

Crime and Corruption and Other Legislation Amendment Bill 2024

Submission No: 9
Submitted by: Australia's Right to Know Coalition
Publication: Public
Attachments: See attachment
Submitter Comments:



26 February 2024

Community Safety and Legal Affairs Committee
Parliament House
Brisbane QLD 4000
By email: CSLAC@parliament.qld.gov.au

Dear Community Safety and Legal Affairs Committee,

Re: Inquiry into *Crime and Corruption and Other Legislation Amendment Bill 2024*

Australia's Right to Know Coalition of media organisations (**ARTK**) appreciates the opportunity to make this submission to the Queensland Parliament's Community Safety and Legal Affairs Committee inquiry into the *Crime and Corruption and Other Legislation Amendment Bill 2024* (the **Bill**).

PROGRESS FROM CONSULTATION DRAFT TO THE BILL

In 2023 ARTK provided detailed feedback on the Consultation Draft of the *Crime and Corruption and Other Legislation Amendment Bill 2023* (the **2023 Submission**). ARTK notes that a number of amendments have been made to the Bill since the 2023 Submission that addressed some of the concerns ARTK raised. We thank the Department for addressing those matters by making those amendments.

Of particular note are the amendments that have been made to sections 205ZL and 205ZZH of the Bill to clarify that, when a claim for journalist privilege is decided by the Supreme Court, the burden of proof for satisfying the Court that the journalist shield should be pierced lies with the Crime and Corruption Commission (**CCC**). These are material and necessary changes, which ARTK supports.

However there remain a number of outstanding issues with the drafting which require attention and amendment, particularly:

1. *Al Muderis v Nine Network Australia Pty Limited* [2023] FCA 1623
 - Since we made the 2023 Submission, this significant shield law decision has been handed down in the Federal Court, which reinforces the importance of these laws to journalists and the seriousness with which they are regarded by the court. This decision now forms an essential consideration for the Parliament in the implementation of the journalist shield;

2. The CCC – whether that be staff member, servant or agent – should NOT make preliminary decisions about whether or not journalist privilege arises and whether or not it should be upheld before the claim is referred to the Supreme Court
 - We strongly recommend that amendments be made to address this issue to ensure a workable journalist shield;
3. There is one new aspect of the drafting that was not present in 2023 to which requires amendment; and
4. There are a number of other more general concerns ARTK notes about the Bill. We make recommendations accordingly.

Lastly, for ease of reference, **Annexure A** and **Annexure B** include drafting amendments recommended in this submission.

1. THE RECENT DECISION IN *AL MUDERIS V NINE NETWORK AUSTRALIA PTY LIMITED* [2023] FCA 1623 IS AN IMPORTANT CONSIDERATION FOR THE IMPLEMENTATION OF THE JOURNALIST SHIELD

As the Committee is aware, two fundamental principles underpin the operation of journalist privilege under Australian law and with which the Bill seeks to come to terms, namely that:

- journalist shield laws are in the public interest; and
- journalist shield laws should only be pierced in exceptional cases.

These principles have been embraced in the approach to determining claims for journalist privilege put forward by the courts, where emphasis has been placed on the importance of maintaining the confidentiality of sources; and the high bar that must be met in order to overturn a claim for privilege.

In the recent Federal Court decision of *Al Muderis v Nine Network Australia Pty Limited* [2023] FCA 1623, when considering the journalist privilege provisions under the *Evidence Act 1995* (Cth), Bromwich J held at [28]-[29] (emphasis added):

...the regime enacted by s 126K **gives paramountcy to the confidentiality of a source** by way of the creation of a statutory privilege from compulsory disclosure of a source's identity or of information to enable it to be ascertained, arising from a proven promise to maintain as confidential the identity of a source. If the privilege is established, **it can only be displaced at the discretion of a court if the party seeking disclosure establishes a superior public interest in that disclosure taking place sufficient to outweigh both any likely adverse effect on a source or anyone else in the case at hand, and the public interest in the media communicating facts and opinions to the public and in the ability of the media to access sources of facts.**

...

The bar for the application of the exception is therefore inherently substantial and onerous. Merely being able to run a somewhat better case if the identity of a confidential source is required to be revealed will generally not suffice. The facts and circumstances in a given case may also serve to elevate the public interest in disclosure not taking place.

We raise this case not only because it is the most recent shield authority but because it highlights the fact that the Bill's implementation of shield remains inconsistent with these principles.

2. THE CCC SHOULD NOT MAKE PRELIMINARY DECISIONS ABOUT THE SHIELD, THIS IS THE ROLE OF THE SUPREMEM COURT

As we noted in the 2023 Submission, ARTK maintains the view that no CCC staff member, servant or agent should make a preliminary decision about whether or not journalist privilege arises and whether or not it should be upheld before the claim is referred to the Supreme Court. However, that is remains the regime proposed in clause 32 of the Bill, in the new sections 205F through 205ZG.

This approach is:

- **Incompatible with the fundamental principles underpinning the public interest in journalist privilege**

Journalist privilege cases are relatively rare but disproportionately weighty in terms of public interest. By way of example, a review of Australian case law indicates that:

- since 2000, there have been only 22 cases which consider the application of journalist privilege, across all Australian jurisdictions (around one per year on average); and
- since the introduction of the journalist privilege under s126K of the *Evidence Act 1995* (Cth) in 2011, only 16 cases have been brought before the Federal Court in relation to that privilege.

In such circumstances, the superior public interest in disclosure is best measured by the court as the most impartial adjudicator.

- **Inherently flawed**

As the investigatory body seeking disclosure of the document or information in question, the CCC – colloquially – has skin the game. The CCC's interests will, by definition, always be aligned with seeking to overturn the privilege claim. As a result of this dual role, the CCC is unable to determine claims for journalist privilege in an impartial manner and is not in an appropriate position to consider claims in a way consistent with the application of the "*inherently substantial and onerous*" bar that the courts have held must be overcome by applicants seeking to pierce the journalist shield.

As we have previously submitted, the case of journalist F, in which the CCC sought to overturn a journalist's privilege claim, underscores that ARTK's concerns are more than merely theoretical and highlights the difficulty that is posed by empowering the CCC, as the investigatory body charged with seeking to obtain all information which is helpful to its investigation, with the role of making decisions in relation to claims of journalist privilege. This is particularly problematic in circumstances where the existing legislative regime requires that primacy be given to the confidentiality of journalist sources, with exceptions only to be made where an applicant is able to overcome the substantial and onerous bar required to pierce the journalist shield; and

- **Unnecessary**

The CCC has a broad armoury of investigative powers at its disposal to explore factual matters, including in situations where the CCC may wish to investigate matters that would otherwise be protected. With this suite of investigative powers available, the CCC need not be reliant on journalists disclosing the identity of their confidential sources, except in exceptional cases.

In summary, there is no sound policy reason for the journalist shield protecting the identity of confidential sources to be able to be pierced by the investigator. Indeed, it is likely that, given their rarity and journalists' professional obligations in relation to sources, applications will be made to the Supreme Court only in circumstances where the privilege claim is legitimate, meaning such claims are inherently unlikely to be deemed frivolous.

Moreover, the keystone of the Bill's regime of CCC decision making – s. 205ZF – is unclear and likely to lead to uncertainty. The 2023 Submission made a number of criticisms of s. 205N (which was s. 205ZF's equivalent in the earlier drafting) which remain on foot:

- s. 205ZF(3)(d) and (e) *require the deciding officer to consider any likely adverse effect of disclosing the informant's identity on the informant or another person and whether the effect can be mitigated; and, whether the informant's identity as the source of the document, thing or information is already in the public domain.*

Unless the deciding officer knows who the confidential source is then any part of his or her decision made in accordance with (d) and (e) can only ever be pure speculation. Moreover, as the facts in *Al Muderis* show, the shield cannot be under by guess work: no matter how accurate.

- s. 205ZF(3)(f) *requires the deciding officer to consider any decision previously made by the commission or a court about a claim, objection or application in relation to the document, thing or information.*

If a previous CCC officer has considered privilege and upheld it, then why is that same material being sought a second time? Alternatively, if a previous CCC officer decided the privilege did not arise or did arise but that the public interest in disclosure outweighed it, why would a fresh consideration of the material result in a different outcome? Lastly, a decision made by a court that journalist's privilege applies in relation to any document, thing, answer or information and should be upheld should not be one of many in a list of factors: it should be comprehensively determinative and result in the CCC being immediately required withdraw its demand that a journalist produce the document, thing or information or answer a question.

- s. 205ZF(3)(g) *requires the deciding officer to consider the way in which the document, thing or information has been used or kept by the journalist, including whether the journalist—*
 - (i) verified the document, thing or information; or*
 - (ii) used the document, thing or information in a way that is fair and accurate and minimised any likely adverse effect on another person.*

The consideration required by (i) is likely to either lead to the confidential source being identified directly or indirectly by the pool of people who the confidential source could be being so depleted that his/her identity becomes apparent. The inquiry at (ii) invites a critique of the journalist's research process which should be wholly irrelevant to a decision about whether or not the privilege arises and should be upheld. Such a consideration inevitably invites a subjective analysis and conclusion of whether the journalist engaged in good or bad journalism. Whether the privilege applies and should be upheld should be subject to an objective test based solely on where the public interest lies in any particular case. The matters set out in (ii) also overlap with defamation law which should be beyond the expertise of a CCC officer.

- s. 205ZF(3)(i) *requires the deciding officer to consider whether obtaining, using, giving or receiving the document, thing or information—*
 - (i) involved an offence or misconduct by the informant or the journalist; or*
 - (ii) poses a risk to national security or the security of the State.*

The example that most obvious springs to mind in relation to this subsection is disclosure made under the *Public Interest Disclosure Act 2010*. A disclosure to a journalist may well be a potential offence or misconduct because the document, thing or information conveyed by the informant triggers an offence provision under a Queensland statute but is, nonetheless, a protected disclosure due to the operation of that Act. Where is the requirement to take that into account? Moreover, and respectfully, the CCC is hardly the appropriate body to make a determination about whether the use

of a document, thing or information poses a risk to national security and should not be making such assessments.

