

INQUEST INTO THE DEATH OF KUMANJAYI WALKER

APPLICATION AND SUBMISSIONS OF MR ROLFE

Filed on behalf of: Mr Zachary Rolfe
Date of filing: 6 October 2023
File by: Mr Luke Officer
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A Introduction

1. By application made on 16 August 2023, Mr Rolfe sought production of documents falling into two categories:
 - a) documents relating to the Coroner's amendment of non-publication orders on or about 23 March 2023, including any documents relating to the circumstances surrounding (or leading up to) that decision; and
 - b) records, whether in hard copy or electronic form, all video, audio and notes from the visit to Yuendumu on 14 and 15 November 2022.
2. By email dated 29 August 2023 sent on behalf of counsel assisting the Coroner, Mr Rolfe was requested to provide submissions:
 - a) identifying the legitimate forensic purpose that would justify production of the documents; and
 - b) to specifically 'identify how it is 'on the cards' that the requested material could assist her Honour in the discharge of her statutory functions, particularly identifying the cause and circumstances of death of Mr Walker'.
3. Mr Rolfe was requested to provide those written submissions by 6 October 2023.
4. The email also indicated that in respect of communications between the Coroner and counsel assisting, such communications were protected from disclosure or production by legal professional privilege. Mr Rolfe has, through his solicitors, requested an explanation of the basis for the claim of privilege. An explanation for the basis for the claim has not been provided at this stage.
5. These submissions:
 - a) explain the concerns which have led to his request for further documents (by way of his application of 16 August 2023);
 - b) identify further concerns which have arisen by reason of the claim of legal professional privilege; and

- c) invite the Coroner to consider recusing herself from the inquest on grounds of apprehended bias.
6. As will be explained, against the background of concerns arising from interactions during the Yuendumu visit, the making of unilateral amendments to a non-publication order (in a manner adverse to Mr Rolfe, and which were apt to assist and advance the position of the Commissioner of Police) has caused Mr Rolfe to have a concern that the impartiality of the inquest is compromised (viewed from the perspective of a fair minded lay observer).
7. Whilst a partial explanation for the events surrounding the amendment of the non-publication order has been provided by Counsel Assisting, respectfully, that explanation (and the more recent claim of legal professional privilege):
 - a) does not dispel the drawing of an inference that an amendment was made in response to undisclosed communications on behalf of the NT Police or their representatives;
 - b) gives rise to an apprehension that the amendment was made because of a belief that NT Police should be uninhibited in pursuing disciplinary complaints against Mr Rolfe arising from material obtained in connection with the inquest;
 - c) asserts that there exists a confidential advisor-client relationship of trust and confidence between counsel assisting and the Coroner (which in and of itself is inconsistent with the *Coroners Act 1993* (NT)) such that the views and conduct of Counsel Assisting is not, in the eyes of the fair minded lay observer, able to be separated from those of the Coroner.
8. In those circumstances, whilst the material requested by him will assist in a more complete and informed consideration of the relevant issues (and may, subject to its content, negate a conclusion that the test for reasonable apprehension of bias is met in this case), mindful of the need to raise a concern of bias promptly, Mr Rolfe respectfully invites consideration of the broader concerns summarised above and developed below.
9. These submissions address the issues as follows:
 - B Reasonable apprehension of bias – principles
 - C The Yuendumu Proceedings – the concerns

- D The March 2023 NPO Amendment – the concerns
- E The role of Counsel Assisting appointed pursuant to s.41(2) of the Coroner’s Act
- F Conclusions

B Reasonable apprehension of bias – principles

- 10. The criterion for apprehended bias was definitively stated by the High Court in *Ebner*.¹ The test is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.²
- 11. Application of the above test ‘logically entail[s]: (1) identification of the factor which it is said might lead a judge to resolve the question other than on its merits; (2) articulation of the logical connection between that factor and the apprehended deviation from deciding the question on its merits; and (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded observer.’³
- 12. The ‘double-might’ formulation adopted by Australian Courts ‘serves to emphasise that the criterion is concern with ‘possibility (real and not remote), not probability.’⁴ The adoption of this formulation reflects the fundamental principle that justice must be done *and* be seen to be done. Thus, in *Johnson v Johnson*, the majority judges observed:⁵

‘If fair-minded people reasonably apprehend or suspect that the tribunal has prejudge the case, they cannot have confidence in the decision. The hypothetical reasonable observer of the judge’s conduct is postulated in order to emphasise that the test is objective, is founded on the need for public confidence in the judiciary, and is not based purely upon the assessment of by some judges of the capacity or performance of their colleagues.’

- 13. Moreover, the test does not require determination of whether the judge or decision-maker will or will not bring an impartial mind to the resolution of the relevant question,⁶ it requires the Court to objectively determine *the public’s view* of the circumstances, *not the*

¹ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. See, more recently, *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419; *Charisteads v Charisteads* (2021) 95 ALJR 824.

² *Ebner*, [6].

³ *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419, [38] (Kiefel CJ and Gageler J), citing *Ebner* at [8].

⁴ *QYFM*, [38].

⁵ (2000) 205 CLR 337, [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁶ *Isbester v Knox City Council* (2015) 255 CLR 135 at 156 [61] (Gageler J).

Court's own view. In *Webb v The Queen*,⁷ Deane J summarised several broad categories in which apprehended bias may manifest itself: interest, conduct, association, extraneous information, or some other circumstance.⁸ The categories – for example, an interest and an association – may overlap.⁹

14. In the context of ‘association’, the majority justices in *Ebner* observed that:¹⁰

‘[i]t is not only association with a party to litigation that may be incompatible with the appearance of impartiality. There may be a disqualifying association with a party’s lawyer, or a witness, or some other person concern with the case. In each case, however, the question must be how it is said that the existence of the “association” or “interest” might be thought (by the reasonable observer) possibly to divert the judge from deciding the case on the merits.’

15. A fair-minded observer is:

- a) a member of the public;¹¹
- b) ‘generally taken to be mistaken because decision-makers will rarely be biased in the ways attributed to them, as the observer might have appreciated if fully apprised of the operation of a particular decision-maker;¹²
- c) taken to be reasonable and does not make snap judgments;¹³
- d) ‘presumed not to have a detailed knowledge of the law, or of the character or ability of a particular judge’¹⁴, but is otherwise presumed to have ‘a broad knowledge of the material objective facts’;¹⁵ and
- e) ‘taken to be aware of the nature of the decision[s] and the context in which it is made, as well as to have knowledge of the circumstances leading to the decision.’¹⁶

⁷ *Webb v The Queen* (1994) 181 CLR 41.

⁸ (1994) 181 CLR 41, 74 (Deane J). See also, *Ebner* at [24].

⁹ See, for example, *Ebner* at [28] (Gleeson CJ, McHugh, Gummow and Hayne J).

¹⁰ (2000) 205 CLR 337, [30].

¹¹ *QYFM* at [71] (Gordon J).

¹² *QYFM* at [69] (Gordon J).

¹³ *Johnson v Johnson* (2000) 74 ALJR 1380, [12], [14].

¹⁴ *Johnson v Johnson* at [12].

¹⁵ *CNY17 v Minister for Immigration and Border Protection* (2019) 94 ALJR 140, [58] (Nettle and Gordon JJ).

¹⁶ *Isbester v Knox City Council* (2015) 255 CLR 135, [23] (Kiefel CJ, Bell, Keane and Nettle JJ), citing *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, [68] and *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 519.

16. Moreover, in *QYFM*, Kiefel CJ and Gageler observed the following in relation to the attributes of a fair-minded observer:¹⁷

‘Being “fair-minded”, the observer “is neither complacent nor *unduly* sensitive or suspicious”. Yet the observer is cognisant of “human frailty” and is all too aware of the reality that the judge is human. The observer understands that “*information [as well as attitudes] consciously and conscientiously discarded might still sometimes have a subconscious effect on even the most professional of decision-making*”.

Being “lay”, the observer “is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge”. Though the observer may be taken to understand that the judge, by reason of professional training and experience and fidelity to the judicial oath or affirmation, will have a greater capacity than most to discard “the irrelevant, the immaterial and the prejudicial” and to discharge the judicial function uninfluenced by past professional relationships, “the public perception of the judiciary is not advanced by attributing to the ... observer a knowledge of the law and an awareness of the judicial process that ordinary experience suggests not to be the case”. This indicates that the observer will see the person who is currently a judge as the person who was formerly an advocate and may be less inclined to dissociate the advocate from the cause advocated than would someone steeped in the adversary process with a cultivated sense of the ethics of the legal profession and the profundity of the judicial oath.

Nor is the observer so abstracted and dispassionate as to be insensitive to the impression that the circumstances in issue might reasonably create in the mind of the actual party who is asserting an apprehension of bias. The observer can be taken to appreciate that a party - especially an individual, and especially a non-citizen facing deportation on the basis of his conviction - might understandably experience a justifiable sense of disquiet in seeing his former prosecutor turn up as one of his judges.’

