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Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	8/05/2025 4:00:03 PM AEST
Date Accepted for Filing:	8/05/2025 4:00:10 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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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY

No NSD389 of 2025

WALTER SOFRONOFF
Applicant

ACT INTEGRITY COMMISSION
Respondent

RESPONDENT'S WRITTEN OUTLINE OF SUBMISSIONS

A. Introduction and overview

1. As matters presently stand but subject to the following, the Respondent (**Commission**) takes no position as to whether the "*principle of non-intervention*"[1] referred to or forming part of "*Parliamentary privilege*" applies to this proceeding.

2. The Commission does, however, say that the contentions that the **Speaker** of the Legislative Assembly seeks to advance as to Parliamentary privilege[2] should be determined before the Court embarks on any consideration of the merits of the Applicant's (**Mr Sofronoff's**) application for judicial review (as the current directions contemplate). That course is appropriate in circumstances where the Speaker's proposed contentions:

   (a) raise a question of justiciability that the Court can and should deal with regardless of how and by whom they are raised;

   (b) if correct, would mean that the merits of this proceeding should not be entertained;

   (c) are sufficiently arguable to warrant their prompt separate determination.

3. As a commission constituted by an officer of the Legislative Assembly, the Commission has an interest that goes beyond that of an ordinary litigant in ensuring that the Assembly's privileges are protected. However, in circumstances where the Speaker – the principal representative of the Legislative Assembly in its powers, proceedings and dignity[3] – is prepared to assist the Court as an *amicus curiae*, the Commission considers (as matters presently stand) that its interest in the protection of the Assembly's privileges is sufficiently served by supporting the Speaker's application for leave to appear as *amicus curiae* and, if that application is granted, to not otherwise make submissions as to Parliamentary privilege in addition to those to be made on behalf of the Speaker.

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[1] See *Prebble v Television* [1995] 1 AC 321 at 334D; *Rann v Olsen* (2000) 76 SASR 450 at 473 [119].

[2] See "Written Submissions of the ACT Speaker" filed 30 April 2025.

[3] See *Erskine May's Treatise on The Law, Privileges and Usage of Parliament* (25th ed, 2019) at [4.19].

4. If this proceeding is to be entertained on the merits despite the Speaker's contentions as to Parliamentary privilege, Mr Sofronoff should have leave to file his proposed Amended Originating Application for Judicial Review (**AOA**) but that application should be dismissed.

5. Mr Sofronoff has not demonstrated that the report of the Commission in respect of which judicial review is sought (**Commission's Report**) was affected by jurisdictional error.

B. Background

6. This proceeding is the second court proceeding that arises from Mr Sofronoff's conduct in connection with his appointment as a board of inquiry to inquire into certain matters arising from the investigation and trial of certain allegations concerning Mr Bruce Lehrmann (**Inquiry**). The first was the proceeding the subject of ***Drumgold*** *v Board of Inquiry (No 3)* [2024] ACTSC 58 in which the Director of Public Prosecutions for the Australian Capital Territory at the time of the investigation and trial, Mr Shane Drumgold, obtained relief in relation to Mr Sofronoff's report (**Inquiry Report**).

7. There appears to be no contest that, whilst he constituted a **Board** of inquiry under the ***Inquiries Act*** *1991* (ACT), Mr Sofronoff provided Ms Janet Albrechtsen, a journalist, with witness statements that were subject to a non-publication order, drafts of the Inquiry Report, a copy of notices of adverse findings issued to Mr Drumgold and two responses by Mr Drumgold to those notices, not including his final response (collectively **Confidential Matter**).

8. One of the drafts of the Inquiry Report Mr Sofronoff provided to Ms Albrechtsen was sent from his private email address and included tracked changes that recorded significant amendments to part of a previous draft dealing with central matters in circumstances where the previous draft report had not been disclosed to Mr Drumgold or to any other participant in the Inquiry.[4] The draft material provided to Ms Albrechtsen also included quotations from and references to statements and exhibits provided to the Board with footnotes indicating that they were not to be published.[5]

9. There is also no contest that, after he delivered the final Inquiry Report to the Chief Minister, Mr Sofronoff provided a copy of it to Ms Albrechtsen and to another journalist, Elizabeth Byrne, before the Chief Minister had decided whether or not to make the Inquiry Report or part of it public in the exercise of his power under s 14A(2) of the Inquiries Act.

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[4] See Commission's Report at [50].

[5] See Commission's Report at [51].

10. That occurred after the Chief Minister had announced an intention to consider the Inquiry Report "*though a proper Cabinet process*" over a period of three to four weeks whereafter his intention was to table all, or part, of the report during the August parliamentary sitting of the Legislative Assembly.[6] As at the time that he provided a copy of the Inquiry Report to Ms Albrechtsen and Ms Byrne, Mr Sofronoff no longer constituted a board of inquiry under the Inquiries Act.[7]

11. As the Commission's Report records, the communications just mentioned must be understood in the context of the extensive communications that occurred between Mr Sofronoff and Mr Albrechtsen while Mr Sofronoff constituted a board of inquiry. According to aspects of the Commission's Report that are not challenged by Mr Sofronoff:

    (a) the quantity, nature, content and circumstances of the communications between Mr Sofronoff and Ms Albrechtsen 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*" and included private and direct contact between Mr Sofronoff and Ms Albrechtsen, with Mr Sofronoff having provided her with his personal email address[8] and on some occasions initiating communication with her;[9]

    (b) Mr Sofronoff and Ms Albrechtsen, before and during the Inquiry, had 51 telephone conversations with each other over 6 hours and 15 minutes, with 27 telephone contacts between them between 7 April and 31 July 2023;[10]

    (c) Mr Sofronoff had on at least two occasions conveyed his views to Ms Albrechtsen on matters of immediate relevance to the Inquiry in a way that conveyed that he had an adverse view of Mr Drumgold;[11]

    (d) Mr Sofronoff had, over time, become a "*fellow traveller*" with Ms Albertsen.[12]

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[6] See Commission's Report at [58].

[7] A person ceases to hold office under the Inquiries Act when his or her board's report has been submitted to the Chief Minister *Inquiries Act 1991* (ACT) s 9.

[8] Commission's Report at [36], [39], citing *Drumgold* at [279], [280].

[9] Commission's Report at [39], citing *Drumgold* at [310]-[314].

[10] Commission's Report at [37], citing *Drumgold* at [137], [140], [281], [326].

[11] Commission's Report at [39], citing *Drumgold* at [294], [297], [299].

[12] Commission's Report at [130], adopting the phraseology used in *Drumgold* at [297].

12. The Commission investigated the conduct summarised above in the exercise of its functions under the *Integrity Commission Act 2018* (ACT) (**IC Act**). The genesis of that investigation was a mandatory corruption notification made pursuant to s 62 of the IC Act.[13] Under s 100 of the IC Act, the Commission has power to conduct an investigation if the commission receives a "*corruption report*" such as a mandatory corruption notification under s 62 and suspects on reasonable grounds that the conduct in the corruption report may constitute corrupt conduct. The Commission also has power to investigate matters on its own initiative.[14]

13. Following an investigation that involved, amongst other things, an oral examination of Mr Sofronoff, the Commission prepared an "*investigation report*" (as it was required to do[15]) and provided it to the Speaker (as it was also required to do[16]). As required by the IC Act,[17] Mr Sofronoff was given an opportunity to consider and provide comments about a draft of the Commission's Report before it was finalised.

14. The Commission's Report recorded a finding or opinion that Mr Sofronoff's disclosure of the Confidential Matter to Ms Albrechtsen and disclosure of the Inquiry Report to Ms Albrechtsen and Ms Byrne before it had been publicly released by the Chief Minister amounted to "*corrupt conduct*" within the meaning of the IC Act.[18] The Commission's Report also recorded a finding or opinion that the "*corrupt conduct*" that it found constituted "*serious corrupt conduct*" within the meaning of the IC Act.[19]

15. Under the IC Act, an investigation report "*may*" include reasons for findings, opinions or recommendations that are included in the investigation report.[20] The reasons that were recorded in the Commission's report disclose that the Commission had several, alternative, reasons for concluding that Mr Sofronoff engaged in corrupt conduct. It follows that – even if error were detected in one or more of those reasons – it would not necessarily follow that the Commission's ultimate finding or opinion that Mr Sofronoff engaged in corrupt conduct was affected by material (and, therefore, potentially jurisdictional) error.[21]

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[13] See Commission's Report at [3].

[14] *Inquiries Act 1991* (ACT) s 101.

