IN THE CORONERS COURT
HELD AT ALICE SPRINGS

No. A0051/2019

INQUEST INTO THE DEATH OF KUMANJAYI WALKER

SUBMISSIONS IN RELATION TO MATTERS CONCERNING THE ANTICIPATED EVIDENCE OF MR ROLFE

Filed on behalf of:	Mr Zachary Rolfe
Date of filing:	15 February 2024
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A Introduction and background

1. These submissions address three issues concerning the anticipated evidence of Mr Rolfe in this inquest, which is scheduled to take place between 26 February 2024 and 1 March 2024. Namely, it is Mr Rolfe's position that cross-examination of Mr Rolfe ought to be limited so that:

   (a) there be no duplication of the cross-examination of Mr Rolfe and that each party provide a list of topics on the issues in respect of which it intends to cross-examine;

   (b) to the extent that there is cross-examination of Mr Rolfe in relation to text messages that have been collated into the aide memoir with input by the parties, that counsel who is questioning first identifies the message by reference to line number, so as to afford a proper opportunity to: a) exercise a claim of privilege against self-incrimination; or b) to make any objection to cross-examination in relation to the message; and

   (c) insofar as topics or questions give rise to a claim of privilege against self-incrimination, that Mr Rolfe not be compelled to answer questions in relation to topics over which those claims will be made.

2. The first and second contentions are essentially concerned with fairness. Although the rules of evidence do not apply in an inquest, and although these proceedings are not judicial proceedings, her Honour is nonetheless required to conduct the inquest in a judicial manner, fairness being an essential dictate of that function.

3. The third contention is concerned with the power to compel Mr Rolfe to answer questions in respect of which he intends to, and does, exercise a right of privilege against self-incrimination in respect of. If a claim is so made – the foreshadowed areas in respect of which claims will be made being set out later in these submissions – then ultimately her Honour is required to consider whether it 'appears expedient for the purposes of justice' that he be compelled to answer the questions over which a claim is made. As will be addressed later in these submissions, this raises questions including scope and necessity.

4. By reference to the issues over which claims will be made, Mr Rolfe submits that it is not expedient for the purposes of justice that he be compelled to answer questions *at*

least in relation to those issues, accepting of course that the appropriate time to argue this issue may arise as each topic emerges during his evidence.

5. The balance of these submissions addresses the issues as follows:

B Procedure for cross-examination

C Relevant history of the inquest

D Privilege against self-incrimination

B Procedure for cross-examination

6. The propositions identified at paragraphs 1.1 and 1.2 of these submissions can be addressed together. Each are concerned with overriding obligations of fairness, and, in this context, to a witness who is an interested person in this inquest.

7. As to proposition 1.1, the ultimate proposition is that fairness to Mr Rolfe requires that the parties be restrained from cross-examining on topics that have already been canvassed in detail by other counsel. To permit otherwise would be oppressive.

8. It is relevant that Mr Rolfe gave evidence in his criminal trial over a period of approximately one and a half days – cross-examination occurred over the course of three half day sittings, due to COVID-19 related issues – that evidence having been confined exclusively to the primary issue in respect of which this inquest is concerned, namely, the cause and circumstance of the death of Kumanjayi Walker. It is presently contemplated that Mr Rolfe will give evidence over a period of five days – to the extent that this is premised upon parties being permitted to ask questions concerning the same subject matter, that would be unfair where the parties seeking to explore those issues have similar interests in this inquest.

9. The recent decision of Lee J in *Lehrmann Network Ten Pty Ltd (Cross-Examination)* [2023] FCA 1477, the following principles were applied with respect to cross examination:

> 7 There is no unfettered right to cross-examine a witness, at common law or since the passage of the *Evidence Act 1995* (Cth) (**EA**).
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> 8 After a detailed survey of the authorities in *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15, Young J (as his Honour then was) relevantly observed (at 22–23):

(1) The only actual "right" is the right to have a fair trial.

(2) It is the duty of the trial judge to ensure that all parties have a fair trial.

