CITATION: *Inquest into the death of Kumanjayi Walker (Ruling No 3)* [2022] NTLC 019

TITLE OF COURT:	Coroners Court
JURISDICTION:	Alice Springs
FILE NO(s):	A51 of 2019
DELIVERED ON:	14 October 2022
DELIVERED AT:	Alice Springs
HEARING DATE(s):	29 September 2022
FINDING OF:	Judge Elisabeth Armitage
CATCHWORDS:	Coronial proceedings; inquests; death in custody; inquest following acquittal; objections to evidence; authority to receive evidence under the *Coroner's Act 1993* (NT)

Coroner's Act 1993 (NT), ss 4A, 4B, 26, 34, 35 and 39
Doomadgee v Clements (2006) 2 Qd R 352
R v Doogan; Ex parte Lucas-Smith (2004) 157 ACTR 1
Inquest into the death of Kumanjayi Walker (Ruling No 2) [2022] NTLC 016
Domaszewicz v State Coroner (2004) 11 VR 237
*Thales Australia Limited v Coroner's Cour*t [2011] VSC 133
Priest v West (2012) 40 VR 521
Harmsworth v State Coroner [1989] VR 989.
Conway v Jerram (2010) 78 NSWLR 689
Doomadgee v Clements (2006) 2 Qd R 352
Re Pochi and Minister for Immigration and Ethnic Affairs (1976) 36 FLR 482
Sullivan v Civil Aviation Safety Authority [2014] FCAFC 93
Nominal Defendant v Manning (2000) 50 NSWLR 139
Bajramovic v Calubaquib (2015) 71 MVR 15
Liu v Age Company Limited (2016) 92 NSWLR 679
Tracy v Repatriation Commission (2000) 101 FCR 279
Knight v FP Special Assets Ltd (1992) 174 CLR 178
PMT Partners Pty Ltd (in liq) v Australian National Parks & Wildlife Service (1995) 184 CLR 301
Victims Compensation Fund Corporation v Brown (2003) 201 ALR 260,
Brisbane City Council v Attorney-General (Qld) (1908) 5 CLR 695

REPRESENTATION:

Counsel Assisting:	Dr P Dwyer with Mr P Coleridge
For Zachary Rolfe:	Mr D Edwardson KC and Mr F Merenda
For the Brown Family:	Mr G Mullins with Ms P Morreau
For the Walker, Lane and Robertson families:	Mr A Boe with Mr D Fuller and Ms G Boe
For the Northern Territory Police Force:	Dr I Freckelton AO KC with Ms A Burnnard
For the Department of Health:	Mr T Hutton
For NAAJA:	Mr P Boulten SC with Ms B Wild and Mr J Murphy
For the Parumpurru Committee:	Mr J McMahon SC
For the Northern Territory Police Association:	Ms S Ozolins
For James Kirstenfeldt:	Mr C Gnech
For Lee Bauwens:	Ms KM McNally with Mr JM Suttner
For Paul Kirkby:	Mr SA Robson SC
For Anthony Hawkings and Adam Eberl:	Mr I Read SC

Judgment category classification:	A
Judgement ID number:	[2022] NTLC 019
Number of paragraphs:	88
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IN THE CORONERS COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. A51 of 2019

In the matter of an inquest into the death of Kumanjayi Walker

Introduction

1. On 9 November 2019 police members from the Alice Springs Immediate Response Team (**IRT**) travelled to Yuendumu. The IRT members encountered Kumanjayi Walker in House 511 Yuendumu. During an incident inside the house, one of the IRT members, Constable Zachary Rolfe, shot Kumanjayi Walker three times. Kumanjayi Walker was taken to the local police station where he passed away. This inquest will inquire into the circumstances of Kumanjayi Walker's death.

2. To date, thirteen interested parties have sought and been granted leave to appear or be represented at the inquest under s 40(3) of the *Coroner's Act 1993* (NT) (**Act**). Those parties are the Brown family, the Walker, Lane and Robertson families (**WLR families**), Constable Zachary Rolfe, the Northern Territory Police Force (**Police Force**), the Department of Health, the Parumpurru Committee of Yuendumu (**Committee**), the North Australian Aboriginal Justice Agency (**NAAJA**), the Northern Territory Police Association (**Association**), Constable James Kirstenfeldt, Sgt Paul Kirkby, Sgt Lee Bauwens, Constable First Class Anthony Hawkings and Constable First Class Anthony Eberl.

3. Constable Rolfe objects to 'eight discrete categories [of] evidence'. With one exception,[1] the evidence that falls within those eight categories is summarised in a 'Schedule of Objections' filed by Constable Rolfe and annexed to this ruling as Annexure A. This ruling deals with each of those objections, save for an objection to a report filed by NAAJA on 12 September 2022 titled '"In Normal Circumstances" – Understanding the structural nature of racial violence in the Northern Territory"' (**NAAJA Report**).[2] It is necessary to deal with Constable

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1 Category H, which Constable Rolfe describes as 'exploration of whether the evidence in the criminal trial of Constable Rolfe was "contaminated"'.

2 Which has been the subject of separate legal submissions and will be the subject of a separate ruling.

Rolfe's objections at this time because it is anticipated that the inquest will shortly hear from a large number of witnesses who are capable of giving evidence about the subject matters of the evidence to which Constable Rolfe objects.[3]

4. The objections were opposed by Counsel Assisting, the Police Force, the Brown family, the WLR families, NAAJA and the Committee. They were supported, at least in part, by [redacted] and Sgts Kirkby and Bauwens.[4]

5. For the reasons that follow, I will receive the evidence under s 39 of the Act. The evidence is appropriately directed to my ultimate function of determining what, if any, finding, comment, or recommendation I should or must make under ss 26, 34 and 35[5] of the Act. To adopt Constable Rolfe's test, there is, or may at the conclusion of the evidence be, a 'rational connection' between the evidence and the subject matters of those provisions.

6. Before turning to the substantive issues, I make two preliminary observations.

Lateness of Constable Rolfe's objections

7. While Constable Rolfe is entitled to raise objections and have those objections determined on their merits, it is appropriate that I again briefly comment on the regrettable timing of this application in light of the express statutory function of the Territory Coroner to 'ensure that the coronial system in the Territory is administered and operates efficiently'.[6]

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3 Constable Rolfe submits that '[t]o the extent that this inquest is to continue whilst these objections are being considered, the exploration of [issues associated with the evidence the subject of the objections] is objected to and should stop': Constable Rolfe (Submissions dated 27 September 2022), [3].

4 The Northern Territory Police Association made written and oral submissions in support of Constable Rolfe's original objection to the evidence of the text-messages. Although no further submissions was made in support of the renewed objections, I have considered those earlier submissions for the purpose of this ruling where appropriate.

5 I accept that, unlike s 26, provisions such as s 34(2) and 35(2) may not authorise a Coroner to 'inquire for the sole or dominant reason of making comment or recommendation': see, *Thales Australia Ltd v Coroner's Court* [2011] VSC 133, [67].

6 *Coroner's Act,* ss 4A and 4B.

8. A procedural history of Constable Rolfe's objections was provided by Counsel Assisting on 9[7] and 29 September 2022,[8] and in the written submissions of NAAJA dated 27 September 2022 at [3]-[13].[9] I consider that the lateness of Constable Rolfe's objections has disrupted the efficient progress of this lengthy and complex inquest. On 9 September 2020, by way of explanation, Mr Edwardson KC submitted that in her formal opening of the inquest Counsel Assisting 'had for the first time, identified how she propose[d] to use and lead the evidence at this inquest'.[10] It was submitted that only 'with the benefit of the opening' could Constable Rolfe make his objections. I am perplexed by this submission because in addition to similar objections having been raised on 25 May 2022 and withdrawn on 26 May 2022, written submissions in support of the revived objections were filed on 30 August 2022, four business days before Counsel Assisting opened on 5 September 2022.

