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NORTHERN TERRITORY OF AUSTRALIA

CORONERS COURT

A 51 of 2019

AN INQUEST INTO THE DEATH

OF KUMANJAYI WALKER

ON 9 NOVEMBER 2019

AT YUENDUMU POLICE STATION

JUDGE ARMITAGE, Coroner

TRANSCRIPT OF PROCEEDINGS

AT ALICE SPRINGS ON 9 SEPTEMBER 2022

(Continued from 08/09/2022)

Transcribed by:
EPIQ

THE CORONER: Dr Dwyer.

DR DWYER: Thank your Honour. Your Honour, a document has been distributed this morning which is headed, Counsel Assisting's Proposed Revised List of Disputed Issues. I make it clear that that's the proposal of your Honour's counsel assisting and your Honour has not determined any of these revised issues at this point and will, no doubt, listen carefully to all the parties at the Bar table before making a determination.

As your Honour knows, counsel appearing for Constable Rolfe raised an objection last week to 13 of the questions termed by them as "Issues" that were on the issues list. I noted yesterday that the proposal from your Honour's counsel assisting team was to respond to the issues they raise and the written submissions of other parties at the Bar table who had a chance to respond by providing a revised issues list that would clarify matters, hopefully.

At the end of the day yesterday, when I explained in open court that that would happen, I also noted that if parties at that time told your Honour today or yesterday that they needed more time to respond to the revised list, we could potentially have this legal argument on Monday. Neither Mr Edwardson of King's Counsel nor his junior were in court to hear those remarks. But Mr Officer said that Mr Edwardson is not available on Monday and so would prefer to push on today in response to that list.

That revised list was finished sometime after 9 am this morning, after working well into last night and at the early hours of this morning and it has been provided to everybody at the Bar table the minute it was off the printer. To be clear, we maintain, your Honour, that the original list with seven issues and the draft questions to assist your Honour are within scope but we propose that this is a list that clarifies issues and will be of greater assistance to your Honour and to parties.

Ultimately, once your Honour makes a determination about the issues list, we will revise it in full and produce one document that can go on to the website and can hopefully then be explained in plain English. So to clarify, this issues list does not change the substance in any great way but it certainly clarifies how they are relevant. I propose, your Honour, to make some brief opening remarks and then invite your Honour to adjourn to allow parties to more carefully consider the revised list.

Perhaps an hour would assist my learned friends. On return, your Honour can then hear submissions from all parties about jurisdiction and about the issue of admissibility that is raised on behalf of Constable Rolfe, that is, his objection to the text messages from his phone and the objection to the evidence of Ms Campagnaro. Your Honour will hear evidence as to whether or not that revised list has any impact on the submissions, ultimately, that parties want to make about your Honour's jurisdiction.

And that includes, of course, on behalf of Constable Rolfe or on behalf of any of the other parties who have carefully written submissions. On 26 April this year,

your Honour, an early draft issues list was distributed to all parties including, of course, to Constable Rolfe or those who appear for him. The only party currently represented which was not represented at that very early stage was the Northern Territory Police Association.

And as your Honour will recall, they sought leave and were granted leave soon after that time. In April, a timetable was set for all parties to respond to the draft issues list. Parties were to provide those submissions prior to the directions hearing on 26 May this year. Broadly, counsel for the Walker, Lane, Robertson families; counsel for the Brown families; NAAJA and Parumpurru urged your Honour to look at a number of further additional issues or to add a related issue, but broadly agreed on the general outline.

Where appropriate and within scope, the issues were amended to accommodate the concerns of families. Other issues were rejected as being too broad. One example for that is counsel for the Northern Territory Health raised an objection to a question that had been proposed by NAAJA. That was given appropriate consideration and then the issues list was shaped with all of the interests of parties and their contributions in mind.

And then parties were satisfied that that was appropriate. Counsel for the Northern Territory Police sought a minor amendment to clarify issue 42 and that was embraced. Prior to 26 May, counsel for Constable Rolfe had foreshadowed some objections. Those objections were however, withdrawn prior to 26 May. Counsel for Constable Rolfe did seek to clarify the focus of a number of issues, a number of issues were then clarified.

Mr Officer appeared at the directions hearing and the nature of those issues and how they would be dealt with was put on the record and Mr Officer responded to that. Every opportunity was given by this court before, during and after the directions hearing to discuss any concerns with the issues list, to seek clarification and to seek amendment. At the directions hearing, it was made clear by your Honour's counsel assisting that an issues list is not a rigid document.

It is not like pleadings in a civil case, nor is it a document that counsel assisting is even required to distribute. This and other courts around the country have developed a practice of producing an issues list in inquests, sometimes, to assist the interested parties and the family and community to understand the types of issues to be ventilated. And we thought that was particularly important in this case, which is of such significant to all Territorians.

After consideration of the issues by way of the submissions that were made orally and in writing, and in consultation with your Honour, counsel assisting distributed a revised issues list shortly after 26 May with some minor tweaks in order to incorporate recent discussions. All parties then – as far as I was aware, your Honour – determined that that issues list was appropriate. I have recently re-read your Honour's comments at the directions hearing in May.

And your Honour urged, at all times, parties to continue to communicate with counsel assisting so that we would be ready to proceed on 5 September and so that we could proceed in a way that was fair and appropriate and inclusive.

The brief has been distributed. It will be very clear to all parties from reading the material in the brief what the relevance of those broad issues are.

So that this process could be fair and accessible, an education package was developed in May and June of this year that was interpreted in Warlpiri. The issues on the list and each of the questions, were interpreted. That was done so that people in community in Yuendumu and Kumanjayi's family and community beyond Yuendumu could understand what this court is trying to do, what its powers and responsibilities are and how they might participate.

CAAMA Radio and PAW Media were enlisted to assist, and we are grateful for their assistance. Teresa Ross, interpreter, also assisted and that recording is on the website. Other social media sites were asked to distribute the issues list and did so. The issues list was published in mainstream media.

A further directions hearing was called in August and no issue was raised on behalf of Constable Rolfe in relation to any concerns about the issues list.

In the months leading up to this inquest your Honour's counsel assisting team, which if I may say, is appropriately but modestly resourced, with a view to be mindful of taxpayer's dollars and the need for efficient justice, set about preparing for this inquest, which includes arranging the witnesses to give evidence.

Your Honour, of course, has responsibilities as a Coroner and as a local court judge to the whole of the Northern Territory and that scheduling is also important to other inquests held in this jurisdiction.

By way of an example of the logistics involved, parties were asked to provide an estimate of the cross-examination that they thought they would need for all witnesses and that is so that we can know if a witness like Mr Williams Snr or Derek is going to be 15 minutes or half a day or two days, we can try and plan for the logistics. All parties have participated in that in good faith and provided a response.

The logistical issue that follows has very real consequences. People take time off work, they arrange child care, the Northern Territory Government and its agencies book scarce accommodation for witnesses so that they can be accommodated appropriately. Interpreters are accommodated. Backfill is arranged for workers. Witnesses book leave. Witnesses rearrange their timetable and schedule and holidays for their family.

By way of example of the inconvenience for witnesses if there is a radical change in that timetable, clinic staff who are required to give evidence in these proceedings because they are summonsed, will have to work out in some cases how they staff remote communities that have limited number of staff and where there are

ongoing recruitment issues and where they are trying to provide for basic health care so that a community is not left unprepared.

