SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

NUMBER: SC 347 of 2023

Plaintiff	**NEVILLE SHANE DRUMGOLD**
First Defendant	**BOARD OF INQUIRY – CRIMINAL JUSTICE SYSTEM**
Third Defendant	**AUSTRALIAN CAPITAL TERRITORY**
Fourth Defendant	**MICHAEL CHEW, SCOTT MOLLER, MARCUS BOORMAN, ROBERT ROSE, TRENT MADDERS, EMMA FRIZZELL**

FOURTH DEFENDANT'S OUTLINE OF SUBMISSIONS

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Overview

1. The Fourth Defendant does not seek to make submissions on Grounds 3 or 4, other than with respect to the nature of any relief which may be granted if the Plaintiff succeeds one or more of those Grounds.

2. [redacted]

3. With respect to Ground 2, the Fourth Defendant submits that the conduct of the First Defendant, as particularised by the Plaintiff, is not sufficient to establish an apprehension of bias as alleged.

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Ground 2 of the application – the apprehended bias ground

4. The Plaintiff alleges that the First Defendant failed to accord him natural justice, in that particularised conduct gave rise to an apprehension of bias.

Relevant Law

5. A duty to afford procedural fairness is imposed on an investigative body such as a Commission of Inquiry, whose power to report is capable of affecting a person's reputation.[1]

6. The test for apprehended bias is whether "a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial mind to the resolution of the question the [decision-maker] is required to decide".[2]

7. The test has two steps:[3]

   (a) firstly, the identification of what it is that might lead a decision-maker to decide a case other than on its legal and factual merits;[4] and

   (b) secondly, an articulation of the logical connection between the identified thing and the feared deviation from deciding the case on its merits.[5]

8. Those two steps then found the application of the test through an assessment of whether the fair-minded lay observer might reasonably apprehend, in the totality of the circumstances, that the articulated departure might have occurred.[6] The test is an objective test, which does not require a conclusion about a decision-maker's actual state of mind.[7]

9. The test is concerned with possibility (which is real and not remote), and not probability.[8] However, a finding of reasonable apprehension of bias is "not to be reached lightly",[9] and should be "firmly established".[10]

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[1] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Annetts v McCann* (1990) 170 CLR 596.
[2] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (***Ebner***), [6]-[7]; *Isbester v Knox City Council* (2015) 255 CLR 135 (***Isbester***), [20]-[21].
[3] *CNY17 v Minister for Immigration and Border Protection and Anor* (2019) 268 CLR 76 (***CNY17***), [21] (per Kiefel CJ and Gageler J. Their Honours were in dissent as to the outcome, but not with respect to this principle), [57] (per Nettle and Gordon JJ).
[4] That is, "what is said to affect a decision-maker's impartiality?" (*CNY17*, [57]).
[5] That is, *how* will the factor identified in the first step have led a decision-maker to have decided otherwise than on an independent and impartial evaluation of the merits (*CNY17*, [21] and [58]).
[6] *CNY17*, [21]; *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 409 ALR 65 (***QYFM***), [38] (per Kiefel CJ and Gageler J), [162] (per Edelman J), [225] (per Gleeson J).
[7] *Ebner*, [6].
[8] *QYFM*, [37] (citing *Ebner* at [7])(per Kiefel CJ and Gageler J), [69] (per Gordon J).
[9] *CNY17*, [56] (per Nettle and Gordon JJ).
[10] *Re Minister for Immigration & Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, [90] (per Kirby J).

