SUPREME COURT
OF THE A.C.T.
- 7 FEB 2024
LODGED

In the Supreme Court of the Australian Capital Territory

No SC 347 of 2023

Neville Shane Drumgold
Plaintiff

Board of Inquiry – Criminal Justice System
First Defendant

~~Attorney-General of the Australian Capital Territory~~
~~Second Defendant~~

Australian Capital Territory
Third Defendant

Michael Chew, Scott Moller, Marcus Boorman, Robert Rose, Trent Madders and Emma Frizzell
Fourth Defendant

THIRD DEFENDANT'S WRITTEN OPENING SUBMISSIONS

(filed pursuant to Order 9 made on 28 September 2023)

Filed for the **Third Defendant** by:
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A. Introduction and overview

1. By way of Amended Originating **Application** dated 21 September 2023, Mr Neville Shane Drumgold (**the Plaintiff**) seeks judicial review of the "Final Report of the Board of Inquiry into the Criminal Justice System" dated 31 July 2023 (**the Report**). The Board of **Inquiry** was constituted by the Honourable Mr Walter Sofronoff KC (**the First Defendant**).

2. The Application raises four grounds of review. The Plaintiff has provided **Particulars** of those grounds, most recently on 2 February 2024:

[redacted]

   (c) the First Defendant failed to accord the Plaintiff natural justice in that Mr Sofronoff's conduct gave rise to a reasonable apprehension of bias (**Ground 2**);

   (d) eight specified findings in the Report are legally unreasonable (**Ground 3**); and

   (e) the First Defendant failed to accord the Plaintiff natural justice by failing to provide the Plaintiff with a fair hearing in respect of three specified findings (**Ground 4**).[2]

3. The Plaintiff seeks:

   (a) declarations that the Report, or alternatively the parts of the Report which relate to the Plaintiff, are:

      (i) invalid and of no effect;

      (ii) alternatively, unlawful; and

      (iii) attended with the appearance of a reasonable apprehension of bias; and

   (b) a declaration that the Plaintiff was denied natural justice by the First Defendant; and

   (c) costs.

4. On 21 September 2023, Mr Sofronoff, as the First Defendant, filed a Notice of Intention to Respond in this proceeding. The First Defendant has provided discovery, filed evidence,

[redacted]

[2] Though Schedule B to the Application contains only two findings which are pressed by the Plaintiff (at [2] and [3]), a third finding has appeared in multiple iterations of the Plaintiff's particulars (see Particulars [5(c)]).

made objections to evidence, and filed submissions. The First Defendant has indicated that he is taking an active role in the proceeding only in relation to Ground 1, which alleges that he contravened s 17 of the *Inquiries Act*.

5. On 15 December 2023, the Fourth Defendant was granted leave to be joined to the proceeding. In seeking joinder, the Fourth Defendant indicated that their participation in the proceeding would be focused on "the form of relief to be granted should the plaintiff succeed in the proceeding, and, secondly, the scope of any findings underpinning that relief, which might affect the interests of the [Fourth Defendant]" (*Drumgold v Board of Inquiry – Criminal Justice System & Ors* [2023] ACTSC 394 at [23]).

6. The Third Defendant (**the Territory**) accepts it is a proper contradictor in this proceeding. The Territory's submissions address the Plaintiff's grounds of review and are directed to the nature and limits of judicial review, the relevant statutory schemes and whether the relief sought by the Plaintiff is available. These submissions also respond to the Plaintiff's opening written submissions dated 30 January 2024 (**POS**). For the reasons outlined in these submissions, the Territory submits the Application should be dismissed.

B. Background to the Inquiry and the *Inquiries Act*

Establishment of the Inquiry

7. On 21 December 2022, the **Chief Minister** of the Territory announced he would establish a Board of Inquiry in connection with *R v Lehrmann*.[3]

8. On 1 February 2023, Mr Sofronoff was appointed as the Board of Inquiry pursuant to the *Inquiries (Board of Inquiry—Criminal Justice System) Appointment 2023 (**Notifiable Instrument NI2023-49**)* which contained Terms of Reference for the Inquiry in Schedule 1.[4] On 28 April 2023, the Terms of Reference were amended by way of the *Inquiries (Board of Inquiry—Criminal Justice System) Amendment Appointment 2023 (**Notifiable Instrument NI2023–232**)* by the Territory following a *request* by Mr Sofronoff (*contra* POS [7]).[5]

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[3] Affidavit of Neville Shane Drumgold affirmed on 17 November 2023 (**First Drumgold Affidavit**) at [10].

[4] First Drumgold Affidavit at [11], Exhibit NSD 1, pp 2 – 3.

[5] Report, Appendix A – Terms of Reference, fn 1; Affidavit of Ian Alexander Meagher sworn on 17 November 2023, Exhibit IAM2, p 8.

9. The preamble to the Terms of Reference contained in the Notifiable Instruments describes the purpose of the Inquiry in these terms:

> *A. The ACT Government acknowledges the need for public confidence in the criminal justice system in the Australian Capital Territory.*
>
> *B. Recent public reporting and commentary in relation to the case of R v Lehrmann and in relation to a letter sent by the ACT Director of Public Prosecutions to the Chief Police Officer, ACT Policing dated 1 November 2022 raise issues that may have wider implications for the prosecution of criminal matters in the Territory.*
>
> *C. The ACT Government is concerned to ensure that:*
>
> > *a. the ACT's framework for progressing criminal investigations and prosecutions is robust, fair and respects the rights of those involved; and*
> >
> > *b. the ACT's criminal justice entities work effectively together, and appropriately within their respective statutory frameworks.*

10. The final Terms of Reference essentially required the Inquiry to inquire into the conduct of police officers, the Director of Public Prosecutions, and the Victims of Crime Commissioner in connection with the matter of *R v Lehrmann*, and to provide a report to the Chief Minister by 31 July 2023.[6]

11. The Inquiry was established pursuant to the *Inquiries Act*. There was no other source of its functions or powers.

12. Pursuant to s 5 of the *Inquiries Act*, the Executive of the Territory may "appoint 1 or more people as a board of inquiry to inquire into a matter stated in the instrument of appointment". That person or those people are then the member(s) of the board of inquiry, and a sole member is automatically designated the Chairperson of an inquiry (see Dictionary).

13. Section 7(2) of the *Inquiries Act* provides the member (here Mr Sofronoff) holds office "on the terms and conditions in relation to matters not provided for by this Act as are determined in writing by the Executive". Pursuant to s 9, "[a] member ceases to hold office as a member when the board's report of its inquiry has been submitted to the Chief Minister in accordance with section 14".

14. Section 16(1) provides that "[a] member has, in the exercise of any function as a member in relation to an inquiry, the same protection and immunity as a judge of the Supreme Court in proceedings in that court".

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[6] See Notifiable Instrument NI2023–232, Schedule 1.

