

CITATION: *Inquest into the death of Kumanjayi Walker (Ruling No 10)*
[2024] NTLC 4

TITLE OF COURT: Coroners Court

JURISDICTION: Alice Springs

FILE NO(s): A51 of 2019

DELIVERED ON: 30 April 2024

DELIVERED AT: Alice Springs

HEARING DATE(s): On the papers.

FINDING OF: Judge Elisabeth Armitage

CATCHWORDS: Coronial proceedings; inquests; death in custody; call for production; witness reading from document during evidence; legal professional privilege; waiver.

ACCC v NSW Ports Operations Hold Co Pty Ltd [2020] FCA 1232.

AWB Ltd v Cole (2006) 152 FCR 382.

Commissioner of Taxation v Spotless Services Ltd (1996) 186 CLR 404.

Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Ltd [1987] 2 Qd R 335.

DB CT Management Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2021] FCA 512.

Esso Australia Resources v Federal Commissioner of Taxation (1999) 201 CLR 49.

Giurina v DPP [2020] VSCA 54.

Great Atlantic Insurance Company v Home Insurance Company [1981] 1 WLR 529.

Hastie Group Ltd (in liq) v Moore [2016] NSWCA 305.

Mancorp Pty Ltd v Baulderstone Pty Ltd (1991) 57 SASR 87.

Mann v Carnell (1999) 201 CLR 1.

Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority (2002) 4 VR 332.

Setka v Dalton (No 2) (Legal professional privilege) [2021] VSC 604.

Spalding v Radio Canberra (2009) 3 ACTLR 105.

Sydney Airports Corp Ltd v Singapore Airlines Ltd [2005] NSWCA 47.

Waterford v Commonwealth (1987) 163 CLR 54, 85; *Pratt Holdings* (2005) 225 ALR 266.

REPRESENTATION ON THE APPLICATION:

Counsel assisting:	Dr P Dwyer SC with Mr P Coleridge Instructed by Maria Walz Legal
For Zachary Rolfe:	Mr M Abbott KC Instructed by Tindall Gask Bentley Lawyers
For the Walker, Lane and Robertson families:	Mr A Boe and D Fuller Instructed by Hearn Legal
For the Northern Territory Police Force:	Dr I Freckelton AO KC with Ms A Burnnard Instructed by PFES Legal
For NAAJA:	P Boulten SC with J Murphy and M Mishra Instructed by NAAJA
Judgment category classification:	A
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IN THE CORONERS COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. A51 of 2019

In the matter of an inquest into the death of
Kumanjayi Walker

Introduction

1. During the course of his evidence on 26 February 2024, Mr Rolfe made a number of allegations against members of the Northern Territory Police Force (**NTPF**) and other public officials. Some of these persons were identified; others were not. It was put to Mr Rolfe that the allegations—whether credible or otherwise—were motivated by desire to settle scores with people, many of them witnesses in the inquest, who had earlier been critical of him.¹
2. During the relevant part of Mr Rolfe’s evidence, it was apparent that Mr Rolfe was referring to, or reading from, a document he had with him in the witness box (**the Notes**). On 29 February 2024, Counsel Assisting called for the production of the Notes. After some discussion with Counsel Assisting, counsel for Mr Rolfe, Mr Abbott KC, produced the first three pages of the Notes. Mr Abbott stated that his client maintained that the Notes were the subject of a valid claim of legal professional privilege (**LPP**), and that, in respect of the final seven pages, the privilege had not been waived. The original copy of the Notes is in the possession of Mr Officer,² who gave an undertaking to retain them.
3. Dr Freckelton AO KC, for the NTPF, then called for the production of the entire ten pages of the Notes. The NTPF, as an interested party granted leave to appear and be represented in the inquest, and being the subject of many of Mr Rolfe’s allegations, has a clear interest in testing this part of Mr Rolfe’s evidence. Mr Rolfe did not submit that the call lacked a proper basis or that, absent his claim of LPP, it would be ineffective to compel the production of the document.

¹ Transcript of Proceedings on 28 February 2024, 5390-5395.

² Solicitor for Mr Rolfe.