Police, who are required to give evidence in these proceedings because they are summonsed will be brought in in some cases from remote stations that may be only staffed by two police officers and then different arrangements have to be made to backfill those positions so that the community is best serviced.

In addition to those logistics, your Honour, there are witnesses who will give evidence in these proceedings who are extremely distressed as a result of Kumanjayi's death. Clearly of course that includes family and community but I also mean by that, Members of the Northern Territory Police Force and health care workers and they anxiously await the time when they give evidence. It's nerve-wracking for them and they, in many cases, are still pained as a result of Kumanjayi's death which has had a profound affect on this jurisdiction.

In my opening I was at pains to set out the impact of Kumanjayi's death on so many different people in the Northern Territory and on workplaces. So it's evident then, your Honour, that the timetable for this first month of the inquest has taken literally months of timetabling, discussion, phone calls, zoom calls, emails, to arrange. Police were scheduled for all this week to give evidence, and for next week and the following.

Four days before this inquest commenced, three months after that issues list was distributed, correspondence was filed on behalf of Constable Rolfe to notify your Honour that objection was made to 13 of the questions on the issues list, termed at the time "13 issues".

The original suggestion on behalf of Constable Rolfe's team was that it had to be dealt with even before we started the opening, which would have derailed us entirely this week. No explanation has been provided to this court as to why that was done. No apology has been made to this court for the enormous imposition. There has been no apology to the family of Kumanjayi for that disruption or to other parties at the Bar table. The actions of the lawyers for Constable Rolfe affectively ignores the orders that your Honour made for the timetable of submissions in April and the appearance at May. We cannot have that, going forward - we cannot. We have to deal with this now and of course your Honour will and your Honour will make sure that there is space to hear from Constable Rolfe's lawyers. But this cannot be the way this inquest proceeds.

Your Honour, might I then invite you to ask Mr Edwardson KC for an explanation as to why?

MR EDWARDSON KC: Your Honour, firstly, I am in a position to proceed today. Your Honour listed this matter and set aside a day and for that I am grateful. It certainly was my intention at the appropriate time to take your Honour through the reasons why there is a significant change on the part of counsel assisting. I note that she said nothing about the pressure that, of course, is focussed on Zachary

Rolfe and the consequences to him of some of the issues that this court wishes to bring to day.

THE CORONER: The pressure is on everybody here.

MR EDWARDSON: Of course, it is. Of course, it is.

THE CORONER: On everybody here to be ready for this inquest to commence on the listed date - 5 September - ready to hear from the witnesses who can give relevant evidence in these proceedings and there was ample opportunity and every invitation - - -

MR EDWARDSON: If your Honour will bear with me - - -

THE CORONER: - - - for - - -

MR EDWARDSON: - - - I will take you through - I can take - - -

THE CORONER: - - - for the parties to engage with counsel assisting and at any stage a directions hearing could have been called to deal with issues that required resolution so that this matter could proceed. But I will allow you to continue, Mr Edwardson.

MR EDWARDSON: Your Honour, what I would prefer to do is I don't need to have any adjournments to deal with the issues that I wish to ventilate before your Honour now in terms of what is called "The revised issues list". It makes no difference at all to the objections that we properly take in our submission. We are happy and ready to proceed on the time that has been allocated by this court - which was today.

As far as Monday is concerned and putting the matter off on Monday, on the strength of this matter being listed today, I am actually appearing in the Northern Territory Supreme Court on Monday which is the reason why I cannot appear today and your Honour would of course recognise that contrary to what was put on the record yesterday, that has got nothing to do with disrespect of this court. That is a superior court. It is a listing that I have to appear in and it is unfortunate that I can't simply accommodate this matter going off otherwise.

So, your Honour, I am in a position to proceed now and work through the objections that we take, deal with the issues that my learned friend has just raised, but I want to do it in an orderly and proper fashion that is consistent with my client's interests and also putting the court on notice why the so-called delay is, in fact, not delay at all. So I am happy to proceed now but if we are going to have an adjournment so that other parties who consider the new list of disputed issues, then that should be done first.

THE CORONER: Well, I don't think it's necessary for that to be done first. We can adjourn after your submissions, Mr Edwardson.

MR EDWARDSON: if your Honour pleases, I will proceed.

Firstly, thank you - - -

MR BOULTEN SC: Your Honour, before that happens, can I just flag what NAAJA's position is? It might assist?

THE CORONER: Yes, sure.

MR BOULTEN: There are a number of changes in the table which we are thinking about. We would like some time to think about what our formal reaction would be to some of these things.

THE CORONER: Yes.

MR BOULTEN: They are quite subtle and we would like also to be nuanced and focussed. We would be informed by what Mr Edwardson has to say today and that would assist us to shape our thinking on these issues too. But we would not like to nail our colours to the mast quickly without considered contemplation of important considerations that relate to racism, your Honour.

THE CORONER: Thank you, Mr Boulten.

Yes, Dr Freckelton.

MR FRECKELTON AO KC: I can be very quick, your Honour. We are in exactly the same position as our learned friend, Mr Boulten.

We should like to consider a number of the subtle changes; the one averted to by my learned friend, but also issues in relation to psychological conditions and traits and also the matters which are now framed as tendency. Those two require a little further thought and we should be grateful of some short time to give that further thought.

THE CORONER: We will hear from Mr Edwardson now and then I can hear further as to whether we take a short adjournment, whether anyone is able to continue with the submissions later today or whether everyone would appreciate a somewhat longer adjournment to perhaps Monday. But we will hear from Mr Edwardson now.

MR EDWARDSON: Your Honour, for the record, I formally tender or ask that the outlines of argument that have been filed on behalf of Zachary Rolfe be received. That's the first outline dated 30 August 2022 and the second dated 2 September 2022.

THE CORONER: All right, yes, I think they have been received.

MR EDWARDSON: Will they be marked with a particular number, your Honour.

THE CORONER: Shall we mark them.

MR EDWARDSON: They should be identified.

DR DWYER: Yes, I think they need to be identified.

THE CORONER: As MFIs?

DR DWYER: Yes, your Honour.

THE CORONER: So, MFI A.

DR DWYER: Thank you, your Honour.

THE CORONER: And – A for both or A - - -

MR EDWARDSON: They can be together.

THE CORONER: Sure.

MR EDWARDSON: I mean it could have been a compendious document. Your Honour, I'll start again. Firstly, thank you for setting aside the time for us to outline our submissions that go to our objections to a body of evidence that is proposed to be adduced. This evidence really falls into four different categories.

In the scheme of things, the four different categories were all a miniscule part of the totality of the evidence of this inquest here. The evidence does, we suggest, have the real prospect of seeking to undermine the jury verdict of acquittal.

The four categories are in no particular order as follows:

The first category can be conveniently described as the Zachary Rolfe Northern Territory Police Force application and specifically, the accuracy and honesty of him in that application.

The second is what might loosely be described as systemic racism or cultural bias, the platform for which it would seem text messages downloaded by the Northern Territory Police from Zachary Rolfe's mobile phone and then disseminated in this court, we say, without any direction having been given by you as the Coroner or, indeed, by your predecessor.

The admissibility of evidence pertaining to the text messages is challenged on a number of fronts, including the downloading and subsequent dissemination of the messages as being unlawful. And secondly, in any event, being too remote to engage the jurisdiction or function of this court.

The third category is the question of whether or not Zachary Rolfe was affected by drugs or that illicit drug use impacted on his conduct on 9 November 2019.

