SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Drumgold v Board of Inquiry & Ors (No. 3)**
Citation:	**[2024] ACTSC 58**
Hearing Date:	13-15 February 2024
Decision Date:	4 March 2024
Before:	Kaye AJ
Decision:	See [596]-[598]
Catchwords:	**CIVIL LAW** – JUDICIAL REVIEW – Application for judicial review of findings by Board of Inquiry concerning prosecution by plaintiff of criminal charge – natural justice – apprehended bias – whether fair-minded observer might reasonably apprehend that Board of Inquiry might not have brought impartial mind to determination of issues concerning conduct of plaintiff of prosecution of the charge – legal unreasonableness – whether findings by Board of Inquiry legally unreasonable – whether plaintiff afforded reasonable opportunity to be heard on issues determined by Board of Inquiry – availability of declaratory relief.
Legislation Cited:	*Evidence (Miscellaneous Provisions) Act 1991*, s 79C *Inquiries Act 1991*, ss 18(a), 26A
Cases Cited:	*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 *Charisteas v Charisteas* (2021) 273 CLR 389 *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 *Commissioner for Australian Capital Territory Review v Alphaone Pty Ltd* (1994) 49 FCR 576 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 *Drumgold v Board of Inquiry & Ors* [2023] ACTSC 394 *Duncan v Ipp* (2013) 34 ALR 359 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 *Mahon v Air New Zealand Limited* [1984] AC 808 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541

R v Carter; ex parte Gray (1991) 14 Tas R 247

Rees v Bailey Aluminium Products Pty Ltd (2008) 21 VR 478

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152

SZMDS v Minister for Immigration and Citizenship (2009) 107 ALD 361

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 and Emma Frizzell (Fourth Defendant)
Representation:	**Counsel**
	D O'Gorman SC with S C Brenker and S Blewett (Plaintiff)
	B Lim (First Defendant)
	K Eastman SC with A Hammond (Third Defendant)
	J A Greggery KC with R Berry (Fourth Defendant)
	Solicitors
	BAL Lawyers (Plaintiff)
	Gilshenan & Luton Legal Practice (First Defendant)
	ACT Government Solicitor (Third Defendant)
	Gnech & Associates (Fourth Defendant)
File Number:	SC 347 of 2023

KAYE AJ:

1. The plaintiff is the former Director of Public Prosecutions ('DPP') for the Australian Capital Territory. In this proceeding, he claims declaratory relief in respect of a number of findings adverse to him in a report entitled 'Report of the Board of Inquiry into the Criminal Justice System' dated 31 July 2023 (the 'Report'). The Board of Inquiry, constituted by Mr W. Sofronoff KC, was appointed by an Instrument of Appointment dated 1 February 2023 pursuant to s 5 of the *Inquiries Act 1991*.

2. The Board of Inquiry is named as the first defendant in the proceeding. The party originally joined as a second defendant, the Attorney-General for the Australian Capital Territory, has been removed from the proceeding. The third defendant is the Australian Capital Territory ('ACT'). In the interlocutory stages of the proceeding, I granted an application by six members of the Australian Federal Police ('AFP')[1] to be joined, collectively, as the fourth defendant in the proceeding.[2]

Background Circumstances

3. The report of the first defendant concerned the investigation by members of the AFP, and the prosecution, of an allegation by Ms Brittany Higgins that she had been raped by Mr Bruce Lehrmann in March 2019 in the parliamentary offices of Senator Linda Reynolds, the then Minister for Defence Industry. Ms Higgins first reported the allegation to police in 2019, but she then decided that she did not wish to proceed with it. Subsequently, in February 2021, she advised police that she wished to proceed with the allegation.

4. In August 2021, Mr Lehrmann was charged with one count of rape. The trial of the charge commenced in early October 2022. The jury commenced its deliberations on 19 October 2022. After more than five days of deliberation, on 26 October 2022, a Sheriff's officer located an inappropriate document in the jury room. As a consequence, on the following day the Chief Justice, who was the presiding judge at the trial, discharged the jury without verdict. Subsequently, on 2 December 2022, the plaintiff, as DPP, having received two medical reports concerning the mental health of Ms Higgins, made a public announcement that he had decided to discontinue the prosecution of the charge against Mr Lehrmann.

---

[1] Commander Michael Chew; Detective Superintendent Scott Moller; Detective Inspector Marcus Boorman; Detective Leading Senior Constable Trent Madders; Senior Constable Emma Frizzell; Sergeant Robert Rose

[2] *Drumgold v Board of Inquiry & Ors* [2023] ACTSC 394

5. In the meantime, on 1 November 2022, the plaintiff wrote a letter to the ACT Chief Police Officer of the AFP, which was critical of 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 case.

6. On 21 December 2022, the Chief Minister of the ACT announced the establishment of a Board of Inquiry into the criminal justice system of the ACT. As I have noted the Board of Inquiry was established was established on 1 February 2023.

7. The original 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 making his decisions to commence, continue and to discontinue criminal proceedings against Mr Lehrmann.

    (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.

    (f) Whether the Victims of Crime Commissioner acted in accordance with the relevant statutory framework in terms of support provided to the complainant in the matter of *R v Lehrmann*.

    (g) Any matter reasonably incidental to any of the above matters.

8. Following its appointment, the Board of Inquiry published 'Practice Guideline 01-2023' on 24 February 2023. The guideline invited any person or organisation with information or evidence, relevant to the terms of reference, to submit that information or evidence to the Board. It further provided that such information and evidence should be provided by email and directed to the Executive Director (of the Board) at BOI.Information@inquiry.act.gov.au. Clause 8 of the guideline provided that any questions about the Inquiry should be directed to the Executive Director at that email address. Clause 26 provided that subject to the chairperson's determination of any application for confidentiality, any information, witness statements (including exhibits to the statements), documents or submissions provided to the Board might be published in whole or in part on the inquiry's website or otherwise made publicly available.

9. At that same time the first defendant also published a document entitled 'Media Protocols Guideline'. That guideline prescribed a number of protocols for the conduct of media in the course of hearings, and provided information as to how access might be obtained by media to those hearings. Relevantly clauses 3 and 14 were to the following effect:

> 3. These guidelines provide details of the arrangements for media access and reporting at hearings. The inquiry may vary or depart from these guidelines.
>
> 14. For media enquiries, please contact BOI.Information@inquiry.act.gov.au.

10. The Board of Inquiry commenced with a series of private hearings commencing in late February 2023. On 16 April 2023, the first defendant wrote a letter to the Chief Minister and the Attorney-General of the ACT seeking an amendment to sub-para (c) of the terms of reference. On 28 April, by notifiable instrument, the terms of reference were amended in accordance with the proposal made by the first defendant, so that sub-para (c) of the terms of reference were:

> 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, to 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.

11. On 17 April 2023, the first defendant conducted its first public hearing, which was in the nature of a directions hearing. It then conducted public hearings, involving receiving

evidence from witnesses, between 8 May and 1 June 2023. The first tranche of the hearings was between 8 May and 12 May, in the course of which the plaintiff gave evidence over a period of four days. In the course of the hearing on Wednesday 10 May, he became significantly medically unwell. However, he continued to give evidence. On Friday 12 May he became extremely unwell while giving his evidence. Mr Sofronoff asked the plaintiff if he wished to adjourn the matter, but the plaintiff responded that he wanted to continue. The hearing adjourned mid-afternoon. On the following day, the plaintiff attended his treating doctor, who advised him that he was unfit to continue giving evidence on the following Monday, 15 May. The plaintiff's doctor issued him with a medical certificate providing him with leave from work until 13 June. The plaintiff then underwent some tests, following which his medical practitioner issued a further medical certificate certifying him to be unfit to return to work until 30 June. In the meantime the plaintiff commenced treatment with a specialist practitioner.

12. The second tranche of public hearings commenced on 22 May and completed on 1 June. In the course of those hearings, seven witnesses gave evidence before the Inquiry.

13. The first defendant was due to deliver its report on 31 July. Following the conclusion of the oral hearings, the first defendant delivered ten Notices of Proposed Adverse Comments to nine individuals. Two of those notices were directed to the plaintiff. On 9 June, the first defendant served the first of those notices on the plaintiff. The plaintiff responded on 26 June by detailed written submissions occupying 130 pages. On 29 June, the plaintiff forwarded further written submissions to the first defendant. On 9 July, the first defendant delivered a second Notice of Adverse Comments to the plaintiff. The plaintiff responded to that notice by written submissions dated 21 July 2023.

14. On 31 July 2023, the first defendant submitted its final report to the Chief Minister of the ACT. The report contained a number of criticisms of the conduct by the plaintiff of 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, which he had written to the ACT Chief Police Officer of the AFP. It is in respect of those findings that the plaintiff seeks declaratory relief.

15. The Report also made a number of findings in chapters 2 and 3 which were favourable to the police investigators, and findings which were favourable to the conduct of the Victims of Crime Commissioner. Those findings are not the subject of the relief sought by the plaintiff in the present proceeding.

The application for judicial review

16. In the proceeding, the plaintiff originally sought declaratory relief on five grounds. He subsequently abandoned the first and fifth grounds. The remaining three grounds are as follows:

    (2) 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;

    (3) The findings in the report, specified in Schedule A to the Originating Application, are legally unreasonable;

    (4) 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.

17. Based on those grounds, the plaintiff seeks declaratory relief in the following form:

    (1) A declaration that the report is, or, alternatively, the parts of the report, which relate to the plaintiff, are invalid and of no effect.

    (2) 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.

    (3) 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.

    (4) A declaration that the plaintiff was denied natural justice by the first defendant.

18. It is not in issue that, in conducting the Inquiry, the first defendant was bound to adhere to the principles of natural justice (procedural fairness).[3] The plaintiff, as a person whose reputation stood to be affected by the issues to be determined by the first defendant, has standing to institute these proceedings, and to seek relief in respect of it.[4]

19. After the plaintiff abandoned ground 1, the first defendant, appropriately, did not take an active role in defending his findings or the report of the Board of Inquiry.[5] Counsel did, in undertaking that role, nevertheless draw my attention to certain matters that are relevant

---

[3] *Inquiries Act 1991* s 18 (a).
[4] *Annetts v McCann* (1990) 170 CLR 596, 598-9 (Mason CJ, Deane and McHugh JJ); *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 574, 577-8 (Mason CJ, Dawson, Toohey and Gaudron JJ) ('*Ainsworth')*.
[5] *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13, 35-6 (Gibbs, Stephen, Mason, Aickin and Wilson JJ).

to my determination of grounds 2 and 4. The role of contradictor was properly undertaken by counsel for the third defendant.[6]

20. The report of the first defendant did not, of itself, have any legal effect, or consequences. Accordingly, relief akin to the prerogative writ of *certiorari* is not available to the plaintiff. However, in an appropriate case, the court has power to grant declaratory relief in respect of it.[7]

Summary of final report of Board of Inquiry

21. For the purpose of addressing the grounds relied on by the plaintiff, it is necessary to summarise, in some detail, the substance of the Report, and the principal findings made by the first defendant in it.

22. As noted in the Report, Senior Constable Emma Frizzell and Detective Leading Senior Constable Trent Madders ('Detective Madders') were the core investigators of the allegation. Their team leaders were Detective Sergeants Gareth Saunders and Jason McDevitt. The crime manager of the SACAT, Detective Inspector Marcus Boorman ('DI Boorman'), supervised the whole team. Detective Superintendent Scott Moller ('DS Moller') assumed case management responsibility for the investigation, that was codenamed Operation Covina. Commander Michael Chew, the Deputy Chief Police Officer – Response in ACT Policing, had overall command of the criminal investigation's portfolio.

23. In Chapter 2 of the Report, the first defendant examined the investigation by ACT Police of the allegation made by Ms Higgins. The first defendant commenced by noting that there was no evidence to support the allegation made by the plaintiff, in his letter to the ACT Chief Police Officer dated 1 November 2022, of political interference in the police investigation of the matter. The plaintiff withdrew the allegation in his evidence at the inquiry. The first defendant was satisfied that a thorough investigation had been conducted by the police, and although some mistakes were made, none of them had affected the quality of the evidence that the police gathered or the prosecution itself.[8]

24. The report proceeded to summarize the history of the investigation. On 6 February 2021, Detective Madders and Senior Constable Frizzell had an initial meeting with Ms Higgins and Mr Sharaz. On 24 February 2021, Ms Higgins participated in a formal Evidence-in-Chief Interview ('EICI') with the police. By that time, DS Moller and DI Boorman had each

---

[6] Cf *Bolitho v Banksia Securities Limited (No 6)* [2019] VSC 653, [110] ff (Dixon J).
[7] *Ainsworth,* 581-2.
[8] Report, [45], [48].

become concerned about the conduct of Ms Higgins' involvement with the media concerning her allegations. On 31 March 2021, DI Boorman and other investigators met the Office of Director of Public Prosecutions ('ODPP') staff to discuss the investigation, in the course of which they expressed concerns as to Ms Higgins' motives and credibility, and as to the reliability of her memory.[9] As a consequence, the plaintiff gained the impression that the investigators had already formed an adverse view of Ms Higgins' credibility. The plaintiff's appreciation of the police thinking caused him to become unreasonably suspicious about the police, which, in turn, 'led to trouble'.[10]

25. On 25 May 2021, DI Boorman directed Detective Madders to prepare a list of identified inconsistencies in the account given by Ms Higgins. Detective Madders prepared such a document, which set out some 18 statements by Ms Higgins that were reportedly contradicted by other evidence.

26. On 26 May 2021, a second EICI was conducted by Detective Madders and Senior Constable Frizzell with Ms Higgins. Ms Yates, the Victims of Crime Commissioner, was present. In the course of the interview, CCTV footage of Parliament House was shown to Ms Higgins. The footage should not have been shown to her.[11] Her responses in the second EICI confirmed the same identified inconsistencies. Ms Higgins became distressed during the second EICI. Police should have recognised that the risk to her health outweighed the minimal investigative and evidential value of the second interview.[12]

27. On 28 June 2021, the plaintiff gave DS Moller a written opinion to the effect that there was a reasonable prospect of conviction at a trial. In view of that opinion, DS Moller was persuaded there was sufficient evidence to charge Mr Lehrmann.

28. On 22 September 2021, Detective Madders and Senior Constable Frizzell, on a direction from DS Moller, took a statement from Ms Yates. On any rational view, Ms Yates could not have added to the body of relevant evidence.[13] The initiative to interview Ms Yates was misconceived and caused unnecessary stress to Ms Higgins and Ms Yates.[14] The interview was one of the 'crosswinds', which led the plaintiff to suspect that police were

[9] Ibid [65].
[10] Ibid [66].
[11] Ibid [78].
[12] Ibid [86]
[13] Ibid [101].
[14] Ibid [106].

interfering with the prosecution. In his evidence, the plaintiff accepted that those suspicions were, in fact, misconceived.[15]

29. On 7 June 2021, DS Moller wrote an executive briefing note for Commander Chew to consider. It was accompanied by an analysis of evidence by DI Boorman, which had been requested by DS Moller. The analysis scrutinised seventeen aspects of Ms Higgins' disclosures, which the investigators believed were inconsistent with the independent evidence. They did not relate to the detail of the allegation of sexual assault and they were not incontrovertible proof that Ms Higgins was dishonest or unreliable.[16] However, the investigators believed that the evidence was insufficient to charge Mr Lehrmann. DS Moller shared that view in an executive briefing note to Commander Chew.[17]

30. Chapter 2 concluded with the observation that the investigators had conducted a thorough investigation. The evidence they gathered was rightly considered by the plaintiff to justify bringing the charge. There was no suggestion that the investigation was flawed. The investigators, and their immediate superiors, had performed their duties in absolute good faith, and with great determination, although faced with obstacles, and they put together a sound case.[18] The investigators made mistakes. The second EICI should not have been conducted, and the interview of Ms Yates was not necessary. However, no police officer breached a duty or acted improperly.[19]

31. Chapter 3 was entitled 'Commencement of Proceedings'. In it, the first defendant noted that the evidence of the police in the Inquiry demonstrated that the investigators had correctly understood that there was a threshold below which a person should not be charged, although their opinions varied about the precise content of that threshold.[20] The factors relating to Ms Higgins' credibility, as identified by the investigators, were real, and, as a result, the police had a firm disinclination to charge Mr Lehrmann.[21] Their doubts led them to think that there were fatal problems with the case, which was a valid professional opinion.[22] The plaintiff was of a different opinion. Once he expressed the opinion that there were reasonable prospects of a conviction, the investigators regarded the issue as closed, and charged Mr Lehrmann. They then continued, conscientiously, to support the prosecutor's conduct of the trial and to assist where they could.[23]

---

[15] Ibid [107].
[16] Ibid [109]–[110].
[17] Ibid [111]–[112].
[18] Ibid [113].
[19] Ibid [116].
[20] Ibid [131].
[21] Ibid [133].
[22] Ibid [134].
[23] Ibid [134].

32. Commander Chew concluded that the investigation and evidence should be independently scrutinised before a decision was made to charge Mr Lehrmann. Having reviewed the documents, he confirmed that the plaintiff's advice, and that an internal review by Commander Smith, should be sought. On 21 June 2021, DS Moller and DI Boorman delivered a letter to the plaintiff seeking his advice, accompanied by a preliminary brief of evidence and documentation. On 28 June, the plaintiff provided legal advice that, on a preliminary basis, there were reasonable prospects of conviction, and there was a public interest in proceeding against Mr Lehrmann.[24] In the meantime, pressure created by the media interest, and the consequent sense of urgency, resulted in mistakes being made, which compromised the right to privacy of Ms Higgins and other individuals.[25]

33. On 2 August 2021, Commander Smith delivered his review, in which he concluded that the police investigation had been conducted in a thorough, reasonable and proportionate manner. On the same day, Commander Chew instructed DS Moller to commence charges against Mr Lehrmann. The delay in charging Mr Lehrmann had become intolerable, with a perceived threat of negative publicity about the investigation.[26] The urgency to charge Mr Lehrmann became conflated with an urgency to deliver the brief of evidence to the defence. Commander Chew directed DS Moller to ensure that the brief of evidence was served, along with the summons, notwithstanding that if normal processes were followed, it would have been delivered about six weeks before the first court appearance. DS Moller was uneasy that normal processes were being circumvented in haste.[27] At the direction of Sergeant Rose, Detective Madders compiled a brief. In doing so, he did not appreciate that Ms Higgins' confidential counselling records, and the audio recordings of her two EICIs, were included in the brief. He also did not realise that the personal contact information of Ms Higgins and three other individuals had not been adequately redacted in seven documents. The police did not inform the plaintiff that they had served the brief of evidence on Mr Lehrmann's solicitor. The errors of disclosure in the brief were not ascertained until 17 September, when the plaintiff noticed that non-disclosable documents had been included in the brief.[28] The haste in delivery of the brief exposed Ms Higgins to the risk that confidential and sensitive information about her could be accessed by people who had no right to see it.[29]

---

[24] Ibid [152].
[25] Ibid [154].
[26] Ibid [170].
[27] Ibid [183].
[28] Ibid [190].
[29] Ibid [191].

34. Chapter 4 of the Report is entitled 'The Prosecution'. It recorded that on 5 November 2021, the ACT Magistrates' Court committed the matter to the Supreme Court for trial, and on 10 November 2021, the plaintiff signed and filed an indictment. The inquiry received no submissions that the plaintiff was wrong in presenting the indictment or continuing the prosecution, and (the first defendant concluded) the plaintiff was correct to file the indictment.[30]

35. The Report then considered aspects of the role of the prosecutor, and noted that, at times, the plaintiff had lost objectivity and had not acted with fairness and detachment, as required by his role.[31]

36. The notes, taken by counsellors at counselling sessions with Ms Higgins, were a protected confidence under s 79C of the *Evidence (Miscellaneous Provisions) Act 1991*. The inclusion of them in the formal brief of evidence, provided to the defence and to the DPP, was a prohibited disclosure. A legal officer for the DPP, Ms Erin Priestly, discovered the error, and she emailed the plaintiff and his junior counsel, Ms Skye Jerome. The plaintiff skim read the notes. By doing so, he placed himself in a difficult position.[32] The police were not prohibited from having access to, and reading the notes, and they acted properly in obtaining and reading them. There was no reason why, with Ms Higgins' consent, they should not have given a copy of them to the plaintiff.[33] Having read the notes the plaintiff was in a position where he held information, which was not available to the defence. His knowledge of what they contained may have been unfair because it might have given him a forensic advantage over the defence.[34] If, at the trial, there was some inconsistency in the evidence, the plaintiff would have been required to disclose that inconsistency to ensure a fair trial, but he would have been unable to do so, due to the statutory prohibition.[35]

37. In evidence to the Inquiry, the plaintiff said he had not turned his mind to those issues. That demonstrated 'a disturbing lack of awareness in [the plaintiff's] understanding of his prosecutorial duties'.[36] The plaintiff should not have read the notes, because it placed him in a position where he might be thought to have significant information about the complainant that was denied to the defence. He could have withdrawn from the case. Alternatively, he could have brought an application for leave to disclose the notes to the

---

[30] Ibid [219].
[31] Ibid [226].
[32] Ibid [241].
[33] Ibid [246].
[34] Ibid [261].
[35] Ibid [262].
[36] Ibid [263].

defence, or supported an application to that effect by the defence. In the absence of those steps, there might not have been a fair trial.[37] The plaintiff's lack of consciousness that the prosecutorial duty of disclosure had been engaged, and his failure to consider what he should do, is disturbing.[38] His failure to do anything about the notes was a breach of his duty as a prosecutor.[39]

38. In the lead-up to the trial, there was an issue concerning the disclosure of DS Moller's executive briefing note, and DI Boorman's evidence analysis. The plaintiff resisted their disclosure. They were ultimately produced when the defence issued a subpoena to the police. The events preceding their production raised questions concerning the plaintiff's conduct as a prosecutor.[40]

39. DS Moller's executive briefing note was highly critical of how Ms Higgins had conducted herself during the investigation. It specified a number of instances of her behaviour, which he believed might form the basis for an attack on her credit. That part of the executive briefing note, of its own, meant the document must be disclosed.[41] The evidence analysis produced by DI Boorman also had to be disclosed, being a detailed analysis of the evidence that had emerged in the interviews of Ms Higgins and Mr Lehrmann.

40. The plaintiff submitted, at the Inquiry, that he had correctly determined that those documents were not disclosable. There is no doubt that they were required to be disclosed. Documents prepared by Detective Madders (comparing the evidence of Ms Higgins to other evidence) and by Commander Smith were also disclosable. The purpose of each of the officers, in preparing the documents, was not to obtain legal advice, but to communicate the facts and their opinions to their superior officer. The documents were required to be given to the defence, and no claim for legal professional privilege could have been maintained. The plaintiff should have known that immediately upon being asked to give his advice.[42] Detective Sergeant Fleming emailed the documents to the plaintiff, stating that AFP Legal had advised that the documents were required to be disclosed and there did not appear to be any obvious claim of public interest immunity or legal professional privilege. In his evidence to the Inquiry, the plaintiff said he did not think it appropriate to provide legal advice, because issues of privilege belonged to the

[37] Ibid [264].
[38] Ibid [265].
[39] Ibid [270].
[40] Ibid [271].
[41] Ibid [294].
[42] Ibid [305].

AFP. The plaintiff did not tell Detective Sergeant Fleming that he did not see it as part of his job to advise on that matter; rather, he chose not to respond to the email.

41. On 27 April 2022, Ms Jerome and Ms Priestly consulted the plaintiff, who expressed the view that the documents were not relevant, and that he did not wish for them to be disclosed. His evidence at the Inquiry was that he formed the view they were not disclosable because they were created by a police officer, who did not understand the admissibility of evidence. He formed the view that the documents did not meet the test for disclosure. That view was 'wrong and untenable'.[43]

42. If the documents were not disclosable, they should not have been included in the certificate. The certificate did refer to them. As a result of an administrative error, the important row was omitted from the prosecution disclosure statement, and the defence disclosure statement, which caused confusion and suspicion.

43. Following the change in Mr Lehrmann's legal representation, the defence requested from the ODPP a copy of the latest version of the disclosure certificate. On 16 June 2022, a teleconference took place between the plaintiff, Ms Jerome, Ms Priestly, Inspector Hughes, Senior Constable Frizzell, Detective Madders, and AFP Legal to discuss the request for disclosure. The plaintiff's previous position was that Detective Madders' and DI Boorman's documents were not disclosable. Now he claimed they were covered by privilege. 'He had no factual basis to form that opinion, and, as has been seen, no such opinion could honestly be formed by a competent lawyer'.[44]

44. On 20 June 2022, Ms McKenzie, a member of AFP Legal, emailed five investigative review documents (including DS Moller's document and DI Boorman's document) to the ODPP, seeking advice as to whether they were disclosable. The email was forwarded to the plaintiff and Ms Jerome. On 21 June 2022, the plaintiff responded, advising that the documents were preparatory to confidential communications between the DPP and the AFP for the dominant purpose of obtaining legal advice, and accordingly were not disclosable pursuant to s 118 of the *Evidence Act*. The plaintiff had no basis to form that opinion.[45] The plaintiff, in evidence, said that DI Boorman and DS Moller's documents were privileged because they post-dated advice that he was going to get a request for advice.

---

[43] Ibid [320].
[44] Ibid [340].
[45] Ibid [353].

45. The proposition, that the legal status of the two documents could be determined by the date on which they were written, is 'absurd'. The status of the documents depends entirely on the state of mind of the person who made the communication.[46] At a meeting between the plaintiff, Ms Priestly, Inspector Hughes, Ms McKenzie and another lawyer, the plaintiff said that all investigation review items are legally privileged. In the Inquiry, it was submitted, on behalf of the plaintiff, that he held that view relating only to the DS Moller and DI Boorman documents. However, the note recording his view related to all the investigation review items.[47]

46. On 31 August 2022 following further exchanges between the defence and the prosecution concerning the disclosure of documents Mr Greig, of the ODPP, emailed the defence, stating that all material falling within the ODPP's disclosure obligations had been disclosed. The defence did not then know that the plaintiff was asserting that any of the documents were privileged or not disclosable. 'In this way [the plaintiff] kept the defence in the dark about steps he was taking to deny them the documents. That meant that they were in no position to mount a challenge'. It is the duty of the prosecutor, who contends there is a ground upon which to decline disclosure of a document, to be candid about it, so that the judge can decide the issue. Criminal litigation is not a poker game in which a prosecutor can hide the cards.[48]

47. In the next section of Chapter 4, the first defendant set out, in detail, steps taken by the defence to obtain disclosure of relevant documents. On 7 September 2022, the defence filed an application, seeking, *inter alia*, a copy of the 'investigative review document' referred to in the disclosure certificate. On 8 September 2022, the plaintiff sent an email to Ms Sarah Pitney, a member of the ODPP, and to Ms Jerome and Mr Grieg, stating that the investigative review document was one of two documents that formed a request by police for advice. On the same date, at a hearing before the Chief Justice, the plaintiff asserted that the document was one of two documents sent by the AFP to the DPP for the express purpose of seeking legal advice. On 12 September 2022, a meeting took place involving the plaintiff, Ms Pitney and Mr Greig, relating to the drafting of affidavits to respond to the application made by the defence. On the same day, the plaintiff emailed the most junior member of his team (Mr Greig), setting out the wording for an affidavit, claiming privilege for the investigative review document.

---

[46] Ibid [356].
[47] Ibid [358].
[48] Ibid [368].

48. The plaintiff's representation to the Chief Justice (on 8 September), that the two documents had formed part of the brief for advice, was true but misleading. He omitted to tell her Honour that the documents had not been prepared for that purpose, and that he had not asked the authors about their purpose in making the documents.[49] The plaintiff's representation, that he thought that it was an error that the documents had been listed as disclosable, was 'untrue and an invention of his own'.[50]

49. The affidavit and the submissions prepared by the plaintiff were filed in order to resist disclosure of the documents prepared by DS Moller and DI Boorman. The submissions claimed that the investigative review document was subject to a claim of legal professional privilege.

50. In an interlocutory application, it is common to use hearsay, but the affidavit must identify the person who supplied the information and affirm the truth of that information. The affidavit, that the plaintiff required a fledging staff member who was newly admitted to practice to swear claiming privilege of the document, did not comply with those rules. The plaintiff knew, or ought to have known, that the deponent was required to identify the source of the information and the grounds of the belief. If he did not know that, it was a very serious instance of gross incompetence. If he did know it, he was intending to mislead the Court by deliberate deception. 'I am of the opinion that [the plaintiff] knew the rule'. He bypassed Ms Pitney, because she knew the requirements, and he thus sidelined the knowledgeable lawyer and procured an inexperienced youngster to do the job instead.[51]

51. The affidavit gave the impression the information came from the AFP, but that was false. The plaintiff knew that it was a crucial belief to induce the Chief Justice, because, as he himself had emphasised before the Chief Justice that the privilege was for the AFP to claim, and not for him.[52] The plaintiff also made statements of fact to the Chief Justice that the AFP was making a claim of privilege over the documents. He knew the AFP had not made such a claim, and had not indicated any intention to do so.[53]

52. In evidence in the Inquiry, the plaintiff claimed that, during a meeting, he had sought to clarify the discrepancy between the plaintiff and the defendant disclosure certificates, and he had been told that the AFP Legal position was that the document fell into the privilege category. 'This never happened. This was another invention of his. There was

---

[49] Ibid [376].
[50] Ibid [376].
[51] Ibid [385].
[52] Ibid [388].
[53] Ibid [389].

no subsequent disclosure certificate. The omission was unintentional, and both disclosure certificates were signed on the same day, in accordance with the usual practice'.[54]

53. Ms Drew (a principal at AFP Legal) gave unchallenged and uncontradicted evidence that no-one in the AFP Legal team told the plaintiff, or his staff that the documents were the subject of legal professional privilege. The plaintiff constructed a false narrative to support a claim of privilege. He initially asked Ms Pitney to draft the affidavit, but she was aware of the rule about hearsay evidence. When she asked him about it, he personally drafted the affidavit, and directed the most junior lawyer on the team to prepare and swear it, based on information, the source of which was not revealed.[55]

54. At a meeting on 15 September 2022, between the ODPP, the AFP, and AFP Legal, the plaintiff was told that DS Moller did not create the executive briefing note for the purpose of obtaining legal advice. The AFP did not instruct, or indicate, that a claim of legal professional privilege should be made in relation to it. On the following day, 16 September 2022, the Chief Justice heard the application by defence for production of the documents. The only inference from what the plaintiff said to the Chief Justice on that date was that he had been told that the investigative review document had been created for the purpose of obtaining his legal advice. 'This was false'.[56]

55. Subsequently, the defence cause a subpoena to be served on the AFP for production of the investigative review documents. Following receipt of advice from the Australian Government Solicitor, the AFP provided the document to the defence. 'They were right to do so. The claim for privilege was utterly untenable'.[57]

56. In the Inquiry, it was submitted on behalf of the plaintiff that his actions were due to the confused state of his instructions. That explanation is rejected. 'There is not the slightest indication that [the plaintiff] was confused. On the contrary, he knew exactly what he was doing when he asked Ms Pitney to swear a misleading affidavit and, when foiled, he asked someone in his office that could not be expected to imagine that he was being asked, by the DPP himself, to do something improper'.[58]

57. It was also submitted on behalf of the plaintiff that a significant consideration was whether the documents were disclosable and that the question of privilege was academic. That

---

[54] Ibid [393].
[55] Ibid [395].
[56] Ibid [404].
[57] Ibid [408].
[58] Ibid [413].

explanation is rejected. 'The evidence has revealed that [the plaintiff] deliberately advanced a false claim of legal professional privilege and misled the Court about this claim through submissions and by directing a junior lawyer in his office to make a misleading affidavit. … [The plaintiff] preyed on the junior lawyer's inexperience'.[59]

58. Quite apart from the plaintiff's misconduct in misleading the Supreme Court in a criminal case, he 'egregiously abused his authority and betrayed the trust of his young staff member to whom he owed a duty to be a mentor and a role model'.[60] The plaintiff '… tried to use dishonest means to prevent a person he was prosecuting from lawfully obtaining material'. If the defence had not been able to obtain the documents, any conviction would have been set aside on the grounds of miscarriage of justice.[61]

59. In the next section of Chapter 4, the first defendant considered the circumstances, which led to the successful application by the defence, on 20 June 2022, for a temporary stay of the trial. The application was based on an acceptance speech given by Ms Lisa Wilkinson for the award of a silver Logie on the previous evening, in which Ms Wilkinson had said that the honour belonged to Ms Higgins, a woman of 'unwavering courage', who had 'had enough'.

60. At that time, the trial was to commence on 27 June 2022, and Ms Wilkinson was one of the witnesses who was to be called by the prosecution. On 15 June 2022, the plaintiff held a briefing conference with Ms Wilkinson, at which she was accompanied by her lawyer, Ms Tasha Smithies. After the plaintiff had discussed with Ms Wilkinson the evidence that she was to give at the trial, Ms Wilkinson told the plaintiff that her television show had been nominated for a Logie award, that she had prepared a speech, and that she wished to read the speech to the plaintiff. In her evidence in the inquiry, Ms Wilkinson said that she read to the plaintiff the section of the speech in which she said, 'The truth is that the honour belongs to Brittany … a woman who's had enough', to which the plaintiff responded, 'I don't want to hear any more'. The evidence at the Inquiry by Ms Smithies was to the same effect. The plaintiff gave evidence that he had a limited memory of the conversation. He accepted he did not tell Ms Wilkinson not to give the speech, and that he did not tell her not to use the particular words she had read out to him.

61. On 20 June 2022, Mr Greig (of the ODPP) sent to the plaintiff and Ms Jerome a contemporaneous note that he had taken during the proofing conference with

---

[59] Ibid [415].
[60] Ibid [416].
[61] Ibid [417].

Ms Wilkinson. The note did not refer to the discussion concerning the speech that Ms Wilkinson intended to make. Ms Jerome responded by email that Mr Greig should add in that Ms Wilkinson had read what she intended to say at the Logies, and that the plaintiff said he could not give witnesses advice on what to say. The plaintiff responded to Ms Jerome's email, by saying that after Ms Wilkinson read the first line, he had stopped her, and said that he was not a speech editor.

62. The plaintiff's best recollection of the conversation differed significantly from the recollections of Wilkinson, Smithies and Jerome in that respect. But it was the plaintiff's recollection that was 'cut and pasted' onto the end of the contemporaneous note sent by Mr Greig.[62]

63. On 20 June 2022 at 4:00 pm, the plaintiff and Mr Whybrow, senior counsel for Mr Lehrmann, appeared before the Chief Justice on an application by the defence for a temporary stay. Mr Whybrow tendered the proofing note. Both the plaintiff and Mr Whybrow put to the judge that Ms Wilkinson had been aware, or must have been aware, that an application for a stay could result from her speech. On the following day (21 June), at the resumption of the hearing, the Chief Justice asked the plaintiff whether he took issue with the accuracy of the proofing note, and the plaintiff responded in the negative. He confirmed that it had been made 'contemporaneously'. The note was not contemporaneous. Mr Greig had not made it. The plaintiff's statement to the Chief Justice was false. He knew that Ms Jerome's recollection was materially different to his own. On Ms Jerome's account, Ms Wilkinson had read the whole of the speech to the plaintiff, which, subsequently, he in fact characterised to the Chief Justice as 'undesirable' and 'unsavoury'.[63]

64. In the Inquiry, it was submitted that the plaintiff's untruthful statements to the Chief Justice were a mistake. That excuse was rejected by the first defendant as 'wholly untenable'.[64]

65. Ms Wilkinson did tell the plaintiff the substance of what she intended to say at the Logies. The plaintiff's statements to the Chief Justice about the nature of the note were not a mere mistake by him. He 'knowingly lied' to the Chief Justice. His instructions to his counsel (in the Inquiry) to make the submission that his conduct involved nothing more than a mistake '… demonstrates a grievous lack of insight into his behaviour and shows

---

[62] Ibid [454].
[63] Ibid [471].
[64] Ibid [472].

that, even now, he is not prepared to admit to what he did'.[65] On any version of the conversation, his response to Ms Wilkinson was wholly inadequate. The speech she intended to give had the obvious tendency to prejudice the fairness of the trial, and that should have been apparent to the plaintiff.[66]

66. Once the plaintiff knew that Ms Wilkinson might broadcast a statement whose tendency would be to affect the fairness of the trial, he was under an obligation to prevent that outcome. At the Inquiry, the plaintiff accepted that, in hindsight, he should have given that advice to Ms Wilkinson, but he said he had entirely misread the situation. 'Actually, [the plaintiff] did appreciate at the time that he had an obligation to warn those involved in the case not to do things that might prejudice the trial. But he was choosy as to whom he should warn'.[67]

67. The plaintiff did not merely fail to do his duty to advise Ms Wilkinson not to make the speech. The tendency of the speech, as the Chief Justice found, was to create a prejudice against Mr Lehrmann, thereby tilting the balance in favour of the prosecution.[68] The first defendant rejected the submission, made on the behalf of the plaintiff, that the warning he gave to Ms Wilkinson was over and above his duty as DPP and as a prosecuting barrister.[69]

68. In the months following the Chief Justice's decision to stay the trial, Ms Wilkinson's lawyer, Ms Marlia Saunders, tried to engage with the plaintiff to correct the falsehood that Ms Wilkinson had given the speech in defiance of a clear warning. Ms Saunders sent an email to the Chief Justice's associate, copying in the parties, attaching a letter stating that neither Ms Wilkinson, nor Network Ten senior legal counsel, had understood that the plaintiff had cautioned them that the speech could result in an application to vacate the trial date. When the plaintiff appeared before the Chief Justice on 23 June, he chose not to tender that letter, despite the Chief Justice saying that she had received it. In evidence in the Inquiry, the plaintiff said he did not tender the letter due to 'inattention'. That was not the true reason. He did not tender it because it would embarrass him, after he had earlier submitted that he had given a clear and appropriate warning to Ms Wilkinson.[70] Subsequently, the plaintiff did not respond to attempts, by Ms Saunders, to contact him about the matter. He did not respond, because he knew he

[65] Ibid [477].
[66] Ibid [479].
[67] Ibid [492].
[68] Ibid [494].
[69] Ibid [496].
[70] Ibid [503].

could not do so without admitting his own failures. That was what his ethical duty as a barrister required him to do.[71]

69. Chapter 5 of the Report is entitled 'The Trial'. It commenced with a section entitled 'Tension between ODPP and ACTP'. The report noted that the relationship between the prosecution and the police deteriorated as the matter progressed from investigation to trial. The investigators formed the incorrect belief that the evidence was insufficient to proceed with the charge. It was correct for the plaintiff to express his opinion to the investigators concerning that matter, just as it was right for the investigators to advance their views of the case to him.[72] The plaintiff came to hold a baseless suspicion that police were interfering and seeking to sabotage the prosecution. That prejudice infected his perception of the actions of the investigators, during the investigation and trial.[73] Feelings of distrust also coloured the investigators' perception of the plaintiff. However, the prosecuting team and the investigators continued to act professionally.[74] The plaintiff continued to be suspicious of communications between the investigators and defence counsel.