- *s. 205ZF(3)(j) requires the deciding officer to consider the extent to which making the requirement is likely to deter other persons from giving information to journalists. This consideration is a moot question: every circumstance in which journalist’s privilege is tested acts as a deterrent to others giving journalist’s information.*

In addition, s. 205ZF(1) fails to specify which party bears the burden of proof in respect of each of the matters that must be determined by the deciding or presiding officer. This is not only inconsistent with the test set out in the *Evidence Act 1977* (Qld) but what appears to be the drafters’ intentions, given the amendments in relation to burden of proof that were made between the 2023 and 2024 versions of the bill.

RECOMMENDATION 1

ARTK recommends that:

- *s. 205ZF be deleted; and*
- *Amendments be made to ss. 205F through 205ZG to distinguish journalist privilege from the other forms of privilege contemplated in the Bill with the affect that when the privilege is raised, the CCC can:*
 - *withdraw the requirement which has led to a journalist raising the shield; or*
 - *decline to engage further or withdraw the requirement, in which case the matter is immediately referred to the court for determination.*

Annexure 2 to this letter shows theses recommended amendments.

3. SECTION 205D(4)

Subsection 205(4) was not part of the 2013 Bill, although ARTK accepts that it is drawn from [Evidence Act s. 14Q\(2\)](#).

The problem is that preventing of a disclosure of an informant identity as a source of a document, thing or information is exactly what the shield does, and is intend to do. “A” person includes the journalist or the relevant person but “another person” does not and, ARTK submits, is clearer drafting.

For ease of reference, s. 205D provides:

205D Journalist privilege relating to identity of informants

- (1) This section applies if:
 - (a) a person makes a claim of reasonable excuse based on journalist privilege for not complying with a requirement to:
 - (i) produce a document, thing or information to the commission; or
 - (ii) provide information in answer to a question at a commission hearing;and
 - (b) the person is a journalist or a relevant person for a journalist; and
 - (c) another person (the **informant**) gave the document, thing or information to the journalist, in the normal course of the journalist’s activities as a journalist, in the expectation the document, thing or information may be published in a news medium; and
 - (d) the journalist promised the informant not to disclose the informant’s identity as the source of the document, thing or information.

- (2) Subject to this chapter, the journalist or the relevant person can not be compelled to comply with the requirement if complying with the requirement would:
 - (a) disclose the identity of the informant as the source of the document, thing or information; or
 - (b) enable the identity of the informant as the source of the document, thing or information to be ascertained.
- (3) However, this section applies in relation to a relevant person for the journalist only if the relevant person became aware of the identity of the informant as the source of the document, thing or information:
 - (a) in the normal course of the relevant person's work with the journalist; or
 - (b) in the course of, or as a result of, an investigation or proceeding under this Act.
- (4) To remove any doubt, it is declared that this section does not prevent a person from disclosing the informant's identity as the source of the document, thing or information.

RECOMMENDATION 2

ARTK recommends that the words "a person" in s. 205D(4) be omitted and replaced with "another person".

4. GENERAL COMMENTS & CONCERNS

ARTK also raises the following issue in no particular order of concern:

a) A "relevant person" for a journalist should not be required to know the identity of a confidential informant in order to rely on journalist privilege

Section 205D(3) of the Bill provides that journalist privilege only applies in relation to a relevant person for a journalist if the relevant person became aware of the identity of the informant as the source of the document, thing or information in the normal course of the relevant person's work with the journalist; or, in the course of, or as a result of, an investigation or proceeding under the Act.

The intention of this provision appears to be to mirror the test that applies to journalists seeking to rely on journalist privilege under s205D(1)(c). However, ARTK is concerned that the requirement that a relevant person be "aware of the identity of the informant as the source of the document, thing or information" in order to rely on the privilege is too restrictive and risks unintended consequences when applied in practice.

For example, if the CCC were to require the editor of a newspaper to produce documents relating to the preparation of a news story which included information from a confidential informant, in circumstances where the editor supervised the journalist in preparing the story but the editor themselves does not know the identity of the informant, the editor would be unable to rely on journalist privilege by reason of the requirement in s205D(3). The editor could therefore be compelled documents in the newspaper's possession (which he or she has access to) which could lead to the identification of the confidential informant, notwithstanding that the journalist would otherwise have a claim for journalist privilege. ARTK submits that such an outcome is plainly contrary to the legislative intention of the journalist privilege provisions and should be rectified.

RECOMMENDATION 3

Section 205D(3) of the Bill be amended to make clear that journalist privilege applies if the relevant person to the journalist either:

- a) became aware of the identity of the informant; or
- b) otherwise obtained access to documents, things or information which would enable the informant to be identified,

in the course of the matters set out in s205D(3)(a)-(b).

b) The Time for Filing of an Application Should be Extended

ARTK acknowledges the amendments to the latest draft of the Bill which adopt the term "business days" instead of "court days". However, the period for a journalist to file an appeal in the Supreme Court pursuant to subsections 205ZJ(3) and 205ZK(3) remains 7 days. ARTK submits that 14 days is a more appropriate time frame to allow a journalist to obtain legal advice and prepare and file an appeal.

RECOMMENDATION 4

The time to file an appeal in the Supreme Court pursuant to subsections 205ZJ(3) and 205ZK(3) be amended to 14 days.

c) Journalists Should be Excluded from Hand-Up Requirements

Proposed sections 185(1), 205L(2), 205W(2), 205ZZ(4) and 205ZZK(4) all contain requirements that person compelling to give a document or thing under the Act bring that item with them when questioned by the CCC and/or hand-up that document for safekeeping by the CCC while a claim of privilege is determined. ARTK accepts that the above provisions are consistent with existing requirements of the CCC Act but, nevertheless, objects in principle to both of these requirements being imposed on journalists.

ARTK's members routinely deal with requests for the production of documents, things and information in all Australian jurisdictions as part of their day-to-day business. They are well aware of their professional obligations, including the requirements to comply with established legal processes. To ARTK's knowledge, it has not been suggested that media organisations have engaged in a practice of destroying material that may be required by a court. To the contrary, recent cases show media organisations have complied with retention requirements.

In the circumstances, the requirements that journalists, under threat of penal provisions, must provide material which is the subject of a claim for journalist privilege to the CCC and/or the Court, notwithstanding that the claim remains unresolved, are unnecessary and heavy-handed.

RECOMMENATION 5

The Bill be amended to exclude journalists from these requirements where a claim for journalist privilege has been made.

d) Judges Access to the Privileged Document, Thing or Information

Contrary to proposed s. 205ZL(7) of the Bill, neither the sections of the current Act currently dealing with privilege claims nor the Evidence Act expressly allow a Judge to access the document or thing central to the dispute. No principled explanation as to why that power is now deemed necessary has been provided by the Queensland Government.

Access to the document or thing by a which may identify or tend to identify the source is unlikely to be necessary to the determination of the matters on which the CCC should bear the onus under the Act and would be irrelevant to the question to be determined by the Court. In the absence of cogent reasons being provided as to why the court should have such a power, ARTK objects to it being included in the Act.

RECOMMENDATION 6

Subsection 205ZL(7) of the Bill be deleted.

e) No Offence for a CCC Officers Accessing Document, Thing or Information in Decision Making

As outlined above, ARTK principle position is that CCC officer should not be making journalist privilege decisions at all and, that being the case, this recommendation is of less importance to us. However, ss. 205G(2), 205H(3) and 205S(2) all providing that the relevant CCC officer “must not” accessing the document, thing or information about which they are making a decision. Without this being an offence each of these provisions is a toothless tiger and, thus, ARTK recommends the introduce of a penalty into each of these sections.

RECOMMENDATION 7

Failure to comply with section 205G(2), 205H(3) and 205S(2) be prescribed as an offence.

f) Review “Only Once”

Proposed s205ZJ(4) of the Bill, consistent with what is currently in s195(8) of the *Crime and Corruption Act*, provides that an application for review/appeal based on a reasonable excuse, including journalist privilege, can be brought to the Supreme Court “only once”.

It is not clear to ARTK what effect these subsections are intended to have. For example, is it the drafters’ intention that:

- the right to review/appeal lies only to single Supreme Court judge and that no further right to appeal to the Court of Appeal and/or the High Court apply; or
- review/appeal in relation to any particular document, thing or question only be allowed once even if the review/appeal upholds privilege but the CCC issues a fresh compelling process

- requiring the production of the same document or thing or that the same question be answered;
or
- some other alternative meaning.

RECOMMENDATION 8

The intention of s205ZJ(4) be clarified before the Bill is enacted.

g) Harmonisation of Different Warrant Regimes

The Bill proposes 3 different ways of dealing with different types of warrants or materials seized in the execution of a warrant. We are disappointed that the regimes in clause 17 and 19 of the Bill leave the burden of proof to the journalist but accept that this is consistent with the warrant scheme for journalist privilege in the Evidence Act. That being the case, ARTK submits that clause 17 and 19 should adopt the same treatment of warrants/

RECOMMENDATION 9

Amend clause 17 and 19 of the Bill as recommended in Annexure 1 to this letter, together with the minor amendments to clause 25 also recommended in that annexure.

h) Confidential Notices, Closed Commission Hearings and Confidentiality of Proceedings

None of the comments ARTK made in the 2023 Submission about open justice are reflected in the drafting of the Bill. We ask the Committee to consider that wherever possible the various close-justice aspects of the Act should be reconsidered.

(i) No Criminalisation of Journalism

In line with (h) above, none of ARTK's recommendations that the jail penalties throughout the Bill should not apply to journalist made in the 2023 Submissions have been adopted. Consistent with those previous submissions, none of the proposed ss. 76(1), 81A(1), 81H(1), 185(1), 189(1), 205L(2), 205W(2), 205ZZ(4) or 205ZZK(4) should impose potential jail time on journalists generally but, in particular, the provisions that allow for 5 years in jail should be amended to make it clear that maximum should never apply to a journalist.

