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Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	16/05/2025 4:00:50 PM AEST
Date Accepted for Filing:	16/05/2025 4:00:50 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 IN REPLY

A. INTRODUCTION

1. These submissions reply to the submissions of the Speaker of the ACT Legislative Assembly dated 30 April 2025 (**SS**), and the Respondent's Submissions dated 8 May 2025 (**RS**). The Speaker seeks leave to intervene as *amicus curiae* to argue that by reason of parliamentary privilege, the Juno Report cannot be admitted into evidence in this proceeding for the purpose of seeking judicial review of it, and that the proceeding therefore ought to be dismissed. The Respondent takes no separate position on the parliamentary privilege issue (**RS [1]-[3]**). The Respondent concedes that it was in error to conclude that the Applicant could have committed a contempt contrary to s 36 of the *Inquiries Act.* As will be explained, that concession is significant, and entitles the Applicant to the substantive relief he seeks in this proceeding.

B. PARLIAMENTARY PRIVILEGE

2. The Speaker seeks leave to appear as *amicus curiae* to argue that the Juno Report is "proceedings in Parliament" for the purposes of s 16(2)(c) and/or (d) of the *Parliamentary Privileges Act 1987* (Cth) (the **PP Act**), and that the proposed use of the Report in these proceedings would infringe parliamentary privilege. As the Speaker concedes (**SS [54]**), the Juno Report was "published … by the Commission in accordance with s 190 of the Act". It is the Juno Report published *by the Commission*, on the website *of the Commission*, pursuant to a statutory duty imposed *on the Commission*, that is the subject of the proposed declarations sought in the Applicant's Amended Originating Application: see Affidavit of Glen Michael Cranny sworn 14 April 2025 at [4]-[7].

3. This report is not "proceedings in Parliament" within the meaning of s 16(3)(c) or (d) of the PP Act. Further, even if the Juno Report were "proceedings in Parliament", its use in this proceeding is not for a purpose precluded by the operation of s 16(3) of the PP Act. The Speaker's submissions should be rejected.[1]

Document for "purposes of or incidental to" the transacting of the business of Parliament

4. The Report by the Commission is not "the preparation of a document for purposes of or incidental to the transacting of" the business of the Legislative Assembly of the ACT.

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[1] The Speaker has made this same argument in proceedings seeking judicial review of a report of the ACT Integrity Commission in *Cover v ACT Integrity Commission* (Proceedings SC 199 of 2024) heard in the Supreme Court of the Australian Capital Territory before Mossop J, in respect of which judgment is presently reserved.

5. *First,* the mere fact that a Report of the Commission is required to be given by the Commission to the Speaker (IC Act, s 189(1)(a)) does not supply the requisite "functional connection" in the sense described by the plurality in *Crime and Corruption Commission v Carne* (2023) 97 ALJR 737 at [36] (***Carne***). So much is clear from the plurality's statement that "[t]he mere preparation of a document for [the Assembly or a committee], or presentation of a document to them, by a third party will not suffice if there is no other connection to their work at the time the document was prepared".

6. It is readily apparent from the scheme of the IC Act that no such connection exists. The "objects" of the IC Act in s 6 provide that the purpose of the Commission's work is (inter alia) the public *exposure* of corrupt conduct (see s 6(a), (b), (c), (f)). The Commission has "complete discretion in the exercise of the commission's functions" (s 22). Its functions, as set out in s 23, include to "investigate conduct that is alleged to be corrupt conduct" (s 23(1)(a)) and "publish information about investigations conducted by the commission" (s 23(1)(d)). None of its functions refer to the purpose of its investigations, or the preparation of its reports, being connected to proceedings in the Legislative Assembly. Indeed, the separation of the Commission from the Legislative Assembly is exemplified in the preclusion of the commission from even employing a person who has been a member of the Legislative Assembly in the preceding 2 years (s 50(2)(a)). The provisions cited at **SS [10]-[12]** relating to the mechanics of the appointment of the Commissioner by the Assembly do not establish an "intimate connection" between the Assembly and the Commission, just as a power of appointment and removal granted to a Minister of the Crown in respect of a statutory office-holder would not give rise to a conclusion that things done by the office-holder are done for the purpose of the Minister (instead of for the express purposes stated in the statute governing the office-holder's powers and duties).

7. *Second,* and relatedly, it is clear from the IC Act as a whole, and Part 3.9 specifically, that an investigation report is created for the purposes of the IC Act, pursuant to the functions imposed on the Commission by that Act. It is not created for the purposes of, or incidental to, proceedings in the Legislative Assembly. Indeed, the Commission does not even have to wait until a report is in fact tabled by the Speaker in the Parliament before publishing it on its website pursuant to s 190. These provisions, read in the context of the functions of the Commission and the purpose of the IC Act, demonstrate *objectively* that the purpose of the preparation of the Report was not for the purposes of the Legislative Assembly.

8. *Third,* the Speaker does not gain any assistance from the Commission being declared to be an "independent officer of the Legislative Assembly" (s 21(1)). As s 21(3) makes clear,

there are "no implied functions, powers, rights immunities or obligations arising from the commissioner being an independent officer of the Legislative Assembly". And that the Commission is so designated does not mean that everything the Commission does is therefore "proceedings in Parliament". That argument was rejected by the Court in *Australian Capital Territory v SMEC Australia Pty Ltd* [2018] ACTSC 252; 337 FLR 390 at [54]-[56], in the context of the *Auditor-General Act 1996* (ACT) which similarly provided in s 6A(1) that "[t]he auditor-general is an independent officer of the Legislative Assembly". The Court in *SMEC* observed (at [55]-[56]) that:

> …it cannot be said as a blanket rule that the activities of the Auditor-General, and confidential communications to her or her office, attract the privilege by mere virtue of the nature of the position.
>
> Just as the authorities referred to above indicate that not every confidential communication with a politician will attract the privilege, the fact that the Auditor-General is preparing a report and obtains confidential information in the course of such preparation does not mean that the information is protected from disclosure by parliamentary privilege.

