

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: Drumgold v Board of Inquiry – Criminal Justice System & Ors

Citation: [2023] ACTSC 394

Hearing Date: 15 December 2023

Decision Date: 15 December 2023

Before: Kaye AJ

Decision: See [45]-[46], [63]-[64].

Catchwords: **CIVIL LAW – Practice and procedure** – Proceeding by plaintiff seeking declarations relating to validity of report of Board of Inquiry into investigation and prosecution of alleged rape – Application by police investigators affected by report to be joined in proceeding – Application not opposed – Application allowed. – Application by Chief Police Officer of the Australian Capital Territory for leave to intervene or appear as *amicus curiae* – Application refused

Legislation Cited: *Court Procedures Rules 2006* (ACT), rr 220, 1356(4)

Cases Cited: *Vandervell Trustees Ltd v White & Ors* [1971] AC 912
News Ltd v Australian Rugby Football League Ltd (1996) 139 ALR 193
Australian Tape Manufacturers Association Ltd v Commonwealth of Australia (1990) 94 ALR 641
Levy v The State of Victoria (1997) 189 CLR 579
Roadshow Films Pty Ltd v II Net Ltd (2011) 248 CLR 37

Parties: Neville Shane Drumgold (Plaintiff)
Board of Inquiry – Criminal Justice System (First Defendant)
Australian Capital Territory (Third Defendant)
Michael Chew, Scott Moller, Marcus Boorman, Robert Rose, Trent Madders, Emma Frizzell (First Applicant)
Chief Police Officer of the Australian Capital Territory (Second Applicant)

Representation: **Counsel**
D O’Gorman SC (Plaintiff)
B Lim (First Defendant)
K Eastman AM SC with A Hammond (Third Defendant)
J Greggery KC with R Berry (First Applicant)
C Tran (Second Applicant)

Solicitors
BAL Lawyers (Plaintiff)

Gilshenan & Luton Legal Practice (First Defendant)
ACT Government Solicitor (Third Defendant)
Gnech & Associates Lawyers (First Applicant)
Australian Government Solicitor (Second Applicant)

File Number: SC 347 of 2023

KAYE AJ:

Introduction

1. The plaintiff, by Originating Application, seeks declaratory relief in respect of findings contained in a report entitled 'Report of the Board of Inquiry into the Criminal Justice System', dated 31 July 2023. The Board of Inquiry, which had been appointed pursuant to s 5 of the Inquiries Act 1991 (ACT), is named as the first defendant in the proceeding. The party originally joined as the second defendant, the Attorney-General for the Australian Capital Territory, has been removed from the proceeding. The third defendant is the Australian Capital Territory.
2. Application is made on behalf of six officers of the Australian Federal Police ('AFP') to be joined as fourth defendants in the proceeding. A separate application is also made by the Chief Police of the Australian Capital Territory for leave to intervene as a non-party, alternatively to appear as *amicus curiae*.
3. I shall consider, first, the application by the six officers of the AFP ('the applicants'). The application is not opposed by the first and third defendants, and is consented to by the plaintiff. For the reasons that follow, that application should be allowed, and the applicants joined as the fourth defendant in the proceeding.

Background Circumstances

4. The report of the first defendant concerned the investigation by members of the AFP, and the prosecution, of an allegation by Ms Brittany Higgins of rape against Mr Bruce Lehrmann. Ms Higgins first reported the allegation to police in April 2019. However, she then decided that she did not wish to proceed with it. Subsequently, in February 2021, she informed police that she wished to proceed with the allegation.
5. In August 2021, Mr Lehrmann was charged with one count of rape. The trial commenced in early October 2022. The jury commenced deliberations on 19 October. After more than five days of deliberation, on 26 October 2022, a sheriff's officer located a document during a routine tidying of the jury room. As a consequence, the Chief Justice, who was the presiding judge at the trial, discharged the jury without verdict on the following day, 27 October. On 2 December, the plaintiff, having received two medical reports concerning the mental health of Ms Higgins, announced that he had decided to discontinue the prosecution against Mr Lehrmann.
6. In the meantime, on 1 November 2022, the plaintiff wrote a letter to the ACT Chief Police Officer of the AFP, in which he criticised the conduct of members of the Sexual Assault and Child Abuse Team ('SACAT') of the AFP who had been responsible for the investigation and prosecution of the matter. In the letter, the plaintiff expressed the view

that, at the conclusion of the trial, there should be a public inquiry into 'both political and police conduct' in the matter, as that was then 'continuing to be a significant factor during the ongoing conduct of [the] trial'. The letter concluded:

I further seek your support for an enquiry to be conducted at the conclusion of the trial process into the conduct of police investigators in the lead-up to charge and beyond, during the trial process itself.

