse material". The second ground of appeal assumed that the Court of Appeal's construction of "adverse material" in s 162(3) was correct.

13 On 11 August 2023, this Court¹³ granted the appellants special leave to appeal in relation to the first ground of appeal only.

The IBAC Act

14 The objects of the IBAC Act and the functions of IBAC include the identification, investigation and exposure of corrupt conduct,¹⁴ assisting in the

10 AB [2022] VSCA 283 at [126] per Emerton P, Beach and Kyrou JJA.

11 AB [2022] VSCA 283 at [159] per Emerton P, Beach and Kyrou JJA.

12 AB [2022] VSCA 283 at [167] per Emerton P, Beach and Kyrou JJA.

13 Kiefel CJ and Gordon J.

14 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ("IBAC Act"), ss 8(a)(i), 15(2)(a).

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prevention of such conduct¹⁵ and assisting in improving the capacity of the public sector to prevent such conduct.¹⁶ The definition of "corrupt conduct" is extensive, but it suffices to state that it includes conduct of a public officer or public body that constitutes the dishonest performance of their functions¹⁷ or conduct of any person that adversely affects the honest performance of those functions,¹⁸ provided that such conduct constitutes a "relevant offence" (which includes any indictable offence committed against an Act).¹⁹ IBAC's functions also include reporting on, and making recommendations as a result of, the performance of its duties and functions.²⁰

15 IBAC may conduct a preliminary inquiry for the purpose of determining whether to dismiss, refer or investigate a complaint or notification made under the IBAC Act.²¹ For the purposes of a preliminary inquiry, IBAC can compel the relevant principal officer of a public body to provide information or produce documents or other things.²² If, following a preliminary inquiry, IBAC suspects on reasonable grounds that the relevant conduct constitutes corrupt conduct, then it may conduct an investigation.²³

16 IBAC's powers in relation to an investigation include the compulsory examination of witnesses and production of documents or other things to IBAC.²⁴

15 IBAC Act, ss 8(b)(i), 15(5)-(6).

16 IBAC Act, ss 8(d), 15(6)(c).

17 IBAC Act, s 4(1)(b).

18 IBAC Act, s 4(1)(a).

19 IBAC Act, ss 3(1), 4(1).

20 IBAC Act, s 15(7)(b).

21 IBAC Act, s 59A.

22 IBAC Act, ss 59D(1), 59E(1).

23 IBAC Act, s 60(1)-(2).

24 IBAC Act, ss 115(1), 120(1).

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Other than in very limited circumstances, witness examinations are not open to the public.²⁵ Unless the hearing is held in public, only the witness, the legal representatives of the witness and IBAC and such other persons that IBAC or the IBAC Act has directed or authorised to attend may be present during the examination.²⁶ A witness is not excused from disclosing information during an examination by reason of secrecy provisions imposed by any enactment or rule of law²⁷ or any potential for them to incriminate themselves or expose themselves to a penalty,²⁸ although, with certain exceptions, that disclosure is not admissible against them before any court or person acting judicially.²⁹

17 IBAC is given the power to issue confidentiality notices during an investigation in relation to "restricted matters" the disclosure of which it considers, on reasonable grounds, would be likely to prejudice its investigation, the safety or reputation of a person or the fair trial of a person charged with a (criminal) offence.³⁰ A similar power can be exercised during a preliminary inquiry.³¹

18 Part 7 of the IBAC Act is entitled "[r]ecommendations, actions and reports". After conducting an investigation, IBAC may take a number of steps including making a referral to other bodies, recommending further action or transmitting a special report to each House of Parliament.³² Section 162(1) empowers IBAC to cause a special report to be transmitted to each House of Parliament "on any matter relating to the performance of its duties and functions". An advance copy of the

25 IBAC Act, s 117(1)-(3).

26 IBAC Act, s 118(1).

27 IBAC Act, s 143(1).

28 IBAC Act, s 144(1).

29 IBAC Act, s 144(2).

30 IBAC Act, s 42(1).

31 IBAC Act, s 42(1A).

32 IBAC Act, s 164(1)(a)-(c).

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special report is to be given to the relevant Minister and the Secretary to the Department of Premier and Cabinet.³³

