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

Australian Capital Territory
Third Defendant

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

<u>(Amended) Opening Written Submissions of the Plaintiff</u>

Filed pursuant to the Orders of Registrar Reece dated 29 September 2023

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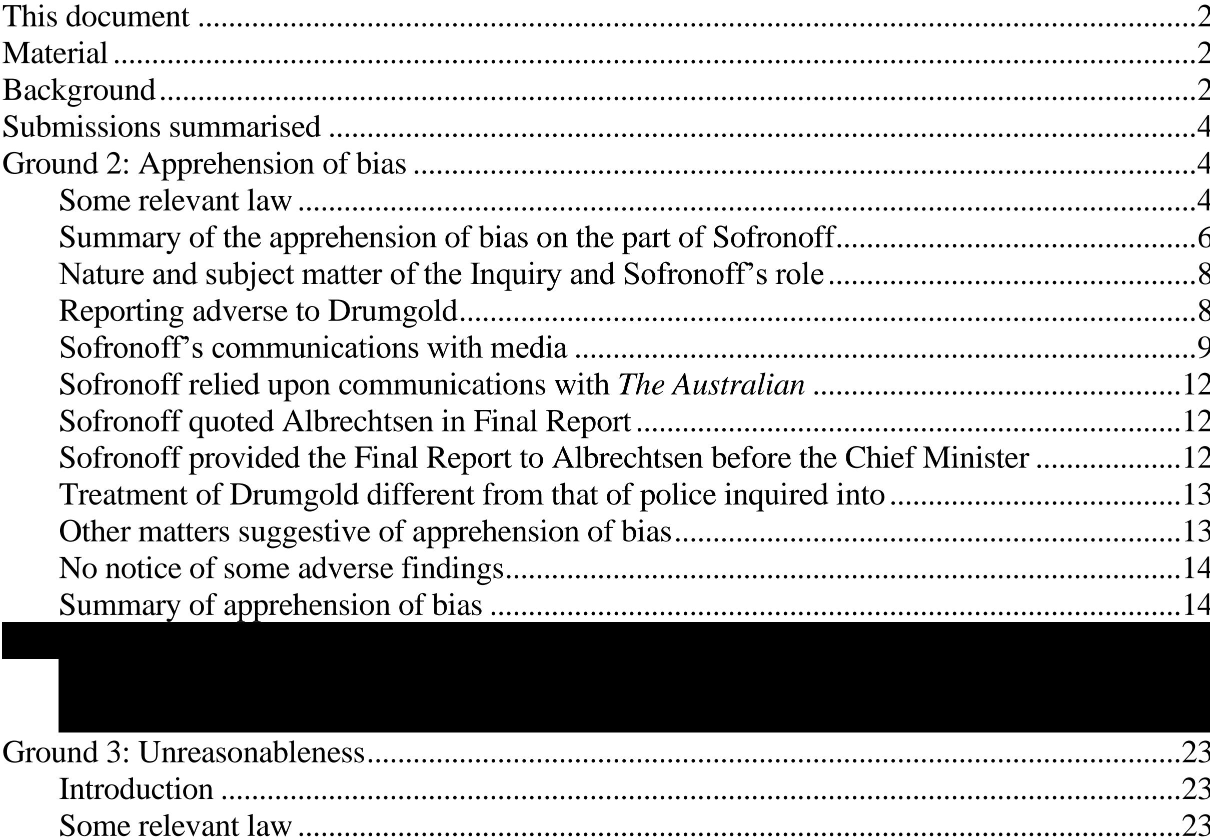

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<u>This document</u>

1. This document is filed by the Plaintiff (**Mr Drumgold**) pursuant to order 8 of the orders made by Registrar Reece on 10 November 2023.

<u>Material</u>

2. Mr Drumgold relies upon the following documents:

   (a) *Originating Application – Judicial Review* filed 25 August 2023 as amended by *Amended Originating Application – Judicial Review* filed 21 September 2023 (the **Application**).

   (b) Affidavit of Neville Shane Drumgold filed 25 August 2023, as amended on 17 November 2023 (**First Drumgold Affidavit**) (including Exhibits NSD1, NSD2 and NSD3).

   (c) Affidavit of Neville Shane Drumgold filed 17 November 2023 (**Second Drumgold Affidavit**).

   (d) Affidavit of Ian Alexander Meagher filed 6 November 2023 (**First Meagher Affidavit**) (including Exhibit IAM1).

   (e) Affidavit of Ian Alexander Meagher filed 17 November 2023 (**Second Meagher Affidavit**) (including Exhibits IAM2, IAM3 and IAM4).

   (f) Affidavit of Ian Alexander Meagher filed 19 December 2023 (**Third Meagher Affidavit)** (including Exhibit IAM5)**.**

3. Mr Drumgold has also filed:

   (a) the *Particulars of the Grounds of Application in the Amended Originating Application* on 30 November 2023 pursuant to orders of Acting Justice Kaye (**Kaye J**) dated 10 November 2023 (the **Particulars**); and

   (b) the *Amended Particulars of the Grounds of Application in the Amended Originating Application* on 22 January 2024 pursuant to orders of Kaye J dated 15 December 2023 (the **Amended Particulars**).

<u>Background</u>

4. These proceedings are an application to review the Final Report of the "*Australian Capital Territory Board of Inquiry Criminal Justice System*" dated 31 July 2023 (**Final Report**).[1]

[1] At First Drumgold Affidavit, Exhibit NSD3.

5. Some of the more important background facts are outlined in the decision of Kaye J in *Drumgold v Board of Inquiry – Criminal Justice System & Ors*[2] and therefore are not repeated herein.

6. The *Inquiries (Board of Inquiry – Criminal Justice System) Appointment 2023*, Notifiable Instrument N12023-49, was made pursuant to the *Inquiries Act 1991* (ACT) (***Inquiries Act***). The Australian Capital Territory (**ACT**) Government appointed Mr Walter Sofronoff KC (**Mr Sofronoff**) as the Board of Inquiry (**Board**) to inquire into the matters specified in the Terms of Reference (**ToR**) at Schedule 1 to the said Notifiable Instrument.

7. Broadly, the ToR required the Board to enquire into the conduct of named police officers, Mr Drumgold and the Victims of Crime Commissioner leading up to and during the criminal proceeding of *R v Lehrmann* (the **Lehrmann Case**). The ToR are relevantly:

> *"**Terms of Reference***
>
> *D. The Board will inquire into:*
>
> *a. Whether any police officers failed to act in accordance with their duties or acted in breach of their duties:*
>
> *i. in their conduct of the investigation of the allegations of Ms Brittany Higgins concerning Mr Bruce Lehrmann;*
>
> *ii. in their dealings with the Director of Public Prosecutions in relation to his duty to decide whether to commence, to continue and to discontinue criminal proceedings against Mr Lehrmann in relation to those allegations;*
>
> *iii. in their dealings with the legal representatives for Mr Lehrmann before, during or after the trial in the matter of R v Lehrmann;*
>
> *iv. in their provision of information to any persons in relation to the matter of R v Lehrmann.*
>
> … …
>
> *c. Whether the Director of Public Prosecutions failed to act in accordance with his duties or acted in breach of his duties in:*
>
> *i. making his decisions to commence, to continue and to discontinue criminal proceedings against Mr Lehrmann; and*
>
> *ii. <u>his conduct of the preparation of the proceedings for hearings; and</u>*
>
> *iii. <u>his conduct of the proceedings.</u>*
>
> … …
>
> *e. The circumstances around, and decisions which led to the public release of the ACT Director of Public Prosecutions' letter to the Chief Police Officer of ACT Policing dated 1 November 2022.*
>
> … …

[2] [2023] ACTSC 394 at [4]-[7].

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

The matters in underline were added to the ToR by Mr Sofronoff pursuant to Notifiable Instrument NI2023-232 (effective from 29 April 2023).[3]

8. Mr Drumgold seeks judicial review of the Final Report, and in so doing, seeks declaratory relief pursuant to the *Supreme Court Act 1933* (ACT) s.20.

9. The *Inquiries Act* is of particular relevance in these proceedings, particularly ss.5, 13, 14, 17, 18 and 21, as discussed further below.

Submissions summarised

10. In summary, Mr Drumgold submits that:

    (a) Mr Sofronoff breached the rules of natural justice in that his conduct gave rise to a reasonable apprehension of bias (ground 2 of the Application); and/or

    (c) some of the individual adverse findings made against Mr Drumgold in the Final Report cannot stand because:

        (i) the findings were unlawfully unreasonable (ground 3); and/or

        (ii) Mr Drumgold was denied natural justice in that he was not given a fair hearing in relation to those findings (ground 4).

11. Mr Drumgold no longer relies upon, and abandons, ground 5 of the Application (as noted in the Amended Particulars at paragraph 6 on page 14).

Ground 2: Apprehension of bias

12. It is submitted that Mr Sofronoff failed to accord Mr Drumgold natural justice in that certain particularised conduct of Mr Sofronoff gave rise to a reasonable apprehension of bias.

Some relevant law

13. Condemnation by an apparently biased tribunal is an unacceptable abuse.[4]

14. 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*[5] (in the judicial context) per Gleeson CJ, McHugh, Gummow and Hayne JJ:

> *"[6] Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), ... the governing principle is (subject to qualifications not presently relevant) ... if a fair-minded lay observer **might** reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. ...*

[3] Final Report, Appendix A – Terms of Reference, fn 1.

[4] *Webb v The Queen* (1993) 181 CLR 41 at 50-52 per Mason CJ and McHugh J and at 68 per Deane J; *Carruthers v Connolly* [1998] 1 Qd R 339 at 371 per Thomas J. See also *Keating v Morris* [2005] QSC 243 at [36] per Moynihan J.

[5] (2001) 205 CLR 337 at 344-345 [6]-[8]; see also *Keating v Morris* [2005] QSC 243 at [38] per Moynihan J.

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

[8] The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."

[Emphasis added]

15. The High Court recently considered the reasonable apprehension of bias test in ***QYFM** v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[6] (in the curial context), and in reaffirming the *Ebner* test, Kiefel CJ and Gageler J stated:[7]

"Application of the criterion was identified in Ebner, and has been reiterated, logically to entail: (1) identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits; (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer."

[Footnotes omitted]

16. The application of the apprehension of bias principles requires the following three steps:[8]

(a) the identification of the factors that are alleged might have led Mr Sofronoff to make the decision other than on its legal and factual merits;

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[6] (2023) 409 ALR 65.

[7] (2023) 409 ALR 65 at 77 [38].

[8] *Ebner* (2001) 205 CLR 337 at 345 [8] and 351 [37] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Isbester v Knox City Council* (2015) 255 CLR 135 at [22] per Kiefel, Bell, Keane and Nettle JJ and [59] per Gageler J; *Hocking v Medical Board of Australia* (2014) 287 FLR 54 at 84 [176] per Murrell CJ.

(b) an articulation of the logical connection between those factors identified and Mr Sofronoff's apprehended deviation from the course of inquiring into the ToR regarding Mr Drumgold on their merits; and

(c) an assessment of whether the apprehension that Mr Sofronoff would deviate from inquiring into matters regarding Mr Drumgold on its merits was reasonable from the perspective of a fair-minded lay observer.

Summary of the apprehension of bias on the part of Sofronoff

17. The following is a summary of what Mr Drumgold submits is the application of the apprehension of bias principles (outlined above) to the present case:

(a) The circumstances relied upon by Mr Drumgold as giving rise to a reasonable apprehension of bias (that is, the factors that might have led Mr Sofronoff to deal with matters in his ToR other than on their legal and factual merits) include some or all of the following:

(i) The ToR required Mr Sofronoff to inquire into matters relating to the Lehrmann Case and Mr Drumgold was the prosecutor who prosecuted Mr Lehrmann, and in that capacity he had a central role in the Lehrmann Case.

(ii) *The Australian* newspaper in general, and **Ms** Janet **Albrechtsen** in particular, engaged in media reporting adverse to Mr Drumgold in that such reporting:

A. related to the Lehrmann Case, and did so from at least November 2022, through to the commencement of, during and subsequent to Mr Sofronoff's conduct of, the Inquiry;

B. cast Mr Drumgold in a negative light, including by impugning Mr Drumgold's character and credibility;

C. cast Mr Lehrmann, the defendant in the Lehrmann Case which was the subject of the Inquiry, in a favourable light.

(iii) Mr Sofronoff [redacted] communicated extensively with, *inter alia*, journalists writing for *The Australian* generally, and Ms Albrechtsen in particular, prior to the commencement of, during the course of, and immediately after the Inquiry was completed, about matters the subject of the Inquiry, and in so doing, Mr Sofronoff [redacted]:

A. disclosed information and documents obtained by virtue of his/their office;

B. disclosed documents obtained by virtue of his/their office;

[redacted]

D. did not adhere, when making such disclosures to guidelines Mr Sofronoff issued relating to the manner in which media enquiries were to be directed to the Board of Inquiry.