And finally, the fourth area relates to the disciplinary proceedings that have, in large measure, been dispensed with by the police, but only very recently, in fact, I think a matter of days before the commencement of these proceedings, we say, could not permissibly be used by this court in fulfilling its functions under either s 34 or s 26 of the *Coroners Act*.

Before I deal with the detail of these categories of evidence, I want to say something about the universal criticism and repeat of what's just been said today levelled at Rolfe's team for the lateness in bringing to the court's attention our objection to the four categories of evidence we have just identified.

The first thing I want to say is that as far as the seven issues that were indicated back in May of this year and remain issues that will shape the scope of this inquest, we take no issue with any of the seven broad categories, we never have.

We accept the criticism made by Senior Counsel, Phil Boulten, on behalf of NAAJA, the 53 questions identified back in May are not properly described as issues, but rather questions. We erroneously describe those questions as issues which has no doubt distracted the focus of the response of the interested parties.

Be that as it may, Mr Boulten is correct, but one could object to the time the question is asked or the evidence is adduced. One could then seek a review and potentially seek further fragmentation of the process.

But we took the view that the appropriate time to raise the issues was right at the beginning when the inquest commenced, and also with the benefit of the opening statement by counsel assisting, who then, for the first time, identified how she proposes to use and lead the evidence at this inquest, including that which is objected to.

Surely, everyone is better placed, including counsel assisting, to know in advance rather than be taken by surprise on a question by question basis. Courtesy and fairness suggests that, once we know precisely how counsel assisting intends to approach her task, it is at that point in time that notice should be given.

We didn't have to give notice at all. We could have simply waited until the evidence emerged, but that's not helpful. Insofar as some suggest notice should have been given earlier, we apologise. There has been a lot of mixed messages, as happens with all cases of this nature, about what might be led, how it might be led and, in some cases, what we understood would not be led. But that position has changed.

What we mean by that is this; the shaping of this inquest has evolved since May of this year and continues to evolve. The investigation is ongoing and materials continue to be added to the enormous amount of material already disclosed.

Between May and the commencement of this inquest, Zachary Rolfe has been

dealing with our instructing solicitor, Mr Luke Officer, with the disciplinary matters in advance of the commencement of this inquest. With one exception that Mr Officer has been involved in, they have been resolved, at least as we understand it from the Northern Territory Police perspective.

That exception is related to the text messages. But of much more significance, on 3 September 2022, two days before the commencement of this inquest, the Assistant Commissioner of Police, Bruce Porter, provided a statement in which he disclosed for the first time that the Ryder incident, which is a previous arrest for which Mr Rolfe was criticised by his Honour, Judge Borchers has been referred to the DPP for a second time, having regard to the Campagnaro statement.

The Ryder incident forms part of the disciplinary package that was successfully challenged before Burns J and which is now chosen by us in this coronial inquest. In the case of Ms Campagnaro, the former girlfriend of Zachary Rolfe whose statement was also challenged before his Honour, Burns J. We now understand that she is to be a witness in the inquest, which is contrary to what we had previously been told.

We suggest that the Ryder incident referral to the DPP made on the doorstep of the commencement of this inquest by the Executive of the Northern Territory Police is not coincidental. This event immediately requires that Zachary Rolfe's interests be protected by his legal team as he, like anyone else, is entitled to do.

The ventilating of the Ryder incident issues and the prospect of a future charge about that incident has the very real capacity to interfere with his prospects of receiving a fair trial, should the Director decide to recommend bringing a prosecution against him.

We have no control over whether the director will make a decision one way or the other, but it is suffice to say that the investigation of that potential criminal matter is active. We confirm counsel assisting's assurance that the whole of the Zachary Rolfe trial, evidence and transcript will be admitted after this hearing (inaudible).

And of course, her acceptance that one cannot go behind the jury's unanimous verdict of not guilty. The starting point in determining the functions of the Coroner in this inquest is s 34 of the *Coroner's Act.* You, your Honour, as the Coroner must, amongst other things, if possible, identify the deceased person, the time and place of death and in the course of it all.

All three issues were clearly, unambiguously resolved in the trial of Zachary Rolfe. None of those issues were the subject of contention, nor could they be. The transcript to be admitted clearly establishes that on 9 November 2019, Constable Zachary Rolfe was a member of the Immediate Response Team deployed to Yuendumu.

They were deployed to make the arrest of Kumanjayi Walker, who had attacked Police Officers Hand and Smith with an axe on 6 November 2019. At that time, there

was an arrest out – an arrest warrant out for Kumanjayi Walker, which permitted his lawful apprehension.

During the arrest, Kumanjayi Walker retrieved a secreted pair of scissors from his pocket and stabbed Zachary Rolfe. Those scissors were a potentially lethal weapon and it was deployment of those scissors against Rolfe, who was exercising his lawful powers of arrest, that justified the lawful discharge of the first shot. At trial, it was accepted by law that the first shot was a reasonable, lawful and proportionate response to the potentially lethal threat posed to Zachary Rolfe by Kumanjayi Walker.

The subsequent struggle between Kumanjayi Walker and Constable Eberl with Kumanjayi Walker deploying the same set of scissors to Eberl was, on the defence case at trial, the lawful justification for firing two further rounds into the centre body mass of Kumanjayi Walker. Tragically, it was those shots which ultimately ended his life because there was no medical attention available that could have saved him. I set these facts out because it is important that nothing that I have said can be changed by this inquest on those issues.

It also sets the scene for why say challenged evidence is inadmissible or, put another way, beyond jurisdiction or not the function of this inquest or otherwise, it is an attempt to go behind the verdict. It is to be accepted that the cases around the country are replete with the notion of the Coroner must not seat his or her jurisdiction as narrow. The material that can be taken into account is fairly broad.

The cases that have been cited in our learned friend's outline and indeed, referenced in our own, say as much, that there is a limit. We say the cases relied upon by our learned friends, in the context of this inquest, are plainly distinguishable. The really important point of distinction between the facts in those cases relied on by our learned friends in this case, is that the cause, time, place and circumstance of death have all been well and truly ventilated and established and the trial which preceded this inquest.

Even the live issue of Sergeant Julie Frost, her arrest plan and what was conveyed to the members of the IRT before they were deployed at 7 pm that night by her, was also explored at length in the trial of Zachary Rolfe. The trial culminated in three defences being put forward on his behalf: self-defence, acting in good faith and the reasonable performance of his duties. To make the point of distinction, the starting point is a single judge decision of Justice Muir in Doomadgee v Clements.

This was a case involving a Coronial Inquest where an Aboriginal man died in custody in a watchhouse cell at the Palm Island Police Station. The cause of death was a badly ruptured liver, most likely caused by severe force being applied over a confined area whilst the body was supported by a hard, flat surface.

Initially, counsel assisting the Coroner declined to lead evidence, or propensity evidence, against the police officer who was responsible for the application of force

that resulted in the death of the deceased. The Coroner, at first instance, declined to admit the evidence because she was not:

> Persuaded that it would be helpful to consider what might have happened on other occasions in considering whether accident had played a part in what had happened.

We've sent these – copies of these judgments to your Honour's email. That appears specifically at par 20 in the judgment. There was no prosecution or trial which preceded the inquest. The cause and circumstance of the death of the deceased was very much a live issue. On the evidence placed before the Coroner, accepted by all parties, the death of the deceased was either caused accidentally or by collision between the applicant and the deceased, or by the application of deliberate force by the applicant to the deceased.