[15] See *Integrity Commission Act 2018* (ACT) s 182(1).

[16] See *Integrity Commission Act 2018* (ACT) s 189.

[17] See *Integrity Commission Act 2018* (ACT) s 188.

[18] See Commission's Report at [5].

[19] See *Integrity Commission Act 2018* (ACT) s 10.

[20] *Integrity Commission Act 2018* (ACT) s 182(2)(b).

[21] See, eg, *MZAPC v Minister* (2021) 273 CLR 506 at 522 [33] regarding the "*threshold of materiality*" in relation to challenging an ultimate decision including on legal unreasonableness grounds.

16. In light of the foregoing, it is convenient first to consider the scheme of the IC Act insofar as it deals with the statutory concepts of "*corrupt conduct*" and "*serious corrupt conduct*" (**Part C**). That analysis confirms that Mr Sofronoff's 12 proposed **grounds** and 29 **sub-grounds** of review can be seen as falling within three categories corresponding with the three intermediate findings that underpinned the Commission's ultimate finding or opinion of corrupt conduct. As will be seen, to demonstrate jurisdictional error in that ultimate finding or opinion, it would be necessary for Mr Sofronoff to make out all of Mr Sofronoff's proposed grounds of review in at least one of the three categories. Those three categories of proposed grounds are then responded to *seriatim* (**Parts D** to **F**).

C. "*Corrupt conduct*", "*serious corrupt conduct*" and Mr Sofronoff's challenge

17. The IC Act includes a lengthy definition of "*corrupt conduct*" in s 9. Insofar as is presently relevant, that section provides as follows (underlining added):

> (1) For this Act, ***corrupt conduct*** is conduct—
>
> (a) that could—
>
> (i) constitute a criminal offence; or
>
> (ii) constitute a serious disciplinary offence; or
>
> (iii) constitute reasonable grounds for dismissing, dispensing with the services of, or otherwise terminating the services of, a public official; and
>
> (b) that is any of the following:
>
> (i) 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 is not impartial;
>
> (ii) conduct by a public official or former public official that—
>
> (A) constitutes a breach of public trust; or
>
> (B) 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; […]
>
> (3) In this section: […]
>
> ***serious disciplinary offence*** includes—
>
> (a) any serious misconduct; or
>
> (b) any other matter that constitutes or may constitute grounds for—
>
> (i) termination action under any law; or
>
> (ii) a significant employment penalty.
>
> ***serious misconduct***—see the *Fair Work Regulations 2009* (Cwlth), section 1.07 (Meaning of ***serious misconduct***).

18. As the Commission explained in its Report,[22] the definition of "*corrupt conduct*" in s 9 can be seen as being constituted by two "*limbs*". Conduct is only "*corrupt conduct*" for the purposes of the IC Act if it satisfies one or more of the elements of the **first limb** (s 9(1)(a)) and one or more of the elements of the **second limb** (s 9(1)(b)).

19. The Commission is prohibited from including in an investigation report a finding that a stated person has engaged in corrupt conduct unless that conduct is serious corrupt conduct (or systemic corrupt conduct). Section 184 of the IC Act expresses the relevant prohibition in the following terms:

> (1) The commission must not include in an investigation report a finding that a stated person has engaged in, is engaging in, or is about to engage in, corrupt conduct unless the corrupt conduct is serious corrupt conduct or systemic corrupt conduct.
>
> (2) However, the commission may include in an investigation report a finding or opinion about the conduct of a stated person that may be corrupt conduct if the statement of the finding or opinion does not described the conduct as corrupt conduct.

20. Section 10 of the IC Act defines "*serious corrupt conduct*" to mean:

> corrupt conduct that is likely to threaten public confidence in the integrity of government or public administration.

21. The upshot of the above is that conduct is "*corrupt conduct*" for the purposes of the IC Act and is capable of being the subject of a finding in an investigation report if the conduct:

    (a) satisfies one or more of the elements of the first limb of the definition of "*corrupt conduct*" in s 9(1)(a); and

    (b) satisfies one or more of the elements of the second limb of the definition of "*corrupt conduct*" in s 9(1)(b); and

    (c) is "*likely to threaten public confidence in the integrity of government or public administration*" within the meaning of s 10 (**s 10 question**).

22. It follows from that and from the absence of any challenge to the Commission's findings as to the conduct that Mr Sofronoff engaged in that Mr Sofronoff's challenge to the validly of the Commission's findings of corrupt conduct can only succeed if he successfully challenges:

    (a) all of the Commission's findings as to satisfaction of an element of the first limb; or

    (b) all the Commission's findings as to satisfaction of an element of the second limb; or

    (c) the Commission's finding on the s 10 question.

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[22] Commission's Report at [13].

23. That being so, Mr Sofronoff's grounds can be conveniently organised into three categories:

(a) grounds 1 to 4, which concern the first limb;

(b) grounds 5 to 11, which concern the second limb; and

(c) ground 12, which concerns the s 10 question.

24. One further point should be made at this juncture – Mr Sofronoff or his advisers appear to have misunderstood the scope of the corrupt conduct finding made against him (see, eg, AS [2]). While the Commission's investigation considered the "*four connected but distinct areas of concern*" that subject of a mandatory corruption notification that is referred to in paragraph 4 of the Commission's Report as the "*impugned conduct*", the Commission's ultimate findings of "*corrupt conduct*" were limited to the two areas of conduct encompassed by the first two dot points of paragraph 5, namely Mr Sofronoff's disclosure of:

(a) the Confidential Matter to Ms Albrechtsen ; and

(b) the Inquiry Report to Ms Albrechtsen and Ms Byrne before it had been publicly released.

25. Those findings were made in light of the Commission's consideration of a broader class of Mr Sofronoff's conduct. For example, the Commission found that "*Mr Sofronoff's communication with Ms Albrechtsen shows that over time he lost sight of the important public function he was discharging*".[23] Findings of that nature are properly understood as findings that were made in aid of the ultimate findings summarised in paragraph 5 of the Commission's Report. They do not expand the scope of those ultimate findings.

D. Mr Sofronoff's grounds concerning the first limb, s 9(1), should be rejected

The Commission did not err in construing s 17 of the Inquiries Act (cf sub-ground 1(a))

26. Section 17 of the Inquiries Act provides as follows:

> 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 [the Inquiries Act]—
>
> (a) make a record of, or divulge or communicate to any person, any information acquired by the firstmentioned person by virtue of that person's office or employment under or for [the Inquiries 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 [the Inquiries Act].
>
> Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

[23] Commission's Report at [139].

27. That section is a conventionally worded non-disclosure provision,[24] which applies expressly to a member of a board or a person who has been a member of such a board. It applies both to information acquired by virtue of office or employment under or for the Inquiries Act (ss 17(a) and (b)) and to documents that have been "*provided for this Act*" (s 17(c)).

28. While ground 1(a) is directed to the application of s 17 to documents created by the Board (specifically, notices of adverse comment, draft versions of the Inquiry Report and the final Inquiry Report), it should be noted at the outset that the Commission's findings in respect of s 17(a) were not limited to these documents. The Commission's findings as to breach of s 17 also concerned Mr Sofronoff's provision to Ms Albrechtsen of Mr Drumgold's responses to notices of adverse comment as well as to two witness statements produced to the Board pursuant to subpoenas and subject to non-publication orders.[25] Mr Sofronoff does not challenge the potential application of s 17(a) or (c) of the Inquiries Act to that material.

29. Mr Sofronoff's submissions on ground 1(a) also do not deal with the Commission's finding that the notices of adverse comment, drafts of the Inquiry Report and the final Inquiry Report themselves communicated information "*acquired by*" Mr Sofronoff in the course of producing the document ultimately disclosed, even if the phrase "*acquired by*" is to be read in the narrow way that Mr Sofronoff argues.[26] Thus, even if (which is denied) the Commission erred in its construction of that phrase, it would be immaterial to the Commission's ultimate findings.

30. In any event, Mr Sofronoff's contention that the Commission misconstrued the phrase "*information acquired by*" in s 17(a) of the *Inquiries Act* should be rejected if reached. That contention rests on an erroneous premise that a document that a person has created will not incorporate information "*acquired by*" a person within the meaning of s 17(a).

31. As noted above, s 17 distinguishes between information (the subject of s 17(a) and (b)) and documents (covered by s 17(c)). Paragraph 17(a) attaches to the making a record of, divulging or communication of information that is "*acquired*" in the manner specified, whether or not it is incorporated in any particular document. That is the ordinary meaning of the text of the statute and does not involve any of the "*stretching*" or "*extending*" of language as Mr Sofronoff alleges (cf AS [37]).

