IN THE CORONERS COURT
OF THE NORTHERN TERRITORY OF AUSTRALIA
AT ALICE SPRINGS

In the matter of an inquest into the death of
KUMANJAYI WALKER

WLR FAMILIES' SUBMISSIONS ON RECUSAL

Introduction

1. The document filed on behalf of Constable Rolfe on 6 October entitled 'Application and Submissions' (**Rolfe submissions** or **RS**) is not accompanied with any document which precisely sets out the relief/orders actually sought by him. It complains about 'non-production' of documents, failure to provide 'explanations' about asserted privilege and the like, then 'invites' the Coroner to 'consider recusing herself from the inquest on grounds of apprehended bias'.[1]

2. The WLR families proceed on the basis that the Rolfe submissions comprise an application by Mr Rolfe that the Coroner recuse herself from continuing with her statutory obligations under the ***Coroners Act*** *1993* (NT), in particular under s 34(1) to make specific findings, under 34(2) to comment and under s 35(2) to make recommendations about matters connected with the death of Kumanjayi Walker. The asserted basis for recusal is apprehended bias.

3. The positions taken by Ms Walz (presumably on behalf of the Coroner) in respect of the complaints made concerning non-production and failure to explain are unexceptionable.

4. For the reasons set out below, the WLR families submit that there is no proper basis on which the Coroner would recuse herself.

Applicable principles regarding apprehended bias

5. The High Court summarised the apprehended bias principle in ***Charisteas*** *v Charisteas*,[2] in terms that apply equally to the Coroner:[3]

> 'The apprehension of bias principle is that "a judge is disqualified if 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". The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial — that it is conducted by an independent and impartial tribunal. Its application requires two steps: first, "it requires the identification of what it is said might lead a judge… to

[1] RS [5].
[2] (2021) 393 ALR 389 at 393 [11] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ). See also, e.g., *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15; (2023) 409 ALR 65 at 77 [37]-[38] (Kiefel CJ and Gageler J), 83 [67] (Gordon J), 107-8 [162] (Edelman J), 114-15 [94] (Steward J), 123 [225] (Gleeson J), 140 [293] (Jagot J).
[3] See, e.g., ***Kontis*** *v Coroners Court of Victoria* [2022] VSC 422.

> decide a case other than on its legal and factual merits"; and, second, there must be articulated a "logical connection" between that matter and the feared departure from the judge deciding the case on its merits. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed.'

6. Four points may be made about the application of these principles in the circumstances of this case.

7. First, it is for the Coroner to determine whether or not to recuse herself.[4]

8. Second, it is critical to distinguish between judges who are determining rights in *inter partes* litigation and a coroner who is conducting an inquest in the course of a coronial inquiry when assessing whether any apprehended bias might be evident.[5]

9. The scope of powers of a coroner under the *Coroners Act* have been the subject of previous debate and rulings in this Inquest and need not be repeated now other than to say that they are very wide including as to the manner in which a coroner may investigate the circumstances surrounding a death,[6] accepting of course that a coroner must act reasonably, impartially and affords all interested parties procedural fairness. Most importantly, it is a function of investigation, not a process leading to the determination of rights or liabilities.

10. As to the scope of the inquiry and what might be regarded as relevant, whilst there are obvious limits,[7] '[i]t is generally for the [Coroner] to determine whether any particular factor could be regarded as sufficiently proximate to fall within'[8] the statutory tasks entrusted to the Coroner.

11. The nature of the coronial inquiry and the breadth of the Coroner's powers bear upon how the fair-minded lay observer would view the Coroner's actions that are the subject of Mr Rolfe's complaint.

12. Third, Mr Rolfe, being the person who killed Kumanjayi Walker, was granted leave as a interested party to the Inquest, and he has had the assistance of counsel and solicitors to protect his interests. Because of his prior acquittal of criminal charges, including murder in respect of this death and also because of s 34(3) and the stage at which this Inquest is at, there is no possibility of Mr Rolfe facing any criminal liability for his actions as a result of findings in this inquest.