7. On 21 December 2022, the Chief Minister of the Australian Capital Territory announced the establishment of a board of inquiry into the criminal justice system of the Australian Capital Territory. On 1 February 2023, the Board of Inquiry was established. Mr Walter Sofronoff KC was appointed as the Board of Inquiry to inquire into matters specified in the terms of reference, contained in Schedule 1 to the Notifiable Instrument. Subsequently, Mr Sofronoff sought an extension of the terms of reference.
8. The terms of reference of the Board of Inquiry included the following:
 - (a) Whether any police officers failed to act in accordance with their duties or acted in breach of their duties:
 - (i) in the conduct of the investigation into the allegations of Ms Brittany Higgins concerning Mr Bruce Lehrmann;
 - (ii) in their dealings with the Director of Public Prosecutions in relation to his duty to decide whether to commence, continue and to discontinue criminal proceedings against Mr Lehrmann in relation to those allegations;
 - (iii) in their dealings with the legal representatives for Mr Lehrmann before, during or after the trial in the matter of *R v Lehrmann*;
 - (iv) in their provision of information to any persons in relation to the matter of *R v Lehrmann*.
 - (b) If any police officers so acted, their reasons and motives for their actions.
 - (c) Whether the Director of Public Prosecutions failed to act in accordance with his duties or acted in breach of his duties in:
 - (i) making his decisions to commence, continue and to discontinue criminal proceedings against Mr Lehrmann; and
 - (ii) his conduct of the preparation of the proceedings for hearing; and
 - (iii) his conduct of the proceedings.

- (d) If the Director of Public Prosecutions so acted, his reasons and motives for his actions.
 - (e) The circumstances around, and decisions which led to the public release of the ACT Director of Public Prosecutions letter to the Chief Police Officer of ACT Policing dated 1 November 2022.
9. The inquiry commenced its hearings in early 2023. On 31 July 2023, Mr Sofronoff submitted his final report to the Chief Minister of the Australian Capital Territory. The report, entitled 'Board of Inquiry Criminal Justice System' (the 'Report'), contained a number of criticisms of the conduct of the plaintiff in the prosecution of the charge against Mr Lehrmann. It also criticised the plaintiff in respect of the release by him, in response to a Freedom of Information application, of the letter dated 1 November 2022.
10. The report made a number of findings that were favourable to the police investigators. They included the following:
- (a) The police investigators conducted a thorough investigation. They made some mistakes. However, none of those mistakes affected the substance of the investigation or prejudiced the case¹
 - (b) The investigators consistently acted in good faith and conducted a thorough investigation. It was not suggested that the investigation was flawed in any way. On the contrary, the evidence demonstrated that the investigators and their immediate superior officers performed their duties in 'absolute good faith, with great determination although faced with obstacles', and they put together a sound case².
 - (c) No police officer breached a duty or acted improperly³
 - (d) The inquiry thoroughly examined the allegations contained in the letter written by the plaintiff, dated 1 November 2022. Each allegation had been exposed to be baseless, and, late in giving his oral evidence, the plaintiff had resiled from his "scandalous allegations."⁴

The application for judicial review

11. In the present proceeding, the plaintiff seeks declaratory relief on five grounds, namely:

¹ Report [14], [48].

² Ibid [113]

³ Ibid [116]

⁴ Ibid [626]

- (a) the first defendant and/or counsel failed to comply with s 17 of the Inquiries Act 1991 (ACT);
- (b) the first defendant failed to accord the plaintiff natural justice, in that the conduct of the Member of the first defendant gave rise to a reasonable apprehension of bias;
- (c) the findings in the report, specified in Schedule A to the Originating Application, are legally unreasonable;
- (d) the first defendant failed to accord the plaintiff natural justice by failing to give the plaintiff a fair hearing in respect of the findings, specified in Schedule B to the Originating Application;
- (e) the findings in the report, specified in Schedule C to the Originating Application, were made in excess of jurisdiction, in that they were outside the first defendant's terms of reference.

