IN THE CORONER'S COURT OF VICTORIA
AT MELBOURNE

Case No: 581/05

INQUEST INTO THE DEATH OF WAYNE JOANNOU

RULING on application for disqualification on the basis of apprehended bias

---

RULING

Summary

1. I am the Coroner investigating the death of Wayne Joannou.
2. Mr Joannou died from a gunshot wound during his attempted arrest by Special Operations Group ('SOG') members of Victoria Police in Bank Street, South Melbourne in the State of Victoria on 18 February 2005.
3. On 30 November 2012, solicitors for four of the SOG witnesses who discharged their firearms indicated that they intended to make an application that I disqualify myself from further hearing this inquest on the basis of apprehended bias.
4. The solicitors also indicated that this application would be based on my decision to refer the matter to the Director of Public Prosecutions ("DPP") pursuant to s.49(1) of the Coroners Act immediately before their clients were due to give their evidence.
5. At a Special Mention hearing on 6 February 2013, counsel appearing for four SOG members who discharged their weapons in the course of the attempted arrest, Mr Lawrie, made a formal application that I disqualify myself from continuing to hear the matter on the grounds of apprehended bias.

6. Mr Lawrie confirmed that my referral of the matter to the DPP under section 49 of the *Coroners Act* 2008 on 18 November 2011 before his clients gave evidence created the primary basis for his application.

7. Mr Lawrie also said that a subsidiary basis of his application was the exchanges that occurred in Court when I was considering the objection of two of his clients to giving evidence on the basis of potential self incrimination and their application for the statutory protection for a witness that is provided by s.57 of the *Coroners Act* 2008.

8. Mr Lawrie submitted that these two issues were sufficient to determine that a fair-minded, lay observer might reasonably apprehend that I might not bring a fair unprejudiced unbiased mind when determining the credit of his four clients when and if they give evidence in Court.

   "Either singularly or in combination, it's my submission that they create the necessary set of facts that would lead the fair-mind(ed) observer to reach that view." [1]

9. Counsel appearing for the Chief Commissioner of Victoria Police and two other SOG members, Mr Gipp, adopted and supported Mr Lawrie's application without further comment.

10. Mr Lawrie's application was supported by written submissions dated 28 January 2013.

11. The Chief Commissioner of Victoria Police and two other SOG members did not file written submissions in response to Mr Lawrie's submissions but their solicitors, Victorian Government Solicitor's Office, indicated support for the application in a letter to the Court dated 1 February 2013.

12. Counsel appearing for Ms Dianne O'Goerk (a civilian witness who was injured during the incident in which Mr Joannou died), Ms Trumble, did not file a written response to the application. At the Special Mention on 6 February 2013, Ms O'Goerk was represented by Ms Cannon of Counsel. She did not seek to be heard on Mr Lawrie's application.

13. The Inquest is listed to re-commence at 10am on 3 April 2013.

14. I have considered carefully the law in relation to my role as a Coroner who has been asked to disqualify herself from further hearing of a case because of

[1] T4:9-30

apprehended bias. I have also considered the evidence in favour of and the evidence against Mr Lawrie's application.

15. In summary, I have concluded that I have not acted in a manner or made comments during the Inquest that might cause a fair-minded, lay observer to reasonably apprehend that I might not bring an impartial and unprejudiced mind to the resolution of the questions I am required to decide in my investigation of Wayne Joannou's death.

The Law

16. The law in relation to Mr Lawrie's application includes the *Coroners Act* 2008 and the common law relating to applications for judicial officers to disqualify themselves from further hearing of a case because of apprehended bias interpreted in the context of the *Coroners Act* 2008.

The *Coroners Act* 2008

17. On 1 November 2009, the *Coroners Act* 1985 was replaced by the *Coroners Act* 2008. Many but not all of the relevant provisions of the *Coroners Act* 1985 and the *Coroners Act* 2008 differ from each other.

18. The *Coroners Act* 2008 created the Coroners Court of Victoria as a specialist inquisitorial court with a duty to investigate reportable deaths and contribute to the reduction of the number of preventable deaths through the findings of the investigation of deaths and the making of recommendations by coroners.[2]

19. Section 67 of the *Coroners Act* 2008 requires a Coroner to investigate a reportable death to determine, if possible, the identity of the deceased, the time and place of death, the cause of death and the circumstances in which the death occurred. The Court of Appeal has interpreted this provision to mean that a Coroner is obliged to pursue all reasonable lines of inquiry in their performance of these obligations having regard to questions of cost, delay and feasibility.[3]

20. Further, section 8 of the *Coroners Act* 2008 requires that a Coroner should have regard, as far as possible in the circumstances, to a number of factors

[2] Section 1 *Coroners Act 2008; Priest v West (in his capacity as Deputy State Coroner of Victoria) and Percy* [2012] VSCA 327.
[3] *Priest v West (in his capacity as Deputy State Coroner of Victoria) and Percy* [2012] VSCA 327, p.2.

including the desirability of promoting public health and safety and the administration of justice.