(3) In carrying out his duties the trial judge must so exercise his discretion in and about the examination and cross-examination of witnesses that a fair trial is assured.

(4) Ordinarily, a judge in carrying out his duty will see that the trial is conducted in the manner that is commonly used throughout the State, namely that witnesses are examined, cross-examined and re-examined.

(5) Where there is more than one counsel for the same party, then ordinarily the judge will not permit any more than one counsel to cross-examine the same witness.

(6) Where there are parties in the same interest, the judge will apply the same rule as stated in (5).

(7) Where the issues are complex and there is no overlapping of cross-examination and the proposal is outlined before cross-examination begins, it may be proper for the judge to permit cross-examination of one or more witnesses by more than one counsel in the same interest notwithstanding prima facie rules (5) and (6).

9 Consistently with this conventional approach, shortly following the introduction of the EA, Lindgren J accepted in *NMFM Property Pty Ltd v Citibank Ltd (No 8)* [1999] FCA 266; (1999) 161 ALR 581 (at 584–585 [16]) that ordinarily, where two or more parties are in the same interest, the trial judge's discretion will be properly exercised if not more than one counsel is permitted to cross-examine, at least on the same subject matter.

10 A decade or so later, the rationale for the rule of practice preventing two counsel from cross-examining one witness, and reasonable exceptions to the rule, were explained by the Full Court (comprising Finkelstein, Siopis and Katzmann JJ) in *Canberra Residential Developments Pty Ltd v Brendas* [2010] FCAFC 125; (2010) 188 FCR 140 (at 148 [44]–[45]), where their Honours noted:

> 44 … [the rule] can be traced back to the decision of *Doe v Roe* (1809) 2 Camp 280; 170 ER 1155. As Lord Ellenborough made clear, the rule is for the protection of the witness. He said (at 1156): "If this rule were not adhered to, a witness might be subject to the examination or cross-examination of as many barristers as were retained for the plaintiff or defendant, much time would be wasted, and great confusion would be introduced into proceedings at Nisi Prius". Put another way, the common law frowns upon cross-examination by multiple counsel because of the possibility of oppression: JD Heydon, *Cross on Evidence* (8th ed, Butterworths, 2010) p 627.
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> 45 Naturally the common law rule is subject to reasonable exceptions. One exception arises from the changing nature of litigation. A common feature of modern commercial litigation is for counsel on one side of the record to split their trial preparation on a topic by

> topic basis. The conduct of the trial often follows this split with the judge permitting both cross-examination and submissions to be divided so that counsel can deal with his/her assigned topic: see eg *Eva Pty Ltd v Charles Davis Ltd* [1982] VR 515. This can be an extremely efficient way in which to conduct complex litigation. All the judge need do in such circumstances is ensure there is no unfairness to the witness …

10. The essential premise of the above authorities referred to by Lee J in *Lerhrmann* is a policy of the common law to avoid oppression. Rather than being a technical rule of evidence, it is a rule of fairness. Where multiple parties have aligned, or similar interests, in relation to all or certain issues, that will support the need for restraint.

11. Although an inquest held pursuant to the *Coroner's Act* is not constrained by the rules of evidence,[1] the Coroner is a current judicial officer,[2] who is required to conduct an inquest in a judicial manner, and, correspondingly, there could be no question that whatever the status of any technical rules of evidence, the responsibility of guarding against unfairness remains an essential dictate of the Coroner's function.

12. For these reasons, it is respectfully requested that the Coroner rule that: (a) the interested persons represented at the inquest be so constrained; and (b) those who represent the various interests who intend to cross examine Mr Rolfe provide a list of the topics they intend to cover, including principally from Counsel Assisting in the circumstances where it is anticipated that the position of Counsel Assisting will be that [Mr Rolfe] *'is not an institutional witness,* [and] *his evidence will be led by Counsel Assisting, as is the usual course.'*[3]

13. As to the proposition at 1.2, a dossier of some 87 pages containing text messages from the mobile phone download of Mr Rolfe was circulated to the interested representatives for a response and whether there was any objection. Mr Rolfe objected to those messages.