9. Constable Rolfe submits that there is a tension between the criticism of his objections as being 'grossly late', and the description in *Ruling No 2* of objections of this kind as 'premature'.[11] However, as Counsel Assisting submitted, when authorities such as *R v Doogan*[12] and *Thales Australia Ltd v Coroner's Court*[13] describe objections of the present kind as 'premature' what they convey is that 'a liberal approach to the receipt of evidence is often necessary during an inquest, because it will often not be possible to determine what, if any, comment or recommendation might be permissible as a result of evidence that has yet to be called.'[14] That is 'a very different thing' to expecting 'that if Constable Rolfe's legal team knew that he wished to make objections of this kind in May of this year,

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7 Transcript of Proceedings, *Inquest into the death of Kumanjayi Walker* (Coroner's Court of the Northern Territory, Alice Springs, 9 September 2022), 297-300.

8 Transcript of Proceedings, *Inquest into the death of Kumanjayi Walker* (Coroner's Court of the Northern Territory, Alice Springs, 29 September 2022), 1182-1184.

9 Provided paragraph [4] is read subject to the qualification that an earlier objection had been made, and withdrawn, in May.

10 Transcript of Proceedings (9 November 2022), 304.

11 Constable Rolfe (Submissions dated 27 September 2022), [1].

12 (2004) 157 ACTR 1.

13 [2011] VSC 133.

14 Transcript of Proceedings (29 September 2022), 1182. See, relevantly, *Thales* [2011] VSC 133, [68] (Beach J); *R v Doogan* (2004) 157 ACTR 1, 34 (the Court).

then those objections should have been presented at that stage, rather than waiting [until four] days prior to the commencement of the inquest.'[15]

Ruling No 2

10. The second preliminary observation concerns the relationship between these objections and earlier objections by Constable Rolfe that I considered and dismissed in *Ruling No 2*.

Procedural background to *Ruling No 2*

11. On 30 August 2022 Constable Rolfe filed written submissions in support of objections to 13 issues identified on what was then Counsel Assisting's 'issues list'. On 2 September 2022 Constable Rolfe filed written submissions objecting to the receipt of two discrete items of evidence: namely, evidence of phone messages downloaded from Constable Rolfe's mobile telephone and any evidence given by the witness Claudia Campagnaro.

12. For reasons explained in *Ruling No 2*, I ultimately accepted a submission that it was inappropriate that I rule in an abstract way on the entirety of what was then Counsel Assisting's issues list. I did, however, consider and reject Constable Rolfe's objections to the two discrete items of evidence. Constable Rolfe now submits that, following *Ruling No 2*, the 'admissibility of the messages, by reference to the scope of this inquest, remains a live issue for determination.'[16]

The 'abuse of process' issue

13. On 9 September 2022 Mr Edwardson KC submitted that the phone download was 'challenged on a number of fronts', one of which was that they were 'too remote to engage the jurisdiction or function of this court'. Mr Edwardson noted that his oral submissions were to be considered alongside Constable Rolfe's written submissions of 30 August 2022 and 2 September 2022, which included detailed submissions on the jurisdiction of a Coroner.

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15 Transcript of Proceedings (29 September 2022), 1182-1183.

16 Constable Rolfe (Submissions dated 27 November 2022), [4].

14. At the commencement of her submissions on 12 September 2022, Counsel Assisting stated that while it would be inappropriate for me to 'try to determine all the questions of what evidence can and can't be received as a block and at the beginning of the inquest',[17] '[t]o the extent that Mr Edwardson KC has raised objections to particular evidence, your Honour can and should rule on those objections'.[18] Counsel Assisting concluded:

> DR DWYER: And just to make it clear before anybody has an opportunity to address your Honour. I anticipate that with the witnesses this week, including Sergeant Jolley, the text messages that are referred to in MFI C, will become relevant. That is, I wish to ask questions of Sergeant Jolley that relate to some of the messages. And to that end, because I anticipate their tender, if there is any objection then, I – or presuming that there will be, given what's followed from Constable Rolfe's lawyers, I would ask that your Honour – that your Honour's ruling assist us, or guide us in that respect.
>
> So if anybody else want – wants to say anything about their text messages and their admissibility, in my respectful submission, they should do so this afternoon so the Coroner is assisted.[19]

15. My response to this statement was to emphasise that I wanted to be in a position to proceed with the inquest without,

> …having to break for further submissions on [the] text messages, and whether I can receive them or not. So I think they fall – fall squarely under objection from Constable Rolfe, and that should be properly addressed now by all parties.[20]

16. I then heard submissions regarding the 'relevance' or 'remoteness' of the text-messages to the subject matter of the inquest.[21] Constable Rolfe's representatives, who had already made lengthy written and oral submissions on the issue, indicated that there was 'nothing in reply.'[22]

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17 Transcript of Proceedings (12 September 2022), 328.

18 Transcript of Proceedings (12 September 2022), 329.

19 Transcript of Proceedings (12 September 2022), 351.

20 Transcript of Proceedings (12 September 2022), 351.

21 See eg, Transcript of Proceedings (12 September 2022), 352-355 (Mr Murphy for NAAJA), 357 (Mr McMahon AC SC for the Committee).

22 Transcript of Proceedings (12 September 2022), 362.

17. Counsel Assisting submitted that insofar as Constable Rolfe's most recent objections contained a renewed challenge to the 'admissibility of the messages, by reference to the scope of this inquest', they were an 'attemp[t] to re-litigate on the same facts and circumstances the question of whether the text messages can and should be received, which would likely constitute an abuse of the court's processes.'[23] Similarly, NAAJA submitted that it was 'not appropriate for the Coroner to be asked to rule again on the objection without Constable Rolfe identifying a relevant change in circumstances (and none has been identified).'[24] While NAAJA suggested that to do so '*may* amount to an abuse of process',[25] its principal submission was that 'the Coroner's statutory function of ensuring the efficient operation of the coronial system is a sufficient basis to refuse to entertain such an objection.'[26]

18. Against this, Constable Rolfe contends that his renewed objection to the 'admissibility' of the text messages was not improper because he had understood that no 'questions of admissibility by reference to the scope of this inquest' were to be argued.[27] Constable Rolfe submits that as a result of this understanding he was denied the opportunity to make submissions in *reply* on the issue of the 'admissibility' of the text messages.[28]

19. In light of the lengthy submissions on 9 and 12 September 2022, I find this explanation unconvincing. I do not accept that Constable Rolfe's legal representatives were denied an opportunity to make submissions in reply and in *Ruling No 2*, Constable Rolfe's submissions regarding the 'remoteness', 'relevance' or 'admissibility' of the text messages were considered and rejected.[29]

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23 Transcript of Proceedings (29 September 2022), 1187.

24 NAAJA (Submissions dated 28 September 2022), [17].

25 NAAJA (Submissions dated 28 September 2022), [17] citing *Nominal Defendant v Manning* (2000) 50 NSWLR 139, [6]–[7], [10] (Mason P), [72] (Heydon JA); *Bajramovic v Calubaquib* (2015) 71 MVR 15, [40]–[41] (Emmett JA, Adamson J in agreement); *Liu v Age Company Limited* (2016) 92 NSWLR 679, [199] (McColl JA, Beazley P and Ward JA in agreement).

26 NAAJA (Submissions dated 28 September 2022), [17].

27 Constable Rolfe (Submissions of 28 September 2022), [4].

28 Constable Rolfe (Submissions of 28 September 2022), [6].

29 *Ruling No 2* [2022] NTLC 016, [18], [34]-[38].

20. Constable Rolfe's renewed objection to the 'admissibility of the messages by reference to the scope of this inquest', might constitute an abuse of process. Alternatively, it might be that it should not be entertained because to do so would 'undermine the efficient operation of the Coronial system.' These issues are, however, unnecessary to decide because, for the reasons given at [49]-[71], I have dismissed the objections on their merits.

