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Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	14/04/2025 4:23:01 PM AEST
Date Accepted for Filing:	14/04/2025 4:23:04 PM AEST
File Number:	NSD389/2025
File Title:	WALTER SOFRONOFF v ACT INTEGRITY COMMISSION
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

No. S389/2025

BETWEEN

WALTER SOFRONOFF
Applicant

AND

AUSTRALIAN CAPITAL TERRITORY INTERGRITY COMMISSION
Respondent

APPLICANT'S OUTLINE OF SUBMISSIONS

A. INTRODUCTION

1. This is an application for judicial review in relation to a report of the Respondent (**Juno Report** or **JR**[1]) in which it was found that the Applicant had engaged in "corrupt conduct" within the meaning of s 9 of the *Integrity Commission Act 2018* (ACT) (the **IC Act**) and "serious corrupt conduct" within the meaning of s 10 of the IC Act.

2. The Applicant had been appointed as the Board to conduct an inquiry into the Criminal Justice System pursuant to the *Inquiries Act 1991* (ACT). The "impugned conduct" found by the Respondent to constitute "serious corrupt conduct" was constituted by the Applicant's engagement with certain journalists in relation to the inquiry. The evidence before the Respondent was that the Applicant engaged with journalists in the way he did because he subjectively considered it was necessary or convenient for the fair and prompt conduct of the inquiry for him to do so. There was no evidence (nor any finding by the Respondent) that the Applicant received (or expected to receive) *any benefit of any kind* from engaging with the journalists. There was no evidence (nor any finding) that the Applicant was seeking to pursue any identified personal interest, nor any identified interest of any third party.

3. The Respondent's findings were affected by material errors in the construction of the definitions of "corrupt conduct" and "serious corrupt conduct" in the IC Act. Upon the proper construction of those definitions, the "impugned conduct" identified in the Juno Report could not constitute "corrupt conduct" or "serious corrupt conduct". The Respondent was not authorised to include in its report any finding to that effect.

4. The Respondent's construction impermissibly stretches the definitions of "corrupt conduct" and "serious corrupt conduct" beyond the limits of the concept of corruption that emerges from the context of the IC Act as a whole: compare *Independent Commission Against Corruption v* ***Cunneen*** (2015) 256 CLR 1 at [2]-[3], [31]-[32], [36]-[37], [38], [46], [53]-[59], [71]. One stark illustration of this is the Respondent's finding that "integrity" in the definition of "serious corrupt conduct" in s 10 of the IC Act means soundness or efficacy, as distinct from probity, of government or public administration (JR [16]). This is an error of the same character as that identified in *Cunneen*.

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[1] Affidavit of Glen Cranny sworn 14 April 2025 and GMC-21. This copy of the report was obtained from the Respondent's website, the Respondent having published it there purportedly pursuant to s 190 of the *Integrity Commission Act 2018* (ACT).

5. The Respondent's findings were also affected by material errors in the construction of ss 17 and 36 of the *Inquiries Act*. The findings that the impugned conduct could have constituted offences against these provisions are incorrect as a matter of law.

6. Further, many of the Respondent's findings were seriously illogical, irrational or unreasonable, or were findings for which there was no evidence. This includes the grave findings of dishonesty, bad faith and actual partiality for which there was no evidence and which lacked any rational foundation.

7. The documents upon which the Respondent has said it relied in making the Juno Report have been filed by the Respondent with the Court: **Bundle** filed 4 April 2024.[2]

B. JURISDICTION AND POWER

8. The Applicant seeks declaratory relief pursuant to s 20(1) of the *Supreme Court Act 1933* (ACT), which confers broad jurisdiction on the ACT Supreme Court.[3] As the Juno Report does not itself have any legal effect or consequences, relief in the nature of certiorari is not available. The Court nevertheless has power to grant declaratory relief in respect of the Report.[4]

9. The Federal Court has jurisdiction to hear and determine the proceedings pursuant to s 9(3) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) and s 4(1) of the *Jurisdiction of Courts (Cross-Vesting) Act 1993* (ACT): *Crosby v Kelly* (2012) 203 FCR 451 at [34]-[35] (Robertson J, Bennett and Perram JJ agreeing).[5]

C. BACKGROUND

10. The Applicant was appointed under s 5 of the *Inquiries Act to* inquire into certain matters arising from a criminal trial in the Supreme Court of the ACT,[6] in which Mr Shane Drumgold had been the prosecutor (JR [8]). The Board held hearings in March, May and June 2023 (JR [8]).

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2 References to the Respondent's Bundle are by reference to the red-numbered pages in the left-hand corner of the Bundle (which will be updated with Court Book references in due course).

3 In *Martin v Purnell* (1999) 93 FCR 181 at [43] the Full Court confirmed that s 20(1) of the *Supreme Court Act 1933* (ACT) operates to give the ACT Supreme Court "the power of supervision of inferior courts and tribunals in the Australian Capital Territory similar to that exercised by the Supreme Courts of the States and other Territories in Australia". See also *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 48A.

4 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582; *Drumgold v Board of Inquiry & Ors (No. 3)* [2024] ACTSC 58; 385 FLR 255 at [20], [599].

5 See also *Dickson Developments Precinct 1 Pty Ltd v Core Building Group Pty Ltd* [2023] FCA 1473 at [2] (Jackman J).

6 Inquiries (Board of Inquiry—Criminal Justice System) Appointment 2023 (NI2023-49) made under s 34 of the *Inquiries Act*, clause 3.

11. On 19 April 2023, the Applicant made a non-publication order under s 21(3)(b) of the *Inquiries Act* as follows:[7]

> 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.

12. The report of the inquiry (the **Inquiry Report**) was provided by the Applicant to the Chief Minister of the ACT on 31 July 2023 at about 1:15pm (JR [8]). On 2 August 2023 (updated on 3 August 2023), an article appeared in *The Australian* newspaper in relation to the contents of the Inquiry Report, authored by Ms Janet Albrechtsen and Mr Stephen Rice.[8] At this time, the Chief Minister had not made the Report public pursuant to s 14A of the *Inquiries Act.* On 3 August 2023, the Chief Minister and the Attorney-General of the ACT wrote to the Applicant and asked whether he had provided copies of the Inquiry Report to anybody other than the Chief Minister, and if so, to whom and on what basis.[9]

13. The Applicant responded on the same day.[10] He stated that he had provided a copy of the report to two journalists on an embargoed basis (Ms Albrechtsen and Ms Elizabeth Byrne), and to the solicitor for Ms Brittany Higgins (Mr Leon Zwier).[11] His letter is powerful, near contemporaneous evidence as to his state of mind. He considered that:

(a) he had acted pursuant to the authority conferred by ss 13 and 18(c) of the *Inquiries Act*;[12]

(b) it was an essential part of the work of the inquiry for the public to be informed about the issues presented;[13]

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7 Bundle at 563.
8 Bundle at 228-246.
9 Bundle at 1221.
10 Bundle at 1222.
11 Bundle at 1222.
12 Bundle at 1222.
13 Bundle at 1223.

(c) this could be achieved by engaging with journalists, it being "within the power of an inquiry head to ensure that what is written is written upon a true factual and conceptual basis";[14] and

(d) giving a copy of the report to Ms Albrechtsen and Ms Byrne on an embargoed basis served to ensure that when the government published the Inquiry Report they 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".[15]

14. These reasons were in substance repeated in a further letter sent on behalf of the Applicant to the Chief Minister and the Attorney-General on 17 August 2023.[16]

15. Subsequently, Mr Drumgold commenced proceedings seeking judicial review of the findings of the Board of Inquiry: see *Drumgold v Board of Inquiry & Ors (No. 3)* [2024] ACTSC 58; 38 FLR 255 (the **Drumgold Decision**). Relief was granted, *inter alia,* on the basis of a finding of a *reasonable apprehension of bias.* There was no finding of actual bias. The finding of a *reasonable apprehension of bias* was based on communications which had occurred between the Applicant and Ms Albrechtsen as set out in the Drumgold Decision.

