**STATE CORONER'S COURT**

**OF NEW SOUTH WALES**

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| **Inquest:** | Inquest into the death of Andrew James Chee Quee |
| **Date of interlocutory application:** | 7 August, 8 August and 17 November 2023<br>(State Coroners Court, Lidcombe) |
| **Date of interlocutory decision:** | 30 November 2023 |
| **Place of interlocutory decision:** | Dubbo Local Court |
| **Decision of:** | **Magistrate Harriet Grahame, Deputy State Coroner** |
| **Catchwords:** | CORONIAL LAW – interlocutory application – recusal application – application for the Coroner to disqualify herself as the presiding coroner in the inquest – apprehension of bias – Coroner's adult sister's public discussion of police conduct following the handcuffing of their mother in a dementia facility |
| **File number:** | 2020/118749 |
| **Representation:** | **Senior Counsel Assisting the Coroner on the Application:** Ms Kirsten Edwards SC, instructed by Mr James Prindiville of the Crown Solicitor's Office<br>**Counsel Assisting in the Inquest:** Mr Jake Harris, instructed by Ms Ellyse McGee of the Crown Solicitor's Office<br>**Commissioner of Police, NSW Police Force:** Ms Kim Burke, instructed by the Office of the General Counsel for the Commissioner of Police<br>**Constable Worboys:** Ms Linda Barnes, instructed by Mr Warwick Anderson of Anderson Boemi Lawyers |

**Introduction**

1. There is an application before the Court seeking that I disqualify myself from hearing an inquest into the death of Andrew Chee Quee. The application was brought on behalf of Constable Worboys who is an interested party in these proceedings, having been granted leave to appear pursuant to s. 57 of the *Coroners Act 2009* (NSW). The application is supported by the Commissioner of Police, New South Wales Police Force ("NSWPF"), who is also an interested party.[1] The application is for disqualification for *apprehended* bias and there is no suggestion that considerations of *actual* bias are raised.

**Background**

2. It is necessary to state some relevant background, particularly as Counsel for the Commissioner and Counsel for Constable Worboys raised concerns over the timing of my disclosure.[2]

3. On the afternoon of Friday 4 August 2023, after the conclusion of the annual NSW Magistrates' conference, I was advised by the NSW State Coroner that she had received correspondence from Natalie Marsic, General Counsel, Office of the General Counsel, NSWPF on behalf of the Commissioner of Police, NSWPF ("the Commissioner") dated 3 August 2023.[3] The letter stated, among other things, that video footage of an 81-year-old woman being restrained in two sets of handcuffs, understood to be my mother, had been shared with media outlets. The letter advised "The Commissioner's view is what occurred with Ms Grahame might give rise to a perception of bias on DSC Grahame's part, especially when she is presiding over matters in relation to the use of police powers, vulnerable persons or use of force."[4] No particular proceeding was referred to and the letter appeared to suggest that events caused concern in relation to a broad class of matters (that is, matters involving "the use of police powers, vulnerable persons or use of force"). In fact, the letter went much further, concluding by requesting that the State Coroner give consideration to "the appropriateness of DSC Grahame continuing to preside over matters involving the Commissioner and NSWPF officers." It is worth

[1] 8/8/23 T 10.43-45. Whether there is a relevant difference between making an application and "supporting" an application is a matter I need not consider in the circumstances of this case. I merely note that initially the Commissioner's representative stated she did not have instructions to make an application, and on the following day she "supported" the application and made submissions on the law. Later, written submissions were received which I assumed grounded a separate application. In final oral submissions. Counsel for the Commissioner once again sought to make a distinction between making an application and "supporting" Constable Worboys' application. The nature of the distinction she draws was not, in my mind, elucidated.

[2] 8/8/23 T 11.10 – T 12.29; 8/8/23 T 15.15-17; written submissions on behalf of the Commissioner dated 3 November 2023 at [10]-[13]; supplementary written submissions on behalf of Constable Worboys dated 3 November 2023 at [24]-[34].

[3] Exhibit 4.

