**IN THE CORONER'S COURT OF THE NORTHERN TERRITORY AT ALICE SPRINGS** **NO. A0051/2019**

**IN THE MATTER OF: Inquest into the death of Kumanjayi Walker**

# NAAJA'S OUTLINE OF SUBMISSIONS ON MR ROLFE'S PRODUCTION & RECUSAL APPLICATIONS

1 These submissions respond to Mr Rolfe's application of 16 August 2023 for the Coroner to produce documents in two categories (**production application**) and the related **recusal application**, both of which are advanced in his submissions filed on 6 October 2023 (**Rolfe submissions**). These submissions deal with the recusal application first as it goes to jurisdiction,[1] and because the serious matters asserted by Mr Rolfe there warrant immediate rejection. In summary, NAAJA submits:

1.1 There is no basis for the Coroner to recuse herself, in fact to do so would be contrary to the objectives of the *Coroners Act 1993* (NT) (**Act**) and that Act's prioritisation of flexibility, efficiency and involvement of the community and families of Aboriginal people who die in custody;

1.2 The production application should be refused insofar as it relates to the amendment of a non-publication order (**NPO**) on or about 23 March 2023 because Mr Rolfe's application in this regard appears to be pursued for the collateral purpose of advancing his interests in disciplinary proceedings and any potential challenge to the legality thereof (and, in any case, he has no legal entitlement to any documents falling within the application); and

1.3 To the extent that the production application relates to the visit to Yuendumu, it has already been substantially acceded to and the remainder of the application should be refused because Mr Rolfe has no legal entitlement to those documents,

[1] *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419, [1]–[2], [4], [26]–[27], [28] (Kiefel CJ and Gageler J), [65], [92] (Gordon J), [121], [189] (Edelman J), [304] (Jagot J).

there are countervailing interests in the documents not being produced, and their production is not otherwise required to protect against an apprehension of bias.

**RECUSAL APPLICATION**

2 The test for apprehended bias is whether 'a fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial mind to the resolution of the question the [decision-maker] is required to decide'.[2]

3 The High Court has explained that 'two things need to be remembered' when applying the test to a judicial decision-maker:

3.1 First, 'the observer is taken to be reasonable';[3] and

3.2 'the person being observed is "a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial"'.[4]

4 To those two things it might be added that '[a] finding of apprehended bias is not to be reached lightly'[5] and must be 'firmly established'.[6] That is in part because too readily acceding to recusal applications 'may be seen by the public to be "judge shopping" and also undermine the legitimacy of the process'.[7]

5 Further, the fair-minded lay observer is taken to be aware of the statutory context. That is because the limit upon statutory power posed by the requirement to appear unbiased is a limit implied from the statute itself,[8] and thus the limit will be sensitive to the particular

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[2] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [6] (Gleeson CJ, McHugh, Gummow and Hayne J). See also *Isbester v Knox City Council* (2015) 255 CLR 135, [20]–[23], [49] (Kiefel, Bell, Keane and Nettle JJ) and, more recently, *Charisteas v Charisteas* (2021) 95 ALJR 824, [11] (the Court) and *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419, [37] (Kiefel CJ and Gageler J), [67] (Gordon J), [221] (Steward J), [274] (Jagot J).

[3] *Johnson v Johnson* (2000) 201 CLR 488, [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[4] *Johnson v Johnson* (2000) 201 CLR 488, [11] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), quoting *Vakauta v Kelly* (1988) 13 NSWLR 502, 527 (McHugh JA) as adopted on appeal in *Vakauta v Kelly* (1989) 167 CLR 568, 584–5 (Toohey J).

[5] *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76, [56] (Nettle and Gordon JJ). See also *JRL; Ex parte CJL* (1989) 161 CLR 342, 371 (Dawson J); *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419, [274] (Jagot J).

[6] *Re JRL; Ex parte CJL* (1989) 161 CLR 342, 371 (Dawson J); *R v Doogan; ex parte Lucas-Smith & Ors* (2005) 158 ACTR 1, [78] (the Court); *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419, [274] (Jagot J).

[7] *Abraham as Tutor for Abraham v St Marks Orthodox Coptic College (No 4)* [2008] NSWSC 1031, [18] (Rothman J).

[8] See, Chief Justice Robert S French, 'Sir Anthony Mason Lecture: Procedural Fairness – Indispensable to Justice?' (7 October 2010) p 3.

statutory demands upon the decision maker. Another way of making this point is to say, as has been said elsewhere, that 'in relation to the Coroners Court, regard must be had to its inquisitorial nature and statutory departures from the "judicial paradigm"'.[9]

6 Thus, in the present case, the fair-minded lay observer's assessment of a Coroner's impartiality would account for the fact that section 39 of the Act envisages that the Coroner may have regard to a wide range of information, including information that will ultimately be found to be of 'little, if any, probative value'.[10] Further, the fair-minded lay observer would appreciate that the Act was intended to be responsive to and adaptable to the cultural make-up of the Northern Territory community (see, eg, the definition of 'next of kin' in s 3, particularly paragraph (e)) and that the scheme for inquests into deaths in custody was a direct response to community concern about Aboriginal deaths in custody.[11] Finally, as has been adverted to above, the fair-minded lay observer would appreciate that s 4(3) and 6(4) of the Act mean that the Coroner investigating a death in custody is a sitting Local Court Judge practised at putting certain evidence out of their mind (for example, evidence ruled inadmissible in criminal or civil proceedings).

