

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title: Drumgold v Board of Inquiry – Criminal Justice System (No 2)

Citation: [2024] ACTSC 8

Hearing Date: Hearing on the papers.

Decision Date: 31 January 2024

Before: Kaye AJ

Decision:

- (1) In respect of the affidavit of Walter Sofronoff, I uphold the objection to paragraph 95. I otherwise do not accept the objections taken to the affidavit.
- (2) I uphold the objection to part of the second sentence of paragraph 23, and to paragraphs 26 to 29, of the affidavit of Geoffrey Lance Davies.
- (3) I uphold the objection to the last two sentences of paragraph 20, and to paragraphs 21 to 26, of the affidavit of James Cochrane Bell.

Catchwords: **CIVIL LAW** – Originating Application – Evidence – Admissibility of aspects of affidavit evidence.

Legislation Cited: *Evidence Act 2011* (ACT), s 76
Inquiries Act 1991 (ACT), ss 17, 18(c)

Parties: Neville Shane Drumgold (Plaintiff)
Board of Inquiry – Criminal Justice System (First Defendant)
Australian Capital Territory (Third Defendant)
Michael Chew, Scott Moller, Marcus Boorman, Robert Rose, Trent Madders, Emma Frizell (Fourth Defendants)

Representation: **Counsel**
Mr D O’Gorman SC with Ms S Brenker (Plaintiff)
Mr B. Lim (First Defendant)
Ms K Eastman AM SC with Ms A Hammond (Third Defendant)

Solicitors
BAL Lawyers (Plaintiff)
Gilshenan & Luton Legal Practice (First Defendant)
ACT Government Solicitor (Third Defendant)

File Number: SC 347 of 2023

KAYE AJ:

Introduction

1. The hearing of the originating application is due to commence on 13 February next. The parties have filed a number of affidavits, which will constitute the evidentiary basis for the issues that are to be agitated at trial. A number of objections have been raised to the admissibility of aspects of those affidavits. The parties have, commendably, engaged in a constructive process with a view to resolving those objections.
2. As a consequence, the parties have resolved all the issues that have been raised in relation to the affidavit of the plaintiff sworn 17 November 2023.
3. In addition, the plaintiff seeks to rely on three affidavits, sworn by his solicitor, Ian Meagher, and the documents, which were exhibited to those affidavits. The first defendant and the third defendant have each objected to the admissibility of the second and third affidavits. Those affidavits exhibit a substantial number of documents, which have been discovered by the first defendant. At present, the plaintiff has not identified a basis upon which the documents may be admitted into evidence. It has not been demonstrated how any of those documents are relevant to one or more of the four grounds of application, specified in the amended originating application, or the particulars that have been provided by the plaintiff in respect of those grounds. In order that they be received in evidence, plainly, it will be necessary for the plaintiff to identify precisely how the documents in question, which are exhibited in Mr Meagher's affidavits, may be relevant to the issues raised by those grounds.
4. The first defendant has filed an affidavit of Walter Sofronoff, affirmed 12 December 2023, an affidavit of Geoffrey Lance Davies, sworn 8 December 2023, and two affidavits of James Cochrane Bell, sworn 12 December and 22 December 2023 respectively. The plaintiff and the third defendant have objected to significant aspects of the affidavit of Mr Sofronoff, and also to the admissibility of the whole of the affidavit of Mr Davies and the whole of the first affidavit of Mr Bell. The parties have exchanged concise submissions concerning those objections, and it is agreed that it is appropriate that I determine those objections 'on the papers'.
5. Each of the affidavits, filed on behalf of the first defendant, are directed to ground 1 of the originating application, which contends that the first defendant failed to comply with s 17 of the *Inquiries Act 1991* (ACT). The particulars of that ground, provided by the plaintiff, concern the communication by Mr Sofronoff to members of the media, and, in particular, to Ms Janet Albrechtsen of The Australian newspaper, of documents produced

to the inquiry, and of information obtained by Mr Sofronoff in the course of his role as the Board of Inquiry.

6. Section 17 of the *Inquiries Act* provides as follows:

17 Nondisclosure of information by members etc

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

- (a) make a record of, or divulge or communicate to any person, any information acquired by the firstmentioned person by virtue of that person's office or employment under or for this Act; or
- (b) make use of any such information; or
- (c) produce to any person, or permit any person to have access to, a document provided for this Act.