4. For the reasons that follow, I am not satisfied that the dominant purpose for which Mr Rolfe produced the Notes was to seek legal advice. In any event, in refreshing his memory from the Notes during his oral evidence Mr Rolfe acted inconsistently with the maintenance of, and, therefore, waived, any privilege that may have existed.

The claim

5. In support of his claim, Mr Rolfe filed an affidavit of 21 March 2024 (the **Rolfe Affidavit**). The Rolfe Affidavit is short and I set it out in full:
 1. I refer to the 3 pages of notes that have been produced in the Inquest. Those 3 pages were the first 3 pages of the notes that I made for the dominant purpose of seeking advice from my Senior Counsel Michael Abbott KC and my legal team. The process of compiling my notes began approximately one and a half weeks before my arrival in Alice Springs for the Coronial inquest.
 2. During my review of the Coronial and Trial Transcripts, I documented in my notes any reflections or questions that arose in my mind which I would need to discuss with my legal team. The notes were intended as a starting point for discussions with my legal team or to direct the way evidence might be presented by me.
 3. I had not spoken with Mr Abbott KC before, but I conferenced with him Sunday evening 25 February 2024 and discussed some of the evidence I would be giving during the coming days. I did not give Mr Abbott KC my notes at that time.
 4. I brought my notes to court on Monday with the intention of giving them to my lawyers that day. During my evidence that morning I recall looking at the first three pages only. I did not refer to the balance of my notes.
 5. When we adjourned for lunch I provided these notes to my lawyers who retained them during the course of my evidence that week.
 6. I affirm my position that they remain confidential and are protected by legal professional privilege, as they were created expressly for the purpose of my discussions with and advice from my legal counsel.
6. Mr Rolfe filed submissions in support of the claim dated 20 March 2024. In the submissions, he contends that his affidavit establishes that the entirety of his notes is subject to a claim of LPP on the basis that the document was created for the dominant purpose of seeking legal advice. As to waiver, Mr Rolfe concedes that

he ‘referred to the first three pages of [the Notes] when examined by counsel assisting the coroner on the topic of racism in the [NTPF]’.³ He appears to concede that by this conduct he impliedly waived LPP over that part of the Notes, but submits that the question is the ‘extent’ to which LPP has ‘been waived by the conduct of Rolfe in the witness box.’⁴

7. The NTPF submits that it is doubtful that the Notes were ever the subject of a valid claim of LPP.⁵ Whether or not that is so, the NTPF submits that by refreshing his memory from the Notes Mr Rolfe has waived privilege.⁶ It submits that Mr Rolfe’s submission that there has been only a ‘partial waiver’ is ‘artificially narrow’ in circumstances where there is no evidence that the remaining seven pages of the Notes are of a different character to the first three. To permit the production of some, but not all, of the document would offend the ‘cherry-picking principle’ and would be liable to give a misleading impression of the document.⁷
8. NAAJA submitted in support of the NTPF, albeit only on the issue of whether the evidence supported the inference that the dominant purpose of the Notes was such as to give rise to advice privilege, submitting it does not.
9. The Walker, Lane and Robertson families claimed not to make any submission for or against Mr Rolfe’s claim but, in substance, clearly submitted against it. These submissions did not assist me.

Does the evidence support the existence of a valid claim of LPP?

Principles

10. In the case of advice privilege, the relevant test is whether the document in question was made for the dominant purpose of giving or receiving legal advice.⁸

³ Submissions of Mr Rolfe dated 21 March 2024, [12].

⁴ Submissions of Mr Rolfe dated 21 March 2024, [6]-[7].

⁵ Submissions of the NTPF dated 22 March 2024, [30].

⁶ Submissions of the NTPF dated 22 March 2024, [31].

⁷ Submissions of the NTPF dated 22 March 2024, [28], [33].

⁸ *Esso Australia Resources v Federal Commissioner of Taxation* (1999) 201 CLR 49, [62].