It was against this background that the challenge was made on review of the Coroner's decision, seeking to justify the admissibility of the propensity evidence as being logically probative of a fact to be determined by the Coroner, namely, whether the death was caused by the deliberate application of force.

Justice Muir was of the view that the propensity evidence in this respect was relevant and logically probative of that fact in issue. Whilst my learned friends seek to rely on this case, their submissions are silent as to why Justice Muir was satisfied that the tendency evidence was relevant and admissible. The really important issue is that in that case, the cause and circumstances of death were not known and had to be determined, if possible, by the sitting Coroner.

This is not that case. When revisiting the tendency evidence before his Honour, Burns J, a number of points were made which should be reflected upon in the context of the admissibility of this evidence in this inquest. In the first application filed by the prosecution seeking to justify the propensity evidence, which included the various arrests performed by Zachary Rolfe which counsel assisting now wishes to lead, the notice was drafted in terms of suggesting the application of force when arresting the individuals concerned was motivated by racial overtones.

This was despite the fact that there wasn't a single word uttered or communicated – or communication made on each of the occasions said to amount to the propensity evidence that was consistent with that notion. Moreover, by dent of fate, the large proportion of alleged offenders who are arrested by the Northern Territory Police are, sadly, from the Indigenous community.

By the time of 9 November 2019, the day of the fatal shooting, Zachary Rolfe had been a police officer for over three years. To try and select less than a handful of arrests who happened to be Indigenous offenders and somehow thereby raise the spectre of racial violence was, as we put, utterly absurd, no more than grand speculation and at the very least, to even have a sense of racially-motivated violence, one would need to analyse every arrest performed by Zachary Rolfe in his time as a police officer.

It was what his Honour accepted was an example of cherry picking by the prosecution. We say the same thing about the attempt to introduce this evidence at this inquest. I might add that in the face of the argument, resisting the notion of racial motivations, the prosecution abandoned and withdrew that aspect of their application to justify the admissibility of tendency evidence.

It supported the proposed tendency evidence, the Crown also sought to lead the contents of two text messages not as tendency evidence, but to prove the state of mind of the accused at the time the messages were sent and that the jury would be entitled, so the argument went, to infer from the fact that the accused had a particular state of mind at the time he sent those text messages and that he had the same state of mind at the time of the alleged offence on 9 November 2019.

Your Honour will see that in *R v Rolfe (No 8)* [2022] NTSC 11 at par 3. The court ruled that the jury could not reasonably draw an inference from those messages and any other evidence that would be available to them that the accused held a state of mind at the time of sending the texts. And the Northern Territory Force Rules relating to the use of force – and particularly lethal force – did not apply to him.

While I think that insofar as the text messages are relied on for the purposes of establishing some sort of racial motivation, we say this: there is no evidence at all in the brief that could give rise to the notion that Zachary Rolfe had any racial motivation at the time he pulled the trigger of his Glock on 9 November 2019.

Beyond the text messages there is, in any event, no evidence on the brief that suggests systemic racism and certainly none that could attach to any police officer on 9 November 2019. As we have been at pains to say it is not, in our respectful submission, the function of this inquest to go behind the acquittal of Zachary Rolfe.

Our greatest concern is there may be attempts made by either counsel assisting or other parties to use these text messages to cross-examine Zachary Rolfe in order to suggest that there were racial overtones or motivations on his part at the time that he defended himself and Constable Eberl against Kumanjayi Walker. That would, in our submission, be an attempt to undermine the acquittal – or put another way, go behind it.

We say that is not the function of this inquest. One can well understand how issues of racial basis or motivations in a broader sense might be of concern to this inquest, of concern to the community generally and of course, a concern to the Northern Territory Police Force. Education, understanding and respect are certainly matters which, very generally, would be the proper subject of this inquest and may well form part of recommendations that might ultimately be made.

That is very different from isolating out of context specific text messages, even if on their face they appear to be offensive, abhorrent or whatever descriptor you might like to give them. If the messages themselves do not and cannot establish a

systemic racial view, they go nowhere. Even more so if there is no connection between those text messages, that view and the death of Kumanjayi Walker.

In short, whether it be the text messages, previous disciplinary matters for arrests and the like, the proposed propensity evidence, we submit, is not relevant in the Doomadgee sense. There is nothing about that evidence which assists your Honour in the identification of the cause of death at all. Moreover, there is no close connection between the circumstances of those incidents and the death that is the subject of this incident.

In advance of our argument, we refer to a case of R v *Doogan; ex parte Lucas-Smith and Ors* [2005] 193 FLR 239 in particular par 29. I wonder if your Honour wouldn't mind pulling up that decision?

At par 29 the court said this;

> "A line must be drawn at some point beyond which even if relevant, factors which come to light will be considered too remote from the event to be regarded as causative. The point where such a line is to be drawn must be determine…….as we have mentioned, does not extend to the resolution of collateral issues relating to compensation or the attribution of blame."

We remind your Honour of Nathan J's remarks in *Harmsworth v The State Coroner* [1989] VR 989 at 995 and in particular at lines 29 to 38. Nathan J said this;

> "The issue of causation as exemplified by the above arguments has vexed philosophers and judges since Socrates was obliged to drink the Hemlock. I deal with this issue of causation not by way of assessing the correctness or otherwise of…….see *ex parte Minister of Justice; Re Malcolm* [1965] NSWLR 1598 and also *John Fairfax & Sons* at 12 NSWLR at page 77.

Your Honour, we say that the four categories of evidence that are now challenged are not causative in the relevant sense and the jurisdiction of this court or the function of this court is not invoked such as to justify this evidence as being permissible. Nathan J in Harnsworth at line 39 went on to say this;

> "The Coroner's source of power of investigation arises from the particular death or fire. A Coroner does not have general powers of inquiry for detection. The inquiry must be relevant…….Such discursive investigations are not envisaged, nor empowered by the Act. They are not within jurisdictional power."

We say, and as I have said before, all four categories of evidence are either too remote or alternatively, have no foundation in the evidence that would invoke the function of a *Coroner's Act*. Likewise, if Zachary Rolfe's application to join the Northern Territory Police Force had been rejected, Kumanjayi Walker would not have died. That issue is, of course, not even remotely relevant to this inquest,

hence it is challenged for exactly the same reasons that were expressed by Nathan J.

We say the challenged categories of evidence are red herrings. They have all the hallmarks of a Rogan Royal Commission, rather than the adducing of relevant and permissible evidence and, to use an expression from time to time used by counsel assisting, "with all the goodwill in the world, the introduction of this evidence is so remote and removed that it will, we suggest, demonise Zachary Rolfe, which is particularly offensive, having regard to the unanimous acquittal following the exploration and detailed examination of the cause and circumstances of the tragic death of Kumanjayi Walker.

Might we add that Zachary Rolfe gave evidence when he did not have to and was cross-examined by senior counsel for two days. All of that evidence will be before this court.

The policy of the law couldn't be plainer. If the Crown fails to prove its case against an accused in a criminal trial because of shortcomings, they cannot appeal. A jury verdict is final. And really our ultimate submission is that the Coroner, with respect, should not be canvassing issues that undermine the finality of the verdict in circumstances where an accused, in this case Zachary Rolfe, was acquitted. It is a mistake, we suggest, of the Coroner's function to canvas the finality of the verdict. We say that the four categories of evidence that fall under the umbrella of the 15 questions identified by way of objection, are either too remote or not probative of any fact in issue or alternatively are either intentionally or incidentally going to have the consequences of going behind the jury verdict, which simply cannot be allowed.