(emphasis added) (citations omitted)

17. When assessing reasonableness of any suggested apprehension, that is to be considered in the context of ordinary judicial practice.¹⁸
18. The extent to which the norms of practice will differentiate from those expected in adversarial litigation will vary depending on the nature and functions of the decision-making body and the practical experience of the persons appointed to discharge those functions.¹⁹
19. In the present context, the relationship between Counsel Assisting and a Coroner will generally permit a proximity that would be grossly unacceptable in ordinary judicial proceedings. That arises as an incident of Counsel Assisting’s appointment pursuant to s.41(2) of the Coroners Act and to assist the Coroner for the purpose of an inquest.

¹⁷ (2023) 97 ALJR 419, [47] – [49].

¹⁸ *Charistead v Charistead* (2021) 95 ALJR 824, [12] (the Court) citing *Johnson v Johnson* at [13].

¹⁹ *Re Finance Sector Union of Australia; Ex parte Illaton Pty Ltd* (1992) 66 ALJR 583, [2] (Dean, Toohey, and Gaudron JJ).

However, the extent and contents of communications between Counsel Assisting and a Coroner is measured by the fact that:

- a) a Territory Coroner *must be* a sitting judge of the Local Court;²⁰
 - b) a Coroner bears the sole responsibility (non-delegable responsibility) of assessing evidence, making findings, reporting on mandatory (or discretionary) matters, and reporting on matters;²¹
 - c) a Coroner exercises their powers at an inquest judicially;²²
 - d) a Coroner *must* conduct an inquest in public;²³ and
 - e) the principles of natural justice apply, whether expressly or implicitly by virtue of s.40(3) of the Coroners Act.
20. The issue of whether a client-lawyer relationship exists between a Coroner and Counsel Assisting has not been considered. The necessary detachment of a Coroner (or a Commissioner, in the context of a Royal Commission) from Counsel Assisting has been the subject of comment in a number of cases.
21. For example, in *Firman v Lasry*,²⁴ Ashley J considered whether the conduct of Counsel Assisting could be imputed to a Commissioner:²⁵

It is apparent from the submissions of counsel for the plaintiff that their client's contention is that the conduct of counsel assisting could be relevant in two ways: first, because the hypothetical observer would reasonably apprehend that partiality on the part of counsel assisting was likely to reflect partiality on the part of the Commissioner. Second, because if the conduct of counsel assisting was or reasonably appeared to be partial, and if the Commissioner appeared to condone that conduct, then the hypothetical observer might reasonably apprehend partiality on the part of the Commissioner.

In my opinion the conduct of counsel could be pertinent at least on the second footing. So, for example, if the conduct of counsel assisting showed an evident and persisting inequality of treatment as between witnesses espousing one view of matters under inquiry and witnesses espousing an opposing view, if one group of witnesses was apparently aided in giving its account of events whilst the other group was apparently frustrated in its attempts, and if a Commissioner either gave support to or took no action to redress the situation which unfolded before him, it would not be wrong to consider that support or

²⁰ *Coroners Act 1993* (NT), ss.4 – 4B.

²¹ See *Priest v West* [2012] VSCA 327; 40 VR 521, [3] (Maxwell P and Harper JA), [167] – [172] (Tate JA).

²² *Rolfe v The Territory Coroner & Ors* [2023] NTCA 8, [55] – [59].

²³ *Coroners Act 1993* (NT), s.43(1).

²⁴ [2000] VSC 240.

²⁵ [2000] VSC 240, [27] – [29].

inaction if an allegation of apprehended bias on the Commissioner's part was raised by an individual whose conduct was under scrutiny. Whether a conclusion adverse to a Commissioner might then be drawn must depend upon the particular circumstances.

Failure by a Commissioner to act in such a case would be, I think, more significant than failure to intervene in the case of unfair cross-examination by counsel for a represented party. Yet in *Carruthers, Thomas J* (at 362) apparently considered that failure to intervene in the last-mentioned situation could be pertinent.

22. Likewise, in *R v Doogan; Ex parte Lucas-Smith*,²⁶ the ACT Court of Appeal considered, in the context of a coronial investigation that ‘there may be situations in which an apprehension of bias on the part of a coroner could arise from statements made by counsel assisting him or her’. Moreover, the Court considered a submission that ‘any sharing of [the responsibility to prepare a final report] with counsel who had been advocating propositions that were contrary to the interests of the [interested parties] would inevitably give rise to a reasonable apprehension of bias.’²⁷ The Court disagreed with that submission, observing:²⁸

‘Whilst, as Mr Tracey has suggested, a coroner cannot delegate his or her responsibility to weigh the evidence and make appropriate findings, that does not mean that he or she must write the report unaided. On the contrary, a coroner is entitled to have counsel assisting or an associate undertake a range of tasks, such as providing a summary of the evidence, an outline of the relevant statutory provisions and references to authorities.

In the present case, the evidence does not suggest that Mr Lasry intended to trespass into areas that were exclusively the responsibility of the first respondent, and we are unable to see how the terse note upon which Mr Tracey’s submissions had been founded could provide any support for the prosecutors’ contentions.’

23. The position of the ACT Court of Appeal as to the permissibility of counsel assisting with the drafting of a report is to be contrasted with the views of the New Zealand Court of Appeal in *Re Royal Commission on Thomas’s Case*, where the Court observed:²⁹

‘When a commission is inquiring into allegations of misconduct, the role of counsel assisting becomes inevitably to some extent that of a prosecutor. It is not right that they should participate in the preparation of the report. But as this was not a ground of complaint by the applicant in the present proceedings, we merely draw it to attention so that it is not treated as a precedent.’

²⁶ [2005] ACTSC 74; (2005) 158 ACTR 1.

²⁷ [2005] ACTSC 74; (2005) 158 ACTR 1, [164] (Higgins CJ, Crispin and Bennett JJ).

²⁸ [2005] ACTSC 74; (2005) 158 ACTR 1, [165] – [166] (Higgins CJ, Crispin and Bennett JJ).

²⁹ [1982] 1 NZLR 252, 273. See also, *Dato Tan Leong Min v Insider Trading Tribunal* [1999] 2 HKC 83, referred to in *R (Clarke) v Chairman of the Magnox Public Inquiry*, where the Hong Kong Court of Appeal considered that there was an absolute prohibition on counsel participating in drafting the tribunal’s report. In reach that conclusion, the Court considered that two functions had been performed, unfair, and in secret – an advisory and a quasi-judicial function.

24. Likewise, in *Dato Tan Leong Min v Insider Trading Tribunal* ('*Dato Tan*'),³⁰ the Hong Court of Appeal observed, in the context of a statutory inquiry conducted by a tribunal that was required to be conducted openly, that:³¹

'Further, the statutory obligation to hold the hearings in public must be maintained. It follows that the evidence must be received and submissions on law and evidence by counsel for the Tribunal or for the parties must be made at public hearings. Counsel for the Tribunal should never be invited to assist in the writing of the report or to make submissions upon the draft report.'

25. The application of principle identified by the Hong Kong Court of Appeal has been distinguished in the context of a non-statutory inquiry. In *R (Clarke) v Chairman of the Magnox Public Inquiry*,³² Murray J considered the application of *Dato Tan* in the context of a *non-statutory inquiry that was not required to be conducted publicly*. His Honour considered that the requirements of a public hearing, with reference to the above observations of the Court in *Dato Tan*, were 'quite different' to the case before him.³³ Moreover, in that case the Terms of Reference *authorised* the inquirer to engage advisors.

26. Mr Rolfe respectfully submits that the position adopted in *Re Royal Commission on Thomas's Case* and *Dato Tan* is the correct one, although that does not dictate the outcome in the present application. Regardless of the conflict between the cases, it is at least sufficiently clear (by reference to the observations at paragraph 19 above, as well as by reference to *Firman v Lasry* and *R v Doogan; Ex parte Lucas Smith*) that a Coroner or Commissioner's independence from counsel assisting when performing their functions is a necessary incident of their conduct of a public inquest or inquiry (and in which principles of natural justice apply).

C The Yuendumu Proceedings – the concerns

27. This inquest was conducted in Yuendumu on 14 and 15 November 2022. The schedule for the proceedings on those dates had been foreshadowed in a number of emails prior to the visit, including on:

a) 3 November 2022 (Ms Walz, annexing a draft schedule);

b) 12 November 2022 (Ms Holloway, solicitor for the Parumpurru Committee);

³⁰ [1999] 2 HKC 83.

³¹ [1999] 2 HKC 83, [43].

³² [2019] EWHC 3596.

³³ [2019] EWHC 3596, [63] – [64].

c) 13 November 2022, (Ms Walz, annexing the finalised schedule).

28. Those emails, and the attachments therein, did not foreshadow the discussion of matters directly concerned with contentious issues of fact in this inquest, or issues directly concerning Mr Rolfe. Indeed, the purpose of the visit, as far as it could be gleaned from the schedules was two-fold:

a) to engage in learning about Walpiri culture, including grieving and ‘sorry business’; and

b) the Coroner’s conduct of a view of relevant locations to this inquest.

29. This was reinforced by the address of Mr McMahon, counsel for the Parumpurru Committee on 4 November 2022, when he addressed the Coroner and interested parties in relation to the proposed schedule for the Yuendumu Visit.