70. In Chapter 5, the first defendant then considered an issue that concerned a prosecution witness, Ms Fiona Brown. Ms Higgins was the first witness in the trial, but her evidence was not completed when she became ill. Other prosecution witnesses were interposed, including Ms Brown, who was Senator Reynolds' Chief of Staff. Ms Brown gave relevant evidence of conversations that she had with Ms Higgins and Mr Lehrmann in the days following the incident. After Ms Brown concluded her evidence, Ms Higgins was re-called. Subsequently, Ms Brown read a media report, quoting the evidence by Ms Higgins to the effect that she had had a conversation with Ms Brown about proposed work arrangements, after she had disclosed to Ms Brown the allegation that she had been raped by Mr Lehrmann. Ms Brown disputed the truth of Ms Higgins' testimony as reported in the media, and telephoned an ODPP staff member. She also wrote an email to Ms Pitney and Mr Greig, disputing the allegation, reported in the media, that Ms Brown had offered to pay Ms Higgins six weeks' wages to go to the Gold Coast during the election campaign. Ms Pitney forwarded the email to the plaintiff, but he did not respond to it, and he did not disclose the email to the defence.

71. In isolation, the email should have been disclosed. But in context, the probative significance of the email had diminished, as the media report was not a true reflection of

---

[71] Ibid [518].
[72] Ibid [522].
[73] Ibid [523].
[74] Ibid [531].

the evidence given by Ms Higgins. The plaintiff's decision not to disclose the email was a sound application of the threshold of disclosure, but it produced the result that the defence was deprived of the opportunity to explore a legitimate forensic inquiry, namely, to speak to Ms Brown and find out the context of the conversation.[75]

72. The Report then dealt with issues relating to Senator Linda Reynolds. At the time of the incident in question, Ms Higgins was working for Senator Reynolds, who was then Minister for Defence Industry. On 1 April 2019, Ms Higgins met with Senator Reynolds and Ms Brown. During the meeting, they discussed that Ms Higgins and Mr Lehrmann had entered into Ms Reynolds' office in the early hours of 23 March 2019. At the trial, Ms Higgins gave evidence that, at that meeting, she told Senator Reynolds that Mr Lehrmann had sexually assaulted her. Senator Reynolds' evidence was that Ms Higgins did not reveal that anything sexual happened between herself and Mr Lehrmann.

73. At the trial, the prosecution advanced the argument that 'political forces' had explained the delay in Ms Higgins making a complaint to the police for two years. The prosecution submitted that it was abundantly clear, from the evidence and actions of Senator Reynolds, during the trial, that those political forces were still a factor. Senator Reynolds and Senator Cash each gave evidence, denying that they had discouraged Ms Higgins from making a complaint, for political or other reasons. There was no other evidence that anyone had applied pressure to Ms Higgins that could be legitimately described as 'strong political forces'. However, the plaintiff submitted to the jury that the evidence of Senator Reynolds, during the trial, indicated that 'political forces' were still extant.[76]

74. During the trial, the plaintiff formed the view that Senator Reynolds had acted improperly in the context of the trial in three respects. First, during the trial, defence counsel, Mr Whybrow, told the plaintiff that he had had contact with Senator Reynolds' partner. Secondly, the plaintiff had observed Senator Reynolds' partner sitting in the court, near DI Boorman and DS Moller. Thirdly, Mr Whybrow revealed to the plaintiff that Senator Reynolds had messaged him, when Ms Higgins was being cross-examined, requesting that a copy of the transcript of Ms Higgins' evidence be given to her lawyer.

75. When Senator Reynolds gave evidence, the plaintiff was granted leave to cross-examine her. He commenced by putting to Senator Reynolds that she had arranged for her partner to attend court and that her partner had discussed with her the evidence that had

---

[75] Ibid [557].
[76] Ibid [574].

been given by Ms Higgins. Those propositions were not based on any evidence, and the plaintiff had no information to support them. The propositions were tantamount to an allegation of an attempt, by Senator Reynolds, to pervert the course of justice. Further, there was no evidence upon which the plaintiff could allege that Senator Reynolds' partner had anything to do with her request for the transcript of Ms Higgins' evidence, and there was no support for the suggestion that the presence of her partner in court was improper.[77]

76. In the Inquiry, the submissions, made on behalf of the plaintiff, acknowledged that he fails to understand the difference between putting an allegation of misconduct to a witness as a matter of fact, and, on the other hand, asking a witness whether or not something is a fact.[78] The request, made by Senator Reynolds to Mr Whybrow, that the transcript be supplied to the lawyer, was not a sufficient basis for the cross-examination. Her evidence at the Inquiry was that, because Ms Higgins had issued proceedings claiming damages for personal injury against her, she had been advised she should obtain the transcript of the criminal trial. The fact that relatives and friends of a witness attend cases cannot be a basis upon which to infer improper collusion. The suggestion that Senator Reynolds, as well as her partner, were engaging in potentially criminal conduct was an improper suggestion and should not have been made.[79] Likewise, it was improper to put to Senator Reynolds, in cross-examination, that she was 'politically invested' in the outcome of the trial.[80] The first defendant accepted that the plaintiff had acted out of ignorance, and did not intentionally breach the ethical principle, but he noted, he was 'taken aback' that senior counsel, holding the office of Director of Public Prosecutions, should be so ignorant of this fundamental principle.[81] The suggestions, made by the plaintiff, had no basis at all and should not have been made. They were intended to, and might have, affected the outcome of the trial adversely to Mr Lehrmann, and the conduct was therefore grossly unethical.[82]

77. Chapter 6 of the Report is entitled 'The aftermath of the mistrial'. It commenced by dealing with the letter, that was written by the plaintiff, to the Chief Police Officer on 1 November 2022. In evidence at the Inquiry, the plaintiff said he had had a reasonably based suspicion that there had been political interference with the prosecution. The letter contained serious allegations of impropriety against police, the defence and Senator

---

[77] Ibid [584]– [585].
[78] Ibid [591].
[79] Ibid [596].
[80] Ibid [597].
[81] Ibid [599].
[82] Ibid [600].

Reynolds. At the Inquiry, the plaintiff advanced nothing in the evidence to support those serious allegations. In his evidence, he said he had no choice but to write to the Chief Police Officer.

78. However, there were other options he could have chosen. Instead, he chose to call for a public inquiry. When a high officer of State demands the establishment of a Commission of Inquiry, a government can hardly refuse. Each allegation, contained in the letter, has been exposed to be 'baseless'. Later, in his oral evidence at the Inquiry, the plaintiff finally resiled from his 'scandalous allegations'.[83] The allegation of political interference was particularly wicked, because it was an allegation that had a tendency to diminish the community's confidence in the system of justice, and it was made without the slightest evidence to support it.[84] The plaintiff chose the path of the highest risk that his unsubstantiated claims might enter the public domain before their truth had been determined. It was with the plaintiff's help that the letter, defaming others, made its way to a newspaper. The result has been the expenditure of public money, which was not justified by any of his allegations.[85]

79. On 2 December 2022, the plaintiff made a statement at a press conference, announcing his decision to discontinue the prosecution. His comments went beyond providing his reasons for that decision. He said that his clear view was that there was a reasonable prospect of conviction, and he praised Ms Higgins for her courage, grace and dignity. In evidence to the Inquiry, the plaintiff conceded that he probably should not have included those comments in his speech. The comments were improper, and they should not have been made. It was not necessary for the plaintiff to express his views on the prospects of conviction. Nor was it his function to identify himself with the complainant to a degree that he made a statement of public support for her. The plaintiff owed Mr Lehrmann a positive obligation to uphold the presumption of innocence, and he should not have used his high office to impute guilt in a public forum. The plaintiff's comments were improper. They undermined the public's confidence in the administration of justice, and constituted a failure in his duty as DPP.[86]

80. In the next section of Chapter 6 of the Report, the first defendant considered the circumstances involving the release, under the Freedom of Information ('FoI') legislation, of the letter written by the plaintiff to the Chief Police Officer on 1 November 2022.

---

[83] Ibid [626].
[84] Ibid [627].
[85] Ibid [620] and [631].
[86] Ibid [656]–[660].

81. On 3 December 2022, *The Australian* newspaper published an article entitled 'Police doubted Brittany Higgins' case was political'. There was no evidence at the Inquiry that explains how and when the police briefing documents had been disclosed to that newspaper. Shortly after the publication of that article, Mr Christopher Knaus, a journalist from *The Guardian* newspaper, contacted the plaintiff about it. The plaintiff told Mr Knaus that he had written a letter to the Chief Police Officer about the matter, so he could not make any further comment about it. On 5 December 2022, Mr Knaus submitted a FoI application to the ODPP, seeking disclosure of any documented complaint, by the DPP, about the conduct of the police. Ms Katie Cantwell, the Chief Executive Officer of the ODPP, forwarded the FoI application to the plaintiff on 7 December 2022. The plaintiff responded, attaching to Ms Cantwell a copy of his letter to the Chief Police Officer. The contents of the letter were not redacted, and it contained the names of Whybrow, Moller, Boorman, Chew, Frizzell, Madders and Senator Reynolds. The letter outlined the plaintiff's suspicions of impropriety by those persons. The AFP could have exercised a feasible claim for legal professional privilege over some or all of the contents of the communication. The plaintiff was aware that an FoI application might give rise to a need to consult others, before making a decision on the application.[87]

82. The plaintiff contacted Ms Cantwell, and he confirmed that he wanted her to send the letter to Mr Knaus. On 7 December 2022, Ms Cantwell emailed the plaintiff, asking him to confirm that the attached letter was the one that he wanted her to release under FoI to *The Guardian.* The plaintiff responded, 'I'm happy for it to go out'. As a consequence, Ms Cantwell emailed a copy of the unredacted letter to Mr Knaus. Thus, the FoI application, concerning the release of the letter in which the plaintiff had impugned the reputations of named police officers and Senator Reynolds, was considered, determined, and executed within four hours of first being considered.[88]

83. The plaintiff had not told the Chief Police Officer that the letter had been the subject of an FoI request. After its release, the Chief Police Officer called the plaintiff to express his frustration about it. The plaintiff told the Chief Police Officer he did not know about the FoI or the fact that it had been released, as it was dealt with by the FoI officer, and he could not explain why the DPP had not advised the ACT Police of the release of the document under FoI. Those statements by the plaintiff to the Chief Police Officer were 'false'.[89]

---

[87] Ibid [680].
[88] Ibid [684].
[89] Ibid [688].

84. After speaking with the Chief Police Officer, the plaintiff arranged for Departmental staff to review the letter. That process culminated in the production of a redacted version of the letter on 9 December 2022. That version was registered as the official response to Mr Knaus' FoI application. However, *The Guardian* newspaper had already published an article, based on the unredacted letter, quoting the allegations contained by the plaintiff, albeit that the journalist did not name the individuals concerned.

85. The Chief Police Officer made a complaint to the ACT Ombudsman about the release of the letter. A similar complaint was also made to the AFP Association. The Ombudsman sought the plaintiff's response on the point. The Ombudsman found that the plaintiff had breached his duty of consultation before releasing the letter under FoI. In evidence in the Inquiry, the plaintiff explained his failure to consult the AFP. He said that Ms Cantwell was still to consider the other requirements of the *FoI Act*, such as whether disclosure of the information would be in the public interest, or whether consultation with third parties was required. He had given similar responses to the Ombudsman and to the ACT Police.

86. In the Report, the first defendant rejected that explanation 'as false'.[90] First, Ms Cantwell did not interpret the plaintiff's email incorrectly; he had given her an unambiguous verbal instruction to release the unredacted letter.[91] Secondly, Ms Cantwell had no responsibility to consider issues of redaction, consultation or public interest; her role was wholly administrative.[92]

87. The first defendant rejected the submission that he should not criticise the plaintiff, because the plaintiff had already unreservedly accepted the observations and assessment by the Ombudsman that he had breached his duty of consultation. The Ombudsman was not told the whole truth. As a result, he did not have the full facts when he made his inquiries. The evidence in the Inquiry has revealed that the explanations, proffered by the plaintiff to the Ombudsman, the ACT Police and to the Inquiry, 'were untrue … [the plaintiff] has shamefully tried to falsely attribute blame to Ms Cantwell, who, in every respect, performed her duty assiduously and in accordance with instructions that she was bound to follow from [the plaintiff]'.[93]

88. The final chapter of the Report, Chapter 7, concerned the conduct of Ms Yates, the Victims of Crime Commissioner, in supporting Ms Higgins during the trial. That section of the report is not relevant to the current proceeding. It is sufficient to record that the

---

[90] Ibid [694].
[91] Ibid [695].
[92] Ibid [696].
[93] Ibid [699].

report concluded that Ms Yates' role as a conduit was beneficial to Ms Higgins in her engagement with the ACT Police, and it also assisted police in the investigation. Her role, as the contact point between herself and the police, had been constructive, and the arrangements were proper and beneficial for the progress of the investigation.[94] The report concluded that Ms Yates' professional involvement with Ms Higgins in the trial was consistent with her statutory functions, albeit that the extent of her involvement was unprecedented.[95] There could be no suggestion, nor had there been, that the trial had been rendered unfair by anything that Ms Yates did or did not do.[96]

89. After the discharge of the jury on 27 October 2022, Ms Higgins asked Ms Yates if she could stay with her while she made a statement out of court about the matter. Ms Yates agreed. Ms Higgins made a speech, stating that she was a victim of a violent offence and that the justice system had failed to vindicate her. Ms Yates candidly accepted in hindsight that she should have asked Ms Higgins what she was going to say. However, the occasion was not one in which anyone could have acted or reacted with total cool detachment. Ms Yates was very concerned about Ms Higgins' welfare. She was correct to consider that to be her primary function. Her presence by Ms Higgins' side when she made the speech was unfortunate, but it was not due to any fault of Ms Yates.[97]

Evidence

90. The plaintiff and the first defendant have each filed affidavits in the proceeding. The plaintiff's affidavits related primarily to the issues raised by ground 2. The affidavits deposed by Mr Sofronoff and two witnesses on behalf of the first defendant were primarily directed to the issues raised by ground 1, which was abandoned by the plaintiff after those affidavits were filed. Aspects of the affidavits are also relevant to ground 2. In summarising them, I shall omit those parts of the affidavits, which are only relevant to ground 1, and not to ground 2.

91. In addition to the affidavits, the parties originally provided a second Court Book, which contained all of the transcript of the public hearings before the Inquiry, and the statements of witnesses that were put before the Inquiry. The Court Book was not received as an exhibit. In their written and oral submissions, the parties referred to and relied on specific parts of the evidence before the Inquiry. At the conclusion of oral argument before me, the parties collated those extracts, which collectively were tendered

---

[94] Ibid [757]–[760].
[95] Ibid [778].
[96] Ibid [785].
[97] Ibid [801]–[802].

in evidence as Exhibit A in this proceeding. That exhibit contains all of the extracts, from the evidence before the Inquiry, which I have considered in determining the three grounds of review in this case. Apart from those extracts, the Court Book is otherwise not relevant. I have not read it, and I have had no regard to it.

92. It is convenient to summarise the substance of the affidavits before considering the grounds of review.

93. In support of his case, the plaintiff himself affirmed an affidavit. In addition, his solicitor, Ian Meagher, deposed a number of affidavits, which exhibited a significant volume of documents, which have been discovered by the first defendant, and also documents which have been obtained under subpoena.

94. It is convenient to commence, first, by summarising the affidavit of the plaintiff.

95. Following the establishment of the Board of Inquiry, the plaintiff, in answer to a subpoena, produced documents to the first defendant. In answer to a further subpoena, he provided a statement, dated 4 April 2023, and subsequently he gave oral evidence in the Inquiry over a five day period between 8 and 12 May 2023.

96. On the morning of 10 May 2023, the plaintiff's counsel, Mr Tedeschi KC, brought to the plaintiff's attention an article in the media, which was inappropriately derogatory of Ms Higgins. On the same day, Mr Tedeschi raised the issue of that article before the first defendant and applied for a non-publication direction. In a ruling on that matter, Mr Sofronoff made the following statement:

> Most people will only know about the proceedings through the work of reputable journalists. With that in mind, I and my counsel assisting have freely engaged with journalists to ensure that they can obtain a full understanding of what the evidence means and what may be the significance and ramifications of the evidence. Without that kind of engagement between my counsel assisting and, indeed, engagement by me with journalists, and without making the oral evidence and the documentary evidence available to journalists and the public, the community would have to wait for my report to learn the truth about how various important public officers perform their duties. The community would be denied the precious opportunity to assess the evidence for themselves as it emerges.

97. In his affidavit, the plaintiff then noted that *The Australian* newspaper, and, in particular, the journalist, Ms Janet Albrechtsen, had, both before and following the Inquiry, frequently reported on him, and (in the opinion of the plaintiff) had only ever done so in an 'adverse manner'. Between 17 November 2022 and 11 August 2023, *The Australian* newspaper published more than 60 articles that (in the opinion of the plaintiff) damaged his character. Some were concerned with work-related issues, and some related to personal issues. A copy of those articles, and some related articles, 77 in total, are

exhibited to the affidavit. The plaintiff contends that the articles were interspersed with other articles that were favourable to Mr Lehrmann and to Senator Reynolds.

98. On 30 June 2023, the plaintiff had a meeting with the Attorney-General of the ACT and the Director-General of the Department of Justice and Community Safety, in which they discussed the process that should be followed, should any proposed adverse findings be made against the plaintiff in the report. The Attorney-General advised the plaintiff that the Board of Inquiry would provide a copy of the report to the Chief Minister, who would consider it, and, if necessary, the Attorney-General would provide the plaintiff with an opportunity to respond to any adverse findings in it. At no time was the plaintiff informed that the first defendant would provide any part or version of the report directly to a journalist.

99. The plaintiff began to become concerned about the report when he read an article in *The Australian* newspaper on 20 July 2023, written by Ms Albrechtsen and Mr Stephen Rice, entitled 'Reynolds blasts DPP Drumgold'. He became further concerned there may be adverse findings against him when, on 1 August 2023, he read a further article in *The Australian* newspaper entitled 'Revenge of Lehrmann', which alluded to what was expected to be 'serious adverse findings against Chief Prosecutor Shane Drumgold'.

100. On the following day, the newspaper published another article, under the headline 'Prosecutor may face charges', and 'DPP at risk of charges if he misled court'. On 3 August 2023, *The Australian* Newspaper published two articles, which referred to several of the adverse comments that were made against him in the final report of the first defendant.

101. At 11:30 am on 3 August 2023, the plaintiff participated in a Teams meeting with the Attorney-General and the Director-General, in which the Attorney-General said he was satisfied, on the face of the final report, that there had been misconduct, so that he considered that the plaintiff's position as DPP for the ACT was untenable. On that basis, the plaintiff agreed to resign. On the following day, he emailed a letter of resignation to the Attorney-General. Later on the same day, the plaintiff received an email, attaching the final report of the first defendant and a letter from the Attorney-General.

102. In his affidavit, the plaintiff said that if he had received the final report before he tendered his resignation, he would have held off resigning, because he would have noticed 'the differential way the report categorised my actions with the actions of others'. He would have also sought to defer making a decision, pending receipt of advice whether he should make an application for an interim injunction in respect of the release or publication of the adverse findings against him.

103. Subsequently, on 12 August 2023, the plaintiff read an article in the 'Canberra Times', which stated that Mr Sofronoff had disclosed the final report to Ms Albrechtsen on 30 July, before he had submitted the report to the Chief Minister. Further, on 1 August, the Queensland Media Club had announced that Mr Sofronoff would give a speech on 25 August 2023 entitled, 'Politics, journalism and social media versus the presumption of innocence'. In addition, on 2 August 2023, Mr Sofronoff had disclosed the final report to the ABC. Having read that article, the plaintiff became further concerned about the legality of the report.

104. As mentioned, in addition to the affidavit, deposed by the plaintiff, his solicitor, Mr Ian Meagher, has deposed five affidavits, which exhibited a substantial amount of documents, discovered by the first defendant and by the third defendant, and in addition, some documents obtained by the plaintiff under subpoena. Those documents include the nineteen specific communications, relied on by the plaintiff under ground 1. The balance of the documents, that are exhibits to the affidavits of Mr Meagher, are relied on by the plaintiff in support of ground 2.

105. At a pre-trial hearing, an issue arose concerning the relevance of those documents. In response, the plaintiff provided a number of schedules, which extracted the relevant parts of those documents, in a manner which made them sufficiently relevant to be admitted in evidence in the case.

106. The first schedule extracts, from the exhibited documents, the relevant aspects of communications between Mr Sofronoff on one hand, and two journalists associated with *The Australian* newspaper, namely, Ms Janet Albrechtsen and Mr Hedley Thomas. The second schedule extracts and summarises communications between Mr Sofronoff and journalists, who were not associated with *The Australian* newspaper. The third schedule extracts and summarises communications between journalists, on the one hand, and staff of the Board of Inquiry, including Counsel Assisting, but excluding Mr Sofronoff, on the other hand. The fourth schedule identifies each of the nineteen communications, relied on by the plaintiff under ground 1, by reference to the exhibits to the affidavit of Mr Meagher. The fifth schedule identifies some ten further documents, contained in the exhibits to Mr Meagher's affidavit, and specifies the issue, specified in the plaintiff's further amended particulars of the ground of application, to which that document is relevant. The sixth schedule contained extracts of relevant articles published in *The Australian* newspaper.

107. The third schedule is quite substantial, comprising some 167 communications. Specifically, it sets out:

(a) communications between journalists (or other members of the media) and the email address BOI.Information@inquiry.act.gov.au (‘BOI Information’);

(b) communications between journalists (or other members of the media) and the email address of Ms Helen Banks, the Executive Director of the first defendant;

(c) communications between journalists (or other members of the media) and Ms Genevieve Cuddihy, Senior Solicitor Assisting the Board of Inquiry;

(d) communications between journalists (or other members of the media) and the email address of the Justice and Community Safety Directorate media team, (‘JACS Media’) which were then forwarded on to BOI Information;

(e) communications between BOI Information, Ms Banks, Ms Cuddihy or JACS Media on the one hand, and Mr Sofronoff, Counsel Assisting, or Ms Cuddihy, on the other hand, which forwarded and/or discussed the communications with media personnel.

108. In response, the first defendant filed an affidavit of Mr Sofronoff, and also affidavits of Geoffrey Lance Davies and James Cochrane Bell. Those affidavits were directed primarily to ground 1 of the originating application, which was subsequently abandoned by the plaintiff, but parts of them are also relevant to some of the issues raised under ground 2.

109. Mr Sofronoff was admitted as a barrister of the Supreme Court of Queensland in 1977. He was appointed Queen’s Counsel in 1988, and practiced at the Bar for 39 years, until his appointment as President to the Queensland Court of Appeal in 2017. He served in that role until 2022.

110. In his affidavit, Mr Sofronoff set out his experience in conducting two previous significant Commissions of Inquiry. In 2015, he was appointed Commissioner of Inquiry into flooding in the town of Grantham in Queensland. The flood, which had occurred in 2011, affected large parts of south-east Queensland, and resulted in the deaths of 21 people. Subsequently, after his retirement from the Court of Appeal, in June 2022, Mr Sofronoff was appointed by the Queensland government as a Commissioner of Inquiry to conduct an inquiry into the practices of the government laboratory that conducted DNA testing and reporting for criminal cases.

111. In discussing his role in each case, Mr Sofronoff has set out, in some detail, the steps that he had taken to liaise with members of the media for the purposes of ensuring that the work of the Inquiry be accurately reported to members of the public. In each case, he had considered that the community would only retain confidence in government administration if it properly understood the proceedings that took place in each Inquiry.

112. In conducting the Grantham Flood Inquiry, Mr Sofronoff had reference to the report of the Commission of Inquiry into police misconduct by G.E. Fitzgerald QC in 1989. In that report, Mr Fitzgerald had referred to the importance of restoring public confidence in the integrity of the criminal justice system by maximising the capacity of the media to report on the evidence in the inquiry. As a consequence, Mr Sofronoff had formed the view that, in conducting an inquiry, it was important to rebuild public confidence, by ensuring that the community had the means of informing itself about the work of the inquiry. He regarded it as an important function of a Commission to ensure, as far as possible, that reporting of its work was timely, accurate and informative to members of the public. In accordance with that view, in conducting the inquiry into the Grantham flooding, Mr Sofronoff had made himself available to discuss the conduct of the inquiry with journalists and local residents. In his affidavit, he said that he believed that only if the community truly understood the proceedings before the inquiry would it retain or recover confidence in government administration, and accept the findings made in the inquiry.

113. In his affidavit, Mr Sofronoff further noted that, in the conduct of the Commission of Inquiry into forensic DNA testing in Queensland, he had several meetings with journalists to ensure that the scientific practices, that were at the centre of that inquiry, could be explained to the public in an understandable way, and thus to ensure that the significance of the evidence presented at the inquiry could be properly understood. For that purpose, he had several meetings with journalists to explain some of those matters.

114. After he was appointed as the Board of Inquiry into the ACT criminal justice system, Mr Sofronoff said that he recognised that the subject matter of the Inquiry concerned public confidence in the criminal justice system. He formed the view that appropriate engagement with the media would be essential to the performance of the functions of the Inquiry. His interest was to ensure accurate coverage of the actual work of the inquiry so far as he could do so.

115. In February 2023, before any hearings were conducted in the Inquiry, Mr Sofronoff had conversations with several journalists, who made contact with him about the Inquiry. In February 2023, he was introduced to Ms Albrechtsen by Mr Thomas, who was also a journalist for *The Australian* newspaper. Mr Sofronoff had come to know Mr Thomas during the DNA testing inquiry. In March 2023, Ms Albrechtsen and Mr Sofronoff had lunch in Brisbane, in order that he could make her acquaintance. At about the same time, two other journalists made arrangements to speak with Mr Sofronoff, namely, Ms Elizabeth Byrne, who was the ABC's Canberra reporter, and Ms Samantha Maiden, who was a reporter for News.com on its internet service. Mr Sofronoff met with each of those two journalists. He directed Counsel Assisting the Inquiry to give whatever

assistance they thought fit to journalists, to ensure that they had a clear understanding of the work of the Inquiry.

116. On 24 February 2023, before the commencement of hearings, Mr Sofronoff published the practice guideline,[98] part of which was to the effect that, subject to his determination of any application for confidentiality, any information, witness statements, documents or submissions, provided to the Board of Inquiry, might be published in whole or in part on the inquiry's website, or otherwise made publicly available.

117. For the purpose of the Inquiry, the hearing room was made available to the journalists. In addition, a second room, adjacent to the hearing room, was available to journalists, and a live feed was established in that room for their use. On occasion, Mr Sofronoff was approached by journalists during an adjournment as he walked across the courtyard that separated the building that contained the hearing room from the Inquiry's offices. By the time public hearings began, he was conscious that the subject matter of the Inquiry could have a severe prejudicial effect on both Ms Higgins and Mr Lehrmann. Accordingly, he determined that any journalist, to whom he spoke, should properly understand that no part of the work of the Inquiry required him to consider the truth of the allegations made by Ms Higgins against Mr Lehrmann. For that purpose, on the first day of the public hearing (8 May 2023), he made a statement, in which he said that he depended on the news media to inform the community, accurately, about the subject matter of the inquiry.

118. Mr Sofronoff referred to two instances in which it came to his attention that media reporting had been inappropriate. The first instance was on 10 May 2023, in respect of the publication to which the plaintiff referred in his affidavit. On that date, Mr Sofronoff, in his ruling, requested that the media remove the offending material, which he described as 'loathsome'. In his oral reasons, he emphasised that media accounts, created by experienced journalists, are vital to the success of a statutory inquiry, and it was for that purpose that he and counsel assisting had freely engaged with journalists.

119. The second instance of inappropriate behaviour by a media organisation consisted of an article, published in *The Australian* newspaper on 19 May 2023. After that article came to his attention, Mr Sofronoff wrote a letter to the editor of *The Australian* newspaper, seeking an explanation for the publication.

120. In his affidavit, Mr Sofronoff said that, in the course of the Inquiry, several journalists called him from time to time, and he spoke with them. They included journalists from The

---

[98] See [8] *supra*.

Guardian, The Canberra Times, The Sydney Morning Herald, *The Australian*, and the ABC.

121. Mr Sofronoff then explained his communications with Ms Albrechtsen. He said that Ms Albrechtsen was the journalist with whom he had most contact, because she was a journalist who was most persistent in contacting him. His purpose in communicating with Ms Albrechtsen, and in providing documents to her when requested to do so, was to ensure that she was accurately informed and would be better able to appreciate the real issues in the Inquiry.

122. On 25 July 2023, Ms Albrechtsen asked, by text, whether Mr Sofronoff would give her a copy of the final report on an 'embargoed' basis, that is, on the basis that the journalist would neither use nor publish its contents until she had authority to do so. On 28 July, Mr Sofronoff provided a draft copy of the report to Ms Albrechtsen on that basis. On 30 July, he gave a final version of the report to her on that basis. On that date, he also provided a copy of the report to the solicitor for Ms Higgins.

123. On 31 July 2023, Mr Sofronoff handed a copy of his report to the Chief Minister and the Attorney-General of the ACT. On 2 August 2023, he furnished a copy of the report, under embargo, to Ms Byrne, of the ABC, on her request. Ms Byrne and Ms Albrechtsen were the only journalists who made that request. Mr Sofronoff said that he would have provided a copy of the report to any journalist whom he trusted. He acceded to the requests of Ms Byrne and Ms Albrechtsen in order to assist the journalists to accurately and timely report on the work of the Inquiry.

124. On 3 August 2023, *The Australian* newspaper published a story, dealing with the content of the report, which the government had not then published. On the previous evening, Ms Albrechtsen telephoned Mr Sofronoff to inform him that she and her colleague, Mr Rice, had obtained a copy of the Report from another source, and that, using that other copy, they were going to publish the story, which would disclose the contents of the Report.

125. During the Inquiry, Mr Sofronoff received a telephone call from a journalist, Mr Peter Kelly, who asked Mr Sofronoff if he would agree to address the Queensland Press Club about the subject of the inquiry. Mr Sofronoff agreed to do so, after the Inquiry had concluded, and after the Report had been published. Accordingly, he suggested a date in August on a date after he expected that the Report would have been published.

126. Geoffrey Davies and James Bell were each former members of the Queensland Bar. Mr Davies was admitted to practice in 1961, and he was appointed Queen's Counsel in 1976. He was a member of the Queensland Bar for some 30 years, before being

appointed as a Judge of Appeal in the Queensland Court of Appeal in December 1991. He served in that role until 2005. Following his retirement, in February 2005, Mr Davies was appointed as Commissioner of the Queensland Public Hospitals Commission of Inquiry, which was involved in investigating very serious allegations about a Bundaberg doctor.

127. In his affidavit, Mr Davies stated that, from the outset of the inquiry, he recognised the importance of the role of the media in reporting the work of the inquiry. In the course of the inquiry, he had regular contact with journalists, and with two journalists in particular, one of whom was Mr Hedley Thomas. Mr Davies was concerned to ensure that his report should be published at the same time that it was presented to the government. Shortly before he presented his report to the Premier, in November 2015, Mr Davies agreed to provide Mr Thomas with an advance copy of the report on an embargo basis, in order to assist him to report its contents promptly and accurately.

128. James Bell was admitted to the Queensland Bar in 1976 and he was appointed Queen's Counsel in 1993. In the course of his career, he has been engaged to act in various Commissions of Inquiry. In 1987, he was retained to act for the former Premier of Queensland, Sir Johannes Bjelke-Petersen, in the Fitzgerald Inquiry. In 1995, he acted for the Commissioner of the Australian Federal Police in an inquiry, conducted by Mr Russell Hanson QC, concerning unauthorised disclosure of confidential information in relation to an investigation. In 1996, Mr Bell appeared for the National Party in the Shooters Inquiry, which was headed by retired New South Wales Justice, the Honourable Kenneth Carruthers QC. In 2013, Mr Bell was appointed as counsel assisting the Honourable Margaret White AO (a former Justice of Appeal of the Supreme Court of Queensland) in the Queensland Racing Commission of Inquiry. In 2015, Mr Bell appeared for the Anglican Archbishop of Queensland, and the Anglican Diocese Southern Queensland, in the Royal Commission into Institutional Responses to Child Sexual Abuse.

129. In his affidavit, Mr Bell described that, during the course of his involvement in those inquiries, he had observed different models, which the Commissioners and their staff had used to engage with the media. The practices in that respect had changed somewhat over the years. Originally, there was a traditional reluctance of Commissions of Inquiry to engage with the media. However, a different approach was taken by Mr Fitzgerald QC in the course of his inquiry into police and political corruption. Mr Fitzgerald had engaged closely with the media in the course of the inquiry. In the Shooters Inquiry in 1996, the Commissioner, Carruthers QC, paid close attention to the reporting by the media and the accuracy of what was reported. In his role as counsel assisting the Racing Inquiry in

2013, Mr Bell had regular engagement with the media, with a view to ensuring that the media reporting was relevant and accurate in relation to the work of the inquiry.

Grounds of Review

130. As I have noted earlier, the plaintiff relies on three grounds of review, namely, grounds 2, 3 and 4 in the Originating Application. I shall consider those grounds in that order.

Ground 2 – Apprehended Bias

131. Under ground 2, it was contended, on behalf of the plaintiff, that Mr Sofronoff conducted the Inquiry in a manner which gave rise to a reasonable apprehension of bias. The plaintiff has not sought to rely on a ground of appeal, nor has he contended, that, in conducting the Inquiry, and in determining the issues that related to the plaintiff, Mr Sofronoff was in fact biased against the plaintiff. Rather, ground 2, and the submissions advanced on behalf of the plaintiff in support of it, are essentially to the effect that Mr Sofronoff engaged in conduct, in the course of the Inquiry, which might have given rise to a reasonable apprehension that he might not have brought an impartial mind to the resolution of the issues in the Inquiry that related to the conduct, by the plaintiff, of the prosecution of the case against Mr Lehrmann.

Ground 2 – Submissions of Plaintiff

132. The plaintiff's principal submission under ground 2 was that, from an early stage in the Inquiry and until its conclusion, Mr Sofronoff regularly communicated with, and provided documents and material relating to the Inquiry to, *The Australian* newspaper, and in particular Ms Janet Albrechtsen, who, throughout that time, had been particularly critical of the conduct by the plaintiff of the prosecution of the charge against Mr Lehrmann.

133. In support of that submission, it was contended that *The Australian* newspaper in general, and Ms Janet Albrechtsen in particular, had, at least from November 2022 through to the commencement of and during to the Inquiry, engaged in media reporting that was adverse to the plaintiff by casting him in a negative light, including by impugning his character and credibility. By contrast the newspaper engaged in reporting that cast Mr Lehrmann in a favourable light. In support of that proposition, the plaintiff relies on the articles that were exhibited to his affidavit in this proceeding. Almost all of the articles contained or alleged facts and expressed opinions that were adverse to the interests of the plaintiff. At the same time, it is alleged, Ms Albrechtsen was communicating with Mr Lehrmann who was, and remained, extremely critical of the plaintiff.

134. It was in that context, the plaintiff submitted that Mr Sofronoff communicated extensively with the journalists who were writing articles for *The Australian* newspaper generally, and

with Ms Albrechtsen in particular, before the commencement of and during the Inquiry, and immediately after the Inquiry was completed. In doing so, Mr Sofronoff did not adhere to the Media Protocols Guideline, which he issued on 17 February 2023, and the Practice Guideline 01–2023 published on 24 February 2023, the effect of which was that media inquiries should be directed to the Executive Director of the Board of Inquiry at a specified Gmail address.