15. A board has power to appoint lawyers to assist it (s 15). A lawyer assisting the board may, so far as the board considers appropriate, examine or cross-examine a witness on any matter that the board considers relevant to its inquiry (s 25(a)). There were three barristers appointed to the role of Counsel Assisting the Inquiry. A number of Territory public servants were appointed to act as the Inquiry's secretariat.[7]

Functions and powers of a board of inquiry

16. The *Inquiries Act* confers broad powers on the members of a board of inquiry, several of which are of particular relevance to the Plaintiff's grounds of review. In summary:

(a) section 13 provides that "[e]xcept as otherwise provided by this Act, an inquiry must be conducted in such manner as the board determines";

(b) section 23 provides "[e]xcept as otherwise provided by this Act, the procedure at a hearing may be decided by the board";

(c) section 18(a) requires the board to "comply with the rules of natural justice". This reflects general common law principles providing a right to be heard and respond to potential adverse findings and the principles applicable to actual and apprehended bias: *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ);

(d) section 18(b) provides the board is "not bound by the rules of evidence but may inform itself of anything in the way it considers appropriate". However, this does not mean the rules of evidence should be ignored. Findings of a body such as an inquiry must be based on "some material that tends logically to show the existence of facts consistent with the finding, and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory": *Mahon v Air New Zealand* [1984] AC 808 at 821;

(e) section 18(c) provides that in conducting an inquiry, a board "may do whatever it considers necessary or convenient for the fair and prompt conduct of the inquiry". In this respect, courts have acknowledged that similar inquiries may take "a more active, interventionary and robust role in ascertaining the facts and a less constrained role in reaching conclusions than applies in court proceedings": *Keating v Morris* [2005] QSC 243, [46] (Moynihan J); and

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[7] Affidavit of Walter Sofronoff deposed on 12 December 2023 (**Sofronoff Affidavit**) at [46].

(f) section 21 provides that the board may hold hearings, which are required to be held in public unless there are reasons such as confidentiality that require a private hearing, which are themselves subject to the considerations set out in s 21(4) directed to making the evidence "available to the public and to all people present at the hearing".

17. Section 17, set out fully at [55] below, creates an offence relating to the disclosure of information or documents by, amongst others, members of a board.

18. A board's powers, while broad, are not unlimited. The exercise of the discretionary powers such as those of a board must be informed by the subject matter, scope and purpose of the *Inquiries Act*.[8] As Kitto J said in *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189:

> It is a general principle of law, applied many times in this Court and not questioned by anyone in the present case, that a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself: *Sharp v. Wakefield* (1891) AC 173, at p 179.

Conduct of the Inquiry

19. The Inquiry conducted its work between February and July 2023. The Inquiry used the offices in a Territory Government office building and a hearing room located at the Territory's Civil and Administrative Tribunal.[9]

20. The Inquiry exercised its powers including by way of:

(a) publishing a "Media Protocols Guideline" on 17 February 2023;[10]

(b) issuing practice guidelines setting out how the Inquiry would obtain, receive, and treat information provided to it; representation at the inquiry; and the conduct of the inquiry on 24 February and 25 May 2023;[11]

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[8] See *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 504 (Dixon J); *R v Australian Broadcasting Tribunal; Ex parte 2 HD Pty Ltd* (1979) 144 CLR 45, 49 (Stephen, Mason, Murphy, Aickin and Wilson JJ); *Wotton v State of Queensland* (2012) 246 CLR 1, 9 [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[9] Sofronoff Affidavit at [47].

[10] Exhibit IAM4, p 1.

[11] These were "Practice Guideline 01/2023; Communication, Public Hearings, Leave to Appear, Witness Statements, Subpoenas, Confidentiality and Other Matters", published on 24 February 2023; and "Practice Guideline 02/2023; Procedure: Cross-Examination of Witnesses", published on 25 May 2023. See Exhibit IAM4, p 3-10. See also Sofronoff Affidavit at [56].

(c) issuing subpoenas pursuant to section 26(1) of the *Inquiries Act* to gather documents and to receive written statements. It appears this primarily occurred in March 2023;[12]

(d) conducting interviews and private hearings pursuant to sections 21 to 26(1) of the *Inquiries Act*. For example, the Plaintiff attended a "meet and greet" session with the Inquiry on 14 February 2023;[13]

(e) making 27 non-publication orders (many of which were subsequently vacated), between 15 February and 30 July 2023;

(f) requiring witnesses to attend hearings of the Inquiry;

(g) conducting 13 days of public hearings between 8 May and 1 June 2023;[14] and

(h) issuing notices of potential adverse findings in June and July 2023.[15]

21. The public hearings were lived-streamed and remain available at "https://www.cjsinquiry.act.gov.au/public-hearings/livestream". Transcripts, redacted copies of the exhibits from the hearings, and video recordings of the hearings were and remain published on the Board of Inquiry's website at "https://www.cjsinquiry.act.gov.au/public-hearings".

Media Protocols Guideline

22. The Media Protocols Guideline states at [13] that "[c]ontact with witnesses, legal representatives or members of the public will not be facilitated by the Inquiry."

23. The Media Protocols Guideline is silent on the Inquiry's engagement with the media, other than to record at [14] "[f]or media enquiries, please contact BOI.Information@inquiry.gov.act.au". No formal media unit was established by the Inquiry to support the inquiry.

24. The Media Protocols Guideline is silent on the circumstances in which Mr Sofronoff, Counsel Assisting or representatives of the Inquiry would respond to unsolicited media inquiries, who would provide information to the media, when briefings to media representatives would occur

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[12] See, for example, Report, Appendix C-4, at [29], which refers to the Plaintiff receiving Subpoena Number 2023/S/0009 from the Inquiry on 14 March 2023.

[13] First Drumgold Affidavit at [17].

[14] See Court Book, Part B, Inquiry Transcripts.

[15] See Report, Appendix C.

outside of the public hearings, and whether any records of the briefings would be provided to the Territory or the parties. In his affidavit in this proceeding, Mr Sofronoff states that he informed the Inquiry Secretariat's Executive Director that he would "generally make myself available to journalists to respond to queries",[16] but that "whether they wanted my assistance was entirely a matter for them. I did not seek out any of them".[17] Mr Sofronoff states that he instructed his "counsel assisting to give whatever assistance they thought fit to journalists to ensure that they had a clear understanding of the work of the inquiry".[18]

25. On the third day of public hearings, 10 May 2023, in the context of some media reporting considered to be objectionable, Mr Sofronoff made comments about media reporting on the Inquiry, and disclosed that he and Counsel Assisting had engaged with journalists. The terms of those comments are set out at [71] of the Sofronoff Affidavit.

Plaintiff's participation in the Inquiry

26. The Plaintiff describes his participation in the Inquiry in the First Drumgold Affidavit at [15] – [21]. The Plaintiff gave oral evidence to the Inquiry over five days between 8 and 12 May 2023.[19] In the First Drumgold Affidavit, the Plaintiff indicates that he became "significantly medically unwell" on 10 May but decided that he wished to "push on" and continue his evidence until mid-afternoon on 12 May (at [25]-[26]).

27. On 13 May 2023, the Plaintiff received a medical certificate from his treating doctor and was given medical leave, initially until 13 June 2023 (at [27]). He states that he was advised by his treating specialist that "it would be detrimental to my current state of health to be subject to the ongoing pressures of giving evidence" (at [29]).

28. On 31 May 2023, he states that he was informed that the Inquiry "had decided that it did not require me to attend to give any further evidence" (at [31]). As discussed further below, these events are particularly relevant to the Plaintiff's claim in Ground 4 to have been denied a fair hearing.