7 The application of the above principles to the coronial context has recently been considered in *Kontis v Coroners Court of Victoria*.[12] That case involved an asserted apprehension of bias by reason of a coroner having regard to material that was not evidence. The particular decision impugned in that case was the Coroner's ruling as to whether a witness should be compelled to give evidence in the interests of justice. The day after receiving submissions on that point (and reserving), the Coroner unrelatedly received written and oral 'impact statements' from the families of the deceased persons. Those impact statements were not evidence.[13] The Coroner subsequently held that the particular witness would be required to give evidence. The witness sought judicial review

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[9] *Kontis v Coroners Court of Victoria* [2022] VSC 422, [240(c)] (O'Meara J). See also *Victoria Police Special Operations Group Operators 16, 34, 41 and 64 v Coroners Court of Victoria* (2013) 42 VR 1, [45] (Kyrou J).
[10] *Doomadgee v Clements* [2006] 2 Qd R 352, [53] (Muir J).
[11] The *Coroners Act* was introduced in response to the Royal Commission into Aboriginal Deaths in Custody, see Northern Territory, *Tabled Paper 865: Royal Commission into Aboriginal Deaths in Custody – Northern Territory/National Response to Recommendations*, tabled by Marshall Perron on 20 May 1992, 4: 'The Department of Law has conducted a thorough and detailed review of the Coroners Act which directly relates to recommendations 6 - 40. It is expect that legislation addressing many of the deficiencies in Coronial Enquires detailed in the Royal Commission's findings will be presented to this House shortly.'
[12] *Kontis v Coroners Court of Victoria* [2022] VSC 422.
[13] *Kontis v Coroners Court of Victoria* [2022] VSC 422, [44] (O'Meara J).

of that ruling on various grounds, including an apprehension of bias said to have arisen by the Coroner's receipt of the family impact statements.

8 The application for judicial review was dismissed. On the apprehended bias ground, the Supreme Court observed:

> I do not accept that any fair-minded and reasonable person would conclude that there could have been any real possibility that his Honour would have been 'overborne' by any such material. His Honour had stated that that would not be so. More particularly, however, a judicial officer will be expected to be capable of separating the relevant from the irrelevant in coming to a decision.
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> … That being the case, I cannot accept that an informed and reasonable lay person could have formed the view suggested. The applicable principle does not involve imputing to such a person a propensity to draw the most sinister of implications …[14]

9 An appeal from that decision was dismissed, with the appellant not seeking to re-agitate the apprehended bias point on appeal.[15]

10 Turning to deal with the substance of Mr Rolfe's application, there are 'two steps' usually entailed in any assertion of apprehended bias, namely:

> First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.[16]

11 The circumstances asserted by Mr Rolfe to give rise to a reasonable apprehension of bias on the part of the Coroner are:

11.1 Interactions during the Yuendumu visit – see Rolfe submissions [6], [30]–[35], [133];

11.2 The edits to Yuendumu recordings and related matters – see Rolfe submissions [40]–[42], [50], [59], [134];

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[14] *Kontis v Coroners Court of Victoria* [2022] VSC 422, [259], [261] (O'Meara J, citations omitted, emphasis added).
[15] *Kontis v Coroners Court of Victoria* [2022] VSCA 274.
[16] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [8] (Gleeson CJ, McHugh, Gummow and Hayne J). See also *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419, [67] (Gordon J), [162] (Edelman J).

11.3 The impression that Counsel Assisting had sympathy for the community's perceptions of justice – see Rolfe submissions [138];

11.4 The amendment of the NPO – see Rolfe submissions [6], [7], [66]–[116].

12 None of those matters – either individually or in combination – give rise to a reasonable apprehension of bias.

*Interactions during Yuendumu visit*

13 It does not appear that Mr Rolfe relies on the Yuendumu visit as *in and of itself* giving rise to a reasonable apprehension of bias. Rather, interactions during this visit are said to provide 'the background of concerns' which then crystallise in an apprehension of bias at the time of the alleged 'making of unilateral amendments to a non-publication order' (Rolfe submissions [6]). As will be explained, however, nothing about the interactions on the Yuendumu visit raises 'concerns' that could in any way contribute to a reasonable apprehension of bias.

14 Although Mr Rolfe does not complain of the visit itself (rather, the interactions that occurred during it), the purpose of the visit provides important context for what occurred thereafter. The stated purpose of the visit from the very start[17] – which Mr Rolfe apparently does not doubt was genuine – was to engage in a process of 'listening' to the community without receiving formal evidence. The idea of 'listening' (sometimes 'deep listening') to the community, and being seen to listen to the community, is an important aspect of culturally competent coronial proceedings.[18] It would have been apparent to the fair-minded lay observer that the Coroner and those assisting her were striving to make the proceedings culturally competent and sensitive to the community's grief by, for example:

14.1 Holding a session on cultural awareness in the opening sitting of the inquest;[19]

[17] Transcript of proceedings, 26 May 2022, page 2; Transcript of Proceedings, 29 March 2022, page 9; Transcript of Proceedings, 15 August 2022, page 4. See also the solicitor assisting's email of 14 August 2022.
[18] See the recognition of listening as a part of cultural competence in COR 2020 0021 - Veronica Nelson Inquiry - Form 37 - Finding into Death with Inquest - 30 January 2023 at [171.2], [863]. As to cultural competence in other types of proceedings, see, for example *Native Title Act 1993* (Cth) s 82.
[19] Transcript of Proceedings, 5 September 2022, pages 8–9.