D. THE "IMPUGNED CONDUCT"

16. The Juno Report identified four "areas of concern", described in [4(a)-(d)] as the "impugned conduct", being:

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

(b) communications by the Applicant of what was said to be confidential matter to Ms Albrechtsen, being witness statements, drafts of the Inquiry Report, Notices of Adverse Findings against Mr Drumgold, and Mr Drumgold's initial response to the Notices (**Confidential Communications Conduct**);

(c) the delivery of the Inquiry Report to Ms Albrechtsen and Ms Byrne following delivery to the Chief Minister and before its public release by him (**Report Conduct**); and

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14 Bundle at 1223.
15 Bundle at 1224.
16 Bundle at 1229-1223.

(d) the failure of the Applicant to afford natural justice to the persons whose interests were affected by the decisions to make the communications (**Procedural Fairness Conduct**).

17. The **Communications Conduct** appears to be that identified by reference to the findings of fact made in the Drumgold Decision and summarised in the Juno Report at [36]-[39].

18. The **Confidential Communications Conduct** appears to be that identified as follows:[17]

(a) On 5 May 2023, Mr Mitchell Greig (an officer of the ACT DPP) and on 3 May 2023 Ms Skye Jerome (an officer of the ACT DPP) each made statements to the Board of Inquiry pursuant to subpoenas dated 2 May 2023. On 6 May 2023, these statements were forwarded to Ms Albrechtsen by the Applicant under cover of the statement "Highly Confidential" (JR [41]-[43]).

(b) On 8 May 2023, a statement made by a partner in the law firm instructed to act for and advise Network Ten Pty Limited and Ms Lisa Wilkinson was provided to Ms Albrechtsen by the Applicant (JR [43]).

(c) On 16 July 2023, copies of notices of proposed adverse findings, and two of Mr Drumgold's response to those notices, were provided by the Applicant to Ms Albrechtsen (JR [44]-[45]).

(d) On 28 and 30 July 2023, drafts of the Inquiry Report containing track changes and comments from the legal team assisting the Inquiry were provided by the Applicant to Ms Albrechtsen (JR [44], [50]-[52]]). These were provided on an embargoed basis (JR [45], [50], [52]).

19. The **Report Conduct** was identified as follows:

(a) Shortly after 2:12pm on 31 July 2023, the Applicant sent Ms Albrechtsen a copy of the final version of the Inquiry Report by text message, again on an embargoed basis (JR [67]).

(b) At around 8pm on 2 August 2023, the Applicant provided a copy of the Inquiry Report to Ms Byrne (JR [9]), again on an embargoed basis (JR [61]).

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[17] At two points in the report an assertion is made that there was a breach of "legal professional privilege" (JR [10], [138]) in respect of the witness statements. No explanation is given as to the basis on which privilege attached, to which documents, or how it was breached. The assertion is wrong, and subject to some explanation from the Respondent, appears to be irrelevant.

20. The **Procedural Fairness Conduct** is identified as the failure to comply with an asserted legal obligation to afford natural justice to Mr Drumgold and the Chief Minister, by giving them appropriate notice of his intention to provide material to Ms Albrechtsen (JR [46]-[49], [71]).

E. THE RESPONDENT'S FINDINGS

21. The Respondent addressed the definitions of "corrupt conduct" and "serious corrupt conduct" in ss 9 and 10 of the IC Act in JR [13]-[17]. The Respondent then made findings as to whether the elements of s 9 were satisfied in JR [105]-[141], and as to whether s 10 was satisfied in JR [142].

22. In terms of s 9(1)(a) of the IC Act, the Respondent found that:

    (a) the Confidential Communications Conduct and the Report Conduct:

        (i) could constitute a criminal offence under s 17 of the *Inquiries Act*;

        (ii) could constitute a criminal offence under s 36 of the *Inquiries Act* (insofar as it concerned two witness statements (JR [120])) on the basis that the Applicant committed a contempt of himself;

        (iii) could constitute a "serious disciplinary offence" within the meaning of s 9(1)(a)(ii) of the IC Act;

        (iv) could constitute reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of the Applicant on the basis it amounts to "misbehaviour", within the meaning of s 9(1)(a)(iii) of the IC Act.

    (b) the Communications Condcut (on the basis it gave rise to a reasonable apprehension of bias (JR [129])):

        (i) could constitute a "serious disciplinary offence" within the meaning of s 9(1)(a)(ii) of the IC Act;

        (ii) could constitute reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of the Applicant on the basis it amounts to "misbehaviour", within the meaning of s 9(1)(a)(iii) of the IC Act.

(c) the Procedural Fairness Conduct:

(i) could constitute a "serious disciplinary offence" within the meaning of s 9(1)(a)(ii) of the IC Act;

(ii) could constitute reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of the Applicant on the basis it amounts to "misbehaviour", within the meaning of s 9(1)(a)(iii) of the IC Act.

23. In terms of s 9(1)(b) of the IC Act, the Respondent found that the impugned conduct constituted:

(a) 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 honest or impartial (s 9(1)(b)(i)); **and**

(b) conduct by a public official or former public official that constitutes a breach of public trust (s 9(1)(b)(ii)(A)); **and**

(c) conduct by a former public official that constitutes the misuse of information or material acquired by the official in the course of performing their official functions, whether or not the misuse is for the benefit of the official or another person (s 9(1)(b)(ii)(B)).

24. Finally, the Respondent found that the impugned conduct constituted "serious corrupt conduct" within the meaning of s 10 of the IC Act (JR [142]).

F. LEGAL UNREASONABLENESS

25. An allegation of legal unreasonableness is made in each of grounds 2 to 12 (in addition to allegations of legal error). It is therefore convenient to summarise the relevant principles at the outset, before turning to the individual grounds.[18]

26. **First**, legal reasonableness or an absence of legal unreasonableness is an essential element of lawfulness in decision-making.[19] However, in determining whether an administrative decision is vitiated by legal unreasonableness, it is essential to bear in mind that the Court's

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[18] See generally, in the context of integrity bodies, *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; 303 ALR 242 at [224]-[241] (Basten JA).

[19] *Minister for Immigration and Citizenship v **Li*** (2013) 249 CLR 332 at [26], [29] (French CJ), [63] (Hayne, Kiefel and Bell JJ) and [88] (Gageler J); *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158 at [58] (Allsop CJ, Griffiths and Wigney JJ).

jurisdiction is strictly supervisory, and does not involve the Court reviewing the merits or substituting its own view for that of the decision-maker.[20]

27. **Secondly**, as Gordon J explained in *Plaintiff S183/2021 v Minister for Home Affairs*:[21]

> … unreasonableness is concerned with both outcome and process. Whether what is being reviewed is an exercise of a power or the formation of a state of satisfaction, a finding of unreasonableness is not limited to cases where the outcome is one which no reasonable decision-maker could have reached.