30. Senior and junior counsel for Mr Rolfe did not attend the Yuendumu Visit. Rather, Mr Officer, the solicitor for Mr Rolfe, appeared on his behalf on 14 November 2022. He did not attend on the second date due to the need to prepare for Mr Rolfe giving evidence the following day. Importantly, a report of the proceedings on 15 November 2022 was published on the news website “NT News”.³⁴ That report disclosed that discussions had taken place during the proceedings about:

a) the need for payback, and that there would be no healing until the blood of Mr Rolfe had been spilt;

b) community views of racist text messages that had been the subject of evidence in the inquest;

c) community views about why Mr Rolfe was still “in the job”, being an apparent reference to Mr Rolfe’s continued employment, at that time, as an NT Police officer;

d) counsel assisting’s question to persons in attendance during a yarning circle “*if you put spearing to one side, is there anything else that payback or justice could involve*”, to which a community member, Ms Samara Fernandez-Brown (who has

³⁴ Annexure A.

given evidence in the inquest) responded that “a start” towards justice would be for Mr Rolfe “not to be working as a police officer anywhere in Australia”;

- e) Ms Fernandez-Brown’s observation that *“For us the court process was really difficult because there was so much evidence on his part that was left out and that’s only come out in the Coronial inquest and that’s been really difficult for us to understand.”*
 - f) that Ms Fernandez-Brown had also said, *“Speaking for myself and from conversations I’ve had with my family, I feel like the bare minimum in terms of Rolfe personally is for him to lose his job, he can’t be working with people because it’s very clear that he’s not safe, particularly with working with Indigenous people.”*
31. Photographs of the events on 15 November 2023, which appear to have been taken during the discussions described above, were published on the Channel Nine Facebook page. That publication showed the Coroner sitting with Counsel Assisting in front of a white-board, on which the topics “IRT working as NT Police Officers”, “Payback story”, “Kardia jury at murder trial in Darwin”³⁵, “Justice Judge Burns from Canberra conflict of interest from a Walpiri perspective”, “Court – Eddie” were displayed.³⁶
32. Photographs in other articles published online showed both the Coroner with her face painted and also what appeared to show the Coroner standing to have her face painted by Mr Walker’s mother, Ms Leanne Oldfield.³⁷ Another photograph published online showed Counsel Assisting with her face painted and holding the hand of a community member.³⁸
33. It was apparent that the nature of these discussions extended beyond the representations that had been made about the content of the Yuendumu Visit. Beyond the general prejudice occasioned by the lack of forewarning about the potential for these topics to be canvassed, it was particularly concerning that:
- a) the inclusion of the topics on the whiteboard suggested that the comments of community members were not ventilated “on the sudden” such that they could not reasonably have been anticipated at least at some juncture during the meeting, thus

³⁵ A “Kardia jury” being a reference to a white jury.

³⁶ Annexure B.

³⁷ Annexure A; Annexure C.

³⁸ Annexure A; Annexure D.

permitting the Coroner to distance herself from any perception that a fair minded lay observer might form about whether the topics and opinions being addressed might be relevant to a consideration of the issues raised by the inquest; and

b) Counsel Assisting actively enquired with members of the community about how justice could be administered as a consequence of Mr Walker's death.

34. The matters reported were of immediate concern to Mr Rolfe and his representatives. On 18 November 2022, Mr Officer raised concerns with the Court about the reporting of comments during the Yuendumu Visit that Mr Rolfe ought to be "speared".
35. On 19 November 2022, Mr Officer requested copies of: a) all video recordings of 14 and 15 November 2022; b) all audio recordings of 14 and 15 November 2022; and c) all notes taken on 14 and 15 November 2022. The purpose of those requests was to confirm the nature of discussions that occurred *during* the proceedings to enquire whether the events of concern gave rise to the need for the Coroner to recuse herself on grounds of apprehended bias.
36. On 5 December 2022, Ms McNally, solicitor for Sergeant Bauwens, indicated that she also sought a copy of the materials that had earlier been requested by Mr Officer.
37. The recordings of the Yuendumu Visit were ultimately provided by the Coroner, in a redacted format, on 14 February 2023, when they were uploaded to the online brief of materials that has been made available to interested parties during this inquest. The basis for the delay in providing the materials was that: a) the court officer who recorded the proceedings having been sick; and b) that the audio needed to be reviewed to ensure that the materials 'do not record private conversations between the Coroner and her staff to which you would not be entitled.'³⁹
38. On the date that the online brief was updated to include the recordings, Ms Walz sent an email to interested parties noting as follows:

'As requested by some parties, I advise that I have just uploaded the following material to the electronic brief (in folder "Yuendumu visit recordings"):

1. *"Yuendumu time log": the notes taken by the Coroner's clerk as typewritten by the Coroner's clerk. We are advised that these are a true copy of the handwritten notes;*

³⁹ Email from Maria Walz to Ms Kate McNally dated 14 December 2022. In that email, Ms Walz indicated that the materials did not form part of the Court records because 'they have not been tendered in the proceedings.'

indeed, as you will see, they have not been edited to remove errata, or notes by the clerk to herself;

2. *Those parts of the audio recording of the visit to Yuendumu that were understood by the parties to be appropriate for recording, that is, public discussions/ceremony, edited to remove private conversations between the Coroner and other persons, such as her legal team. The recordings cover:*
 1. *The public ceremonies on the morning of Monday 14 November 2022 (“Yuendumu 14 November 2022 – part 1”);*
 2. *The public forum or “Community Truth Telling Meeting” on the afternoon of Monday 14 November 2022 (“Yuendumu 14 November 2022 – part 2”);*
 3. *The public forum or “Yarning Circle” on the morning of Tuesday 15 November 2022 (“Yuendumu 15 November 2022”).*
3. *The document entitled “Coroner’s Visit to Yuendumu”, which was kindly prepared by the Parumpurru Committee setting out what would take place and which was distributed prior to the Yuendumu visit. We note that there was no opposition, or alternative suggestion from any party.*
4. *Relevant email correspondence between the parties about the visit, and the transcript of the discussion of what would take place, and what would be recorded, as outlined by Mr McMahon SC on 4 November 2022, which confirmed, without objection from any party, that, beyond the public ceremony and forums, the visit to Yuendumu was not anticipated to be the subject of ‘recording’. We note that that was the basis upon which each party was invited, and indeed encouraged, to attend all aspects of the Coroner’s visit to Yuendumu.*

With respect to the matters that were recorded, we note the specific comment by Ms Hollway on behalf of Parumpurru that: “We do not of course anticipate such recordings going to matters which might be regarded as disputed facts. Rather, they may go to areas of cultural knowledge of value to the inquest.”

Please note that the Counsel Assisting team does not propose to tender any recordings from the Yuendumu visit, given that the statements made are not being received as evidence and do not bear upon the Coroner’s determination of any contentious factual issues in the inquest.’

39. The nature of the response given by Ms Walz gave rise to further concerns.
40. *First*, the response provided at point 2 of the email purported that further recordings were made of the proceedings but that only the recordings of events ‘understood by the parties to be appropriate for recording’ would be provided. The difficulty with that approach is that consent to conduct the inquest in a particular way could only be given if there was reasonable forewarning of at least the fact that issues concerning Mr Rolfe – particularly of the kind described above – was made known to him.
41. *Secondly*, the redaction of the recording of the proceedings, regardless of whether the Coroner intended to take the events occurring on those dates into account, raised a concern

about the transparency of the inquest, particularly in light of the unforeseen events of 15 November 2022 (that is, unforeseen by Mr Rolfe and his representatives) and the nature of those discussions.

42. It was apparent from the recordings of the proceedings on 15 November 2022 that a significant amount of audio from the day had not been provided. Of the entire day, 1 hr 43 minutes of audio was provided, which appeared to be a recording of the session that had been reported on by NT News on 15 November 2022. The audio gave rise to a number of further concerns.
43. *First*, the commencement of the session began with a person pointing out issues on the whiteboard, which reflected the photograph that had been posted on the Channel 9 Facebook page. Thus, the comments of community members were not ventilated “on the sudden” such that they could not reasonably have been anticipated at least at some juncture during the meeting, and therefore permitting the Coroner to distance herself from any perception that a fair minded lay observer might form about whether the topics and opinions being addressed might be relevant to a consideration of the issues raised by the inquest.
44. *Secondly*, notwithstanding the representations made by Ms Walz that the recordings would not be tendered in the proceedings, and it follows, considered by the Coroner, Counsel Assisting made representations to persons in the community session that were to the contrary.
45. During a session with the community, a community member enquired about ‘something from the ABC’ to the effect that ‘The conversation the Coroner had in Yuendumu will not form part of the formal inquest evidence, which will resume on Wednesday.’⁴⁰
46. In response to that enquiry, Counsel Assisting said:⁴¹

“Robin. Can I tell you that, poor media, they’re going to give us the recordings and all of it will be taken into account. So you said very important to support.”
47. As can be seen from the Channel 9 photographs of this discussion, the Coroner was seated next to Counsel Assisting and, so far as Mr Rolfe is aware, did not seek to correct or clarify the statement of Counsel Assisting.

⁴⁰ Recording of 15 November 2022, [42:40].