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

7. In response to ground 1, it is contended, on behalf of the first defendant, that the provision of the documents and information to the media constituted the exercise by him of a function under the *Inquiries Act*. In particular, the first defendant relies on s 18(c) of the Act, which provides that in conducting an inquiry, a Board:

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

8. In his affidavit, Mr Sofronoff explains that, upon his appointment as the Board of Inquiry in the present matter, he recognised that the subject matter of the inquiry concerned public confidence in the criminal justice system. He was of the view that appropriate engagement with the media would be essential to the performance of the inquiry's functions. Accordingly, he advised the solicitor, who was appointed Executive Director to lead the Secretary to the inquiry, that he would generally make himself available to journalists to respond to queries. His interest was to ensure the accurate coverage of the work of the inquiry so far as he was able to do so. The affidavits of Mr Davies and Mr Bell each describe the respective deponent's own experience with commissions of inquiry, and, in particular, the engagement by those inquiries with the media in the course of the conduct of the inquiry.

9. Objection has been taken on behalf of the plaintiff and the first defendant to substantial aspects of the affidavit of Mr Sofronoff, and as to the affidavits of Mr Davies and Mr Bell, on the basis that they are not relevant to the determination of the question as to whether the first defendant breached s 17 of the *Inquiries Act*, by the conduct specified in the particulars to ground 1 of the originating application.

10. At this preliminary stage of the proceeding, there are, necessarily, limitations in determining such an objection. Ultimately, I expect that, in the course of the hearing of

the originating application, the parties will address arguments as to the construction of ss 17 and 18 of the Act. At this point, I am required to determine the question of the relevance of the evidence, to which I have referred, without the advantage of having heard such submissions as to the content of those statutory provisions.

11. However, and with that qualification, it is apparently common ground in the submissions, and in my view correct, that there is both a subjective and an objective component to each statutory provision in question. In essence, the provision of information to the media, by the first defendant, could only have been undertaken in the exercise of a function under the Act, for the purpose of s 17, if the first defendant was thereby intending to exercise some such function. Similarly, the provision of such information could only fall within s 18(c) of the Act if the first defendant subjectively considered it necessary or convenient to do so for the 'fair and prompt conduct of the inquiry'.
12. Further, at this preliminary point, I would accept that the provision of a document or information, obtained in the course of the inquiry, could only fall within s 17 if, on a rational basis, such conduct could be properly described as being an 'exercise of a function' under the Act. Likewise, in order that particular conduct be authorised by s 18(c), such conduct must, rationally, be capable of being considered to be necessary or convenient for the fair and prompt conduct of the inquiry.
13. In determining, at this preliminary stage, the admissibility of aspects of the affidavits, to which objection has been taken, it needs to be borne in mind that I have not had the opportunity to hear detailed argument concerning the issues in question. As a consequence, any ruling that I make, at this point, as to the admissibility of evidence contained in the affidavits, does not, necessarily, have the consequence that, on further consideration, that material may or may not in fact be relevant. With that qualification, I turn to the objections made to the affidavits, filed on behalf of the first defendant.

Objections to affidavit of Walter Sofronoff

Paragraphs 10 – 45

14. In paragraphs 10 to 45 of his affidavit, Mr Sofronoff ('Sofronoff') set out his previous experience in the conduct of commissions of inquiry and the like. In particular, in 2015, he was appointed Commissioner of Inquiry into flooding in the town of Grantham in Queensland. In 2022, he was appointed the Commissioner of Inquiry into DNA testing in Queensland. In addition, in 2016, he was appointed by the Queensland government to review the State parole system.
15. In discussing his role in the Grantham flood inquiry and the DNA testing inquiry, Sofronoff set out, in some detail, the steps that he took to liaise with members of the media in order

to ensure that the work of the inquiry be accurately reported to members of the public. In each case, he considered that the community would only retain or recover confidence in government administration if it accurately and properly understood the proceedings that took place before the respective inquiry.