Similarly, as was set out in the 2023 Submission, the Bill retains and amends sections 198 and 199 of the Act, allowing a person to be punished for contempt for failing to produce a document or thing pursuant to an attendance notice or IPRH or answer a question put by the presiding officer.

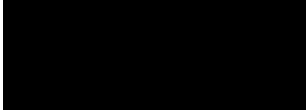
A journalist should never be put in the position of having such an extreme penalty imposed purely for doing his or her job and preserving an obligation of confidentiality. The risk of such a penalty inevitably has a chilling effect on public interest journalists. Further, it is contrary to the Legislative recognition that gives paramountcy to the confidentiality of a source by way of the creation of a statutory privilege from compulsory disclosure of a source's identity or of information to enable it to be ascertained, arising from a proven promise to maintain as confidential the identity of a source.

RECOMMENDATION 10

Each of subsections 76(1), 81A(1), 81H(1), 185(1), 189(1), 198, 199, 205L(2), 205W(2), 205ZZ(4) or 205ZZK(4), if they are enacted, be amended to make it clear that journalist's cannot be jailed or subjected to punishment as a contempt where privilege has been raised.

ARTK trusts this submission is useful in the Committee's considering of the Bill and implementing a workable journalist shield.

Kind regards



Georgia-Kate Schubert

On behalf of Australia's Right to Know coalition of media organisations

ANNEXURE 1

KEY

Black text – current drafting of the Act

Green text – inserted by the Bill

Red text – omitted by the Bill

Blue text – additional amendments recommended by ARTK

Clause 17 of the Bill

94 Limitation on search warrant powers for corruption investigations

- (1) This section applies if:
- an authorised commission officer who is exercising search warrant powers for a corruption investigation wishes to inspect, photograph or seize a document or thing under the warrant; and
 - a person who is entitled to claim the privilege claims the document or thing is subject to privilege.
- (2) The authorised commission officer must consider the claim and may ~~withdraw the requirement in relation to which the claim is made or advise the person that the person may apply to, or be required to attend before, the Supreme Court to establish the claim under section 196.~~—
- decide to withdraw the requirement in relation to which the claim is made; or
 - in relation to a claim that is not based on journalist privilege, decide not to withdraw the requirement and advise the person that, ~~for a claim of privilege other than journalist privilege,~~ the person may apply to, or be required to attend before, the Supreme Court to establish the claim under section 205ZW; or
Note— For a claim of journalist privilege, see the Evidence Act 1977, part 2, division 2B, subdivision 3.
 - in relation to a claim based on journalist privilege, decide not to withdraw the requirement and advise the person that, ~~for a claim of privilege other than journalist privilege,~~ the person may apply to, or be required to attend before, the Supreme Court to establish the claim under section 205ZW; or
Note— For a claim of journalist privilege, see the Evidence Act 1977, part 2, division 2B, subdivision 3.
- (3) If the commission officer ~~does not withdraw the requirement, section 81 applies.~~ decides not to withdraw the requirement—
- for which a claim of journalist privilege has been made—the *Evidence Act 1977*, part 2, division 2B, subdivision 3 and subsection 205ZW(6) apply ~~applies~~; or
 - for which another claim of privilege has been made—chapter 4A, part 4, division 3 applies.
- (4) In this section:
"privilege" does not include privilege on the ground of confidentiality or self-incrimination privilege.

Clause 19 of the Bill

111 General power to seize evidence: corruption investigation

- (1) This section applies if a commission officer conducting a corruption investigation who lawfully enters a place under a search warrant:
- finds at the place a thing the officer reasonably suspects is admissible evidence of an indictable offence against the law of the Commonwealth or of any State; and
 - reasonably believes that it is necessary to seize the thing:
 - to prevent its loss, destruction, mutilation or concealment; or
 - to prevent its use for committing an offence of a kind mentioned in paragraph (a).
- (2) The officer may seize the thing.
- (3) However, if a person who is entitled to claim the privilege claims the document or thing is subject to privilege, the authorised commission officer must consider the claim and may:

- ~~(a) withdraw the requirement in relation to which the claim is made; or~~
- ~~(b) advise the person that the person may apply to, or be required to attend before, the Supreme Court to establish the claim under section 196.~~

- (a) decide to withdraw the requirement in relation to which the claim is made; or
- (b) in relation to a claim that is not based on journalist privilege, decide not to withdraw the requirement and advise the person that, ~~for a claim of privilege other than journalist privilege,~~ the person may apply to, or be required to attend before, the Supreme Court to establish the claim under section 205ZW; or

~~Note— For a claim of journalist privilege, see the Evidence Act 1977, part 2, division 2B, subdivision 3.~~

- (c) in relation to a claim based on journalist privilege, decide not to withdraw the requirement and advise the person that, ~~for a claim of privilege other than journalist privilege,~~ the person may apply to, or be required to attend before, the Supreme Court to establish the claim under section 205ZW; or

Note— For a claim of journalist privilege, see the Evidence Act 1977, part 2, division 2B, subdivision 3.

- ~~(4) If a claim of privilege is made and the commission officer does not withdraw the requirement, section 81 applies~~ decides not to withdraw the requirement, chapter 4A, part 4, division 3 applies.
- (4) If the commission officer decides not to withdraw the requirement—
 - (a) for which a claim of journalist privilege has been made—the Evidence Act 1977, part 2, division 2B, subdivision 3 and subsection 205ZW(6) apply; or
 - (b) for which another claim of privilege has been made—chapter 4A, part 4, division 3 applies.
- (5) In this section:
"privilege" does not include privilege on the ground of confidentiality or self-incrimination privilege.

Clause 25 of the Bill

185 Refusal to produce document or thing

- (1) A person required to produce a document or thing at a commission hearing under an attendance notice or immediate production requirement (hearing) must—
 - (a) if the document or thing is in the person's possession, bring the document or thing to the hearing, regardless of whether the person has a reasonable excuse for paragraph (b) **other than a reasonable excuse based on journalist privilege;** and
 - (b) produce the document or thing at the hearing unless the person has a reasonable excuse.Maximum penalty—200 penalty units or 5 years imprisonment.

Note— If a claim of reasonable excuse is made, the claim is dealt with under chapter 4A.

- (2) An offence against subsection (1) is a misdemeanour.
- (3) It is not a reasonable excuse for subsection (1) that complying with the notice or requirement might tend to incriminate the person.

Note— If a claim of self-incrimination privilege is made, the claim is dealt with under chapter 4A.

189 Refusal to answer question

- (1) A witness at a commission hearing must answer a question, including a question about a claim of reasonable excuse made at the hearing, put to the person at the hearing by the presiding officer unless the person has a reasonable excuse.
Maximum penalty—200 penalty units or 5 years imprisonment.
- (2) An offence against subsection (1) is a misdemeanour.
- (3) It is not a reasonable excuse for subsection (1) that answering the question might tend to incriminate the person.

Note— If a claim of self-incrimination privilege is made, the claim is dealt with under chapter 4A.

- (4) A person commits an offence under subsection (1) if the person remains silent.

190 Claim of reasonable excuse

A person does not commit an offence against section 189(1) if the person has made a claim of reasonable excuse and 1 of the following applies—

- (a) the commission withdraws the question;
- (b) the claim of reasonable excuse is based on journalist privilege and the person does not answer any subsequent question that may cause the loss of that privilege;
- (c) the commission is ordered by the Supreme Court to withdraw the question.

KEY

Black text – current drafting of the Act

Green text – inserted by the Bill

Red text – omitted by the Bill

Chapter 4A – Procedure on claims of reasonable excuse, including privilege

Part 1 – Preliminary

205A Definitions for chapter

In this chapter:

informant see section 205D(1)(c).

journalist see section 205C(1).

journalist privilege means the privilege established under section 205D.

news medium means a medium for the dissemination of news and observations on news to the public or a section of the public.

privilege see section 205B.

relevant person, for a journalist, means:

- (a) a current or previous employer of the journalist; or
- (b) a person who has engaged the journalist on a contract for services; or
- (c) a person who:
 - (i) is or has been involved in the publication of a news medium; and
 - (ii) works or has worked with the journalist in relation to publishing information in the news medium.

205B Meaning of *privilege*

Privilege, in relation to an answer, information, communication, document or thing, means:

- (a) parliamentary privilege; or
- (b) legal professional privilege; or
- (c) public interest immunity; or
- (d) a claim on the ground of confidentiality; or
- (e) self-incrimination privilege; or
- (f) journalist privilege.

205C Who is a *journalist*

- (1) A person is a **journalist** if the person is engaged and active in:
 - (a) gathering and assessing information about matters of public interest; and
 - (b) preparing the information, or providing comment or opinion on or analysis of the information, for publication in a news medium.
- (2) In deciding whether a person is a journalist, a deciding officer, presiding officer or the Supreme Court may consider the following matters:
 - (a) whether the person is regularly engaged and active in the activities mentioned in subsection (1);
 - (b) whether the person complies with a recognised professional standard or code of practice in carrying out the activities;
 - (c) whether the publisher of the news medium complies with a recognised professional standard or code of practice in publishing information in the news medium;
 - (d) any other matter the officer or court considers relevant.

205D Journalist privilege relating to identity of informants

- (4) This section applies if:
 - (a) a person makes a claim of reasonable excuse based on journalist privilege for not complying with a requirement to:
 - (iii) produce a document, thing or information to the commission; or
 - (iv) provide information in answer to a question at a commission hearing; and
 - (b) the person is a journalist or a relevant person for a journalist; and
 - (c) another person (the **informant**) gave the document, thing or information to the journalist, in the normal course of the journalist's activities as a journalist, in the expectation the document, thing or information may be published in a news medium; and
 - (d) the journalist promised the informant not to disclose the informant's identity as the source of the document, thing or information.
- (5) Subject to this chapter, the journalist or the relevant person can not be compelled to comply with the requirement if complying with the requirement would:
 - (a) disclose the identity of the informant as the source of the document, thing or information; or
 - (b) enable the identity of the informant as the source of the document, thing or information to be ascertained.
- (6) However, this section applies in relation to a relevant person for the journalist only if the relevant person became aware of the identity of the informant as the source of the document, thing or information:
 - (a) in the normal course of the relevant person's work with the journalist; or
 - (b) in the course of, or as a result of, an investigation or proceeding under this Act.
- (4) To remove any doubt, it is declared that this section does not prevent another person from disclosing the informant's identity as the source of the document, thing or information.