[4] Exhibit 4.

noting at this point that almost all matters in the coronial jurisdiction have some involvement by the NSWPF in one way or another and that a large proportion of the work of a deputy state coroner involves presiding over matters where the operation of police powers may be an issue. There is a limited number of deputy state coroners available to undertake these matters and the workload is substantial.[5]

4. The letter also stated that "In practice, bias, or the potential for it, is often overcome by early disclosure of information that could be reasonably been seen to constitute a bias (sic)."

5. I was due to commence an inquest into the death of Andrew Chee Quee on the following Monday morning, 7 August 2023. However, given the very serious concerns the Commissioner had raised with the State Coroner, I thought it appropriate to make a short disclosure before commencing proceedings.

6. Until the Commissioner wrote to the head of my jurisdiction requesting her to consider removing me from "matters involving the Commissioner and NSWPF officers", it had not entered my mind to publicly disclose my association with Rachel Grahame or the events which had occurred back in 2020. I regarded the events concerning my mother as wholly personal and on no occasion did it occur to me that those events or the subsequent media comment by my adult sister might cause a fair-minded lay observer to apprehend that I might preside over the inquest into the death of Mr Chee Quee in an inappropriate or partial manner. Indeed, the disclosure I made on 7 August 2023 was the first time I had ever spoken publicly about these events which had absolutely no connection with my mother's more recent death, nor with any of the police officers or counsel involved in the matter concerning the death of Mr Chee Quee.

7. The facts of the relevant events were not, to my own mind, closely connected to the inquest before me. Mr Chee Quee died of a gunshot wound to the chest in April 2020, my own mother died quite recently of advanced dementia in her bed surrounded by family, some years after the events which triggered the Commissioner's concern. Nevertheless, having been advised that the Commissioner of NSWPF was apparently "concerned" about a class of matters, I hastened to make an immediate public disclosure prior to commencing the inquest on 7 August 2023.

8. After making a short disclosure outlining my association with Rachel Grahame, her restraint by NSWPF officers in 2020, the subsequent proceedings in the NSW District Court, and more recent

[5] I note discussion of related issues in *R* v *Albert* [2022] NTSC 62 where Kelly J remarked at [29] that "[o]ne reason why judges should not be over-ready to disqualify themselves from hearing a matter (or a class of matters) simply because an application has been made, when a proper basis for recusal has not been made out, is that it would inevitably lead to an increased work load for other judges with an already substantial work load."

media reporting,[6] I invited parties to make any applications they wished to make and gave them time to prepare any such application.

9. Perhaps somewhat surprisingly given the correspondence I have referred to, Counsel for the Commissioner told the Court that she did not have instructions to make a disqualification application on 7 August 2023.[7] However, she subsequently "supported" Constable Worboys' application the following day[8] and provided written submissions on 3 November 2023. On 17 November 2023, Counsel for the Commissioner maintained that she did not "make an application" and that she "supported" the application of Constable Worboys.[9]

10. The Commissioner has been very critical of the timing of my disclosure. In written submissions, the Commissioner suggested that there was an "onus" on me to disclose that the body worn footage shown in the media reporting was my mother from the moment it was released into the public domain in May 2023 "at the very latest".[10] She submitted that the events in relation to my mother "fell well within the judicial conscience."[11]

11. The Commissioner submitted:

> "It was not and is not reasonable nor appropriate for an interested party, such as the Commissioner of Police, to make such a disclosure to another interested party and/or breach privacy legislation through disclosing to another interested party in an inquest, facts of which are personal in nature to the judicial officer, facts, which might reasonably give rise to an apprehension of bias."[12]

12. Clearly, the Commissioner was at least comfortable writing privately to the head of my jurisdiction to request consideration of quietly removing me from presiding over all matters in which she or other NSWPF officers were involved.

13. I note that I was always available to hear a disqualification application at any point a party wished to be heard. In my view, these matters should be dealt with in open court, not through private request – hence my decision to make an immediate public disclosure.