10. The test applies not only to judicial proceedings, but also to administrative and investigative proceedings.[11]

11. The application of the test requires consideration of the legal, statutory and factual contexts in which the decision is made.[12] The fair-minded observer is taken to be aware of the nature of the decision, the relevant statutory context, what is involved in making the decision, the role and function of the decision maker and the circumstances leading to the decision.[13] They are taken to have a broad knowledge of the material objective facts, as distinct from a detailed knowledge of the law or of the character and ability of the decision-maker.[14] The fair-minded observer is not a lawyer, but is taken to have a basic knowledge of the issues to be decided and the nature of the proceedings or process, and knowledge of the "key elements" of a statutory scheme.[15]

12. The necessity of considering the decision-making process and the identity of the decision-maker draws attention to the fact that the test must recognise differences between court proceedings and other kinds of decision-making.[16] A commission of inquiry is an investigatory body, required to inquire into and report upon specified matters, and this will be at the forefront of a fair-minded observer's mind when considering the conduct of such a decision-maker.[17]

13. In *R v Carter; Ex parte Gray*, in the context of a Royal Commission, the Full Court of the Supreme Court of Tasmania stated:[18]

> …the 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 nor even if he learnt that the Commissioner, as his inquiry progressed, began to entertain certain tentative views about key witnesses.

14. Depending upon the circumstances, a decision-maker in a commission of inquiry will generally be entitled to formulate questions, have suspicions that are tested by asking questions, select witnesses or persons of interest for questioning and form and announce preliminary conclusions.[19]

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[11] *Ebner*, [4].
[12] *CNY17*, [58], citing *Isbester* [20].
[13] *Isbester,* [23], *CNY17,* [58]; *QYFM*, [170] (per Edelman J), [197]-[200] (per Steward J).
[14] *CNY17*, [58].
[15] *QYFM*, [199].
[16] *CNY17*, [58], citing *Isbester*.
[17] *R v Carter; Ex parte Gray* [1991] 14 Tas R 247, [31].
[18] [1991] 14 Tas R 247, [31].
[19] *Moodie v Racing Integrity Commissioner* [2017] VSC 693, [66], citing *Ferguson v Cole* (2002) 121 FCR 402; *Duncan v Ipp* (2013) 304 ALR 359, [151].

Submissions

15. With respect to the first step of the test for apprehended bias, the subject matter identified by the Plaintiff is that of particularised conduct of the First Defendant, including the context in which it occurred.[20] The Fourth Defendant's submissions below refer to that conduct in the following broad categories:

    (a) communications between the First Defendant (and Counsel Assisting) and journalists from *The Australian* newspaper, and in particular Ms Janet Albrechtsen;[21]

    (b) the extension of the Terms of Reference (**TOR**) of the inquiry, at the First Defendant's recommendation;[22]

    (c) the First Defendant's treatment of the Plaintiff during the inquiry;[23]

    (d) the omission from the Final Report of two written statements of the Plaintiff (or the omission of reference to those statements);[24] and

    (e) the agreement by Mr Sofronoff to appear at a function hosted by *The Australian* newspaper.

16. In addition to these matters, the Plaintiff also relies on part of his case with respect to Ground 4, namely the allegation that the First Defendant failed to give him prior notice of particular adverse findings.[25]

17. The second step in the test is identification of a "logical connection", that is, how the existence of these matters might have caused a deviation from inquiring into, and deciding, the matters the subject of the TOR on their merits. The Plaintiff identifies this logical connection as concern for the potential influence of these matters to the formation of Mr Sofronoff's view of the Plaintiff's character (particularly his "honesty, credibility and reliability") and the application of that view to the task of inquiring into and deciding matters the subject of the TOR.[26]

Communications with the media

18. The Plaintiff seeks to impugn the First Defendant's communications with journalists from *The Australian* newspaper, and particularly Ms Albrechtsen. The Plaintiff identifies that the First Defendant did not notify him of the fact or content of those communications.

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[20] Plaintiff's outline, [17]-[18].
[21] Plaintiff's outline, [17(a)] and [17(c)(i)].
[22] Plaintiff's outline, [17(c)(ii)].
[23] Plaintiff's outline, [17](c)(iii)].
[24] Plaintiff's outline, [17](c)(v)].
[25] Plaintiff's outline, [43]-[45].
[26] Plaintiff's outline, [17(b)] (with respect to the matters outlined in [17(a)]) and [46].