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[24] Compare, eg, *Drug Dependence Act 1989* (ACT), s 201; *Associations Incorporation Act 1991* (ACT), s 100; *Ombudsman Act 1989* (ACT), s 33(2); *Legal Aid Act 1977* (ACT), s 92(2); *Judicial Commissions Act 1994* (ACT), s 28(2); *Royal Commissions Act 1991* (ACT) s 20(2).

[25] Commission's Report at [106]

[26] Commission's Report at [107].

32. Yet, on Mr Sofronoff's construction, once a person has made a "*subjective appraisal*" of information acquired by a board or devoted thought to or made a determination about such information, the information ceases to be protected by s 17(a) and is available to be communicated or otherwise used by a member or member of staff of a board otherwise than in the exercise of a function under the Inquiries Act. That approach to s 17(a) is not consistent with the natural and ordinary meaning of the words used in that paragraph, nor with the *chapeau* to s 17, which refers to the indirect divulging or communication of information. Nor is it supported by the decision in *VAF v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 236 FCR 549 (FCAFC) at [24], cited in AS [35], which was concerned with what information was *required* to be disclosed for the purpose of a statutory scheme concerned with procedural fairness.

33. Mr Sofronoff's construction of the phrase "*information acquired by*" also does not advance what he says (AS [36]) is the purpose of the provision (ensuring information provided to the board is used or disclosed only for the purpose of the inquiry). On Mr Sofronoff's approach, information may be provided to a board and then communicated or otherwise used to any person for any purpose provided that that information is first recorded in a document that involves a "*subjective appraisal*" of the information. That result would be apt to defeat the very purpose that Mr Sofronoff contends is the purpose of s 17.

34. Mr Sofronoff's approach also does not grapple with the anomalous result of his construction referred to in the Commission's Report at [107] (other than to assert, without explanation, that there is no anomaly). On Mr Sofronoff's approach, s 17(a) does not apply to a member or member of staff of a board of inquiry who creates a document but does apply to others constituting or assisting such a board. Thus, on that approach, if a board's report were prepared solely by a person constituting the board but distributed to staff of the board for comment, it would be an offence under s 17(a) for a staff member to publish that document other than in the exercise of a function under the Integrity Act but not for the person constituting the board to do so. Anomalies of that kind disappear when s 17(a) is understood – consistent with its text – to refer to information rather than documents.

35. As to s 17(c), the Commission accepted Mr Sofronoff's point that "*provided*" means "*furnished*" or "*supplied*"; and also that "*for this Act*" meant "*for the purposes of this Act.*[27] It did not, however, accept that "*provided for this Act*" (which is the language of the provision) should be read as if it said "*provided to the Board*". The Commission was correct to proceed in that

[27] Commission's Report at [108], see AS [39], [42].

manner. There is no basis in text, structure or context of the Inquiries Act for the phrase "*provided for the Act*" to be read as if it could only apply to documents provided to a board of inquiry, as opposed to (for example) documents provided by a board of inquiry to a person the subject of the inquiry for the purposes of the inquiry, such as a notice of adverse comment or a draft report.

36. The supposed "*logical and temporal sequence*" relied on by Mr Sofronoff (AS [40]) and the use of the past tense for "*provided*" provide no support for the implication of the words "*to the Board*" into s 17(c). The legislative history relied on by Mr Sofronoff (AS [42]) shows no more than that "*for this Act*" should be construed to mean "*for the purposes of this Act*", as the Commission did. A document may be provided "*for this Act*" in the sense of "*for the purposes of this Act*" where it is provided by, as well as provided to, a board of inquiry.

37. Mr Sofronoff's construction, if accepted, would lead to the absurd result that a draft or completed report of a board of inquiry would not be caught by either s 17(a) or (c) because it included a board member's "*subjective appraisals*" and had not been provided to the board. On that view, a final report of a board of inquiry could lawfully be publicly released by staff of the board prior to its presentation to the Chief Minister. Such a result would thwart the scheme of the Inquiries Act, which contemplates that it is for the Chief Minister to decide whether and to what extent a report of a board of inquiry should be made public. Such a distorted view of s 17 should not be accepted.

38. Ground 1(a) of review should be rejected if it is entertained.

No jurisdictional error was committed in the Commission's finding that Mr Sofronoff divulged the Confidential Matter otherwise than in the exercise of a function under the Inquiries Act (cf sub-ground 1(b))

39. Sub-ground 1(b) challenges the Commission's approach to Mr Sofronoff's conduct prior to him ceasing to hold office under the Inquiries Act.[28] It does not challenge the Commission's separate findings (see [111]-[118]) concerning provision of the Inquiry Report to Ms Albrechtsen and Ms Byrne after it was given the Chief Minister but before a decision was made regarding public release. By that point in time, Mr Sofronoff no longer held office under the Inquiries Act.[29] Thus, establishing ground 1(b) would not undermine the Commission's ultimate findings insofar they related to the provision of the Inquiry Report to Ms Albrechtsen and Ms Byrne.

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[28] Commission's Report at [110].

[29] *Inquiries Act 1991* (ACT) s 9.

40. In relation to the findings that Mr Sofronoff does seek to challenge by sub-ground 1(b), Mr Sofronoff first contends that the Commission overlooked the extended definition of "*function*" by reference to the *Legislation Act 2001* (ACT) (AS [46]). The Commission did not overlook this, as indicated by its consideration of whether there was *any* due exercise of a function under the Inquiries Act.[30]

41. The balance of Mr Sofronoff's contentions on sub-ground 1(b) reduce to a submission that s 18(c) of the Inquiries Act was engaged because Mr Sofronoff had a subjective belief that:

> engagement with journalists was essential to the performance of his functions, and that he engaged in conduct impugned by the Commissioner for this purpose (and this purpose alone).

42. That submission involves insufficient attention to the relevant statutory text. The statutory provision said by Mr Sofronoff to authorise his divulging of witness statements the subject of non-publication orders, drafts of the Inquiry Report, notices of adverse findings to Mr Drumgold and Mr Drumgold's initial responses to Ms Albrechtsen is s 18(c) of the Inquiries Act. Section 18 provides as follows (underlining added):

> **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
>
> (c) may do whatever it considers necessary or convenient for the fair and prompt conduct of the inquiry.

43. Properly construed, s 18(c) does not authorise a board to do whatever it considers necessary or convenient for the performance of its functions generally as Mr Sofronoff's submissions suggest. Rather, as its heading and context suggests, s 18(c) is a "*procedur[al]*" provision concerns with the "*fair*" and "*prompt*" "*conduct*" of an inquiry.

44. Mr Sofronoff's divulging of drafts of the Inquiry Report and other Confidential Matter to Ms Albrechtsen did not, on any available view, have anything to do with the "*fair*" or "*prompt*" "*conduct*" of Mr Sofronoff's inquiry. On Mr Sofronoff's account, the Confidential Matter was divulged to Ms Albrechtsen for a different purpose – "*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*".[31] Divulging the Confidential Matter for that purpose was thus not, on any available view, authorised by s 18(c).

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[30] Commission's Report at [110].

[31] See Sofronoff affidavit at [131], quoted in Commission's Report at 48.

45. That is not, of course, to say that a board of inquiry under the Inquiries Act is prohibited from engaging with journalists at all. The Inquiries Act contemplates that some of a board of inquiry's proceedings may be conducted in public. Specifically, s 21 authorises a board to hold "*hearings*" and generally requires those hearings to be "*in public*". It is implicit from that section that a board of inquiry is authorised to engage with the public, including through journalists, in relation to its public proceedings. But the Inquiries Act provided no authorisation for Mr Sofronoff to do what he, in fact, did – engaging with Ms Albrechtsen in relation to proceedings of the Board that the Inquiries Act contemplated would be private.

46. Once the above is appreciated, the Commission's approach to the divulging of the Confidential Matter to Ms Albrechtsen is confirmed to be correct. As the Commission correctly found (at [110]):

> 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.