14. Curiously, NAAJA sought to criticise Mr Rolfe's objection to the messages as a repetition of previously ruled on applications, in circumstances where objection was invited, and moreover, where those objections arise in a context where the fullness of the evidence has now emerged with clarity. It is the appropriate time for the Coroner to

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1 *Coroner's Act 1993* (NT)*, s.39.*

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

3 Email from Maria Walz to Kate McNally 12 February 2024 3:43pm ACST, re queries made by Sergeant Bauwens.

turn her mind to the assessment of relevance, particularly in the context where the issues over which claims of privilege against self-incrimination are likely to be made also overlap with the material that is objected to.

15. In any event, so that cross-examination can proceed efficiently and with the least possible interruption, it is appropriate that if any party intends to put a message to Mr Rolfe that is contained in the aide memoire, that Mr Rolfe be taken to the specific line reference in the aide memoire before it is read onto the transcript or put to the witness for comment, so the objection can be made and subsequently ruled on.

16. It readily goes without saying that by adopting the procedure requested, which is not onerous, Mr Rolfe and his counsel will be afforded the opportunity to appreciate the nature of the question being asked, and have the opportunity of properly rising to address an objection precisely, or from Mr Rolfe's perspective, exercising his right of privilege against self-incrimination and seeking a ruling in relation to whether he ought to be compelled to answer questions in accordance with s.38 of the *Coroner's Act*.

C Relevant history of this inquest

17. The inquest has now sat for approximately 57 days and has heard from over 70 witnesses. At a very early stage of the inquest, the Coroner considered two applications by Mr Rolfe, which were concerned with the permissible scope of the issues to be considered by her Honour and the admissibility of certain evidence, which, were in part, also addressed with reference to scope.

18. In *Ruling No.2* at [12] when declining to rule on the scope of the Inquest, the Coroner held:

> [12] I accept those submissions. At this early stage of this lengthy and complex inquest, it is impossible to know whether a number of the 'issues' or 'questions' anticipated to arise on the evidence by my Counsel Assisting team (and the interested parties) will ultimately be relevant to, or connected with, the death, or whether any comment or recommendation about those matters will be necessary under ss 26, 34, and/or 35 of the Act.
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> [13] As the Full Court of the Supreme Court of the Australian Capital Territory noted in R v Doogan; Ex parte Lucas-Smith, 12 one difficulty with trying to conclusively determine the scope of an inquest at its outset is that it may 'become apparent … that an issue identified in the list early in the proceedings was no longer relevant at the conclusion of the evidence.' Equally, evidence may emerge late in the inquest that may give rise to new issues. In light of the investigative character of an inquest, this is not surprising. In *Doogan*, the Full Court continued,

> the mere admission of evidence that appears to canvass a range of issues extending beyond those specified in [the Coroner's Act] does not demonstrate any error of jurisdiction. Indeed, a liberal approach to the potential relevance of evidence may sometimes be appropriate, particularly in the early stages of an inquiry when the Coroner is still seeking to identify what issues are likely to arise.

[14] Similarly, in *Thales Australia Limited v Coroner's Court*, Beach J (as his Honour then was) in the Supreme Court of Victoria was critical of objections that required a Coroner to conclusively rule, at an early stage of proceedings, on the nexus between discrete items of evidence and the subject matters of the Coroner's ultimate powers to make findings, comments and recommendations:

> In the present case, the inquest has been fragmented as a result of submissions made on behalf of Thales. If the case had been conducted as an ordinary inquest where all of the relevant evidence is called before findings are made, then it would have been open to the Coroner to call as part of his investigation into the circumstances in which the deceased died, evidence of the kind he now wishes to call. The question of what comment or recommendation might be permissible as a result of evidence that has yet to be called is not capable of determination at this stage. The complaints of Thales are premature.
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> […] 72. It is, at this stage, hypothetical to consider whether the calling of a particular witness or particular evidence might infringe the prohibition on not inquiring for the sole or dominant reason of making a comment or recommendation. Similarly, it would be premature to speculate on whether any particular evidence that might or might not be called might or might not be "connected with the death [of the deceased]". I do not propose to embark on the dangerous course of attempting to chart the metes and bounds of what will be permissible upon any resumption of the inquest.