9. The Speaker's submissions do not confront this aspect of the Court's reasoning in *SMEC,* nor does the Speaker attempt the task of persuading the Court that the reasoning is "plainly wrong" and should not be followed. The Speaker's submission is also inconsistent with the clear indications in the legislative history that things done by the Commission *are* capable of being tendered in proceedings (and the Speaker's own contention that judicial review will sometimes be available: see **SS [68]**). The Explanatory Memorandum to the Integrity Commission Bill 2018 (at 84-85) indicates that decisions made by the Commission under s 143 in relation to public hearings, and directions made under s 146 in relation to examinations, are decisions which are subject to review under the *Administrative Decisions (Judicial Review) Act 1989* (ACT) and that a person could request a statement of reasons under that Act. Yet if the Speaker's construction of the IC Act were correct (see, esp **SS [67]**) those reasons would be "proceedings in Parliament" and incapable of being tendered in evidence by operation of the PP Act. It is clear from this history that by making the Commission an "independent officer of the Legislative Assembly", the legislature did not intend that everything the Commission did would attract parliamentary privilege.

10. Yet the Speaker's argument must logically invoke the proposition that because of s 21, everything the Commission does is "proceedings in Parliament". That submission emerges most clearly from **SS [67]**, where it is suggested that the Commission is not part of the executive government and is not a "stranger to Parliament". It is not clear how it is said as a matter of legal theory that the Commissioner is not part of the "executive government",

noting that the Commissioner is an independent body on which the legislature has conferred statutory powers and duties. That the Commissioner is not a "stranger to Parliament" does not advance the argument. A member of Parliament is not a stranger to the Parliament. And yet, as explained below, not everything a member of Parliament does falls within the concept of "proceedings in Parliament".

11. This leads to the *fourth* point, which is to return to the critical importance of the distinction between the report which has apparently been published pursuant to Standing Order 212A, and the Juno Report which was published on the website of the Commission pursuant to s 190 of the IC Act. In *British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing* (2011) 195 FCR 123 (***BAT***), Keane CJ, Downes and Besanko JJ held that s 16(3) did not extend to the publication "by the executive government (or anyone else) of statements made in Parliament" (at [50]). Applied to this case, the publication of the Juno Report on the website pursuant to s 190 does not attract privilege. The Speaker's attempt to distinguish this authority — which is binding on this Court — is unpersuasive (**SS [66]-[67]**). The basis on which it is sought to be distinguished is that s 190 of the IC Act "required" publication, and s 190 is legislation which has been passed by the ACT Legislative Assembly. That reasoning confuses a *statute* which has been passed by the Parliament with the concept of an order of the Parliament itself. There is nothing in *BAT* which would support the (radical) proposition that because a *statute* directs that a document be created or published, the document so created or published is therefore protected by parliamentary privilege. Such a radical proposition would strike at the heart of the separation of powers at every level of Australian government. It should be rejected.

12. This point is fortified by the decision of Crispin J in ***Szwarcbord*** *v Gallop* (2002) 167 FLR 262, where it was sought to be argued by the Speaker that a report prepared pursuant to the *Inquiries Act 1991* (ACT) was similarly not capable of being tendered by reason of parliamentary privilege. Justice Crispin concluded that privilege would "not attach to copies of the document which were not prepared or used for" a purpose of or incidental to the transaction of business of the Assembly, *even if* other copies of the report did attract the privilege (at [22]). The Speaker attempts to distinguish this authority by suggesting there is a "critical distinction" by reason of the fact that although the *Inquiries Act* required the Chief Minister to be provided with a copy of the report, the Chief Minister had a discretion whether or not to present that report to the Legislative Assembly. As has been explained, there is nothing in the IC Act which supports the proposition that an investigation report is prepared for the purposes of the Legislative Assembly. In any event, the Speaker's

submission does not offer a sufficient basis for the Court not to follow *Szwarcbord:* the publication of the copy of the Report on the Commission's website has nothing to do with the purposes of the Legislative Assembly, and as *Szwarcbord* makes clear, copies made for other purposes do not attract privilege. (This accords with the numerous authorities which similarly emphasise that a statement made inside Parliament is not protected if repeated outside Parliament: *Faruqi v Hanson* [2024] FCA 225 at [22] (Stewart J), *Buchanan v Jennings* [2005] 1 AC 115 at [12]-[17]; *Beitzel v Crabb* [1992] 2 VR 121 at 127-128 (Hampel J);and in relation to copies of documents see *Ellis v The King* (2023) 306 A Crim R 404 at [38]-[59] (applying *Szwarcbord*)).

13. *Finally*, the Speaker points to no principle underlying the absolute privilege accorded to parliamentary statements which would warrant its extension in the manner the Speaker proposes: see, by analogy, *Buchanan v Jennings* [2005] 1 AC 115 at [17]. There is nothing about the right of members of the Assembly to "speak their minds in [the Assembly] without any risk of incurring liability" which would be infringed by the non-application of the privilege to the s 190 copy of the Juno Report in this case. See also *R (Miller) v Prime Minister (Lord Advocate and others intervening)* [2020] AC 373 at [66]-[68]; *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341 at [41].

14. The Court should not accept the submission that the Juno Report is "the preparation of a document for purposes of or incidental to the transacting" of the business of the Legislative Assembly pursuant to s 16(2)(c) of the PP Act.

