ACT INTEGRITY COMMISSION

Investigation Report
Operation Juno

Concerning certain conduct of Mr Walter Sofronoff KC.

March 2025

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Acknowledgement of Country
The ACT Integrity Commission acknowledges the Ngunnawal people as the traditional owners and custodians of the Canberra region. We pay our respects to Elders past, present, and emerging and extend our respects to all Aboriginal and Torres Strait Islander people.

Contents

ACT INTEGRITY COMMISSION

FROM THE OFFICE OF THE COMMISSIONER

Our Ref: INV-20243

Mr Mark Parton MLA
Speaker
Legislative Assembly for the ACT
CANBERRA ACT 2601

Dear Mr Speaker

INVESTIGATION REPORT – OPERATION JUNO

On 22 September 2023 the Commission received a mandatory notification that Mr Walter Sofronoff KC, acting as the Board of Inquiry, was suspected on reasonable grounds to have engaged in serious corrupt conduct. The Commission decided to investigate the matter under s 100 of the *Integrity Commission Act 2018* ('Act').

Enclosed is the Commission's Investigation Report prepared pursuant to s 182 of the Act and provided to you in accordance with s 189 (Presentation to the Legislative Assembly).

The Commission has concluded that certain aspects of Mr Sofronoff's conduct as Board of an Inquiry instituted under the *Inquiries Act 1991* amounted to serious corrupt conduct as defined in the *Integrity Commission Act 2018*.

Yours sincerely

The Hon Michael F Adams KC
Commissioner

18 March 2025

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Explanatory note

1. This is the investigation report of Operation Juno, made pursuant to s 182 of the *Integrity Commission Act 2018* (the **IC Act**) which has been provided to the Speaker of the ACT Legislative Assembly in accordance with s 189. A copy of the proposed report was given to various persons in accordance with s 188, some of whom have made comments. These comments have been considered and, where appropriate, amendments have been incorporated in this report.

2. For the purposes of s 186 of the IC Act, in this report an asterisk is used after the first-occurring reference to the name or position of a person to indicate that the person is not the subject of an adverse comment or opinion by the Commission.

Introduction – summary of allegation

3. On 22 September 2023, a mandatory corruption notification pursuant to s 62 of the IC Act was made to the Commission, reporting there was a suspicion on reasonable grounds that Mr Walter Sofronoff KC acting as the Board of Inquiry appointed under the Inquiries Act 1991 (the **Inquiries Act**) had engaged in serious corrupt conduct. The notification referred to two areas of conduct:

    a. the delivery of a copy of the Board's Report (the **Report**) to two journalists* before it had been made public by the Chief Minister* (described in this report as the **additional publications**), and
    b. disclosures to and communications with members of the media during the course of the Inquiry (the **media communications**).

    The term "**disclosures**" and "**impugned communications**" are also used in this report as a collective description of both areas of conduct.

4. The central question for the investigation was whether these disclosures breached the requirements of the Inquiries Act or other rules or principles governing the probity of the Inquiry such as to amount to corrupt conduct as defined in the IC Act, in substance as involving dishonesty or recklessness. As it happened, the only communications that were impugned were those between Mr Sofronoff and

Ms Janet Albrechtsen* (a journalist with the Australian newspaper) and, following delivery of the Report to the Chief Minister, also Ms Elizabeth Byrne* (a journalist with the ABC). An important issue in this investigation concerned whether, in deciding to disclose information to them, Mr Sofronoff failed to afford natural justice to those with a relevant interest, particularly Mr Drumgold SC*, and the Chief Minister. In the result, therefore, four connected but distinct areas of concern are the subject of this Report (collectively referred to as the **impugned conduct**):

a. the communications between Mr Sofronoff and Ms Albrechtsen that were considered in the ACT Supreme Court proceedings initiated by Mr Drumgold against the Board of Inquiry (the **litigation**);

b. the communications by Mr Sofronoff of confidential matter (see paragraph 8) to Ms Albrechtsen;

c. the delivery of the Report to Ms Albrechtsen and Ms Byrne following delivery to the Chief Minister and before its public release by him; and

d. the failure of Mr Sofronoff to afford natural justice to the persons whose interests were affected by the decisions to make the communications.

Outline of findings

5. Mr Sofronoff's conduct fell within several elements of the definition of "corrupt conduct" in the IC Act –
    - His disclosure of confidential material to journalists contrary to the obligations of confidentiality prescribed by the Inquiries Act could have amounted to offences against ss 17 and 36 of the Inquiries Act.
    - His disclosure of the Report itself to journalists before it had been publicly released contravened the requirement of the Inquiries Act to provide the Report exclusively to the Chief Minister to determine the timing and extent of publication, subject to the role of the Legislative Assembly.
    - The disclosures were dishonestly concealed from persons involved in the Inquiry, in particular Mr Drumgold and the Chief Minister, which prevented them taking protective legal action.

- This impugned conduct constituted the exercise of Mr Sofronoff's official functions in a way that was not impartial, significantly compromised the integrity of the Inquiry constituting a breach of public trust and, in respect of his communications with Ms Albrechtsen, gave rise to an apprehension of bias that affected his findings about Mr Drumgold.
- That conduct could have justified Mr Sofronoff's removal from the Inquiry.

6. Mr Sofronoff claimed that his conduct complied with the requirements of the Inquiries Act, and that he had acted in the public interest to ensure the media were adequately informed about the issues being investigated by his Inquiry and in a position to comment accurately about them. However, the Commission concludes that he had not, in fact, acted in good faith and that his conduct, amounting to corrupt conduct within the meaning of the IC Act, undermined the integrity of the Board's processes and the fairness and probity of its proceedings to such an extent as to have been likely to have threatened public confidence in the integrity of that aspect of public administration. It therefore constituted serious corrupt conduct.

7. No other adverse comment or opinion has been made against any other person or entity named in this report.

Key events relating to the Report's disclosure to journalists

8. Pursuant to s 5 of the Inquiries Act Mr Sofronoff was appointed as the Board to inquire into certain matters arising from a widely publicised and controversial criminal trial in the Supreme Court of the ACT and to "report to the Chief Minister by 30 June 2023" (later extended to 31 July 2023). The Board held public, live-streamed hearings in Canberra on 30 March 2023 and then over 13 days between 8 May and 1 June 2023. Transcripts, redacted copies of the exhibits and video recordings of the hearings were published on the Board's website. The Report was provided by Mr Sofronoff in person to the Chief Minister on 31 July 2023 at about 1:15 pm. Amongst other things, the Report was highly critical of the conduct of Mr Drumgold, then ACT Director of Public Prosecutions, who personally had undertaken the prosecution in the ACT Supreme Court.

9. At about 2:12 pm on 31 July 2023, following delivery of the Report to the Chief Minister earlier that day, Mr Sofronoff sent Ms Albrechtsen a copy of the final

version of the Report by text message. On 2 August 2023, at approximately 8 pm, Mr Sofronoff also provided a copy of the Report to Ms Byrne. Mr Sofronoff did not inform the Chief Minister or any of his staff of these deliveries, either when he had decided to make them or at the time they were made and only did so when the issue of the communications was raised with him by the Chief Minister some days later. During the evening of 2 August 2023, Ms Albrechtsen telephoned Mr Sofronoff to inform him that she and a colleague had obtained a copy of the Report from another source, and that, using that other copy, they were going to publish a story which would disclose its contents. Aside from sending a text message at 6:52 pm to ask that she not publish a name which should have been redacted from the Report (to which she agreed), Mr Sofronoff did not in any way seek to dissuade her from the proposed publication or warn the Chief Minister about it. On 3 August 2023, *The Australian* published two articles explicitly based on the Report (the first, timed at 8:59pm August 02, 2023 and updated 2:16pm August 03, 2023, the second timed at 9:15pm August 02, 2023 and updated 4:06pm August 03, 2023). On 3 August the Chief Minister and Attorney-General* wrote to Mr Sofronoff asking whether he had provided copies of the Report to anybody other than the Chief Minister and, if so, to whom and on what basis. Mr Sofronoff responded on the same day with these details and sought to justify his actions.

Key events relating to the media disclosures throughout the conduct of the Inquiry

10. The provision to Ms Albrechtsen of the Report was part of a pattern of contact by Mr Sofronoff which included a very large number of communications with her throughout the course of the Inquiry. This included the provision of witness statements (as to some, that were subject to a non-publication order and subject to legal professional privilege), drafts of the Report, Notices of Adverse Findings against Mr Drumgold (the **Notices** – ultimately appended to the report) and Mr Drumgold's initial Response to the Notices (the **Response**). Those four categories of documents are also collectively referred to in this report as the **confidential matter** and constitute part of the **media communications** referred to above. The evidence before the Commission records a large number of interactions between Mr Sofronoff and Ms Albrechtsen by phone, email and text message.

The conduct of this investigation and the handling of an informant

11. Included in the documents provided to the Commission in the mandatory report was a statement from a source who was a potential witness should an investigation ensue. That person had appeared before the Commissioner in proceedings over which he had presided as a judge of the Supreme Court. Since it was possible that the person's evidence might be significant in considering the media communications, the Commissioner decided he should recuse himself from dealing with the assessment of the mandatory notification in respect of that matter. Following appropriate arrangements with the Speaker of the Assembly, Professor John McMillan AO, as Acting Commissioner, therefore undertook, in respect of this part of the mandatory notification, the assessment and preliminary inquiry (under s 86 of the IC Act). He concluded that the information from the source was of insufficient cogency to be considered significant to the assessment and proceeded to assess the media communications without regard to the source's information.

12. In the result, Professor McMillan and the Commissioner decided that the issues covered by each aspect of the notification were so closely interconnected that they should be consolidated into the one investigation for which the Commissioner should be responsible. This has been done, with the consequence that this report deals with the entirety of the impugned conduct.

The meaning of "corrupt conduct"

13. The Commission is established under the IC Act, amongst other things to investigate conduct that is alleged to be corrupt conduct, refer suspected instances of criminality or wrongdoing to the appropriate authority for further investigation and action and report the outcome of investigations to the Legislative Assembly. In order to find that corrupt conduct occurred, the Commission must be satisfied to the necessary degree (see below) that it falls within at least one of the elements specified in each of ss 9(1)(a) and 9(1)(b). These are –

    - *First limb*: the conduct could constitute
        - a criminal offence,
        - a serious disciplinary offence, or
        - reasonable grounds for dismissing a public official or dispensing with or terminating their services.

    - *Second limb*: the conduct contravenes one of several standards that include:
        - exercise of the public official's functions in a way that is not honest;
        - exercise of the public official's functions in a way that is not impartial;
        - conduct by the public official or former public official that constitutes a breach of public trust;
        - conduct by the public official or former public official that constitutes the misuse of information or material acquired in the course of performing their official functions;
        - conduct that adversely affects, either directly or indirectly, the honest or impartial exercise of functions by a public official or public sector entity, and that would constitute one of several criminal offences (such as fraud or bribery).

14. The issue under investigation was whether the impugned conduct of Mr Sofronoff amounted to "corrupt conduct" as defined in s 9. The first question was whether Mr Sofronoff was a public official as defined in s 12(1), which includes a person who is acting in a public official function for the Territory and (amongst others) is a statutory office holder. The Dictionary to the *Legislation Act 2001* defines a statutory officeholder as meaning: "… a person occupying a position under an Act or statutory

instrument (other than a position in the public service)". Mr Sofronoff was appointed to the position of Chair of the Board of Inquiry pursuant to s 5 of the Inquiries Act and was therefore a statutory office holder and, thus, a public official. His appointment ended (in accordance with s 9 of the Inquiries Act) upon delivery of the Report to the Chief Minister on 31 July 2023. Accordingly, he was no longer a public official at the time of his deliveries of the Report to Ms Albrechtsen and Ms Byrne, nor was this done in the exercise of his functions as the Board, which had come to an end. However, some elements of the definition of "corrupt conduct" apply to conduct engaged in by a former public official. Importantly, this includes the duty to act in accordance with the public trust, and to avoid misuse of information or material acquired in the course of performing their official functions (s 9(1)(b)(ii)(A) and (B) of the IC Act, applying specifically to "conduct by a public official or *former* public official").

15. Although not every element specified in the two limbs of s 9(1) of the IC Act expressly involves moral turpitude or lack of probity, this is an inherent quality of the notion of "corrupt conduct" to which the section is directed. Mere ineptitude or carelessness, even negligence, would not suffice unless it reflected this element or, at least, amounted to recklessness (in the sense of indifference to the character of the conduct or whether it was legitimate or authorised or not). Sub-para 9(1)(b)(i) includes in the definition of "corrupt conduct" conduct "that constitutes the exercise of a public official's functions … in a way that is not honest … ". Conduct is "dishonest" for the purpose of this meaning when it would be regarded as such according to the standards of ordinary, decent people. It is not necessary that the official appreciated or realised that his or her conduct would be regarded as "dishonest". Conduct that involves a lack of impartiality, to come within s 9(1)(b)(i), must be intentional or reckless; again, ineptitude or negligence would not suffice. A breach of public trust (s 9(1)(b)(ii)(A)), implicitly involves the intentional or reckless misuse or abuse of a power or office reposed in the public official rather than mere ineptitude. It matters not whether the official believes he or she is acting in the public interest. The trust that is reposed in the official is that, whatever may be their personal opinions, they will act in conformity with their duty, which is what defines the public interest. It is obvious that a rule that allowed personal views to trump the due exercise of a public function would be destructive of the basic assumptions underlying institutional probity. By parity of reasoning, the "misuse of information or material acquired by an official in the course

of performing their official functions" falling within s 9(1)(b)(ii)(B) must be intentional, reckless or dishonest and mere negligence or ineptitude would not meet the description; again, the probity of the use will depend on the functions of the official and not their personal opinion about whether some different or wider purpose needed to be served.

16. This reasoning applies to the definition in s 10 of "serious corrupt conduct" which occurs where the corrupt conduct (necessarily already found) also has the likelihood of "threatening public confidence in the integrity of government or public administration". "Integrity" carries two major meanings: the first connotes individual moral rectitude or probity; the second, organisational soundness or compliance with requirements. Since s 10 specifies that the seriousness of the corrupt conduct depends, not on the degree to which it is wrongful, but on the negative consequences for public trust, there appears to be no reason to apply an artificial construction to the meaning of "integrity". On this basis, it is sufficient if a likely consequence of the identified corrupt conduct is to threaten public confidence in the soundness or efficacy, as distinct from probity, of government or public administration.
The requirement of a lack of probity is satisfied by the character of the corrupt conduct whose effect is under consideration; whether the corrupt conduct is serious depends on the objective gravity of the consequences of the wrongful conduct. It is important to understand that a finding of serious corrupt conduct is relevant (for present purposes) only to the question whether this investigation report is precluded (pursuant to s 184) from including a finding that a stated person has engaged in corrupt conduct. Such a finding may be included in the report only if it is "serious corrupt conduct. Otherwise, the term has no independent role. (For completeness, it should be noted that it has not been necessary to consider the application of s 11 in respect of the definition of systemic corrupt conduct.)

17. Whether the identified corrupt conduct is likely to threaten public confidence in the integrity of government or public administration is a question of fact, not law.
The likelihood is not required to be more probable than not but conveys the notion of a substantial – a "real and not remote" – chance, regardless whether it is less or more than fifty per cent.

The standard of proof

18. In a conventional trial, conclusions are drawn by applying the rules concerning the onus (or burden) and standard of proof. An investigation under the IC Act is not a trial: there are no parties; and no legal or evidentiary burden is placed on anyone to prove or disprove any fact. There is an applicable standard of proof in the sense that the process of investigation and the ability to make any findings must be based on a rational assessment of the relevant and available evidence to an appropriate level of certainty. In respect of findings of corrupt conduct, this is the civil, as distinct from the criminal, standard of proof. The civil standard is conventionally stated to be reasonable satisfaction on the balance of probabilities or on the preponderance of probabilities, whilst the criminal standard is satisfaction beyond reasonable doubt. When considering the balance of probabilities, attempting to undertake a mechanical or arithmetical comparison (say, 51% to 49%), even were it conceptually possible, is not appropriate. The Commissioner must actually be persuaded by the evidence, at least to a reasonable or comfortable degree, of the occurrence or existence of a fact before it can be found. In other words, the mere mechanical comparison of probabilities, independent of any belief in reality, cannot justify the finding of a fact. The tribunal of fact cannot choose between guesses, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal may reasonably be satisfied. At the same time, the difference between the criminal and civil standards of proof is of crucial significance and is no mere matter of words or mere semantics. Even in respect of misconduct capable of amounting to a crime, it is only necessary that the Commissioner be reasonably satisfied of the matter and is not required to reach the degree of certainty essential to ground a conviction. Accordingly, an adverse finding of corruption is not to be regarded as mere conjecture or surmise although it falls short of certainty.

19. Findings of corrupt conduct may well have grave repercussions for and seriously affect a person's reputation, professional standing and employment. It is conventionally accepted that it is inherently unlikely that persons of good character will knowingly act corruptly and this and the gravity of the consequences that flow from a particular finding are considerations that must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. The rule is conventionally stated: ''In such matters 'reasonable satisfaction'

should not be produced by indefinite testimony, inexact proofs or indirect inferences". This should not, however, be understood as directed to the standard of proof. Rather, those words should be understood as merely reflecting the conventional perception that people act rightly and, that a finding should not lightly be made that, on the balance of probabilities, a person has been guilty of corrupt conduct.

20. Another significant difference between the fact-finding exercise in criminal trials and that undertaken in an investigation concerns circumstantial evidence. In a criminal trial, the prosecution must exclude any reasonably possible explanation or hypothesis consistent with an accused person's innocence. In civil proceedings or an investigation by the Commission, the question is whether the evidence is sufficiently cogent or of sufficient probative force as to give rise to a reasonable satisfaction that the impugned conduct occurred. The mere fact that it is reasonably possible that it did not occur does not preclude a determination that, even so, it did.

21. In this investigation, for the most part the objective facts are not controversial: the contentious questions depend on the appropriate inferences to be drawn from those facts.

22. This report addresses the issue of whether Mr Sofronoff's actions amounted to corrupt conduct within the meaning of s 9 of the IC Act. This requires consideration, amongst other things, of the provisions of the Inquiries Act, the functions of a Board of Inquiry and the facts of and relevant to the impugned conduct.

The Inquiries Act 1991

23. So far as is relevant, the Inquiries Act provides –

> **5 Appointment of board of inquiry**
>
> The Executive may appoint 1 or more people as a board of inquiry to inquire into a matter stated in the instrument of appointment.
>
> **7 Terms and conditions of appointment**
>
> (1) A person may be appointed as a full-time or part-time member.
>
> (2) A member holds office on the terms and conditions in relation to matters not provided for by this Act as are determined in writing by the Executive.
>
> **9 Cessation of office**
>
> A member ceases to hold office as a member when the board's report of its inquiry has been submitted to the Chief Minister in accordance with section 14.

11 Termination of appointment

The Executive may terminate the appointment of a member for misbehaviour or physical or mental incapacity.

13 Conduct

Except as otherwise provided by this Act, an inquiry must be conducted in such manner as the board determines.

14 Reports of boards

(1) After completing an inquiry, a board must—

(a) prepare a report of the inquiry; and

(b) submit the report to the Chief Minister.

(2) …

(3) …

14A Presenting reports

(1) The Chief Minister may present a copy of a report or part of a report submitted by a board to the Legislative Assembly.

(2) The Chief Minister may make a report or part of a report public whether or not the Legislative Assembly is sitting and whether or not the report or part has been presented to the Assembly.

(3) …

14B Chief Minister to explain non-presentation of report

(1) This section applies if—

(a) a board submits a report to the Chief Minister under section 14A; and

(b) the Chief Minister does not present a copy of the report to the Legislative Assembly or otherwise publish the report within the reporting period.

(2) On the next sitting day after the end of the reporting period, the Chief Minister must present to the Legislative Assembly a written statement explaining why a copy of the report was not presented or otherwise published within the reporting period.

(3) In this section:

reporting period, for a report, means the shorter of the following periods:

(a) either—

(i) if there is a sitting day within 1 month after the day the report is submitted by the board to the Chief Minister—1 month after the day the report is submitted; or

(ii) if there is no sitting day within 1 month after the day the report is submitted by the board to the Chief Minister—the period ending on the 1st sitting day after the report is submitted;

(b) the period ending on the 2nd last sitting day before the polling day for the next general election of members of the Legislative Assembly.

17 Nondisclosure of information by members etc

A person who is or has been a member, a member of the staff of a board or a lawyer assisting a board must not, either directly or indirectly, except in the exercise of a function under this Act –

(a) make a record of, or divulge or communicate to any person, any information acquired by the first mentioned person by virtue of that person's office or employment under or for this Act; or

(b) make use of any such information; or

(c) produce to any person, or permit any person to have access to, a document provided for this Act.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

18 Procedure

In conducting an inquiry, a board –

(a) must comply with the rules of natural justice; and

(b) is not bound by the rules of evidence but may inform itself of anything in the way it considers appropriate; and

may do whatever it considers necessary or convenient for the fair and prompt conduct of the inquiry.

Hearings

21 Power to hold

(1) For the purposes of conducting an inquiry, a board may hold hearings.

(2) Subject to subsection (3), a hearing must be in public.

(3) If a board is satisfied that it is desirable to do so because of the confidential nature of any evidence or matter, or for any other reason, the board may –

(a) direct that a hearing or part of a hearing must take place in private and give directions as to the people who may be present; and

(b) give directions prohibiting or restricting the publication of evidence given at a hearing (whether in public or private) or of matters contained in documents lodged with, or received in evidence by, the board; and

(c) give directions prohibiting or restricting the disclosure to some or all of the people present at a hearing of evidence given before, or the contents of a document lodged with or received in evidence by, the board.

(4) In considering whether to give a direction under subsection (3), a board must take as the basis of its consideration the principle that it is desirable that hearings be in public and that evidence given before, or the contents of documents lodged with or received in evidence by, the board should be made available to the public and to all people present at the hearing, but must pay due regard to any reasons given to the board why the hearing should be held in private or why publication or disclosure of the evidence or the matter contained in the document should be prohibited or restricted.

The Terms of Reference for the Board of Inquiry

24. By an instrument of appointment entitled Inquiries (*Board of Inquiry—Criminal Justice System) Appointment 2023*, the Executive* appointed Mr Sofronoff "as the Board of Inquiry to inquire into the matters specified in the Terms of Reference at Schedule 1".

25. The Schedule stated –

> **Preamble**
>
> A. The ACT Government acknowledges the need for public confidence in the criminal justice system in the Australian Capital Territory.
>
> B. Recent public reporting and commentary in relation to the case of R v Lehrmann and in relation to a letter sent by the ACT Director of Public Prosecutions to the Chief Police Officer, ACT Policing dated 1 November 2022 raise issues that may have wider implications for the prosecution of criminal matters in the Territory.
>
> C. The ACT Government is concerned to ensure that:
>
> a. the ACT's framework for progressing criminal investigations and prosecutions is robust, fair and respects the rights of those involved; and
>
> b. the ACT's criminal justice entities work effectively together, and appropriately within their respective statutory frameworks.
>
> **Terms of Reference**
>
> The board will inquire into
>
> ...
>
> c. Whether the Director of Public Prosecutions failed to act in accordance with his duties or acted in breach of his duties in making his decisions to commence, continue and to discontinue criminal proceedings against Mr Lehrmann.
>
> d. If the Director of Public Prosecutions so acted, his reasons and motives for his actions.
>
> e. The circumstances around, and decisions which led to the public release of the ACT Director of Public Prosecutions letter to the Chief Police Officer of ACT Policing dated 1 November 2022.
>
> D. The Board will report to the Chief Minister by 30 June 2023.

The functions of a Board of Inquiry

26. The functions of a Board are clearly stipulated in the Inquiries Act. They are, first, to inquire into a matter stated in the instrument of appointment (s 5), secondly, to prepare a report (s 14(1)(a)) and, finally, submit the report to the Chief Minister (s 14(1)(b)). The Terms of Reference stipulate reporting by the Board to the Chief Minister without reference to another person. This scheme envisages a single report and the submitting of *that* report to the Chief Minister and – of critical importance here and further discussed below – by necessary implication, *not to any other person*.

27. The requirement that the Board reports to the Chief Minister is entirely consistent with the historical and constitutional status of tribunals such as this, in the past created *ad hoc* by the exercise of the prerogative. To be effective, they have needed coercive powers to require evidence to be produced and witnesses to be examined. Given the development of legal limits to prerogative powers, it has been necessary for legislation to provide such powers and to ensure the independence of the tribunal. But this legislation, such as the *Royal Commissions Act 1991* (ACT) and the Inquiries Act, has not changed the primary character of the tribunal as an instrument of the Executive. Unsurprisingly, the Explanatory Memorandum to the Inquiries Bill 1990 states that it "… is intended that a Board of Inquiry would be established to provide the Government of the Territory with information on a matter of general importance".

28. The independence of the Board is ensured by permitting termination only for misbehaviour or physical or mental incapacity (s 11) and requiring an inquiry, subject to the Act, "to be conducted in such manner as the Board determines" (s 13; see also s 18). Whilst this excludes government interference in *how* the inquiry is to be conducted, it does not of course prevent the government from making submissions either as to the procedures to be adopted or the evidence or possible findings and, as is the case with the non-government parties, the Board must take such submissions fairly into account. More, natural justice *requires* the Board to give the government (or its agents) the opportunity to respond to any decisions, whether procedural or substantive, that might affect its interests, as also to other parties whose interests might be affected by such a decision. The participants in an inquiry plainly have an interest, amongst other things, in its being conducted with probity accordingly to law

(the basis of the proceedings in and declarations made by the Supreme Court in the litigation) and the publication of material that might adversely affect their reputations, particularly if this were prohibited or unauthorised. This obligation is imposed by the general law at all events but is also specifically provided in s 18(a) of the Inquiries Act. The requirement of s 14 that the Board is to prepare a report effectively excludes any role of government in the content of the report, except to the extent that government must be given the opportunity to make submissions as to matters relevant to a potential report that might affect it.

29. Since the Board is armed with coercive and intrusive powers, it is not surprising that the use to which those powers are to be put is constrained by the Act and the Terms of Reference. In particular, it is entirely consistent with the purpose of an inquiry, namely, for the Executive to obtain information by means which the general law denies to it, that publication of a report which refers to, and opinions that rely on, information divulged by a compulsory process, will be controlled by the legislation that enables it to be made. Hence, specific provision is made in the Act governing publication of the report in ss14, 14A and 14B, which *require* the completed report to be delivered to the Chief Minister, and *permit* disclosure by the Chief Minister in any way (including to the Assembly) and to the extent he or she thinks proper but, if it is not presented in full or at all to the Assembly, requires an explanation to be made to the Assembly for the adopted course.

Who was entitled to release the Inquiry Report?

30. It is obvious that the report of a Board may contain matters that government might reasonably consider should remain confidential (say, to prevent compromise of government actions or to protect privacy or human rights) or otherwise ought not to be disclosed (say, within the rules relating to public interest immunity or to avoid prejudice to pending or potential legal proceedings). Whatever the reasons, any non-disclosure of an Inquiry Report must be explained by the Chief Minister's statement pursuant to s 14B(2) of the Act. If the Assembly does not regard the explanation as sufficient, it has its own recourse by virtue of its constitutional role. Thus, the Inquiries Act contains its own distinct procedures for ensuring public transparency of and accountability concerning the report of a Board, which reflect the executive character of the tribunal and its relationship to government, the public interest in

protecting the confidentiality of government affairs and the constitutional role of the Assembly. It is therefore necessary to consider whether this has the effect of according solely to government in the first place and ultimately the Assembly, the responsibility for deciding what is to be done with reports of a Board, in particular, to whom they may be communicated. The Board may have a role in controlling the publication of sensitive information that has been produced as evidence, but its role is nevertheless that of an instrument of the executive, which has its own exclusive responsibilities in respect of the use to be made of any report.

31. Additional questions arise from apparent breaches by Mr Sofronoff (constituting the Board) of the obligation to afford natural justice, to the interested parties in respect of the confidential matter and the Chief Minister in respect of the Report, by providing an opportunity to those parties make submissions in respect of the proposed disclosure decisions before the Board acted on them.

The litigation and the use of the Court's findings

32. Following publicity about the Report by journalists from *The Australian* newspaper, which used a copy of the Report that had not been released by the Chief Minister, Mr Drumgold commenced proceedings in the ACT Supreme Court seeking declaratory relief in respect of adverse findings that had been made by Mr Sofronoff. The Court delivered its judgment on 4 March 2024 affording him relief in respect of a number of these findings (see *Drumgold v Board of Inquiry & Ors* (No 3) [2024] ACTSC 58, Kaye AJ). The judgment was delivered after the mandatory notification to the Commission but the details of contact during the Inquiry between Mr Sofronoff and Ms Albrechtsen and information provided to her, as disclosed in the litigation, were relevant to the investigation. The IC Act does not limit the Commission's use of facts, information or evidence which may be ascertained in the course of an investigation or the modes by which they can be acquired (except that implicitly this must be lawful). The nature of the information or evidence, rather than its formal character (say, hearsay or opinion), will determine the weight to be accorded to it. Consistently with this approach, s 142(1)(b) of the IC Act, provides that, in conducting examinations, the Commission "is not bound by the rules of evidence and may inform itself of anything [relevant] in the way it considers appropriate". Indicated below is the use that the Commission has made of the matters disclosed in the litigation. It is

useful to mention at this point that the issue before the Commission is different to that before the Court. Specifically, the issue for the Commission is whether the conduct of Mr Sofronoff amounted to corrupt conduct or was otherwise relevant to that issue. The characterisation of Mr Sofronoff's conduct by the Court in the litigation – namely, that it gave rise to an apprehension of bias – is not the same issue as that before the Commission.

33. Leaving aside the contentions in the litigation as to the legal unreasonableness of certain key Board findings, the litigation was substantially concerned with whether Mr Sofronoff's communications with Ms Albrechtsen had given rise to a reasonable apprehension of bias in respect of Mr Drumgold's conduct. The crucial significance of this issue for the legitimacy of the Inquiry was explained by Kaye AJ* –

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

It should be understood that the litigation did not involve an appeal on the merits in respect of the Board's findings of fact and Kaye AJ did not make any such findings. The dismissal of contentions made on Mr Drumgold's behalf that certain findings were vitiated for legal unreasonableness did not entail any suggestion by the Court that those findings were in fact correct, as distinct from a conclusion that Mr Drumgold had failed to satisfy the demanding legal threshold that the findings were legally unreasonable. In short, a determination that a finding is not legally unreasonable is not a finding that it is correct. The finding of apprehended bias is one of jurisdictional error that vitiates the legal validity of findings affected by it. As a practical matter, if it is reasonable to think that key findings in an Inquiry might have been affected by bias on the part of the Board, a fundamental purpose for instituting the Inquiry is frustrated. This is what occurred in the present case.