14.2 Distributing to the parties (and their legal representatives) information and materials relating to Yuendumu;[20]

14.3 Encouraging the use of interpreters;[21]

14.4 Facilitating the remote viewing of the inquest proceedings in Yuendumu in particular,[22] but also in other rooms of the Local Court building and on the lawns across the road for those who found it too distressing to sit in the courtroom;[23]

14.5 Distributing information about the inquest in Warlpiri and Luritja languages;[24]

14.6 Suggesting that one member of the counsel assisting team spend time in Yuendumu during the course of the inquest to bolster community engagement;[25]

14.7 Granting leave for customary families to be party to the inquest so their joint and separate interests could be properly represented and considered;[26]

14.8 Granting leave for the Parumpurru Community to be party to the inquest in order to help the court formulate recommendations suggested by the community;[27] and

14.9 Making efforts to ensure that questions asked of Aboriginal and family witnesses during the inquest were culturally appropriate.[28]

15 It would have been understood by the fair-minded lay observer that a degree of informality, flexibility and openness to hearing community concerns was necessary for the coronial proceedings to engender community trust and 'buy in'. The fair-minded observer would have understood that without that buy in the Coroner would have been frustrated in the discharge of her statutory functions by, for example, witnesses from Yuendumu being unwilling to cooperate in the coronial proceedings, including by

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[20] See, for example, documents 20-023 to 20-030 of the Brief.
[21] Transcript of Proceedings, 15 August 2022, page 7; Transcript of Proceedings, 7 September 2022, page 125.
[22] Transcript of Proceedings, 7 September 2022, page 125.
[23] Transcript Proceedings, 8 March 2023, page 4643. As to the difference between waiting in or outside of Court see Thalia Anthony and Elizabeth Grant, 'Courthouse Design Principles To Dignify Spaces For Indigenous Users: Preliminary Observations' (2016) 8(1) *International Journal for Court Administration* 43, 47: 'The need for relief from court processes, by being able to vacate the building and sense sun and wind on the face is crucial to stress reduction among Aboriginal users.'
[24] See the 'About the inquest' recording in Warlpiri at <https://justice nt.gov.au/attorney-general-and-justice/courts/inquests-findings/kumanjayi-walker#about-the-inquest>.
[25] Transcript of Proceedings, 26 May 2022, page 19.
[26] Transcript of Proceedings, 29 March 2022, page 4.
[27] Transcript of Proceedings, 29 March 2022, page 5.
[28] Transcript of Proceedings, 7 September 2022, page 120.

volunteering their time and expertise to give evidence about the subject matter of the inquest.

16 It would also have been understood by the fair-minded lay observer that a visit to Yuendumu was likely to render the coronial proceedings more accessible and visible to those in the Yuendumu community for whom the proceedings are particularly important but who may not be able to travel to Alice Springs. Indeed, that idea is the premise for the busy roster of circuits that is engaged in by the Local Court of the Northern Territory in its criminal and civil jurisdiction.[29]

17 Finally, it would have been understood by the fair-minded lay observer that the need for listening and other aspects of cultural competency and community engagement was particularly acute in the present coronial proceedings because of the way that the death of Kumanjayi Walker and the acquittal of Mr Rolfe had divided the Northern Territory community.[30]

18 Seen in the above context, and in light of the repeated statements by the coronial team that evidence would not be received at the Yuendumu visit, the fair-minded lay observer would have understood the visit to be an informal means of listening, and being seen to listen, to the community. This was entirely consistent with, and indeed essential to, the discharge of the Coroner's statutory functions – which have long been recognised to require adaptation to community concerns about Aboriginal deaths in custody so that the 'system … retains public confidence'.[31] The fair-minded lay observer would have thus understood that the Coroner was not proposing to, and did not intend to, use anything seen or heard on the visit for the purposes of her findings or recommendations.

19 Mr Rolfe complains however, that despite this intention of the Coroner, the way that the Yuendumu visit transpired meant that the Coroner *did* ultimately hear discussions about

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[29] See Northern Territory Local Court, 'List of Circuit Courts' <https://localcourt nt.gov.au/about-us/list-circuit-courts>. See also Chief Magistrate Jenny Blokland (as her Honour then was), 'Bush Courts – A Forum' (paper presented at the Criminal Lawyers Association of the Northern Territory Bali Conference 2007) p 5: 'the Court wants to increasingly engage the community in the hope for more satisfactory outcomes'.

[30] See, eg, Hilary Whiteman, 'What the acquittal of a police officer over an Indigenous teenager's death shows about Australia's deep race divide' *CNN*, 26 March 2022 <https://edition.cnn.com/2022/03/26/australia/australia-indigenous-walker-rolfe-trial-intl-hnk-dst/index.html>. See also Anna Krien, 'The death of Kumanjayi Walker' *The Monthly* (May 2022) <https://www.themonthly.com.au/issue/2022/may/anna-krien/death-kumanjayi-walker>.

[31] Royal Commission into Aboriginal Deaths in Custody, Justice J H Muirhead, *Interim Report* (1989) 501–51 [10.2].

matters the subject of the inquest that bear some resemblance to evidence. The focus of Mr Rolfe's complaint in this respect is with the things recorded at [30] of his submissions.

20 Three points can be made in response, which reveal the things said at [30] to be incapable of supporting an assertion of apprehended bias on account of 'extraneous information'[32] (this being the orthodox categorisation of such an assertion of apprehended bias).