135. Counsel for the plaintiff referred to the circumstances in which the plaintiff and Ms Albrechtsen commenced to communicate with each other. In particular, on 4 February 2023, Mr Hedley Thomas, of *The Australian* newspaper, who was well acquainted with the plaintiff, forwarded an email to Mr Sofronoff, noting that Ms Albrechtsen would be reporting on the Inquiry, and noting that, in the past, Ms Albrechtsen had written articles, which were supportive of the defence in the Lehrmann rape trial, and which were critical of the plaintiff. Subsequently, on 22 February 2023, Mr Thomas sent a further text message to Mr Sofronoff, informing him that he (Mr Thomas) had spoken to Ms Albrechtsen, who had indicated that she was '… happy to collate her writings for you and your inquiry …'. After further introductory communications between Ms Albrechtsen and Mr Sofronoff, on 31 March 2023, Ms Albrechtsen flew to Brisbane, in order to have an introductory lunch with Mr Sofronoff and with Counsel Assisting the inquiry.

136. It was submitted that from early February 2023, Mr Sofronoff engaged with *The Australian*, and in particular with Ms Albrechtsen, in a manner which was more favourable than that accorded to other media outlets and journalists.

137. In support of that proposition, the plaintiff relied on both the quantity and the nature of the communications between Mr Sofronoff and Ms Albrechtsen, that are the subject of the exhibits to the affidavit of Mr Meagher. In that respect, counsel noted that the material establishes that from the time that Mr Sofronoff was appointed, he was in constant contact with Ms Albrechtsen. Between 9 February and 2 August 2023, he engaged in 91 telephone calls with journalists, 51 of which were with Ms Albrechtsen, and 22 of which were with Mr Thomas. The 91 telephone calls were for a total of 13 hours and 37 minutes. The telephone calls with Ms Albrechtsen were for 6 hours and 19 minutes, and with Mr Thomas for 5 hours and 8 minutes. By contrast the telephone calls with all other journalists during that period occupied a total of 2 hours and 10 minutes. In the course of the public hearings (between 8 May and 1 June 2023), Mr Sofronoff engaged in ten telephone calls with *The Australian* newspaper (eight of which were with Ms Albrechtsen), and no telephone calls with any other member of the media. Further, between 7 April and 31 July 2023, Mr Sofronoff had 31 telephone contacts with *The*

Australian newspaper (27 of which were with Ms Albrechtsen), and, during that period, he had no such contacts with any other journalist.

138. Counsel for the plaintiff made a number of submissions concerning the nature of the contacts between Ms Albrechtsen and Mr Sofronoff. He submitted that there were a number of those contacts which could be regarded as concerning from the viewpoint of the fair-minded observer. Counsel provided instances of such contacts. For example, on 3 April 2023, Mr Sofronoff responded to a suggestion, by Ms Albrechtsen, that the courts could review the conduct of the prosecutor in a claim for malicious prosecution. He concluded the discussion by sending a text message to Ms Albrechtsen, 'Good question. Thanks for alerting me to that point'. On the following day, Ms Albrechtsen sent a text message to Mr Sofronoff concerning a stay application (which had been suppressed), and suggesting that it might assist the Inquiry 'to shed some light on why the DPP decided to drop charges'. On 17 April 2023, Ms Albrechtsen sent a further text message to Mr Sofronoff, asking whether she was permitted to report that the Inquiry had made an application for the lifting of a suppression order in respect of a stay application.

139. In that context, counsel placed particular reliance on a text message, by Mr Sofronoff to Ms Albrechtsen, dated 6 May 2023, concerning the circumstances in which Mr Greig had sworn the affidavit claiming legal professional privilege in respect of the police investigation documents. In that text message he said: 'What a thing to do to two young professionals under your mentorship'.

140. Counsel for the plaintiff further referred to the timing of the exchanges between Ms Albrechtsen and the plaintiff as being a matter of concern. In the three days that immediately preceded the commencement of public hearings in the Inquiry on 8 May 2023, there were 38 such communications. Between 8 May and 12 May 2023, in the period in which the plaintiff gave his evidence, there were 13 such exchanges.

141. Counsel further noted that there were occasions on which Mr Sofronoff volunteered information to Ms Albrechtsen. In addition, counsel submitted that it was evident, from the schedule of text and email messages that preceded and followed them, that at least six of the communications between them were initiated by Mr Sofronoff.

142. Counsel further noted that there were unusual features in some of the communications between Ms Albrechtsen and Mr Sofronoff, which would have given cause for concern to the fair-minded observer. On two occasions, Ms Albrechtsen informally, by text message, made a request to Mr Sofronoff for information, which she followed up by making a formal request for the information by email.

143. Further, counsel noted that, at the time, Mr Sofronoff had four different email addresses. Ms Albrechtsen used one of those addresses on eight occasions, when she forwarded particularly sensitive information to Mr Sofronoff. Counsel asked, rhetorically, if the communications between them were all 'appropriate/above board', why would Ms Albrechtsen and Mr Sofronoff use that one particular email address to be providing documents and information to Mr Sofronoff.

144. Another feature of the contacts between Ms Albrechtsen and Mr Sofronoff, relied on by the plaintiff, were communications in which, it was submitted, Ms Albrechtsen provided information to Mr Sofronoff, and which it would appear was intended to assist him in his role. In that context, counsel noted that, in his report, Mr Sofronoff relied on some of the communications, which he had had with Ms Albrechtsen.

145. Counsel submitted that in deciding matters in the terms of reference, Mr Sofronoff relied on communications that he (and counsel assisting) had with *The Australian* newspaper in general, and with Ms Albrechtsen in particular. In addition, it was submitted, Mr Sofronoff relied on facts ascertained as a result of communications with, or articles published by, *The Australian* newspaper and Ms Albrechtsen in particular. Those articles were not part of the evidence before the Inquiry and were published after the evidence in the Inquiry had closed. In his final report, Mr Sofronoff quoted from articles written by Ms Albrechtsen in support of propositions he advanced in the report.[99]

146. Further, the plaintiff relied on the circumstance that Mr Sofronoff provided drafts of his final report, including parts of his draft final report, to Ms Albrechtsen and to no one else (apart from the lawyer acting on behalf of Ms Higgins) not directly associated with the Inquiry. In addition, Mr Sofronoff provided a copy of his final report to Ms Albrechtsen, and to no other journalist, on 31 July 2023, after he had submitted it to the Chief Minister under s 14 of the Act.

147. Counsel further submitted that not only was the quantity of communications, which Mr Sofronoff had with Ms Albrechtsen, much greater than those which he had with other journalists, but, significantly, the nature of the communications he had with Ms Albrechtsen were quite different to those which he had with other journalists. The communications with Ms Albrechtsen took place in the context of the steps that were taken by the Executive of the Board of Inquiry to ensure that all communications by journalists be made through a specified email address entitled 'BOIinformation'. The Executive of the Board of Inquiry maintained a media distribution list, and counsel noted

---

[99] Report [129] footnotes 167,168

the manner in which members of the media, other than Ms Albrechtsen, gained entry to that list. It was noted that Ms Albrechtsen's name was not on the list. When other members of the media made inquiries of the Executive of the Board of Inquiry, on occasion, those requests would be referred by BOI Information to Mr Sofronoff, who would respond to BOI Information, and that response would be then conveyed to the person who made the request for information.

148. Counsel submitted, in contrast to the nature of the communications between Mr Sofronoff and Ms Albrechtsen, his communications with other journalists were significantly different. In particular, no other journalist: was given the opportunity to engage directly with Mr Sofronoff; had lunch with Mr Sofronoff; had a choice of email addresses by which they might communicate with Mr Sofronoff; assisted the Inquiry by providing information to it in the manner in which Ms Albrechtsen had; was provided by Mr Sofronoff with documents related to the Inquiry; was provided with drafts of the final report of the Inquiry; or was provided with the final report on the same day on which it was submitted by Mr Sofronoff to the Chief Minister.

149. Counsel further submitted that at no time was the plaintiff advised by Mr Sofronoff, or by any other person associated with the Inquiry, of the extent and the content, of the communications that Mr Sofronoff and Counsel Assisting had with *The Australian* newspaper in general, and with Ms Albrechtsen in particular. The fact that the plaintiff was not so informed was significant for two reasons. First, the plaintiff was specifically referred to in the terms of reference as the Director of Public Prosecutions at the time in question. Secondly, in the course of the Inquiry, Mr Sofronoff required Mr Whybrow (counsel who had acted for Mr Lehrmann), investigators of Operation Covina, and the DPP staff to disclose to him the communications which they had had with the media about the case of *R v Lehrmann*.[100]

150. In that respect, counsel accepted that a fair-minded observer would take into account that the Inquiry could have appropriate contact with the media, in order to ensure that its work was properly reported. However, it was submitted, a fair-minded observer would expect that that contact be conducted openly and transparently, so that any party concerned with the nature of the contact might be able to deal with any issue arising out of it. Counsel submitted that that proposition is consistent with the media protocols and the guidelines, published by the first defendant, at the commencement of the Inquiry. Counsel further submitted that, in that context, a fair-minded observer would reasonably

---

[100] Ibid [662].

have significant concern with the extent of the private communications that took place between Mr Sofronoff and Ms Albrechtsen. In that connection, counsel submitted that the decisions, and the statements of principles, by the High Court in *Charisteas v Charisteas*,[101] and the Full Court of the Federal Court *Gaisford v Hunt,*[102] are relevant.

151. For those reasons, counsel submitted that a fair-minded observer, knowing all of the foregoing facts, might have reasonably apprehended that, in determining the issues in the Inquiry concerning the conduct by the plaintiff of the prosecution of the case against Mr Lehrmann, Mr Sofronoff might have been influenced against the plaintiff by Ms Albrechtsen, who had been, and was, particularly critical of the manner in which the plaintiff had prosecuted the rape charge against Mr Lehrmann.

152. In addition, in support of the plaintiff's submissions under ground 2, counsel relied on six further considerations.

153. First, by at least 14 February 2023, Mr Sofronoff had exhibited 'an unusual interest' in the plaintiff in that, on that date, he sent via text message to Mr Hedley Thomas, a link to the plaintiff's Wikipedia page, which generated three photographs of the plaintiff.

154. Secondly, in the course of the inquiry, Mr Sofronoff sought, on his own initiative, an extension of the terms of reference insofar as they related to the plaintiff.

155. Thirdly, it was contended that the treatment accorded to the plaintiff by Mr Sofronoff and by Counsel Assisting during the Inquiry was different to that accorded to other persons about whom the board inquired. In particular:

- the plaintiff was called as the first witness; his evidence occupied five of the 13 hearing days;
- the plaintiff was cross-examined by the most senior of counsel assisting, while all police witnesses were cross-examined by more junior counsel assisting;
- the plaintiff was subjected to intense cross-examination almost from the commencement of his evidence;
- Mr Sofronoff engaged in a significant amount of cross-examination of the plaintiff, and he often interrupted the plaintiff's answers. By contrast, he assisted some police witnesses with their answers.

---

[101] (2021) 273 CLR 289, 298–9 [15]–[18] ('*Charisteas*').
[102] (1996) 71 FCR 187, 200.

156. Fourthly, the final report omitted any reference to, and/or failed to annex, two written submissions made to the board by the plaintiff, in breach of s 26A(4) of the *Inquiries Act*.

157. Fifthly, Mr Sofronoff agreed to be hosted by *The Australian* newspaper at a function scheduled to be held before the Chief Minister of the ACT had publicly released the final report. By at least 1 August 2023, the Queensland media club was advertising that Mr Sofronoff was to address that club on 25 August '…to discuss issues raised by his inquiry into the handling of allegations made by (Ms Higgins) against (Mr Lehrmann)', and that such an event was to be hosted by Mr Hedley Thomas.

158. Finally, it was submitted that Mr Sofronoff failed to give the plaintiff a fair hearing in respect of the adverse finding he made relating to the plaintiff's request of a junior lawyer, Mr Greig, to make an affidavit, and in respect of the finding he made relating to the release, pursuant to requests made under the *Freedom of Information Act 2016*, of the letter that the plaintiff had written to the Chief Police Officer on 1 November 2022. It was submitted that the failure of Mr Sofronoff to give the plaintiff a fair hearing in respect of those two findings is an additional matter that gives rise to a reasonable apprehension of bias on his behalf.

Ground 2 – Submissions of third defendant

159. The defendants each advanced submissions in response to those made on behalf of the plaintiff in respect of ground 2.

160. Senior Counsel for the third defendant noted that the most substantial point, relied on by the plaintiff in support of ground 2, concerned the amount and nature of the communications between Mr Sofronoff and Ms Albrechtsen. In that respect, counsel noted that the first, and necessary, premise to the plaintiff's arguments is the proposition that Ms Albrechtsen, in her published articles, had consistently taken a position that was critical of the plaintiff, and which was supportive of Mr Lehrmann. Counsel for the third defendant submitted that the publications, that were tendered on behalf of the plaintiff, do not support that proposition. Some of the articles were published after Mr Sofronoff had provided his report to the Chief Minister, and a number of them were not written by Ms Albrechtsen. Further, it was submitted, a number of the articles, relied on by the plaintiff, consisted of the recitation by Ms Albrechtsen of the views of other persons who were critical of the plaintiff, and the articles did not purport to constitute the views of Ms Albrechtsen. In those circumstances, it was submitted that the first, and fundamental, premise to the principal argument, advanced by the plaintiff in support of ground 2, is not supported by the evidence.

161. Counsel further submitted that there was no evidence, in any event, that Mr Sofronoff had read the articles written by Ms Albrechtsen which were relied on by the plaintiff, and there was no evidence from which a fair-minded observer might reasonably apprehend that Mr Sofronoff might have been affected by the views held and expressed by Ms Albrechtsen in her articles.

162. Counsel then turned to the submission, made by the plaintiff, based on the quantity of communications between the first defendant and Ms Albrechtsen. In that respect, counsel noted that while the volume of the communications between the first defendant and *The Australian* newspaper, and Ms Albrechtsen in particular, was greater than with other media outlets and journalists, Mr Sofronoff, in his affidavit, explained that that was due to the fact that *The Australian* newspaper and Ms Albrechtsen were the most persistent in contacting him. Further, counsel noted that not all of the interchanges between Mr Sofronoff and *The Australian* newspaper were amicable. On 22 May 2023, he wrote to the editor of *The Australian* newspaper to express concern about some coverage by that newspaper in relation to the plaintiff, which Mr Sofronoff considered to be improper and unfair to the plaintiff.

163. Counsel further noted that the plaintiff put some emphasis on the communication by Mr Sofronoff to Ms Albrechtsen on 6 May, in which he made the comment, in respect of the affidavit of discovery sworn by Mr Greig, 'What a thing to do to two young professionals under your mentorship'. Counsel submitted that the reasonable observer would take into account the context of that communication. As at 6 May, the Inquiry had undertaken a considerable amount of work, which included receiving a witness statement from the plaintiff, and undertaking a private interview with him. In those circumstances, the ordinary, reasonable observer would consider it reasonable that, by that stage, the plaintiff would have had some preliminary views about the particular issue in question. Further, between 8 May and 12 May, the plaintiff was given the opportunity to deal with the issues that had been raised about it.

164. Counsel for the third defendant noted that the submission by the plaintiff, that Mr Sofronoff relied on communications that he had with *The Australian* newspaper, and with Ms Albrechtsen, is not supported by the evidence in the proceeding. In particular, counsel referred to the occasion on which Mr Sofronoff considered the reporting by *The Australian* newspaper to be so objectionable that he wrote a letter to the editor to express his concern about it.

165. Counsel also noted that the Report contains references to articles in *The Australian* newspaper, published in July 2023, only as an illustrative example in relation to different criminal prosecution, which was unrelated to the plaintiff. The other references in the

Report, to articles in *The Australian*,[103] were made because they were factually relevant to the Freedom of Information issues raised by the Inquiry's terms of reference.

166. In respect of the submission by the plaintiff, that the plaintiff was not advised by Mr Sofronoff of his communications with *The Australian* newspaper, the third defendant noted that, at the Inquiry hearing on 10 May 2023, Mr Sofronoff, in the course of a ruling concerning a broadcast on a television channel the previous evening, stated that he considered that media accounts by experienced journalists are vital to the success of a statutory inquiry, and that, for that purpose, he and Counsel Assisting had freely engaged with journalists to ensure that they could obtain a full understanding of what the evidence before the Inquiry means and the potential significance and ramifications of that evidence.

167. Accordingly, counsel submitted that a fair-minded observer would not reasonably conclude, from the nature and amount of communications between Ms Albrechtsen and Mr Sofronoff, that in some way Ms Albrechtsen had influenced Mr Sofronoff in the determination of the issues before the Inquiry.

168. Counsel then turned to the six additional points advanced on behalf of the plaintiff under ground 2.

169. In response to the first point made by the plaintiff — that on 14 February 2023 Mr Sofronoff viewed the plaintiff's Wikipedia page and sent a link to it to Mr Thomas — it was submitted that that circumstance is unremarkable, given that Mr Sofronoff had just been appointed to the Inquiry in which the plaintiff was necessarily to play a central role. That was particularly so in circumstances in which Mr Sofronoff had held a 'meet and greet' function with the plaintiff on the same day.

170. It was submitted, in response to the second point relied on by the plaintiff, that the extension of the terms of reference in relation to the plaintiff is unremarkable. That extension was sought before any public hearings in the Inquiry, and shortly after the receipt of written statements, including that of the plaintiff. The reason for the amendment was explained by Mr Sofronoff in the letter in which he sought it, namely, that having conducted 34 private hearings, and issued 33 statement requests, the information obtained, and statements received, had raised issues about the conduct of the prosecution by the plaintiff, both before as well as during the trial.

---

[103] Report, [661]–[665], [685].

171. In response to the third point relied on by the plaintiff — that the treatment accorded by Mr Sofronoff to him was different to that accorded to other persons about whom the Board inquired — it was noted that the plaintiff relied on the fact that he was the first witness called, the length of his cross-examination, and the identity of the cross-examiner. It was submitted that those factors, themselves, could not give rise to an apprehension of bias, in view of the terms of reference and the factual context of the inquiry. Further, counsel referred to *Chen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[104] in which the Full Court of the Federal Court noted that the inquisitorial role of a tribunal may involve more robust and forthright testing of a party than might be undertaken in a court proceeding.

172. In response to the fourth point relied on by the plaintiff, it was submitted, on behalf of the second defendant, that the omission by the first defendant to annex to the report the two written submissions made by the plaintiff to the Inquiry, could not give rise to a reasonable apprehension of bias on the part of Mr Sofronoff.

173. In response to the fifth point relied on by the plaintiff, counsel noted that the event, at which Mr Sofronoff agreed to speak, had no specific connection to the plaintiff or any finding concerning him. In fact, in the upshot, that event never proceeded.

174. In response to the sixth point relied on by the plaintiff — that the plaintiff was not given a fair hearing in respect of the finding concerning the circumstances in which Mr Greig made his affidavit — counsel relied on its submissions in response to ground 4.

Ground 2 – Submissions of fourth defendant

175. The submissions by the fourth defendant, in respect of ground 1, dealt with the conduct relied on by the plaintiff in five categories.

176. The first category of conduct, addressed by the fourth defendant, consisted of the communications between the first defendant and journalists from *The Australian* newspaper, and, in particular, Ms Albrechtsen. Senior Counsel for the fourth defendant submitted that the plaintiff had not established that those communications might reasonably raise an apprehension of bias. In that respect, counsel referred to s 21 of the *Inquiries Act*, which, it was submitted, emphasises the importance of the public nature of the hearings of the first defendant, and the desirability that the contents of documents, lodged with, or received in evidence by, the first defendant, be made available to the public. It was further noted that, at the commencement of the public hearings of the

[104] (2022) 288 FCR 218.

Inquiry, Mr Sofronoff made remarks about the work of journalists covering the Inquiry, and the role of the news media in assisting the Inquiry to accomplish one of its aims. During the hearings on 8 May 2023 and 10 May 2023, Mr Sofronoff stated that he and Counsel Assisting had freely engaged with journalists, in order to ensure that they could obtain a full understanding of the evidence and its significance.

177. Counsel further noted that 22 of the telephone calls identified by the plaintiff, that Mr Sofronoff made with journalists, were made with Mr Hedley Thomas, who was not reporting on the Inquiry. Further, it was submitted, it was apparent from the content of the SMS communications between Mr Sofronoff and Ms Albrechtsen that, in many of them, Mr Sofronoff was responding to a request for information from Ms Albrechtsen. Further, it was submitted, if it were accepted that Ms Albrechtsen favoured a particular point of view, there is an insufficient logical connection between the first defendant communicating with that journalist, and the potential for that journalist's views to cause the plaintiff to form a similar view, or to have her views influence his work. Counsel further submitted that a fair-minded observer would also be aware that the reasons why the first defendant reviewed media would include maintaining an awareness of the level of accuracy of the reporting of the work of the Inquiry, so as to remain informed as to the extent to which the Inquiry was achieving its purpose. In addition, a further reason for the first defendant to review media would be to ensure that reporting of the Inquiry or its public hearings was not such as might discourage persons from coming forward and providing information to the Inquiry.

178. Counsel further submitted that a fair-minded observer would be aware that, in the course of the Inquiry, the first defendant wrote to the editor-in-chief of *The Australian* newspaper, complaining about an article written relating to the plaintiff, and concerning the potential adverse effect that that article might have on the work of the Inquiry. In addition, the first defendant made public comment about that matter in the course of a public hearing on 22 May 2023.

179. Counsel for the fourth defendant further submitted that the provision by Mr Sofronoff of the report to Ms Albrechtsen was consistent with his stated purpose, namely, to ensure that the reporting of the Inquiry was accurate. It was contended that a fair-minded observer would be aware of the practice, particularly in the context of a government and statutory body, of the provision of material under embargo for the purpose of ensuring the accuracy of reporting of the Inquiry.

180. Counsel for the fourth defendant addressed, in some detail, the issue concerning the communication by the plaintiff to Ms Albrechtsen on 6 May 2023, when he expressed disapproval of the conduct of the plaintiff in respect of the preparation of the affidavit of

Mr Greig concerning the discovery of the police investigation documents. Counsel submitted that, when taken in context, the fair-minded observer would understand that the view expressed by Mr Sofronoff was not then a contentious view. There was no dispute that the plaintiff had instructed the junior solicitor to prepare the affidavit, which did not disclose the source of the relevant hearsay, and which was, in the upshot, misleading. The text message by Mr Sofronoff to Ms Albrechtsen did not allege that the plaintiff had deliberately misled Mr Greig. Rather, the view that he advanced was uncontentious, namely, that he had caused a junior lawyer to swear an affidavit which was erroneous.

181. Counsel further noted that in oral submissions, counsel for the plaintiff had placed some reliance on the absence of evidence, relating to the content of the telephone contacts, which Mr Sofronoff had had with Ms Albrechtsen. Counsel submitted that, in that respect, it would not be open to the fair-minded observer to speculate concerning the content of those telephone calls, or to infer that, in the course of any of them, Ms Albrechtsen might have infected Mr Sofronoff's independence, by expressing her views concerning the plaintiff. In that context, counsel relied on the decision of the Full Court of the Federal Court in *Duncan v Ipp*.[105]

182. Counsel further submitted that the inclusion, in the report, of a reference to an article, published by Ms Albrechtsen, and one published by another journalist of *The Australian*, would not give rise to an inference of prejudice in the mind of a fair-minded observer. Those references were included in the report as an illustration of an example of the particular type of case in which a prosecutor might conclude that the lack of credibility of a vital witness meant that there was no reasonable prospect of conviction. Secondly, it was noted that the report also referred to articles written by other journalists.

183. Counsel further submitted that the fact, that the first defendant might have communicated more frequently with Ms Albrechtsen than with other journalists, is consistent with her more frequent requests for information. It is not a sufficient foundation for a conclusion that the first defendant formulated his findings and conclusions with respect to the plaintiff with regard to anything other than their merits.

184. Counsel then turned to the six additional matters relied on by counsel for the plaintiff. Counsel noted the submissions, made by the plaintiff, in respect of the extension to the terms of reference of the Inquiry. Counsel noted that the original terms of reference expressly required the first defendant to inquire into the plaintiff's actions with respect to

---

[105] (2013) 304 ALR 359, [210].

his decisions to commence, continue and discontinue the criminal proceedings against Mr Lehrmann. The letter, sent by the first defendant, which requested the amendment, requested the amendment out of an abundance of caution, so there could be no doubt that the particular matters, identified in the amended terms, came within the jurisdiction of the Inquiry.

185. Counsel then addressed the matters, raised by the plaintiff, as to the treatment of him by the first defendant during the Inquiry. Counsel noted that the terms of reference related entirely to the actions of either police officers or the Director of Public Prosecutions. In that respect, the plaintiff's actions were of central and fundamental significance, and were a necessary and proper focus of the Inquiry. Thus, it was submitted, a fair-minded observer would expect that, in view of the terms of reference, a substantial part of the Inquiry, including the public hearings and evidence, would be constituted either by police witnesses or the plaintiff.

186. It was further submitted that any cross-examination or interruption of the plaintiff by the first defendant must be considered in light of the principles, established in cases such as *R v Carter; ex parte Gray*,[106] that the task, undertaken by the first defendant, of inquiring and reporting, was significantly different to that of a judge in court. The plaintiff had made serious allegations against police, which formed the basis for the establishment of the Inquiry. In accordance with the terms of reference, he, himself, was the subject of specific lines of inquiry. Accordingly, it was submitted, it was necessary and unsurprising that his evidence would be the subject of questioning, testing and examination, particularly in view of the extensive leading of evidence from the plaintiff by his own counsel.

187. In that respect, counsel further noted the conduct of the first defendant, which, it was submitted, would be contrary to conduct that would give rise to an apprehension of bias in the mind of a fair-minded observer. In particular, the first defendant upheld objections by plaintiff's counsel on a number of occasions. During the plaintiff's evidence, the first defendant made comments that indicated that he was aware of the length of time over which the plaintiff had been examined. On 12 May, the first defendant discussed with the plaintiff's counsel adjourning the plaintiff's evidence and interposing other witnesses until a time that was convenient for the resumption of the plaintiff's examination.

---

[106] [1991] 14 Tas R 247.

188. In those circumstances, it was submitted that the conduct of the Inquiry by the first defendant was not such as would have given rise to a reasonable apprehension of bias by a fair-minded observer.

Ground 2-Submissions of first defendant

189. Counsel for the first defendant also advanced short oral submissions in response to ground 2.

190. Counsel first addressed the issue concerning the telephone conversations between Mr Sofronoff and Ms Albrechtsen. In particular, the plaintiff had advanced the submission that the fair-minded observer would be left wondering about the content of those conversations. In that respect, counsel for the first defendant submitted that it is appropriate to take into account the explanation, given by Mr Sofronoff in his affidavit, of the content of those telephone calls, namely, that they concerned identifying the nature of the issues that were before the Inquiry, as well as practical matters concerning when documents would be available on the Inquiry's website and the timing of the work of the Inquiry. In that respect, counsel contrasted the present case with the circumstances that were before the court in *Gaisford v Hunt*, in which the court had emphasised that the decision-maker had not given evidence in the case concerning the content of the communications in question.[107]

191. Counsel further submitted that Mr Sofronoff's affidavit is relevant to rebut the proposition that he had given preferential treatment to *The Australian* newspaper, and to Ms Albrechtsen in particular. In particular, Mr Sofronoff had contact with other journalists to assist them in understanding the work of the Inquiry. He had directed Counsel Assisting to give whatever assistance they thought fit to journalists, to ensure they had a clear understanding of the work of the Inquiry. He had had the most amount of contact with Ms Albrechtsen, because she was a journalist who was most persistent in contacting him. At no time did Mr Sofronoff refuse to speak to any other journalist. Counsel also noted that, following the publication of an article by *The Australian* newspaper on 19 May 2023, Mr Sofronoff had, on 22 May, written a letter to the editor of *The Australian*, raising his objection to a photograph contained in that article.

192. It was submitted on behalf of the first defendant that the reasonable observer, with knowledge of those facts, would not have reasonably inferred that the contacts between Mr Sofronoff and Ms Albrechtsen had involved anything, which might have diverted

[107] (1996) 71 FCR 187, 200.

Mr Sofronoff from deciding the issues in the Inquiry with an independent and impartial mind.

193. Counsel further submitted that it is relevant to take into account the evidence of Mr Sofronoff, Mr Davies and Mr Bell, that other inquiries had also adopted the practice of communicating directly with members of the media in order to ensure that the publication of the proceedings of the Inquiry were accurate and informative.

194. Finally, counsel noted that, as part of its case, the plaintiff had contended that a number of the communications between Mr Sofronoff and Ms Albrechtsen had been initiated by Mr Sofronoff. Counsel submitted that, on a proper analysis of the records of each of those communications, in fact the person who initiated them was not Mr Sofronoff, but Ms Albrechtsen.

Ground 2 -Reply submissions by plaintiff

195. Senior Counsel for the plaintiff made a number of submissions in response to the propositions advanced on behalf of the defendants.

196. Counsel first addressed the evidence of Mr Sofronoff, Mr Davies and Mr Bell as to the practices of other inquiries, which involved communications, by those inquiries, with members of the media. Counsel submitted that those practices are not relevant to the present case, because they took place in jurisdictions to which a different statutory regime applies. In particular, it was noted that s 17 of the *Inquiries Act* is a unique provision in the Australian Capital Territory, and there is no equivalent provision in any other jurisdiction.

197. Counsel further submitted that, in any event, the evidence, given by Mr Sofronoff, concerning practices adopted by other inquiries in respect of communications with the media, did not support the amount or nature of the communications, which Mr Sofronoff had with Ms Albrechtsen. In particular, in his affidavit, Mr Sofronoff noted that the Fitzgerald Inquiry adopted a transparent process of communicating with the media. There was no suggestion that Mr Fitzgerald had engaged in private communications with the media. Rather, all the communications were conducted in a public forum at the commencement of each day's hearing. Counsel further noted that, in view of the technological advances that had taken place since that inquiry — such as livestream publications and the use of websites onto which to upload materials produced to an inquiry — the kind of communications, engaged in by Mr Sofronoff with the media, were less necessary in order to keep the media informed of the processes of the Inquiry.

198. In that respect, counsel again referred to the Media Protocol Guideline and the Practice Direction issued at the commencement of the Inquiry, which established the appropriate

means by which media could obtain relevant information from the Inquiry. In that respect, counsel also noted that neither Mr Bell nor Mr Davies, in their affidavits, described any process by which previous inquiries had engaged in private communications with select members of the media of the kind that occurred between Mr Sofronoff and Ms Albrechtsen.

199. Counsel then turned to a submission made by the third defendant, to the effect that the kind of ostensible bias, relied on in this case, is novel. Counsel submitted that, in fact, this case involved the kind of apprehended bias, described by Deane J in *Webb v The Queen*.[108] Counsel also noted the submission made by the third defendant, that this case may be distinguished from the decision in *Charisteas*, because (it was submitted) Ms Albrechtsen was not in the position of an advocate before the court or inquiry. However, it was submitted, the cases are analogous, because Ms Albrechtsen had become an advocate for a particular point of view in the case, which was inimical to the plaintiff. Counsel accepted that the facts of the present case are different to those in *Gaisford*, but nevertheless, the principles stated by the Full Court in that case are relevant.

200. Counsel for the plaintiff then turned to the submission, made by the third defendant, to the effect that the plaintiff had failed to demonstrate that Ms Albrechtsen was biased against the plaintiff. In particular, counsel noted that it had been submitted that, in a number of the articles, Ms Albrechtsen had done nothing other than quote from the views or propositions advanced by other persons. In response to that submission, counsel for the plaintiff noted that Ms Albrechtsen had selected views, which she would include in her opinion pieces. Further, in none of the articles did Ms Albrechtsen record or recite the opinions of any person who expressed views that were favourable to the plaintiff. Rather, she only recited the opinions of people which were adverse to the plaintiff.

201. Counsel then addressed the submission, made on behalf of the first defendant, that it is not clear that any of the telephone communications that took place between Mr Sofronoff and Ms Albrechtsen had been initiated by Mr Sofronoff. Counsel analysed those telephone communications and submitted that, in respect of six of them, it should be concluded that they were initiated by Mr Sofronoff. It was submitted that the fact that Mr Sofronoff initiated those calls constitutes part of the preferential treatment that he extended to Ms Albrechtsen, which would add to the apprehension, by a fair-minded

[108] (1984) 181 CLR 41, 74.

observer, that Mr Sofronoff might, as a consequence, be influenced by the views, held by Ms Albrechtsen, concerning the plaintiff.

202. Counsel for the plaintiff then addressed the submission, made by the third defendant, that it could not be inferred that Mr Sofronoff read any of the articles, published by *The Australian* newspaper, and in particular that were authored by Ms Albrechtsen. In response, it was submitted that it was clear that Mr Sofronoff was well aware of Ms Albrechtsen's views. Indeed, at an early stage, Mr Thomas advised Mr Sofronoff that Ms Albrechtsen held views that were critical of the plaintiff. Further, on one occasion (24 June 2023), Ms Albrechtsen sent a text to Mr Sofronoff, concerning an article in *The Australian* newspaper, and Mr Sofronoff responded by stating that he had read it.

203. Counsel then turned to the text message that Mr Sofronoff sent to Ms Albrechtsen on 6 May 2023, concerning the circumstances in which Mr Greig had come to swear an affidavit in support of a claim for legal professional privilege. Counsel submitted that the significance of that text message was the fact that Mr Sofronoff saw it as appropriate to communicate such a view to a journalist, and, in particular, a journalist whose views were antithetical to the plaintiff.

204. Counsel for the plaintiff then referred to the communications between Mr Sofronoff and Ms Albrechtsen, in which Ms Albrechtsen initially made an informal request for a particular document (such as a notice of adverse comment), and, after further communications with Mr Sofronoff, she then made a second formal such request by way of email. Counsel submitted that that circumstance, which occurred on two occasions, highlighted the private and secretive nature of a number of the communications that took place between Mr Sofronoff and Ms Albrechtsen.

205. In that context, counsel submitted that the pronouncements that Mr Sofronoff made, in the course of the hearing of the Board of Inquiry, on 8 May 2023 and 10 May 2023, did not reveal that Mr Sofronoff was engaging, and had been engaging, in non-transparent, private communications with Ms Albrechtsen. In particular, it was submitted that on neither occasion did Mr Sofronoff disclose the nature and volume of the communications that he had been undertaking with Ms Albrechtsen, and that those communications had been occurring for in excess of two months.

206. Finally, counsel submitted that the two footnotes in the report, which recited information obtained from Ms Albrechtsen, are relevant, because they were two instances in which Mr Sofronoff relied on information provided to him by Ms Albrechtsen or *The Australian* newspaper.

Ground 2- Legal principles

207. As I have noted, by ground 2, the plaintiff does not seek to impugn the Report, or the findings relating to it, on the basis of actual bias on behalf of the first defendant. Rather, the plaintiff contends that particular conduct of the first defendant in the course of the Inquiry was such as to give rise to a reasonable apprehension of bias.

208. The rule, as to apprehended bias, is concerned with maintaining public confidence in the administration of justice, and, in cases such as this, maintaining public confidence in the conduct of processes to which the principles of natural justice apply.[109] The applicable test, in a case in which apprehended bias is alleged, is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not have brought an impartial mind to the resolution of the question, which he or she was required to decide.[110]

209. In *Ebner*, Gleeson CJ, McHugh, Gummow and Hayne JJ described the elements of the test in the following terms:

> The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.[111]

210. The application of the test involves three steps. First, it is necessary to identify the fact or circumstance, which it is said might have lead the decision-maker to decide a case other than on its legal and factual merits. Secondly, there must be demonstrated to be a logical connection between that fact or circumstance and the apprehended deviation from the course of deciding the case or issue in question on its merits.[112] Thirdly, it is

---

[109] See, for example, *Webb v The Queen* (1983) 181 CLR 41, 47 (Mason CJ, McHugh J); *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76, 98 [55] (Nettle and Gordon JJ) ('*CNY17*').

[110] *Livesey v The New South Wales Bar Association* (1983) 151 CLR 289, 293-4; *Webb*, 47, 49; *Johnson v Johnson* (2000) 201 CLR 488, 492 [11] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Ebner*').

[111] Ibid 345, [7].