34. The Commission has not relied on the finding of Kaye AJ that Mr Sofronoff's decisions were affected by apprehended bias. It has arrived at its own independent conclusion that is to the same effect, based on the material set out comprehensively

in his Honour's judgment and the evidence before the Commission (set out in this report) of other communications between Ms Albrechtsen and Mr Sofronoff. Amongst other things, Kaye AJ's findings demonstrate the reality of the practical injustice that was liable to be suffered by Mr Drumgold as a result of the Board's failure to afford him natural justice in respect of the decisions to make disclosures to Ms Albrechtsen of the confidential matter and to the journalists of the Report. He was, in effect, deprived of his right to litigate their propriety in a timely way that might have prevented publication of the adverse findings on the basis that they were vitiated by apprehended bias. (It is vital to bear in mind, in considering this real life consequence of Mr Sofronoff's denial of natural justice that it cannot be assumed that, had he acted with propriety in a way that did not give rise to an apprehension of bias, the adverse findings would nevertheless have still been made.) This matter is taken up further at a later point in this report but, for transparency, the material contributing factors are set out in summary form below.

35. Kaye AJ made it clear that he did not regard media contact as itself giving rise to a reasonable apprehension of bias ([275], [336]). It was not objectionable to have "freely engaged with journalists to ensure that they could obtain a full understanding of the evidence and the significance and ramifications of it" ([322-323]). The Commission shares this view and has applied it in considering the issues posed by this investigation. At the same time, that engagement was constrained by the requirements of procedural fairness and probity in maintaining the integrity of the Inquiry, as well, of course, (which his Honour did not need to consider) by the requirements imposed, expressly or by necessary implication, by the Inquiries Act.

36. Kaye AJ observed that the "volume of communications that took place between Mr Sofronoff and Ms Albrechtsen was substantially greater than the volume of communications, which Mr Sofronoff himself had directly with other members of the media" ([280]) and the "quantity, nature, content and circumstances of the communications … in the course of the Inquiry, were markedly different to the method by which the [Board], ordinarily, communicated with members of the media and others" ([279]). Ms Albrechtsen had published a large number of articles prior to the finalisation of the Report that were highly critical of Mr Drumgold. Kaye AJ observed, after reviewing the articles: "the conclusion is irresistible that a fair-minded observer, having read the articles, would have readily understood that Ms Albrechtsen expressed firm and considered views that were significantly critical of

[Mr Drumgold]" ([232]) … and which suggested the involvement of political factors in the case". His Honour noted that "a substantial number of the articles were specifically critical of the conduct… [of Mr Drumgold], both in instituting the criminal charge against Mr Lehrmann*, and in his prosecution of that charge ... [and alleged] serious breaches … of his duties as a prosecutor". The judge also noted that opposing parties "have not been able to tender, or refer to, any articles, published by Ms Albrechtsen, which were supportive of … [Mr Drumgold's] conduct of the prosecution, or which in any way countered the criticisms … that were reported in her articles".

37. Kaye AJ noted that Mr Sofronoff and Ms Albrechtsen, before and during the Inquiry, engaged in 51 telephone conversations, for a total of 6 hours and 15 minutes ([137], [140], [326]). Mr Sofronoff had additional 27 telephone contacts with Ms Albrechtsen between 7 April and 31 July 2023. Although those conversations were described by Mr Sofronoff in his affidavit filed in the proceedings as "identifying the nature of the issues that were before the Inquiry" ([325]), a fair-minded observer may have held a reasonable apprehension that "Mr Sofronoff might have been affected in his judgment of the issues that involved [Mr Drumgold] by the views that had been and were strongly held and articulated by Ms Albrechtsen in the large number of articles she had published in *The Australian* newspaper" [327]. Those articles "had been consistently critical of [Mr Drumgold]" [318]. His Honour added that "conversations concerning 'the nature of the issues' may well not have been confined to a one-sided communication by Mr Sofronoff, in relation to those issues, but might also have involved some response to them by Ms Albrechtsen that reflected her own views in respect of them" [328]. "[T]he fair-minded observer would consider it significant that Ms Albrechtsen communicated with Mr Sofronoff on so many occasions, in circumstances in which other members of the media were adhering to the protocols" adopted by the Inquiry for media contact ([281]).

38. The frequency of the communications between Mr Sofronoff and Ms Albrechtsen, particularly in a period of three days immediately preceding the receipt of oral evidence by the Inquiry from Mr Drumgold, would have led to a reasonable apprehension by a fair-minded observer that the content of the communications went beyond a request by Ms Albrechtsen for information ([282]).

39. As to the observation regarding the nature of the communications between Mr Sofronoff and Ms Albrechtsen, the following instances were mentioned –

- Media contact with the Inquiry was generally handled by the Executive arm of the Inquiry*. Media enquiries could be referred to Mr Sofronoff, for a response by the Executive. Ordinarily, media personnel were kept “at arm's length” from Mr Sofronoff [278].

- The communications between Mr Sofronoff and Ms Albrechtsen took place in private and were not disclosed to the public at large or to Mr Drumgold ([319]). Mr Sofronoff provided his private email address to her [206]. Her name and email address were not included on the media distribution list maintained by the Executive arm of the Inquiry ([277]).

- In the vast majority of the communications between them, Ms Albrechtsen contacted Mr Sofronoff directly ([281]). Kaye AJ gave examples of where she raised issues with Mr Sofronoff, conveyed information to him or referred to matters relevant to the Inquiry for his consideration ([284]-[292]).

- Mr Sofronoff did not discourage Ms Albrechtsen from communicating material to him, but “gave his apparent imprimatur”, for example, by responding that “I read it” in response to one text message in which she conveyed a newspaper article she had written ([293]).

- On at least two occasions Mr Sofronoff conveyed his views to Ms Albrechtsen on matters of immediate relevance to the Inquiry ([294]). On the first occasion he commented on an affidavit sworn by a witness in the Inquiry in a way that conveyed that he (Mr Sofronoff) held an adverse view of Mr Drumgold: “The fair-minded observer might fairly apprehend that, at that point, Mr Sofronoff regarded himself as a ‘fellow traveller’ of Ms Albrechtsen in respect of the views that she had expressed and maintained in her publications about [Mr Drumgold]” ([297]). On the second occasion, Mr Sofronoff agreed with Ms Albrechtsen's suggestion as to a question that ought to have been asked of a witness ([299]).

- Mr Sofronoff felt it appropriate to express to Ms Albrechtsen a derogatory view about a counsel appearing before the Inquiry ([302]).

- Mr Sofronoff agreed to Ms Albrechtsen's request to speak “off the record”, and sent her material that he advised was “Strictly confidential” ([307]).

- On some occasions Mr Sofronoff initiated communication with Ms Albrechtsen, including forwarding documents that she had seemingly not requested, but could have sought through the established channels of the Inquiry ([310]-[314]).

- In the days preceding the Report being provided to the Chief Minister, Mr Sofronoff provided Ms Albrechtsen with sequential drafts under embargo via his private email address, including material with tracked changes and internal comments ([316]).

The disclosure of witness statements, Notice of Adverse Findings, the responses and draft reports (the confidential matter)

40. On 19 April 2023 Mr Sofronoff, as the Board, made a non-publication order under s 21(3)(b) of the Inquiries Act as follows –

> Subject to further order of the Chairperson, the matters contained in the statements and documents lodged with the Board of Inquiry in response to any subpoena shall:
>
> a) be published by the Board of Inquiry to the parties for the sole purpose of those parties participating in, and acting and advising clients in relation to the Inquiry; and
>
> b) not be published further until it has been published to the public by the Board of Inquiry or otherwise entered the public domain.

41. Both Mr Mitchell Greig* and Ms Skye Jerome* were officers of the ACT Director of Public Prosecutions. Both were required by subpoenas issued by the Board of Inquiry dated 2 May 2023 to provide a written statement regarding their knowledge of a conference between the DPP and Ms Lisa Wilkinson* on 15 June 2022. Mr Greig made a statement dated 5 May 2023, that included 20 attachments; and Ms Jerome made a statement dated 3 May 2023, that included 14 attachments. Mr Sofronoff, uninvited, forwarded both statements to Ms Albrechtsen by a “Highly Confidential” text message on 6 May 2023.

42. Neither statement had been tendered in evidence or provided to the parties. (Without entering into the merits of the issue concerning Mr Drumgold’s submissions

to the Chief Justice* which were the subject of serious criticism in the Report, Mr Drumgold's contention in respect of a key issue, found against him by Mr Sofronoff –whether Mr Greig was taking contemporaneous notes of a particular conference –was, as it happened, supported by Mr Greig's statement.)

43. Also forwarded by Mr Sofronoff to Ms Albrechtsen by text message on 8 May 2023 was the statement made by a partner in the law firm* instructed to act for and advise Network Ten Pty Limited* and Ms Wilkinson describing her interactions with Mr Drumgold regarding Ms Wilkinson's conduct. Whilst this statement may not have been produced in response to a subpoena within the terms of the non-publication order, it was certainly a document that had been "acquired by" the Board as well as "provided for this Act" within the meanings, respectively, of s 17 (a) and (c) of the Inquiries Act.

44. Then, in summary –

- Ms Albrechtsen first asked Mr Sofronoff on 12 July 2023 for copies of the proposed findings regarding any parties. She followed up on several occasions to ask if she could also be shown Mr Drumgold's response and a copy of the Report on an embargoed basis (her subsequent requests were on 13, 14, 16, 21, 28 and 31 July).

- Mr Sofronoff forwarded copies of those documents to Ms Albrechtsen on 16 (twice), 28, 30 and 31 July.

- The copies of the draft Report forwarded on 28 and 30 July contained track changes and comments from the legal team assisting the Inquiry*.

- The final Report was forwarded to Ms Albrechtsen on 31 July (following her request) approximately 40 minutes after Mr Sofronoff had presented the Report to the Chief Minister.

- A copy of the final Report was forwarded to Ms Byrne on 2 August.

45. On 9 June 2023, a Notice of Adverse Findings against Mr Drumgold was served on him, to which he responded on 26 and 29 June by detailed written submissions. On 9 July, a second Notice of Adverse Comments was served, to which he responded on 21 July 2023. On 12 July, Mr Sofronoff emailed the Senior Solicitor

Assisting the Board* requesting copies of all 11 Notices sent to various persons. These were provided on the same day. About two hours after this, Ms Albrechtsen emailed Mr Sofronoff asking for "copies of the proposed findings regarding any parties … not to report them but only for background …" (Thus, explicitly stating that the material would be used – even if not reported on.) On 13 July Ms Albrechtsen texted Mr Sofronoff to ask if she was "allowed to see the DPP's response … [not] for reporting" and, on 14 July, emailed asking for a copy of the response "not for publication". On the following day, she texted asking whether the report was likely to be handed down sooner than 31 July and added, "I'd love an embargoed copy if possible please". Mr Sofronoff replied, "Not before 31. Embargoed copy ok".
(For reasons to be explained, this is important as indicating that he had made the decision to provide the Report whilst he was still acting as the Board.)
Ms Albrechtsen also referred to her email seeking Mr Drumgold's response to the Notice. On 16 July Mr Sofronoff emailed a copy of the Notices addressed to Mr Drumgold to Ms Albrechtsen. Shortly after, Ms Albrechtsen emailed Mr Sofronoff requesting a copy of Mr Drumgold's Response, repeating this in a text message.
A few minutes later, Mr Sofronoff sent her a copy of Mr Drumgold's submissions of 26 and 29 June by text message. He omitted to provide Mr Drumgold's Response of 21 July 2023. Mr Drumgold was not informed of these disclosures and neither the Notices nor Mr Drumgold's Responses were, moreover, provided to the other parties affected. Amongst other things, Mr Drumgold's Responses questioned the veracity or reliability of evidence that differed from his own and conclusions that favoured other protagonists against his account.

46. The embargo agreed to was, in terms, limited to public reporting; it did not expressly amount to an undertaking not to communicate the material to any other person for any other purpose or otherwise to use it, for example, for "background".
Mr Sofronoff's assertion that he understood the undertaking to apply to communication to others or other use was, accordingly, no more than an assumption which was contradicted by the language actually used by Ms Albrechtsen.
Provision of the confidential matter transferred what should have been absolute control by the Board to control by a journalist not accountable to any legal authority and, moreover, with her separate and different interests. The persons subjected to the risk of inappropriate disclosure were the interested persons from whom the communications were concealed, being the Chief Minister and the individuals

adversely named in the report. It was all very well for Mr Sofronoff to have trusted Ms Albrechtsen; it was an altogether different thing to subject the interests of others to that trust without their knowledge.

47. The fundamental purpose of the Notices was to provide relevant persons with information about potential adverse findings in order to give them an opportunity to respond before the findings were determined. It was therefore possible, and perhaps likely, that to a greater or lesser extent the findings might be qualified before finalisation. This was no mere formal process. It is a commonplace outcome that responses provided by persons with an interest in a decision being considered often lead to a qualification of some kind to an indicated finding. The change may be of a nuance or of real significance. Thus, though this practice of notice and comment is expressed as an essential legal element of the decision-making process and typically characterised as a rule of natural *justice* or procedural *fairness*, it is also a useful, practical process that can alert a decision maker to mistakes and give a greater degree of confidence in the ultimate conclusions. This was, therefore, no mere technical legal requirement but one of practical justice that governed the Inquiry and was explicitly mandated by the Inquiries Act itself.

48. Furthermore, the natural justice requirement was not artificially limited to the ultimate findings expressed in the Report. It applied to all potential findings that affected the rights, interests and legitimate expectations of the individuals affected by them. The interests of those individuals were affected by the serial decisions to make disclosures of confidential material outside the settled protocols to Ms Albrechtsen. Since adverse findings were capable of seriously affecting personal and professional reputation, strict adherence to confidentiality measures, subject to explicit rules and cognate enforceable legal obligations, was essential. This was especially so in Mr Drumgold's case, given the gravity of the proposed adverse findings. That he had a direct legal, as well as personal, interest in the confidentiality of the Notices and his Responses was, of course, known to Mr Sofronoff. By concealing from him the disclosures to Ms Albrechtsen, Mr Sofronoff prevented Mr Drumgold from making submissions about the disclosures or seeking to vindicate his rights in Court. It also gives rise to an apprehension that the conditional character of the findings pending the response may have been compromised in perhaps making it more difficult to approach them with an open mind when ultimately formulating them. Ms Albrechtsen had already adopted (and almost certainly indicated) a strongly negative view about

the propriety and probity of Mr Drumgold's conduct. Indeed, the fact that Mr Drumgold's ultimate response of 21 July 2023 was not disclosed to her suggests that the material was disclosed by Mr Sofronoff, not so much to inform Ms Albrechtsen of the issues, but to support her strongly held opinions. If Mr Drumgold had taken court action to prevent the proposed disclosures of the confidential material, it is clear that the embargo would have been an inconsequential consideration. It is reasonable to infer that such proceedings would have had the same outcome as the litigation, and that a finding of apprehended bias at that stage would have prevented continuation of the Inquiry and the making of the adverse findings in the final report. This is not hindsight reasoning – the matters relied on by Kaye AJ had mostly taken place by then. By the time Mr Drumgold was able to take action it was too late: the damage to his reputation had already occurred.

49. The covert disclosure of the confidential material to Ms Albrechtsen amounted to a serious breach in the probity of Mr Sofronoff's exercise of his functions as Board, both in itself and in the failure to accord Mr Drumgold (at least) natural justice.

50. On 21 July Ms Albrechtsen returned to the subject of the Report, asking by text when she might be able to get a copy of the report "embargoed of course". On 28 July, Mr Sofronoff emailed Ms Albrechtsen a copy of "the draft report as it currently stands". This document was replete with tracked changes and disclosed comments (some merely pointing to a nuance but some making significant observations and proposing potentially important changes) obviously made by members of the legal team assisting the Inquiry, and apparently sent in the first instance to Counsel Assisting*, with a copy to Mr Sofronoff. It is necessarily the case that the comments were made on a confidential basis and not for disclosure. It was a grave breach of probity to make them available to a journalist, especially without informing the commentators of the intention to do so. As for the tracked changes, they recorded significant amendments to parts of the draft report dealing, amongst other issues, with the prosecution's duty of disclosure, the AFP* disclosure certificates and associated legal advice. These matters were central to the aspersions cast on Mr Drumgold. The draft was not disclosed to him, nor to any other party, including the relevant AFP members*.

51. Furthermore, the draft report material included quotations from and references to multiple statements and exhibits provided to the Board. The footnote references to

them frequently included in red lettering 'Tendered but not published', a few contain the additional comments, 'Not to be published', 'Cannot be published', 'To confirm with AGS if can publish', 'AGS Requested not to be published' and 'AGS have confirmed this cannot be published'. Whilst the drafts do not explain if all were lodged in response to a subpoena, which is the category of documents to which the non-publication order explicitly applied, it is clear that the footnoted documents were regarded by the editors as confidential and that there could be no proper basis upon which they were disclosed to a journalist, whether under an embargo or otherwise.

52. On 25 July 2023, Ms Albrechtsen texted Mr Sofronoff, "Hi Walter, Just checking on when I might be able to get a copy of the report – embargoed of course." He replied, "Likely Friday" (i.e. 28 July). On 28 July 2023, Ms Albrechtsen texted to Mr Sofronoff, "… any drafts [sic] chapters would be very welcome weekend reading". On 30 July, the draft Chapter 1 was emailed from Mr Sofronoff's personal Gmail account to Ms Albrechtsen, and the entire draft Report followed about 20 minutes later. The draft by this stage had only minor tracked changes but, again, extensive commentary from the legal team assisting the Inquiry.

53. It is unarguable that the draft reports were highly sensitive, confidential documents. There can be no suggestion that any of the persons involved in the Inquiry, or their lawyers, might have contemplated that the Board would release these documents to a journalist, under embargo or not, still less to do so secretly. This was a clear breach of the implicit arrangements concerning the use of confidential material that were necessarily a key element maintaining the probity of the Inquiry and under which all participants, including the legal team assisting the Inquiry and secretariat, were operating and, plainly, believed Mr Sofronoff was himself operating.

Delivery of the Report to the Chief Minister, Ms Albrechtsen and Ms Byrne

54. By 16 June 2023, following exchanges of communications, the Executive Director of the Board* (the **Executive Director**) confirmed that it had been arranged for Mr Sofronoff to meet with the Chief Minister at 1:30 pm on 31 July 2023 to submit the Report. On 26 June 2023 the Executive Director emailed the Chief Minister's Executive Officer* (**EO**) to ask, arising from media inquiries, whether there would be a photo opportunity for the presentation of the Report. On 30 June the EO responded

that it was "not the intention of the Chief Minister's Office to have this as a Media opportunity". The Executive Director told the Commission that she expected she had probably passed this on to Mr Sofronoff.

55. On 6 July 2023, the Chief Minister was briefed, through the Head of Service*, about the impending report of the Board, due on 31 July. The intense public interest in the report was adverted to, as well as the commitment that had been given by the Chief Minister and the Attorney-General when the Inquiry was announced that the report would be partially or fully released, likely in either July or August (when the report was due by 30 June). A detailed analysis of the reporting requirements under the Act was included, which essentially set out the requirements of ss 14, 14A and 14B of the Act. The available Government responses were carefully explained –

> 8. Community expectations are that the report will be released in its entirety, however this must be balanced with considerations of the potential harm to affected parties and will largely be dependent on the contents and recommendations of the report (as they relate to the potential for further harm). Given that some of the hearings held were private, consideration should also be given to the privacy of those witnesses in any such release.
>
> 9. If you choose not to present the Report to the Legislative Assembly or otherwise publish the report on or before 31 August 2023, you must provide a written statement to the Legislative Assembly explaining why the report has not been presented or published within the reporting period. That explanation must be presented on the next sitting day after the end of the reporting period on 31 August 2023 – which would be 12 September 2023.
>
> 10. The Government may wish to issue an interim response concurrently with the release of the report, followed by a commitment to release a full response to the recommendations. This will give sufficient time to consider the impact of the recommendations, without anticipating the outcome of the report or any government deliberations on its recommendations.

56. These are elementary points and must independently have been obvious to any person of Mr Sofronoff's experience who, at all events, had the process of disposal of the Report under active consideration. It is worth noting that the fundamental assumption underlying the brief was that any release of the Report, in whole or part, was a matter in the first instance for the Chief Minister, with the necessary corollary

that it would not be released by the Board to any other person. The legal basis for this assumption is discussed later in this report.

57. As it happened, on 6 July 2023, the Executive Director informed the Directorate Liaison Officer* (**DLO**) –

> The Board will be providing parties with draft recommendations tomorrow. The Board will not be providing the parties with draft findings. The findings will be contained in the report and will be made available to the parties, if, and when, the report is published.
>
> I note that some media have erroneously reported that draft findings will be provided to parties tomorrow.

58. On 26 July 2023 the Chief Minister responded to media inquiries by releasing the following statement –

> The Government will consider the report through a proper Cabinet process. This will take 3-4 weeks. The Legislative Assembly will be updated during the scheduled sittings in late August. The Inquiries Act 1991 outlines the process for presenting reports. The relevant sections are outlined below.
>
> [Sections 14,14A and 14B]
>
> Subject to the contents of the report, and any legal implications, the Chief Minister currently intends to table all, or part, of the report during the August parliamentary sitting of the ACT Legislative Assembly. Again, subject to the recommendations of the report, the Government may provide an interim response to some, or all, of the recommendations when the report is tabled in the Legislative Assembly. Subject to the recommendations, a final Government response may take several months.

59. On 27 July 2023, the Executive Director emailed the relevant DLO to pass on an inquiry from Mr Sofronoff as to when the Chief Minister was likely to release the report "as he may receive media requests following its release".

60. Mr Joshua Jones* had been retained as one of Counsel Assisting the Inquiry, as junior to Ms Erin Longbottom KC*. He provided a statement to the Commission which disclosed that, on 28 July 2023, he and Ms Longbottom met with Mr Sofronoff, who told them that he had provided the (then) draft report to Ms Albrechtsen "on an embargo basis". Mr Jones said that this was the first he knew about this and had no discussion with Mr Sofronoff about it. Ms Longbottom also made a statement for the

Commission. Her recollection was that the meeting occurred on 27 July in her chambers but that she had been moving between her chambers and those of Mr Jones. (The difference as to date is immaterial; it is clear that there was only one occasion.) Mr Jones had told her of Mr Sofronoff's disclosure. She could not recall Mr Sofronoff discussing providing the report to Ms Albrechtsen, but it is possible. She thought it possible that, whilst in Canberra on 30 and 31 July, Mr Sofronoff discussed providing the report to Ms Albrechtsen but she had no recollection of this.

61. Mr Jones also stated that, just prior to this meeting, he had spoken with Ms Elizabeth Byrne, who asked if she could have a copy of the report, to which he had responded in the negative. He said that, when Mr Sofronoff informed them at the meeting he had given the report to Ms Albrechtsen, he told Mr Sofronoff that Ms Byrne had asked for the report, and Mr Jones had told her that she could not have a copy. He asked Mr Sofronoff whether a copy of the report could be given to Ms Byrne, since he had given the report to Ms Albrechtsen. He said, "'Yes' to providing the report to Ms Byrne on an embargo basis". Mr Jones then called Ms Byrne and advised her that Mr Sofronoff said she could have the report on an embargo basis, and that she should contact him (Mr Sofronoff) to organise it and call Mr Jones if she could not make contact with Mr Sofronoff. Mr Jones said he believed he spoke with Ms Byrne again sometime later and, again, he referred her to Mr Sofronoff. On 31 July 2023, Ms Byrne texted Mr Jones her email address, which he forwarded to Mr Sofronoff. Mr Jones did not provide the Report to Ms Byrne. Mr Sofronoff had not asked Mr Jones for any advice as to whether the provision of the Report to journalists was permitted under the Inquiries Act and Mr Jones did not provide him with any such advice.

62. For her part, Ms Longbottom stated that, to the best of her recollection, she was not involved in any discussions with Mr Sofronoff about provision of the Report or draft Report to Ms Byrne before the Report was provided to her. Ms Longbottom was not aware of when Mr Sofronoff provided the Report or draft Report to Ms Byrne. Ms Longbottom's evidence in the Commission was to the effect that she was never asked by Mr Sofronoff, nor did she provide any advice to him, as to whether he was legally entitled under the Inquiries Act to provide the report to Ms Albrechtsen and Ms Byrne. Nor was she asked about his obligations under procedural fairness rules to advise the Chief Minister in relation to that or follow a similar process.

63. In the evening of 30 July 2023, a celebratory dinner took place, attended by Mr Sofronoff and the support team for the Inquiry*, including Ms Longbottom, Mr Jones and the Executive Director. At some point Mr Sofronoff gave a speech of thanks for the contributions made by staff, during which he said that he had provided a copy of the draft Report to Ms Albrechtsen. This was the first that the Executive Director heard of the disclosure. In his examination, Mr Sofronoff was asked about this. He said, "I don't recall. I don't recall making a speech or saying that, but I wouldn't be surprised if I had". Mr Sofronoff said in his evidence to the Commission that he had not sought advice from his Counsel Assisting about whether providing an embargoed copy of the Report to Ms Albrechtsen was permissible under the Act. He was asked –

> COUNSEL ASSISTING: Q. And did you turn your mind, specifically, to whether that was something that was permitted by the Act? By the Inquiries Act that is? ---
>
> A. In my view – well, yes – in that, when I came into do the inquiry, I was familiar with the Queensland Act. I wasn't familiar with the ACT Act. I read the ACT Act cover to cover and perused it, analysed it and so I knew what I would be tasked with and how I would approach it, including my treatment of journalists. [Emphasis added.]

64. The Executive Director also gave evidence to the Commission that, on the night of the dinner, Mr Sofronoff communicated to the team that he had given draft copies under embargo to Ms Albrechtsen and Ms Byrne (though probably not the latter, as later corrected by the Executive Director). She said she was shocked when she heard this, and this reaction was shared by the Senior Solicitor assisting the Board, who was sitting nearby. The Executive Director became "extremely concerned that the report was going to hit the media" and, shortly after 8 am on 2 August, she attempted to call Mr Sofronoff to let him know that she was about to tell the Head of Service about the release. Her attempt to contact Mr Sofronoff was unsuccessful but, as she thought it could not be left any longer, she called the Head of Service and informed her that Mr Sofronoff had released a draft of the Report to Ms Albrechtsen. Shortly before 9:12 am Mr Sofronoff contacted the Executive Director who told him what she had said to the Head of Service. He said, "You'd better tell her about Byrne as well", which she did.

65. In his affidavit of 12 September 2023 filed in the Supreme Court, Mr Sofronoff said –

> [81] … I understood "embargo" to be a term used by journalists to signify an undertaking that the journalist would neither use nor publish the content of the embargoed information until the proper authority had published it. For example, it is the practice of government to make available confidential budget papers "on embargo" before they are published in parliament. This is done to ensure the media can publish their analyses and accounts very promptly after the budget information has been made public. I understood that an undertaking to receive a document on embargo was regarded by journalists as creating a most serious trust-relationship.

66. (There is no sensible comparison at all between the situation applying to the budget papers and the situation applying here: first, the budget process is publicly disclosed; second, the extent of “trust” is limited by the distribution in a locked room with phones removed only hours before actual release; third, the list of those permitted access is arranged by application and approval in a public process; fourth, the papers are very extensive and extremely complex, with many attachments; fifth, the entirety of the budget papers provided are to be published without further consideration; and, sixth, immediate detailed analysis available in the public domain is necessary because of the immediate financial implications for virtually every Australian citizen and business. The “embargo” in the budget context, given both the publicity of the process and the physical controls on dissemination, provides no useful parallel with the “embargo” to which Mr Sofronoff and Ms Albrechtsen agreed.)

67. On 31 July 2023 at about 1:30 pm Mr Sofronoff submitted the Report personally to the Chief Minister. At 2:12 pm Mr Sofronoff texted Ms Albrechtsen, “Report has been delivered”. She responded, “May I have the final please”. Minutes later, he sent the Report to her.

68. As it happened, the Head of Service had been unable to attend the meeting between the Chief Minister and Mr Sofronoff and arranged to meet with Mr Sofronoff some hours later in order to receive a copy of the Report. Before doing so, she asked the Chief Minister whether there was anything following his meeting with Mr Sofronoff that he would like her to follow up at her meeting with him. The Chief Minister requested her to ask if Mr Sofronoff intended to do any media. She overlooked this during the meeting but, as the Executive Director was escorting her out of the premises, the Head of Service asked about it and the Executive Director undertook to check with Mr Sofronoff and let her know. They exchanged mobile numbers for this purpose. Forty minutes later the Executive Director texted that she had checked with Mr Sofronoff and he said he did not intend to do any media.

69. Following the communication (set out above) on the morning of 2 August 2023 at 8:22am between the Head of Service and the Executive Director about the release of the report to Ms Albrechtsen, the former immediately texted this information to the Chief Minister.

70. On 2 August 2023, Ms Albrechtsen telephoned Mr Sofronoff to inform him that she and her colleague, Mr Stephen Rice*, had obtained a copy of the Report from another source, and that, using that other copy, they were going to publish a story which would disclose the contents of the Report. On 3 August *The Australian* published a story, dealing with the content of the Report.

71. The report deals below with the obligation of Mr Sofronoff to afford natural justice to (at least) two parties in respect of his intention to provide and the provision of the Report to Ms Albrechtsen. One party was the Chief Minister, given his role in determining the extent and timing of public release; and the other was Mr Drumgold, against whom serious adverse findings were made. Appropriate notice would have enabled each to take legal steps to, in effect, maintain confidentiality.