Receiving evidence under the *Coroner's Act 1993* (NT)

21. Section 39 of the Act provides that a 'coroner holding an inquest is not bound by the rules of evidence and may be informed, and conduct the inquest, in a manner the coroner reasonably thinks fit.'

22. That power must be exercised in light of the Coroner's ultimate powers and duties to make findings, comments or recommendations at the conclusion of the inquest under ss 26, 34 and 35 of the Act. The only purpose for receiving evidence in this inquest is to enable me to make such findings, comments or recommendations.[30]

23. In addition to obliging a Coroner to find, 'if possible … the cause of death', ss 26, 34 and 35 of the Act collectively impose:

    (a) An obligation to find, 'if possible … any relevant circumstances concerning the death': s 34(1)(a)(iv);

    (b) A power to comment on matters 'including public health or safety or the administration of justice, connected with the death … being investigated': s 34(2);

    (c) An obligation to 'investigate and report on the care, supervision and treatment of the person while being held in custody or caused or contributed to by injuries sustained while being held in custody': s 26(1)(a); and,

    (d) A power to 'investigate and report on a matter connected with public health or safety or the administration of justice that is relevant to the death': s 26(1)(b).

24. These powers and duties were inserted into the Coroner's Act in 1993 in order 'to implement various recommendations of the Royal Commission into Aboriginal

[30] For the avoidance of doubt, I note that, unlike s 26, ss 34(2) and 35(2) of the Act do not to authorise a Coroner to 'inquire for the sole or dominant reason of making comment or recommendation': see, *Thales* [2011] VSC 133, [67].

Deaths in Custody'.[31] As Counsel Assisting submitted, that report had 'recommended that … Coronial legislation be strengthened to increase the breadth and depth of Coronial investigations in the case of deaths in custody and in particular the death of an Aboriginal person in custody.'[32]

25. Although not unlimited, it is apparent from the text of ss 26, 34 and 35 that the subject matters of the coronial inquiry are 'broad … with indefinite boundaries.'[33] That is consistent with the legislative history of the Act. It is also consistent with the principles governing the construction of 'remedial' provisions,[34] and provisions conferring powers or jurisdiction on courts,[35] which ordinarily require that such provisions be read as broadly as a fair reading of their text, in context, will allow. Each of these principles has been held to apply to coronial legislation.[36]

26. Accordingly, I accept Counsel Assisting's submission that 'any attempt [by Constable Rolfe] to artificially narrow the language which is actually used in the *Coroners Act* of the Northern Territory should be rejected.'[37] In particular, I do not accept that the word 'relevant' in s 26 of the Act can be read as if it said, 'closely connected to'.[38] Beyond that, I do not perceive there to be any significant dispute between the parties about the ambit of ss 26, 34 and 35 of the Act.

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31 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 3 March 1993, 7897-7899 (Mr Stone, Attorney-General).

32 Transcript of Proceedings (29 September 2022), 1186.

33 *Doomadgee v Clements* (2006) 2 Qd R 352, [32].

34 *Tracy v Repatriation Commission* (2000) 101 FCR 279, [13].

35 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 205 (Gaudron J). See also, *PMT Partners Pty Ltd (in liq) v Australian National Parks & Wildlife Service* (1995) 184 CLR 301, 313 (Brennan CJ, Gaudron and McHugh J),

36 *Conway v Jerram* (2010) 78 NSWLR 689, [39] (Barr AJ); *Doomadgee v Clements* (2006) 2 Qd R 352, [31] (Muir J).

37 Transcript of Proceedings (29 September 2022),

38 Cf Constable Rolfe (Submissions dated 30 August 2022), [24]-[26], Constable Rolfe (Submissions dated 27 September 2022), [6]. I acknowledge that there is a potential superfluity to the words 'relevant' and 'connected with' in the expression 'relevant circumstances connected with the death'. One explanation is that the words do not convey two different concepts and that the expression is a 'composite phrase' or hendiadys: *Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260, [32] (Heydon J). This would reflect the principle that it will not always be possible to give a full and accurate meaning to every word in a statute: *Brisbane City Council v Attorney-General (Qld)* (1908) 5 CLR 695, 720 (O'Connor J). An alternative, but in my view less likely,

27. The authorities emphasise the flexible and inclusive approach a Coroner should take to the receipt of evidence under a provision such as s 39 of the Act. In *Priest v West*,[39] for example, the Court of Appeal of Victoria noted that it was 'precisely because' provisions such as s 34 of the Act *oblige* a Coroner to 'do everything *possible* to determine the cause and circumstances of the death that Parliament has removed all inhibitions on the collection and consideration of material which may assist in that task.'[40] Hence, '[f]ar from justifying a narrow view of the scope of an investigation' provisions such as s 39 of the Act 'oblige the coroner to take an expansive or inclusive approach, in our view.'[41]

28. In part, this flexible, and inclusive, approach to the receipt of evidence reflects the 'broad … scope and indefinite boundaries' of the subject matters of provisions such as ss 26, 34 and 35 of the Act.[42] As Muir J noted in *Doomadgee v Clements*,[43] that breadth and those indefinite boundaries, 'generally make it inappropriate to interfere with the gathering of evidence by a coroner' or 'to seek from a coroner a ruling that one piece of evidence or another is inadmissible or irrelevant as if the coroner were conducting a civil or criminal trial.'[44]

29. But equally, this flexibility and inclusivity reflects the fact that, unlike ordinary court proceedings between parties,[45] an inquest is an *investigative* process.[46] In that sense, the purpose of an inquest is to identify the issues that arise out of the circumstances of a reportable death. And, particularly in an inquest as lengthy and complex as this, those issues may not fully emerge until the evidence gathering process is complete. That is why, as the Court of Appeal of the ACT confirmed in *Doogan* 'a liberal approach to the potential relevance of evidence may sometimes

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construction is that the word 'relevant' limits the *kind* (but not degree) of relation between the circumstance and the death: ie, to circumstances 'underlying', or in the broadest sense 'contributing to', the death. Ultimately, it is unnecessary to decide.

39 (2012) 40 VR 521.

40 (2012) 40 VR 521, [6] (Maxwell P, Harper J).

41 (2012) 40 VR 521, [6] (Maxwell P, Harper J).

42 *Doomadgee v Clements* (2006) 2 Qd R 352, [32], [36].

43 (2006) 2 Qd R 352.

44 *Doomadgee v Clements* (2006) 2 Qd R 352, [36].

45 In which the major issues between the parties are, or should ordinarily be, defined in advance by a charge or cause of action and civil or criminal pleadings.

46 *Domaszewicz v State Coroner* (2004) 11 VR 237, [28].

be appropriate'.[47] And that is why, as Beach J noted in *Thales*, objections such as these are often criticised as being 'hypothetical', 'speculative' or 'premature', or as tending inappropriately to 'fragment' the evidence gathering process.[48] As Beach J noted, sometimes the 'question of what comment or recommendation might be permissible as a result of evidence that has yet to be called is not capable of determination'.[49]

30. Even so, I would be hesitant to accept the submissions of NAAJA and the WLR families that a Coroner's power to receive evidence is not, at least indirectly, 'limited by reference to concepts of relevance'.[50] It is difficult to think of a case in which concepts of relevance, or potential relevance, would not at least inform the question of whether a Coroner thinks fit to receive an item of evidence under s 39 of the Act. Even administrative decision makers, who 'are equally free to disregard formal rules of evidence in receiving material on which facts are to be found'[51] are not absolved of the 'obligation to make findings of fact based upon material which is logically probative'.[52] Hence, if a Coroner concluded that a piece of evidence could not, at the conclusion of the inquest, possibly be relevant to any of the subject matters of ss 26, 34 and 35 it is unlikely that she could reasonably think fit to receive it. But, as *Thales* and *Doogan* demonstrate, that does not equate to a positive obligation to conclusively determine all questions of relevance before the evidence gathering process is complete.