21 *First*, the vast majority of the extraneous information is coextensive with information that is actually in evidence in the coronial proceedings. The fact that the Coroner *also* heard that information *outside* of evidence would not be understood by the fair-minded observer to change the Coroner's view of the information that was *in* evidence. For example:

21.1 As to the community's desire for 'payback' against Mr Rolfe (Rolfe submissions [30(a)]), this was the subject of evidence;[33]

21.2 As to the community's views of racist text messages (Rolfe submissions [30(b)]), this was the subject of evidence;[34]

21.3 As to the community's concern about Mr Rolfe still being a member of the police force (Rolfe submissions [30(c), (d) and (f)]), this was the subject of evidence;[35]

21.4 As to the community and family members' difficulty in understanding the exclusion of certain evidence at the criminal trial (Rolfe submissions [30(e)]), this was the subject of evidence.[36]

22 *Second*, even if not the subject of evidence in the proceeding, the fair-minded lay observer would understand that the Coroner does not live in a hermetically sealed box for the duration of the inquest (stretching as it does over years) and is likely to have been incidentally exposed to media coverage of the shooting, the criminal trial, and the community's response to both events. Yet the publicly available media coverage traversed most of the topics about which Mr Rolfe now complains that the Coroner was exposed to. For example:

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[32] *Webb v The Queen* (1994) 181 CLR 41, 74 (Deane J).
[33] Transcript Proceedings, 28 November 2022, page 3771; Transcript Proceedings, 5 September 2022, page 6.
[34] Transcript of Proceedings, 28 November 2022, page 3805.
[35] Transcript of Proceedings, 5 September 2022, page 9.
[36] Transcript of Proceedings, 25 November 2023, page 3727.

22.1 As to the community's desire for 'payback' against Mr Rolfe (Rolfe submissions [30(a)]), this was the subject of media coverage;[37]

22.2 As to the community's views of racist text messages (Rolfe submissions [30(b)]), this was the subject of media coverage;[38]

22.3 As to the community's concern about Mr Rolfe still being a member of the police force (Rolfe submissions [30(c), (d) and (f)]), this was the subject of media coverage;[39]

22.4 As to the community and family members' difficulty in understanding the exclusion of certain evidence at the criminal trial (Rolfe submissions [30(e)]), this was the subject of media coverage.[40]

23 *Third*, and in any event, it is not enough for Mr Rolfe to merely point to extraneous information that has come to the attention of the Coroner. As opined by Nettle and Gordon JJ, 'a logical connection must be articulated between the identified thing and the feared deviation from deciding the case on its merits. How will the claimed interest, influence or extraneous information have the suggested effect?'[41] That question must be asked in light of the principles outlined earlier in these submissions and with an appreciation of exactly what it is that requires determination in the proceedings – i.e. the cause and circumstances of the death, and remedial recommendations. Further, it must be understood that the Coroner will invite the parties (all of whom are capably legally

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[37] Australian Associated Press, 'Zachary Rolfe should face Aboriginal traditional payback, Kumanjayi Walker inquest told' *The Guardian*, 17 November 2022, <https://www.theguardian.com/australia-news/2022/nov/17/zachary-rolfe-should-face-aboriginal-traditional-payback-kumanjayi-walker-inquest-told>.

[38] Lorena Allam, "Racist and disgusting': inquest into Kumanjayi Walker death hears of 'shocking' texts sent by Zachary Rolfe' *The Guardian*, 14 September 2022, <https://www.theguardian.com/australia-news/2022/sep/14/racist-and-disgusting-inquest-into-kumanjayi-walker-death-hears-of-shocking-texts-sent-by-zachary-rolfe> and Tom Zaunmayr, 'Cousin's fury at 'racist' texts from cop who killed Kumanjayi Walker' *National Indigenous Times*, 15 September 2022 <https://nit.com.au/15-09-2022/3886/cousins-fury-at-racist-texts-from-cop-who-killed-kumanjayi-walker>.

[39] Jason Walls, 'Slain teen's family calls for Zach Rolfe's sacking, labelling his refusal to talk a 'cop out' *NT News*, 17 November 2022 <https://www ntnews.com.au/subscribe/news/1/?sourceCode=NTWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.ntnews.com.au%2Ftruecrimeaustralia%2Fpolice-courts-nt%2Fkumanjayi-walkers-family-label-zach-rolfe-a-coward-for-refusing-to-testify-at-inquest-into-teens-death%2Fnews-story%2Fc4f7111e46dd606462d68e1da0a7c93c&memtype=anonymous&mode=premium&offerset=nt_truecrime_premium> .

[40] Nino Bucci, 'Evidence not examined in Zachary Rolfe trial could be scrutinised at Kumanjayi Walker's inquest' *The Guardian*, 29 March 2022, < https://www.theguardian.com/australia-news/2022/mar/29/evidence-not-examined-in-zachary-rolfe-trial-could-be-scrutinised-at-kumanjayi-walkers-inquest>.

[41] *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76, [57] (Nettle and Gordon JJ).

represented) to make detailed written and oral submissions on the issues for determination at the conclusion of the evidence. Viewed in that context, and with an appreciation of the Coroner's position as a judicial officer practiced in excluding inadmissible information from her considerations, the fair-minded lay observer would have no concerns at all from the things said on the Yuendumu visit.

24 That leaves Mr Rolfe's complaints about other aspects of the Yuendumu visit, such as the Coroner potentially having her face painted by, and counsel assisting shaking the hand of, a community member (Rolfe submissions [32]). It is respectfully submitted that a fair-minded lay observer would view those interactions as part and parcel of visiting a remote Aboriginal community on a significant occasion, and the Coroner and counsel assisting's participation in them as a matter of basic courtesy and respect.