⁴¹ Recording of 15 November 2022, [44:07].

48. The affirmative language used by Counsel Assisting, as if consideration of “all” discussions was a *fait accompli*, is noteworthy.
49. *Thirdly*, it is apparent from the audio that Mr Rolfe’s conduct, the purported injustice surrounding the outcome and conduct of his criminal trial, and the consequences that should follow for his conduct, including his termination as an NT Police Officer, was not an infrequent discussion.⁴²
50. *Fourthly*, notwithstanding that Mr Rolfe’s requests for information about the nature of redactions (length and location within the audio provided) having gone unanswered, there is a passage in the audio which, although somewhat unclear, commenced with a concern by a community member about the influence of Mr Rolfe, his wealth, and his maintenance of employment within NT Police. Counsel Assisting then can be heard saying:

“Otto, the Coroner can”

51. The audio then breaks and appears to jump to a response from a community member and the background noise when Counsel Assisting is heard to speak, as compared when the community members re-commences speaking appears to change – it is not clear whether this is reflective of a redaction.
52. *Fifthly*, Counsel Assisting, in response to concerns raised about the bias of the trial Judge in Mr Rolfe’s trial for murder, said:⁴³

Dr Dwyer: So I might need to. I wasn't involved in that criminal trial, so. But I can find out more information now.

Community member: If he wasn't there.

Dr Dwyer: I wasn't that one. But what I think happened but I will find out from you is that there are a number of judges from the NT who were involved in early arguments about whether evidence could go in or what you could hear from the trial. And so by the time they got to the actual trial, I think they wanted to go outside the NT. I don't know why they went to Canberra, I don't know. But I can ask for you to find out.

Community member: Find out and you'll find out. And you bring them back here and we want to spear him. Yeah.

Dr Dwyer: What I'm told. What I am told that that judge Judge Burns. I don't know that fella but he does sit on a number of trials in in Northern Territory. So not just, not just this one for Constable

⁴² Recording of 15 November 2022, [14:15] – [15:17]; [1:20:08] – [1:33:32].

⁴³ Recording of 15 November 2022, [1:22:51] – [1:24:01].

Rolfe but on other trials. But what we're hearing from you is because he came from Canberra and Constable Rolfe's family come from Canberra and they got a lot of money that felt really not good for Warlpiri people and I understand that.

53. Counsel Assisting was undoubtedly seeking to be being polite by expressing an understanding for the community member's views about the trial of Mr Rolfe but the making of offers to obtain information for community members in response to their concerns about the injustice of Mr Rolfe's trial is liable to create an impression that the purpose of the inquest is to meet concerns expressed by the Yuendumu community, or justice for that community, including a desire to see Mr Rolfe at least professionally punished. Moreover, as with all the statements made by Counsel Assisting during this session, they seem likely to have been made whilst in the direct company of the Coroner.

54. *Sixthly*, Counsel Assisting made further comments that give rise to the same concern.

55. Early in the recorded session, Counsel Assisting said:

‘And one thing we did really hear yesterday is that the community wants justice. And what we've really heard that loud and clear and and I really understand that. And we need to hear what the community thinks justice will look like. *We will see what we can achieve together.*’

56. Shortly afterwards, Counsel Assisting said:

‘Can I ask a question, Uncle? If we heard yesterday about what payback means in Warlpiri culture, and that was really important to hear. If you put spearing to one side, is there anything else that payback or justice could involve? For example, are there better services for the community? Is there more things that you would like that would be part of justice that you could tell us about?’

57. That query prompted a response from Samara-Fernandez Brown, a witness in this inquest, which was reproduced in part within the article by NT News on 15 November 2022:

‘For me personally, because Rolfe hasn't been convicted and for us, the court process is really difficult because there was so much evidence on his part that was left out and that's only come out in the coronial inquest and that's been really difficult for us to understand. And so I think for me, speaking on myself and from conversations I've had with family, I feel like the bare minimum in terms with Rolfe personally is for him to lose his job. He can't be working with people because it's very clear that he's not safe, particularly with working for Indigenous people. So that's my personal opinion on a start to justice. But it's certainly not what we wanted initially because from our perspectives, we truly believed that he should have been convicted and put away for everybody's safety. But since that's not possible anymore, the bare minimum is for him not to be working. As a police officer. And I think anywhere in Australia, not just the Northern Territory.’

58. The response to requests for information in relation to the nature of the redactions made by Counsel Assisting Team has amplified the above concerns.

59. *Seventhly*, the scope for redaction of recording that has been provided on 15 November 2023 is unclear. In a community session, where people are sitting around a circle and being recorded, it is difficult to understand what opportunity the Coroner would have had for a ‘private conversation’ with the Counsel Assisting team. That is important because, by reference to time logs of this particular event, which have been provided by the Counsel Assisting team, there would appear to be approximately 3 minutes of audio that has been redacted from the session, assuming that the time logs are accurate.

60. Mr Officer responded to Ms Walz’ email of 14 February 2023 that day, in which he enquired:

‘Thank you for uploading these. I haven’t yet listened to the recordings, but to avoid confusion so I can follow when I do, what you are saying is that the recordings have been edited? If so, can you please confirm how much has been edited, when they were edited, and by whom, and the legal basis upon which they were so edited?’

I also note that you refer only to audio recordings, are there not any video recordings?’

61. On 17 February 2023, Ms Walz replied to the above email from Mr Officer, in which she responded:

‘I can confirm the assisting team is not in possession of any video recordings of the Yuendumu visit.

Parties have been provided with audio recordings of the three significant public forums that took place at the Yuendumu visit. As indicated below, editing was conducted by the assisting team to remove irrelevant or private conversations, including those between the Coroner and her legal team. The edited portions are short and typically last less than a minute.

In relation to your question about the legal basis for editing, I note that the Coroner’s visit to Yuendumu was not conducted to take evidence or form part of the Coroner’s determination of contentious evidence in the inquest. The recordings will not be tendered by the assisting team. It was made clear in advance of the hearing that private conversations would not be recorded.

If there is some concern about the editing process, the Coroner is open to a written request to obtain a transcript so that the length and reason for each edit can be identified with more precision; however, I note that such a process would involve some significant time and expense and that it is unconventional for transcripts to be made of coronial views and cultural learning events which do not form part of the evidence before the Court.’

62. On 16 August 2023, Mr Officer filed an application for the Coroner to provide recordings relating to the Yuendumu Visit and materials relating to, directly or indirectly, the decision to amend the non-publication order on or about 23 March 2023.

63. On 19 August 2023, Mr Officer sent an email to Ms Walz seeking confirmation of the nature of the claim of legal professional privilege made by the Coroner over materials concerning her decision to amend the non-publication order. He also noted:

‘Additionally, I note that in relation to the redactions of the Yuendumu recordings, we are not advised of the precise location of the redactions within the audio, or the length of those redactions. Can you please provide me with these details so that I can relay the same to counsel.’

64. On 20 September 2023, Ms Walz replied to that particular aspect of Mr Officer’s email above by noting:

*‘In relation to the recordings from the Coroner’s visit to Yuendumu, I **attach** my email of 17 February, which responded to your questions concerning the editing of the recordings.’*

65. Absent confirmation of the length and location of redactions in the recordings provided, there is no meaningful way for Mr Rolfe, and his representatives, to consider the extent to which the record of the proceedings has been redacted and whether the basis for those redactions is appropriate.

D The amendment of the non-publication orders on or about 23 March 2023

66. On 24 March 2023 at 7:36am (ACST) Constable Rolfe wrote to Ms Walz querying the amendment:

Dear Ms Walz,

I refer to your email below and respond as follows:

1. It is not clear why materials relating to my client Constable Rolfe are being released when he has yet to give any evidence beyond that before his claim of privilege, and particularly when those materials have not yet been canvassed with him, if they are to be. So it seems that it is premature to release those materials to the website.
2. Secondly, can you please confirm the basis upon which the non-publication order has been amended to remove the words in 2a of the NPO “**for the purposes of these coronial proceedings**”? In other words, has an application been made by any of the parties to so amend, if so who and when, what submissions were made, and what was

the basis for the amendment? We did not receive any notice that it was to be so amended.

Yours faithfully,

Luke Officer

(emphasis added)

67. On 24 March 2023 at 10:50am (ACST), Ms Walz responded informing the parties that the Coroner had withdrawn the amendment, as follows:

...

The Coroner is content to withdraw the amendment, since parties have not had a chance to comment. We are of the view that the words of the current NPO are confusing, and in any event, it is no longer appropriate that there be a blanket non-publication order over the brief. Parties are advised that the NPO dated 25 November will be rescinded at 9am on Tuesday 28 March. Her Honour is prepared to consider making an NPO over individual items upon application. Please note that this is separate to the process for putting items onto the website, where more time may be required to redact items.

To be clear then, the NPO of 25 November 2022 (the blanket NPO over the coronial brief) remains the same for now. That NPO will be rescinded at 9am on 28 March 2022. At that time, the Coroner will make an interim NPO over individual brief items that we have been notified of, to allow for written submissions with respect to those individual items.