12. Based on those grounds, the plaintiff seeks the following declaratory relief:

- (a) A declaration that the report is, or, alternatively, that parts of the report, which relate to the plaintiff are, invalid and of no effect.
- (b) In the alternative to (1), a declaration that the report is, or, alternatively, the parts of the report, which relate to the plaintiff are, unlawful.
- (c) A declaration that the report is, or, alternatively, the parts of the report, which relate to the plaintiff are, attended with the appearance of a reasonable apprehension of bias.
- (d) A declaration that the plaintiff was denied natural justice by the first defendant.

The application for joinder

13. The present application is brought on behalf of the following six applicants:

- (a) Commander Chew, who was the Deputy Chief Police Officer — Response in ACT Policing, and who had overall command of the criminal investigations portfolio.
- (b) Superintendent Moller, who was the Detective Superintendent in charge of Criminal Investigations.
- (c) Inspector Boorman, who was the Inspector in charge of Major Crime, including three SACATs.

- (d) Senior Constable Madders and Senior Constable Frizzell, who were the lead or primary investigators in the matter.
 - (e) Sergeant Rose, who was responsible for having the brief of evidence served on defence counsel for Mr Lehrmann.
14. The application is made on the ground that the applicants are interested in maintaining the findings and comments in the report, that relate to them, because:
- (a) those findings and comments are generally favourable to them, and form part of a public record about matters relevant to their reputations and careers. Accordingly, the applicants would be directly affected by the relief sought by the plaintiff if that relief were granted, in full or in part;
 - (b) further, if the relief sought were granted in full or in part, the applicants would be liable to submit to any further inquiry or process, which may be instituted as a consequence of the grant of a declaration that would impugn the conclusions in the report.
15. Accordingly, the application is made on the basis that, pursuant to r 3556(4)(a) and r 220(1)(a) of the Court Procedures Rules 2006, the applicants ought to have been included as a party to the proceeding; or, alternatively, pursuant to r 220(1)(b), the inclusion of the applicants as a party to the proceeding is necessary to enable the Court to adjudicate effectively and completely on all issues in dispute in the proceeding.
16. The application is supported by an affidavit affirmed by Mr Calvin Gnech, the legal practitioner acting on behalf of the six applicants. Mr Gnech represented thirteen officers of the AFP, including the applicants, at the inquiry.
17. In his affidavit, Mr Gnech noted that each of the applicants was granted leave to appear, and to be legally represented, during the private and public sittings of the Board of Inquiry. The applicants were subpoenaed to give evidence in the private hearings, and to provide a written statement, which formed part of the materials that were considered by the Board of Inquiry. Each of the applicants also received a direction from a senior officer to give evidence in the inquiry. In addition, in the course of the inquiry, Commander Michael Chew, Detective Superintendent Scott Moller and Senior Constable Emma Frizzell were each subpoenaed to attend, and to give evidence and be examined, in the public hearings.
18. At the conclusion of evidence, each of the applicants was served with a 'Proposed Adverse Comment Notice' by the Board of Inquiry. Each applicant responded in writing to that notice, filing submissions in response to it. The Proposed Adverse Comment

Notices, and the submissions in response, applicable to each of the applicants, were attached to and published, unredacted, in the final report of the Board of Inquiry.

19. Mr Gnech has also deposed that, as a result of the correspondence, sent by the plaintiff to the Chief Police Officer on 1 November 2022, the matters raised in that letter were referred to the AFP's Professional Standards (PRS) command, who accepted the matter for investigation. The PRS investigation with respect to each of the applicants has not been finalised. In addition, as a result of the letter by the plaintiff to the Chief Police Officer of the AFP dated 1 November 2022, an Australian Commission for Law Enforcement Integrity investigation (which is now part of the National Anti-Corruption Commission) was commenced. The fact of the existence of that investigation was made public, and it was referred to in the report of the first defendant. Further, there has been publicity, including media reporting, about that investigation into the allegations made by Ms Higgins, and some of the applicants were personally named in those reports.

Submissions

20. Based on those matters, counsel for the applicants submitted that, pursuant to r 220(1) of the Rules, the inclusion of the applicants as a party is necessary to enable the Court to adjudicate effectively and completely on all issues in dispute in the proceeding.
21. In particular, counsel noted that the terms of reference for the Board of Inquiry focused almost entirely on the conduct of either the applicants or the plaintiff. The findings in the report of the Board of Inquiry are favourable to the applicants, and they constitute a public vindication of them, and a repudiation of the allegations made against them. In that way, the report affects the reputational interests of each of the applicants.
22. Accordingly, it was submitted that, in view of the breadth of the declaratory relief sought by the plaintiff, there is a potential that the grant of such relief would affect the applicants in one or more of the following ways:
 - (a) The applicants would lose the benefit, or part of the 'value' of the public vindication of the good reputation and of the repudiation of the allegations made against them.
 - (b) The applicants would be liable to submit to any further inquiry or process, which might be instituted, as a consequence of the impugment of the report, including exposure to a new risk of adverse comments and findings.
 - (c) The applicants would be liable to submit to the continuation of the disciplinary processes, that had been initiated as a result of the allegations made by the plaintiff, in circumstances in which the value of the findings of the report, that

are relevant to that process, might be diminished by the grant of any relief to the plaintiff that would impugn the report.