*Counsel assisting's asserted sympathy for the community's perceptions of justice*

25 Mr Rolfe also complains that a factor contributing to a reasonable apprehension of bias is 'the impressions relating to Counsel Assisting's sympathy for the community's perceptions of justice' (Rolfe submissions [138]). NAAJA is largely content to leave this assertion to be responded to by senior counsel assisting – but four comments should be made immediately.

26 *First*, the interactions of which Mr Rolfe complains would be understood by the fair-minded lay observer to be far from improper expressions of sympathy and in fact to be attempts by counsel assisting to respond to, and be seen to be responding to, community concerns while moving the public discussions forward to matters that *do not* concern Mr Rolfe, such as systemic changes for the advantage of the Yuendumu community.

27 *Second*, and in any event, counsel assisting and the Coroner had elsewhere expressed sympathy for members of the community in open Court.[42] The fact that this had occurred and no objection had been taken by Mr Rolfe's otherwise enthusiastic and capable legal team would convey to the fair-minded observer that there was nothing objectionable about such expressions of sympathy.

28 *Third*, and relatedly, the fair-minded lay observer would appreciate that a natural and entirely human inclination of sympathy towards the community and family of the

[42] See, for example, Transcript Proceedings, 26 May 2022, page 2.

deceased is a common feature of coronial proceedings (which regularly concern unfortunate or unexpected deaths) and is not incompatible with the proper discharge of counsel assisting's role (indeed, it is not incompatible with the Coroner's role).

29 *Fourth,* Mr Rolfe has failed to bring this complaint within the statement of principle on which he relies – that is, the statement that 'if conduct of counsel assisting showed an evident and persisting inequality of treatment as between witnesses espousing one view of matters under inquiry and witnesses espousing an opposing view … *and* if the Commissioner either gave support to or took no action to redress the situation which unfolded before him [or her], it would not be wrong to consider that support or inaction if an allegation of apprehended bias on the Commissioner's part was raised'.[43] Rather than focus on the Coroner (as any asserted apprehension of bias ultimately must), Mr Rolfe focuses on counsel assisting. But the greater problem with his submission is that counsel assisting has also publicly expressed sympathy for Mr Rolfe in open court, acknowledging the difficult circumstances in which he finds himself.[44] Thus it is simply untenable to say there has been any 'evident and persisting inequality of treatment' by counsel assisting. Rather, counsel assisting has been a model of patience and even-handedness with all parties and witnesses.

30 This aspect of Mr Rolfe's complaint is baseless.

*Edits to Yuendumu recordings and related matters*

31 A somewhat discrete aspect of Mr Rolfe's complaint about the Yuendumu visit relates to the aftermath of that visit, and in particular the edits to the recordings of what occurred on those visits.

32 The background to that complaint is that on 14 February 2023, in response to Mr Rolfe's request for material relating to the Yuendumu visit, the solicitor assisting the Coroner wrote to the parties as follows (emphasis added):

> Dear colleagues,
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> As requested by some parties, I advise that I have just uploaded the following material to the electronic brief (in folder "Yuendumu visit recordings"):

[43] *Firman v Lasry* [2000] VSC 240, [28] (Ashley J, emphasis added).
[44] Transcript of Proceedings, 5 September 2023, pages 29–30.

1. "Yuendumu time log": the notes taken by the Coroner's clerk as typewritten by the Coroner's clerk. We are advised that these are a true copy of the handwritten notes; indeed, as you will see, they have not been edited to remove errata, or notes by the clerk to herself;

2. Those parts of the audio recording of the visit to Yuendumu that were understood by the parties to be appropriate for recording, that is, public discussions/ceremony, edited to remove private conversations between the Coroner and other persons, such as her legal team. The recordings cover:

    1. The public ceremonies on the morning of Monday 14 November 2022 ("Yuendumu 14 November 2022 – part 1");

    2. The public forum or "Community Truth Telling Meeting" on the afternoon of Monday 14 November 2022 ("Yuendumu 14 November 2022 – part 2");

    3. The public forum or "Yarning Circle" on the morning of Tuesday 15 November 2022 ("Yuendumu 15 November 2022").

3. The document entitled "Coroner's Visit to Yuendumu", which was kindly prepared by the Parumpurru Committee setting out what would take place and which was distributed prior to the Yuendumu visit. We note that there was no opposition, or alternative suggestion from any party.

4. Relevant email correspondence between the parties about the visit, and the transcript of the discussion of what would take place, and what would be recorded, as outlined by Mr McMahon SC on 4 November 2022, which confirmed, without objection from any party, that, beyond the public ceremony and forums, the visit to Yuendumu was not anticipated to be the subject of 'recording'. We note that that was the basis upon which each party was invited, and indeed encouraged, to attend all aspects of the Coroner's visit to Yuendumu.

With respect to the matters that were recorded, we note the specific comment by Ms Hollway on behalf of Parumpurru that: "We do not of course anticipate such recordings going to matters which might be regarded as disputed facts. Rather, they may go to areas of cultural knowledge of value to the inquest."

Please note that the Counsel Assisting team does not propose to tender any recordings from the Yuendumu visit, given that the statements made are not being received as evidence and do not bear upon the Coroner's determination of any contentious factual issues in the inquest.

If you have any difficulties accessing the material in the Sharepoint folder, please get in touch with Anna Karaolias or me.

Kind regards,

Maria

33 On 15 February 2023, Mr Rolfe's solicitor inquired as to whether the recordings had been edited and if so, when, how, by whom, and on what basis.

34 On 17 February 2023, the solicitor assisting the Coroner then responded (emphasis added):

Good afternoon Luke,

Thank you for your email below.

I can confirm the assisting team is not in possession of any video recordings of the Yuendumu visit.