[112] Ibid 345, [8]; *CNY* 98–9 [57] (Nettle and Gordon JJ).

necessary to assess the reasonableness of that apprehension from the perspective of a fair-minded lay observer.[113]

211. It is recognised that the application of the principle of apprehended bias to decision-makers, other than courts, must necessarily recognise, and accommodate, material differences between court proceedings on the one hand, and the proceedings before the decision-maker in question.[114]

212. In *Laws v Australian Broadcasting Tribunal*,[115] Deane J explained the application of the principle in such cases in the following terms:

> It has long been settled that the content of the requirements of procedural fairness may vary according to the particular circumstances of a case, including the nature and general functions of the entity required to observe them and the relationship between that entity and the person to whom procedural fairness must be accorded. Plainly, such variations may occur in the content of the requirement that a tribunal required to observe procedural fairness be not tainted by either the actuality or the appearance of disqualifying bias. Thus, acquaintanceship with or preconceived views about a party of a kind which would create the appearance of disqualifying bias in a judge exercising the judicial power of a court of law may be permissible and unobjectionable in a statutory body which, while required to accord procedural fairness in the discharge of a particular function, is entrusted with other functions which necessitate a continuing relationship with those engaged in a particular industry.[116]

213. In similar terms, in *R v Carter; ex parte Gray*,[117] the Full Court of Tasmania, in an application for a writ of prohibition in respect of the proceedings before a Royal Commission, stated:

> ... [T]he fair minded person would not be quick to suspect bias if the Commissioner intervened in the cross-examination of certain witnesses in a robust way and on occasions to an extent in excess of that expected of a judicial officer. Similarly, the fair minded observer would not be quick to suspect bias upon learning that the Commissioner was, in general terms, directing counsel assisting to pursue certain lines of inquiry even if he learnt that the Commissioner, as his inquiry progressed, began to entertain certain tentative views about key witnesses. The Commissioner's duty to inquire as well as to report and recommend is a factor which the fair minded bystander will have to the forefront of his or her mind when considering whether the Commissioner's conduct … reasonably gives rise to an apprehension of bias.[118]

---

[113] *QYFM V Minister for Immigration, Citizenship, Migrant Services and Multicultural Services* (2023) 409 ALR 65,77 [38] (Kiefel CJ, Gageler J); *Charisteas v Charisteas* (2021) 273 CLR 289-90 [11].
[114] *Isbester v Knox City Council* (2015) 255 CLR 135, 146 [22]–[23] (Kiefel, Bell, Keane and Nettle JJ).
[115] (1990) 170 CLR 70.
[116] Ibid 90, [3].
[117] (1991) 14 Tas R 247.
[118] Ibid 263 [90] (Cox, Underwood and Slicer JJ).

214. In applying the test, the fair-minded lay observer is taken to have knowledge both as to the material facts and aspects of the case, and as to the nature of the particular proceeding in which the determination is being made.[119]

215. In *CNY17*, Nettle and Gordon JJ described the attributes and knowledge of the fair-minded lay observer in the following terms:

> In applying the test, "it is necessary to consider ... the legal, statutory and factual contexts in which the decision is made". It is also necessary to consider "what is involved in making the decision and the identity of the decision-maker".[120] This draws attention to the fact that the test must recognise "differences between court proceedings and other kinds of decision-making". The fair-minded lay observer knows the nature of the decision, the circumstances which led to the decision and the context in which it was made. The fair-minded lay observer has "a broad knowledge of the material objective facts ... as distinct from a detailed knowledge of the law or knowledge of the character or ability of the [decision-maker]".
>
> Where, however, as here, the statutory context is complex, the fair-minded lay observer at least must have knowledge of the key elements of that scheme.[121]

216. In that passage, Nettle and Gordon JJ quoted extracts from a passage of the dissenting judgment of Deane J in *Webb*, in which his Honour considered the content of the objective facts available to the hypothetical fair-minded lay observer. In that passage, Deane J stated:

> While the question is not settled by any decision of the Court, it appears to me that the knowledge to be attributed to him or her is a broad knowledge of the material objective facts as ascertained by the appellate court, as distinct from a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant court. The material objective facts include, of course, any published statement, whether prior, contemporaneous or subsequent, of the person concerned.[122]

217. In *Duncan v Ipp*,[123] the New South Wales Court of Appeal was concerned with an application by a shareholder in a company, whose wholly owned subsidiary had been awarded an exploration licence, to restrain the Independent Commission Against Corruption ('ICAC') from presiding over an investigation into, and preparing a report concerning, the development approval process. The applicant alleged that there was a reasonable apprehension that the Commissioner of ICAC had prejudged the matters, which were to be determined by the Commission. In dismissing the appeal by the applicant, Bathurst CJ (with whom Barrett and Ward JJA agreed) explained how the

---

[119] *Laws*, 87–88 (Mason CJ, Brennan J).
[120] *Isbester* (2015) 255 CLR 135 at 146 [23].
[121] *CNY 17* (2019) 268 CLR 76, 99 [58]–[59] (citations omitted).
[122] *Webb v The Queen* (1994) 181 CLR 41, 73.
[123] (2013) 304 ALR 359.

foregoing principles are to be applied in determining the second step of the test for determining a claim of apprehended bias:

> …[T]he application of the second limb of the *Ebner* test does not require an inevitable conclusion to be drawn from the facts that a fair-minded observer would consider there was a possibility that the decision-maker had pre-judged the issue. The test to be applied is framed at all stages at the level of possibility. What is required is that a fair-minded observer might perceive a logical connection between the matters raised and the possibility of the decision-maker not bringing an impartial mind to the issue.
>
> That being said, it must be emphasised that the connection must be one capable of being drawn as a possibility by a reasonable and fair-minded observer. …it must be "firmly established" that such a suspicion may be reasonably engendered in the minds of the public or the parties
>
> In this context it was submitted by the applicant that it was inappropriate to consider what might be described as alternative possibilities to that of apprehended bias in determining whether the second limb of the *Ebner* test was made out. I do not agree. A consideration of the possible reasons why the particular course may have been taken may be of assistance in determining whether the logical connection required by the second limb of the *Ebner* test is made out. For example, if it was clear that the reason for the action taken by the decision-maker said to give rise to the possibility of bias was unconnected with any pre-judgment of the issue, consideration of that reason would be appropriate in determining the issue of whether a reasonable and fair-minded observer might see a logical connection between the acts complained of and the possibility of bias.
>
> That does not mean that if there is an explanation of what occurred inconsistent with or not involving the possibility of bias, a claim of apprehended bias will necessarily fail. The fact that there are alternate possibilities that may exist does not mean that a fair-minded observer might not conclude that what occurred showed the possibility of bias. Ultimately the question is whether as a matter of possibility the matters complained of might lead a fair-minded observer to conclude that the decision-maker did not bring an impartial mind to the decision.[124]

218. At the risk of repetition, it is convenient to summarise the principles, which I have discussed, as follows:

(1) In a case in which apprehended bias is alleged, the applicable test is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not have brought an impartial mind to the resolution of the question, which that decision-maker is required to determine.

(2) So defined, the test involves an assessment of possibility on two levels:

(a) the question whether a fair-minded lay observer might entertain the material apprehension concerning the decision-maker;

---

[124] Ibid 396, [147]–[150].

(b) the requirement that that apprehension, by the fair-minded lay observer, is that the decision-maker might not bring an impartial mind to the resolution of that question.

(3) Accordingly, no prediction by the court is involved in determining whether the decision-maker might not have brought an impartial mind to bear.

(4) Although the test is defined in terms of possibility at two levels, nevertheless, a court should not lightly conclude that an allegation of apprehended bias is made out. Reasonable apprehension, at each level, must be 'firmly established'.[125] The possibility of bias must be real, and not merely remote.[126]

(5) The application of the principle of apprehended bias to decision-makers, other than courts, must accommodate relevant differences between court proceedings on the one hand, and the proceedings before the Board of Inquiry in the present case.

(6) The hypothetical fair-minded lay observer is assumed to know and understand both the nature of the proceeding, and the material objective facts that relate to the processes undertaken by the decision-maker.

(7) The application of those principles involves three steps in the present case:

(a) the identification of the fact or circumstance which it is said might have lead the first defendant to decide the issues before it other than on their merits;

(b) there must be demonstrated to be a logical connection between that fact and circumstance, and the apprehended deviation from the course of determining the issues before the Board of Inquiry on their merits;

(c) the assessment of the reasonableness of that apprehension from the perspective of the fair-minded lay observer.

---

[125] *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (1969) 122 CLR 546, 553 at 4; *R v Lusink & Anor* (*Shaw*) (1980) 32 ALR 47, 50-51 (Gibbs ACJ); *CNY17,* 98[56] (Nettle and Gordon JJ).

[126] *Ebner,* 345 [7].

Ground 2- Analysis and conclusion

219. The principal point, relied on by the plaintiff in support of ground 2, concerns the communications between Mr Sofronoff and Ms Janet Albrechtsen of *The Australian* newspaper before and during the Inquiry, culminating in the provision, by Mr Sofronoff to Ms Albrechtsen, of the Report on the same date on which he had provided it to the Chief Minister of the ACT.

220. The basic submission, advanced on behalf of the plaintiff, was that a fair-minded lay observer, who was acquainted with the views expressed by Ms Albrechtsen in her articles in *The Australian* newspaper concerning the prosecution by the plaintiff of Mr Lehrmann, and knowing the extent and nature of the contacts that occurred between Ms Albrechtsen and Mr Sofronoff before and during the Inquiry, might reasonably have apprehended that Mr Sofronoff might have been influenced by Ms Albrechtsen's views in determining the issues in the Inquiry that related to the conduct by the plaintiff of the prosecution of the criminal proceeding against Mr Lehrmann.

221. Applying the principles relating to apprehended bias, which I have just outlined, the question, which arises under ground 2, does not involve any consideration, or determination, whether the amount and nature of the contacts that occurred between Mr Sofronoff and Ms Albrechtsen were 'appropriate' or 'prudent'. That question does not involve any legal issue for determination in the present proceeding. Rather, the question is whether, as a consequence of those contacts, a fair-minded lay observer, with knowledge of the material objective facts, might reasonably apprehend that Mr Sofronoff might not have brought an impartial mind to the resolution of the questions, which came for determination before the Inquiry, relating to the conduct by the plaintiff of the prosecution of Mr Lehrmann. That issue is the central question that is to be determined under ground 2.

222. In essence, the plaintiff's submission in support of ground 2 was based on two fundamental premises, both of which are necessary to maintain a case of apprehended bias arising from the communications that took place between Mr Sofronoff and Ms Albrechtsen.

223. The first premise is that Ms Albrechtsen, in her published articles in *The Australian* newspaper, had expressed views, which were consistently and strongly critical of the plaintiff in respect of his conduct of the prosecution of the rape charge against Mr Lehrmann. The second premise is that the fair-minded observer, with knowledge of that fact, and also with knowledge of the extent, nature and circumstances of the communications that took place between Ms Albrechtsen and Mr Sofronoff before and during the Inquiry, might reasonably apprehend that Ms Albrechtsen might have caused

Mr Sofronoff to be biased against the plaintiff in his determination of the issues in the Inquiry relating to his conduct of the prosecution of the case against Mr Lehrmann. As expressed in oral argument by counsel for the plaintiff, the submission, advanced under ground 2, was that the fair-minded observer might reasonably have apprehended that Mr Sofronoff 'did not bring to the Inquiry a mind that was unburdened about [the plaintiff] … by Ms Albrechtsen'.

224. The submissions made on behalf of the defendants put both of those premises in issue.

225. Accordingly, the first question is whether it should be concluded that a fair-minded observer, acquainted with the articles written by Ms Albrechtsen concerning the matter, would have considered that Ms Albrechtsen held and expressed views that were firmly critical of the plaintiff in respect of his conduct of the prosecution of the charge against Mr Lehrmann.

226. In support of that proposition, the plaintiff in his affidavit exhibited some 77 articles, published by *The Australian* newspaper between 6 December 2022 and 12 August 2023. In the course of submissions, counsel for the plaintiff only sought to rely on articles, published up to and including 3 August. The first premise in the plaintiff's case under ground 2 is based on the views expressed and maintained by Ms Albrechtsen up to the time at which the report was delivered by Mr Sofronoff to the Chief Minister, on 31 July. While articles written by Ms Albrechtsen, subsequent to that date, might confirm any assessment of the views, which she held concerning the plaintiff up to and including 31 July, they would be of marginal, if any, relevance in determining that issue.

227. In the further amended particulars of ground 2, the plaintiff relied on reporting published in *The Australian* newspaper in general, and by Ms Albrechtsen in particular, that was contended to be adverse to the plaintiff. However, the second premise in the argument, advanced by the plaintiff under ground 2, focused essentially on the communications that occurred between Mr Sofronoff and Ms Albrechtsen. In those circumstances, it is appropriate, in determining the issue raised by the first premise in the argument, to confine consideration solely to articles published by Ms Albrechtsen, either alone, or in combination with a co-author.

228. The plaintiff, in particular, highlighted three related aspects of the articles written by Ms Albrechtsen. First, some of the articles discussed what the author perceived to be weaknesses or deficiencies in the prosecution case against Mr Lehrmann. Secondly, and as a related topic, the articles suggested that the decision to prosecute Mr Lehrmann, and the conduct by the plaintiff of the trial, were affected by political considerations. Thirdly, the articles contained criticisms of the conduct by the plaintiff in

the prosecution of the trial, including his decision to file the charge of rape against Mr Lehrmann. Those three topics were intertwined, but it is useful to consider the articles in the context of each of them.

229. A number of the articles, and in particular those that were critical of the conduct of the prosecution by the plaintiff, contained a number of quotations from statements by persons, including legal practitioners, expressing views that were critical of the plaintiff. Counsel for the third defendant submitted that, in reporting those statements by other persons, Ms Albrechtsen would not have been understood to have been adopting or propounding the views expressed by them.

230. I do not accept that submission. It seems quite clear from the content and tenor of the articles in question, that Ms Albrechtsen recited the views of other persons, who were critical of the plaintiff, as support for the position expressed by her in the article in question. Further, as was contended by counsel for the plaintiff, in that respect, it is relevant that Ms Albrechtsen did not, in any of the articles that were tendered in evidence in this proceeding, cite or record the views of any person who was supportive of the plaintiff.

231. In order to consider the issues raised by the first premise in the plaintiff's submission, it is necessary to examine the articles, relied on by him, in some detail.

232. In essence, having reviewed the articles in question, it is clear that Ms Albrechtsen consistently expressed views that were particularly critical of the plaintiff in his decision to commence the criminal proceedings against Mr Lehrmann, and in his conduct of those proceedings. Relevantly, the conclusion is irresistible that a fair-minded lay observer, having read the articles, would have readily understood that Ms Albrechtsen expressed firm and considered views that were significantly critical of the plaintiff in those respects.

233. The first article, relied on by the plaintiff, was an article entitled 'Hasty law change means Brittany Higgins might not return to court', written by Ms Albrechtsen and dated 17 November 2022. It reported that the ACT Attorney-General might make it easier for the plaintiff to re-try Mr Lehrmann by amending the existing law to permit the plaintiff to rely on the evidence given by Ms Higgins in the first trial. The article concluded by stating the opinion that that 'astounding change' in the law '… strikes at the heart of the criminal justice system's foundational principle: the rule of law'.

234. The next article, co-authored by Ms Albrechtsen and Mr Stephen Rice, was entitled 'Cops doubted Higgins but case was "political"'. The article was dated 3 December 2022, which was the day after the plaintiff had announced that he had discontinued the prosecution of the charge against Lehrmann. The article recorded that 'most senior

police officers' on the case had believed that there was insufficient evidence to prosecute Mr Lehrmann, but they were unable to stop the plaintiff from proceeding with the charge, because 'there is too much political interference' according to diary notes made by DS Moller. The article quoted from the executive briefing of DS Moller dated 9 June 2021 and a minute signed by DI Boorman. It referred to police concerns about inconsistencies in the evidence of Ms Higgins, her initial refusal to hand over her telephone, and texts that had been exchanged between Ms Higgins and her former boyfriend, in which they had joked about wanting a political sex scandal to occur.

235. Subsequently, an article co-authored by Ms Albrechtsen and Mr Rice, dated 18 March 2023, entitled 'Lehrmann shocked at judge's secret guilty plea comment', and another article, written on the same date by Ms Albrechtsen, entitled 'Balancing interests of complainants and defendants', expressed concern about an alleged meeting between the presiding judge and counsel early in the trial in which the judge had expressed the view that if Mr Lehrmann had pleaded guilty, that would be taken into account as a mitigating circumstance. The second article concluded with the comment that that latest revelation followed internal police reports, uncovered by *The Australian* newspaper, in which senior AFP officers had raised concern as to whether a prosecution should have been brought.

236. On 20 May 2023, Ms Albrechtsen and Mr Rice published an article entitled 'Verdict first, trial later: rule of law under threat'. In essence, the article recorded comments made by Mr Whybrow SC, who had represented Mr Lehrmann at the trial, to the effect that the presumption of innocence and the right to due process had been dangerously undermined by the 'Me Too' movement.

237. In an article dated 6 June 2023 that echoed the same theme, entitled 'Spotlight falls onto Me Too juggernaut', Ms Albrechtsen expressed strong criticisms of the role undertaken by Ms Wilkinson 'in helping Higgins frame her story in the course of the five hour plus meeting'. The article was highly critical of Ms Wilkinson, describing her as someone who was 'hell bent on launching a Me Too juggernaut …'.

238. In an earlier article, dated 8 February 2023, co-authored by Ms Albrechtsen and Remy Varga, entitled 'Recklessly indifferent to truth: Lehrmann sues Lisa for damages', it was reported that Mr Lehrmann was suing Channel Ten and Ms Wilkinson for defamation '… accusing them of seeking to exploit allegations of sexual assault against him for personal professional gain'. In an article on the following day, 9 February 2023, entitled 'Apologise and pay compo or I'll sue, Lehrmann tells ABC', co-written by Ms Albrechtsen and Mr Rice, it was reported that Mr Lehrmann had warned the Australian Broadcasting Corporation ('ABC') that he would sue it for defamation over its broadcast of an address,

by Ms Higgins, in February, unless the ABC took down the You Tube video of the event, apologised and paid compensation.

239. Pausing there, the articles that I have discussed so far focused on issues, which were described as being underlying weaknesses in the prosecution case against Mr Lehrmann, and the involvement of ulterior considerations in the allegations made against Mr Lehrmann. Allied with those matters were some articles, written by Ms Albrechtsen, suggesting the involvement of politics in the decision to prosecute Mr Lehrmann, and in the conduct of that prosecution.

240. On 22 December 2022, Ms Albrechtsen authored an article entitled 'Bring it on in full, and free from politics', the focus of which was on political interference in the trial of Mr Lehrmann. The article referred to disturbing claims, raised by senior AFP officers in charge of the investigation, that there was 'too much political interference' in the plaintiff's decision to prosecute Mr Lehrmann. The article questioned whether the ACT Labor government, which was closely aligned with the Federal Labor government, 'can get this right'. The article also queried why the plaintiff had not prosecuted other persons, including members of the media, for contempt of court. The article concluded by stating that:

> Only a robust investigation by this Board of Inquiry can possibly stem the disturbing tide of trial by media and the contamination of the legal system with politics.

241. It will be recalled that the Board of Inquiry was appointed on 1 February 2023. On 4 February, Ms Albrechtsen published an article 'Lehrmann at trial inquiry must restore faith in law and order'. The article commenced by stating that the Inquiry was important to vindicate the principle that laws applied equally to all people, and that protections of law applied equally to all. The article set out Mr Sofronoff's background in some detail, in terms which were commendatory of Mr Sofronoff. It concluded by noting that Mr Sofronoff's task would involve considering whether '… the administration of justice [had] become so politicised that prosecutions now depend on political calculus, not the application of the law?'.

242. On 18 April 2023, Ms Albrechtsen wrote a lengthy and detailed article entitled 'In her own defence'. The article reported on a lengthy interview that Ms Albrechtsen had undertaken with Senator Reynolds, concerning her involvement in the issues in the trial. In the course of the article, Ms Albrechtsen recorded that Senator Reynolds expressed the view that Ms Higgins had been exploited, for overtly political purposes, by the Labor Party, by prominent journalists, and by the Me Too movement. Two days later, on 20 April 2023, Ms Albrechtsen and Mr Rice co-authored an article entitled 'Gallagher knew Higgins' boyfriend before payout: Reynolds'. The central point of the article, which was quite

detailed, concerned the politicisation of the rape allegation, made by Ms Higgins, including the link between the Federal Finance Minister, Senator Gallagher, and Ms Higgins' boyfriend, David Sharaz.

243. On 27 May 2023, Ms Albrechtsen published an article 'The wrong face for Me Too'. The central point of that article was that Ms Higgins was the 'face' of the Me Too movement in Australia, but that she was the 'wrong face' for that movement, because (it was recorded) normal rules and sound judgments had been discarded for her. In similar terms, on 8 June 2023, Ms Albrechtsen and Mr Rice wrote an article entitled 'Higgins, politics, plots: "feed everything to Katy"', which again repeated the proposition, that the issues in the criminal trial had become politicised.

244. Finally, in an article dated 24 June 2023 entitled 'Sophie's story: no Higgins. No hype. And no help for victims', Ms Albrechtsen and Mr Rice compared what was described as the priority treatment, given by the plaintiff to the Higgins case, with the way in which (the article alleged) the plaintiff, in his role as the DPP, had let down another victim ('Sophie') and made her feel like a second class victim. The article noted that, in the Higgins case, the plaintiff had 'thrown everything he legally could — and some he couldn't' at convicting a suspect who police investigators thought should never have been charged. But in the same criminal justice system, far from the television cameras, the prosecution case, in respect of a child victim of a convicted paedophile, had been given significantly inferior attention.

245. The foregoing review of the articles, that I have discussed, firmly substantiates the proposition that, in her articles, Ms Albrechtsen had expressed views that were critical of the prosecution case against Mr Lehrmann, and of the decision to prosecute him. In those articles, it was suggested that the decision to prosecute Mr Lehrmann, and the conduct in the trial, had been affected by political considerations.

246. The third, and related, aspect of the reports, published by Ms Albrechtsen, consisted of direct criticisms of the plaintiff, in the institution and conduct by him of the prosecution against Mr Lehrmann.

247. On 6 December 2022, Ms Albrechtsen and Mr Rice published an article entitled 'Push for DPP to quit over rape trial'. It will be recalled that that article was published three days after an article, written by the same authors, entitled 'Cops doubted Higgins but case is "political"'. The article of 6 December 2022 commenced by noting that a 'leading Canberra criminal lawyer' had called for the resignation of the plaintiff and an investigation by the ACT Integrity Commission into the decision to prosecute Mr Lehrmann. The article referred to police reservations about the prosecution, that were

expressed in notes made by DS Moller and in executive briefing notes by investigators. It also referred to claims, in DS Moller's notes, of political interference in the case. The article referred to 'other senior figures' being highly critical of the plaintiff in respect of public statements that he had made concerning the merits of the case. It quoted a 'prominent Sydney lawyer' as describing the plaintiff as 'a DPP (who) trashes centuries of prosecutorial ethics and obligations by simultaneously withdrawing a criminal prosecution in the court and then try to continue it in the media'.

248. On the following date, 7 December 2022, Ms Albrechtsen and Mr Rice published a further article, entitled 'Leading media lawyer joins Lehrmann defamation team'. The article related to a potential claim, by Mr Lehrmann, for defamation. It referred to a letter by the head of Channel Ten, disputing claims by the plaintiff that he (the plaintiff) had warned Ms Wilkinson that her planned Logies speech could cause substantial delay in the trial. The article recorded that Mr Lehrmann was considering lodging a formal professional complaint against the plaintiff.

249. On 9 December 2022, Ms Albrechtsen and Mr Rice published an article, entitled 'ACT's top cop wants rape trial probe into DPP, Higgins'. The article reported that the ACT Chief Police Officer wanted the planned inquiry, into the Lehrmann rape trial, to examine the behaviour of the plaintiff and an alleged contempt of court by Ms Higgins. The article further recorded that the Deputy Chief Commissioner made it clear that police wanted the conduct of the prosecution to be 'firmly in the inquiry's sights'. The article was critical of the failure of the plaintiff to consult with ACT police in respect of the release of the letter, dated 1 November 2022, in response to the FoI request. The article also recorded that the AFP Association President 'slammed' the plaintiff for failing to report allegations of alleged inappropriate conduct to the Australian Law Enforcement Integrity Commission when he became aware of it, rather than months later.

250. On 12 December 2022, Ms Albrechtsen wrote an article, entitled 'Higgins saga a spotlight on politics of justice'. It referred to the release of the plaintiff's letter to the Chief Police Officer dated 1 November 2022 under FoI, and stated that there must be an inquiry 'into every aspect of the saga', including the plaintiff's conduct in his claims against the AFP. The article referred to the political connection involved in the rape trial, and it questioned why the plaintiff did not call DS Moller as a witness for the prosecution. The article noted a number of matters, which the Inquiry should deal with, including: questions concerning the plaintiff's claim that police wrongfully had direct contact with the defence team during the trial, which (the article recorded) is 'standard procedure'; the breakdown in the relationship between the plaintiff and the AFP; the release, by the plaintiff, of his letter

dated 1 November 2022; and the question whether the plaintiff had access to Ms Higgins' private psychological counselling notes.

251. It is relevant to note that most of the issues, discussed in that article, came for determination before the proposed Board of Inquiry.

252. Ten days later, on 22 December 2022, Ms Albrechtsen, Mr Rice and Mr Varga published an article, entitled 'Lehrmann alleges misconduct by DPP'. The article reported that Mr Lehrmann had written a letter of complaint to the ACT Bar Association making allegations of 'serious misconduct' against the plaintiff. The article recited criticisms, by the AFP Association President, that were directed at the plaintiff, and at the Attorney-General.

253. On 2 February 2023, Ms Albrechtsen and Mr Rice published an article, entitled 'Professional misconduct: Lehrmann takes on ACT DPP'. The article reported that Mr Lehrmann had lodged a complaint of professional misconduct against the plaintiff, alleging that he had failed to ensure a fair trial and that his conduct had been driven by malice and political interests. The article quoted from the letter, written by Mr Lehrmann to the ACT Bar Association. The article repeated that Mr Lehrmann had alleged that the plaintiff's decision to prosecute him was 'driven by malice … [and] his conduct was political'.

254. On the same day, 2 February 2023, Ms Albrechtsen and Mr Rice published a further article, entitled 'Higgins and DPP threatened me: trial witness'. The article reported that a 'key witness' in the trial, Ms Fiona Brown, had accused the plaintiff of threatening her and intimidating her as she left the witness box on a morning break. The article set out, in some detail, the complaints made by Ms Brown, whose evidence did not support the prosecution case. In her complaint, Ms Brown stated that, during his final address, the plaintiff had used arguments and language that cast aspersions on her mental health, in order to discredit her as a witness. The article stated that Ms Brown's complaints about the plaintiff's behaviour had begun before the trial started, when the plaintiff, at a conference, had been dismissive of her concerns about the nomination of Ms Wilkinson in the upcoming Logies awards in respect of an interview she had conducted with Ms Higgins.

255. The next article, which is relevant to this topic, was published by Ms Albrechtsen and Mr Rice on 11 February 2023. It was entitled 'Weird whodunit: reno texts in Higgins trial'. The article raised a question as to who had been using the plaintiff's telephone to text his builder while Ms Higgins was giving evidence in the trial.

256. On 27 February 2023, Ms Albrechtsen and Mr Rice wrote an article, entitled 'Hearing set for Lehrmann case probe'. The article set out the background to the Inquiry, and the

issues that were to be considered in it. It then discussed the issues, relating to the plaintiff, namely, whether the plaintiff had exercised his prosecutorial discretion properly. The article referred to the public statement, made by the plaintiff, when deciding not to proceed with the second trial, that he stood by his belief that there were reasonable prospects of a conviction. The article said that that comment 'astonished' many members of the legal profession, who questioned whether it was consistent with the role of the DPP in the administration of justice.

257. On 21 April 2023, Ms Albrechtsen and Mr Rice authored an article, entitled 'DPP Shane Drumgold complicit with Brittany Higgins' bid to prejudice case, Bruce Lehrmann's lawyer claims'. The article reported that a draft submission to the ACT Supreme Court, prepared by Mr Arthur Moses SC, alleged that the plaintiff had been 'complicit' in a bid, by Ms Higgins, to prejudice the case against Mr Lehrmann. The article recorded that the draft submission raised questions about the reasons for the decision, by the plaintiff, not to proceed with the retrial. In the submission, Mr Moses had described the plaintiff's 'inaction', over the speech by Ms Higgins outside court after the trial was aborted, as 'deeply troubling'. Mr Moses alleged that the plaintiff had failed to safeguard the plaintiff's right to a fair trial. The article further reported that the plaintiff had surprised many members of the legal profession by praising Ms Higgins' conduct, stating that he believed there was a reasonable prospect of convicting Mr Lehrmann at a second trial. The article noted that several senior lawyers had questioned whether it was appropriate for a DPP to make public statements of that nature.

258. The next three articles, relevant to this topic, reported on the public hearings in the Inquiry, which had commenced on 8 May 2023.

259. On 9 May 2023, Ms Albrechtsen published an article, entitled 'World of pain ahead for DPP'. The article stated that, on the first day of the Inquiry, material before the Inquiry suggested that the plaintiff 'may be in a world of pain'. Ms Albrechtsen stated that the plaintiff was central to the Inquiry for reasons, which would soon become clearer. She reported that one of the most serious issues facing him concerned whether he had disclosed all the material, that he was duty-bound to disclose, to Mr Lehrmann's defence. In that context, the article described the circumstances concerning the issues relating to the disclosure of the internal review document prepared by DS Moller. It noted that the plaintiff had procured a junior member of staff to depose an affidavit, claiming that the document was privileged. The article concluded by noting that the upshot of the letter dated 1 November 2022, that the plaintiff had written to the Chief Police Officer, was that he appeared to view police conduct as pressuring him and undermining his prosecution,

whereas he should have considered that that conduct was part of a search by the police for the truth in the case.

260. On the same date, 9 May 2023, Ms Albrechtsen and Mr Rice also published an article, entitled 'Those statements were false: prosecutor grilled on stand'. The article recorded that the plaintiff had been accused of making false statements to the Chief Justice in the hearing of the trial, in respect of the Logies speech made by Ms Wilkinson. It also noted that the plaintiff faced 'intense scrutiny' over whether he had properly disclosed all relevant material to the court and to the defence, and it noted that Counsel Assisting the Inquiry had accused the plaintiff of making a false statement to the Chief Justice during an application, on behalf of Mr Lehrmann, to stay the prosecution. The article also referred to the plaintiff's failure to disclose relevant material to the defence, including the Moller review, and a disclosure issue concerning Ms Brown.

261. On 10 May 2023, Ms Albrechtsen and Mr Rice wrote an article, entitled 'Prosecutor accused of withholding crucial documents'. The article reported that Mr Whybrow had accused the plaintiff of withholding crucial police documents that exposed discrepancies in Ms Higgins' claim, and of alleging political interference and cover-ups by Liberal Ministers, when there was no evidence to substantiate that allegation. The article then outlined eight 'explosive claims', made by Mr Whybrow at the Inquiry. It noted that the plaintiff himself was giving evidence at the Inquiry. The article set out a number of the complaints, made by Mr Whybrow, and referred to Mr Whybrow's 75 page statement to the Inquiry, which alleged (*inter alia*) that the plaintiff had withheld a key police document from the defence, which had detailed many inconsistencies in the account given by Ms Higgins in her evidence. Mr Whybrow also alleged that the evidence of former Ministers Reynolds and Cash had been strategically deployed for the purposes of the plaintiff making submissions about political interference and cover-up, when there was no objective evidence to substantiate that allegation. The article further contained criticisms, made by Mr Whybrow: concerning the plaintiff's treatment of the police in court; concerning the plaintiff's failure to inform him of Ms Brown's complaint about the serious misrepresentation made by Ms Higgins in her evidence; and concerning the statement, made by the plaintiff at the press conference, in which he had expressed an opinion concerning the prospects of conviction of Mr Lehrmann on a retrial.

262. On 20 July 2023, *The Australian* published an article, by Ms Albrechtsen and Mr Rice, entitled 'Reynolds blasts DPP Drumgold'. The article noted that Senator Reynolds, in a submission to the Inquiry, had launched a 'blistering attack' on the plaintiff, accusing him of making baseless and unsubstantiated allegations that she had been motivated by political forces to supress Ms Higgins' rape complaint. The article noted that, in a

submission to the Inquiry, Senator Reynolds asked the Inquiry to find that the plaintiff had been recklessly indifferent to the truth as to that matter. The article also noted that Senator Reynolds alleged multiple breaches by the plaintiff of the Barristers Rules, the Legal Profession Act, the Director of Public Prosecutions Policy, the FoI Act and the Human Rights Act. Senator Reynolds said that the plaintiff had ambushed her in the trial, and had given her no indication beforehand that he intended to have her declared a hostile witness.

263. Finally, on 29 July 2023, Ms Albrechtsen wrote an article, entitled 'How close is too close?'. The subtitle to the article was 'The media's role in Brittany Higgins saga has escaped scrutiny for too long'. The central point of the article was that Ms Higgins had used the media, which had led to a trial by media of the rape charge against Mr Lehrmann. As part of what the article described as 'a media circus', Ms Albrechtsen referred to the plaintiff's public statement after the trial, when he declared that there would not be a second trial, but that he believed that he would have secured a conviction if such a trial had been held.

264. From the foregoing review of the articles published by Ms Albrechtsen in *The Australian* newspaper, it is clear that, in the period between early December 2022 and late July 2023, Ms Albrechtsen wrote a series of publications, which were critical of the case, instituted by the plaintiff against Mr Lehrmann, and which suggested the involvement of political factors in the case. Most significantly, a substantial number of the articles were specifically critical of the conduct by the plaintiff, both in instituting the criminal charge against Mr Lehrmann, and in his prosecution of that charge. The articles alleged serious breaches by the plaintiff of his duties as a prosecutor.

265. In that way, the articles canvassed, in terms critical of the plaintiff, a number of the issues, which ultimately fell for consideration by the first defendant, pursuant to paragraph (c) of the Terms of Reference of the Inquiry, and which were determined by him in Chapters 4, 5 and 6 of the Report.

266. In that context, it is also relevant that the defendants in this case have not been able to tender, or refer to, any articles, published by Ms Albrechtsen, which were supportive of the plaintiff's conduct of the prosecution, or which in any way countered the criticisms of the plaintiff, that were reported in her articles.

267. In those circumstances, in my view, a fair-minded lay observer, acquainted with the articles written by Ms Albrechtsen, would readily conclude that she published and held views, which were strongly critical of the conduct by the plaintiff in the prosecution of the charge of rape against Mr Lehrmann.

268. Accordingly, the critical question is whether a fair-minded observer, in those circumstances, and with knowledge of the material objective facts, might reasonably have apprehended that Mr Sofronoff might have been influenced, by Ms Albrechtsen, in his determination of the issues that were raised in the Inquiry relating to the conduct by the plaintiff of the prosecution of the case against Mr Lehrmann.

269. As a starting point, the fair-minded observer would take into account that Ms Albrechtsen first established contact with and met Mr Sofronoff, and subsequently communicated with him, for purposes which were directly connected with the Inquiry. In that way, this case is quite different to and distinct from a case in which a member of a Board of Inquiry — or a judicial officer — might happen to meet socially with a representative of a party for purposes unconnected with the issues that were before the inquiry.[127]

270. Further, as a material objective fact, a fair-minded observer would take into account that Ms Albrechtsen's views, as expressed in the articles published by her, could not be characterised superficial or unreasoned. Rather, the articles were clearly the product of substantial research undertaken by Ms Albrechtsen, and were based on a significant amount of information that was apparently available to her. A number of those articles were quite lengthy and detailed in their content.[128] A fair-minded observer, acquainted with the articles, written by Ms Albrechtsen, would understand that she was well immersed in the background and the circumstances of the prosecution of the case against Mr Lehrmann, and would understand that Ms Albrechtsen held considered and firm views relating to that matter, which were significantly critical of the plaintiff.

271. In those circumstances, it is, I consider, particularly relevant that, when Mr Sofronoff first met with Ms Albrechtsen, he had been informed that she held views, and had published articles, that were very much adverse to the plaintiff.

272. In early February 2023, Mr Hedley Thomas, a journalist with *The Australian* newspaper, made contact with Mr Sofronoff. It is evident from the content of the communications between them, that they were on quite amicable terms, and were quite well acquainted with each other. After an exchange of text messages between them, Mr Thomas then sent to Mr Sofronoff an email dated 4 February 2023, the subject of which was 'Janet'. The email attached an article, written by Ms Albrechtsen, in *The Australian* newspaper on the same date, entitled 'Lehrmann trial inquiry must restore faith in law and order'. In

---

[127] Cf *Charisteas v Charisteas* (2021) 273 CLR 289.

[128] See, for example, articles dated: 12 December 2022; 17 November 2022; 18 February 2023; 20 February 2023; 22 April 2023; 9 May 2023 (two articles); 10 May 2023; 10 June 2023; 24 June 2023; 14 July 2023; and 29 July 2023.

the email, Mr Thomas introduced Ms Albrechtsen to Mr Sofronoff as a lawyer and a 'conservative columnist' for *The Australian* newspaper who, in his experience, had been 'scrupulously straight and professional'. Mr Thomas, in the email, then stated:

> Janet has been doing much of the post-verdict reporting and commentary on the Higgins case, including breaking several recent and very interesting stories and complaints levelled against DPP Drumgold and his behaviour.
>
> I think it would be fair to speculate that Janet's relationship with the defence team in the Higgins case would be much more rosy than with the DPP.

273. Subsequently, on 22 February 2023, Ms Albrechtsen contacted Mr Sofronoff by text, and inquired whether he was free for a 'chat'. On the following day, 23 February 2023, Mr Thomas sent a text message to Mr Sofronoff, stating:

> I spoke to Janet who is in London on hols. She's happy to collate her writings for you and your inquiry, and she agrees she is best placed to do it. I gave her your contact details so she will be in touch about it.
>
> Janet has done her homework and expressed great confidence in your appointment.