28. Thus, as Crennan and Bell JJ explained in *Minister for Immigration and Citizenship v SZMDS,* "the correct approach is to ask whether it was open to the [decision-maker] to engage in the process of reasoning in which it did engage and to make the findings it did make on the material before it".[22]

29. **Thirdly**, the threshold that the end result, or fact finding leading to the end result, is illogical or irrational is high. It is not a finding lightly made.[23]

30. **Fourthly**, an evaluation of whether a decision in the exercise of a statutory power is legally unreasonable must be made having regard to the terms, scope and policy of the statutory source of the power.[24] "The task of determining whether a decision is legally reasonable or unreasonable involves the evaluation of the nature and quality of the decision by reference to the subject matter, scope and purpose of the relevant statutory power, together with the attendant principles and values of the common law concerning reasonableness in decision-making".[25] The evaluation is also likely to be fact dependant and to require careful attention to the evidence. As such, only limited assistance can be gleaned from other cases.[26]

G. THE IMPUGNDED CONDUCT COULD NOT CONSTITUTE A CRIMINAL OFFENCE UNDER SECTION 17 OF THE INQUIRIES ACT (GROUND 1)

31. Section 17 of the *Inquiries Act* provides:

> **Nondisclosure of information by members etc**

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20 *Li* (2013) 249 CLR 332 at [66] (Hayne, Kiefel and Bell JJ).
21 (2022) 96 ALJR 464 at [43].
22 (2010) 240 CLR 611 at [133].
23 *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 21 at [33] (Allsop CJ, Besanko and O'Callaghan JJ).
24 *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [9] (Allsop CJ, with whose reasons Wigney J agreed at [90]).
25 *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158 at [63] (Allsop CJ, Griffiths and Wigney JJ).
26 *BKTS v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 729 at [46] (Perry J).

> 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.

Section 17 of the *Inquiries Act* does not apply to documents created by the Board (Ground 1(a))

32. The first error in respect of s 17 was to construe it as being capable of applying to the following documents that were *created by the Board*: notices of adverse comment, draft versions of the Inquiry Report, and the final Inquiry Report.

33. Contrary to JR [107]-[108], these documents were not "*information acquired by*" the Board within the meaning of s 17(a); nor were they documents "*provided for this Act*" within the meaning of s 17(c).

34. **Subsection 17(a)**. The Respondent's construction of s 17(a) was expressed in JR [107]:

> … 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 it having been made or created by him.

35. This is not correct. The natural and ordinary meaning of "*information acquired by*" in s 17(a) connotes knowledge of relevant facts or circumstances communicated to or received by the person, as distinct from the person's subjective appraisals, thought processes or determinations.[27] The information must be *acquired* from another, not *created* by the person him or herself.

36. This accords with the evident purpose of the provision, which is to protect those who provide information to the Board (sometimes under compulsion) from the information being disclosed or used other than for the purposes of the inquiry. It serves to encourage

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27 *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 436 FCR 549 at [24] (Finn and Stone JJ).

cooperation with the inquiry, as well as giving effect to a substantive legal obligation akin to that implied in relation to compulsory disclosure under rules of court and court orders.[28]

37. There is nothing anomalous about this construction (cf JR [107]), certainly not so as to warrant a departure from the natural and ordinary meaning of the text. That is especially so given that this is an offence provision, the language of which should not be unduly stretched or extended, and which should be construed in favour of the subject to the extent of any real ambiguity.[29]

38. **Subsection 17(c)**. The Respondent's construction of s 17(c) was expressed in JR [108]:

> The sense of the provision is better understood as comprehending all 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".

39. Again, this is not correct. The reference in s 17(c) to "*a document provided for this Act*" means what it says: it refers to a document "provided", in the sense of furnished or supplied to the Board, for the *Inquiries Act*. The verb "provide" means "furnish or supply".[30]

40. The use of the past tense confirms that the prohibition applies only from the time the document was "provided". Thus, the logical and temporal sequence is that the document is "provided" to the Board, and then the persons specified in the *chapeau* ("a person who is or has been a member, a member of the staff of a board or a lawyer assisting a board") cannot "produce [the document] to any person" or "permit any person to have access to [the document]" (except in the exercise of a function under the *Inquiries Act*).

41. This sits comfortably with the context and purpose of the provision. As noted above, subsection (a) is concerned with information *acquired* by the Board from another. Subsection (c) is concerned with documents *provided* to the Board by another. And the purpose of s 17 is to protect the legitimate interest of persons who provide information or documents (sometimes under compulsion), in that information or those documents being used only for the purposes of the inquiry.

42. The legislative history confirms the correctness of this construction. As enacted, s 17(c) used the following language: "produce to any person, or permit any person to have access to, a document furnished for the purposes of this Act". The words "the purposes of this Act" were removed by Parliamentary Counsel, pursuant to Part 11.3 of the *Legislation Act 2001*

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28 *Hearne v Street* (2008) 235 CLR 125 at [96] (Hayne, Heydon and Crennan JJ).

29 *R v A2* (2019) 269 CLR 507 at [52] (Kiefel CJ and Keane J). See also *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at [45] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

30 *Macquarie Dictionary* (5th ed) at 1334: "1. To furnish or supply".

(ACT), by Republication No. 4 of the *Inquiries Act 1991* (dated 28 February 2002). The word "furnished" was changed to "provided" by Sch 3, Part 3.12, clause [3.69] of the *Statute Law Amendment Act 2006* (ACT), which was entitled "technical amendments". The explanatory note records the purpose of the amendment as being to "update[] language". Section 114(a) of the *Legislation Act* permits Parliamentary Counsel to "to make editorial amendments and other textual amendments of a formal nature that the Parliamentary Counsel considers desirable to bring the law into line, or more closely into line, with current legislative drafting practice". Critically, s 115 provides that an amendment "that would change the effect of the law" is not permitted under Part 11.3. This reinforces the conclusion that "provided" was being used in its natural and ordinary meaning, *viz.* in the sense of "furnished".

43. Finally, again, as an offence provision, s 17(c) should not be unduly stretched or extended, and any real ambiguity should be resolved in favour of the subject.

The Applicant's conduct prior to him ceasing to hold office was conduct in the exercise of a function under the *Inquiries Act* (Ground 1(b))

44. The Respondent found (at JR [26]) that:

> 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 (s5), secondly, to prepare a report (s14(1)(a)) and, finally, submit the Report to the Chief Minister (s14(1)(b)).

45. This is an incomplete account of the functions of a Board which led to the incorrect finding (at JR [110]) that "disclosure of the confidential matter, including the created material, was not within the due exercise of a function under the Inquiries Act".

46. **First**, the Respondent's approach overlooked the extended definition of "function" in the Dictionary in the *Legislation Act 2001* (ACT), which provides that "function" includes "authority, duty and power".

47. The functions of a board therefore includes its authority, duty or power to conduct the Inquiry "in such manner as the Board determines" (s 13), to "inform itself of anything in the way it considers appropriate" (s 18(b)), and "do whatever it considers necessary or convenient to be done for the fair and prompt conduct of the inquiry" (s 18(c)).

48. The Board's state of mind is the only precondition to the power (function) conferred by s 18(c).[31]

49. **Secondly**, the Applicant's subjective opinion was that engagement with journalists was essential to the performance of his functions, and that he engaged in the conduct impugned by the Commissioner for this purpose (and this purpose alone). This genuine subjective opinion is sufficient to engage s 18(c) of the *Inquiries Act*. The evidence as to the Applicant's subjective state of mind is addressed in detail below.

50. **Thirdly**, it was not permissible for the Respondent to bypass the significance of the Applicant's subjective state of mind based on the Respondent's own "emphatic disagreement" with the Applicant's view.[32]

51. **Fourthly**, the breadth of the phrase is reinforced by the language in s 16(1) – "in the exercise of any function as a member", which provides the member with "the same protection and immunity as a judge of the Supreme Court in proceedings in that court". The cognate phrase in s 17 should be given a consistent construction.[33] In each section, the phrase should be given a broad construction which picks up the full scope of operation of s 18(c). Section 18(c) is not drafted in terms of power to do what *is* necessary or convenient, but rather to do what the board *considers* necessary or convenient. Sections 16, 17 and 18 are to be read in context and consistently. Accordingly, "in the exercise of a function under this Act" in s 17 should be read consistently with the broad discretion conferred on the Board by s 18(c).