72. In his affidavit to the Supreme Court, Mr Drumgold explained that he had on 30 June 2023 raised with the Attorney-General of the ACT and the Director-General of the Justice and Community Safety Directorate* the process to be followed in respect of adverse findings. The Attorney-General told him that the Board would provide the Report to the Chief Minister, who would consider it, and, if necessary, the Attorney-General would provide him with an opportunity to respond to any adverse findings in it. Mr Drumgold said he began to become concerned about the report when he read an article in *The Australian* on 20 July 2023, written by Ms Albrechtsen and Mr Rice, entitled “Reynolds blasts DPP Drumgold” and became further concerned there may be adverse findings against him when, on 1 August 2023, he read a further article in *The Australian* entitled “Revenge of Lehrmann”, which alluded to what were expected to be 'serious adverse findings against Chief Prosecutor Shane Drumgold'. On the following day, the newspaper published another article, under the headline “Prosecutor may face charges”, and “DPP at risk of charges if he misled court”. These predictions could have followed from what was exposed in the public hearings, but they were also explicit in the Notices which, it should be inferred in the circumstances, would certainly have been used in preparing the article, given that they had been sought (on 12 July) specifically “for background”.

That the background use of this information was not understood to be a breach of the embargo demonstrates the inadequacy of such an undertaking for the protection of confidentiality. On 3 August 2023, *The Australian* published two articles, which referred to several of the adverse comments that were made against Mr Drumgold in the final report of the Board. At 11:30 am on 3 August 2023, Mr Drumgold was told by the Attorney-General that he was satisfied, on the face of the final report, that there had been misconduct, and considered that his position as DPP for the ACT was untenable. On that basis, Mr Drumgold agreed to resign. On the following day, he emailed a letter of resignation to the Attorney-General and, later that day, received an email attaching the Report and a letter from the Attorney-General which stated that he had formed the view that the findings in the Report warranted consideration as to whether he should be dismissed and that, notwithstanding his pending retirement, he should have an opportunity to respond. Had the Attorney-General been aware that the findings in the Report adverse to Mr Drumgold were affected by jurisdictional error for apprehended bias, it would have been unlikely that, at that stage, he would have thought it appropriate to act in reliance on them in being satisfied that Mr Drumgold had been guilty of misconduct and should resign. It would have been necessary to first consider – and, no doubt, obtain advice concerning – the status of the Report. It is difficult to know what the Attorney-General would have done had he been aware that Mr Sofronoff had provided a copy of the Report to Ms Albrechtsen in breach of his obligations as Board and without giving notice to the Chief Minister that he intended to do so and, thus, effectively forestalling the process of consideration and consultation that had had been envisaged once the Report had been delivered to the Chief Minister. Prior notice of Mr Sofronoff's proposed disclosure would at least have enabled consideration to have been given to urgently seeking relief in the Supreme Court against such a step and may well have enlivened enquiries that brought to light the extent of Mr Sofronoff's communications with Ms Albrechtsen with the corollary that the question of apprehended bias became a real issue. This, of course, is somewhat speculative: the necessary point is that serious departures from probity and legal requirements carry risks whose consequences cannot always be predicted and, in this case, to which the legitimacy of the Inquiry and, for that matter, the reputation of Mr Drumgold, should not have been exposed.

73. In his affidavit, Mr Drumgold said, if he had received the Report before he tendered his resignation, he would have held off resigning, because of the way in which his

actions were categorised as contrasted with the actions of others. He said he would have also sought to defer making a decision, pending receipt of advice whether he should make an application for an interim injunction in respect of the release or publication of the adverse findings against him. Subsequently, on 12 August 2023, Mr Drumgold read an article in *The Canberra Times*, which stated that Mr Sofronoff had disclosed the final report to Ms Albrechtsen on 30 July, before he had submitted the report to the Chief Minister.

74. In fairness to Mr Drumgold, it could not be said that the apprehension of bias as regards the irregular process followed by Mr Sofronoff in reaching findings against him amounted merely to a technical breach of legal procedure. The Commission does not need, and does not propose, to enter into any consideration of the merits of the disputed findings. In respect of matters that gave rise to questions of professional misconduct or unsatisfactory professional conduct, the Bar Council of the ACT, following its independent investigation (and also not attempting for its part to consider the merits of Mr Sofronoff's findings), resolved that there was no reasonable likelihood that Mr Drumgold would be found guilty by the ACT Civil and Administrative Tribunal of unsatisfactory professional conduct or professional misconduct and therefore dismissed the complaints made against him. The Bar Council's Reasons for Decision, provided at the instigation of the Commission (the protection of the privacy provisions in the *Legal Profession Act 2006* (ACT) having been satisfied), are annexed to this report. It should be noted that the evidence considered by the Bar Council excluded that which had been given by Mr Drumgold to the Board except to the extent to which he relied on it in his submissions to the Council, and also that the Bar Council did not consider the probity of those other aspects of Mr Drumgold's conduct that did not involve his professional obligations as a barrister. The point is that the conduct of Mr Sofronoff gave rise, on the one hand, to significant problems for the government, which had instituted the Inquiry to seek clarity, and, on the other hand, almost certainly led also to irreparable practical injustice for Mr Drumgold.

75. The Court's judgment in the litigation had the effect of rendering the findings against Mr Drumgold legally invalid for jurisdictional error. However, release of the Report could not effectively be prevented because it was already in the public domain as a result of the articles in *The Australian*. The failure to afford natural justice to Mr Drumgold was, therefore, productive of actual substantive injustice and not a mere technical error. This was predictable. And irreparable.

Mr Sofronoff explains

76. On 3 August 2023 the Chief Minister and Attorney-General wrote to Mr Sofronoff asking whether he had provided copies of the Report to any person other than the Chief Minister and, if so, when and in what circumstances and upon what authority. Mr Sofronoff replied on the same day disclosing that that he had provided a copy of the Report to Ms Albrechtsen and Ms Byrne "upon an express agreement by them that the copy was embargoed until the government had published it" and to Mr Leon Zwier* on his undertaking not to publish its contents to anybody, including his client. (Mr Zwier was Ms Brittany Higgins'* solicitor. No issue about this communication arises.) Mr Sofronoff stated that his "succinct answer to the question about authority" was that he did so pursuant to the powers given to him under the Inquiries Act and followed with an extensive discussion of what, in his view, that entailed – the substance of which is set out below.

77. On 7 August 2023, the Report was publicly released by the Chief Minister and the Attorney-General.

78. On 17 August, in response to a public statement by the Chief Minister, in effect questioning the appropriateness of communications by Mr Sofronoff with media, the latter's solicitors* wrote to the Chief Minister and the Attorney-General elaborating the arguments earlier made that justified them.

79. In his first letter, Mr Sofronoff commenced with references to s 13, s 18 and s 26A (the last in reference only to the disclosure to Mr Zwier) of the Inquiries Act and pointed out that, "consistently with traditional approaches elsewhere, the statute requires – as a fundamental premise – that any such inquiry be conducted in public unless there is good reason not to do so". He referred also to the "assumption of publicity [that] also attaches to documents that are tendered. He pointed to the "virtues of a public inquiry… [which involves taking] the community into their confidence". This contention developed as follows –

> The relationship of an inquiry such as mine with the community is, therefore, a vital aspect of an inquiry. There are only two ways in which an inquiry can engage with the community. One of these is to hold hearings in public, as the Act requires.
>
> However, the bulk of the community cannot be expected to attend or watch daily hearings and cannot be expected to be able to crystallise an opinion about what are

issues thus presented. That essential part of the work of an inquiry can only be achieved by means of forming relationships of trust with journalists.

During the whole course of this inquiry several journalists sought access to me and counsel assisting, wishing to obtain information. It would have been wrong to deny them. Like anybody else, the chair of an inquiry cannot affect what journalists write. However, it is within the power of an inquiry head to ensure that what is written is written upon a true factual and conceptual basis. Indeed, I hold the firm view that it would be a failure of performance of my function if I did not, myself and by my counsel assisting, form appropriate relationships with journalists in order to serve the statutory purpose of public education and involvement.

My conversations with journalists for this purpose have all been conducted upon the basis that I was never speaking for publication. I made it perfectly clear that the only things that I would say for publication would be the words I spoke at public hearings and the words contained in my report. By way of background information, I sometimes told journalists what appeared to me to be the issues that would arise on the following day's hearing. Sometimes, the discussions were more general, such as concerning the conceptual interplay between the function of prosecutor and the function of investigative police.

My previous experience, as well as my experience in this inquiry, has led me to conclude that it is possible to identify journalists who are ethical and who understand the importance of their role in the conduct of a public inquiry. I have not had my trust betrayed nor have I had any reason to be disappointed. The outcome of this process of professional engagement with journalists has been that, on the whole, stories about the inquiry have been on point and informative…In relation to the report specifically, as I have said, I gave a copy of the report to Ms Albrechtsen and Ms Byrne upon their undertaking not to use the information until after the government published the report, whenever that might be. The giving of the report on that basis served the same purpose as every one of my interactions with journalists. It served to ensure that, when the government published the report, those two journalists would be in a position swiftly and promptly to write and broadcast stories that would have as their foundation a true appreciation of the result of the work of the commission. You will observe that the furnishing of copies on this basis was limited to two journalists.

80. The letter from Mr Sofronoff's solicitors elaborated on the contention already proffered by their client that exposure of the Board's Report to the public was a responsibility of the Chair. They referred to the processes mandated by the Inquiries Act, particularly s 21, as to the conduct of hearings and the availability of

documentary evidence and contended that "the principle recognized there *required* Mr Sofronoff to ensure that, by some means, the ACT community had access to all relevant documents and information and, as well, was placed in a position to understand the significance of their contents" (emphasis added). This entailed engaging with "journalists because public hearings alone cannot fulfil that objective". It was contended –

> Unlike the position of a government engaged in administration, which must necessarily keep secrets in aid of efficient and good government, a chair of an Inquiry is required by the law of the ACT to publish everything unless there is a good reason not to do so. There is, therefore, no room for consultation with government before publication. That would be inconsistent with the independence of the inquiry and its relationship with the public.
>
> The statutory relationship between a chair of an inquiry and the community served by the inquiry is a relationship of trust based upon the status of the chair as a person regarded by the government and the community as independent, impartial and properly qualified and by the knowledge, on the part of the community, that the chair will share everything with them, unless there is some very good reason justifying an alternate approach. Markedly, in establishing that kind of institution, the Act does not permit the government to stand between the chair and the community in order, for example, to filter the kind of information that will be published.
>
> It must be borne in mind that it is not the right of the government that is germane here; it is the right of the public, conferred upon it by the Act.
>
> …Equally, if the public was to be kept within the inquiry's confidence, it was crucial to make certain that responsible journalists had an opportunity to read, understand and digest the significance of the report in good time to be able to report upon it once the government released it.

81. At the outset, as to there being no "room for consultation with government", this is fundamentally wrong: it is clear that the Board is obliged to comply with the rules of natural justice (as explained below) and the right to be afforded natural justice applies to government just as much as any party who might be affected by a finding or decision that affects them. Moreover, accepting that the relationship between the Chair and the community is one of trust necessarily entails that the community trusts that the Chair will comply with the legal constraints applying to the appointment. The government that appointed him to the role has the same expectation.

In short, the trust necessarily operates in both directions. Even apart from the rules of natural justice, the relationship between the Board and the government is such that consultation about media release was entirely appropriate, indeed, was solicited at least by Mr Sofronoff's query about it. Quite apart from natural justice, the necessary relationship of candour between the Chair and the Chief Minister required, in all honesty, that Mr Sofronoff should at least have given fair notice of his intention to provide a copy of the Report to journalists before the Chief Minister made it public and to have informed him that he had already provided Ms Albrechtsen with a next-to-completed draft on the previous day. In the circumstance where release to the media was the subject of active consideration, for Mr Sofronoff to have remained silent about what he had done and proposed to do could only be regarded as deceitful. Not too much should be made of the fact that, when he delivered the Report to the journalists, he was no longer acting as the Board. His moral obligation of integrity and honesty did not cease (and improper disclosure was still an offence under s 17 of the Inquiries Act – see below). At all events, it is clear from the sequence of communications and his own justifications that Mr Sofronoff's intention to provide the Report, at least to Ms Albrechtsen, was formed whilst his appointment was on foot, and when he was still a public official.

82. The very scheme of the Inquiries Act, as provided in ss 14, 14A and 14B (discussed below) is to give the Chief Minister a "filtering" function and, in that respect, a distinct legal right which it was necessary to respect and, being enshrined in legislation, this was a right in which the public also had an interest. Suggesting that, somehow, the rights of government on the one hand were at odds with those of the public on the other is fundamentally wrong. The legislative scheme in ss 14, 14A and 14B, embodied the public interest in constitutional accountability. Providing the Report to the highest elected representative of the community can be viewed as the ultimate exercise of engagement with that community – the very objective Mr Sofronoff purports to have been trying to achieve.

83. Tendered in the Supreme Court proceedings were the affidavits of Mr James Bell KC* and the Hon Geoffrey Davies AO KC*, which explained the important role of the media in reporting on the proceedings of inquiries such as that here. The points made are uncontroversial, so far as they go, but neither affidavit grapples with the effect of ss 14, 14A and 14B of the Inquiries Act that specifically governed the course of action to be undertaken so far as provision of the Board's report was concerned; nor do they

deal with the application of s 17 creating an offence of improper disclosure; or with the propriety of the covert provision of confidential information or material to particular members of the media. Accordingly, with unfeigned respect, they do not usefully inform the matters essentially in issue in this investigation.

84. The inevitable effect, both legally and practically, of Mr Sofronoff's action was to substitute, in place of the Chief Minister, who had specific legislative authority and was answerable to the Legislative Assembly, employees of media organisations whose undertakings were uncertain in scope and legally unenforceable and who were effectively answerable to no-one without an interest. This position must have been known to and understood by Mr Sofronoff, whose decision to disclose the Report secretly therefore should be seen as making a choice that the latter course was the better. It is contended by Mr Sofronoff that this course was permitted by the Inquiries Act, to enable the journalists to understand the Report and prepare their commentary before public release – though, it appears, the desirability of this process was overlooked by the legislature.

85. If the disclosure of the Board's Report to two journalists was in fact believed to be legitimate, there was no need for secrecy, least of all from the Chief Minister who, as Mr Sofronoff was undoubtedly well aware, was distinctly concerned to manage media interest in and public dissemination of the Report. On any reasonable view, disclosure to journalists of the Report prior to its public release by the Chief Minister must have been regarded in light of the legislative scheme as at least highly questionable and certainly controversial. That the Chief Minister was likely to object to such a course and at least consider taking legal action to prevent this occurring was obvious. Furthermore, in light of their capacity, had the legislative scheme been followed, to make submissions to the Chief Minister as to redaction, the affected parties (in particular, Mr Drumgold) had standing to litigate whether disclosure of this kind was permitted. In those circumstances, it is impossible to perceive a legitimate reason for not at least seeking advice from or consulting Counsel Assisting about the proposed course or, at least, giving them notice about it. The omission to do so must have been deliberate and calculated to avoid receiving an unwanted opinion from that source. It strongly tends to the conclusion that Mr Sofronoff did not actually believe, at least, that the legality, if not the propriety, of his decision was beyond doubt but that, whatever the position as to this might be, he resolved to make the disclosure, either aware it was unauthorised or reckless as to its impropriety.

86. It is not to the point that the Report, as Mr Sofronoff asserts, was provided to the journalists to give them an opportunity to understand it "in good time to be able to report upon it once the government released it", nor that they "were both reputable senior journalists who wrote for mainstream media organisations", nor that they could be trusted to honour the embargo and there is no evidence that they did not do so. "Good time" did not mean enabling a scoop; the course adopted introduced both new, unofficial, decision-makers about publication and unnecessary uncertainty. The fact is that the journalists were given the Report when it was exclusively for the government to consider what to do about publication, which necessarily carried the possibility that all or some of the report might legitimately not be published.

87. The matter may be easily tested. If, as may have happened, the Report contained some matter that should not, in the opinion of the Chief Minister, have been published (or not then published) and was redacted from the tabled report, whether or not the redacted material might be published would not depend on the Chief Minister's powers specifically afforded under the Act, but upon whether the journalists decided to adhere to their undertakings or were aware of and honoured the redactions. It is contrary to the legislative scheme that third parties should have the ability to make a decision about publication, however well-intentioned those persons might be. This is apart from the patent inability of any such party, not being privy to government business, to know whether a legitimate public interest ought to apply to retain secrecy of some aspect or other. Nor does this question depend on the issues that happened to concern the particular Inquiry here, since, if Mr Sofronoff's argument be good, it must also apply, for example, even to an Inquiry that involved state or sensitive commercial secrets. Here, the report destroyed at least one professional and personal reputation by findings that were, in significant part, vitiated by jurisdictional error and, with the benefit of hindsight, ought never to have been published.

88. In his evidence, Mr Sofronoff expressed a different view as to the Report. He was asked –

> COMMISSIONER: Q … I'll ask it to you in an open way, did you consider whether section 14 of the Act precluded you or might preclude you from giving the report to a journalist under embargo in the way that you did? --- A. I did not at the time think that section 14 contained any preclusion of that kind and I don't think so now.
>
> Q. I'm asking a slightly different question and that is, did you consider whether section

> 14 had an impact or might have an impact on the propriety of the disclosure of the report to Ms Albrechtsen? --- A. I - if you're asking whether I - before giving any document of that kind to Ms Albrechtsen, I sat down and, in my mind, turned my mind towards section 14 and its terms, the answer is, "no". But the position is that having read and understood the Act – and I might be wrong in my understanding of it, but having read and understood the Act, the view I took was that, for the reasons I've explained, I had the authority to give the document to her in the way that I did, for the purposes that I did. And the key, of course, is the purpose for which I did it.
>
> Q. Well, that is one of the matters which is important, but the first matter surely is what you were authorised to do under the Act? A. Yes, I agree with you.

89. The mere fact that Mr Sofronoff relied on the embargo to preclude publication until the Report had been placed in the public domain by the Chief Minister necessarily involved appreciation of the condition that it was for the Chief Minister to decide when and what was to be published. Furthermore, accepting that Mr Sofronoff's purpose for the delivery to the journalists was to inform them of the Report, the other side of that coin was foreclosing the Chief Minister's (or Mr Drumgold's) power to prevent it. To have intended one necessarily entailed the intention to do the other.

90. The contention that prior release of the Report to selected journalists was calculated to assist them to understand or make accurate comment on it immediately following the official release is highly contestable. There is no evidence of any request having been made on this basis by any journalist or media representative.
In Ms Albrechtsen's case, in particular, the very large number of her written communications with Mr Sofronoff that were produced in the litigation do not contain any suggestion that she needed earlier access to report than would otherwise have been possible, nor do her communications make any reference, direct or implied, to the need to understand the issues in any greater detail than, one way or another, had been exposed by the evidence given and statements tendered in the public hearing. Furthermore, Mr Sofronoff does not himself cite any example in his otherwise extensive affidavits (which contain an apparently comprehensive explanation of and justification for his communications with and provision of information to the media) of a query of this kind or that he had identified any matter that required particular explanation. Accepting that it is a part of the work of journalists to gather news, and that it is in the public interest that they should be able to do this, it does not follow at all that this could explain, let alone justify, secretly giving the confidential material to

Ms Albrechtsen, or the Report to her and Ms Byrne before anyone else, especially, when it was provided on the basis that the embargo, if trustworthy, meant in effect the Report would not be published until everyone else had access.

91. The key issues in the Inquiry were highlighted very clearly in the public hearings as well as in the Report itself (which had the advantage of being in the English language). Explanations to journalists of the legal issues or the Board's procedures could not reasonably be regarded as calling for the provision of the confidential material or making it appropriate to provide early access to the Report. The Report would not have been (and was not) difficult for any literate person to understand, especially someone, such as Ms Albrechtsen, who had been following the public hearings with attention. The asserted justification for provision of the Report (as well as the confidential material) is fanciful and amounts in reality to no more than giving Ms Albrechtsen and Ms Byrne a "standing start" (to use the vernacular).

92. To summarise, the Inquiries Act does not deal with communications by or with the media, rather than with the public, nor does it authorise disclosure of confidential material or giving prior notice of the Report to the media. By contrast, the Act makes specific provision for public exposure of hearings and evidence and what is to be done with reports. Mr Sofronoff's attempted justification comes down to no more than that it was implied in the Act that he could give (two) journalists confidential material and prior notice of the Report so that they could publish commentary immediately after its publication by the Chief Minister instead of having to read the authorised release first. This is not tenable.

Mr Sofronoff's public statements about media communications

93. On 10 May 2023, two days after public hearings of the Board of Inquiry commenced, and following his attention being brought to an article in the media about Ms Higgins, and receiving submissions in relation to non-publication directions, Mr Sofronoff made the following statement –

> This is an inquiry that is being conducted according to law. Section 21(1) of the Inquiries Act empowers me to hold hearings. I decided that my Terms of Reference required me to hold hearings in order to get at the truth. Section 21(2) of the Act requires me to hold hearings in public unless I am satisfied that it is desirable for any reason that the hearing take place in public. My Terms of Reference and the public interest in the criminal proceedings and their fate meant that I had to hold hearings in public, not in private. The community, as well as journalists, watching the livestream or reading or viewing various accounts of the proceedings in the media would be unable to understand the oral evidence of witnesses if I declined to open up the relevant documents so that they can be appreciated. Media accounts created by experienced journalists are vital to the success of a statutory inquiry.
>
> Most people will only know about the proceedings through the work of reputable journalists. With that in mind, I and my counsel assisting have freely engaged with journalists to ensure that they can obtain a full understanding of what the evidence means and what may be the significance and ramifications of the evidence.
>
> Without that kind of engagement between my counsel assisting and, indeed, engagement by me with journalists, and without making the oral evidence and the documentary evidence available to journalists and the public, the community would have to wait for my report to learn the truth about how various important public officers perform their duties. The community would be denied the precious opportunity to assess the evidence for themselves as it emerges. It has been put to me that I should restrain publication of some evidence that I believe that the community should be able to see. One issue that I've been investigating is the resistance of the Director of Public Prosecutions to disclose to the defence at the trial documents in which police officers set out some untested evidence, as well as untested information, that they believe made inroads into the credibility of Ms Brittany Higgins as a witness at the trial. Police regarded those documents as an important tool in assessing the case. The Director of Public Prosecutions viewed those documents as nothing of the sort and, indeed, he characterised them as evidence of an attempt to interfere with the administration of justice. The issue, thus presented, is serious. Mr Drumgold has given evidence about it, and the police officers will be called to give their evidence. If the community and the

journalists who serve the community are to follow the oral evidence of the hearing and form their own views as citizens whose vital interests are involved, they have to be able to see the whole of the relevant and significant evidence. However, the public interest is not served by the misuse of the evidence that I make available only for that purpose.

This morning, Mr Tedeschi KC [counsel for Mr Drumgold] brought my attention to some media stories in which journalists have picked up short statements in the documents, statements that are defamatory of Ms Brittany Higgins, that are scandalous, which could never have surfaced at the trial and which have been made available by me only as a small mosaic piece of the whole of the evidence for the sole purpose that I have explained. To give prominence to a scandalous, unjustified, defamatory and prurient isolated statement on the pretence that it has some independent importance for an understanding of the issue that I have referred to is not just low journalism. It does not represent a fair report of the proceedings. It is actionable. It may constitute a contempt of this inquiry because it involves an abuse of the access that I have allowed to the evidence before me. It is also a mean and cruel thing to do to somebody. I know that there have been similar repugnant publications on social media by individuals. These are also actionable, and it would not be hard to track down who has posted this kind of material. In the course of many dealings with experienced Australian mainstream journalists as part of my work over some decades, I have learnt to trust their ethics and their professionalism, and I have not once been disappointed. My trust has been damaged today. I'm not prepared to conduct this inquiry in a way that causes avoidable harm. Two young people - Ms Higgins and Mr Lehrmann - are at the centre of this matter. Their lives have been irrevocably changed in the course of the last few years. Each of them now has a burden to bear. At least, they will have to accept that they will be the subject of public discussion and debate for a long time. But they don't have to tolerate being defamed or maligned. I have been urged to suppress some of the evidence before me to avoid this. I have thought about whether I should conduct all future hearings in private. I have thought about whether it would be better, at least to restrict the free engagement that my staff has had with journalists until now. I've thought about whether I should do any of these things. Pursuit of the truth in the public eye is very important, but the truth can cost too much, and the cost will be borne by people who do not deserve to bear it. The simplest and most effective thing for me to do is to cease holding public hearings and to hear the rest of the oral evidence in private. That would be easier, and it would be cheaper, than anything else. It will instantly solve for the future the problem that I am addressing. I'm loath to take such a step that would change the character of this inquiry. Ms Chrysanthou, who appears today for Ms Wilkinson but who has made submissions to assist me and not behalf of her client, and Mr Quill, who appeared by leave today for five media organisations, emphasised to me

> that the public nature of the inquiry is too important to be let go. Mr Quill reminded me that the importance of the publicity attached to these hearings is emphasised by the statute in subsection (4), which requires me, before making a direction that hearings be private under subsection (3), to take as the basis for my consideration of the issue the principle that it's desirable that hearings be in public and that evidence given before the contents of documents lodged with or received in evidence by the Board should be made available to the public and all people present at the hearing. The subsection provides that I must pay due regard to any reasons given to the Board why the hearing should be held in private or why publication or disclosure of the evidence should be prohibited or restricted. It is well for me to remind myself that that is the statutory foundation upon which I should proceed. In substance, Mr Quill and Ms Chrysanthou submitted that I should not baulk at the first sign of trouble. I take it that this is particularly so since nobody has asked me to conduct the inquiry in private. I have decided, with some trepidation and on account of the statements made to me by Mr Quill about the importance which his clients will attach to my concern that I have expressed today - I have decided that I will not cease conducting hearings in public. I have been made very sensitive to the damage that can be done, and it will now take very little more for me to start going about my work in a different way. As to the documents that have been used in this harmful way, Ms Chrysanthou submitted correctly that it would be impossible to formulate a direction that would be effective to suppress or even substantially suppress republication of the offending material, and she has demonstrated to my satisfaction that the direction that I made this morning would not have such an effect. I therefore vacate it. In the result, I will do nothing today except ask the media companies that have published this loathsome material to do all that is possible to remove it from the public eye.

94. This passage shows that Mr Sofronoff directed his mind to the distinction between private or confidential material on the one hand and publicly available material on the other. In short, he declared his intention to receive evidence in public hearing – together with material documents – to enable public understanding of the Inquiry and appropriate media commentary, noting that evidence given in a private hearing would not be available to the public or to the media. At no point did he suggest that private material would be made available to the media on any basis – with the sole exception, it may be, of making private explanations of the legal issues to journalists. The entire thrust of this statement was to emphasise the importance of public exposure of the course of the investigation conducted by the Board, since this would not occur if parts were to be conducted in private or exhibits remain confidential.

95. The Board's Media Protocols Guideline, published on 17 February 2023, provides details of the arrangements for media access and reporting at hearings (which could be varied or departed from). It notes that hearings will generally be in public and live streamed and gives directions as to the conduct of attending members of the media (e.g., as to decorum and use of electronic devices). An email address to contact for media enquiries was provided. There is nothing that suggests the availability of a procedure by which journalists could apply for confidential information to be made available to them.

96. The Board published a Practice Note on 24 February 2023, which stated, amongst other things –

Part G: Publication and Confidentiality

26. Subject to the Chairperson's determination of any application for confidentiality, any information, witness statements (including exhibits to those statements),documents or submissions provided to the Board might be published in whole or in part on the Inquiry's website or otherwise made publicly available.

27. Any person or organisation who provides information or evidence to the Board and wishes such material to be treated confidentially should provide the material to the Board together with a written notice stating:

a) the part of the material for which confidentiality is sought;
b) whether total confidentiality is sought or whether there is no objection to publication to particular persons or classes of persons; and
c) the ground on which such confidentiality is necessary despite the public nature of the Inquiry.

28. Where confidentiality is sought:

d) the Chairperson will decide the application and notify the person or their legal representative of his decision.
e) A person who wishes to object to the decision should give prompt notice of intention to the Board by email to the Executive Director and, in any event, no later than seven clear days after the notification of the decision to publish.
f) The Board will notify the person or their legal representative of a date on which the objection can be heard. The material will be kept confidential until the objection has been heard and determined.

> 29. Nothing in this guideline should be taken as limiting the Chairperson's powers to treat any material or information as confidential and to take any steps appropriate for the preservation of that confidentiality.

Again, nothing in the Note suggests that applications might be made by journalists for confidential material or that such material might be released to journalists without notice to interested parties.

97. Given the purpose of the Practice Note and the Protocol, if the Board envisaged that confidential information or material could be provided to journalists, this was plainly of such significance that it should have been publicly disclosed and a protocol developed that controlled the process. Given the function of these official announcements, clearly designed to be comprehensive in respect of their subject matter, the lack of any such reference amounted to a representation directed to informing participants that no such action would be taken. When the issue became enlivened by Ms Albrechtsen's requests for confidential information (as to which see below), the only legitimate way in which this might have been agreed to would have been to amend the Protocol and/or the Practice Note and inform parties who might have an interest in the particular confidential matter to be given an opportunity to respond to the request for access before that occurred.

98. At the commencement of public hearings on 8 May 2023, Mr Sofronoff said:

> THE CHAIRPERSON: Before we begin, I want to make a few points. First, the evidence upon which I will rely in writing my report in due course will be the material that the parties have seen, that is to say, the witness statements, the exhibits to those statements, the documents tendered at public hearings and, of course, the evidence of witnesses at public hearings. Second - and that is to say that if you haven't seen it, I won't be relying upon it even if it exists. The inquiry has been given tens of thousands of documents. Most of them won't be looked at ever again. I'm telling you that what you see is what I will be looking at. If that changes, I will tell you.
>
> Second, some of the documents given to lawyers acting for witnesses have been redacted by blacking out parts of documents. In every case, a redaction has been made to prevent personal information being published that has no relevance to any issue at all. If any of the parties who have been given leave to appear, if any of their lawyers want to look at a redacted document for some reason, for example, to satisfy yourself that the information is, in fact, irrelevant to your client's interests at this inquiry, then that can be arranged.

Third - and this is really the important part of what I wanted to say - the most important part. A public inquiry is a powerful engine for getting at the truth, but an inquiry must not just uncover the truth; it must tell the community about it. That part of my work depends mostly upon the work of the journalists covering this inquiry.

So I'm depending very much upon the news media to do its work so that this inquiry can accomplish one of its two aims: the first of the inquiry's aims is to inform the ACT Government about the truth; the second of the aims is to inform the community about the truth.

