IN THE CORONERS COURT
HELD AT ALICE SPRINGS

No. A0051/2019

INQUEST INTO THE DEATH OF KUMANJAYI WALKER

REPLY SUBMISSIONS OF MR ROLFE

Filed on behalf of:	Mr Zachary Rolfe
Date of filing:	17 October 2023
File by:	Mr Luke Officer Partner Tindall Gask Bentley 76 Light Square ADELAIDE SA 5000

A Introduction and background

1. Mr Rolfe filed further written submissions on 13 October 2023 addressing the question of whether the Coroner ought to resolve Mr Rolfe's application for documents and other records of the inquest prior to the determination of this application.

2. It was submitted by Mr Rolfe that her Honour should not consider that application at all because, by virtue of her assertion of the claim of legal professional privilege over certain communications, she was a party to the objection to that application.

3. Thus, it was submitted that the only question of disclosure relates to her Honour's own appraisal of whether *any* material exists that substantially weighs upon the question of apprehended bias. If her Honour considers material falling within that descriptor exists, regardless of whether that material is within or beyond the scope of the material sought by virtue of the 16 August application, then 'judicial prudence' would suggest that it ought to be disclosed.

4. Apropos Counsel Assisting submissions at [45], it is partly because the appearance of bias or predetermination cannot be forensically examined by means including evidence from a Coroner, that the context requires appropriate levels of disclosure by a Coroner of dealings with Counsel Assisting that are such as to require fair opportunity for an affected person to consider, and if thought necessary, to answer.

5. It was otherwise submitted that this application ought to be resolved prior to any determination of the 16 August application because an assertion of apprehended bias goes to the essence of her Honour's jurisdiction to continue conducting this inquest.

6. Extensive submissions have been filed by interested parties both in support and in opposition to the recusal of the Coroner. Although discrete issues raised by the opposing parties are addressed further below, the following observations can be made in general as to the opposition taken by the parties in response to the application by Constable Rolfe.

7. *First*, the opposing parties approach the question posed by Constable Rolfe's application by considering each of the identified concerns on a piecemeal basis.

8. *Secondly*, the opposing parties assert that Mr Rolfe should be taken to have waived any right to challenge the Coroner's continued jurisdiction over this inquest due to the fact that he did not apply for her Honour to recuse herself following the Yuendumu Visit.

9. Each of the above contentions is premised upon a misunderstanding of Mr Rolfe's application. His application does not turn upon a discrete ground for recusal by reference to the Yuendumu Visit. Rather, the application is premised upon a cumulation of conduct that, when viewed in combination, gives rise to a reasonable apprehension of bias.

10. These submissions approach the remaining issues in the following order:

    B NTPF allegations that Mr Rolfe's application is a further attempt on behalf of Mr Rolfe to distract from and delay the inquest process

    C The fact that the Counsel Assisting Team and the NTPF have not eschewed the existence of communications concerning, or giving rise to, the amendment of the non-publication orders on or about 23 March 2023

    D Reliance upon the facts of *Kontis & Anor v Coroners Court of Victoria*[1]

    E Submissions in relation to the Yuendumu Visit

    F Submissions in relation to the concerns about the amendment of the 23 March amendment of the non-publication orders

    G Waiver

B Response to the NTPF submission that the application is a tactic to delay the giving of evidence by Mr Rolfe

11. At paragraph 4 of its submissions, the NTPF submitted as follows:

> 'In summary, the position of the Northern Territory Police Force ("NTPF") is that the current application, invitation and objection appear to constitute a further attempt on behalf of Mr Rolfe (and Sergeant Bauwens) to distract from and delay the inquest

[1] *Kontis & Anor v Coroners Court of Victoria* [2022] VSC 422.

process. Brought, as they are, immediately before Mr Rolfe and Sergeant Bauwens are scheduled to give evidence from 23 October, in respect of which they have already made unsuccessful objections to giving evidence before the Territory Coroner and in appellate proceedings before a Single Judge of the Supreme Court and the Court of Appeal of the Northern Territory, they could be seen as the adoption of another forensic tactic and should be found to be without merit.'

12. The description of a serious submission as a forensic tactic is unjustified.

13. Mr Rolfe's application is premised upon a cumulative sequence of events concerning the conduct of this inquest, the most recent event being the Coroner's disclosure of a lawyer-client relationship with Counsel Assisting (by virtue of her claim of legal professional privilege)[2]. Neither NTPF, nor any party, could suggest that this was a relationship disclosed, either expressly or implicitly, at any point prior to late August 2023.