The asserted denial of natural justice does not mean that the Applicant was not exercising a function under the *Inquiries Act* (Ground 1(c))

52. The Respondent found (at JR [114]) that:

> 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

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31 Provided of course that the state of mind was not legally unreasonable in the sense described in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76]. See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130]-[143].

32 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [34].

33 *The Registrar of Titles of the State of Western Australia v Franzon* (1975) 132 CLR 611 at 618 (Mason J); *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456 at [21] (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ).

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.

53. The basis for the asserted legal duty to afford the Chief Minister natural justice before making a decision to provide the Report to journalists was that it was a decision that "affected the Chief Minister's rights, interests or legitimate expectations pursuant to s 14 of the *Inquiries Act*" (JR [114]).

54. Upon proper analysis, there was no such legal duty. **First,** the reference to "legitimate expectations" is misplaced and should be put to one side.[34] **Secondly**, neither the Chief Minister, nor Mr Drumgold, had a legal right or interest which was capable of attracting an obligation of procedural fairness on the part of the Applicant in relation to the Applicant's contact with journalists.[35] **Thirdly**, a duty to afford procedural fairness to the Chief Minister in respect of decisions made by Boards in the exercise of the discretion in s 18(c) of the *Inquiries Act* is incongruous with the very nature of such Boards, which are appointed to conduct *independent* inquiries in relation to matters stated in the instrument of appointment.

55. But even if there were such a duty, and it were breached, it would not follow that the Applicant was not exercising a function under the *Inquiries Act*. The Respondent is impermissibly mixing concepts. The fact that jurisdictional error may have been committed in the exercise of the function does not mean that the Applicant was not in fact exercising the function. It may mean that the outcome of the exercise is deprived of legal effect. But that is different from saying that there was in fact no exercise of the function in the first place.

H. THE IMPUGNDED CONDUCT COULD NOT CONSTITUTE A CRIMINAL OFFENCE UNDER SECTION 36 OF THE INQUIRIES ACT (GROUND 2)

56. Section 36 of the *Inquiries Act* provides for an offence of "Contempt of board", in the following terms:[36]

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34 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [65]-[77] (McHugh and Gummow JJ).

35 See generally *Kioa v West* (1985) 159 CLR 550 at 617-622.

36 This form of the provision was introduced by Schedule 1 of the *Criminal Code (Administration of Justice Offences) Amendment Act 2005* (ACT). The predecessor provision (former s 35 of the *Inquiries Act*) stated "35. Contempt of boards A person shall not— (a) wilfully insult or disturb a board; (b) wilfully interrupt the proceedings of a board; (c) use insulting language towards a board; (d) make a statement that is false and defamatory of a board; or (e) commit a wilful contempt of a board". The Explanatory Statement describes this as part of a broad suite of "minor consequential amendments", suggesting that the legislature did not intend the amended provision to have any broader operation.

Contempt of board

A person commits an offence if the 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.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

Section 36 does not apply to conduct other than in the face, or within the hearing, of the Board (Ground 2(a))

57. The Respondent found that, despite its text, s 36 was not confined to "contempt in the face or hearing of the board", but rather extended to conduct in breach of a non-publication order of a Board (at [122], [124]).

58. This was a plain failure to attend to the text of the statute.

59. It also fails to have regard to the distinction between civil and criminal contempt. "[C]ivil contempt involves disobedience to a court order or breach of an undertaking in civil proceedings, whereas a criminal contempt is committed either in the face of the court or there is an interference with the administration of justice".[37] Section 36 is an offence provision. It uses the language of criminal contempt. The language should not be unduly stretched or extended so as to criminalise what would otherwise be a mere civil contempt. Rather, the language is apt to pick up what is commonly recognised as contempt in the "face" of a Court,[38] which is concerned with matters such as the disruption of proceedings,[39] a witness's refusal to be sworn or give evidence or answer questions,[40] and disrespectful behaviour towards the Court.[41] There is no ambiguity. But if there were, it ought to be resolved in favour of the subject.

60. It follows that the conduct of the Applicant could not have constituted the offence of contempt contrary to s 36, because a breach of a non-publication order does not amount to a contempt in the face or within the hearing of the Board.

The Applicant could not commit a contempt of himself (Ground 2(b))

61. The second error was in construing s 36 as being capable of applying to the Applicant, such that the Applicant committed a contempt of himself (JR [123], [124]).

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37 *Witham v Holloway* (1995) 183 CLR 525 at 530.
38 See generally Rolph, *Contempt* (Federation Press, 2023), Chapter 7.
39 See, eg, *Morris v Crown Office* [1970] 1 QB 114.
40 See, eg, *Kennedy v Lovell* [2002] WASCA 217 at [36] (Malcolm CJ).
41 See, eg, *Registrar of The Supreme Court of South Australia v Moore-McQuillan* [2007] SASC 447 at [46].

62. The "board" in s 36 means "a board of inquiry appointed under section 5" (see Dictionary, *Inquiries Act*), and s 5 in turn provides for one or more people to be appointed "as a board of inquiry". In that context, the Applicant is "the board".

63. The Respondent appeared to recognise that this construction of s 36 would lead to an "unusual or extreme outcome" (which, according to the orthodox rules of statutory construction, is a strong reason not to prefer such a construction).[42] The reason given for acceding to this extreme construction was that there was "no reason why the person constituting the Board should enjoy such an immunity" (JR [123]). There are two strong reasons why that the Board does enjoy such an "immunity".

64. **First**, as explained above, s 36 applies only to conduct "in the face, or within the hearing, of a board". That is, it is that part of the law of contempt concerned with the proper administration of justice "in the courtroom"[43] (or here, the hearing of the inquiry), directed towards the Court (or board) itself. To construe it as capable of being committed *by* the body in the face of which it is committed, is circular and absurd.

65. **Secondly**, the Commission did not (and could not) point to a single authority in support of the notion that a person *constituting* the judicial or administrative body could be held in contempt of him or herself. That is not possible at law. In *Yeldham v Rajski* (1989) 18 NSWLR 48, a litigant sought to charge a judge with a criminal contempt, alleging the judge knowingly and wilfully abused the process of the court and interfered with the course of justice. Hope AJA (Priestley JA agreeing) explained that a judge enjoyed immunity in respect of their judicial acts, noting that "[i]f the law were that any disgruntled litigant could charge a judge with contempt for being wrong and mala fide in his conclusion, or in arriving at the conclusion without any or any sufficient evidentiary basis, the independence required of judges would be greatly eroded". That reasoning applies equally to the Board, noting that s 16 of the *Inquiries Act* conferred on the Applicant "in the exercise of any function as a member in relation to an inquiry, the same protection and immunity as a judge of the Supreme Court in proceedings in that court". Further s 36 itself states expressly that the conduct must amount to a contempt as if the board were a court of record, and in a court of record the court cannot commit a contempt of itself.

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42 See, eg, *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [45] (French CJ, Kiefel, Bell and Keane JJ), [100] (Nettle J); *Independent Commission against Corruption v Cunneen* (2015) 256 CLR 1 at [46]-[55] (French CJ, Hayne, Kiefel and Nettle JJ).