23. Counsel further submitted that the joinder of the applicants, as defendants in the proceeding, would cause minimal additional material to be provided to the Court, and would not delay the proceeding. The applicants do not have an interest in the issues, which are properly confined to the current parties, and the protection of their interests would be focused on two principal issues, namely, the form of relief to be granted should the plaintiff succeed in the proceeding, and, secondly, the scope of any findings underpinning that relief, which might affect the interests of the applicants.

The applicable rules

24. As I have noted, the application is made pursuant to r 220 and r 3556(4) of the Court Procedures Rules 2006.

25. Rule 3556 prescribes the procedures which apply to applications for judicial review. Rule 3556(1) provides that such an application must be sought by Originating Application. Rule 3556(4)(a) provides:

- (4) A person must be included as a defendant to the application if
 - (a) The application relates to a decision made by an entity authorised to make the decision, and the person—
 - (i) appeared, or was given leave to appear, before the entity; and
 - (ii) would be directly affected by the relief sought in the application or is interested in maintaining the decision;

26. Rule 220(1) provides:

- (1) The court may order that a person be included as a party to a proceeding if –
 - (a) The person ought to have been included as a party; or
 - (b) Including the person as a party is necessary to enable the court to adjudicate effectively and completely on all issues in dispute in the proceeding.

Legal Principles

27. The first basis, on which the applicants seek to be joined in the proceeding, is that, pursuant to r 220(1)(a) and r 3556(4)(a), they ought to have been included as a party to the proceeding.
28. The requirement in r 3556(4)(a)(i) — that the applicants appeared, or were given leave to appear, before the Board of Inquiry — is plainly satisfied.
29. Rule 3556(4)(a)(ii), as expressed, contains two alternative requirements. First, the applicants must demonstrate that they would be 'directly affected' by the relief sought by

the plaintiff in the proceeding. Alternatively, the applicants must establish that they are 'interested in maintaining the decision' of the Board of Inquiry.

30. The first alternative requirement — that the applicants would be directly affected by the relief sought by the plaintiff — necessarily involves consideration of the potential effect of any relief, in the present proceeding, on a legal right or interest of the applicants. The requirement — that they be directly affected — reflects a qualification that a series of decisions, in respect of other similar rules, have developed in determining whether a person, who is not a party, ought to be joined as a party.

31. In *News Ltd & Ors v Australian Rugby Football League Ltd & Ors*⁵, the Full Court of the Federal Court described the effect of that qualification in the following terms:

The requirement that a third party's rights against, or liability to, any party to the proceedings be directly affected is an important qualification that recognises that many orders of a court are likely to affect other people to a greater or lesser extent. ... The requirement of a direct effect on rights or liabilities differentiates the case where a person ought to be joined, from other cases where the effect of the order on non-parties can be characterised as only indirect or consequential⁶.

32. The alternative requirement contained in r 3556(4)(a)(ii) — that the party seeking to be joined be 'interested' in maintaining the decision — has not, as I understand it, been the subject of any judicial interpretation. However, it would seem clear that the 'interest', referred to in that requirement, would involve a form of legal or equitable right or interest. That construction would be consistent with r 3556(3), which provides that a person may apply for prerogative relief if the person's 'interests' are, or would be, adversely affected in or by the matter to which the application relates. However, it may be noted that the alternative requirement in r 3556(4)(a)(ii) — that the person seeking to be joined as a party be 'interested' in maintaining the decision — does not, by its terms, require that the interest be 'direct'.

33. The second alternative basis, upon which the applicants seek to be joined in the proceeding, is under r 220(1)(b), namely, that their inclusion as a party in the proceeding is 'necessary to enable the court to adjudicate effectively and completely on all issues in dispute in the proceeding'.