Public inquiries, unavoidably, hurt some people's reputations. That's because the truth sometimes hurts, and sometimes the truth is hidden so that it doesn't cause hurt. To the extent that damage to reputation is unavoidable, then it has to be lived with. But the inquiry is trying to ensure that nobody is harmed unnecessarily. For example, that's why we have redacted the material. What I want to do is to ask the journalists working on this inquiry to take the same sympathetic approach.

99. This needs to be contrasted with the position Mr Sofronoff actually adopted, as disclosed in his affidavit filed in the proceedings –

127. Section 26A of the Inquiries Act required me to give written notice of proposed adverse comment, and invite submissions, before including any such adverse comment in my Report. As set out in Appendix C to my Report, I provided various persons or entities with notices on 9 June 2023, and I provided Mr Drumgold with a second notice on 16 July 2023.

128. On 12 July 2023, Ms Albrechtsen requested copies of potential adverse findings via iCloud message, and then via email at my request. I also said: “The proposed findings will never be published. Only any findings that I make.” Ms Albrechtsen responded: "Yes understood”.

129. On that basis, I was prepared to provide Ms Albrechtsen with the notices she requested. […]

130. I provided the particularised documents to Ms Albrechtsen via email on 16 July 2023.

131. I did so to ensure that the reporting of the inquiry was based on as accurate information as possible, and to ensure that Ms Albrechtsen appreciated the relevant issues and had a proper understanding of the inquiry's work. All the notices of proposed adverse comment were eventually published in my Report.

132. Mr Drumgold provided written submissions dated 26 June 2023 in response to my notice of potential adverse comment dated 9 June 2023.

133. On 17 July 2023, Ms Albrechtsen requested Mr Drumgold's response to the potential adverse findings.

134. I provided the submissions of 26 June 2023 to Ms Albrechtsen via text message on 17 July 2023.

135. I did so to ensure that the reporting of the inquiry was based on as accurate information as possible, and to ensure that Ms Albrechtsen appreciated the relevant issues and had a proper understanding of the inquiry's work.

100. The process identified in paragraphs [129]-[131] and [135] of Mr Sofronoff's affidavit was a material departure from and, in effect, contrary to, the procedure explained in the Practice note, the Protocol, the introductory statement of 8 May and the extended statement on 10 May. There was no suggestion that Mr Sofronoff envisaged, let alone intended to effect, disclosure to a journalist of the confidential material. The reason for doing so is obvious, given the inevitable response that could be anticipated to an announcement that such action might be taken, which amounts to an implicit acknowledgement that such a course could not be justified.

101. There is scarcely a more important procedure for an Inquiry exercising coercive powers than that governing the protection of confidential material, especially where its disclosure was likely to cause serious reputational damage. The secret release of the confidential matter to Ms Albrechtsen constituted a substantial breach of the integrity of the Inquiry and the probity with which it was conducted.

Concealment of the disclosures

102. Section 18(a) of the Inquiries Act requires the Board to "comply with the rules of natural justice". Furthermore, whilst 18(c), authorised the Board to do "whatever it considers necessary or convenient" in conducting an inquiry, this is subject to the requirement of "fair conduct". Accordingly, as wide as the Board's discretion is in respect of how it goes about its business, mere necessity or convenience will not justify unfairness. The rules of natural justice, context driven and, in the end, aimed at preventing practical injustice, have a well-defined content; by contrast, fairness is a term in common parlance and not subject to technical conditions. The former has the

effect that a person whose legally recognised right or interest may be adversely affected by any decision made under an enactment (such as the Inquiries Act) must first be given a reasonable opportunity to be heard. Compliance with this requirement is an essential prerequisite to the lawful exercise of the statutory power. It is not strictly necessary for present purposes to determine whether someone in Mr Drumgold's position had a sufficient legally recognised interest in the procedures of the Inquiry in respect of the impugned communications (although it is clear that he did). On any view, it was unfair without notice to him to have secretly placed his reputation in the hands of a journalist who would not be controlled by legally enforceable sanctions or officially required probity and had published much material that was, in the words of Kaye AJ [318] "consistently critical" of him. Furthermore, the government (as well as those whose reputations were at stake) had a real and practical interest in the due conduct of the Inquiry. The breach of confidentiality involved in the covert disclosure of the confidential material to Ms Albrechtsen was undoubtedly both a substantial breach of the obligation to afford natural justice to the government and also very unfair by ordinary standards. Although s 18(a) and (c) did not apply to the supply of the Report to the journalists (as it occurred after Mr Sofronoff became functus officio), the decision to provide the Report had been made well before. The Chief Minister undoubtedly had a sufficient interest, calculated by reference to his statutory rights, to obtain injunctive relief against any attempt by Mr Sofronoff to limit or qualify the exclusive character of that interest or right by himself disclosing the Report to the journalists. (As explained below, at all events, the conduct in making the disclosures without first informing the Chief Minister was relevantly dishonest.)

103. Even apart from the rules of natural justice, Mr Sofronoff was under a duty to act honestly (both independently and by virtue of the statutory requirement that he must act fairly) in undertaking the Inquiry. This duty was owed to all interested persons, including the Chief Minister. Mr Sofronoff was aware that the Chief Minister (rightly) proposed to take time to consider the report and to consult officials about it as well as the Cabinet. Managing the substantial media interest was the subject of communications involving Mr Sofronoff. His failure to make candid disclosure to the Chief Minister of the fact that he intended to make the Report available to journalists or, when he had done so, to inform the Chief Minister of that fact, was a very serious departure from the appropriate standards of candour between an official in

Mr Sofronoff's position and the Chief Minister. Mr Sofronoff's failure to inform the Chief Minister, in a timely, way of his decision to provide Ms Albrechtsen with a copy of the Report – a decision that had certainly been made by 12 July and possibly before – and of the extent of his disclosures up to 31 July, to Ms Albrechtsen amounted to the dishonest concealment of a matter of obvious direct legal and actual interest to the Chief Minister. That there was an embargo agreed by Ms Albrechtsen was immaterial. Since the obligation of candour in his communications with the Chief Minister was obvious in the circumstances and there would have been no reason for secrecy had Mr Sofronoff genuinely believed he was entitled to make the disclosures, it is evident that he was aware that the entire transaction lacked probity or else was reckless about whether it was wrongful.

The integrity of the Inquiry was fundamentally prejudiced

104. There are a number of connected features of Mr Sofronoff's conduct, all part of a pattern of communication with Ms Albrechtsen, that undermined the integrity and legitimacy of the inquiry which, as Board, he was entrusted with conducting. As identified early in this report, this had been the effect of his communications with Ms Albrechtsen that gave rise to the apprehension of bias. These communications were, of course, intentional and their character and extent deliberately not made known to those concerned with or otherwise having an interest in the Inquiry and the probity of its proceedings. These communications included disclosing the confidential matter contrary to the procedures in respect of dealing with material coming into the hands of the Inquiry and doing so without affording the interested parties natural justice. The further feature was the secret provision of the Report to the journalists, which undermined the process prescribed by ss 14, 14A and 14B of the Inquiries Act, and the decision to do so being made without affording natural justice at least to the Chief Minister or to the parties affected.

The elements of corrupt conduct

The possible application of s 17 of the Inquiries Act

105. It is convenient to deal first with s 9(i)(a)(i) of the IC Act and consider whether making the impugned communications "could … constitute a criminal offence". This concerns the application of s 17 of the Inquiries Act, which provides that a

"person who is or has been a member … of a board ...[must not] except in the exercise of a function under this Act … divulge or communicate to any person, any information acquired by virtue of that person's office … under … this Act … or make use of any such information … or … produce to any person, or permit any person to have access to, a document provided for this Act". The offence carried a maximum penalty of 50 penalty units or imprisonment for 6 months or both. This provision applied to Mr Sofronoff as the member constituting the Board. Paragraph 17(a) raises the question whether any of the confidential matter or the Report comprised "information *acquired* by virtue of that person's office" [emphasis added].

106. Dealing first with the confidential matter, it is clear that the Responses were (literally) provided to the Board by Mr Drumgold, whilst the comments on the draft reports amounted also to "information acquired [by Mr Sofronoff] by virtue of [his] office" and, almost certainly, also at least parts of the draft reports, if not their entirety, which were prepared in the first instance by members of the legal team assisting the Inquiry then settled by Mr Sofronoff. So also, were the witness statements. Two of which were produced pursuant to subpoenas and covered by non-publication orders. Accordingly, this material falls within s 17(a), leaving the question whether its communication to the journalists was "in the exercise of a function under [the] Act" to be considered.

107. The Notices and the Report (referred to here as the **created material**) may fall into a somewhat different category since, whilst they were brought into existence by Mr Sofronoff, it is a somewhat awkward use of language to regard them as "acquired by virtue" of his office. However, even if the primary meaning of "acquired" implies acquisition from another, this does not exclude the notion that, as a matter of ordinary parlance, the created material was acquired in the secondary sense of coming into or being in Mr Sofronoff's possession by virtue of its having been made or created by him. Since s 17 expressly applies to Board members and thus envisages the need to prohibit the unauthorised disclosures even by the holder of that office, it would be anomalous for such a provision to prohibit unauthorised release, even by the Board, of every document produced to him or her with the exception of any document, including the report, created by him or her. This would mean that, had Counsel Assisting, say, forwarded the Report to The Canberra Times for publication, otherwise than in the performance of a function under the Act, that would constitute the offence under s 17 but, if this were done by the Chair, it would not. Such a

construction would undermine the evident intention of the section to prohibit unauthorised disclosures and attach a criminal sanction to such conduct where it occurs, even if at the hand of the Board. It is difficult to see how this intent would be served by excepting documents brought into being by the Board. It follows that it is open to conclude that s 17(a) applies to the created material, again, however, leaving the issue of whether the communication was in the exercise of the statutory function. As already noted, at all events, the Notices, drafts of the report and the Report itself, were not solely created by Mr Sofronoff. They embodied initiating and drafting material provided by members of the legal team assisting the Inquiry and necessarily forming part, to a greater or lesser extent, of the documents in their finally settled form. Accordingly, provision of those documents *indirectly* communicated what had been acquired by him in the course of producing the document ultimately disclosed and thus fell within the prohibition in s 17 unless this disclosure was in the course of the exercise of a function under the Act.

108. It is not necessary to confine the crucial question to the meaning of para 17(a). Whilst para 17(b) is subject to the same difficulty (in that it refers to making use of "any such information", i.e., the acquired information), this issue does not arise in connexion with para 17(c), which refers simply to producing to another person "a document *provided for this Act*" (emphasis added). It was submitted to the Commission on Mr Sofronoff's behalf (relying on the Macquarie Dictionary) that the verb "provide" means "furnish or supply". So much can be accepted, but it is further submitted that the clause therefore means "*furnished or supplied to the Board*". This is a materially different reconstruction of the statutory phrase "provided *for this Act*", which is significantly broader. Though perhaps less than pellucid, no particular *process* is assumed or implied. Rather it should be understood as describing the *purpose* or *function* of the document, thus producing the meaning "provided for [the purposes of] this Act". There is no reason in logic or the ordinary meaning of the phrase to confine it to documents that, for example, may have been tendered or written submissions that have been given to the Board. Such documents would, in ordinary parlance, be "provided to the Board" and may also be "provided for the Act" but they do not exhaust the application of the latter description. The sense of the provision is better understood as comprehending all the documents that are produced or come into existence by virtue of the work performed under the Act, so that the created material should be regarded as a document that was "provided for the Act".

This interpretation renders the scheme of prohibition and protection of confidentiality embodied by s 17 more coherent than that for which Mr Sofronoff contends.

109. It follows that, if the created material were disclosed by Mr Sofronoff to Ms Albrechtsen or Ms Byrne otherwise than "in the exercise of a function under … [the] Act", by virtue of s 17 of the Inquiries Act this conduct could constitute a criminal offence within the meaning of s 9(1)(a)(i) of the IC Act.

110. The question then arises whether the disclosure of the confidential matter (including the created material) came within the due exercise of the Board's functions under the Inquiries Act. The Commission is satisfied to the requisite degree that disclosure of the confidential matter, including the created material, was not within the due exercise of a function under the Inquiries Act. Mr Sofronoff, as the Board, had a duty to maintain confidentiality as part of the due administration of the inquiry and to act in accordance with the instituted procedures. The documents in question were provided to the Board or created within the Board by him or its staff either for internal use or to provide natural justice to persons in respect of whom adverse findings were contemplated. They were not intended for publication, except (so far as the Notices and responses were concerned) in association with the report envisaged by the Inquiries Act to be submitted in due course to the Chief Minister, which dealt with the issues they raised and their resolution by appropriate findings. It was no part of the Board's function to provide intermediate confidential material for the purpose of enabling a journalist more easily to comment on the ultimate report. As already pointed out, even if there were a public interest in facilitating such comment, it was more than overwhelmed by the public interest in maintaining the integrity of the Board's processes, of which critical parts were compliance with the established policies and, the public interest in affording natural justice to those persons whose interests might be affected by the breach of confidentiality. The agreement to embargo the material pending public release by government, which amounted to no more than a voluntary undertaking without legal force, did not maintain the integrity of the Board's processes but undermined it by introducing another decision-maker as to publication with no relevant accountability or responsibility. It follows that release of the material to Ms Albrechtsen was not in the due exercise of a function under the Inquiries Act.

111. Was the provision of the Report to Ms Albrechtsen and Ms Byrne made in the exercise of a function under the Inquiries Act? For the reasons already given, s 14 mandates what is to be done by the Board once the Inquiry has been completed, namely a report is to be prepared and submitted to the Chief Minister. Section 9 of the Inquiries Act provides that a member's office ceases "when the board's report of its inquiry has been submitted to the Chief Minister in accordance with section 14". Thereafter, the Board is *functus officio*. It necessarily follows that provision of the Report by Mr Sofronoff to the journalists after it was given to the Chief Minister could not be in the exercise of a function under the Inquiries Act. (For completeness, it should be inferred that providing a copy of the Report to the Head of Service should be taken to have been at the Chief Minister's direction.) In his evidence to the Commission, Mr Sofronoff said that it had not occurred to him that he was *functus officio*. He said that Ms Albrechtsen had asked for a copy of the Report, and he was not prepared to give it her until after it had been delivered to the Chief Minister, but it had not occurred to him that his functions as the Board had come to an end – although the decision to provide it had been made when he was still acting as the Board. On 7 August, he declined to give a copy of the Report to a reporter from the ABC* on the ground: "I'm afraid I no longer have any right to do that. While I was chair, the statute gave me legal power to run things as I thought best."

112. More fundamentally, that the Chief Minister is the *only* appropriate recipient of the Report is made abundantly clear by the responsibilities specified in ss 14A and 14B of the Inquiries Act, which would be foreclosed if a third party were able to make the report public. Not only would the role of the Chief Minister be undermined but also that of the Assembly, which might well agree with the Chief Minister's reasons for not presenting a copy or a full copy of a report. Mr Sofronoff introduced an element into the process of dealing with the Report that is alien to and essentially contradictory of the statutory scheme. Nor is there is any way in which an embargo could make the disclosure co-exist coherently with the statutory procedure. The conventional rule of statutory interpretation, its utility controlled by context, is that where a power is explicitly given by a particular legislative provision that prescribes the mode of exercise and the conditions and restrictions which must be observed, this has the effect of excluding general expressions which might otherwise authorise the exercise of the same power. Thus, the specific terms constructing the exercise of a function

may also have the effect of forbidding its exercise in another way. This rule of construction is decisive here, where the context is a precise scheme governing the responsibilities of the Chief Minister and the Legislative Assembly in respect of the specific issue of publication of a report, one of the major elements of the Inquiry's purpose. It follows that the requirement that a Report must be provided to the Chief Minister, which triggers the operation of the legislative scheme, necessarily excludes other possible modes of publication and, hence, provision of the Report to members of the media. Doing so under embargo is not an adequate corrective, for the reasons already mentioned. Conduct calculated to undermine or risk undermining the integrity of this part of the legislative purpose is impermissible. This must apply not only to the Report itself but also penultimate drafts of the Report.

113. It was argued on Mr Sofronoff's behalf, in substance, that the phrase "exercise of a function under this Act" as used in s 17 is not relevantly limited to the function concerning communication of the Report. It is submitted that the "function of inquiring carries with it the implied power to do everything necessary for its performance". "Necessary", in this context, presumably means reasonably necessary for the accomplishment of that which is expressly provided. Media reporting is not the subject of either express or implicit provision. Furthermore, it is patently incorrect to state that possession by journalists of the Report prior to its publication by government was necessary to enable adequate reporting of its content: its content would be available by its release by government, as envisaged by the Act.
The contention that it was "important for these journalists to be prepared for the release of the Report ... [and] I wanted to equip them with the means of reporting accurately and promptly when the Report was released …" cannot be regarded as a "necessary" implied function. The legislative scheme governing publication of a report concerns only the report itself and not at all the promptitude with which accurate commentary of the report once released can be made. It is an untenable interpretation of the Act to imply a function of enabling prompt commentary that would or could significantly qualify the express provisions dealing with how a report is to be dealt with. Put otherwise, the functions of the Board do not implicitly or explicitly permit disclosure of a Report otherwise than by the specified process. The time taken to prepare and publish media commentary on a report is outside the purposes of the Act and, thus, outside the functions of the Board. Mr Sofronoff's argument must have the result, if correct, of adding (c) to s 14 –

(1) After completing an inquiry, a board must—

a) prepare a report of the inquiry;

b) submit the report to the Chief Minister; and may

c) at any time, including before submitting the report to the Chief Minister under para (b), submit the report under embargo to any journalist he or she selects.

Such a construction is patently untenable.

114. The legal framework governing submission of the Report is more specific than that dealing with other confidential material. The scheme is comprehensive and complete. In particular, it does not leave open the implication that, by virtue of some public interest personally identified by the Board without input from government as the party affected, the Board could for himself or herself decide how to deal with publication of the Report. The decision to deal with the Report by delivering it to journalists as well as to the Chief Minister was a decision purportedly made under a statutory power that affected the Chief Minister's rights, interests or legitimate expectations pursuant to s 14 of the Inquiries Act. Subject only to the clear manifestation of a contrary statutory intention, Mr Sofronoff was under a legal duty to afford him natural justice before making the decision. This was, at all events, explicit by virtue of s 18 of the Act, since submission of the Report is the final administrative act in the conduct of the Inquiry. The exclusive power of publication reposed in the Chief Minister (subject to the Assembly in the specified circumstances) was adversely affected by Mr Sofronoff's conduct in providing the Report to the journalists: this instigated the necessity of affording natural justice by giving him prior notice of the decision. The exercise of a function under the Act in circumstances that give rise to the requirement to afford natural justice is not a valid exercise of the function unless the requirement is satisfied. In other words, the failure to afford natural justice where it is required is jurisdictional error, with the result that the function is not validly exercised. Thus, even if, as Mr Sofronoff contended, the Inquiries Act implicitly gave him the function of providing the Report to the journalists as he did, he had no jurisdiction to exercise it without affording the Chief Minister (and the other interested persons) natural justice in respect of the decision.

115. It has been contended on Mr Sofronoff's behalf that the point that Mr Sofronoff failed to accord the government procedural fairness before providing the Report to the journalists was based on s 21(4) of the Inquiries Act, which is directed to other

matters. This is not so. The obligation to afford natural justice "in conducting an inquiry" – of which provision of the Report is a necessary, though concluding, part – is expressly provided in s 18. Furthermore, s 14 gave the Chief Minister certain legal rights in respect of publication of the report which the decision of Mr Sofronoff affected. In purported exercise of an implied power by virtue of his office, Mr Sofronoff proposed to act in a way that adversely affected those rights and was therefore subject to the obligation to afford natural justice to the Chief Minister before doing so.

116. The same analysis would apply to the decisions by Mr Sofronoff to disclose to Ms Albrechtsen the documents described in this report as the media communications. The decisions to disclose affected the interests of the participants in the Inquiry, particularly Mr Drumgold and, with an additional particular feature, the Chief Minister were made in purported exercise of a statutory power were susceptible to relief in the Supreme Court, even if not under the *Administrative Decisions (Judicial Review) Act 1989*. Although such a proceeding would now have no practical utility for Mr Drumgold or the Chief Minister, it is clear that the rules of natural justice applied to the decisions and timely notice may have enabled effective relief to have been obtained.

117. In his evidence to the Commission, Mr Sofronoff disputed that any question of natural justice arose in respect of the provision of the Report to the journalists. He was asked whether he had consulted with the Chief Minister prior to his providing the Report to the media and replied that he had not done so as it had never occurred to him it was necessary. He added that, in his view, in effect, the fact that the Report was embargoed meant that the Chief Minister's legal rights were unaffected. For the reasons already provided, this is so patently not an available view that it cannot reasonably be accepted that it was in fact held by him or else he was reckless as to the actual position. By reckless it is meant that Mr Sofronoff realised there was at least a reasonable possibility the embargo did not suffice to maintain the legislative scheme but proceeded nevertheless. Given that the requirements in the Inquiries Act of retaining confidentiality until the Report was released pursuant to the legislative scheme, necessarily implied consideration of the significance of those provisions. The question of inadvertent recklessness does not arise.

118. Provision of the Report to the journalists was not done in the due exercise of any function under the Inquiries Act either as a matter of substance or on the narrow basis that, since it followed submission to the Chief Minister, Mr Sofronoff was functus officio and could no longer exercise the Board's functions. Nor was the earlier provision to Ms Albrechtsen of the confidential matter made pursuant to the valid exercise of any function under the Act.

119. Each of the provision of the Report to the journalists and the confidential matter to Ms Albrechtsen could constitute an offence under s 17 of the Inquiries Act and thus satisfy the requirement of s 9(1)(a)(i) of the Integrity Act.

120. In addition to the offence prescribed by s 17, s 36 of the Inquiries Act creates the offence of contempt if a "person does something in the face, or within the hearing, of a Board that would be contempt of court if the Board were a court of record", to which a maximum penalty of 100 penalty units, imprisonment for 1 year or both applies. The question is whether this could encompass the provision of the confidential material, including, in particular, the witness statements to Ms Albrechtsen. This depends, so far as the two witness statements subject to a non-publication order are concerned, on whether breach of a non-publication order is "something done in the face or within the hearing of the Board" and whether the offence applies to the officer who made the non-publication order.

121. As to the first question, the phrase "contempt in the face of the court" is a familiar common law concept, but not necessarily of fixed meaning. Some definitions potentially apply to non-compliance with a court order, as having the tendency to interfere with or undermine the authority, performance or dignity of the courts or those who participate in their proceedings. On the other hand, some definitions focus on behaviour in or in the vicinity of a courtroom - such as disruptive, insulting or disrespectful conduct. For example, the Victorian Law Reform Commission report on Contempt of Court distinguishes between "contempt in the face of the court" and "disobedience contempt", with the latter applying to failure or refusal to comply with a court order or undertaking. The narrow view is that the jurisdiction is restricted to conduct seen or heard by the judge, whilst the wider is that it extends to conduct, without geographic boundaries, which is sufficiently proximate in time and space to the trial of proceedings then in progress or imminent so as to provide a present confrontation to the trial.

122. It is possible that s 36 of the Inquiries Act adopts the narrower meaning in referring to contempt 'in the face or the hearing of the board'. A consequence of adopting that narrow meaning is there would be no clear procedure in the Act for dealing with non-compliance with a Board order made under s 23. In light of the strong public interest purpose of s 23, of empowering a Board of Inquiry to constrain publication of confidential material, there is much to be said for adopting the broader meaning of contempt in applying s 36.

123. The second issue is whether a person constituting a Board can commit the offence of contempt under s 36 or, put another way, is that person under the same obligation as other people to comply with a non-publication order? That would, on one view, be an unusual or extreme outcome. However, in principle there is no reason why the person constituting the Board should enjoy such an immunity. They are, for example, subject to s 17 as regards the unauthorised non-disclosure of official information. It should likewise follow that the person constituting the Board has a duty to uphold the dignity and authority of the Board and not engage in conduct that constitutes a contempt of the board. The path open to that person is to vary a non-publication order rather than ignore it.

124. The Commission has concluded that the conduct of Mr Sofronoff in making the impugned communications could constitute a criminal offence within the meaning of s 9(1)(a), under s 17 or s 36 of the Inquiries Act or both.

Misconduct or reason for termination

125. Paragraph 9(1)(a) of the IC Act is satisfied if the impugned conduct falls into any of the three sub-paragraphs (i), (ii) or (iii). Sub-para (ii) is satisfied if the conduct could "constitute a serious disciplinary offence" and sub-para (iii) if the conduct could "constitute reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of a public official". Section 9(3) defines "serious disciplinary offence" as including "any serious misconduct" or "any other matter that constitutes or may constitute grounds for … termination action under any law …". "Serious misconduct" is defined by reference to the *Fair Work Regulation 2009* (Cth), s 1.07 as having "its ordinary meaning" and includes (relevantly) "wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment". So far as sub-para (iii) is concerned, s 9 of the Inquiries Act provides that a member's appointment may be terminated "for misbehaviour".

126. “Misbehaviour” is a term commonly used in legislation as a ground for terminating a statutory appointment – sometimes in the form of “proved misbehaviour”. The term necessarily takes meaning from the context in which it is used, a central theme being that it draws attention to a person’s fitness or suitability to continue holding a particular statutory office. The nature and functions of the office are therefore centrally relevant. To take the present situation as an example, it would not, unless the circumstances were exceptional, be considered misbehaviour warranting removal from a judicial office that an appeal court had made a ruling of apprehended bias against the judicial officer in an individual case. However, as discussed below, that would be a more prominent consideration in deciding whether to terminate the appointment of a member of a board established to conduct a specific inquiry. Furthermore, maintenance of public confidence in an office (or officer) is an important consideration in deciding whether particular conduct constitutes misbehaviour worthy of dismissal, and apprehended bias undermines the necessary function of impartiality. In addition, conduct that is in breach of the basic institutional procedures governing the use of confidential material, including disclosure in breach of the rules of fairness or of natural justice, undermining the probity of the Inquiry, is likely to have the effect, at least, of presenting a substantial risk to public acceptance of the legitimacy of the Inquiry and the tenure of the person(s) constituting the inquiry.

127. Are there reasonable grounds for suspecting that Mr Sofronoff’s conduct constituted misbehaviour which, had it been known at the time, would have a reasonable ground for the ACT Executive to terminate his appointment to conduct the Board of Inquiry? The Terms of Reference for the Board required it to inquire (*inter alia*) into "Whether the Director of Public Prosecutions failed to act in accordance with his duties or acted in breach of his duties" in commencing, conducting and discontinuing the criminal proceedings against Mr Lehrmann. That clause in the Terms of Reference was amended at the request of Mr Sofronoff to broaden the scope of the Board’s inquiry into Mr Drumgold’s conduct. The finding of apprehended bias by Kaye AJ related specifically to how the Board had gone about examining Mr Drumgold’s conduct. Kaye AJ found that a fair-minded lay observer who was aware of the amount, context, nature, manner and content of the communications between Mr Sofronoff and Ms Albrechtsen might reasonably have apprehended that he was influenced by her highly critical and published views about Mr Drumgold’s conduct. In short, a fair-minded lay observer might reasonably have

lacked confidence that Mr Sofronoff would properly discharge a prime element of the Terms of Reference for the Inquiry, namely, to conduct a fair and impartial inquiry into Mr Drumgold's conduct. This could reasonably have provided grounds for the Executive to terminate Mr Sofronoff's appointment had the circumstances been known before he provided his report to the Chief Minister. Indeed (as has been pointed out), Mr Drumgold would have been on firm ground to seek injunctive relief to prevent the continuation of the inquiry had he earlier been aware of Mr Sofronoff's conduct. He was, after all, successful in obtaining a declaration that the findings of the Board on three of the Terms of Reference relating to him were adversely affected by the Board's apprehended bias.

128. As mentioned at the outset, the Commission is not bound by the rules of evidence and is entitled, therefore, to receive and consider the enumeration by Kaye AJ of the evidence considered by him in the course of his determination of the factual and legal issues in the litigation. The communications between Mr Sofronoff and Ms Albrechtsen were objective facts, and the Commission accepts they were accurately set out or summarised. The context in which their significance needs to be evaluated has already been described and the Commission has independently concluded that they demonstrate, taken together with the particular communications to which have been specifically referenced, that the process followed by Mr Sofronoff in reaching his findings adverse to Mr Drumgold was affected by apprehended bias.

129. Whether conduct amounts to misconduct or "misbehaviour" is a matter of fact and degree. The test for present purposes is not whether the impugned conduct is misconduct of misbehaviour warranting dismissal or termination but whether it could be so. As explained at the outset, the impugned conduct falls into four connected but distinct categories: first, the disclosure to Ms Albrechtsen of the confidential matter; second, providing the Report to the journalists before its public release by the Chief Minister; third, in each case the failure to afford natural justice to the relevantly interested parties; and, fourth, communications with Ms Albrechtsen giving rise to a reasonable apprehension of bias in respect of the findings adverse to Mr Drumgold. The secret provision of the confidential matter, together with Mr Sofronoff's reasonably apprehended bias, can fairly be characterised as amounting to a such a substantial departure from the accepted norms of conducting an inquiry under the Inquiries Act as to vitiate its legitimacy. This was intentional conduct and *could* (to use the test in para 9(a)), as distinct from *would*, constitute either a serious disciplinary offence or reasonable grounds for dismissing, dispensing with or

terminating the services of Mr Sofronoff. The impugned conduct was by no means a mere failure to comply with technical and inconsequential requirements of the Inquiries Act. Each element involved deliberate decisions and seriously affected not only the integrity of the Inquiry, but the legal rights of persons interested. As such, it could reasonably be regarded as "wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment".