205E Part of document or thing

- (1) A claim of reasonable excuse in relation to a document or thing required to be produced under this Act may be made in relation to only part of the document or thing.
- (2) A reference in this chapter to a document or thing includes a reference to a part of the document or thing.

Part 2 – Claims dealt with by commission

Division 1 – Claims made outside of hearings

Subdivision 1 – Dealing with claims other than for journalist privilege

205F Application of subdivision

- (1) This subdivision applies if:
 - (a) a person claims a reasonable excuse:
 - (i) under section 76(1) in relation to a requirement to produce a document or thing under a notice to produce; or
 - (ii) under section 81H(1) in relation to a requirement to give a statement of information under a notice to discover; and
 - (b) the document, thing or information was not required to be produced at a commission hearing; and
 - (c) the reasonable excuse is not journalist privilege.
- (2) This subdivision also applies if a person claims privilege under section 81M(2) in relation to a document or thing found in or on official premises that a commission officer proposed, under an authorisation under section 81L:
 - (a) to inspect; or
 - (b) to seize and remove; or
 - (c) for a document: to make copies of or take extracts from.
- (3) In this subdivision, a reference to a requirement in relation to a document or thing includes a reference

to a commission officer exercising a power under section 81M(1) in relation to the document or thing.

205G Commission officer to consider claim

- (1) The commission officer who required the document, thing or information to be given must consider the claim and may:
 - (a) decide to withdraw the requirement in relation to which the claim is made; or
 - (b) decide not to withdraw the requirement and advise the person by notice:
 - (i) that the claim will be dealt with under this part; and
 - (ii) that the person may make written submissions to the commission; and
 - (iii) the day by which the submissions must be made, which must be at least 7 days after the notice is given.
- (2) When considering the claim, the commission officer must not access the document, thing or information the subject of the claim.

205H Deciding officer to decide claim or decline to decide claim

- (1) This section applies if the commission officer does not withdraw the requirement.
- (2) The chairperson or a senior officer (the *deciding officer*) must:
 - (a) consider the claim; and
 - (b) consider any written submissions made by the person; and
 - (c) either:
 - (i) decide the claim under section 205J or division 3; or
 - (ii) for a claim of reasonable excuse based on privilege: in the circumstances, decline to decide the claim.

Example of circumstances in which a deciding officer may decline to decide a claim: The deciding officer is unable to decide the claim because the officer does not have enough information to decide the claim.
- (3) When considering the claim, the deciding officer must not access the document, thing or information the subject of the claim.
- (4) The deciding officer must deal with the claim expeditiously.
- (5) In this section:

senior officer means a senior officer who:

 - (a) is not the commission officer or part of the investigation, operation or function to which the requirement relates; and
 - (b) holds a position at a level equivalent to or 1 above the commission officer's level; and
 - (c) is appropriately qualified to decide the claim.

205I Deciding officer declines to decide claim of reasonable excuse based on privilege

If the deciding officer declines to decide a claim of reasonable excuse based on privilege, the officer must give the person:

- (a) reasons for the decision; and
- (b) a notice advising the person that the person may be required to attend before the Supreme Court under section 205ZK to establish the claim.

205J Reasonable excuse not based on privilege

- (1) If the deciding officer decides a claim of reasonable excuse not based on privilege is established, the officer may:
 - (a) amend the requirement to which the claim relates; or
 - (b) withdraw the requirement to which the claim relates.
- (2) If the deciding officer decides a claim of reasonable excuse not based on privilege is not established, the officer must:
 - (a) require the person making the claim to comply with the requirement to which the claim relates; and

- (b) give the person:
 - (i) reasons for the decision; and
 - (ii) an application notice for the decision.

Subdivision 1A - Dealing with claims for journalist privilege

205JA Application of subdivision

- (1) This subdivision applies if:
 - (a) a person claims a reasonable excuse:
 - (i) under section 76(1) in relation to a requirement to produce a document or thing under a notice to produce; or
 - (ii) under section 81H(1) in relation to a requirement to give a statement of information under a notice to discover; and
 - (b) the document, thing or information was not required to be produced at a commission hearing; and
 - (c) the reasonable excuse is based on journalist privilege.

205JB Commission officer to consider claim

- (1) The commission officer who required the document, thing or information to be given must consider the claim and either:
 - (a) decide to withdraw the requirement in relation to which the claim is made; or
 - (b) in the circumstances, decline to decide the claim.

Example of circumstances in which a deciding officer may decline to decide a claim: The deciding officer is unable to decide the claim because the officer does not have enough information to decide the claim.
- (2) When considering the claim, the commission officer must not access the document, thing or information the subject of the claim if it available to the commission officer.

205JC Deciding officer declines to withdraw a requirement following a claim of journalist privilege

If the deciding officer declines to withdraw a requirement after a person claims a reasonable excuse on the basis of journalist privilege, the officer must give the person:

- (a) reasons for the decision; and
- (b) a notice advising the person that the person may be required to attend before the Supreme Court under section 205ZK to establish the claim.

Subdivision 2 – Procedures for documents and things other than in relation to a claim for journalist privilege

205K Application of subdivision

This subdivision applies if:

- (a) a person makes a claim of reasonable excuse **other than a claim for journalist privilege** in relation to a document or thing the person is required to give or produce to the commission, other than at a commission hearing; and
- (b) the person acknowledges that the document or thing is in the person's possession; and
- (c) the commission officer who required the document or thing to be given decides not to withdraw the requirement under section 205G(b); and
- (d) section 205ZZC does not apply.

205L Procedure for claims made outside of hearings

- (1) The commission officer must require the person to seal the document or thing immediately and give it to the commission officer for safekeeping.
- (2) The person must immediately seal the document or thing and give it to the commission officer for safekeeping.

Maximum penalty: 85 penalty units or 1 year's imprisonment.
- (3) The commission officer must:

- (a) give the person a receipt for the sealed document or thing; and
 - (b) place it in safe custody at the commission's place of business at the earliest reasonable opportunity.
- (4) A person must not open the sealed document or thing unless authorised to open it under this Act or a court order.
Maximum penalty: 85 penalty units or 1 year's imprisonment.

205M Procedure if requirement is withdrawn

- (1) This section applies if the requirement to give a document or thing sealed under section 205L is withdrawn under section 205J or division 3.
- (2) The commission must return the sealed document or thing to the person within 7 days after the requirement is withdrawn.

205N Procedure if chairperson does not apply to Supreme Court after deciding officer declines to decide claim

- (1) This section applies if:
 - (a) a document or thing sealed under section 205L is the subject of a decision by a deciding officer to decline to decide a claim under section 205I; and
 - (b) the chairperson fails to apply to the Supreme Court under section 205ZK within the period allowed under that section.
- (2) The commission must return the sealed document or thing to the person within 7 days after the end of the period mentioned in subsection (1)(b).

205O Procedure if person does not apply to Supreme Court

- (1) This section applies if:
 - (a) a document or thing sealed under section 205L is the subject of:
 - (i) a decision by a deciding officer under section 205J in relation to which the officer advised the person of their right to apply to the Supreme Court under section 205ZH; or
 - (ii) a decision by a deciding officer under division 3 in relation to which the officer advised the person of their right to apply to the Supreme Court under section 205ZJ; and
 - (b) the person fails to apply to the Supreme Court under section 205ZH or 205ZJ within the period allowed under the relevant section.
- (2) The commission may access the sealed document or thing.

205P Procedure if person or chairperson applies to Supreme Court

- (1) This section applies if:
 - (a) a document or thing sealed under section 205L is the subject of:
 - (i) a decision by a deciding officer under section 205J in relation to which the officer advised the person of their right to apply to the Supreme Court under section 205ZH; or
 - (ii) a decision by a deciding officer under division 3 in relation to which the officer advised the person of their right to apply to the Supreme Court under section 205ZJ; and
 - (b) the person applies to the Supreme Court under section 205ZH or 205ZJ within the period allowed under the relevant section.
- (2) This section also applies if:
 - (a) a document or thing sealed under section 205L is the subject of a decision by a deciding officer to decline to decide a claim under section 205I; and
 - (b) the chairperson applies to the Supreme Court under section 205ZK within the period allowed under that section.
- (3) The commission's representative must immediately deliver the sealed document or thing to a registrar of the Supreme Court to be held in safe custody.
Maximum penalty: 85 penalty units or 1 year's 18 imprisonment.

- (4) The commission's representative must notify the person that the sealed document or thing has been delivered to the registrar.
- (5) A person must not open the sealed document or thing unless authorised to open it under this Act or a court order.
Maximum penalty: 85 penalty units or 1 year's 26 imprisonment.

205Q Action by registrar

- (1) This section applies if a sealed document or thing has been delivered to a registrar of the Supreme Court under section 205P.
- (2) The registrar must keep the sealed document or thing in safe custody until:
 - (a) the application under section 205ZH, 205ZJ or 205ZK is decided by the Supreme Court;
 - (b) the person and the commission's representative give the registrar notice that agreement has been reached on the disposal of the sealed document or thing.
- (3) The registrar must:
 - (a) if the application under section 205ZH, 205ZJ or 205ZK is decided by the Supreme Court: dispose of the sealed document or thing in the way ordered by the court; or
 - (b) if the person and the commission's representative give the registrar notice that agreement on the disposal of the sealed document or thing has been reached: dispose of the sealed document or thing in the way agreed.

Subdivision 2A - Procedures for documents and things in relation to a claim for journalist privilege

205QA Application of subdivision

This subdivision applies if:

- (a) a person makes a claim of reasonable excuse based on journalist privilege in relation to a document or thing the person is required to give or produce to the commission, other than at a commission hearing; and
- (b) the person acknowledges that the document or thing is in the person's possession; and
- (c) the commission officer who required the document or thing declines to decide the claim pursuant to section 205JB(b).