19. It is submitted that the Plaintiff has not established that these communications might reasonably raise an apprehension of bias, on the part of the First Defendant, in the mind of a fair-minded observer.

20. The statutory scheme emphasises the importance of the public nature of any hearings of the First Defendant, and the desirability that the contents of documents both lodged with, or received in evidence, by the First Defendant be made available to the public, which includes journalists who are covering the inquiry.[27]

21. At the commencement of the public hearings of the inquiry, the First Defendant made remarks about the work of journalists covering the inquiry, and the involvement of the news media in assisting the inquiry to accomplish one of its aims.[28] During the course of those hearings, the First Defendant publicly communicated that he and his Counsel Assisting had "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".[29]

22. A statistical analysis of the First Defendant's communications with journalists requires further context to determine its significance and inform an assessment of whether those communications might reasonably cause a fair-minded observer to form the relevant apprehension.[30]

23. Here, the Plaintiff identifies that Mr Sofronoff made 65 telephone calls to journalists between a date range in 2023, of which 55 were to journalists associated with *The Australian*, including 33 to Ms Albrechtsen. However, included in those figures were 22 calls to Mr Hedley Thomas. Mr Thomas had indicated to Mr Sofronoff that he would not be reporting on the inquiry,[31] and there is no evidence of the content of their telephone communications. That leaves 33 calls to Ms Albrechtsen (totalling, according to the Plaintiff, 3 hours 36 minutes) and 10 calls to other journalists (totalling 1 hour 24 minutes). The content of those communications is not known.

24. It is apparent from the content of the SMS communications between Mr Sofronoff and Ms Albrechtsen that for many of those communications, Mr Sofronoff was responding to requests for information from Ms Albrechtsen.

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[27] *Inquiries Act 1991* (ACT), s 21.
[28] Transcript of hearings, 8 May 2023, P2 l20-26 (Court Book, Part ~~A~~B, ~~3580~~47).
[29] Transcript of hearings, 10 May 2023, P279 l26-32 (Court Book, Part ~~A~~B, ~~3857~~324).
[30] See, for example, in a judicial context with respect to the issue of pre-judgment: *ALA15 v Minister for Immigration and Border Protection* [2016] FCAFC 30, [38].
[31] Affidavit of Ian Alexander Meagher, sworn 17 November 2023, Exhibit IAM2, 199 (Court Book, Part A, 1403).

25. The tone of Ms Albrechtsen's articles, and any views which she may have held about the Plaintiff, is of little to no relevance with respect to the First Defendant's views, or the process by which he formulated his reasoning or his conclusions as expressed in the Final Report.

26. A fair-minded observer would be aware of the potential role of the media in reporting, and disseminating information, during an inquiry. They would also be aware that, generally, communications would occur to facilitate that role. In this case, the First Defendant publicly expressed that such communications were occurring. A fair-minded observer would have no expectation that specific communications would be disclosed, nor would the fact that they were occurring give rise to a possibility of bias in the observer's mind.

27. Even if it is accepted, as contended by the Plaintiff, that such communications were with a journalist or journalists who favoured a particular point of view, a fair-minded observer would be aware that those were the views of that journalist. There is an insufficient logical connection between the First Defendant communicating with a journalist expressing such views in their work, and the potential for that journalist's views to cause the First Defendant to form similar views and for this to then, in turn, influence his work.

28. A fair-minded observer would be aware that the First Defendant would engage in careful and critical review of media articles or reporting with respect to the inquiry, from a variety of media outlets. The fair-minded observer would also be aware that the reason for the First Defendant reviewing media could include maintaining an awareness of the accuracy of reporting on the inquiry, and remaining informed as to the extent to which the inquiry was achieving its purpose to inform the public of its progress and the issues into which it was inquiring. It could also include ensuring that reporting of the inquiry or its public hearings was not being undertaken in a way which could discourage persons from coming forward and providing information to the inquiry, or from cooperating with the inquiry's processes.