130. The Commission has concluded to the requisite degree of certainty that Mr Sofronoff well understood that the persons to whom the disclosures related had an interest in maintaining their confidentiality and were entitled to be afforded natural justice in respect of the decision to make them. Having regard to his extensive legal, judicial and inquiry experience, it is necessarily the case that he was fully aware that he had no uncontrolled power to disclose this material to the journalists or to make it public, and requiring the embargo, uncertain as it was, showed that he turned his mind to the necessity to protect confidentiality. He must have been well aware that his trust of the journalists – particularly of Ms Albrechtsen who had publicly exposed her own strong opinions adverse to Mr Drumgold – would not have been shared by Mr Drumgold, amongst others, including the Chief Minister, hence the need for secrecy to avoid the risk of action being taken against making the disclosures. That there might have been a public interest in preventing the parties from exercising their legal rights is not tenable and Mr Sofronoff could not have considered that there was. Even if the impugned conduct arose from an idiosyncratic view about what was desirable in the public interest, Mr Sofronoff well knew that the impugned conduct could substantially undermine the countervailing fundamental public interest in maintaining the integrity of the Inquiry. In the result, this predictable outcome came about. The mere fact that, in the result, the confidential matter and the reports provided to the journalists were not published, (though it is not known how else they may have been used) if a somewhat mitigating circumstance, cannot restore the integrity of the Inquiry.

131. It has been submitted on Mr Sofronoff's behalf that his conduct did not amount to such serious misconduct as to warrant termination of his services. This submission relied on the contentions that he had not committed an offence under s 17, that he was motivated by the desire to ensure timely and accurate reporting in what he genuinely perceived to be the public interest, obtained no private benefit and acted honestly and in good faith, and, in the result, no confidentiality was actually breached.

132. It has already been pointed out that the Commission does not accept Mr Sofronoff's claim that he had acted in good faith, given his concealment of the disclosures and the omission to afford natural justice in accordance with his legal obligations. It would have been obvious to him that, were Ms Albrechtsen's claim true that a copy of the report was obtained from another source, this must have been an unauthorised and a serious breach of trust. Nevertheless, he took no action by remonstrance or otherwise to urge on Ms Albrechtsen that the embargo which applied to his disclosure should also apply to the other copy. Nor did he bring the impending publication to the attention of the Chief Minister. If Mr Sofronoff believed that Ms Albrechtsen had obtained a copy from some other source, why would he not disclose this to the Chief Minister, who may have been able to obtain an urgent interim injunction to prevent publication given that, on any account, the source must have acted illegally? The only available conclusion is that he was indifferent to the breach of confidentiality and that his contention that it was important was hollow.

133. (The Executive Director of the Board of Inquiry gave evidence to the Commission emphatically rejecting any suspicion that there was a further provision of the report, "because I know how tightly it was kept". Ms Albrechtsen was requested by the Commission to identify the source of the additional Report. Perhaps not surprisingly, this was refused. The Commission also asked, in the alternative, for any evidence that supported the claim which did not reveal the source. Her lawyers* responded that Ms Albrechtsen was not in possession of any documents capable of corroborating her claim and that there was no oral evidence that would not breach "our clients' journalistic ethic in relation to confidential sources". It is neither necessary nor feasible, for the purposes of this investigation, to test the truth of this assertion. In the result – and not surprisingly, as Mr Sofronoff must always have known – it is not (and it would never have been) practically possible to verify whether the embargo was honoured. Ms Albrechtsen (and Mr Rice) have maintained that it was. Mr Sofronoff's assertion that he trusts Ms Albrechtsen is, though it may be accepted, valueless. It certainly does not by any means establish that, as claimed on his behalf, the embargo was in fact honoured. In the result, this does not change the character of Mr Sofronoff's own actions.)

134. The gravity of the misconduct that justifies termination of a statutory appointment is, as mentioned, a matter of fact and degree: there is no doubt that confidentiality was breached although, as it happened, the confidential matter did not appear in the public domain (although it appears it was used as "background"), but Mr Sofronoff intentionally exposed the interested persons to the risk of public disclosure in the media of matter that they were entitled to believe would be kept confidential; nor could the conduct be reasonably regarded as honest in light of the fact that it was concealed from those whom Mr Sofronoff knew had the right to be afforded the opportunity to object to his decision. It is not possible to accept that the disclosures were made on a good faith basis by ordinary standards of probity.

135. Dealing then with para 19(a) of the IC Act, although, in light of the conclusion that the disclosures could constitute a criminal offence within sub-para 9(a)(i), it is not strictly necessary to consider whether sub-paras 9(a)(ii) and (iii) also apply, it should be stated, for completeness, that this conduct could also satisfy sub-para (ii) and (iii). It is not necessary to approach the tests in s 9 by considering the particular characterised conduct as separate independent matters. As it happens, each of the disclosures could satisfy each of sub-paras (i), (ii) and (iii) and the omissions to afford natural justice as well as the communications with Ms Albrechtsen giving rise to apprehended bias satisfy sub para (ii) and (iii). Taken together, *a fortiori.*

136. Coming to the elements of para 9(1)(b), it has already been explained why it should be concluded that, in making the disclosures in the way that he did, Mr Sofronoff acted dishonestly within the meaning of sub-para 9(1)(b)(i) and relevant to the breach of public trust within s 9(i)(b)(ii)(A) and misuse of official information within s 9(1)(b)(ii)(B). Mr Sofronoff's role as Board carried both implicit and specific statutory obligations, in particular, concerning maintaining the integrity of the Inquiry, and the protection of confidentiality, together with affording natural justice where applicable and in respect of publication of the Report. The obligation expressed in s 14 required him to provide his report to the Chief Minister and, implicitly, no-one else, still less representatives of the media. Mr Sofronoff deliberately decided that he would provide the report to journalists as well as the Chief Minister. The Commission has concluded that this constituted an intentional or, at least, reckless departure from his obligations as Chair of the Board. Any reasonable person would understand that the legal effect would be to remove from the Chief Minister the sole discretion (subject to the procedures in ss 14A and 14B) to determine whether and to what extent the report

would be made public if the embargo were not honoured. The Chief Minister was misled into believing that he was free to act in accordance with the legislative scheme without concerning himself with the likelihood that the journalists who already had copies of the report might decide, for reasons of their own, to publish it. He was thus placed in a false position by the deliberate acts of Mr Sofronoff. So far as the disclosure of the confidential matter is concerned, it has been explained why this was in breach of the functions of the Board – in substance, in breaching a non-publication directive as to some witness statements, and by virtue of the failure to afford natural justice. The fact that this was concealed makes clear what might otherwise be readily inferred, that it was not done pursuant to the *bona fide* exercise of the functions of the Inquiry.

137. It was submitted on Mr Sofronoff's behalf that a breach of public trust within the meaning of s 9(1)(b)(ii)(A) "refers to a category of misconduct entailing a breach of the public official's duty of loyalty in pursuit of an unauthorised end (such as private gain)" and, further, "requires wilfulness in the sense of bad faith". It is submitted that "actions done honestly and in good faith negate the possibility of breach of public trust". As general statements of principle, these propositions may be accepted, but it is not necessary that the "unauthorised end" or purpose needs to be for private or personal gain or any cognate motive. Rather, the crucial element is that the end or purpose is known to be unauthorised (or the person is reckless as to this issue) since, *ipso facto*, the conduct is in breach of the official's duty and intentionally undertaken for ulterior reasons personal to the official. This is especially so when the action is contrary to a specific obligation as distinct from a mere failure to perform a duty. Thus, "noble cause" corruption, where a rule or restriction on a duty or function is deliberately broken because of the particular moral or political views of the official, is nevertheless a breach of public trust, or at least capable of being such, even where those views may be widely held by respectable persons. A breach of duty that is "done honestly and in good faith" also may fairly be regarded as not constituting a breach of public trust. But this is not the case where the official knows (or is reckless as to whether) the impugned action constitutes a breach of duty. The exception applies to the honest or careless mistake, not to the deliberate or reckless breach of duty. If the impugned actions are performed in secret in order to prevent correction or even avoid consequences, it may more readily be concluded that they have not been honestly performed or done in good faith.

138. It is submitted on Mr Sofronoff's behalf that the question is whether there has been a breach of the public official's duty of loyalty. Accepting this view makes no difference in substance. The nature and style of his communications with Ms Albrechtsen which involved intentional disclosure of confidential matter contrary to non-publication orders, material that might otherwise be protected by legal professional privilege, and material that had not been exposed to the rigour of a natural justice process, as well as the potential commission of offences under the Inquiries Act, demonstrated a lack of fidelity and good faith with respect to the task with which he was entrusted. That he was open about the fact he would speak privately and individually to journalists does not by any means correct the covert character of the actual content of the exchanges with Ms Albrechtsen.

139. It is also important to bear in mind that it was Mr Sofronoff's positive responsibility, as the person constituting the Board, to maintain the integrity of its processes. In his affidavit in the litigation (quoted earlier), Mr Sofronoff observed that an inquiry of this kind typically follows “a crisis in public confidence in government of a particular kind”. In addition to advising government, the inquiry shoulders a responsibility “of rebuilding public confidence” and establishing a basis “for the community's acceptance of the commission's final conclusions”. The overall chain of events in Mr Sofronoff's communication with Ms Albrechtsen shows that over time he lost sight of the important public function he was discharging. Parallel to the known Board processes, Mr Sofronoff was engaging privately with Ms Albrechtsen, a journalist, who was not a participant in the Inquiry and who was known to have strong views about issues that would certainly be the subject of the report to government. Even in the earlier stages of their engagement Mr Sofronoff had, in Kaye JA's words, become a “fellow traveller” with Ms Albrechtsen. This engagement intensified over time. His function was to provide to the ACT Government a report that presented an impartial and objective analysis of evidence obtained from various witnesses in a public inquiry and conclusions that could withstand scrutiny and be relied on. It would then be for the Government to decide how to take the matter forward. It was inevitable and foreseeable that, when the concealed matters became publicly known, it would severely undermine public confidence in and respect for the Board processes and report. It follows that Mr Sofronoff's communications with Ms Albrechtsen was conduct that constituted a breach of public trust.

140. For the reasons already explained, it is appropriate to conclude that Mr Sofronoff well understood that his actions were in breach of his statutory functions but that he decided to undertake them for what he thought to be more important considerations. In the alternative, he understood that he may not have been authorised to act as he did but decided to proceed nevertheless even though this entailed acting covertly in a way calculated to undermine the rights of those whose legal interests and legitimate expectations were adversely affected. This conduct entailed a lack of bona fides in the way already described, with seriously adverse consequences for the legitimacy of the Inquiry and the interests of Mr Drumgold and the government which it was his duty to respect. It accordingly constituted a breach of public trust within the meaning of s 9(1) (b)(ii)(A) and a misuse of information within the meaning of 9(1)(b)(ii)(B).

141. Section 9(1)(b)(i) also inserts, as an alternative element of corrupt conduct "conduct by a public official that constitutes the exercise of the public official's functions as a public official in a way that is not impartial". Reference has already been made to the interests of Mr Drumgold and the Chief Minister which were adversely affected by Mr Sofronoff's decisions to disclose confidential information and the Report contrary to the proper exercise of his functions as Board.
All participants in the Inquiry had an interest in the due probity and integrity of the Inquiry's processes. In making the communications to Ms Albrechtsen and (in respect of the Report) to Ms Byrne, Mr Sofronoff acted to favour their interests as journalists to the detriment of the countervailing interests of the participants and the Chief Minister. Accordingly, this element of the definition of corrupt conduct is also satisfied.

Conclusion

142. Having determined that the requirements of s 9(1) are satisfied, the next question to consider is whether this constitutes serious corrupt conduct as defined in s 10 of the IC Act. The application of this provision has been explained above.

The corrupt conduct will be serious if it "likely to threaten public confidence in the integrity of government or public administration". Mr Sofronoff's corrupt conduct has significantly undermined the integrity of the Board's processes and the fairness and probity of its proceedings. The Commission has concluded that this is likely to have threatened public confidence in the integrity of that aspect of public administration constituted by the Inquiries Act as well as the particular assessments and judgements made in the Board's report concerning the administration of criminal justice. Accordingly, the corrupt conduct is serious.

Annexure – Bar Council's Reasons for Decision

Bar Council Reasons for Decision

Date:	10 October 2024
RE:	**Neville Shane Drumgold,** own motion complaint by Bar Council made on 19 December 2023

The Complaint

1. On 19 December 2023 the Council of the Australian Capital Territory Bar Association (**Bar Council**) made a complaint about Mr Neville Shane Drumgold SC (**Drumgold** or **the Barrister**).

2. The Bar Council's complaint alleges that Drumgold has engaged in professional misconduct or unsatisfactory professional conduct by engaging in the following conduct:

Ground 1:

On 21 June 2022, knowingly made misleading statements to the ACT Supreme Court in the matter of *R v Lehrmann*, in breach of rule 21 of the *Legal Profession (Barristers) Rules 2021* (ACT).

Ground 2:

From 21 June 2022 onwards, failed to take all necessary steps to correct the misleading statements on 21 June 2022 to the ACT Supreme Court in the matter of *R v Lehrmann,* in breach of rule 22 of the *Legal Profession (Barristers) Rules 2021* (ACT).

Ground 3:

Between 8 September and 16 September 2022 (inclusive), made misleading statements to the ACT Supreme Court in the matter of *R v Lehrmann,* in breach of rule 21 of the *Legal Profession (Barristers) Rules 2021* (ACT).

Ground 4:

In addition and in the alternative to ground 3, from 16 September 2022 onwards failed to take all necessary steps to correct misleading statements made by him between 13 September 2022 and 16 September 2022 to the ACT Supreme Court in the matter of *R v Lehrmann,* in breach of rule 22 of the *Legal Profession (Barristers) Rules 2021* (ACT).

Ground 5:

Between 8 September and 16 September 2022, advanced a claim of legal professional privilege to the ACT Supreme Court in the matter of *R v Lehrmann,* on behalf of the Australian Federal police, without holding instructions and without a proper basis to do so.

Ground 6:

On 12 September 2022, procured a false or misleading affidavit from a junior member of staff at the ACT Office of the Director of Public Prosecutions, which was subsequently relied upon in the matter of *R v Lehrmann.*

Ground 7:

On 17 and 18 October 2022 made positive assertions of fact in the matter of *R v Lehrmann,* without a proper basis for doing so, in breach of rules 36 and/or 37 of the *Legal Profession (Barristers) Rules 2021* (ACT).

Ground 8:

On 3 December 2922, alerted a journalist as to the existence of a letter from him to the Chief Police Officer containing sensitive allegations related to the trial of *R v Lehrmann,* in circumstances where Mr Drumgold perceived that it may be in his interest for the letter to enter the public domain.

Ground 9:

On 7 December 2022, personally authorised the release of an unredacted copy of his letter to the ACT Chief Police Officer dated 1 November 2022, pursuant to a Freedom of Information request, without first consulting with the Chief Police Officer and individuals named in the letter in order to determine whether they objected to the disclosure and in circumstances where Mr Drumgold perceived that it may be in his interest for the letter to enter the public domain.

Ground 10:

On 8 December 2022, knowingly falsely informed the Chief Police Officer of the ACT, Neil Gaughan, that he was unaware of the FOI request relating to his letter dated 1 November 2022 and that the request had been dealt with by an employee of the DPP.

Ground 11:

On or after 4 April 2023, provided false evidence in a witness statement to the Board of Inquiry into the Criminal Justice System in the ACT in relation to the release of his letter to the Chief Police Officer dated 1 November 2023 under FOI.

(together, **The Complaint**)

3. At all material times Drumgold was the ACT Director of Public Prosecutions (**DPP**).

4. Grounds 1 to 8 relate to Drumgold's conduct and prosecution of Mr Bruce Lehrmann during the matter of *R v Lehrmann.*

5. Grounds 9 to 10 relate to Drumgold's conduct in respect of the release of an unredacted copy of his letter to the ACT Chief Police Officer dated 1 November 2022, pursuant to a Freedom of Information request. Ground 11 relates to the evidence provided by Drumgold in that respect at the 2023 Board of Inquiry into the Criminal Justice System in the ACT (the **Inquiry**).

6. It is noted that the Bar Council had previously resolved to make an own motion complaint against Drumgold on 11 October 2023 (**Original Complaint**). A copy of that own motion complaint was sent to Drumgold by letter dated 17 October 2023.

7. Between 23 October 2023 and 3 November 2023, correspondence was exchanged between the ACT Bar Association and Drumgold in respect of the Original Complaint.

8. On 19 December 2023, the Bar Council resolved to revoke the Original Complaint and replace it with The Complaint.

9. On 19 December 2023 a letter was sent by the Bar Council to Drumgold informing him of The Complaint and providing him with particulars of The Complaint. Drumgold was invited to provide submissions by close of business on Friday, 15 March 2024.

10. On Friday, 15 March 2024, Drumgold provided submissions to the Bar Council.

11. Drumgold does presently hold a practising certificate issued by the Bar Council.

Background

12. Ms Brittany Higgins (**Ms Higgins**) alleged that she had been raped by Mr Bruce Lehrmann (**Mr Lehrmann**) in March 2019 in the parliamentary offices of Senator Linda Reynolds (**Senator Reynolds**), the then Minister for the Defence Industry. Ms Higgins first reported the allegation to the police in 2019, but decided shortly thereafter she did not wish to proceed with it.

13. In February 2021, Ms Higgins advised police that she did wish to proceed with the allegation. Subsequently, Mr Lehrmann was charged with one count of sexual assault without consent in August 2021 (the **Charge**).

14. Drumgold was involved providing advice to Police in relation the matter prior to Mr Lehrmann being charged (in around June 2021).

15. The trial of the Charge was initially listed to commence on 27 June 2022. On 20 June 2022 the Chief Justice vacated that date due to pre-trial publicity (*R v Lehrmann (No 3)* [2022] ASTSC 145).

16. The trial of the Charge commenced in early October 2022 before the Chief Justice and a jury. The jury commenced its deliberations on 19 October 2022. Drumgold was the lead prosecutor in the matter. Ms Skye Jerome appeared as junior counsel. Several solicitors at the ACT Office of the Director of Public Prosecutions (**ODPP**) were involved in instructing Drumgold and Ms Jerome, including Mr Mitchell Greig. Mr Lehrmann's legal team was led by Mr Stephen Whybrow SC.

17. After more than five days of deliberation, on 26 October 2022, a Sheriff's officer located an inappropriate document in the jury room. On 27 October 2022, the Chief Justice discharged the jury without taking a verdict (*Director of Public Prosecutions v Lehrmann (No 5)* [2022] ASTSC 296). The matter was adjourned for a new trial date to be fixed. Subsequently, the matter was listed for retrial on 20 February 2023.

18. On 1 November 2022, Drumgold wrote a letter to the Chief Police Officer of the ACT (**ACT Police Chief**) of the Australian Federal Police (**AFP**), which was critical of the conduct of members of the Sexual Assault and Child Abuse Team of the AFP, who had been responsible for the investigation and prosecution of the matter. In the letter, Drumgold expressed the view that, at the conclusion of the trial, there should be a public inquiry into 'both political and police conduct' in the case.

19. On 1 December 2022, Drumgold, having received two medical reports concerning the mental health of Ms Higgins, advised Mr Whybrow and the Chief Justice that he had determined that he would discontinue the proceedings. A notice of discontinuance was filed with the Supreme Court on 2 December 2022. The same day Drumgold made a public statement to the media that he had decided to discontinue the prosecution of the charge against Mr Lehrmann.

20. On 21 December 2022, the Chief Minister of the ACT announced the establishment of the Inquiry. The Inquiry was established on 1 February 2023, and was constituted by Mr Walter Sofronoff KC.

21. Between 8 May 2023 and 1 June 2023, the Inquiry conducted public hearings, which involved calling evidence from witnesses, and tendering various documents obtained by the Inquiry under subpoena.

22. Drumgold gave evidence at the Inquiry for a period of four days between 8 and 12 May 2023 and also provided a written statement (see further below regarding Council's lack of regard for the evidence and written statement given by Drumgold to the Inquiry).

23. Following the conclusion of the oral hearings, the Inquiry delivered ten Notices of Proposed Adverse Comments to nine individuals. Two of those notices were directed to Drumgold.

24. Drumgold responded to each of the notices on 26 June 2023 and 21 July 2023 respectively by way of written submissions.

25. Drumgold was legally represented at the Inquiry by solicitors and by junior and senior counsel.

26. Mr Sofronoff submitted the Final Report to the Chief Minister on 31 July 2023 (**Sofronoff Report**), which made a number of adverse findings about Drumgold. Given that the Sofronoff Report refers to, and is based on, evidence from Drumgold, regard has not been had to it.

Application for Judicial Review

27. On 25 August 2023, Drumgold filed an application for judicial review (the **Application**) of the Sofronoff Report in the ACT Supreme Court.

28. On 4 March 2024 Kaye AJ handed down his decision in *Drumgold v Board of Inquiry & Ors (No. 3)* [2024] ACTSC 58. In summary, the Court held that the conduct of the Inquiry gave rise to a reasonable apprehension of bias and that one of the adverse findings against Drumgold (that dealing with the same subject matter as Ground 7 of The Complaint) was legally unreasonable.

29. As the Inquiry was complete and the Sofronoff Report tabled, the only relief available to Drumgold was declaratory relief, which he was granted.

Questions for the Bar Council

30. In accordance with s 410 of the *Legal Profession Act 2006* (ACT) (**LPA**), the question for the Bar Council is, on the basis of the information obtained during its investigation, which of the three available courses of action should be taken in relation to The Complaint, namely:

    (a) dismissal under s 412;

    (b) summary action under s 413; or

    (c) make an application to the ACT Civil and Administrative Tribunal (**the ACAT**) for a disciplinary order under Part 4.7 of the LPA.

31. In addition, it remains open at any time to withdraw the complaint pursuant to s 400 (s 410(2)).

32. The questions to be answered by the Bar Council in reaching this decision are as follows:

    <u>Dismissal (s 412)</u>

    (a) Is the Bar Council satisfied there a reasonable likelihood that Drumgold will be found guilty of either unsatisfactory professional conduct of professional misconduct by the ACAT (or both)?

    (b) If the answer to (a) is no (i.e. the Bar Council is satisfied that there is no such reasonable likelihood), The Complaint should be dismissed under s 412.

(c) If the answer to (a) is yes, the Bar Council should consider whether it is satisfied that it is in the public interest to dismiss The Complaint? If the answer to (c) is yes, the complaint should also be dismissed under s 412.

(d) If the answer to (a) is yes and the answer to (c) is no, the Bar Council should go on to consider other action.

Summary action (s 413)

(e) If the Bar Council is satisfied there a reasonable likelihood that Drumgold will be found guilty of unsatisfactory professional conduct by the ACT, but not professional misconduct, the Bar Counsel should consider whether it is also satisfied:

(i) that Drumgold is generally competent and diligent; and

(ii) that the unsatisfactory professional conduct can be adequately dealt with by action under s. 413.

(f) If the answer to all of the matters at (e) is yes, the Bar Council may take any (or all) of the types of action in s. 413(2).

Application to the ACAT under Part 4.7

(g) Bar Council may only commence disciplinary proceedings under Part 4.7 if either:

(i) it is satisfied there is a reasonable likelihood that the Barrister will be found guilty of professional misconduct by the ACAT; or

(ii) it is satisfied there is a reasonable likelihood that the Barrister will be found guilty of unsatisfactory professional conduct by the ACAT, and has determined not to take action under s. 413.

33. *"Unsatisfactory professional conduct"* is defined in s 386 of the LPA:

> In this Act, *unsatisfactory professional conduct* includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

34. *"Professional misconduct"* is defined in s 387 of the LPA as:

> (1) In this Act: professional misconduct includes—
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

(2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.

35. Section 389 of the LPA prescribes, without limitation, conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct, including a failure to comply with the Barrister Rules which may amount to either unsatisfactory professional conduct or professional misconduct (s 585(2)).

36. In hearing any application under Part 4.7, the ACAT is bound by the rules of evidence (s 420).

37. Section 82 of the *LPA* provides:

"**82 Government lawyers generally**

(1) A government lawyer is not subject to—

(a) any prohibition under this Act about—

(i) engaging in legal practice in the ACT; or

(ii) making representations about engaging in legal practice in the ACT; or

(b) any provision of this Act about professional indemnity insurance;

in relation to the exercise of the lawyer's official functions as a government lawyer.

(2) Contributions and levies are not payable to the fidelity fund by or in relation to a government lawyer in the lawyer's capacity as a government lawyer.

(3) A regulation may provide that a government lawyer is not subject to—

(a) any provision of this Act about professional discipline; or

(b) any provision of this Act (other than section 38 (2) (a)) about conditions imposed on a local practising certificate; or

(c) any requirements of the legal profession rules;

in relation to the exercise of the lawyer's official functions as a government lawyer.

(4) This section does not prevent a government lawyer from being granted or holding a local practising certificate."

38. Section 33A of the *Director of Public Prosecutions Act 1990* (**DPP Act**) provides:

> "(1) No action, suit or proceeding lies against a person who is or has been—
>
> (a) the director; or
>
> (b) a member of the staff of the office; or
>
> (c) a person acting under the direction or authority of the director or a member of the staff of the office;
>
> in relation to an act done or omitted to be done in good faith in the exercise or purported exercise of a power, or the performance or purported performance of a function or duty, of the director under this Act or any other law."

39. Section 390 of the *LPA*, which is the provision setting out the practitioners to whom Chapter 4 applies, relevantly provides:

> "…
>
> (4) A provision of this Act or any other Act that protects a person from any action, liability, claim or demand in relation to any act or omission of the person does not affect the application of this chapter to the person in relation to the act or omission.
>
> ...
>
> (7) For this chapter, conduct of an Australian legal practitioner is not conduct happening in connection with the practice of law to the extent that it is conduct engaged in the exercise of an executive or administrative function under an Act as—
>
> (a) a government employee or statutory officeholder; or
>
> (b) a council or a member, officer or employee of a council."

40. Therefore, conduct engaged in by the statutory office holder could be:

(a) unsatisfactory professional conduct (s 386) or professional misconduct (s 387) if it is not conduct "*engaged in the exercise of an executive or administrative function under an Act*", is not conduct "*engaged in the exercise of an executive or administrative function under an Act*"); and/or

(b) professional misconduct, pursuant to s 387(1)(b), even if the conduct is "*engaged in the exercise of an executive or administrative function under an Act*", if the conduct is "*happening otherwise than in connection with the practice of law and would, if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice*", because s 390(7) only excludes such conduct from the definition of "*conduct happening in connection with the practice of law*".

41. The functions of the Director of Public Prosecutions are set out in Division 2.2 of the DPP Act, primarily in s 6. Relevant to what follows, s 6 includes:

(a) "instituting" and "conducting" prosecutions in relation to indictable and summary offences (ss 6(1)(a)-(c));

(b) making statements or providing information to particular persons, to the public or to particular sections of the public (whether about decisions taken and the reasons for those decisions, or otherwise) relating to the exercise of powers or the performance of functions or duties under this Act (s 6(1)(o));

(c) functions given to the director under another provision of this Act or any other Territory law (s 6(1)(p));

(d) doing anything incidental or conducive to the performance of another function (s 6(1)(r)). Whilst s 16 of the DPP Act provides that *"[w]here for the purposes of the performance of his or her functions, the director is required to appear before a court*", the Director may appear or be represented by specified other persons, appearing in court is not specified as a function.

42. There is significant authority that the common law recognises the commencement (ie the laying of charges) and the conduct of prosecution (ie to present evidence at all, or not, to accept a plea including a negotiated plea) are all part of a Director's executive functions: see e.g. *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 39 (Brennan J); ***Ridgeway** v The Queen* (1995) 184 CLR 19 at 32-33 (Mason CJ, Deane and Dawson JJ); *Maxwell v The Queen* (1996) 184 CLR 501 at 514 (Dawson and McHugh JJ) at 534 (Gaudron and Gummow JJ); *Salmat Document Management Solutions Pty Ltd v R* (2006) 199 FLR 46; [2006] WASC 65, at 53 [42]-[43] (McKechnie J).

43. The analysis of this common law position (now replicated in statute) is based on the necessary separation in our system of the administration of criminal justice of prosecutorial (executive) function and judicial functions. This supports the following characterisation: once the prosecution has commenced before a judge and/or a jury, the conduct of that prosecution is no longer executive but subject to judicial function and therefore subject to the applicable rules in the *Legal Profession (Barristers) Rules 2021* (ACT) (**Barristers Rules**). As Dawson and McHugh JJ said in *Ridgeway*:

> "*The function of determining whether, in the circumstances of a particular case, a criminal prosecution should be initiated and maintained is essentially that of the Executive. The function of hearing and determining the prosecution, when initiated and while maintained, is that of the courts.*"

Preliminary issue

44. Section 19 of the *Inquiries Act 1991* (ACT) confers "derivative use immunity" on evidence given by a witness to an inquiry under compulsion by providing that "any information, document or other thing obtained, directly or indirectly, because of the producing of the document or other thing, or the answering of the question, is not admissible in evidence against the person in a civil or criminal proceeding".

45. A similarly worded provision in New South Wales has been interpreted as conferring immunity in respect of disciplinary proceedings against a member of the NSW police force.[1].

46. Both the witness statement provided by Drumgold and his oral testimony were given at the Inquiry under compulsion.

47. In the circumstances, Council resolved to brief senior counsel who had neither read nor seen the witness statement or oral evidence of Drumgold given to the Inquiry to provide advice on prospects of disciplinary action against Drumgold based only on material otherwise available. Further, senior counsel's advice forms the basis for the conclusions reached by Council and articulated in this statement of reasons for decision.

Investigation

48. The investigation has relied on various documentary materials identified below.

49. As noted above, due to the operation of s 19 of the *Inquiries Act 1991*, regard has not been had to Drumgold's oral or written evidence to the Inquiry (unless Drumgold has referred to it in his submissions as supportive of his position), nor to the Sofronoff Report and its findings.

Consideration

50. Each ground of The Complaint is considered below.

Ground One – Knowingly made a misleading statement to the Court on 21 June 2022

Facts

51. On 20 and 21 June 2022, Drumgold appeared in the matter of *R v Lehrmann* listed before the Chief Justice of the ACT Supreme Court. The proceedings were conducted on these two days in open court.

52. On 20 June 2022, Mr Whybrow, counsel for Mr Lehrmann, tendered a file note of a conference between the prosecution and Ms Wilkinson (a prosecution witness) held on 15 June 2022 (later marked Exhibit E).

53. On 21 June 2022, Drumgold informed the Chief Justice that Exhibit E was made:

(a) by his instructor Mr Mitchell Greig; and

[1] See the decision of the NSW Court of Appeal in *Hartmann v Commissioner of Police* (1997) 91 A Crim R, in which the court held that evidence given by a police officer in a NSW Royal Commission could not be used in any disciplinary proceedings against the police officer. Section 17 of the *Royal Commissions Act 1923* (NSW) provided direct use immunity to a witness compelled to give evidence at a Royal Commission. The ambit of the protection was expressed in similar terms in that it was expressed to relate to "**any** [as opposed to "a"] civil or criminal proceedings". The Court of Appeal held that these words were intended "to encompass the full category of possible future proceedings" and that the word "civil" included disciplinary proceedings.