205QB Procedure for journalist privilege claims

- (1) The commission officer must require the person to seal the document or thing immediately and store the sealed document or thing in a safe location.
- (2) If the document or thing includes or contains material that is not the subject of the requirement referred to in section 205JA, the person obliged to store the document or thing pursuant to subsection (1) may meet that obligation by sealing a hard or soft copy of each part of the document or thing that is subject to the requirement.
- (3) The person must give the commission officer a written notice confirming that the document or thing, or a copy of the document or thing, has been sealed and stored in compliance with subsections (1) and (2).
- (4) A person must not open the sealed document or thing, or copy of a document or thing, unless:
 - (a) the requirement is withdrawn;
 - (b) the chairperson fails to apply to the Supreme Court under section 205ZK within the period allowed under that section;
 - (c) the person is otherwise authorised to open it under this Act; or
 - (e) the person is authorised to open it under a court order.

Division 2 – Claims made in hearings

Subdivision 1 – Dealing with claims **other than for journalist privilege**

205R Application of subdivision

- (1) This subdivision applies if:
 - (a) a person claims a reasonable excuse under section 81H(1) **other than for journalist privilege** in relation to a requirement to give a statement of information under an notice to discover; and
 - (b) the statement was required to be given at a commission hearing.
- (2) This subdivision also applies if a person claims a reasonable excuse **other than for journalist privilege** :
 - (a) under section 185(1) in relation to a document or thing required to be produced under an attendance notice or immediate production requirement (hearing); or
 - (b) under section 189(1) in relation to a requirement to answer a question.

205S Presiding officer to decide claim or decline to decide claim

- (1) The presiding officer must:
 - (a) consider the claim; and
 - (b) hear the person’s submissions; and
 - (c) either:
 - (i) decide the claim under section 205U or division 3; or
 - (ii) for a claim of reasonable excuse based on privilege: in the circumstances, decline to decide the claim.

Example of circumstances in which a presiding officer may decline to decide a claim: The presiding officer is unable to decide the claim because the officer does not have enough information to decide the claim.
- (2) When considering the claim, the presiding officer must not access the document, thing or information the subject of the claim.

205T Presiding officer declines to decide claim of reasonable excuse based on privilege

If the presiding officer declines to decide a claim of reasonable excuse based on privilege, the officer must give the person:

- (a) reasons for the decision; and
- (b) a notice advising the person that the person may be required to attend before the Supreme Court under section 205ZK to establish the claim.

205U Reasonable excuse not based on privilege

- (1) If the presiding officer decides a claim of reasonable excuse not based on privilege is established, the officer may:
 - (a) amend the requirement to which the claim relates; or
 - (b) withdraw the requirement to which the claim relates.
- (2) If the presiding officer decides a claim of reasonable excuse not based on privilege is not established, the officer must:
 - (a) require the person making the claim to comply with the requirement to which the claim relates; and
 - (b) give the person:
 - (i) reasons for the decision; and
 - (ii) an application notice for the decision.

Subdivision 1A – Dealing with claims for journalist privilege

205UA Application of subdivision

- (1) This subdivision applies if:
 - (a) a person claims a reasonable excuse based on journalist privilege under section 81H(1) in relation to a requirement to give a statement of information under an notice to discover; and
 - (b) the statement was required to be given at a commission hearing.

- (2) This subdivision also applies if a person claims a reasonable excuse based on journalist privilege :
 - (a) under section 185(1) in relation to a document or thing required to be produced under an attendance notice or immediate production requirement (hearing); or
 - (b) under section 189(1) in relation to a requirement to answer a question.

205UB Presiding officer to consider claim

- (1) The presiding officer must consider the claim and either:
 - (a) decide to withdraw the requirement in relation to which the claim is made; or
 - (b) in the circumstances, decline to decide the claim.
 - Example of circumstances in which a presiding officer may decline to decide a claim: The presiding officer is unable to decide the claim because the officer does not have enough information to decide the claim.*
- (2) If the claim is in relation to a document or thing required to be produced under an attendance notice or immediate production requirement (hearing), the presiding officer must not access the document or thing when considering the claim if it is available to the presiding officer.

205UC Presiding officer declines to decide claim of reasonable excuse based on journalist privilege

If the presiding officer declines to decide a claim of reasonable excuse based on journalist privilege, the officer must give the person:

- (a) reasons for the decision; and
- (b) a notice advising the person that the person may be required to attend before the Supreme Court under section 205ZK to establish the claim.

Subdivision 2 – Procedures for documents and things other than in relation to a claim for journalist privilege

205V Application of subdivision

- (1) This subdivision applies if:
 - (a) a person makes a claim of reasonable excuse **other than a claim based on journalist privilege** in relation to a document or thing the person is required to give or produce at a commission hearing; and
 - (b) the person acknowledges that the document or thing is in the person’s possession; and
 - (c) 1 of the requirements mentioned in subsection (2) is met; and
 - (d) section 205ZZC does not apply.
- (2) The requirements are:
 - (a) the presiding officer declines to decide the claim under section 205T; or
 - (b) both of the following:
 - (i) the presiding officer does not withdraw the requirement under section 205U or division 3;
 - (ii) the person informs the presiding officer that:
 - (A) the person wishes to apply to the Supreme Court or consider an application to the Supreme Court under section 205ZH or 205ZJ in relation to the document or thing; or
 - (B) the person does not intend to comply with the requirement.

205W Procedure for claims made in hearings

- (1) The presiding officer must require the person to seal the document or thing immediately and give it to the presiding officer for safekeeping.
- (2) The person must immediately seal the document or thing under the supervision of the presiding officer.
Maximum penalty: 85 penalty units or 1 year’s imprisonment.
- (3) The commission’s representative and, if practicable, the person must immediately deliver the sealed document or thing to a registrar of the Supreme Court to be held in safe custody.
Maximum penalty: 85 penalty units or 1 year’s imprisonment.

205X Action by registrar – if presiding officer declined to decide claim

- (1) This section applies if:
 - (a) the commission's representative and, if applicable, the person delivered a sealed document or thing to a registrar of the Supreme Court under section 205W(3); and
 - (b) the requirement mentioned in section 205V(2)(a) applies.
- (2) The registrar must keep the sealed document or thing in safe custody until the first of the following happens:
 - (a) the person and the commission's representative give the registrar notice that agreement has been reached on the disposal of the sealed document or thing;
 - (b) an application is made to the Supreme Court under section 205ZK to decide the claim of reasonable excuse;
 - (c) the end of the period in which an application may be made to the Supreme Court under section 205ZK.
- (3) The registrar must:
 - (a) if the person and the commission's representative give the registrar notice that agreement has been reached on the disposal of the sealed document or thing: dispose of the sealed document or thing in the way agreed; or
 - (b) if an application is made to the Supreme Court under section 205ZK to decide the claim of reasonable excuse: dispose of the sealed document or thing in the way ordered by the court; or
 - (c) if subsection (2)(a) does not apply and an application is not made by the end of the period in which the chairperson may apply to the Supreme Court under section 205ZK: give the sealed document or thing to the person.

205Y Action by registrar –if presiding officer did not withdraw requirement

- (1) This section applies if:
 - (a) the commission's representative and, if applicable, the person delivered a sealed document or thing to a registrar of the Supreme Court under section 205W(3); and
 - (b) the requirement mentioned in section 205V(2)(b) applies.
- (2) The registrar must keep the sealed document or thing in safe custody until the first of the following happens:
 - (a) the person and the commission's representative give the registrar notice that agreement has been reached on the disposal of the sealed document or thing;
 - (b) an application is made to the Supreme Court under section 205ZH or 205ZJ to decide the claim of reasonable excuse;
 - (c) the end of the period in which the person may apply to the Supreme Court under section 205ZH or 205ZJ.
- (3) The registrar must:
 - (a) if the person and the commission's representative give the registrar notice that agreement has been reached on the disposal of the sealed document or thing: dispose of the sealed document or thing in the way agreed; or
 - (b) if an application is made to the Supreme Court under section 205ZH or 205ZJ to decide the claim of reasonable excuse: dispose of the sealed document or thing in the way ordered by the court; or
 - (c) if subsection (2)(a) does not apply and an application is not made by the end of the period in which the person may apply to the Supreme Court under section 205ZH or 205ZJ: give the sealed document or thing to the commission, who may access it.

Subdivision 2A – Procedures for documents and things in relation to a claim for journalist privilege

205YA Application of subdivision

- (1) This subdivision applies if:
 - (a) a person makes a claim of reasonable excuse based on journalist privilege in relation to a document or thing the person is required to give or produce at a commission hearing; and
 - (b) the person acknowledges that the document or thing is in the person's possession; and

- (c) the presiding officer declined to decide the claim pursuant to section 205UB(1)(b).

205YB Procedure for journalist privilege claims

- (1) The presiding officer must require the person to seal the document or thing immediately and store the sealed document or thing in a safe location.
- (2) If the document or thing includes or contains material that is not the subject of the requirement referred to in section 205UA, the person obliged to store the document or thing pursuant to subsection (1) may meet that obligation by sealing a hard or soft copy of each part of the document or thing that is subject to the requirement.
- (3) The person must give the presiding officer a written notice confirming that the document or thing, or a copy of the document or thing, has been sealed and stored in compliance with subsections (1) and (2).
- (4) A person must not open the sealed document or thing, or copy of a document or thing, unless:
 - (a) the requirement is withdrawn;
 - (b) the chairperson fails to apply to the Supreme Court under section 205ZK within the period allowed under that section;
 - (c) the person is otherwise authorised to open it under this Act; or
 - (e) the person is authorised to open it under a court order.

Division 3 – Deciding claims of privilege

205Z Purpose and application of division

- (1) This division provides for:
 - (a) how claims of privilege being considered by a deciding officer under division 1 or a presiding officer under division 2 are decided; and
 - (b) the circumstances in which a person can be required to produce a document, thing or information, or answer a question, even if the deciding officer or presiding officer decides a claim of confidentiality, self-incrimination privilege or journalist privilege is established.