13. Fourth, the Rolfe submissions make no attempt to articulate how the 'concerns' set out at some length would give rise to an apprehension of bias on the part of a fair-minded lay observer. That is important because the second step in the test summarised in *Charisteas* is to articulate a logical connection between the matters raised and the feared departure of the decision-maker from deciding the case on its merits (noting that the concept of a coroner 'deciding the case on its merits' simply means performing the statutory tasks set out in paragraph 2 above). It is for the party seeking recusal to give that articulation. It should not

---

[4] See, e.g., *Bainton v Rajski* (1992) 29 NSWLR 539 at 544, 548.
[5] *Kontis* [2022] VSC 422 at [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 at [45] (Kyrou J).
[6] See, e.g., *Coroners Act*, ss 19 – 24.
[7] See generally, *Harmsworth v State Coroner* [1989] VR 989 at 995 per Hedigan J and *R v Doogan; ex parte Lucas-Smith* [2005] ACTSC 74 at [28] per Higgins CJ, Crispin and Bennett JJ.
[8] *R v Doogan, Re; Ex parte Lucas-Smith* (2005) 158 ACTR 1 at 11 [34] (Higgins CJ, Crispin and Bennett JJ).

be for other interested parties, or the Coroner, to seek to divine from a lengthy list of 'concerns' the asserted connection between those concerns and a feared departure from proper decision-making. Mr Rolfe's failure to do this himself should be the end of the matter. That is especially so in light of the lateness of this 'application', which it is, respectfully, difficult to see as anything other than strategic. We return to this issue at the conclusion of these submissions.

Yuendumu visit

14. Many of the complaints in the Rolfe submissions comprise what occurred at the Coroner's visit (with legal representatives for all of the parties) to Yuendumu on 15 November 2022.

15. First, the visit was entirely open for the Coroner to pursue within the boundaries of her functions under the *Coroners Act*. No party, including Rolfe, objected. Indeed his solicitor attended.

16. Second, the Coroner made clear that information that was received on the Yuendumu visit would not form part of the evidence upon which her Honour would be making findings, comments and recommendations. As submitted by NAAJA in their submissions of 11 September 2022 at [59] and [60], when Mr Rolfe hinted at bringing this application, the approach taken by Omeara J in *Kontis* at [259] and [261] is apposite and instructive in this regard.

17. Third, there could not be any proper complaint that a visit to the scene of the death and the community in which it occurred was undertaken. Indeed there might be some criticism if such a visit was not undertaken.

18. Fourth, that this community chose to conduct ceremonies and rituals and provide amenities and welcome to all of the legal representatives (including Mr Rolfe's) also could not be the subject of legitimate complaint. For some of them this was their first ever visit to a remote Aboriginal community or exposure to rituals and ceremonies and to the conditions under which services such as policing, education and health are provided.

19. Fifth, the real complaint made by Mr Rolfe appears to be as to what was said by some community members in public, reports about those comments in the media and what was said by Counsel Assisting in public (in some but not all cases in the presence of the Coroner).

20. As to the first two of these matters (what was said by some community members and media reporting of those comments), no explanation is given as to how they could lead a fair-minded lay observer to apprehend bias on the part of the Coroner. They could not.

21. As to the third matter, it may be accepted that partiality on the part of Counsel Assisting which appears expressly or tacitly to be endorsed by the Coroner may give rise to a reasonable apprehension of bias. However, none of the matters raised by Mr Rolfe indicate any partiality on the part of Counsel Assisting. For example, it would be ludicrous to suggest that Counsel Assisting gave any indication that any form of 'payback', a much misunderstood and misused term, whether spearing or consequences in his continued employment, was being considered as a finding, comment or recommendation (RS [52]-[58]).