47. Ground 1(b) should be dismissed if it is entertained.

No jurisdictional error was committed in relation to the Commission's finding that the divulging of the Inquiry Report to journalists was not done in the exercise of a function under the Inquiries Act (cf sub-ground 1(c))

48. Sub-ground 1(c) is concerned with the aspect of the Commission's Report dealing with the provision of the Inquiry Report to Ms Albrechtsen and Ms Byrne after the Inquiry Report had been completed and submitted to the Chief Minister: Commission's Report at [114]-[118]. The sub-ground does not challenge the separate basis for finding that this was not done in the exercise of a function under the Inquiries Act, namely that the board was *functus officio* at the material time, having regard to s 9 of the Inquiries Act.[32] The Commission expressly referred to the separate and alternative bases for its finding concerning provision of the Inquiry Report to Ms Albrechtsen and Ms Byrne, stating that this 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 … Mr Sofronoff was functus officio and could no longer exercise the Board's functions*" (emphasis added). The error alleged in ground 1(c) could not be material in view of the alternative (and unchallenged) "*narrow basis*" for the finding concerning provision of the Inquiry Report to Ms Albrechtsen and Ms Byrne.

49. In any event, Mr Sofronoff is incorrect to assert that the Chief Minister and Mr Drumgold lacked any legal interest capable of attracting an obligation of procedural fairness in relation to

[32] Commission's Report at [111], [118].

Mr Sofronoff's decision to provide the Inquiry Report to Ms Albrechtsen and Ms Byrne. Contrary to Mr Sofronoff's submissions (AS [54]), the Commission's procedural fairness analysis was not concerned with the Mr Sofronoff's contact with journalists generally. Mr Sofronoff was under an express duty to comply with the "*rules of natural justice*" in conducting the Inquiry: s 18(a). The requirement to afford procedural fairness "*is not limited to cases where the exercise of the power affects rights in the strict sense, but extends to the exercise of a power which affects an interest or a privilege*".[33] The Chief Minister's right to decide (or interest in the maintenance of his or her capacity to decide) how to deal with publication of the Inquiry Report (under ss 14A and 14B of the Inquiry Act) was plainly affected by Mr Sofronoff's decision to deal with the Report by providing it to journalists as well as the Chief Minister.

50. There is nothing "*incongruous*" (cf AS [54]) as between the nature of a board of inquiry and a duty of procedural fairness in respect of a decision regarding publication of the report of a board, in circumstances where the Inquiries Act contains a "*comprehensive*"[34] framework governing submission and publication of a board's report. It is not necessary to find (and the Commission did not find) that there was a duty of procedural fairness owed to the Chief Minister in respect of all exercises of discretion under s 18(c) of the Inquiries Act.

51. Mr Sofronoff next contends that, even if there had been a breach of procedural fairness, he was nevertheless still exercising a function under the Inquiries Act, because he was "*in fact*" exercising such a function, even though that purported exercise had no legal effect: AS [55]. That should not be accepted. The chapeau to s 17 of the Inquiries Act refers to the exercise of a function under the Inquiries Act, not to the purported exercise of a function or the exercise of a function that a person thinks (rightly or wrongly) is a function under the Inquiries Act. If the exception in the chapeau to s 17 applied merely because a person wrongly thought that he or she was exercising functions under the Inquiries Act, the protection against disclosure of information provided by s 17 would be rendered largely meaningless, because the requirement that disclosure only occur in the exercise of a function under the Inquiries Act would depend not on the exercise of such a function within the law, but simply (for example) on a person's own view or representation that they were exercising such a function.

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[33] *Plaintiff M61/2010E v Commonwealth (Offshore Processing Case)* (2010) 243 CLR 319 at 352-353 [75].

[34] Commission's Report at [114].

Ground 2 (concerning s 36 of the Inquiries Act) seeks to raise a point that is immaterial

52. The Commission does not seek to defend its alternative finding that Mr Sofronoff engaged in conduct that could constitute an offence contrary to s 36 of the Inquiries Act. On reflection, the Commission accepts that s 36 of the Inquiries Act is not capable of applying to a board of inquiry itself.

53. Nothing ultimately turns on the concession just made. The Commission's finding that Mr Sofronoff engaged in conduct that could constitute an offence contrary to s 36 of the Inquiries Act was a separate and alternative finding to the other findings that the Commission made to the effect that the first limb of the definition of "*corrupt conduct*" in s 9(1) was satisfied. Unless all of those alternative findings are held to have been unlawfully made, the Commission's finding concerning s 36 of the Inquiries Act is immaterial.

No jurisdictional error was committed in relation to the Commission's finding that Mr Sofronoff's conduct could constitute a "*serious disciplinary offence*" (cf ground 3)

54. Ground 3 is concerned with the application of the phrase "*serious disciplinary offence*" to Mr Sofronoff's conduct as a board of inquiry. The Commission found (at [129], [135]) that Mr Sofronoff's conduct could constitute a "*serious disciplinary offence*".

55. Again, that was an alternative finding. It is not a material one unless it were found that all of the other bases for the Commission's conclusion that Mr Sofronoff satisfied the first limb were affected by material error.

56. If ground 3 is reached, it should be dismissed.

57. While it is true that aspects of the definition of "*serious disciplinary offence*" in s 9(3) of the IC Act could not apply to persons constituting a board of inquiry under the Inquiries Act (such as the reference in that definition to matters that constitutes or may constitute grounds for "a *significant employment penalty*"), that does not exhaust the definition. "*Serious disciplinary offence*" also includes, for example, "*any other matter that constitutes or may constitute grounds for– (i) termination action under any law*". The natural and ordinary meaning of those words extends beyond the employment context to any matter potentially constituting grounds to exercise a statutory mechanism for termination of a person's services. The fact that there is some overlap between the language of s 9(3)(b)(i) and s 9(1)(a)(iii) is not a basis for reading down the plain words of the former (or s 9(1)(a)(ii)) to exclude termination action against persons who are not employees, particularly given the use of the words "*under any law*" in s 9(3)(b)(i).

58. Mr Sofronoff's submissions in respect of sub-ground 3(b) (AS [76]) (legal unreasonableness) are the same as those for ground 4(c) and are addressed below.

No jurisdictional error was committed in relation to Commission's construction and application of the term "*misbehaviour*" in s 11 of the Inquiries Act (cf ground 4)

59. Mr Sofronoff correctly accepts that the term "*misbehaviour*" in s 11 of the Inquiries Act is dependent on its context: AS [79]. That was exactly the point made by the Commission, which further found that a "*central theme*" of the term is that it "*draws attention to a person's fitness or suitability to continue holding a particular statutory office*".[35] That is also seemingly consistent with Mr Sofronoff's construction of the term (AS [79]-[81]). Mr Sofronoff nevertheless submits that the standard for "*misbehaviour*" applicable to removal from judicial office was applicable to the board. That is incorrect, because a board of inquiry has functions quite different to those of a judge who holds a general commission. A board is appointed pursuant to the Inquiries Act to inquire into a particular matter stated in the instrument of appointment,[36] and its members' capacity to conduct that particular inquiry (and to do so in a manner that retains the confidence of the public) is relevant to the question of what will constitute misbehaviour justifying removal.

60. In the context of the Board's terms of reference, not only impartiality but the appearance of impartiality was crucial, given the concern that Mr Drumgold had acted other than in an impartial manner in commencing, conducting and discontinuing the criminal proceedings against Mr Lehrmann. There is no reason to exclude from the scope of "*misbehaviour*" for the purpose of removal under s 11 a perceived incapacity to conduct a particular inquiry by reason of actions taken by the board contrary to the statutory scheme and giving rise to apprehended bias, such as those of Mr Sofronoff in relation to the communications to and disclosures of Confidential Matter to Ms Albrechtsen.

61. The appropriate remedy for apprehended bias is, in the judicial context on which Mr Sofronoff relies, generally recusal. Having regard to Kaye AJ's conclusions, had Mr Drumgold become aware of Mr Sofronoff's conduct in respect of provision of Confidential Matter to, and the nature of his communications with, Ms Albrechtsen during the course of the Board's inquiry, it would have been open to him to apply to the Supreme Court (or to this Court) for a declaration concerning Mr Sofronoff's apprehended bias, and also to seek to enjoin the continuation of the inquiry in the event that Mr Sofronoff declined to recuse himself.[37] Such a declaration could have been made on the basis that, on Kaye AJ's findings, the fair-minded lay observer might not have confidence in Mr Sofronoff's

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[35] Commission's Report at [126] (emphasis added).

[36] See s 5 of the Inquiries Act.

[37] See Commission's Report at [128].

impartiality. In those circumstances, it would be well open to the Executive to conclude that the Board lacked capacity to conduct the inquiry in accordance with the requirements of the Inquiries Act with the result that Mr Sofronoff's appointment under the Inquiries Act should be terminated for "*misbehaviour*". That course would have involved no misconstruction or misapplication of the word "*misbehaviour*" in s 11 of the Inquiries Act. The Commission made no error in finding accordingly.