274. It was in that context that, following that text message, Mr Sofronoff and Ms Albrechtsen exchanged a number of text messages and telephone calls. Ultimately, they agreed to meet for lunch. For that purpose, Ms Albrechtsen flew to Brisbane, where Mr Sofronoff was based, and had a lunchtime meeting with Mr Sofronoff at a restaurant, which was also attended by senior counsel assisting the Inquiry, Ms Longbottom SC.

275. Of itself, the circumstance of Mr Sofronoff meeting with Ms Albrechtsen socially for lunch would be considered, by the fair-minded observer, to be quite innocuous. However, the fair-minded observer would also have in mind, first, that Mr Sofronoff had been told of the particular views, held and expressed by Ms Albrechtsen in her publications, and that Ms Albrechtsen had expressed 'great confidence' in his appointment. Further, the lunch meeting, on 31 March, in effect set the scene for the significant amount and nature of the communications that took place between Mr Sofronoff and Ms Albrechtsen, up to and including the time at which he delivered his final report to the Chief Minister of the ACT.

276. In considering those contacts and communications, the fair-minded observer would, of course, know, as a material objective fact, of the effect of the Practice Guideline and the Media Protocols Guideline published by the first defendant on or about 24 February 2023. That is, the fair-minded observer would understand that, from its inception, the first defendant had established, and had notified the public, including the media, of the means by which documents would be made available to members of the public. Further, the fair-minded observer would have in mind that the first defendant, from an early stage, had

specified the protocols, which would govern its communications with members of the media.

277. In addition, the fair-minded observer would, in viewing the contacts between Mr Sofronoff and Ms Albrechtsen, bear in mind that, during the Inquiry, the Executive arm of the Board of Inquiry maintained a media distribution list, by which it might communicate to members of the media as a whole. It would be relevant for the fair-minded observer to understand that, for some reason, Ms Albrechtsen's name and email address were not included on that list.

278. The plaintiff, in this proceeding, helpfully provided a schedule of communications between the Board of Inquiry staff (excluding Mr Sofronoff) and journalists and related communications. The schedule was based on exhibits to the affidavits of Mr Meagher. It is evident from that schedule, and the evidence of Mr Meagher, that, during the Inquiry, pursuant to the Practice Guideline and the Media Protocols Guideline, the Executive arm of the Board of Inquiry regularly communicated with members of the media, receiving their requests for information, and responding to them, principally through the 'BoI Information' email address. On some occasions, communications received from a member of the media were referred, by the Board of Inquiry Executive, to Mr Sofronoff. On those occasions, Mr Sofronoff would reply to the request for information by providing his response to the Executive, which would then convey that response to the member of the media who made the relevant request. In other words, the first defendant had and maintained a process by which, ordinarily, members of the media were kept at arm's length from Mr Sofronoff, and by which the Executive of the first defendant received and responded to requests for information from the media.

279. It is in that context that the fair-minded observer would, as an objective fact, be aware that the quantity, nature, content and circumstances of the communications, that took place between Mr Sofronoff and Ms Albrechtsen leading up to and in the course of the Inquiry, were markedly different to the method by which the first defendant, ordinarily, communicated with members of the media and others.

280. Quite plainly, as counsel for the plaintiff has demonstrated, the volume of communications that took place between Mr Sofronoff and Ms Albrechtsen was substantially greater than the volume of communications, which Mr Sofronoff himself had directly with all other members of the media.

281. The vast majority of those communications with Ms Albrechtsen took place in circumstances in which it would appear that Ms Albrechtsen contacted Mr Sofronoff. Nevertheless, a fair-minded observer would regard the volume, and frequency, of those

communications as a matter of concern. In particular, the fair-minded observer would consider it significant that Ms Albrechtsen communicated with Mr Sofronoff on so many occasions, in circumstances in which other members of the media were adhering to the protocols to which I have referred.

282. Further, the frequency with which the communications took place would, have raised an apprehension, on behalf of the fair-minded observer, that the content of them might well have gone beyond requests, by Ms Albrechtsen, for information. In that context, the fair-minded observer would regard it as particularly relevant that a substantial amount of communications took place between Ms Albrechtsen and Mr Sofronoff in the period of three days between 5 May and 7 May 2023, which immediately preceded the commencement of oral evidence in the public hearings of the Inquiry. In that respect, the fair-minded observer would be cognisant that the first witness, who gave evidence in the public hearings, was the plaintiff, about whom Ms Albrechtsen held particularly strong and considered views.

283. Further, the fair-minded observer would regard the nature, content and circumstances of those communications as matters of particular concern.

284. In that respect, it is relevant that, on a number of occasions, it would seem that Ms Albrechtsen raised issues, or referred Mr Sofronoff to matters, which, at least, had some relevance to the matters that were to be considered in the Inquiry. That point is of particular relevance, as the fair-minded observer would apprehend that, in that way, Ms Albrechtsen felt that it was appropriate for her to convey information, or views which she held, to Mr Sofronoff, and that he was prepared to receive them from her.

285. On 3 April 2023, Ms Albrechtsen, in a text message to Mr Sofronoff, asked whether a claim for malicious prosecution would be a practical means by which the courts could review the prosecution. Mr Sofronoff responded to Ms Albrechtsen, outlining the limitations that apply to a claim based on that tort.

286. On the next day, 4 April, Ms Albrechtsen sent a text message to Mr Sofronoff, stating that she had just finished hearing Mr Arthur Moses SC make a stay application that had been suppressed. In the text message, she stated:

> It may assist the Inquiry to shed some light on why the DPP decided to stop charges. Janet.

287. On 18 April 2023, Ms Albrechtsen forwarded to Mr Sofronoff, in a text message, an article that she had published in *The Australian* newspaper on that date, entitled ‘Confused? Join the club. The Bruce Lehrmann story I can’t bring you’.

288. On 9 May 2023, Ms Albrechtsen sent a text message to Mr Sofronoff in the following terms:

> This is Commander Smith review dates 3 August 2022 not included in DPP statements attached Moller report but it was part of what defence received when they finally subpoenaed the Moller report. Also the Briefing For CPO dated 6 May 2021 not included in DPP exhibit. **Why not?** (emphasis added)

289. On the same date, Ms Albrechtsen sent to Mr Sofronoff a text message containing a photograph of a document entitled 'Briefing for CPO – 6 May 2021', that apparently set out a 'timeline of the disclosures' between 23 and 26 March 2019 relating to the alleged sexual assault in the Lehrmann trial. She followed that text with a further message, stating:

> This is CPO doc I mention above. Again part of Moller report which is 60+ pages yet DPP only gives inquiry 40 page version. I don't know why.

290. Mr Sofronoff responded to that message with a text containing the 'thumbs up' emoji.

291. On 19 May 2023, Ms Albrechtsen then forwarded to Mr Sofronoff, by text message, an exhibit from Ms Jerome's 3 May statement, stating:

> This is exhibit from Jerome's 3 May statement that I mentioned. Note DPP only passes on 3 of the attachments to defence. I would like to write about these as I've heard about them from another source. I won't mention the Jerome statement. I'm not writing on proofing note. Not anything within your remit.

292. On 24 June 2023, Ms Albrechtsen sent a text message to Mr Sofronoff, apparently attaching the article dated 24 June 2023, entitled 'Sophie's story: No Higgins. No hype. And no help for victims', to which I have earlier referred. In her text message, Ms Albrechtsen stated:

> Hi Walter
>
> I know it's not part of your remit. But still this story we wrote for today's paper points to what happens, beyond the Lehrmann matter, when dysfunction sets in.

293. In that respect, it is relevant that, on the same date, Mr Sofronoff texted a response to Ms Albrechtsen, 'Yes. I read it'. That is, instead of discouraging Ms Albrechtsen from communicating material, and, in particular, her own views, to him, Mr Sofronoff gave his apparent imprimatur to Ms Albrechtsen doing so.

294. Further, in that context, it is of particular significance that, on at least two occasions, Mr Sofronoff, in his communications with Ms Albrechtsen, expressed views on matters that were of immediate relevance to the Inquiry.

295. On 6 May 2023, Mr Sofronoff, in response to a request by Ms Albrechtsen, sent to her statements that were relevant to the issues concerning the affidavit deposed by Mr Greig, relating to the claim that had been made by the plaintiff for privilege in respect of the police investigation documents. On the same date, Mr Sofronoff sent a text message to Ms Albrechtsen as follows:

> What a thing to do to two young professionals under your mentorship.

296. Ms Albrechtsen then responded by text message:

> Thank you. Agreed on all accounts.

297. That exchange between Mr Sofronoff and Ms Albrechtsen, relating to the circumstances in which Mr Greig had deposed the affidavit, is of particular moment. The matter, on which Mr Sofronoff expressed his views, concerned an issue of importance to the Inquiry. The plaintiff was due to commence his evidence, which would no doubt have included addressing that issue, two days later. It was clear, from the message that Mr Sofronoff sent to Ms Albrechtsen on 6 May, that he then held a view that was adverse to the plaintiff in respect of that issue. That point, of itself, of course does not mean that he had prejudged or predetermined the issue. However, the point, that is of particular relevance, is that a fair-minded observer would be significantly concerned that Mr Sofronoff saw fit to communicate that assessment, that he had made about the plaintiff, to Ms Albrechtsen, particularly in circumstances in which he knew that Ms Albrechtsen held views that were critical of the plaintiff. The fair-minded observer might fairly apprehend that, at that point, Mr Sofronoff regarded himself as a 'fellow traveller' of Ms Albrechtsen in respect of the views that she had expressed and maintained in her publications about the plaintiff. The observer might also apprehend that, as such, Mr Sofronoff regarded it as appropriate to exchange views with Ms Albrechtsen about specific issues which he was required to determine in the Inquiry.

298. Another instance of Ms Albrechtsen communicating with Mr Sofronoff, concerning the matters before the Inquiry, occurred on 23 May 2023. On that date, Ms Albrechtsen sent a text to Mr Sofronoff, asking whether the Inquiry was looking into what Commander Chew meant when he said (as recorded in DS Moller's diary) that there was 'too much political interference'. In response, Mr Sofronoff sent a text message to Ms Albrechtsen:

> Yes, he should have asked Moller yesterday what he understood by it. He'll do that this morning and follow up with Chew.

299. That text exchange is relevant for two reasons. First, Ms Albrechtsen felt free to communicate with Mr Sofronoff, and express an opinion to him, about the issues that were being agitated at the Inquiry. Secondly, Mr Sofronoff saw fit to express to

Ms Albrechtsen his agreement with her suggestion as to a question that ought to have been asked of a witness.

300. On the same date, Ms Albrechtsen sent a text message to Mr Sofronoff, stating that she was 'catching up' on 'Moller and evidence', and requesting whether she was permitted to know what had transpired during the 'muted' (that is, closed) sections of the Inquiry. In response, Mr Sofronoff sent a text message to Ms Albrechtsen:

> I'll send you the transcript in the morning. Boring Tedeschi.

301. In the course of oral submissions, I was informed by counsel that Mr Sofronoff did not send the transcript of the private sessions to Ms Albrechtsen. The fact that he was prepared to do so would, I consider, be a minor, but nevertheless relevant, consideration for the fair-minded observer. There was no indication that any other member of the media was considered to be entitled to transcripts of sessions that had been held in private.

302. The phrase, 'Boring Tedeschi', referred to Senior Counsel who represented the plaintiff in the Inquiry. The fact that Mr Sofronoff felt it appropriate to express such a view to Ms Albrechtsen, about a counsel appearing before him, is, again, a minor point, but, nevertheless, one which would be relevant to the perception of a fair-minded observer. The comment went beyond conveying information to a journalist, but indicated that he felt comfortable to express such a view about counsel to Ms Albrechtsen, particularly counsel who was appearing for the plaintiff.

303. Another instance, in which Ms Albrechtsen felt free to communicate her views to Mr Sofronoff, occurred on 7 April 2023. On that date, Ms Albrechtsen sent a text message to Mr Sofronoff, following other communications between the two of them relating to the case, in which she stated:

> Interesting development today. If I were an active trader, I'd call that a hedge.

304. It is not clear what aspect of the Inquiry Ms Albrechtsen was referring to in that text, particularly in view of the fact that public hearings had not commenced. However, in the context in which the text occurred, a fair-minded observer would consider that text message as an indication that Ms Albrechtsen again felt free to express her view about an aspect of the Inquiry (or some other matter) to Mr Sofronoff.

305. There were also some aspects of the means by which Mr Sofronoff and Ms Albrechtsen communicated with each other, which would be relevant to the considerations of the fair-minded observer.

306. At an early stage (15 March 2023), Mr Sofronoff, at the request of Ms Albrechtsen, provided to her his private email address. Mr Sofronoff's willingness to provide that

address to Ms Albrechtsen would be viewed in the context of the media protocol guidelines that had been disseminated to the media, and also in light of the circumstance that, it would seem, Mr Sofronoff had other official email addresses, which he was using.

307. In that context, a fair-minded lay observer would, I consider, regard two aspects of the communications that took place between Mr Sofronoff and Ms Albrechtsen as matters of concern. First, on two occasions (14 March 2023 and 16 July 2023), Ms Albrechtsen asked Mr Sofronoff if he could speak with her 'off the record', to which, in each case, Mr Sofronoff replied in the affirmative. Secondly, on 6 May 2023, Mr Sofronoff forwarded to Ms Albrechtsen, by way of separate text messages, the statements of Mitchell Greig and of Skye Jerome respectively. Following his dispatch of each text message, Mr Sofronoff sent a separate text to Ms Albrechtsen, stating: 'Strictly confidential'.

308. Those communications would, in my view, cause a fair-minded lay observer to be concerned as to the private and, to some extent secretive, nature of the communications that took place between Mr Sofronoff and Ms Albrechtsen, who, as I have discussed, held views that were cogently adverse to the plaintiff.

309. As a further aspect of the communications between Ms Albrechtsen and Mr Sofronoff, it was submitted on behalf of the plaintiff that an examination of the communications between them revealed that, on some six occasions, between 29 March 2023 and 24 June 2023, it was Mr Sofronoff who initiated communication with Ms Albrechtsen. That submission was made by reference to the schedule of summarised communications between Mr Sofronoff and Ms Albrechtsen.

310. By reference to that schedule, it is difficult to determine whether, on all those six occasions, it was Mr Sofronoff who instigated the contact. However, I am satisfied that he did so on at least the majority of them.

311. Some of those occasions were, on their face, quite innocuous. For example, it would seem that, on 29 March, Mr Sofronoff initiated communication, but, in context, that contact probably occurred for the purpose of making arrangements with Ms Albrechtsen to meet her for lunch two days later.

312. On three occasions, Mr Sofronoff forwarded to Ms Albrechtsen documents relating to the Inquiry, in circumstances in which it does not seem that Ms Albrechtsen had asked specifically for them.

313. On 28 April, Mr Sofronoff forwarded to Ms Albrechtsen the amended terms of reference of the Inquiry. On 3 May, Mr Sofronoff, in response to a question from Ms Albrechtsen as to whether the Inquiry was due to start on the following Monday, texted, 'Yes. I'll call

later about statements'. On 23 May, Mr Sofronoff texted to Ms Albrechtsen the names of the witnesses who, it would appear, were to be called in the following weeks. The materials, that have been put in evidence, do not indicate that Ms Albrechtsen had made any specific request for that information.

314. Taken in isolation, those matters would be of relatively minor moment to the fair-minded observer. However, they would raise a question as to why that information was not sought by Ms Albrechtsen through the established channels of Inquiry (the BoI Information gmail address), and as to why Mr Sofronoff made it his task to provide those documents to Ms Albrechtsen.

315. Of more moment, in that respect, was that on 7 April, Mr Sofronoff, by text message, sent to Ms Albrechtsen a copy of the ACT Director of Public Prosecutions policy. There is no indication that Ms Albrechtsen had made a request for that document. The document was one which, at least potentially, was relevant to the determination of the issues before Mr Sofronoff relating to the conduct, by the plaintiff, of the prosecution of the case against Mr Lehrmann. A fair minded observer would, I consider, regard it as relevant that Mr Sofronoff sent it to Ms Albrechtsen himself, rather than by having it disseminated to the media as a whole by the executive arm of the Board of Inquiry.

316. Further, a fair-minded observer would regard it as of particular significance that Mr Sofronoff, in the days preceding the presentation of his report to the Chief Minister of the ACT, provided to Ms Albrechtsen sequential drafts of his report under embargo via his personal email address.

317. On 28 July, Mr Sofronoff provided a first draft of the report to Ms Albrechtsen. On 30 July, he emailed to her a draft of the first chapter of the final report. Later on the same date, he emailed to her a draft of the whole report, which contained internal comments and tracked changes.

318. It is appropriate to record, at this point, that, in his affidavit, Mr Sofronoff explained (in respect of the abandoned ground 1) that his intention in doing so was to assist the media ultimately to write accurately concerning the contents of the report after it was released. However, for the purposes of the question of apprehended bias, Mr Sofronoff's subjective intention in providing drafts of the report would not be an objective material fact known to the fair-minded lay observer. In my view, such an observer, with knowledge of the fact of the provision, by Mr Sofronoff, of those reports, would regard that conduct as a matter of some concern, particularly in light of the fact that Ms Albrechtsen's articles had been consistently critical of the plaintiff. In essence, the fair-minded observer would consider that conduct by the plaintiff as being consistent with his conduct in

communicating his views, relating to the matters that were before the Inquiry, to a journalist who was, in essence, a 'fellow traveller' in respect of those opinions.

319. Of particular moment is the fact that the communications between Mr Sofronoff and Ms Albrechtsen, which I have discussed, all took place in private. At no time were they disclosed to the public at large, or to the plaintiff in particular.

320. In respect of that issue, the defendants have relied on pronouncements, which Mr Sofronoff made on 8 May 2023 and 10 May 2023, in the course of the public hearings before the Inquiry.

321. On 8 May 2023, at the commencement of the first day's public hearing, Mr Sofronoff made a statement, emphasising the importance of the work of the news media in informing the public about the subject matter of the Inquiry. Plainly, that pronouncement, while appropriate, did not reveal that, for that purpose, Mr Sofronoff would be extensively communicating personally, and privately, with one particular member of the media.

322. On 10 May 2023, at the commencement of the day, counsel appearing for the plaintiff drew the Board's attention to a broadcast on a television channel the previous evening, which had been quite derogatory about, and unfair to, Ms Higgins. Mr Sofronoff heard submissions from counsel as to whether, as a consequence, all further hearings should be held in private. In delivering a ruling that he would continue to conduct the hearings in public, Mr Sofronoff emphasised that it was in the public interest that the hearings of the Inquiry should take place in public, so that the community might know, and be informed about, the proceedings before the Inquiry. In his ruling, Mr Sofronoff made it plain that both he and Counsel Assisting had 'freely engaged with journalists' to ensure that they could obtain a full understanding of the evidence and the significance and ramifications of it. Mr Sofronoff explained that he and Counsel Assisting had done so, in order that the community was properly informed about the work of the Inquiry.

323. In the present proceeding, it was not in issue that the kind of contact, spoken about by Mr Sofronoff on 10 May, could give rise to any reasonable apprehension of bias from the perspective of a fair-minded observer. However, it is quite clear from the context in which the ruling was delivered by Mr Sofronoff, that the kind of engagement, which he spoke about in that ruling, was significantly less than, and different from, the quantity, nature, content and circumstances of the communications in which he engaged with Ms Albrechtsen, leading up to and during the Inquiry. In my view, a fair-minded observer, acquainted with the ruling, given by Mr Sofronoff on 10 May, could not have understood that the kind of engagement that, he then spoke about, encompassed the extent and nature of the communications that he did, in fact, undertake with Ms Albrechtsen.

324. In that respect, it may be observed that the extent and nature of the communications, undertaken by Mr Sofronoff with Ms Albrechtsen in the present case was qualitatively and quantitatively quite different to that which had been undertaken in the course of the landmark Fitzgerald Inquiry, to which Mr Sofronoff referred in his affidavit. In that Inquiry, it appears that the Chairman (Mr Fitzgerald) frequently addressed media in hearings of the Commission in order to ensure that the community was not misled by the media in the reporting of the work of the inquiry.

325. In respect of the telephone communications, which took place between Ms Albrechtsen and Mr Sofronoff, counsel for the defendants placed some reliance on the evidence, given by Mr Sofronoff, in his affidavit in this proceeding, concerning the content of those conversations, namely:

> My telephone conversations with Ms Albrechtsen concerned identifying the nature of issues that were before the inquiry as well as practical matters about when documents would be available on the inquiry's website and the timing of the work of the inquiry.

326. It will be recalled that the evidence, adduced by the plaintiff, demonstrated that before and during the Inquiry, there was a most substantial amount of telephone communications that took place between Ms Albrechtsen and Mr Sofronoff. In total, they engaged in some 51 telephone conversations, eight of which occurred during the public hearings of the Inquiry that were held between 8 May and 1 June 2023.

327. The fact that those telephone conversations concerned 'identifying the nature of the issues that were before the inquiry', as well as other practical matters, would not, in my view, detract from a reasonable apprehension, by a fair-minded observer, that in the course of such conversations, Mr Sofronoff might have been affected in his judgment of the issues that involved the plaintiff by the views that had been, and were, strongly held and articulated by Ms Albrechtsen in the large number of articles she had published in *The Australian* newspaper.

328. In particular, the fact that the conversations involved 'identifying the nature of the issues' that were before the Inquiry would, in the context of the other contacts between Mr Sofronoff and Ms Albrechtsen that I have discussed, add to the apprehension of the fair-minded observer that conversations concerning 'the nature of the issues' may well have not been confined to a one sided communication by Mr Sofronoff in relation to those issues, but might also have involved some response to them by Ms Albrechtsen, that reflected her own views in respect of them.

329. Counsel for the defendants also submitted that the fair-minded observer would take into account the fact that, in his report, Mr Sofronoff made a number of findings, which were positive for the plaintiff. For example, Mr Sofronoff vindicated the decision of the plaintiff,

to institute criminal proceedings against Mr Lehrmann.[129] He also acquitted the plaintiff in respect of his decision not to disclose to the defence the email, which Ms Fiona Brown had sent to him.[130]

330. Each of those matters are, or would be, relevant to the consideration, by the fair-minded lay observer, of the conduct by Mr Sofronoff of his role as the Chairperson of the Commission of Inquiry. However, as a countervailing consideration, the fair-minded observer would also take into account that Mr Sofronoff made a number of findings that were particularly critical of the plaintiff, and which impugned his professional integrity. In essence, the findings, reached by Mr Sofronoff, rendered the plaintiff's position as Director of Public Prosecutions to be untenable. That consideration, of itself, could not bespeak bias, or give rise to the apprehension of bias. However, it is an important counterweight to the weight sought to be attributed, by the defendants in this case, to the positive findings, made by Mr Sofronoff in favour of the plaintiff, in his report.

331. The authorities on apprehended bias have noted that the determination of each case is necessarily dependent on the facts of the particular case in question. No previous decision could constitute a precedent. In each case, the question whether a plaintiff has established a case based on apprehended bias must necessarily depend on the facts of that case.

332. Counsel for the plaintiff nevertheless sought to draw some support from the decision of the High Court in *Charisteas v Charisteas*.[131]

333. That case concerned private and social communications that took place in the course of a Family Court proceeding between the trial judge and counsel, who was then appearing on behalf of the wife. During the relevant period, counsel had met with the judge on about four occasions, had spoken with the judge by telephone on five occasions, and had exchanged occasional text messages with the judge. Following the delivery of judgment in the case, opposing counsel first learned of those communications. On appeal, the High Court unanimously held that, in those circumstances, the husband had established a case of apprehended bias on behalf of the trial judge, so that the orders, made by that judge, were set aside.

334. In reaching that conclusion, their Honours stated:

> A fair-minded lay observer, understanding that ordinary and most basic of judicial practice, would reasonably apprehend that the trial judge might not bring an impartial mind to the

[129] Report, [219].
[130] Ibid [557].
[131] (2021) 273 CLR 289.

> resolution of the questions his Honour was required to decide. The trial judge's impartiality might have been compromised by something said in the course of the communications with the wife's barrister, or by some aspect of the personal relationship exemplified by the communications. Accordingly, there is a logical and direct connection between the communications and the feared departure from the trial judge deciding the case on its merits.[132]

335. As I have stated, the facts in *Charisteas* were quite different to those in the present case. Nevertheless, the decision, and the reasoning of the High Court, is of some relevance in the present case, in illustrating the manner in which the impartiality of a judge, or a Commission of Inquiry, might be reasonably apprehended to be compromised by private communications between the judge (or inquiry) on the one hand, and a person who is perceived to have a role in advocating for a particular position in the matter before it.

336. In determining the issues, raised under ground 2, I am mindful of the caution, which must be applied in determining whether the case of apprehended bias has been established. As the principles, to which I have earlier referred, make clear, the apprehension, by the fair-minded observer, must be reasonably held. The present case involves the processes of a Commission of Inquiry, which, by their nature, were quite different to, and distinct from, those of a court. In such a case, some interchange between the Chairman of the Commission, and the media, might be fairly considered to be acceptable, in circumstances where the same communication might be entirely inconsistent with the role of a judicial officer.

337. Nevertheless, and giving full weight to that caution, I am driven to the conclusion, in this case, that a fair-minded observer, acquainted with all the material objective facts of the case, might reasonably have apprehended that, as a consequence of his communications with Ms Albrechtsen, Mr Sofronoff might have been influenced, and thus biased, against the plaintiff in determining the issues, specified by paragraph (c) of the Terms of Reference of the Inquiry, concerning the conduct by the plaintiff of the prosecution of the case against Mr Lehrmann.

338. In the terms of the three steps in the reasoning, outlined by the High Court in *Ebner* and *QYFM*, the fact or circumstance, which a fair-minded observer might apprehend might have led Mr Sofronoff to decide the case other than on its legal and factual merits, consisted of his contacts and communications with Ms Albrechtsen, in circumstances in which Ms Albrechtsen had formed views and published considered articles, which had been and were highly critical of the plaintiff in his conduct of the prosecution of the criminal trial against Mr Lehrmann. The connection between that circumstance and the

---

[132] Ibid 298 [15].

apprehended deviation from the course of deciding the issues on their merits consisted not only of the communications between Mr Sofronoff and Ms Albrechtsen, but, more significantly, the nature and cogency of the views held by Ms Albrechtsen on the issues to be determined by Mr Sofronoff under paragraph (c) of the Terms of Reference, the amount of communications between Mr Sofronoff and Ms Albrechtsen, and the context, circumstances, nature and content of those communications. Taking those matters into account, which I have discussed above, in my view, the conclusion is unavoidable that a fair-minded lay observer, acquainted with the material objective facts, might reasonably have apprehended that Mr Sofronoff might have been influenced, in determining the issues relating to conduct by the plaintiff of the prosecution of the criminal proceeding against Mr Lehrmann, by the views held and publicly expressed by Ms Albrechtsen.

339. For those reasons, I have concluded that the conduct of the first defendant, which I have described, did give rise to a reasonable apprehension of bias. It follows that ground 2 of the application for judicial review must succeed.

340. That conclusion is based on the principal aspect of the case advanced by the plaintiff in support of ground 2, namely, the communications between Mr Sofronoff and Ms Albrechtsen.

341. In reaching the conclusion that the plaintiff has, on that basis, established a case of apprehended bias, I have not had reference to the six additional matters, relied on by the plaintiff, which, in the context of the submissions advanced on his behalf, were addressed as relatively minor matters. For the purposes of completeness, it is convenient for me to deal shortly with each of them. In essence, I do not regard any of those six matters as supporting or reinforcing the conclusion that I have reached under ground 2.

342. The first additional point by the plaintiff concerned the conduct of Mr Sofronoff in forwarding to Mr Thomas, on 14 February 2023, a link to the plaintiff's Wikipedia page. I consider that a fair-minded lay observer would not regard that conduct by Mr Sofronoff to support any case of apprehended bias. It will be recalled that Mr Sofronoff appears to have been on quite friendly terms with Mr Thomas, and it was in that context that he forwarded to him a document, which would otherwise be readily available on the internet.

343. I also agree with the submissions, made on behalf of the defendants, that the second additional point, namely, the extension of the terms of reference relating to the Inquiry, was of no moment. As counsel pointed out, that extension was sought by Mr Sofronoff after a number of days of private hearings. During that time, it might be expected, by the ordinary lay observer, that Mr Sofronoff might have formed preliminary views concerning the issues that were identified in the original terms of reference. The amendments to the

terms of reference did no more than make more specific, and resolve any doubt about, the ambit of the original terms of reference in respect of the conduct of the plaintiff.

344. In substance, the third point relied on by the plaintiff concerned the treatment apparently accorded to him as a witness by Mr Sofronoff. In particular, the plaintiff sought to compare the treatment, that he received while giving evidence in the Inquiry, with the treatment afforded to other witnesses. In the submissions, counsel referred to parts of the transcript of the hearing before the Board of Inquiry, which were included in the exhibit tendered in the current proceeding. Having read those parts of the transcript, I do not consider that there is any substance in the point, made on behalf of the plaintiff.

345. The first aspect of that point was that Mr Sofronoff engaged in a significant amount of cross-examination of the plaintiff, and often interrupted his answers. The extracts from the transcript that have been made available to me do not substantiate that point. In fact, with a few exceptions — which are normal in the course of any hearing, whether in a court or in an inquiry — Mr Sofronoff waited until the plaintiff had completed his answer, to ask him a question. The questioning of the plaintiff by Mr Sofronoff did not, in my view, constitute a significant amount of cross-examination, particularly taking into account the relevant differences between a court hearing and proceedings before a Board of Inquiry. The questions, which Mr Sofronoff asked the plaintiff, in the main, sought to clarify his position concerning a particular issue that was relevant to the Inquiry (such as the stance, which the plaintiff had taken in the stay application, arising from the speech made by Ms Wilkinson after she had been awarded a Logie). The questions also sought, relevantly and appropriately, to clarify the plaintiff's understanding of the duties of a prosecutor, for example, in a case in which the prosecutor has become aware of a publication in the media, which might result in unfair prejudice to an accused person.

346. Further, having regard to the parts of the transcript in which other persons gave evidence, I do not consider that the questions, which Mr Sofronoff asked of those witnesses, were an attempt by him to assist them. Rather, in each of the instances relied on by the plaintiff, Mr Sofronoff properly sought to clarify the point being asked of the witness, and to identify the relevance of the issue that was addressed by that question. On occasion, Mr Sofronoff sought to assist by clarifying questions asked of the witness by counsel, and, on other occasions, he sought to clarify the answer given by a witness.

347. Taking the extracts of the transcripts, that have been tendered in evidence in this case, as a whole, I do not consider that there is any sufficient contrast between the treatment, by Mr Sofronoff, of the plaintiff as a witness, with the treatment that he extended to other witnesses, to raise or support a case of apprehended bias.

348. In respect of the fourth point raised by the plaintiff, I do not consider that a fair-minded lay observer would regard it as relevant that the first defendant did not, in the upshot, annexe to the report the two written submissions made by the plaintiff to the Inquiry. In fact, and in any event, the report did annexe the two sets of submissions made by the plaintiff in response to the notices of adverse comment. The first such response was a document of some 130 pages (together with a substantial annexure).

349. The fifth point relied on by the plaintiff also would, in my view, be considered by a fair-minded observer to be of no consequence. The topic on which Mr Sofronoff agreed to speak on 25 August 2023 had no specific or apparent connection to the Inquiry that he conducted, or to the plaintiff. The fact that it was to be hosted by *The Australian* newspaper would be a matter that would be of little, if any, moment to the fair-minded observer.

350. The sixth point, relied on by the plaintiff, was that in three particular respects, Mr Sofronoff had failed to give the plaintiff a fair hearing in respect of findings that he made in his report that were adverse to the plaintiff. Those three findings are the subject of ground 4. In considering that ground, I have rejected the plaintiff's claim that he was not given a fair hearing in respect of two of those findings. I have accepted that he was not accorded natural justice in respect of the conclusion that the plaintiff had made false statements to the Chief Police Officer, that he did not know about the Freedom of Information request concerning the letter, that he had written to the Chief Police Officer, dated 1 November 2023, or the fact that it had been released.[133] That conclusion, and the reason why I have reached that conclusion, do not support, or indicate, apprehended bias on behalf of the first defendant. Rather, in the context of the Inquiry, the failure of natural justice in that instance would be considered by the, reasonable lay observer to be the product of an oversight, rather than an omission that reflected any bias on behalf of Mr Sofronoff.

351. Accordingly, the additional six factors, relied on by the plaintiff, do not, in my view, demonstrate, or add to, the case made by the plaintiff under ground 2 based on the communications between Mr Sofronoff and Ms Albrechtsen.

352. However, for the reasons that I have already given, I have concluded that the conduct of Mr Sofronoff, in engaging in those communications, was such as would give rise to a reasonable apprehension of bias on the part of a fair-minded lay observer. Specifically, I have concluded that the amount, context, nature, manner and content of the

---

[133] Report, [688].

communications, that occurred between Mr Sofronoff and Ms Albrechtsen, were such that a fair-minded lay observer, acquainted with the material objective facts, might reasonably have apprehended that Mr Sofronoff in determining the issues raised by paragraph (c) of the Terms of Reference concerning the conduct by plaintiff of the prosecution of the charge against Mr Lehrmann, might have been influenced by the views held and publicly expressed by Ms Albrechtsen concerning those issues.

353. Accordingly, ground 2 of the application for judicial review must succeed.

Ground 3 – Legal Unreasonableness

354. Under ground 3, it is contended that eight specific findings in the Report are legally unreasonable.

355. The findings, that are the subject of ground 3, are as follows:

(1) The finding to the effect that, having read counselling notes pertaining to Ms Higgins, the plaintiff's prosecutorial duty of disclosure had been engaged, and his failure to do anything in respect of it was a breach of his duty as prosecutor.[134]
(2) The finding that the plaintiff's determination, during the proceeding, that certain documents generated by the ACT Police were not disclosable, was wrong and untenable.[135]
(3) The finding that the plaintiff deliberately advanced a false claim of legal professional privilege in respect of certain documents provided by ACT Police,[136] based in part on the findings by the first defendant,[137] that a determination that those documents were protected could not honestly be formed by a competent lawyer.
(4) In respect of an affidavit, deposed by a junior lawyer within the Office of the Director of Public Prosecutions, supporting the position that certain documents were protected by legal professional privilege, the finding that the plaintiff asked a solicitor to swear a misleading affidavit and, when 'foiled', he directed a junior lawyer in his office to make a misleading affidavit, and, in doing so, he 'preyed' on the junior lawyer's inexperience, egregiously abused his authority and betrayed the trust of his young staff member.[138]

[134] Report, [264]–[265], [270].
[135] Ibid [320].
[136] Ibid [415].
[137] Ibid [340], [408].
[138] Ibid [413]–[416].

(5) The finding that the plaintiff misled the court in respect of the claim of legal professional privilege, and tried to use dishonest means to prevent a person, whom he was prosecuting, from lawfully obtaining relevant material.[139]

(6) The finding that the plaintiff made false statements and knowingly lied to the court in respect of the contemporaneity and authorship of the conference note relating to the proofing of the journalist, Lisa Wilkinson.[140]

(7) The finding that, in respect of the disclosure by Ms Wilkinson of the nature of a speech she might give in the event she won an award, the plaintiff was under a duty to warn her not to give the speech, and, if necessary, to seek an injunction preventing the speech, and that he had failed to do so.[141]

(8) The finding that the plaintiff had engaged in 'grossly unethical' conduct, by making suggestions, in his cross-examination of Senator Linda Reynolds, that had no basis at all and should not have been made.[142]

356. I shall consider the issues that have been raised in respect of each of those findings separately. Before doing so, it is convenient, first, to outline the principles that apply to a ground of review, based on legal unreasonableness.

Principles of legal unreasonableness

357. The requirement, that a statutory authority act reasonably in any decision-making process undertaken by it, is based on a presumption of law that the legislature intended that the power, reposed in the authority, would be exercised reasonably.[143]

358. The test for unreasonableness is stringent, and the courts have emphasised that it is not a process by which a merits review of the decision may be undertaken by the courts.[144] In a case in which it is asserted that the decision, reached by the statutory authority, is unreasonable, the court will only intervene, and hold such a decision to be invalid, where the decision itself is so unreasonable 'that it could not have been reached if proper reasoning had been applied in the exercise of the statutory power in the particular circumstances'.[145] Expressed in that way, the test of reasonableness is, necessarily, to

---

[139] Ibid [415], [417].
[140] Ibid [471], [477].
[141] Ibid [482], [489], [494] and [496].
[142] Ibid [600].
[143] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1,36 (Brennan J); M*inister for Immigration and Citizenship v Li* (2013) 249 CLR 332,, 364 [68], 366 [72] (Hayne, Kiefel and Bell JJ) (*'Li')*.
[144] *Li*, 376 [108] (Gageler J); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 574 [86] (Nettle and Gordon JJ) ('*SZVFW*').
[145] *SZVFW*, 573–4 [83] (Nettle and Gordon JJ); *Li* 367 [76] (Hayne, Kiefel and Bell JJ); *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21, 28 [34] (Allsop CJ, Besanko and O'Callaghan JJ).

some extent circular.[146] However, the terms in which the test is so expressed underlines the narrow scope of review afforded by it.[147]

359. The legal requirement of reasonableness is not confined to an examination of the final decision, made by the statutory authority. It may also apply to the process of reasoning, undertaken by the authority, in reaching the decision which is under review. Nevertheless, it has been emphasised by the courts that the test of reasonableness is no less narrow or stringent, when applied to the process of reasoning engaged in by the statutory authority, than in its application to an examination of the reasonableness of the decision reached by the authority.