43 Rolph, *Contempt* (Federation Press, 2023) at 415.

The Applicant could not (and did not) breach his own order in any event (Ground 2(c))

66. The final difficulty with the Respondent's reasoning is in its conclusion that the conduct of the Applicant, as the Board, could constitute a breach of the Board's own non-publication order.

67. **First**, the direction cannot sensibly be construed as directed to the Board itself. Just as a judge would not make an order directed to him or herself, nor would a Board. It is absurd to suppose that a Board would create a situation where it may have to sit in judgment of itself.

68. **Secondly**, there is the broad discretion conferred by s 18(c) and s 23. The non-publication order made by the Board should not be read in a manner which essentially amounted to a fetter on the Board's own (broad) discretion.

69. **Thirdly**, and in any event, the terms of the non-publication order made by the Board (extracted in Part C above) prohibited the "publication" of the evidence, not its "disclosure". There is a well-recognised distinction between publication and disclosure in the context of such orders.[44] Providing the statements to the journalist (under the cover of a note that these were "strictly confidential") did not amount to publication in breach of the order.[45]

I. NO "SERIOUS DISCIPLINARY OFFENCE" (GROUND 3)

The Applicant was not an employee (Ground 3(a))

70. The phrase "serious disciplinary offence" could not have any application to the Applicant as the Board of the Inquiry, because he was not an employee, and was liable to be terminated as the Board only in accordance with s 11 of the *Inquiries Act*.

71. The term "serious disciplinary offence" is defined in s 9(3) to include "serious misconduct", and that term is defined by reference to s 1.07 of the *Fair Work Regulations 2009* (Cth)

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44 *Roget v Flavel* (1987) 47 SASR 402 at 406 (Cox J), adopted by Matheson J in *ABC v Royal Commissioner* (1991) 56 SASR 274 at 282-4 and by Hidden J in *KF v Parramatta Children's Court* [2008] NSWSC 1131 at [14]-[17]. See, for example, the *Court Suppression and Non-Publication Orders Act 2010* (NSW), which defines "publish" as being "disseminate or provide access to the public or a section of the public by any means", and distinguishes between "non-publication orders" which restrict publication (but not disclosure), and "suppression orders" which prohibit or restrict disclosures (s 3). There can be no contention that the two statements were provided to Ms Albrechtsen for publication by her: see Affidavit of the Applicant affirmed 12 December 2023 at [102]-[109]: Bundle at 420-421.

45 It should be noted that the Respondent expresses the finding at JR [124] as if it is directed the "impugned communications", the scope of which is not clear. The Applicant assumes that it was intended to apply only to the Greig and Jerome statements which are the only statements the Respondent finds were required by subpoena (see JR [41]).

which provides that "serious misconduct has its ordinary meaning" (s 1.07(1)), and in s 1.07(2) provides "examples" of serious misconduct.

72. "Serious misconduct" is a well-known term of art in the context of employment law, being "conduct which strikes at the heart of the employment relationship", such that the employee has "repudiated the contract of employment or one of its essential conditions".[46]

73. Section 9(1)(a)(iii) makes separate provision for conduct which could constitute "reasonable grounds for … terminating the services of, a public official". Reading the provisions harmoniously together, it is readily apparent that the language of "serious disciplinary offence" in s 9(1)(a)(ii) is related to conduct by persons who are *employees,* and intended to capture the standard of conduct which would justify summary dismissal.

74. A Board of Inquiry, being a statutory appointee and not an employee, could not commit a "serious disciplinary offence".

The finding was otherwise legally unreasonable (Ground 3(b))

75. The finding that the impugned conduct could constitute a "serious disciplinary offence" was also attended by legal unreasonableness.

76. The submissions on this point are the same as those developed below in respect of ground 4(c), which concerns the legal unreasonableness of the finding as to termination for "misbehaviour".

J. NO TERMINATION FOR "MISBEHAVIOUR" (GROUND 4)

77. Section 9(1)(a)(iii) provides that the conduct must have the character of "constitut[ing] reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of, a public official".

78. Section 11 of the *Inquiries Act* provides that:

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

79. The term "misbehaviour" has no universal meaning, and its construction depends upon the context of the legislative provision in which is used.[47] In the context of s 11 of the *Inquiries*

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46 *Mount v Dover Castle Metals Pty Ltd* [2025] FCA 101 at [562] citing *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 at 287, 289 (Lord Evershed MR, Lord Jenkins and Willmer LJ agreeing). See also *McDonald v Parnell Laboratories (Aust) Pty Ltd* (2007) 168 IR 375 at 390 [48]; *Boral Resources (Queensland) Pty Ltd v Pyke* (1989) 93 ALR 89 at 97; *Gooley v Westpac Banking Corporation* (1995) 129 ALR 628 at 636; *Carter v The Dennis Family Corporation* [2010] VSC 406 at [36]-[38].

47 See *Vanstone v Clark* (2005) 147 FCR 299 at [21] (Black CJ), [163] (Weinberg J).

Act, misbehaviour must mean more than conduct which the Executive finds inconvenient or disagreeable. The independence of the officeholder is of obvious importance to the construction of the standard which must be met to reach "misbehaviour". The standard of misbehaviour must therefore be calibrated to the gravity of the process. In this context, it must be of such a nature as to render the officeholder unsuitable as a repository of the powers entrusted in him.[48] It must be "so far short of accepted standards … as to warrant the ultimate sanction of removal".[49] As the Hon Geoffrey Nettle AC KC has observed in the context of the term "misbehaviour" in s 72(ii) of the *Constitution* (citations omitted):[50]

> Historically, the range of terms used to describe the kind of misbehaviour sufficient to justify the loss of judicial office included 'corruption or corrupt motive', 'dishonest motive', 'perversion of justice', 'abuse of power', 'badness of heart and corrupt intention', 'partial and oppressive behaviour', 'partisan political bias', 'moral delinquency', and 'corruption or moral turpitude'. Such epithets bespeak varying degrees of judicial and moral obliquity and, more problematically, variable degrees of objectivity..

80. The power of the Crown to remove a judge from office for misbehaviour has also been described in the following terms:[51]

> Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and, thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise.

81. In *Vanstone v Clark* (2005) 147 FCR 299, the Court considered similar statutory language – "misbehaviour or physical or mental incapacity". Black CJ considered that the term was to be read in the context of the statutory scheme, and preferred the view that the juxtaposition of "misbehaviour" and "physical or mental incapacity" in the provision suggested that it was concerned with the person's capacity to hold office.[52]

The existence of a reasonable apprehension of bias does not amount to "misbehaviour" (Ground 4(a))

82. The first error lies in the Commission's conclusion that conduct giving rise to a reasonable apprehension of bias is capable of constituting "misbehaviour" (JR [127]-[129]). That

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48 Nettle, "Removal of Judges from Office" (2021) 45(1) MULR 241 at 276.
49 *Wilson v A-G (NZ)* [2011] 1 NZLR 399 at [71].
50 Nettle, "Removal of Judges from Office" (2021) 45(1) MULR 241 at 254-255.
51 Todd, *On Parliamentary Government in England: Its Origin, Development and Practical Operation* (1887-9), Vol 2, at 857-858.
52 (2005) 147 FCR 299 at [23]. See also *Parliamentary Commission of Inquiry Re The Honourable Mr Justice Murphy Ruling on Meaning of "Misbehaviour"* (1986) 2 Aust Bar Rev 203.

conclusion was in error as a matter of law, and was legally unreasonable as a conclusion of fact. As a matter of law, the Commissioner impermissibly conflated the concept of an apprehension of bias with actual partiality in concluding that "apprehended bias undermines the necessary function of impartiality" (JR [126]). As a conclusion of fact, it was irrational, bizarre and lacked an "evident and intelligible justification".[53]

Breach of the rules of natural justice does not amount to "misbehaviour" (Ground 4(b))

83. The second error lies in the Commission's conclusion that conduct which amounted to a breach of the rules of natural justice could constitute "misbehaviour" (JR [129]-[134]). As a matter of law, conduct which amounts to a breach of the rules of natural justice, without more, is incapable of amounting to "misbehaviour" in the requisite sense. The law reports contain many instances of administrative (and indeed judicial) decision-makers who have been found to have breached the rules of natural justice. That circumstance falls far short of warranting removal from office for "misbehaviour". As a conclusion of fact, it was irrational, bizarre and lacked an "evident and intelligible justification".[54]

Conclusions as to "misbehaviour" are seriously illogical, irrational and unreasonable in and of themselves (Ground 4(c))

84. The final error is that the conclusions reached by the Commissioner to find the conduct of the Applicant amounted to "misbehaviour" are seriously illogical, irrational and unreasonable in and of themselves.