11. As to the nature of a ‘dominant purpose’:
 - (a) it ‘is one that predominates over other purposes; it is the prevailing or paramount purpose’⁹ or the ‘most influential purpose’;¹⁰
 - (b) it ‘is *not* the same as the “primary” or the “substantial” purpose’;¹¹
 - (c) a document will *not* satisfy the dominant purpose test ‘where one purpose for its creation is to obtain legal advice, but there is another equally important purpose’;¹² and,
 - (d) a document will *not* satisfy the dominant purpose test if there is another purpose which would, on its own, have given rise to the creation of the document.¹³

12. As to proof of a ‘dominant purpose’:
 - (a) whether a purpose is the ‘dominant purpose’ is a question of fact;¹⁴
 - (b) the question is to be ‘determined objectively’, having regard to all of the evidence, although ‘subjective purpose will always be relevant and often decisive’;¹⁵ and,
 - (c) the party claiming LPP bears the onus of establishing the basis of the claim, and the party seeking production does not bear the onus of excluding the privilege.¹⁶

13. Finally, and as will assume some importance here, a “bare or skeletal” claim [of LPP], unsupported by evidence which enables the court to consider and make an informed decision about the correctness of the claim or whether it is supportable,

⁹ *AWB Ltd v Cole* (2006) 152 FCR 382, [105] (Young J).

¹⁰ *Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

¹¹ *Commissioner of Taxation v Pratt Holdings Pty Ltd* (2005) 225 ALR 266, [30] (Kenny J).

¹² *AWB Ltd v Cole* (2006) 152 FCR 382, [106] (Young J), citing *Pratt Holdings* (2005) 225 ALR 266, [30] (Kenny J).

¹³ *Waterford v Commonwealth* (1987) 163 CLR 54, 85; *Pratt Holdings* (2005) 225 ALR 266, [30(8)(b)] (Kenny J).

¹⁴ *Esso Australia Resources* (1999) 201 CLR 49.

¹⁵ *Esso Australia Resources* (1999) 201 CLR 49, [172] (Callinan J), cited in *Sydney Airports Corp Ltd v Singapore Airlines Ltd* [2005] NSWCA 47 at [6] (Spigelman CJ; Sheller JA and Campbell AJA agreeing).

¹⁶ *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332; [2002] VSCA 59; *Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305; *Giurina v DPP* [2020] VSCA 54, [20].

will not suffice.’¹⁷ In that sense, there is a distinction between *evidence* of the privilege, which is necessary, and a sworn *assertion* of the privilege, which is not sufficient.¹⁸ Ultimately, the claimant ‘must ... by admissible evidence, set out the facts from which the court can consider whether the assertion or assertions concerning the purpose of the communication in respect of which privilege is claimed is properly made.’¹⁹

Consideration

14. The onus being on Mr Rolfe, I am not satisfied that the dominant purpose for which he produced the Notes was to seek legal advice.
15. In the Rolfe Affidavit, Mr Rolfe asserts that he prepared the Notes for *two* purposes. The first was to serve as a ‘starting point for discussions with my legal team’ and the second was to ‘direct the way evidence might be presented by me.’²⁰ If those purposes were related—in the sense that Mr Rolfe intended the Notes to facilitate the giving of legal advice *and in that way* to direct the course of his evidence—the Rolfe Affidavit does not say so.
16. I accept that the Rolfe Affidavit begins with the assertion that the Notes were ‘made for the dominant purpose of seeking advice’. The difficulty with this assertion—like the assertions that the Notes are ‘confidential’ or are ‘protected by legal privilege’—is that it is not clear whether it is an assertion of fact or law. In other words, it is not clear whether Mr Rolfe is describing a factual relationship between the first and second identified purpose (including one that existed in his own mind at the time of the creation of the Notes), or whether he is, in effect, simply making a sworn assertion of his claim of LPP.
17. In light of that ambiguity, it is significant that there is no other information in the balance of the Rolfe Affidavit that suggests that the purpose of seeking legal advice

¹⁷ *DB CT Management Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2021] FCA 512, [81] (Abrahams J).

¹⁸ *DB CT Management* [2021] FCA 512; *Hancock v Rinehart* [2016] NSWSC 12; *ACCC v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 1232; *Setka v Dalton (No 2) (Legal professional privilege)* [2021] VSC 604.

¹⁹ *DB CT Management* [2021] FCA 512, [81] (Abrahams J).

