IN THE CORONERS COURT

OF NORTHERN TERRITORY

HELD AT ALICE SPRINGS

No. A0051/2019

INQUEST INTO THE DEATH OF KUMANJAYI WALKER

SUBMISSIONS OF THE BROWN FAMILY IN RESPONSE TO THE APPLICATION AND SUBMISSIONS OF MR ROLFE FILED 6 OCTOBER 2023

Filed on behalf of:	Brown Family
Date of Filing:	13 October 2023
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A. Introduction

1. Mr Rolfe, by application on 16 August 2023, sought production of documents from the Coroner.

2. By his submission of 6 October 2023, he:

   (a) explains concerns which led to the application of 16 August 2023;

   (b) identifies further concerns which have arisen by reason of the claim of legal professional privilege; and

   (c) invites the Coroner to consider recusing herself from the Inquest on grounds of apprehended bias (**the Recusal Application**).[1]

3. These submissions are directed solely to the Recusal Application. The Brown family submits that the Coroner should not recuse herself.

B. Legal Framework

Applicable Test

4. The criterion for apprehended bias was definitively stated by the High Court in *Ebner v. Official Trustee in Bankruptcy* (**Ebner**).[2] The test is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.[3]

5. *Ebner* was, however, concerned with adversarial proceedings. As the majority in *Ebner* observed:[4]

> Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial Tribunal …
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> The principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision making and decision maker. Most often it now finds its reflection in application in the body of learning that has developed about procedural fairness. The application of the principle in connection with decision makers outside the judicial system must sometimes recognise and accommodate differences between Court proceedings and other kinds of decision making.

6. Application of the *Ebner* test requires:

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[1] Application and submissions of Mr Rolfe (**Rolfe Submissions**), 6 October 2023, paragraph 5.
[2] (2000) 205 CLR 337.
[3] *Ebner* [6].
[4] *Ebner* per Gleeson CJ, McHugh, Gummow and Hayne JJ at [3]-[4].

(a) identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits;

(b) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and

(c) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.[5]

7. The ACT Supreme Court, sitting as a three judge Court[6] recognised that the *Ebner* principle will be applicable to a Coroner acting within the Coronial jurisdiction (or other tribunal) only when it is *"firmly established"* that a suspicion may reasonably be engendered in the minds of those who come before the tribunal, or in the minds of the public, that the tribunal or a member of it, may not bring to the resolution of the questions arising before it fair and unprejudiced minds.[7]

8. In *Doogan*, Higgins CJ, Crispin and Bennett JJ observed:

> In litigation *inter partes* the nature of the questions that the judicial officer is required to determine can generally be found in the pleadings, but coronial Inquiries have no pleadings and, strictly speaking, no parties. The task of the Coroner is not to determine whether anyone is entitled to some legal remedy, is liable to another or is guilty of an offence. The coroner's task is to enquire as to the matters specified in the relevant section of the *Coroner's Act* 1997 ("the Act") and make, if possible, the required findings and any comments that may be appropriate. Thus, if an application raising questions of apprehended bias is made before the Coroner has handed down his or her report or at least foreshadowed specific findings, it may be more difficult to determine the potential relevance of particular rulings or comments made during the course of the proceedings.

9. The jurisdiction to conduct the Inquest is defined by the *Coroner's Act, 1993* (NT). As Ipp JA observed in *Musumeci v. Attorney-General of New South Wales*[8] in respect of the equivalent provisions of the New South Wales coronial legislation:

> I think it is sufficient to note, firstly, that it is a hybrid process containing both adversarial and inquisitorial elements. Secondly, Coroners exercise judicial power, notwithstanding the executive nature of their function. Thirdly, the proceedings in the Coroner's Court involve the administration of justice … The nature of an Inquest differs from that of a fundamentally investigatory process such as a Royal Commission.

10. A Coroner is a professional judge whose training, tradition and oath or affirmation require him or her to discard the irrelevant, the immaterial and prejudicial.[9]

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[5] *QYFM v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419 [38].
[6] *The Queen v. Coroner Maria Doogan; Ex Parte Australian Capital Territory* [2005] ACTSC 74 (***Doogan***).
[7] *Doogan* at [10]; see also *Annetts v. McCann* (1990) 170 CLR 596; *The Queen v. Commonwealth Conciliation and Arbitration Commission; Ex Parte Angliss Group* (1969) 122 CLR 546; *Laws v. Australian Broadcasting Tribunal* (1990) 170 CLR 70 per Gaudron and McHugh JJ at 100.
[8] (2003) 57 NSWLR 193 at 199.
[9] *Johnson v. Johnson* (2000) 201 CLR 488 at [12].