31. I will turn to the objections.

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47 *Doogan* (2004) 157 ACTR 1, [34] (The Court).

48 *Thales* [2011] VSC 133, [68].

49 *Thales* [2011] VSC 133, [68]. I accept that there will be cases where, irrespective of how the evidence might emerge, it would be inconceivable that particular evidence could bear upon the subject matters of ss 26, 34 and 35 of the Act: see, albeit in a different statutory context, *Harmsworth v State Coroner* [1989] VR 989.

50 NAAJA (Submissions dated 28 September 2022),

51 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1976) 36 FLR 482, 492 (Brennan J).

52 *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93, [97] (Flick and Perry JJ).

The objections

32. The categories of evidence to which Constable Rolfe objects, as described by him, are:

a) evidence concerning the honesty of Constable Rolfe's application to join NT Police;

b) evidence concerning the nature and adequacy of NT Police recruitment policies;

c) evidence concerning the alleged discrimination by NT Police against indigenous persons or community police;

d) evidence concerning Constable Rolfe's use of force history;

e) evidence concerning Constable Rolfe's disciplinary background/history;

f) evidence concerning the possibility of prior recreational drug use by Constable Rolfe;

g) evidence concerning the procedures of NT Police in relation to drug and alcohol testing;

h) exploration of whether the evidence in the criminal trial of Constable Rolfe was 'contaminated'.

33. I will deal with the evidence that falls into these categories in turn. Where they concern broadly overlapping evidence and have related subject matters, I will attempt to deal with categories together. For the avoidance of doubt, the category descriptions are Constable Rolfe's, not mine.

Category A: evidence concerning the honesty of Constable Rolfe's application to join the NT Police

Category B: evidence concerning the nature and adequacy of NT Police recruitment policies

34. Constable Rolfe applied to join the Police Force on 2 February 2016. Following a recruitment process, he received an offer of employment as a Constable on 22 April 2016 and commenced training on 30 May 2016. He commenced duties as a general duties police officer at Alice Springs Police Station on 14 December 2016. A little under three years later, on 9 November 2019, he shot and killed Kumanjayi Walker.

35. At least three areas of potential relevance emerge from the evidence covered by Categories A and B. First, the impugned evidence suggests that Constable Rolfe did not provide accurate information to the Police Force during his recruitment process. For example:

(e) In his written application, Constable Rolfe was asked 'Have you ever been the subject of any complaints, internal investigations or ever had any disciplinary action imposed on you?', Constable Rolfe marked his application form 'No'. The impugned evidence suggests, however, that while a soldier in the Australian Defence Force in 2012, Constable Rolfe had been the subject of an internal military investigation as a result of which he had pleaded guilty, at a military trial, to a charge of theft.[53]

(f) During his interview on 16 March 2016, the impugned evidence suggests that Constable Rolfe was asked by the three-member panel, 'Did you have [any] disciplinary problems when you served in the military?' The impugned evidence suggests that Constable Rolfe again failed to declare his ADF disciplinary matters.[54]

(g) In his written application, Constable Rolfe initially marked both the 'Yes' and "No" boxes when answering the question 'Have you previously applied to join any other police service?'. He then crossed out the 'Yes' box. Constable Rolfe had, however, applied to join the Victoria Police Service on 30 December 2015 and, on 1 February 2016 had applied to join the Queensland Police Force (ie, the day before his application to join the Police Force).[55]

(h) In his written application to the Police Force, Constable Rolfe did not disclose a fine he had received in Queensland for 'Public nuisance – violent behaviour'. On the other hand, Constable Rolfe disclosed this matter during his oral interview.[56]

(i) Finally, by way of context, in his application to join the Queensland Police Force, Constable Rolfe also did not disclose the fine he had received in that State for 'Public nuisance – violent behaviour'.[57] On 7 March 2016, Queensland Police informed

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53 Coronial Investigation Report of Commander David Proctor APM, 'Death in Custody of Charles Arnold Walker at Yuendumu on 9 November 2019' (31 August 2021), 18.

54 Ibid, 20.

55 Ibid, 19.

56 Ibid, 21.

57 Ibid, 19.

> Constable Rolfe that the failure to disclose this matter was an integrity breach and that he was excluded from reapplying for the Queensland Police Service for 10 years.[58]

36. Second, the impugned evidence suggests that on 28 February 2016, as a part of the recruitment process, Constable Rolfe undertook psychological testing with the Australian Institute of Forensic Psychologists. Although he was otherwise found to be an 'excellent' candidate, the resulting report found that:

> After making a mistake, Zachary is less likely than many others to accept responsibility. He may brush off the significance of the error, seek to minimise his own role, or to blame others.[59]

37. And that,

> The 'Aggression' score is above average. Whether Zachary will act with firm assertiveness or frank aggression cannot be determined from this scale alone.[60]

38. And that friction between Constable Rolfe and his father, Richard Rolfe, was a pattern that:

> …has frequently found to be associated with later resentment of authority figures in highly structured organisations in which employees are expected to comply with strict procedures. In the present case, other data confirm this could be a problem.[61]

39. Third, as Mr Boe for the WLR families noted, the impugned evidence 'reveals that attempts to access a recruit's ADF information was abandoned by police in the recruitment process because there were delays and obstacles in obtaining information about Constable Rolfe's particular ADF history.'[62] As I have noted, that ADF history would have disclosed Constable Rolfe's conviction for an offence of dishonesty.

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58 Ibid, 19.

59 Ibid, 20.

60 Ibid, 20.

61 Ibid, 20.

62 Transcript of Proceedings (29 September 2022), 1200.

40. Constable Rolfe submits that there is 'no logical connection' between this material and my assessment of the issues that arise out of the death of Kumanjayi Walker.[63] I disagree.

41. Most obviously, the impugned evidence may prove relevant to my assessment of the credibility and reliability of Constable Rolfe's evidence. It is neither necessary nor appropriate for me to determine the 'value' of the impugned evidence for that purpose at this stage, noting, in particular, that I have yet to hear from Constable Rolfe. It suffices that the evidence is, like some of the impugned text messages and the evidence of Claudia Campagnaro,[64] prima facie evidence of dishonesty or unreliability by Constable Rolfe. This is in circumstances where I may well be called upon to resolve inconsistencies between the evidence of Constable Rolfe and other witnesses.[65]

42. As to whether the 'nature and adequacy of NT Police Force recruitment policies' might justify or require a finding, comment or recommendation, as Beach J noted in *Thales*, it is not possible at this stage to say whether this issue 'might or might not be "connected with the death [of the deceased]"'.[66] Much will depend on the evidence, including, in particular, my findings on the evidence about the nature of Constable Rolfe's conduct, and any inappropriate conduct or misconduct, on 9 November 2022.

43. There is, however, certainly evidence from Deputy Commissioner Smalpage that different recruitment policies, which would have disclosed Constable Rolfe's ADF file and military conviction for a dishonesty offence, '*could* have adversely influenced the decision to offer him employment.'[67] Equally, the combination of

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63 Constable Rolfe (Submissions dated 27 September 2022), [11].

64 See, *Ruling No 2* [2022] NTLC 016, [42]-[56].

65 Although the relevance of this evidence does not depend on the existence of such inconsistencies.

66 *Thales* [2011] VSC 133, [68].

67 Affidavit of Deputy Commissioner of Police Murray Smalpage dated 12 July 2022, [203].

the expert reports of Sgt Andrew Barram,[68] Professor Andrew McFarlane AO,[69] and Dr Ned Dobos[70] may suggest that more robust recruitment processes would have disclosed 'disentitling … pathology or attitudes suggestive of [Constable Rolfe's] unsuitability'[71] for employment as a police officer that contributed to Kumanjayi Walker's death. At this stage that is not a matter that is possible to determine.