360. The application of those principles is demonstrated by the decision of the High Court in *Minister for Immigration and Citizenship v SZMDS*.[148]

361. In that case, a Pakistani citizen applied for a protection visa, on the ground that if he was forced to return to Pakistan, he feared he would be persecuted because he was homosexual. A delegate of the Minister refused the application, and the Refugee Review Tribunal affirmed that decision. In its reasons, the Tribunal considered that the applicant's conduct, in returning to Pakistan for three weeks before coming to Australia, and in failing to seek asylum during a previous visit to the United Kingdom, was inconsistent with his claims, both that he was homosexual and that he feared he would be persecuted in Pakistan for that reason. His application to the Federal Magistrates' Court for review of the Tribunal's decision was dismissed. The Federal Court allowed an appeal from that decision on the ground that the Tribunal had fallen into jurisdictional error in adopting an illogical or irrational process of reasoning in determining that the respondent was not a homosexual[149]. The High Court, Heydon, Crennan and Bell JJ (Gummow ACJ and Kiefel J dissenting) upheld an appeal against that decision, holding that there was no jurisdictional error in the Tribunal's decision.

362. Crennan and Bell JJ stated the principles to be applied to the case in the following terms:

> Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.
>
> What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision

---

[146] *Li*, 364 [68]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 647 [129] (Crennan and Bell JJ) ('*SZMDS*').
[147] *SZVFW*, 551 (Kiefel CJ).
[148] (2010) 240 CLR 611.
[149] *SZMDS v Minister for Immigration and Citizenship* (2009) 107 ALD 361

> or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.[150]

363. Having discussed the application of those principles to the decision of the Tribunal, their Honours concluded:

> On the probative evidence before the Tribunal, a logical or rational decision maker could have come to the same conclusion as the Tribunal. Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn. None of these applied here. It could not be said that the reasons under consideration were unintelligible or that there was an absence of logical connection between the evidence as a whole and the reasons for the decision.[151]

364. In the present case, the plaintiff and the third defendant addressed each of the eight impugned findings separately. In addition, senior counsel for the third defendant submitted that, in respect of each finding, the contentions advanced on behalf of the plaintiff fell well short of demonstrating that the particular finding was legally unreasonable. Counsel submitted that, in respect of each finding, the plaintiff has failed to refer to the evidence before the Inquiry, or to the submissions made to the first defendant in the Inquiry in respect of the issues in question. It was thus submitted that, in each case, the contentions advanced by the plaintiff rose no higher than disagreement with the findings of the first defendant, and an invitation to me to consider that there may have been other findings open to the first defendant.

The first finding

365. As I have noted, the first finding, in issue under ground 3, was to the effect that, having read the counselling notes pertaining to Ms Higgins, the plaintiff's prosecutorial duty of disclosure had been engaged, and his failure to do anything in relation to it was a breach of his duty as prosecutor.[152] In paragraphs [36] to [37] above, I have summarised the relevant circumstances relating to that finding.

---

[150] *SZMDS*, 648 [130]-[131]; see also *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439, 450-1[19]-[20] (Kiefel CJ, Bell, Gageler, and Keane JJ), 489-90 [122]-[125] (Edelman J).

[151] Ibid 649–50, [135]; see also *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 574 [84] (Nettle and Gordon JJ).

[152] Ibid [264]–[265], [270].

The first finding – submissions

366. The plaintiff submitted that the finding, that he breached his duty as a prosecutor in respect of the counselling notes, was legally unreasonable for two reasons.

367. First, it was submitted, it was common ground that it was legitimate for the police to disclose the counselling notes to the plaintiff when they sought his advice regarding institution of a prosecution, and, accordingly, it was legitimate for the plaintiff to read them in order to provide that advice. In those circumstances, it was illogical to conclude that by reading the notes at a later stage, the plaintiff engaged the duty of disclosure.

368. Secondly, counsel contended, the plaintiff's duty of disclosure could only be engaged if, by reading the counselling notes, he gained an unfair advantage over the defence. There is no finding that the plaintiff's reading of the counselling notes provided him with any identified advantage. Contrary to the finding in the final Report,[153] the plaintiff's mere knowledge of their contents was not such an advantage.

369. In response, counsel for the third defendant noted that in the Report, the first defendant found that there was no statutory prohibition upon police seeking and obtaining the notes with Ms Higgins' consent, and that the police could have provided the notes to the plaintiff in seeking his advice.[154] However, that did not occur. The first defendant found that the notes came into the possession of the plaintiff by way of their inclusion in the brief of evidence, which was prohibited because it was a disclosure 'for the purpose of a preliminary proceeding'.[155] It was following that prohibited disclosure that the plaintiff read the notes.[156] Further, it was submitted, even if it was legitimate for the plaintiff to read the counselling notes for the purpose of providing advice to the police, that did not render it unreasonable for the first defendant to conclude that the duty of disclosure was engaged in relation to them once the plaintiff was prosecuting a case in which they were relevant.

370. In respect of the second point relied on by the plaintiff, counsel for the third defendant noted that, in the proceedings before the first defendant, the plaintiff accepted that the notes were relevant to the proceeding and were proper to be included in the disclosure certificate. In that respect, the first defendant formed the view, that the notes were relevant, because they might have been relevant to Ms Higgins' credibility, or they might have put the defence on a train of inquiry.[157] In light of that concession, it was submitted,

---

[153] Ibid [261].
[154] Ibid [246].
[155] Ibid [232].
[156] Ibid [238].
[157] Ibid [257].

the plaintiff should not now be permitted to make a submission to the contrary. Further, it was noted that the first defendant, in the Report,[158] elaborated on the matters on which the notes might have been relevant to the issues in the trial.

371. Further, it was submitted on behalf of the third defendant that, contrary to the plaintiff's submissions, the first defendant did make a finding that the plaintiff gained an evidentiary advantage as a result of having read the notes.[159]

The first finding – conclusions

372. The first finding, that is the subject of ground 3, was based on six sequential propositions formulated by the first defendant.

373. Those propositions were as follows. First, after the criminal charges had been issued against Mr Lehrmann, s 79C of the *Evidence (Miscellaneous Provisions) Act 1991* prohibited the disclosure of the counselling notes to either party, that is, to either the prosecution or the defence in the proceeding.[160] Second, as a consequence, the inclusion of the counselling notes in the brief of evidence received by the plaintiff, after the commencement of the proceeding, was a prohibited disclosure of the notes.[161] Third, the plaintiff read the notes after he had been advised (by Ms Priestly of the ODPP) that the inclusion of them in the brief was prohibited by s 79C.[162] Fourth, by reading the notes, the plaintiff became placed in a position of unfair forensic advantage in respect of the defence, because he held information (that had not been revealed to the defence), which might have assisted the defence.[163] Fifth, accordingly, the plaintiff's duty as the prosecutor required him to take appropriate steps to redress that unfair advantage, either by withdrawing from the case, bringing an application for leave to disclose the notes to the defence, or supporting an application to that effect by the defence.[164] Sixth, the plaintiff did not take any of those steps, or any other steps; he did nothing to redress the unfair disadvantage that had occurred as a consequence of him reading the notes.[165]

374. It was based on those six propositions that the first defendant concluded (as the first finding) that the plaintiff thereby breached his duty as a prosecutor.[166]

---

[158] Ibid [260].
[159] Ibid [261]–[262].
[160] Ibid [232].
[161] Ibid [232].
[162] Ibid [234]–[238].
[163] Ibid [241], [257]–[261].
[164] Ibid [264].
[165] Ibid [265], [270].
[166] Ibid [270].

375. In essence, the plaintiff, in submitting that the first finding, so concluded by the first defendant, was legally unreasonable, relied on two principal contentions, that were directed to the fourth and fifth of those propositions.

376. First, it was contended that, as the counselling notes had been legitimately included in the brief that was delivered to the plaintiff before the commencement of the prosecution against Mr Lehrmann, it was illogical for the first defendant to conclude that, when the plaintiff subsequently read the notes after they were also included in the brief provided to the parties after the proceedings were instituted, he thereby had a duty to disclose them to the defence.

377. There are two difficulties with that contention. First, it is correct that the counselling notes were legitimately included in the brief to the plaintiff to advise in respect of prospective proceedings, which was delivered to him on 21 June 2021. However, the first defendant did not make any finding as to whether the plaintiff, at that time, read the notes. Secondly, and more significantly, the fact that the notes had been legitimately delivered to the plaintiff in the first brief in June 2021, did not alter the position that when they were included in the second brief of evidence, delivered to the parties on 6 August 2021, the plaintiff did read them and have regard to them, after he had been alerted by Ms Priestley that their inclusion in the brief was proscribed by s 79C of the Act.

378. The second aspect of the first finding, that is the subject of ground 3, is that because the plaintiff read the notes after he had been alerted that there might be a prohibited disclosure, his duty of disclosure, as a prosecutor, had been engaged in respect of them. It was based on that proposition that the first defendant concluded that the plaintiff's failure to do anything in those circumstances was a breach of that duty. In respect of that aspect of the first finding, counsel for the plaintiff submitted that the first defendant did not make a finding that the plaintiff had derived any relevant advantage in the criminal proceeding and, accordingly, his duty to disclose the notes to the defence was not engaged.

379. That submission has a flawed basis. First, as noted in the Report, the plaintiff himself accepted that the counselling notes were a category of document that fell within Schedule 2 of the disclosure certificate, being relevant to the trial, but which were precluded from being disclosed on the basis of a statutory publication restriction.[167] Further the first defendant found that the notes might have been required to be disclosed to the defence, because they were capable of evidencing prior inconsistent statements,

---

[167] Ibid [257].

evidence of statements of fact by the complainant inconsistent with the prosecution case, or evidence of a medical disability affecting the witness's reliability.[168] Thus, the first defendant concluded that the plaintiff was in a position in which he held information, which might have been useful to the defence, and which the defence did not have available to it. It was for that reason that the first defendant considered that that position was 'unfair because it gave [the plaintiff] a forensic advantage'.[169]

380. The plaintiff has not demonstrated, nor could he, that it was unreasonable for the first defendant to consider that the notes might have been disclosable, by the prosecution to the defence, as they were capable of evidencing prior inconsistent statements, evidence of statements of fact by the complainant that were inconsistent with the prosecution case, or evidence of a medical disability that might have affected the reliability of the evidence of the complainant. Accordingly, the conclusion, by the first defendant, that, apart from the statutory prohibition in s 79C of the *Evidence Act*, the notes would otherwise have been disclosable, is unimpeachable.[170]

381. Consequently, it follows, logically, that, as the plaintiff had possession of and had read the documents, his duties as a prosecutor required him to take an appropriate action in order to redress the position that he had placed himself in by reading the notes. The first defendant outlined three possible courses of action, which the plaintiff might have undertaken to do so. It is not suggested in this proceeding that it was unreasonable for the first defendant to consider that those three possible courses were available to the plaintiff.

382. Accordingly, it necessarily follows that it was not unreasonable for the first defendant to conclude that the plaintiff's failure to do anything about the counselling notes, when he had those options available to him, was a breach of his duty as a prosecutor.

383. For those reasons, ground 3 is not made out in respect of the first finding.

Second finding

384. The second finding, that is the subject of ground 3, was to the effect that the plaintiff's determination that certain documents, generated by the ACT Police, and in particular the executive briefing note by DS Moller and the evidence analysis by DI Boorman, were not

---

[168] Ibid [260].
[169] Ibid [261].
[170] Ibid [261].

disclosable, was wrong and untenable.[171] I have summarised the circumstances relating to that finding at paragraphs [38] to [42] above.

Second finding — submissions

385. In this proceeding, the plaintiff does not take issue with the finding that his view of the documents, concerning their disclosure, was 'wrong'. He does take issue with the finding that that view was 'untenable'.

386. In support of that aspect of ground 3, Senior Counsel for the plaintiff referred to the decision of Beech-Jones J in *Hamilton v State of New South Wales*,[172] in which his Honour considered that it is generally inappropriate for police officers to disclose their, or the DPP's, assessment of the relative strengths or weaknesses of witnesses or of the case generally. The first defendant found that DI Boorman's analysis should have been disclosed, because it might have led the defence to a chain of inquiry. However, it was submitted, the disclosure principle only applies to facts or evidence that might lead to a chain of inquiry, and it does not apply to expressions of internal opinion about the strengths or weaknesses of evidence. Consequently, it was submitted, the view formed by the plaintiff, in respect of DI Boorman's analysis, was perfectly tenable.

387. Counsel noted that the first defendant found that DS Moller's executive briefing note was disclosable, because it referred to Ms Higgins' reluctance to provide the police with access to her mobile telephone. However, counsel contended, there is no suggestion that Ms Higgins' reluctance was not otherwise referred to in the evidentiary material that was disclosed to the defence. DS Moller's expressed opinion regarding that reluctance was not a matter requiring disclosure. Accordingly, it was submitted, the finding, that the plaintiff's view in respect of disclosure was 'not tenable', was unreasonable.

388. In response, Senior Counsel for the third defendant noted that the first defendant in the Report appropriately defined the relevant test for the disclosure of documents.[173] Counsel submitted that contemporary documents, created by the police, may fall within that test.[174] Counsel noted that the first defendant found that the executive briefing note prepared by DS Moller was relevant, because it recorded Ms Higgins' disinclination to give police immediate access to the contents of her mobile telephone. On that basis, the document was disclosable, because it was a factual statement, capable of providing a

[171] Ibid [320].
[172] [2016] NSWSC 1213, [38]–[39].
[173] Report, [158]–[160].
[174] *R v Reardon (No 2)* [2004] NSWCCA 197 [59]–[60].

line of cross-examination relevant to Ms Higgins' credit.[175] Further, it was submitted, the plaintiff has not provided support for the proposition that Ms Higgins' reluctance, to provide police with access to her mobile telephone, was contained in other evidentiary material disclosed to the defence.

389. Counsel further noted that the first defendant had concluded that the evidence analysis prepared by DI Boorman was a detailed analysis, which would have clearly put the defence on several trains of inquiry.[176] On that basis, contrary to the submissions advanced on behalf of the plaintiff, it was clearly disclosable.

390. For those reasons, counsel for the third defendant submitted that it was not unreasonable for the first defendant to conclude that the plaintiff's determination, during the criminal proceeding, that the two documents were not disclosable, was not only wrong, but it was also untenable.

Second finding — conclusion

391. In the Report, the first defendant set out, in a series of sequential steps, the premises upon which it was concluded that the view, expressed by the plaintiff, that he was not required to disclose the two investigation documents, was not only incorrect, but was 'untenable'. The submissions advanced by the plaintiff do not seek to impugn or demonstrate any legal unreasonableness in respect of any of those premises. On analysis, they were each logical and rational.

392. The first defendant commenced by appropriately describing the duty of disclosure of a prosecutor, which, it was noted, not only extends to material that sets out the prosecution case, but also includes material, which might bear upon the defence of the charges.[177]

393. The first defendant then concluded that the DS Moller briefing note, and the DI Boorman evidence analysis, were each required to be disclosed pursuant to that duty. In particular, the first defendant explained, DS Moller's briefing note was required to be disclosed because it specified instances of Ms Higgins' behaviour, such as her disinclination to provide police with access to the content of her mobile telephone, which could constitute the basis of cross-examination relevant to her credit. The first defendant noted that the evidence analysis, prepared by DI Boorman, was also required to be disclosed, because it would 'without a shadow of a doubt' have put the defence on several trains of inquiry.[178]

---

[175] Report, [293]–[294].
[176] Ibid [295].
[177] Ibid [273]; see Grey v The Queen (2001) 75 ALJR 1708; Mallard v The Queen (2005) 224 CLR 125, 134 [17]; Roberts v The Queen [2020] VSCA 277 [55]-[64]
[178] Ibid [295].

394. The plaintiff has not demonstrated that either of those propositions were legally unreasonable. The decision in *Hamilton*, relied upon by the plaintiff, is not to the point. Even if it could be regarded as inappropriate for police officers to disclose their assessments of the relative strengths or weaknesses of a witness for the prosecution, nevertheless, the fact is that the two documents, the briefing note of DS Moller and evidence analysis of DI Boorman, were not simply reflections of their subjective assessments of the merits of the prosecution case. They were disclosable because they might have borne on, and been relevant to, the defence of the case against Mr Lehrmann.

395. The Report then noted that Senior Constable Frizzell, in the disclosure certificate drafted by her, described the documents as 'internal brief and investigative material inclusive of the situation, evidential reviews, enquiries and identified issues and/or discrepancies'. The first defendant considered that that description of the two documents was 'perfectly accurate'.[179] Based on that description, it necessarily follows that the documents were required to be disclosed to the defence, particularly because, as the first defendant correctly noted, on any issue of disclosure, the balance should always 'resoundingly be in favour of disclosure'.[180]

396. The disclosure certificate was conveyed to the plaintiff, together with DS Moller's executive briefing note and DI Boorman's evidence analysis. The first defendant noted that the plaintiff, on receipt of the document, considered that it was not his role to provide advice as to whether they ought to be disclosed, and, accordingly, he did not respond to Detective Sergeant Fleming, who had emailed the documents to him.[181] In a subsequent meeting with Senior Constable Frizzell and DS Fleming, Ms Priestley and Ms Jerome, the plaintiff expressed the view that the documents were not relevant.

397. In respect of that proposition, the first defendant noted that if the documents were not relevant, they should not have been included on the disclosure certificate at all. The first defendant noted that, in his evidence, the plaintiff also stated that he had formed the view the documents were not disclosable, because, in effect, they were inadmissible. The first defendant rejected the validity of that explanation, correctly noting that a document does not need to be admissible in order for it to be disclosable.[182]

---

[179] Ibid [308].
[180] Ibid [315].
[181] Ibid [309]–[312].
[182] Ibid [319].

398. It was based on those sequential steps in his analysis that the first defendant concluded that the view, by the plaintiff, that the documents did not meet the test of disclosure, was not only wrong, but 'untenable'.[183]

399. As I have discussed, the plaintiff has not sought to, nor could he, impugn any of the sequential steps, which I have outlined, and on the basis of which the first defendant reached that conclusion. Further, it could not be demonstrated that it was legally unreasonable for the first defendant to conclude, based on those premises, that the view held by the plaintiff, concerning the disclosure of the documents, was not only wrong, but also 'untenable'. In particular, the first defendant, in the analysis in the Report, demonstrated that the bases upon which the plaintiff had resisted disclosure of the two documents were clearly flawed.

400. It follows that ground 3 does not succeed in respect of the second findings.

Third, fourth and fifth findings

401. The third, fourth and fifth findings, that are the subject of ground 3, were each concerned with the claim for legal professional privilege that was advanced by the prosecution in respect of the police investigation documents. I have summarised the relevant aspects of the Report, relating to those findings, at paragraphs [47] to [58] above. Counsel for the plaintiff addressed each of those grounds individually. In response, counsel for the third defendant addressed them together. It is convenient first to summarise the submissions made on behalf of the parties, before stating my conclusions in relation to each of those findings.

<u>Third, fourth and fifth findings – submissions</u>

402. As noted, the third finding, that is the subject of ground 3, is the finding by the first defendant that the plaintiff deliberately advanced a false claim of legal professional privilege in respect of documents prepared by the ACT Police in the course of its investigation of the complaint by Ms Higgins.[184] It was submitted on behalf of the plaintiff that the finding by the first defendant, to the effect that the plaintiff knew that the AFP did not claim legal professional privilege over the two investigation documents, was legally unreasonable.

403. Counsel noted that the ACT Police had not disclosed the two investigation documents in the brief of evidence that was provided to the defence on 6 August 2021. Throughout the

---

[183] Ibid [320].
[184] Ibid [415].

subsequent communications between the AFP and the DPP, concerning whether legal professional privilege was maintainable in respect of the documents, the discussions were not definitive. The AFP sought the plaintiff's advice, which was consistently that privilege was claimable. Counsel submitted that the fact that those discussions continued, necessarily indicates that, at the least, the AFP had not made a decision not to claim privilege.

404. Further, counsel contended that the various descriptors in the disclosure certificates were apt to, and did, cause confusion. The plaintiff's evidence was that he understood, at the time, that the reference in Schedule 1 in the disclosure certificates (claiming privilege) was a reference to the two investigation documents. Notwithstanding that the plaintiff gave evidence to the Inquiry over five days, it was not suggested to him that his understanding of the disclosure certificates was wrong, let alone that it was false or an invention.

405. Further, it was submitted, the finding that the plaintiff deliberately advanced a false claim of privilege was inconsistent with the plaintiff maintaining the position that it was a matter for the AFP, and not the prosecution, to claim privilege in respect of the documents. It was also inconsistent with the plaintiff's agreement to a process whereby the AFP would be subpoenaed, the purpose of which was to have the AFP determine its position on that issue.

406. The fourth finding, that is the subject of ground 3, concerned the finding that the plaintiff made an improper request of a junior solicitor (Mr Greig), to swear an affidavit claiming legal privilege in relation to the documents.[185]

407. On behalf of the plaintiff, it was submitted that that finding was legally unreasonable. In particular, it was submitted that the so-called narrative, referred to by the Report, to support the claim that the documents were privileged, was not false.

408. Counsel noted that the plaintiff gave evidence to the effect that he understood the disclosure certificates in the way he did, and that he understood that the two investigation documents were comprehended within Schedule 1 of those certificates.

409. Further, it was submitted, the findings in question — that the plaintiff regarded himself as rebuffed or 'foiled' by Ms Pitney, and, for that reason, turned to the junior solicitor, Mr Greig, because he wanted to rely on Mr Greig's inexperience — were findings based on conjecture. The three foundational facts (namely: the request to Ms Pitney; Ms Pitney's

---

[185] Ibid [413]–[416].

response; and the request to Mr Greig) do not provide a sufficient foundation for these inferences drawn by the first defendant. Further, it was submitted, the inferential reasoning, in the Report, was never put to the plaintiff, Ms Pitney or Mr Greig, and was not the subject of any notice of proposed adverse finding.

410. The fifth finding, that is the subject of ground 3, is the finding that the plaintiff had misled the court, in respect of the claim of legal professional privilege, through his submissions, and that by a misleading affidavit he had tried to use dishonest means to prevent a person he was prosecuting from lawfully obtaining relevant material.[186]

411. It was submitted that that finding was unreasonable, substantially for the reasons advanced in respect of the third finding. In particular, it was submitted, the fifth finding essentially was based on the finding that the plaintiff had advanced a false claim of legal professional privilege, that he had invented a false narrative to support that false claim, and that he had procured a false affidavit from Mr Greig to further that end. As (as was submitted above) those findings are unreasonable, then (it was submitted) the fifth finding — that the plaintiff misled the Court — is also necessary legally unreasonable.

412. Further, it was submitted that the fifth finding made no sense in the context in which the plaintiff and the defence had agreed, on 16 September 2022, that the appropriate process was for the defence to issue a subpoena, directed to the AFP, in respect of Superintendent Moller's executive briefing note. That agreement by the plaintiff was, necessarily, inconsistent with the fifth finding. The plaintiff's agreement to the process could only be explicable on the basis that he genuinely believed that the AFP was, or might be, maintaining a claim for legal professional privilege.

413. In response to those submissions, the third defendant submitted that the contentions, made on behalf of the plaintiff, in respect of each of the three findings, failed to deal with the following matters:

    (a) The advice, provided by AFP Legal to the ACT Police, that there did not appear to be an obvious claim for public interest immunity or legal professional privilege, and that the document should be provided to the ODPP to consider whether they should be disclosed to the defence.[187] That advice, by AFP Legal, was emailed by Detective Sergeant Fleming to the plaintiff.[188]

---

[186] Ibid [415], [417].
[187] Ibid [300].
[188] Ibid [309].

(b) The finding, by the first defendant, that a perusal of each of the two documents would have demonstrated 'straight away' that the communications were not privileged.[189]

(c) In a number of instances, findings by the first defendant, relevant to the issue, were expressly based on the plaintiff's own evidence to the Inquiry.[190]

(d) Inconsistencies identified by the first defendant in the evidence given by the plaintiff to the Inquiry[191]

(e) Specific elements of the evidence, given by the plaintiff, were rejected by the first defendant.[192]

(f) The first defendant expressly recognised that there was confusion concerning the disclosure certificates.[193]

(g) The Inquiry received varying evidence from witnesses, and from documents, concerning the timing and nature of the assertions of privilege, made by the plaintiff.[194]

(h) The specific engagement, by the first defendant, with the submissions advanced on behalf of the plaintiff.[195]

Third, fourth and fifth findings – conclusions

414. The third and fifth findings, that are the subject of ground 3, were essentially based on a conclusion by the first defendant that, in response to issues relating to the disclosure of police investigation documents, and, in particular, the executive briefing note of DS Moller and the evidence analysis of DI Boorman, the plaintiff had '… constructed a false narrative to support a claim of legal professional privilege' in respect of those documents.[196]

415. The fourth finding, that is the subject of ground 3, is that, as part of the assertion of that false narrative, the plaintiff abused his authority and 'preyed on' a junior lawyer's

[189] Ibid [304].
[190] Ibid [385]–[387], [390].
[191] Ibid [311], [358]–[359].
[192] Ibid [355]–[356].
[193] Ibid [325]–[329].
[194] Ibid [355]–[359], [372], [378], [395], [399]–[402].
[195] Ibid [413]–[417].
[196] Ibid [395].

inexperience in order to procure that lawyer to swear a misleading affidavit claiming legal professional privilege in relation to the documents.[197]

416. The conclusion by the first defendant, that the plaintiff had intentionally constructed a 'false narrative' as a foundation for a claim of legal professional privilege in relation to the documents, was the product of a detailed analysis by the first defendant of the relevant circumstances in the Report.[198] In reaching the conclusion about the 'false narrative', the first defendant made a number of intermediate findings, none of which the plaintiff has sought to demonstrate were based on an erroneous foundation, or were legally unreasonable.

417. The starting point, for the conclusion relating to the 'false narrative', was the finding by the first defendant, which I have earlier discussed, that the plaintiff's initial position, that the documents were not disclosable, was both wrong and untenable.[199] In reaching that conclusion, the first defendant noted that, in April 2022, the advice given by AFP Legal, that the documents were not the subject of legal professional privilege, was 'manifestly correct', and that no claim for legal professional privilege 'could possibly have been maintained' in respect of them. In that respect, the first defendant considered that the plaintiff should have known that 'immediately upon being asked to give his opinion'.[200] In the Report, the first defendant also noted that when the plaintiff was consulted about that matter on 12 April 2022, he took the position that it was not appropriate to provide legal advice to the AFP concerning privilege, which was 'at odds' with his 'later vigorous assertion of a claim of privilege'.[201]

418. The Report then considered, in some detail, the circumstances in which the plaintiff ultimately advanced a claim for privilege in respect of the DS Moller and DI Boorman documents.

419. Following the issue by the defence of a subpoena to the Chief Police Officer of AFP on 15 June 2022, a teleconference was held on the next day between a number of persons, including the plaintiff, Ms Jerome, Ms Priestley, members of the AFP, and members of AFP Legal. The first defendant considered the evidence concerning the advice, given by the plaintiff, relating to the documents in the course of that conference. He concluded

---

[197] Ibid [415]–[416].
[198] Ibid [306]–[415].
[199] Ibid [320].
[200] Ibid [305].
[201] Ibid [311].

that, in the conference, the plaintiff asserted that the documents were covered by the privilege.

420. Relevantly, as an intermediate conclusion, the first defendant made two findings in that respect. First, the plaintiff's asserted position, that the documents were privileged, was materially different to his previous position, that the documents were not disclosable. Secondly, the plaintiff had no basis upon which to express that opinion. That intermediate conclusion by the first defendant was expressed as follows:

> Previously, Mr Drumgold's asserted position was that Detective Superintendent Moller's executive briefing note and Detective Inspector Boorman's evidence analysis were not disclosable. Now he claimed that they were covered by legal professional privilege. He had no factual basis to form that opinion and, as has been seen, no such opinion could honestly be formed by a competent lawyer.[202]

421. Subsequently, on 20 June, Ms McKenzie of AFP Legal requested the advice of the plaintiff confirming his earlier advice that the DS Moller and DI Boorman documents were privileged, and requesting his advice as to whether other copies of those documents (which had not been provided to the plaintiff) were not privileged. On the following morning, 21 June, the plaintiff responded with advice that he considered the documents were 'preparatory to confidential communications between DPP and AFP for the dominant purpose of providing legal advice', and, accordingly, they were the subject of legal professional privilege.

422. The first defendant, in the Report, stated, in relation to that response by the plaintiff:

> Mr Drumgold had no basis to form that opinion.[203]

423. In doing so, the first defendant considered the evidence given by the plaintiff to the Inquiry concerning that issue. In that evidence, the plaintiff said that he had considered that the documents were privileged, because they post-dated advice (to him) that he was going to receive a request to advise concerning the documents. The first defendant, in the Report, rejected the validity of that rationalisation, given by the plaintiff for the claim for legal professional privilege, in the following terms:

> The proposition that the legal status of Detective Superintendent Moller's executive briefing note and Detective Inspector Boorman's evidence analysis could be determined by the date on which they were each written is absurd. The status depends entirely upon the state of mind of the person who made the communication.[204]

---

[202] Ibid [340].
[203] Ibid [353].
[204] Ibid [356].

424. I interpolate that that proposition, by the first defendant, is a basic principle concerning legal professional privilege. It was unimpeachable.

425. The first defendant, in the Report, then turned to a meeting that took place one month later, on 19 July, between the plaintiff, Ms Priestley, Detective Inspector Hughes, Ms McKenzie, and another lawyer, at the request of AFP Legal, in order to discuss the issue of the disclosure of the documents. The first defendant considered the evidence, given by the plaintiff, concerning that meeting. He expressly rejected the evidence given by the plaintiff that he had understood that the AFP had asked his opinion based on the timing of the creation of the documents and his engagement with the AFP. In that respect, the first defendant noted:

> There was no evidence before me to substantiate this belief.[205]

426. More importantly, the first defendant rejected evidence by the plaintiff, in that regard, that he had given advice concerning whether the documents were privileged, based on the assumption that AFP Legal would 'gather evidence' about the documents and formulate its own position. In respect of that part of the plaintiff's evidence, the first defendant made the following factual finding:

> There was no evidence to substantiate this proposition and his advice [to AFP Legal] was not given in provisional terms.[206]

427. The Report then noted that, on 23 August 2022, the defence emailed Ms Priestley, Mr Greig and Mr Jerome, requesting disclosure of material that it had previously requested, and foreshadowing a hearing before the trial judge. The plaintiff responded that there was 'no specific LPP claim' — as that was a claim to be made by the AFP and not the DPP — 'but the position is that there is nothing disclosable'.[207] That position was then conveyed to the defence.

428. The first defendant noted that as a consequence, the defence did not know that, at that point, the plaintiff was asserting that any of the documents, sought by it, were privileged. Accordingly, the first defendant concluded in that respect:

> In this way, Mr Drumgold kept the defence in the dark about steps he was taking to deny them the documents. That meant that they were in no position to mount a challenge. It is the duty of a prosecutor who contends that there is a ground upon which to decline to disclose a document that a defendant is seeking to be candid about the nature of the ground so that,

---

[205] Ibid [359].
[206] Ibid [359].
[207] Ibid [365].

> if necessary, a judge can decide the issue. Criminal litigation is not a poker game in which a prosecutor can hide the cards.[208]

429. That proposition by the first defendant has not been impugned, nor could it be. It is a basic principle that if a party, and in particular a prosecutor, wishes to claim privilege in respect of a document, then that party (and, in particular, the prosecution) must be entirely candid about that claim. The corollary of that proposition is that the first defendant was logically entitled to conclude that the defence was inappropriately 'kept in the dark' about steps then being taken by the plaintiff to deny it access to the documents sought by it.

430. The Report then dealt with the applications, made by the defence before the Chief Justice on 8 September 2022, for disclosure of the investigative review document, referred to in the disclosure certificate. On that date, on the hearing of the application, the plaintiff stated to the court that the document had been sent, by the AFP to the DPP, 'for the express purposes of seeking legal advice on this matter', and that it was, in an earlier discovery schedule, incorrectly listed as disclosable. The Chief Justice noted that, if it was privileged, the claim would need to be verified. Her Honour asked: 'But that's your position in respect of it?', to which the plaintiff responded, 'That is our position'.

431. In respect of that exchange with the judge, the first defendant made the following findings:

> Mr Drumgold's representation to the Chief Justice that the two documents had formed part of the brief for advice was true but misleading. He omitted to tell her Honour that the documents had not been prepared for that purpose. He did not tell her that he had not bothered asking the authors about their purpose in making the documents. He omitted to tell her that AFP Legal had informed him of the true provenance of the documents and that, according to that account, the documents were not privileged.
>
> Mr Drumgold's representation that he thought that it was an error that the documents had been listed as disclosable was untrue and was an invention of his own. Senior Constable Frizzell had deliberately and correctly listed them in the appropriate place in the certificate.[209]

432. That intermediate conclusion is, of course, of importance, particularly relating to the challenge made to the third and fifth findings.

433. In the meantime, on 12 September 2022, the plaintiff drafted an affidavit, claiming privilege in respect of the documents, and he instructed Mr Greig, a junior member of the staff, to swear the affidavit. In the affidavit drafted by the plaintiff, Mr Greig deposed that he was informed and verily believed that the investigative review document in

---

[208] Ibid [368].
[209] Ibid [376]–[377].

question was the subject of legal professional privilege. Significantly, the affidavit did not reveal the source of the hearsay to which he deposed. The first defendant considered that the plaintiff was aware of the rule that when a deponent to an affidavit relies on hearsay evidence, the deponent is required to identify, in the affidavit, the source of the information and the grounds for the belief in it.[210]

434. In his evidence before the Inquiry, the plaintiff was prepared to admit that the terms in which he drafted the affidavit were 'potentially' misleading.[211] The first defendant, in that respect, noted:

> The affidavit gave the impression that the information came from the AFP but this was false. Mr Drumgold knew that this was a crucial belief to induce in the Chief Justice because, as he himself emphasised before her Honour, the privilege was for the AFP to claim and not for him.[212]

435. In addition, the first defendant, in the Report, noted that while the plaintiff made statements of fact to the Chief Justice that the AFP was making a claim of privilege over the documents, he in fact knew that the AFP had not made such a claim, and that it had not indicated to the plaintiff an intention to do so.[213]

436. The Report then noted that, in his oral evidence in the Inquiry, the plaintiff stated that at some time the AFP had instructed him to claim legal professional privilege in relation to the documents. He said that the reason for a discrepancy, between the prosecution disclosure certificate and the defence disclosure certificate, was that, subsequently, the claim for legal professional privilege had been made over the documents. In respect of that evidence by the plaintiff, the first defendant concluded, as a finding of fact:

> This never happened. This was another invention of his. There was no subsequent disclosure certificate. The omission [from the original disclosure certificate] was unintentional ...[214]

437. The Report then noted that Ms Drew, principal lawyer at AFP Legal, gave 'unchallenged and uncontradicted evidence' that no-one in the AFP Legal team had advised or communicated to the plaintiff, or his staff, that the documents were the subject of legal professional privilege.[215]

---

[210] Ibid [385].
[211] Ibid [387].
[212] Ibid [388].
[213] Ibid [389].
[214] Ibid [393].
[215] Ibid [394].

438. It was based on those intermediate findings, to which I have referred, that the first defendant then made a critical finding, namely:

> Mr Drumgold constructed a false narrative to support a claim of legal professional privilege.[216]

439. The Report then noted that, on 15 September 2022, a meeting took place, attended by the plaintiff, Mr Greig, two members of the AFP (AFP Assistant Commissioner Crozier and Commander Cameron), and three members of AFP Legal (Ms Drew, Ms McKenzie and another lawyer). Based on the evidence in the Inquiry, the first defendant, in the Report, found (as a fact) that, at that meeting, the plaintiff was told that DS Moller did not create his executive briefing note for the purpose of obtaining legal advice, and, further, that at the meeting, the AFP did not instruct, or indicate, that a claim of legal professional privilege should be made.[217]

440. The Report then noted that, on the following day, 16 September, the matter came on for hearing before the Chief Justice in relation to the application, by the defence, for disclosure of the document. At that hearing, the parties agreed that the appropriate method of resolving the issue was for the defence to issue a subpoena for production of the investigative review documents. In the Report, the first defendant quoted a passage from the transcript of an interchange between the plaintiff and the Chief Justice on that date. The first defendant concluded that the 'only sensible inference', from that passage of the transcript, was that the plaintiff represented to the Chief Justice that he had been told that the investigative review document had been created for the purpose of obtaining his advice. The first defendant, in that respect, found:

> This was false.[218]

441. I interpolate that, in the present proceeding, it was not submitted that that analysis, by the first defendant, of the exchange between the plaintiff and the Chief Justice, was misconceived or erroneous. That is, the plaintiff does not seek to impugn — as unreasonable or otherwise — the intermediate conclusion, by the first defendant in the Report, that on 16 September 2022, the plaintiff represented to the Chief Justice that he had been told that the investigative review document had been created for the purpose of obtaining his advice. Nor has the plaintiff sought to impugn the intermediate conclusion, by the first defendant in the Report, that that representation was 'false'.