Conduct giving rise to a reasonable apprehension of bias is capable of constituting "*misbehaviour*" for the purposes of s 11 of the Inquiries Act (cf sub-ground 4(a))

62. Sub-ground 4(a) contends that, as a matter of construction, conduct giving rise to a reasonable apprehension of bias is incapable of constituting "*misbehaviour*" for the purpose of s 11 of the Inquiries Act: AS [82]. Given the context-driven nature of "*misbehaviour*", the Court should not find that apprehended bias on the part of the board – a finding of which will be made based on a wide range of circumstances, some very serious in relation to non-conformity with the requirements of the Inquiries Act – is necessarily excluded from the scope of s 11.

63. Mr Sofronoff's submission that the Commission "*impermissibly conflated*" apprehended and actual bias (AS [82]) misreads the Commission's Report at [126]. The presently relevant sentence commences with a consideration of the importance of "*maintenance of public confidence in an office (or officer)*". The following sentence also refers to risks to "*public acceptance of the legitimacy of the Inquiry and the tenure of the person(s) constituting the inquiry*". The reference to apprehended bias undermining the "*necessary function of impartiality*" must be read in that context, with the concept of impartiality extending to perceived impartiality. As the Commission recognised,[38] the terms of reference for the Board required it to consider whether Mr Drumgold's conduct was consistent with his duties. The finding of apprehended bias made by Kaye AJ was concerned with the apprehended influence on Mr Sofronoff's of Ms Albrechtsen's highly critical views about the very same issue.

64. As to the legal unreasonableness aspect of ground 4(a), that must be rejected in light of the Commission's written reasons, which explain that it relied on the provision of the Confidential Matter to Ms Albrechtsen "*together with*" the reasonable apprehension of bias as amounting to "*such a substantial departure from the accepted norms of conducting an inquiry under the* Inquiries Act *as to vitiate its legitimacy*".[39] It is inaccurate to say that the Commission concluded

[38] Commission's Report at [127].

[39] Commission's Report at [129].

that Mr Sofronoff's apprehended bias by itself constituted "*misbehaviour*". In any event, the "*intelligible justification*" for the Commission's statement as to apprehended bias undermining impartiality is supplied by the context for that statement, outlined above, as well as the Commission's description of the conduct giving rise to the Commission's independent finding regarding apprehended bias.[40]

"*Misbehaviour*" is capable of being committed by breaching the rules of natural justice (cf sub-ground 4(b))

65. Sub-ground 4(b) alleges that the Commission erred in concluding that conduct in breach of the rules of natural justice is capable of constituting "*misbehaviour*".

66. The argument seems to be that there are a wide range of circumstances in which the rules of natural justice may be breached that will not amount to (or should not be considered to be) "*misbehaviour*": AS [83]. So much may be accepted, but that does not mean that conduct amounting to a breach of the rules of natural justice is <u>never</u> capable of constituting "*misbehaviour*". The question will always be one of the nature and gravity of a board member's conduct.

67. In any event, the Commission did not rely only on the breach of the rules of natural justice as constituting "*misbehaviour*" by itself or "*without more*", as Mr Sofronoff contends.[41] In the paragraphs of the Commission's Report challenged by sub-ground 4(b) (Report at [129]-[134]), the Commission closely considered both aspects of the underlying conduct said to give rise to a breach of the rules of natural justice, namely divulging of the Confidential Matter to Ms Albrechtsen and the divulging of the Inquiry Report to Ms Albrechtsen and Ms Byrne prior to its public release by the Chief Minister and found that that conduct constituted misbehaviour.

The Commission's findings as to "*misbehaviour*" were not illogical, irrational or legally unreasonable (cf sub-ground 4(c))

68. The Commission did not fail to "*justif[y]*" its findings as to why Mr Sofronoff's conduct amounted to "*misbehaviour*" and in any event had no obligation to do so:[42] cf AS [84]-[89]. In each instance, the Commission explained its findings in relation Mr Sofronoff's state of mind within the Report and those findings are capable of rationally supporting the Commission's conclusion as to misbehaviour.

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[40] Commission's Report at [128].

[41] Commission's Report at [129].

[42] And it is, in any event, wrong to suggest that the Commission had some duty to "*justify*" its findings of record supposedly "*necessary finding[s]*" : see paragraphs 100 to 102 below.

69. As to the findings complained of in AS [85]:

(a) at [129] (that Mr Sofronoff engaged in "*intentional conduct*" and "*deliberate decisions*" in relation to the secret provision of the Confidential Matter to Ms Albrechtsen and the provision of the Report to journalists), the Commission had earlier found Mr Sofronoff knew of Mr Drumgold's interest in the confidentiality of the notices of adverse comment and his responses but disclosed them to Ms Albrechtsen in a covert manner;[43] that he had resolved to make the disclosure to journalists "*either aware that it was unauthorised or reckless as to its impropriety*",[44] and that he necessarily had the intention to foreclose the Chief Minister's (or Mr Drumgold's) power to prevent provision to journalists;[45]

(b) at [130] (that Mr Sofronoff understood he owed a duty to afford natural justice to the Chief Minister and Mr Drumgold in relation to the disclosure of the Inquiry Report to journalists), the Commission found that Mr Sofronoff's "*extensive legal, judicial and inquiry experience*" meant that he was fully aware that his power to disclose this material to journalists was not "*uncontrolled*"; that he had turned his mind to the need to protect confidentiality and "*must have been aware*" that his trust in Ms Albrechtsen would not have been shared by Mr Drumgold or the Chief Minister given the public exposure of her strong opinions.[46] The Commission also found that Mr Sofronoff was aware that the Chief Minister was concerned to manage public dissemination of the Inquiry Report and that it was "*obvious*" that he was likely to object to provision of the Inquiry Report to journalists prior to its public release and consider legal action to prevent that occurring.[47]

(c) at [134] (that he "*concealed*" the decision to release Confidential Matter and the Inquiry Report from persons who he knew had the right to be afforded the opportunity to object), the Commission had made the findings referred to at (a) and (b) above in relation to Mr Sofronoff's experience, consideration of the need to protect confidentiality and intention to foreclose the power to prevent provision of the Inquiry Report to journalists, as well as that he deliberately omitted consult with Counsel Assisting about the proposed course to avoid receiving an unwanted opinion.[48]

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[43] Commission's Report at [45]-[49].

[44] Commission's Report at [85].

[45] Commission's Report at [89[].

[46] Commission's Report at [130].

[47] Commission's Report at [85].

[48] Commission's Report at [85].

70. Sub-ground 4(c) assumes that the impugned findings must be unreasonable or irrational because Mr Sofronoff gave evidence that he did not subjectively consider that he owed an obligation of natural justice; and the Commission did not find that evidence was deliberately false: AS [86]-[88]. That assumption is in error, in circumstances where the Commission was entitled to draw inferences as to Mr Sofronoff's state of mind from relevant circumstances which led it not to accept his evidence. It was also not to the point whether Mr Sofronoff gave "*deliberately*" false evidence.[49]

71. In any event, the Commission did not (and was not required to) approach s 9(1)(a)(iii) of the IC Act on the basis that "*misbehaviour*" required a particular state of mind. The Commission's reasons at [132]-[134] are by way of response to Mr Sofronoff's submission recorded at [131] including that he acted honestly and in good faith.

E. The grounds of review concerning the second limb (grounds 5 to 11) should be dismissed if entertained

Mr Sofronoff's challenges to specific factual findings should be rejected if entertained (cf grounds 8 to 11)

Introduction to grounds 8 to 11

72. Before descending into the detail of ground 5 (concerning the Commission's intermediate finding that Mr Sofronoff engaged in conduct that was "*not honest*" or was "*not impartial*" for the purposes of s 9(1)(b)(i) of the IC Act), it is convenient to consider grounds 8 to 11. Those grounds provide building blocks to the allegation of jurisdictional error in sub-grounds 5(a) and (b). Unless Mr Sofronoff succeeds on all of grounds 8 to 11, he will necessarily fail on sub-grounds 5(a) and (b).

73. Grounds 8 to 11 challenge findings in four specified paragraphs of the Commission's Report ([134], [138], [140] and [81]), each of which involve the Commission's characterisation of Mr Sofronoff's conduct or are a step along the way to such characterisation. Those findings are challenged on the asserted basis that there was no evidence to support them, or otherwise that they were illogical, irrational and/or unreasonable.