⁵ (1996) 139 ALR 193

⁶ Ibid 298-9 (Lockhart, Von Doussa and Sackville JJ). See also *Sportsbet Pty Ltd v Harness Racing Victoria (No 2)* [2010] FCA 952 at [38] (Mansfield J.)

34. In *Vandervell Trustees Ltd v White & Ors*⁷ the House of Lords was concerned with the construction of a similar rule, which provided for the joinder of a person, who 'ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon'. The case involved a complex issue concerning whether the executors of an estate of a deceased person were entitled to join the Commissioner of Inland Revenue in a proceeding commenced by them, against the trustees of a trust to which the deceased had transferred his rights to shares in a company with which he was concerned. The key issue in the case concerned the entitlement of the estate to the income of the shares, which had been transferred by the deceased person to the trust. The issue had been precipitated by the Commissioner, who had assessed the estate for surtax in respect of the dividends, received by the trustees, in relation to the shares. The House of Lords held that the court did not have jurisdiction, under the relevant rule, to order that the Commissioner be added as a party to the proceedings.
35. Lord Morris of Borth-y-Gest explained the reasons for that conclusion in the following terms:

It does not seem to me that the Commissioners if present before the court could make any contribution to the determination or adjudication of the matters in dispute. If they wish to present argument that favour the executors and which was adverse to the trustees, they could add nothing to what could be said by those representing the executors. No question of revenue law is raised in the action. The Commissioners do not assert any claim to the sums in question. They do not ask for any relief against either party. They did not seek to be joined. They could do nothing to ensure that the matters in dispute in the action brought by the executors against the trustees are "effectually and completely" determined. The matters in dispute between the executors and the trustees can be effectively and completely determined and adjudicated upon in the absence of the Commissioners⁸.

36. A similar approach was taken by Dawson J in *Australian Tape Manufacturers Association Ltd & Ors v Commonwealth of Australia*⁹ to a corresponding provision in the High Court Rules. In that case, the plaintiffs, who were involved in the distribution or sale of blank audiotapes, commenced a proceeding, claiming a declaration that particular provisions of the Copyright Act 1968 (Cth) are invalid, being beyond the legislative power of the

⁷ [1971] AC 912

⁸ Ibid 930. See also 935-936 (Viscount Dilhorne). See also *Director of Public Prosecutions for the Australian Capital Territory v the Honourable Acting Justice Brian Martin* [2014] ACTSC 104, [230] – [231] (Murrell CJ, Katzmann and Wigney JJ.)

⁹ (1990) 94 ALR 641

Commonwealth. Application was made to be joined as defendants to the proceedings by an association, which represented the owners and exclusive licensees of copyright in sound recordings, and by the owner, or the agent of owners, of copyright in musical works. Dawson J dismissed the application, holding that the joinder of the applicants was not necessary to enable the court to 'effectually and completely adjudicate upon and settle all the questions arising' in the proceeding. His Honour noted that the circumstance that the applicants might have had sufficient standing to contest the validity of the legislation in a separate action, was insufficient to bring them within the terms of the relevant rule. His Honour further observed:

... the mere fact that a person claims to be in a better position to call relevant evidence and to make submissions in support of a case which an existing party already seeks to make is plainly insufficient to justify the joinder of that person as a party. However desirable his presence may be to advance the presentation of the existing party's case, he is not for that reason a person whose presence may be necessary before the Court as a party¹⁰.

Analysis and conclusion

37. In applying those principles, the starting point is that, quite clearly, the effect of the conclusions, by the first defendant in the report, were such as to affect the professional reputations of both the plaintiff and the applicants. It is well-established that the reputation of a person is an interest that, in an appropriate case, may attract the rules of natural justice¹¹ It is on that basis that the plaintiff instituted the present proceeding, seeking declaratory relief in respect of the conclusions formed by the Board of Inquiry, that were detrimental to his reputation. At the hearing before the Board, the applicants were, equally, entitled to be afforded natural justice. It would follow that the applicants would have a sufficient interest, which might be affected by the determination of the claim, made by the plaintiff, in the present proceeding.
38. The question which thus arises is whether, for the purpose of r 3556(4)(b)(ii), the interests of the applicants would be 'directly affected' by the relief, sought by the plaintiff in the Originating Application, or whether the applicants are otherwise interested in maintaining the decision of the Board, so that, pursuant to r 220(1)(a), they ought to have been included as a party to the proceeding. Similarly, the issue which arises under r 220(1)(b) is whether, in view of that interest of the applicants in the conclusions made by

¹⁰ Ibid 645; see also *Re Great Eastern Cleaning Services Pty Ltd and the Companies Act* [1978] 2 NSWLR 277,280-1 (Needham J); *Qantas Airways Ltd v AF Little Pty Ltd* [1981] 2 NSWLR 34,53-4 (Mahoney JA); *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* (2021) 105 NSWLR 152,188-9(Preston CJ at LEC).