11. Whilst acknowledging that a Coroner has a duty to act judicially in resolving the various issues that arise for determination, the evolution of those issues and the progression of the investigation are relevant. The Coronial legislation confers a *"degree of flexibility upon a Coroner concerning the procedure which he thinks appropriate to adopt."*[10] The Coronial process is *"much less rigid than a trial proper whether civil or criminal"*.[11]

12. As the Court observed in *Doogan*:[12]

> However, his or her awareness of those issues may emerge only gradually as the investigatory stage of the Inquiry unfolds. It may be some time before the Coroner can make sensible judgments as to who should be granted leave to be represented at the subsequent Inquiry. The hypothetical lay observer must be taken to be aware of this general process from an investigatory to a curial phase and to understand that a Coroner may be obliged to undertake some investigations and duties at an earlier stage of the proceedings without consultation with parties who might conceivably be interested ... It is true, of course, that an apprehension of bias may arise even at the investigatory phase of an Inquiry, whether due to some expression or pre-judgment or otherwise, but many grounds of complaint commonly relied upon to support applications of this kind in relation to other proceedings will obviously be inapplicable …
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> …
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> Even when the Inquiry has been formally convened and evidence is being adduced, the Coroner may still be engaged in an investigation of potential issues, the scope of which will not have been defined by pleadings. Issues may continue to arise and be progressively clarified and refined. Hence, any allegation that a remark or statement by the Coroner may have given rise to an apprehension of bias must be considered, not only in the context of the relevant jurisdictional limits, but also by reference to the extent to which the relevant issue has been crystallised or remains inchoate.

13. Furthermore, the unique investigative nature of the Coroner's role is such that contact with witnesses and others outside of court is commonplace: see the observations of Underwood J in *R v Matterson & Anor,*[13] repeated with approval by Henry J in *Leahy v Barnes:*[14]

> In the circumstances of a coronial inquiry, fair minded people or the hypothetical bystander, would not reasonably apprehend bias from the mere fact that there had been out of court contact between the coroner and a witness who later gave evidence. Indeed, the bystander would not be at all surprised to learn that there had been such contact having regard to the nature of the coronial process. In *R v Carter and the Attorney-General; ex p Gray and McQuestin* the court held that the apparent bias needs to be considered in the context in which it is claimed, and that the fair minded people referred to in the majority judgment of *R v Watson* would be aware that a large part of the Commissioner's duty involved investigation and inquiry. So it is in the case of a coronial inquiry." (citations omitted)

14. In *Leahy v Barnes,* Henry J also dealt with a complaint about *ex parte* extra curial communications with the family of the deceased. In circumstances where there was no attempt to shut the applicant out from those discussions and indeed, to the contrary, there was an invitation to participate, his Honour concluded that a fair-minded lay observer would

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[10] *Maksimovich v Walsh* (1985) 4 NSWLR 318 at 335 (Samuels JA).
[11] *Maksimovich v Walsh* (1985) 4 NSWLR 318 at 335-6 (Samuels JA)
[12] *Doogan* [46].
[13] [1994] TASC 184, 11.
[14] [2013] QSC 226 at [134].

not apprehend the Coroner was biased against the applicant and might decide the inquest other than on legal and factual merits.[15]

15. In respect of the third stage of the *Ebner* test, *"whether the fair-minded lay observer might reasonably apprehend in the totality of the circumstances that the articulated departure might occur"*[16], it is the Court's view of the public's view, not the Court's own view, which is determinative.[17]

Counsel Assisting

16. The Coroner is empowered to appoint a person to assist the Coroner for the purpose of an Inquest. The role of counsel assisting is not defined.

17. The learned authors of *Waller's Coronial Law and Practice* in New South Wales identify that the duties of counsel assisting include preparation of witness lists and lists of issues; assisting family members who may be unrepresented; calling and examining witnesses and tendering documents on behalf of the Coroner; making submissions to assist the Coroner in any area of law that may arise during the hearing and assisting the Coroner in the preparation of findings such as providing a summary of evidence, chronologies, an outline of the relevant statutory provisions and reference to authorities.[18]

18. Partial conduct by counsel assisting may in some circumstances impugn a coroner who condones it.[19]

Waiver

19. A party may have waived the right to object on grounds of apprehended bias where the point is not taken within a reasonable time. The time and money wasted by the delay is also relevant.[20]

C. Rolfe's Concerns

20. The "concerns"[21] expressed by Mr Rolfe, as summarised in his conclusions, include:

    (a) exchanges occurring between counsel assisting and members of the community during the course of the Yuendumu visit which *"give rise to a perception that the views of community*

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[15] *Leahy* at [142], [144].
[16] *Ebner* at [8]; *Isbester v. Knox City Council* (2015) 255 CLR 139 at [59].
[17] *CNY 17 v. Minister for Immigration* [2019] HCA 50 at [21] (Kiefel CJ and Gageler J); *Webb v. The Queen* (1994) 181 CLR 41 at 52.
[18] *Doogan* at [165]. See also I. Freckleton QC & D. Ranson, *Death Investigation in the Coroner's Inquest* (Oxford UP, Melbourne, 2006), pp. 564-5.
[19] *Firman v Lasry* [2000] VSC 240 at [28].
[20] *Michael Wilson & Ptnrs v Nicholls* (2011) 244 CLR 427 at [84].
[21] Rolfe Submissions, page 10.

members during those proceedings would be 'taken into account'". The views expressed included a view that Mr Rolfe's employment as an NT police officer must end;

