

INQUEST INTO THE DEATH OF KUMANJAYI WALKER

**SUBMISSIONS OF MR ROLFE IN RELATION TO INTERIM NON-PUBLICATION
ORDER MADE BY THE CORONER on 10 OCTOBER 2023**

Filed on behalf of: Zachary Rolfe

Date of filing: 12 October 2023

Filed by: Mr Luke Officer
Partner
Tindall Gask Bentley
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A Introduction

1. By application made on 6 October 2023, Mr Rolfe invited the Coroner to consider recusing herself from the Inquest into the death of Kumanjayi Walker ("the application").
2. The first correspondence received in relation to the application came by way of email from the instructing solicitor to the Counsel Assisting team, Ms Walz, on 7 October 2023 at 12:16pm ACST requesting a signed copy of the application and submissions.
3. The second correspondence received was again by email from Ms Walz on 9 October 2023 at 2:42pm, which inter alia, included a timetable for further submissions in response and reply in relation to the application and that the Coroner proposed to consider the application on the papers.
4. The third correspondence received was by email from Ms Walz on 10 October 2023 at 9:37am advising that *"in the interests of open justice, all submissions filed in relation to the application will be released to the media and posted on the Inquest website when the Coroner's decision is released."*
5. The fourth correspondence received was by email from Ms Walz on 10 October 2023 at 10:56am attaching short minutes of order signed by the Coroner prohibiting publication of the application, as well as any submissions to be provided in response. The order was purportedly made pursuant to section 43 of the Coroners Act, and/or the Court's implied or incidental powers.
6. Objection was taken to the interim non-publication order by the legal representatives for Lee Bauwens, and also on behalf of Mr Rolfe, both by email on 10 October 2023.
7. Ms Walz replied by email on 10 October 2023 at 11:49am confirming that *"the order was made to preserve the status quo, while any objection to the order could be made, as was invited in my email below."* Ms Walz then required written submissions be provided in support of the objection so that it can be 'considered and determined' with other parties to be given 24 hours thereafter to respond consequent upon which the Coroner *"will make a determination as to the continuation or revocation of the interim order."*

8. The following must be borne in mind:
 - a. Mr Rolfe's concerns expressed in the application are:
 - i. That a confidential lawyer/client relationship exists between the Counsel Assisting team and the Coroner to which claims of legal professional privilege have been asserted;
 - ii. That the Coroner previously amended a non-publication order *ex parte*.
9. Mr Rolfe adopts the submissions on behalf of Lee Bauwens with respect to the interim non-publication order.
10. Mr Rolfe respectfully notes that having raised his concern in his application as to *ex parte* decisions, the coroner has embarked upon another *ex parte* decision.
11. Mr Rolfe further submits that having raised his concern as to the apprehension of bias on the part of the Coroner, which is inherently jurisdictional in that it negates judicial power,¹ and that the Coroner does not have implied or incidental powers of the kind purported to be exercised,² that the order was made in circumstances it cannot be as a matter of law. In that sense it is invalid and has no effect.
12. Mr Rolfe finally submits that the effect of the order is to suppress matters that by their very nature are to be conducted in open court.
13. As Matthew Groves notes in his article "Clarity and Complexity in the bias rule;"³

A cornerstone of the modern law governing bias is the statement of Lord Hewart CJ that it 'is of fundamental importance that justice should not only be done, but should be manifestly and undoubtedly be seen to be done.'⁴ The notion that justice be 'seen' to be done, or that the 'appearance' of bias be studiously avoided, draws attention to the importance of public perception to the bias rule. That perception has long been linked to public confidence in the administration of justice.⁵

¹ *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor* [2023] HCA 15

² *Rolfe v the Territory Coroner & Ors* [2023] NTCA 8

³ Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44(2) *Melbourne University Law Review*, p.4

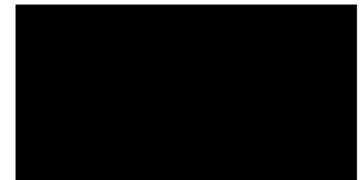
⁴ *R v Sussex Justices; Ex Parte McCarthy* [1924] 1 KB 256, 259

⁵ *Serjeant v Dale* (1877) 2 QBD 558, 567

14. As was said in *Serjeant v Dale*:⁶

The law does not measure the amount of interest in which a judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security.

15. Accordingly, the interim non-publication order either has no effect given a challenge to the jurisdiction of the Coroner, or otherwise, it should be rescinded.



Luke Officer

Tindall Gask Bentley Lawyers
Solicitors for Mr Rolfe

⁶ *Serjeant v Dale* (1877) 2 QBD 558, at 567