14. In any event, I have now had the opportunity to carefully consider the evidence tendered on the application and the oral and written submissions subsequently received. I reject the

[6] 7/8/23 T 1.25-50.
[7] 7/8/23 T 2.1.
[8] 8/8/23 T 10.43-45.
[9] 17/11/23 T 11.17 – T 12.8.
[10] Written submissions on behalf of the Commissioner dated 3 November 2023 at [12]-[13].
[11] Written submissions on behalf of the Commissioner dated 3 November 2023 at [16].
[12] Written submissions on behalf of the Commissioner dated 3 November 2023 at [12].

suggestion contained in recent correspondence to those assisting me and repeated in the supplementary submissions of Constable Worboys that my request for further legal assistance is a factor which "increases the apprehension of bias".[13] Senior Counsel Assisting on the application has done no more than set out the relevant law in clear and detailed terms. There is no urging, either way, just as there was not when Counsel Assisting in the inquest, Mr Harris, made brief remarks on 8 August 2023. Since that time there has been a generous timetable for further written and oral submissions.[14] I completely reject the submission that it is "inappropriate" that I sought guidance on the law from Senior Counsel on the application – she has done no more than fulfil her role as Senior Counsel Assisting on the application. I also reject the suggestion made by Counsel for Constable Worboys that Senior Counsel Assisting's submissions "appear to lean towards a particular outcome".[15] The submissions provided are balanced and the resulting procedure has been both transparent and fair.

15. Any application for disqualification on the basis of apprehended bias must be considered very carefully and, for that reason, I requested further assistance in relation to the law and reserved my decision to provide an opportunity to give it full consideration. The authorities make it clear that justice must not only be done, it must be *seen* to be done.[16]

**The suggestion of bad faith, impropriety, or illegality in seeking further legal submissions**

16. I intend to deal with these issues briefly before considering the substantive application.

17. The oral submissions on the law regarding apprehended bias received on 8 August 2023 were helpful but brief. I note that Mr Harris had been given very little notice that the issue would be raised. Some time after returning to chambers it occurred to me that I would need to undertake further research on the law to give this application the attention it properly deserved. It occurred to me that the fairest and most transparent way to proceed would be to seek further legal submissions and then allow all parties to consider them and make any further submissions if they wished to do so. This appeared to me a fairer approach than conducting my own research and possibly making a decision on the basis of authority which had not been canvassed in open court.[17]

[13] Supplementary written submissions on behalf of Constable Worboys dated 3 November 2023 at [8].
[14] Exhibit 5.
[15] Supplementary written submissions on behalf of Constable Worboys dated 3 November 2023 at [44].
[16] *Johnson v Johnson* (2000) 201 CLR 488 ("*Johnson"*) at [12].
[17] The following is a chronology of events following the disclosure I made on 7 August 2023:

- On 8 August 2023, Counsel for Constable Worboys made an application for me to disqualify myself as the presiding coroner in the inquest on the grounds of apprehended bias. Written submissions were

18. I am surprised by the suspicion my decision to request further submissions has caused given that the opportunity for further submissions from Constable Worboys and the Commissioner was factored into the timetable set out in the letter to the parties dated 12 September 2023.[18]

19. The following submissions were made by Counsel for the Commissioner and Counsel for Constable Worboys in relation to the engagement of Senior Counsel Assisting.

20. First, Counsel for the Commissioner submitted that I had no jurisdiction to seek further advice "after the application ha[d] been heard and after submissions … [were] made"[19] on 8 August 2023.[20] In support of this submission, Counsel for the Commissioner referred me to the comments of Kiefel CJ and Gageler J (at [26]-[28], [30], and [57]) and Edelman J (at [121] and [124]) in the decision of *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15 ("*QYFM*").

21. In my view, there is no "jurisdictional issue" which barred me from seeking further assistance on the disqualification issue. I agree with Senior Counsel Assisting's submission that there is nothing in the *QYFM* decision which would suggest that I was precluded from seeking, receiving,

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provided to the Court, which were supplemented by oral submissions. Counsel for the Commissioner made oral submissions in support of that application. Counsel Assisting did not consent nor oppose the application. The matter was adjourned to 20 September 2023 for a decision on the application.