"By or pursuant to an order of a House or a committee"

15. The Report is also not a document which is made "by or pursuant to an order of a House or a committee" for the purposes of s 16(2)(d). That is because, as has been made clear, the Report which is tendered in these proceedings is not that which was published pursuant to Standing Order 212A of the Legislative Assembly, but rather the Report published by the Commission on its website under s 190 of the IC Act. To the extent the Speaker's submission is that the Report published on the website of the Commission under s 190 is published pursuant to an "order" of the Legislative Assembly, because the Parliament (by enacting s 190) "required" it to be published, that submission should be rejected for the reasons given at paragraph 11 above. That would be a radical construction of s 16(2)(d) of the PP Act, unsupported by any authority.

The proposed use of the Report does not infringe parliamentary privilege

16. Even if the Report were "proceedings in Parliament", the Report is not being tendered for any impugned purpose described in s 16(3)(a)-(c). The Speaker submits that in drawing a conclusion as to whether the Report is "infected by legal error", the Court would "fall foul" of the prohibitions in s 16(3)(a) and (c) (**SS [72]**) (namely, "questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament" or "drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament"). That submission should be rejected, having regard to the nature of these proceedings and the consequent purpose for which the Report is tendered.

17. *First,* the Applicant's grounds of review all contend that the Commission fell into jurisdictional error in making the Report. That is, the Applicant invites this Court to exercise its supervisory role in declaring that the making of the Report was outside the jurisdiction of the Commission conferred by the IC Act. As Bell CJ and Meagher JA explained in *Berejiklian v ICAC* [2024] NSWCA 177, the jurisdiction of the Court exercising supervisory jurisdiction in this way is confined "to ensuring that the Commission carried out its investigative and reporting functions, including with respect to the making of findings of 'serious corrupt conduct' in accordance with the statutory provisions which govern the performance of those functions and exercise of the relevant powers" (at [5]), and such proceedings are *not* an opportunity for the Court to undertake a "merits" review of the Commission's findings (at [6]). The *merits* of what the Commission has done are for the Commission (subject to political control). But determining the *lawfulness* of what the Commission has done is squarely within the role of this Court: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 (Brennan J).

18. The Speaker submits — relying on *Carne* — that it is "notable" that the High Court "expressed no doubt" that if the report had been a report under s 69(1) of the Queensland Act, it "would have attracted parliamentary privilege" (**SS [58(a)]**). But that submission overlooks the fact that the High Court expressly concluded it was *unnecessary to consider* whether parliamentary privilege would have precluded the declaration sought by Mr Carne and made by the Court of Appeal if it were engaged: see *Carne* (2023) 97 ALJR 737 at [24] observing that this was a "large question" (Kiefel CJ, Gageler and Jagot JJ), and see [117] (Gordon and Edelman JJ).

19. *Second,* to submit that the Court — in declaring whether the Report falls within or outside the limits of the IC Act — is impeaching proceedings in Parliament tends to overlook that Parliament *itself* sets the requirements in the IC Act concerning the conditions for the making of a Report by the Commission. The Court, in declaring whether the Report falls within or outside those limits is giving effect to what the Parliament itself has said in the IC Act, consistently with the Court's role in enforcing the limits which Parliament has expressly or impliedly set on the powers which Parliament has conferred on the Commission: see, by analogy, *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [46].

20. *Third,* it is not impermissible to consider statements in Parliament — including statements actually made within the chamber — where those statements constitute a Minister's reasons for decision in respect of which judicial review is sought. Thus, in *Pepper v Hart* [1993] AC 593, Lord Browne-Wilkinson explained that Hansard had "frequently been referred to with a view to ascertaining whether a statutory power has been improperly exercised for an alien purpose or in a wholly unreasonable manner".[2] Justice Gray referred in *Mees v Roads Corporation* (2003) 128 FCR 418 at [80], without apparent disapproval, to the English position that "examination of the content of [a statement to Parliament], even for the purpose of considering whether the decision is so unreasonable that no reasonable decision-maker could have made it, is not considered to be impeaching or questioning the statement". The content of the Juno Report here stands in no different position to such reasons for decision.

21. The Applicant does not ask the Court to receive the Report into evidence for any of the prohibited purposes in s 16(3)(a) or (c). The Report is tendered as a record of what the Commission said it was doing in (purported) exercise of powers under the IC Act. The Applicant asks this Court to adjudicate — consistently with its constitutional role — on whether what the Respondent has done is within or outside the limits imposed by the Assembly on the Respondent by the IC Act. That is not to question or rely on the truth, motive, intention or good faith of anything said by the Commission in the Juno Report. Nor is it to draw, or invite the drawing of, inferences or conclusions wholly or partly from anything forming part of the Juno Report.

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[2] Citing *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696, in which the Court relied on statements made by the Secretary of State in Parliament to conclude that a decision made by the Secretary was not unreasonable in the *Wednesbury* sense: at 749 (Lord Bridge of Harwich, Lord Roskill agreeing at 749-750), 755-756 (Lord Ackner, Lord Lowry agreeing at 763).

Residual matters arising from the Speaker's submissions

22. The Speaker acknowledges the Court "may be concerned" that the consequence of its radical construction is that there are "limited avenues for review of an investigative report presented to the ACT Speaker pursuant to s 189 of the IC Act" (**SS [68]**). This is indeed a strong reason for the Court to be wary of the overbroad construction of both the IC Act and the PP Act advanced, the effect of which is to shield from judicial review the conduct of a body which wields extraordinary statutory powers, with far-reaching consequences for the individuals subject to their exercise. It is telling that no similar argument has been raised in respect of the highly litigated *Independent Commission Against Corruption Act 1988* (NSW), notwithstanding that reports of that body are also furnished to the Presiding Officer of each House of Parliament (s 74(4), and see s 78(3)-(4)).