(b) contemporaneously.

54. Ground one relates to the accuracy of these statements.

55. On 15 June 2022 a witness conference was held with Ms Lisa Wilkinson (who was to be a witness at the trial) and Ms Wilkinson's solicitor, Ms Smithies. From the prosecution the attendees were Drumgold, Ms Jerome and Mr Greig. According to Mr Greig the meeting took place via Teams, with each of Drumgold, Ms Jerome and Mr Greig sitting together in Drumgold's office. Mr Greig describes taking notes on his laptop during the conference.

56. During the conference it is common ground of all who attended that Ms Wilkinson raised the fact that she was nominated for a Logie, and that she had prepared a speech. Precisely what was said by Ms Wilkinson, and in response by Drumgold, is the subject of some disagreement between the various attendees, although the total effect of their interaction is not the subject of significant, if any, disagreement.

57. On 19 June 2022 Ms Wilkinson won a Logie Award for an interview with Ms Higgin on the television show *The Project*. Ms Wilkinson delivered an acceptance speech which was televised. The speech included references to Ms Higgins.

58. On 20 June 2022 there were a series of emails between Drumgold, Ms Jerome and Mr Greig regarding a proofing note of the conference with Ms Wilkinson.

59. At 12:38pm Mr Greig sent an email to Drumgold and Ms Jerome attaching conference notes with Ms Wilkinson, and asking if they were "happy" for them to be sent to the defence. The attached notes did not contain any reference to the Logies speech.

60. At 12:46pm Ms Jerome replied to both Mr Greig and Drumgold. The substantive part of the email read:

> *"Thanks for the conference notes.*
>
> *Can you also add in that Lisa read to us what she intended to say at the Logies if she won the award. Lisa then asked for advice on whether she should read it out at the Logies Ceremony. Shane stated that he couldn't give witnesses advice on what to say. He stated that any further pre-trial publicity may increase the likelihood of defence applying for a further stay. Shane stated that the Crown would then have to meet that application.*
>
> *Can we please check with Shane's memory on what he said in this regard."*

61. At 12:47pm Drumgold replied to Mr Greig's email of 12:38pm, saying *"Looks correct to me".*

62. At 12:52pm Drumgold replied to Ms Jerome's email of 12:46pm in the following form:

> *"To the best of my recollection*

At conclusion Lisa was asked if she had any questions:

- I am nominated for a Gold Logie for Brittany Higgins interview

- I don't think I will get it because it is managed by a rival network

- I have however prepared a speech in case

- Lisa read the first line and stopped by the Director who said:

(A) *We are not speech editors*

(B) *We have no power to approve or prohibit any public comment, that is the role of the court*

(C) *Can advise however that defence can reinstitute a stay application in the event of publicity"*

63. At 1:09pm Mr Greig sent the Wilkinson conference notes to Mr Lehrmann's solicitor, Rachel Fisher. The version sent to Ms Fisher included at the end of the document Drumgold's recollections from his email of 12:53pm.

64. At 4:04pm the matter was listed for mention before the Chief Justice at the request of the defence. Drumgold appeared for the Crown and Mr Whybrow for the defence.

65. Mr Whybrow raised Ms Wilkinson's speech and foreshadowed a further stay application. During the hearing Mr Whybrow handed up two documents, one of which was the note of the conference with Ms Wilkinson that Mr Greig had disclosed to the defence earlier that afternoon. That document became exhibit E during the hearing the following day.

66. Much of the hearing involved discussion of the content of Ms Wilkinson's speech, other reporting on the speech and social media commentary, and what steps might be taken in respect of further publications. Also discussed were a number of disclosure issues. In relation to the conference with Ms Wilkinson, the following exchange occurred:

> *MR DRUMGOLD: … I'll address your Honour tomorrow other than to say – to just let this sync for a moment. The speech is really undesirable. I accept. It's completely undesirable. The proofing notes probably can be open to interpretation. My permission was not being sought.*
>
> *I was being advised and I didn't - - -*
>
> *HER HONOUR: I don't understand Mr Whybrow to be directing any criticism to you.*
>
> *MR DRUMGOLD: No.*

HER HONOUR: And I would read those remarks as indicating that you were saying, 'Hang on a minute I'm not your speech writer'.

MR DRUMGOLD: Exactly. Yes.

HER HONOUR: That's a matter for the court but be warned.

MR DRUMGOLD: I'm not interested in hearing your speech.

HER HONOUR: Yes.

MR DRUMGOLD: But no - - -

HER HONOUR: Yes. Mr Whybrow, I take it - - -

MR WHYBROW: It's just that she was on notice.

HER HONOUR: - - - the point was that she was on notice.

MR WHYBROW: Yes.

HER HONOUR: That if she said something that this very application might – it might found this very application.

MR WHYBROW: Indeed. The Director is not the lawyer for any of the witnesses, so yes.

MR DRUMGOLD: And I'll finish after this point and perhaps take up your Honour's invitation. The speech at the Logie's as undesirable as it was is a regurgitation of some of the emotion that's been thrown around including on the hill that was subject of the original application.

67. The matter returned to Court before the Chief Justice on the morning of 21 June 2022 at 9:04am. The appearances were as before. Mr Whybrow made an application for a temporary stay of proceedings on the basis of the pre-trial publicity, including Ms Wilkinson's speech. A number of documents were admitted into evidence, including the conference note, which became Exhibit E.

68. An extract from the transcript [pp 19,20] of the exchange regarding the conference notes during the 21 June 2022 hearing is as below:

HER HONOUR: Could I just ask you about – I don't think I marked – I haven't marked your conference note. Sorry, that's Exhibit E. That was tendered by Mr Whybrow yesterday.

MR DRUMGOLD: Yes.

HER HONOUR: It seems to be admissible as to whether or not you'd call it a business record but on the present application may, I take it that you don't take issue with the accuracy of the document?

MR DRUMGOLD: No.

HER HONOUR: And can I infer that there was a conference on the 15 June between the people named, including yourself, and Lisa Wilkinson in the afternoon?

MR DRUMGOLD: Correct.

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 Gregg who made the note?

MR DRUMGOLD: Yes. Correct. Those are our submissions, your Honour.

HER HONOUR: Thank you, Mr Crown. That will be Exhibit E.

69. The hearing of the application concluded at 10:04am, and the Chief Justice adjourned until after lunch for the delivery of her decision.

70. Her Honour's decision to vacate the trial date of 27 June 2022 as a result of the potential prejudice caused by Ms Wilkinson's speech at the Logies was handed down on the afternoon of 21 June 2022: *R v Lehrmann (No 3)* [2022] ACTSC 145. In that decision her Honour referred to:

(a) Ms Wilkinson being a Crown witness, as evidenced by the file note of her conference with Drumgold and others, tendered by the accused: [21];

(b) the "clear and appropriate warning" contained in the file note: [22];

(c) Ms Wilkinson's speech and the later commentary: [22]-[24]; with such commentary in at least one case assuming the guilt of the accused.

71. Her Honour found that "the recent publicity does, in my view, change the landscape because of its immediacy, its intensity and its capacity to obliterate the important distinction between an allegation that remains untested at law and one that has been accepted by the jury giving a true verdict according to the evidence in accordance with their respective oaths or affirmations". Her Honour vacated the trial date.

72. On 23 June 2022 the trial was re-listed to commence on 4 October 2022.

73. Following the judgment on 22 June 2022, Drumgold had a conversation with Ms Saunders, partner at Thomson Geer lawyers in relation to her request that he seek a correction to the record that Ms Wilkinson was not given a direction not to make the speech. According to the statement of Ms Saunders to the Inquiry, Drumgold said he would consider the issue and "might say something in open Court". Drumgold did not take this any further with the Court. As foreshadowed to Drumgold during the conversation, Ms Saunders sent a letter under the hand of Beverley McGarvey of Paramount (on behalf of Channel 10 and Ms Wilkinson) later the same day to the Chief Justice (copied to a number of others, including Drumgold and Mr Lehrmann's solicitor). That letter included a statement that "*Neither Ms Wilkinson nor the Network Ten Senior Legal Counsel present at the conference with the DPP on 15 June 2022 understood that they had been cautioned that Ms Wilkinson giving an acceptance speech at the Logie Awards could result in an application being made to the Court to vacate the trial date.*" Ms Saunders says in her statement that she subsequently spoke again to Drumgold regarding Ms Wilkinson on 24 October 2022 during which he said that he had not been able to say anything to in response to media questions in relation to the issue due to the trial, and expressed the view that there had not been a contempt of court by Ms Wilkinson." Ms Saunders wrote again to Drumgold about the issue on 13 December 2022 (see paragraph 97 below).

Drumgold's Position

74. What follows is taken from Drumgold's primary submissions dated 15 March 2024.

75. Drumgold's recollection is as follows:

    (a) Ms Wilkinson said words to the effect that she was up for an award for her interview with Ms Higgins, but because the awards were managed by a rival network, she considered she was not a real chance, but had prepared a speech in case she did. She then began to read it;

    (b) At approximately one sentence into the speech, he interrupted her and to his recollection said words to the effect that they are not speech editors, but accepts that he could have used the term "*speech writers*" as suggested by Ms Smithies;

(c) He was cautious at this time because, as in-house counsel for Network 10, Ms Smithies was central to the successful bid to prevent the granting of an injunction against publications on the matter, and this was at the forefront of his thoughts; and

(d) He was conscious that to use the authority of his position to impose silence in circumstances where the court had declined to do so, could be considered as an abuse of his authority. He was also conscious that Ms Smithies was an experienced media lawyer who also made it clear that she was there to advise Ms Wilkinson, so he felt it best to stop Ms Wilkinson reading the speech and be circumspect in his response, saying that the DPP could not advise her and gave a brief blanket statement that publicity could give rise to a second application for a stay and thought no more about it.

76. Drumgold submits that five days after the proofing of Ms Wilkinson, he received a disclosure minute from his instructing solicitor and was asked whether he was *"happy for me to send this through to the Defence."* Drumgold says he had a quick look at the minute which looked accurate to him, and he could not identify any relevant omissions and therefore responded by email at 12:46pm saying, *"looks correct to me".*

77. At the same time, Ms Jerome sent the email timed 12:46pm in which she asked Mr Greig to add in what Mr Ms Wilkinson said about the Logies speech and to check Drumgold's recollection (set out above in full at paragraph 60).

78. Drumgold says he was not convinced that the issue was sufficiently relevant to be added to the disclosure minute. A speech made by a peripheral witness three years after the alleged offence did not go to a fact in issue in the trial, and as such it did not go to any issue falling within the disclosure policy. Drumgold believed Ms Jerome was being over cautious. However, at that time, she was the counsel who was expected would lead Ms Wilkinson through her evidence in trial so he thought he would leave it to her call.

79. Drumgold then responded at 12:52pm with his recollection (as set out in full above at paragraph 62).

80. Drumgold submits that the insertion of the term *"To the best of my recollection*" supplemented the well-known practice that as lead counsel conducting proofing, it was neither practice, nor was it appropriate for him to take notes, making it clear to the rest of the team that his contribution was based on his recollection ex post facto, and was clearly designed to assist what he thought were more detailed proofing notes than taken by the instructing solicitor.

81. Drumgold submits that he had assumed three important things:

(a) the instructing solicitor had continued to make notes on his computer during the discussion surrounding the Logies speech;

(b) the detailed proofing notes had been subject to some processing into a disclosure minute between the proofing on 15 June 2022, and the production of the disclosure minute on 20 June 2022, because the detailed proofing notes were subject to legal professional privilege; and

(c) it was the processed disclosure minute that was circulated at 12:37pm on 20 June 2022, rather than the comprehensive proofing notes taken during the proofing.

82. The discovery process for his judicial review application revealed another statement from the instructor, Mr Greig dated 5 May 2023 that Mr Sofronoff sent to Ms Albrechtsen on 6 May 2023 – a document that was neither tendered into evidence nor disclosed to Drumgold or his legal team.

83. The statement of Mr Greig revealed to Drumgold that at the critical time Mr Greig was distracted thinking about his child and thought the meeting had wrapped up and had closed his laptop prior to Ms Wilkinson mentioning the Logies speech. Further, this statement of Mr Greig also disclosed that he had been distracted by a combination of family issues and unrelated matters and had "*switched off*" and had done no processing of the detailed proofing notes into a disclosure minute. Although not specifically referred to by Drumgold, this statement also indicates that:

(a) Mr Greig was, prior to closing his laptop, contemporaneously taking notes of the conference.

(b) That after receiving Drumgold's email with his recollection, Mr Greig discussed the matter with Ms Jerome who advised Mr Greig to add into the note Drumgold's recollection and then provide the note to the defence.

84. The disclosure minute was provided to the Defence at some point following the above.

85. Following Ms Wilkinson's Logies speech, on 20 June 2022, Mr Whybrow asked for an urgent listing before the Chief Justice. Mr Whybrow made an oral application for a temporary stay of the proceedings based on the publicity from the Logies speech. In doing so, Mr Whybrow handed up the disclosure minute.

86. Drumgold submits that at the time the disclosure minute was handed up, he had not seen the final disclosure minute. However, the Chief Justice read it to herself and expressed criticism of Ms Wilkinson for giving the speech when she had been alerted to the fact that it could give rise to a stay application. Drumgold conceded the speech was undesirable and also stated that he felt his permission was not being sought, rather he was being advised because Ms Smithies was present for the express purpose of advising Ms Wilkinson during the proofing.

87. The hearing on the stay application was adjourned to 21 June 2022. Drumgold relied upon his submissions on law in a previous stay application and just posed the question of what had changed through the speech.

88. In the exchange, the Chief Justice received the disclosure minute into evidence from the defence, and she asked Drumgold if he took issue with the accuracy, and he quickly looked at it and said he did not. He was asked who made the note and when. Drumgold responded that it was made by his instructing solicitor, and the Chief Justice then asked "*Contemporaneously?*", and he responded "*Contemporaneously?".* Drumgold honestly believed at this time that the entire disclosure minute was transcribed.

89. Drumgold submits that the following are crucially important facts:

(a) The materially relevant aspects of what was in the disclosure minute were consistent along all recollections of the discussion in his possession:

(i) The ODPP could not advise by way of approval or prohibition on such issues.

(ii) The ODPP could however advise that as a question of fact and law, publicity could give rise to another stay application, and this was consistent across all recollections of the exchange.

(b) When he was on his feet and addressing the Chief Justice, he assumed that all of the material in the disclosure minute being referred to as the proofing note, was made contemporaneously, although the reference to the Logies speech had simply not been copied from the comprehensive proofing note and included in the first draft of the disclosure minute, until his junior asked for it to be.

(c) His dot point response in the email was a less than 30 second exchange the day before, and he did not cross check it with the final version of words.

(d) On his feet, he did not even have access to his email of 12:52pm on 20 June 2022 to facilitate such cross-checking.

(e) Given the peripheral nature of the subject matter, he did not consider it was something that required analysis.

(f) He had a genuine belief that the final version in the disclosure minute was an accurate amalgam of the original detailed proofing notes that he had assumed was prepared by the instructing solicitor, possibly aided in clarity by the contributions of his junior and himself, now inserted into the disclosure minute before her Honour.

(g) He held a genuine belief that what appeared in the disclosure minute was, for all intents and purposes, both contemporaneous and accurate.

90. Drumgold also makes the following points in his defence to this allegation (relying on his evidence to the Inquiry):

(a) As it turned out, the entry in the file note was taken verbatim from the dot points in his email;

(b) At the time of these events, Drumgold was lead counsel in a fast-moving application being dealt with on the run, and at no point turned his mind to this;

(c) The whole issue was peripheral to the application, which on the case law the subject of detailed submissions, was based on the actual publicity rather than its cause;

(d) In fact, the first time Drumgold turned his mind to this was when it was "*unexpectedly sprung*" on him during his evidence to the Inquiry having seen none of the Network 10 statements before the Inquiry; and

(e) As conceded in evidence at the Inquiry, with the benefit of 20/20 vision, he may have unpacked the details of the preparation of the disclosure minute, however given the peripheral nature of the issue in a fast-moving application, it would seem somewhat impractical, but if faced with the same situation again he would obviously do so.

91. In addition to the above, Drumgold relies upon the statement of Ms Smithies dated 8 May 2023 to the Inquiry which stated:

(a) *"Mr Drumgold then interrupted Ms Wilkinson"* reading the speech then said *"I am not a speech writer. It's not our place to advise you or approve this speech".*

(b) To Ms Wilkinson, *"This isn't a matter they can deal with, we can chat about this later".*

(c) She *"did not recall"* any discussion or comments by herself or anyone else from the office, regarding potential publicity or impact upon the impending trial which may arise from the acceptance speech.

92. Further, Drumgold relies upon Ms Smithies evidence in the Inquiry, which was:

> *"And she said words to the effect, "I'm nominated for a Logie. I don't think I will win. However, I have prepared a speech. And then I recall her starting to recount the speech, up until the point where it reads, 'The truth is, our honour – this honour belongs to Brittany', and particularly though to the words 'enough'. And that's where I recall Mr Drumgold cutting her off and saying words to the effect that he was not a speech writer and couldn't give her any advice on the speech."*

93. Drumgold also relies upon Ms Wilkinson's statement to the Inquiry dated 5 May 2023 which stated:

"Mr Drumgold: If you give a speech, you can't mention the trial.

Me: Mr Drumgold, I can assure you I'm very aware that I can't mention the trial - I wouldn't do that. As a journalist, and particularly on a matter as sensitive as this, I take my legal obligations very seriously. The speech I've prepared doesn't mention the trial, it doesn't mention the accused, it doesn't mention the charges and it doesn't even mention Parliament House where this alleged crime is alleged to have taken place. Let me read the speech to you so you can see if you think it would be in any way problematic. So it reads, "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' ...

Mr Drumgold: I don't want to hear any more. If I listen to the whole speech, I could be accused at a later date of endorsing it, which could cause problems. I am not a speechwriter."

94. Drumgold noted that in her statement to the Inquiry, Ms Wilkinson omitted the parts of the conversation where Drumgold allegedly stated that she could not mention the trial as it could give rise to a stay.

95. He then observed that in the Federal Court of Australia defamation proceedings brought by Mr Lehrmann against Channel 10 and Ms Wilkinson, Ms Wilkinson repeated her statement to the Inquiry, but added that she was not told that the speech could give rise to a further application for a stay.

96. Drumgold submits that the evidence given by those associated with Network 10 must be evaluated with caution because at the time evidence from all associated with Network 10 was provided to the Inquiry, Ms Wilkinson and Network 10 were defendants in the pending defamation proceeding in which the Logies speech was of some importance. Drumgold further submits that it suited the defence to defamation proceedings that Ms Wilkinson and Ms Smithies overlook the fact that they were cautioned that the speech could give rise to a further stay application.

97. Drumgold further relies on a letter from Ms Saunders to Drumgold dated 13 December 2022, Ms Saunders states in the second paragraph that Ms Smithies reported to her that Ms Wilkinson was told she "*could not mention the trial*", as it "*could give rise to a stay.*"

98. Drumgold submits that the crucially important facts are as follows:

(a) the materially relevant aspects of what was in the disclosure minute were consistent along all recollections of the discussion in Drumgold's possession:

(i) the ODPP could not advise, by way of approval or prohibition on such issues;

(ii) but could however advise that as a question of fact and law, publicity could give rise to another stay application.

(b) The only potentially material difference is the amount of the speech that was read before he stopped Ms Wilkinson.

(c) Ms Smithies said, "*Mr Drumgold then interrupted Ms Wilkinson".*

(d) Ms Wilkinson, though the letter from Ms Saunders was silent on the issue, instead focused on what was said, "*So it reads, '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 …Mr Drumgold: I don't want to hear any more*" making it apparent that this was the first sentence into the speech she read.

(e) The only difference is Ms Jerome, who:

(i) stated in an email of 20 June 2022 "*Lisa read to us what she intended to say*";

(ii) stated in her statement to the Inquiry dated 4 April 2023 at paragraph 172 that she and Mr Greig created a file note from the meeting, and at paragraph 173 she refers to her file note which is silent on the matter of the Logies speech; and

(iii) in her statement to the Inquiry of 3 May 2023 she made corrections to the statement of 4 April 2023, which is silent on the Logies speech.

99. Drumgold submits that, considering all of the evidence, it appears:

(a) Ms Wilkinson's evidence that "*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' ...*" was the first line of the speech, and this is the point at which Drumgold interrupted her;

(b) Ms Jerome's file note states "*Lisa read to us what she intended to say*" which was read as "*[everything] she intended to say*" and formed the basis of the cross-examination about differing accounts, and was an incorrect interpretation.

(c) Ms Jerome concedes in the undisclosed statement (being a statement dated 3 May 2023 by Ms Jerome to Ms Albrechtsen) that she only thought it was her entire speech, or close to her entire speech, and importantly, Ms Jerome is the only witness that makes no reference to me interrupting Ms Wilkinson, yet she made no notes to support this position, at least as disclosed at exhibit 36 to her statement.

Consideration

100. Ground one is that Drumgold knowingly made misleading statements to the ACT Supreme Court in the matter of *R v Lehrmann*, in breach of rule 21 of the Barristers Rules. Those misleading statements are:

(a) that Exhibit E was a file note that was made by Mr Greig and that it was made contemporaneously; and

(b) that his junior Ms Jerome had a different recollection to Drumgold in relation to the additional material in Exhibit E.

101. Rule 21 provides: "*A barrister must not knowingly make a misleading statement to a court on any matter*."

102. Bar Council is satisfied that the conduct in question, being conduct in court as an advocate, is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. Section 390(7) of the LPA is not applicable, and it is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

103. Bar Council is satisfied that Drumgold made two misleading statements to the ACT Supreme Court, namely that Exhibit E was a file note that was made by Mr Greig and that it was made contemporaneously. In light of the additions made on 20 June 2022 following the provision, by Drumgold, of his recollection, the file note was in fact not entirely that of Mr Greig; and was not entirely contemporaneous.

104. Bar Council is not satisfied that Drumgold misled the Court in failing to inform the Court of his junior's email in which Ms Jerome suggested that Ms Wilkinson had *"read to us what she intended to say at the logies if she won the award*". *First*, the content of the file note was only relevant to prove that Ms Wilkinson had told Drumgold of her intention to speak at the Logies (and even that fact was ultimately not relevant to the Chief Justice's decision). *Second*, to the extent the Chief Justice referred to the content of Exhibit E it was merely to observe that Ms Wilkinson had been warned about the implications of speaking publicly, and that fact was included in Ms Jerome's own email. *Third*, the weight of the available material before Bar Council supports Drumgold's recollection as recorded on 20 June 2022 that Ms Wilkinson did not recount her entire speech but was in fact interrupted.

105. Bar Council is also satisfied that Drumgold made the two misleading statements identified in paragraph 103 above with the knowledge that the additions to Exhibit E were made on 20 June 2022 following the provision, by Drumgold, of his recollection. That is because he was part of the email exchange on 20 June 2022 in relation to additional matters not included in the original disclosure minute and communicated in an email dated 20 June 2022 his own recollection of the conference on 15 June 2022.

106. However, on balance, Bar Council is not satisfied to the requisite standard that, at the time Drumgold informed the ACT Supreme Court that Exhibit E was made by Mr Greig and made contemporaneously, he had an intention to mislead the Court or that he knowingly misled the Court. Bar Council accepts that it is possible that Drumgold did not turn his mind to the detail of Exhibit E, possibly because the issue before the Supreme Court at that time was not whether the Logies speech had been raised by Ms Wilkinson on 15 June 2022 as it was accepted it had been raised. Rather, the issue before the Supreme Court was whether a stay should be granted in light of Ms Wilkinson's Logies speech: the fact of the speech and the consequential media attention to the speech were not in dispute. Furthermore, Drumgold's contention that he believed that there were notes being taken contemporaneously by Mr Greig is supported by Mr Greig's second statement which describes contemporaneous note taking until the point that Mr Greig closed his laptop.

107. Therefore, Bar Council is not satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to this ground.

108. As to the recklessness of not considering carefully a question from the Court as to the nature of Exhibit E, particularly the weight given to contemporaneous records, Drumgold has accepted in his submissions to Bar Council (and also in his evidence to the Inquiry) that he would approach such a situation differently.

109. As to his discussion with Ms Saunders on 22 June 2022, that discussion related to the reports in the media that Ms Wilkinson had been directed by Drumgold not to give the speech. There is no suggestion that Drumgold said that to the Chief Justice or otherwise misled the Court in relation to what was said to Ms Wilkinson. What was recorded in Exhibit E is consistent with Ms Saunders' and Drumgold's recollection and formed the basis for the Chief Justice's findings.

Ground Two – Failed to take steps to correct the alleged misleading statement of 21 June 2022

Facts

110. The facts set out at paragraphs 51 to 73 above are repeated.

111. As noted above, on 21 June 2022, the Chief Justice delivered judgment vacating the trial scheduled for 27 June 2022 (*R v Lehrmann (No 3)* [2022] ACTSC 145) and the judgment at [21] referred to the portion of Exhibit E set out above at paragraph 62. Her Honour did not refer to the purported author of the note nor to the fact it was said to be contemporaneous; in circumstances where the note was tendered by the accused with no objection from the Crown that is not surprising. Her Honour did conclude that Ms Wilkinson had been given a "clear and appropriate warning" about delivering the Logies speech. However, that warning did not seem to have any bearing on her Honour's final conclusion that the public comments were such that there was prejudice to the accused for the trial to commence as planned on 27 June 2022.

112. At no point from 21 June 2022 did Drumgold take any steps to correct his misleading statements as to the author of Exhibit E or its preparation, nor to inform the Court that Ms Jerome had expressed a different recollection of the conference to that reflected in Exhibit E.

Drumgold's Position

113. Drumgold relies upon his response to Ground One and further states that he held a good faith belief that the statement was not misleading, and the decision was handed down, with the matter listed for call over. This belief was held until he was cross-examined at the Inquiry.

Consideration

114. Rule 22 of the Barristers Rules provides: "*A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading*".

115. Bar Council is satisfied that the conduct in question, being conduct in court as an advocate, is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. Section 390(7) of the LPA is not applicable, and it is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

116. As noted in relation to Ground One above, Bar Council is not satisfied to the requisite standard that Drumgold knowingly made any misleading statements to the Court.

117. Bar Council accepts that it is possible that Drumgold remained unaware that his statement about the file note had been misleading until the matter was raised with him in the course of the Inquiry.

118. As a result, Bar Council is not satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to this ground.

Ground Three – Made misleading statements to the Court between 8 to 16 September 2022

Facts

119. On 27 April 2022, Detective Superintendent Moller signed a document headed "Disclosure" on behalf of the AFP (**First April Disclosure Certificate**, also known as "RF1") to be provided by the AFP to the DPP with the brief. From the available evidence it appears that Drumgold, and the ODPP more generally, was not aware of this version until the application for access to material was made by the Mr Lehrmann's legal representatives on 7 September 2022.

120. Schedule 1 of the First April Disclosure Certificate (listing material not contained in the brief because of a claim for immunity from disclosure) included "*Review of brief material and subsequent advice/recommendations made by the DPP to ACT Policing*" as subject to "LPP". Schedule 3 (relevant unprotected material that is not subject to claim of privilege or immunity or statutory publication restriction) included at p 18 an item described as "*Investigative review documents*" with the comment "*This document [sic] outlines versions of events as supplied by Ms Higgins during the course of her engagements with Police since 2019 against the available evidence and subsequent discrepancies. Available upon request and in consultation with DPP*" (**Investigative Review Documents**). This was later identified as one document.

121. On 28 April 2022, Detective Superintendent Moller signed a further document headed "Disclosure" on behalf of the AFP (**Second April Disclosure Certificate**, also known as "RF2") to be provided by the AFP to the DPP with the brief. This version was the version provided to the DPP.

122. The Second April Disclosure Certificate included the same item in Schedule 1 "*Review of brief material and subsequent advice/recommendations made by the DPP to ACT Policing*" but made no reference to "*Investigative Review Documents*" in Schedule 3 or otherwise. The officer who drafted the certificates, Senior Constable Frizzell, said in evidence to the Inquiry that the version intended for the ODPP contained witness contact details (RF1), and that the other (RF2) which did not, was intended for the defence. Senior Constable Frizzell said that the omission of the "*Investigative Review Documents*" in Schedule 3 was an error.

123. Inadvertently, the ODPP received the version intended for the defence (RF2), whilst by 7 June 2022 both versions of the of the Disclosure Certificates had been provided to Mr Lehrmann's legal representatives.