- On 12 September 2023, those assisting me wrote to the parties to advise that I had formed the view that I would be assisted by receiving further submissions from those assisting me. The directions hearing on 20 September 2023 was vacated and a timetable was proposed for the provision of both written and oral submissions from Counsel Assisting and the interested parties. The timetable included the listing of a directions hearing on 17 November 2023 for oral argument or judgment on the application.
- On 27 September 2023, the representatives of Constable Worboys wrote to those assisting me and advised that, in Constable Worboys' view, the timetable gave rise to the appearance that there had been further discussions with Counsel Assisting that prompted a change in the position adopted by Counsel Assisting in open court and that this and "further delays" "increases the apprehension of bias".
- On 29 September 2023, the representatives of the Commissioner wrote to those assisting me and advised that the Commissioner had "concerns" about the delay in the delivery of the judgment on the application in light of the proposed timetable.
- On 3 October 2023, those assisting me wrote to the parties to again advise that I was seeking assistance by way of "submissions on relevant case law, particularly cases arising from the coronial jurisdiction" and that I had requested that Kirsten Edwards (junior counsel at the time) be engaged as secondary counsel assisting solely in relation to the application.
- On 20 October 2023, Senior Counsel Assisting's written submissions were received and circulated to the parties.
- On 3 November 2023, the Commissioner and Constable Worboys provided submissions in reply.
- On 17 November 2023, Senior Counsel Assisting's brief outline of submissions in reply was circulated in the morning. Oral submissions were made by Counsel for the Commissioner, Counsel for Constable Worboys, and Senior Counsel Assisting.

[18] Exhibit 5.
[19] 17/11/23 T 9.38.
[20] 17/11/23 T 8.8 – T 10.3.

or hearing submissions on the question of apprehended bias, which I agree is a question that goes to my jurisdiction.[21]

22. Furthermore, it is not unheard of in this jurisdiction to engage separate counsel on particular applications.

23. Secondly, Counsel for Constable Worboys submitted that there was an appearance of unfairness (even perhaps bad faith) in me seeking further legal submissions.[22] In a nutshell, it was suggested that it appeared I did not like Counsel Assisting's initial submissions made on 8 August 2023 and so I went elsewhere. Reference was made to the oral submission of Counsel Assisting in the inquest, Mr Harris, that "there's force in what Ms Barnes says at para 27 of her written submissions."[23] It was then suggested, in my view without any basis whatsoever, that it was this "concession" on the part of Mr Harris which might explain why Senior Counsel Assisting was engaged. The submission appeared to indicate I had made some kind of pre-judgement and was then engaged in cherry-picking legal advice that I might find more in line with my own thoughts. It is an outrageous suggestion with no evidentiary basis and I reject it. I also note that Senior Counsel Assisting placed on the record that, in any event, she agreed with Counsel Assisting on this issue in that she "concede[d] that there is force to para 27 of Constable Worboys' submission".[24]

24. Thirdly, in oral submissions on 17 November 2023, Counsel for Constable Worboys complained of unfairness brought upon her client by not being offered an opportunity to object to me seeking legal guidance from Senior Counsel Assisting.[25] Counsel submitted that the unfairness arose in circumstances where the application had "concluded" on 8 August 2023[26] and where the parties were not informed of what had transpired outside the court room as to my decision to vacate the directions hearing on 20 September 2023 and seek submissions from Senior Counsel Assisting.[27] I accept that on 8 August 2023 the matter had been set down for decision and further directions. However, *prior* to making a decision I sought further submissions from all parties. It may have been inconvenient, however, from time to time, *prior* to a decision being

[21] 17/11/23 T 15.1-17; T 16.3-10.
[22] Supplementary written submissions on behalf of Constable Worboys dated 3 November 2023 at [41]-[45].
[23] 8/8/23 T 14.16-17.
[24] 17/11/23 T 15.31-37. See also outline of reply of Senior Counsel Assisting dated 17 November 2023 at [20]-[21].
[25] 17/11/23 T 4.28 – T 5.31; T 6.34 – T7.22.
[26] 17/11/23 T 6.42 – T 7.22.
[27] 17/11/23 T 4.38 – T 5.31.

made, a court will require further guidance. In my view, an application is not "concluded" until a decision has been made in relation to that application.