[15] Accordingly, except where necessary to determine Constable Rolfe's objections, I will not consider the question of the 'scope of the inquest' at this time.

19. In *Ruling No.3* the Coroner also made the following comments:

> [21] Section 39 of the Act provides that a 'coroner holding an inquest is not bound by the rules of evidence and may be informed, and conduct the inquest, in a manner the coroner reasonably thinks fit.'
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> [22] That power must be exercised in light of the Coroner's ultimate powers and duties to make findings, comments or recommendations at the conclusion of the inquest under ss 26, 34 and 35 of the Act. The only purpose for receiving evidence in this inquest is to enable me to make such findings, comments or recommendations.
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> [23] In addition to obliging a Coroner to find, 'if possible … the cause of death', ss 26, 34 and 35 of the Act collectively impose:
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> > (a) An obligation to find, 'if possible … any relevant circumstances concerning the death': s 34(1)(a)(iv);
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> > (b) A power to comment on matters 'including public health or safety or the administration of justice, connected with the death … being investigated': s 34(2);

> (c) An obligation to 'investigate and report on the care, supervision and treatment of the person while being held in custody or caused or contributed to by injuries sustained while being held in custody': s 26(1)(a); and,
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> (d) A power to 'investigate and report on a matter connected with public health or safety or the administration of justice that is relevant to the death': s 26(1)(b).
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> …
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> [30] Even so, I would be hesitant to accept the submissions of NAAJA and the WLR families that a Coroner's power to receive evidence is not, at least indirectly, 'limited by reference to concepts of relevance'. It is difficult to think of a case in which concepts of relevance, or potential relevance, would not at least inform the question of whether a Coroner thinks fit to receive an item of evidence under s 39 of the Act. Even administrative decision makers, who 'are equally free to disregard formal rules of evidence in receiving material on which facts are to be found' are not absolved of the 'obligation to make findings of fact based upon material which is logically probative'. Hence, if a Coroner concluded that a piece of evidence could not, at the conclusion of the inquest, possibly be relevant to any of the subject matters of ss 26, 34 and 35 it is unlikely that she could reasonably think fit to receive it. But, as Thales and Doogan demonstrate, that does not equate to a positive obligation to conclusively determine all questions of relevance before the evidence gathering process is complete.

20. It followed that on each objection thereafter, the Coroner determined to receive the evidence *'under section 39 of the Act at [that] stage.'*

21. The inquest has now reached the end point, there being no further evidence to be given beyond that of Mr Rolfe and Sergeant Bauwens.

D The privilege against self-incrimination

22. Mr Rolfe will make a claim of privilege against self-incrimination in respect of topics where the claim can be taken, and without being exhaustive, the following topics:

(a) Use of force incident and findings by Judge Borchers - Malcolm Ryder;

(b) Use of force incident - Cleveland Walker;

(c) Use of force incident - Albert Bailey;

(d) Use of force incident – Master Gibson;

(e) Use of force incident – Luke Madrill;

(f) Use of force incident – Antonio Woods;

(g) Use of force incident – Todd Tavern;

(h) Use of force incident - Araluen Park

(i) NTPF employment application;

(j) Text messages related to recreational drug use, illicit or prescription;

(k) Text messages related to dissemination of body-worn video;

23. *Importantly*, once the claim is made, Mr Rolfe will object to the Coroner compelling him to answer questions pursuant to s.38. For Mr Rolfe to be compelled, it would need to appear to the Coroner that is 'expedient for the purposes of justice' that Mr Rolfe be compelled to answer the question for a certificate to be offered, and for him to then be compelled to so answer. That is a jurisdictional pre-condition to the offer of a certificate.