21. A Coroner conducting an inquest determines the relevant issues for the purposes of the inquest and the witnesses to be called.[4]

22. Further, a Coroner has power to summon a person to attend as a witness or to produce any document or other materials, order a witness to answer questions and give any other directions and do anything else the coroner believes necessary if they believe it is necessary for the purposes of an inquest.[5]

23. Further, a Coroner is not bound by the rules of evidence but may be informed and conduct an inquest in any manner that they reasonably think fit.[6]

24. These provisions mean that the coronial investigation does not depend only on the information provided by the interested parties. Rather, the Coroner responsible for an investigation is obliged to independently investigate the cause and circumstances of the death.[7]

25. Section 52(1) of the *Coroners Act* 2008 requires a Coroner to hold an inquest into a death if the death or cause of death occurred in Victoria and, as relevant, the coroner suspects the death was the result of homicide or the deceased was a person placed in custody, including a person who was escaping custody or whom the police were seeking to apprehend immediately before death.[8]

26. Section 49 of the *Coroners Act* 2008 requires the principal registrar to notify the DPP if the Coroner investigating the death believes an indictable offence may have been committed in connection with the death.

27. Section 69 of the *Coroners Act* 2008 provides that a Coroner must not include in a finding any statement that a person is, or may be, guilty of an offence. However, this provision does not prevent a Coroner including a statement relating to a notification to the DPP under section 49.

---

[4] Section 64 *Coroners Act 2008*.
[5] Section 55 *Coroners Act* 2008.
[6] Section 62(1) *Coroners Act 2008*.
[7] Section 62 *Coroners Act* 2008; Priest *v West (in his capacity as Deputy State Coroner of Victoria) and Percy* [2012] VSCA 327.
[8] See also Second Reading Speech, Coroners Bill Victoria, Legislative Assembly Hansard 9 October 2008 p. 4035.

28. Neither section 49 nor section 69 of the *Coroners Act* 2008 indicate when this notification should occur. Therefore, considered in the context of the rest of the *Coroners Act* 2008, the Coroner should trigger this notification when is appropriate in the interests of justice and in the public interest in all the circumstances of their investigation.

29. Section 57 of the *Coroners Act* 2008 applies if a witness objects to giving evidence, or evidence on a particular matter, at an inquest on the ground that the evidence may tend to prove that the witness has committed an offence against or arising under an Australian law. This provision was not included in the *Coroners Act* 1985.

30. Section 57 is intended to limit the privilege against self-incrimination in circumstances where the interests of justice would be served.[9] It implemented Recommendations 61-64 of the Law Reform Committee Inquiry on the effectiveness of the *Coroners Act* 1985 including:

"***Recommendation 63***

That the Coroners Act 1985 be amended to include a provision which provides that, in considering whether the interests of justice require that the evidence be given, a coroner must consider whether there is a compelling argument that the information is necessary to prevent further harm from occurring." [10]

31. If the Coroner determines that there are reasonable grounds for the objection to giving evidence, section 57(3) of the *Coroners Act* 2008 requires the Coroner to tell the witness that they need not give evidence unless the Coroner requires them to do so and that the Coroner will issue them with a certificate if they give evidence willingly or the Coroner requires them to do so.

32. Section 57(7) of the *Coroners Act* 2008 prohibits use of evidence given by a person in respect of which a certificate under this section has been given and use of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence in a court or before any person or body authorised by a Victorian law or by consent of parties.

---

[9] See Second Reading Speech, Coroners Bill Victoria, Legislative Assembly Hansard 9 October 2008 p. 4037.

[10] Law Reform Committee, Parliament of Victoria, "*Coroners Act* 1985", Parliamentary Paper No 229 of Session 2003-06, September 2006.

The common law in relation to apprehended bias

33. Mr Lawrie submits and I accept that the 'test' to be applied in determining an application for disqualification on the grounds of apprehended bias is set out by the High Court in an appeal from the Full Court of the Family Court of Australia[11]:

"It has been established by a series of decisions of this Court that the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias (which, in the present case, was said to take the form of prejudgment) is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide."[12]

34. In *Johnson v Johnson*, the High Court emphasised that 'the test' is based upon the need for public confidence in the administration of justice. Accordingly, the judgments note that:

- This 'test' has been adopted in Australia because it gives due recognition to the fundamental principle that justice must both be done and be seen to be done;
- The hypothetical observer is independent reasonable and fair-minded, neither complacent nor unduly sensitive or suspicious, not legally trained but has some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted;
- The person being observed is *"a professional judge whose training, tradition and oath or affirmation require the judge to discard the irrelevant, the immaterial and the prejudicial."*
- Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced

[11] *Johnson v. Johnson* (2000) 201 CLR 488 at 492; see also *Ebner v. Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345.

[12] applying *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12; 32 ALR 47; *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568; *Webb v The Queen* [1994] HCA 30; (1994) 181 CLR 41. See also *Ebner v. Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345.

and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them;

- Modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx;
- It depends upon the circumstances of the particular case;
- The hypothetical observer is no more entitled to make snap judgments than the person under observation.