19 Section 162(2)-(4) provide:

- "(2) If the IBAC intends to include in a report under this section adverse findings about a public body, the IBAC must give the relevant principal officer of that public body an opportunity to respond to the *adverse material* and fairly set out each element of the response in its report.
- (3) If the IBAC intends to include in a report under this section 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* and fairly set out each element of the response in its report.
- (4) If the IBAC intends to include in a report under this section a comment or an opinion about any person which is not adverse to the person, the IBAC must first provide that person with the relevant material in relation to which the IBAC intends to name that person." (emphasis added)

20 Similar obligations are imposed on IBAC where it intends to include an adverse comment or opinion in its annual report for a financial year prepared under Pt 7 of the *Financial Management Act 1994* (Vic).³⁴ Section 166 of the IBAC Act provides that, subject to certain exceptions, any person who receives a proposed report, an advance copy of a report, a draft report, part of a proposed report or information contained in any such drafts or reports prior to publication must not disclose any information contained therein.³⁵

33 IBAC Act, s 162A(1).

34 IBAC Act, s 165(2)-(4).

35 IBAC Act, s 166(1).

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Adverse material and s 162(3)

21 The interpretation of s 162(3) of the IBAC Act must "begin with a consideration of the text itself",³⁶ that is, the text of the statute as a whole.³⁷ That said, ascertaining the meaning of the text requires a consideration of its context, which includes the general purpose and policy of a provision and, in particular, the mischief it is seeking to remedy.³⁸ Neither the Court of Appeal³⁹ nor any of the parties suggested that the extrinsic materials or legislative history of s 162⁴⁰ were of assistance in resolving the construction issue raised in this case.

22 The obligation imposed by s 162(2) is engaged where IBAC intends to include in a special report an "adverse finding" about a public body, whereas the obligation imposed by s 162(3) is engaged where IBAC intends to include in a special report a "comment or ... opinion which is adverse to any person". The words "finding", "comment" and "opinion" are not defined in the IBAC Act. It is unnecessary to explore whether there is any substantial difference between those words in this context, as there is no doubt that each of them at least includes a

36 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 ("Alcan") at 46 [47] per Hayne, Heydon, Crennan and Kiefel JJ. See also *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at 149 [20] per Kiefel CJ, Bell and Nettle JJ, 157 [41] per Gageler J, 162 [64] per Edelman J.

37 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304 per Gibbs CJ, 320 per Mason and Wilson JJ.

38 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Alcan* (2009) 239 CLR 27 at 47 [47] per Hayne, Heydon, Crennan and Kiefel JJ.

39 *AB* [2022] VSCA 283 at [139] per Emerton P, Beach and Kyrou JJA.

40 Section 162(2)-(4) in the above form were originally inserted in the IBAC Act as s 86(2)-(4) by s 9 of the *Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Act 2012* (Vic), which took effect from 10 February 2013. Section 86 was renumbered as s 162 by s 298 of the *Integrity and Accountability Legislation Amendment Act 2012* (Vic), which took effect from 11 February 2013.

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conclusion that a person has engaged in "corrupt conduct".⁴¹ If it were otherwise, the protections afforded by s 162(2) and (3) would be illusory. The potential damage to the interests, including the reputation, of a public body, public officer or other person from the publication of a special report containing a conclusion that they engaged in corrupt conduct is manifest.⁴²

23 Section 162(4) provides little assistance in construing s 162(2) and (3). Where IBAC intends to include in a special report a comment or opinion about a person that is not adverse to them, it is obliged to provide that person with the "relevant material" in relation to which IBAC intends to name them.⁴³ Section 162(4) does not afford that person an opportunity to respond to that material, much less require the inclusion of a response in any draft report.