16. The plaintiff and the third defendant each object to the whole of paragraphs 10 to 45 of the affidavit on the basis that they are not relevant to the issues in the present case. In particular, it is submitted that Sofronoff's previous experiences in other inquiries provide no assistance to the Court in respect of the proper construction of s 17 and s 18(c) of the Act. Those inquiries were conducted in a different jurisdiction and pursuant to different statutory regimes. The question whether, in publishing matters to the media, the first defendant contravened s 17 of the Act depends, necessarily, on the proper construction of that provision of s 18.
17. I am not persuaded, at this point, that the contents of paragraphs 10 to 45 of the affidavit of Sofronoff are irrelevant. At the least, they give some content to the reason, given by Sofronoff, as to why, in the course of the inquiry in the present case, he actively engaged with the media and provided documents and other material to them. In essence, they provide some background to the explanation given by Sofronoff as to why he considered that his conduct, in providing the documentation and information to the media, constituted an exercise by him of a function under the Act (for the purposes of s 17) and as to why he considered it necessary to engage in that manner with the media for the 'fair and prompt conduct of the inquiry' (for the purposes of s 18).
18. Further, and subject to more detailed submissions, at this preliminary point, the matters contained in paragraphs 10 to 45 of Sofronoff's affidavit may be relevant as to whether, objectively, his conduct, in disseminating the information and documentation to the media, could be reasonably considered to be an exercise of a function of an inquiry under the Act, and could reasonably have been considered necessary or convenient for the fair and prompt conduct of the inquiry.
19. Accordingly, I rule that paragraphs 10 to 45 of the Sofronoff affidavit are not inadmissible on the basis of relevance.
20. The plaintiff also takes objection to specific aspects of the contents of paragraphs 10 to 45 as follows:
 - (a) Paragraph 17. Objection is taken to the second sentence of paragraph 17 of Sofronoff's affidavit on the basis that it is inadmissible opinion evidence. I disagree. It is not opinion evidence. It consists of an explanation, given by Sofronoff, as to why, when he conducted the Grantham flood inquiry, he

consulted the report of the Commission of Inquiry into police misconduct by G.E. Fitzgerald QC. That aspect of the affidavit is relevant as part of the explanation why Sofronoff considered that it was important that a Commission of Inquiry is conducted in a manner which enhances public confidence.

- (b) Paragraph 20. The plaintiff objects to the last sentence in this paragraph on the basis that it is inadmissible opinion evidence. In the passage in question, Sofronoff explains why it is important, in his view, that a Commission of Inquiry must not only make findings of fact for the purposes of assisting the government in making decisions, but that it must also serve the purpose of rebuilding public confidence. In that way, that part of the paragraph in question is relevant to explaining Sofronoff's view that the work of an inquiry should be accurately reported by the media to the members of the public.
- (c) Paragraph 21. Objection is taken to paragraph 21 on the basis that Sofronoff does not disclose the manner in which the opinion, expressed in it, was arrived at. I reject that objection. Sofronoff clearly states, in paragraph 21, that he drew from the Fitzgerald report the need to address public confidence was a fundamental factor in conducting a Commission of Inquiry.
- (d) Paragraphs 25, 26 and 27. Objection is taken to the first sentence of each of these three paragraphs on the basis that Sofronoff has not disclosed the source of the belief attested to in them. In each of the passages in question, Sofronoff in fact expresses his opinion in the present tense, which is not strictly relevant to the issues in the case. However, in the context of the section of the affidavit in which the three paragraphs appear, it is clear that Sofronoff explains how, by reference to the Fitzgerald inquiry, he formed the view, while conducting the Grantham floods inquiry, that it was important for a commission to ensure, as far as possible, that media reporting about its work is timely, accurate and informative. That evidence is relevant to the subjective reason why, in the present case, Sofronoff disseminated documents and other information to the media about the inquiry that he was conducting. On that basis, it is relevant otherwise than as opinion evidence under s 76 of the *Evidence Act 2011* (ACT).

Paragraph 59

- 21. The plaintiff takes objection to the third sentence in paragraph 59, in which Sofronoff says that he was aware that, from time to time in public hearings of the Inquiry, journalists approached counsel assisting to seek information or assistance in accessing documents. If the evidence is sought to be admitted for hearsay purposes, the objection would be upheld on the basis that Sofronoff has not stated by whom he was made aware of that

fact. However, the passage in question is also relevant to Sofronoff's then awareness, that is, as to his then state of mind, as to the role of other members of the inquiry in communicating with the media. On that limited basis, the evidence is admissible and relevant.