29. Particularly in this context, a fair-minded observer would also be aware that the First Defendant wrote to the Editor-in-Chief of *The Australian* newspaper about an article written about the Plaintiff. In that letter, the First Defendant raised the potential for the publication of the photograph of the Plaintiff, which accompanied the article, to create unwillingness in witnesses to cooperate with the inquiry and therefore "interfer[e] with the conduct of [the] inquiry".[32] The First Defendant also made public comment about the same issue in the public hearings.[33] He

[32] Affidavit of Ian Alexander Meagher, sworn 17 November 2023, Exhibit IAM4, 157-159 (Court Book, Part A, 2850-2852).
[33] Transcript of hearings, 22 May 2023, P680 l5-33 (Court Book, Part ~~A~~B, ~~4259~~726).

made public comment with respect to articles critical of other witnesses, for example, police witnesses and the Victims of Crime Commissioner.[34]

30. A fair-minded observer would recognise that the First Defendant's public statements during the hearings were capable of demonstrating that the First Defendant's interactions with the media were for the above purposes, and that he acted consistently with this to ensure those purposes were fulfilled. This was so regardless of the witnesses to which any issue related, or of the lines of inquiry or preliminary views he was pursuing or forming at those times.

31. The Plaintiff also raises the provision of the report to Ms Albrechtsen. The provision of the report is consistent with the above purposes (in [28]), and with Mr Sofronoff's explanation for the provision of the report to her (and, later, to Ms Byrne, also a journalist) in his letter to the Chief Minister and Attorney-General of the ACT.[35] A fair-minded observer would be aware of the practice, particularly in the context of a government or statutory body, of the provision of material under embargo for the purposes of ensuring accuracy of reporting. Mr Sofronoff's provision of the report to Ms Albrechtsen and Ms Byrne was consistent with previous communications with them, where they requested materials and he provided them, or arranged for their provision, if he considered it appropriate.

32. The Plaintiff also raises the inclusion in the Report of a reference to one article published by Ms Albrechtsen, and one published by another journalist writing for *The Australian*. Firstly, those references are included as an illustration of an example of a particular type of case the subject of the paragraph in which they are cited.[36] They are not used as a basis upon which the First Defendant has informed his understanding of the exercise of the prosecutorial discretion, which issue, in any event, the First Defendant:

    (a) "respectfully agree[d]" with Mr Drumgold's submission relating to a decision to prosecute, and stated "the application of which by Mr Drumgold in this case has not been questioned";[37] and

    (b) found that "it was right to file the indictment in the case".[38]

33. Secondly, they are just two references in the context of the Report, in which other articles by other journalists are cited throughout.[39]

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[34] Transcript of hearings, 22 May 2023, P682 l16-30 (Court Book, Part ~~A~~B, ~~4261~~728).
[35] Affidavit of Ian Alexander Meagher, sworn 17 November 2023, Exhibit IAM4, 12-14 (Court Book, Part A, 2705-2707).
[36] Report, [129] (Court Book, Part A, 385).
[37] Report, [124]-[125] (Court Book, Part A, 384).
[38] Report, [219] (Court Book, Part A, 406).
[39] See, for example: Report, citations to [420], [430], and [431] (Court Book, Part A, 452, 454).

34. None of the above matters, raised by the Plaintiff, provide a sufficiently cogent basis for a finding of apprehended bias on the part of the First Respondent.

35. It is unclear how Ms Albrechtsen's views on the Plaintiff, even if known to the First Defendant, would likely have any influence on the First Defendant's assessment of the Plaintiff's character, or on the First Defendant's formulation of his conclusions as expressed in the Final Report. The opinion of one journalist was unlikely to have had any such influence in light of the more probative and relevant evidence gathered by the First Defendant, which was specifically identified and evaluated throughout the course of the inquiry and in the formulation of the findings and conclusions in the Final Report.