22. In any event, no attempt is made to explain how a fair-minded lay observer would perceive the Coroner to be endorsing any appearance of partiality on the part of Counsel Assisting simply by reason of, for example, overhearing something said by Counsel Assisting to a community member without intervention or correction. The community visit is not like cross-examination by counsel assisting in the formal setting of the inquest, as was considered in *Firman v Lasry*, especially in circumstances where what occurred at the community visit is not going to be evidence in the inquest.

23. Sixth, the complaint at RS [40] to [42] of the Rolfe submissions is unfounded. The Coroner has expressly stated that none of that which was not released to the parties would be considered as evidence. That should be the end of the concern.

24. Seventh, the allegation in RS [43] is a mere speculation. There is no evidence at all that the Coroner, or indeed anyone else, had notice as to what would be said by members of the community. It may be noted that threats of spearing and the like had been published in the media from almost the first day following the death. Rehearsing that threat hardly adds to what is known about the sentiments of some members of the community. To suggest that there was some pre-concert is a serious allegation without foundation, and should be withdrawn.

25. Eighth, the response attributed to Counsel Assisting, in this case Dr Dwyer SC, in RS [46] must be viewed in proper context.[9] Dr Dwyer was speaking to a respected and senior member of the community, Robin Granites, who was chairing the public discussion. The reassurance that some of the discussion was being recorded and will 'be taken into account', whether in front of the Coroner or not, could not reasonably be seen as saying that it would be received into evidence in circumstances where it was made clear before the visit that none of what occurred would be evidence in the inquest. The fair-minded lay observer, who would be taken to be aware of that context given it was made clear in open hearings, would not perceive Dr Dwyer's comment to be anything more than an indication that their voiced concerns were being listened to.

26. Ninth, these matters must also be seen in the context of evidence that had already been received in the inquest, in respect of so called 'payback'. For example, evidence was received on this topic before the Yuendumu visit from several witness, including [Lottie Roberston, 9 August 2022, [41]], as well as after the visit [Eddie Robertson 22 November 2022, [18] to [24]]. An opportunity was given to any interested party to object to this evidence and cross-examine its deponents. Mr Rolfe's counsel did not do so. This is revealing of the specious quality of the recusal submissions.

27. Tenth, the reference in RS [49] to the termination of Rolfe from the NT Police Force is a distraction. The Coroner cannot make any findings about this issue, in circumstances where the termination occurred following misconduct by Mr Rolfe unrelated to his involvement in the death that is the subject of the Inquest. Again, no attempt is made to explain how the fact that community members discussed matters in the presence of the Coroner and Counsel Assisting (which they had raised publicly before the visit in any event) could cause a fair-minded lay observer to apprehend bias on the part of the Coroner.

28. Eleventh, the fair-minded lay observer would not view the comment attributed to Dr Dwyer that she 'understands' the concern about any perception of bias that a Canberra based judge

[9] As should what is contended in [54] to [58] of Rolfe's submissions on the issue of 'payback'.

heard the trial and that Rolfes are a wealthy family from Canberra (RS [52]), in its full context, as anything more than a statement that Dr Dwyer listened to and comprehended the things said to her by community members. In any event, it is not articulated how the fair-minded lay observer would apprehend that comment by Counsel Assisting to infect the Coroner's discharge of her statutory functions.

29. Twelfth, in the context set out above, a fair-minded lay observer would not view the matters raised in the Rolfe submissions as indicating 'Counsel Assisting's sympathy for the community's perceptions of justice' (RS [138]).

30. For these reasons, the 'concerns' raised by Mr Rolfe in relation to the Yuendumu visit do not give rise to an apprehension of bias.

Other matters raised by Mr Rolfe

31. Although it is not clear from the Rolfe submissions, Mr Rolfe appears to suggest that two other matters may give rise to a reasonable apprehension of bias.

32. The first is the editing of recordings from the Yuendumu visit (RS [58]-[65]). The explanation given for that editing was 'to remove irrelevant or private conversations, including those between the Coroner and her legal team'. There are two points about this.