124. On 9 June 2022, Mr Lehrmann's legal representatives made a written request to the DPP for disclosure of a number of items, including the Investigative Review Documents referred to in the First April Disclosure Certificate. That request was in the following form:

> *ALL PROMIS 6831473 investigation files – INCLUDING the 'Investigative Review Documents' referred to in the Disclosure Statement*

125. On 16 June 2022 Drumgold participated in a conference with officers and lawyers from the AFP regarding the request for disclosure and a subpoena that had been received. The note of the conference by a solicitor from the ODPP includes the following:

- *Investigative Review documents – two issues with investigative documents*
    - *DPP request for advice + attached spreadsheet with summary of AFP obligations – seems to be subject to LPP*

- *AFP identified another internal document – tactical investigative review done June 2021 to identify what material outstanding etc.*
- *AFP identified AFP media plan*
- *AFP proposed sending those documents over to get DPP view on disclosability – DPP to have a look*
- *AFP proposed providing overview of case log so defence can determine which items they are interested in*
- *Defence have declined to narrow disclosure request for PROMIS records – DPP said will have to decline disclosure request*
- *DPP to action – unless they can narrow what they are after will not be able to comply*

126. A file note by an AFP solicitor included:

- *In relation to the 'investigative review documents':*
  - *Shane said that he had provided advice that two of the documents he had seen were privileged as they were created for the dominate [sic] purpose of obtaining legal advice.*
    - *A four page report dated 8 June 2021 to him which was a spreadsheet containing a summary of observations.*
    - *The brief signed by Marcus Boorman.*
  - *In relation to the tactical investigative review report*
    - *Shane did not consider that disclosable.*
  - *The AFP advised that it would send through a copy of the documents to ensure we were on the same page as to which documents may be privileged.*

127. On 20 June 2022, Drumgold was forwarded an email dated 20 June 2022 from a lawyer at the AFP, which:

(a) attached five documents, which were identified as being covered by the request for disclosure of "*investigative review documents*", "*for the purpose of advice as to whether they should be disclosed in the proceedings"*;

(b) described the five documents as:

(i) a “minute” dated 4 June 2021 from Marcus Boorman to DCPO-R titled “Op Covina Direction/Decision — Alleged sexual assault Australian Parliament House 23 March 2019";

(ii) an “executive brief” from Scott Muller [sic] to Michael Chew dated 7 June 2021 entitled “Seeking direction in relation to Operation COVINA — alleged sexual intercourse without consent, Australian Parliament House 23 March 2019 and completed cover sheet” (**Moller Executive Briefing**);

(iii) an “investigative review conducted by Cmdr [redacted]” dated 2 August 2021;

(iv) an undated document entitled “identified discrepancies”; and

(v) an undated document entitled “review doc”;

(c) expressed an understanding that the first two of the above documents (i.e., those dated 4 June 2021 and 7 June 2021), had previously been received by Drumgold “*in the context of being asked to provide advice”* and “*considers in that context that the documents are subject to LPP*”;

(d) requested confirmation that the first two documents were the same documents as previously received by Drumgold and that his position is that they are privileged;

(e) included reference to a potential argument that the first two of the above documents held by the AFP may not be privileged because they had been prepared for the purpose of internal AFP briefing and guidance, and not for the purpose of any communications with a legal advisor nor for the dominant purpose of obtaining advice or for use in, or for the purposes of litigation proceedings, and sought advice on this point;

(f) noted that the author believed that the third, fourth and fifth documents had not previously been provided to the DPP and that those documents appeared to be disclosable but would defer to the DPP’s view; and

(g) noted that some documents had “legal professional privilege claims marked up”, and the “LPP redactions” should be applied to two documents being the third document and a sixth document referred to “Higgins brief response by DCRO”.

128. Drumgold replied on 21 June 2022 to the forwarded email referred to above as follows:

“I believe these documents are preparatory to confidential communications between DPP and AFP for the dominant purpose of providing legal advice, and are not disclosable pursuant to s 118 Evidence Act 2011.”

129. Drumgold did not, prior to 21 June 2022, nor at any other time, make any enquiry as to the purpose of any of the authors of the documents identified in paragraph 127 above in making the documents.

130. On 19 July 2022 Drumgold participated in a telephone conference with AFP lawyers. The file note taken by the ODPP solicitor includes the statement "*DPP say all investigation review items are legally privileged"*.

131. On 7 September 2022, Mr Lehrmann's legal representatives filed with the Court an application seeking disclosure of a number of items, including a copy of "the '*Investigative Review Document'* [sic] referred to at page 18 of RF-1" (i.e. in the First April Disclosure Certificate). That application was supported by an affidavit of Rachel Fisher, which exhibited a number of documents, including the First and Second April Disclosure Certificates.

132. On the morning of 8 September 2022, Drumgold emailed Ms Jerome, Ms Greig and Ms Sarah Pitney (another solicitor at the ODPP working on the matter) regarding the defence application for disclosure. Drumgold indicated that he thought an affidavit outlining three areas was required. The first related to a Cellebrite report. The second two were referred to as follows:

> *"2) Investigative Review Document*
>
> > *a. This document was one of two documents that formed a request for advice from police.*
>
> *3) All material relating to investigations*
>
> > *a. There is no material that has not been provided"*

133. Drumgold went on in the 8 September 2022 email to say, "*Sarah, my preliminary thoughts are whether you have access to both the redacted and unredacted Cellebrite report to affirm point 1) in affidavit form, and further whether in relation to points two and three, it would suffice to state that you have been advised and verily believe this to be true, and I can talk to it from the bar table?*"

134. Ms Pitney responded to the effect that she would have difficulties getting an affidavit completed until that afternoon, and also said, "*In relation to 2) and 3), who would I say I have been advised by?"* Drumgold responded that he understood and that they may need to adjourn the application for a week or two to respond with their own evidence.

135. Later on 8 September 2022, Drumgold appeared in the matter of *R v Lehrmann* listed before the Chief Justice. During the hearing, Drumgold made statements to the effect that:

(a) the "Investigative Review Document" was one of two documents that had been "sent by the AFP to the DPP for the express purposes of seeking legal advice on this matter";

(b) he thought that the inclusion of the "Investigative Review Document" in the First April Disclosure Certificate as not being subject to any claim of legal professional privilege was an error; and

(c) he envisaged he may be instructed by the AFP to make a claim for legal professional privilege in respect of the "Investigative Review Document'.

136. Extracts from the transcript [pp 5 and 19] regarding the investigative review document during the 8 September 2022 hearing is as below:

> *Mr Drumgold: The question really over what is disclosable - I withdraw that. So that's the Cellebrite report. The investigative review document is one of two documents that was sent by the AFP to the DPP for the express purposes of seeking legal advice on this matter.*
>
> *Her Honour: So it was listed on an earlier discovery schedule?*
>
> *Mr Drumgold: It was.*
>
> *Her Honour: Was that – you'll say that was - - -*
>
> *Mr Drumgold: I think that was in error. It was why it was removed. In the same disclosure report, they also claim legal professional privilege over documents. I think what has happened is they have whoever has completed that, and I don't know who completes that, I know who signs it but I imagine it's a collection of things.*
>
> *I know the investigative review document and it was one of two documents. It was a supporting document that came with a letter of request for legal advice, and also in that first disclosure certificate, it contained legal professional privilege. In any case, it is there. It is the AFP's legal professional privilege and it is not an issue for us.*
>
> *---*
>
> *Mr Drumgold: I am sorry, your Honour. The problem is that the legal professional privilege is not our legal professional privilege. It belongs to the Australian Federal Police, and we are the lawyer they are the client. So they are going to have to argue the legal professional privilege aspect of their material.*
>
> *Her Honour: Well, you can make the claim on their behalf if they instruct you to.*
>
> *---*
>
> *Mr Drumgold: That's what I'm envisaging.*

137. On 12 September 2022, Drumgold asked Mr Greig to swear an affidavit regarding two items from the defence disclosure request. He suggested that Mr Greig include the following in the affidavit:

"I am informed and verily believe that [the Investigative Review Document] was inserted in the first disclosure declaration individually as not being subject to a claim of privilege in error, which was remedied in the second disclosure document.

I am informed and verily believe that the document referred to as "Investigative Review Document" appropriately falls within the definition of "Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing" listed in schedule 1 of the Disclosure Declaration at RF1 and RF2 of the Affidavit of Rachel Elizabeth Fisher affirmed on 8 September 2022 and read in this application in proceedings on 8 September 2022, in which legal professional privilege is claimed."

138. Neither prior to 12 September 2022, nor at any subsequent time, did Drumgold confirm with the AFP, that:

(a) The subject of the disclosure application was "*The investigative review document* [that was] *one of two documents that was sent by the AFP to the DPP for the express purposes of seeking legal advice on this matter";* or

(b) that the AFP had incorrectly included the "Investigative Review Document" in the Second April Disclosure Statement and was in fact claiming legal professional privilege in relation to the "Investigative Review Document" whether in the hands of the DPP or the AFP.

139. On 13 September 2022, as requested by Drumgold, Mr Greig swore an affidavit in the proceedings including the words suggested by Drumgold, which was subsequently filed.

140. On 13 September 2022 Drumgold signed submissions in the matter of *R v Lehrmann* which relied on the affidavit of Mr Greig and which included the following:

"Order 1b,

2. As outlined in the Affidavit of Mitchell Greig affirmed 12 September 2022, the document entitled 'Investigative Review Document' is one of two documents provided by the Australian Federal Police to the Director of Public Prosecutions on 21 June 2021, seeking legal advice.

3. This document falls within the definition of 'Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing' listed in schedule 1 of the Disclosure Declaration at RF1 and RF2 of the Affidavit of Rachel Elizabeth Fisher affirmed on 8 September 2022 and read in this application in proceedings on 8 September 2022

4. Accordingly, the document listed at order 1b) is subject to a claim of legal professional privilege by the Australian Federal Police.

…

35. In the present case, the document 'Investigative Review Document' was provided by the Australian Federal Police, to the Office of the Director of Public

> *Prosecutions for the sole purpose of seeking legal advice, and a claim of privilege has been made in schedule 1 of the Disclosure Declaration at RF1 and RF2 of the Affidavit of Rachel Elizabeth Fisher affirmed on 8 September 2022 and read in this application in proceedings on 8 September 2022, as a document falling within the definition of 'Review of brief materials and subsequent advice/recommendations made by the DPP to ACT Policing."*

141. As at 13 September 2022, Drumgold had not confirmed with the AFP that he was instructed to claim legal professional privilege in respect of what he had referred to as the "Investigative Review Document".

142. On 15 September 2022, Drumgold met with representatives from the AFP. During the conference Drumgold is recorded as describing the "Investigative review document" as one he believed he received for advice. (Drumgold refers to the file note prepared by his instructing solicitor Mr Greig in his submissions at [138]). According to the available file notes from an AFP lawyer (Ms McKenzie) and Mr Greig, Drumgold was told:

(a) that the AFP had received advice from the Government solicitor that the "documents" on their face appeared to be seeking internal guidance and it was "*Not clear on face if privilege, if additional evidence on the evidence - why were they created - seeking further legal advice*";

(b) that the author of the document (Moller) did not have in mind when creating the documents that it was for the purpose of seeking legal advice and it was "*created for the purpose of briefing up the chain of command*", and it was a "*Decision making document, for [Commander] Michael Chew to make a decision on the matter*."

(c) that if subpoenaed for the document, the AFP did not think they could resist production.

143. On 16 September 2022, Drumgold appeared at a directions hearing in the matter *of R v Lehrmann* listed before the Chief Justice. An extract from the transcript [pp 3, 4] of the exchange during the 16 September 2022 hearing is as below:

> *Mr Berger: There is, your Honour. The investigative review document which was initially listed in a disclosure schedule which did not make a claim for privilege over it, the document is described as a document outlines version of events as supplied by Ms Higgins during the course of her engagements with police in 2019 against the available evidence and subsequent discrepancies and it says, 'Available upon request in consultation with the DPP.' The DPP have now claimed that it was not subject to a claim for privilege inadvertently and a claim is maintained. We contest that.*
>
> *Her Honour: So you accept that it was inadvertent?*
>
> *Mr Berger: Yes, your Honour.*
>
> *Her Honour: What's your position then?*

Mr Berger: And we don't make anything of the initial non-claim, but nevertheless maintain that it's not properly a document that attracts legal professional privilege because the dominant purpose for its creation as opposed to whatever purpose there may have been of the director in receiving it or indeed the AFP in providing it to the director, is not the same as the purpose for the creation of the document.

We say the most appropriate way to crystallise this dispute would be for us to issue a subpoena to the AFP in relation to that document. If there is a privilege it's the AFP's privilege, not the director's, and the AFP can decide whether it wishes to maintain a claim for privilege over that document and if so, put on evidence to justify that claim and that can be considered by us and then either accepted or not. If it's not, then we would probably need maybe in the order of an hour before your Honour to deal with that.

Her Honour: Do you accept that's an appropriate way to proceed?

Mr Drumgold: I'm content that that is a way forward. I agree that it is the AFP's privilege. I think that I may run into some problems that my friend Mr Whybrow has, that I would effectively become a witness in the purposes for the creation of that document, so - - -

Her Honour: That might be able to avoided if the - if a subpoena is issued and it's the client's privilege, the client will have to verify - - -

Mr Drumgold: Yes.

Her Honour: Don't answer this, but unless you're telling me you created it - but your office created it but that's - that doesn't seem - - -

Mr Drumgold: I was told it was being created for a particular purpose, yes.

Her Honour: Well, whatever you were told wouldn't be admissible. I can't see you being a necessary witness, Mr Prosecutor.

Mr Drumgold: Yes. Well, in any event, I agree with my friend's - - -

Her Honour: But you flag that as a potential issue.

Mr Drumgold: Yes. I agree with my friend's way forward.

144. The Chief Justice proceeded to make directions in relation to a subpoena before turning to other issues.

145. The AFP subsequently determined to produce a number of documents to the defence pursuant to the subpoena. This included the document authored by Superintendent Moller. Legal professional privilege was claimed over one other document.

Drumgold's Position

146. In response to the request for the Investigative Review Document, Drumgold sets out the history as follows:

(a) there were two competing disclosure certificates dated one day apart. Both certificates had listed *"Review of brief material and subsequent advice / recommendations made by the DPP to ACT Policing"* (being material provided to Drumgold requesting advice on prospects of success) listed as not disclosed because they were subject to a claim for immunity from disclosure;

(b) the key difference between the certificates was that the earlier version had an entry of "*Investigative Review Documents*" as not disclosed and not subject to immunity from disclosure;

(c) he was not aware of an individual document called *"Investigative Review Documents"* and the whole prosecution team wrongly assumed this was a reference to one of the three documents that formed the *"Review of brief material and subsequent advice / recommendations made by the DPP to ACT Policing"* and listed in error;

(d) this was partly based on the fact that it was listed in the first disclosure certificate and removed from the second disclosure certificate;

(e) the claiming of immunity from production in both versions of the disclosure certificate was supported by the timing of the various documents coming into existence;

(f) when Drumgold received the request for advice on 21 June 2021, it contained three documents:

(i) The first was a letter dated 18 June 2021 requesting the advice, that in support said; "*Please find attached at **annexure B & C** a summary report and time line of disclosures made in relation to [the matter]*".

(ii) **Annexure B** was the Moller Executive Briefing. In his view, this document was completely inadmissible and not disclosable and did not require the protection from immunity from production. It contained a list of frustrations the police expressed about Ms Higgins.

(iii) **Annexure C** dated 4 June 2021, was a further table containing a list of criticisms the police had about the complainant, and some further out of context evidence. To his mind, this document had all of the same issues as the Moller Report, in that it was not evidence at all, it was essentially the disgruntled musings of a police officer about his frustration, and his consequential opinion of the value of evidence. The AFP claim for statutory immunity from production was of course also supported by the fact that police had not produced the items to defence with the brief of evidence.

<u>Annexure B and C not disclosable</u>

147. Drumgold relies upon *Hamilton v NSW* [2016] NSWSC 1213 and states that when he produced the submissions on around 13 September 2022, his view was that the annexures were protected by legal professional privilege and confidential communications for professional legal service. They were also not relevant to a fact in issue in the trial.

Grounds for opposing disclosure

148. Drumgold submits that the disclosure was opposed on two grounds:

(a) consistent with *Hamilton,* the musings of a police officer about his opinion of the value of evidence that had been disclosed in its primary source, and gratuitous opinions about the credibility of the complainant could not affect the actual value or interpretation of that primary evidence; and

(b) he had misinterpreted the terms "*Review of brief material and subsequent advice / recommendations made by the DPP to ACT Policing*" and "*Investigative review documents*" the second of which was incorrectly listed in the disclosure certificate as plural, as being the same documents.

149. Drumgold accepts that the documents were different documents, however the Investigative Review document contained no evidence at all. It was an internal working document about how the investigators performed.

Process where disclosure is opposed

150. The prosecution do not arbitrarily decide whether a document is disclosable. The existence of the material is disclosed in the disclosure certificate to facilitate an application to the court should defence so desire, as defence did in this case by way of application dated 7 September 2022. In response, the prosecution prepared affidavits, and annexed all material subject to the dispute, so everything is before the adjudicating Judge. In this case however, in light of the confusion between the terms "*Review of brief material and subsequent advice / recommendations made by the DPP to ACT Policing*" and "*Investigative review documents*" the affidavit only annexed the letter requesting advice, and annexures b and c.

151. Mr Greig was tasked with dealing with the Investigative Review Document in respect of the application dated 7 September 2022 and Drumgold submits that he asked him if he needed additional help. The junior instructor said he would be fine but asked for some guidance on wording for the supporting affidavit. Drumgold submits that he sent him a cut and copy from a previous affidavit on similar issues with reference to the current subject matter. The statement of Mr Greig given in the Inquiry supports that Drumgold provided some suggested wording.

152. Drumgold submits it was a clear and shared understanding that the position on legal professional privilege was based on the instructions from the AFP through the disclosure certificate.

Basis for belief that material was subject to LPP

153. With regard to the bundle of documents labelled "*Review of brief material and subsequent advice / recommendations made by DPP to ACT Policing*" statutory immunity was claimed in schedule 1 of the Second April Disclosure Certificate dated 28 April 2022, and provided to the DPP, and the items were not produced by police to defence with the brief of evidence.

154. The Second April Disclosure Certificate also listed "*Review of brief material and subsequent advice / recommendations made by DPP to ACT Policing*" in Schedule 1 claiming statutory immunity but had removed the document "*Investigative Review Documents*" from schedule 3.

155. Drumgold submits that he had a number of brief meetings with AFP legal where the issue was discussed and he outlined his views based on the timing of the documents coming into existence, for a decision that at all times remained AFP Legal's to make. This was followed by an email sent by AFP Legal to the first instructor, Ms Priestly on 20 June 2022, that enclosed documents (see above at paragraph 127) to which Drumgold responded: "*I believe these documents are preparatory to confidential communications between DPP and AFP for the dominant purpose of providing legal advice, and are not disclosable pursuant to s118 Evidence Act 2011*".

156. Drumgold reproduces (at [125]) his evidence to the Inquiry:

> *"The reason I considered the documents were likely privileged included that documents of analysis such as this appeared to be directed to legal issues which I was asked to advise on. They did not appear to be intended to guide the investigation. Additionally, the documents were dated from around the time that a decision appears to have been made to brief the ODPP, consistent with them being prepared for this purpose."*

157. The instructor responded to AFP Legal accordingly, pointing out that the primary position was that they were not disclosable in the first place, such that they would need to be protected by statutory immunity:

> *"The Director has reviewed this material and is of the view that the documents are preparatory to confidential communications between DPP and AFP for the dominant purpose of providing legal advice, and are not disclosable pursuant to s118 of the Evidence Act 2011. Further, where the documents amount to inadmissible opinion evidence, it would not seem to be relevant or possibly relevant to an issue in the case."*

Application for disclosure on 7 September 2022

158. It was through the documentation annexed to the affidavit in support of the application that Drumgold first became aware of the First April Disclosure Certificate, which had "*Investigative Review Documents*" in schedule 3, not subject to a claim for privilege. Drumgold's position is that he was not aware of such a document and wrongly assumed it was the same document as one of the documents in the "*Review of brief material and subsequent advice / recommendations made by DPP to ACT Policing.*"

159. As outlined in Drumgold's submissions to the Inquiry (and referred to at [132] of his submission), during the team discussions on the application of 7 September 2022, the team was all referring to an *"Investigative Review Document"* singular rather than plural, which he understood the team all wrongly concluded was one of the three documents contained within the *"Review of brief material and subsequent advice / recommendations made by DPP to ACT Policing"* and he understood all held the view that the disclosure certificate instructed the team that the AFP were claiming legal professional privilege.

Submissions to the court on 8 September 2022

160. Drumgold relies upon the exchange reproduced above at paragraph 136 to show his honestly held state of mind on 8 September 2022, including the references to the "one of two documents".

161. Drumgold's position is that the primary basis for not agreeing with disclosure (of the documents he assumed were being discussed) was that, in accordance with clear authority in *Hamilton*, the documents were not disclosable under the prosecution policy. Even if they were, the disclosure certificate instructed a claim for statutory immunity over the documents (albeit with some confusion of the titles of documents), and the documents were not produced to defence by the AFP with the brief of evidence.

Meeting on 15 September 2022

162. Drumgold relies upon a file note of Ms McKenzie, a lawyer from AFP Legal that was provided to the Inquiry (referred to above at paragraph 142).

163. Drumgold's position is that all discussions on 15 September 2022 was contingent on if the AFP were subpoenaed directly, should it produce the documents. There was no discussion about whether the AFP should withdraw the current disclosure certificate binding the DPP and issue a new one without listing the documents "*Review of brief material and subsequent advice / recommendations made by the DPP to ACT policing*" which they all still understood included the "Investigative Review Documents" in schedule 3, rather than schedule 1. This is because in the hands of the DPP they were clearly both for legal advice and/or confidential documents, as the only purpose for providing them to the DPP was to obtain legal advice on the prospects of conviction.

164. Drumgold submits that his impression from the meeting was that AFP Legal felt that this was still a very live question, and they were weighing factors from both sides:

(a) On one hand, investigators had claimed statutory immunity in the disclosure certificate, and they had not produced the documents to defence with the brief of evidence.

(b) But on the other hand, Moller had later said some things that may raise a question over the legal professional privilege aspect alone, and it was unclear on the face of the certificate.

(c) They may be confidential documents under s 119, but the AFP had not run this type of claim in the past and were seeking advice from AGS.

(d) Accordingly, to Drumgold's mind the AFP's position on statutory immunity and what was referred to as PII was that, should it come to it, it was very much undecided.

(e) Further, it was also discussed that if the AFP were subpoenaed directly, Drumgold would not be put at risk of handing documents over that were listed in the current version of the disclosure certificate as being subject to a claim for statutory immunity and the AFP could waive this themselves in relation to the documents in their hands.

Appearance on 16 September 2022

165. Drumgold refers to the exchange extracted above between himself and the Chief Justice where he said he was content for Mr Berger's process to be adopted.

166. Drumgold submits that he expressed that he was content with the proposed way forward and the reason why.

167. Drumgold submits that his reference to the document being "*created for a particular purpose*" was a reference to his meeting with Moller and Boorman on 1 June 2021, where he was told that a request for advice would be forwarded to him, and the date on the documents clearly show they subsequently came into existence immediately after the meeting and were sent to Drumgold.

168. When he expressed the term *"was being created"* he was making a reference to him being told on 1 June 2021 that the request for advice would be coming, which to his mind clearly included annexure B and C.

169. Drumgold submits that he categorically did not mislead the court as to any exchange between an investigator and AFP legal. He was stating that should the subpoena be issued directly on the AFP, and they challenged production, he could potentially be a witness in regard to his conversation with the police on 1 June 2021.

Consideration

170. Ground three is that Drumgold knowingly made misleading statements to the ACT Supreme Court in the period 8 and 16 September in the matter of *R v Lehrmann*, in breach of rule 21 of the *Legal Profession (Barristers) Rules 2021* (ACT), namely:

(a) on 8 September 2022 Drumgold told the Court:

(i) that the "Investigation Review Document" that was being discussed was one of two documents that have been "sent by the AFP to the DPP for the express purposes of seeking legal advice on this matter";

(ii) that the "Investigation Review Document" had been included in schedule 3 of the First April Disclosure Certificate in error;

(iii) that he envisaged he would be instructed by the AFP to make a claim for legal professional privilege in respect of the "Investigation Review Document"; and

(iv) did not inform the Court that copies of the documents might not be privileged because they had been prepared for the purpose of internal AFP briefing and guidance (as set out in the email from the AFP dated 20 June 2022 and forwarded to Drumgold on 21 June 2022).

(b) on 16 September 2022 Drumgold:

(i) told the Court that he had been told that the "Investigative Review Document" was being created for the purpose of obtaining legal advice; and

(ii) did not refer to the advice received on 15 September 2022 on the AFP's queries in relation to the author's purpose and the AFP's concern if they were subpoenaed.

171. Rule 21 provides: "*A barrister must not knowingly make a misleading statement to a court on any matter*." Bar Council is not satisfied to the requisite standard that Drumgold misled the Court on 8 or 16 September nor in the content of the written submissions dated 13 September 2022.

172. Bar Council is satisfied that the conduct in question, being conduct in court as an advocate, is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. Section 390(7) of the LPA is not applicable, and it is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

173. It is clear from the chronology of events, in particular the terms of the 20 June 2022 email (received while the stay application was being heard and determined as outlined in relation to ground 1 above) and the file note of the 15 September 2022 that there was a lack of specificity as between the AFP and the DPP in relation to the documents that were being identified and sought by the accused. Much of the confusion arose from the lack of precise language in the disclosure certificates themselves. The lack of specificity and resulting confusion is underscored by the fact that according to the officer who compiled the disclosure certificates (Senior Constable Frizzell), the Moller Executive Briefing and minute by Marcus Boorman, were not intended to be captured by reference to investigative review documents; rather, they were intended to be captured by a different entry that referred to "*Internal AFP briefing and Investigative material Inclusive of situation, evidentiary reviews, enquiries and identified issues and/or discrepancies*". This was despite the fact that the AFP lawyers had in the email of 20 June 2020 referred to both documents as falling within the description of "investigative review documents".

174. The statements made to the Court by Drumgold are not inconsistent with him having been confused as to what documents were being discussed.

175. As to the particular alleged misleading statements set out above at paragraph 170:

<u>8 September 2022</u>

(a) Each of the statements at (i)-(iii) appear to be consistent with Drumgold possibly having had a genuine but mistaken belief.

(b) In the case of (iv), this was a matter of argument. Given that the issue of determining the claim was being stood over, it was not misleading to not mention it.

<u>16 September 2022</u>

(c) In the case of (i), it again represented his genuine belief.

(d) As to (ii), given that by that time the course being adopted was a subpoena to the AFP, it was not necessary to raise those matters, particularly given the past confusion and that the AFP would be clarifying the position themselves in response to the subpoena.

176. Although Drumgold relies in detail on the application of fundamental principles of disclosure, Bar Council has not examined whether at any point the contested documents were disclosable because the concern as articulated in Ground Three does not relate to the underlying position, but instead to Drumgold's statements to the Court.

177. Therefore, Bar Council is not satisfied to the requisite standard that Drumgold knowingly made a misleading statement.

178. The vice in Drumgold's conduct was to not ensure that he understood, once the First April Disclosure Certificate was identified in the application in September 2022, what document or documents were captured by the "Investigative Review Document" label, or otherwise identified by the AFP as documents obtainable under a subpoena (if not otherwise subject to disclosure). Whilst inquiries of the AFP were made, the responses were themselves not always clear, and the issue of the conflicting versions of the disclosure certificates was never clarified.

179. Understandably, in the period from May to September 2022 there were many pressures operating on Drumgold in relation to the Lehrmann trial. Although not referred to by Drumgold in his submissions the combination of preparing and conducting such a trial, as well as his wider obligations as the DPP, may have impacted on his capacity to ensure that he clearly understood the questions being asked of him by the AFP. This conduct is conduct that could amount to unsatisfactory professional conduct, because it could be conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. However, that is not the conduct that is identified in Ground Three, and therefore, Bar Council cannot be satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to Ground Three.

Ground Four – Failed to take all necessary steps to correct misleading statements to the Court

Facts

180. The facts set out at paragraphs 119 to 145 above are repeated.

181. Drumgold took no steps to disclose to the Court on or after 16 September 2022 what had been conveyed to him at his meeting with the AFP representatives on 15 September 2022.

Drumgold's Position

182. Drumgold submitted that he had a good faith belief that the statement was not misleading.

Consideration

183. On the same basis as noted above at paragraph 102 in relation to Ground 1, Bar Council is satisfied that the conduct in question is not conduct "engaged in the exercise of an executive or administrative function under an Act" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. It is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

184. In light of the conclusions above in relation to Ground Three, Bar Council is not satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to Ground Four.

Ground Five – Advanced a claim of legal professional privilege without a proper basis

185. The facts set out at paragraphs 119 to 145 above are repeated.

186. Drumgold relies upon the submissions outlined at paragraphs 146 to 169 above.

Consideration

187. Bar Council is satisfied that the conduct in question, being conduct in court as an advocate, is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. Section 390(7) of the LPA is not applicable, and it is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

188. In light of the conclusions above in relation to Ground 3, Bar Council is not satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to Ground Five.

Ground Six – Procured a false or misleading affidavit from a junior member of staff

Facts

189. The facts set out at paragraphs 119 to 139 above are repeated.

190. This ground alleges Drumgold was aware that the affidavit was false and/or misleading in that it:

(a) suggested by necessary implication that the source of the information referred to in the affidavit was the AFP when Drumgold knew that was not to be the case; and

(b) asserted that the "Investigative Review Document" was the subject of a claim of legal professional privilege by the AFP in circumstances where the DPP did not hold instructions from the AFP to advance such a claim.

Drumgold's Position

191. Drumgold relies upon paragraphs 146 to 169 above in response to this allegation and further submits as follows.

192. It was his understanding that the entire prosecution team's source of what was being claimed as protected under the statutory immunity of legal professional privilege was the disclosure certificate of 28 April 2022, being the first certificate. This was combined with the fact that ACT Police did not disclose the material when serving the brief (particularly in light of the fact that they served a number of protected items, including counselling notes, audio of evidence in chief

interviews, medical records). The very function of the disclosure certificate was for the AFP to instruct the DPP of such claims in writing.

193. When the application for disclosure dated 7 September 2022 was received, Drumgold coordinated the various functions amongst the team. A team meeting was held in the following days and discussed the distribution of various roles.

194. Mr Greig was to draft the affidavit for part in response to the application for the Investigative Review Document. Drumgold agreed to provide Mr Greig with some guidance in respect of the affidavit and sent him a cut and copy from a previous affidavit on similar issues.

195. Drumgold relies upon Mr Greig's statement dated 11 April 2023 provided to the Inquiry which stated that his interpretation of the exchange was that *"on the same date, the DPP provided some suggested wording for the affidavit he wished me to prepare".*

196. Drumgold further submits that there is no evidence to support a proposition that he requested or even implied that Mr Greig should swear a false affidavit.

Consideration

197. Bar Council is satisfied that the conduct in question, being conduct inextricably bound up with Drumgold's appearances in the proceedings as an advocate in court, is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. Section 390(7) of the LPA is not applicable, and it is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

198. Bar Council is not satisfied that the affidavit sworn by Mr Greig was intended (either by Drumgold or Mr Greig) to be false or misleading. The statements by Mr Greig in the affidavit are consistent with Drumgold's understanding (although mistaken) that the Investigative Review Document was in fact the document prepared for and provided to the DPP for the purpose of legal advice, as set out above in relation to Ground 3.

199. Bar Council is not satisfied that there is a reasonable likelihood that the ACAT would find Drumgold guilty of either unsatisfactory professional conduct or professional misconduct in relation to Ground Six.