(iv) Ms Albrechtsen:

A. is an opinion columnist with *The Australian*;[10]

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[9] [redacted]

[10] Second Meagher Affidavit, Exhibit IAM2 at p.238.

B. is a person who, at all relevant times, expressed views critical of Mr Drumgold;

C. had a relationship with the defence in the Lehrmann Case that was more positive than what she had with Mr Drumgold as the prosecutor in the Lehrmann Case;

D. engaged in extensive discussions with Mr Sofronoff [redacted] about matters of concern to the Board prior to the commencement of, during, and subsequent to, the conduct of the Inquiry;

E. received documentation and information, including confidential documentation and information, from Mr Sofronoff [redacted] about matters of concern to the Board, prior to the commencement of, during and subsequent to the public hearings of the Inquiry.

(v) Mr Drumgold was not advised by Mr Sofronoff, or by any other person associated with the Inquiry, of the existence, and therefore the content, of the communications Mr Sofronoff [redacted] had with *The Australian* in general, and Ms Albrechtsen in particular.

(vi) In deciding the matters in the ToR, Mr Sofronoff relied upon communications he [redacted] had with *The Australian* in general, and Ms Albrechtsen in particular, in that:

A. Mr Sofronoff relied upon facts ascertained as a result of communications with, and/or articles published by, *The Australian* in general, and Ms Albrechtsen in particular;

B. Mr Sofronoff relied upon articles published by *The Australian* which were not in evidence before the Inquiry, and were published after the evidence in the Inquiry had closed.

(vii) Mr Sofronoff [redacted] engaged with *The Australian* in general, and Ms Albrechtsen in particular, in a manner that was not accorded to other media outlets or journalists, and the manner in which Mr Sofronoff [redacted] so engaged with *The Australian* in general and Ms Albrechtsen in particular was more favourable than that accorded to other media outlets or journalists;

(viii) Mr Sofronoff provided drafts of his Final Report, including parts of his draft Final Report, to Ms Albrechtsen and to no one else (apart from Mr Leon **Zwier**, the lawyer acting on behalf of **Ms** Brittany **Higgins**) not directly associated with the Inquiry;

(ix) Mr Sofronoff provided his Final Report to Ms Albrechtsen, and to no other journalist, before he submitted it to the Chief Minister.

(b) The logical connection between those factors outlined in the preceding subparagraph and Mr Sofronoff's apprehended deviation from deciding the matters in his ToR on their merits arises include that:

(i) in inquiring into his ToR, Mr Sofronoff was required to form a view of the honesty, credibility and reliability of Mr Drumgold; and

(ii) Mr Sofronoff's assessment of the honesty, credibility and reliability of Mr Drumgold when considering the issues the subject of the ToR might have

been influenced by some or all of those matters outlined in subparagraph (a) for determination in the Inquiry.

(c) Further conduct of Mr Sofronoff that could lead a fair-minded observer to have a reasonable apprehension of bias on the part of Mr Sofronoff when dealing with the matters within the ToR include that:

(i) by at least 14 February 2023, Mr Sofronoff was exhibiting an unusual interest in Mr Drumgold in that on 14 February 2023 Mr Sofronoff sent via text message to **Mr** Hedley **Thomas,** a journalist employed or otherwise engaged by *The Australian* a link to Mr Drumgold's Wikipedia page, which generated three photographs of Mr Drumgold;

(ii) Mr Sofronoff sought, on his own initiative, an extension of the ToR insofar as they related to Mr Drumgold;

(iii) the treatment accorded to Mr Drumgold by Mr Sofronoff and Counsel Assisting during the Inquiry was different from that accorded to other persons into whom the Board inquired;

(iv) the Final Report omitted any reference to and/or failed to annex two written submissions made to the Board by Mr Drumgold and dated 29 June 2023 and 13 July 2023, in breach of the *Inquiries Act* s.24A(4); and

(v) Mr Sofronoff agreed to be hosted by *The Australian* at a function scheduled to be held before the Chief Minister had publicly released the Final Report.

18. Each of the above factors, the cumulative effect of some or all of which are alleged to found a conclusion of apprehended bias, will be briefly addressed.

Nature and subject matter of the Inquiry and Sofronoff's role

19. In determining an allegation of apprehended bias such as that made in the present proceedings, a Court must have regard to the nature of the inquiry/commission in question and its subject matter.[11]

20. In the present case, an understanding of the nature of the Inquiry and its subject matter requires an understanding of Mr Sofronoff's ToR and the Lehrmann Case generally (see paragraphs 5 and 7 above).

Reporting adverse to Drumgold

21. An important part of Mr Drumgold's argument relating to Mr Sofronoff's apprehended bias is that *The Australian*, in general, and Ms Albrechtsen in particular, engaged in media reporting that was clearly adverse to Mr Drumgold.

22. Between November 2022 and August 2023, Ms Albrechtsen in particular, and *The Australian* in general, published a significant number of articles that concerned matters the subject of the ToR or matters related to the matters the subject of the ToR.

23. Almost all of those articles contained facts/ alleged facts and/or opinions that were adverse/contrary to the interests of Mr Drumgold.

24. Examples of publications in *The Australian* that cast Mr Drumgold in a negative light are found in Exhibit NSD2 to the First Drumgold Affidavit.

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[11] *Re The Finance Sector Union; Ex parte Illaton Pty Ltd* (1992) 107 ALR 581 at 582 per Deane, Toohey and Gaudron JJ.

25. At the same time as Mr Drumgold was the subject of this reporting adverse to his reputation, Ms Albrechtsen was communicating with Mr Lehrmann who was, and remains, a person who has been extremely critical of Mr Drumgold.[12]

Sofronoff's communications with media

26. Mr Sofronoff discussed matters relating to the business of the Inquiry at length with people associated with *The Australian*, particularly Ms Albrechtsen, and the extent of these communications are in stark contrast to the communications Mr Sofronoff had with other media outlets and other individual journalists.

27. Mr Sofronoff has acknowledged that he had communications with the media while conducting the Inquiry.[13]

28. Mr Sofronoff communicated extensively with Ms Albrechtsen in particular and *The Australian* in general in that, *inter alia*:

    (a) Ms Albrechtsen received confidential information relating to the Inquiry and/or matters of interest to Mr Sofronoff's ToR from, or shortly after, the time the Board was established and Mr Sofronoff was appointed on or about 1 February 2023 (see below);

    (b) Mr Sofronoff was then in constant contact with Ms Albrechtsen from or about 22 February 2023 and then throughout the remainder of the time he was performing his role as the sole member of the Board;

    (c) Mr Sofronoff's communications with journalists[14] disclose the following:[15]

        (i) Mr Sofronoff exchanged 91 telephone calls with journalists between 9 February and 2 August 2023, and they may be summarised thus:

            A. *The Australian* = 73:

                (I) Ms Albrechtsen = 51 (including 3 which may have been missed calls);

                (II) Mr Thomas = 22 (including 1 which may have been a missed call);

            B. Others = 23:

                (I) Mr Bucci = 1 (2 August);

                (II) Ms Byrne = 4 (28 July and 2 August (x 3));

                (III) Mr Hart x 10 (9 February, 3 April, 4 April) (including 7 which appear to be missed calls from Hart);

[12] First Drumgold Affidavit, Exhibit NSD2 pp. 7, 24, 27, 77 and 191.

[13] Transcript of the Inquiry hearings at T279.26 (10 May 2023). See also Affidavit of Walter Sofronoff affirmed 12 December 2023 (**Sofronoff Affidavit**).

[14] The journalists in this context are confined to those journalists identified by the Mr Sofronoff in his discovery of 3 November 2023 in his answer to the request for discovery of *any call logs, text message logs or other phone records… between 21 December 2022 and 25 August 2023, evidencing communication with Ms Janet Albrechtsen…, Ms Elizabeth Byrne… and any other journalist or member of the media*, in respect of which Mr Sofronoff, having made discovery, affirmed that he believed that there were no other discoverable documents.

[15] Second Meagher Affidavit, Exhibit IAM2, pp.312-314. These calculations do not include any reference to the communications disclosed in the subpoenaed documents produced by Telstra. These were only recently received by Mr Drumgold and he and his legal advisers have not yet been able to complete an assessment of them.

(IV) Mr Kelly x 5 (6 April, 12 April, 11 July, 25 July, 26 July);[16]

(V) Mr Knaus x 2 (27 February);[17]

(VI) Ms Maiden x 1 (9 February);[18]

(VII) Ms Whop x 1 (4 April).

(ii) These calls were for a total of 13 hours 37 minutes:

A. *The Australian* = 11 hours 27 minutes;

(I) Ms Albrechtsen = 6 hours 19 minutes;
(II) Mr Thomas = 5 hours 8 minutes;

B. Others = 2 hours 10 minutes:

(I) Mr Bucci = 19.58;
(II) Ms Byrne = 15.27;
(III) Mr Hart = 3.56;
(IV) Mr Kelly = 16.37;
(V) Mr Knaus = 20.37;
(VI) Ms Maiden = 47.23;
(VII) Ms Whop = 5.40.

(iii) Between 7 April and 31 July 2023, Mr Sofronoff made a total of 35 calls to journalists:

A. To *The Australian* = 31:

(I) Ms Albrechtsen = 27 (including 2 which appear to be missed calls);
(II) Mr Thomas = 4;

B. Others = nil.

(iv) During the public hearings (8 May to 1 June) Mr Sofronoff made 9 calls:

A. To *The Australian* = 9;

(I) Ms Albrechtsen = 8;
(II) Mr Thomas = 1;

B. Others = nil.

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[16] The content of surrounding text messages and emails suggests these calls would have been with Mr Kelly in his capacity as representative of the Queensland Media Club rather than in his capacity as a journalist, and was likely related to a potential appearance by Mr Sofronoff at the club; Plaintiff's Schedule of Communications in Exhibits IAM2 to IAM6, Schedule B, pp4, 7-9

[17] The phone records disclose that Mr Sofronoff spoke to Mr Knaus on 27 February 2023 for 20 minutes and 37 seconds: Second Meagher Affidavit, Exhibit IAM2, p.312 (Court Book, Part A, vol 3, p1516), Sixth Meagher Affidavit, Exhibit IAM6, p161 (Court Book, Part A, vol 6, p 3921). Mr Knaus was not only a journalist with *The Guardian*, he was the person who made the FOI request for the letter that Mr Drumgold sent to the Chief Police Officer, and the release of that letter was a matter into which the Board was inquiring: see Final Report at [663]-[699]; it is possible that Mr Sofronoff was speaking to him in his capacity as a potential witness rather than in his capacity as a journalist.

[18] The phone records disclose that Mr Sofronoff spoke with Ms Maiden on 9 February 2023 for 47 minutes and 23 seconds. Ms Maiden was a person considered by the Inquiry as a potential witness, and it is possible that Mr Sofronoff was speaking to her in that capacity rather than in her capacity as a journalist.

(v) Sofronoff made 65 telephone calls to journalists between 9 February 2023 and 31 July 2023, and they may be summarised thus:

A. *The Australian* = 55:

(I) Ms Albrechtsen = 33;

(II) Mr Thomas = 22;

B. Others = 10:

(I) Mr Bucci = 2 (3 August (x2));

(II) Ms Byrne = 3 (9 February and 2 August (x 2));

(III) Mr Hart x 1 (4 April);

(IV) Mr Kelly x 1 (8 August);

(V) Mr Knaus x 1 (27 February);[19]

(VI) Ms Maiden x 1 (9 February);

(VII) Ms Whop x 1 (4 April).

(vi) These calls were for a total of 9 hours 57 minutes:

A. *The Australian* = 7 hours 33 minutes;

(I) Ms Albrechtsen = 3 hours 36 minutes;

(II) Mr Thomas = 3 hours 57 minutes;

B. Others = 1 hour 24 minutes:

(I) Mr Bucci = 1.18 (0.10 and 1.08);

(II) Ms Byrne = 7.58 (0.11, 0.22 and 7.25);

(III) Mr Hart = 1.07 (only call);

(IV) Mr Kelly = 1.42 (only call);

(V) Mr Knaus = 20.18 (only call);

(VI) Ms Maiden = 47.23 (only call);

(VII) Ms Whop = 5.40 (only call).

(vii) From 7 April to 31 July 2023, Mr Sofronoff made 30 calls:

A. To *The Australian* = 30:

(I) Ms Albrechtsen = 26;

(II) Mr Thomas = 4;

(III) Others = nil.

(viii) During the public hearings Mr Sofronoff made 10 calls:

A. To *The Australian* = 10;

[19] According to the phone records produced by Mr Sofronoff, Mr Sofronoff spoke to Mr Knaus on 27 February 2023 for 20 minutes and 18 seconds: Second Meagher Affidavit, Exhibit IAM2, p.312. Mr Knaus was not only a journalist with *The Guardian*, he was the person who made the FOI request for the letter that Mr Drumgold sent to the Chief Police Officer, and the release of that letter was a matter into which the Board was inquiring: see Final Report at [663]-[699].