74. The specific findings impugned by grounds 8 are each said to be affected by jurisdictional error. The issue for determination is not, therefore, whether this Court would have made the challenged findings if it had the authority vested in the Commission by the IC Act. Nor is this proceeding akin to an appeal by way of rehearing in which (subject to observing the natural limitations of the appellate process) this Court has power to give the decision and

[49] See the discussion of this issue in the context of ground 8 to 10 in paragraph 86 below.

make the findings that it considers ought to have been given in the first instance. Rather, Mr Sofronoff must demonstrate an absence of evidence or illogicality or unreasonableness that rises to the level of jurisdictional error before any of grounds 8 to 11 could be regarded as being made out. In other words, grounds 8 to 11 could only be upheld if this Court were to hold that the Commission was not authorised to make the findings that Mr Sofronoff challenges, even though, as a general proposition, authority to make and record findings after completing an investigation is vested in the Commission and is not subject to a right of appeal.

75. Despite the foregoing, much of Mr Sofronoff's submissions on grounds 8 to 11 read as if they were prepared in relation to an appeal by way of rehearing in which it would be for this Court to decide (within the natural limitations of the appellate process) what findings it considers should have been made.

76. Properly analysed, jurisdictional error has not been established in relation to any of the findings impugned by grounds 8 to 11. On a fair understanding of the findings and analysis recorded in the Commission's Report, the Commission was entitled to make the findings that it made.

"[H]onest[y]" for the purposes of s 9(1)(b)(i) of the IC Act

77. In considering Mr Sofronoff's challenges to the specific findings referred to in grounds 8 to 11, it is important to recall the legislative context in which those findings were made.

78. A question that arose for the Commission's consideration in its investigation was whether Mr Sofronoff's conduct should be characterised as "*not honest*" for the purpose of s 9(1)(b)(i) of the IC Act. The Commission directed itself that conduct was not honest for that purpose "*when it would be regarded as such according to the standards of ordinary, decent people*" and considered that it is "*not necessary that the official appreciated or realised that his or her conduct would be regarded as 'dishonest'*."[50] There is no challenge to this construction of the phrase "*not honest*" in s 9(1)(b)(i) of the IC Act.

79. Thus, the principally relevant question for s 9(1)(b)(i) purposes was not whether Mr Sofronoff thought his conduct was appropriate[51] but rather whether Mr Sofronoff's conduct, in all of the circumstances of the particular case, should be characterised as "*not honest*".

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[50] See *Berejiklian v Independent Commission Against Corruption* [2024] NSWCA 177 at [308].

[51] Cf AS at [106]-[114].

The no evidence sub-grounds to grounds 8 to 10 should be dismissed if entertained

80. That observation defeats Mr Sofronoff's "*no evidence*" sub-grounds forming part of grounds 8 to 10. Those sub-grounds (and, as will be seen, the corresponding sub-grounds based on irrationality or legal unreasonableness) proceed on the erroneous assumption that it was necessary for the Commission to be satisfied (and to find and to record a finding) that Mr Sofronoff knew that his conduct involved impropriety despite his evidence to the contrary. That assumption is inconsistent with the correct understanding of s 9(1)(b)(i) as found in the unchallenged passage of the Commission's report referred to above.

The legal unreasonableness sub-grounds forming part of grounds 8 to 10 should be dismissed if entertained

81. The legal unreasonableness sub-grounds forming part of grounds 8 to 10 should be rejected for a similar reason.

82. Those sub-grounds are said to be supported by three matters, each of which proceed on the basis of one or more misapprehensions.

83. First, Mr Sofronoff asserts that the Commission did not express any finding that Mr Sofronoff's evidence should be rejected: AS [118]. That submission reflects a misreading of the Commission's Report. The Commission had at various points declined to accept the Mr Sofronoff's evidence, and explained why this was the case. For example, the Commission:

(a) rejected Mr Sofronoff's evidence that it had never occurred to him that he needed to consult with the Chief Minister prior to providing the Inquiry Report to the journalists;[52]

(b) stated that Mr Sofronoff's omission to consult with counsel assisting about the proposed disclosure of the Inquiry Report strongly tended to the conclusion that Mr Sofronoff did not actually believe that the legality of his decision to do so was beyond doubt;[53]

(c) explained its view that had Mr Sofronoff genuinely believed he was entitled to make the disclosures of the Inquiry Report, there would have been no reason for not advising the Chief Minister;[54] and

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[52] Commission's Report at [117].

[53] Commission's Report at [85].

[54] Commission's Report at [103].

(d) found that Mr Sofronoff's explanations in his affidavit material did not explain or justify secretly giving the Confidential Matter to Ms Albrechtsen, or the Inquiry Report to Ms Albrechsten 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*".[55]

84. It is true that the Commission did not find that all of Mr Sofronoff's evidence before the Commission should be rejected or make a general finding that Mr Sofronoff knew that his appreciated that his conduct would be regarded as not honest. But such a finding was unnecessary in light of the correct understanding of the phrase "*not honest*" in s 9(1)(b)(i) as referred to above.

85. The second "*matter*" said by Mr Sofronoff to support a conclusion of legal unreasonableness is Mr Sofronoff's assertion that absent rejection of his evidence "*there is no rational, or evidence and intelligible justification for the findings of dishonesty, bad faith and partiality*". That undeveloped submission does not add to the first "*matter*" and suffers from the same vices: the Commission did, in fact, reject aspects of Mr Sofronoff's evidence and it was unnecessary for it to go further in order to make the findings that it did.

86. The final "*matter*" relied on by Mr Sofronoff relies on a *non sequitur* (or, more precisely, on the Commission's failing to adopt reasoning that would involve a *non sequitur*). As part of the final "*matter*" relied on in this aspect of his application, Mr Sofronoff asserts that the specific findings that he challenges by grounds 8 to 10 "*actually depend on an anterior finding*" that Mr Sofronoff "*deliberately gave false evidence*" to the ACT Supreme Court and to the Commission. That assertion is in error. As has already been explained, the standard by which Mr Sofronoff's conduct was relevantly to be assessed was whether it was "*not honest*" according to the standards of ordinary decent people. In order to make a finding of absence of honesty, it was unnecessary for the Commission to find that Mr Sofronoff deliberately gave evidence to the effect that he thought that his conduct was appropriate. Further, to the extent that the Commission rejected Mr Sofronoff's evidence as to his state of mind, it was not necessary for the Commission to find that Mr Sofronoff's evidence to the contrary was deliberately false. Whether Mr Sofronoff's evidence was dishonest or mistaken insofar as it was inconsistent with the Commission's findings is not to the point. The relevant point was whether, on the facts as found by the Commission, Mr Sofronoff's conduct should be characterised as "*not honest*". The Commission was entitled to so characterise Mr Sofronoff's conduct without finding that Mr Sofronoff "*deliberately gave false evidence*".

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[55] Commission's Report at [90].

Ground 11 ("covert" conduct etc) should be dismissed if entertained

87. As to what is said to be the "*bizarre*" or "*extreme*" findings about "*covert disclosure*" and "*dishonest concealment*" (AS [121]-[129]), the manner in which the Commission addressed "*dishonesty*" is considered above. These findings were found to be dishonest on the basis of what the Commission found Mr Sofronoff must have known that Mr Drumgold and the Chief Minister would have sought to do if they were aware of the disclosures made by Mr Sofronoff. There was nothing bizarre or irrational about taking into account the fact that the disclosures were not done transparently. Such absence of transparency is supportive of a finding of dishonesty. It is not to the point that Mr Sofronoff "*freely told*" his (by then former) counsel assisting and staff of his disclosure of the Inquiry Report to Ms Albrechtsen at a celebratory dinner (to his former Executive Director's "*shock[ ]*" and "*extreme concern[ ]*": see Commission's Report at [64]). The relevant concealment of the disclosure of the Inquiry Report to Ms Albrechtsen and Ms Byrne was the concealment from the Chief Minister who, the Commission found, had an "*obvious direct legal and actual interest*" in disclosure not occurring unless and until he made a decision to make the Inquiry Report public as contemplated by the Inquiries Act.[56] It was open to the Commission to take that concealment into account in deciding whether to find that Mr Sofronoff did not act honestly according to the standards of ordinary, decent people. The matter of how much weight to give that fact of concealment was a matter for the Commission. [57]

Browne v Dunn does not apply to investigative proceedings

88. Finally, the Court should reject Mr Sofronoff's apparent invitation to invite this Court to apply to so-called "*rule in Browne v Dunn*" to this proceeding for judicial review: see AS at [115],-[116], [120]. That "*rule*" applies to *inter partes* proceedings; not to investigative proceedings of the kind before the Commission.