14. The very experienced counsel representing the NTPF can be assumed to understand that individual events, although not individually manifesting an apprehension of bias, may give rise to such an apprehension when considered as a collective sequence of events. That is the essential premise of Mr Rolfe's application.

C The fact that the Counsel Assisting Team and the NTPF have not eschewed the existence of communications concerning, or giving rise to, the amendment of the non-publication orders on or about 23 March 2023

15. Added to the concerns identified by Mr Rolfe in his submissions dated 6 October 2023 is the fact that neither the NTPF or Counsel Assisting has eschewed the existence of communications between the Counsel Assisting Team and NTPF, either directly or through legal representatives of the NTPF, in relation to:

a) the amendment of the non-publication order prior to its amendment on or about 23 March 2023;

b) potential defects or issues with disciplinary proceedings commenced against Mr Rolfe in February 2023; or

[2] A claim that does not appear to have ever been considered in any reported decisions concerning the conduct of a coronial inquest – or for that matter, a Royal Commission or inquiry.

c) use of the Spotlight materials contained within the coronial brief.

16. If there are any persons apart from the Coroner who could give assurances to that effect, it would have been;

a) Dr Freckleton KC, along with his junior and instructing solicitor (who represent, bar a few, every Police officer in the Northern Territory); or

b) Dr Dwyer, Mr Coleridge, and Ms Walz.

17. If there are no such communications, why are there no such assurances?

18. Neither Dr Dwyer nor Mr Coleridge are signatories to the submissions filed in response to this application. Other Counsel Assisting, Ms Huxley, has been engaged for that purpose.

19. Moreover, although the NTPF has taken an approach that borders on being antagonistic towards the concerns of Mr Rolfe about the amendment of the non-publication order, the submissions filed by NTPF appear to endorse the amendment of non-publication orders for the purposes identified by Mr Rolfe in his written submissions.

20. The failure to positively deny the existence of the type of communications described above by either the Counsel Assisting Team or the NTPF only reinforces the concerns identified by Constable Rolfe in his written submissions that have been filed in support of this application.

D Reliance on *Kontis & Anor v Coroners Court of Victoria*

21. Several opposing parties[3] have sought to draw parallels with the present application and the facts underlining the decision of O'Meara J in *Kontis*. The reliance upon that case is, with respect, overstated – the factual distinctions between the present circumstances and those in *Kontis* renders any analogical resort to the decision of O'Meara J (dismissing the assertion of apprehended bias) as close to nought.

22. ***First***, the nature of the evidence heard by the Coroner and informing the question of bias – although informal and apparently if not clearly given on the supposed basis that

[3] WLR [16]; PC [7] – [18]; NAAJA [7] – [9]; NTPF [25] – [27]

it would not be received as evidence in the inquest – was presented in a manner that maintained an appropriate appearance of separation between the Coroner and the persons who gave 'victim impact statements' in that inquest.

23. Nothing about the conduct of the Coroner in *Kontis* bears any similarity to that of the Coroner and Counsel Assisting during the Yuendumu Visit. The Coroner's decision to permit the deceased's mother to paint her face and Counsel Assisting's positive encouragement of discussion concerning the community's desire for "justice", in the presence of the Coroner, renders the facts of *Kontis* factually incomparable.[4]

24. Moreover, the topics for discussion during the session on 14 November 2022 must have been contemplated by the Coroner as being directly concerned with Rolfe simply by reference to the contents of the white board at the commencement of that discussion.

25. ***Secondly***, and relevantly to the question of waiver, the interested parties in *Kontis* were on notice of the prospect that evidence may be given informally that was adverse to their interests. In the present case, the parties were given the impression that the core focus of the informal aspects of the Yuendumu Visit was, in effect, concerned with cultural learnings.[5]

26. ***Thirdly***, and closely allied to the above points of distinction, the concerns addressed by the applicants in *Kontis* were limited to remarks of witnesses during the informal evidence sessions. They did not extend to the conduct of either the Coroner or Counsel Assisting, apart from a purported failure by the Coroner to correct or control the nature of prejudicial commentary given, as it were, "on the fly". The concerns raised about those matters were not considered in the context of broader concerns such as those identified by Mr Rolfe in the present case.