24 With both s 162(2) and (3), the opportunity (or reasonable opportunity) IBAC must afford is to respond to the "adverse material". The text of those provisions suggests that "adverse material" is something different from the "adverse findings" and the "comment or ... opinion which is adverse". Parliament could have provided that the opportunities afforded by s 162(2) and (3) respectively are to respond to the proposed "adverse findings" and the "comment or ... opinion which is adverse", but it chose not to. Instead, the undefined phrase "adverse material" was utilised.

25 In construing that phrase, it is important to begin by identifying some basic propositions about the applicable common law principles of natural justice where a person's interests are likely to be affected by an exercise of power. First, such a person "must be given an opportunity to deal with relevant matters adverse to [their] interests which the repository of the power proposes to take into account in deciding upon its exercise".⁴⁴ Second, the person whose interests are likely to be

41 See IBAC Act, ss 162(5)-(6), 165(5)-(6), which prevent such a conclusion being expressed in terms that a person is guilty of, or has committed, a criminal or disciplinary offence.

42 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 ("*Ainsworth*") at 577-578 per Mason CJ, Dawson, Toohey and Gaudron JJ.

43 *AB* [2022] VSCA 283 at [131] per Emerton P, Beach and Kyrou JJA.

44 *Kioa v West* (1985) 159 CLR 550 ("*Kioa*") at 628 per Brennan J.

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affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. However, "in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made".⁴⁵ At least in some contexts, the affected person must be given the opportunity to respond to such information obtained from third parties even if it was not expressly relied on, or proposed to be relied on, by the decision-maker.⁴⁶

26 The nature of a decision-maker's powers and their capacity to affect a person's rights and interests not only bears upon the existence and informs the content of any duty of procedural fairness,⁴⁷ but also informs the proper construction of statutory provisions that create *analogous* rights and obligations in that "all statutes are construed ... against a background of common law notions of justice and fairness".⁴⁸ IBAC is given broad and intrusive powers to gather evidentiary material during an investigation. It marshals that material in

45 *Kioa* (1985) 159 CLR 550 at 629 per Brennan J, cited in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 ("*Applicant VEAL*") at 95 [15] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ and *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ("*Saeed*") at 256 [2] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ. See also *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 315-316 per Gibbs CJ; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 161-162 [29] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ, quoting *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592 per Northrop, Miles and French JJ.

46 See *Kioa* (1985) 159 CLR 550 at 629 per Brennan J; *Applicant VEAL* (2005) 225 CLR 88 at 96-97 [18] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

47 *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; *Ainsworth* (1992) 175 CLR 564 at 576 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 122 FCR 78 at 100 [117] per Weinberg J.

48 *Kioa* (1985) 159 CLR 550 at 609 per Brennan J. See also *Italiano v Carbone* [2005] NSWCA 177 at [80] per Basten JA.

formulating the proposed adverse findings, comments or opinions intended to be included in a special report. The potentially grave consequences for an affected public body, public officer or other person from the inclusion of such findings, comments or opinions in a special report have already been described.

27 Construed against this background, s 162(2) and (3) modify the common law obligation to afford procedural fairness so as to require a connection between the "adverse material" and the proposed "adverse findings", "comment or ... opinion". Otherwise, the scope and nature of IBAC's powers, considered in the context of the common law principles noted above, confirm that the phrase "adverse material" in s 162(3) refers to the "adverse information"⁴⁹ said by IBAC to justify the proposed comments or opinions and not the comments or opinions themselves. For the opportunity provided for by s 162(2), and the reasonable opportunity provided for by s 162(3), to be effective, the person affected must be given the opportunity to respond to the material collected by IBAC which it contends justifies the adverse findings, comments or opinions in the special report.

28 In this Court, IBAC sought to support the construction adopted by the Court of Appeal for the reasons it gave. The Court of Appeal reasoned that to construe "adverse material" in s 162(3) as referring to only the adverse comment or opinion would give the provision "definite scope", whereas to construe it as referring to other material would "introduce uncertainty".⁵⁰ However, this overlooks the fact that the obligation is only engaged when IBAC forms the intention to include the adverse comment or opinion in its special report. In formulating that adverse comment or opinion, IBAC will, or at least should, have identified the evidentiary material that justifies it. In that respect, the appellants' construction not only enhances the capacity of the affected person to respond to the proposed adverse comment or opinion, but also enhances the performance of IBAC's functions by ensuring that it identifies the material said to support the adverse comment or opinion.