²⁰ Rolfe Affidavit, [1].

predominated or ‘prevailed’ over the purpose of directing the course of Mr Rolfe’s evidence. While I accept that the use that is made of a document may not necessarily reflect the purpose for its creation, Mr Rolfe’s own evidence is that he *did not* provide the Notes to his legal representatives until after he had made reference to them *during* his evidence. Indeed, there is no evidence that the Notes, or their contents, have *ever* been used to facilitate a request for, or the giving of, legal advice. For those reasons, I am not satisfied that the Rolfe Affidavit sets out facts from which I could find that the sworn assertion concerning the purpose of the Notes is properly made (see above, [13]).

18. Moreover, I accept NAAJA’s submission that ‘the content and tone of the notes are more consistent with them being created as a note-to-self for the purposes of Mr Rolfe’s evidence rather than a document created for the purposes of discussions with legal counsel.’²¹ The document is not addressed to Mr Rolfe’s legal team and contains no questions. Instead, the Notes contain a series of prompts, in bullet point form, of what appear to be matters about which Mr Rolfe anticipated that he would, could, or wished to, give evidence, such as ‘Sexism Police’, ‘Racism Police’ and ‘Racism in Court/Judge Borchers.’ Whilst conceivable that Mr Rolfe wrote these down because he wanted to discuss them with his lawyers, it is not the most likely inference on the face of the document.²²
19. Finally, when compared to the contents of the first three pages of the Notes, Mr Rolfe’s evidence on 26 February 2024 suggests very strongly that the Notes were prepared for the purpose of prompting him to give particular evidence in answer to anticipated questions. Certainly, that is the way they were used. For example, when asked by Counsel Assisting whether it ‘must have been obvious to [him] ... that it was unacceptable for a police officer in the Northern Territory or elsewhere to use racist language’, Mr Rolfe gave an answer that ran to almost a page, and which appeared to run through a significant number of the bullet points under the

²¹ Submissions of NAAJA dated 22 March 2024, [23].

²² I have not overlooked that at the top of each page handwritten words state ‘For my lawyers only – LPP’ or ‘Instructions for my lawyers – LPP claimed’ or ‘LPP’ appear. Mr Rolfe has chosen not to provide any evidence as to when these annotations were made. In those circumstances, I would be speculating if I attempted to determine whether they were made before or after Counsel Assisting’s call.

heading ‘Racism Police.’ It was during the course of this answer that he can be observed reading from the Notes on the video recording of his evidence (most obviously when saying the word ‘Goonudda’).

20. For those reasons, I am not satisfied, the onus being on Mr Rolfe, that the dominant purpose for which he produced the Notes was that of seeking legal advice. In reaching that conclusion, it has not been necessary for me to make any finding as to the credibility or reliability of Mr Rolfe as a witness. I have been prepared to assume, for the purposes of determining the claim, that each of the assertions of fact in the Rolfe Affidavit is both credible and reliable. The difficulties for Mr Rolfe, as I have already noted, are that the Rolfe Affidavit does not set out facts from which I could find that the assertion concerning the purpose of the Notes is properly made, and that the three pages of Notes that have been produced, together with Mr Rolfe’s oral evidence, are, at best, neutral on the issue.

Waiver

Principles

21. ‘Waiver may be express or implied’.²³ What ‘brings [it] about is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality’. Importantly, and although inconsistency may be *informed* by notions of fairness, this is not a matter of ‘some overriding principle of fairness operating at large’.²⁴
22. It is well recognised that the use of a privileged document to refresh a witness’ memory—at least when the document is used for that purpose *in court*—will effect a waiver.²⁵ That is because, as Refshauge J noted in *Spalding v Radio Canberra* following a lengthy survey of the relevant authorities, ‘[t]he use of a document for the purpose of reviving recollection from which evidence will be given is, in itself, inconsistent with the maintenance of the privilege of the document.’²⁶

²³ *Mann v Carnell* (1999) 201 CLR 1, [29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

²⁴ *Mann v Carnell* (1999) 201 CLR 1, [29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

²⁵ *Mann v Carnell* (1999) 201 CLR 1, [29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

²⁶ *Spalding v Radio Canberra* (2009) 3 ACTLR 105, [63]; for the survey, see, [31]-[61].