24. In Mr Rolfe's submission, it would not be expedient for the purposes of justice for him to be compelled to answer questions in relation to the above topics.

Expedient for the purposes of justice

25. There has been no judicial consideration of the meaning of the requirement 'that it appears to the coroner expedient for the purposes of justice that the person be compelled to answer the question', although there is likely to be any relevant distinction between that phrase and phrases such as "in the interests of justice", "in the public interest", for the "end of justice" and "for the purposes of justice".[4] As with, for example, the interpretation of the words 'in the interests of justice', the amorphous requirement that it appear to be expedient in the interests of justice for a person to be compelled to answer questions is necessarily broad and unconfined.[6] However, relevant to the coroner's consideration will be at least the following factors.

26. *First*, the common law privilege against self-incrimination is a fundamental legal right.[7] Although it may be abrogated by statute, the pre-conditions to the abrogation by virtue

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4 I Freckleton QC, 'The privilege against self-incrimination in Coroners' Inquests', (2015) 22 Journal of Law and Medicine 491, 498. The addition of the word 'expedient' adds little to the phrase – in ordinary usage it means 'tend[ing] to promote some proposed or desired object; fit or suitable for the purpose; or proper in the circumstances': see *Macquarie Dictionary* (online at 13 February 2024) 'expedient'.

6 See, eg, Western Australian Newspapers Ltd v The State of Western Australia [2010] WASCA 10, [29] (Owen J).

7 *Sorby v The Commonwealth* (1983) 152 CLR 281 [294]-[295] (Gibbs J).

of s.38(1) require clear consideration to be given to the importance of the fundamental right, and, similarly, that although an immunity is provided against use of the questions and answers in criminal proceedings, the immunity does not prevent indirect use of the evidence compelled in any criminal or civil proceedings.[8]

27. *Secondly*, the 'purposes of justice' in the context of an inquest conducted pursuant to the Coroner's Act must necessarily be concerned with, inter alia, the subject matter of what is being investigated. In that context, the Coroner has mandatory obligations, as well as discretionary powers, to investigate and make findings, and report on a number of matters.

28. Section 26(1)(a) *requires* the Coroner to 'investigate and report on the care, supervision and treatment of the person while being held in custody or caused or contributed to by injuries sustained while being held in custody', whereas section 26(1)(b) provides that the Coroner *may* 'investigate and report on a matter connected with public health or safety or the administration of justice that is relevant to the death.'

29. Section 34 requires the Coroner to investigate and make findings, which are well-understood and do not require recital here. They are concerned with the investigation of the death of *the person to whom the inquest relates*.

30. Section 26(2) requires that a 'coroner who holds an inquest into the death of a person held in custody or caused or contributed to by injuries sustained while being held in custody must make such recommendations with respect to the prevention of future deaths in similar circumstances as the coroner considers to be relevant.' The requirement to do so is necessarily limited by reference to the subject matter that is either required to be investigated by virtue of s.26(1)(a) or that may *permissibly* be investigated pursuant to s.26(1)(b). The distinction between the powers of investigation, being powers whilst an inquest is occurring, and the requirement to make recommendations, which necessarily arise after the investigation has concluded, renders that conclusion inevitable.

31. Section 35 also provides that the Coroner may:

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[8] Bearing in mind that the common law privilege against self-incrimination is both a protection from direct and derivative use: See *Sorby* at [310].

a) report to the Attorney-General on a death or disaster investigated by the coroner; and

b) may make recommendations to the Attorney-General on a matter, including public health or safety or the administration of justice connected with a death or disaster investigated by the coroner;

c) report to the Commissioner of Police and the Director of Public Prosecutions appointed under the Director of Public Prosecutions Act 1990 if the coroner believes that an offence may have been committed in connection with a death or disaster investigated by the coroner.

32. The powers to report do not give rise to additional powers to investigate. Rather, they arise because of the Coroner's powers of investigation into a death.