Paragraph 64

22. The plaintiff takes objection to the whole of paragraph 64, on the basis that it is irrelevant, that it is 'vague and meaningless', and that the basis for the opinion expressed in it is not disclosed. In paragraph 64, Sofronoff deposes that he believed that it was important for journalists, who were interested in the real issues of the inquiry, to have an understanding that, when the inquiry heard evidence and submissions, they would understand that it would be imprudent to report on an issue upon the basis of a mere 'uninformed lay reaction'. The paragraph is relevant, because it provides some explanation as to why Sofronoff considered it necessary to provide some detailed information to the media as to the proceedings before the inquiry. As such, evidence is not sought to be adduced as opinion evidence. The passage in question is clear, and is not 'vague and meaningless', as contended by the plaintiff.

Paragraph 87

23. In paragraph 87, it is stated that, on 3 August 2023, The Australian newspaper published a story, dealing with the content of the report of the Inquiry, which the government had not then published. It is then deposed that, on the previous evening, Ms Albrechtsen had contacted Sofronoff to inform him that she and her colleague had obtained a copy of the report from another source and that, using that source, they would publish a story the following day. That section of the affidavit is objected to by the plaintiff on the basis that it contains inadmissible hearsay. In response, the first defendant has stated that the evidence is sought to be adduced for a non-hearsay purpose. The relevance of the evidence on that basis is, at most, marginal. With some reservation, I would uphold its admissibility, on the basis that it may explain why Sofronoff did not, apparently, take any steps in relation to the publication by The Australian newspaper of the report before it had been published by the government. On that limited basis, I would admit paragraph 87, albeit that its relevance is, at best, marginal.

Paragraph 95

24. Paragraph 95 is plainly inadmissible. It is, at most, argumentative, and does not depose to any relevant fact in issue.

Paragraph 97

25. The plaintiff takes exception to the first sentence of this paragraph on the basis that it contains inadmissible opinion evidence. I do not accept that objection. The passage in question is relevant to the subjective reason why Sofronoff dealt with journalists by providing to them information and documents that had been produced in the course of the inquiry. On that basis it is not opinion evidence. It is therefore admissible.

Paragraphs 100, 109–10, 112, 118, 122, 131, 135, 138, 141, 145, and 147

26. The third defendant has objected to each of these paragraphs on the basis that they contain inadmissible opinion evidence. Each of the paragraphs in question relate to the specific documents specified in the particulars under paragraph 1, which it is alleged that Sofronoff provided to the media. In each paragraph in question, Sofronoff explains why he considered that the particular document in question should be provided to the media. That evidence is relevant for the reasons I have already discussed, namely, as to the subjective reason why Sofronoff considered that the documents should be provided by him to the media in the exercise of a function under the Act, and, in particular, why he considered it necessary and convenient for the fair conduct of the inquiry. On that basis, the evidence is not admitted as opinion evidence, but, rather, as relevant to one of the issues, which may need to be determined under ground 1 of the originating application. The evidence, accordingly, is admissible.

Paragraph 137

27. Objection is taken by the plaintiff to the third sentence of paragraph 137 on the basis that it is inadmissible opinion evidence because Sofronoff has not disclosed the source of the opinion, which (it is said) was expressed in it. In my view, it is not opinion evidence. In the passage in question, Sofronoff does no more than explain his understanding of the nature of the document in question. On that limited basis, it is admissible.

Objections to affidavits of Geoffrey Davies and James Bell

28. The plaintiff and the third defendant have each objected to the admissibility of the whole of the affidavit of Geoffrey Davies ('Davies') and the whole of the first affidavit of James Bell ('Bell'). The objections are made, substantially, on the same basis, and may be dealt with together.
29. The affidavits of each of the two deponents cover two topics. The first topic is the witness's own direct experience of the conduct of Commissions of Inquiry. The second topic comprises the witness's opinion concerning the legitimacy of the engagement, by a Commissioner, with the media in respect of the subject matter of the Inquiry.