68. On two occasions, following the receipt of that email from Ms Walz, Constable Rolfe wrote seeking clarification in the following terms:

26 March 2023:

It follows, in relation to item 2, I still remain confused. Your email does not answer my earlier query, specifically, the basis upon which the non-publication order has been amended to remove the words in 2a of the NPO “for the purposes of these coronial proceedings?” In other words, has an application been made by any of the parties to so amend, if so who and when, what submissions were made, and what was the basis for the amendment?

I am also confused because the amendment has now been withdrawn, and yet the NPO is to be revoked in its entirety? How is the amendment withdrawn when it has already been made, and the order circulated?

27 March 2023 6:12pm (ACST):

Dear Ms Walz,

Can you please confirm you have received my email below and when a response will be forthcoming? Can you also confirm that more time is going to be provided for a response and that the NPO will not be lifted tomorrow until the issues are addressed, and my client has a proper time to consider any application for a further NPO?

69. On 27 March 2023 at 7:06pm (ACST) Ms Walz responded to those emails but it did not respond to the substantive query. The email was as follows:

Good evening Luke,

My apologies for the delay replying to your email. I have been in Court all day, as I am in an inquest out at Lidcombe this week (and was last week). Like you, Peggy, Paddy and I are all juggling other matters and commitments. I will endeavour to speak with Peggy tomorrow about your email below.

In the meantime, I have managed to speak with the Coroner today and there is no difficulty with you having the additional time that you seek. I confirm that the NPO will not be rescinded tomorrow as indicated. I understand that you return from leave on 3 April. The Coroner is happy for you to have until **11 April** to respond to the proposal to rescind the blanket NPO. The same extension is granted to all parties.

70. On a third occasion on 11 April 2023, Constable Rolfe wrote to Ms Walz seeking clarification as to the amended NPO, as follows:

Dear Ms Walz,

I write in relation to the below, as requested by todays date;

1. Firstly, is there any further information that can be provided with respect to my request in relation to item 2 in the emails below that I have sent relating to the amendment, and then subsequent withdrawal of that amendment of the NPO that you said you would speak to Peggy and Paddy about?

...

71. Ms Walz responded confirming that a directions hearing was scheduled for 28 April 2023 to deal with matters concerning the NPO.
72. In the lead up to directions hearing on 28 April 2023, Mr Officer again wrote an email to the Counsel Assisting team querying purpose of the amendment of the non-publication order, and again, for a fourth time, raising the same query as to the amended NPO, as follows:

Dear Ms Walz,

It has now been at least four occasions that I have asked you to inform my client why the Coroner decided to amend the non publication order, then withdraw the amendment after it was questioned by me, by reference to the email correspondence dated 23 March 2023 and following.

Yet, we have just received two emails in quick succession from you relating to purported new material the Coroner intends to receive, without any notice to my client.

Your emails do not provide an answer to those matters I raised above, which had their origin over a month ago. When should I expect a response?

In any event, these (*sic*) materials are objected to.

My client reserves all of his rights to make any application that arises from these developments.

Yours faithfully,

Luke Officer

73. At the directions hearing on 28 April 2023, Counsel Assisting addressed the Court in relation to the amendments to the non-publication orders, during which she disclosed that:⁴⁴
- a) she suggested to the Coroner that the phrase ‘for the purposes of the Coronial proceedings’ in the non-publication orders was confusing;
 - b) that this was “particularly apparent” to her because even though the NT Police Professional Services Command (NT PSC) was specifically listed in an original non-publication order that the non-publication order did not apply to or prevent access to, the NT PSC were not involved in the inquest or were not involved for the purposes of the inquest. In light of that, “the phrase ‘for the purpose of the Coronial proceedings’” did not make any sense to her;
 - c) that if NT PSC had concerns about breaches of discipline based upon material from the coronial brief, then “the interests of justice requires that they be in a position to review that action, or to review that conduct and take action if required. And it couldn’t be the case that the Northern Territory non-publication order of the Coroners Act interfered with that work”;
 - d) that the deletions of the words from the non-publication order were not “part of a submissions process” and that there had been “no formal application” to the Coroner and that it had been her suggestion to the Coroner to clear up “the obvious confusion”;
 - e) that “[she] regret[s] the confusion caused by that, your Honour. My intent was to

⁴⁴ TS 4905 – 4909.

suggest a clarification, not a change to the non-publication order. And I should have suggested that parties have the opportunity to comment, even if it was a clarification rather than a change”;

- f) that her “intention was then and is always to allow procedural fairness to all parties. So that was an administrative error on [her] part”
- g) that the error “was corrected as quickly as humanly possible. In any event, the order was not published on the website. We are not aware of it affecting any rights or interests”;
- h) that she “took full responsibility for it and [was] conscious that [the Coroner] is always, always very mindful in this court it is shown that all parties have procedural fairness; and
- i) that, “in [her] respectful submission, the parties have not been given an ample opportunity to comment on the non-publication order. But in any event, the issue of an amendment to the existing order is now moot, since the whole of the broader non-publication order would be gone. It would be replaced by a much more restricted order. And if your Honour grants that order, then it would be in the terms that I propose.”

74. When Mr Officer rose to address the Coroner in relation to his concerns about the potential breach of non-publication orders by NT Police, and his requests to understand how it came about, the Coroner declined to hear further from him on that issue at that time as, in her view, it was not relevant to the inquest.⁴⁵ When the solicitor for Mr Bauwens rose to address the issue, the Coroner again dismissed the relevance of any further enquiries in relation to a breach of the non-publication orders or their amendment:

‘Why? How is it relevant to this Inquest? There was a clarification or correction attempted to be made because there appeared to be an inconsistency in the terms of the non-publication order and when it was brought to our attention that the parties hadn’t been consulted, it was immediately rescinded and now the non-publication order is going to be revoked and replaced. *It is not a matter for this Inquest or an issue for this Inquest that there be any further enquiries made. An explanation has been given.*’

75. Rather than allaying the concerns about the amendment of the non-publication order, the submissions of Counsel Assisting in relation to the circumstances of the amendment give

⁴⁵ TS 4294 – 4297.

rise to an issue about the existence of a relationship between Counsel Assisting (or her team) and the Coroner and whether it undermines and is incompatible with the roles and relationship envisaged by the *Coroners Act* 1993 (NT).

76. *First*, the acceptance of a submission by counsel assisting in relation to an amendment that had the real capacity to affect Mr Rolfe was a matter that evidently required consultation with the parties.
77. *Secondly*, the submissions of Counsel Assisting approach the apparent denial of procedural fairness in a manner that gives rise to a perception that the failing arose as a consequence of *her* decisions and as though the decision to amend the non-publication order was not an issue over which the Coroner had exercised any independent judgment or discretion.
78. *Thirdly*, when considered in the context of what had been occurring in the lead up to the amendment of the non-publication order, a concern arises as to whether the purpose of the amendment was to assist NT Police to remedy a possible defect in connection with disciplinary proceeding against Mr Rolfe, namely that it that had been commenced with reference to material on the coronial brief, in circumstances that might amount to a contravention of the non-publication orders, or were inconsistent with the implied undertakings.
79. An inference arises, as well, that the amendment was prompted by a unilateral communication between NT Police and the Coroner (through Counsel Assisting).
80. To understand that concern, it is necessary to outline the relevant correspondence between NT Police and Mr Officer over the period between 20 February 2023 and 19 March 2023 (four days prior to the confirmation of the amendment of the NPO).

Service of disciplinary notice breaches

81. On 20 February 2023, Mr Rolfe was served with a Disciplinary Notice alleging breaches of discipline relating to interviews he gave with Channel 7 and the Spotlight program.
82. On 22 February 2023, Mr Rolfe responded querying the origins of the documents relied upon in the notice of allegations.
83. On 24 February 2023 Commander Tonkin responded but did not address the queries, and instead noted the 'information was provided to a prescribed member on 19 October 2022'.

84. On 28 February 2023 Mr Rolfe responded to the allegations and questioned the propriety of the use of the Spotlight materials that PSC intended to rely upon.
85. On 26 February 2013, Mr Rolfe was served with a further disciplinary notice alleging breaches of discipline relating to an opinion piece published in the NT Independent.
86. On 8 March 2023, Constable Rolfe was served with a Notice inviting him to show cause why he should not be immediately dismissed on public interest grounds, pursuant to section 78 of the *Police Administration Act 1978* (NT).
87. Between 17 March 2023 and 19 March 2023 Constable Rolfe responded to the Notice and again raised his concern as to the propriety of the use of the Spotlight transcripts (the first use of the Spotlight materials).

NTPF Response to the concerns raised by Mr Rolfe's representatives

88. On 18 March 2023 Superintendent Hill responded to that submission and made the following remark:

...

On 24 November 2023 (*sic*), Coroner Armitage pursuant to s.42 *Coroners Act 1993* amended her original orders which prevented disclosure of material:

See 2(a)(ii) & (vi) [Amended-non-publication-order-from-Nov-24.pdf \(nt.gov.au\)](#)

See page 55 of 56 items 20-46 through to 20-55

Following the amended order, material was provided to the Professional Standards Command for me to consider if a breach of discipline had occurred. On 26 February 2023, I the Prescribed Member, determined a s.76 Breach of discipline had occurred and signed a s.79 Notice which I served upon your client via you on 27 February 2023.