It is very important to emphasise that true it is, in the Coronial Court there are no rules of evidence and the breadth of material as it may be considered, is broad. But there is a special point of departure when there has been a trial and the issues in that trial were such that the questions of reasonableness and conduct were joined.

Your Honour, it would be remiss of me to not draw your Honour's attention to the serious prejudice that will be caused to Zachary Rolfe in the event that a charge is preferred against him which is currently under consideration, it would seem, by the DPP. That is, if your Honour is against us on the questions of jurisdiction and function, our application is in any event, these proceedings insofar as they relate to that issue, must be stayed or at least at the hearing of any evidence in relation to the Ryder incident and the associated propensity evidence that is proposed in this case, which includes Ms Campagnaro, and Barram, in respect of his use of force matters but in particular the Ryder incident.

There is no doubt that this court has the capacity to take measure which can guard against prejudice. For example, the court can issue a certificate of immunity pursuant to s 38. Your Honour can also make an order that proceedings can be held in camera, but those matters do not and cannot overcome the forensic prejudice and disadvantage to him if those issues are ventilated and then subsequently he faces criminal charges. The forensic disadvantages that would be caused viz a viz the

prosecution in this case to disregard, we refer your Honour - and they have been sent through to you - to two cases.

I want to start if I can, by taking you to the decision of the High Court in *X7 v The Australian Crime Commission* (2013) HCA 29. That case, which concerned the legality of a compulsory examination of a person charged with a criminal offence, was considered with condemnation in light of the incredibly serious impacts that such a course would have on the fairness of an accused person's trial. Relevantly, to the present case, their Honours, Hayne and Bell JJ said in pars 124 to 125;

> Even if the answers given at the compulsory examination are kept secret and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged. The requirement to give answers after being charged would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial and adversarial trial in the court room.

No longer could the accused person decide the course which he or she should have to trial in answer the charge and accordingly, only to the strength of the prosecution case as revealed by the material provided by the prosecution before trial or the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid.

That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead or trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that is being laid by being required to answer questions about the subject matters of pending charge.

As has been explained, if an alteration of that kind is to be made to the criminal justice system by statute, it must be made clearly by its expressed words or by necessary intendment. If the relevant statute does not provide clearly for an alteration of that kind, compelling answers to questions about the subject matter of the pending charge would be a contempt.

The application of those principles was endorsed and, in fact, broadened again by the High Court in Strickland against the Commonwealth and DPP where the court considered the application of those principles in the context of a person, although likely to be charged, had not yet been charged. Those principles apply here with force. It's with those principles in mind that I take your Honour to another case of the High Court and the *Commissioner of Australian Federal Police v Zhao* [2015] HCA 5.

It was in that case where the High Court considered the appropriateness of a stay of proceedings with reference to the principles I've just referenced in. In circumstances where *Zhao* had been both charged with an offence and with subject of Commonwealth proceedings of crime – proceedings of crime proceedings, the

subject matter which was identical to those the subject of the offences with which he was charged – in the court below, the Court of Appeal had considered that if the civil proceedings had not been stayed:

> The prosecution would be informed in advance of the second respondent's trial of his defence, because he could not realistically defend forfeiture proceedings without telegraphing his likely defence. The result would be that the prosecution would be advantaged in a manner which fundamentally alters his position, vis-à-vis, the second respondent, and renders the trial unfair.

At par 70. The court considered at par 42 that the risk of prejudice to *Zhao* if the stay was not granted in proceeds of crime proceedings was plain. Moreover, the court held that the appropriate disposition was to stay the proceedings, even though those proceedings could be held in camera. This inquest is now on notice by Assistant Commissioner Bruce Porter of the referral to the DPP.

We received that notice last Saturday, with more disclosure continuing. Little wonder we wanted to have a true understanding of our client's predicament and position before finalising objections, including disciplinary matters that have been ongoing the entire time. There is much to be gained from this Coronial Inquest on so many fronts.

Police education, systems, respect, minimising the need for extreme force, educating the communities as to the potential for a tragic response if they arm themselves, the work of the Aboriginal Community Police Officers and so on. They are all very important issues which are the clear focus of each of the seven issues as identified back in May this year. The issues themselves, insofar as they're expressed in those terms, not being challenged by us.

They go to systems. Having said that, we are duty-bound to try at least to ensure that a mistake of your Honour's functions to canvas of the finality of the verdict with respect to an individual does not happen. As I said at the commencement of the submissions that I just put to your Honour, we could have simply waited – as Mr Boulten suggested in his outline of argument – until the issue arises and took the objection at that stage.

That would have caused far more fragmentation of these proceedings than set aside one day that your Honour has so that we could articulate precisely the body of evidence that we challenge and why. And we did that after we had the benefit of counsel assisting's opening statement, so that she could identify to us precisely why that was so.

I want to turn now – if it's convenient, your Honour – sorry, I should say that as far as the unlawfulness point is concerned, we simply rely on our written submissions and obviously, the submissions that I've just made now should be read in conjunction with my earlier submissions that were made. I don't propose to simply repeat what's recorded in writing, your Honour, but that puts the position from our perspective as to the objection to the body of evidence that's proposed to be led.

Your Honour indicated before that it was your intention to deal with the question of weight today as well. We are in a position to deal with that now.

THE CORONER: The issue of?

MR EDWARDSON: Legal question of privilege and- - -

THE CORONER: Okay.

MR EDWARDSON: - - -the redactions that apply to the Proctor Report. I may as well get it all out the way and then my learned friends can deal with it as they see fit, including counsel assisting, but I haven't actually seen any response to these issues from her.

THE CORONER: Been a bit busy.

MR EDWARDSON: Your Honour, by correspondence to counsel assisting on 17 August 2022, we wrote to your Honour – and there was further correspondence dealing with the issue of the redactions of the Proctor Reports. For the record, your Honour, I'll tender – or ask to be marked, the letters that were written to the solicitor for counsel assisting and the ultimate response that we received a few days ago about that issue. And copies can be provided to our learned friends.

THE CORONER: So that bundle can be marked MFI B.

MFI B Bundle of correspondence between Mr Edwardson and counsel assisting.

MR EDWARDSON: Specifically, your Honour, we wanted to identify and understand whether the Northern Territory Police Force had provided to the Coroner's Office – your Honour, counsel assisting, your predecessor and the like – the unredacted version of the Proctor Report.

The request was made, because the copy that we received – and no doubt, the same applies to the other interested parties – contains significant redactions and by reference to the report, at least before some further changes were made by my learned friend, Dr Freckelton.

They appear at pages 81 to 83 of the report but most significantly at pages 142 to 149, with significant redactions under the head, "Influence and Bias." As your Honour well knows, issue number 4 as set out at page 34 of the transcript by counsel assisting, is expressed in these terms:

> The conduct of this Coronial Investigation, and that includes whether anything was done to compromise the investigation.

That is the fourth category of issues identified by counsel assisting, in written form, disclosed to the parties and reinforced in her opening statement. Plainly, the

significant redactions that appear under the heading, “Influence and Bias,” at page 141 – which includes at page 142, “Investigation Bias/Expert Witness,” and onwards – are relevant to issue number 4.

It’s clear from what is not redacted that the focus of the redactions, in part, relates to an important and significant witness, namely,
Senior Sergeant Andrew Barram and an expert who was called at committal but not at trial, Professor Geoffrey Alpert. We understand, from the written submissions filed on behalf of the Northern Territory Police Forced dated 7 September 2022 at pars 47 onwards, that legal professional privilege is maintained over the redacted portions of the Pollock Report.