23. Weight should also be given to the presumption that "Parliament does not intend to cut down the jurisdiction of courts save to the extent the legislation expressly so states or necessarily implies" (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [72]) and the more fundamental precept that "all power of government is limited by law", and the "function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process and through the grant, where appropriate, of judicial remedies": *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [39]. That the effect of the Speaker's construction is to confer authority on Commission to determine the limits of its own jurisdiction is a very strong reason not to prefer that construction of the Act: *Coco v The Queen* (1994) 179 CLR 427 at 437-438.

24. In this context, the Speaker's submission that s 16 should be given an "expansive operation" must also be viewed with some circumspection (**SS [32]-[34]**). As the Full Court explained in *BAT* (2011) 195 FCR 123 at [55]:

> The Courts should not be astute to confine the scope of parliamentary privilege, but neither should they give effect to exorbitant claims which are apt to interfere with the rights of subjects without any corresponding benefit in terms of the freedom of debate in Parliament and the protection of Parliamentarians. See *Buchanan v Jennings* at [6]-[10]. It would, we think, give an unduly expansive operation to the provisions of Senate Standing Order 167 to regard it as clothing with Parliamentary privilege any republication by any stranger of any document tabled in the Senate.

25. Finally, the Speaker concedes that judicial review is "available while any such investigation report remains proposed (that is, during the period in which a person or public sector entity to whom the proposed report relates is provided the opportunity to comment on it)" (**AS**

[68]). No explanation is given for how that concession can sit with the balance of the Speaker's submissions. But if that concession is correct, then the Speaker's argument in relation to the attachment of parliamentary privilege must, by parity of reasoning, be rejected. There is no principled basis on which the Speaker's construction of the IC Act could apply only to a final report and not to a draft report, particularly having regard to the terms of s 16(2)(c) of the PP Act which refers to the "preparation" of a document (notably, the Speaker does not attempt to offer one).

C. REPLY TO RESPONDENT'S SUBMISSIONS

Section 36 of the *Inquiries Act* (ground 2)

26. The Respondent concedes ground 2 of the Application. That concession is significant (cf **RS [53]**). *First,* the Applicant has been subject to a finding in the Juno Report that his conduct constituted corrupt conduct because it could have amounted to an offence of contempt contrary to s 36 of the *Inquiries Act* (JR [124]). That is a most serious finding with serious reputational consequences for the Applicant. The Respondent's concession necessarily entails a concession of error of law in this aspect of the Juno Report. The Applicant seeks declaratory relief consequent on the concession that the Respondent erred in finding that the conduct of the Applicant was capable of constituting an offence contrary to s 36 of the *Inquiries Act.* The discretionary conditions for the making of a declaration set out by Gibbs J in *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438 are satisfied: the question is real not theoretical, the Applicant has a real reputational interest at stake, and the proper contradictor (the Commission) has conceded the error.

27. The Respondent's submissions on materiality confuse the nature of judicial review seeking declaratory relief in relation to a report of this kind with judicial review seeking relief in respect of decisions which have a legal effect. Materiality looks to whether compliance with a statutory condition — here that the Respondent was obliged to proceed "by reference to correct legal principles, correctly applied" — could have made any difference to the *ultimate decision*, and if it could not have made any difference the Court would not grant relief setting aside that decision: *Hossain v Minister for Immigration* (2018) 246 CLR 123 at [29]-[30]. The Applicant does not (and cannot) seek to "set aside" the Juno Report; his standing in this proceeding stems not from the legal effect of the report (it has none) but rather from the impact of the report on his reputation: see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. Declaratory relief deriving from this aspect of the report (in respect of which the Respondent concedes that it did not proceed by reference to correct legal principles,

correctly applied) would address (at least in part) the reputational impact of the Juno Report on the Applicant. That the impact on the Applicant's reputation might be addressed only in part does not diminish the significance of the grant of such relief nor deny him a sufficient interest to obtain it, particularly having regard to the fact it concerns a finding of *contempt* by a person of Applicant's professional background and standing.

28. *Second*, and in any event, the concession has consequences for the Juno Report as a whole. The Respondent submits that because this was a "separate and alternative" finding to the other findings that the Respondent made (namely, that the conduct could have constituted an offence under s 17 of the *Inquiries Act*), the error of law is "immaterial" to the Respondent's ultimate conclusions. But that is not so, particularly in relation to whether the conduct amounted to "serious corrupt conduct" pursuant to s 10 of the IC Act. There is a realistic possibility that the conclusion on this issue *could* have been different if the Respondent had not erroneously found that the Applicant could have committed the offence of contempt (an offence of utmost seriousness in the administration of justice): *LPDT v Minister for Immigration Citizenship and Migrant Services* (2024) 98 ALJR 610 at [7]. This is fortified by the fact the Respondent offered no reasons in support of its conclusion that the conduct in question met the threshold described in s 10: the absence of reasoning makes it practically impossible to disentangle this admitted error from the balance of the matters that contributed to the conclusion of "serious corrupt conduct". The threshold of materiality is "not onerous", and the Court cannot be satisfied that the absence of the erroneous contempt finding could have had "no bearing on the outcome": *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at [47]. Because making a finding of "serious corrupt conduct" was a precondition to making a report in which the conduct of the Applicant was described as "corrupt conduct" (IC Act, s 184), the report as a whole is necessarily infected by jurisdictional error.