33. First, as a matter of substance, Mr Rolfe's claim that he is entitled to the whole unedited recordings by virtue of ss 28(h) and 29 of the ***Local Court Act*** *2015* (NT) as applied by s 11 of the *Coroners Act* is misconceived. The recordings, at least so far as they record private conversations including conversations between the Coroner and her legal team, are not 'information that is reasonably necessary for the proper management of the proceedings' within s 28(h) of the *Local Court Act*. Mr Rolfe's contentions as to the scope of s 28(h) at RS [110] are unsustainable: if they were correct, they would mean that, for example, a judicial officer would be required to produce to parties copies of correspondence with his or her associate or colleagues relating to proceedings over which he or she was presiding. That would be destructive of judicial decision-making. In the coronial context, it would also be inconsistent with s 45 of the *Coroners Act*, which precludes a coroner from being called to give evidence in a court or judicial proceedings about anything coming to his or her knowledge in carrying out a coroner's powers, duties or functions under the *Coroners Act* (other than in proceedings for an offence under that Act).

34. There may be a debate about whether discussions between the Coroner and her legal team are properly described as the subject of legal professional privilege. However, even if that is not an accurate characterisation, there can be no real doubt that they would be immune from any kind of compulsory production, for example by analogy with the principle that judicial officers are not compellable to give evidence as to proceedings before them (reflected in s 45 of the *Coroners Act*), or as a species of public interest immunity.

35. Second, even if the Coroner and her counsel assisting team were mistaken about their entitlement to make redactions to the recordings of the Yuendumu visit, it is not explained how this would cause a fair-minded lay observer to apprehend bias on the part of the Coroner. To the extent there is an (unarticulated) concern that the redactions must mean the Coroner has something to hide, that is mere speculation. An alternative, and compelling, explanation for the redactions is that the Coroner rightly believed it would be destructive of the coronial function if she were compellable to disclose to interested parties records of

private communications she has with persons appointed to assist her under s 41(2) of the *Coroners Act*, in the same way as a judge would no doubt be justified in seeking to resist any attempt to obtain copies of his or her private communications with their associate, tipstaff or a colleague.

36. The Rolfe submissions do not point to any conduct of Counsel Assisting in this case which rises to the level considered in *Firman v Lasry* nor is it suggested the sort of conduct mentioned in *re Royal Commission on Thomas' Case* or *Dato Tan*, viz. drafting the report, has occurred, or is likely to occur. References to these cases is unhelpful.

37. The other matter raised by Mr Rolfe as a 'concern' in the context of apprehended bias is the amendment of a non-publication order (RS [66]-[97]). The 'concern' appears to be that a fair-minded lay observer would perceive the Coroner as amending the non-publication order for the purpose of assisting the NT Police Force in rectifying a defect in disciplinary proceedings against Mr Rolfe and facilitating further disciplinary proceedings against him. That is a serious allegation. If such an allegation is to be maintained, it is incumbent on Mr Rolfe to articulate clearly what he says gives rise to the asserted inference. None of the matters set out in RS [66]-[97] appear on their face to support it.

Timing

38. Finally, it may be noted that the application is brought by Mr Rolfe within a few weeks of the resumption of the Inquest, after a significant delay (Mr Rolfe started his evidence, after earlier delays, on 16 November 2022, nearly a year ago), occasioned by an unsuccessful application to prevent him being called to give evidence on an erroneous premise.

39. It may also be noted that the Mr Rolfe has been threatening to bring a recusal application since as early as November 2022, shortly after the Yuendumu visit and has waited for nearly a year to make it and provide submissions. While it is necessary for the Coroner to consider any allegation of apprehended bias, and refuse it for the reasons articulated above, this process should not be permitted to further delay Mr Rolfe (and Mr Bauwens) giving evidence.

[redacted] [redacted] [redacted]

Andrew Boe Dan Fuller Greer Boe

Counsel for the Walker Lane & Robertson Families
13 October 2023