44. Quite apart from the issue of the adequacy of the relevant Northern Territory Police *recruitment* processes, the impugned evidence may raise questions about the adequacy of the ongoing supervision and assessment Constable Rolfe received after he commenced as police officer; in particular, his supervision and assessment in or around 9 November 2019, including the assessment that he was suitable for deployment to Yuendumu with the IRT on that day. As Deputy Commissioner Smalpage notes in the impugned portion of his affidavit, 'while *initial* assessment processes must be rigorous, they need to be supplemented by *ongoing* assessments'.[72] That is because '[i]n spite of all the checks and balances that are conducted during the recruitment process, it is possible that unsuitable applicants may still be offered employment if they deliberately obscure disentitling conduct or pathology or attitudes suggestive of their unsuitability.'[73]

45. While it would be wrong to characterise them as even provisional 'diagnoses', Constable Rolfe had been identified at recruitment as someone who might be 'less likely than many others to accept responsibility', as having an above average 'Aggression score', and as exhibiting patterns of behaviour associated with

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68 Who opines that Constable Rolfe 'has demonstrated a tendency to rush into situations with a disregard for his and others' safety, and a disregard for NT Police training, practice and procedure': Affidavit of Sgt Andrew Barram dated 26 March 2022, [19].

69 Who opines that Constable Rolfe may have suffered from PTSD or an exaggerated survival instinct: Statutory Declaration of Professor Alexander McFarlane dated 15 July 2020.

70 Who opines that Constable Rolfe's 'ability to use [violence] without emotional or moral distress' was consistent with 'what one would expect from a morally injured individual' who had undergone military conditioning: Statutory Declaration of Dr Ned Dobos dated 31 August 2022, [23].

71 Affidavit of Deputy Commissioner of Police Murray Smalpage dated 12 July 2022, [213].

72 Affidavit of Deputy Commissioner of Police Murray Smalpage dated 12 July 2022, [213].

73 Affidavit of Deputy Commissioner of Police Murray Smalpage dated 12 July 2022, [213].

'resentment of authority figures in highly structured organisations in which employees are expected to comply with strict procedures'.[74]

46. In addition, Constable Rolfe was known to have served with the ADF and, as Mr Boe submitted, there is now expert 'evidence that training and service in the ADF may have a significant impact on a soldier; both PTSD, according to Professor McFarlane and 'moral injury' according to Dr [Ned] Dobos'.[75] Indeed, in the United States, the Justice Department and the International Association of Chiefs of Police developed guidelines in 2009 for police departments recruiting military veterans. These guidelines note that military conditioning may,

> cause returning officers to mistakenly blur the lines between military combat situations and civilian crime situations, resulting in inappropriate decisions and actions – particularly in the use of less lethal or lethal force.[76]

47. It might ultimately be argued that what the Police Force learned about Constable Rolfe during his recruitment called for a greater degree of ongoing supervision and/or assessment to ensure Constable Rolfe's suitability as a police officer and, in particular, his suitability for deployment with a tactical team such as the IRT. Indeed, it might ultimately be argued that had a greater degree of supervision or assessment been provided, Constable Rolfe would not have been deemed suitable for deployment with the IRT on 9 November 2019. That is to bear in mind the evidence of Constable Rolfe's use of force complaint history at that time (as to which, see [72]-[77], below), his text exchanges, which include exchanges with supervisors, and the evidence that he was diagnosed with a depressive illness in October 2019 of which his supervisors appear not to have been aware.

48. Accordingly, I will receive the evidence under s 39 of the Act at this stage.

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74 Ibid.

75 Transcript of Proceedings (27 September 2022), 1200.

76 See, Statutory Declaration of Dr Ned Dobos dated 31 August 2022, [25].

Category C: evidence concerning the alleged discrimination by NT Police against indigenous persons or community police

49. Leaving to one side the NAAJA Report and the issue of systemic racism, Category C comprises two principal sub-categories of evidence. The first is evidence of and about Constable Rolfe's participation in text-message exchanges that may evince racist attitudes towards aboriginal people.[77] The second is evidence of and about Constable Rolfe's participation in text-message exchanges that may evince derogatory attitudes towards community police.[78] Essentially for the reasons I gave in *Ruling No 2* at [34]-[41], I dismiss the objection.

50. In his renewed attempt to object to this evidence, Constable Rolfe submits that any evidence of racism by him cannot be 'relevant to *this* death' because the body-worn video shows that Constables Rolfe and Eberl engaged with Kumanjayi Walker in a 'calm and respectful manner' and that it was Kumanjayi Walker who then 'set upon the two officers', including by stabbing them.[79] There may be debate about that. But more importantly, as Counsel Assisting noted, the focus on the body-worn footage 'ignores a range of decisions made by Constable Rolfe and others prior to the entry into House 511 which led to the confrontation with Kumanjayi, which may or may not have been affected by conscious or unconscious racial bias'.[80] These decisions may have increased the likelihood of Kumanjayi Walker's death.

51. Constable Rolfe then submits that any expressions of misogyny, or derogatory and dismissive attitudes towards community police, cannot be relevant because there is no inconsistency between what the IRT did on 9 November 2019 and the orders given to them at the Yuendumu Police Station by Sgt Julie Frost, who is both a woman and a 'bush cop'.[81] Specifically, Constable Rolfe submitted that Sgt Frost had accepted that, 'contrary to the written plan that had been prepared for the

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77 See, Constable Rolfe (Submissions dated 27 September 2022), [13]-[16].

78 Ibid.

79 Ibid, [13].

80 Transcript of Proceedings (29 September 2022), 1191.

81 Constable Rolfe (Submissions dated 27 September 2022), [16].

deployment of the IRT' – which involved a 5am arrest – 'she nonetheless deployed them at 7pm … and told the officers that they were to intelligence gather.'[82]

52. Counsel Assisting submitted that it was 'plainly incorrect' to say that there was no inconsistency between Sgt Frost's orders and the conduct of the IRT.[83] She submitted that it was,

> clear from the evidence, written and oral of Sergeant Frost that it was her belief when the IRT members left the Yuendumu Station that the 5 am arrest plan was still in effect. She gave evidence that it was Constable Kirstenfeldt who suggested that the IRT should go out and 'gather intelligence'. She rejected the notion that their almost immediate searches of House 577 and House 511 amounted to mere intelligence gathering. And she and other officers have noted that in fact those sorts of actions would jeopardise the plan of a 5 am arrest which was meant to minimise the use of force.[84]

53. It is unnecessary and inappropriate for me to resolve this dispute at this time, noting that I have not yet heard from a number of the direct witnesses to the conversation between Sgt Frost and the IRT. It is sufficient that Counsel Assisting's interpretation of the evidence is, on the basis of what I have heard so far, arguable. That being so, I agree with Counsel Assisting that,

> ….on the issue of whether there was a deliberate disobedience of [Sgt Frost's] written arrest plan … expressions of contempt towards females and more importantly expressions of contempt about bush cops may well be highly relevant.[85]

54. Finally, although Constable Rolfe's objects to the text messages insofar as they are prima facie evidence of racism or derogatory attitudes towards community police, a number of the text-messages provide prima facie evidence of an *association* between those sentiments and inappropriate attitudes towards the use of force. One example of this is a text exchange between Constable Rolfe and another police officer on 9 April 2019 from 8:45:24PM:

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82 Constable Rolfe (Submissions dated 27 September 2022), [16].