¹¹ *Annetts v McCann* (1990) 170 CLR 596, 608 (Brennan J); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 577-8 (Mason CJ, Dawson, Toohey and Gaudron JJ).

the Board, that their inclusion as a party in the proceeding would be necessary to enable the Court to adjudicate 'effectively and completely' on all issues in dispute at the present proceeding.

39. The resolution of those questions involves a consideration, first, of the nature of the relief sought by the plaintiff in the originating application, and, secondly, the basis on which he claims that relief.
40. In that respect, and as I have set out earlier in these reasons¹², the plaintiff claims four declarations in his prayer for relief. The first three declarations are to the effect that, 'The Report is, alternatively the parts of the Report which relate to the plaintiff are' respectively: invalid and of no effect (first declaration); unlawful (second declaration); and, further or alternatively, attended with the appearance of a reasonable apprehension of bias (third declaration). The fourth declaration is in a general form, namely, that the plaintiff was denied natural justice by the first defendant.
41. Thus, potentially, the form of relief, sought by the plaintiff, is directed to the whole of the Report, and is not restricted, necessarily, to the parts of the Report that relate to the plaintiff.
42. Further, and more significantly, the third declaration — that the report is attended with the appearance of a reasonable apprehension of bias — would, if granted, have the potential to affect the positive findings, made in the Report, in favour of the applicants. While the ground, specified in the Originating Application, that is directed to that declaration, is confined to specific findings, specified in Schedule B to the Originating Application, nevertheless, there is a material potential that, if the ground were upheld, such a finding, and a declaration made in consequence of it, might affect the whole of the Report, including those aspects, which contain findings favourable to the applicants. That is particularly so, in view of the fact that a number of the findings, favourable to the applicants, were made in respect of specific allegations, made by the plaintiff in the letter to the Chief Police Officer of the AFP dated 1 November 2022, and, it would seem, were based on evidence or propositions, advanced on behalf of the plaintiff before the Board of Inquiry.
43. In that context, it is relevant to take into account that the decision to establish the Board of Inquiry was preceded by the publication of that letter, after it had been released pursuant to the Freedom of Information application made in respect of it. The letter itself

¹² Above, [12]

strongly criticised the conduct of the applicants, in terms which could only have adversely affected their reputations. Those allegations were subject to investigation by the Board of Inquiry, and were, it would seem, specifically addressed in particular parts of Chapter 2 to 5 (inclusive) of the Report. As I have noted¹³, the Report, by its terms, substantially and significantly vindicated the conduct of the applicants, and, as such, rejected the criticisms made of them by the plaintiff¹⁴

44. In similar terms, the Report also supported the position of the applicants, as opposed to that of the plaintiff, in respect of the decision by the plaintiff not to disclose to the defence, in the criminal trial, police briefing notes made available to him¹⁵. The Report further rejected the validity of suspicions that the plaintiff had formed, concerning the applicants, in respect of their attitude to the prosecution of the criminal charge in question¹⁶
45. Taking those matters into account, at this preliminary stage of the proceeding, it is sufficient to conclude that there is a material potential that the interests of the applicants might be directly affected by the relief sought by the plaintiff, and, accordingly, that they have a sufficient legal interest in maintaining the decision of the Board, so as to maintain the validity of the findings by the Board, which vindicated their conduct in the investigation of the criminal charge, and in the prosecution of it. For the same reasons, I am persuaded that the inclusion of the applicants in the proceeding would be necessary to enable the Court, on the hearing of the Originating Application, to adjudicate effectively and completely on all the issues in dispute in the present proceeding.
46. Accordingly, I shall order that the applicants be joined as the fourth defendant in the proceeding.

Application by the Chief Police Officer of the Australian Capital Territory

47. I turn to the application, by the Chief Police Officer of the Australian Capital Territory ('the Chief Officer') for leave to intervene in the proceeding as a non-party, or, alternatively, to appear as *amicus curiae* in the proceeding. That application is not opposed by the plaintiff, the first defendant and the third defendant.
48. For the reasons that follow, I have concluded that the application should be refused.