...

89. On 18 March 2023 Constable Rolfe provided further Submissions in relation to this issue, specifically noting the following:

Dear Detective Superintendent Hill,

I am aware of that amended non-publication order, but that is a separate issue as that controls publication of material that is on the brief, in other words a “suppression order.”

The key words in that amended non-publication order are that use of material is permitted

“a. to and between the following people **for the purposes of these coronial proceedings:**”

The use to which is now made of the transcripts is the concern that I have raised, which might be for an improper purpose and unlawful, or a breach of the Harman undertaking - that is;

...

90. On 18 March 2023 Constable Rolfe further addressed the issue relating to the NPO in the following terms:

Dear Detective Superintendent Hill,

There also appears to be a further problem in reliance upon the amended non-publication order. In your email below you state it was following the amended order (24 November 2022) the material was provided to PSC for you to assess, yet the date of discovery is earlier in time (19 October 2022). Therefore, who discovered it on 19 October 2022, how that occurred and how it was disseminated is all relevant, because on one possible view, had it been provided earlier than the amended order that might constitute non-compliance with the non-publication order, which creates further issue as to legality of use.

Yours faithfully,

Luke Officer

91. On 18 March 2023 Superintendent Hill responded in the following terms:

Hello Mr Officer

As you are likely aware, prescribed members form part of the coronial investigation team assisting the Coroner and NTPFES employees & prescribed members are assisting Counsel for the Commissioner of Police during coronial proceedings. Please note that I do not intent (*sic*) to enter into further correspondence over the matter and repeat my earlier advice that is a further submission is to be made, it will need to be by 1600 hours today.

...

92. On 19 March 2023, Constable Rolfe made a final submission, which inter alia, included the following:

Dear Detective Superintendent Hill,

As indicated yesterday if there was anything further to provide I would do so by 9:00am.

There is one matter to provide further clarification for the avoidance of doubt, and two further matters to raise:

1. The Harman undertaking and the Coroners approval to amend the non-publication order are different and separate matters as to what use can be made of material. It seems the spotlight material is likely to have been provided under coercive power of subpoena, and that needs to be confirmed. The material is not capable of use if it infringes the Harman undertaking. A non-publication order, and in its terms, only permits use for the purpose of the coronial.

I also query why Commander Tonkin declined to provide this information when first requested weeks ago?

...

93. The background circumstances would found a concern in the mind of a fair minded lay observer that the purpose of the Coroner's amendment of the non-publication orders was connected with the concerns raised with NT Police about the unlawful use of information obtained from the coronial brief and that the purpose of those amendments was to assist with rectifying a defect with the disciplinary proceedings that had been commenced against Mr Rolfe and to otherwise facilitate broader disciplinary actions against him.
94. Moreover, it was of concern that, although the Spotlight materials related to an interview participated in by Mr Rolfe with Channel 7 about events concerning this inquest, the disciplinary action against Rolfe for doing so is not a matter that, either directly or indirectly, arises for consideration by the Coroner in the exercise of her statutory functions. Of itself, this raises concerns about a possible connection between the decision to amend the non-publication orders and the Yuendumu community's desire for Mr Rolfe's employment with NT Police to be terminated, being a matter which by reasons of the interactions at Yuendumu, a fair-minded observer might think that the inquest had undertaken to consider as part of 'justice for the community'.
95. The background to the amendment gives to an apprehension that the Coroner's purpose, either solely or together with Counsel Assisting, was to assist in remedying a potentially defence disciplinary investigation against Mr Rolfe. Moreover, it gives to an apprehension that the Coroner may approach her statutory obligations in a manner that reflects a preference for the objectives of NT Police at the expense of the rights and interests of Mr Rolfe.
96. The concerns identified immediately above, and at paragraph 38 – 65 above, underscored the basis of the application for documents on 16 August 2023, in relation to what was

described in the application as ‘Materials relevant to Spotlight program/NPO’.

97. The response to Mr Rolfe’s requests for information relating to these issues⁴⁶ has not assuaged his concerns about the partiality of the Coroner, which arise against the background summarised in detail above.
98. On 16 August 2023, Constable Rolfe sent the Request for Documents to Ms Walz via email.
99. On 19 August 2023, Mr Officer wrote to Ms Walz seeking confirmation that she had received that application.
100. On 29 August 2023, Ms Walz wrote to Mr Officer as follows:

Dear Mr Officer,

I refer to your email of 16 August attaching an “application for material”.

As you would appreciate, your application is analogous to a subpoena in *inter partes* litigation. Of course, by contrast to *inter partes* litigation, this is an inquisitorial jurisdiction, rather than an adversarial one.

Your application and email provide no explanation as to why the information is sought. It is not readily apparent from the material requested what legitimate forensic purpose those documents would serve or how they are relevant to the proceedings.

In particular:

a. in relation to your request 2.1 and 2.3, on 18 October 2022 we served all parties with all of the Spotlight footage of your client that was produced by Channel 7, and it is not apparent why correspondence relating to the transcripts of that footage has any relevance to the coronial proceedings,

b. in relation to your request 2.7, I **attach** a copy of the summons,

c. in relation to your request 2.8, my emails of 14 February 2023, and again to you on 17 February 2023 addressed the cultural event at Yuendumu on 14 and 15 November (to which all parties were invited and about which recordings have been provided to you). It was made clear in advance of that event that recordings would be limited and would not be tendered in proceedings. The nature of the event was outlined on the record on 4 November, and

d. while there is no apparent forensic relevance to your request for correspondence between the Coroner and Counsel Assisting, that correspondence is subject to legal professional privilege in any event.

The matter is next listed in the week of 23 October 2023, when we will hear the evidence of Mr Rolfe and Sgt Bauwens. As you are aware, and with no criticism intended, by that time the proceedings will have been delayed for almost one year to allow for all legal

⁴⁶ Issues that directly affect his interest in the inquest.

avenues of appeal to be exhausted by your client. It is essential that we finish the evidence in that week, and we anticipate being pressed for time, such that stopwatch orders may be required.

If you consider it necessary to press this application, her Honour requires written submissions to be filed by no later than **6 October 2023**. Those submissions should:

- a. identify, expressly and precisely, the legitimate forensic purpose for seeking the material;
- b. in particular, identify how it is ‘on the cards’ that the requested material could assist her Honour in the discharge of her statutory functions, particularly identifying the cause and circumstances of the death of Mr Walker; and
- c. any relevant case law supporting your application.

Her Honour proposes to circulate your submissions to all parties and will provide those parties with an opportunity to be heard if they so wish. Any submissions in response should be provided by **13 October 2023**.

Finally, you will recall that at the conclusion of his evidence on 16 November 2022, your client was advised that he had not been released from his summons, and he was still obliged to appear as required for further examination. Your client indicated that he understood that he would be advised, through you, about when he would be required to appear for that further examination. ***Would you please confirm that you have advised him that he is required to appear on 23 October for that purpose?***

Yours faithfully,

Maria

101. On 15 September 2023, Mr Officer wrote to Ms Walz seeking confirmation of the basis upon which the claim of legal privilege was asserted.
102. On 19 September 2023, having received no reply, Mr Officer again wrote to Ms Walz seeking confirmation of the basis upon which legal professional privilege was asserted as well as requesting the location of the redactions within the recordings of the Yuendumu Visit and the length of those redactions.
103. On 20 September 2023, Ms Walz replied to Mr Officer’s email, as follows:

Good afternoon Luke,

Thank you for your email below.

In relation to your request that we identify the basis of the LPP claim, I advise that the Coroner will respond to your application once you have provided written submissions that answer the three questions set out in my email of 29 August. Until the Coroner is satisfied that there is an entitlement to the documents, it is not necessary for her to respond further.

In relation to the recordings from the Coroner’s visit to Yuendumu, I **attach** my email of 17 February, which responded to your questions concerning the editing of the recordings.