35. The Supreme Court of Victoria has applied the *Johnson v Johnson* test in the context of the then State Coroner hearing an Inquest under the *Coroners Act* 1985.[13] In so-doing, Smith J emphasised that:

- A reasonable apprehension of bias must be firmly established and that a court should not lightly conclude that an allegation is made out;
- The inference sought to be relied upon must be reasonably open on all the evidence;
- The transcript should be used to determine if it reveals discussion and testing in an open minded fashion;
- It must be clear the coroner had formed a final view;
- The evidence at its highest must not simply indicate a possible inference which is contradicted by other evidence;
- In that case, the coroner articulated his thinking frankly so the parties knew the way his thinking was developing and what issues were troubling him.

36. In determining the application for the State Coroner to disqualify himself, His Honour stated:

"As to the ultimate question, I am satisfied that a consideration of all the material evidence would have left a fair-minded observer with no doubt that

[13] *Honda Australia Motorcycle v. Johnstone (as State Coroner)* [2005] VSC 387.

the coroner would bring an impartial and unprejudiced mind to the resolution of the outstanding questions.'

37. The High Court has further held that reasonable apprehension of bias by reason of prejudgment of a witness's credibility must be more firmly established than bias inferred for other reasons.[14] For example, the majority in *Reg. v. Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty. Ltd.* described the difficulty in establishing bias from apparent pre-conceptions of credit:

"when bias arising from preconceptions is in question, as distinguished from bias through interest, there must be strong grounds for finding its existence. A judge "must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons".[15]

38. Further, an application for a judicial officer to refuse to continue sitting should be made as soon as the party making the application becomes aware of the facts giving rise to the suggestion of apprehended bias[16]:

"*There is no reason why, in authority or in principle, a litigant who is fully aware of the circumstances from which ostensible bias might be inferred, should not be capable of waiving the right later to object to the judge continuing to hear and dispose of the case. That is not to say that the litigant in such a position must expressly call upon the judge to withdraw from the case. It may be enough that counsel make clear that objection is taken to what the judge has said, by reason of the way in which the remarks will be viewed. It will then be for the judge to determine what course to adopt, in particular whether to stand down from the case… In the result, when a party is in a*

---

[14] E.g. *Rozenes v Judge Kelly* [1996] 1 VR 320 at 333; *R v. Watson; ex parte Armstrong* (1976) 136 CLR at p 262; *Re Lusink; Ex parte Shaw* (1980) 32 ALR 47, at pp 50-51; *Re JRL; ex parte CJL* (1986) 161 CLR 342 at 352; *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568.

[15] *Reg. v. Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty. Ltd.* [1953] HCA 22; [1953] HCA 22; (1953) 88 CLR 100, at p 116 adopted in *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568 at per Dawson J.

[16] *Vakauta v Kelly*[1989] HCA 44; (1989) 167 CLR 568 at 572; *Smits v Roach* (2006) 227 CLR 423 at para 43.

position to object but takes no steps to do so, that party cannot be heard to complain later that the judge was biased."[17]

The Inquest

39. The Inquest which is part of the coronial investigation of Mr Joannou's death commenced on 30 May 2011 (Day 1).

40. In my opening comments on that day, I stated without objection that Mr Joannou's death was reported to the Coroner because:

"it appears to have been unexpected, unnatural or violent; or to have resulted directly or indirectly from an accident or injury. That's taking the words directly from the Act.

It is also arguable that it occurred while Mr Joannou was in police custody, but that's not definite. And I also suspect it occurred as the result of a homicide, and if I expect it occurred as the result of a homicide, then I must have an inquest. I use the word homicide to include any death that's caused by an outside agent; and it's really important to understand that. "

41. I also told the Court:

"I'm specifically prohibited from finding that anyone's committed an offence. If I suspect - and it's only suspect - an offence has been committed, I am required to refer that file to the Director of Public Prosecutions. It's my usual practice if that happens, to notify the person I suspect has committed an offence that that's what I'm doing, but not to include that reference in my finding, and not to notify other parties.

The reason for this is I don't want to inappropriately influence the DPP's decision about whether or not to prosecute, and I don't want to raise expectations in the minds of the public, or victims, or anyone else about what the DPP might do."

42. On Day 1, I also told the Court that Mr Joannou's death is intimately connected with the death of Brian Bottomley on 2 February 2005. I noted that:

- I am also the Coroner investigating Mr Bottomley's death;
- I have determined that it is more likely than not that Mr Bottomley was shot dead by Mr Joannou; and

[17] *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568 Dawson J at para 15-16.

- There is considerable overlap of witnesses involved in the two deaths.

43. I explained the relationship between the two deaths to the Court without objection:

"*We've already had an inquest into Mr Bottomley's death, and I have already said that I formally announce that I find that Mr Bottomley is dead. Victoria Police have submitted I should rely on the evidence from the Bottomley inquest to find that he was killed by Mr Joannou. I don't necessarily disagree with them or reject all their reasoning, but I've not yet made that formal finding about the circumstances of Brian's death, and in particular I accept that it's difficult to make any reliable conclusions about Mr Joannou's state of mind on 2 February or on 18 February.*

I have also said it's difficult to rely on the evidence of Ms Briffa and Mr Birsoz who were the two witnesses in the house at the time that Mr Bottomley died, because of the circumstances and the way they have been affected by the incident. However relying on the evidence of Mr Birsoz, I've decided it's more likely than not that Mr Bottomley was shot dead by Mr Joannou. He says he didn't actually see the shooting, so I'm still forming an opinion about that, and this inquest may change that view. But at the moment that's where I'm starting from."