¹³ Above, [10]

¹⁴ See, for example, Report, [48], [107], [113], [114].

¹⁵ Report, Chapter 4.4; see especially [407], [413]–[417].

¹⁶ *Ibid* [537].

49. By way of background, the AFP, through ACT Policing, provides community policing services in the Australian Capital Territory, pursuant to an agreement between the Commonwealth and the Australian Capital Territory governments. The Chief Officer is the person appointed by the AFP Commissioner, under that arrangement, to be responsible for the delivery of those policing services.
50. The Commonwealth (whose interests were represented by the AFP) was granted leave to appear, and did appear, at the hearings of the Board of Inquiry. The present application is made on the basis that the report makes findings of fact, which, it is contended, directly affect 'the reputational and other interests' of the AFP and individual AFP officers, and, in addition, the report makes recommendations to the AFP. Accordingly, it is contended that the AFP is interested in maintaining the report, so that it was a necessary party to the present proceeding pursuant to r 3556(4). It is also put that, although it would have been appropriate for the Commonwealth (as represented by the AFP) to be made a party to the proceeding, that course may have raised issues whether the court would be exercising Federal jurisdiction, and whether it could make an order, binding the Commonwealth, and whether it would have jurisdiction to determine the matter at all. Thus, it is contended, a grant to the Chief Officer of leave to intervene, or to appear as *amicus curiae*, would avoid those issues while still enabling the Commonwealth's interests to be represented in the present proceeding.
51. In support of the application, it is submitted that the Chief Officer has an interest in maintaining the findings, made in the report, to the extent that those findings and recommendations are apt to affect ACT Policing's reputational and other interests. In particular, it is contended that the Originating Application will likely raise wide-ranging matters affecting the AFP and ACT Policing, or the conduct of proceedings before the Board in which the AFP/ACT Policing was closely involved. It is noted that the Board of Inquiry was established following the publication of the letter dated 1 November 2022, by which the plaintiff had made a series of grave allegations relating to the conduct of ACT Policing officers. It is also noted that the report makes recommendations relating to the AFP and/or ACT Policing, and that if the plaintiff is granted the relief sought in the Originating Application, those recommendations would be affected.

Legal Principles

52. The principles, upon which a court may grant leave to a person, who is not a party to the proceeding, to intervene in the proceeding, are not in dispute. In essence, a non-party, whose legal interest might be substantially affected by the outcome of proceedings, may be granted leave to intervene in the proceeding, if that person can demonstrate that the

existing parties to the proceeding might not fully present submissions on a particular issue, which would assist the court to reach the correct conclusion.

53. In *Roadshow Films Pty Ltd v IINet Ltd*¹⁷, the High Court stated those principles in the following terms:

In determining whether to allow a non-party intervention the following considerations, reflected in the observations of Brennan CJ in *Levy v Victoria*, are relevant. A non-party whose interests would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected. A non-party whose legal interest, for example, in other pending litigation is likely to be affected substantially by the outcome of the proceedings in this Court will satisfy a precondition for leave to intervene. Intervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation.

Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs as between all parties as it sees fit to impose¹⁸.

54. The role and function of an *amicus curiae* is different to that of a party granted leave to intervene in a proceeding. An *amicus curiae* is not a party to the proceeding, and leave would only be granted to a person to act as amicus if that person would be able to provide assistance to the court, which might not otherwise be provided by the existing parties to the proceeding.
55. In that respect, Brennan CJ, in *Levy v State of Victoria*¹⁹, stated:

It is not possible to identify in advance the situations in which the Court will be assisted by submissions that will not or may not be presented by one of the parties nor to identify the requisite capacities of an amicus who is willing to offer assistance. All that can be said is that an amicus will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected.²⁰

¹⁷ (2011) 248 CLR 37.

¹⁸ Ibid 38–39, [2]–[3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); see also *Levy v The State of Victoria* (1997) 189 CLR 579, 602–604 (Brennan CJ); *Hua Wang Bank Berhard v Commissioner of Taxation* (2013) 296 ALR 479, 491–2[51]–[52] (Logan, Jagot and Robertson JJ); *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, 536 [55] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

¹⁹ (1997) 189 CLR 579.

²⁰ Ibid 604–5; *Roadshow Films Pty Ltd v iiNet Ltd (No 1)*, 39 [4]; *Priest v West* (2011) 35 VR 225, 233 [33] (Maxwell CJ, Harper JA and Kyrou AJA).