Serious corrupt conduct (ground 12)

29. Ground 12 provides a second clear pathway to the substantive relief sought by the Applicant.

30. The Respondent's submissions on the construction of "serious corrupt conduct" seek to radically expand its remit beyond the scope of its governing legislation. There are four main errors in its approach.

31. *First*, the Respondent seeks to read the word "integrity" in s 10 of the IC Act in a way which is detached from its proper legislative context. The context is important: it is concerned with

conduct which is likely to "threaten public confidence" in the "integrity of government or public administration". To dilute "integrity" to mere "efficacy" is to radically distort its contextual meaning. The objects of the Act in s 6 are centred upon *corruption* in public administration, not the mere effectiveness of public administration. And the definition in s 10 reinforces the point that the concern of the Act is not with conduct that may merely make government less effective, but rather with *corrupt conduct* that is of such a quality as to threaten public confidence in government or public administration.

32. *Second*, the Respondent impermissibly diverts attention from the term *integrity* in s 10, and the necessary connection with threatening public confidence *in government or public administration* by pointing to the possibility that the definition of "corrupt conduct" in s 9 might operate more broadly than the Applicant's conception of "serious corrupt conduct" in s 10. The spectre raised is that there might be "corrupt conduct" which *cannot be described as such* in an investigation report because it does not strike at integrity in the sense of probity (**RS [110]-[111]**). There are many problems with the Respondent's submissions in this regard. (1) As has been noted, they impermissibly divert attention from the term *integrity* in s 10, and the necessary connection with threatening public confidence *in government or public administration*. (2) They overlook the obvious narrowing function of s 10. The evident concern of the legislature — as appears from the legislative history cited at **AS [138]** — was that not all "corrupt conduct" could be described in an investigation report as such. (3) They overlook the fact the Applicant's construction does not prevent the investigation of conduct within the examples given by the Respondent (s 9(1)(b)(v)(A) and (B)), and nor does it prevent that conduct from being the subject of a report in accordance with s 184(2) (even if it does not meet the definition of "serious corrupt conduct"). In accordance with s 184(2), conduct which is not "serious corrupt conduct" can still be the subject of a finding or opinion. It can still be exposed. But the Act does not permit the basic misuse of language for which the Respondent contends. That is, it does not permit a report to describe conduct as "corrupt conduct" unless it strikes at integrity in the sense of probity in government or public administration. These errors in the Respondent's approach lead to the extreme submission at **RS [111]** that the Court should replace the statutory definition with new and different legislative text: "of such seriousness as to be likely to threaten public confidence in the probity or efficacy of government or public administration". This should be rejected.

33. *Third,* the Respondent suggests that it is permissible to simply assert a conclusion of "serious corrupt conduct" without any basis. The failure to explain the basis means that the

Court has no firm foundation on which it can be said that the conclusion was logical or reasonable; the Commission was evidently not able to identify one when it crafted the Report. The *ex post facto* reconstruction in **RS [113]** should be disregarded, but in any event it does not assist. First, it adopts the erroneous construction of "serious corrupt conduct" for which the Respondent otherwise contends. Second, this makes plain the serious flaws in that construction, because it is apparent the Respondent considers that mere non-compliance with a statutory condition is capable of satisfying the high threshold of "serious corrupt conduct". Of course the public is entitled to have confidence that public officers comply with the law, but mere non-compliance with a statutory provision does not logically give rise to a conclusion that the conduct is likely to "threaten public confidence" in the *integrity* of government or public administration.

34. *Fourth*, the Respondent fails adequately to grapple with the significance of *Cunneen*. It cannot be distinguished in the manner in which the Respondent contends. The statutory language at issue in *Cunneen* was "adversely affects, or that could adversely affect … the exercise of official functions by any public official". That language is in fact far broader than the narrowly constrained definition of serious corrupt conduct in s 10 of the IC Act. And yet even in respect of such broad statutory language, the Court considered that the conduct did not extend to mere "efficaciousness" ((2015) 256 CLR 1 at [53]-[54], taking into account the purpose of the Act more generally and the principle of legality).

35. The Respondent is correct to suggest there is no "ambiguity" as considered in *Cunneen* in s 10 of the IC Act (**RS [106]**), because in s 10 the language is simply not apt to extend to mere efficacy. In concluding that the broader language under consideration in *Cunneen* did not extend to efficaciousness, French CJ, Hayne, Kiefel and Nettle JJ emphasised that the ICAC Act "is directed towards promoting the integrity and accountability of public administration in the sense of maintaining probity in the exercise of official functions" (at [59]). That is the proper understanding of "integrity" in the definition of "serious corrupt conduct". That the term "integrity" was adopted by the legislature in s 10 of the IC Act, in view of the decision in *Cunneen,* is also relevant.

36. The Respondent's error in relation to the construction of "serious corrupt conduct" has the consequence the making of the Report was beyond the power of the Respondent by operation of s 184(1) of the IC Act.

General points in reply

37. Before turning to the remaining grounds, three general points may be made. *First,* the Respondent cannot by its submissions recast the Juno Report after the fact in an attempt to justify its conclusions on bases different from those expressed in the Report. One significant instance of this appears in **RS [24]**, which asserts a "misunderstanding" as to the scope of the corrupt conduct findings made in the Juno Report on the part of the Applicant and "his advisers". The Respondent then purports to confine the findings of "corrupt conduct" to the two matters listed at JR [4(b)] and [4(c)]. In the Juno Report the "impugned conduct" is defined by reference to all of the matters at JR [4(a)-(d)]. The Respondent repeated that defined term throughout the document in making findings about corrupt and serious corrupt conduct. The Respondent specifically refers to each of the "four connected but distinct categories" of conduct set out at JR [4(a)-(d)] again at JR [129] and purports to make findings in respect of each category of conduct. The Respondent is apparently now not prepared to defend its conclusion that the conduct at JR [4(a)] and [4(d)] constituted "corrupt conduct" and "serious corrupt conduct". The Applicant consequently seeks declaratory relief that such conduct did not amount to corrupt or serious corrupt conduct. It is not enough for the Respondent now to contend that this is not what he meant: the Report (published to the world on the Commission's website) says what it says. The public statement that those two classes of conduct were corrupt itself has serious reputational consequences.