30. Davies was admitted as a barrister of the Supreme Court of Queensland in 1961, and was appointed senior counsel in 1976. He was appointed a judge of the Court of Appeal of Queensland in December 1991, and he served in that capacity for 15 years. While at the Bar, Davies advised a Federal Parliamentary Commission of Inquiry, which was established under the Parliamentary Commission of Inquiry of 1986, to inquire into allegations concerning the conduct of the then Justice of the High Court, the Honourable Lionel Murphy.
31. Following his resignation from judicial office in February 2005, Davies was appointed Commissioner of the Queensland Public Hospitals Commission of Inquiry. That inquiry heard 50 days of evidence between May and August 2005, and Davies presented his final report to the Premier in November 2005. In his affidavit, Davies notes that, from the outset of that inquiry, he recognised the importance of the role of the media in reporting the work of the inquiry. As a result, from the commencement of the inquiry, he had regular contact with interested journalists, with the intention of ensuring that the media accurately reported the conduct of the inquiry. In his affidavit, Davies set out the nature of the contact, which he had with the media, during that time.
32. In the second section of his affidavit, in paragraphs 26 to 29, Davies expresses the opinion that an important aspect of an inquiry's work is to ensure that the public is, and remains, fully informed of the inquiry's work and findings, which can be done effectively only through the media. Accordingly, Davies considers that forming relationships of trust with trusted journalists is an important means of achieving that objective and of countering media reports which are inaccurate. Davies also expresses the opinion that, other than in exceptional circumstances, the report of a Commission should be published at the same time it is handed to the government.
33. In a similar manner, Bell's affidavit sets out, at paragraphs 7 to 20, his experience in the conduct of inquiries during his career. Bell was admitted to the Queensland Bar in 1976 and was appointed Queen's Counsel in 1993. In 1987, he was retained to act for the former Premier of Queensland, Sir Johannes Bjelke-Petersen, in the inquiry, which became known as the Fitzgerald inquiry. In 1995, Bell acted for the Commissioner of the Australian Federal Police in an inquiry concerning allegations of unauthorised disclosure of confidential information in relation to an investigation. In 1996, Bell appeared for the National Party in the '*Shooters Inquiry*' which was headed by retired New South Wales Justice the Honourable Kenneth Carruthers QC. In 2013, Bell was appointed as counsel assisting the Honourable Margaret White AO in the Queensland Racing Commission of Inquiry, which investigated wide-ranging allegations of mismanagement in the thoroughbred, harness and greyhound racing industries in Queensland. Finally, in 2015,

Bell appeared for the Anglican Archbishop of Brisbane, and the Anglican Diocese Southern Queensland, in the Royal Commission into Institutional Responses to Child Sexual Abuse.

34. In paragraphs 13 to 20 of the affidavit, Bell sets out his experience, during those inquiries, of the engagement, by the various Commissioners, with the media. He notes that in earlier times, Commissions of Inquiry had been reluctant to engage with the media, but that practice had altered over time. In that respect, he notes the approach taken by Mr Tony Fitzgerald QC during his 1987 inquiry into police and political corruption, in the course of which Mr Fitzgerald engaged closely with the media. In the *Shooter's Inquiry* (in 1996), Commissioner Carruthers QC was also conscious about the information, to which the press had access, and how it might impact on the reporting of the inquiry. Further, in his role as counsel assisting in the Racing Inquiry in 2013, Bell had regular engagement with the media throughout the matter. Bell concludes that part of his affidavit by stating that Commissioners and their staff worked very much as a team, and that the role of a Commissioner includes ensuring that the media understand the evidence and the important issues that are the subject of the inquiry.
35. Having thus outlined his background experience in the conduct of Commissions of Inquiry, Bell, in paragraphs 21 to 26 of his affidavit, states his view as to whether, and, if so, how Commissions of Inquiry might properly engage with members of the media. In essence, Bell expresses the view that a Commission might quite properly discuss with members of the media their suggestions of leads justifying further investigation. He considers that it is legitimate for a Commission of Inquiry to seek to ensure that the media report accurately on the evidence. In that respect, it is appropriate for a Commission of Inquiry to seek out what a journalist knows, and the views the journalist might have formed, based on the inquiry. Bell concludes that part of his affidavit by stating that his opinion is that a Commissioner may properly engage informally with a journalist in the course of an inquiry with a view to advancing the inquiry's task.