83 Transcript of Proceedings (29 September 2022), 1191.

84 Transcript of Proceedings (29 September 2022), 1191.

85 Transcript of Proceedings (29 September 2022), 1189-1190.

Officer to Rolfe:	I'm so sick of aboriginals tonight fuckkkkkkk
Rolfe to Officer	They being losers?
Officer to Rolfe:	Just had a chick lying the whole time 'I don't know him' then her kid has the same last name 'oh no relation' and then fucking look her up and they're husband and wife. So we laid into her and she stuck to it
Officer to Rolfe:	..... and I may have been super hangry.....
Rolfe to Officer:	Hate that.
	Oi if you're hungry you're definitely allowed to towel locals up
Officer to Rolfe:	If your last name rhymes with Rolfe you're allowed to towel up locals
Rolfe to Officer:	I do have a license to towel locals. I like it

55. While that is sufficient to dismiss Constable Rolfe's renewed objection to the text-messages, there were additional objections pressed by [redacted] and Sgts Bauwens and Kirkby.

56. [redacted]

57. [redacted]

58. [redacted]

59. [redacted]

60. Sgt Bauwens made two submissions in support of his objection to the text messages. First, he 'adopts and associates himself with' the submissions made by Constable Rolfe regarding the legality and receipt of the phone download that I considered and dismissed in *Ruling No 2*. It is not necessary to say anything further about them. Second, he contends that if the purpose of admitting the text messages is 'to establish the existence of a form of systematic racism in the NTPF or in the IRT' then '*more* is required'. He suggests that I should seek an apparently random 'sample of cell phones and records to make the evidence more representative of the NTPF.'

61. In my view, the principal relevance of Sgt Bauwens' text messages is not that they are prima facie evidence of 'systemic racism' within the Police Force.[88] The principal relevance of Sgt Bauwens' text-message is that they are prima facie

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86 [redacted]

87 [redacted]

88 Although they may be.

evidence that Sgt Bauwens held *overtly* racist attitudes and that he expressed these views to his subordinates in the IRT when discussing the work of the IRT.

62. For example, on 9 July 2019 from 7:04:52PM Sgt Bauwens and Constable Rolfe had this text exchange about what appears to have been an arrest of an aboriginal person in a remote community:

Bauwens to Rolfe:	Cool as long as we got him, had a run hey
Rolfe to Bauwens:	Yeah the bush cops would never have been able to get him. Impossible for them
Rolfe to Bauwens:	So it was good we went, the bush cops fucked up as usual but that just mean we had a run instead of getting him cordoned properly so it's all good.
Rolfe to Bauwens:	He was fair rapid
Bauwens to Rolfe:	Good job, I'll let [Superintendent Jody] Nobbs know the details
	I want to do a lot more of this stuff
	That's a couple we have got for Nobbs
Rolfe to Bauwens:	Yeah I'm hell keen, it seems he's getting on board
Bauwens to Rolfe:	<u>These *bush coons* aren't used to people going after them</u>
Rolfe to Bauwens:	Yeah bushcops blow my mind, I'll tell you about these dudes when I see you[89]

63. In my view, there is a potential nexus between Sgt Bauwens' conduct and the circumstances of Kumanjayi Walker's death. Sgt Bauwens was the Officer in Charge of the IRT. It might be thought that he was, or ought to have been, responsible for establishing discipline and a working 'culture' within the IRT. Superintendent Nobbs, who authorised the deployment of the IRT on 9 November 2019, gave evidence that he perceived in Sgt Bauwens' and others' text-messages a 'theme of contempt for the community and contempt for colleagues and *from that*

[89] Emphasis added.

clearly ill-discipline'.[90] He agreed that this ill-discipline was relevant when 'trying to understand why [the] operation plan [for the arrest of Kumanjayi Walker] was not executed in the way [he and Sgt Frost] had wanted it to be.'[91] That was because,

> if the starting point is a nil discipline workforce and a broad contempt for the colleagues in which they're going to actively operate within the community in which they're operating … there is no foundation to the plan in the first instance. So anything that will flow from that is destined to fail.[92]

64. For those reasons, it is unnecessary for me to consider Sgt Bauwens' suggestion that I should obtain an apparently random 'sample of cell phones and records to make the evidence more representative of the NTPF' in order better to conduct an abstract examination of systemic racism within the Police Force. I doubt very much that this would be lawful.

65. Finally, Sgt Kirky made, in effect, two broad submissions in support of his objection to the text messages. First, Sgt Kirkby submitted that an abstract 'investigation into whether discrimination, systemic racism and cultural bias exists within the … Police Force' would 'presen[t] more as a wide inquiry into the Police Force, than an inquest into a particular death.'[93] I agree. But that is not what I am doing. What I am considering is whether any discriminatory attitudes, systemic racism and/or cultural bias as is evidenced by these text-messages may have been involved in, or made more likely, Kumanjayi Walker's death. That is a distinction recognised by Nathan J in *Harmsworth v State Coroner*.[94]

66. Second, Sgt Kirkby submitted that his 'attitude, whether deemed to be good, bad, indifferent or ill-informed, is not a matter directly or indirectly connected with the death of Mr Walker.' While I accept that he was not a member of the IRT, for the reasons I gave in respect of Sgt Bauwens' objections, there may well be a nexus between Sgt Kirkby's conduct and the circumstances of Kumanjayi Walker's death.

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90 Transcript of Proceedings, *Inquest into the death of Kumanjayi Walker* (Coroner's Court of the Northern Territory, Alice Springs, 27 September 2022), 1121.

91 Transcript of Proceedings (27 September 2022), 1121.

92 Transcript of Proceedings (27 September 2022), 1121.

93 Sgt Kirkby (Submissions dated 7 October 2022), [11].

94 In particular in the course of his Honour's discussion of the relevance of 'theories of maximum security imprisonment': [1989] VR 989, 998.

Sgt Paul Kirkby was a senior police office in the Alice Springs Police Station and directly supervised Constable Rolfe. Of Constable Rolfe's 46 use of force incidents 11 occurred while Sgt Kirkby was his shift supervisor. It is not inconceivable that to the extent that Sgt Kirkby expressed or tolerated inappropriate behaviours or attitudes, this may have contributed to the development of such behaviours or attitudes by Constable Rolfe.

67. For example, some of the text-messages may suggest that Sgt Kirkby expressed or tolerated racism, homophobia, misogyny or contempt for senior police officers and community police in his communications with Constable Rolfe. On 22 June 2019 from 8:13:34PM Sgt Kirkby and Constable Rolfe had the following exchange about what appears to have been a policing interaction between Constable Rolfe and an unidentified woman:

Kirkby to Rolfe:	Who was the silly bitch?
Rolfe to Kirkby:	Fuck knows some white bitch who thinks she aboriginal
Kirkby to Rolfe:	Lying in the dirt pissed!
	Doing a fucking good impression

68. Equally, on 22 September 2019 from 4:24:55PM Sgt Kirkby and Constable Rolfe had the following exchange about what appears to have been an unsuccessful application by Constable Rolfe to join the Territory Response Group:

Rolfe to Kirkby:	Nah application was fine, except that dashy wrote a stupid comment and vicary didn't fill out her bit at all.
	But they reckon that the other applicants have "longer and more diverse careers" then me.
	And recommend I go out bush for 12 months haha
	Fucking joke
Kirkby to Rolfe:	That's their standard line now.
	Everyone knows people go out bush cause they're fucking lazy. Maybe that's who

they're looking for now. The order of preference now is blacks, chicks, gays and lazy fucks – then Zac

69. Other text-messages may provide prima facie evidence that Sgt Kirkby (whose responsibility it was to review Constable Rolfe's Use of Force incidents) tolerated or encouraged dishonesty by Constable Rolfe in the context of his work as a police officer. For example, on 3 September 2019 from 12:04:47PM Sgt Kirkby and Constable Rolfe had the following exchange:

Kirkby to Rolfe:	Sorry about the stress caused by losing my shit the other night. Stress you didn't need. You sorted it well. I'd just had enough. He was the second person to press my button that night.
Rolfe to Kirkby:	Bro there was literally no stress about it. I'm all for that shit, I've done the same thing to you more than once before. <u>I'm always ready to make my camera face the other way and be a dramatic cunt for the film</u> Haha
Kirkby to Rolfe:	And the Oscar goes to …
Rolfe to Kirkby:	Haha