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4 See *Kontis*, at [256], where O'Meara J observed, as one factor leading to the conclusion that there was no reasonable apprehension of bias, that the Coroner 'could not be reasonably said to have actively encouraged any expressions of distress concerning St Basil's, the governments or the one such statement directed to the plaintiffs.'

5 See for example, PC submissions at [5(c) and (d)]

E Submissions in relation to the Yuendumu Visit

27. The submissions advanced by opposing parties in relation to Mr Rolfe's submissions concerning the Yuendumu Visit fall into two distinct categories, namely, assertions in support of the appropriateness of the Coroner and Counsel Assisting's conduct, bearing in mind the cultural sensitivities of the case, and secondly, criticisms of the concerns identified by Mr Rolfe about that conduct.

28. As to the first category, it can be accepted at once that an inquest *can and should* be conducted in a manner that is both sensitive and understandable to culturally diverse groups, when required. The examples identified by NAAJA in its written submissions at 14.1 – 14.9 reflect the proper pursuit of that objective.

29. Likewise, it may also be that an overly formal approach to the conduct of the proceedings in Yuendumu would have been counter-productive to those objectives.

30. There is, however, a marked distinction between the conduct of a culturally appropriate inquest and the Coroner's engagement in, or condonement of, conduct during an inquest that has the capacity to unnecessarily blur the divide between a Coroner and interested parties or groups. The conduct of Counsel Assisting and the Coroner at Yuendumu, with respect, is not tempered by the fair-minded observer's understanding of the appropriate requirements for cultural sensitivity. That is because there is no rational connection between those requirements or expectations and:

    a) the Coroner's decision to permit the deceased's mother to paint her face;

    b) the Coroner's refraining from correcting assertions of Counsel Assisting that all of discussions at Yuendumu would be taken into account; and

    c) the Coroner's refraining from correcting, and thus, it would appear, condoning of Counsel Assisting's encouragement of discussion with members of the Yuendumu community about their desires for justice (which were followed up with offers by Counsel Assisting to make enquiries in relation to their concerns about the integrity of Mr Rolfe's trial).

31. In needs to be re-iterated, particularly in the context of the reliance placed upon *Kontis* by various parties, that although it has been repeatedly said that the discussions in

Yuendumu would not be considered in this inquest, the statements of Counsel Assisting at Yuendumu, in the presence of the Coroner, directly contradicted those assertions. The response by Counsel Assisting was in direct response to a concern expressed by a community member about the possibility that discussions in Yuendumu would not be considered by the Coroner. The lay observer would likely apprehend that a senior legal practitioner – now senior counsel – such as Dr Dwyer was serious in what she said.

32. As to the second category identified by the parties, it is unnecessary to address each of those submissions in detail. Importantly, the matters identified by Mr Rolfe necessarily engender the concerns that, when considered in conjunction with *all other matters*,[6] give rise to a prospect that the fair-minded lay observer might reasonably apprehend that the Coroner might fail to bring an impartial mind to the discharge of her statutory functions.

F Submissions in relation to the non-publication order

33. Although the concerns expressed by Mr Rolfe in relation to the amendment of the non-publication order have been the subject of criticism by opposing parties, no attempt has been made by any party, save for the NTPF, to engage with the factual circumstances leading up to the amendment of the non-publication order.

34. The submissions of NTPF, however, go no further than identifying that the concerns identified by Mr Rolfe are 'extraordinarily strained'. As to the irony of that submission, Mr Rolfe repeats his submissions above at paragraphs 15 – 20.

G Waiver

35. Mr Rolfe repeats his submissions above at paragraphs 6 – 9.

36. Mr Rolfe has repeatedly attempted to make enquiries into the circumstances surrounding certain events of concern (a pursuit that has, with respect, not been advanced by the Coroner or the Counsel Assisting Team). That pursuit ultimately led to the identification of a lawyer-client relationship between the Coroner and Counsel Assisting as a consequence of a claim of legal professional privilege relating to one of

[6] But in particular, the circumstances leading up to the amendment of the non-publication orders on or about 23 March 2023 and the Coroner's disclosure of a lawyer-client relationship between her Honour and Counsel Assisting.

the principal matters of concern. In these circumstances, the question of waiver simply does not arise.

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