44. As well, on Day 1, I raised the issue of Mr Joannou's medical and mental state and the possibility that the Chief Commissioner and Mr Lawrie's clients might have perhaps looked differently at what they were dealing with if they knew about it.

45. Further, I made a number of Suppression Orders relating to non-disclosure of SOG tactics and equipment. These remain in force.

46. The Court has already heard evidence from 22 civilians, 2 doctors and 17 Victoria Police witnesses, including 6 SOG members.

47. On 17 November 2011 (Day 14), after hearing evidence from a Victoria Police firearms and ballistics expert and the forensic pathologist, the first of Mr Lawrie's clients was listed to be called.

48. At this stage in proceedings, Mr Lawrie informed me that, out of an abundance of caution, each of his four clients objected to giving evidence in

the Inquest because their evidence may tend to prove that they had committed an offence.[18]

49. After having assessed the competing issues and the current state of the evidence, I ruled that there were reasonable grounds for each of Mr Lawrie's four clients' objections.

50. Accordingly, at that point I had necessarily formed the belief that each of Mr Lawrie's clients may have committed offences which also required me to implement section 49 of the *Coroners Act* 2008 and notify the DPP.

51. The Court then embarked on the process articulated in section 57 of the *Coroners Act* 2008 for providing witnesses with certificates which would prohibit use of the evidence they gave or any information obtained as a direct or indirect result of the evidence in any other court or adjudicating body in Victoria.

52. I decided that Mr Lawrie's clients were in two discrete groups with respect to the factors influencing how I managed these applications: the first group comprised the two SOG witnesses who discharged their weapons but, on the evidence, did not kill Mr Joannou; and the second group comprised the two SOG witnesses who discharged the type of ammunition from their weapons which is consistent with the ammunition that killed Mr Joannou.

53. Mr Lawrie subsequently agreed with me that:

"… it seems we've got to a point on ballistics evidence and medical evidence that it's uncontroversial that either of those two men (the second group of two SOG witnesses) *fired the fatal shot*"[19]

54. Further, I indicated that I would respond to applications for and provide the first group of two SOG witnesses with certificates under section 57(5) of the *Coroners Act* 2008 and hear their evidence the following day.

55. I also indicated that I expected to delay making a decision about hearing from the second group of two SOG witnesses.

56. In particular, I told the second group of two SOG witnesses who were in Court for this discussion:

"I have formed the view that having looked at what we've already heard from the witnesses from SOG and other parts of the police force in particular and

[18] T1162: 5-20
[19] T1169-70: 29-1.

other witnesses who were at the scene, and having looked at - knowing that we've got two more witnesses who were not people who could have possibly fired the shot that was the fatal shot, that your evidence is at this stage not important but I retain the right to be able to change that if I find I need to.

I have to consider the possibility that there are criminal and disciplinary proceedings that may proceed and in particular I'm worried about the criminal proceedings. And I'm particularly concerned about the provisions of s.57 of our Act which prevents admission of evidence in other courts derived from evidence given in this court under protection of a certificate. That means that if you give evidence now, that evidence cannot be used in another court, and on top of that, evidence derived from that evidence cannot be used in another court.

So for all of those reasons it's in the interests of justice that I do not consider that I should require you to give evidence."[20]

57. In the course of discussion about these issues, Mr Lawrie accepted it was my decision whether or not to call the witnesses.

58. Mr Lawrie also agreed with me that the nature and severity of the potential offences has primacy in the consideration as to whether or not the interests of justice ought to require the witnesses to give evidence:

" (I) agree with Your Honour with some enthusiasm to say that the nature of the offence, the seriousness of the offence has primacy in the consideration as to whether or not the interests of justice ought to require the witness to give evidence or not is the right way to attack the problem." [21]

59. However, Mr Lawrie also told me that I could not get to the point of differentiating in this way between the two groups of SOG witnesses without considering the effect of calling the first group of two SOG witnesses but not calling the second group of two SOG witnesses, including:

- Mr Lawrie's four clients are the central witnesses to the events in which Mr Joannou died;

[20] T1164: 6-28
[21] T1172: 9-14.

- I could not make any critical comments about the second group of two SOG witnesses' involvement in this matter unless I allowed them to give evidence;
- The effect of section 57 on alternative use of the evidence is an irrelevant consideration in the balancing act that goes into where the interests of justice should fall;
- Understanding that evidence after the fact is always imperfect, section 57 is designed to perfect it to some degree and at the same time provide protection to the witness that would otherwise not be heard from at all.

60. Mr Lawrie also submitted that:

- All four men were at the scene as part of a team with the common purpose to effect the safe arrest of an armed man;
- If they were charged with criminal offences they would say they were acting in concert;
- *"If Your Honour exempts these two* (the second group of two SOG witnesses) *but requires the other two* (the first group of two SOG witnesses) *to give evidence there are grave concerns within the organisation as to the repercussions that has for those members as well as in this whole case";*
- The desire for all four of his clients to be heard is a genuine belief. It comes organically from the four of them that there is no difference between them.
- That it is the witness' way of expressing a desire to be served with natural justice, "If I'm going to be criticised, please level it at me and allow me to answer it. Allow me to explain. Whether you accept my explanation or not please hear my words."
- I ought not underestimate the desire that is inherent amongst police members to tell the story, to tell what it was like.