70. For those reasons, I do not accept Sgt Kirkby's submission that his conduct could not be indirectly relevant to 'the circumstances of Mr Walker's death or the interests of the persons represented at the bar table as they relate to that matter.'[95]

71. Accordingly, I will receive the evidence under s 39 of the Act at this stage.

Category D: evidence concerning Constable Rolfe's use of force history

Category E: evidence concerning Constable Rolfe's disciplinary background/history

72. A relatively significant body of evidence on the coronial brief concerns Constable Rolfe's use of force and disciplinary history. On the basis of much of this material,

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95 Sgt Kirkby (Submissions dated 7 October 2022), [11].

one witness, Sgt Andrew Barram, identified five incidents in which Constable Rolfe used excessive force or 'engaged in conduct that unnecessarily led to situations where force was then required.'[96] In Sgt Barram's opinion, Constable Rolfe 'has demonstrated a tendency to rush into situations with a disregard for his and others' safety, and a disregard for NT Police training, practice and procedure.'[97]

73. Constable Rolfe submits that 'there is no question as to who fired the fatal shots that killed Kumanjayi Walker or the circumstances in which those shots were fired'. It is submitted that this 'inform[s] the necessity of investigating the circumstances of Constable Rolfe's use of force history.'[98] In addition, Constable Rolfe submits that differences between the prior use of force history and the circumstances of 9 November 2019 eliminate the relevance of this evidence as 'tendency' evidence.[99] Finally, Constable Rolfe submits that in order to determine whether the prior history discloses a relevant tendency the court would 'be required to conduct several discrete trials'[100] involving the calling of 'each of the persons who were allegedly the subject of that use of force'.[101]

74. In oral argument, Counsel Assisting's response to these submissions was as follows:

> In my respectful submission, Constable Rolfe's use of force and disciplinary history may well be rationally connected with your Honour's … functions under ss 26, 34 and 35. The [objection] fails for essentially three reasons.
>
> First, the fact that there is no question as to who fired the fatal shots does not mean that evidence as to prior inappropriate excessive use of force is not probative as tendency evidence. It is.
>
> For example, it may be probative of Constable Rolfe's state of mind at the time of the shooting and it may be probative of his state of mind in the lead up to the shooting and whether or not there were less forceful options, or options that would have minimised the risk of use of force and been safer for Constable Rolfe and for Kumanjayi.

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96 Affidavit of Sgt Andrew Barram dated 26 March 2022, [19].

97 Affidavit of Sgt Andrew Barram dated 26 March 2022, [19].

98 Constable Rolfe (Submissions dated 27 September 2022), [18].

99 Constable Rolfe (Submissions dated 27 September 2022), [21].

100 Constable Rolfe (Submissions dated 27 September 2022), [19].

101 Constable Rolfe (Submissions dated 27 September 2022), [19], [22].

> For example, Sergeant Barram's expert opinion … in his report that is tendered in these proceedings … – and Sergeant Barram of course will be available for cross-examination – is that Constable Rolfe had a tendency to rush into situations in such a way as to increase the likelihood of the use of force scenario.
>
> And that issue is, in my respectful submission, squarely an issue within your Honour's remit and should be an issue of concern. It's not an issue I'm inviting your Honour to predetermine now of course. This is just in relation to the admissibility of this evidence. Because your Honour is open minded about these issues and your Honour will give full and fair consideration to Constable Rolfe's evidence when he comes to give that evidence and the evidence of other members of the IRT.
>
> [Second, t]here is no real risk of a trial within a trial as suggested by those appearing for Constable Rolfe. In many cases there is body worn video footage or even transcript of a local court hearing that then becomes relevant in proceedings. If there are particular witnesses who Constable Rolfe wishes to say should be added to the witness list … so that he can fairly represent the situation in previous situations where he is said to have used excess force, then those assisting Constable Rolfe should notify counsel assisting. But we have not, at this stage, had any suggestion that any further witnesses should be added to the witness list in that regard.
>
> Thirdly, and perhaps most importantly, as I've stressed previously, your Honour, one of the significant focusses … is … the supervision of what is said may be excessive use of force; the supervision by NT Police of Constable Rolfe in certain circumstances, but equally, and possibly more importantly going forward, of other officers in those circumstances. So that any issues in relation to potential excessive use of force can be addressed, not necessarily through discipline, although that might be appropriate, but at least through instruction.[102]

75. I accept those submissions. In doing so, I note, and adopt, the observations of Dr Freckelton AO SC regarding the need for 'a rigorous approach' to the use of any of this evidence for a 'tendency' or 'propensity' purpose. Although permissible in coronial proceedings,[103] 'a fair and rigorous analysis is required to analyse whether proven instances of that prior conduct are available, shown on proper evidence, and then whether those prior incidents can fairly be interpreted as manifesting [a relevant] tendency or propensity'.[104]

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102 Transcript of Proceedings (29 September 2022), 1192-1193.

103 See, *Priest v West* (2012) 40 VR 521; *Doomadgee v Clements* (2006) 2 Qd R 352.

104 Transcript of Proceedings (29 September 2022), 1205.

76. Having said this, I agree with the submission of Mr McMahon AC SC that the relevance of the evidence of Constable Rolfe's prior uses of force may not ultimately depend on whether I characterise them as 'excessive', or whether they give rise to evidence of a relevant tendency.[105] Mr McMahon submitted that in the lead up to 9 November 2019 Constable Rolfe had accrued a 'troubling list of use of force complaints'.[106] In addition, he had recently been publicly described by a sitting Northern Territory judge as having giving evidence justifying an application of force that was a 'pure fabrication',[107] and was an active suspect in an associated investigation for perjury by the Police Force's Crime Command.[108] Accordingly, irrespective of whether he is ultimately 'exonerated or not exonerated', Mr McMahon submitted that it is '*the fact* of the long list of use of force complaints' that may bear upon the adequacy of the Police Force's supervision and assessment of Constable Rolfe in the lead up to 9 November 2019, and, in particular, the assessment that he was suitable for deployment with the IRT on that day.

77. Accordingly, I will receive the evidence under s 39 of the Act at this stage.

Category F: evidence concerning the possibility of prior recreational drug use by Constable Rolfe

Category G: evidence concerning the procedures of NT Police in relation to drug and alcohol testing

78. The relevant prima evidence of recreational drug use by Constable Rolfe is contained in the text-messages on the phone download. Other evidence within this category includes passages of the affidavit of Deputy Commission Murray Smalpage and the statutory declaration of Professor Alexander McFarlane AO, psychiatrist. Constable Rolfe submits that because there is no evidence that Constable Rolfe was affected by recreational drugs or alcohol at the time he shot

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105 Transcript of Proceedings (29 September 2022), 1198.

106 Transcript of Proceedings (29 September 2022), 1198. Whether that characterisation is justified is a matter for another day.

107 Transcript of Proceedings, *Police v Malcolm Ryder* (Local Court of the Northern Territory, Alice Springs, 9 September 2022, Judge Borchers), 9.

108 See, Northern Territory Police Force, Memorandum to Superintendent Special References Unit by Detective Sgt Sonia Kennon, dated 17 October 2022.

and killed Kumanjayi Walker, there is no logical connection between the evidence and the subject matters of ss 26, 34 or 35 of the Act.

79. I agree that there is no evidence that suggests that Constable Rolfe was affected by recreational drugs or alcohol at the time he shot and killed Kumanjayi Walker. But nor is there any objective evidence that he was not affected by recreational drugs or alcohol. That is because Constable Rolfe was not tested for those substances after the shooting.