25. I accept Senior Counsel Assisting's submission that it is a convention of this Court to engage separate counsel to assist in relation to legal issues or in relation to issues of public interest immunity and that, as a matter of practice, this is not something that parties are consulted about.[28] I also accept Senior Counsel Assisting's submission that *ex parte* communications with counsel assisting are not uncommon in this jurisdiction (and that fact would not give rise to an apprehension of bias).[29]

26. In accordance with the timetable for submissions set out in the letter of 12 September 2023, the parties have now had the opportunity to respond to Senior Counsel Assisting's submissions and make any objections both in writing and orally. In this sense, the parties have been afforded procedural fairness.

27. Lastly, Counsel for Constable Worboys and Counsel for the Commissioner appeared to suggest that Senior Counsel Assisting's written submissions were somehow not impartial.[30]

28. When pressed, the only objectionable matter identified by Counsel for Constable Worboys and Counsel for the Commissioner in Senior Counsel Assisting's written submissions was contained in the list of factors set out at [77]. In oral submissions, both parties submitted that the list of factors to consider at [77] somehow indicates a position and urges me to reject the application (in particular, because "the use of force" and the Issues List is not referred to in that paragraph).[31]

29. That paragraph, which contains a non-exhaustive list of matters to consider, directs me to consider the facts of the incident involving Mr Chee Quee and the incident involving Rachel Grahame. This must involve consideration of the use of force by police. Elsewhere in her submissions, Senior Counsel Assisting refers me to the Issues List. I can assure the parties these are matters I have given careful consideration to. I do not accept that I have been urged one way or another or accept that the matters set out at [77] indicate a partial position.

**The application and the evidence**

30. Three exhibits were tendered on the application.

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[28] 17/11/23 T 14.15.34.
[29] 17/11/23 T 15.19-29.
[30] 17/11/23 T 10.5 – T12.43 (Counsel for the Commissioner); T 16.36-40 (Counsel for Constable Worboys).
[31] 17/11/23 T 12.19-36; T 16.36-40.

31. Exhibit 1 is an affidavit sworn by Brooke Kellie Fitzpatrick on 7 August 2023 which annexes seven news articles (and a summary thereof) from May 2023 regarding the handcuffing incident involving my mother, Rachel Grahame, in 2020 and a related lawsuit, which was settled in 2021.

32. Exhibit 2 is a bundle of tweets apparently authored or re-posted by my sister, Emma Grahame, from February 2022 and May 2023 in relation to the treatment of my mother by officers of the NSWPF. One of the tweets is purportedly authored by a member of the Legislative Council, Ms Sue Higginson, from May 2023 which refers to the incident involving my mother in 2020. I note that Ms Higginson is not a person known to me.

33. Exhibit 3 consists of copies of NSW Legislative Council Notice Papers 11 and 16 where it is recorded, among other things, that Ms Higginson moved that the House "note" the incident in relation to my mother while also moving a motion which called on the House to take certain action in relation to the death of Mrs Nowland.

34. The application relied on the following matters:

    a. The incident involving Rachel Grahame and the NSWPF involved the use of force against a vulnerable person. It occurred in October 2020.

    b. Proceedings had been taken against the State of NSW by Rachel Grahame, with Emma Grahame acting as her tutor. Tortious actions of assault, battery, and false imprisonment by NSWPF officers grounded those proceedings.

    c. The settlement of those proceedings involved a compensation payment by the State of NSW in 2021.

    d. The incident came into "fresh focus" in May 2023 following the death of Mrs Nowland after she was tasered by an officer of the NSWPF in her care facility. The fresh focus came about because, after the death of Mrs Nowland, Emma Grahame engaged with media about the earlier incident involving Rachel Grahame.

    e. Emma Grahame made public statements in 2023 that the NSWPF had not learned anything from the civil claim brought against them and that there was never an apology or acknowledgement of wrongdoing.

    f. The Notice Papers noted a call for a parliamentary inquiry into NSWPF powers, policies, and responses when dealing with vulnerable people.