29. Section 26A(1) of the *Inquiries Act* provides that "[t]he 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)".

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[16] Sofronoff Affidavit at [48].

[17] Sofronoff Affidavit at [50].

[18] Sofronoff Affidavit at [55].

[19] See Court Book, Part B, Inquiry Transcripts, at B3-B7.

30. The Plaintiff, via his lawyers, received Notices of Proposed Adverse Comments from the Inquiry on 9 June 2023 (**First Notice**) and 9 July 2023 (**Second Notice**). He states that he provided responses to these notices on 26 June 2023, 29 June 2023, 13 July 2023 and 21 July 2023 (First Drumgold Affidavit at [32]-[40]).

On completion of the Inquiry

31. It appears to be common ground in this proceeding that Mr Sofronoff provided drafts of the Report to Ms Janet Albrechtsen on 28 July 2023 and 30 July 2023, and provided copies of the Report to Ms Albrechtsen on 31 July 2023, and to Ms Elizabeth Byrne on 2 August 2023. Ms Albrechtsen is an opinion columnist with *The Australian* newspaper. Ms Byrne is a journalist at the Australian Broadcasting Corporation (**ABC**).

32. Pursuant to s 14 of the *Inquiries Act*, after completing an inquiry a board must prepare a report of the inquiry and submit the report to Chief Minister.

33. Mr Sofronoff delivered the Report to the Chief Minister around lunchtime on 31 July 2023.[20] A copy of the Report is before the Court in this proceeding in Exhibit NSD3. As acknowledged at Report [21], the Report makes "several serious findings of misconduct on the part of [the Plaintiff]".

34. Section 14(3) then provides that "[w]hen submitting a report to the Chief Minister, a board must commit any documents and things then in its possession to the custody of the Chief Minister for safekeeping". Properly construed, "documents and things then in its possession" in s 14(3) must mean "documents and things related to the board of inquiry". The *Inquiries Act* contemplates that members of a board of inquiry will not retain possession of documents and things related to the inquiry after submission of a report.

35. The Territory Executive did not publicly release the Report until Monday 7 August 2023.

C. Plaintiff's Application and the Court's jurisdiction

36. The Plaintiff's Application is not framed by reference to the *Administrative Decisions (Judicial Review) Act 1989* (ACT).[21] The Originating Application seeks "prerogative and other relief", which is now limited to the declarations summarised above and costs.

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[20] See Exhibit IAM2 at p 147, where Mr Sofronoff indicated at 2:12pm on 31 July 2023 that the Report had been delivered.

[21] Pursuant to schedule 1, column 1, item 11 of the *Judicial Review Act*, any decision under the *Inquiries Act* is a decision to which the *Judicial Review Act* does not apply (see Dictionary ***decision to which this Act applies***).

37. At POS at [8], the Plaintiff says he seeks declaratory relief pursuant to s 20 of the ***Supreme Court Act*** *1933* (ACT). Section 20(1)(a) relevantly provides that this Court has "all original and appellate jurisdiction that is necessary to administer justice in the Territory".

38. Reference may also be had to ss 25 and 34B of the *Supreme Court Act*. Section 34B enables the Court to grant prerogative and other relief by way of prerogative orders "in the nature of, and to the same effect as" the abolished common law prerogative writs.

39. Specifically, proceedings in this Court are governed by the *Court Procedures* ***Rules*** *2006* (ACT), which are made under the *Court Procedures Act 2004* (ACT). Rule 3553 of the Rules purports to abolish the common law prerogative writs by providing "[t]he prerogative writs of mandamus, prohibition and certiorari are no longer to be issued by the Supreme Court". Rule 3554, however, makes provision for the Court to grant relief by making orders under the Rules "in the nature of, and to the same effect as, the relief that would have been available before the commencement of these rules". This Court has confirmed that this conversion of "the mechanism by which the orders are made" is a procedural, rather than substantive, matter.[22]

40. In circumstances where the only prerogative relief now sought by the Plaintiff consists of declarations, the Territory does not apprehend that these provisions will make any practical difference to this proceeding. Rule 2900 of the Rules is express that a "proceeding is not open to objection on the ground that the only relief sought is a declaratory order" and that the Court "may make binding declarations of right, whether or not any consequential relief is claimed".

Declaratory relief

41. POS [206] indicates the Plaintiff's interest in obtaining the declarations sought is to vindicate his reputation. The Territory accepts that the declarations sought could serve that purpose, and that the Plaintiff can properly bring the proceeding.

42. Further questions arise, however, as to the form of the declarations sought, and the effect they would have if they were granted. It is convenient to address the Territory's concerns about the nature and scope of the declaratory relief sought at the outset before addressing each of the Grounds.

[redacted]

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[22] *Faull v Commissioner for Social Housing for the ACT* (2013) 277 FLR 61; [2013] ACTSC 121 at [94], [109] (Refshauge J).

[redacted]

45. *Second*, in circumstances where the Plaintiff does not seek any order in the nature of *certiorari* to quash the Report, it is unclear what would be the effect of the declaration sought in prayer 1 that the Report is "invalid and of no effect". Relief in the nature of *certiorari* is not available.[24]

[redacted]

47. It is unclear if the Plaintiff submits that as a result, Mr Sofronoff continues to hold office as the Inquiry (*Inquiries Act*, s 9, in circumstances where Mr Sofronoff has also not had his appointment terminated (s 11) or resigned – see ***Legislation Act 2001*** (ACT), s 210). There has been no suggestion, however, that the Plaintiff could or would seek a remitter.

48. *Third,* at least at a factual level, the Report was submitted to, and received by, the Chief Minister on 31 July 2023. Of itself, it has no legal effect. Section 8 of the Report[25] contains ten recommendations directed variously to the Territory, ACT Policing (which is a business unit of the Australian Federal Police responsible for providing policing services to the Territory community), "policy makers and subject matter experts" and the Territory's Office of the Director of Public Prosecutions. Those recommendations, however, do not bind or constrain any person.

[redacted]

[24] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 580-581 (Mason CJ, Dawson, Toohey and Gaudron JJ), 595 (Brennan J).

[25] Exhibit NSD3, pp 197-201.

49. The Plaintiff has made no submissions concerning what the status of those recommendations would be if the Court grants the declarations he seeks. The actions set out in the recommendations, however, could be taken regardless of the status of the Report.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

E. Ground 2 – apprehended bias

96. Ground 2 alleges that "[t]he First Defendant failed to accord the Plaintiff natural justice in that conduct of [Mr Sofronoff] gave rise to a reasonable apprehension of bias".

97. The Plaintiff addresses Ground 2 at POS [12]-[46], with a summary at POS [17].

98. The key points of the Plaintiff's Particulars and submissions on this ground articulate the following case:[54]

(a) *The Australian* and Ms Albrechtsen engaged in media reporting that cast the Plaintiff in a negative light, including by impugning the Plaintiff's character and credibility;

(b) Mr Sofronoff communicated extensively with journalists writing for *The Australian* and Ms Albrechtsen before, during and after the Inquiry, in a manner more favourable than that accorded to other media or journalists;

[redacted]

[54] Particulars at [3]; POS at [17].