Note: See section 197 for a restriction on the use of an answer, document, thing or statement disclosed or produced where a person claims self-incrimination privilege in relation to the answer, document, thing or statement.

- (2) In this division, a reference to a requirement in relation to a document or thing includes a reference to a commission officer exercising a power under section 81M(1) in relation to the document or thing.

205ZA Parliamentary privilege

- (1) If the deciding officer or presiding officer decides a claim on the ground of parliamentary privilege is established, the officer must withdraw the requirement to which the claim relates.
- (2) If the deciding officer or presiding officer decides a claim on the ground of parliamentary privilege is not established, section 205ZG(2) applies.

205ZB Legal professional privilege

- (1) If the deciding officer or presiding officer decides a claim on the ground of legal professional privilege is established, the officer must withdraw the requirement to which the claim relates.
- (2) If the deciding officer or presiding officer decides a claim on the ground of legal professional privilege is established but the privilege has been waived by a person having authority to waive it, the person must comply with the requirement to which the claim relates.
- (3) If the deciding officer or presiding officer decides a claim on the ground of legal professional privilege is not established, section 205ZG(2) applies.

205ZC Public interest immunity

- (1) If the deciding officer or presiding officer decides a claim on the ground of public interest immunity is established, the officer must withdraw the requirement to which the claim relates.
- (2) If the deciding officer or presiding officer decides a claim on the ground of public interest immunity is not established, section 205ZG(2) applies.

205ZD Confidentiality

- (1) Subsection (2) applies if the deciding officer or presiding officer decides a claim on the ground of confidentiality is established and it would not be against the public interest:
 - (a) for a claim related to a requirement to produce a document, thing or information: for the document, thing or information to be produced; or
 - (b) for a claim related to a requirement to answer a question: for the question to be answered.
- (2) The deciding officer or presiding officer must require the person to comply with the requirement to which the claim relates.
- (3) If the deciding officer or presiding officer makes a requirement of the person under subsection (2), section 205ZG(2) applies.
- (4) If the deciding officer or presiding officer decides a claim on the ground of confidentiality is established and it would be against the public interest for the document, thing or information to be produced or question to be answered, the officer must withdraw the requirement to which the claim relates.

- (5) If the deciding officer or presiding officer decides a claim on the ground of confidentiality is not established, section 205ZG(2) applies.

205ZE Self-incrimination privilege

- (1) If the deciding officer or presiding officer decides a claim on the ground of self-incrimination privilege is established, the person must comply with the requirement to which the claim relates.
Note: See section 197 for a restriction on the use of an answer, document, thing or statement disclosed or produced where a claim of self-incrimination privilege in relation to the answer, document, thing or statement is established.
- (2) If the deciding officer or presiding officer decides a claim on the ground of self-incrimination privilege is not established, section 205ZG(2) applies.

205ZF Journalist privilege

- ~~(1) Subsections (2) and (3) apply if the deciding officer or presiding officer decides a claim made by a journalist or a relevant person for a journalist on the ground of journalist privilege is established in relation to a requirement to produce a document, thing or information or provide information in answer to a question and the public interest in disclosing the identity of the informant the subject of the claim outweighs:~~
- ~~(a) any likely adverse effect of the disclosure on the informant or another person; and~~
- ~~(b) the public interest in:~~
- ~~(i) the communication of facts and opinion to the public by the news media; and~~
- ~~(ii) the ability of the news media to access sources of facts.~~
- ~~(2) The deciding officer or presiding officer:~~
- ~~(a) may require the journalist or relevant person to comply with the requirement to which the claim relates; or~~
- ~~(b) otherwise: must withdraw the requirement to which the claim relates.~~
- ~~(3) In deciding whether to make the requirement of the journalist or relevant person, the deciding officer or presiding officer may have regard to the following matters:~~
- ~~(a) whether the document, thing or information is a matter of public interest;~~
- ~~(b) the nature and subject matter of the investigation, operation or function to which the requirement relates;~~
- ~~(c) the importance of the document, thing or information, and the informant's identity, to the investigation, operation or function to which the requirement relates and the availability of other evidence in relation to the document, thing or information;~~
- ~~(d) any likely adverse effect of disclosing the informant's identity on the informant or another person and whether the effect can be mitigated;~~
- ~~(e) whether the informant's identity as the source of the document, thing or information is already in the public domain;~~
- ~~(f) any decision previously made by the commission or a court about a claim, objection or application in relation to the document, thing or information;~~
- ~~(g) the way in which the document, thing or information has been used or kept by the journalist, including whether the journalist:~~
- ~~(i) verified the document, thing or information; or~~
- ~~(ii) used the document, thing or information in a way that is fair and accurate and minimised any likely adverse effect on another person;~~
- ~~(h) whether the journalist complied with a recognised professional standard or code of practice in obtaining, using or receiving the document, thing or information;~~
- ~~(i) whether obtaining, using, giving or receiving the document, thing or information:~~
- ~~(i) involved an offence or misconduct by the informant or the journalist; or~~
- ~~(ii) poses a risk to national security or the security of the State;~~
- ~~(j) the extent to which making the requirement is likely to deter other persons from giving information to journalists;~~
- ~~(k) any other matter the deciding officer or presiding officer considers relevant.~~

~~(4) If the deciding officer or presiding officer requires the journalist or relevant person to comply the requirement to which the claim relates, section 205ZG(2) applies.~~

~~(5) If the deciding officer or presiding officer decides a claim on the ground of journalist privilege is not established, section 205ZG(2) applies.~~

205ZG Claim not established or requirement made

- (1) This section applies if the deciding officer or presiding officer:
 - (a) decides that the claim is not established; or
 - (b) requires the person to comply with the requirement to which the claim relates.
- (2) The deciding officer or presiding officer must give the person:
 - (a) reasons for the decision; and
 - (b) an application notice for the decision.

Part 3 – Claims dealt with by Supreme Court

Division 1 – Claims of reasonable excuse not based on privilege

Division 2 – Claims of reasonable excuse based on privilege

205ZJ Applications about decisions of deciding officers and presiding officers

- (1) This section applies in relation to:
 - (a) a decision of a deciding officer or presiding officer under part 2, division 3 that a claim of reasonable excuse based on privilege is not established; or
 - (b) a decision of a deciding officer or presiding officer under any of the following sections to make a requirement of a person:
 - (i) section 205ZD(2);
 - (ii) section 205ZF(2)(a).
- (2) The person may apply to the Supreme Court for the court to decide the claim of reasonable excuse based on privilege the subject of the decision.
- (3) The person must apply within 147 days after the day the person receives the application notice under the relevant section.
- (4) The person may apply only once under subsection (2) in relation to a particular requirement:
 - (a) to produce information or a document or thing; or
 - (b) to answer a question.

205ZK Applications after deciding officer or presiding officer declines to decide claim

- (1) This section applies if:
 - (a) a deciding officer declines under section 205I or section 205JB to decide a claim of reasonable excuse based on privilege; or
 - (b) a presiding officer declines under section 205T or section 205UB to decide a claim of reasonable excuse based on privilege.
- (2) The chairperson may apply to the Supreme Court for the court to decide the claim.
- (3) The chairperson must apply within 147 days after the day the person making the claim receives the notice under the relevant provision.

205ZL Supreme Court to decide claim

- (1) This section applies in relation to an application made under section 205ZJ or 205ZK.
- (2) Other than for a claim on the ground of journalist privilege, the burden of proof on the application is on the person who seeks:
 - (a) to withhold the document, thing or information; or
 - (b) not to answer the question; or
 - (c) to prevent the exercise of authority.
- (3) For a claim on the ground of journalist privilege:
 - (a) the burden of proof for establishing the claim is on the journalist or relevant person for the journalist; and
 - (b) the burden of proof in relation to the matters mentioned in section 205ZS(1), other than the establishment of the claim, is on the commission.
- (4) The Supreme Court must:
 - (a) consider the claim of reasonable excuse based on privilege the subject of the application; and
 - (b) hear the person's submissions and the commission's submissions; and
 - (c) decide the claim under division 3.
- (5) The Supreme Court must deal with the application expeditiously.
- (6) The Supreme Court may hear the application in any way it considers appropriate, including, for example, by hearing the matter afresh, in whole or part.

- ~~(7) When considering the claim, the Supreme Court may access the document, thing or information the subject of the claim.~~
- (8) The application is to be heard in closed court.
Note: See also section 200A in relation to the confidentiality of proceedings under this section.
- (9) However, the Supreme Court may permit another person to be present at a hearing for the application if the court considers it is in the interests of justice to do so.
- (10) The Supreme Court must give reasons for the court's decision, which may be given orally.
- (11) Costs of the application are to be borne by the commission, unless otherwise ordered by the Supreme Court on the ground that the claim is frivolous or vexatious.

Division 3 – Deciding claims of Privilege

205ZM Purpose of division

This division provides for how claims of privilege being considered by the Supreme Court under the following provisions are decided:

- (a) division 2;
- (b) part 4, division 2;
- (c) part 6, division 2.

205ZN Parliamentary privilege

- (1) If the Supreme Court decides a claim on the ground of parliamentary privilege is established, the court must order the commission to withdraw the requirement to which the claim relates.
- (2) If the Supreme Court decides a claim on the ground of parliamentary privilege is not established, the court must order the person to produce the document, thing or information or answer the question.

205ZO Legal professional privilege

- (1) If the Supreme Court decides a claim on the ground of legal professional privilege is established, the court must order the commission to withdraw the requirement to which the claim relates.
- (2) If the Supreme Court decides a claim on the ground of legal professional privilege is established but the privilege has been waived by a person having authority to waive it, the court must order the person to produce the document, thing or information or answer the question.
- (3) If the Supreme Court decides a claim on the ground of legal professional privilege is not established, the court must order the person to produce the document, thing or information or answer the question.