We note that, following on from our correspondence dated 17 August 2022 to the solicitor assisting the Coroner, requesting access to the unredacted versions of the reports, the Commissioner on 24 August 2022 revised his position in respect of some of the redacted materials but maintained privilege over others.

It is fair to say that the report remains largely redacted over critical areas in that report. In Rolfe (No 2) [2022] NTSC at page 45, Mildren J was required to consider claims for legal professional privilege over portions of the Pollock, Proctor and Barram reports as well as some notes from the then-investigating officer, Pennuto. Legal professional privilege was claimed over redacted copies, see par 10.

On the question of waiver at par 29, Mildren J observed that the commissioner did not seek to maintain common interest privilege, but rather the police involved in the preparation of a report to the Deputy Coroner, were not parties for the purposes of waiver.

Mildren J accepted that those police officers involved in the preparation of the drafts of the report to the Deputy Coroner were separate from those officers involved in the criminal investigation. But there was a considerable amount of common interest between the two sets of officers.

However, he accepted that the Deputy Coroner cannot make findings as to criminal liability, nor commit a person for trial. Ultimately, Mildren J agreed with counsel for the commissioner that there was no intention by the police investigating the circumstances of the alleged offence to waive any claim of privilege.

Although, his Honour said, this does not determine the matter. He found that privilege had not been waived, “by police officers involved in the investigation of the alleged offence, passing on privileged information to police officers involved in preparing the report to the Coroner, bearing in mind that the police had not then sent a report to the Coroner or Deputy Coroner.

That was the basis upon which he determined against us our application and the determination waiver. By letter dated 4 September 2022, the counsel assisting team responded to our previous request in respect of the redacted materials in these terms. In particular, whether the Coroner, that is, your Honour, had received the

unredacted Proctor report. The response was this:

"I can confirm that the Coroner's office received the Proctor Report in unredacted form when Judge Cavanagh was the Northern Territory Coroner. The Coroner's office did not receive a copy of the Pollock drafts in an unredacted form. If the Northern Territory Police Force maintains it's claim of privilege, the Coroner will give argument on whether the claim of privilege is legitimate and/or whether any privilege has been waived.

This of course then raises a very significant and important issue. As we understand Dr Freckelton's position, on behalf of his many clients, legal/professional privilege is maintained despite the fact that the unredacted portions have been disclosed to this court, including no doubt counsel assisting.

Putting to one side the question of whether the disclosure of the unredacted portions amounts to waiver, there is a much more significant issue that arises from this unfortunate and concerning sequence of events. The issue is the consequence of access to extraneous information by a presiding officer.

Your Honour, we hand up to you extracts at pages 168 to 171 of the author, John Tarrant on Disqualification For Bias. And in particular, I direct your Honour's attention to the case of *Kirkland v Tippett*.

MR EDWARDSON: Your Honour will see there's a heading outside influence or information access to extraneous information and of particular relevance in the context of this hearing, we direct your Honour's attention for convenience to the author's reference to *Kirkland v Tippett.*

The author said this, the issue of extraneous information arose in unusual circumstances in *Kirkland v Tippett* where an interim restraining order against the applicant was made by a Magistrate, Mr Wilson, for the protection of the respondent. A final order had not been made.

An application for review came before Crawford J who treated the application as an application to review the finding of the magistrate that he was satisfied that a restraining order should be made. Mr Wilson, as well as being a magistrate, was a Coroner and was enquiring into the death of Ms Capasso(?).

The police's perspective was that the applicant was responsible for Ms Capasso death. The magistrate issued a warrant under s 7 of the *Criminal Process* (*Identification and Search Procedures*) *Act,* Tasmania directed at the applicant in relation to investigations into the death of Ms Capasso.

The magistrate also issued a warrant pursuant to s 17 of the *Listening Devices Act* directed at the applicant in relation to investigations into the death of Ms Capasso. The magistrate did not disclose to the applicant his involvement with the issuing of the two warrants.

However, Crawford J said the magistrate was not under a duty to disclose that information because the processes necessarily had to be kept secret from the applicant. Nevertheless, Crawford J held that the magistrate disqualified because no one knew the content of the communications between the police and the magistrate, except for the magistrate and the police.

Crawford J noted that he had no idea of the content of the communications, nor did the applicant, his legal advisor or the hypothetical fair-minded observer. Crawford J also noted that it was possible that the magistrate, in his capacity as the Coroner, had considerable information concerning Ms Capasso's death and the applicant's alleged involvement with it.

Crawford J concluded that the observer "Would have little choice but to reasonably apprehend that the learned magistrate might not bring an impartial and unprejudiced mind to bear. Accordingly, having regard to the secrecy of the communications, the magistrate ought to have declined to hear the application for the restraint order.

But in the circumstances, it would not have been appropriate for him to explain in detail why he was doing so. The long and short of all of that, in our submission, is this; the Northern Territory Police Force has to make a very considered and serious decision.

If, as they currently do, maintain the claim for legal/professional privilege and acting on the assumption that the mere provision of the unredacted reports to the Coroner does not amount to waiver, then the question of disqualification necessarily must arise having regard to the nature and topics that are canvassed in relation to topic or issue number 4, as set out in the Proctor report.

Our position is that disclosure of the document waives privilege and we rely on the authorities and submissions that are set out in *Rolfe (No 2)* and point out the distinction between the situation that confronted Mildren J and what now exists. At that point in time of argument before Mildren J, the unredacted report had not been provided to the Coroner. But of course, that has now changed.

Your Honour, it could not be said from any view, whether by inference or by the fair minded observer or anybody else for the matter, it could not be said that the redacted portions, given the significance of the headings and the topics that have been discussed, do not bear very significantly on a clear issue that your Honour has to consider; that your Honour has had access to, that is the unredacted portions that have been provided, and we say that the position is quite different from that which confronted Mildren J.

And I commend to your Honour too the last paragraph of that judgment where your Honour would understand that those Proctor draft reports had not been disclosed by the prosecution, hence the defence, who were put on notice of their actual existence, were forced to issue a subpoena to flush them out.

And it was against that background that his Honour made the obvious and pointed reference to how an innocent person could be convicted if proper disclosure is not made. It is our respectful submission that as those unredacted portions – sorry, redacted portions – I'll start again. As long as the Proctor report remains in its redacted form and the defence do not have access to that which the Coroner's Court has, the situation is simply - - -

A PERSON UNKNOWN: It's not to (inaudible).

MR EDWARDSON: And your Honour, again, getting back to the criticisms that have been made by counsel assisting about the lateness of objections and the like, we point out that we're doing it now at the first proper opportunity. But we're doing it now, your Honour, so that the court can make the considered position about the admissibility, the question of waiver and matters of that nature.

So, those are resolved and disposed of right at the commencement rather than waiting, for example, until the Proctor report was to be introduced into evidence and then raising the spectre of there being a problem with your Honour residing, if the claim for legal/professional privilege was maintained.

We accept and apologise if that has caused, or anything else has caused, inconvenience to your Honour, to counsel assisting or anybody else. But it is our submission, in the scheme of things, to have one set day set aside where your Honour can consider at the outset whether our objections are sound, is the appropriate time and now is the appropriate time for that to happen.