85. They rest on labels the Respondent has attached to the Applicant's state of mind, but without making the necessary finding that the Applicant gave deliberately false evidence as to his state of mind, or explaining why such a finding could be justified. This topic is addressed in further detail below. For now, it is enough to note it was irrational to conclude that:

    (a) The Applicant intentionally, wilfully and deliberately failed to comply with requirements of the *Inquiries Act* (JR [129]).

    (b) The Applicant "well understood" that he owed a duty to afford natural justice to the Chief Minister and Mr Drumgold in making a "decision" to give a copy of the Report to journalists on an embargoed basis (JR [130]).

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53 *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [11] (Allsop CJ).

54 *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [11] (Allsop CJ).

(c) The Applicant "concealed" his decision from those he "knew had the right to be afforded the opportunity to object to his decision" (JR [134]).

86. These conclusions are premised on actual knowledge of a *legal duty* on the Applicant, and a *legal right* on the part of the Chief Minister and Mr Drumgold, which did not exist. This alone renders the conclusions legally unreasonable.

87. They also lacked any intelligible justification because the Applicant's evidence to the Commissioner was that he did not subjectively consider he owed such an obligation of natural justice.[55]

88. Unless the Applicant gave deliberately false evidence (a finding which the Respondent did not make), the conclusion that the Applicant had actual subjective knowledge of a breach of an obligation of procedural fairness is not a finding or inference of fact supported by any logical ground: it is irrational.

89. And even if the Applicant was wrong in his view, that would not justify the labels attached to his state of mind. Misconstruction of the limits of a person's statutory authority does not even equate to *negligence*,[56] much less to *mala fides* of the kind ascribed to the Applicant by the Respondent. As Abbott CJ said in a related context in *R v Borron* (1820) 3 B & Ald 432 at 434:

> … the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive or corrupt motive, under which description fear and favour may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment. To punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom.

K. THE FINDINGS THAT THE APPLICANT WAS NOT HONEST OR IMPARTIAL (GROUND 5)

The findings of dishonesty and partiality were made in excess of jurisdiction and without any evidence in support of them (Grounds 5(a) and (b))

90. In respect of grounds 5(a) and (b), the Applicant relies upon the submissions made in respect of grounds 8 to 11 below. As noted there, the finding of dishonesty was made

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55 Bundle at 1272-1275.

56 *Rowling v Takaro Properties Ltd* [1998] 473 at 502: "As is well known, anybody, even a judge, can be capable of misconstruing a statute; and such misconstruction, when it occurs, can be severely criticised without attracting the epithet "negligent"".

without any evidence to support it, and could not rationally have been made without first finding that the Applicant had given deliberately false evidence as to his state of mind (a finding which the Respondent did not make). The finding of partiality is similarly bereft of evidence and rationality.

The findings of dishonesty and partiality were otherwise seriously illogical, irrational and unreasonable (Ground 5(c))

91. In addition to the matters raised in support of grounds 5(a) and (b), the following matters reinforce the conclusion that the findings of dishonesty and partiality were legally unreasonable.

92. As to dishonesty, there is an irrational leap in logic from the state of mind that the Respondent would attribute to "any reasonable person" to the state of mind in fact held by the Applicant. Dishonesty cannot be completely divorced from the actual state of mind of the person whose honesty is in issue. Even if honesty is to be judged by reference to the standards of ordinary, decent people (JR [15]),[57] it remains necessary to identify the knowledge, belief or intent which is said to render the relevant act dishonest and to consider whether the actor had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest.[58] One cannot simply reason from what it is thought a reasonable person would know to any particular conclusion as to the actor's own knowledge, belief or intent. Yet that is what Respondent has done.

93. As to partiality, it is irrational to reason that the Applicant exhibited *actual partiality* in the absence of any finding that he subjectively knew of the different interests (unidentified by the Respondent) at stake.

L. NO BREACH OF PUBLIC TRUST (GROUND 6)

94. The Respondent found (at JR [137]) that, for there to be a breach of public trust:

> … 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.

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57 *Berejiklian v Independent Commission Against Corruption* [2024] NSWCA 177 at [307] (Bell CJ and Meagher JA)

58 *Peters v R* (1998) 192 CLR 493 at [18].

95. This statement makes little logical sense and does not reflect the proper construction of the expression "breach of public trust".

96. If a person knows that, or is reckless as to whether, his or her conduct might be beyond the jurisdictional conditions of power, it does not automatically follow that a person is taking the action "for ulterior reasons personal to the official". One cannot assert the pursuit of "ulterior reasons personal to the official" in such an abstract way without identifying what those reasons are, and without pointing to some evidence that the identified reasons were in fact being pursued.

97. The personal reasons must be cognisable in terms of the public official's *duty of loyalty*. This emphasis on the duty of loyalty derives from the central conception of the public *trust* and accords with the writings of Professor Finn,[59] who referred to the public official's "*fiduciary duty of loyalty*".[60]

98. In the case law, it has been said that the duty is "analogous to that of a fiduciary": *Obeid v R* (2015) 91 NSWLR 226 at [148]; special leave refused [2016] HCASL 86. At first instance in *R v Obeid (No 2)* [2015] NSWC 1380 at [74]-[75], Beech-Jones J held that a parliamentarian's public duties for the purposes of misconduct in public office were informed by the fiduciary analogy. The Court of Criminal Appeal dismissed a ground challenging Beech-Jones J's formulation of Mr Obeid's public duty: *Obeid v R* (2015) 91 NSWLR 226 at [143]-[150]. In *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at [243], Edelman J observed:

> Public powers to act in the performance of duties are said to be conferred "as it were upon trust". These loose references to trusteeship are expressions of the duty of loyalty owed by holders of public offices created "for the benefit of the State".

99. To be cognisable in terms of the duty of loyalty, the public official's interest need not be pecuniary; rather the question is whether the identified interest is capable of influencing the exercising of the official's public function in a way which conflicts with the proper exercise of his or her public duty.[61]

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59 See PD Finn, *Abuse of Official Trust: Conflict of Interest and Related Matters*, Integrity in Government Project, 2nd Report (ANU, 1993) (**Professor Finn's Report**), Working Paper II, at 17.