(I) Ms Albrechtsen = 8;

(II) Mr Thomas = 2;

B. Others = nil.

29. The [redacted] nature and extent of the engagement between Mr Sofronoff and Ms Albrechtsen was very different from the [redacted] engagement Mr Sofronoff had with any other journalist, and Ms Albrechtsen and Mr Sofronoff had a high regard for each other in that Mr Sofronoff has, at least inferentially, spoken highly of Ms Albrechtsen, and in return, Ms Albrechtsen has written articles that speak glowingly of Mr Sofronoff.[20]

Drumgold was not informed of such discussions

30. At no time did anyone, whether Mr Sofronoff or anyone else, inform Mr Drumgold of the fact that Mr Sofronoff was having with Ms Albrechtsen communications of the type outlined above, let alone the content of such discussions.

31. That Mr Drumgold was not informed of these communications is of significance in circumstances where:

    (a) Mr Drumgold was specifically referred to in the ToR in his capacity as the DPP at the times in question (see, in particular, ToR paragraphs c., d. and e.); and

    (b) Mr Sofronoff "*required Mr Whybrow, the investigators of Operation Covina and DPP staff to disclose to [him] their communications with the media about R v Lehrmann*".[21]

Sofronoff relied upon communications with *The Australian*

32. It is submitted that in deciding matters relating to his ToR, Mr Sofronoff relied upon communications he [redacted] had with *The Australian* in general, and Ms Albrechtsen in particular.

33. There is evidence that discloses that Mr Sofronoff read at least some articles in *The Australian*, including those by Ms Albrechtsen prior to completing his Final Report.[22]

Sofronoff quoted Albrechtsen in Final Report

34. Somewhat extraordinarily, in his Final Report, Mr Sofronoff quoted from Ms Albrechtsen's articles in support of propositions he advanced in his Final Report.[23]

Sofronoff provided the Final Report to Albrechtsen before the Chief Minister

35. Again somewhat extraordinarily, Mr Sofronoff provided the Final Report to Ms Albrechtsen, including drafts of the Final Report with track changes and internal comments between Mr Sofronoff and Counsel Assisting, prior to him providing it to the Chief Minister.[24]

36. Mr Drumgold submits that the fact that Mr Sofronoff chose to provide his Final Report to Ms Albrechtsen, whose previous articles revealed opinions contrary to Mr Drumgold, and

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[20] See, e.g., First Drumgold Affidavit, Exhibit NSD2 pp.40 and 227.

[21] Final Report at [662].

[22] See, e.g., Transcript of the Inquiry hearings at T680.5 and T682.24 (22 May 2023).

[23] Final Report at [129], fn 167 and 168, wherein Mr Sofronoff quoted from the following two articles: (a) Janet Albrechtsen, 'Higgins office rape 'cover-up' conspiracy debunked', *The Australian* (online, 15 July 2023); and (b) Stephen Rice, 'Prosecutors knew key witness was a liar', *The Australian* (online, 14 July 2023).

[24] Second Meagher Affidavit, Exhibits IAM2 p.222 and IAM3 pp.553-737; Exhibits IAM2 pp.144, 224 and IAM3 pp.738-742; Exhibits IAM2 p.225 and IAM3 pp.743-941; Exhibit IAM2 pp.148-149.

to no other journalist, prior to providing it to the Chief Minister would, of itself, lead a fair-minded observer to conclude that this conduct reflected an apprehension of bias.

37. By providing his Final Report to Ms Albrechtsen prior to it being provided to the Chief Minister, Mr Sofronoff provided a benefit to Ms Albrechtsen while at the same time exposed Mr Drumgold to a potential detriment, being the risk of denying him the opportunity to seek remedies in the Court to prevent its public release.

Treatment of Drumgold different from that of police inquired into

38. As to the conduct of the public hearings of the Inquiry:

    (a) Mr Drumgold was called as the first witness.

    (b) The evidence of Mr Drumgold occupied 5 of the 13 hearing days.

    (c) Mr Drumgold was cross-examined by the most senior of Counsel Assisting, Ms Longbottom KC, while all police witnesses were cross-examined by more junior Counsel Assisting.

    (d) Mr Drumgold was subjected to intense cross-examination almost from the commencement of his evidence at the Inquiry.[25]

    (e) Mr Sofronoff:

        (i) engaged in a significant amount of cross-examination of Mr Drumgold;[26]

        (ii) often interrupted Mr Drumgold's answers;[27] and

        (iii) assisted some police witnesses with their answers.[28]

Other matters suggestive of apprehension of bias

39. There are other matters that are of potential relevance in support of Mr Drumgold's submissions that a fair-minded observer might reasonably apprehend that Mr Sofronoff might not have brought an impartial mind to his task as the Board. These matters do not relate to Mr Sofronoff's relationship with Ms Albrechtsen.

40. First, Mr Sofronoff himself sought an extension of his ToR insofar as they related to Mr Drumgold.[29] This is of some significance because:

    (a) Mr Drumgold was the only person who was the subject of alterations to the ToR;

    (b) this extension of the ToR resulted in the following additions to the ToR:

        "c. Whether the Director of Public Prosecutions failed to act in accordance with his duties or acted in breach of his duties in:

        i. making his decisions to commence, to continue and to discontinue criminal proceedings against Mr Lehrmann; and

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[25] Mr Drumgold's oral evidence commences at T6.18 of the Transcript of the Inquiry hearings. It was only a very short time after introductory questions of Mr Drumgold were completed that Mr Sofronoff began asking Mr Drumgold questions about contentious issues: see T9.24ff.

[26] A perusal of the transcript of the Inquiry hearings readily discloses the volume of interruptions by Mr Sofronoff while Mr Drumgold is giving his evidence: see, e.g., T11.20 – .33, T27.8 – .48 and T28.29 – 29.18.

[27] Transcript of the Inquiry hearings at T48.28 – .37, T54.20 – 55.20 and T56.9 – .46.

[28] See, e.g., Transcript of the Inquiry hearings at T19.38 – T24.50, T742.90 – .35, T887.25 – 891.39, T967.5 – 968.46, T998.36 – 999.25 and T1053.24 – .36.

[29] First Drumgold Affidavit at [13]; Final Report, Appendix A – Terms of Reference, fn 1; Second Meagher Affidavit, Exhibit IAM2, pp. 3, 7-9 and 15.

ii. *his conduct of the preparation of the proceedings for hearings; and*

iii. *his conduct of the proceedings.*

d. *If the Director of Public Prosecutions so acted, his reasons and motives for his actions."*

[Underlining depicts the additions to the ToR]

(c) the amended Notifiable Instrument[30] was signed on 28 April 2023 and was effective from 29 April 2023; and

(d) the amendment was promptly reported to *The Australian* newspaper as seen by the fact that it was reported in an article by Ms Albrechtsen on 29 April 2023 titled "Heat on DPP over rape trial conduct".[31]

41. Second, the Final Report omitted any reference to and/or failed to annex two written submissions made to the Board by Mr Drumgold and dated 29 June 2023 and 13 July 2023,[32] in breach of the *Inquiries Act* s.24A(4).

42. Third, by at least 1 August 2023, the Queensland Media Club was advertising that Mr Sofronoff was to address that club on 25 August 2023 "*... to discuss issues raised by his inquiry into the handling of allegations made by (Higgins) against (Lehrmann)*", and such event was to be hosted by Mr Thomas, a journalist who has articles published in *The Australian*.[33]

No notice of some adverse findings

43. It is submitted that Mr Sofronoff's failure to give Mr Drumgold a fair hearing in respect of the findings set out in Schedule B of the Application is an additional matter that gives rise to apprehended bias.

44. These adverse findings relate to:

(a) Mr Drumgold's request of a junior lawyer, Mr Greig, to make an affidavit which Mr Sofronoff found to be misleading (see paragraphs 177 to 180 and 192 to 198 below); and

(b) the release, pursuant to a request made under the *Freedom of Information Act 2016* (ACT), of a letter that Mr Drumgold had written to the Chief Police Officer (see paragraphs 199 to 204 below).

45. Pursuant to the *Inquiries Act* s.26A(1), the Board was prohibited from including a comment in its report that was adverse to Mr Drumgold unless it had given prior notice of the proposed adverse comment to him.

Summary of apprehension of bias

46. By way of summary, Mr Drumgold submits thus:

(a) Mr Drumgold's credibility and reliability was critical to many of the Board's ToR.

(b) In making his case to the effect Mr Sofronoff failed to accord him natural justice by conducting the Inquiry in circumstances where there was an apprehension of bias on

[30] Notifiable Instrument NI2023-232.
[31] First Drumgold Affidavit, Exhibit NSD2, p.91.
[32] Mr Drumgold's submissions dated 29 June 2023 are at First Drumgold Affidavit, Exhibit NSD1, pp.32-38. Mr Drumgold's submissions dated 13 July 2023 are at First Drumgold Affidavit, Exhibit NSD1, pp.39-44.
[33] See Second Meagher Affidavit, Exhibit IAM2, pp.315-317.

the part of Mr Sofronoff, Mr Drumgold does not rely upon any single fact but rather, he relies upon a combination of some or all of the facts outlined above.

(c) The logical connection between, on the one hand, the subject matter of the apprehension and, on the other hand, a deviation from the course of deciding matters relating to the ToR on its merits, lay in the potential for the views formed by Mr Sofronoff as to Mr Drumgold's character to be affected by some or all of the facts outlined above.

(d) The apprehension that Mr Sofronoff would deviate from inquiring into matters regarding Mr Drumgold on its merits was therefore a reasonable one from the perspective of a fair-minded lay observer.

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Ground 3: Unreasonableness

Introduction

101. It is submitted that the findings in the Final Report set out in Schedule A to the Application are legally unreasonable (see ground 3 of the grounds outlined in the Application).

Some relevant law

102. Where legislation contains a statutory discretionary power, the standard to be applied in the exercise of that power is derived not only from the legislation but also from a presumption of the law, namely that the legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably.[61]

[61] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [63] per Hayne, Kiefel and Bell JJ.

103. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification,[62] and/or is unsupported by probative material and/or is based on an inference that cannot reasonably drawn from the findings of fact.[63]

104. A discretionary power conferred by a statute is to be construed as subject to the condition that it be exercised reasonably.

105. In *Minister for Immigration and Citizenship v Li*,[64] Hayne, Keifel and Bell JJ stated:

> *"The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say (one) that it is so unreasonable that no reasonable person could have arrived at it."*

Disclosure of counselling notes

Background

106. The Police, during their investigation of Ms Higgins' complaint, obtained **counselling notes** taken by counsellors of counselling sessions with Ms Higgins.[65]

107. These counselling notes were included in the Advice Brief provided to Mr Drumgold for advice as to whether a prosecution should be instituted,[66] and again in the Brief of Evidence provided to both the prosecution and the defence after the prosecution had been commenced.[67]

108. After being alerted to the fact that the counselling notes had been disclosed to the defence, Mr Drumgold "*skim read*", or "*had a superficial read*" of, the counselling notes, in order to determine the potential harm arising from their disclosure and to work out what remedy was required, and given that he would need to discuss the fact of their disclosure with Ms Higgins.[68]

109. The *Evidence (Miscellaneous Provisions) Act 1991* (ACT) (**EMPA**) provides that:

    (a) a protected confidence must not be disclosed in or for the purposes of a preliminary criminal proceeding;[69] and

    (b) a protected confidence must not be disclosed in or for the purposes of a proceeding unless the court dealing with the proceeding gives leave for the disclosure.[70]

110. The counselling notes constituted a "*protected confidence*" for the purposes of the EMPA.[71]

111. The EMPA does not prohibit the police:

    (a) obtaining the counselling notes before any proceedings have been initiated;[72]

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[62] *Li* (2013) 249 CLR 332 at 367 [76] per Hayne, Kiefel and Bell JJ; *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [48] per the Full Federal Court.
[63] *Muggeridge v Minister for Immigration and Border Protection* [2017] FCAFC at [35] and the authorities cited therein.
[64] (2013) 249 CLR 332 at [68].
[65] Final Report at [227].
[66] Final Report at [151]-[152] and [227].
[67] Final Report at [227].
[68] Final Report at [238]-[239]. See also Final Report, Appendix C-2, Submissions on behalf of Shane Drumgold SC to the Board of Inquiry – Criminal Justice System (**Drumgold Submissions**) dated 26 June 2023 at [184(vi)], although no finding is made as to exactly why Mr Drumgold read the notes: see Final Report at [241].
[69] EMPA s.79C.
[70] EMPA s.79D.
[71] Final Report at [229].
[72] Final Report at [232].

(b) providing the counselling notes to Mr Drumgold for the purposes of obtaining his advice prior to proceedings being initiated.[73]

112. At the Inquiry, Mr Drumgold:[74]

(a) accepted that the EMPA prohibited the police from disclosing the counselling notes to him once proceedings had commenced;

(b) submitted that at the time of the disclosure and during the course of the trial he had not regarded the disclosure to him as having been unlawful.