(c) in the course of those communications, documents and information were improperly disclosed. This includes the fact that Mr Sofronoff provided the Report, and drafts of the Report, to Ms Albrechtsen prior to providing the Report to the Territory;

(d) the Plaintiff was not aware of these communications; and

(e) in making decisions on the Terms of Reference, Mr Sofronoff relied upon communications which had occurred with *The Australian* and Ms Albrechtsen, including matters which were not in evidence before the Inquiry.

99. It is alleged by the Plaintiff that Mr Sofronoff's assessment of the honesty, credibility and reliability of the Plaintiff was likely to have been, or might have been, influenced by these matters.[55]

100. It is further alleged by the Plaintiff (in POS [17(c)]) that a reasonable apprehension of bias arises from matters including: an "unusual interest" by Mr Sofronoff in the Plaintiff; the amendment of the Terms of Reference in relation to the Plaintiff at the instigation of Mr Sofronoff; differential treatment accorded to the Plaintiff during the Inquiry; the failure to refer to or annex to the Report written submissions of the Plaintiff dated 29 June 2023 and 13 July 2023; and Mr Sofronoff's agreement to be hosted by *The Australian* for a speaking engagement.

Applicable test and principles for establishing apprehended bias

101. The rule against bias is one element of natural justice. The law concerning apprehension of bias safeguards the interests of justice against situations where there is the realistic possibility that a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial or unprejudiced mind to the resolution of the question(s) in dispute.

102. The Territory agrees with the submission at POS [14] that the test to be applied in determining whether there is apprehended bias is that set out by the High Court in ***Ebner*** *v Official Trustee in Bankruptcy* (2000) 205 CLR 337. This test depends on whether there is a real rather than a remote possibility of bias: *Ebner* at [7]. The Ebner test is the same for judicial and administrative decision-makers but its content may often differ according to the type of decision-maker.[56]

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[55] Particulars at [3(b)(ii)].

[56] *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 460 (McHugh J) and at 480 (Kirby J); *Minister for Immigration and Multicultural Affairs v* ***Jia Legeng*** (2001) 205 CLR 507 at 564-565 [187] (Hayne J).

103. This was aptly summarised by Bell J in *Moodie v Racing Integrity Commissioner* [2017] VSC 693 at [44]:

> Someone with statutory power adversely to affect the interests (including the reputation) of individuals is required to ensure that justice is not only done but is also seen to be done. The power must be exercised in a manner that does not give rise to a reasonable apprehension of bias. *(footnote omitted)*

104. The Territory likewise accepts that application of the *Ebner* test in this proceeding requires the following three steps:[57]

(a) identification of the factor(s) which it is said might lead Mr Sofronoff to resolve the issues in the Inquiry's Terms of Reference otherwise that on their legal and factual merits;

(b) articulation of the logical connection between that factor / those factors and the apprehended deviation from deciding those issues on their merits; and

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

105. These steps fall to be applied in light of the legal, statutory and factual context for the Inquiry.[58]

106. The rule against bias "does not require the absence of any predisposition or inclination for or against an argument or conclusion".[59] Nor can bias be established from the mere fact that a decision-maker has reached a significant adverse view of a person about whom they are making a decision.[60] It is wrong to suggest that because adverse findings are made by a decision-maker, this is evidence of bias or apprehended bias.

107. The characteristics of the fair-minded lay observer are well-established. They are reasonable; not complacent, unduly sensitive or suspicious; assumed to have a broad knowledge of the material objective facts; assumed not to make snap judgments; aware of the strong

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[57] *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419; [2023] HCA 15 at [38] (Kiefel CJ and Gageler J).

[58] *Isbester v Knox City Council* (2015) 255 CLR 135 at [20] (Kiefel, Bell, Keane and Nettle JJ). See also POS [19].

[59] *Jia Legeng* at [71].

[60] *Bilgin v Minister for Immigration and Multicultural Affairs* (1997) 149 ALR 281 at 292 (Finkelstein J).

professional pressures on adjudicators to uphold traditions of integrity and impartiality; and are not assumed to have a detailed knowledge of the law.[61]

108. At least in a judicial context, issues of bias are ordinarily determined primarily by reference to what a judge has said, rather than considerations of manner or demeanour. That said, such considerations can, in an appropriate case, be relevant to the determination of an allegation of actual or apprehended bias.[62]

109. Further, statements by decision-makers that could give rise to an appearance of bias will not satisfy the test unless the Court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.[63]

What the Plaintiff must establish

110. In essence, the Plaintiff must demonstrate how and why Mr Sofronoff's association with *The Australian* and Ms Albrechtsen might be thought by the reasonable observer possibly to divert him from deciding the issues in the Inquiry on their merits.[64]

111. One premise of this argument is that reporting by *The Australian* and Ms Albrechtsen was persistently adverse to the Plaintiff (POS [17(a)(ii), (iv)]). Beyond the assertion at POS [24] that Exhibit NSD2 contains examples of such publications, the Plaintiff has not sought to make good this claim with specificity. The Territory notes that of the 77 items in Exhibit NSD2, twenty were published after Mr Sofronoff submitted the Report to the Chief Minister. The items also include letters to the editor from members of the public. Exhibit NSD2 does not purport to be a comprehensive record of reporting by *The Australian* relevant to the Plaintiff. Further, the fact that Ms Albrechtsen may have spoken to other sources for her columns who were critical of the Plaintiff could not establish bias on the part of Ms Albrechtsen, let alone Mr Sofronoff (*cf* POS [25]).

112. Further, it is necessary (though not sufficient) for the Plaintiff to establish some link between this reporting and Mr Sofronoff.

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61 *Johnson v Johnson* (2000) 201 CLR 488 at [12]-[14] (Gleeson CJ, Gaudron, McHugh Gummow and Hayne JJ), [53] (Kirby J); *Webb v R* (1994) 181 CLR 41 at 73; *Honda Australia Motorcycle v Johnstone* [2005] VSC 387 at [18]; *Pratten v R* [2021] NSWCCA 251 at [332] (Beech-Jones J).

62 *Davies v The Queen* [2018] VSCA 315 at [25] (Kaye, McLeish and T Forrest JJA).

63 *Winky Pop Pty Ltd & Anor v Hobsons Bay City Council* [2007] VSC 468 at [45] (Kaye J), quoting Sopinka J in *Old St Boniface Residents Inc v City of Winnepeg et al* (1999) 75 DLR (4th) 385, 408-09.

64 *Ebner* at [30].

113. It is uncontroversial that Mr Sofronoff and his Counsel Assisting communicated extensively with journalists during the Inquiry (POS [17(a)(iii)]). The propriety and permissibility of certain disclosures to journalists has been considered in relation to Ground 1 above.

114. For the purposes of Ground 2, it is also uncontroversial that the volume of communications with *The Australian* and Ms Albrechtsen was greater than with other media outlets and journalists, including because only Ms Albrechtsen received drafts of the Report[65] (POS [17(a)(vii)-(ix)]). At the directions hearing in this proceeding on 31 January 2024, the Plaintiff confirmed that he does not press any allegation that Mr Sofronoff and Ms Albrechtsen had an "inappropriate relationship" (see POS [28]). Rather, he relies merely on the evidence of the communications between them.