36. Even if the First Defendant communicated more frequently with Ms Albrechtsen than other journalists, that is consistent with her more frequent requests for information, and is insufficient to establish a logical connection with the First Defendant formulating his findings and conclusions with respect to the Plaintiff with regard to anything other than their merits. The additional matters outlined by the Plaintiff do not alter that position.

37. The circumstances are insufficient to conclude that a fair-minded observer could reasonably consider, from the First Defendant's conduct, that he would deviate from formulating his findings and conclusions other than on their legal and factual merits.

Extension to the Terms of Reference

38. The original TOR expressly required the First Defendant to inquire into the Plaintiff's actions with respect to his decisions to commence, continue and discontinue the criminal proceedings against Mr Bruce Lehrmann. The TOR also required inquiry into "any matter reasonably incidental" to the other matters listed.

39. The letter sent by the First Defendant which requested an amendment to the TOR stated that although, in his view, an inquiry into the Director of Public Prosecutions' conduct both before as well as during the trial was covered by the existing TOR, "the contrary [wa]s arguable". The letter stated that an amendment to the TOR was therefore recommended "out of an abundance of caution" and "so that there can be no doubt that those matters are caught".[40]

40. Although framed broadly, the TOR are necessarily developed prior to the establishment of an inquiry, and may require refinement or clarification from time to time throughout an inquiry. A fair-minded observer would be aware of this, and also that it is not unusual for an inquiry, as its investigation progresses, to identify particular lines of inquiry which are relevant to the

[40] Affidavit of Ian Alexander Meagher, sworn 17 November 2023, Exhibit IAM2, 8-9 (Court Book, Part A, 1212-1213).

issues which have been included in its TOR, but which the phrasing or scope of the TOR might unnecessarily or intentionally restrict because of their early stage of creation.

41. This circumstance does not give rise to an apprehension of bias on the part of the First Defendant.

Treatment of the Plaintiff during the inquiry

42. With the exception of one term,[41] the TOR related entirely to the actions of either police officers or the Director of Public Prosecutions. This was the case even prior to the TOR being amended. The Plaintiff's actions were therefore of central and fundamental significance to the work of the First Defendant, and were both a necessary and proper focus of the inquiry.

43. A fair-minded observer would know this and would expect, given the TOR, that a substantial part of the inquiry, including the public hearings and the evidence, would be taken up by either police witnesses or the Plaintiff. It was therefore unremarkable that the Plaintiff was called as the first witness, nor that his evidence occupied 5 of the 13 days of oral hearings. In comparison, Detective Superintendent Moller's oral evidence occupied 3 days of the oral hearings.

44. Any cross-examination or interruption of the Plaintiff by the First Defendant must be considered in light of the observations set out in *R v Carter; Ex parte Gray*[42] at [13] above. A fair-minded observer would be aware of the First Defendant's task of inquiring and reporting, and the difference of that position with that of a judge's task. To the extent relevant in the current circumstances, they would "not be quick to suspect bias" in circumstances where a decision-maker intervened in cross-examination of witnesses in a robust way, or to an extent in excess of that expected of a judicial officer.

45. The Plaintiff had made serious allegations against police, and which formed the basis for the establishment of the inquiry. In accordance with the TOR, he was himself the subject of specific lines of inquiry as to his own role and conduct. Issues involving the Plaintiff and other witnesses (for example, Ms Lisa Wilkinson) arose during the course of the inquiry, which required a number of legal representatives to be given an opportunity to examine the Plaintiff.