Sofronoff's findings

113. Mr Sofronoff stated that Mr Drumgold should not have read the counselling notes after they were provided to him in the Brief of Evidence because:

(a) having read the notes, he was in a position where he held information about the matter that the defence did not and so gave him an unfair forensic advantage;[75]

(b) if an issue arose at the trial concerning some kind of inconsistency between the contents of the counselling notes and the oral evidence, Mr Drumgold would be required to disclose the inconsistency to ensure a fair trial, but would be unable to do so due to the statutory prohibition on disclosure of the protected confidences;[76] and

(c) reading the notes placed Mr Drumgold in a position in which he may be thought to have significant information about the complainant that was denied to the defence.[77]

114. Mr Sofronoff concluded that:

(a) having read the counselling notes, Mr Drumgold "*had three choices available to him*", namely:[78]

(i) to withdraw from the case;

(ii) to make an application for leave to obtain the notes so that he could disclose them to the defence; or

(iii) support a defence application to the same effect.

(b) Mr Drumgold was not conscious that his prosecutorial duty of disclosure had been engaged, and this failure was disturbing.[79]

(c) Mr Drumgold's failure to do anything was a breach of his duty as a prosecutor.[80]

Unreasonableness

115. Mr Drumgold submits that the finding that he had breached his duty as a prosecutor in respect of the counselling notes was legally unreasonable because:

(a) It was common ground that it was legitimate for the Police to disclose the counselling notes to Mr Drumgold when seeking his advice regarding institution of the prosecution,[81] and it therefore follows that it was legitimate for Mr Drumgold to read them in order to provide that advice.

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[73] Final Report at [246].
[74] Final Report, Appendix C-2, Drumgold Submissions dated 26 June 2023 at [184(vii)] and [192].
[75] Final Report at [261].
[76] Final Report at [262].
[77] Final Report at [264].
[78] Final Report at [264].
[79] Final Report at [265].
[80] Final Report at [270].
[81] Final Report at [246].

Hence it was illogical to conclude that reading them at a later stage only then engaged the duty of disclosure.

(b) The duty of disclosure could only be engaged if the reading of the counselling notes provided the prosecution with an unfair advantage over the defence.

(c) It is possible in a given case that the reading of counselling notes *could* provide such an advantage. However, there is no finding that Mr Drumgold's reading of the counselling notes provided an identified evidential advantage.

(d) Mr Drumgold's mere knowledge of their contents is not, contrary to Mr Sofronoff's finding in the Final Report at [261], such an advantage.

Wilkinson proofing note

Background

116. Ms Wilkinson is a journalist at Network 10 who was to be a witness the prosecution proposed to call at the trial of *R v Lehrmann* (**Lehrmann Trial**), then scheduled to commence on 27 June 2022.[82]

117. On 15 June 2022, Mr Drumgold, accompanied by Ms Jerome (junior counsel) and Mr Greig (instructing solicitor), held a proofing conference with Ms Wilkinson, who was accompanied by a lawyer engaged by Network 10, Ms Smithies.[83]

118. Mr Greig, Ms Jerome and Ms Smithies all took notes of that part of the conference concerning the evidence that Ms Wilkinson would give.[84]

119. After discussing the evidence Ms Wilkinson would give at the trial, Mr Drumgold asked if Ms Wilkinson had anything to raise, whereupon Ms Wilkinson:

(a) advised that her television program had been nominated for a television media award, known as a Logie award, for Ms Wilkinson's interview with Ms Higgins, the awards ceremony was imminent, and she had prepared a speech in case the Logie was awarded to her program;

(b) told Mr Drumgold she wanted to read that speech to Mr Drumgold.[85]

120. Ms Wilkinson read at least that part of the prepared speech which stated:[86]

> *"The truth is this honour belongs to Brittany. It belongs to a 26-year-old woman's unwavering courage. It belongs to a woman who said, 'enough'."*

121. Mr Drumgold:

(a) stopped Ms Wilkinson at that point and said something to the effect that "*he was not a speechwriter and couldn't give her any advice on the speech*";[87]

(b) said words to the effect that "*any publicity could give rise to a stay*";[88]

(Mr Sofronoff did not make a definitive finding as to whether or not he accepted the evidence that Mr Drumgold had used this phrase, but appears to proceed on the basis that he did.)

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[82] Final Report at [440].
[83] Final Report at [440].
[84] Final Report at [440]-[441].
[85] Final Report at [441].
[86] Final Report at [442], [444].
[87] Final Report at [441], [444].
[88] Final Report at [445], [446].

(c) did not direct Ms Wilkinson not to give a speech and did not direct Ms Wilkinson not to use the particular words she had read out to him.[89]

122. Ms Wilkinson's program was awarded a Logie at the Logie's award ceremony held on 19 June 2022, and in accepting the award Ms Wilkinson gave a speech in the terms she had prepared when she spoke to Mr Drumgold, including the words set out at paragraph 120 above.[90]

123. The record of the conference conducted on 15 June 2022 was the subject of a number of communications on 20 June 2022:

(a) Mr Greig emailed Mr Drumgold and Ms Jerome (at 12:37pm) "*the contemporaneous note he had taken during the proofing conference*" and asked if Mr Drumgold and Ms Jerome were "*happy for me to send through to Defence*".[91]

(b) Mr Drumgold replied (at 12:46pm), "*Looks correct to me*".[92]

(c) Ms Jerome responded simultaneously by requesting that Mr Greig include reference to that part of the conference concerning Ms Wilkinson's proposed speech, set out her recollections in that regard, and asked that Mr Drumgold's recollection be checked about that part of the conference.[93]

(d) Mr Drumgold responded by email (at 12:52pm) setting out his recollection of that part of the conference concerning Ms Wilkinson's proposed speech.[94]

(e) This recollection of Mr Drumgold was then cut and pasted by Mr Greig into the document he then sent to the defence (at 13:09pm).[95]

124. The defence also requested an urgent hearing of the Lehrmann Trial on 20 June 2023 (at 13:51pm), by which time Mr Whybrow (the defence's Senior Counsel) had a copy of the notes relating to the proofing conference.[96]

125. At the resumed hearing on 21 June 2022, there was the following exchange between the Chief Justice and Mr Drumgold:[97]

> *"Her Honour: Does Mr Whybrow know who made the note and when? And if not are you able to provide that information?*
>
> *Mr Drumgold: Yes. The note was made by my instructor and forwarded from my instructor.*
>
> *Her Honour: Contemporaneously?*
>
> *Mr Drumgold: Contemporaneously.*
>
> *Her Honour: Effectively. Is that Mr Greig who made the note?*
>
> *Mr Drumgold: Yes. Correct."*

126. The Chief Justice granted a temporary stay of proceedings that same afternoon.[98]

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[89] Final Report at [446].
[90] Final Report at [447].
[91] Final Report at [449].
[92] Final Report at [450].
[93] Final Report at [451].
[94] Final Report at [452].
[95] Final Report at [452] and [454].
[96] Final Report at [456].
[97] Final Report at [466].
[98] Final Report at [468].

Sofronoff's findings

127. Mr Sofronoff found that:

(a) the part of the proofing note relating to Ms Wilkinson's foreshadowed speech was not contemporaneous and was not made by Mr Greig.[99]

(b) Mr Drumgold's statements to the Chief Justice on 21 June 2022 in respect of the contemporaneity of the proofing note, and that it was authored by Mr Greig:

(i) were false;[100]

(ii) were not the product of a mistake;[101] and

(In doing so, he rejected Mr Drumgold's submission that his statements were the product of a mistake that could be made by a prudent and experienced counsel.)

(iii) constituted Mr Drumgold having "*knowingly lied to the Chief Justice*".[102]

Unreasonableness

128. Mr Sofronoff's expressed foundation for the finding that Mr Drumgold's statements were not the product of a mistake but were deliberate lies appears to be that "*a prudent and experienced barrister*" of the seniority and experience of Mr Drumgold "*could not have forgotten that the material words in the note were words that he had written himself …. on the day before*".[103]

129. Mr Drumgold submits that the finding that Mr Drumgold's statements to the Chief Justice constituted deliberate "*lies*" is legally unreasonable on the following bases:

(a) The inference drawn by Mr Sofronoff was nothing more than conjecture in that:

(i) while there is no dispute as to the objective facts, the finding that Mr Drumgold made false statements to the Chief Justice and that he knowingly "*lied*" to her Honour was an inference drawn from those objective facts;

(ii) a finding that a legal practitioner has lied to the Court is a very serious finding, and should be made in accordance with the *Briginshaw* standard.[104] The application of that standard to findings based upon inference was considered by Gordon J in *Re Day*:[105]

> *"Where direct proof is not available and satisfaction of the civil standard depends on inference, 'there must be something more than mere conjecture, guesswork or surmise' – there must be more than 'conflicting inferences of equal degrees of probability so that the choice between them is [a] mere matter of conjecture'."*

(iii) on the objective facts, it was equally open to find that the statements were the product of mistake as it was to find that they were the product of deliberate lying. Given the imminence of the commencement of what was on any measure

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[99] Final Report at [471].
[100] Final Report at [471].
[101] Final Report at [472] and [477].
[102] Final Report at [477].
[103] Final Report at [472].
[104] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362. See also *NHB Enterprises Pty Ltd v Corry (No 5)* [2020] NSWSC 1838 at [57] per Ward CJ in Eq.
[105] (2017) 340 ALR 368 at [18].

a significant and hard-fought trial, Mr Drumgold would have been dealing with multiple issues as at 21 June 2022. A simple mistake in that context was a real possibility;

(iv) because the inference drawn by Mr Sofronoff from the objective facts did not rise above the level of conjecture or surmise, they were unreasonable.

(b) The adverse inference drawn by Mr Sofronoff was apparently drawn on two bases:

(i) First, Mr Drumgold's seniority and experience.

However, seniority and experience say little about the question whether a statement may be the product of a mistake or a lie.

Experienced and senior practitioners are just as susceptible to error regarding matters of fact and recollection as are more junior practitioners, or at least there was no evidence that experienced and senior practitioners are less susceptible to error.

(ii) Second, the shortness of time between the proofing note being prepared and the statement being made to the Court.

But again, in the context of an imminent significant trial, with the likelihood of multiple issues occupying Mr Drumgold's mind, the mere fact of the shortness of time is not a cogent reason for rejecting mistake as an explanation.

(c) In these circumstances, the inference drawn by Mr Sofronoff, that Mr Drumgold had knowingly lied to the Chief Justice was not a legally reasonable inference to draw.

Duty to warn Wilkinson

Background

130. Relevant background facts are outlined in paragraphs 116 to 122 above.

Sofronoff's findings

131. Mr Sofronoff:

(a) found that Mr Drumgold did not tell Ms Wilkinson not to make the speech or not to use the particular words read to him;[106]

(b) further found that Mr Drumgold "*was keenly aware that the substance of Ms Wilkinson's speech had the obvious tendency to prejudice the fairness of the trial*";[107]

(c) then made the following findings adverse to Mr Drumgold:

(i) Mr Drumgold was "*under a duty to warn her not to give the speech in the form read to him*".[108]

(ii) While Mr Drumgold was not Ms Wilkinson's adviser and he owed her no duty to become an adviser, he "*should have told her emphatically not to make the speech in the form in which she had prepared it. If she did not agree to change her speech, it would then have been his obligation to tell the judge promptly and, if necessary, to seek an injunction to prevent Ms Wilkinson from making it so as to protect the integrity of the trial and prevent a threatened contempt of court*".[109]

[106] Final Report at [446] and [481].
[107] Final Report at [479].
[108] Final Report at [482].
[109] Final Report at [489].

(iii) Mr Drumgold "*did nothing*".[110]

(iv) Mr Drumgold failed "*to do his duty to advise Ms Wilkinson not to make the speech*".[111]

Unreasonableness

132. Mr Drumgold submits that Mr Sofronoff's finding that Mr Drumgold had a duty to warn Ms Wilkinson not to give the speech she had foreshadowed was unreasonable for the following reasons:

(a) Ms Wilkinson was accompanied by a supporting lawyer as an adviser.[112]

(b) Mr Drumgold was not Ms Wilkinson's adviser and he owed her no duty to become an adviser, as noted by Mr Sofronoff.[113]

(c) While Mr Sofronoff referred to "*the duties that a prosecutor owes to the court to do what is required to preserve the integrity of the administration of criminal justice*",[114] and more directly, found that Mr Drumgold's duty to prevent Ms Wilkinson from making the speech "*arose from his status as a barrister and as a prosecutor who had a duty, in the circumstances, to take steps to protect the criminal process against interference*",[115] no authority was cited for the existence of either the general duty to "*do what is required to preserve the integrity*" of the administration of criminal justice, or for the proposition that the content of that duty extended to preventing a person who intends to make a public comment which might have an adverse impact upon the fairness of a criminal trial, from making that comment. Further, Mr Sofronoff did not outline the test he applied when addressing this issue of Mr Drumgold's duty.