80. As Deputy Commissioner Smalpage notes in his first affidavit, 'in Australia, all other jurisdictions can require police officers to submit to drug and alcohol testing following the discharge of a firearm.'[109] The public policy served by such testing is obvious. In my view, whether and if so in what way the Police Force of the Northern Territory ought to have been empowered, or obliged, to test Constable Rolfe for illicit drugs following the shooting of Kumanjayi Walker is a matter relevant to the administration of justice connected with the death under ss 26(1)(b), 34(2) and 35(2) of the Act. Indeed, as Deputy Commissioner Smalpage himself notes, the Police Force is currently,

> pursuing the implementation of suitable drug and alcohol testing powers. Amendments to the *Police Administration Regulations* are being progressed to implement drug and alcohol testing. The anticipated commencement date of the drug and alcohol testing regime is December 2022. A *General Order: Drug and Alcohol Testing of Police Officers* has been developed and will be promulgated once the *Police Administration Regulations – Drugs and Alcohol Testing* come into force.[110]

81. Quite apart from the issue of *illicit* drug use, at the time of Kumanjayi Walker's death there is evidence that Constable Rolfe had recently been prescribed a medication that may also have impacted upon his decision-making, Escitalopram. Accordingly, the direct outcome of routine drug testing may have been that the Police Force identified that Constable Rolfe was taking a drug that, in Professor McFarlane's view, is 'likely to have impacted on his capacity for behavioural inhibition to threat.'[111] An indirect outcome may have been that the Police Force

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109 Affidavit of Deputy Commissioner of Police Murray Smalpage dated 12 July 2022, [338].

110 Affidavit of Deputy Commissioner of Police Murray Smalpage dated 12 July 2022, [338].

111 Statutory Declaration of Professor Alexander McFarlane dated 15 July 2020, 4.

identified that Constable Rolfe was suffering from a psychiatric condition that is 'associated with significant difficulties with information processing and threat perception' and is 'likely to have impacted upon Constable Rolfe's capacity to respond in an appropriate and measured way at the time of the attempted arrest of Mr Walker on 9 November 2019.'[112] Accordingly, the evidence may prove relevant to my assessment of 'the cause of death', or constitute a 'relevant circumstance connected with the death', pursuant to s 34 of the Act.

82. Accordingly, I will receive the evidence under s 39 of the Act at this stage.

Category H: exploration of whether the evidence in the criminal trial of Constable Rolfe was 'contaminated'

83. Because this category of objection appears not to be covered by the Schedule of Objections, it is convenient to quote directly from Constable Rolfe's written submissions:

> As this inquest has developed, Counsel Assisting has sought opinions from witnesses in relation to the appropriateness of a barbecue held at Rolfe's home in the aftermath of the events of 9 November 2019. For example, Assistant Commissioner Wurst was questioned about whether he considered that such a gathering, which was in contravention of general orders relating to the separation of police officers following a fatal incident, considered [sic] that there was a real potential for evidence, including that of Rolfe at trial, to have been contaminated by such a gathering. Constable Rolfe objects to that line of questioning.[113]

84. Insofar as it contains a description of the evidence, that passage is accurate. It appears that on 10 November 2019 Constable Rolfe attended a social gathering with a relatively large number of police officers, including witnesses to the events of 9 November 2019.

85. Turning to the relevance of the evidence, Constable Rolfe's written submissions appear to concede that this social gathering contravened the General Order on

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112 Statutory Declaration of Professor Alexander McFarlane dated 15 July 2020, 4-5.

113 Constable Rolfe (Submissions dated 27 September 2022), [26].

Deaths in Custody,[114] which mandates that '[a]ll members, whether directly or indirectly involved in the incident, are to be segregated from all other witnesses, including other police immediately after the incident'[115] and that 'communication between such witnesses is [must be] prevented'.[116] Certainly, that was the opinion of Assistant Commissioner Travis Wurst.[117] His concerns applied 'particularly to Constable Rolfe, who … hadn't provided a statement at that point in time'.[118] Assistant Commissioner Wurst's evidence was that this gathering 'had the potential to contaminate the version of events that Constable Rolfe eventually gave'.[119]

86. Although Constable Rolfe's objection focusses on the social gathering on 10 November 2019, other material raises similar concerns. For example, also on 10 November 2019 a member of Constable Rolfe's patrol group and the IRT[120] texted Constable Rolfe with what on one view is a suggestion as to how he should justify his decision to shoot Kumanjayi Walker. Including all factual and spelling errors, the relevant part of the text message reads:

> The member has to answer his critics with IAMO +P.
>
> I= Intent... the shit cunt was telling them he was going to stab the police....
>
> A= ABILITY... He had the ability to do so because he both said it and was a young fit male who (looking at Rolfe) would have had size disparity.
>
> M= Means. He had an edged weapon and told the police he (more tham like said) was going kill them.
>
> O= OPPORTUNITY.

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114 Northern Territory Police Force, 'General Order: Deaths in Custody, and Investigation of Serious and/or Fatal Incidents Resulting from Police Contact with the Public (OP-C1)' (Dated 10 November 2011 and updated on 8 September 2016).

115 Northern Territory Police Force, 'General Order: Deaths in Custody, and Investigation of Serious and/or Fatal Incidents Resulting from Police Contact with the Public (OP-C1)' (Dated 10 November 2011 and updated on 8 September 2016), [26.1]

116 Northern Territory Police Force, 'General Order: Deaths in Custody, and Investigation of Serious and/or Fatal Incidents Resulting from Police Contact with the Public (OP-C1)' (Dated 10 November 2011 and updated on 8 September 2016), [15].

117 Transcript of Proceedings (26 September 2022), 998.

118 Transcript of Proceedings (26 September 2022), 998.

119 Transcript of Proceedings (26 September 2022), 998.

120 Although not a member deployed on 9 November 2019.

> The members let him get close enough to be afforded the opportunity to stab one of them and coupled with all of the above..... IAMO
>
> +P = PRECLUSION
>
> "I was precluded from all other options available to me, (being distance, time, cover, taser, baton, spray, etc) so I had no other option but to protect myself and those with me by shooting the offender to gain immediate subject control and incapacitation...
>
> That what I did (taught by some very experienced old members in 1994)
>
> Never forget it... IAMO +P.

When asked about these messages, Assistant Commissioner Wurst agreed that it was 'extremely concerning that another officer is texting Constable Rolfe with what appears to be suggestions as to how evidence should be given about what occurred in [House 511]'.[121]

87. As Counsel Assisting submitted, the purpose of this evidence is not to assist me to determine whether the evidence in the *criminal trial* of Constable Rolfe was contaminated – its purpose is to assist me to assess 'the credibility and reliability of the evidence which is now available to [me] in these *Coronial proceedings*.'[122] In addition, it may be necessary to make a finding, comment or recommendation about the consistency of the post-incident police conduct with the General Order on Deaths in Custody, which could constitute a 'matter [concerning] the administration of justice, connected with the death'.[123] Ultimately, Counsel Assisting urged me to,

> consider the evidence that is now available to [me] in these Coronial proceedings and to make a determination whether or not, contrary to the General Order that requires officers to be separated before a version is given, and contrary to the direction in that General Order that every effort be made to preserve independent accounts, whether or not in fact accounts have been tainted.[124]

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121 Transcript of Proceedings (26 September 2022), 1062.

122 Transcript of Proceedings (29 September 2022), 1194.

123 See, ss 26(1)(b), 34(2) and 35(2).

124 Transcript of Proceedings (29 September 2022), 1194.

88. I agree that this inquiry is appropriately directed to my ultimate functions under ss 26, 34 and 35 of the Act. Accordingly, I will receive the evidence at this stage under s 39 of the Act.

Conclusion

89. Save for the NAAJA Report which has not yet been considered, under s 39 of the Act I will at this stage receive the evidence in the Schedule of Objections.

Dated this 14th day of October 2022.

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ELISABETH ARMITAGE
TERRITORY CORONER