33. Thus, an aspect of the court's consideration of whether it appears 'expedient for the purposes of justice' for the person to be compelled to answer questions requires an assessment of the relationship between the subject matter of a question to the functions being performed by the Coroner (and bearing in mind that some of the investigative powers are discretionary, whether those powers are being exercised in the inquest in which the question arises).

34. *Thirdly*, it will be relevant to consider the importance of the evidence to the assessment of the issue that is sought to be addressed in cross-examination.[9] Likewise, if there is other evidence from which facts may be objectively found, then ultimately, the Coroner would be entitled to consider whether evidence of the person who makes a claim would limit the opportunity for the Coroner to investigate that issue. Of course, the claim of privilege against self-incrimination is, in this respect, a "double-edged sword" – if a person is not compelled to answer questions in relation to an issue, one consequence is that the court will not hear a denial, or an excuse, or the person's version of events in relation to that issue.

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9 I Freckleton QC, 'The privilege against self-incrimination in Coroners' Inquests', (2015) 22 Journal of Law and Medicine 491, 501 – 504.

It is not expedient for the purposes of justice for Mr Rolfe to be compelled to answer questions

35. Plainly enough, each of the topics identified above at paragraph 22 concern issues of potentially unlawful use of force, illegal drug use, or fraudulent conduct. Thus, the foreshadowed claims are proper claims of privilege against self-incrimination.

36. One of the essential questions to be resolved is a question of scope. Respectfully, given that this inquest has nearly reached its end – Mr Rolfe and Sergeant Bauwens being the final two witnesses – the Coroner is now in the comfortable position of being able to clearly evaluate the relevance of these issues and the permissible scope of the inquest to her powers and functions. Accordingly, the liberal approach to the reception of evidence that was considered by the Coroner to be justified at the outset of this inquest is no longer appropriate.

37. The short point to be made about each of the issues over which the claim of privilege is made is that they have no logical bearing on the Coroners obligations to investigate and make findings pursuant to s.34 of the Coroner's Act. That is so for several reasons.

38. *First*, the circumstances concerning what can be conveniently summarised as incidents of allegedly excessive use of force have no bearing at all upon the issues to be determined. Relevant to this point, and the points that follow, the death of Kumanjayi Walker was captured on video. That is not an insignificant factor in this enquiry, given that the real assessment to be conducted by the Coroner is concerned with the events leading up to discovery of Kumanjayi Walker, the conduct of Kumanjayi Walker, and the response by Mr Rolfe to that conduct. It cannot be reasonably suggested that the topics identified above could rationally inform the assessment of that issue, which is specific to the events leading up to the death of Kumanjayi Walker.

39. *Secondly*, allied to the first proposition, and regardless of whether strict rules of admissibility apply or not, the utility of any proven propensity, assuming it is proved, is underscored by considering any connection that exists between the propensity and the issues to be determined. The alleged propensity and the factual issues for determination must *logically* intersect. In this context, the video of the events leading up to the death of Kumanjayi Walker is critical to that evaluation. The video positively controverts the reasonableness of a suggestion that any of the 'excessive force' matters

identified above have any bearing on the issues to be determined in this inquest. That is *a fortiori* in relation to matters concerning fraudulent conduct or recreational drug use.

40. The suggestion that those issues do have a bearing is, with respect, absurd. That is particularly in the context of:

(a) the incredibly calm and dignified way in which Constable Rolfe engaged with Kumanjayi Walker in the leadup to his arrest, bearing in mind of course the dangers that must have been reasonably anticipated to exist in the circumstances where Kumanjayi Walker had, in the context of a previous arrest attempt a few days earlier, lunged at another police officer with an axe;

(b) the fact that the conduct of Mr Rolfe in discharging his weapon occurred only after he was stabbed by Kumanjayi Walker and, thereafter, when Kumanjayi Walker was on the ground wrestling with Constable Eberl; and

(c) the fact that the above conduct of Kumanjayi Walker and Mr Rolfe escalated over a few *seconds*.