205ZP Public interest immunity

- (1) If the Supreme Court decides a claim on the ground of public interest immunity is established, the court must order the commission to withdraw the requirement to which the claim relates.
- (2) If the Supreme Court decides a claim on the ground of public interest immunity is not established, the court must order the person to produce the document, thing or information or answer the question.

205ZQ Confidentiality

- (1) Subsection (2) applies if the Supreme Court decides a claim on the ground of confidentiality is established and it would not be against the public interest:
 - (a) for a claim related to a requirement to produce a document, thing or information: for the document, thing or information to be produced; or
 - (b) for a claim related to a requirement to answer a question: for the question to be answered.
- (2) The Supreme Court must order the person:
 - (a) to produce the document, thing or information; or
 - (b) to answer the question.
- (3) If the Supreme Court decides the claim is established and it would be against the public interest for the document, thing or information to be produced or question to be answered, the court must order the commission to withdraw the requirement to which the claim relates.
- (4) If the Supreme Court decides a claim on the ground of confidentiality is not established, the court must order the person to produce the document, thing or information or answer the question.
- (5) This section does not apply to a claim under section 94(2)(b) or 111(3)(b).

205ZR Self-incrimination privilege

- (1) Whether or not the Supreme Court decides a claim on the ground of self-incrimination privilege is

established, the court must order the person to produce the document, thing or information or answer the question.

Note: See section 197 for a restriction on the use of an answer, document, thing or statement disclosed or produced where a claim of self-incrimination privilege in relation to the answer, document, thing or statement is established. 21

(2) This section does not apply to a claim under section 94(2)(b) or 111(3)(b). 23

205ZS Journalist privilege

- (1) Subsections (2) and (3) apply if the Supreme Court decides a claim made by a journalist or a relevant person for a journalist on the ground of journalist privilege is established in relation to a requirement to produce a document, thing or information or provide information in answer to a question and the public interest in disclosing the identity of the informant the subject of the claim outweighs:
 - (a) any likely adverse effect of the disclosure on the informant or another person; and
 - (b) the public interest in:
 - (i) the communication of facts and opinion to the public by the news media; and
 - (ii) the ability of the news media to access sources of facts.
- (2) The Supreme Court may order the person:
 - (a) to produce the document, thing or information; or
 - (b) answer the question; or
 - (c) otherwise, must order the commission to withdraw the requirement to which the claim relates.
- (3) In deciding whether to make the order, the Supreme Court may have regard to:
 - (a) ~~the matters mentioned in section 205ZF(3)(a) to (j)~~ any of the following matters:
 - (i) whether the document, thing or information is a matter of public interest;
 - (ii) the nature and subject matter of the investigation, operation or function to which the requirement relates;
 - (iii) the importance of the document, thing or information, and the informant's identity, to the investigation, operation or function to which the requirement relates and the availability of other evidence in relation to the document, thing or information;
 - (iv) any likely adverse effect of disclosing the informant's identity on the informant or another person and whether the effect can be mitigated;
 - (v) whether the informant's identity as the source of the document, thing or information is already in the public domain;
 - (vi) any decision previously made by the commission or a court about a claim, objection or application in relation to the document, thing or information;
 - (vii) the way in which the document, thing or information has been used or kept by the journalist, including whether the journalist:
 - (A) verified the document, thing or information; or
 - (B) used the document, thing or information in a way that is fair and accurate and minimised any likely adverse effect on another person;
 - (viii) whether the journalist complied with a recognised professional standard or code of practice in obtaining, using or receiving the document, thing or information;
 - (ix) whether obtaining, using, giving or receiving the document, thing or information:
 - (A) involved an offence or misconduct by the informant or the journalist; or
 - (B) poses a risk to national security or the security of the State;
 - (x) the extent to which making the requirement is likely to deter other persons from giving information to journalists;
 - (xi) any other matter the deciding officer or presiding officer considers relevant; and
 - (b) any other matter the court considers relevant.
- (5) If the Supreme Court decides a claim on the ground of journalist privilege is not established, the court must order the person to produce the document, thing or information or answer the question.
- (6) This section does not apply to a claim under section 94(2)(b).

Division 4 – Other orders

205ZT Access to, or return of, documents and things

- (1) This section applies if a document or thing was delivered to a registrar of the Supreme Court

under section 205P or 205W.

- (2) The Supreme Court must make an order directing that the document or thing be given to the commission if:
 - (a) the Supreme Court declines to grant leave to make an application under section 205ZH(2) in relation to the document or thing; or
 - (b) the Supreme Court orders a person under section 205ZI(9)(a) to produce the document or thing to the commission; or
 - (c) the Supreme Court orders a person under division 3 to produce the document or thing to the commission.
- (3) If the Supreme Court orders the commission under section 205ZI(9)(b) or division 3 to withdraw a requirement in relation to the document or thing, the court must also make an order directing that the document or thing be given to the person.

205ZU Ancillary orders

- (1) In addition to any order the Supreme Court may make under this part, the court may make any order the court considers appropriate in the circumstances.
- (2) Without limiting subsection (1), the Supreme Court may make an order restricting access to any material, including a document, thing or information given to the court in the proceedings for the application (the **relevant material**), including an order that the relevant material:
 - (a) is not required to be disclosed to another party; and
 - (b) is not to be publicly accessible.
- (3) In deciding whether to make an order under subsection (2), the Supreme Court may have regard to whether disclosure of the relevant material would:
 - (a) prejudice a proceeding, or an investigation or intelligence operation of the commission or the police service; or
 - (b) cause harm or detriment to a person; or
 - (c) not be in the public interest; or
 - (d) in the context of a claim of reasonable excuse based on journalist privilege, or a claim of journalist privilege:
 - (i) disclose the identity of the informant as the source of the relevant material; or
 - (ii) enable the identity of the informant as the source of the relevant material to be ascertained.

Part 4 – Claims made in relation to search warrants and seizures

Division 1 – Preliminary

205ZV Application of part

This part applies in relation to a decision of a commission officer under section 94(2)(b) or 111(3)(b) not to withdraw a requirement of a person in relation to a document or thing.

Division 2 – Supreme Court to decide claim

205ZW Applications to Supreme Court

- (1) The chairperson or the person making the claim of privilege in relation to the document or thing may apply to the Supreme Court to decide whether the claim is established and, if established, whether it is to be upheld.
- (2) **Other than in relation to claims based on journalist privilege to which Evidence Act 1977, part 2, division 2B, subdivision 3 applies,** the burden of proof on the application is on the person who seeks to withhold the document or thing or to prevent the exercise of authority.
- (3) The Supreme Court must—
 - (a) consider the claim of privilege; and
 - (b) hear the submissions of the person making the claim and the commission's submissions; and
 - (c) decide the claim—
 - (i) for a claim under section 94(2)(b)—under part 3, division 3, other than sections 205ZQ to 205ZS; or
 - (ii) for a claim under section 111(3)(b)—under part 3, division 3, other than sections 205ZQ and 205ZR.
- (4) The Supreme Court may hear the application in any way it considers appropriate.
- (5) The Supreme Court must give reasons for the court's decision, which may be given orally.
- (6) Costs of an application are to be borne by the commission, unless otherwise ordered by the Supreme Court on the ground that the claim is frivolous or vexatious.

205ZX Access to, or return of, documents and things

- (1) If the Supreme Court orders a person under part 3, division 3 to produce a document or thing to the commission and the document or thing was delivered to a registrar of the Supreme Court under section 205ZZ, the court must also make an order directing that the document or thing be given to the commission.
- (2) If the Supreme Court orders the commission under part 3, division 3 to withdraw a requirement in relation to a document or thing and the document or thing was delivered to a registrar of the Supreme Court under section 205ZZ, the court must also make an order directing that the document or thing be given to the person mentioned in section 205ZZ(1).

205ZY Ancillary orders

- (1) In addition to any order the Supreme Court may make under this part or part 3, division 3, the court may make any order the court considers appropriate in the circumstances.
- (2) Without limiting subsection (1), the Supreme Court may make an order restricting access to any material, including a document or thing given to the court in the proceedings for the application (the **relevant material**), including an order that the relevant material—
 - (a) is not required to be disclosed to another party; and
 - (b) is not to be publicly accessible.
- (3) In deciding whether to make an order under subsection (2), the Supreme Court may have regard to whether disclosure of the relevant material would—
 - (a) prejudice a proceeding, or an investigation or intelligence operation of the commission or the police service; or

- (b) cause harm or detriment to a person; or
- (c) not be in the public interest; or
- (d) in the context of a claim of reasonable excuse based on journalist privilege, or a claim of journalist privilege—
 - (i) disclose the identity of the informant as the source of the relevant material; or
 - (ii) enable the identity of the informant as the source of the relevant material to be ascertained.

Division 3 – Procedure for documents and things

205ZZ Procedure for documents and things subject to claim

- (1) This section applies if the document or thing is in a person's possession or a person acknowledges that the document or thing is in the person's possession.
- (2) For subsection (1), the person may or may not be the person claiming privilege in relation to the document or thing.
- (3) **Unless a claim based on journalist privilege has been raised, t**The commission officer must require the person to seal the document or thing immediately and give it to the commission officer for safekeeping.
- (4) **A ~~The~~ person to whom subsection (3) applies** must immediately seal the document or thing under the supervision of the commission's representative.
Maximum penalty—85 penalty units or 1 year's imprisonment.
- (5) The commission's representative and, if practicable, the person **to whom subsection (3) applies** must immediately deliver the sealed document or thing to a registrar of the Supreme Court to be held in safe custody.
Maximum penalty—85 penalty units or 1 year's imprisonment.
- (6) **If a claim based on journalist privilege has been raised:**
 - (a) the commission officer must require the person to seal the document or thing immediately and store the sealed document or thing in a safe location;
 - (b) if the document or thing includes or contains material that is not the subject of the requirement referred to in section 205ZV, the person obliged to store the document or thing pursuant to subsection (6)(a) may meet that obligation by sealing a hard or soft copy of each part of the document or thing that is subject to the requirement; and
 - (c) the person must give the commission officer a written notice confirming that the document or thing, or a copy of the document or thing, has been sealed and stored in compliance with subsections (6)(a) and (b).