115. Mr Sofronoff has given evidence that the volume of these communications is because *The Australian* and Ms Albrechtsen were the most persistent in contacting him. He states that he did not refuse to talk to any journalist (see Sofronoff Affidavit at [52]-[54], [75], [77]). He states that he provided "embargoed" copies of the Report to Ms Albrechtsen and Ms Byrne because they "were the only journalists who made that request", rather than any favouritism (see Sofronoff Affidavit at [85]).

116. In May 2023, Mr Sofronoff in fact wrote to the editor of *The Australian* to express concern about coverage by that newspaper in relation to the Plaintiff which he considered improper (see Sofronoff Affidavit at [74] and Exhibits WS-5 to WS-7). Mr Sofronoff expressed concern that "the purpose of the publication was to humiliate Mr Drumgold" and that it was "incapable of serving" … any "proper purpose". He indicated that he thought the reporting could have consequences in circumstances where "witnesses are loathe to give evidence at a public inquiry" and the Inquiry was reliant on "actual willingness" and "genuine cooperation" from witnesses.

117. The Plaintiff must establish that the communications between Mr Sofronoff and *The Australian* and Ms Albrechtsen may reasonably have been perceived as diverting him from an impartial determination of the matters in the Terms of Reference, as opposed to, for example, being simply unwise, or imprudent, or in breach of s 17 of the *Inquiries Act*.

118. The Plaintiff further points to the fact that he was not advised of the existence or content of the communications Mr Sofronoff had with *The Australian* and Ms Albrechtsen

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[65] Though it does not appear to be correct that she received a copy of the Report before it was provided to the Chief Minister: Sofronoff Affidavit at [83], *contra* POS [37].

(POS [17(a)(v)]). This factor falls to be assessed in light of Mr Sofronoff's public comments at the Inquiry hearing on 10 May 2023 (extracted at [71] of the Sofronoff Affidavit).

119. Next, the Plaintiff points to Mr Sofronoff's agreement to speak at a function hosted by *The Australian* (POS [17(c)(v)]) on 25 August 2023. The event never went ahead.[66] In any case, the event had no specific connection to the Plaintiff or to any finding concerning him. It was to be an address to the Queensland Media Club entitled "Politics, journalism and social media v The presumption of innocence".[67]

120. Perhaps the most significant factor relied on by the Plaintiff is the allegation that Mr Sofronoff relied upon his communications with *The Australian* and Ms Albrechtsen in deciding the matters in the Terms of Reference (POS [17(a)(vi)]).

121. This submission is put very briefly by the Plaintiff in opening at POS [32]-[33] and will need to be made good. The Plaintiff submits at POS [33] that there is evidence Mr Sofronoff read some articles from *The Australian*. The footnote to this paragraph contains only transcript references at which Mr Sofronoff discussed the reporting from *The Australian* which he considered so objectionable that he wrote to the editor to express concern about it (see [116] above). It does not establish any reliance by Mr Sofronoff.

122. The Report contains references to articles by *The Australian* at [129], published in July 2023 as an illustrative example in relation to an entirely different criminal prosecution, and unrelated to the Plaintiff. There are references to another article by *The Australian* at Report [661]-[665] and [685] because it was factually relevant to the Freedom of Information (**FOI**) issues raised by the Inquiry's Terms of Reference. *The Guardian*, another publication, is referred to in the same passages (and at Report [45], [682], [690]) for the same reason. The Report also cites relevant reporting by the ABC,[68] the television programme *The Project,*[69] and *The Canberra Times*.[70] None of this material establishes any possibility of improper reliance by Mr Sofronoff.

123. Some factors relied upon by the Plaintiff do not relate directly to *The Australian* or Ms Albrechtsen. It is difficult to see how these factors, however, could give rise to a reasonable apprehension of bias.

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66 Exhibit IAM2, p 280.

67 First Drumgold Affidavit at [87(c)].

68 See Report fn 544, 545.

69 See Report [38], [424], [427], [437], [441], [447].

70 See Report fn 528.

124. *First,* the fact that the Terms of Reference related to *R v Lehrmann*, in which the Plaintiff was the prosecutor and had a central role (POS [17(a)(i)]), is a matter of context that of itself can give rise to no apprehension of bias.

125. *Second,* the fact that on 14 February 2023 Mr Sofronoff viewed the Plaintiff's Wikipedia page and sent a link to it to Mr Hedley Thomas (POS [17(c)(i)]), is unremarkable in circumstances where Mr Sofronoff had just been appointed to the Inquiry, in which the Plaintiff was necessarily to play a central role. That is particularly so in circumstances where Mr Sofronoff had a "meet and greet" with the Plaintiff on the same day (First Drumgold Affidavit, [17]).

126. *Third,* the extension of the terms of reference in relation to the Plaintiff in April 2023 (POS [17(c)(ii)]) is also unremarkable. The extension was sought before any public hearings of the Inquiry, and shortly after the receipt of written statements (the Plaintiff provided his statement to the Inquiry, for example, on 4 April 2023[71]). The reason for the amendment was explained by Mr Sofronoff as follows: "[t]he Board of Inquiry has now conducted 34 private hearings and issued 33 statement requests. Information obtained and statements received as part of those investigations have raised issues about the conduct of the prosecution by the Director of Public Prosecutions both before as well as during the trial".[72] The Plaintiff has not advanced any reason to doubt that explanation.

127. *Fourth,* the Plaintiff alleges that he was treated "differently" by Sofronoff and Counsel Assisting during the Inquiry (POS [17(c)(iii)]). The Plaintiff points to the fact that he was the first witness called, the length of his cross-examination, and the identity of his cross-examiner. These factors can themselves give rise to no apprehension of bias given the Terms of Reference and the factual context for the Inquiry. The Plaintiff further points to the "intensity" of his cross-examination, and to the manner of Mr Sofronoff during examinations. The Plaintiff will need to establish the specifics of these allegations, and their connection to a reasonable apprehension of bias in light of the authorities.

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[71] First Drumgold Affidavit at [19].

[72] Exhibit IAM2, p 8. See also the fact that the "amendments [were] intended to clarify the parameters of the inquiry and ensure that the Board of Inquiry [had] sufficient time to finalise the report" (Explanatory Statement to Notifiable Instrument NI2023-232).

128. In particular, in *Chen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 218, the Full Federal Court (Bromberg, Murphy and Markovic JJ) held at [50] that:

> The Tribunal's inquisitorial role may involve robust and forthright testing of a visa applicant's claims, and such testing will not of itself sustain a finding of apprehended bias: *SZRUI* at [24] (Flick J, with whom Allsop CJ agreed); and occasional displays of impatience and irritation or occasional sarcasm or rudeness on the part of the Tribunal do not generally establish disqualifying bias. Generally such behaviour simply forms part of the factual matrix in relation to which any question of apprehended bias is to be assessed, but in some cases such behaviour may show bias or give rise to a reasonable apprehension of bias: *SZRUI* at [91] (Robertson J with whom Allsop CJ agreed) citing *Sarbjit Singh v Minister for Immigration & Ethnic Affairs* [1996] FCA 902 at 10–11 (Lockhart J).

129. *Fifth,* the Plaintiff particularises the omission of two written submissions made by the Plaintiff to the Inquiry on 29 June 2023 and 13 July 2023 (POS [17(c)(iv)]). The 29 June submissions are at NSD1, p 32-38, while the 13 July submissions are at NSD1 p 39-44. The Territory notes that the Plaintiff has not produced the communications by which these submissions were provided to the Inquiry, and the Territory does not know if they were provided. In any case, the Plaintiff has not articulated how the failure to refer to or annex these submissions is indicative of apprehended bias by Mr Sofronoff.