46. It was both necessary and unsurprising that the Plaintiff's evidence be the subject of questioning, testing and examination. Given the number of witnesses and Counsel involved, including the extensive leading of evidence by the Plaintiff's own Counsel, it was likely to take some significant length of time. The First Defendant made comments that indicated that he was conscious of the length of time for which the Plaintiff had been examined, and had an exchange

[41] Relating to the actions of the Victims of Crime Commissioner.
[42] [1991] 14 Tas R 247, [31].

with the Plaintiff's Counsel in which he suggested an adjournment of the Plaintiff's evidence, and the interposing of other witnesses until a time convenient for the resumption of his examination.[43]

47. The First Defendant also upheld objections by the Plaintiff's Counsel on a number of occasions, including with respect to the examination of police witnesses, and sometimes directed that such examination occur in the way suggested by the Plaintiff's Counsel.[44]

48. The First Defendant's conduct demonstrated a balance between competing factors, including those above, and including the need to properly inquire and report in the available timeframe. The Plaintiff has not identified conduct of the First Defendant sufficient for a fair-minded observer to reasonably consider that the First Defendant conducted the inquiry or formulated findings other than on the relevant legal and factual merits.

Other issues

49. With respect to other issues raised by the Plaintiff under this ground, namely: the omission of documents; the First Defendant's proposed attendance at an event which did not eventuate; and the alleged lack of notice for proposed adverse findings; the Plaintiff has not sufficiently explained, or established, how those issues have the necessary logical connection, or could reasonably raise an apprehension of bias in a fair-minded observer, even taken cumulatively with the other issues raised.

Disposition and relief

50. The Fourth Defendant submits that the Plaintiff has not, by reference to the conduct particularised, established that such conduct might reasonably raise an apprehension of bias on the part of the First Defendant, in the mind of a fair-minded observer.

51. The Plaintiff seeks relief in the form of declarations that the Report is, or alternatively "the parts of the Report which relate to the Plaintiff" are: "invalid and of no effect"; or, alternatively, are "unlawful"; and are attended with the appearance of a reasonable apprehension of bias. The Plaintiff also seeks a declaration that he was denied natural justice by the First Defendant.

52. The Fourth Defendant submits that, subject to the Court's findings and determination with respect to each of the Plaintiff's grounds, the Court may consider it appropriate to confine any declaratory relief, to the extent possible, to operate as between the Plaintiff and the First Defendant.

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[43] Transcript of hearings, 12 May 2023, P517 l28-37 (Court Book, Part ~~A~~B, ~~4096~~563).
[44] See, for example: Transcript of hearings, 22 May 2023, P718 l47 – P722 l49 (Court Book, Part ~~A~~B, ~~4297-4301~~764-768); Transcript of hearings, 23 May 2023, P785 l19-33 (Court Book, Part ~~A~~B, ~~4364~~831); P785 l44 - P786 l13 (Court Book, Part ~~A~~B, ~~4364-4365~~831-832); P793 l2-46 (Court Book, Part ~~A~~B, ~~4372~~839).

53. [redacted] Ground 2 alleges that the First Defendant failed to ensure procedural fairness to the Plaintiff due to a reasonable apprehension of bias. With respect to Ground 2, [redacted] the Fourth Defendant submits that if the Plaintiff succeeds [redacted], the Court could consider making a declaration which specifically refers to the nature of any error, rather than a general reference to 'invalidity'.[45]

54. Ground 3 alleges that particular findings set out at Schedule A to the Plaintiff's application are legally unreasonable. Ground 4 alleges that the First Defendant failed to afford the Plaintiff a fair hearing in respect of the findings set out at Schedule B to the Plaintiff's application. If the Plaintiff succeeds on either of these grounds, the Fourth Defendant submits that the terms of any declaratory relief could be confined, to the extent possible, as between the Plaintiff and the First Defendant, and to the particular paragraphs of the Report to which any findings are directed.[46]

Justin Greggery KC
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6 February 2024

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Counsel for the Fourth Defendant
6 February 2024

[45] For example, in *Moodie v Racing Integrity Commissioner* [2017] VSC 693, Bell J referred to "a declaration that the Commissioner breached the rules of natural justice by failing to ensure that a reasonable apprehension of bias did not arise in respect of the findings that he made".
[46] See, for example: *Lawrie v Lawler* (2016) 168 NTR 1, [365]-[366], citing *Brinsmead v Commissioner, Tweed Shire Council Public Inquiry* (2007) 69 NSWLR 438.