(b) requested information about those events to understand precisely what occurred and the entire context in which those exchanges occurred has allegedly not been fully disclosed;

(c) the facts and circumstances relating to the amendment to the non-publication order give rise to an inference and perception that:

(i) the amendment was made as a result of unilateral communications with NT Police; and

(ii) the amendment was apt to assist NT Police to pursue disciplinary proceedings (believed to be in the interests of justice) to the detriment of Mr Rolfe and in furtherance of the express desire of the Yuendumu community, namely, that Mr Rolfe's employment with the NT Police be terminated;

(d) impressions of counsel assisting's sympathy for the community's perceptions of justice, when considered against the entire context, give rise to an apprehension that the Coroner may fail to discharge her functions in a manner that is impartial; and

(e) the explanation provided for the redaction of certain material that there was a legal professional privilege between the Coroner and counsel assisting leads to an impression that the Coroner may be in receipt of legal advice on a confidential basis which may or may not be coextensive with submissions made in open Court.

D. Submissions

21. The Brown family submits that the **first limb** of the *Ebner* test is not satisfied. Nothing in the abovementioned matters, as established and detailed in the Rolfe Submissions, identifies with any precision what it might be said that would lead the Coroner to decide the case other than on its legal and factual merits.

22. Notably absent from the submissions and their factual context is any suggestion that there has been a statement by the Coroner that indicates that she is likely to decide issues on the Inquest *"other than on its legal and factual merits"*.

23. To the contrary, after many weeks of evidence, Mr Rolfe is unable to identify any statement or conduct of the Coroner that indicates that she has "prejudged" an issue or is likely to decide the case other than on its legal and factual merits.

24. Identifying the absence of evidence as to why matters were not disclosed (and the decision not to disclose certain matters) does not lead to an inference that is indicative of an inclination by the Coroner not to make findings on the legal and factual merits of the case.

25. Further, it is hyperbolic to describe counsel assisting's statements in Yuendumu as demonstrating partiality. To the contrary, the course of proceedings in Yuendumu was consistent with the nature of the visit as earlier foreshadowed in court, with the respect afforded to Warlpiri custom and community representatives' views expressed in evidence in the inquest, and with counsel assisting's evenly balanced conduct of the inquest otherwise. No correction from the Coroner was called for.

26. The Brown family submit, with respect, that the apprehension of bias is nothing more than suspicion.[22]

27. Even if there were matters that were identified as satisfying the first limb of the test in *Ebner*, there has not been an articulation (as opposed to an assertion)[23] of a *"logical connection between the matters identified and the feared deviation from the course of deciding the case on its merits"* in order to satisfy the **second limb** of the *Ebner* test.

28. There has no attempt to articulate the issues upon which adverse findings might be made against Mr Rolfe that are to be influenced by the matters purportedly identified as apprehended bias. Without an articulation of that connection, the application must fail.

29. In respect of the **third stage**, that the fair-minded lay observer might reasonably apprehend in the totality of the circumstances that the articulated departure might occur, the requirement has not been satisfied.[24]

30. As Kiefel CJ and Gageler J observed in *CNY17:*[25]

> The purpose of combining the "fair-mindedness" of the hypothetical lay observer with the "reasonableness" of that observer's apprehension is to stress that the appearance or non-appearance of independence and impartiality on the part of the authority falls to be determined from the perspective of a member of the public who is "neither complacent nor unduly sensitive or suspicious". Together they emphasise that "the confidence with which the [authority] and its decisions ought to be regarded and received may be undermined, as much as may confidence in the Courts of law, by a suspicion of bias reasonably – and not fancifully – entertained by responsible minds.[26]

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[22] Compare the comments of the High Court in *Johnson v. Johnson* (2000) 201 CLR 488 at [53].
[23] *QYFM* at [225] per Gleeson J.
[24] *Ebner* at [8]; *Isbester v. Knox City Council* (2015) 255 CLR 135 at [59].
[25] *CNY17 v. Minister for Immigration* (2019) 94 ALJR 140 at [19].
[26] See also *R v. Commonwealth Conciliation and Arbitration Commission; Ex Parte Angliss Group* (1969) 122 CLR 546 at 553.

31. The Brown family submit, with respect, that not even the *"unduly sensitive or suspicious"* fair-minded lay observer would determine apprehended bias in this instance.

32. Finally, the unreasonable delay in bringing the objection since November 2022 operates to prevent Mr Rolfe from doing so now. The significant personal and institutional cost that would be incurred should the Coroner accede to the application inclines strongly against such a course.

E. Conclusion

33. The Brown family submit that the application for the Coroner to recuse herself should be dismissed.

34. The comments of Mason J in *Re JRL, Ex Parte CJL*[27] cited by Barr J in *Voller v. Northern Territory of Australia*[28] are apposite:

> It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that it is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of pre-judgment and this must be "firmly established". [citations omitted]
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> 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.

[redacted]

Gerard Mullins KC

[redacted]

Paula Morreau

Counsel for the Brown Family
13 October 2023

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[27] (1986) 161 CLR 342 at 352.
[28] [2017] NTSC 78 at [31].