60 Professor Finn's Report, at 3.

61 *Berejiklian v Independent Commission Against Corruption* [2024] NSWCA 177 at [150]-[151] (Bell CJ and Meagher JA)

100. Further, to constitute a breach of public trust there must be *mala fides*. Disloyalty entails an improper motive beyond wilfulness.[62] In *Shum Kwok Sher v HKSAR* (2002) 5 HKFCAR 381; [2002] HKFCA 27 at [83], Mason NPJ elaborated on the issue of motive in a related context as follows:

> A dishonest or corrupt motive will be necessary as in situations where the officer is exercising a power or discretion with a view to conferring a benefit or advantage on himself, a relative, or friend. A malicious motive will be necessary where the officer exercises a power or discretion with a view to harming another. And a corrupt, dishonest or malicious motive will be required where an officer acts in excess of power … the existence of an improper motive, beyond the existence of a basic wilful intent, is necessary to stamp various categories of conduct by a public officer as culpable misconduct for the purposes of the offence.

101. If what is done in carrying out an office is done honestly and in good faith, there can be no breach of public trust.[63] Thus, it has been said that "[i]f a member of the executive honestly believes that … a certain course of action is the proper way to pursue the narrower purpose of the empowering legislation, then that action is properly taken, and it is not for the court or the law or anyone else to gainsay the decision".[64]

102. In the result, in order to constitute a breach of public trust, there must be:

(a) conduct in pursuit of an identified interest or unauthorised end cognisable in terms of the duty of loyalty; **and**

(b) *mala fides* in the form of wilfulness and an improper motive.

103. None of these features are present here. The Respondent's analysis in JR [138]-[139] does not disclose any rational basis for a finding that these features exist in the present case. That is no doubt because the Respondent was asking itself the wrong question, based on a legally erroneous conception of what can constitute a breach of public trust.

M. NO MISUSE OF INFORMATION OR MATERIAL (GROUND 7)

104. At the conclusion of the last sentence of JR [140], the Respondent states a bare conclusion, without any additional reasoning, that the impugned conduct constituted a "misuse of information" within the meaning of s 9(1)(b)(ii)(B). The Commissioner does not identify:

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62 Professor Finn's Report, Appendix II, at 32-33.
63 Hall, *Investigating Corruption and Misconduct in Public Office* (2nd ed, 2019) at [11.245].
64 Smith, *The Law of Loyalty* (Oxford University Press, 2023) at 384.

what the information or material was; how it was "acquired by" the Applicant in the course of performing official functions; and what amounted to a "misuse" of that information. Findings of fact on each of those matters was necessary to reach the serious conclusion that there was a "misuse of information", and in failing to make such necessary findings of fact, the conclusion is attended by jurisdictional error. Any attempt by the Respondent to suggest that necessary findings were made will be addressed in reply (in aid of ground 7(b)).

N. THE APPLICANT'S STATE OF MIND (GROUNDS 8-11)

105. A recurring issue in the Juno Report is the making of findings — of the utmost seriousness — of actual dishonesty, bad faith, and actual partiality on the part of the Applicant. These matters are the specific subject of grounds 8 to 12, but are also important to the Applicant's no evidence/unreasonableness challenges in grounds 3 to 7.

106. The evidence which was before the Commissioner going to the Applicant's state of mind with respect to the "impugned conduct" was in three categories:

(a) Evidence as to what the Applicant wrote when the issue was initially raised with him by the Chief Minister and the Attorney-General. This is powerful near contemporaneous evidence as to the Applicant's state of mind.[65]

(b) The Applicant's affidavit affirmed for the Drumgold proceedings.

(c) The Applicant's evidence to the Commission given on affirmation pursuant to a private examination.

107. The Applicant's evidence as to his state of mind has been consistent and unwavering.

What the Applicant wrote at the time

108. The key aspects of the Applicant's letter sent on 3 August 2023[66] have been set out in Part C above.

The applicant's affidavit (affirmed 12 December 2023)[67]

109. The Applicant's affidavit was expressly directed to explaining the "circumstances in which [communications with journalists] were made" including his "considered views at the time of conducting the inquiry as to the appropriate engagement between [himself] as the Board of Inquiry and the media".[68]

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65 *Walton v R* (1989) 166 CLR 283 at 288.
66 Bundle at 1222. See also the subsequent letter at 1229.
67 Bundle at 397-559.
68 Bundle at 397 [4].

110. The Applicant's evidence was that the Board of Inquiry concerned public confidence in the criminal justice system, and he considered that appropriate engagement with the media would be essential to the performance of his functions.[69]

111. He deposed:[70]

> … I considered that it was necessary or convenient for the fair conduct of the inquiry for me to engage with journalists for the purposes I have described.
>
> In all of my dealings with journalists I considered that I was discharging my functions as the Chair of the Board of Inquiry. I had no other reason or purpose.

112. He goes on to address the particular communications which Mr Drumgold had identified.[71]

113. As to the provision of embargoed copies of the Report, the Applicant described his state of mind as follows:[72]

> I considered it important for these journalists to be prepared for the release of the Report. I wanted to equip them with the means of reporting accurately and promptly when the Report was released … I released the Report to them on agreement that the Report would be embargoed until the government published it. It was not in my contemplation that the government would not publish the Report.

The Applicant's evidence to the Commission

114. The Applicant did not resile from his affidavit evidence in his private oral examination before the Commissioner. He was asked "are you able to indicate what your view is about the media's role to play in the public inquiry".[73] He went on to explain, at some length, his views on this topic, which were ultimately summarised by counsel-assisting and put back to him as follows: "essentially it was that public confidence had been eroded and you saw that as a basis for these proceedings to be public. And for them to be public and for the community to be properly informed the media had to be engaged".[74] The Applicant agreed, but added that in his view, public confidence had been degraded not because of what anyone had actually done in the criminal proceedings preceding the Inquiry, but because of "what was said in the press about these things", a lot of which was "misguided and false".[75]

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69 Bundle at 408 [48].
70 Bundle at 419 [96]-[97].
71 Bundle at 419-426 [97]-[147].
72 Bundle at 425 [141].
73 Bundle at 1246.
74 Bundle at 1251.
75 Bundle at 1251.

115. At no point during the examination did the Commission suggest the Applicant was being untruthful as to his subjective views in this regard. Nor was it ever suggested to the Applicant that he was being dishonest, deceitful, or was not acting in good faith in respect of his communications with journalists, including the provision of the Report to them.

116. There was a curious and convoluted series of rolled up questions as to "the appearance of events" without "making or suggesting a conclusion about them"[76], and as to how "a lay person might consider these matters".[77] None of these were proper questions, and in any event they did not squarely put anything of moment to the Applicant.

The consequences

117. The consequence is that there was no evidence[78] and no reasonable or logical basis, on which the Respondent could make the serious findings he purported to make as to the Applicant's *mala fides.* There are **three** matters which fortify this conclusion.

118. **First**, the Respondent did not express any finding that the Applicant's evidence should be rejected, or expose any rational basis for doing so. This is not a case, for example, where adverse credibility findings provided the basis for rejection of the evidence . Such findings are frequently said to be the function of a decision-maker, *par excellence.*[79] But even they are not immune from judicial review.[80] In this case, however, the Respondent did not express any adverse credibility finding in relation to the Applicant, or expose any other rational basis for rejection of his evidence.

119. **Secondly**, absent rejection of the Applicant's evidence, there is no rational, or evident and intelligible justification for the findings of dishonesty, bad faith and partiality.

120. **Thirdly**, the findings of dishonesty, bad faith and partiality actually depend on an anterior finding that the Applicant gave deliberately false evidence to the Supreme Court of the ACT in his affidavit (upon which he was not cross-examined) *and* before the Commission – that the Applicant falsely stated that he had a particular state of mind, when in truth he

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76 Bundle at 1272-1273

77 Bundle at 1274.

78 Absence of material capable of supporting a finding on a material issue constitutes an error of law: *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at [91] (Hayne, Crennan, Heydon and Kiefel JJ); *Stolzenberg v Workers Compensation Nominal Insurer* [2025] NSWCA 40 at [24] (Stern JA).