(d) The duty of a prosecutor to take all steps to prevent Ms Wilkinson from making a speech that might impact upon the fairness of the trial is not a duty known to the law, and as noted above, Mr Sofronoff cited no authority for such proposition.

(e) There was no evidence, and no suggestion, that a relevant Act, or relevant policy, the barristers' rules or the common law provided for such a duty. It was an alleged duty without any foundation.

(f) Given that there is no foundation for Mr Sofronoff's findings as to the scope of the prosecutorial duty, there is no intelligible foundation for the adverse findings which were consequent upon the findings as to the scope of the prosecutorial duty.

(g) These adverse findings were therefore unreasonable.

133. Further, even if it were found that there was a duty to warn Ms Wilkinson not to make a speech that might have an impact upon the trial (which is not accepted), Mr Drumgold gave such a warning:

(a) That warning was recorded in the file note.

(b) The accuracy of that file note was not impugned by Mr Sofronoff (as opposed to the contemporaneity of the relevant portion).

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[110] Final Report at [490]
[111] Final Report at [494].
[112] Final Report at [440].
[113] Final Report at [485] and [489].
[114] Final Report at [485].
[115] Final Report at [489].

(c) The Chief Justice found that the content of the file note recorded "*a clear and appropriate warning*".[116]

(d) That Mr Sofronoff might consider that the warning could have been more clearly expressed, or could have been expressed in blunter terms, does not substantiate the conclusion which he drew, to the effect that there had been a failure to provide any warning (that "*he did nothing*").

134. Such a finding was, in the circumstances, without intelligible foundation and was unreasonable.

Cross-examination of Senator Reynolds

Background

135. Senator Reynolds was a witness called by the prosecution in the Lehrmann Trial, and at the end of her evidence-in-chief Mr Drumgold sought and was granted leave to cross-examine her.[117]

136. Senator Reynolds had been the Minister for Defence Industry in the Australian Government in whose office Ms Higgins was working as an administration and media assistant at the time of the alleged rape.[118]

137. Senator Renolds gave evidence which was inconsistent with the evidence of Ms Higgins in that:

(a) Ms Higgins had given evidence that at a meeting on 1 April 2019, she told Senator Reynolds that she had been sexually assaulted by Mr Lehrmann;

(b) Senator Reynolds gave evidence that Ms Higgins did not at that meeting reveal that anything sexual had happened between herself and Mr Lehrmann.[119]

138. Because that evidence of Senator Renolds was unfavourable to the prosecution case, Mr Drumgold was given leave to cross-examine Senator Reynolds about that evidence and as to matters going only to her credit.[120]

139. In cross-examining Senator Reynolds as to credit, Mr Drumgold put the following **four propositions** to her:[121]

(a) Senator Reynolds "*arranged*" for her partner to attend court during the Lehrmann Trial;

(b) Senator Reynolds' partner had been discussing Ms Higgins' evidence given at the Lehrmann Trial with Senator Reynolds;

(c) Senator Reynolds had sought that transcripts of the Lehrmann Trial be sent to her lawyer because she, not her lawyer, had an interest in the transcripts;

(d) Senator Reynolds was "*politically invested*" in the outcome of the trial.

140. In putting the four propositions, Mr Drumgold was aware of the following matters:

(a) Senator Reynolds was in Rwanda at the time that Ms Higgins gave her evidence.[122]

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[116] Final Report at [470].
[117] Final Report at [579].
[118] Final Report at [570].
[119] Final Report at [571].
[120] Final Report at [581].
[121] Final Report at [583]-[584], [592] and [597].
[122] Final Report at [583].

(b) Senator Reynolds' partner had been sitting in the court throughout Ms Higgins evidence.[123]

(c) Senator Reynolds' partner ordinarily resides in Perth, whereas the trial was conducted in Canberra.[124]

(d) Senator Reynolds' partner had had discussions with the defence's Senior Counsel.[125]

(e) During the cross-examination of Ms Higgins, Senator Reynolds had sent text messages to the defence's Senior Counsel and the following portion of that text exchange was shown to Mr Drumgold by that Senior Counsel:[126]

> *"Senator Reynolds: Hi, do you have the daily transcripts and if so are you able to provide my lawyer?*
>
> *Also if you have text messages between Brittany and Nikky they may be revealing.*
>
> *Mr Whybrow: Hi Linda*
>
> *I won't give you the transcript for your own protection so you can honestly say all you know is what you have been told by the media (or hubby – and I recommend you ask him not to give you detailed accounts)*
>
> *Then no one can say you have tailored your evidence to fit in with what already been said*
>
> *Senator Reynolds: Great points thanks. Will do."*

Sofronoff's findings

141. Mr Sofronoff found that:

(a) Mr Drumgold put two propositions of fact to Senator Reynolds "*about which there had been no evidence and about which he had no information*", namely that Senator Reynolds had "*arranged*" for her partner to attend court and her partner had been discussing Ms Higgins' evidence with Senator Reynolds;[127]

(b) Mr Drumgold had no basis upon which to put the suggestion that Senator Reynolds was interested in the transcript of the trial, rather than it being her lawyer who was interested;[128] and

(c) there was no basis for putting to Senator Reynolds that she was politically invested in the outcome of the trial.[129]

142. Mr Sofronoff then drew the following conclusions:[130]

> *"The suggestions made by Mr Drumgold [that Senator Reynolds arranged for her partner to attend court, that she and her partner had been discussing*

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[123] Final Report at [576]-[577].
[124] Final Report at [583].
[125] Final Report at [576].
[126] Final Report at [578]. See also Final Report, Appendix C-2, Drumgold Submissions dated 26 June 2023 at [226]-[230] setting out part of the transcript of the Inquiry hearings relating to this issue, and at [313(d)] setting out a screenshot of the text message exchange. The text message exchange was also set out in Exhibit SD175 to Mr Drumgold's Statement to the Inquiry dated 4 April 2023.
[127] Final Report at [584].
[128] Final Report at [593].
[129] Final Report at [597]
[130] Final Report at [600].

> *Ms Higgins' evidence, that she, not her lawyer, wanted the transcripts of the trial, and that she was politically invested in the outcome] had no basis at all and should not have been made. … the conduct was… grossly unethical."*

Unreasonableness

143. Mr Drumgold submits that Mr Sofronoff's findings to the effect that there was "*no basis at all*" for the propositions put by Mr Drumgold and that Mr Drumgold's conduct in putting the four propositions was "*grossly unethical*" were legally unreasonable.

144. Mr Drumgold accepts that for counsel to put to a witness a proposition unfavourable to that witness there must be reliable information to warrant the suggestion which the proposition conveys,[131] or put another way, it is a fundamental principle of ethical legal practice that suggestions to a witness should not be made unless they are supported by reliable information.[132]

145. As to the proposition to the effect that Senator Reynolds had "*arranged*" for her partner to attend the court during the Lehrmann Trial:

    (a) Senator Reynolds and Ms Higgins had very different accounts about an issue of some importance in the Lehrmann Trial, namely whether Ms Higgins had told Senator Reynolds on 1 April 2019 that she had been assaulted by Mr Lehrmann in Senator Reynolds' ministerial office in Parliament House in the early hours of 23 March 2019.[133]

    (b) As set out in paragraph 140 above, Senator Reynolds' partner had been a member of the public sitting in court during the Lehrmann Trial;[134] Senator Reynolds was in Rwanda at the time that Ms Higgins gave her evidence at the Lehrmann Trial;[135] and Senator Reynolds' partner ordinarily resides in Perth, whereas the Lehrmann Trial was conducted in Canberra.[136]

    (c) Such facts constitute "*reliable information*" upon which common sense would make it more likely that the presence of Senator Reynolds' partner during Ms Higgins' evidence was the product of an arrangement between himself and Senator Reynolds, rather than the possibility that he attended without Senator Reynolds' agreement.

    (d) There was therefore a basis for the proposition put by Mr Drumgold.

    (e) In such circumstances, Mr Sofronoff's finding that there was "*no basis at all*" to put that proposition is legally unreasonable.

146. As to the proposition to the effect that Senator Reynolds and her partner had discussed the evidence given by Ms Higgins evidence in the Lehrmann Trial:

    (a) Senator Reynolds' partner was present in the court during Ms Higgins evidence while Senator was in Rwanda, and, as outlined in the preceding paragraph, there is evidence to support an inference that his presence in court was arranged by and/or with the knowledge of Senator Reynolds.

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[131] *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186 at 199-200 per Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ.

[132] As paraphrased by Mr Sofronoff in Final Report at [588], citing *Clyne* (1960) 104 CLR 186 at 199-200.

[133] Final Report at [571].

[134] Final Report at [577].

[135] Final Report at [583].

[136] Final Report at [583].

(b) The content of the text exchanges between Senator Reynolds and Senior Counsel for the defence suggests Senator Reynolds and her partner had discussed the evidence this was the case (see above at paragraph 140(e)).

(c) It was clearly open to infer from that text message exchange, in the context of Senator Reynolds' partner being present in the courtroom, that Senator Reynolds and her partner had discussed Ms Higgins' evidence.

(d) Such facts constitute "*reliable information*" upon which one could conclude that Senator Reynolds and her partner had discussed the evidence given by Ms Higgins at the Lehrmann Trial.

(e) There was therefore a basis for the proposition put by Mr Drumgold.

(f) The finding that there was *no basis at all* for Mr Drumgold to put that proposition to Senator Reynolds is legally unreasonable.

147. As to the proposition to the effect that Senator Reynolds had sought the transcripts of the evidence because *she,* rather than her lawyer, was interested in them rather than her solicitor:

(a) The request made by Senator Reynolds was not for transcripts, but for "*the daily transcripts"* (see the text exchange reproduced at paragraph 140(e) above), and the use of the adjective "*daily*" is suggestive of a desire to seek contemporaneous access to the transcripts. This is more consistent with a desire by Senator Reynolds herself to see the transcripts, than that she was merely conveying a request from her lawyer.

(b) Senator Reynolds' response to Mr Whybrow's text, in which he refused to send her the transcripts, to the effect that he made "*great points*", and the absence of any protestation that she had not sought to access the transcripts herself is further suggestive that Senator Reynolds had sought the transcripts for her own purposes.

(c) Senator Reynolds' initial response when asked in cross-examination in the Lehrmann Trial why she had sought the transcripts is highly suggestive that she had sought the transcripts for her own purposes: "*Because I was – I was curious to know what had been said…*".[137]

(d) Senator Reynolds made the request for daily transcripts during the cross-examination of Ms Higgins. She did not make the request at a later time when she could have requested the full set of transcripts. That timing suggests an immediacy to her desire for access to the transcripts, which supports the inference that *she* rather than her lawyer was interested in them.

(e) The above facts constitute "*reliable information*" upon which one could conclude that Senator Reynolds had sought the transcripts because *she* was interested in them. There was therefore a basis for the proposition put by Mr Drumgold.

(f) Each of the above facts is also inconsistent with Senator Reynolds' evidence to the Board, which was that she was requesting the criminal trial transcript on behalf of her lawyer so that her lawyer could provide an opinion on the prospects of success of personal injury proceedings which Ms Higgins had issued against her.[138]

(g) The finding by Mr Sofronoff that there was "*no basis at all*" for the proposition is therefore legally unreasonable.

[137] Final Report at [583].
[138] Final Report at [593].

148. As to the proposition that Senator Reynolds was "*politically invested*" in the outcome of the Lehrmann Trial:

(a) Senator Reynolds was at the relevant time a Senator and she was a Minister in the Australian Government.[139]

(b) The complainant and the defendant in the Lehrmann Trial had both been members of Senator Reynolds' staff in Parliament House in Canberra.[140]

(c) Mr Sofronoff himself referred to the investigation of the rape complaint being conducted "*in the inevitable context of a political scandal*"[141] and the "*notoriety of the whole affair*".[142]

(d) Mr Sofronoff was aware of a media report to the effect that "*a Cabinet Minister*" had allocated blame for a perceived delay for in the decision as to whether Mr Lehrmann was to be charged.[143]

(e) Mr Sharaz, when referring to this article, referred to "… *how much of an impact <u>this political back and forth</u> has on Brittany* …."[144] (emphasis added).

(f) Ms Higgins met (separately) with the then Prime Minister (in the context of him "*undertaking a review of Parliamentary Workplaces*") and Mr Albanese and Ms Plibersek on 30 April 2021.[145]

(g) Commander Chew referred to the investigation thus:[146]

> *"We had the Prime Minister commenting on it. We had senior government ministers making comment in the media on it. We had two government ministers who were witnesses within the investigation."*

(h) The Lehrmann Case was played out widely in the national media.[147]

(i) Mr Drumgold knew that Senator Reynolds' partner attended court throughout Ms Higgins' evidence and was in discussions with the defence team.

(j) Senator Reynolds had such familiarity with members of the defence team in the Lehrmann Trial that she was dealing directly with the defence Senior Counsel rather than the defence solicitor, and she had the mobile telephone number of the defence Senior Counsel.