41. Apropos the above, the evidence cannot:

(a) inform whether the force used by Mr Rolfe was excessive, in circumstances where that question falls to be considered by reference to Mr Rolfe's response to Kumanjayi Walker's conduct, considered in the context the expert evidence in relation to the use of force; and

(b) otherwise logically inform any consideration of Mr Rolfe's state of mind in the leadup to and at the time that he discharged his weapon, to the extent that it is alleged that any prior evidence of excessive force against indigenous persons or racial prejudice towards indigenous persons is concerned. With respect, and with reference to the clear sequence of events depicted in the video of this incident, that is obvious.

42. This is all to the point that the Coroner cannot consider the question of scope without closely considering the video of what *actually* occurred between Mr Rolfe and Kumanjayi Walker, and, if her Honour does, the only conclusion is that there is no evidence that could give rise to any logical correlation between a purported racial bias

or pre-disposition to excessive force and the conduct of Mr Rolfe; that conduct having indisputably occurred within a space of seconds in response to what was an undeniable threat with a weapon (indeed, a threat that was, by reference to the video, carried out).

43. Put succinctly, the subject matter of the issues over which privilege is claimed have no bearing on the Coroner's obligation to make findings pursuant to s.34 of the *Coroner's Act*.

44. In relation to the requirement to investigate by virtue of s.26(1)(a), it is obvious that the issues over which a claim is made have no bearing on the care and treatment of Kumanjayi Walker. In relation to s.26(1)(b), however, it is important that for the Coroner to be investigating a matter connected with public health or safety or the administration of justice that is relevant to the death, the Coroner must have first exercised the power to do so – that is, her Honour must have *decided* to do so. At no stage have the parties been informed of whether there are any matters that the Coroner has decided to investigate pursuant to s.26(1)(b).

45. *If* the Coroner *is* investigating a matter pursuant to s.26(1)(b), then fairness dictates that the Coroner inform the parties what those matters are. Respectfully, the obligation to do so arises quite apart from the issue of privilege – to not inform the parties of a discretionary investigation into a matter or matters being conducted by the Coroner would constitute a gross denial of procedural fairness to all interested parties.

46. *If* the Coroner is not exercising power pursuant to s.26(1)(b), then ultimately, it is irrelevant to the question of whether Mr Rolfe ought to be compelled to answer questions in relation to the issues over which a claim of privilege has been made.

47. In any event, once it is confirmed whether an investigation pursuant to s.26(1)(b) is, or is not, being conducted, the position in relation to whether Mr Rolfe ought to be compelled by reference to that issue can be addressed with clarity.

48. For present purposes, and on the information available to the parties concerning what the Coroner is investigating, it is not expedient for the purposes of justice that Constable Rolfe be compelled to answer questions in relation to the issues identified in these submissions.

49. To conclude, the point has been reached in this Inquest where the evidence has reached its advanced stages, and the issues that can be permissibly investigated are now clear.

Up until this point in time, and in the interests of ensuring that all potentially relevant evidence is received, a liberal approach has been taken to the receipt of evidence.

50. At this very late juncture in the inquest, hindsight reveals that this Court has received an incredibly broad amount of evidence that, when considered against what is *shown* to have occurred in the leadup to and at the time of Kumanjayi Walker's death, goes well beyond the issues that fall within the statutory remit of this Court – although the receipt of evidence in relation to the topics identified above has occurred, that does not justify their further investigation.

51. It has been said numerous times in this inquest that it is not a Royal Commission, and that is plainly so. Requiring Mr Rolfe to be compelled to answer questions in the face of proper claims of privilege against self-incrimination in relation to issues that are so devoid of connection with the death of Kumanjayi Walker, would, when looked at in the context of what is known occurred in the leadup to Kumanjayi Walker's death, be akin to the approach of a roving Royal Commission. It would be a genuine distraction from the true functions that this Court has been entrusted to perform. The Coroner should not entertain such an approach; it would be legally wrong.

F P Merenda
F P Merenda

L Officer
L Officer