---

[216] Ibid [395].
[217] Ibid [402].
[218] Ibid [404].

442. As the foregoing discussion reveals, the third and fifth findings, that are the subject of ground 3, were based on a number of intermediate conclusions by the first defendant. The gravamen of the submissions advanced on behalf of the plaintiff, in respect of those findings, were based on propositions that, in discussions with the plaintiff, the AFP did not take a definitive stance as to whether or not it sought to claim legal professional privilege in relation to the two investigative documents, that there was some confusion about that matter, and that the plaintiff had understood that the reference in Schedule 1 of the disclosure certificates (claiming privilege) was a reference to the two investigative documents.

443. Those propositions fail to take into account the findings made by the first defendant in the Report.

444. First, and importantly, as noted in the Report, AFP Legal's advice was that there did not appear to be any legitimate claim of legal professional privilege in relation to those documents. That advice, in turn, was provided to the plaintiff by Detective Sergeant Fleming. It was the plaintiff who determined to advance a claim for legal professional privilege in relation to the documents. As I have discussed, the first defendant, in the Report, stated his reasons for finding that the claim, that the documents were the subject of privilege, could not be 'honestly formed by a competent lawyer',[219] and that the plaintiff had 'no basis' on which to form the opinion that they were the subject of such privilege.[220]

445. In short, none of the matters, advanced on behalf of the plaintiff, demonstrate that any of the intermediate conclusions, on which the first defendant relied in the Report, were erroneous or legally unreasonable. Those intermediate conclusions were a sufficient and reasonable basis for the critical conclusion, by the first defendant, that the plaintiff himself constructed a false narrative to support a claim of legal professional privilege. That conclusion in turn was the essential basis of the third finding that is the subject of ground 3. Further, it was based on that false narrative that the plaintiff, at the hearings on both 12 September and 16 September 2022, represented to the Chief Justice that the documents were privileged, because they had been created for the purpose of obtaining his advice. It follows, that the fifth finding, by the first defendant, that the plaintiff misled the court in respect of the claim of legal professional privilege, could not be impugned on the basis of legal unreasonableness.

---

[219] Ibid [340].
[220] Ibid [353].

446. As part of that representation, the plaintiff, in the hearing before the Chief Justice, relied on the affidavit claiming privilege that was deposed by the junior lawyer, Mr Greig. The fourth finding, that is the subject of ground 3, is the finding, by the first defendant, in respect of the circumstances in which Mr Greig came to swear that affidavit. In particular, ground 4 is directed to the conclusion, by the first defendant, that the plaintiff 'preyed' upon Mr Greig's inexperience, and, in doing so, 'egregiously' abused his authority and 'betrayed the trust' of his young staff member, by procuring him to depose an affidavit, claiming privilege in relation to the documents, which was misleading.[221]

447. That fourth finding, by the first defendant, in the Report, was based on a series of propositions, and factual findings, that he made, which may be briefly summarised as follows:

(1) On 8 September 2022, the plaintiff, in an email to Ms Pitney, stated that he considered it would be sufficient for her, in an affidavit claiming privilege, to state 'You have been advised and verily believe this to be true'. In response, Ms Pitney (correctly) asked, 'Who should I say I had been advised by?'. The plaintiff responded to the email, but, in doing so, he did not address that question.[222]

(2) The plaintiff knew the rule of civil procedure that, in an interlocutory application, when relying upon hearsay information, the deponent must identify the source of the information and the grounds for the deponent's belief in the veracity of that information.[223]

(3) On 12 September, the plaintiff drafted the affidavit in the form, that I have set out earlier, stating that the deponent was informed and verily believed that the documents were privileged, but not disclosing the source of that hearsay. He emailed that document to 'the most junior member of his team' (Mr Greig).[224]

(4) In drafting the affidavit, the plaintiff could not identify the source of his instructions, because he himself was the source.[225]

---

[221] Ibid [415]–[416].
[222] Ibid [371].
[223] Ibid [380]–[385].
[224] Ibid [374]–[375].
[225] Ibid [386].

(5) The affidavit gave the false impression that the information (that the documents were privileged) came from the AFP, which was a crucial point to vindicate the claim for privilege before the Chief Justice.[226]

(6) As discussed above in respect of the third and fifth findings, the plaintiff thereby constructed a 'false narrative' to support that claim for legal professional privilege.[227]

448. The aspect of the fourth finding, that is the basis of ground 3, is the finding that, after Ms Pitney had correctly identified the need for the deponent to nominate the source of the hearsay in the affidavit, the plaintiff, because he could not do so, deliberately exploited the inexperience of the youngest member of his team to procure him to depose the affidavit.

449. That finding, of course, was essentially based on an inference. In determining whether the inference, so drawn by the first defendant, was legally unreasonable, it is important to bear in mind the principle stated by Crennan and Bell JJ in the passage in *SZMDS* to which I have earlier referred, namely, that the critical question is whether a reasonable mind could have reached the conclusion made by the first defendant.[228]

450. It might be fairly maintained that reasonable minds might differ as to whether, based on the facts found by the first defendant, the inference should be drawn that the plaintiff had intentionally exploited the inexperience of Mr Greig to procure him to depose an affidavit that was misleading. However, in view of the factual findings made by the first defendant, and the bases upon which the first defendant drew the conclusion that is the subject of ground 4, it could not, in my view, be maintained that that process of reasoning, undertaken by the first defendant, was legally unreasonable. The combination of the findings by the first defendant, to which I have referred, were a sufficient basis for a rational inference that the plaintiff intentionally relied on the inexperience of Mr Greig to induce him to swear an affidavit that the plaintiff knew to be misleading, in circumstances in which Ms Pitney, the more senior legal practitioner, had rebuffed the plaintiff by noting that it was necessary for her, if she swore an affidavit, to depose to the source of the hearsay information, which was the critical aspect of the affidavit.

451. It follows that it could not be maintained that it was legally unreasonable for the first defendant to conclude (as the fourth finding) that the plaintiff, having asked a solicitor to

---

[226] Ibid [388].
[227] Ibid [380]–[395].
[228] *SZMDS* (2010) 240 CLR 611, 648 [130]–[131].

swear a misleading affidavit and, having been 'foiled' in that respect, 'preyed' on the inexperience of a junior lawyer and, in doing so, 'egregiously' abused his authority and betrayed the trust of that staff member, by procuring him to swear a misleading affidavit, which in fact deposed to a false narrative supported by the plaintiff.

452. It is for those reasons that ground 3 does not succeed in respect of the third, fourth and fifth findings.

Sixth finding

453. The sixth finding, that is the subject of ground 3, is the finding that, in respect of a proofing note in respect of his conference with the journalist, Ms Lisa Wilkinson, the plaintiff made false statements and knowingly lied to the Court concerning the contemporaneity and authorship of that proofing note.229 I have summarised the aspects of the Report, relevant to that finding, at paragraphs [59] to [65] above.

Sixth finding – submissions

454. Counsel for the plaintiff submitted that the finding, that the plaintiff's statements to the Chief Justice were deliberate 'lies', constituted an inference that, in reality, was no more than conjecture. Counsel noted that a finding that a legal practitioner has lied to the court is a very serious finding, and, accordingly, it should be made in accordance with the *'Briginshaw*' standard.[230] On the objective facts, it was equally open to conclude that the statements by the plaintiff to the Chief Justice were the product of a mistake, as it was to find that they were the product of deliberate lies.

455. In that respect, counsel noted that the plaintiff had made the statements in the course of an application, made on behalf of Mr Lehrmann, for a stay of the prosecution. In such a case, the issue of the actual intent of the person who spoke the words (Ms Wilkinson) was of marginal relevance. Accordingly, it was submitted, it would be understandable that the plaintiff, in the tense atmosphere of the upcoming criminal trial, might well have made an error in his recollection of the relevant aspect of the proofing conference, which he had with Ms Wilkinson.

456. Counsel for the plaintiff noted that the adverse inference, drawn by the first defendant, was made on two bases, namely:

---

[229] Ibid [471], [477].
[230] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.

(1) the plaintiff's seniority and experience. However, it was submitted, that consideration says little about the issue, whether a statement may be the product of a mistake or a deliberate falsehood;

(2) the brief time between the briefing note being prepared and the statement made to the court. However, counsel contended, in the context of an imminent significant trial, with multiple issues occupying the plaintiff's mind, that consideration is not a cogent basis for rejecting mistake as an explanation.

457. In response, it was submitted on behalf of the third defendant, that the conclusion, that the plaintiff had knowingly lied to the Chief Justice,[231] was not unreasonable. In reaching that conclusion, the first defendant referred to the relevant documents and to the evidence in the Inquiry.[232] In the Report, the first defendant rejected the submission that a prudent and experienced barrister would behave in the way in which the plaintiff had, or would make a mistake of that kind. Thus, it was submitted, the reasoning for the conclusion, that the plaintiff had lied to the Chief Justice, could not be held to be unreasonable.

Sixth finding – conclusion

458. In considering the point raised by the plaintiff in respect of the sixth finding, the starting point is that, on any view, at the hearing on 21 June 2022, the plaintiff made a clear misstatement of fact, when he said to the Chief Justice that the proofing note of the conference, that had been held on 15 June, was 'contemporaneous'. It clearly was not contemporaneous. The note contained a material addition made by and at the behest of the plaintiff on 20 June, five days after the meeting.

459. Specifically, on 20 June 2022 (five days after the conference), the plaintiff sent an email to Ms Jerome, copied to Mr Greig, containing the following section that, on the direction of the plaintiff, was 'cut and pasted' onto the end of the proofing note:

- Lisa read the first line and stopped by Director who said;
- We are not speech editors.
- We have no power to approve or prohibit any public comment, that is the role of the court.

[231] Report, [477].
[232] Ibid [437]–[477].

- Can advise however that defence can re-institute a stay application in the event of publicity.

460. Strictly speaking, as noted by the first defendant in the Report, the state of mind of Ms Wilkinson in making her speech after the Logies awards, was of minor relevance to the stay application made on behalf of Mr Lehrmann. However, in the context of the terms in which the application for a stay was made, the first defendant noted that that consideration was 'prominent in the minds of the Chief Justice, the prosecutor [the plaintiff] and defence counsel'.[233] The first defendant thus considered that the plaintiff must have appreciated that that point was important, having regard to the reasons that her Honour gave in ordering the stay of the criminal proceeding.[234]

461. In that context, it is also relevant that the plaintiff, in the hearing before the Chief Justice, not only characterised the proofing note as contemporaneous, but, in the stay application, he also described the part of the speech, made by Ms Wilkinson, that was in issue, as 'undesirable' and 'unsavoury'.[235] That is, the plaintiff made specific reference to the relevant part of Ms Wilkinson's speech in terms, and he expressed his specific disapproval of it.

462. The statement by the plaintiff to the Chief Justice, that the note was contemporaneous, was made one day after the plaintiff had inserted the relevant passage into the note. Notwithstanding the fraught circumstances in which the stay application was made, nevertheless, the conclusion by the first defendant, that the plaintiff's misstatement about the contemporaneity of the note was deliberate, could not be characterised as legally unreasonable. The plaintiff, as a senior and experienced member of counsel, holding an important public office, could reasonably be considered to be well aware of the importance of his duty of candour with the court. The short time between the preparation of the briefing note and the plaintiff's misstatement to the court, and the fact that that topic was of particular relevance to the Chief Justice, were relevant and valid considerations in the conclusion by the first defendant that the misstatement by the plaintiff, about the note, was not a product of error.

463. For those reasons, ground 3 does not succeed in respect of the sixth finding.

---

[233] Ibid [461].
[234] Ibid [474].
[235] Ibid [471].

Seventh finding

464. The seventh finding, that is the subject of ground 3, is the finding that, in respect of the disclosure by Ms Wilkinson of the nature of the speech that she might give in the event that she won an award, the plaintiff was under a duty to warn her not to give the speech, and, if necessary, to seek an injunction, preventing that speech, and that the plaintiff failed to discharge that duty.[236] Those findings, by the first defendant, are summarised in paragraphs [66] to [67] above.

Seventh finding – submissions

465. It was submitted on behalf of the plaintiff that the finding, that the plaintiff had a duty to warn Ms Wilkinson not to give the speech, was unreasonable.

466. In particular, counsel noted that Ms Wilkinson was accompanied to the meeting with the plaintiff by a supporting lawyer as an adviser. The plaintiff was not Ms Wilkinson's adviser, and he owed her no duty to become an adviser to her. The first defendant did not cite or refer to any authority for the proposition that the plaintiff had a general duty to do what was required to preserve the integrity of the administration of criminal justice, or for the proposition that the content of that duty extended to preventing a person from making public comment, which might have an adverse impact on the fairness of a criminal trial. Further, there was no evidence, and no suggestion, that a relevant statute, or policy, or the Barristers' Rules or the common law, provided that the prosecutor had a duty to take all steps to prevent Ms Wilkinson making a speech, which might impact the fairness of the trial.

467. Further, it was submitted, even if the plaintiff had a duty to warn Ms Wilkinson not to make a speech that might have an impact on the trial, the plaintiff did give such a warning. That warning was recorded in the file note, the accuracy of which was not impugned by the first defendant. The Chief Justice, on the stay application, found that the content of the file note recorded a clear and appropriate warning to Ms Wilkinson. Further, in his evidence before the Inquiry, the plaintiff stated that he recalled Ms Wilkinson reading a small portion of the proposed speech before he stopped her, and that he said to her words to the effect, 'Any publicity could give rise to a stay'. In the Report, it was noted that Ms Smithies, in her evidence, said that she could not recall the plaintiff saying those words, but she did not deny the possibility that he did so.[237]

---

[236] Ibid [482], [489], [494] and [496].
[237] Ibid [445].

468. In response, it was submitted, on behalf of the third defendant, that the finding in question was preceded by a finding that, on any version of the conversation, the plaintiff's response to Ms Wilkinson was wholly inadequate.[238] Further, the first defendant rejected the evidence of the plaintiff that he had inferred that, in a muted conversation online, Ms Wilkinson's lawyer, Ms Smithies, had cautioned Ms Wilkinson not to give the speech in its then form.[239] The first defendant also noted that, in his evidence at the Inquiry, the plaintiff accepted, in hindsight, that a mere warning 'not to mention the trial', would not have been sufficient.[240]

469. Counsel noted that the first defendant cited relevant authorities and academic work for the finding, that the plaintiff owed a duty to advise Ms Wilkinson not to make the speech.[241] Further, the Report noted that the plaintiff accepted in evidence that, in hindsight, he probably should have advised her not to give the speech.[242]

470. Based on those matters, it was submitted on behalf of the third defendant that the conclusion, by the first defendant, that the plaintiff was under a duty to warn Ms Wilkinson not to give the speech, was not unreasonable.

Seventh finding – conclusion

471. Contrary to the submission made on behalf of the plaintiff, the first defendant, in the Report, did cite authority in support of the proposition that, as part of his duty as a prosecutor, the plaintiff had a duty to prevent a person from making a public comment, which might have an adverse impact on the fairness of a criminal trial. In particular, the first defendant specifically referred to, and quoted from, the judgment of Deane J in *Whitehorn v The Queen*,[243] in which his Honour described the duty of a prosecutor to ensure that the trial of an accused person is a fair one.[244] That duty is an aspect of the fundamental principle in our criminal justice system that a prosecutor, in occupying the role as a 'minister of justice', has an obligation to ensure that a trial is conducted in accordance with the dictates of fairness to an accused person, and to ensure that the integrity of a trial is appropriately preserved.[245]

---

[238] Ibid [478].
[239] Ibid [480].
[240] Ibid [481].
[241] Ibid [485]–[489].
[242] Ibid [491].
[243] (1983) 152 CLR 657, 663-4.
[244] See also 675 (Dawson J).
[245] See, for example, *R v Apostolides* (1984) 154 CLR 563, 576-7; *Richardson v The Queen* (1974) 131 CLR 116, 119; *Kanaan v The Queen* [2006] NSWCCA 109, [80] (Hunt AJA, Buddin and Hoeben JJ); *R v Bazley* (1986) 21 A Crim R 19, 29 (Young CJ).

472. The fact that Ms Wilkinson was accompanied by a supporting lawyer to the meeting with the plaintiff did not, logically, affect the obligation of the plaintiff, in his capacity as the prosecutor in the impending trial, to ensure that Ms Wilkinson did not make a public comment, which might unfairly prejudice a potential jury against Mr Lehrmann, and which might compromise the integrity of the trial. The lawyer, who accompanied Ms Wilkinson, owed a duty to her to give her appropriate legal advice. However, as I have discussed, the duty borne by the plaintiff was directed to ensuring the integrity of the criminal justice system and the fairness of the trial of the accused man, Mr Lehrmann. As such, it was an entirely different duty to that owed to Ms Wilkinson by the lawyer who accompanied her to the meeting.

473. In those circumstances, the conclusion by the first defendant, that the plaintiff had a duty to warn Ms Wilkinson not to make the speech in the form in which she read it to him, was not only legally reasonable, but was entirely unimpeachable. Indeed, as counsel for the third defendant noted, the first defendant's Report recorded that, at the Inquiry, the plaintiff accepted that, in hindsight, as a minister of justice, he probably ought to have given Ms Wilkinson advice to that effect.[246]

474. Further, contrary to the submissions made by the plaintiff, it is clear that the first defendant, in the Report, found, as a fact, that the plaintiff did not give such advice to Ms Wilkinson.

475. In particular, the first defendant noted, in the Report, that the plaintiff accepted that he did not tell Ms Wilkinson not to give a speech, and he did not tell her not to use the particular words that she had read to him. The plaintiff's evidence in the Inquiry was that he said to Ms Wilkinson words to the effect that he could not approve or prohibit public comment, and that any publicity could give rise to a stay.[247]

476. In respect of that evidence, the first defendant found that Ms Wilkinson could 'hardly' have understood the response by the plaintiff to have 'meant anything much', and that neither Ms Wilkinson nor Ms Smithies left the conference with an understanding that Ms Wilkinson should not give the speech in the form she had prepared.[248]

477. That aspect of the reasoning of the first defendant could not be described as legally unreasonable. Further, as the first defendant noted in the Report, at the Inquiry, the plaintiff not only accepted in hindsight that he should have advised Ms Wilkinson not to

---

[246] Report, [491]
[247] Ibid [446].
[248] Ibid [446].

give the speech, but he also accepted that in retrospect that 'not doing so was a failure'.[249]

478. For those reasons, there was no legal unreasonableness in the finding by the first defendant, that the plaintiff had a duty to warn Ms Wilkinson not to give the speech in the form in which she had read to him, and in the finding that the plaintiff had failed to give such advice to Ms Wilkinson.

479. It follows that the plaintiff has failed demonstrate legal unreasonableness in respect of the seventh finding that is the subject of ground 3.

Eighth finding

480. The eighth finding, that is the subject of ground 3, is the finding that the plaintiff had engaged in 'grossly unethical' conduct, by making suggestions, in the cross-examination of Senator Reynolds, that allegedly had no basis at all, and that they should not have been made.[250] I have summarised the section of the Report, relating to that finding, at paragraphs [72] to [76] above.

481. The eighth finding concerns four propositions, put by the plaintiff to Senator Reynolds in cross-examination in the trial, which related to her credit, namely:

(1) Senator Reynolds had 'arranged' for her partner to attend the court during the Lehrmann trial.

(2) Senator Reynolds' partner had been discussing Ms Higgins' evidence, given at the Lehrmann trial, with Senator Reynolds.

(3) Senator Reynolds had sought that transcripts of the Lehrmann trial be sent to her lawyer, because she, and not her lawyer, had an interest in the transcripts.

(4) Senator Reynolds was 'politically invested' in the outcome of the trial.

<u>Eighth finding – submissions.</u>

482. It was submitted, on behalf of the plaintiff, that the first defendant's findings, to the effect that there was 'no basis' for the propositions so put by the plaintiff in cross-examination, and that his conduct in putting those propositions was 'grossly unethical', were legally unreasonable.

---

[249] Ibid [491].
[250] Ibid [600].

483. In respect of the first proposition, put in cross-examination, that Senator Reynolds had 'arranged' for her partner to attend the court during the trial, the plaintiff relied on the following considerations:

(a) Senator Reynolds and Ms Higgins had significantly different accounts about an important issue in the trial, namely, whether Ms Higgins had told Senator Reynolds, on 1 April 2019, that she had been assaulted by Mr Lehrmann in Senator Reynolds' Ministerial office in Parliament House in the early hours of 23 March 2019;

(b) Senator Reynolds' partner had been a member of the public, sitting in court during the trial. Senator Reynolds was in Rwanda at the time that Ms Higgins gave her evidence at that trial. Senator Reynolds' partner ordinarily resides in Perth, whereas the trial was conducted in Canberra.

484. Accordingly, it was submitted that there was a sufficient basis for the proposition, put in cross-examination, that Senator Reynolds had arranged for her partner to attend court during the Lehrmann trial. It follows, it was submitted, that the finding, that there was no basis for the first proposition, is legally unreasonable.

485. In respect of the second proposition, put by the plaintiff in cross-examination, that Senator Reynolds and her partner had discussed the evidence, given by Ms Higgins in the trial, the plaintiff relied on the following considerations:

(a) Senator Reynolds' partner was present in the court during Ms Higgins' evidence while Senator Reynolds was in Rwanda.

(b) There was evidence to support the inference that his presence in court was arranged by, and/or with the knowledge of, Senator Reynolds.

(c) The content of text exchanges, between Senator Reynolds and senior counsel for defence in the trial, suggested that Senator Reynolds and her partner had discussed the evidence given by Ms Higgins in the trial.

486. Based on those facts, it was submitted that the finding, that there was no basis for the plaintiff to put the second proposition to Senator Reynolds, is legally unreasonable.

487. In respect of the third proposition, advanced in cross-examination, that Senator Reynolds had sought the transcripts of the evidence, because she was interested in them (rather than her lawyer), the plaintiff relied on the following:

(1) The request, made by Senator Reynolds, was not just for the transcripts, but was for the 'daily transcripts'.

(2) Senator Reynolds' response to Mr Whybrow's text (in which he refused to send her the transcripts) suggests that she had sought the transcripts for her own purposes.

(3) Senator Reynolds' initial response, in cross-examination, to the question why she sought the transcripts, was suggestive that she did so for her own purposes, stating, 'Because I was — I was curious to know what had been said …'.

(4) Senator Reynolds made the request for daily transcripts during the cross-examination of Ms Higgins. She did not make it at a later time. That timing suggested an immediacy to her desire for her access to the transcripts.

488. Based on those matters, it was submitted on behalf of the plaintiff that the finding, by the first defendant, that there was no basis for the third proposition in cross-examination, is legally unreasonable.

489. In respect of the fourth proposition, put in cross-examination to Senator Reynolds, that she was 'politically invested' in the outcome of the trial, the plaintiff relied on the following factors:

(a) Senator Reynolds was, at the relevant time, a Senator and a Minister of the Australian Government.

(b) The complainant and the defendant in the Lehrmann trial had both been members of her staff in Parliament House in Canberra.

(c) The first defendant referred (in the Report) to the investigation of the rape complaint being conducted 'in the inevitable context of a political scandal'[251] and the 'notoriety of the whole affair'.[252]

(d) The first defendant was aware of a media Report to the effect that 'a Cabinet Minister' had blamed the prosecution for a perceived delay in the decision as to whether Mr Lehrmann was to be charged.[253]

---

[251] Ibid [40].
[252] Ibid [679].
[253] Ibid [159].

(e) Mr Sharaz (the partner of Ms Higgins), when referring to that article, had referred to '… how much of an impact this political back and forth has on [Ms Higgins]'.[254]

(f) Ms Higgins had met separately with the then Prime Minister, and with Mr Albanese and Ms Plibersek, on 30 April 2021.[255]

(g) Commander Chew, in his evidence, referred to the fact that the Prime Minister and two senior government Ministers had made comments in the media about the matter.[256]

(h) The case had received wide publicity in the national media.[257]

(i) The plaintiff knew that Senator Reynolds' partner attended court throughout Ms Higgins' evidence and that he had been in discussions with the defence team.

(j) Senator Reynolds had such familiarity with members of the defence team in the Lehrmann trial that she dealt directly with senior counsel for the defence.

(k) Senator Reynolds sent text messages to the defence during the cross-examination of Ms Higgins, notwithstanding that she was then in Rwanda.[258]

(l) Senator Reynolds had, in that text message exchange, provided advice to the defence that they should look at text communications, between Ms Higgins and another person, as they might be 'revealing'.

490. Based on those matters, it was submitted that the finding, by the first defendant, that there was no basis for the plaintiff to put the fourth proposition in the cross-examination of Ms Reynolds, is legally unreasonable.

491. In response, counsel for the third defendant submitted that the reasoning of the first defendant, in respect of each of those four propositions, is adequately explained in the Report to support the conclusion, by the first defendant, that in putting those propositions in cross-examination of Senator Reynolds, the plaintiff had engaged in 'grossly unethical' conduct.[259] In particular, the first defendant, having extracted parts of the plaintiff's examination before the Inquiry on this matter, recorded that the written submissions to

---

[254] Ibid [163].
[255] Ibid [749].
[256] Ibid [44], [442].
[257] Ibid [420].
[258] Ibid [583].
[259] Ibid [570]–[600].

the Inquiry on behalf of the plaintiff acknowledged that he failed to understand the difference between putting to a witness an allegation of misconduct as a fact, and asking a witness whether or not something is a fact.[260]

Eighth finding – conclusion

492. The issues raised in relation to the eighth finding concern the interaction between two important principles that apply to the cross-examination of a witness by counsel.

493. The first principle, which is the well-known rule in *Browne v Dunn*,[261] requires counsel to put to a witness, in cross-examination, any point on which counsel intends to rely, or about which counsel intends to make their submission, and which is contrary to, or which may undermine or affect, the credibility or reliability of the evidence given by that witness.[262]

494. The second principle derives from the circumstance that anything stated by counsel in court, including any defamatory statement, is protected from an action in defamation by the defence of absolute privilege. As a corollary to that privilege, counsel has a corresponding ethical duty, to the court and to the system of justice, not to make an allegation, in cross-examination or otherwise, which may impugn the credit, reputation, or integrity of a witness or person, unless counsel has a sufficient basis upon which to substantiate or justify that allegation.[263] Where counsel makes an allegation of serious discreditable misconduct against a witness or a party, without a proper foundation for that allegation, counsel may be in breach of that ethical duty, and may have committed an abuse of process, for which counsel can be appropriately brought to account.[264]

495. As the Court of Appeal of Victoria in *Rees* explained, that principle does not preclude counsel asking proper questions that are directed to establishing the relevant misconduct or discreditable factor relating to the witness in question. However, the Court noted:

> Cross-examination as to the content of a conversation or some other event which occurred in the course of the trial may result in evidence which provides a basis for an allegation that there has been a joint concoction of a fraudulent account. But there is a plain distinction between asking questions for the purpose of exploring the content of a conversation and the making of a positive suggestion of a jointly concocted fraud. There must either be an established evidentiary foundation, anticipated evidence or soundly based instructions which

---

[260] Ibid [590].
[261] (1893) 6 R 67, 7071.
[262] See, for example, *Morgan v John Fairfax & Sons Ltd* (1988) 13 NSWLR 208, 230–231 (Clarke JA); *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* [1983] 1 NSWLR 1, 16 (Hunt J); *The Queen v Thompson* (2008) 21 VR 135, 160 [122] (Redlich JA).
[263] *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 200-201 (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ) ('*Clyne*'); *Rees v Bailey Aluminium Products Pty Ltd* (2008) 21 VR 478, 490 [32] ('*Rees*').
[264] *Rees*, 490 [32] (Ashley and Redlich JJA, Coghlan AJA).

> are sufficient to justify an allegation of fraud or joint impropriety. In the present case, no grounds existed which could justify pursuit of such an allegation. The allegation should not have been made.[265]

496. Apart from a case in which counsel may have no basis to make an unsubstantiated allegation in cross-examination (or final address), the issue whether in a particular case counsel has a proper or sufficient basis, for putting a direct proposition to a witness in cross-examination, is one on which reasonable minds might respectably differ. The issue raised by ground 3, in relation to the eighth finding, does not involve such a case. In the Report, the first defendant concluded that there was 'no basis at all' for the two central propositions that are the subject of the eighth finding, namely, first, that Senator Reynolds and her partner had been engaging in potentially criminal conduct in improperly colluding in respect of the evidence of Ms Higgins, and, secondly, that Senator Reynolds was 'politically invested' in the outcome of the trial.

497. In respect of those two propositions, the first defendant made the following conclusion:

> The suggestions made by Mr Drumgold had no basis at all and should not have been made. They were intended to, and might have, affected the outcome of the trial adversely to Mr Lehrmann and the conduct was, therefore, grossly unethical.[266]

498. The issue raised by ground 3, in relation to that finding, essentially involves the question whether that conclusion was one which could be reasonably made by a Commission of Inquiry invested with the powers and authority of the first defendant.[267] That is, the issue is whether the conclusion made by the first defendant, about the cross-examination by the plaintiff of Senator Reynolds, was one to which a reasonable person could come.[268]

499. It was not in issue, in this case, that if the plaintiff had 'no basis at all' upon which to put the propositions to Senator Reynolds in cross-examination, that conduct by him could reasonably be considered to be grossly unethical.[269] The allegations put by the plaintiff to Senator Reynolds were serious. They sought to impugn the credibility and integrity of the witness. If there was no basis at all on which to make them, such conduct would indisputably have been 'grossly' unethical. The critical issue, in this case, is whether the basic premise to the eighth finding, namely, that the plaintiff had 'no basis at all' to put the propositions to the witness, was legally unreasonable.

---

[265] Ibid 492, [36].
[266] Report, [600].
[267] *Li*, 366–7 [72], [76] (above).
[268] *ABT*, 450–451 [19].
[269] Cf *Clyne* (1960) 104 CLR 186, 200–1.

500. It is not uncommonly the case that counsel may properly advance a proposition, in cross-examination, which proposition might be an inference or conclusion, formed by counsel, based on particular facts that are in evidence, or which are available to the counsel. Depending on the circumstances of the case, a proposition in cross-examination, impugning the credibility or reputation of a witness, may be properly advanced notwithstanding that the proposition itself cannot be substantiated by direct evidence, but rather, may be the product of an appropriately drawn inference.

501. In the present case, the four propositions, which were the subject of the eighth finding, were each the product of inferences apparently drawn by the plaintiff. The critical issue, then, is whether it was legally unreasonable for the first defendant to conclude that the facts and circumstances in the possession of the plaintiff, on which the four propositions were based, constituted 'no basis at all' for those propositions.

502. The first three propositions, which are the subject of the eighth finding, were interconnected. In combination, they constituted what the first defendant described to be an allegation of improper collusion between Senator Reynolds and her partner, in respect of which the first defendant concluded that the plaintiff had 'no basis at all'[270].

503. The issue raised by ground 3, in relation to that aspect of the cross-examination by the plaintiff, involves a consideration of a number of facts and circumstances, which had been either established in the evidence, or which were apparent at the time that he cross-examined Senator Reynolds. They included the following.

504. First, the context to the cross-examination concerned the differences between the evidence given by Ms Higgins, and the evidence to be given by Senator Reynolds on two important issues, namely, whether, shortly after the incident in the office of the Defence Ministry, Ms Higgins made a complaint to Senator Reynolds, and whether, on receipt of that complaint, Senator Reynolds discouraged Ms Higgins from doing anything about it. In that respect, the evidence, that was given by Ms Higgins, differed from that to be given by Senator Reynolds on an important aspect of the case in the trial. Importantly, Ms Higgins' evidence reflected on the integrity and reputation of Senator Reynolds, by alleging that, in effect, Senator Reynolds had sought to discourage her from making a complaint to the authorities that she had been raped by a staff member in the employment of Senator Reynolds.

---

[270] Report [596].

505. Secondly, the plaintiff knew, as a fact, that Senator Reynolds' partner lived in Perth. He had travelled to Canberra, and it could be properly inferred that he did so, in order to attend the trial while Ms Higgins was giving evidence. His attendance at the trial evidenced an interest, by him, in the content of the evidence given by Ms Higgins.

506. Thirdly, and related to that, the plaintiff was entitled to consider that Senator Reynolds' partner's attendance in court, during Ms Higgins' evidence, was not unrelated to, and was not purely coincidental with, the fact that he was the partner of Senator Reynolds. That is, the plaintiff was entitled to infer that Senator Reynolds' partner attended the court for purposes relating to his relationship with her. In that respect, it was also relevant to the plaintiff that, at the time that her partner attended court, Senator Reynolds was overseas in Rwanda.

507. Fourthly, the plaintiff had a sufficient basis to consider that Senator Reynolds herself was interested in the content of the evidence, given by Ms Higgins, while Ms Higgins was in the witness box. That is, her interest in the evidence, given by Ms Higgins, was contemporaneous with the evidence that was being given by Ms Higgins. The basis for that understanding comprised the text messages, which Senator Reynolds sent to defence Senior Counsel, Mr Whybrow SC, and which were shown by Mr Whybrow to the plaintiff at the time. There were two important aspects to those text messages. First, Senator Reynolds requested the 'daily transcripts' of the evidence (while Ms Higgins was being cross-examined). Secondly, and relevantly, she drew Mr Whybrow's attention to text messages, which had passed between Ms Higgins and another person, which, Senator Reynolds stated, 'may be revealing' – that is, which might be relevant to the cross-examination of Ms Higgins.

508. Thus, taken together, there were facts and materials before the plaintiff, which suggested that Senator Reynolds' partner attended the court, not as a matter of coincidence, but with the knowledge and agreement of Senator Reynolds, that Senator Reynolds was interested in ascertaining the evidence, given by Ms Higgins during the trial, at the time at which it was given, and that Senator Reynolds had a material interest in ascertaining the content of that evidence at that time.

509. The question, which I need to determine, is not whether the facts and circumstances, to which I have referred, would be a sufficient basis upon which counsel might advance, and put to Senator Reynolds, the first three propositions identified in respect of the eighth finding, namely, that Senator Reynolds had arranged for her partner to attend the court, that she had discussed with her partner the evidence given by Ms Higgins, and that she had sought transcripts of the trial, because she was interested in the contents of the transcript at that time. The question, which I need to determine, is whether it was legally

unreasonable for the first defendant to conclude that, notwithstanding those facts and circumstances, the plaintiff had 'no basis at all' for advancing those propositions to Senator Reynolds, and by doing so, imputing that Senator Reynolds had improperly colluded with her partner to ascertain the evidence that was given by Ms Higgins.

510. Certainly, it may be accepted that reasonable minds might fairly disagree whether the matters, to which I have referred, were a sufficient basis for counsel to advance the propositions in cross-examination, in the manner in which the plaintiff did so. However, taking into account the matters to which I have referred, I do not consider that it could be reasonably concluded that the plaintiff had 'no basis at all' to put those propositions to Senator Reynolds.

511. The fourth proposition, advanced in cross-examination, and that is the subject of the eighth finding, was that Senator Reynolds was 'politically invested' in the outcome of the trial. Ground 3 is directed to the conclusion, by the first defendant, that it was 'improper' to put that proposition to the plaintiff, and that there was 'no basis' for it.[271]

512. The question is whether it was legally unreasonable for the first defendant to conclude that the plaintiff had 'no basis at all' for putting that proposition to Senator Reynolds in cross-examination.

513. In considering that issue, the following matters are relevant.

514. First, there was, quite obviously, a significant political context in which the incident, that was the subject of the criminal trial, was alleged to have taken place. At the time, Senator Reynolds was a Minister in the Federal government. The incident, that was the subject of the criminal trial, was alleged to have taken place in her office between two members of her staff.

515. Relevantly, the evidence of Ms Higgins was that Senator Reynolds had sought to dissuade her from making a complaint about the incident, and had thereby attempted to 'silence' her about it. As I have discussed, that evidence, if accepted, necessarily might have impacted on Senator Reynolds' political reputation. As the first defendant noted in the Report, the investigation of the complaint was undertaken by police 'in the inevitable context of a political scandal', and in the context in which the complainant had taken steps that would 'bring the case prominently into the public eye'.[272]

---

[271] Report, [597].
[272] Ibid [40].

516. Further, as I have already discussed, there was a basis for the proposition, advanced in cross-examination, and thus a basis for considering, that for that reason, Senator Reynolds herself was interested in the evidence being given by Ms Higgins, particularly in circumstances in which Senator Reynolds was to give evidence that contradicted Ms Higgins' evidence in two important respects.

517. Again, the question, which I must determine, is not whether those considerations were a sufficient basis for the plaintiff to advance the proposition, in cross-examination, that Senator Reynolds was 'politically invested' in the outcome of the trial. I would accept that that is a question upon which, again, reasonable minds might properly differ. However, in view of the matters which I have discussed, it could not be reasonably concluded that the plaintiff had 'no basis at all' upon which to advance that proposition.