49 *Kioa* (1985) 159 CLR 550 at 629 per Brennan J, cited in *Applicant VEAL* (2005) 225 CLR 88 at 95 [15] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ and *Saeed* (2010) 241 CLR 252 at 256 [2] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

50 See *AB* [2022] VSCA 283 at [126] per Emerton P, Beach and Kyrou JJA.

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29 IBAC also contended that its proposed construction was supported by the use of the definite article in s 162(3) (ie, "the" adverse material).⁵¹ However, the use of the definite article only serves to confirm that s 162(2) and (3) do not confer a reasonable opportunity to respond to *all* material held by IBAC that is adverse to the affected public body or person, but only to "the" adverse material said to justify the adverse findings, comments or opinions IBAC intends to publish in its special report.

30 Like the Court of Appeal, IBAC sought to rely on the fact that the confidentiality restrictions in s 166 of the IBAC Act only applied to a draft report rather than adverse material not included in such a report that might be provided to a public body or person pursuant to s 162(2) or (3).⁵² While it was accepted that such adverse material could be the subject of a confidentiality notice, IBAC contended that it was highly improbable Parliament would have intended that s 162(3) require IBAC to disclose a category of information or documents beyond that proposed to be included in a draft report without expressly protecting its confidentiality. However, in oral argument in this Court, IBAC conceded that the provision of a reasonable opportunity in accordance with s 162(3) might require the disclosure of material beyond that included in the Draft Report. Such material would not be protected by s 166.

31 In any event, IBAC's reliance on s 166 loses force once it is accepted that, if "adverse material" is construed as referring to the material said to justify the adverse findings, comments or opinions, it does not necessarily mean that s 162(2) and (3) will always oblige IBAC to provide the affected public body or person with copies of that material. Both before the Court of Appeal and in this Court, the appellants correctly accepted that a "reasonable opportunity" to respond to the adverse material could be afforded in this case by an opportunity to respond to the "gravamen or substance" of the adverse material, rather than the material itself.⁵³ Further, while it is understandable that Parliament might conclude that the contents of, inter alia, a draft report should always remain confidential lest its release compromise IBAC's investigation or Parliament's response to the report, it is also

51 See *AB* [2022] VSCA 283 at [127] per Emerton P, Beach and Kyrou JJA.

52 See *AB* [2022] VSCA 283 at [135]-[138] per Emerton P, Beach and Kyrou JJA.

53 See *Coutts v Close* [2014] FCA 19 at [118] per Griffiths J; *Applicant VEAL* (2005) 225 CLR 88 at 99 [27] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

understandable that Parliament would not make the same assessment in relation to the material said to justify the adverse findings, comments or opinions in such a report. For example, that material could include publicly available information. Once these matters are accepted, it follows that it is not improbable that Parliament intended to afford IBAC flexibility in determining whether to impose confidentiality restraints in relation to such material while also imposing a blanket restraint on the release of a draft report.

32 It follows that the appellants' sole ground of appeal should be upheld. The Court of Appeal erred in construing the phrase "adverse material" in s 162(3) of the IBAC Act. That phrase refers to the evidentiary material said by IBAC to justify a "comment or ... opinion which is adverse to any person". In most cases, including this one, it would be expected that a reasonable opportunity to respond to that evidentiary material will be afforded by proffering a reasonable opportunity to respond to the substance or gravamen of that material, which will usually involve a full account of its essential content. In some cases, more may be required where the provision of the substance or gravamen of the material is not sufficient to discharge IBAC's obligation under s 162(3).