Parties have been provided with audio recordings of the three significant public forums that took place at the Yuendumu visit. As indicated below, editing was conducted by the assisting team to remove irrelevant or private conversations, including those between the Coroner and her legal team. The edited portions are short and typically last less than a minute.

In relation to your question about the legal basis for editing, I note that the Coroner's visit to Yuendumu was not conducted to take evidence or form part of the Coroner's determination of contentious evidence in the inquest. The recordings will not be tendered by the assisting team. It was made clear in advance of the hearing that private conversations would not be recorded.

<u>If there is some concern about the editing process, the Coroner is open to a written request to obtain a transcript so that the length and reason for each edit can be identified with more precision</u>; however, I note that such a process would involve some significant time and expense and that it is unconventional for transcripts to be made of coronial views and cultural learning events which do not form part of the evidence before the Court.

I hope this is of assistance. I am able to discuss the matter further if you consider it necessary.

Kind regards,

Maria

35 It can be noted from these emails that the redactions to the recordings of which Mr Rolfe complains have been made on the entirely orthodox basis that the material redacted contains 'private conversations between the Coroner and other persons, such as her legal team'.

36 The fair-minded lay observer would appreciate the privacy of the redacted material, and would understand that the mere making of a request does not justify the production to a party of private communications. The fair-minded lay observer would also be aware that court transcripts normally do not capture bar-table conversations – or conversations of a judge over the bench to their associate – and when they do, they are regularly removed by transcribers.

37 With that in mind, the fair-minded lay observer would consider it entirely unsurprising that the audio recordings had been redacted, and would attribute no bias to the Coroner on that count. The fair-minded lay observer's view would be reinforced by the fact that the Coroner had expressed a willingness to provide further information about the edits if a 'written request' was made. No such request was made.

*Amendment of the NPO*

38 The parties were notified of the amendment of the NPO on 23 March 2023 in an email from the solicitor assisting the Coroner. It pays to reproduce that email in full, as it includes important context that is overlooked in Mr Rolfe's written submissions (italics and bold in original, underline added).

> Good morning colleagues,
>
> Further to my email of 9 March (below), I advise that we are preparing to release the next tranch of material to the website. Would you please advise if you seek any redactions to any of the material listed in the **attached** document (in addition to DOBs, phone numbers, addresses, signatures) and the basis for the request for redaction? *I would be grateful if I could please have your response by COB next Friday 31 March.*
>
> <u>Secondly, the non publication order in relation to the coronial brief has been amended, and uploaded to the Sharepoint folder "Orders/Non publication orders". It attaches an updated brief index and the words "for the purposes of these coronial proceedings" in 2(a) have been deleted.</u> Please let me or Anna Karaolias know if you have any difficulties with access to the Sharepoint folder.

> I advise that it is proposed that this non publication order will be revoked at the end of the next sittings (this will not affect applications for non publication orders that have been made separately). *Would you please consider whether you seek a non publication order over specific items in the coronial brief?* A timetable will shortly be set for any such applications to be made.
>
> Kind regards,
>
> Maria

39 A number of observations can be made about that email. *First*, the opening paragraph makes clear that the context is that the coronial team are working through issues relating to the publication of materials in the inquest and seeking to make as much information public as is appropriate (consistently with the open justice principles inhering in the Act). *Second*, the second paragraph of the email demonstrates transparency in the fact and extent of the recent amendment to the non-publication order. *Third*, the italicised sentence in the final paragraph (together with the redactions referred to in the first paragraph) indicates an awareness of the fact that various parties or persons may have a legitimate interest in ongoing prohibitions on publication.

40 As was anticipated by the solicitor assisting, Mr Rolfe's solicitor responded the following day submitting that it would be premature to release materials to the website before Mr Rolfe had given evidence. Mr Rolfe's solicitor's email also included: (emphasis added)

> Secondly, can you please confirm the basis upon which the non-publication order has been amended to remove the words in 2a of the NPO "for the purposes of these coronial proceedings"? In other words, has an application been made by any of the parties to so amend, if so who and when, what submissions were made, and what was the basis for the amendment? <u>We did not receive any notice that it was to be so amended.</u>

41 The solicitor assisting the Coroner responded a few hours later by email as follows:

> Good morning Luke, thank you for your email. To address the issues you have raised:
>
> 1. The purpose of releasing the materials in a tranche is to do it in an orderly way. We are content to remove the material relating to your client until after he has given evidence. Please identify which of the documents you do not wish to be on the website until after the week of your client's evidence.
>
> 2. The Coroner is content to withdraw the amendment, since parties have not had a chance to comment. We are of the view that the words of the current NPO are confusing, and in any event,

> it is no longer appropriate that there be a blanket non-publication order over the brief. Parties are advised that the NPO dated 25 November will be rescinded at 9am on Tuesday 28 March. Her Honour is prepared to consider making an NPO over individual items upon application. Please note that this is separate to the process for putting items onto the website, where more time may be required to redact items.
>
> To be clear then, the NPO of 25 November 2022 (the blanket NPO over the coronial brief) remains the same for now. That NPO will be rescinded at 9am on 28 March 2022. At that time, the Coroner will make an interim NPO over individual brief items that we have been notified of, to allow for written submissions with respect to those individual items.
>
> Kind regards,
>
> Maria

42 A number of observations should be made about that email. *First,* the email demonstrated a continued preparedness to accommodate Mr Rolfe's legitimate interest in restricting the publication/dissemination of certain material until after his cross-examination. *Second*, as to the amendment to the NPO, the swiftness with which the amendment was withdrawn suggests that it was not something that the Coroner was blindly committed to in pursuit of some ulterior or otherwise unstated purpose. *Third*, the Coroner's stated reason for withdrawing the amendment to the NPO – namely, that 'parties have not had a chance to comment' – demonstrates a continued commitment to ensuring that the parties (relevantly Mr Rolfe) have an opportunity to be heard on matters that are identified to affect their interests. *Fourth*, the solicitor assisting's different usage of 'we' and 'the Coroner' (or 'her Honour') in the email makes clear that it was *the Coroner* who amended the NPO *not* the team assisting the Coroner (i.e. the solicitor and counsel assisting).