130. *Finally,* POS [43]-[45] allege that a supposed failure to give the Plaintiff a fair hearing in respect of two findings is an additional matter that gives rise to apprehended bias. This matter does not appear in the summary at POS [17], or in the Plaintiff's Particulars. In any case, the same two findings are the subject of Ground 4 and are dealt with in that section below.

F. Ground 3 – legal unreasonableness

131. Ground 3 alleges that eight findings specified in Schedule A of the Application were legally unreasonable.

132. The Plaintiff addresses Ground 3 at POS [101]-[188].

133. In assessing a finding for legal unreasonableness, it is necessary for the Court to have regard to the material which was relied upon by the Inquiry in making that finding. For that reason, Part B of the Court Book contains all of the evidence before the Inquiry which is cited in the sections of the Report impugned by the Plaintiff. In the interests of reducing the volume of

material before the Court, the Court Book does not contain all of the other evidence which was before the Inquiry, as might be usual in other judicial review proceedings.

Applicable test and principles

134. Legal unreasonableness is a stringent and confined ground of review.[73] In assessing an allegation of unreasonableness, the question for the Court is whether the Inquiry could reasonably have come to the conclusions it did, or whether findings were outside the bounds reasonably open to the Inquiry.[74]

135. A finding may be unreasonable if it is irrational or illogical,[75] lacks an evident and intelligible justification, or is unsupported by evidence.[76] The Territory accepts the standard to be applied does not require the finding to be "so unreasonable that no reasonable person could have arrived at it" (see POS [105]).[77]

136. As with many judicial review grounds, however, it is essential that in assessing allegations of unreasonableness, the Court avoids a slide into impermissible merits review.[78]

Findings said to be legally unreasonable

Report [270] (POS [106]-[115])

137. The Plaintiff challenges the finding that, having read counselling notes for Ms Higgins, the Plaintiff's prosecutorial duty of disclosure "had been engaged" and that the Plaintiff's "failure to do anything was a breach of his duty as a prosecutor". The reasoning for this finding is set out at Report [227]-[270].

138. POS [115] sets out the reasons this finding is said to have been unreasonable.

139. As to POS [115(a)], the Inquiry found that there was no statutory prohibition upon police seeking and obtaining the notes with Ms Higgins' consent, and that the police *could have*

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[73] *Minister for Immigration and Border Protection v* ***SZVFW*** (2018) 92 ALJR 713 at [11] (Kiefel CJ), [52] (Gageler J), [135] (Edelman J).

[74] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 (FC) at [21]; *SZVFW* at [10], [82].

[75] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [131] (Crennan and Kiefel JJ), [78] (Heydon J).

[76] *Minister for Immigration and Citizenship v* ***Li*** (2013) 249 CLR 332 at [76] (Hayne, Kiefel and Bell JJ); *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [48] (Allsop CJ, Robertson and Mortimer JJ).

[77] *Li* at [68] (Hayne, Kiefel and Bell JJ).

[78] *BZD17 v Minister for Immigration and Border Protection* (2018) 263 FCR 292 (FC) at [38].

provided the notes to the Plaintiff in seeking his advice (Report [246]). That is not, however, what occurred. The Inquiry found that the notes came into the possession of the Office of the Director of Public Prosecutions (**ODPP**) by way of their inclusion in a brief of evidence which was prohibited because it was a disclosure "for the purpose of a preliminary proceeding" (Report [232]). It was following this prohibited disclosure that the Plaintiff read the notes (Report [238]).

140. Further, even if it was legitimate for the Plaintiff to read the counselling notes for the purpose of providing advice to the police, that does not render it unreasonable 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.

141. As to POS [115(b)-(c)], these sub-paragraphs assert that it was unreasonable for the Inquiry to find that the duty of disclosure was engaged, because the Plaintiff says that his knowledge of the counselling notes could not have conferred an unfair advantage over the defence.

142. Before the Inquiry, the Plaintiff accepted that the notes were relevant to the proceeding and were proper to include in the disclosure certificate. The Inquiry stated this was presumably because "they might have been relevant to Ms Higgins' credibility or might have put the defence on a train of inquiry" (Report [257]). The Plaintiff should not now be permitted to submit to the contrary. Report [260] elaborates on what the notes might have been capable of evidencing.

143. Contrary to POS [115(c)], the Inquiry did find that the Plaintiff's reading of the notes provided an evidential advantage: Report [261]-[262]. The fact that a particular advantage (which could arise from the course events in the dynamic environment of a criminal trial) is not "identified" is unsurprising. There is nothing irrational or illogical in the Inquiry's conclusion that an advantage existed.

Report [320] (POS [149]-[166])

144. The Plaintiff challenges a finding that his view that two documents prepared by the police were not disclosable because they did not meet the test for disclosure was "wrong and untenable". POS [162] confirms that the Plaintiff does not challenge the finding that his view was "wrong", only the finding that it was "untenable".

145. The Inquiry's reasoning for this finding is at Report [292]-[320], particularly [294]-[295].

146. The test for disclosure is properly set out at POS [158]-[160]. "Contemporary documents created by the police" can fall within these principles.[79] The NSW authority cited at POS [163] relates to discussions between police and ODPP officers, including discussions recorded in writing. The Inquiry found that the two documents did not fall into this category. Further, the written Territory Prosecution Policy required disclosure of material which "can be seen" "to be relevant **or possibly relevant** to an issue in the case" or "to raise or **possibly raise** a new issue".[80] The disclosure obligation therefore attaches to "material" generally.

147. The Inquiry found that the first document, prepared by DS Moller, was disclosable because it recorded Ms Higgins' disinclination to give police immediate access to the contents of her mobile phone. That was because it was "a factual statement that was capable of constituting a line of cross-examination relevant to Ms Higgins' credit" (Report [293]-[294]). POS [165] states that the Plaintiff "understands that there is no suggestion that her reluctance was otherwise not contained in the evidentiary material disclosed to the defence", but the Plaintiff has provided no support for that proposition.

148. The Inquiry found that the second document, prepared by DI Boorman, was a "detailed analysis" which "would, without a shadow of a doubt, have put the defence upon several trains of inquiry". As noted above, the disclosure obligation therefore attaches to "material" generally (cf POS [164(a)]). Further, the Inquiry did not characterise it is an "expression of internal opinion" (cf POS [164(b)]).

Report [413], [415], [416] , [417] (POS [167]-[188]).

149. These three separate allegations of legal unreasonableness from Schedule A of the Application (items 3, 4 and 5) are dealt with somewhat together in the Plaintiff's submissions.

150. This finding relates to the same two documents prepared by DI Boorman and DS Moller as the previous finding challenged by the Plaintiff. The Plaintiff challenges findings that he acted improperly in respect of claims of client legal privilege over these documents. POS [170] confirms that the Plaintiff "accepts for the purpose of the present Application that legal professional privilege was not claimable over these documents".

151. *First,* the Inquiry found that the Plaintiff acted improperly in respect of his instructions to junior ODPP solicitors in respect of an affidavit about the documents. *Second,* the Inquiry found that the Plaintiff "deliberately advanced a false claim of legal professional privilege".

