

AN INQUEST INTO THE DEATH OF KUMANJAYI WALKER ON 9 NOVEMBER 2019 AT
YUENDUMU POLICE STATION

SUBMISSIONS ON BEHALF OF LEE BAUWENS

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1. At 1.39pm WST on 6 October 2023 Constable Rolfe filed an application which included an invitation for the coroner to recuse herself on the basis that there was a reasonable apprehended bias.
 2. These submissions are advanced on behalf of Mr Lee Bauwens. First, he, like several other persons and entities, was invited to make submissions. Second, the question of bias, apprehended or real is a fundamental issue going to the coroner's jurisdiction to continue the inquest. Third, the debate on bias, and the consequences of any decision made on Mr Rolfe's application impact on questions whether and, if so when, Mr Bauwens will be required to testify before this coroner.
 3. At 12.12pm WST on 9 October 2023 Ms Walz for the coroner emailed the legal representatives appearing and provided programming orders for the filing of responsive material and that the application would be dealt with on the papers.

4. At 7.07am on 10 October 2023 Ms Walz for the coroner emailed the legal representatives appearing and advised 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's website when the decision is released.
5. At 8.26am on 10 October 2023 Ms Walz for the coroner emailed the legal representatives appearing and provided them with a non-publication order (**NPO**) made by the coroner on 10 October 2023, which is said to be made pursuant to s.43 of the *Coroners Act* 1993 (NT) [**Act**], and / or the court's implied or incidental powers. The email asked the legal representatives to advise as a matter of priority if they had any objection to the order.
6. The context in which the NPO was made is crucial. It entailed a complaint of apprehended bias. One of the grounds is that there is a relationship between the coroner and the team assisting her which Mr Rolfe has expressed concern about. It includes the proposition that, based upon the solicitor / client relationship between the coroner and the team headed by counsel assisting, there are matters occurring between the coroner and that team from which other persons, with legitimate interests, are excluded.
7. In that peculiar context the NPO was made, either by the coroner of her own accord or by the coroner at the instance or on the advice of the counsel assisting team. The NPO was made ex parte and without notice to anyone else and in camera.
8. If anything in the course of this inquest justified the apprehension of bias complained of by Mr Rolfe, this was it.
9. As noted by Mr Officer in his email of 9.08am on 10 October 2023, the Court has no implied / incidental powers, as was confirmed in *Rolfe v The Territory Coroner & Ors* [2023] NTCA 8.
10. A question of apprehended bias is inherently jurisdictional in that it negates judicial power¹. If the application is successful either at first instance or on appeal, the result is that the coroner

¹ [26] *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 (17 May 2023)

has no power either to make orders including the NPO or to preside over any further evidence-taking.

11. The only basis upon which the NPO could have been made is s.43 of the Act, which provides that:

43 *Restriction on publication of reports*

(1) *A coroner must order that a report of an inquest or of part of the proceedings, or of evidence given at an inquest, not be **published if the coroner reasonably believes that**, to publish the report, would:*

(a) *be likely to prejudice a person's fair trial; or*

(b) *be contrary to the administration of justice, national security or personal security; or*

(c) *involve the disclosure of details of sensitive personal matters including, where the senior next of kin of the deceased have so requested, the name of the deceased.*

(2) *A person must not publish a report in contravention of an order under subsection (1).*

Maximum penalty for an offence against this subsection: 85 penalty units or imprisonment for 2 years.

[our emphasis]

12. The making of such an order can have serious consequences, including imprisonment for any party that commits an offence against the sub-section.
13. The parties do not have the benefit of written reasons of the coroner. However, the coroner through Ms Walz indicated at 9.19am WST on 10 October 2023 that the NPO was to “*preserve the status quo*” whilst any objection to the order could be made. We do not understand what this mean, but it indicates to us that the NPO was made *prior* to the coroner forming a reasonable belief as is required under s.43 of the Act.
14. This statement generates more questions than answers. What is the *status quo* that the coroner sought to protect by the NPO? What is it about the application for recusal that threatened the *status quo*? How has the NPO protected the *status quo*? Why could the question of protection of the *status quo* not be protected by the time-honoured principle of justice not only being done, but by it being seen to be done, i.e. why was it not debated in open court with all parties being afforded the opportunity to be heard?
15. The effect of the NPO has simply shielded the coroner from scrutiny for a week. It has done nothing to protect the inquest. Effectively the coroner was the judge in her own cause – and

then in private without entertaining views contrary to her own. The fact that submissions were invited after the event is irrelevant to whether there were grounds to make the NPO.

16. The urgency also appears illusory given the nearly 4 days from the receipt of the application to the making of the ex parte NPO.
17. As the coroner is aware open justice is one of the most fundamental aspects of the system of justice in Australia. In *Commissioner of the Australian Federal Police v Zhao*, the High Court said that that the basic '*rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principles save in exceptional circumstances*' – [8] of ruling #4, citations removed.
18. Having reviewed the application and submissions filed 6 October 2023, we cannot identify any material in it that could give rise to a reasonable belief as to the matters in s.43(a)-(c) of the Act.



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