Kind regards,

Maria

104. There are two issues of concern arising from this response.
105. The first issue is that access to the court file and records is governed by Part 4, Division 2 of the *Local Court Act 2015* (NT) by virtue of s.11 of the Coroner's Act, which picks up and applies that division as if a reference to the 'principal registrar' was a reference to the 'coroner's clerk' and as if a reference to 'proceedings in the Local Court' were a reference to 'an investigation conducted by a coroner'.
106. In this context, although s.3 of the Coroners Act defines 'investigation' to include an 'inquest', the Local Court Act provisions relating to records and files of the Coroner do not apply only to records and files of the inquest. Rather, they apply more broadly to an investigation conducted by a Coroner.
107. Section 27(1) of the Local Court Act provides that the coroner's clerk 'must ensure that proper records are kept in relation to proceedings in court', and s.27(2) provides that the 'records must include case files for all [investigations conducted by a Coroner].'
108. Section 28(a) – (h) identifies the minimum content of a case file that must be kept by the coroner's clerk. Relevantly, sub-paragraph (h) applies to investigations conducted by a coroner so that it reads: 'all information that is reasonably necessary for the proper management of an investigation conducted by a coroner.'
109. Allowing for differences between the nature of adversarial judicial proceedings with the investigative functions performed by a coroner, the breadth of information 'that will be reasonably necessary for the proper management' of a coronial investigation will necessarily be far broader than information that is reasonably necessary for the proper management of adversarial judicial proceedings in the Local Court.
110. The material sought (save for the recordings of the Yuendumu proceedings), by Mr Rolfe's application dated 16 August 2023, falls within sub-paragraph (h), in that:
 - a) the correspondence of Counsel Assisting in relation to matters concerning, whether directly or indirectly, the inquest, are necessary for the proper management of an investigation conducted by a Coroner. That arises as a consequence of the fact that

Counsel Assisting's role in this inquest arises as a consequence of her appointment 'to assist' the Coroner for the purpose of the conduct of the inquest. Necessarily, correspondence sent and received by Counsel Assisting in association with her functions in this inquest are records that are 'reasonably necessary' for the proper management of the investigation conducted by the Coroner; and

- b) for similar reasons, correspondence between Counsel Assisting (and the Counsel Assisting team generally) and the Coroner in relation to the inquest again is information that is necessary for the proper management of the investigation conducted by the Coroner.
111. By virtue of s.29, it is submitted Mr Rolfe is entitled to information falling within subparagraph (h) of s.28.
 112. If the material does not fall within s.28(h), the Coroner may nonetheless permit access to the records sought, on application, on such conditions as her Honour thinks fit, by virtue of s.31A(2) – (3), which relates to 'any document, information, recording or thing that is a Court record or part of a Court record and is not part of a case file, judgment, order or exhibit.'
 113. In terms of the Yuendumu recordings, the Coroner may grant leave to access a recording mentioned by virtue of s.29(1)(b).
 114. Whether the documents fall within s.28(h) or the broader category of materials contemplated by s.31A of the Local Court Act, it is submitted that on a proper reading of Part 4, Division 2 of the Local Court Act, there is no scope for reasoning that an application for materials does not turn on whether the Coroner is satisfied that it is 'on the cards' that the provision of the materials would materially assist *the Coroner* in the discharge of her duties.
 115. The second issue arises from the claim of legal professional privilege that has been preserved by the Coroner, through Ms Walz, in her emails dated 29 August 2023 and 20 September 2023.
 116. Particularly when considered in light of other issues noted in these submissions, the assertion of legal professional privilege by the Coroner involves the assertion of a relationship with Counsel Assisting that (in Mr Rolfe's respectful submission) is not

contemplated by the Coroner's Act.

117. Before addressing the implications of that relationship and how it bears on questions of an apprehension of bias, it is necessary to first address why the relationship maintained in this inquest between the Coroner and Counsel Assisting is not contemplated, nor permitted, by the Coroners Act.

E The role of Counsel Assisting appointed pursuant to s.41(2) of the Coroner's Act

118. The modern approach to statutory construction is purposive and requires a provision (indeed, the entire Regulation) to be read as a coherent and harmonious whole. In *SZTAL v Minister for Immigration and Border Protection*,⁴⁷ the plurality (Kiefel CJ, Nettle, and Gordon JJ) at [14] said:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely, how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical, or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

119. The starting point of the enquiry is s.41(2), which provides for the appointment of a person to assist a Coroner. The sub-section reads:

(2) A Coroner:

(a) may appoint a person to assist the Coroner for the purpose of an inquest; or

(b) must appoint a person to assist the Coroner for the purpose of an inquest into a death in custody.

120. Regulation 11 of the *Coroners Regulations 1994* (NT) requires that a person appointed pursuant to 41(2) shall be a legal practitioner,⁴⁸ and, 'if practicable, be experienced in

⁴⁷ *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 347 ALR 405.

⁴⁸ *Coroners Regulations 1994* (NT), regulation 11, sub-para (a).

coronial matters.’⁴⁹ However, properly understood, the regulation does not assist in ascertaining the scope of the activities that may be performed by a person pursuant to s.41(2). Rather, what the regulations impose is a minimum competency requirement in relation to persons appointed pursuant to that section.

121. The words ‘for the purpose of an inquest’ in s.41(2)(a) and (b) are important, particularly when considered in conjunction with s.40(3) and s.42(1) of the Coroners Act.
122. Section 40(3) permits a person who ‘in the opinion of the coroner has a sufficient interest’ to appear at an inquest and, or, be represented to call and examine or cross-examine witnesses and make submissions. Thus, the Coroners Act expressly applies the principles of natural justice, the corollary of which is that a person with a sufficient interest has both a personal interest in the duties imposed by the law on the Coroner, and a legitimate expectation that they will be heard in relation to findings adverse to the interests that a person represents⁵⁰ – which is to say, the ‘hearing rule’ applies in coronial proceedings in the Northern Territory.
123. The hearing rule will ordinarily be comprised of three minimum requirements, which were summarised by the Full Federal Court of Australia in *Commissioner for Australian Capital Territory Revenue v Alaphone Pty Ltd*:⁵¹

‘Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.’

124. In terms of minimum disclosure requirements, that obligation has been described as an obligation to disclose all ‘relevant, credible and significant information’,⁵² which is to be

⁴⁹ *Coroners Regulations 1994* (NT), regulation 11, sub-para (b).

⁵⁰ *Annetts v McCann* (1990) 170 CLR 596, 599 (Mason CJ, Deane and McHugh JJ).

⁵¹ (1994) 49 FCR 576, 591.

⁵² *Kioa v West* [1985] HCA 81; 159 CLR 550, [38] (Deane J); *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; 225 CLR 88, [14] – [18].

understood ‘as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision’.⁵³

125. Allied to the application of these principles to an inquest held by a Coroner, s.41(1) requires that, subject to limited exceptions,⁵⁴ an inquest must be conducted openly.
126. Understood in light of the s.40(3) and s.41(1) of the *Coroners Act*, ‘appoint a person to assist the coroner’ means to assist the Coroner with the conduct of an inquest in public. The words, ‘to assist’, must relate to the assistance *required* by the Coroner.
127. In that context, *does the assistance that may be required by a Coroner include instructing Counsel Assisting to give legal advice, or otherwise receiving legal advice from Counsel Assisting, in relation to the conduct of an inquest?*
128. A construction of the Coroners Act that is more consistent with proceeding judicially, such that legal issues and questions relevant to dispositive orders are dealt with by submissions by Counsel Assisting in open court and not private and confidential advice.
129. Thus, it is submitted that, even if one possible construction of s.41(2) of the Coroners Act is that it empowers a Coroner to obtain legal advice from Counsel Assisting for the purpose of an inquest, such an outcome ought not be preferred.
130. The relationship maintained by the Coroner, on its face, is inconsistent with the assistance that may be permissibly provided by a person appointed pursuant to s.41(2) of the Coroners Act. Indeed, a lawyer-client relationship is underlined by confidence and trust. Those characteristics of themselves raise a reasonable apprehension that the Coroner may approach questions of law and fact in this inquest in a way that is partial to the views expressed by *her legal advisor(s)*.
131. Moreover, to what end has that relationship impacted upon the consideration of disputed issues concerning Mr Rolfe. The claim in relation to the amendment of the non-publication order is an example of how that relationship may have manifested in relation to the Coroner’s conduct of the inquest in a way that affects Mr Rolfe. In the absence of

⁵³ *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 95 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

⁵⁴ Section 41(2) of the *Coroner’s Act* permits the closing of the inquest to a person or class of persons, if they think fit, for the administration of justice, national or personal security.

production of the communications sought and those communications assuaging the concerns raised, a fair-minded observer might apprehend that the Coroner's relationship with Counsel Assisting might cause her to bring an impartial mind to the discharge of her functions in this inquest.

132. However, the relevance of that relationship to the broader context also gives rise to a number of further concerns that a fair-minded observer may have about whether the Coroner may approach the issues in this inquest in a way that is impartial.

G Conclusions

133. Throughout the period in which these proceedings were held in Yuendumu, several exchanges occurred between Counsel Assisting and members of the community. Those exchanges give rise to a perception that the views of community members during those proceedings would be 'taken into account'. The views expressed included a view that Mr Rolfe's employment as an NT Police Officer must end.

134. Mr Rolfe has requested information about those events to understand precisely what occurred and the entire context in which those exchanges occurred. That information has not been fully disclosed.

135. So far as the facts and circumstances relating to the amendment to the non-publication order are known to Mr Rolfe, they give rise to an inference and perception that:

- a) the amendment was made as a result of unilateral communications with NT Police; and
- b) the amendment was apt to assist NT Police to pursue disciplinary proceedings (believed to be in the interests of justice) to the detriment of Mr Rolfe and in furtherance of the expressed desire of the Yuendumu Community, namely, that Mr Rolfe's employment with NT Police be terminated.

136. The explanation given by Counsel Assisting in relation to the amendment of the non-publication orders properly acknowledged the failing of procedural fairness but, in emphasising that what occurred was the result of beliefs and decisions made by Counsel Assisting, suggests an involvement in the decision-making that makes it difficult to separate the Coroner and Counsel Assisting in relation to the impression created by their words and conduct.

