

INQUEST INTO THE DEATH OF KUMANJAYI WALKER

**SUBMISSIONS FILED ON BEHALF OF SERGENT IAN NANKIVELL AND CONSTABLE
JAMES KIRSTENFLEDT
RE: APPLICATION FOR ARMITAGE RECUSAL**

1. The applicants respectfully join in the application made on behalf of Mr Rolfe and in the submissions made on his behalf and also on behalf of Mr Bauwens.
2. Further to those submissions, the applicants respectfully make the following points.
3. It is well established that a coroner must afford procedural fairness to parties appearing at an inquest. That duty includes a requirement that a coroner's decision-making process be free from actual or apprehended bias.¹
4. That the test for apprehended bias involves a "double might" has been explained by those acting for Mr Rolfe. The question is therefore whether the conduct complained of here raises the relevant possibility.
5. The applicants support the approach adopted on behalf of Mr Rolfe, in that the conduct of counsel assisting is relevant in assessing whether the test for apprehended bias is satisfied. That is so *a fortiori* when the apparent "indivisibility" (for want of a better term) of the coroner and counsel assisting is underscored by the recent claim of legal professional

¹ *Victoria Police Special Operations Group Operators v Coroners Court of Victoria* (2013) 42 VR 1, [36].

Outline of Submissions

Filed on behalf Sergeant Ian Nankivell and
Constable James Kirstenfeldt
Filed by Calvin Gnech

Gnech & Associates

Level 9
193 North Quay
Brisbane Qld 4000
Ph: (07) 3558 1040
admin@gnechl原因.com

privilege, implicit in which is the notion that counsel assisting's relationship with the coroner equates to one of solicitor-client.

6. It is accepted that this inquest presents special cultural difficulties, however those difficulties cannot be addressed by means that give rise to the relevant apprehension. Ultimately, none of the parties' interests will be served by findings that a fair minded observer *might* think *may* have been the product of partiality towards relatives and friends of the deceased.
7. Here, the applicants rely, cumulatively, on the following matters as giving rise to the relevant apprehension:

I. The attendance by the Coroner at Yuendumu on 14 and 15 November 2022

- a. Such a visit, for the stated purposes of learning about Walpiri culture and inspecting the scene, was regarded as unremarkable, and would have been so, were it not for a series of unfortunate events that took place during the course of it. It is not suggested that those events were necessarily planned or foreseen by the coroner or counsel assisting, but, once they occurred, they irredeemably raised the spectre of apprehended bias.
- b. *First*, the Coroner allowed her face to be painted by the deceased's mother, Leanne Oldfield. This occurred in the presence of the media, who photographed the coroner in close proximity to Ms Oldfield and later with her face painted. Those photographs, and an accompanying story were widely published. One only needs to momentarily reflect on the likely reaction of the deceased's family and the Yuendumu community, had the coroner conducted an intimate meeting with the family of Mr Rolfe, to appreciate the significance of what occurred.
- c. *Second*, the Coroner and counsel assisting received statements from members of the community about:
 - i. The need for payback, including the spilling of Mr Rolfe's blood;
 - ii. Concern that Mr Rolfe was still employed as a police officer, and that "justice" required his dismissal;
- d. *Third*, neither the coroner nor counsel assisting demurred to the making of such statements. Although counsel assisting engaged in what was perhaps an attempt at polite deflection, the failure to make the point – immediately – that those statements were completely unacceptable was apt to imply tacit acceptance, and to suggest to those present that addressing these matters was a legitimate function of the inquest. As has

been noted on behalf of Mr Rolfe, the first statement (and others like it) received significant publicity.

- e. The applicants acknowledge that no application for recusal was made in the immediate aftermath of the visit, however it is now relied upon in conjunction with the matters specified below.

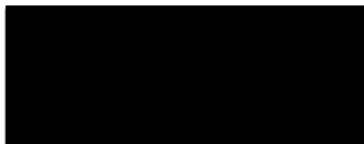
II. The unilateral redaction of the recordings of the visit

- a. The applicants were not on notice that events of the sort described above were planned or likely to happen. They were not present at Yuendumu and nor were their legal representatives. Given what transpired, Mr Rolfe and others were entitled to know the entirety of what occurred over the course of the visit, and, as explained by his legal representatives a unilateral decision to edit the recording raises concerns about the transparency of the inquest.
- b. Those concerns are amplified by the surprising assertion that the redactions are properly the subject of legal professional privilege.

III. Response to this application

- a. The making of the 10 October non-publication order – in the absence of submissions from interested parties – was fundamentally inconsistent with procedural fairness and the principle of open justice. The unilateral decision to determine the matter in chambers without the benefit of oral submissions was similarly procedurally unfair.
- b. Whilst the approach taken might be sought to be justified on the basis of the exigencies of time, to act in this way in response to an application for recusal is apt to give rise to a *perceived* unwillingness to permit the impugned conduct and arguments of the parties to be subject to normal public scrutiny.

8. The application should be allowed.



Jeffrey Hunter KC
Counsel for the Applicants
13 October 2023