38. *Second,* the Respondent suggests that the Applicant does not challenge that he "had, over time, become a 'fellow traveller' with Ms Albrechtsen" (**RS [11(d)]**. That submission misstates what Kaye AJ found and what the Juno Report purported to repeat, which was that "the fair-minded observer might fairly apprehend that" the Applicant so regarded himself: JR [297]. There is no basis for any conclusion that the Applicant had in fact become a fellow traveller, or that he subjectively regarded himself as such. The significance of this misstatement is relevant to ground 6 and returned to below.

39. *Third,* to the extent that some point is intended to be made of the reference to material being provided by the Applicant to a journalist from his "private email address" (**RS [8]**), the evidence before the Respondent was that the Applicant used his so-called "private" email address for all of his communications for the work of the Board of Inquiry because of an entirely banal technological issue with his inquiry email address: see Bundle at 1241.

Section 17 of the *Inquiries Act* (ground 1)

40. In relation to ground 1(a), the Respondent submits that the notices of adverse comment, drafts of the Inquiry Report and the final Inquiry Report "themselves" contained information "acquired by" the Applicant in the course of producing the document, relying on JR [107], to submit that the Respondent found that s 17(a) was satisfied in respect of the (unidentified) "information" apparently contained in those documents (**RS [29]-[30]**). The first major difficulty with this submission is the Respondent did not identify any specific "information" (as compared to the subjective appraisal of the Applicant *of* information and the legal and factual conclusions the Applicant proposed to or did draw *from* that information) which was contained in those documents, and which was "information" not already publicly available on the website of the Board, so as to be capable of being caught by s 17(a) of the *Inquiries Act* at all. At the most basic level, a charge of misuse of confidential or other information acquired by a person requires the identification of the specific information said to have been misused: see, e.g., *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443; *Equititrust Limited v Tucker* [2019] QSC 51 at [69]. To the extent the Respondent seeks to rely on the reference at JR [51] on comments in footnotes in the draft that documents were "tendered but not published", the footnotes contain references; they do not establish that any *information* was contained in the Report that could not be published but rather that the *documents* underlying the footnotes may not have been published or had been requested by a party not to be published. The Respondent does not identify what (if any) *information* was contained in the final Report which had not already been made public.

41. In relation to the construction of s 17(a), the Respondent misstates the Applicant's submission (at **RS [32]-[33])**. The Applicant does not contend that merely making a subjective appraisal of information acquired by a board of inquiry means it ceases to be "protected" by s 17(a). The Applicant does contend that first, there must actually be information which is not already public for s 17 to be engaged, and second, that documents in the nature of notices of adverse comment authored by the Board, and the report of the Board, are not "information acquired by" the Board for the purposes of the Act, at least where no information is capable of being identified within those documents which was not already public. That is not the kind of material the legislature intended to be encompassed by the provision: see **AS [36]**.

42. In relation to the construction of s 17(c), it is in fact the Respondent's construction that would require words to be read in: as if "provided for the Act" read as "provided for by this Act" (see **RS [36]**). No part of the Applicant's construction is to the effect that s 17(a) does

not apply to a member of staff of a Board who creates a document and the asserted "anomaly" does not exist (cf **RS [34]**).

43. Further, the Applicant *does* challenge the application of s 17 of the *Inquiries Act* to Mr Drumgold's responses to notices of adverse comments and two witness statements (cf **RS [28]**), by way of ground 1(b).

44. The Respondent's contentions at **RS [43]-[44]** in relation to ground 1(b) are reflective of the difficulty with its approach in the Juno Report: to assume that it was for the Respondent and not the Applicant as the Board to decide what is necessary or convenient for the "fair and prompt conduct of the inquiry" and to thereby supplant the Respondent's own assessment for one which the legislature placed in the Applicant's hands by s 18 of the *Inquiries Act*. The subjective purpose stated by the Applicant — to ensure reporting was based on accurate information and a proper understanding of the Inquiry's work — is capable of falling within the scope of s 18(c) of the *Inquiries Act*. The submission at **RS [45]** — that the Applicant engaged with Ms Albrechtsen in relation to proceedings that the Inquiries Act "contemplated would be private" — is not correct. The proceedings that the Act "contemplated would be private" are not identified, and nor are the "private" proceedings the subject of the engagement between the Applicant and Ms Albrechtsen.

45. The Respondent's submission that the giving of the Inquiry Report to Ms Albrechtsen and Ms Byrne constituted a denial of procedural fairness is inconsistent with its submission that the Applicant, upon submission to the Chief Minister, was *functus officio* (**RS [48]**). Assuming that to be the case, the Applicant could no longer have a duty to afford procedural fairness under the *Inquiries Act:* cf **RS [49]**. That is, if the Applicant was acting as an ordinary citizen, then there could not have been an implied statutory obligation to afford procedural fairness to anyone at all, because a duty to afford procedural fairness is a condition implied as a matter of statutory construction on the exercise of statutory powers; natural justice is not a common law obligation owed by private citizens to each other, or to the State: *Kioa v West* (1985) 159 CLR 530 at 609 (Brennan J).