Analysis and Conclusion

56. The application of those principles necessary produces the conclusion that leave should not be granted to the Chief Officer to intervene in the proceeding, or to act as *amicus curiae*.
57. The terms of reference of the Board of Inquiry, which I have set out earlier in these reasons, were specifically directed to the conduct of the individual police officers, who were involved in the investigation and prosecution of the charge against Mr Lehrmann. The terms of reference did not purport, either directly or indirectly, to identify any particular systemic or procedural issues affecting the AFP, which were to be investigated by the Board of Inquiry.
58. Further, the findings by the Board of Inquiry were specifically directed to the conduct of the police officers, who had been involved in the investigation and prosecution of the proceeding. The Board of Inquiry investigated and formed conclusions about the manner in which the police officers, who had been involved in the investigation, or in supervising it, had conducted that investigation, and in which they had performed their respective roles in the prosecution of the charge against Mr Lehrmann. The report did not purport to involve an investigation, or consideration, of the AFP as a whole. The recommendations, made by the Board of Inquiry, were singularly directed to the particular issues that had arisen in the case in, and were directed to clarifying some of the issues that had arisen in it.
59. It follows that any interest of the AFP, and the Chief Officer, in the findings and conclusions of the Board of Inquiry, is indirect. If the Board of Inquiry had made findings that were adverse to any particular police officer, those findings could only have had an indirect, and limited, effect on the public perception of the AFP as a whole, and thus on its reputation. Similarly, the positive conclusions and findings, made by the Board of Inquiry, reflected directly on the police officers in question, and, to that extent, indirectly redounded to the credit of the AFP's reputation. In that way, it could not be concluded that the AFP, or the Chief Officer, has a direct interest in maintaining the report.
60. Further, it is not apparent why the present applicants — the six named members of the AFP who are to be joined as fourth defendants in the proceeding — would not be able to fully and sufficiently advance any submissions, which the Chief Officer might otherwise seek to make in support of the findings of the Board of Inquiry. As I have discussed, in essence, the indirect interest of the Chief Officer in the findings, made by the Board of Inquiry, is dependent on, and thus coincides with, the direct interests of the applicants in those findings. The Chief Officer does not have any other interest in the findings, which,

it might be apprehended, the six applicants, themselves, would not have a direct interest to maintain.

61. In the affidavit in support of the application by the Chief Officer, it is suggested that the Originating Application in this case will probably raise 'wide-ranging matters affecting the AFP/ACT Policing, or the conduct of proceedings before the Board of Inquiry in which the AFP/ACT Policing was closely involved'. That suggestion is not correct. As I have noted, the application by the plaintiff is based on specific grounds specified in the Originating Application, and the declaratory relief sought by the plaintiff is directed to and based on those grounds. The proceeding will not, in any form, raise 'wide-ranging matters' affecting the AFP/ACT Policing or the conduct of AFP/ACT Policing before the Board of Inquiry.
62. The affidavit also contends that if the plaintiff is granted the relief claimed in the Originating Application, the recommendations contained in the Report 'would not stand for consideration and action.'
63. Regardless of the outcome of the proceeding, it would be a matter for the parties, and others, as to whether the recommendations in the Report are adopted and implemented. In that respect, I note that the ten substantive recommendations in the report are primarily based on, and directed to, issues that emerged in the Inquiry relating to procedural aspects of criminal investigations and prosecutions. They are not, other than indirectly, the consequence of any conclusion by the Board of Inquiry concerning the conduct of the plaintiff or the police investigators.
64. For those reasons, I am not persuaded that the Chief Officer has a direct interest in the findings, by the Board of Inquiry, which would be likely to be affected by the outcome of the present proceedings. Further, I am not persuaded that any indirect interest of the Chief Officer would not be fully and properly vindicated by submissions, which would be advanced on behalf of the six applicants. Accordingly, the Chief Officer has failed to establish a basis upon which he should be granted leave to intervene. For the same reasons, the Chief Officer will not be granted leave to be heard as an *amicus curiae* in the proceeding.
65. For completeness, I should add that, for the same reasons, I would conclude that the Chief Officer would not be entitled to an order to be joined as a defendant in the proceeding pursuant to rule 220 and rule 3556 of the Court Procedures Rules.
66. It follows that the application by the Chief Officer on the Australian Capital Territory for leave to intervene in the proceeding, or alternatively, to appear as *amicus curiae*, is refused.

I certify that the preceding sixty-six [66] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Acting Justice Kaye.

Associate:

Date: 15 December 2023