23. Although there is some inconsistency in the authorities, I accept that the better view of the doctrine of waiver is that it ‘does not always require disclosure of the whole of the privileged document.’²⁷ For example, I accept that a waiver would likely only be partial where the document contained material unrelated to the evidence a witness might give, or that did not constitute a note on, or a part of the proof of, the witness’ evidence.²⁸

24. Following another survey of the authorities, Refshauge J put the distinction neatly in *Spalding*, as follows,

Usually a document such as a proof of evidence would be an auxiliary document and contain only what it purports to be — the evidence to be given by the witness. It may be, however, that the proof of a party might contain other material. An example might be instructions on settlement negotiations. This would clearly be unrelated to the evidence to be given by the party as a witness.²⁹

25. Where a document contained material of this latter, and unrelated, kind, there would be a fair argument that the whole of the document need not be produced.

Consideration

26. As the NTPF submitted, the question of waiver turns on the *use* to which the Notes were put, not the purpose for their creation.³⁰ On the basis of Mr Rolfe’s concessions—in the Rolfe Affidavit and in his submissions—and on the basis of my own perceptions of his evidence, I am comfortably satisfied that he did use the Notes to refresh his memory during his examination by Counsel Assisting. In doing so, Mr Rolfe acted inconsistently with the maintenance of any privilege that may have existed. That was sufficient to effect a waiver.

27. As to the extent of the waiver, Mr Rolfe does not suggest that there is any material difference between the contents of the first three, and the final seven, pages of the

²⁷ *Spalding v Radio Canberra Pty Ltd* [2009] ACTSC 26, [65] (Refshauge J), quoting from *Mancorp Pty Ltd v Baulderstone Pty Ltd* (1991) 57 SASR 87, 95 (Debelle J). Compare, *Great Atlantic Insurance Company v Home Insurance Company* [1981] 1 WLR 529 and the criticism to which it was subject in *Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Ltd* [1987] 2 Qd R 335, 339-340 (McPherson J).

²⁸ *Spalding v Radio Canberra Pty Ltd* [2009] ACTSC 26, [64]-[69] (Refshauge J).

²⁹ *Spalding v Radio Canberra Pty Ltd* [2009] ACTSC 26, [67] (Refshauge J).

³⁰ *Spalding v Radio Canberra Pty Ltd* [2009] ACTSC 26, [78] (Refshauge J).

Notes. On the face of the Rolfe Affidavit, the only difference between the first three, and the final seven, pages of the Notes is that he did not actually refer to the final seven pages while sitting in the witness box. To the extent that Mr Rolfe submits that the final seven pages traversed different *topics*,³¹ the submission is not supported by any evidence and, in any event, misses the point. That point is, to adopt the passage from *Spalding* at [23], above, that there is no reason to think that the document contains anything other than what it purports to be: Mr Rolfe's notes on the evidence he could, would, or wished to give during his oral examination.³²

28. In circumstances where there is no suggestion that the final seven pages of the Notes are of a different kind from, or wholly unrelated to, the first three pages, I am not persuaded that the waiver has been only partial. To the extent that the doctrine of inconsistency is informed by fairness, it favours the disclosure of the Notes in their entirety. As Refshauge J noted in *Spalding*, '[t]his is a hard-fought [inquest], with significant issues of credibility clearly involved. Those issues may well be affected one way or the other by what is produced in response to this call.'³³ The production of the whole of the Notes 'avoids the risk of an individual item being plucked out of context with the potential for its real weight or meaning being misunderstood.'³⁴ There is no sufficiently compelling countervailing reason why I would exercise my discretion differently.

Conclusion

29. For those reasons, and again noting that the onus is on Mr Rolfe, I am not satisfied that the dominant purpose for which he produced the Notes was that of seeking legal advice. In any event, in refreshing his memory from the Notes during his oral evidence Mr Rolfe acted inconsistently with the maintenance of, and therefore waived, any privilege that may have existed.
30. Accordingly, I order that the Notes be produced to the representatives of the NTPF in full.

³¹ Submissions of Mr Rolfe dated 20 March 2024, [19].

³² Irrespective of the purpose for which the Notes were created.

³³ *Spalding v Radio Canberra Pty Ltd* [2009] ACTSC 26, [80] (Refshauge J).

³⁴ *Mancorp* (1991) 57 SASR 87, 90-91 (Debelle J).

Dated this 30th day of April 2024

ELISABETH ARMITAGE
TERRITORY CORONER