61. To Mr Lawrie's last point, I answered: "*I don't*".

62. On the contrary, I also said to the second group of two SOG witnesses:

"Now, the other thing I need to say - and I say this to you personally - I understand how you feel about wanting to give evidence. I have had at least

four times when I've excused policemen for various reasons, usually under the Occupational Health and Safety Act, their - usually their superintendents or similar, when I meet them somewhere coming to me and saying, "I had terrible trouble with that case because those guys wanted to tell me what had happened, they wanted to make sure that they were on the record exactly and then there was no other way in which that could happen."

I don't do it lightly. I don't do it in a way that means I don't take that into account at the personal level. But from my perspective, the defences are not something for me to decide. They are not part of the circumstances, because I can't assess it at the level at which a jury would assess it. And so I don't want to compromise that."[22]

63. I also told Mr Lawrie:

"I disagree with you for two reasons. The first is, as you've said, and I've said, it's my decision. The second is that what I have already said to these men, and it's with great respect, that I'm not going to give them a certificate today and I'm not going to call them, but if after I have heard all the evidence I need to then I will. OK.

Because I think there are two reasons against excusing them completely. The first is that … that the evidence that they will give me will not add sufficiently to what I already have and will get from the other two witnesses and from their bosses next week, the policy people….

The second is that in the interests of justice the negative side of the section which says that the evidence cannot be used elsewhere if I give a certificate or even if I don't give a certificate the evidence can't be used elsewhere means that the information that does come that may tend to incriminate, which is what they've already said it might do, cannot be used elsewhere."[23]

64. Following this discussion, I confirmed:

"… my view is that I will be compromising the interests of justice by hearing evidence from these people both generally and specifically unless I absolutely need it for my own purposes…

at the moment I don't think I need to hear from these people right now. If I do need to then I'll still call them and give them a certificate…

[22] T1174, 4-21.
[23] T1172:17-29; 1173: 3-10.

*And I understand that there'll be stress for you (*the witnesses) *in the meantime and I'm sorry….*

And it may be that I choose to call one of you and not the other and if I do it is not because of who shot, it will be because of other reasons."

65. I also said that, apart from the possibility that I could say that the fatal shot was discharged by one of the second group of two SOG witnesses:

" because of the facts of the situation I can't imagine how I can be critical of them particularly as individuals as against as part of the group".

66. Counsel for the Chief Commissioner and other SOG witnesses, Mr Gipp, adopted Mr Lawrie's submission. Further, Mr Gipp stated that:

*"If Your Honour does rule that they (*the first two SOG witnesses*) give evidence under certificate tomorrow I expect my instructions will be to have the matter stood down whilst I get instructions as to whether or not the matter needs to be taken to another place."*

67. Ms Trumble, Counsel for Ms O'Goerk, also adopted Mr Lawrie's submission that there was no distinction between his four clients.

68. I repeated that I had not made a final decision about whether to call the second group of SOG witnesses to give evidence:

".. in terms of balancing that against the interests of justice in particular, and I understand - although I wouldn't call it natural justice - the natural justice argument that Mr Lawrie is putting about them wanting to give evidence, if I think it's necessary for me to fulfil my role that's why I'm leaving open a door to call them."

69. Counsels' insistence that I commit to hearing all four of Mr Lawrie's clients at this stage placed me in a difficult position.

70. I was aware of my obligations under section 49 of the *Coroners Act* 2008 because I had formed the belief that offences may have been committed in relation to Mr Joannou's death.

71. I was also aware that it is usual practice in this jurisdiction for the Homicide Squad to refer a brief to the DPP for an opinion before it is submitted to the Coroner. This had not occurred in this case and the issue was not discussed on 17 November 2011.

72. Further, I understood that *Annetts v McCann*[24] confirmed the common law that a represented interested party has a right of reply where a Coroner is considering making a finding which is adverse to the interests of that person.

73. From the outset and based on my experience as a Coroner before and after commencement of the *Coroners Act* 2008, I was aware that Victoria Police witnesses who discharged their firearms in a public place had successfully applied to be excused from giving evidence under the *Coroners Act* 1985 because of their potential exposure to prosecution for indictable offences under the *Occupational Health and Safety Act* 1985.

74. I also knew that section 57 of the *Coroners Act* 2008 was intended to limit the privilege against self-incrimination in circumstances where the interests of justice would be served. [25]

75. I was particularly mindful that any evidence given under protection of section 57(5) of the *Coroners Act* 2008 could not be used elsewhere. Further, any information, document or thing obtained as a direct or indirect consequence of the person having given this evidence could not be used in another court or before any person or body authorised by a Victorian law or by consent of parties.