(k) Senator Reynolds sent the text messages at paragraph 140(e) above to the defence during Ms Higgins' cross-examination notwithstanding that she was in Rwanda at the time.[148]

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

(m) Such facts constitute "*reliable information*" upon which one could conclude that Senator Reynolds was politically invested in the outcome of the Lehrmann Trial.

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[139] Final Report at [570].
[140] Final Report at [550] and [570].
[141] Final Report at [40].
[142] Final Report at [679].
[143] Final Report at [159].
[144] Final Report at [163].
[145] Final Report at [749].
[146] Final Report at [44] and [442].
[147] Final Report at [420].
[148] Final Report at [583].

These facts indicated an interest in the outcome of proceedings beyond that of a mere witness.

(n) There was therefore a basis for the proposition put by Mr Drumgold.

(o) The finding that there was "*no basis at all*" for Mr Drumgold to put the proposition is legally unreasonable.

Disclosure and privilege issues relating to the Moller and Boorman documents

The documents

149. Det Insp Boorman and Det Super Moller prepared documents dated 4 and 7 June 2021 respectively which, *inter alia*, critically analysed inconsistencies in Ms Higgins accounts of certain facts and expressed serious concerns about the reliability of her evidence.[149] They were prepared shortly after Mr Drumgold had been advised that his advice would be sought regarding the laying of charges, and they were provided to him on 21 June 2021 as part of a brief of documents when his advice was formally sought.[150]

150. These documents prepared by Det Insp Boorman and Det Super Moller (collectively, the **Two Investigation Documents**) were provided to Commander Chew[151] (who had taken overall responsibility for the investigation).

151. A brief of documents:

(a) was provided to Mr Drumgold on 21 June 2021;[152]

(b) was provided to enable Mr Drumgold to provide his legal advice;[153]

(c) included a "*preliminary brief of evidence*" and the Two Investigation Documents.[154]

152. On 28 June 2021, Mr Drumgold provided to Det Super Moller his legal advice "*on a preliminary basis*", and it was to the effect that there were reasonable prospects of conviction and that a prosecution was in the public interest.[155]

153. Subsequent to the commencement of the proceedings, issues arose as to whether the Two Investigation Documents should be disclosed, and whether they were protected by legal professional privilege.

154. On 21 September 2022, the Australian Federal Police (**AFP**), who ultimately had responsibility for disclosure of the Two Investigation Documents, disclosed and produced the Two Investigation Documents to the defence.[156]

155. Mr Drumgold's position was to the effect that the documents were not disclosable[157] and were protected by legal professional privilege,[158] and this position was the basis for Mr Sofronoff making a number of findings adverse to Mr Drumgold.

156. The circumstances surrounding the maintenance of the claim for legal professional privilege were complex and gave rise to confusion.

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[149] Final Report at [108]-[112] and [293].
[150] Final Report at [140]-[141], [151], [202], and [335(e)].
[151] Final Report at [141]-[143]
[152] Final Report at [151].
[153] Final Report at [151].
[154] Final Report at [151], [202].
[155] Final Report at [207].
[156] Final Report at [407].
[157] Final Report at [296].
[158] Final Report at [340].

(a) There was evident confusion by both defence and prosecution as to which documents were comprehended by this claim.[159] However, at all times Mr Drumgold had in his contemplation only the Two Investigation Documents.[160] And certainly by the time that material was being provided to the Court on this issue, the parties jointly were focused upon Det Super Moller's executive briefing note.[161]

(b) There was evident confusion by both defence and prosecution as to which documents were comprehended within different descriptors set out in disclosure certificates.[162]

157. Schedule 1 of the disclosure certificate provided in the proceedings included the following entry (so protected from disclosure):

> *"Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing"*,

with the associated subject "*LPP*".[163]

Were the documents disclosable

Disclosure principles

158. The prosecution must disclose documents to the defence which are material, and documents will generally be regarded as material if they can be seen, on a sensible appraisal by the prosecution:

(a) to be relevant or possibly relevant to an issue in the case;

(b) to raise or possibly raise a new issue the existence of which is not apparent from the prosecution case; or

(c) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence going to either (a) or (b).[164]

159. Documents created by police containing information which is otherwise disclosed is not of itself a ground for not disclosing those documents; but if those documents merely repeat in second or third hand ways information which is otherwise disclosed, it is unlikely that they will be disclosable.[165]

160. In the ACT:

(a) the nature of the documents which were disclosable were set out in a Prosecution Policy;[166] and

(b) documents which have been determined to be disclosable and which should be provided to the defence are provided in a brief of evidence.[167]

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[159] Final Report at [329].

[160] See, e.g., Final Report at [355(b)], [358]. While Mr Sofronoff appeared to express some scepticism in this regard, he made no finding to the contrary.

[161] Det Super Moller's executive briefing note was sometimes referred to as the "investigative review document": see, e.g., Final Report [372], [375], [403], [404].

[162] See Final Report at [325]-[326].

[163] See Final Report at [375], [390] and Appendix C-2, Drumgold Submissions dated 26 June 2023 at [28] and [120(c)].

[164] *Director of Public Prosecutions (Cth) v Kinghorn* (2020) 102 NSWLR 72 at 105 [124]-[125] per the Court; *Hamilton v New South Wales* [2016] NSWSC 1213 at [36]-[40] per Beech-Jones J.

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

[166] See Final Report at [278]-[279].

[167] As disclosed in the Final Report at [174]-[187], ordinarily, the brief of evidence is to be supplied by the police to the ODPP, which is then responsible for providing the brief of evidence to the defence; in the Lehrmann Trial, the

Sofronoff's findings

161. In the Final Report, Mr Sofronoff:

(a) stated that the material which might put the defence on a line of inquiry, and material that might cast doubt on the credibility or reliability of a prosecution witness, must be disclosed,[168] and that the prosecution should be very slow to decline to disclose material that might be useful to the defence;[169]

(b) found that the fact that Det Super Moller's executive briefing note included a reference to Ms Higgins' reluctance to give police access to her mobile phone *on its own* meant that the executive briefing note had to be disclosed; the defence was entitled to know about her reluctance;[170]

(c) found that Det Insp Boorman's evidence analysis was a document that, "*without doubt*", had to be disclosed;[171]

(d) accepted that if the defence had worked assiduously, it might have identified the same points as did Det Insp Boorman, but that was not the point. The analysis would have put the defence upon several trains of inquiry, and identified weaknesses in the Crown case that might otherwise have been missed;[172]

(e) found that Mr Drumgold's view that the documents were not disclosable was *"wrong and untenable*".[173]

Unreasonableness

162. Mr Drumgold does not, in these proceedings, take issue with Mr Sofronoff's finding that Mr Drumgold's view was "*wrong*". He does take issue with Mr Sofronoff's finding that his view was *"untenable"*.

163. Ordinarily, it is inappropriate for police officers to disclose either their or the DPP's assessment of the relative strengths or weaknesses of witnesses, and overall police officers are not at liberty to disclose the contents of their discussions with members of the ODPP on these and similar topics:[174]

> *"[38]The nature of the relationship between police officers and solicitors from the ODPP who discuss proposed and existing criminal proceedings that arise out of investigations the former have conducted is, at least in part, governed by statute. Often the DPP will have taken over a prosecution after the police have charged the accused.[175] After assuming the conduct of the proceedings, the DPP retains a power to issue a written request to the Commissioner for Police or the police officers who conducted the investigation to 'investigate or further investigate matters associated with the alleged commission of the offence'.[176] If such a written request is issued it must, so far as practicable, be complied with.[177] Investigating police*

ACT Police perceived there was a need to expedite the matter and therefore provided the brief of evidence directly to the defence on 6 August 2021, at the same time as it provided it to the prosecution.

[168] Final Report at [276].
[169] Final Report at [281].
[170] Final Report at [293]-[294].
[171] Final Report at [295].
[172] Final Report at [295].
[173] Final Report at [320].
[174] *Hamilton v New South Wales* [2016] NSWSC 1213 at [38]-[39] per Beech-Jones J.
[175] *Director of Public Prosecutions Act 1986* (NSW) (***NSW DPP Act***), s.9.
[176] *NSW DPP Act*, s.18(1).
[177] *NSW DPP Act*, s.18(2).

officers owe a statutory duty of disclosure to the DPP of 'all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person'.[178] Generally in discussing pending cases with ODPP solicitors police officers are discharging their statutory function of providing 'police services ... by way of [the] detection of crime' and services 'necessary for, or incidental'[179] to that end.

[39] Otherwise, the discussions between police officers and ODPP solicitors about pending criminal cases, including those recorded in the documents the subject of this application, clearly concern a matter of great seriousness. The variety of topics discussed extend to assessments of the relative strengths and weaknesses of Crown witnesses and possible lines of inquiry. Those are the subject matters of the subpoenaed documents (see [14]). The disclosure and discussion by police officers of lines of inquiry without the approval of the DPP of such matters may compromise any further investigation. Otherwise, it is inappropriate for police officers to disclose either their or the DPP's assessment of the relative strengths or weaknesses of witnesses or the case generally. In this context, the DPP has the conduct of prosecutions and not the police. It is not in the interests of either victims, the accused or potential jury members for police to be able to freely discuss such matters. Overall, the maintenance of the integrity of the prosecution, the interests of the accused and the proper administration of justice all point to police officers not being at liberty to freely disclose the contents of their discussions with ODPP solicitors on these and similar topics."

[Emphasis added]

164. Mr Sofronoff found that Det Insp Boorman's analysis should be disclosed because its analysis might lead the defence to a chain of inquiry. However:

    (a) that is a misunderstanding of that aspect of the disclosure principle. That principle pertains to facts, or evidence, that might lead to a chain of inquiry;

    (b) it does not pertain to expressions of internal opinion about the strengths and weaknesses of the evidence; and

    (c) consequently, in respect of Det Insp Boorman's analysis, the view that it was not disclosable was perfectly tenable.

165. Mr Sofronoff found that Det Super Moller's executive briefing note was disclosable because it referred to Ms Higgins' reluctance to provide the police with access to her mobile phone. Mr Sofronoff found that the fact of Ms Higgins' reluctance to provide access to her mobile phone was a fact which the defence was entitled to know. Mr Drumgold understands that there is no suggestion that her reluctance was otherwise not contained in the evidentiary material disclosed to the defence. Det Super Moller's expressed *opinion* regarding that reluctance was not a matter requiring disclosure.

166. In the circumstances, the finding that Mr Drumgold's view in respect of disclosure was "*not tenable"* was unreasonable and, given its concomitant implication that Mr Drumgold's view was one which could not honestly have been held by a competent prosecutor, the finding was arbitrary and capricious. This finding is legally unreasonable.

[178] *NSW DPP Act*, s.15A(1).

[179] *Police Act 1990* (NSW), s.6(2).

Was legal professional privilege honestly claimed and maintained

167. Mr Sofronoff made a number of findings adverse to Mr Drumgold in respect of the claim of legal professional privilege which he maintained in respect of the Two Investigation Documents.

Adverse finding that LPP claim not honest, untenable

168. Mr Sofronoff made the following adverse findings as to whether a claim for legal professional privilege in respect of the Two Investigation Documents was maintainable:[180]

(a) "… *no such opinion could honestly be formed by a competent lawyer*".

(b) "*The claim of privilege was utterly untenable*".

169. The basis for these findings appears to have been twofold:[181]

(a) The authors of the Two Investigation Documents had not made the documents with the obtaining of legal advice in mind.

(b) It should have been clear on the face of the documents that the authors were seeking internal advice, not legal advice.

170. Mr Drumgold accepts for the purpose of the present Application that legal professional privilege was not claimable over these documents.

171. However, Mr Drumgold submits that Mr Sofronoff's finding that in forming that view he was either incompetent or dishonest, and that the view was untenable, is legally unreasonable because:

(a) The following facts were suggestive that the Two Investigation Reports were generated for the purpose of obtaining legal advice:

(i) the timing of the creation of the Two Investigation Documents;

(ii) the provision of them to Mr Drumgold in addition to the brief of evidence as part of seeking his advice prior to proceeding commencing;

(iii) the content, being an analysis of concerns regarding the state of the evidence; and

(iv) the stamped reference "*PROTECTED Sensitive Legal*" on Det Super Moller's executive briefing note.

(b) Mr Drumgold did not have, at least until the meeting on 15 September 2021, any information suggesting that either Det Super Moller or Det Insp Boorman had a subjective belief that the documents that they authored were not for the purposes of legal advice.

(c) That is, while ultimately the finding that legal professional privilege was not maintainable, reached upon all of the evidence available to the Board, may have been correct, the finding that on the material available to Mr Drumgold the maintenance of the claim was either the product of dishonesty or incompetence, and was untenable, was without intelligible foundation. To the contrary, there was a clear basis, on the material known to Mr Drumgold, upon which a competent practitioner could make an honest determination that legal professional privilege could be claimed in respect of the documents.

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[180] Final Report at [340] and [408].
[181] Final Report at [301]-[305].