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[79] *R v Reardon (No 2)* [2004] NSWCCA 197 at [59]-[60] (Hodgson JA, Simpson J and Barr J agreeing).

[80] See Report [279], emphasis by the Inquiry.

Third, the Inquiry found that the Plaintiff misled the Court about the false claim of legal professional privilege, including through use of a junior ODPP solicitor's affidavit.

152. The Inquiry's reasoning for these findings is contained in the entire section at Report [271]-[419]. That section is lengthy and detailed and was the subject of extensive evidence before the Inquiry, including oral evidence from a significant number of witnesses. The findings also turn on the precise chronology of how these documents were dealt with and discussed, and the conduct of the Plaintiff at particular times. It is of particular importance in respect of these findings that the parties and the Court do not attempt to "re-run" the Inquiry.

153. For example, the factors identified at POS [171] may be reasons that the Plaintiff continues to think a view that client legal privilege could be claimed was "tenable", but it is not clear how they can establish that it was legally unreasonable for the Inquiry, having heard all of the evidence about the Plaintiff's conduct, to conclude that the Plaintiff in fact acted deliberately dishonestly.

154. Further, the POS do not grapple with at least the following evidence/ elements of the Inquiry's reasoning:

(a) the advice received by the ACT Police from AFP Legal in relation to the two documents, and the manner in which it was conveyed to the Plaintiff (eg. Report [300], [309]);

(b) the content of the documents themselves (eg. Report [304]);

(c) instances where findings were expressly based on the Plaintiff's own evidence to the Inquiry (eg. Report [385]-[387], [390]);

(d) inconsistencies identified in the Plaintiff's evidence (eg. Report [311], [358]-[359]);

(e) specific elements of the Plaintiff's evidence which were rejected by the Inquiry (eg. Report [355]-[356]);

(f) the Inquiry's express recognition that there was confusion concerning the disclosure certificates (eg. Report [325]-[329]);

(g) varying evidence from documents before, and witnesses to, the Inquiry concerning timing and nature of the Plaintiff's assertions of privilege (eg. Report [335]-[339], [372], [378], [395], [399]-[402]); and

(h) the Inquiry's specific engagement with the Plaintiff's submissions (eg. Report [413]-[417]).

155. Acceptance of the Plaintiff's allegations of legal unreasonableness on these issues would require the Court to grapple with each of these (and indeed, everything else said and referred to in the relevant section of the Report), not least due to the Plaintiff's claims that the Inquiry's findings were "mere speculation or conjecture" (POS [174(a)]), were merely "inferential" (POS [182]) or lacked an "intelligible foundation" (POS [188(b)]); that the narrative told by the Plaintiff was, in fact, "not false" (POS [181(a)]); and that certain matters were not put to witnesses (POS [183]).

Report [471], [477] (POS [116]-[129])

156. The Plaintiff challenges a finding in respect of a proofing note of a meeting between the Plaintiff, ODPP officers and Ms Lisa Wilkinson. The Inquiry found that the Plaintiff made statements to the Chief Justice of the Territory concerning this note which were "false", and that he "knowingly lied". That finding related to the Plaintiff's statements that the note was contemporaneous, in circumstances where the relevant part of the note had been added the day before, in terms set out by the Plaintiff that day (see POS [123]-[125]).

157. POS [128]-[129] indicates that the Plaintiff challenges only the finding that he "knowingly lied" to the Chief Justice, not that what he said was objectively wrong. The Plaintiff's position is that his statements were the product of a mistake. Further, the Plaintiff submits that the Inquiry's conclusion that the statement was a lie, rather than a mistake, was unreasonable because it was "nothing more than conjecture" and the mistake hypothesis was "equally open" (POS [129]).

158. The Inquiry's reasoning for this finding is at Report [437]-[477]. In making its finding, the Inquiry referred in the Report to the relevant documents, and to oral evidence at the Inquiry. At Report [472], the Inquiry rejected the submission that a "prudent and experienced barrister would behave in that way or make a mistake of this calibre", and that the Plaintiff "could not have forgotten that the material words in the note were words that he had written himself (choosing to do so in the third person) on the day before". The reasoning for the finding is further expounded at [473]-[477].

Report [482], [489], [494], [496] (POS [130]-[134])

159. The Plaintiff challenges findings by the Inquiry that he was under a duty to warn Ms Wilkinson not to make a speech in the form she proposed in the event that she received an

award for her reporting in relation to Ms Higgins. The Plaintiff submits that this finding was unreasonable both for seven reasons in POS [132], and because a warning was in fact given (POS [133]).

160. The Inquiry's reasoning for this finding is at Report [437]-[496].

161. At Report [442]-[446], the Inquiry recounted evidence from witnesses including the Plaintiff, who "accepted that he did not tell Ms Wilkinson not to give a speech or tell her not to use the particular words that she read to him". Report [453] refers to the fact that the Plaintiff's recollection five days after the conversation, which was ultimately included in the proofing note, "differed significantly from the recollections of Ms Wilkinson, Ms Smithies and Ms Jerome".

162. The subsequent findings in the Report were preceded by a finding that "[o]n any version of the conversation, Mr Drumgold's response to Ms Wilkinson was wholly inadequate" (Report [478]). At Report [480], the Inquiry expressly preferred the evidence of another witness to the Plaintiff. Such a finding is a quintessential function of a primary decision-maker who has the benefit of seeing and hearing from witnesses in person. Report [481] records concessions made by the Plaintiff in his oral evidence.

163. The Inquiry's basis for finding the Plaintiff owed a duty is set out at Report [485]-[489] and includes the citation of general principles from authorities and academic work (contra POS [132]). In any case, Report [491] records an acceptance by the Plaintiff that "in hindsight, probably' as a minister of justice he should have advised Ms Wilkinson not to give the speech".

Report [600] (POS [135]-[148])

164. The Plaintiff challenges the Inquiry's finding that four propositions he put to Senator Linda Reynolds during cross-examination had no basis and were unethical. The Plaintiff submits that this finding was unreasonable because there was a basis for each proposition (POS [145]-[148]).

165. The Inquiry's reasoning for this finding is at Report [570]-[600], particularly from Report [584] in relation to finding there was not a basis for the various propositions. That reasoning includes extracts from the Plaintiff's examination before the Inquiry on these questions. Report [590] then records that "[t]he written submissions on behalf of Mr Drumgold acknowledge that he fails to understand the difference between putting forward to

a witness an allegation of misconduct as a fact and asking a witness whether or not something is a fact".

166. It will be necessary for the Court to consider the matters at POS [145]-[148] and determine whether any of them disclose a basis for the propositions which it was legally unreasonable for the Inquiry not to find / accept.

G. Ground 4 – fair hearing

167. Ground 4 alleges that the Plaintiff was denied natural justice by the Inquiry in respect of two findings set out in Schedule B to the Application. The Particulars and POS add as a third finding the finding relating to the affidavit of a junior ODPP solicitor discussed at [151] above. This finding is not set out in Schedule B to the Application.

168. The Plaintiff addresses Ground 4 at POS [189]-[204].

Applicable test and principles concerning a fair hearing

169. It is a fundamental requirement of natural justice that a person must have a reasonable opportunity to know the case against him or her, and to make answer to that case.[81] Gleeson CJ described the concept as follows:[82]

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.