89. In any event, the suggestion that the serious findings that the Commission ultimately made were not "*put*" to Mr Sofronoff should be rejected. As well as being examined orally, Mr Sofronoff was given a copy of the Commission's draft report before it was finalised and given an opportunity to comment upon it. Those comments were taken into account in issuing the Commission's final report. No unfairness of the kind to which the "*rule in Browne v Dunn*" is directed infects the procedural course that the Commission took or the findings that it made.

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[56] See Commission's Report at [103].

[57] See, eg, *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 648 [131].

No jurisdictional error was committed in relation to the Commission's findings concerning honesty and impartiality (cf ground 5)

90. As Mr Sofronoff has done, the Commission relies on its submissions in respect of grounds 8-11 (above) in respect of grounds 5(a) and (b). Those submissions demonstrate that Mr Sofronoff is wrong to assert that the Commission's findings concerning honesty and partiality were made without evidence or were irrationally made. Properly analysed, the findings challenged by Mr Sofronoff fell within the scope of the Commission's fact-finding function. As explained in paragraph 86 above, irrationality is not demonstrated by the Commission's failure to find that Mr Sofronoff gave "*deliberately false evidence*". As there explained, the question of whether Mr Sofronoff gave "*deliberately false evidence*" was not to the point of the Commission's analysis.

91. As to sub-ground 5(c) (which is said only to "*reinforce*" the conclusion otherwise said to be available having regard to sub-grounds 5(a) and (b)), Mr Sofronoff alleges an "*irrational leap of logic*" that the Commission did not in fact make (cf AS [92]).

92. As already noted, it seems to be common ground that honesty for the purposes of s 9(1)(b)(i) of IC Act is to be assessed against the standards of ordinary decent people. That said, the Commission accepts that honesty in that sense cannot, as Mr Sofronoff puts it (AS [92]), "*be completely divorced from the actual state of mind of the person whose honesty is in issue*".

93. The Commission did not proceed otherwise.

94. The Commission found (at [134], [136]) that Mr Sofronoff had made deliberate and intentional decisions to provide the Confidential Matter and the Inquiry Report to journalists, which he had not disclosed to the Chief Minister or other interested persons. It found (at [130]) that Mr Sofronoff was necessarily "*fully aware*" that he lacked uncontrolled power to disclose the material to journalists or to make it public. In addition, the Commission declined to accept that Mr Sofronoff actually held the view that the fact that the Inquiry Report was embargoed meant that the Chief Minister's legal rights were unaffected, and instead found that he "*realised there was at least a reasonable possibility the embargo did not suffice to maintain the legislative scheme but proceeded nonetheless.*": Commission's Report at [117].

95. To the extent that the Commission reasoned (at [136]) that "*any reasonable person*" would understand the legal effect of disclosure of the final Inquiry Report to Ms Albrechtsen and Ms Byrne was to remove from the Chief Minister the sole discretion to decide whether and to what extent to make that Report public if the embargo were not honoured, the Commission was not taking an approach to honesty that was "*completely divorced from the*

actual state of mind of the person whose honesty is in issue" as Mr Sofronoff seems to allege: see AS [92]. Rather, the identified finding was a step along the way to a finding that Mr Sofronoff – a person who the Commission found had significant legal, judicial and inquiry experience[58] – was put in a "*false position*" by the "*deliberate acts*" of Mr Sofronoff. In other words, on the Commission's findings, Mr Sofronoff knew that his "*deliberate acts*" would put the Chief Minister in the "*false position*" of no longer having the sole discretion to decide whether or not to make the Inquiry Report public as the Inquiries Act contemplated. That finding was well open to the Commission to make.

96. As to partiality (AS [93]), the Commission did identify the different interests at stake (those of the journalists and countervailing interests of participants in the Inquiry and the Chief Minister)[59] and found that Mr Sofronoff must have been well aware that Mr Drumgold and the Chief Minister would not share his trust of the journalists, particularly Ms Albrechtsen given her strong published opinions adverse to Mr Drumgold.[60] The premise for Mr Sofronoff's argument challenging the Commission's findings on partiality therefore falls away.

No jurisdictional error was committed in relation to the Commission's findings concerning "*breach of public trust*" (cf sub-ground 6)

97. Sub-ground 6(a) alleges that the Commission erred in its construction of the phrase "*breach of public trust*" in s 9(1)(b)(ii)(A) of the IC Act, by failing to construe it as requiring breach of a public official's duty of loyalty: see AS [94]-[99]. That alleged error did not occur. The Commission twice expressly stated that it accepted that a breach of public trust within the meaning of s 9(1)(b)(ii)(A) required breach of a public official's duty of loyalty.[61] To the extent this ground is concerned with the Commission's reference to conduct undertaken for "*ulterior reasons personal to the official*" in the Report at [137] (as suggested by AS [94]-[96]), if this is asserted to involve an error of construction, that error is addressed by fairly reading the whole of the Commission's reasons concerning breach of a duty of loyalty. The Commission identified the relevant conduct[62] and found that Mr Sofronoff had become a "*fellow traveller*" with Ms Albrechtsen in a manner which intensified over time, conflicting with his duty to

[58] Commission's Report at [130].

[59] Commission's Report at [141].

[60] Commission's Report at [130].

[61] Commission's Report at [137], [138].

[62] Commission's Report at [136]-[139].

the Territory to maintain the integrity of the Inquiry's processes.[63] In other words, having accepted that Mr Sofronoff's duties as the holder of an office of public trust imposed upon him a duty of loyalty, the Commission found that that duty was breached because he acted inconsistently with that duty. The suggestion that the Commission proceeded otherwise should be rejected.

98. Mr Sofronoff further contends that the Commission was asking itself the wrong question when considering the "*breach of public trust*" issue because a breach of public trust requires an improper motive beyond wilfulness for the relevant *mala fides* to be present: AS [100]-[103]. The Commission accepted this, expressly stating that – as Mr Sofronoff submits (and had submitted to the Commission) – a breach of duty done honestly and in good faith would not constitute a breach of public trust.[64]

99. Mr Sofronoff then submits (AS [103]) in aid of sub-ground 6(b) that the analysis in the Report at [138]-[139] does not disclose a rational basis for finding that the "*features*" of a breach of public trust existed. That submission should be rejected. The Commission's reasons concerning breach of public trust extend from [136]-[140] of the Report. In those paragraphs, the Commission found that Mr Sofronoff deliberately placed the Chief Minister in a "*false position*" in relation to publication of the Inquiry Report, that his actions in covertly disclosing the Confidential Matter to Ms Albrechtsen demonstrated a lack of fidelity and good faith to the task with which he was instructed and that he had become a "*fellow traveller*" with Ms Albrechtsen, contrary to his important public function of reporting in a manner that would retain public confidence and could be relied on.[65] The Commission further found that Mr Sofronoff either understood that his actions were in breach of his statutory functions but decided to undertake them "*for what he thought to be more important considerations*", or understood that he may not have been authorised to act as he did but decided to proceed regardless, in a manner that was "*calculated to undermine the rights of those whose legal interests and legitimate expectations were adversely affected*".[66] This was found to entail a lack of bona fides in the relevant sense.[67] There was no failure to identify an unauthorised end cognisable in terms of the duty of loyalty, or an improper motive beyond wilfulness.

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[63] Commission's Report at [138], [139].

[64] Commission's Report at [137].

[65] Commission's Report at [137]-[139].

[66] Commission's Report at [140].

[67] Commission's Report at [140].

No jurisdictional error was committed in relation to the Commission's findings as to misuse of information (cf ground 7)

100. Ground 7 is dealt with in only a single paragraph of Mr Sofronoff's submissions. That paragraph wrongly proceeds on the premise that the Commission has some duty to record "*necessary findings of fact*" before it is authorised to make intermediate findings including, relevantly, the Commission's finding that Mr Sofronoff's divulging of the Confidential Matter to Ms Albrechtsen and his divulging of the Inquiry Report to Ms Albrechtsen and Ms Byrne amounted to a misuse of information within the meaning of s 9(1)(b)(ii)(B) of the IC Act.

101. That misunderstands the relevant statutory scheme, which imposes no duty on the Commission to give reasons of a particular quality or at all. And even if such a duty existed, a breach of it would not mean that the Commission's Report was affected by jurisdictional error.[68]

102. This is not to say, of course, that the absence of reasons or inadequacy of reasons cannot support a conclusion of jurisdictional error.[69] It is, however, to say that jurisdictional error is not demonstrated merely by an applicant asserting that allegedly "*necessary findings of fact*" do not appear on the face of a report as Mr Sofronoff does in his submissions.