76. I told the witnesses:

"It may be that at the end of that I say to myself when I'm balancing things - and this is always a balancing issue - I really need those chaps. OK. At the moment I don't think I do. The second is that in the interests of justice the negative side of the section which says that the evidence cannot be used elsewhere if I give a certificate or even if I don't give a certificate the evidence can't be used elsewhere means that the information that does come that may tend to incriminate, which is what they've already said it might do, cannot be used elsewhere."[26]

77. Therefore, I delayed my decision about what to do until I had thought about it overnight.

---

[24] *Annetts v McCann* (1990) 97 ALR 177.
[25] See also Second Reading Speech, Coroners Bill Victoria, Legislative Assembly Hansard 9 October 2008 p. 4037.
[26] T1172-3, 31, 1-10.

78. On 18 November 2011, after considering the arguments put to me, the state of the evidence at that time and all the circumstances of this case, I determined that it was appropriate in the interests of justice and in the public interest to exercise my obligation under section 49 of the *Coroners Act* 2008 immediately.

79. I made this decision because this course of action would:

- Allow me to hear from all four of Mr Lawrie's clients together without compromising the interests of justice;
- Fulfill my statutory obligations under section 49 of the *Coroners Act* 2008 or the responsibility vested in the DPP; and
- Not unnecessarily extend the time, cost and resources required to complete my investigation.

80. Accordingly, on 18 November 2011, I announced to the court:

"*Now, I understand that you have been told that I, having heard all of the evidence to date and your submissions, I have now decided that I form the belief that requires me to act under s.49, so accordingly I adjourn this matter sine die while that happens. Thank you."*

81. On 6 December 2011, the Senior Registrar of the Coroners Court duly notified the DPP and forwarded the Inquest brief and current evidence for his consideration.

82. On 14 December 2011, the transcript of the Inquest was distributed to all interested parties.

83. On 22 October 2012, the DPP notified the Coroners Court that he had considered the material and did not intend to prosecute any matters in relation to Mr Joannou's death. On 1 November, the interested parties were duly notified and arrangements commenced for re-listing the Inquest.

84. On 30 November 2012, solicitors instructing Mr Lawrie notified solicitors assisting me that they intended to ask me to disqualify myself and sought to list a Special Mention to allow Mr Lawrie to make the application.

85. On 6 February 2013, I heard Mr Lawrie's application.

Conclusion

86. Mr Lawrie, Counsel for four SOG operators who discharged their weapons in the course of an attempt to arrest Wayne Joannou, has made an application

that I disqualify myself from continuing to hear the Inquest which is part of my investigation of the circumstances of Mr Joannou's death on the grounds of apprehended bias.

87. On 6 February 2013, Mr Lawrie submitted that my referral of the matter to the DPP under section 49 of the *Coroners Act* 2008 on 18 November 2011 before his clients gave evidence created the primary basis for his application.

88. Mr Lawrie also submitted that the subsidiary basis of his application arose from the exchanges that occurred in court on 17 November 2011 when I was considering the objection of the second group of two of his four clients to giving evidence on the grounds of potential self-incrimination but insisting on giving evidence under protection of a certificate issued under section 57(5) of the *Coroners Act* 2008.

Notification of the DPP under section 49 of the *Coroners Act* 2008

89. On 6 February 2013, Mr Lawrie told me:

"The effect of Your Honour making that announcement (to notify and refer the papers to the DPP) *and it's an important statutory step that you formed that belief at that time, Your Honour, is that in a most public way and a most explicit way Your Honour has announced that at that time you formed the belief that one or more of my client's may have committed an indictable offence in connection with the death of Wayne Joannou…."*[27]

90. Although I did not state what my belief was in court, Mr Lawrie is correct that I had formed the belief that triggers section 49 of the *Coroners Act* 2008.

91. I had formed that belief as the result of the forensic and other evidence which was completed on 17 November 2011 and I had confirmed that belief when I determined his clients' applications to be excused from giving evidence because they may give evidence that could tend to prove that they had committed an offence.

92. A fair-minded, lay observer would reasonably be expected to already know from my response to Mr Lawrie's application on 17 November 2011 that I had formed the belief that Mr Lawrie's clients may have committed offences. Therefore, my announcement on 18 November 2011 would not have changed their understanding of that belief.

[27] T7:1-7.

93. However, a fair-minded, lay observer would also reasonably be expected to understand that this belief went only to the possibility that each of Mr Lawrie's clients may have committed an offence.

94. In the absence of prior referral to the DPP, I also understood that one of the tasks I was performing on 17 and 18 November 2011 was to decide when to apply the provisions of section 49 of the *Coroners Act* 2008.

95. A fair-minded, lay observer would reasonably understand that I was performing this task on that day in the context of two immediate issues:

- My obligation to exercise my obligations under section 49 of the *Coroners Act* 2008 in the interests of justice and in the public interest, and
- Mr Lawrie's submission on the previous day that I should commit to calling all four of his SOG clients to give evidence with the protection of a certificate issued under section 57 of the *Coroners Act* 2008.

96. A fair-minded, lay observer would also reasonably understand that I was performing this task on 17 and 18 November 2011 in the context of my collateral statutory obligations including:

- To reduce the number of preventable deaths through recommendations;
- To determine if possible the circumstances of Mr Joannou's death;
- To not make any comment with respect to guilt for an offence;
- To determine the issues and witnesses to be examined;
- To apply natural justice to the witnesses; and
- To minimise the stress on witnesses.