205ZZA Action by registrar

- (1) This section applies if the commission's representative and, if applicable, the person delivered a sealed document or thing to a registrar of the Supreme Court under section 205ZZ.
- (2) The registrar must keep the sealed document or thing in safe custody until the first of the following happens—
 - (a) the person and the commission's representative give the registrar notice that agreement has been reached on the disposal of the sealed document or thing;
 - (b) an application is made to the Supreme Court under section 205ZW to decide the claim of privilege;
 - (c) the end of 3 business days after the day on which the sealed document or thing is given to the registrar.
- (3) The registrar must—
 - (a) If the person and the commission's representative give the registrar notice that agreement has been reached on the disposal of the sealed document or thing—dispose of the sealed document or thing in the way agreed; or
 - (b) if an application is made to the Supreme Court under section 205ZW to decide the claim of privilege—dispose of the sealed document or thing in the way ordered by the court; or
 - (c) if subsection (2)(a) does not apply and an application is not made by the end of 3 business days after the day on which the sealed document or thing is given to the registrar—return the sealed document or thing to the person.

Part 5 – Procedure for claims of legal professional privilege

Part 6 – Claims made in confiscation related investigations

Division 1 – Preliminary

205ZZE Application of part

- (1) This part applies if a person claims privilege under section 81A(1) in relation to a requirement to produce a document or thing under a notice to produce.
- (2) This part also applies if a person claims privilege under 110A(3) in relation to a document or thing found at a place that a commission officer proposed to seize.
Note— However, sections 205ZZF and 205ZZG apply only to claims of privilege under section 81A(1).
- (3) In this part, a reference to a requirement in relation to a document or thing includes a reference to a commission officer exercising a power under section 110A(2) in relation to the document or thing.

205ZZF Commission officer to consider claim made under s 81A

- (1) This section applies if the person claims privilege under section 81A(1) in relation to a requirement to produce a document or thing under a notice to produce.
- (2) The commission officer who required the document or thing to be given must consider the claim and may—
 - (a) decide to withdraw the requirement in relation to which the claim is made; or
 - (b) decide not to withdraw the requirement and advise the person that the person may apply to, or be required to attend before, the Supreme Court to establish the claim under section 205ZZH.

205ZZG Procedure for claims of legal professional privilege if person has no authority to waive privilege

- (1) This section applies if—
 - (a) a person makes a claim of legal professional privilege under section 81A(1) in relation to a requirement to produce a document or thing under a notice to produce; and
 - (b) the person has no authority to waive the privilege.
- (2) The person must, if required by the commission officer identified in the notice to produce—
 - (a) tell the officer the name and address of the person entitled to waive the privilege; and
 - (b) seal the document or thing and give it to the commission for safekeeping.Maximum penalty—85 penalty units or 1 year's imprisonment.
- (3) The commission officer must—
 - (a) give the person a receipt for the sealed Document or thing; and
 - (b) place it in safe custody at the commission's place of business at the earliest reasonable opportunity.
- (4) A person must not open the sealed document or thing unless authorised to open it under this Act or a court order.
Maximum penalty—85 penalty units or 1 year's imprisonment.
- (5) The commission must return the sealed document or thing to the person who gave it to the commission if the chairperson has not, within months after the day on which the sealed document or thing was given to the commission, made an application under section 205ZZH.
- (6) If the chairperson or the person makes an application under section 205ZZH, the commission's representative must immediately deliver the sealed document or thing to a registrar of the Supreme Court to be held in safe custody.
Maximum penalty—85 penalty units or 1 year's imprisonment.
- (7) The commission's representative must notify the Person that the sealed document or thing has been delivered to the registrar.
- (8) The registrar must keep the sealed document or thing in safe custody until—
 - (a) the person and the commission's representative give the registrar notice that agreement has been reached on the disposal of the sealed document or thing; or

- (b) the application under section 205ZZH is decided by the Supreme Court.
- (9) The registrar must—
 - (a) if the person and the commission’s representative give the registrar notice that agreement on the disposal of the sealed document or thing has been reached—dispose of the sealed document or thing in the way agreed; or
 - (b) if the application under section 205ZZH is decided by the Supreme Court—dispose of the sealed document or thing in the way ordered by the court.

Division 2 – Supreme Court to decide claim

205ZZH Applications to Supreme Court

- (1) The chairperson or the person making the claim of privilege in relation to a document or thing may apply to the Supreme Court to decide whether the claim is established and, if established, whether it is to be upheld.
- (2) In subsection (1), a reference to the person making the claim of privilege in relation to a document or thing includes a reference to a person mentioned in 205ZZG(2)(a) who is entitled to waive legal professional privilege in relation to the document or thing.
- (3) Other than for a claim on the ground of journalist privilege, the burden of proof on the application is on the person who seeks to withhold the document or thing or to prevent the exercise of authority.
- (4) For a claim on the ground of journalist privilege—
 - (a) the burden of proof for establishing the claim is on the journalist or relevant person for the journalist; and
 - (b) the burden of proof in relation to the matters mentioned in section 205ZS(1), other than the establishment of the claim, is on the commission.
- (5) The Supreme Court must—
 - (a) consider the claim of privilege; and
 - (b) hear the submissions of the person making the claim and the commission’s submissions; and
 - (c) decide the claim—
 - (i) if the claim was made under section 81A(1)—under part 3, division 3; or
 - (ii) if the claim was made under section 110A(3)—under part 3, division 3, other than sections 205ZQ and 205ZR.
- (6) The Supreme Court may hear the application in any way it considers appropriate.
- (7) The Supreme Court must give reasons for the court’s decision, which may be given orally.
- (8) Costs of an application are to be borne by the commission, unless otherwise ordered by the court on the ground that the claim is frivolous or vexatious.

205ZZI Access to, or return of, documents and things

- (1) If the Supreme Court orders a person under part 3, division 3 to produce a document or thing to the commission and the document or thing was delivered to a registrar of the court under section 205ZZG or 205ZZK, the court must also make an order directing that the document or thing be given to the commission.
- (2) If the Supreme Court orders the commission under part 3, division 3 to withdraw a requirement in relation to a document or thing and the document or thing was delivered to a registrar of the court under section 205ZZG or 205ZZK, the court must also make an order directing that the document or thing be given to the person mentioned in the relevant section.

205ZZJ Ancillary orders

- (1) In addition to any order the Supreme Court may make under this part and part 3, division 3, the court may make any order the court considers appropriate in the circumstances.
- (2) Without limiting subsection (1), the Supreme Court may make an order restricting access to any material, including a document or thing given to the court in the proceedings for the application (the **relevant material**), including an order that the relevant material—
 - (a) is not required to be disclosed to another party; and

- (b) is not to be publicly accessible.
- (3) In deciding whether to make an order under subsection (2), the Supreme Court may have regard to whether disclosure of the relevant material would—
 - (a) prejudice a proceeding, or an investigation or intelligence operation of the commission or the police service; or
 - (b) cause harm or detriment to a person; or
 - (c) not be in the public interest; or
 - (d) in the context of a claim of reasonable excuse based on journalist privilege, or a claim of journalist privilege—
 - (i) disclose the identity of the informant as the source of the relevant material; or
 - (ii) enable the identity of the informant as the source of the relevant material to be ascertained.

Division 3 – Procedure for documents and things

205ZZK Procedure for documents and things subject to claim

- (1) This section applies if—
 - (a) the document or thing is in a person’s possession or a person acknowledges that the document or thing is in the person’s possession; and
 - (b) the commission officer decides not to withdraw the requirement in relation to the document or thing under section 110A(3)(b) or 205ZZF(2)(b); and
 - (c) section 205ZZG does not apply.
- (2) For subsection (1), the person may or may not be the person claiming privilege in relation to the document or thing.
- (3) **Unless a claim based on journalist privilege has been raised, t**~~F~~The commission officer must require the person to seal the document or thing immediately and give it to the commission officer for safekeeping.
- (4) **A** ~~The~~ **person to whom subsection (3) applies** must immediately seal the document or thing under the supervision of the commission’s representative.
Maximum penalty—85 penalty units or 1 year’s imprisonment.
- (5) The commission’s representative and, if practicable, the person **to whom subsection (3) applies** must immediately deliver the sealed document or thing to a registrar of the Supreme Court to be held in safe custody. Maximum penalty—85 penalty units or 1 year’s imprisonment.
- (6) **If a claim based on journalist privilege privilege has been raised:**
 - (a) the commission officer must require the person to seal the document or thing immediately and store the sealed document or thing in a safe location;
 - (b) if the document or thing includes or contains material that is not the subject of the requirement referred to in section 205ZZE, the person obliged to store the document or thing pursuant to subsection (6)(a) may meet that obligation by sealing a hard or soft copy of each part of the document or thing that is subject to the requirement; and
 - (c) the person must give the commission officer a written notice confirming that the document or thing, or a copy of the document or thing, has been sealed and stored in compliance with subsections (6)(a) and (b).

205ZZL Action by registrar

- (1) This section applies if the commission’s representative and, if applicable, the person delivered a sealed document or thing to a registrar of the Supreme Court under section 205ZZK.
- (2) The registrar must keep the sealed document or thing in safe custody until the first of the following happens—
 - (a) The person and the commission’s representative give the registrar notice that agreement has been reached on the disposal of the sealed document or thing;
 - (b) an application is made to the Supreme Court under section 205ZZH to decide the claim of privilege;

- (c) the end of 3 business days after the day on which the sealed document or thing is given to the registrar.
- (3) The registrar must—
- (a) if the person and the commission’s representative give the registrar notice that agreement has been reached on the disposal of the sealed document or thing—dispose of the sealed document or thing in the way agreed; or
 - (b) if an application is made to the Supreme Court under section 205ZZH to decide the claim of privilege—dispose of the sealed document or thing in the way ordered by the court; or
 - (c) if subsection (2)(a) does not apply and an application is not made by the end of 3 business days after the day on which the sealed document or thing is given to the registrar—return the sealed document or thing to the person.