Adverse finding that Drumgold deliberately advanced false claim

172. Mr Sofronoff made the following finding adverse to Mr Drumgold as to whether he advanced a claim of legal professional privilege on behalf of the AFP which he knew was not in fact being made by the AFP:[182]

> *"Mr Drumgold deliberately advanced a false claim of legal professional privilege……."*

173. Mr Sofronoff found that:

    (a) The AFP had never made a claim of legal professional privilege over the Two Investigation Documents.[183]

    (b) Mr Drumgold knew that no claim for legal professional privilege had been made by the AFP.[184]

    (c) This was an invention.[185]

174. Again, Mr Drumgold accepts for the purposes of this Application that, as a matter of fact, the AFP may not have made a claim of legal professional privilege. However, he submits that Mr Sofronoff's findings to the effect that Mr Drumgold knew this at the time, and that he deliberately advanced a false claim is legally unreasonable:

    (a) The findings are findings of inference. They involve an assessment of the state of mind of Mr Drumgold inferred from the facts. To permissibly draw such an inference, the inference must be supported by more than a mere speculation or conjecture.

    (b) As a matter of fact, the ACT Police had not disclosed the Two Investigation Documents in the brief of evidence provided to the defence on 6 August 2021.[186]

    (c) Throughout the subsequent communications between the AFP and the DPP about whether or not legal professional privilege was maintainable, the discussions were not definitive. The AFP identified issues with a claim regarding legal professional privilege, but at all relevant times had sought Mr Drumgold's advice, which was consistently that privilege was claimable, and at no time had it rejected that advice.[187]

    (d) The very fact that the discussions continued necessarily indicates that, at the very least, the AFP had not determined not to claim privilege.

    (e) Further, the various descriptors in the disclosure certificates were apt to cause confusion, and did cause confusion (see paragraph 156 above).

    (f) Mr Drumgold's evidence was that he understood at the time that the reference in Schedule 1 to the disclosure certificates was a reference to the Two Investigation Documents.[188] No one at the time of these events disagreed with that analysis of the disclosure certificates.

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[182] Final Report at [415].
[183] Final Report at [394].
[184] Final Report at [389].
[185] Final Report at [390]-[393].
[186] Final Report at [175]-[189]. While the Final Report contains no specific finding to the effect that the Two Investigation Documents were not included in the brief of evidence, that must be the case given the subsequent controversies about their non-disclosure.
[187] Final Report at [309]-[314], [334]-[339], [350]-[352] and [400]-[401].
[188] Mr Drumgold's Statement to the Inquiry dated 4 April 2023 at [327]-[333].

(g) Notwithstanding that Mr Drumgold gave evidence to the Inquiry over five days, it was never suggested to him that his understanding of the disclosure certificates was wrong, let alone that it was false or an invention.[189]

175. The finding that Mr Drumgold was deliberately advancing a false claim is squarely inconsistent with him maintaining that the privilege was that for the AFP to claim, and agreeing to a process of subpoenaing the AFP, the very purpose of which was to get the AFP to determine its position.[190]

176. The objective facts support Mr Drumgold's position taken in the Lehrmann Trial and at the Inquiry that he was acting on the basis that, until it determined not to claim legal professional privilege on 16 September 2022, the AFP had been maintaining the claim.

Adverse findings re improper request of junior solicitor, abuse of authority, betrayal of trust

177. Mr Sofronoff's findings that Mr Drumgold made a false claim of legal professional privilege and constructed a false narrative to support that claim formed the basis for the following further adverse findings against Mr Drumgold in respect of procuring an affidavit from Mr Greig relating to that claim:

(a) Mr Drumgold "*knew exactly what he was doing when he asked Ms Pitney to swear a misleading affidavit and, when foiled, he asked someone in his office who could not be expected to imagine that he was being asked, by the DPP himself, to do something improper*".[191]

(b) Mr Drumgold directed "*a junior lawyer in his office to make a misleading affidavit' and 'preyed on the junior lawyer's inexperience*".[192]

(c) Mr Drumgold "*egregiously abused his authority and betrayed the trust of his young staff member*".[193]

178. The factual bases for these findings appear to have been as follows:

(a) On 8 September 2022, Mr Drumgold emailed a solicitor, Ms Pitney, advising that an affidavit would be required to the effect that Det Super Moller's executive briefing note was one of two documents that formed a request for advice from the ACT Police. Mr Drumgold advised his "*preliminary thoughts*" whether it would suffice for Ms Pitney to provide the affidavit on statement and belief.[194]

(b) Ms Pitney responded by saying, relevantly, "*who would I say I have been advised by*".[195]

(c) On 12 September 2022, Mr Drumgold asked a more junior solicitor, Mr Greig, to provide an affidavit relating to Det Super Moller's executive briefing note, and proposed wording for such an affidavit.[196]

(d) Mr Drumgold did not, as a matter of fact, understand that the Disclosure Certificate provided by the ACT Police intended to claim legal professional privilege over the

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[189] As to questioning on this topic, see Transcript of the Inquiry hearings at T72.1 – .26, T73.45 – .48, T75.29 – .36, T78.39 – 80.48, T81.1 – .23, T82.1 – 84.20 and T128.21 – 129.7.
[190] See Final Report at [503].
[191] Final Report at [413].
[192] Final Report at [415].
[193] Final Report at [416].
[194] Final Report at [370]-[371].
[195] Final Report at [371].
[196] Final Report at [374]-[375].

Two Investigation Documents.[197] Instead, Mr Drumgold constructed a false narrative to support a claim of legal professional privilege.[198]

179. Mr Sofronoff then inferred from those facts that Ms Pitney's response was either a refusal to do that which Mr Drumgold had requested, or was interpreted by Mr Drumgold in that way, and *therefore* he had turned to Mr Greig, and that he had turned to Mr Greig because, being more junior, Mr Greig would not respond in the same way as Ms Pitney.[199]

180. Mr Sofronoff then found that Ms Pitney had "*foiled*" Mr Drumgold's plan and that Mr Drumgold's reaction was to "*sideline the too-knowledgeable lawyer and to procure a youngster to do the job*".[200]

181. Mr Drumgold submits these findings are legally unreasonable:

    (a) For the reasons set out above, the so-called narrative was not false.

    (b) Mr Drumgold gave evidence to the effect that he understood the disclosure certificates in the way he did, and understood that the Two Investigation Documents were comprehended within Schedule 1 of the disclosure certificates.[201]

    (c) Once that it is accepted, the foundation for the balance of these findings falls away.

182. The findings that Mr Drumgold regarded himself as being rebuffed or *foiled* by Ms Pitney, and therefore turned to Mr Greig, and did so because he wanted to rely on Mr Greig's inexperience, were inferential findings. However:

    (a) They were simply conjecture.

    (b) The three foundational facts (namely, the request on 8 September 2022 to Ms Pitney; Ms Pitney's response; and the request on 12 September 2022 to Mr Greig) simply do not give rise to those inferences.

183. Further, this inferential reasoning was never articulated during the course of the Inquiry:[202]

    (a) None of it was put to Mr Drumgold.

    (b) It was not put to Ms Pitney.

    (c) It was not put to Mr Greig.

    (d) It was not made the subject of any proposed adverse finding.

184. The making of a significantly adverse finding, based entirely on inference, in respect of which the subject of the adverse comment is given no opportunity to respond, must necessarily mean that the adverse inferences drawn from the objective facts do not rise above the level of conjecture, guesswork or surmise.

185. The findings in respect of involving Mr Greig in the preparation of the affidavit were legally unreasonable.

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[197] Final Report at [392]-[393].
[198] Final Report at [395] and [415].
[199] Final Report at [413].
[200] Final Report at [385] and [413].
[201] Mr Drumgold's Statement to the Inquiry dated 4 April 2023 at [327]-[333]. As to the questioning on this topic, see Transcript of the Inquiry hearings at T72.1 – .26, T73.45 – .48, T75.29 – .36, T78.39 – 80.48, T81.1 – .23, T82.1 – 84.20 and T128.21 – 129.7.
[202] First Drumgold Affidavit at [45]. References to the transcript of the Inquiry relevant to this issue will be provided separately.

Adverse finding that Drumgold misled the Court

186. Mr Sofronoff found that Mr Drumgold in respect of presentations to the Court regarding the claim of legal professional privilege:[203]

> *".... misled the Court through submissions and by ... a misleading affidavit ... the ACT DPP tried to use dishonest means to prevent a person he was prosecuting from lawfully obtaining material."*

187. The representations of Mr Drumgold which Mr Sofronoff found formed part of his misleading the Court were as follows:

   (a) The representation on 8 September 2022 that the Two Investigation Documents formed part of the brief for advice seeking his advice on the laying of charges.[204]

   (b) The representation on 8 September 2022 that Mr Drumgold thought it was an error that the Two Investigation Documents had been listed as disclosable on one of the disclosure certificates.[205]

   (c) The representation made orally on 7 September 2022 and in subsequent written submissions and in Mr Greig's affidavit that the AFP were making a claim for legal professional privilege.[206]

   (d) The representation on 16 September 2022 that Mr Drumgold had been told that Det Super Moller's executive briefing note (also known as the "investigation review document") had been created for a particular purpose, being the obtaining of legal advice.[207]

188. Mr Drumgold submits these findings are legally unreasonable because:

   (a) These findings are of the utmost seriousness for a lawyer with the result that they could only be reached by reference to the *Briginshaw* standard.[208]

   (b) These findings lack an intelligible foundation, largely for reasons already set out.

   (c) The findings essentially rest upon the findings addressed earlier to the effect that Mr Drumgold advanced a false claim of legal professional privilege, that he invented a false narrative to support that false claim, and that he procured a false affidavit from Mr Greig to further that end.

   (d) Once it is accepted that those findings are unreasonable, then these findings regarding misleading the Court fall away.

   (e) In any event, these findings simply make no sense in the context where Mr Drumgold and the defence agreed on 16 September 2022 that the way to proceed was for the defence to issue a subpoena directed to the AFP in respect of Det Super Moller's executive briefing note.

   (f) This process was arrived at upon the shared understanding of Mr Drumgold, the defence and the Court that the relevant privilege was for the AFP to claim.

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[203] Final Report at [415] and [417].
[204] Final Report at [376].
[205] Final Report at [377].
[206] Final Report at [389].
[207] Final Report at [404].
[208] See fn 100 above.

(g) If Mr Drumgold was deliberately making a false claim for legal professional privilege that the police were making, it seems unlikely he would accede to a process whereby the police would be required to disclose its position by the AFP.

(h) Rather, agreeing to that process is only explicable on the basis that Mr Drumgold genuinely believed that the AFP was, or might be, maintaining the claim for legal professional privilege.

(i) At no point did Mr Sofronoff deal with this fundamental inconsistency at the heart of his reasoning process.

(j) In these circumstances these findings were legally, unreasonable.

<u>Ground 4: Failure to provide fair hearing</u>

189. It is submitted Mr Sofronoff failed to accord Mr Drumgold natural justice by failing to give him a fair hearing in respect of the findings set out in Schedule B to the Application (ground 4).

190. Mr Drumgold contends that the findings made by Mr Sofronoff relating to the release of a letter pursuant to a request under the *Freedom of Information Act 2016* (ACT) (**FOI**), and relating to the procuring of that which Mr Sofronoff found to be a misleading affidavit, constituted a failure to accord him natural justice by failing to provide Mr Drumgold with a fair hearing.

191. Some basic principles include the following:

(a) While the content of procedural fairness obligations will differ according to context, fundamentally, procedural fairness requires that a person know the substance of the case against them and be given the opportunity to respond to adverse material that is credible, relevant or significant.[209]

(b) That opportunity must be a reasonable one.[210]

(c) A person who might be affected by an adverse finding should be given the opportunity to adduce evidence or make submissions rebutting the potential adverse finding.[211]

(d) While a decision-maker is generally not obliged to expose his or her reasoning process or provisional views for comment by the person affected,[212] the circumstances might require disclosure of such matters, such as where they relate to a critical issue or factor, or where they do not follow such matters, such as where they relate to a critical issue or factor, or where they do not follow from an obvious or natural evaluation of the evidence.[213]

(e) Ultimately, the relevant question is whether, determined at the level of practicality, the person has been afforded fairness, as has been stated by Gleeson CJ:[214]

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[209] *Kioa v West & Anor* (1985) 159 CLR 550 at 629 per Brennan J.
[210] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [40] per Gaudron and Gummow JJ.
[211] *Ex parte Aala* (2000) 204 CLR 82 at [100] per McHugh J.
[212] *Re Ruddock; ex parte Applicant S154/2002* (2003) 201 ALR 437 at 449 per Gummow and Haydon JJ, 456-7 per Kirby J.
[213] *Commissioner of the Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591 per the Court.
[214] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37] per Gleeson J.

> *"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."*

Adverse findings relating to procuring of the misleading affidavit

192. Mr Drumgold refers to paragraphs 177 to 180 above, which set out the relevant findings and factual bases for the findings in respect of this issue.