And likewise, the issue of waiver, if it be waiver, or if legal/professional privilege is maintained, what are the consequence, are much better dealt with now than down the track. So, I said right at the commencement, Mr Boulten is quite right. We could simply have waited until the evidence was sought to be adduced. We could have taken the objection then, one by one.

But that would have had a much greater consequence in terms of fragmenting these proceedings than the approach that we have taken. Your Honour, I do, out of an abundance of caution, ask for a nonpublication order, just in respect of one matter, that is, reference to the prospect of my client being charged again by the DPP in relation to the Ryder matter.

THE CORONER: That's already been published hasn't it?

DR DWYER: That's already been published. In fact, I think the NT Independent was one, and it's already been published on the livestream, so that's one form of publishing. But as I understand it, just from my own reading, that information has already been published. I might be wrong. I can- - -

MR EDWARDSON: Well, I'm certainly not aware of it and I asked for it out of abundance of caution. Anything that can protect his interests of a fair trial – if there is to be a trial – is obvious of paramount consideration.

DR DWYER: I agree with that, your Honour, that it – clearly, the interests of Constable Rolfe need to be protected in – with respect to any trial of that matter. Perhaps we can just give that consideration over the break and you could – your Honour could impose an interim non-publication order while it's being considered.

THE CORONER: I'll certainly impose an interim non-publication order and we'll have to consider what, if anything, can be done in relation- - -

MR EDWARDSON: It's only that issue, your Honour. I accept that there has got to be some transparency and indeed, if I was asked for a wider non-publication order, it would be contrary to the arguments that I unsuccessfully advanced to Justice Burns after the acquittal of Zachary Rolfe. He took the view that once the acquittal occurred, it was appropriate for all of the transcripts and so on, and issues be open to the public so that transparency prevailed. Of course, you've got slightly different consideration here. I just want to protect his interests on that particular topic.

THE CORONER: I'll certainly give you an interim non-publication at this stage.

MR EDWARDSON: And if your Honour pleases, they're my – our submissions.

DR DWYER: Your Honour, I think we need to take a break to consider that for a couple of reasons. I just want to make this clear – and I certainly don't want to get into a tit for tat with my learned friend – but it is slightly disingenuous to suggest that this was the first opportunity to deal with this after the opening. There is a comprehensive report in the way of the Proctor Report, which really outlines each of the issues that I went through in my opening. And the additional material would not change, in any way, reflections on the issues list.

THE CORONER: And, in fact, we received the objection before the opening, which was- - -

DR DWYER: That's quite right, your Honour. Which was subsequently withdrawn. The other thing is about the inconvenience to the court and the parties. It's not just this day that has been set aside. Your Honour will then, of course, have to carefully reflect on all the submissions from parties and then produce a written decision, which will – which parties will then have time to consider.

And my learned friend's submissions contain in them a suggestion that there might be a challenge to your Honour's ruling if it doesn't go one way. In my respectful submission, as was put in the submissions of NAAJA, it's inappropriate to have suggested in those submissions that it might go elsewhere, because your Honour- - -

THE EDWARDSON: Well, I didn't say anything of the sort.

THE CORONER: Just take a seat, Mr Edwardson.

DR DWYER: But in any event, it's not just a day. It's much more than a day that will take to consider these issues. The issue of the X7 cases and the implications of them has been raised today, as I understand it, for the first time. We did get cases of X7 last night. I actually thought that one of them was going to make quite a different point with respect to derivative use. So that will have to be considered by those at the bar table and parties will have to be given an opportunity to consider the impact on them in relation to the Ryder decision.

Similarly, the issue of any apprehended bias has been raised for the first time in court today. The reason I'm doing it now is not to try and be a school mum or to try and pick an argument with Mr Edwardson – it's the last thing I want to do. The reason is this: right from the outset in May, your Honour urged all parties to continue discussions with counsel assisting. There is no need, in these proceedings, to come up with things for the first time on your feet or to wait to raise these in court.

Please, can I urge an open dialogue with counsel assisting so that these issues can be properly ventilated? I welcome my learned friend's suggestion that there are very important issues for your Honour to consider and the list that my learned friend gave. And I also certainly pay respect to the impact of the previous proceedings and these proceedings on Constable Rolfe. And he was one of the many parties that I mentioned in my opening as having been affected by the tragic death of Kumanjayi.

And I can assure his legal team that when Constable Rolfe comes to give evidence in these proceedings, he will be treated with respect and he will have an opportunity to reflect on the questions that I put him, because he has a lot of valuable information that then this court needs to consider. And that's the tone in which I hope these proceedings can be conducted.

THE CORONER: Yes.

MR FRECKELTON: Your Honour?

THE CORONER: Mr Freckelton?

MR FRECKELTON: There is something that can be communicated to you and to the court, which we believe will contract the issues which may be in dispute before you. My learned friend has expressed concern about the prospect of Constable Rolfe being charged with the criminal offence of perjury in respect of the Ryder matter.

His apprehension, as we understand it, arises from the second affidavit of Commander Proctor, dated 2 September 2022. So I beg your pardon, Assistant Commissioner Porter, in his affidavit of the day to which I have referred. At page 16 of that there is an entry which reads:

> At time pending, awaiting advice for prime command about the outcome of a second review or submission on an opinion file to DPP, allegation of perjury.

We take it that it is that entry in the table which has generated the consternation of my learned friend. I am in a position to update the court in relation to that and we hope to alleviate the concerns of Constable Rolfe and our learned friends. This issue had been given further consideration by prime command and the decision has been made not to refer the perjury issue to the DPP.

Constable Rolfe will not be charged with perjury in respect of this issue. So we hope that that contracts the issues. It is a decision that has been latterly, and in – on the basis of consideration of all of the evidence that the ordinary course of these matters being raised in respect of the re-evaluation of the Ryder matter and the DPP has not been asked for advice or involvement in respect of this as a result of the re-evaluation. So that matter has been (inaudible).

THE CORONER: Thank you, Mr Freckelton.

MR EDWARDSON: Your Honour, can I just – sorry, it just made me think of one thing that my learned friend has just mentioned. There is always scope for agreement in this sense: obviously, our concern would be the extent to which my client might be exposed to further cross-examination on extraneous issues. And that's the real issue.

That's separate and distinct, for example, of having a body of evidence that might be put before your Honour, in a very general and broad sense, to look at issues that might go to questions of concern by the community. That's very different from actually deploying that material in the way that might be envisaged. But I'm interested in that, for what it's worth.

MR BOULTEN: Your Honour, just in relation to – for the conduct of the proceedings today and on Monday.

THE CORONER: Yes, Mr Boulten.

MR BOULTEN: I'm indebted to my learned friends in the way in which issues have highlighted and now clarified. We were concerned about the Ryder prosecution issue. Now, not so much. We though, are – we were not going to buy into waiver of legal professional privilege, but we were unaware of an argument that would suggest that you might be conflicted as continuing in the inquest.

That's a matter of some concern. We would like to look at that issue with some great care. We could make submissions today about scope, but we would prefer to consider our position about the new document that we have, not just to respond to what Mr Edwardson has said, but to consider very carefully about – consider carefully what we will say about the new document and the new framing or correlation of issues.

THE CORONER: Yes.

MR BOULTEN: So I would be asking for the opportunity to put our thoughts in writing and to have them to the parties and to counsel assisting by Sunday night and to be focused on these issues, carefully, before 9:30 on Monday, please.

THE CORONER: Yes, Mr Boulten. So you're asking for an adjournment till 9:30 on Monday to address the court on these issues?