518. Accordingly, it was legally unreasonable for the first defendant to find that there was 'no basis at all' for the four propositions, that the plaintiff put in cross-examination to Senator Reynolds and that were the subject of the eighth finding. It was on the basis of that finding that the first defendant concluded that the plaintiff's conduct, in putting those propositions, was 'grossly unethical'.

519. It follows that the plaintiff has demonstrated that the eighth finding that is the subject of ground 3 — that his conduct in cross-examination of Senator Reynolds was 'grossly unethical' — was legally unreasonable.

Ground 3- Conclusions

520. For the foregoing reasons, I have concluded:

(1) the plaintiff has not established that the first seven findings, that are the subject of ground 3, were legally unreasonable;

(2) the plaintiff has demonstrated that the eighth finding, by the first defendant, that is the subject of ground 3, was legally unreasonable.

Ground 4 – Natural Justice

521. Under ground 4, the plaintiff contends that the first defendant failed to accord him natural justice by failing to give him a fair hearing in respect of three findings, namely:

(1) The finding that, in respect of an affidavit sworn by a lawyer within the ODPP, regarding the position that certain documents were protected by legal professional privilege, the plaintiff had asked a solicitor to swear a misleading affidavit to that effect, and, when 'foiled', he had directed a junior lawyer in his office to make a

misleading affidavit, had thereby 'preyed' on that junior lawyer's inexperience, and, in doing so, had egregiously abused his authority and betrayed the trust of his young staff member.[273]

(2) The finding, that the plaintiff had made false statements to the Chief Police Officer, that he did not know about the Freedom of Information request concerning the letter dated 1 November 2022 or the fact that it had been released because it had been dealt with by the FoI officer.[274]

(3) The finding, that the plaintiff had proffered untrue explanations to the Ombudsman, to the ACT Police and to the Board, concerning the release of that letter, and that he had shamefully tried to falsely attribute blame to Ms Cantwell for the release of the letter.[275]

Principles of Natural Justice

522. Before considering the issues that have been raised in respect of each of those three findings, it is helpful, first, to outline the principles of natural justice that are relevant to the determination of those issues.

523. As I have earlier noted, it is not in issue that as the Terms of Reference required the first defendant to inquire into, and report on, matters which had the potential to affect the reputations of the plaintiff and of other persons, the first defendant was obliged to comply with the principles of natural justice in his conduct of the Inquiry and in formulating the findings contained in his report[276]. That requirement is made specific in s 18 (a) of the *Inquiries Act 1991*, which expressly provides that in conducting an inquiry, a board of inquiry must 'comply with the rules of natural justice.'

524. In any particular case, the content of the requirement of natural justice necessarily depends on the subject matter of the inquiry, the nature of the inquiry, and the circumstances in which it is undertaken.[277] However, in a case such as the present, in which the subject matter of the inquiry may lead to findings adverse to the reputation of an individual, the principles of natural justice require that that person have a fair opportunity to be informed of the nature of any such potential finding, and to appropriately

---

[273] Report, [413], [415] and [416].
[274] Ibid [688].
[275] Ibid [699].
[276] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564,577-8 (Mason CJ, Dawson, Toohey and Gaudron JJ).
[277] *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118 (Tucker LJ); *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 503–4 (Kitto J); *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 311–12 (Gibbs CJ).

address it. As part of that requirement, it is requisite that such an individual be given sufficient notice in respect of the prospect that such a finding might be made against that person.

525. That principle was explained by the Privy Council in *Mahon v Air New Zealand Ltd*.[278] That case concerned the findings of a Royal Commission that had been appointed to investigate the circumstances of an aircraft collision at Mount Erebus over Antarctica. The Royal Commissioner found that the dominant cause of the accident was the act of the airline in changing the computer track of the aircraft, without informing the air crew. The Royal Commissioner made an order that the airline should pay part of the costs of the Commission on the basis of a finding that the airline had, in the Commission, engaged in a predetermined and planned deception that was directed to concealing a series of disastrous administrative errors, which had resulted in the collision. The airline did not seek to set aside the primary finding by the Royal Commission, but it sought to set aside the finding on the basis of which it was ordered to pay part of the costs of the Commission.

526. The Privy Council held that the Commissioner, in making the order for costs, had acted in breach of the rules of natural justice, first, by failing to base its findings on proper conclusions of fact, and, secondly, by failing, first, to give appropriate notice to the airline of its intention to make that finding. In that second respect, the Privy Council stated the relevant principle in the following terms:

> The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision maker, *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.[279]

527. In considering the content of that aspect of the requirement of natural justice, the courts have, on a number of occasions, noted that while a decision-maker is required to identify a proposed finding or decision to a person who might be affected, the decision-maker is not required to expose its mental processes or provisional thinking in respect of those issues.

528. That distinction was first outlined by the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*.[280] That case involved

---

[278] [1984] AC 808.
[279] Ibid 821.
[280] (1994) 49 FCR 576; 127 ALR 699 ('*Alphaone*').

judicial review of a decision by the Commissioner to reject an application by the respondent for a licence to sell X-rated videos. The respondent contended that it had been denied natural justice because it had not been afforded an appropriate opportunity to respond to the Commissioner's conclusion that it had been trading in breach of the relevant legislation.

529. In rejecting that claim, the Court stated the applicable principle in terms which have been adopted and applied in a number of subsequent decisions:

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.[281]

530. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*,[282] the High Court cited that passage with approval, but in doing so cautioned against treating it as an exclusive dichotomy for two reasons. First, the two categories identified (conclusions not obviously open on the known material and mental processes of the decision-maker) might not necessarily encompass every case that may call for consideration. Secondly, there is a risk that focusing on those two categories might distract attention from the fundamental principles that are engaged.[283] In that respect, the High Court endorsed[284] an earlier passage in the judgment in *Alphaone* in which the Full Court stated:

> It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. *That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material*.[285]

---

[281] Ibid, 49 FCR 576, 590-1; 127 ALR 699, 715 (Northrop, Miles and French JJ); see also *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57, 117–118 [194] (Kitto J); *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* (2003) 216 CLR 212, 219 [22] (Gleeson CJ, Gummow and Heydon JJ); *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, 599 (French CJ, Kiefel J).

[282] (2006) 228 CLR 152.

[283] Ibid 162 [31].

[284] Ibid 162 [32].

[285] *Alphaone*, 714 (emphasis added).

531. In the case of a Board of Inquiry appointed under the *Inquiries Act,* one important aspect of that requirement is specified by s 26A, which provides:

> **Proposed adverse comments in reports**
>
> (1) The board must not include a comment in a report of an inquiry that is adverse to an entity who is identifiable from the report unless the board has, before making the report, given the entity a copy of the proposed comment and a written notice under subsection (2).
>
> (2) The written notice to the entity must—
>
> (a) tell the entity that the entity may—
>
> (i) make a submission to the board in relation to the proposed adverse comment; or
>
> (ii) give the board a written statement in relation to the proposed adverse comment; and
>
> (b) tell the entity that, if the entity makes a submission or gives a written statement in relation to the comment, the submission or statement, or a summary of it, will be included in the board's report of the inquiry; and
>
> (c) state the period within which a submission in relation to the comment may be made or statement given.

First finding

532. The first finding, that is the subject of ground 4, is the finding concerning the circumstances in which the plaintiff had arranged for the young staff member, Mr Greig, to depose an affidavit claiming legal professional privilege in respect of the two investigative review documents, prepared by DS Moller and DI Boorman. I have summarised the relevant part of the report relating to that finding at paragraphs [53] to [55] above.

<u>First finding - submissions</u>

533. In respect of that finding, it was submitted, on behalf of the plaintiff, that at no stage in the course of the plaintiff's evidence were any of the following four premises, formulated by the plaintiff as the basis of that finding, put to the plaintiff in evidence, namely, that:

(a) the plaintiff had approached Ms Pitney to make an affidavit that was misleading;[286]

(b) the plaintiff interpreted Ms Pitney's response to his approach to be that she declined to make the affidavit;[287]

---

[286] Ibid [413].
[287] Ibid [413].

(c) because the plaintiff interpreted Ms Pitney's response to be that she declined to make the affidavit, he therefore procured the misleading affidavit to be made by the more junior solicitor, Mr Greig;[288]

(d) in doing so, the plaintiff relied on Mr Greig's inexperience and the likelihood that Mr Greig would not question the plaintiff about the appropriateness of making that affidavit.[289]

534. In addition, it was submitted that the plaintiff was not accorded natural justice in respect of the finding, that he did not, as a matter of fact, understand that the disclosure certificate, provided by the ACT Police, intended to claim legal professional privilege over the two investigative documents. In particular, it was submitted, at no stage during the course of the Inquiry, was it suggested to the plaintiff that his understanding of the disclosure certificate was wrong, let alone false.

535. It was submitted on behalf of the plaintiff that, while the notice of proposed adverse comments served by the Board on the plaintiff after the close of evidence put the plaintiff on notice of a finding regarding the filing of a misleading affidavit, the notice did not advise the plaintiff of any proposed finding to the effect that he had 'preyed' on the inexperience of the junior lawyer, Mr Greig.

536. For those reasons, it was submitted that the plaintiff was not given an opportunity to respond to the findings, ultimately made against him, in respect of the procuring of that which the first defendant found to be a misleading affidavit. Accordingly, it was submitted that the first defendant failed to accord the plaintiff natural justice in respect of that finding.

537. In response, counsel for the third defendant submitted that the plaintiff was given a sufficient opportunity to address the matters, that were the subject of the first finding. In particular, the first notice of adverse comments, provided to the plaintiff, included adverse comments: that the plaintiff directed a junior lawyer in the ODPP to depose an affidavit that the documents had in error been inserted in the first disclosure declaration, as not being the subject of a claim of privilege, in error; that the plaintiff knew, or ought to have known, that, when relying on hearsay evidence in that form, the deponent was required to identify the source of the information and the grounds of belief; and that the plaintiff's

---

[288] Ibid [413].
[289] Ibid [413]–[415].

actions were dishonest, and involved the preparation and tender of false evidence in support of a criminal prosecution.

538. Counsel noted that the plaintiff responded to the notice of adverse comments in terms, which indicated that he well understood the nature of the proposed finding, which ultimately was made against him. In addition, the plaintiff's response was noted by the first defendant in the report.[290] Counsel further submitted that the plaintiff was examined about the topic in question in the course of his evidence before the Inquiry. In essence, it was submitted that, taken together, that examination, and the notice of adverse comments, constituted sufficient notice to the plaintiff of the first finding, and provided to the plaintiff a sufficient opportunity to address them.

539. Counsel for the first defendant briefly addressed the issues relating to the first finding, and, in doing so, he referred the court to relevant sections of the report[291] and the relevant section of the written submissions made by the plaintiff to the first defendant in the Inquiry.

First finding — conclusion

540. As formulated by counsel for the plaintiff, the first finding, that was the subject of ground 4, effectively comprises two principal propositions. The first proposition was that the plaintiff, having approached Ms Pitney to make an affidavit that was misleading, interpreted Ms Pitney's response to be a refusal by her to swear that affidavit.[292] The second proposition was that, because the plaintiff understood Ms Pitney to have refused to make the affidavit, he therefore procured the affidavit to be deposed by a more junior solicitor, Mr Greig, and, in doing so, he exploited ('preyed on') Mr Greig's inexperience, and thereby betrayed his trust.[293]

541. It is clear, from an analysis of the relevant part of the transcript of the evidence before the first defendant, and the notice of adverse comments that was subsequently served on the plaintiff, that the first defendant put the plaintiff on sufficient notice as to the principal aspect of the second proposition, namely, that he had exploited Mr Greig's inexperience, and thus betrayed his trust, by procuring him to depose an affidavit that the plaintiff knew to be misleading. On the other hand, I have not been referred to any aspect of the evidence, or of the notice of adverse comments, in which it was put to the

[290] Ibid [413], [414] (n 525, 526 and 527).
[291] Report, [374]–[375].
[292] Ibid [413].
[293] Ibid [415]–[416].

plaintiff that a finding might be made that he had turned to Mr Greig, after and because his attempt to get Ms Pitney to make the affidavit had been rebuffed by her.

542. In respect of the principal aspect of the finding, it is clear from a review of the relevant aspects of the transcript of the Inquiry, that in the course of his evidence in the Inquiry, the plaintiff had adequate opportunity to respond to questions relating to the following issues: Mr Greig, to the knowledge of the plaintiff, was a junior lawyer (who had only been admitted to practice six months earlier); the plaintiff knew the rule that required that, where an affidavit relies on hearsay, it is necessary to identify the source of that hearsay; the plaintiff was the source of the hearsay in the affidavit drafted by him and provided to Mr Greig; the plaintiff instructed Mr Greig to draft and depose an affidavit in the form prepared by him; in accordance with that instruction, Mr Greig prepared and deposed such an affidavit; the affidavit claimed that the documents in question were privileged, Mr Greig did not 'have a clue' whether the documents were privileged or not privileged; and, in that way, the affidavit was misleading.

543. Further, in the context of that evidence, it is quite apparent from the transcript, that the plaintiff was put on notice that a finding might be made that the circumstance that the plaintiff had caused Mr Greig to depose an affidavit, that was in fact misleading, could not be explained or excused as being the result of an unintentional mistake on the part of the plaintiff.

544. In particular, the first defendant put directly to the plaintiff the question: 'And you say that's just an error?'. After the plaintiff made a response to that question (that he 'just didn't think'), the first defendant then asked him: 'Do you want to say anything about what I've put to you?'. The first defendant then asked the plaintiff questions which implied that, at the hearing before the Chief Justice relating to the question of privilege, 'instead of being candid' with the judge about the claim for privilege, the plaintiff had read the affidavit to her Honour, which, in a misleading manner, implied that the claim for privilege was made by the AFP.

545. In view of those parts of the plaintiff's evidence in the Inquiry, in my view, the plaintiff was clearly put on notice of a potential finding that he had intentionally taken advantage of the inexperience of Mr Greig by procuring him to swear an affidavit, that the plaintiff knew would mislead the court relating to the claim for legal professional privilege in relation to the police investigation documents.

546. Those matters were also the subject of the first notice of proposed adverse comments, served on the plaintiff on 9 June 2023. In paragraphs [20]–[25] of the notice, the following propositions were stated as proposed adverse findings (*inter alia*): at the directions

hearing before the Chief Justice on 8 September 2022, the plaintiff informed the Chief Justice that the documents in question were privileged; the plaintiff knew that that statement was false; the plaintiff thereafter directed a junior lawyer in the ODPP to depose the affidavit claiming privilege; the affidavit did not reveal the source of the hearsay; the plaintiff knew (or ought to have known) that the deponent was required to identify the source of the hearsay; the plaintiff caused the affidavit to be filed in support of the claim of privilege; the plaintiff did not reveal to the defence, or the court, that he was the source of the hearsay in the affidavit; and the plaintiff, in the application on 16 September 2022, continued to maintain the false claim of privilege.

547. Paragraph [26] of the notice of proposed adverse comments was to the effect that the plaintiff's actions, as outlined in paragraphs [20]–[25], were dishonest, and involved the preparation and tendering of false evidence to support a criminal prosecution.

548. The critical conclusion in the Report of the first defendant, in respect of the preparation of, and reliance on, the affidavit of Mr Greig, was contained in two paragraphs of the Report, in which the following findings were made: the evidence revealed that the plaintiff had 'deliberately advanced a false claim of legal professional privilege and misled the court about [that claim] through submissions, and by directing a junior lawyer in his office to make a misleading affidavit'; there was no fault at all on the part of the junior lawyer in deposing the affidavit; rather, the plaintiff had 'preyed on the junior lawyer's inexperience', and had 'egregiously abused his authority and betrayed the trust of his young staff member, to whom he owed a duty to be a mentor and role model'[294].

549. From the foregoing review of the transcript and the notice of adverse comments, it is clear the plaintiff had been put on notice in respect of each of those critical findings.

550. In an immediately preceding paragraph in the Report, the first defendant noted the submission, made on behalf of the plaintiff, that he had been confused as to his instructions. The first defendant rejected that submission. It was in that context that the Report referred to the involvement of Ms Pitney in the process, stating:

> ... He [the plaintiff] knew exactly what he was doing when he asked Ms Pitney to swear a misleading affidavit and, when foiled, he asked someone in his office who could not be expected to imagine that he was being asked, by the DPP himself, to do something improper.[295]

551. The plaintiff was not expressly put on notice in respect of that specific proposition, namely, that he had turned to Mr Greig to depose the affidavit, after he understood that

---

[294] Ibid [415] – [416].
[295] Ibid [413].

he had been rebuffed by Ms Pitney in his attempt to get her to swear an affidavit, and that he only asked Mr Greig to do so when he was 'foiled' by Ms Pitney's response.

552. However, that proposition was not necessary to the principal findings by the first defendant that the plaintiff had exploited the inexperience of Mr Greig by wrongly procuring him to depose the misleading affidavit. The observations by the first defendant, concerning Ms Pitney, reinforced the conclusion, that the plaintiff 'knew exactly what he was doing' when he asked Mr Greig to swear the affidavit. However, that intermediate finding was not necessary for the ultimate conclusion formed by the first defendant.

553. In the context of the issues that were being determined by the first defendant, I do not regard it was a breach of natural justice that the specific issue, relating to the plaintiff's dealings with Ms Pitney in respect of the affidavit, was not the subject of any questioning, of him, or of any notice of proposed adverse finding. Rather, as I have discussed, the critical conclusion, by the first defendant, on this aspect of the Inquiry, was directly raised, both in the course of the plaintiff's evidence in the Inquiry, and in the notice of adverse comments served on the plaintiff.

554. It follows that ground 4, in relation to the first finding, does not succeed.

Second and third findings

555. The second and third findings, that are the subject of ground 4, concern the response by the plaintiff to the FoI application, made by Mr Knaus of *The Guardian* newspaper, for the release of the letter dated 1 November 2022 that he wrote to the Chief Police Officer.

Second and third findings – submissions

556. The second finding is that the plaintiff made a false statement to the Chief Police Officer when he told the Chief Police Officer that he did not know about the FoI application, or the fact that the letter, dated 1 November 2022, had been released, as that matter had been dealt with by the FoI officer of the ODPP.[296] I have summarised the part of the report, relevant to that finding, at paragraph [83] above.

557. It was submitted, on behalf of the plaintiff, that he was denied natural justice in respect of the second finding, made by the first defendant, for the following reasons:

    (a) Although the plaintiff made a written statement to the Inquiry, in which he referred to the circumstances of the release of the letter under the FoI and his involvement

[296] Ibid [688].

in an ACT Ombudsman's inquiry in relation to the release of the letter, the statement did not address the detail of what he had discussed with the Chief Police Officer.

(b) The plaintiff did not give oral evidence at the Inquiry, regarding the release of the letter under FoI, or his discussions with the Chief Police Officer about the release of the letter.

(c) The plaintiff was not questioned, by the first defendant, regarding the release of the letter under FoI, or his discussions with the Chief Police Officer, concerning the release of the letter.

(d) In the Inquiry, it was not put to the plaintiff, in cross-examination, that he had made statements attributed to him and as set out in the diary notes of the Chief Police Officer, or that those statements were false.

(e) Although the first defendant served on the plaintiff a notice of proposed adverse comments, that notice did not advise him of any proposed finding, to the effect that the plaintiff had made false statements to the Chief Police Officer, concerning the release of the letter under FoI.

558. For those reasons, it was submitted that the plaintiff was not given any opportunity, in evidence or otherwise, to respond to the adverse finding ultimately made against him concerning the statement, that he made to the Chief Police Officer, relating to the release of the letter dated 1 November 2022.

559. The third finding, that is the subject of ground 4, is the finding that the plaintiff had given false explanations, relating to the release under FoI of the letter dated 1 November 2022, in which he had 'shamefully' tried to falsely attribute blame to the Executive Officer of the ODPP, Ms Katie Cantwell, for the release of that letter.[297] I have summarised the relevant aspects of the report, in respect of that finding, at paragraphs [85] to [87] above.

560. It was submitted, on behalf of the plaintiff, that that finding constituted a denial of natural justice for the following reasons:

(a) While the plaintiff provided a statement to the Inquiry, which, in part, related to the release of the letter under FoI and the Ombudsman investigation, he did not give oral evidence in respect of those matters.

---

[297] Ibid [693]–[694], [699].

(b) The plaintiff was not cross-examined, by the first defendant, about: the release of the letter under FoI; the investigation by the Ombudsman; or the plaintiff's explanations, regarding the failure to consult before the letter was released.

(c) In the course of the Inquiry, it was not put to the plaintiff that his explanations, to the Ombudsman or to the first defendant (as contained in his statement), were false; or that, by his explanations, he had falsely tried to attribute blame to Ms Cantwell.

(d) The first defendant served on the plaintiff a notice of proposed adverse comments, that notice, which put the plaintiff on notice of the possible finding that he had misled the Ombudsman, the ACT Police and the Inquiry in respect of his explanations as to why the letter was released under FoI without having consulted with the ACT Police. However, the notice was served on the plaintiff on or about 9 June 2023, after evidence in the Inquiry had closed on 1 June 2023. In that respect, it was noted that the plaintiff last gave evidence in the Inquiry on 12 May 2023.

(e) The provision of such a notice, without giving the plaintiff an opportunity to give evidence to refute the findings ultimately made against him, was insufficient to accord to him procedural fairness.

(f) Further, the notice did not put the plaintiff on notice of a possible finding that he had falsely tried to attribute blame to Ms Cantwell.

(g) The findings were of particular seriousness for a lawyer, and, accordingly, it was of particular importance that the plaintiff be given an appropriate opportunity to address them.

561. In response to the submissions by the plaintiff, in respect of the second and third findings, counsel for the third defendant noted that, as a consequence of the plaintiff's illness, he had not been available to give oral evidence concerning the issues that were the subject of those findings. However, it was submitted that, in respect of each of them, he received adequate notice of those proposed findings for four reasons.

562. First, in his statement to the Inquiry, the plaintiff specifically addressed the circumstances in which the decision was made to release the letter in response to the FoI application.

563. Secondly, counsel noted that it is evident from the Report[298] that the plaintiff gave evidence to the Inquiry, in a private hearing on 27 February 2023, concerning the issue.

564. Thirdly, the examination of the plaintiff before the Inquiry was curtailed as a result of his illness.

565. Fourthly, counsel noted that the plaintiff addressed written submissions to the Inquiry, in which it was submitted that the plaintiff's unavailability to give evidence, due to his illness, should be taken into account in any assessment of the issues relating to the FoI application.

566. Counsel then addressed, separately, the submissions made by the plaintiff in respect of the second and third findings.

567. In respect of the second finding, it was submitted by the third defendant that the plaintiff had been given adequate notice of the proposed finding, in two notices of adverse comments, to which the plaintiff had in fact responded.

568. In particular, the first notice of adverse comments included certain facts that established that, on 7 December 2022, the plaintiff had known of, and had been involved in, the FoI request, and that, on 8 December 2022, the plaintiff had made certain statements to the Chief Police Officer, including that he did not know about the FoI request or the fact that the letter had been released, as it had been dealt with by his FoI officer. The second notice of adverse comments included that the plaintiff did not inform the Chief Police Officer: that he had informed Mr Knaus about the 1 November 2022 letter; and that Mr Knaus had made an FoI request to obtain a copy of the 1 November 2022 letter.

569. In respect of the third finding, it was submitted, on behalf of the third defendant, that the plaintiff had been given adequate notice of the proposed finding. In particular, it was noted that the attachment prepared by the AFP, and referred to in the first notice of adverse comments, included the following: the plaintiff's submission to the Ombudsman was misleading; the plaintiff's apology concerning the letter was misleading, because he had apologised on the basis that the letter had been released by his office, and he had attributed the failure to consult the AFP to an internal communication training issue, whereas in fact he was the person who made the decision to release the letter; the plaintiff's evidence, in his witness statement concerning the matter, was incomplete and misleading for a number of reasons specified in the attachment; and that, on 7 December 2022, Ms Cantwell had drawn to the plaintiff's attention the fact that any document

[298] Report, [685].

matching the description of Mr Knaus' FoI request was likely to contain material the subject of legal professional privilege, so that when the plaintiff caused the letter to be released under FoI, he did so either in the knowledge that he was releasing the material that was legally professionally privileged, or he was reckless as to that matter.

570. Counsel noted that the plaintiff responded to the matters raised in the notice of adverse comments. In particular, in that response, the plaintiff took responsibility for the decision concerning the release of the 1 November 2022 letter, and said he did not seek to transfer any responsibility for that decision to Ms Cantwell.

Second and third findings — conclusion

571. The second and third findings, that are the subject of ground 4, in essence concern two aspects of explanations that the plaintiff proffered concerning the release, under FoI, of the letter that he had written to the Chief Police Officer of the AFP on 1 November 2022.

572. It is common ground that the plaintiff was not questioned concerning either of those two aspects in his evidence before the Inquiry. His statement, which formed part of his evidence, did set out his version of the chronology of the events that led to the release of that letter pursuant to the FoI request. However, it did not cover either of the two matters that were the subject of the second and third findings.

573. The two notices of adverse comments, that were served on the plaintiff subsequent to the completion of evidence before the Inquiry, did relate to the topic with which the two findings were ultimately concerned. In the course of submissions, Senior Counsel for the plaintiff contended that any notice, of those findings, in the notice of adverse comments, would not have been sufficient, because it did not give the plaintiff the opportunity to address those matters in evidence.

574. That submission, by counsel for the plaintiff, must be considered in the context of how the plaintiff gave his evidence at the Inquiry.

575. It will be recalled that the plaintiff's evidence was discontinued, before it was completed, because of his ill-health. Subsequently, the plaintiff was certified to be medically unfit to return to the Inquiry to give further evidence. In the plaintiff's detailed responses to the two notices of adverse comments, it was not suggested that the plaintiff desired or needed to give further *viva voce* evidence in order to address the matters contained in those notices.

576. In those circumstances, the fact that the particular issue might first have been raised in the notice of adverse comments, without having been put to the plaintiff in cross-examination, does not, of itself, lead to the conclusion that the plaintiff was not afforded

natural justice in respect of either of the two findings. However, it is, nevertheless, a relevant consideration to take into account, in determining whether the plaintiff was given adequate notice in the notices of adverse comment in respect of the two findings that were ultimately contained in the report, and about which the plaintiff now makes complaint.

577. The question, then, is whether the notices of adverse comment, served on the plaintiff, were, of themselves, sufficient notice of the second and third findings, to comply with the requirements of the principles of natural justice. I commence by addressing that question in relation to the second finding.

578. That finding concerned a conversation, which the plaintiff had with the Chief Police Officer on 8 December 2022, on the day after the letter dated 1 November 2022 had been released under FoI. The Chief Police Officer first became aware that the letter had been the subject of a FoI request after it had been released in the media, and when Mr Knaus, of *The Guardian* newspaper, sought a comment from him about it. It was as a consequence of that contact, by Mr Knaus, that the Chief Police Officer then telephoned the plaintiff.[299] The first defendant found, in the report, that in that telephone conversation, the plaintiff told the Chief Police Officer that 'he did not know about the FoI or the fact that [the letter] had been released as it was dealt with by his FoI officer'. Ground 4 is not directed to that factual finding. It is directed to the conclusion, expressed by the first defendant, based on that finding, namely, that the plaintiff's statements to the Chief Police Officer 'were false'.[300]

579. The question, then, is whether the first defendant, by the two notices of adverse comment, gave sufficient notice to the plaintiff of that potential finding against him. In order to address that question, it is necessary to consider the contents of the notices in a little detail.

580. The first notice (dated 9 June 2023), under the sub-heading 'Freedom of Information request', stated:

> The propositions, findings and conclusions in the document prepared by the AFP concerning the "Freedom of Information issue" (attached) form part of this notice of potential adverse findings to which you may respond.

581. The AFP notice, attached to that notice, was entitled 'Propositions document prepared by the Australian Federal Police concerning TOR para D(e) (Freedom of Information

---

[299] Ibid [687].
[300] Ibid [688].

issue)' ('the AFP document'). In its introduction, it stated that section 2 of the document set out the 'factual background' concerning the circumstances surrounding the release of the 1 November 2022 letter under FoI, which (section 2 stated) were matters that had been established in the evidence before the Inquiry. The AFP notice stated that section 2 set out factual propositions and conclusions that the AFP submitted arose from the matters set out in the 'Factual background' section of the submission.

582. The introduction to the AFP document then stated that section 3 of the document set out 'findings and conclusions that the Inquiry may permissibly draw' because they were findings and conclusions that arose from the matters contained in the 'Factual background' section of the document.

583. The AFP document, under section 2 (entitled 'Factual background'), set out a number of facts relating to the release of the 1 November 2022 letter under FoI. It is not necessary to set them out in detail. It recorded that, on 7 December 2022 at 6:50 pm, the plaintiff had emailed Ms Cantwell, stating that he was happy for the letter to 'go out' (under FoI). It also referred to the telephone conversation, which the Chief Police Officer (Mr Gaughan) had with the plaintiff concerning the release of the letter, and specifically stated that the plaintiff, in that conversation, had told the Chief Police Officer that he did not know about the FoI application, or the fact that the letter had been released, as it had been dealt with by his FoI officer.

584. Section 3 of the AFP document, entitled 'Findings and conclusions', stated that the plaintiff was the person who caused the release of the letter under FoI, and that it was he who made the decision for its release. The AFP document (under section 3) expressed, as a proposed finding and conclusion by the Inquiry, that the plaintiff's submission to the Ombudsman, his apology (on 13 January 2023) to the AFP, and his evidence in his witness statement to the Inquiry, were 'incomplete and misleading'. Relevantly, the AFP document, having referred, in section 2, to the plaintiff's statement to the Chief Police Officer on 8 December 2022 (that was the subject of the second finding), did not contend for a specific finding that that statement, itself, was 'false'.

585. In response to the first notice of adverse comments, the plaintiff filed lengthy and detailed written submissions dated 26 January 2023. They specifically addressed the issues raised in section 3 of the AFP document ('Findings and conclusions'), but they did not address, specifically, the 'Factual background' contained in section 2 of that document. As a consequence, the submissions by the plaintiff did not address the question whether the response, that he had made to the Chief Police Officer, on 8 December 2022, was untrue or false.

586. The second notice of proposed adverse comments was served on the plaintiff, dated 9 July 2023. It contained two propositions, under the sub-heading 'Freedom of Information request'. The first proposition was that on 3 December 2022, the plaintiff had informed Mr Knaus (of *The Guardian* newspaper) that he had sent the 1 November 2022 letter (to the Chief Police Officer). The second proposition was as follows:

> You did not inform the Chief Police Officer:
>
> (a) that you had informed Mr Knaus about the 1 November 2022 letter; and
>
> (b) of Mr Knaus' FoI request to obtain a copy of the 1 November 2022 letter.

587. The issue, whether that proposed adverse comment was sufficient notice to the plaintiff concerning the second finding, is not without difficulty. However, the proposed adverse comment was expressed (in the second notice) in terms of a failure of the plaintiff to inform the Chief Police Officer of his conversation with Mr Knaus, after he had spoken to Mr Knaus. It was not, specifically, or even implicitly, notice of a proposed finding that the plaintiff had intentionally lied to the Chief Police Officer after the Chief Police Officer had contacted him relating to the issue.

588. In this context, it must be borne in mind that, as a Director of Public Prosecutions, it was most important that the plaintiff be honest and truthful in his dealings with the Chief Police Officer. That requirement was an integral aspect of the plaintiff's responsibilities as a Director of Public Prosecutions. Accordingly the finding that the plaintiff had intentionally made a false statement to the Chief Police Officer, about a matter of some sensitivity, was a serious finding. It follows that if the first defendant were minded to make a specific finding to that effect, it was necessary that specific notice of that finding should be given to the plaintiff, in order to afford him a fair opportunity to address it.

589. Taking that matter into account, I do not, on balance, consider that the second notice of adverse comments did provide sufficient notice to the plaintiff that the first defendant might make a finding against him that he had been deliberately untruthful when he spoke to the Chief Police Officer on 8 December 2022, after the Chief Police Officer had learnt that the letter dated 1 November 2022 had been released to the media under FoI. For those reasons, I conclude that the plaintiff was not afforded natural justice in respect of the second finding, that is the subject of ground 4.

590. On the other hand, I consider that it is well demonstrated that sufficient notice was given to the plaintiff concerning the third finding that is the subject of ground 4, namely, the finding that the plaintiff had given false explanations to the Ombudsman, in his apology

to the ACT Police, and in his statement in evidence in the Inquiry, concerning his failure to consult the AFP before the 1 November 2022 letter was released under FoI.[301]

591. In particular, the AFP document, which I have discussed, and which was appended to the first notice of proposed adverse comment, specifically sought such a finding under the sub-heading 'Findings and conclusion' in section 3 of the document. As a prelude to that section, the document, in section 2 (entitled 'Factual background') had set out the plaintiff's response to the Ombudsman, and his letter of apology to the AFP, concerning the release of the document. In section 3 of the document, the section entitled 'Findings and conclusions', it sought findings that the plaintiff's submission to the Ombudsman, and his apology to the ACT Police, concerning the release of the letter under FoI, were each 'misleading', and it set out the reasons for that proposed conclusion. It then, under the sub-heading 'Evidence in witness statement regarding release of 1 November 2022 letter under FoI was incomplete and misleading', sought, as a proposed finding, that the plaintiff's evidence, in his witness statement, as to that topic, was 'incomplete and misleading', and it set out, in detail, the reasons for that conclusion.

592. Relevantly, in his lengthy response to the first notice of adverse comment, the plaintiff addressed each of those issues in some detail. In that document, the plaintiff gave detailed reasons why the first defendant ought not to make the findings sought in section 3 of the AFP document. The plaintiff's response, and the content of it, demonstrates, unequivocally, that he sufficiently understood the nature of the proposed adverse comment contended for by the AFP, and which, ultimately, constituted the third finding that is the subject of ground 4.

593. It follows, from the foregoing, that it must be concluded that the plaintiff was provided with adequate and fair notice of that third finding. It follows that ground 4, in relation to that finding, does not succeed.

Summary of conclusions in respect of ground 4

594. For the reasons that I have stated, I have reached the following conclusions under ground 4:

(a) The plaintiff was afforded natural justice in respect of the first and third findings that are the subject of ground 4.

[301] Ibid [694].

(b) The plaintiff was not afforded natural justice in respect of the second finding, namely, that his statement to the Chief Police Officer on 8 December 2022, concerning his lack of knowledge about the FoI application relating to the 1 November 2022 letter, was false.[302]

Summary of Conclusions

595. In conclusion, I summarise the conclusions that I have reached, in respect of the three grounds of review relied on by the plaintiff.

596. In respect of ground 2 — (that the conduct of the first defendant of the Inquiry gave rise to a reasonable apprehension of bias) — I have concluded that the amount, context, nature, manner and content of the communications, that occurred between Mr Sofronoff and Ms Janet Albrechtsen of The Australian newspaper, were such that a fair-minded lay observer, acquainted with the material objective facts, might reasonably have apprehended that Mr Sofronoff, in determining, in Chapters 4,5 and 6 of the Report, the issues specified by paragraph (c), (d) and (e) of section D of the Amended Terms of Reference of the Inquiry, might have been influenced by the views, held and publicly expressed by Ms Albrechtsen, concerning the conduct by the plaintiff of the prosecution of the criminal proceedings against Mr Lehrmann. Accordingly, ground 2 of the application for judicial review must succeed.

597. In respect of ground 3 (legal unreasonableness), the plaintiff submitted that eight findings, by the first defendant in the Report of the Inquiry, were legally unreasonable. I have concluded that the plaintiff has not established that seven of those findings were legally unreasonable. I have concluded that the finding, by the first defendant, that the plaintiff had engaged in grossly unethical conduct in his cross-examination of Senator Linda Reynolds, was legally unreasonable. Accordingly, ground 3 succeeds in respect of that finding.

598. In respect of ground 4 (failure to accord natural justice), the plaintiff contended that the first defendant failed to accord him natural justice by failing to give him a fair hearing in respect of three findings, made by the first defendant in the Report. I have concluded that the plaintiff has not established a failure of natural justice in respect of two of those findings. I have concluded that the first defendant failed to afford the plaintiff natural justice in respect of the finding, in the Report, that the plaintiff's statement to the Chief Police Officer on 8 December 2022, concerning his lack of knowledge about the Freedom

[302] Ibid [688].

of Information application relating to the 1 November 2022 letter, was false. Accordingly, ground 4 succeeds in respect of that finding.

599. As I have noted earlier,[303] as the Report of the first defendant did not, of itself, have any legal effect or consequences, relief in the form of the prerogative writ of *certiorari* is not available to the plaintiff. However, in a case such as this, it is appropriate to grant declaratory relief, reflecting the conclusions that I have just stated.[304] I shall hear from counsel in respect of the precise formulation of that relief.

I certify that the preceding five hundred and ninety-nine [599] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Acting Justice Kaye

Registrar:

Date:

[303] Above, [20].
[304] *Ainsworth*, 582, 597; *Plaintiff M61/2010E v The Commonwealth of Australia& Anor* (2010) 243 CLR 319,358-9 [100]-[101]; *Plaintiff M 76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship & Ors* (2013) 251 CLR 322,391-2 [233]-[240] (Kiefel and Keane JJ).