193. From that set of findings and facts, Mr Sofronoff concluded that:

    (a) Mr Drumgold had approached Ms Pitney to make a misleading affidavit;[215]

    (b) by her response to his email, Ms Pitney had *foiled* Mr Drumgold's attempt to have her make a misleading affidavit (presumably in that her response evinced a reluctance to provide such an affidavit);[216]

    (c) because he had been foiled by Ms Pitney, Mr Drumgold procured the misleading affidavit from the more junior solicitor, Mr Greig;[217] and

    (d) in doing so, Mr Drumgold relied upon Mr Greig's inexperience and the likelihood that he would not question him about the appropriateness of making the affidavit.[218]

194. Mr Sofronoff gave Mr Drumgold no opportunity to respond to these findings which were ultimately made against him.[219]

195. As to the finding that Mr Drumgold did not, as a matter of fact, understand that the disclosure certificate provided by the ACT Police intended to claim legal professional privilege over the Two Investigation Documents, at no stage during the course of the Inquiry was it suggested to Mr Drumgold that his understanding of the disclosure certificate was wrong, let alone false.[220]

196. As to the conclusions Mr Sofronoff drew from that finding and the objective facts, set out in paragraph 193 above, at no stage during the course of Mr Drumgold's evidence was it suggested to Mr Drumgold that:[221]

    (a) he had approached Ms Pitney to make an affidavit that was misleading;

    (b) he interpreted Ms Pitney's response to his approach to be effectively her declining to make the affidavit;

    (c) because he interpreted Ms Pitney's response to be effectively her declining to make the affidavit, he therefore procured the affidavit from Mr Greig; or

    (d) he procured the affidavit from Mr Greig because he was relying on Mr Greig's inexperience and the likelihood that Mr Greig would not question him about the appropriateness of making the affidavit.

197. Further, the notice of proposed adverse comments, served by the Board upon Mr Drumgold[222] after the close of the evidence, did not advise Mr Drumgold of any proposed

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[215] Final Report at [413].
[216] Final Report at [413].
[217] Final Report at [413].
[218] Final Report at [413]-[415].
[219] First Drumgold Affidavit at [45]. References to the transcript of the Inquiry relevant to this issue will be provided separately.
[220] The questioning on this topic includes T72.1-26, T73.45-48, T75.29-36, T78.39-T80.48, T81.1-23, T82.1-T84.20 and T128.21-T129.7 of the Transcript of the Inquiry hearings.
[221] First Drumgold Affidavit at [45]. References to the transcript of the Inquiry relevant to this issue will be provided separately.
[222] Such notice was purportedly issued pursuant to the *Inquiries Act* s.26A(1).

finding to the effect that [redacted] he had preyed upon Mr Greig's inexperience.

198. For these reasons, Mr Drumgold was given no opportunity to respond to the findings ultimately made against him in respect of the procuring of that which Mr Sofronoff found to be a misleading affidavit, and so for these reasons Mr Sofronoff failed to accord Mr Drumgold with natural justice by failing to give him a fair hearing in this regard.

Adverse findings relating to FOI request

199. Mr Sofronoff made two adverse findings against Mr Drumgold arising out of the release in December 2022, pursuant to a FOI request, of a letter he had written to the Chief Police Officer (**CPO**).

(a) At [688] of the Final Report:

> *"Mr Drumgold told [the Chief Police Officer] 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'. .... Mr Drumgold's statements to him were false."*

(b) At [699] of the Final Report:

> *"..... the explanations proffered by Mr Drumgold to the Ombudsman, ACTP and to [the Board] were untrue. ……. He has shamefully tried falsely to attribute claim to Ms Cantwell...."*[223]

200. Mr Sofronoff's findings on this topic include the following:

(a) On 1 November 2022, Mr Drumgold wrote a letter to the CPO of the ACT Police in which he set out his concerns regarding the conduct of police in the investigation and proceedings.[224]

(b) On 2 December 2022, Mr Drumgold announced the discontinuance of the prosecution of Mr Lehrmann.[225]

(c) On 3 December 2022, *The Australian* newspaper published an article which quoted from materials which had not been publicly released, and which was critical of Mr Drumgold.[226]

(d) Later on 3 December 2022, Mr Knaus of *The Guardian* newspaper alerted Mr Drumgold to the article in *The Australian* and sought comment from Mr Drumgold. Mr Drumgold said words to the effect that he had written to the CPO and therefore he "*better not make any comment*".[227]

(e) On 5 December 2022, Mr Knaus submitted a FOI request for any documented complaint of the DPP about the conduct of the police during the proceedings.[228]

(f) On 7 December 2022:

(i) At 3:06pm, Ms Cantwell, the executive officer of the ODPP, forwarded the FOI request to Mr Drumgold, under cover of an email in which she suggested that any document covered by the request would be covered by legal professional

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[223] See also Final Report at [693]-[694].
[224] Final Report at [621].
[225] Final Report at [647].
[226] Final Report at [661].
[227] Final Report at [664].
[228] Final Report at [688].

privilege and asked whether she should put the request through to other officers or would Mr Drumgold make the decision on release himself.[229]

(ii) At 3:18pm, Mr Drumgold replied to Ms Cantwell and attached a copy of his letter to the CPO to the reply email and advised that this was the only letter the ODPP had falling within the FOI request description.[230]

(iii) Later that same afternoon, Ms Cantwell asked Mr Drumgold whether he wanted her to send the letter to Mr Knaus, and Mr Drumgold confirmed that he did.[231]

(iv) At 6:35pm, Ms Cantwell emailed Mr Drumgold and asked that he confirm that the attached letter was the letter he was happy to be released under FOI; and

(v) At 6:50pm, Mr Drumgold replied that he was happy for it to go out.[232]

(vi) At 6:57pm, Ms Cantwell emailed the letter to Mr Knaus.[233]

(g) No consultation occurred with the ACT Police before the letter was released, in circumstances where consultation should have occurred.[234]

(h) When he learnt through the media that Mr Drumgold's letter had been released through FOI, the CPO contacted Mr Drumgold, and according to the diary note of the CPO, which Mr Sofronoff accepted as accurate, Mr Drumgold told the CPO 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.[235]

(i) The CPO made a complaint to the ACT Ombudsman regarding the lack of consultation before the letter was released under FOI.[236]

(j) Mr Drumgold, in his statement to the Inquiry, stated that, in responding to Ms Cantwell's email on the evening of 7 December 2022 asking whether he was happy for the letter to be released under FOI:

(i) he had not given it due thought;

(ii) he understood Ms Cantwell's question to be directed towards the issue of legal professional privilege;

(iii) he anticipated that Ms Cantwell would consider the other requirements of the FOI Act, including consultation; and

(iv) his response risked being interpreted as an instruction that the letter be sent out without further consideration, and that is how it was interpreted by Ms Cantwell.[237]

(k) Mr Drumgold had given similar explanations to the Ombudsman and in an apology to the ACT Police.[238]

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[229] Final Report at [673]-[674].
[230] Final Report at [675]-[676].
[231] Final Report at [681].
[232] Final Report at [682]-[683].
[233] Final Report at [683].
[234] Final Report at [677]-[679].
[235] Final Report at [688].
[236] Final Report at [691].
[237] Final Report at [692].
[238] Final Report at [693].

Adverse finding of false statement to the CPO re the FOI request

201. Mr Sofronoff found that the statements to the CPO, as recorded in the CPO's diary, were made by Mr Drumgold and were false.[239]

202. Mr Drumgold submits that such findings constituted a denial of natural justice for the following reasons:

(a) While Mr Drumgold gave a statement to the Inquiry in which he referred to the circumstances of the release of the letter under FOI and his involvement in an ACT Ombudsman's inquiry into the release of the letter under FOI and the outcome of that inquiry,[240] the statement did not address the detail of what he discussed with the CPO.[241]

(b) Mr Drumgold did not give oral evidence regarding the release of the letter under FOI or his discussions with the CPO about the release.[242]

(c) Mr Drumgold was not questioned by the Board regarding the release of the letter under FOI or his discussions with the Chief Police Officer about the release.[243]

(d) It was not put to Mr Drumgold in cross-examination that he had made the statements set out in the diary note of the CPO, or that those statements were false.[244]

(e) While the Board served upon Mr Drumgold a notice of proposed adverse comments,[245] that notice did not advise of any proposed finding to the effect that Mr Drumgold had made false statements to the CPO regarding the release of the letter under FOI.

(f) Therefore, Mr Drumgold had no evidentiary opportunity, or indeed any opportunity, to respond to the adverse finding ultimately made against him.

Adverse finding of untrue explanations re the FOI release

203. Mr Sofronoff found that Mr Drumgold's explanations to the Ombudsman, the ACT Police and to the Board relating to the FOI release were untrue, and that Mr Drumgold had "*shamefully tried falsely to attribute blame to Ms Cantwell*".[246]

204. Such findings constituted a denial of natural justice for the following reasons:

(a) While Mr Drumgold provided a statement to the Inquiry which, in part, related to the release of the letter under FOI and the Ombudsman investigation, he did not give oral evidence in respect of these matters.[247]

(b) He was not cross-examined by the Board about:

(i) the release of the letter under FOI; or

(ii) the Ombudsman investigation; or

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[239] Final Report at [688].
[240] Mr Drumgold's Statement to the Inquiry dated 4 April 2023 at [471]-[497], particularly [489].
[241] Final Report at [689].
[242] First Drumgold Affidavit at [43].
[243] First Drumgold Affidavit at [43].
[244] First Drumgold Affidavit at [43].
[245] Final Report, Appendix C-1, NCA 2023/1 – Notice of Proposed Adverse Comments Mr Shane Drumgold SC dated 9 June 2023 at [57] and the document prepared by the AFP attached thereto. Such notice was purported to be issued pursuant to the *Inquiries Act* s.26A(1).
[246] Final Report at [693]-[694] and [699].
[247] First Drumgold Affidavit at [43].

(iii) his explanations regarding the failure to consult before the letter was released.[248]

(c) It was not put to him that:

(i) his explanations to the Ombudsman and to the Board (as contained in his statement) were false; or

(ii) his explanations falsely tried to attribute blame to Ms Cantwell.[249]

(d) While the Board served upon Mr Drumgold a notice of proposed adverse comments,[250] that notice:

(i) put Mr Drumgold on notice of the possible finding that he had misled the Ombudsman, the ACT Police and the Inquiry in respect of his explanations as to why the letter was released under FOI without having consulted with the ACT Police;[251] but

(ii) was served on Mr Drumgold after the close of evidence.[252]

(e) The provision of such a notice without giving Mr Drumgold the evidentiary opportunity to refute the findings ultimately made against him was therefore insufficient to provide him with procedural fairness. It did not give him a *reasonable opportunity to address those matters.*

(f) Further, the notice did not put him on notice of the possible finding that he had falsely tried to attribute blame to Ms Cantrell. Therefore, he was given no opportunity at all to address that possible finding.

(g) The findings were findings of great seriousness for a lawyer and so engaged the *Briginshaw* standard. That standard requires that such matters be strictly proved. The findings also involved a determination of Mr Drumgold's state of mind. The failure to provide him with a reasonable opportunity to address the potential findings was therefore all the more significant because of the nature of the contemplated findings.

(h) For those reasons, the findings should not have been made without providing Mr Drumgold with the opportunity to respond to them in his evidence. It was insufficient merely to put Mr Drumgold on notice of a possible adverse finding after the close of the evidence.

Remedies

205. Mr Drumgold seeks the relief set out in his Application and, in particular, the following declarations:

(a) a declaration that the Final Report is invalid and of no effect; and/or

(b) a declaration that the Final Report was attended with the appearance of a reasonable apprehension of bias; and/or

(c) a declaration that Mr Drumgold was denied natural justice by the First Defendant.

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[248] First Drumgold Affidavit at [43].

[249] First Drumgold Affidavit at [43]. References to the transcript of the Inquiry relevant to this issue will be provided separately.

[250] Final Report, Appendix C-1, NCA 2023/1 – Notice of Proposed Adverse Comments Mr Shane Drumgold SC dated 9 June 2023. Such notice was purported to be pursuant to the *Inquiries Act* s.26A(1).

[251] Final Report, Appendix C-1, NCA 2023/1 – Notice of Proposed Adverse Comments Mr Shane Drumgold SC dated 9 June 2023 at [57], incorporating by reference to propositions asserted by ACT Police.

[252] The notice was served on or about 9 June 2023. The evidence had closed on 1 June 2023. Mr Drumgold last gave evidence on 12 May 2023.

206. Mr Drumgold had a real interest in obtaining a declaration that there had been a failure to observe procedural fairness because of the harm caused to his reputation.[253]

Date: ~~30 January 2024~~ 16 February 2024

D O'Gorman

S Blewett

S C B Brenker

[253] *Forster v Jododex Aust. Pty Ltd* (1972) 127 CLR 421; *Ainsworth v Criminal Justice Commissioner* (1992) 175 CLR 564.