97. In determining when to apply the provisions of section 49 of the *Coroners Act* 2008, I also took into account:

- The forensic reliability of the individual operators' memories in the context of alterations in aural perception, time assessments and similar psychological effects in events such as those encountered by the SOG witnesses in an incident that was already six years old,
- The evidence I had already heard from Victoria Police and other witnesses and Mr Lawrie's submissions that indicated that the SOG worked cooperatively as a team so that the evidence from the first two

of Mr Lawrie's clients may be able to provide me with the information I required about their practice and public health and safety issues in relation to discharge of firearms in an attempted arrest, and

- The close connection between my investigations of Mr Joannou's death and Mr Bottomley's death.

98. I balanced all these competing interests and issues in an attempt to achieve an outcome which would allow me to hear evidence from all four of Mr Lawrie's clients within the over-riding context of the interests of justice and the public interest.

99. I do not believe that my decision to exercise my statutory obligation under section 49 of the *Coroners Act* 2008 on 18 November 2011 in the context of the circumstances as they presented themselves might have given a fair-minded, lay observer reason to apprehend that I might not bring an impartial and unprejudiced mind to the resolution of questions I am required to decide.

100. Mr Lawrie also asserts that my referral of the papers to the DPP on 18 November 2011 would have demonstrated to a fair-minded, lay observer that I had formed a certain negative opinion about the credit of some or all the his clients.

101. On 6 February 2013, he told me:

"Your Honour will be assessing that evidence (what the SOG members saw, the threats they perceived to their colleagues, the action they took, why they took that action) *based not just on objective facts but also in an assessment of the credibility of the witness when they talk about their subjective processes that lead them to make a particular decision or make a particular risk assessment."*[28]

102. However, a fair-minded, lay observer would have heard my announcement on 18 November 2011 in the context of section 49 of the *Coroners Act* 2008 and the exchanges that had occurred on 17 November 2011 and all the previous evidence.

103. For example, in accepting the applications of the second group of two SOG witnesses who discharged their firearms to be excused from giving evidence under section 57(2) of the *Coroners Act* 2008, I expressed concern that the

[28] T7:28 – T8:1

evidence they would give to the court in good faith may create the forensic situation where Mr Joannou's death could be attributed to one of them.

104. Further, I left the final decision about whether to call one or both of the second group of two SOG witnesses who discharged their weapons until I had heard all the other evidence. I also said they would be called if required from a forensic perspective or for any other reason.

105. Therefore, the discussion on 17 November 2011 would have made it clear to a fair-minded, lay observer that I had not formed a negative opinion about the credit of Mr Lawrie's clients.

106. Reasonable apprehension of bias by reason of pre-judgment of a witness's credibility must be more firmly established than other forms of bias.[29]

107. Accordingly, in the context of all the evidence, there is no reason to believe that my referral to the DPP under section 49 of the *Coroners Act* 2008 on 18 November 2011 might cause a fair-minded, lay observer to reasonably apprehend that I had pre-judged the credit of any or all of Mr Lawrie's clients.

Applications under section 57 of the *Coroners Act* 2008

108. Mr Lawrie also asserts that my exchanges with him on 17 November 2011 demonstrated that I had formed the view that his clients' applications to be excused from giving evidence on the grounds of self incrimination together with their willingness to give evidence under the protection of certificates issued under section 57(5) of the *Coroners Act* 2008 constituted use of the legislation to impede a possible future criminal prosecution.

109. Mr Lawrie says that, if I had formed this view, I would have accepted that his clients used the legislation for a collateral and improper purpose and would have pre-judged their credit prior to their giving evidence.

110. In making this limb of his application, Mr Lawrie relied on my response to a suggestion made by Counsel Assisting the Coroner, Mr Goetz, in the context of discussion on 17 November 2011 about whether I should commit to calling all four of Mr Lawrie's clients:

---

[29] E.g. *Rozenes v Judge Kelly* [1996] 1 VR 320 at 333; *R v. Watson; ex parte Armstrong* (1976) 136 CLR at p 262; *Re Lusink; Ex parte Shaw* (1980) 32 ALR 47, at pp 50-51; *Re JRL; ex parte CJL* (1986) 161 CLR 342 at 352; *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568.

"…And I'm just wondering whether we'd be having this discussion if these witnesses had been left off the witness list, whether my learned friends would have gone off to another location to insist that they come – but leaving that to one side, had they been left off the list then who knows what would have taken place."[30]

111. My response to Mr Goetz's comment was: *"Hypothetical"*. When Mr Lawrie took issue with and effectively objected to Mr Goetz's comment, my only other response was: *"I hear you."*

112. Mr Lawrie says that my response to the exchanges between himself and Mr Goetz demonstrated that I accepted the imputation he states was contained in Mr Goetz's hypothetical suggestion.