170. Section 18(a) of *Inquiries Act* required the Inquiry to "comply with the rules of natural justice", while s 18(b) provides that the Inquiry was not bound by the rules of evidence but could inform itself of anything in the way it considered appropriate.

171. In assessing the Plaintiff's allegation that he was denied a fair hearing, the following principles should be borne in mind:

(a) the onus of establishing a denial of procedural fairness lies on the Plaintiff;[83]

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[81] *Onus v Sealey* [2004] VSC 396 at [29] (Kaye J). See also *Obeid v Ipp* (2016) 338 ALR 234 at 250 [83] – 253 [99].

[82] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37] (Gleeson CJ).

[83] ***VAAD*** *v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 (Hill, Sundberg and Stone JJ) at [45].

(b) procedural fairness is concerned with procedures rather than with outcomes;[84]

(c) the Report is "not to be construed minutely and finely with an eye keenly attuned to the perception of error";[85]

(d) what must be demonstrated is practical unfairness or injustice to the Plaintiff, rather than some merely technical breach.[86] The Plaintiff bears the onus of establishing "a realistic possibility that the decision in fact made could have been different had the breach of the condition not occurred";[87]

(e) the principles of natural justice have a flexible quality, such that the statutory context of the *Inquiries Act* is the starting point for determining the content of the duty to accord procedural fairness, and the requirements of procedural fairness are to be "judged in relation to the statute under which the decision is made and upon the particular circumstances of the case";[88] and

(f) there will be no practical unfairness if the Plaintiff knew "what [he] was required to prove to the decision maker and was given the opportunity to do so", even if the Inquiry "without notice to [him] rejected what was put forward".[89]

Findings allegedly made without a fair hearing

Report at [413], [415] and [416] (POS [192]-[198])

172. As noted above, the Inquiry found that the Plaintiff acted improperly in respect of his instructions to junior ODPP solicitors in respect of an affidavit about the privilege status of the analysis documents authored by DI Boorman and DS Moller.

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[84] *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [55] (Gageler and Gordon JJ).

[85] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271–2 (Brennan CJ, Toohey, McHugh and Gummow JJ), quoting with approval *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287 (Neaves, French, and Cooper JJ).

[86] *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1 at [34]-[37] (Gleeson CJ);

[87] *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [2] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [48] (Bell, Gageler and Keane JJ).

[88] *Kioa v West* (1985) 159 CLR 550 at 611-612 (Brennan J); *VAAD* at [39]; *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57 at [130] (McHugh J); *Wills v Chief Executive Officer of the Australian Skills Quality Authority* [2022] FCAFC 10 at [118] (Perry J, Logan and Griffiths JJ agreeing).

[89] *WACO v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 131 FCR 511 at [46] (Lee, Hill and Carr JJ).

173. The First Notice of Adverse Comments to the Plaintiff (Report, Appendix C-1) included the following adverse comments at [24] and [26]:

> *"[24](b) you... directed a junior lawyer in the Office of the Director of Public Prosecutions to swear or affirm an affidavit stating that "I am informed and verily believe that it [the document] was inserted in the first disclosure declaration individually as not being the subject to a claim of privilege in error, which was remedied in the second disclosure document";*
>
> *[24](c) you... knew, or ought to have known, Rule 6711 of the Court Procedure Rules 2006, when relying upon hearsay evidence in that form, the deponent is required to identify the source of the information and the grounds for the belief.*
>
> *[26] Your actions referred to in paragraphs 20 to 25 were: (a) dishonest; (b) involved the preparation and tendering of false evidence to support a criminal prosecution."*

174. The Plaintiff responded to the part of the Notice dealing with the instructions to junior ODPP solicitors in respect of an affidavit about the privilege status of the analysis documents authored by DI Boorman and DS Moller, including these allegations, at [117]-[182] of his Submissions (Report, Appendix C-2), especially at [120(e)], [152]-[155].

Report [688] (POS [199]-[202])

175. The Inquiry found that the Plaintiff made false statements to the Chief Police Office (**CPO**) in relation to the Plaintiff's involvement in the FOI release of a letter the Plaintiff had written to the CPO.

176. The First Notice of Adverse Comments to the Plaintiff (Report, Appendix C-1) included the following at [57]: "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."

177. The attachment prepared by the AFP included the following:

(a) at [6]-[12]: certain facts establishing that on 7 December 2022, the Plaintiff had known of and been involved in the FOI request; and

(b) at [14]: that on 8 December 2022, the Plaintiff had made certain statements to the CPO, including that he did not know about the FOI or the fact that it had been released, as it was dealt with by his FOI Officer.

178. The Plaintiff responded to that part of the Notice concerning the FOI request at [343]-[380] of his Submissions (Report, Appendix C-22).

179. The Second Notice of Adverse Comments to the Plaintiff (Report, Appendix C-21) included the following at [3]: *"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."*

180. The Plaintiff responded to that part of the Notice at [104]-[105] of his Supplementary Submissions (Report, Appendix C-22).

Report [693]-[694], [699] (POS [203]-[204])

181. The Inquiry found that the Plaintiff had given false explanations concerning his failure to consult the AFP concerning the FOI release of his letter to the CPO, and that he "tried falsely to attribute blame to Ms Cantwell", the executive officer of the ODPP who oversaw FOI matters.

182. The attachment prepared by the AFP referred to at [57] of the First Notice of Adverse Comments to the Plaintiff (Report, Appendix C-1) included the following:

(a) at [33]: "Mr Drumgold's submission to the Ombudsman (see paragraph 24 above) was misleading because…";

(b) at [34]: "Mr Drumgold's apology to Mr [redacted] (see paragraph 27 above) was misleading because…";

(c) at [37]: The Plaintiff's evidence in his witness statement regarding release of the 1 Nov 2022 letter under FOI was incomplete and misleading for specified reasons;

(d) at [38]-[39], propositions concerning the Plaintiff's interactions with Ms Cantwell and consultation with the AFP.

183. The Plaintiff responded to that part of the Notice concerning the FOI request at [343]-[380] of his Submissions (Report, Appendix C-22).

184. The Territory accepts that due to the Plaintiff's illness, he did not give oral evidence to the Inquiry concerning the FOI issue, nor was he cross-examined in relation to it. In his Submissions to the Inquiry (Report, Appendix C-22), however, no complaint was made about this fact on procedural fairness grounds. At [351], those submissions stated:

"Mr Drumgold has not given oral evidence to the Inquiry about this matter, although he has addressed it in [471]-[497] of his statement to the Inquiry. The AFP Document notes

that it has been provided to the Inquiry in circumstances in which "the examination of Mr Drumgold SC as a witness has not been able to be completed"."

185. At [376], those Submissions stated:

"It is regrettable that Mr Drumgold has been unavailable to give oral evidence in support of his statement on this topic. Although his statement provides comprehensive details of the events that occurred leading up to the release of the letter, the absence of oral evidence should be taken into account by the Chairman in any assessment of this complaint."

H. Disposition

186. For these reasons, the Territory submits the Application should be dismissed.

187. Costs are in the discretion of the Court: rules, r 1721. In this case, the Territory submits that costs should follow the event.

6 February 2024

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