Outcome of the appeal

33 In their written submissions, the appellants identified various passages from Pt 5 of the Draft Report as examples of adverse comments or opinions in respect of which IBAC had not complied with s 162(3) as properly construed. However, most of these passages were not the passages from Pt 5 that the appellants relied on before the Court of Appeal⁵⁴ and were not identified in their application for special leave as proposed grounds of appeal. The appellants should not be permitted to raise complaints about the Draft Report that were not raised before the Court of Appeal. Otherwise, the appellants sought the remitter of the proceedings to the Court of Appeal for that Court to address their complaints about Pt 5 of the Draft Report in accordance with the correct construction of s 162(3).

34 IBAC contended that, even if the appellants' construction of the phrase "adverse material" in s 162(3) was upheld, the appeal should nevertheless be dismissed. IBAC contended that the Court of Appeal construed s 162(3) as requiring the disclosure of the substance of material beyond that included in the Draft Report if such disclosure was necessary to afford a "reasonable opportunity"

54 AB [2022] VSCA 283 at [87] per Emerton P, Beach and Kyrou JJA.

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to respond to the adverse comments or opinions. IBAC relied on the Court of Appeal's finding that Pt 5 of the Draft Report included the "substance or gravamen" of the matters IBAC took into account in formulating its adverse comments or opinions about the appellants.⁵⁵ The appellants responded by contending that the Court of Appeal's finding was affected by its incorrect construction of "adverse material".

35 To address these contentions, it is necessary to place the Court of Appeal's findings about Pt 5 of the Draft Report in context. Their Honours found:⁵⁶

"A public official who conducts an investigation which may result in the publication of a report containing adverse findings about a person may afford that person a reasonable opportunity to be heard in a variety of ways. One way is to provide the person with the substance or gravamen of *the matters* that are adverse to him or her and give him or her a reasonable opportunity to respond to *that material* before the public official forms final views. The substance or gravamen of adverse matters may be disclosed to a person by giving him or her a draft report which discusses *those matters* and sets out *proposed findings* in relation to them ...

In the present case, the method [just noted] is not only consistent with the applicable statutory framework, it is facilitated by s 162(3) of the IBAC Act. *In accordance with that section, pt 5 of the draft report sets out the terms of the comments and opinions that are adverse to the [appellants] and also the substance or gravamen of the matters that IBAC took into account in formulating those comments and opinions.*" (emphasis added; footnote omitted)

36 This passage identifies a method of affording an affected person a reasonable opportunity that is said to conform with s 162(3) of the IBAC Act by providing them with the "substance or gravamen of the matters that are adverse to him or her" and then affording them "a reasonable opportunity to respond to that material". The balance of the passage makes it clear that "the matters" and "that material" are distinct from the "proposed findings" ("in relation to"). Thus, the method of complying with s 162(3) in the above extract assumes that the "adverse

55 See *AB* [2022] VSCA 283 at [167] per Emerton P, Beach and Kyrou JJA.

56 *AB* [2022] VSCA 283 at [166]-[167] per Emerton P, Beach and Kyrou JJA.

material" is not the "proposed findings", but the "matters" or "material" available to IBAC upon which the "proposed findings" are based. This reasoning is curious, as that is the construction of "adverse material" that was adopted by the primary judge but rejected by the Court of Appeal in upholding IBAC's notice of contention. Putting that curiosity aside, this means that, subject to one exception, the Court of Appeal's finding concerning Pt 5 of the Draft Report was not affected by its incorrect construction of "adverse material".

37 The exception was identified later in the reasons of the Court of Appeal as follows:⁵⁷

"That exception is the statement [in Pt 5 of the Draft Report that] '[o]ther concerns were also raised about providing evidence against [CD] or [AB]' ... That statement is so general and lacking in content that it is impossible for the [appellants] to respond to it. However, the inclusion of that statement in the draft report does not mean that IBAC has denied the [appellants] a reasonable opportunity to be heard. That is because, in their response to IBAC, the [appellants] may make the same criticism of that statement that we have made, and request that IBAC either provide details of the 'other concerns' to enable them to respond to them or delete the statement."