46. Seemingly to get around this problem, the Respondent in fact found at JR [103] and [111] that the "decision" to give the Final Report to journalists was made at a time when he was still acting as the Board. This analysis confronts two insurmountable hurdles: (1) even if there was an operative "decision" (which there was not), it was one within the scope of s 18(c); and (2) it was not a decision capable of attracting a duty of procedural fairness.

Serious disciplinary offence (ground 3)

47. The Respondent seemingly agrees that the conduct could not have constituted "serious misconduct" under subsection (a) of the definition of "serious disciplinary offence", and now offers an alternative basis on which the Applicant's conduct could have satisfied that definition, namely that it was "any other matter that constitutes or may constitute grounds for—(i) termination action under any law" (**RS [57]**). The natural and ordinary meaning of that language does not encompass statutory removal for misbehaviour (as compared to the termination of *employment*), particularly when read in the context of the express provision in s 9(1)(a)(iii), which is clearly directed to the concept of removal from office. It is wrong to suggest that reading the term "serious disciplinary offence" in its immediate context (being sub-paragraph 9(1)(a)(iii)) is to read it "down". A presumption arises by reason of the use of that different language between s 9(1)(a)(ii) and (iii), that the legislature intended to suggest a difference in meaning (*King v Jones* (1972) 128 CLR 221 at 266 (Gibbs J); *Paul v Cooke* (2013) 85 NSWLR 167 at [44] (Leeming JA, Ward JA agreeing)), and a construction which avoids surplusage or redundancy should be preferred over one which introduces it: *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffith CJ), 419 (O'Connor J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby and Hayne JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [39], [41]-[42] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), [76], [79] (Heydon J).

Misbehaviour (ground 4)

48. The Applicant does not submit that the "standard" for "misbehaviour" applicable to removal from judicial office was applicable to the Board (cf **RS [59]**). His submission is (and was) that the standard of misbehaviour must be calibrated to the gravity of the process (here it is grave), and that it is concerned with the person's capacity and fitness to hold office. But there is a serious flaw in the Respondent's submission that a decision-maker who erroneously concludes that they do not need to recuse themselves for apprehended bias has therefore engaged in "misbehaviour". The hypothetical situation which the Respondent posits at **RS [61]** does not assist, first because it does not represent the actual facts which the Commission considered, and second because there is a qualitative difference between a decision-maker simply being affected by an apprehension of bias, and a decision-maker who is found and *declared by a Court* to be so affected and who nevertheless refuses to recuse themselves. The latter situation might very well constitute "misbehaviour". The former does not, even if the decision-maker was asked to and did turn their mind to the

question and wrongly concluded there was no such apprehension. The difficulty is that the Respondent construes the concept of "misbehaviour" without any attention to the serious nature of the conduct which is contemplated by that word. At **RS [63]** the Respondent repeats the error exhibited in the Juno Report of conflating the "double might" test with an implicit suggestion that the Applicant was in fact influenced; a finding which the Respondent did not make and for which there is no basis.

49. The Respondent's attempt to minimise the significance of the error in its approach on this issue should not be accepted given what the Respondent itself described, and then analysed, as "four connected but distinct categories of conduct" at JR [129] (emphasis added) (cf **RS [64], [67]**). Nor should the Commission's attempt to now walk back its conclusion that a breach of natural justice constituted misbehaviour by the submission that that finding was actually based on "close considerat[ion]" of the "underlying conduct"; it was not on the face of the Report subject to any such consideration (cf **RS [67]**).

50. Finally, the reliance on the Respondent's findings as to the Applicant's subjective state of mind at **RS [69]** is infected with the difficulty in the submission at **RS [70],** that the Respondent was entitled to "draw inferences" as to "Mr Sofronoff's state of mind" from "relevant circumstances" and therefore "not accept his evidence". The Commission appears to accept that it did not find that he gave deliberately false evidence in the last sentence of **RS [70].** In the context of the evidence in *this case,* the Commission could not draw an inference about the Applicant's *own state of mind* from (unidentified) "relevant circumstances" (never put to the Applicant) without *also* finding that the Applicant's evidence on oath about his own state of mind was false. The only possible source of *direct* evidence about a person's state of mind is the person. When a person gives evidence about their state of mind, that is direct evidence of that fact. Of course, in a case where a person gives no evidence about their state of mind, an inference can be drawn from relevant circumstances about it and there would be no need for any further finding. But in a case where a person has in fact gone into evidence about what was in their mind, to reject that evidence is to find that their evidence about their state of mind was false. An express finding of falsity in the Applicant's evidence was a necessary step and it was not made.

The Applicant's state of mind (grounds 8-11)

51. The Applicant's submissions do not treat this case as an appeal by way of rehearing (cf **RS [75]**). The principles in respect of the unreasonableness ground of review were set out in

full at **AS** Part F, and the Respondent has not identified any disagreement with those principles, which are uncontroversial.

52. The Respondent repeats the error made in the Juno Report that he did not have to engage with the Applicant's evidence about his state of mind, and did not have to find that the Applicant's evidence about his own state of mind was false at **RS [80], [84], [85]** and **[86]**.

53. The Respondent then points to four matters in respect of which it is said the Applicant's evidence was not "accepted" at **RS [83(a)-(b)]**. None strike at the central point concerning the Applicant's subjective evidence as to his purpose in engaging with journalists. And none withstand close scrutiny. As to (a), the (somewhat convoluted) finding at JR [117] cannot be regarded as a finding that the Applicant in fact turned his mind to whether he needed to "consult with the Chief Minister" before providing the Inquiry Report to journalists; it is rather about the Applicant's appreciation or not of whether there was a *legal* obligation of natural justice owed to the Chief Minister (which there was not), or whether he considered an embargo sufficient. As to (b), the Respondent does not in fact go so far as to make a finding in the cited paragraph. As to (c), that is again not a rejection of the Applicant's evidence. As to (d), that is a normative conclusion about whether the explanation was justified according to the Respondent's subjective appraisal of it, it is not a rejection of the Applicant's evidence at all.