79 *Re Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham* (2001) 74 ALJR 405 at [67].

80 *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 at [78] (Robertson J); *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109 at [83] (Griffiths, Perry and Bromwich JJ).

had another. Such a finding was not made by the Respondent, and could never responsibly have been made without having put those matters to the Applicant squarely. The hurdle here is high for the Respondent, and it cannot be surmounted. As the High Court has said in a different context, "as a matter of logic and common sense, something more than mere rejection of a person's evidence is necessary before there can be a positive finding that he or she deliberately lied in the giving of that evidence": *Smith v New South Wales Bar Association* (1992) 176 CLR 256 at 268.

"Covert" and "deceitful" conduct and "dishonest concealment"

121. The Respondent expressed a series of extreme but baseless conclusions as to the character of the Applicant's conduct. It was said that for the Applicant "to have remained silent about what he had done and proposed to do could only be regarded as deceitful" (JR [81]), that the Applicant had made a "decision to disclose the Report secretly" (JR [84]), and that there had been "covert disclosure" (JR [102]) and "dishonest concealment of a matter of obvious direct legal and actual interest to the Chief Minister" (JR [103]).

122. These extreme conclusions were simply not open. They assume without basis that the Applicant knew and appreciated that he was bound to tell the Chief Minister "what he had done and what he proposed to do", that he consciously refrained from doing what he knew and appreciated he was bound to do, and that he did so dishonestly.

123. Further, the notion that the Applicant was engaging in secret or "covert" behaviour is bizarre.

124. The Applicant freely told Counsel Assisting on 28 July 2023 that he had provided the draft report to Ms Albrechtsen (JR [60]) and he told the entire inquiry team about it at dinner on 30 July 2023 (JR [63]).

125. On 2 August 2023, the Applicant prompted the Executive Director to tell the Head of Service about the provision of the report to Ms Byrne (JR [64]).

126. And *immediately* upon being asked by the Chief Minister and the Attorney-General whether he had provided a copy of the report to anyone, the Applicant responded with a full and frank account of the facts (see Part C above).

127. The Applicant had never made a secret of his free engagement with journalists. His evidence to the Commissioner was that he was "open to speak to any journalist who rang",

and that he told his Executive Director that she could put any journalist through to him.[81] The Applicant referred to the "free engagement" which the Inquiry had with the media in the course of the public hearings.[82]

128. The failure to tell one person (the Chief Minister) something that is not otherwise a secret cannot, without more, be stigmatised as "covert" and "deceitful".

129. That is the case even if that "failure" involved a breach of the rules of natural justice (which it did not). But by way of analogy, when a Tribunal fails to put a person on notice of the case to be met (and thereby breaches its obligation of procedural fairness[83]), that does not logically give rise to a conclusion that the Tribunal has been secretive or deceitful about the matters which might be relied on by the decision-maker. Something more would be required, and there was nothing more identified by the Respondent here.

O. NO "SERIOUS CORRUPT CONDUCT" (GROUND 12)

130. A finding of "serious corrupt conduct" is a grave matter. It is defined as "corrupt conduct that is likely to threaten public confidence in the integrity of government or public administration".

131. The Respondent's approach is premised on an error in construction (at JR [16]). Central to the definition is the concept of "integrity". The *Macquarie Dictionary* (online) relevantly defines "integrity" as being "soundness of moral principle; uprightness; honesty". The Respondent considered that "integrity" carried two meanings, "moral rectitude or probity" **and** "organisational soundness or compliance with requirements". The Respondent found that it is "sufficient" if a "likely consequence of the identified corrupt conduct is to threaten public confidence in the soundness or efficacy" of government administration (JR [16]).

132. This wrongly decouples integrity from probity, contrary to the substantive reasoning of the High Court in *Cunneen*.

133. Neither the IC Act nor its NSW counterpart were designed to stigmatise as corrupt any and all conduct of public officials which might amount to a criminal offence or a civil wrong, or which might exhibit an error or a lack of judgment.

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81 Bundle at 1252.
82 Bundle at 1558.
83 See generally *Hall v University of New South Wales* [2003] NSWSC 669 at [68].

134. Rather, as was said in *Cunneen*[84] (emphasis added):

> … the Act is directed towards promoting the integrity and accountability of public administration in the sense of maintaining **probity** in the exercise of official functions. That is the context from which the relevant concept of "corruption" emerges.

135. Earlier, their Honours said that the relevant subsections in the NSW Act[85] (emphasis added):

> … define the nature of the **improbity** of public officials in the exercise of official functions which the ICAC Act conceives to be anathema to integrity in public administration.

136. This reflects the ordinary understanding of corruption in public administration, and the statute should not be extended beyond this ordinary understanding given its conferral of extraordinary coercive powers (and consequent abrogation of fundamental rights and privileges).[86] Such restraint is demanded by the principle of legality.[87]

137. The Respondent's approach also fails to give effect to the evident purpose of the definition of "serious corrupt conduct", which is to *narrow* the conduct to the serious end of the spectrum of "corrupt conduct", *viz.* conduct exhibiting a greater degree of moral failure. Decoupling the definition from the central thread of "probity" would result in the provision losing much of its force as a mechanism for directing attention to a narrower category of serious cases.

138. The Applicant's construction is supported by the legislative history: the term was adopted from the analogous NSW provision, s 74BA of the *Independent Commission Against Corruption Act 1988* (NSW).[88] That provision was introduced to that legislation in 2015, in the wake of the High Court decision in *Cunneen.* The Second Reading Speech explained the purpose of the amendment in the context of the "obvious capacity [of a finding of corrupt conduct] to harm individuals", which "should be reserved only for cases where the misconduct in question is serious".[89] The focus is on the quality (seriousness) of the misconduct.

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84 (2015) 256 CLR 1 at [59].
85 (2015) 256 CLR 1 at [46].
86 *Cunneen* (2015) 256 CLR 1 at [2]-[3] and [54]-[55].
87 *Cunneen* (2015) 256 CLR at [54].
88 *Report of the Inquiry into the establishment of an Integrity Commission for the ACT,* Select Committee on an Independent Integrity Commission 2018, October 2018 at [4.9].
89 New South Wales, *Parliamentary Debates,* Legislative Assembly, 8 September 2015 (the Hon Mike Baird).

139. The error in the construction of "serious corrupt conduct" vitiates the conclusion on this question.

140. The conclusion expressed in JR [142] was also in error because it was both unreasonable and illogical. It was a bare conclusion with any exposed reasoning. It refers to undermining "the integrity of the Board's processes and the fairness and probity of its proceedings". This entails a misuse of the terms "integrity" and "probity". It was necessary for the Respondent to "at least … express the essential ground or grounds for his conclusion".[90] This was not done. This inadequacy itself supports the inference that the Respondent applied the wrong test or was not "in reality" satisfied of the requisite matters.[91]

141. The failures in this regard are of real moment. By s 184(1) of the IC Act, the Respondent was not authorised to include in its report any finding that the Applicant engaged in corrupt conduct unless the conduct was (relevantly) "serious corrupt conduct". Accordingly, the Respondent has incorrectly construed, and failed to expose any reasoning as to, the provision that operates as the key safeguard against an individual being subjected to the devastating reputational consequences associated with a finding of corrupt conduct.

P. RELIEF

142. The Applicant seeks the relief set out in his proposed Amended Originating Application.

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14 April 2025

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90 *Re Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 216 CLR 212 at [40].

91 *Re Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 216 CLR 212 at [40] (Gleeson CJ, Gummow and Heydon JJ), citing *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120.