43 Further, on resuming the inquest, counsel assisting the Coroner explained the reason for the NPO amendment in open court, being that there was a desire for more open publication of material and that the wording of the NPO had been thought to be confusing.[45] The fair-minded lay observer would by this time have understood, in light of the earlier email exchange, that the NPO amendment came about at the instigation of counsel assisting for entirely legitimate reasons and that the only shortcoming in the

[45] Transcript of Proceedings, 28 April 2023, pages 4905–6.

process was the failure to afford the parties an opportunity to be heard on it (a failure which was readily acknowledged and promptly remedied by the Coroner's withdrawal of the amendment).

44 Thus, understood in its proper context and without an unduly suspicious eye, the amendment to the NPO would not cause any apprehension of bias in the fair-minded lay observer.

*Conclusion on the recusal application*

45 Finally, the fair-minded lay observer is aware not just of the basis for the allegation of apprehended bias but also 'the whole of the judge's conduct in the particular trial or inquiry'.[46] In the present case, Mr Rolfe's assertion of apprehended bias is grounded very narrowly in a few episodes in a months-long inquest and he has not suggested that any other aspect of the Coroner's conduct has been otherwise than impeccably fair and balanced. In a highly charged inquest where various parties have at times taken a combative approach to proceedings, the ability of the Coroner to maintain even-handedness throughout would not go unnoticed by the fair-minded lay observer. Indeed, these are proceedings in which 'at all points [her] Honour remained open to and dealt patiently and responsively with any submissions or objections that were raised [by the party asserting an apprehension of bias]'.[47]

46 There being no reasonable apprehension of bias, the Coroner should not recuse herself. Indeed, she *must* not. As Mason J explained in *Re JRL; Ex parte CJL*:

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[48]

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[46] *Kontis v Coroners Court of Victoria* [2022] VSC 422, [240(b)] (O'Meara J).
[47] *Kontis v Coroners Court of Victoria* [2022] VSC 422, [248] (O'Meara J).
[48] *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 352 (Mason J).

47 The Coroner has a 'duty'[49] to continue to hear this inquest to its completion, and to deploy the considerable knowledge and experience gained in the inquest in findings and recommendations.

**PRODUCTION APPLICATION AS IT RELATES TO NPO**

48 On 16 August 2023, Mr Rolfe relevantly applied in writing to the Coroner for:

> 2.1. Production of all correspondence between Professional Standards Command ("PSC") investigators with the Northern Territory Police Force ("NTPF"), and investigators with the Coronial team relating to Spotlight Transcripts at brief items 20-50 through to 20-55.
>
> 2.2. Production of all correspondence between PSC investigators with the NTPF, and investigators with the Coronial team relating to the amendment of the NPO dated 24 November 2022 (and the subsequent amendment that occurred on or about 23 March 2023);
>
> 2.3. Production of all correspondence between lawyers for the NTPF and PSC and/or the Coronial counsel assisting team relating to spotlight transcripts at brief items 20-50 through to 20-55;
>
> 2.4. Production of all correspondence between lawyers for the NTPF and PSC and/or the Coronial counsel assisting team relating to the amendment of the NPO dated 24 November 2022 (and the subsequent amendment that occurred on or about 23 March 2023);
>
> 2.5. Production of all correspondence between the Counsel Assisting team and the Coroner relating to spotlight transcripts at brief items 20-50 through to 20-55;
>
> 2.6. Production of all correspondence between the Counsel Assisting team and the Coroner relating to the amendment of the dated 24 November 2022 (and the subsequent amendment that occurred on or about 23 March 2023); and
>
> 2.7. Production of the summons served on Channel 7 relating to the spotlight transcripts.

49 It can immediately be observed that, contrary to the characterisation of Mr Rolfe's submissions at [1(a)], the documents sought are not accurately described as 'relating to the Coroner's amendment of non-publication orders on or about 23 March 2023'. Rather, the focus[50] of the application is the transcripts of the Channel 7 Spotlight program

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[49] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [19] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[50] The only document that relates to the Coroner's own coming into possession of the transcripts – rather than the asserted release of those transcripts to PSC – is item 2.7 (the summons). However that item has been produced to Constable Rolfe and thus is of no ongoing relevance to the contested application.

featuring Constable Rolfe. More to the point, when understood in the context of Mr Rolfe's contemporaneous disciplinary proceedings (which are summarised in Mr Rolfe's submissions at [81]–[92]) the compelling inference is that Mr Rolfe's application is an attempt to corroborate a suspicion previously held by his legal team that use of Spotlight transcripts in his disciplinary proceedings were somehow 'improper' or 'unlawful', in 'breach of the Harman undertaking' (Rolfe submissions [89], see also [82], [84], [92]).

50 To put it plainly, the compelling inference to be drawn from the narrative and communications in Mr Rolfe's own submissions is that the animating purpose of his present application in the coronial proceeding is to elicit information for the purposes of advancing his interests in disciplinary proceedings, or a challenge to the legality thereof. Mr Rolfe seeks to invoke the Coroner's powers not to advance the inquest but to satisfy his curiosity as to a matter of relevance to his disciplinary proceedings (or a challenge thereto).