Submissions

36. The objections, made by the plaintiff and the third defendant, to the affidavits of Davies and Bell are substantially similar.
37. On behalf of the plaintiff, it is submitted that the affidavits are irrelevant to the issues in the case, because both Davies and Bell depose to their experience based on statutory regimes that are different to that contained in the *Inquiries Act*. Secondly, it is submitted that the affidavits fail to comply with s 76 of the *Evidence Act*. In particular, neither Davies nor Bell are compliant experts for the following reasons:

- (a) They are not independent or impartial, because they are both friends and colleagues of Sofronoff.
 - (b) The first defendant has failed to provide to the parties the instructions and directions, given to Davies and Bell, in respect of the opinions expressed by them.
 - (c) Neither witness has identified the specific facts upon which their opinion is expressed.
38. Further, it is submitted on behalf of the plaintiff that Bell does not have the requisite expertise. He has never been a chairperson or Commissioner of an Inquiry, and he has never had experience as a Board of Inquiry.
39. On behalf of the third defendant, it is similarly submitted that the affidavits of Davies and Bell are not relevant to the proceeding, because their opinions are based on their experience with inquiries which were not conducted under the legislative provisions of the *Inquiries Act*. Further, it is submitted that the evidence of both witnesses should be excluded, for similar reasons advanced on behalf of the plaintiff, namely:
- (a) Neither witness is independent, as they have had longstanding relationships with Sofronoff.
 - (b) The first defendant has declined to provide the briefing letters and materials by which the evidence was sought from Davies and Bell.
 - (c) Neither Davies nor Bell referred to or disclosed that they have any knowledge of, or experience with inquiries under the *Inquiries Act*.
40. In response, it is submitted on behalf of the first defendant that the evidence of Davies, as to the conduct of the Queensland Public Hospitals Commission of Inquiry, is relevant to the reasonableness of the view, taken by Sofronoff, that it was necessary or convenient for the fair and proper conduct of the inquiry, to engage with journalists in the manner in which he did. Further it is submitted that Davies' opinion, expressed in the concluding paragraphs of his affidavit, as to the appropriateness of a Commissioner engaging with the media, is relevant to the assessment, by the Court, of whether the first defendant reasonably formed the view it was necessary or convenient to engage in the conduct that is impugned by paragraph 1. For similar reasons, it is submitted that the matters attested to by Bell, are also relevant as to the reasonableness of the conduct of the first defendant in communicating with the media.
41. In the case of both Davies and Bell, it is submitted that each witness has sufficient expertise to express the views that are contained in their affidavits. The fact that each of

them are friends of Sofronoff does not disqualify them from giving expert evidence in the case.

Conclusion as to the admissibility of the affidavits of Davies and Bell

42. As I have noted, the first part of the affidavit of each of Davies and Bell does not contain the expression by the deponent of any opinion. Rather, in that part of each affidavit, the deponent describes his experience of the manner in which inquiries have been conducted in the past. In particular, both Davies and Bell describe how Commissions of Inquiries have, in conducting public inquiries, communicated with members of the media for the evident purpose of promoting the accurate reporting of the subject matter of the inquiry to the public at large.
43. At this preliminary point, and without the benefit of full submissions on the matter, the evidence of both Davies and Bell to that effect is arguably potentially relevant. I would apprehend that that evidence may be relevant to a contention that, in contrast to the ordinary functioning of courts of justice, it is not uncommonly the practice of Boards and Commissions of Inquiry, as part of their functions, to disseminate information to the media about the proceedings of the inquiry. Ultimately, it will be a matter for argument at the hearing of the proceeding, whether the evidence of Davies and Bell does establish that proposition as a matter of fact, and, if so, whether it supports the submission, made on behalf of the first defendant, that, in communicating with the media in the course of the Commission of Inquiry undertaken by him, he was exercising a function under s 17 of the *Inquiries Act*, and, in particular, whether he could reasonably have concluded that it was necessary or convenient for him to do so for the purposes of the fair and prompt conduct of the inquiry. At this point, it is sufficient to conclude that I am not in a position to rule that paragraphs 4 to 25 of Davies' affidavit, and paragraphs 6 to 20 of Bell's affidavit, are inadmissible.
44. The second part of the affidavit of each deponent is, as I have discussed, quite different. In that part of the affidavit, each deponent expresses his own individual opinion as to whether it is appropriate for an inquiry to communicate with the media in order to ensure that the inquiry's work is accurately published to members of the public. Thus, in paragraphs 27 to 29 of his affidavit, Davies deposes to his view that an important aspect of the inquiry's work is to ensure that the public is and remains fully informed of the inquiry's work and findings. While Davies has observed a wide variety of practices of how Commissions of Inquiry deal with the media, in the case of the inquiry undertaken by himself (in 2005), he considered it important that he communicate with the media.