103. In any event, there is no basis for the Court to find jurisdictional error in relation to the Commission's finding that Mr Sofronoff engaged in a "*misuse of information or material*" within the meaning of s 9(1)(b)(ii)(B) by divulging the Confidential Matter to Ms Albrechtsen and by divulging the Inquiry Report to Ms Albrechtsen and Ms Byrne before the Chief Minister made a decision publicly to release that report. Prior to recording that finding, the Commission had already explained (at [15]) that "*misuse*" for the purposes of s 9(1)(b)(ii)(B) of the IC Act involves use of information or material in circumstances involving a lack of probity ("*international, reckless or dishonest*" use) rather than "*mere ineptitude*" with probity "*depend[ing] on the functions of the official and not their personal opinion about whether some different or wider purpose needed to be served*", had recorded its view that the Confidential Matter and the Inquiry Report embodied material that had been acquired by him[70] and explained why it regarded the divulging of the Confidential Matter to Ms Albrechtsen and the divulging of the Inquiry Report to Ms Albrechtsen and Ms Byrne to lack probity.[71] It was unnecessary for the Commission to repeat those findings lest jurisdictional error be committed.

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[68] See, eg, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212.

[69] See, eg, *Avon Downs v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.

[70] Commission's Report at [106]-[107].

[71] Commission's Report at [136]-[139].

F. The ground of review concerning the s 10 question (ground 12) should be rejected

104. Ground 12 wrongly seeks to apply the decision of the High Court in *Independent Commission Against Corruption v* ***Cunneen*** (2015) 256 CLR 1 to the IC Act, an Act that is materially different to the (since relevantly amended) legislation considered in *Cunneen*.

105. The principal question for determination in *Cunneen* was whether the ambiguous expression "*adversely affects, or that could adversely affect, … the exercise of official functions by any public official*" in the definition of "*corrupt conduct*" in a since amended version of the *Independent Commission Against Corruption Act 1988* (NSW) referred only to effects or potential effects on the probity of the exercise of an official function or whether it also included effects or potential effects on the efficacy of the exercise of an official function.[72] Four Justices of the High Court (French CJ, Hayne, Kiefel and Nettle JJ) and two judges of appeal (Basten and Ward JJA) said the former; one Justice of the High Court (Gageler J), one judge constituting the NSW Court of Appeal (Bathurst CJ) as well as the primary judge (Hoeben CJ and CL) said the latter.

106. No similar ambiguity exists in relation to the definition "*serious corrupt conduct*" in s 10 of the IC Act.

107. It is plain that, under the IC Act, several kinds of conduct that affect only the efficacy as distinct from the probity of public administration may constitute "*corrupt conduct*" for the purposes of that Act. For example, "*collusive tendering*", fraud in relation to applications for certain licenses, permits or other authorities and "*defrauding the public revenue*" are all capable of constituting "*corrupt conduct*" for the purposes of the IC Act[73] even though such conduct might not affect the probity of public administration in the sense referred to in *Cunneen*.

108. Once that is appreciated, Mr Sofronoff's contention – based on *Cunneen* – that his conduct is not capable of constituting "*serious corrupt conduct*" for the purposes of the IC Act is revealed to be misplaced.

109. The word "*integrity*", like the phrase "*adversely affects*", is protean. While it can refer to "*soundness of moral principle; uprightness; honesty*" as Mr Sofronoff suggests (probity), it can also refer to something being "*sound, unimpaired, or perfect condition*" (efficacy).[74] The latter meaning is the legal meaning of the word "*integrity*" in s 10 of the IC Act.

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[72] See *Independent Commission Against Corruption v* ***Cunneen*** (2015) 256 CLR 1 at 9 [1].

[73] See *Integrity Commission Act 2018* (ACT) s 9(1)(b)(v).

[74] See Macquarie Dictionary, definition of "*integrity*", third sense.

110. If it were otherwise, there would be classes of "*corrupt conduct*" falling within s 9 that could not by reason of s 10 be described by the Commission in an investigation report as "*corrupt conduct*", no matter how serious. For example, if the Commission uncovered endemic Territory-wide collusion among tenderers for ACT government contracts or serious and systemic fraud in the making of applications for licences issued under statutes designed to protect health or safety,[75] that corrupt conduct could not be described as such in an investigation report because, on Mr Sofronoff's approach, the conduct would have no impact on the integrity as opposed to the probity of government or public administration and therefore could not constitute "*serious corrupt conduct*" no matter how objectively serious the collusion or fraud was. That is an unlikely construction of s 10, which does not qualify the definition of "*corrupt conduct*" in s 9 but is rather directed to ensuring that only serious correct conduct can be labelled as such due to the risk of such labelling to reputation.

111. The correct construction of s 10, and one that is "*consistent with the language and purpose of all the provisions of the statute*",[76] is a construction that treats all "*corrupt conduct*" as being capable of constituting "*serious corrupt conduct*". On that approach, conduct falling within the definition of "*corrupt conduct*" in s 9 of the IC Act is "*serious corrupt conduct*" if it is of such seriousness as to be likely to threaten public confidence in the probity or efficacy of government or public administration. As the Commission put it in its Report (at [16]): "*it is sufficient [for the purposes of s 10] if a likely consequence of the identified corrupt conduct is to threaten public confidence in the soundness or efficacy, as district from probity, of government or public administration*". The Commission made no error in proceeding accordingly.

112. Mr Sofronoff also contends in a single paragraph (AS [140]) that the Commission's finding that Mr Sofronoff's conduct was "*serious corrupt conduct*" is "*both unreasonable and illogical*". That submission appears to be based on an erroneous suggestion that the Commission had a duty to provide reasons of a particular quality lest jurisdictional error be committed.[77]

113. The contention that the Commission's finding that Mr Sofronoff's conduct constituted "*serious corrupt conduct*" for s 10 purposes was "*both unreasonable and illogical*" is in any event without merit. It is obvious that divulging of Confidential Material to a journalist contrary

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[75] These examples are adapted from Gageler J's reasons in *Cunneen* at [92], which seem to have inspired the insertion of ss 8(2A)(a) and (b) to the *Independent Commission Against Corruption Act 1988* (NSW) and s 9(1)(v)(A) and (B) of the *Integrity Commission Act 2018* (ACT).

[76] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

[77] Cf the statutory obligation to give reasons under s 501G(1)(e) of the *Migration Act 1958* (Cth) in issue in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 224 [40], cited AS [140].

to obligations of confidentiality prescribed by the Inquiries Act and the divulging of the Inquiry Report in contravention of the Inquiries Act are both apt to undermine public confidence in the probity and efficacy of public administration, specifically that aspect of public administration constituted by the Inquiries Act. In a society governed by the rule of law, the general public is entitled to have confidence that public officers such as those appointed to conduct inquiries comply with and do not undermine the law. The Commission was entitled to find that Mr Sofronoff's conduct (involving, as it did, breaches of the Inquiries Act) was likely to threaten public confidence in the probity 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*".

114. Ground 12 should be dismissed if it is entertained.

G. Conclusion and relief

115. For these reasons, if this proceeding is to be entertained, Mr Sofronoff should have leave to file his proposed AOA but that application should be dismissed with costs.

116. If, despite the above, the Court is satisfied that all of the ultimate findings summarised in paragraph 5 of the Commission's Report were affected by jurisdictional error, the Commission accepts that the Court should make a declaration along the lines of prayer 1 of Mr Sofronoff's AOA.[78]

117. In no event should the Court make the positive declaration proposed in prayer 2 of the AOA (a declaration that certain conduct does not amount to "*corrupt conduct*"). Making such a declaration would wrongly involve the Court assuming the authority to make findings concerning alleged corrupt conduct that is vested in the Commission and not in courts.

8 May 2025

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[78] Although nothing is likely ultimately to turn on it, the relevant empowering provision to make a declaration is not s 20(1) of the *Supreme Court Act 1933* (ACT). Rather, it is s 21 of the *Federal Court of Australia Act 1976* (Cth). As Mr Sofronoff correctly submits (at [9]), this Court has jurisdiction (in the sense of authority to decide) this matter by reason of s 9(3) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) read with s 4(1) of the *Jurisdiction of Courts (Cross-Vesting) Act 1993* (ACT). Those provisions have the effect that this Court has and may exercise original jurisdiction in respect of "*ACT matters*". "*ACT matters*" include matters in which the Supreme Court of the Australian Capital Territory (**ACTSC**) has jurisdiction otherwise than by reason of a law of the Commonwealth or another State or Territory. The ACTSC has jurisdiction in relation to this matter by reason of ss 20(1)(a) of the *Supreme Court Act 1933* (ACT).