38 This treatment of the "exception" confirms that the Court of Appeal did not adopt the construction of s 162(3) ascribed to it by IBAC in this Court. According to the Court of Appeal's approach, if the contents of a draft report did not provide sufficient detail to enable an affected person to respond to an adverse comment or opinion, the person would only obtain further details of the matters or material justifying that comment or opinion if they were subsequently included in the draft report.⁵⁸

39 In their submissions in this Court, the appellants contended that the relief they sought followed from an acceptance of their proposed construction of s 162(3) and the Court of Appeal's finding that the statement the subject of the "exception" was "so general and lacking in content that it is impossible ... to respond to it". IBAC contended that this part of the Court of Appeal's reasons contemplated that compliance with s 162(3) by IBAC is an iterative process and that it was

57 AB [2022] VSCA 283 at [177] per Emerton P, Beach and Kyrou JJA.

58 See AB [2022] VSCA 283 at [135] per Emerton P, Beach and Kyrou JJA.

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"premature" to now conclude that IBAC had failed to comply with its obligations when it had not been asked to provide details about the "exception". However, compliance with s 162(3) is only an iterative process if IBAC's intentions in relation to the publication of a special report change over time. The obligation imposed on IBAC by s 162(3) was engaged in December 2021 when it formed the intention to include the relevant adverse comments or opinions about the appellants in its special report. Between that time and up to the hearing in this Court, IBAC's intentions did not alter.

40 The combination of the correct construction of s 162(3) set out above and the Court of Appeal's findings in relation to the "exception" was sufficient to conclude that the provision was not complied with in relation to one of the adverse comments or opinions about the appellants in Pt 5 of the Draft Report, namely, the statement that "[o]ther concerns were also raised about providing evidence against [CD] or [AB]". The fact that the appellants could respond to it by criticising the lack of detail provided, requesting that further detail be included in the Draft Report or seeking the deletion of the proposed statement does not detract from the conclusion that IBAC had not complied with its obligation under s 162(3).

41 However, during the hearing of the appeal, IBAC undertook to this Court that it would not transmit to Parliament a report containing the comment or opinion the subject of the above statement (ie, the "exception"). The effect of that undertaking was that IBAC abandoned the intention referred to in s 162(3) in relation to that comment or opinion. This meant that IBAC was no longer failing to comply with s 162(3).

Relief

42 Notwithstanding that it erred in construing s 162(3) of the IBAC Act, the Court of Appeal's findings in relation to Pt 5 of the Draft Report meant that, with the exception of the above statement the subject of IBAC's undertaking, the appellants failed to establish that IBAC did not comply with s 162(3). In relation to that exception, the appellants have the benefit of the undertaking such that there is no utility in now granting declaratory relief in relation to IBAC's past non-compliance. It follows that, other than noting the undertaking, no substantive relief is warranted.

43 In relation to costs, although the parties' respective cases have varied since the litigation commenced, one constant feature has been their dispute about the proper construction of the phrase "adverse material" in s 162(3). The appellants

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have succeeded on that issue. They were otherwise only successful in relation to one aspect of the Draft Report. They should have an order for their costs in this Court, but there should be no order as to costs in relation to the proceedings at first instance and the application for leave to appeal to the Court of Appeal.

44 The following orders should be made:

1. Appeal allowed.
2. Set aside orders 1 and 4 made by the Court of Appeal of the Supreme Court of Victoria on 15 December 2022 and, in their place, order that:
 - (a) the application for leave to appeal be granted;
 - (b) orders 1 and 2 made by Ginnane J on 4 October 2022 be set aside and in their place:
 - (i) note the undertaking given by the respondent to the High Court of Australia on 7 December 2023 that it will not transmit to the Parliament of Victoria a report pursuant to the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) containing the proposed comment or opinion set out in the sixth paragraph on page 32 of the appellants' Book of Further Materials filed in the High Court of Australia;
 - (ii) order that each party pay their own costs of the proceedings; and
 - (iii) order that the proceedings otherwise be dismissed;
 - (c) each party pay their own costs of the application for leave to appeal to the Court of Appeal; and
 - (d) the appeal otherwise be dismissed.
3. The respondent pay the appellants' costs of the appeal to this Court.