Ground Seven - Made positive assertions of fact without a proper basis for doing so

Facts

200. On 17 October 2022, during the *R v Lehrmann* trial, Drumgold asked Senator Linda Reynolds, a witness in the proceedings, the following questions (having previously been granted leave to cross-examine Ms Reynolds as an unfavourable witness:

> *You arranged for your husband to sit in the back of the court, didn't you?--- No, he's not my husband, but my partner has been here in the court, yes. (Transcript of proceedings on 17 October 2023 p 726 line 39)*
>
> *And he's been talking to you about the evidence that Ms Higgins gave, hasn't he?---No, he has not. My lawyer was very – my lawyer was very clear and I have been in Rwanda for the last week. I came back early to testify today. (Transcript of proceedings on 17 October 2023 p 726 lines 32-33)*
>
> *So I am suggesting that on this basis you are clearly - - -?---Yes. - - - politically invested in the outcome of this trial, aren't you?---No. What's*. *(Transcript of proceedings on 17 October 2023 p 726 lines 2-4)*

201. On 18 October 2022 Drumgold made the following statement as part of his closing address to the jury:

> *"Suffice to say that there were clearly strong political forces at play in the period immediately after the events through the election and beyond. These forces, I submit to you, were at play through the almost two years that she worked with Senator Cash and it is abundantly clear from the evidence and actions of Senator Reynolds during this trial that those political forces were still a factor." (Transcript of proceedings on 18 October 2023*, p 726 *lines 5-10).*

Drumgold's Position

202. Drumgold notes that neither the Chief Justice nor the defence objected to the above aspect of his closing address; in circumstances where both the prosecution and defence sought correction to each other's closing addresses.

203. Drumgold submits, correctly, that whether he had a proper basis to put particular matters to a witness or make a submission in closing is to be assessed on the basis of the entire evidence.

204. Ms Higgins gave evidence that she had a conversation with Senator Reynolds about the alleged sexual assault in her Parliament House office on 1 April 2019, stating that she told Senator Reynolds that she recalled Mr Lehrmann being on top of her. In her statement and subsequent evidence in chief, Senator Reynolds denied this, stating that this conversation was limited to a conversation about a security breach, repeatedly stating that she was not aware of any sexual element to the alleged events prior to her meeting with the complainant on 1 April 2019.

205. Senator Reynolds was the last witness to be called. Drumgold notes that Senator Michaelia Cash had previously given evidence and had also been the subject of leave to the prosecution to cross-examine her as an unfavourable witness.

206. Drumgold sets out in his submissions the basis for putting the questions to Ms Reynolds, including the presence in Court throughout most of the trial of Ms Reynolds' partner and the text messages between Ms Reynolds and defence counsel (Mr Whybrow) on the day that Ms Higgins' cross-examination began.

207. Drumgold provided Bar Council with the transcript of the text messages (copies of which are also attached to the statement of Mr Whybrow). They are set out below:

(a) Senator Reynolds at 4:27pm to Mr Whybrow:

"Hi, do you have the daily transcripts and if so are you able to provide my lawyer?"

(b) Senator Reynolds at 4:28pm to Mr Whybrow:

"Also if you have text messages between Brittany and Nicky they maybe [sic] revealing."

(c) Mr Whybrow to Senator Reynolds:

"Hi Linda I won't give you the transcript for your own protection so you can honestly say all you know is what you 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."

(d) Senator Reynolds to Mr Whybrow:

"Great points thanks. Will do"

208. In light of the above text messages, Drumgold interpreted the final acknowledgement as Senator Reynolds expressing an intention to receive an account of evidence given in court from her partner who was seated in the courtroom, albeit with the qualification that the account not be detailed. The final qualification that the account of the evidence Senator Reynolds was to receive from her partner not be detailed was, in his assessment, somewhat irrelevant, as evidence contamination will more likely than not result from any shared accounts, regardless of the level of detail provided.

209. Drumgold further submits that the above text messages were sent by Senator Reynolds just over two hours into the cross-examination of Ms Higgins. Drumgold was concerned that Senator Reynolds knew that there were text messages between Brittany and Nicky (an administration officer at Senator Reynolds' Perth Office and a witness in the trial) and considered that those text messages may have been revealing.

210. Drumgold sets out his belief that it was odd that Senator Reynolds' partner found himself in the courtroom in the first place and it appeared clear to Drumgold on the face of the SMS exchanges that there were conversations between Senator Reynolds and her partner, albeit with a suggestion that they should not be detailed. Drumgold formed the view that the exchanges expressed that Senator Reynolds limit her knowledge of the evidence being led in the courtroom to the media and her partner.

211. Drumgold further submits that issues of potential contamination go directly to credibility, and issues impacting credibility are not favourable to the prosecution case. On that basis, Drumgold

sought leave to cross-examine Senator Reynolds, which was not opposed by the defence, and was granted.

212. As to Senator Reynolds request for transcripts, Drumgold states that, under cross-examination:

(a) he asked Senator Reynolds if she asked for the transcripts to be sent to her lawyer, and she admitted she did, but said that it was explained to her that it wasn't appropriate to make that request; and

(b) she admitted that she was aware at the time of sending the SMS requests to the defence barrister, that Ms Higgins' cross-examination had just commenced.

213. As to Senator Reynold's partner being in court, Drumgold submits that:

(a) he put to Senator Reynold's that she had arranged for her husband to sit in the back of the Court;

(b) that proposition was based on the SMS exchange inferred that in the lead up to giving her evidence, she limit her knowledge of evidence led in the courtroom to that obtained from the media and husband, who had (in Drumgold's view) no other reason to be in the courtroom;

(c) Senator Reynolds agreed that *"he has been here in Court, yes",* but that he was her partner and not husband;

(d) Drumgold submits that, by saying yes, Senator Reynolds was responding to his proposition that she had arranged for her husband to be in court, and she was confirming her knowledge of his presence, and implied that she had at least assisted in coordinating her partner's attendance in the Court;

(e) Senator Reynolds denied in cross-examination that her partner had been speaking to her about her evidence, because her lawyers were *"very clear",* and she had been overseas;

(f) Drumgold put to Senator Reynolds that she was overseas, and her partner lived in Perth, and he found himself sitting in the back of the court listening to Ms Higgins evidence, and Senator Reynolds responded by saying "*Yes, although we do have a house here in Canberra and he has been here in Canberra for most of the last month*" which Drumgold understood to mean that his attendance was deliberate, but he did not need to fly from Perth to be there.

214. Drumgold further submits in respect of him questioning Senator Reynolds about her partner being in the Court that it was abundantly clear to those in the courtroom that:

(a) the questions were clear and were a fundamental part of the application for leave to cross-examine the witness;

(b) the application was presided over by an eminently qualified Judge, with a strong and experienced defence team;

(c) the application was not opposed by defence, and the questions were not objected to, and the Chief Justice did not raise issues; and

(d) this demonstrates the clear understanding that the references in the SMS messages formed a sound basis for the question.

215. As to the SMS at 4:28pm that the text messages between Brittany and Nicky may be revealing, Drumgold submits:

(a) that he asked Senator Reynolds whether she had seen such texts messages, and she said she had not;

(b) he then asked her, what her source of information was that they may be revealing, and she said she had previously met with defence counsel who had asked for information relevant to the case, and she knew Brittany and Nicky were friends, and thought they might be able to shed some light on the matters;

(c) he then asked why she was alerting defence counsel to this two hours into the cross-examination, and she said she understood it was appropriate because she had spoken to both defence and prosecution, and it seemed appropriate to do so; and

(d) he asked her why she didn't have something better to do whilst overseas, and she said she had thought deeply about the case for 18 months and was interested in the case.

216. Drumgold believed that everyone in the courtroom would have accepted that it could directly impact her credibility in a way that could affect the credibility of her evidence, most particularly those portions that contradicted Ms Higgins' evidence about her knowledge of the alleged sexual assault prior to the 1 April meeting, and it was accordingly placed before the jury.

217. As to Drumgold putting to Senator Reynolds the proposition in respect of her being 'politically invested' in the outcome of the trial, Drumgold submits:

(a) the questions regarding Senator Reynolds being 'politically invested' need to be considered in line with the whole trial, rather than singling out one point in cross-examination and one statement in closing;

(b) the trial was presided over by an eminently experienced trial Judge, the Chief Justice of the ACT, with the benefit of a strong and experienced defence team; and

(c) when evidence was being given and during the closing, the defence made regular objections and sought regular requests for clarification and redirection on Drumgold's closing address. However, in relation to this question and statement in closing, there was neither intervention by the Chief Justice, nor was there any complaint by the defence.

218. Drumgold's position is that it was accepted by everyone directly involved in the trial that there were strong political forces at play, and it was a very clear part of the prosecution case that Senator Reynolds political interests were impacted by progressing a complaint:

(a) this was based on evidence of the complainant;

(b) this was appropriately put to Senator Reynolds without objection or complaint and mentioned in closing without complaint or comment; and

(c) this much is apparent from the fact that for the first time in history, a criminal complaint within Parliament House was mentioned on the floor of Parliament by a sitting Prime Minister, and the matter has been mentioned more than 300 times in Senate Estimates, with questions being asked of everyone from Federal Ministers and Department Heads, through to a Federal Police Commissioner.

Consideration

219. Ground Seven alleges that Drumgold did not have a proper basis for putting to Ms Reynolds that she had arranged for her husband to sit in the back of the Court, that she improperly discussed her evidence with him and that she was politically invested in the outcome of the proceedings, nor for making the submission in closing set out above at paragraph 201.

220. Rule 36 of the Barristers Rules provides, relevantly:

> A barrister must not allege any matter of fact in:
> (a) …;
> (b) …;
> (c) …; or
> (d) the course of a closing address or submission on the evidence;
> unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.

221. Rule 37 of the Barristers Rules provides:

> A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:
>
> (a) available material by which the allegation could be supported provides a proper basis for it; and

(b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

222. On the same basis as noted above at paragraph 102 in relation to Ground 1, Bar Council is satisfied that the conduct in question is not conduct "*engaged in the exercise of an executive or administrative function under an Act*" (for the reasons set out at paragraphs 41 to 43 above), and is conduct in connection with the practice of law. It is therefore open to consider whether the conduct comprises either unsatisfactory professional conduct or professional misconduct.

223. First, in relation to the questions put to Ms Reynolds in relation to the presence of her partner in the court room and any contact between them in relation to Ms Reynolds' evidence, those questions, whilst put as positive propositions, appear to have been inferences that were available to be drawn on the material that Drumgold had in relation to contact by Ms Reynolds with the defence team, including the content of the text messages referred to above (noting of course Ms Reynolds was a Crown witness subject ultimately to an application pursuant to s 38 *Evidence Act* 2011 (ACT)). In any event, Rule 37 was not contravened because the questions put to Ms Reynolds did not amount to criminality, fraud or other serious misconduct as evidenced by the fact that the Chief Justice permitted the questions to be asked.

224. Second, in relation to the proposition put to Ms Reynolds that she was politically invested in the trial, that was an available proposition to put given the submission to the jury Drumgold was to make in relation to Ms Higgins and the various decisions she made in relation to her complaint and her credibility more generally. Neither Rule 36 nor Rule 37 was engaged in this question to Ms Reynolds.

225. Third, the disputed phrase in the jury address is in relation to Ms Reynolds and that her denial of any political investment in the outcome of the trial did not permit Drumgold to say (emphasis added):

> "Suffice to say that there were clearly strong political forces at play in the period immediately after the events through the election and beyond. These forces, I submit to you, were at play through the almost two years that she worked with Senator Cash and it is abundantly clear from **the evidence and actions of Senator Reynolds** during this trial that those political forces were still a factor." (Transcript of proceedings on 18 October 2023, lines 5-10).

226. The Bar Council accepts that the Crown address to the jury, in its totality, including for example other references to "strong political forces", addressed a consistent message to the jury to explain Ms Higgins' behaviour and that neither the Chief Justice nor defence counsel objected to this aspect of the closing address, including the portion reproduced in the preceding paragraph. Rule 36 has not been contravened in relation to this portion of the closing address.

227. Bar Council is satisfied there is no reasonable likelihood that the practitioner will be found guilty by the ACAT of either unsatisfactory professional conduct or professional misconduct in relation to Ground Seven.

Ground Eight – Informed a journalist as to the existence of a letter to the Chief Police Officer containing sensitive allegations

Facts

228. On 1 November 2022, Drumgold wrote a letter to the ACT Chief Police Officer (**CPO**), which among other things:

(a) raised "serious concerns" which Drumgold stated he held with what he perceived as "some quite clear investigator interference in the criminal justice process in the matter of *R v Lehrmann"*;

(b) cited his perception that a briefing he had attended with ACT Police on 31 March 2021 was "an attempt to persuade me to agree with a position police had clearly adopted, specifically that the allegations should not proceed to charge";

(c) cited his perception that in a meeting with Detective Superintendent Moller on 12 April 2021, Moller "was very clearly attempting to secure my agreement to a position he had clearly adopted that the matter should not proceed to charge";

(d) expressed his opinion that a letter from Moller to him sent on 21 June 2021 had contained "blatant misrepresentations of evidence" and "inaccurate select summaries of evidence ... clearly advanced as a list of reasons why I should agree with a position clearly already being taken by Moller and shared by DCPO Chew, that the matter should not proceed to charge";

(e) asserted that during the trial Senator Reynolds had been *"directly soliciting transcripts of other evidence to tailor her evidence direct from the defence Barrister Steven Whybrow"* and had *"engaged in direct coaching of the defence cross-examination of the complainant*";

(f) asserted that police had engaged in "*constant exclusive direct engagement ... with the defence rather than the prosecution in the lead up and during the trial";* and

(g) asserted that there had been "over one and a half years of consistent and inappropriate interference by investigators, firstly directed towards my independence with a very clear campaign to pressure me to agree with the investigators desire not to charge, then during the conduct of this trial itself, and finally attempting to influence any decision on a retrial".

229. On 3 December 2022, The Australian newspaper published an article by Ms Albrechtsen and Mr Rice variously titled, including "*Cops doubted Higgins but case was political*" and "*Police doubted Brittany Higgins but case was political*", which among other things referred to internal AFP documentation expressing doubts as to whether or not Mr Lehrmann should be charged.

230. On 3 December 2022, Drumgold spoke with journalist Mr Christopher Knaus from The Guardian concerning the article referred to above. During that conversation, Drumgold revealed to Mr Knaus that he had written to the ACT Chief Police Officer concerning matters related to the trial of *R v Lehrmann.*

Drumgold's Position

231. Drumgold said that on 3 December 2022, Ms Albrechtsen and Mr Rice published the article "*Cops doubted Higgins but case was political*" and "*Police doubted Brittany Higgins but case was political*". The article suggested that he had engaged in misconduct by pressuring police to charge Lehrmann in an otherwise unmeritorious case, because he was under political pressure to do so.

232. Drumgold learnt about the article when contacted by a reporter from The Guardian asking for comment and specifically asking him where the material may have come from. Drumgold said he was concerned that the article contained protected material including to matters in his letter to the CPO.

233. Drumgold admits to inadvertently let slip, under highly emotional circumstances, to the reporter that some of the information in the article could have come from a letter he had written to the ACT Chief Police Officer "*and for this reason I said I would not make any formal comment*".

Consideration

234. Ground Eight alleges that Drumgold revealed the existence of the letter from him to the Chief Police Officer containing sensitive allegations related to the trial of *R v Lehrmann*, in circumstances where Drumgold perceived that it may be in his interest for the letter to enter the public domain.

235. Section 6(1)(o) of the DPP Act specifies as a function of the Director, "*making statements or providing information to particular persons, to the public or to particular sections of the public (whether about decisions taken and the reasons for those decisions, or otherwise) relating to the exercise of powers or the performance of functions or duties under this Act*". Bar Council is therefore satisfied that the conduct in question is "*conduct engaged in the exercise of an executive or administrative function under an Act*" and is, by operation of s 390(7) of the LPA, "*not conduct happening in connection with the practice of law*". The conduct is therefore not capable of amounting to unsatisfactory professional conduct and may only be considered to be professional misconduct if it is conduct that is "*happening otherwise than in connection with the*

practice of law and would, if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice".

236. Bar Council is not satisfied that Drumgold told Mr Knauss about the existence of the letter because he perceived that it may be in is interest for the letter to enter the public domain. It was clear from the article published in the Australian that the authors of the article potentially already had access to sensitive information. Whilst only a relatively small portion of that information appears to have been possibly soured from the letter, it is not untenable that Drumgold would have drawn that conclusion. In any event, even were that not a possible explanation for his response, there is not sufficient material on which to impute the alleged motivations to his actions.

237. As its highest the evidence only permits a conclusion that Drumgold responded ill advisedly, and possibly without thinking through the consequences. In those circumstances, Bar Council is not satisfied in the circumstances of the events that Drumgold's conduct in telling the journalist of the existence of the letter, on its own, would amount to unsatisfactory professional conduct, even were it conduct, contrary to the operation of s 390(7) of the LPA, that was capable of comprising such.

238. Bar Council is therefore satisfied there is no reasonable likelihood that the practitioner will be found guilty by the ACAT of either unsatisfactory professional conduct or professional misconduct in relation to Ground Eight on its own. Bar Council has separately considered whether there is a reasonable likelihood that the practitioner will be found guilty by the ACAT of unsatisfactory professional conduct (but not professional misconduct) when Ground Eight is considered in combination with Ground Nine.

Ground Nine – Released unredacted letter to the Chief Police Officer without proper consultation

Facts

239. The facts set out at paragraphs 228 to 230 above are repeated.

240. On 5 December 2022 Mr Knaus made a Freedom of Information (**FOI**) application to the Office of the DPP in which he sought disclosure of "a copy of any documented complaint made by the DPP about the conduct of police during the matter of *R v Lehrmann*, which was sent to ACTP in the months of October or November 2022",

241. On 7 December 2022, Drumgold identified to the Executive Officer of the ODPP, Ms Cantwell, a letter from him to the ACT Police Chief dated 1 November 2022 as falling within the request.

242. The letter dated 1 November 2022 contained the names of Mr Whybrow, Detective Superintendent Moller, Detective Inspector Boorman, Commander Chew, Senior Constable Frizzell, Detective Leading Senior Constable Madders and Senator Reynolds.

243. The letter dated 1 November 2022 also contained material over which the AFP might potentially have claimed legal professional privilege.

244. On 7 December 2022 Drumgold discussed the FOI application with a member of staff, Ms Cantwell. During that conversation:

(a) Ms Cantwell asked Drumgold whether he wanted her to send the letter to Mr Knaus; and

(b) in response, Drumgold said that he wanted her to send the letter to Mr Knaus.

245. Subsequently on 7 December 2022, Ms Cantwell sent Drumgold an email referring to the letter to the ACT Police Chief dated 1 November 2022, which stated:

"Can I confirm that this is the letter you are happy for me to release under FOI to the guardian."

246. A short time later on the same day, Drumgold responded in the following terms:

"I am happy for it to go out"

247. Later on 7 December 2022, Ms Cantwell sent the letter from Drumgold to the ACT Chief Police Officer dated 1 November 2022 to Mr Knaus.

248. Drumgold at no stage consulted with the ACT Chief Police Officer or with any of the named individuals prior to authorising the release of the letter dated 1 November 2022 and in doing so:

(a) failed to comply with the obligation of disclosure under the *Freedom of Information Act 2016* (ACT), ss 38(3)(a)(ii), and (b); and

(b) failed to seek instructions about whether the AFP claimed legal professional privilege in respect of any of the communications in the letter.

Drumgold's Position

249. Drumgold says he has little independent recall of the circumstances of the release of the FOI and states that he has rarely dealt directly with FOI due to him creating a position of a policy officer at the DPP that was tasked to manage the legalities of a range of things, including FOI requests.

250. Dr Melanie Blair was the policy officer for the DPP for a number of years. When she left the position, it was decided by the DPP to expand the role of the executive officer, who took over the role of communications officer, and management of the FOI, public interest disclosure and the annual report.

251. Drumgold does not recall all of the exchanges in relation to FOI, but states that he recalls a number of exchanges relating to the FOI were from locations outside of the office, some of which were under highly stressful personal circumstances.

252. Drumgold states that at the time, the ODPP had two FOI requests and were attempting to deal with stressful freedom of information requests expediently, to avoid further negative media accusing Drumgold of refusing to release or delaying release of information that should be released. Drumgold was trying to keep up to date with requests in case he or Ms Cantwell were called away suddenly for family matters.

253. Drumgold submits that he had become over-reliant on having all of his oversights and errors picked up and had become lax in his attention to detail on more remote issues.

254. Drumgold accepts that he should not have had an expectation that any oversights or errors would be picked up by Ms Cantwell to the same extent as they were by Dr Blair. He also accepts that Ms Cantwell would have had a legitimate expectation that he would have picked up on legalities as consultations and redaction, noting she was not legally trained.

255. Drumgold also submits that he was not aware of FOI requirements.

256. The letter was released, subsequently recalled, and the names redacted, and were not ultimately published in the article. The only place the names were published was in the article in *The Australian* by Ms Albrechtsen and Mr Rice referred to above.

257. Drumgold admits that he should have consulted the legislation, identified that he had time to deal with the matter, and paused and dealt with the issue with the attention that it deserved, and it was just an error on his behalf and was not deliberate.

Consideration

258. Ground Nine alleges that Drumgold authorised the release of an unredacted copy of his letter to the ACT Chief Police Officer without first consulting with the Chief Police Officer and individuals named in the letter in order to determine whether they objected to disclosure and in circumstances where Drumgold perceived that it may be in his interest for the letter to enter the public domain.

259. The conduct in question relates to the functions of the Director in relation to the *Freedom of Information Act 2016*. The Director is defined as an agency under s 15 of that Act, as well as the principal officer of the agency (see Dictionary). Section 6(1)(p) of the DPP Act specifies as a function of the Director "*functions given to the Director under another provision of this Act or any other Territory law*". Bar Council is therefore satisfied that the conduct is not capable of amounting to unsatisfactory professional conduct, and may only be considered to be professional misconduct if it is conduct that is "*happening otherwise than in connection with the*

practice of law and would, if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice".

260. Bar Council is satisfied that Drumgold authorised the release of an unredacted copy of his letter to the ACT Chief Police Officer without first consulting with the Chief Police Officer and individuals named in the letter in order to determine whether they objected to disclosure.

261. Bar Council is not satisfied that Drumgold did so because he perceived that it may be in his interest for the letter to enter the public domain. Drumgold's conduct is equally consistent with him acting without proper thought and carelessly.

262. Ultimately, the letter was not published in an unredacted form.

263. Bar Council is not satisfied that Drumgold's conduct in relation to Ground Nine on its own would amount to unsatisfactory professional conduct. In those circumstances Bar Council is satisfied there is no reasonable likelihood that the practitioner will be found guilty by the ACAT of either unsatisfactory professional conduct or professional misconduct in relation to Ground Nine. Bar Council has separately considered whether there is a reasonable likelihood that the practitioner will be found guilty by the ACAT of unsatisfactory professional conduct (but not professional misconduct) when Ground Nine is considered in combination with Ground Eight.

Ground Ten - Informed the Chief Police Officer of the ACT, that he was unaware of the FOI request and that the request had been dealt with by an employee of the DPP

Facts

264. The facts set out at paragraphs 239 to 248 above are repeated.

265. On 8 December 2022, the ACT Police Chief Officer called Drumgold in response to a media inquiry regarding the letter dated 1 November 2022 from Drumgold to the ACT Chief Police Officer (referred to in grounds 8 and 9 above). A diary note of the conversation between the ACT Chief Police Officer and Drumgold was taken by the ACT Chief Police Officer and provided to the Inquiry. The note reads as follows:

> *8/12/22 1245pm: Called Shane Drumgold Director DPP re media inquiry from [indecipherable] in relation to FOI released by DPP, Release was in full letter from Drumgold to myself making a series of unsubstantiated claims against ACTP. Drumgold stated he did not know about the FOI or the fact that it had been released as it was dealt with by FOI officer. He stated that he too has received a call from Guardian + made no response. Could not explain why DPP had not advised ACTP of the FOI release. I advised him I would need to response to some of it + we ([indecipherable]) were in discussion with ACLEI re claims.*

Drumgold's Position

266. Drumgold does not recall the conversation with the ACT Chief Police Officer and does not have knowledge of the specific details. However, he does recall being informed by the ACT Chief Police Officer that the FOI had gone out unredacted and without consultation because it was the first time that he became aware that such requirements may exist.

267. Drumgold submits that he may have expressed either that he did not know that it had to be redacted or that it required consultation. He further submits that he most likely expressed that if the Chief Police Officer wished, he would have the letter recalled and redacted. Although, he only believes this because he knows the letter was subsequently recalled and redacted rather than a specific memory.

268. Drumgold further submits that he categorically did not, and had no reason to, deliberately mislead the Chief Police Officer or misrepresent his knowledge in a private phone call, on a matter that appeared clear on its face.

Consideration

269. Ground 10 alleges that Drumgold knowingly falsely informed the Chief Police Officer of the ACT, Neil Gaughan, that he was unaware of the FOI request relating to his letter dated 1 November 2022 and that the request had been dealt with by an employee of the DPP.

270. Section 6(1)(o) of the DPP Act specifies as a function of the Director, "*making statements or providing information to particular persons, to the public or to particular sections of the public (whether about decisions taken and the reasons for those decisions, or otherwise) relating to the exercise of powers or the performance of functions or duties under this Act*". Bar Council is therefore satisfied that the conduct in question is "*conduct engaged in the exercise of an executive or administrative function under an Act*" and is, by operation of s 390(7) of the LPA, "*not conduct happening in connection with the practice of law*". The conduct is therefore not capable of amounting to unsatisfactory professional conduct, and may only be considered to be professional misconduct if it is conduct that is "*happening otherwise than in connection with the practice of law and would, if established justify a finding that the practitioner is not a fit and proper person to engage in legal practice*".

271. The key part of the of the Chief Police Officer's diary entry is the following, "*Drumgold stated he did not know about the FOI or the fact that it had been released as it was dealt with by FOI officer."* The Chief Police Officer did not give evidence at the Inquiry, and therefore Drumgold's position has not been put to him.

272. Bar Council accepts that the diary note, although contemporaneous, cannot be accepted as a verbatim note of what Drumgold said to the Chief Police Officer. Drumgold's position as to what he might have said cannot be excluded. Further, Bar Council accepts that Drumgold would have no reason to misrepresent his knowledge of the FOI request, or the fact of the document's release.

273. In those circumstances Bar Council is satisfied there is no reasonable likelihood that the practitioner will be found guilty by the ACAT of either unsatisfactory professional conduct or professional misconduct in relation to Ground Ten.

Ground Eleven – Provided false evidence to the Inquiry

Facts

274. Drumgold provided a statement to the Inquiry in response to a subpoena issued pursuant to ss 18(c), 26(1)(b) and 26(3)(b) of the *Inquiries Act 1991*. He also gave oral evidence to the Inquiry over five days, also under the compulsion of a subpoena.

Drumgold's Position

275. Drumgold states that at all times he provided statements to both the FOI Ombudsman and the Inquiry that are true and correct.

276. In a separate submission dated 23 May 2024 Drumgold has relied on s 19 of the *Inquiries Act 1991* in relation to The Complaint generally; that submission is particularly applicable to Ground 11.

Consideration

277. Section 19 of the *Inquiries Act 1991* provides:

> 19 Privileges against self-incrimination and exposure to civil penalty
>
> (1) This section applies if a person is required under section 26 (1) or (3) to—
>
> (a) produce a document or other thing; or
>
> (b) answer a question.
>
> (2) The person cannot rely on the common law privileges against self-incrimination and exposure to the imposition of a civil penalty to refuse to produce the document or other thing or answer the question.
>
> Note The Legislation Act, s 171 deals with client legal privilege.
>
> (3) However, any information, document or other thing obtained, directly or indirectly, because of the producing of the document or other thing, or the answering of the question, is not admissible in evidence against the person in a civil or criminal proceeding, other than a proceeding for—
>
> (a) an offence in relation to the falsity or the misleading nature of the document, other thing or answer; or
>
> (b) an offence against the Criminal Code, chapter 7 (Administration of justice offences).

278. The consideration of the truthfulness of any part of Drumgold's evidence, or indeed any matter by Bar Council, or any disciplinary proceedings in ACAT on the same subject matter, do not constitute "proceedings for an offence". Therefore, the exception in s 19(3) of the *Inquiries Act* does not apply, and none of Drumgold's evidence can be used against him.

279. In those circumstances, given there is no evidence on which Bar Council (or ACAT) could give consideration to the substance of this Ground, Bar Council is satisfied that it is appropriate that this Ground be withdrawn pursuant to s 400 of the LPA.

Grounds Considered Together

280. Bar Council is satisfied, putting the application of s 390(7) to one side, that the matters identified above in relation to Grounds Eight and Nine, and Drumgold's admissions as to his own behaviour, when considered together would give rise to a reasonable likelihood that the ACAT would find Drumgold guilty of unsatisfactory professional conduct, that is, conduct happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

281. Each of the grounds reveals a lapse in judgment, or a lack of care, from Drumgold in situations of high professional and/or personal stress. Although members of the public would appreciate that moments of professional and personal stress may affect a legal practitioner's actions and professional judgment, for Drumgold, in the position he held, Bar Council is of the view that it was of particular importance he avoid situations, where personal or professional stressors could result in conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

282. However, as set out above at paragraphs 235 and 259, Bar Council is of the view that Drumgold's communication with Mr Knaus (Ground Eight) and his decision to authorise the FOI release (Ground Nine) was "*conduct engaged in the exercise of an executive or administrative function*", and therefore is not "*conduct happening in connection with the practice of law*". It therefore cannot be "unsatisfactory conduct" for the purposes of Chapter 4 of the LPA.

283. Therefore, Bar Council is satisfied that even when Grounds Eight and Nine are considered in combination there is no reasonable likelihood that Drumgold will be found guilty by the ACAT of unsatisfactory professional conduct.

Proposed Resolutions

284. RESOLVE, pursuant to section 412(1)(a) of the LPA, to dismiss Grounds 1 –10 on the basis that there is no reasonable likelihood that the practitioner will be found guilty of either unsatisfactory professional conduct or professional misconduct.

285. FURTHER RESOLVE, pursuant to section 400 of the LPA, to withdraw Ground 11.