MR BOULTEN: Yes, and what we would like to do is just to review the evidence in the brief with a view to considering whether or not the reshaping, if I might call it loosely that, will impact on whether any of that gets before the court, eventually. And we also wish to encapsulate precisely what we wish to say about some of these issues, please.

THE CORONER: Yes. There's no issue with that, Mr Boulten. But what I might do is take the short adjournment before I hear from the other parties today- - -

MR BOULTEN: Yes, your Honour.

THE CORONER: - - -about their ability to either continue with submissions on the legal issues today or whether they're also seeking some further time. But I'll take the short adjournment.

ADJOURNED

RESUMED

THE CORONER: Yes?

MR EDWARDSON: (Inaudible) my learned friends (inaudible).

THE CORONER: Yes.

MR EDWARDSON: Your Honour, counsel assisting asked whether we maintain our non-publication order request in relation to the issue that I raised (inaudible) provoked. I am just taking instructions (inaudible) an indication by the Northern Territory Police (inaudible) in relation to that matter. We don't ask that there be a suppression order, that is first thing.

And the second thing I want to make absolutely clear is that my commitment on Monday has nothing to do with these proceedings. I am actually part-heard in a matter before Barr J, and that was the only day that he had available because of his previous commitments in Alice Springs and I couldn't do anything about it, it is part-heard. It will only be for Monday.

THE CORONER: Thank you, Mr Edwardson.

The interim non-publication made just before the break is lifted.

Yes, Dr Dwyer?

DR DWYER: Your Honour, I propose just to deal briefly with some issues and then expand on submissions on Monday when we have had the benefit of receiving some further submissions on the jurisdictional issue - the scope issue - and I am told by my learned friends at the bar table that they do not wish to provide any comprehensive oral submissions now and will take up your Honour's opportunity to come back on Monday.

THE CORONER: All right, so Monday will also be set aside for submissions.

DR DWYER: Yes.

THE CORONER: And we won't be commencing witnesses until later in the week.

DR DWYER: Yes, your Honour.

THE CORONER: Thank you.

DR DWYER: Your Honour, a document has been distributed. If I might hand up a copy to your Honour? It's relevant text messages from the extraction from Constable Rolfe's phone. It involves text exchanges between Constable Rolfe and other officers both prior to and immediately after Kumanjayi's death. I ask that it be marked MFI C.

MFI C Extract of text messages.

THE CORONER: Yes. Are you asking for anything else in relation to (inaudible)?

DR DWYER: Yes, I am, your Honour. I note that contains and set out a number of the text messages that were sent from Constable Rolfe to other officers in the Northern Territory Police Force primarily based in Alice Springs and it has both the names of the other officers that text messages were sent to and of course, some text messages that were sent back to Constable Rolfe and also the content of those messages and I ask for a non-publication order - an interim non-publication order over that document at this stage in order to preserve the rights of parties at the bar table.

THE CORONER: Yes, so I now make an interim non-publication order over the document marked MFI C and also noted as a counsel assisting the Coroner's aide-memoire in relation to messages from an Apple iPhone.

DR DWYER: Thank you, your Honour. And your Honour, just to make it clear, it's not suggested that they are all of the text messages that might be relevant to your Honour's enquiries in this inquest. They are merely an example of some of the text messages that I will make further submissions on, on Monday as to the relevance to the scope of your Honour's enquiries.

They go well beyond just the two text messages that were sought to be relied on by the prosecution at trial and they involve other officers, not just Constable Rolfe. And of course, by virtue of a non-publication order over that document, there's a nonpublication order over the names of other officers that were communicated with at that time.

There's just one other issue that I just seek to deal with today, your Honour, and it's primarily because of the purpose of informing the public too about the mature of coronial proceedings and to clarify one issue, particularly one Mr Edwardson is here at the bar table today in case anything further is sought to be said on that.

I will distribute a short note about this issue today. The purpose of these submissions is just to put on a record, counsel assisting's position with respect to the assertion raised orally today that it's not permissible or proper for a coronial to enquire into the facts underlying the criminal offence of what a person has been acquitted, because to do so would be to go beyond acquittal, if I've correctly understood learned senior counsel's position on that.

In fact, a coronial court looking into the facts of a tragic death, including police shootings, after a criminal trial can be done, analysis and investigation of the facts is permitted and has been permitted on a significant number of occasions in Australia and different jurisdictions dealing with similar acts.

An example of that is the case of – I'll just get the full citation for my friends. An

inquest into the death of *Vlado Micetic,* I apologise if I've mispronounced that, scope of inquest ruling, Coroner's Court Victoria, Coroner Jamieson 19 August 2019. And of course, we can provide a copy of these to my learned friends.

But in that case, it was dealing with a police officer who had – well the death of a man who had been killed by a police officer, an officer shot and killed a motorist and that officer was then tried and acquitted of murder.

Following the acquittal, an inquest into the death was resumed and among the issues identified on the issues list were the immediate circumstances that led up to the death of the motorist from the gunshot injuries received and whether the use of force against that motorist was consistent with the relevant Victoria Police policies, practices and training and was otherwise reasonable in the circumstances.

Those appearing on behalf of the officer objected to those issues on the basis that they were not within the scope of the inquest. It was said, in effect, that to enquire into the reasonableness of the constable's response to the threat posed by the motorist had been already the subject of a Supreme Court criminal trial.

The Coroner rejected that submission. He noted, of course, that he must not include in his findings or comment any statement that a person is or may be guilty of an offence. And that, of course, is the same situation with respect to the *Northern Territory Act*.

But he did not accept that an inquiry into the factual circumstances in which the constable fired his weapon at the motorist was necessarily an inquiry into the commission of a criminal offence, because the Coroner's perspective is quite different from a criminal trial.

He noted that there was substantially potentially relevant evidence before him that was not available to the jury and he was not bound by the rules of evidence. And that may well be the position and certainly in terms of additional information, that will be the position before your Honour and of course, the rules of evidence do not apply in these proceedings either.

He noted that it would be open to interested parties to make submissions about the extent to which definitive findings could be made on the question of nonlethal force options or related topics. And he said these words, your Honour, which I will read in full, because they're so important for us all in understanding the nature of the coronial proceedings.

"The nature, object and outcome of an inquest is substantially very different to the nature, object and outcome of a criminal trial. Coroners do not adjudicate issues inter partes and their findings do not determine legal rights. Rather, the purpose of the Coroner's investigation is to determine what happened.

In seeking to determine what happened, I must keep in mind the preventative and public health purposes of coronial investigations. The circumstances of Vlado's

death have implications for the training and support of police officers in their interactions and in dealing with people like Vlado.

They also have implications for the safety of persons who interact with police and the broader community. This note on this issue is being distributed for the benefit of my learned friends now. Perhaps then, all I need say in addition is that, contained within this note, are four cases where a similar issue has arisen and they are coronial inquests in which Coroners have examined the facts underlying an offence of which a person has been acquitted.

The Coroner is not bound by a criminal verdict, but is a able to make findings on the evidence presented, irrespective of a previous determination, mindful however of course of the restrictions under the Act of making any finding that someone was guilty of a criminal offence.

HER HONOUR: Yes.

DR DWYER: Thank you, your Honour. If I can continue submissions later.

HER HONOUR: Yes. So, thank you, Dr Dwyer.

We will now adjourn, if there's nothing further from the Bar table, to 9:30 on Monday.

ADJOURNED