51 If that much is accepted, the Coroner would not accede to the application. Indeed, for the Coroner to exercise her facilitative powers (see s 4A(2)) in furtherance of such an application may well go beyond jurisdiction if her Honour was thereby exercising the power for a purpose extraneous to the statute. The position is at least analogous to where 'the party issuing the subpoena has done so for some improper, illegitimate or ulterior purpose foreign to the litigation', in which case 'the Court in the exercise of its discretion may set aside the subpoena as an abuse of process or refuse access to the subpoenaed documents in spite of their apparent relevance'.[51] The Coroner should take a similar approach here.

52 In any event, even if the Coroner could not be satisfied that Mr Rolfe's purpose was ulterior, he has no entitlement to the documents the subject of the application and thus there is no reason to produce them to him. Contrary to his submission (Rolfe submission [105]–[108]) none of the documents he seeks would be part of the 'case file' within the meaning of s 28 of the *Local Court Act 2015* (NT) as applied by s 11A of the *Coroners Act*. Mr Rolfe's reliance on s 28(h) of the *Local Court Act* is misplaced: the examples[52]

[51] *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145, [70] (Brereton JA).
[52] *Interpretation Act 1978* (NT) s 55(4), see also s 62D.

provided under that sub-paragraph reveal that it is directed to logistical or clerical records, not communications of the sort that Mr Rolfe seeks.

53 It makes sense that such communications were not intended by Parliament to be part of the 'case file' to which parties are automatically entitled access. The production of such documents to parties would likely have a chilling effect on communications within and between the Coroner's office, those assisting the Coroner and other government bodies. It can be expected that those persons will occasionally (or perhaps ordinarily) communicate in ways not intended for 'general consumption' including (but not only) on sensitive or private matters. It is essential to the well-running of 'coronial services in the Territory'[53] that such communications – made in an expectation of privacy – are not produced solely on the basis that they are asked for and where they could not have any bearing on the matters the subject of the inquest. This aspect of the production application should be refused for those reasons.

54 It is thus unnecessary to resort to consideration of legal professional privilege as a further basis on which it might be said that some of the material the subject of the application is protected from production. Unlike Mr Rolfe (Rolfe submissions [115]–[116]), NAAJA does not see the word 'assist' in s 41(2) of the Act as excluding lawyers appointed in roles assisting the Coroner from providing legal advice to the Coroner[54] and maintaining privilege over that advice pursuant to s 118 of the *Evidence (National Uniform Legislation) Act 2011* (NT) so long as doing so does not frustrate another feature of the statutory scheme (such as the obligation to provide procedural fairness).

**PRODUCTION APPLICATION AS IT RELATES TO YUENDUMU VISIT**

55 On 16 August 2023, Mr Rolfe relevantly applied in writing to the Coroner for:

> Production of a complete set of records, whether in hard copy of electronic form, all video, audio and notes from the visit to Yuendumu on 14 and 15 November 2022.

56 This aspect of the production application has been substantially complied with in that edited audio recordings have been provided as well as a log of the proceedings. Further,

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[53] *Coroners Act 1993* (NT) s 4A(1)(b).
[54] *Jian v Downing* [2023] FCA 1018, [83]–[90] (Meagher J).

the solicitor assisting the Coroner confirmed on 17 February 2023 that the Coroner does not hold video from the visit to Yuendumu.

57 Mr Rolfe nevertheless appears to assert an entitlement to: (1) unedited audio recordings; and (2) other notes of court staff.

58 As to the unedited audio recordings, the basis for the edits were stated by the solicitor assisting the Coroner on 17 February 2023 to be to remove 'irrelevant or private conversations, including those between the Coroner and her legal team'. Mr Rolfe has no entitlement to recordings of private conversations, including those between the Coroner and her legal team. Indeed, the logical extension of Mr Rolfe's claim would appear to be that the solicitor and counsel assisting team could be requested to provide any notes or records of every conversation they have had between themselves or outside of the open court proceedings. That is plainly untenable, and it demonstrates the absence of any limiting principle to Mr Rolfe's claimed entitlement to production.

59 As to other notes of court staff, just as Mr Rolfe's legal team would not in the Alice Springs courthouse be entitled to peer over the shoulder of the court staff to read what they are writing, so too do they have no right to access every single note or record made by those assisting the Coroner.

60 The Act is clear in requiring an inquest to be conducted in open court (s 42(1)). It could have similarly clearly conferred an entitlement on any interested person to have access to anything and everything that the Coroner or those assisting her have written. But the Act does not do so. Instead, in adherence to orthodox design principles of statutory agencies, the Act lets the obligation to afford procedural fairness do the work. If, for some reason, procedural fairness requires the Coroner to produce a document to a party, then the Act could be said to impliedly entitle the party to that document. But procedural fairness does not require the production of records of irrelevant and private conversations.

61 Mr Rolfe has no legal entitlement to the remaining documents relating to the Yuendumu visit, there are countervailing interests in the documents not being produced, and their production is not otherwise required to protect against an apprehension of bias. This aspect of the production application must also be refused.

**CONCLUSION**

62 For the above reasons, the Coroner should not recuse herself and should refuse Mr Rolfe's production application.

[redacted]

**Phillip Boulten SC**

[redacted]

**Julian R Murphy**

[redacted]

**Matthew Derrig**

[redacted]

**Maithili Mishra**

For NAAJA
13 October 2023