54. Next, the submission at **RS [87]** repeats the error of conflating non-disclosure and concealment. As Millet LJ explained in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 21:

> Non-disclosure and concealment are two very different things. This has been a truism of the law from the time of Cicero (De Officiis, lib. 3, c. 12, 13 citing Diogenes of Babylon). It is even enshrined, like other such truisms, in a Latin tag: aliud est celare, aliud tacere.

55. Contrary to **RS [88]-[89]** the Applicant does not invite this Court to apply *Browne v Dunn* to this proceeding, or suggest that the Respondent was bound by that rule. The Applicant's submissions did not even mention that case. The point is more fundamental. The Respondent was confronted with direct evidence from the Applicant as to his state of mind. There was *no evidence* capable of showing that this was false. Absent some challenge, there would remain *no such evidence*. The Commissioner left himself in a position where he had no evidence and no logical basis on which to make the serious findings he did about the Applicant's state of mind.

Findings of dishonesty and impartiality (ground 5)

56. The Respondent accepts that dishonesty in the sense the term "not honest" is used in s 9(1)(b)(i) involves consideration of the person's state of mind (**RS [92]**). That concession is well made. None of the matters cited at **RS [94]** rationally support a conclusion that the Applicant's conduct was dishonest. By way of example, JR [117] is a finding that the Applicant had a subjective awareness that an embargo could be breached. That is not capable without more of rationally amounting to something that is not honest. It simply does not have that character. Similarly, at **RS [96]** the submission is made that to do something *deliberately* that has the *effect* of putting someone else under a misapprehension, is dishonest. But such conduct cannot be stigmatised as dishonest absent an intention to put that person under that misapprehension. Again, the conduct relied upon is incapable of bearing the legal character of dishonesty. Finally, for the Applicant to be aware that Mr Drumgold and the Chief Minister might not share his trust of a journalist is not logically to be actually partial (cf **RS [96]**). Again, the conduct is simply incapable, without more, of bearing the serious character of actual partiality.

No breach of public trust (ground 6)

57. It is not correct that the Respondent accepted that a breach of public trust required a breach the duty of loyalty (cf **RS [97]**).The Respondent went no further than to say that accepting this would make no difference to his conclusion (JR [138]). Of course, it was necessary for the Respondent to first identify the relevant legal test and then apply it, and the Respondent did not do that.

58. The Respondent now contends that what he found was that the Applicant had become a "fellow traveller" with Ms Albrechtsen and it was *that* which conflicted with his "duty to the Territory to maintain the integrity of the Inquiry's processes" (**RS [97]**). Those are not the reasons the Respondent gave, and this *ex post facto* explanation of his conclusions should be rejected. In any event, as explained above, the "fellow traveller" comment was in terms a repetition of Kaye AJ's finding, and *that* finding was as to what might have been reasonably apprehended by a fair minded observer, not what in fact happened. In any event, whatever "fellow traveller" means, it does not satisfy the requirements identified in the Applicant's submissions at [102].

59. The recasting of the Respondent's reasons at **RS [99]** does not, again, disclose any rational basis for a conclusion that the Applicant engaged in conduct in pursuit of an identified interest or unauthorised end, or *mala fides* in the form of wilfulness *and* an improper motive.

Moreover, to the extent that **RS [99]** relies upon bare assertions as to the Applicant's state of mind, as explained above, they were simply not open.

Misuse of information (ground 7)

60. As the Respondent concedes, an absence of reasons for the conclusion that the Applicant's conduct amounted to a misuse of information is capable of supporting a conclusion of jurisdictional error: **RS [102]**. That concession is well made, because mere assertion that conduct fell within the scope of s 9(1)(b)(ii)(B) would generally (save perhaps in the clearest of cases) give rise to jurisdictional error because the Court could not be satisfied the finding met the threshold of reasonableness. The matters relied on by the Respondent to now take things beyond mere assertion do not assist it. As for the description of "misuse" at JR [15], the comments there do not amount to any meaningful attempt to construe the concept of "misuse" but rather relate to whether the conduct must be intentional or negligent. The submission that the Respondent had already "explained" why it regarded the conduct to "lack probity" similarly does not assist, because that does not explain how and why this amounted to a *misuse* of information within the meaning of the statute. The evidence before the Respondent was that the purpose of the Applicant's conduct was to ensure the reporting of the Inquiry was based on accurate information, and ensure that the journalists appreciated the relevant issues and had a proper understanding of the Inquiry's work: see **RS [44]**. Logically, on that evidence, there is no rational basis for a conclusion that the Applicant's conduct amounted to actual "misuse". The Respondent's reasons do not disclose any rational basis for grounding his conclusion the contrary.

D. RELIEF

61. As noted above, the Applicant seeks declaratory relief consequent on the Commission's concession of Ground 2. In the event the Court is satisfied that one or more of the other grounds of review are established, it may be most convenient — consistently with the course taken by Kaye AJ in *Drumgold v Board of Inquiry & Ors (No. 3)* [2024] ACTSC 58 at [599] — for the Court to give reasons on the substantive relief sought, and for the parties to then be directed to seek to agree, or failing such agreement make submissions to the Court, on the precise formulation of relief consequent on the Court's ultimate findings.

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16 May 2025