45. Similarly, in paragraphs 21 to 26 of his affidavit, Bell expresses the opinion that a Commission may 'quite properly' discuss with members of the media their suggestions and leads justifying further investigation and the evidence adduced in the Commission hearings, and that it is 'legitimate' for a Commission of Inquiry to seek to ensure that media reports on the evidence are accurate. He concludes the affidavit with the expression of an opinion that '... a Commissioner may properly engage informally with a journalist in the course of an inquiry with a view to advancing the Inquiry's task'.
46. In the present case, the issue raised under ground 1 of the originating application does not involve consideration whether it was 'appropriate' or 'proper' for the first defendant to communicate with the media. Rather, as I have discussed, the issue is whether, in communicating with the media, the first defendant acted in accordance with ss 17 and 18 of the *Inquiries Act*. The opinions expressed by both Davies and Bell do not address that point. Nor could they. Their opinions are necessarily based on inquiries conducted under different statutory regimes. Accordingly, the expressions of opinion by each deponent in the parts of the affidavits to which I have just referred are irrelevant. It follows that paragraphs 21 to 26 of Bell's affidavit, and paragraphs 26 to 30 of Davies' affidavit, are inadmissible and will not be received in evidence in the present case.
47. In addition, the plaintiff has also raised objections to particular aspects of the other paragraphs of the affidavits of Davies and Bell.
48. The plaintiff has objected to the second sentence of paragraph 23 of Davies' affidavit. In that section of the affidavit, Davies states that he formed the view, when conducting the inquiry in 2005 into the Queensland Public Hospitals, that his report should be published at the same time as it was presented to the government. In the sentence in question, he said, 'I was of the view, and still am, that the report of a public inquiry should also be made public immediately'. For the reasons that I have discussed, the expression by Davies of his present opinion is not relevant. Accordingly, the phrase 'and still am', contained in paragraph 23, is inadmissible.
49. The plaintiff has also objected to particular aspects of the remaining paragraphs of Bell, which I have not so far excluded. I can deal shortly with those objections as follows:
 - (a) Paragraph 14, the third-last sentence and second-last sentence. The evidence in paragraph 14 is of borderline relevance. However, with that qualification, in the two passages in question, Bell explains his understanding that, because the National Hotel Inquiry was conducted in a formal manner, the inquiry was not as successful as it might otherwise have been. On that basis, the sections of the paragraph are not inadmissible as hearsay or impermissible opinion

evidence. However, they are, at the most, of borderline relevance to the issues in the present case. With that qualification, I do not uphold the objections to paragraph 14.

- (b) Paragraph 17, the first and last sentences. Bell participated in the *Shooter's Inquiry* and, as such, the observations that he makes in these two passages are the product of his observations during the conduct of the inquiry. Accordingly, they are not opinion evidence, and the foundation for the observations contained in the passages in question is disclosed.
- (c) Paragraph 18, the third-last sentence and last sentence. The objection to these passages is on the basis that the deponent has not disclosed the foundation for the assertions contained in them, and that they contain impermissible opinion evidence. I do not accept that objection. The passages in question do not contain any expression of opinion. The foundation for the assertion is clear: Bell was counsel assisting the Racing Inquiry in 2013 and the passages in question clearly derive from his recollection and observation of the work of that inquiry.
- (d) Paragraph 20, second-last sentence and last sentence. The objection to these two passages is on the basis that the deponent expresses an opinion on a basis which is not disclosed. I uphold the objection on the basis that the opinion of the deponent, as to whether or not it was proper for the Commission to communicate with the media, is not an issue in the present case and, therefore, is not relevant.

Summary of conclusions

- 50. For the reasons that I have set out above, I summarise my conclusions as follows.
- 51. In respect of the affidavit of Walter Sofronoff, I uphold the objection to paragraph 95. I otherwise do not accept the objections taken to the affidavit.
- 52. I uphold the objection to part of the second sentence of paragraph 23, and to paragraphs 26 to 29, of the affidavit of Geoffrey Lance Davies.
- 53. I uphold the objection to the last two sentences of paragraph 20, and to paragraphs 21 to 26, of the affidavit of James Cochrane Bell.

I certify that the preceding fifty three [53] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Acting Justice Kaye

Associate:

Date: 31 January 2024