137. The difficulties suggested by that explanation are compounded by the assertion of a claim of legal professional privilege between the Coroner and Counsel Assisting, leading to an impression that the Coroner may be in receipt of legal advice on a confidential basis which may or may not be co-extensive with submissions made in open court.
138. Importantly, the impressions relating to Counsel Assisting's sympathy for the community's perceptions of justice, when considered against the entire context, give rise to an apprehension that the Coroner might fail to discharge her functions in a manner that is impartial.
139. In these circumstances, Mr Rolfe respectfully presses his application of 16 August 2023 and, in any event, respectfully submits that there is a reasonable apprehension of bias having regard to the matters addressed in this submission.



Luke Officer
Tindall Gask Bentley
Solicitors for Mr Rolfe

True Crime Australia > Police & Courts NT

Kumanjayi Walker inquest Coroner Elisabeth Armitage speaks to family and Yuendumu community members

A leader in Kumanjayi Walker's Yuendumu community says there will be no healing until they 'spill the blood' of Zach Rolfe. The comment was made while the coroner was visiting the region.

Jason Walls

X @jas_walls 3 min read November 15, 2022 - 1:12PM



The Kumanjayi Walker coronial inquest visited Yuendumu where Territory Coroner Elisabeth Armitage was greeted by senior Warlpiri men. Video: Jason Walls

A senior Warlpiri Elder says the Yuendumu community will not be able to heal

from the death of Kumanjayi Walker until they are able to spill the blood of his killer, [Constable Zach Rolfe](#), in a form of traditional justice known as “payback”.

[Coroner Elisabeth Armitage is visiting the central Australian outback community as part of a long-running inquest into the fatal 2019 police shooting, for which Constable Rolfe was acquitted on all charges in March.](#)

While Ms Armitage toured significant sites on Tuesday, Ned Jampijinpa Hargraves told reporters traditional payback for a homicide involved an organised cultural ceremony in which “people have roles and responsibilities to the person who passed away”.

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He said the perpetrator would have the chance to have his say and the victim’s family would then decide on a punishment based on the seriousness of the crime, including spearing to both legs for the most serious offences.

“Deep in our hearts, deep in our minds, deep in the community, we want to see justice - we have not seen the blood of [Zach Rolfe](#),” he said.

“That tells us that is not the way it should have been, it tells us we have been disrespected, we as a community stand and fight for justice, parumpurru, it’s the end of the line.”



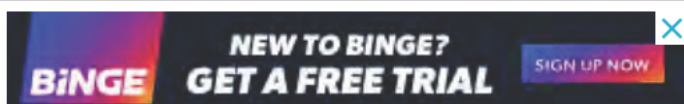
Territory Coroner Elisabeth Armitage visits Yuendumu during the inquest into the death of Kumanjayi Walker. She is pictured outside house 51 with counsel assisting Maria Walz and Peggy Dwyer. Picture: Jason Walls

Mr Hargraves said the Yuendumu community remained “very, very angry” and disgusted by racist text messages between Constable Rolfe and other officers that emerged during the first two months of the inquiry.

“They’re not satisfied (with the trial that) happened in Darwin, they’re not happy about what had happened, like what the stories from the (inquest),” he said.

“When they read all those letters and the people that spoke, all the policemen, it is so disgusting, it is disgusting.

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“This is the thing that we in the community are thinking: How come he’s still in the job? How come he’s still in the NT?”



House 511 is know as the memory house. It is where Kumanjayi Walker was shot by Constable Zach Rolfe. Picture: Jason Walls

During a yarning circle meeting with community members on Tuesday,

counsel assisting, Peggy Dwyer, asked “if you put spearing to one side, is there anything else that payback or justice could involve?”

Mr Walker’s cousin, Samara Fernandez-Brown, said “a start” towards justice would be for Constable Rolfe “not to be working as a police officer anywhere in Australia”.

“For us the court process was really difficult because there was so much evidence on his part that was left out and that’s only come out in the Coronial inquest and that’s been really difficult for us to understand,” she said.

“Speaking for myself and from conversations I’ve had with family, I feel like the bare minimum in terms of Rolfe personally is for him to lose his job, he can’t be working with people because it’s very clear that he’s not safe, particularly with working with Indigenous people.”

Constable Rolfe is due to give evidence in the inquest for three days from Wednesday but is expected to be excused early due to a pending legal challenge to the scope of his evidence in relation to the texts.

As the second day of community meetings with Mr Armitage got under way, Mr Hargraves said Elders were still undecided about whether the inquest would lead to permanent change.

“The feeling that I got from the community (was) ‘Here is someone within the law, within the justice (system), here is someone that maybe we can trust her, maybe not’,” he said.

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“We’re still unsure to be honest but we know someone is listening, someone is listening, and that someone will take the message out and deliver it to the people right across the world.

“We no longer want to hear you saying to us ‘It’s going to come again and we’re going to say the same thing, we’re going to get together again’ and then what has happened - what has happened? Nothing. We don’t want that.”

The inquest continues on Wednesday with the Supreme Court due to hear arguments next week on the scope of questions Constable Rolfe can be compelled to answer.



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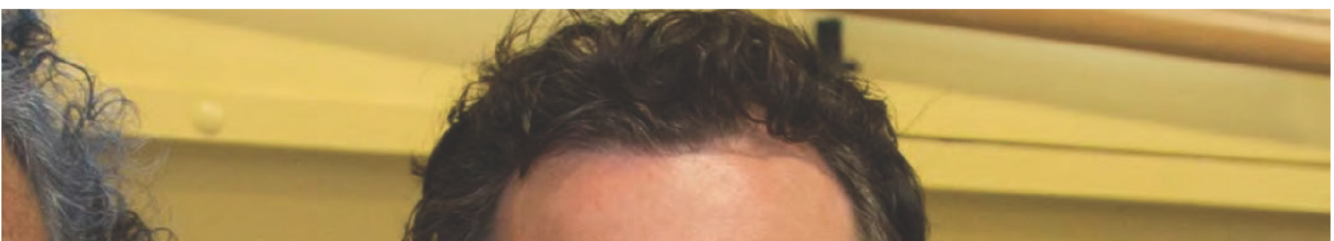


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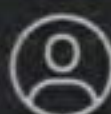
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Zach Rolfe's legal bid to avoid questions at Walker inquest rejected

A Supreme Court judge has handed down her ruling on Zach Rolfe's refusal to answer questions at an inquest into the death of Kumanjayi Walker, describing an alternative outcome as 'absurd'.



Jason Walls

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@jas_walls 2 min read December 18, 2022 - 12:05PM



Constable Zach Rolfe outside the Alice Springs Local Court on November 16 for an inquest into the death of Kumanjayi Walker. Picture: Jason Walls

Police & Courts

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Zach Rolfe will be forced to answer questions about [racist text messages](#) he sent to colleagues and the night he fatally shot [Kumanjayi Walker](#) after a last ditch bid to avoid scrutiny failed.

Constable Rolfe gave evidence at an inquest into Mr Walker's death last month but [refused to answer various questions](#) after appealing Coroner Elisabeth Armitage's ruling compelling him to do so.

In dismissing that appeal on Thursday, [Supreme Court Justice Judith Kelly](#) ruled his lawyers' arguments about why Ms Armitage should be overruled were

“untenable”.

Constable Rolfe’s legal team had contended he was entitled to refuse to answer questions that could expose him to internal NT Police disciplinary proceedings, even if granted an immunity certificate declaring his answers could not be used against him.

But in making her ruling, Justice Kelly said she agreed with lawyers for the North Australian Aboriginal Justice Agency that parliament had never intended for the “penalty privilege” to apply to Coronial inquests at all.

“Quite the reverse — it was intended to make it harder for witnesses to refuse to answer questions (and so easier for the Coroner to ascertain the truth) — not to provide witnesses with an extended ability to refuse,” she wrote.

However, Justice Kelly said even if she was wrong in supporting NAAJA’s interpretation of the law, the Coroner’s original ruling compelling Constable Rolfe to testify under an immunity certificate “must be correct”.



Kumanjaya Walker's mother Leeanne Oldfield paints Coroner Elisabeth Armitage's forehead. Picture: Jason Walls

She said his lawyers’ contention that witnesses could be compelled to implicate themselves in a crime but not an internal disciplinary proceeding “would be an absurd result”.

“It would subvert the whole purpose of section 38 since, in the case of police officers and other public officials, almost all criminal acts would also have potential disciplinary consequences with the result that the Coroner could almost never require police officers (and others) to answer such questions on the provision of a certificate,” she said.

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“Given the expressed object of the Act to implement recommendations of the Royal Commission into Aboriginal Deaths in Custody, and the key role of police officers in such proceedings — and others under the Act — and given the expressed object of the 2002 amendment to make it easier for the Coroner to ascertain the truth by limiting the ability of witnesses to refuse to answer

questions, such an interpretation would not advance the objects of either the original Act or the 2002 amendment; rather it would subvert those objects.”

Constable Rolfe is now [expected to return to the witness box](#) in Alice Springs in February, subject to any further appeal of Justice Kelly’s ruling.

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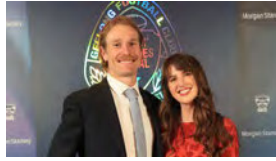
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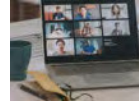
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