113. In particular, Mr Lawrie told me:

"Now given the significance of what was said by Your Honour's assistant and given the special relationship that exists and necessarily so between the Coroner and the Coroner's assistant there would have to be an expectation from anyone sitting in the court at that moment that Your Honour would disavow that comment, distance the court from that comment, disagree with that comment or make a comment that otherwise gave some comfort that Your Honour wasn't of the same view."[31]

114. Mr Lawrie also asserts my failure to actively distance myself from Mr Goetz's comment reinforces his concern that I had formed the view that there was an improper purpose behind his four clients' applications for certificates under section 57(5) of the *Coroners Act* 2008.

115. Mr Lawrie implies that, if I had accepted that his clients used the legislation for a collateral and improper purpose, I would have judged their credit prior to their giving evidence.

116. I do not accept that a fair-minded, lay observer might reasonably form the view from my responses that I had accepted Mr Goetz's suggestion and pre-judged the credit of Mr Lawrie's clients.

117. Further, even if a fair-minded, lay observer did not understand the proper working relationship between a judicial officer and their Counsel Assisting, I

[30] T1198: 5-11
[31] T13: 27 – T14: 4

note that Mr Goetz made his comments in the context of the following prior discussion:

- He acknowledged Mr Lawrie's interpretation of the mechanisms and functioning of section 57 of the Act was accurate;
- He explained the logical process by which I should apply the provisions of section 57;
- He acknowledged it was not his role to urge me to call specific witnesses;
- He acknowledged he was not privy to my interpretation of the evidence to date nor to the weight I had attached to it; and
- He confirmed he was unaware of my views on the evidence of Mr Noonan, Operator 6 and all the other witnesses that cast light on how the various operators went about their work.

118. Accordingly, I reject Mr Lawrie's assertion that a fair-minded, lay observer might reasonably apprehend from my response to Mr Goetz's comment that I had ascribed an improper motive to any of Mr Lawrie's clients for indicating their preparedness to give evidence under the protection of a certificate.

Delay in making the application

119. Although the dialogue which gave rise to Mr Lawrie's application occurred on 17 and 18 November 2011, I was not aware that he intended to make an application for me to disqualify myself from further hearing of the Inquest until 30 November 2012.

120. In response to my questions about the delay in notifying me and listing the application, Mr Lawrie explained:

"No I understand Your Honour. It's a difficult situation to be in to not have the answer from the OPP. Of course if the OPP had come back and said yes - sorry the DPP had said yes, there is sufficient material here, in fact we are interested in prosecuting a case in – for whatever indictable offence they consider, that this Coroner's inquest would necessarily be adjourned sine die while those criminal proceedings took place and an application would be nugatory. It would be pointless, it would be a waste of time. Accordingly there was no option unfortunately other than to wait for the answer from the OPP. It's as simple as that and that answer having come, albeit that there was a

delay of some weeks, I say that we have bought this application with the greatest expedition that is reasonable in the circumstances."

121. However, the DPP's decision does not influence the facts relevant to Mr Lawrie's application as they stood on 18 November 2011 or immediately thereafter.

122. Therefore, Mr Lawrie was in a position to object to my referring the matter to the DPP on 18 November 2011 by making me aware that he believed that it indicated that I had pre-judged his clients' credit. He did not take that step.

123. Further, Mr Lawrie could have made his application that I disqualify myself because I had made the referral on or soon after 18 November 2011. He took no steps to do so until his instructors sought to list a Special Mention on 30 November 2012.

124. Further, the reason Mr Lawrie failed to make his application on or soon after 18 November 2011 was because it would be pointless and a waste of time if the DPP had decided to commence criminal proceedings.

125. However, if I had determined the matter as I do today, his clients would have had the opportunity to express their opinions elsewhere without further increasing the time before they give evidence in this Inquest.

126. Therefore, this delay is within the category of conduct contemplated by the High Court which held that delay in making the application establishes waiver of the right to make an application that a judicial officer disqualify herself from further hearing of the matter because of ostensible bias.[32]

127. Accordingly, in my opinion, Mr Lawrie has waived his right to apply for me to disqualify myself from further hearing of the Inquest on the grounds of apprehended bias.

Ruling

For the above reasons, I make the following rulings:

I **I have not acted in a manner or made comments during the Inquest which is part of the coronial investigation of Wayne Joannou's death that might lead a fair-minded, lay observer in court to reasonably apprehend that I might not bring an impartial and unprejudiced mind to the resolution of the questions I am required to decide.**

---

[32] *Vakauta v Kelly*[1989] HCA 44; (1989) 167 CLR 568 at 572; *Smits v Roach* (2006) 227 CLR 423 at para 43.

II **In particular, I have not acted in a manner or made comments during the Inquest which is part of the coronial investigation of Wayne Joannou's death that might lead a fair-minded, lay observer in court to reasonably apprehend that I had pre-judged the credit of four Special Operations Group members of Victoria Police prior to their giving evidence in the Inquest which is part of the coronial investigation of Wayne Joannou's death.**

III **Accordingly, I refuse Mr Lawrie's application that I disqualify myself from further hearing of the Inquest which is part of the coronial investigation of Wayne Joannou's death.**

IV **I further direct that the Inquest re-commence on 3 April 2013.**

Jane Hendtlass

Coroner

21 February 2013