35. It is important for accuracy to pause and point out that although Counsel for Constable Worboys referred to Emma Grahame in submissions as a "family spokesperson", she is nowhere

described in those terms in the articles tendered. Nor does she describe herself in that way in any one of her reported tweets. I accept that some of the news articles refer to "the family's opinions" in a general sense and incorrectly suggest "the family" took legal action (rather than my mother with my sister Emma Grahame acting as her tutor). Emma Grahame refers to her own opinions ("I am happy to go public now") and certainly also uses "we" on three occasions in her tweets. However, given her role as tutor in the relevant proceedings, one might assume the "we" she refers to is herself and my cognitively impaired mother. She does not tweet the word "family" as far as I can see and while journalists use the word "family", there is no direct quote using that word from my sister.[32]

36. I have carefully considered the material tendered. It provides further graphic detail of the events I had briefly disclosed. I do not intend to record everything set out in the articles, however, given that I will be tasked to consider how this information might affect the perspective of a hypothetical fair-minded lay observer it may be useful to note that my mother was recorded as having advanced dementia and weighing 45 kilograms, "howling in distress" as a team of police surrounded her, at one point "screaming in discomfort", and calling an officer "a brute". The incident is said to have been sparked after my mother took a lanyard from a staff member in her dementia unit. I note one of the articles records that she was speaking incoherently throughout the encounter and that police recorded that she tried to bite, kick, and strike police officers while they held her arms and legs. Six police officers appear to have been involved. It is recorded that she spent six weeks in hospital recovering after the event. It is also reported that the Aged Care Quality and Safety Commission launched an investigation and described the actions of the NSWPF and St Basil's Nursing Home as "abhorrent". The bundle contained images of my mother. There is more, but I mention those facts to make it clear that I have carefully considered the material and the gravity of the events described.

37. The initial written submissions for Constable Worboys state that:

[32] In Exhibit 1, Emma Grahame is directly quoted as saying "we" in:

- the *Guardian* article ("it just showed me that the police have learned nothing from the actions that we took against them".)
- the *Independent* article ("it just showed me that the police have learned nothing from the actions that we took against them".)
- the *ABC* article ("we never got an apology, we never got any acknowledgement that they had done anything wrong").
- the *Daily Mail* article ("it just showed me that the police have learned nothing from the actions that we took against them").

> "It is contended that the circumstances of the assault, battery and false imprisonment claim settled by consent and the issues of police conduct being re-agitated by a family spokesperson who is a direct family member provides a logical and direct connection between the incident involving police and Mrs Grahame and the feared deviation from the course of deciding the case on its merits.
>
> The issues relating to the original 2020 incident, the civil claim ultimately settled in November 2021 and the May 2023 re-agitation of issues relating to police powers, policies and conduct raised by a spokesperson for the family who is a direct family member are logically connected to the factual issues particular to Constable Worboys being issues 4, 5, 6 and 8 in the Issues List."[33]

38. In oral submissions, Counsel for Constable Worboys described the basis for the application as being in relation to a "perception of what has been reported"[34] rather than being based on the facts of what occurred. Counsel clarified the application to some degree, referring to the evidence which had been tendered, stating:

> "If a lay ordinary person were to read that information and it's, I think the use of spokesperson for the family, the family, that when you go back across to the test and the 'might', in terms of perception, so I just want to differentiate there that it's not asserted that any of that is attributed to your Honour."[35]

39. I understood that the application did not suggest that the fact that my mother had been assaulted was enough to sufficiently ground the application, rather, it was the fact of my sister discussing what had occurred, the legal action which had been taken, and my sister's apparent recent dissatisfaction with the response that had been offered by the NSWPF. On a number of occasions, it was suggested that my relationship or close association with Emma Grahame was at the crux of the matter.[36] In particular, it was her comments as "spokesperson" for the family that were particularly concerning.

40. I note that while the Commissioner supported the application made by Constable Worboys, there was no detailed attempt to particularise what she understood the logical connection to be in initial oral submissions. I understood her main contention is that both my sister's comments and the Issues List in Mr Chee Quee's matter contemplate consideration of "the use

[33] Written submissions on behalf of Constable Worboys dated 8 August 2023 at [55]-[56].
[34] 8/8/23 T 5.47.
[35] 8/8/23 T 6.10-15.
[36] 8/8/23 T 9.16-38.

of force by NSW Police". Written submissions subsequently received focus on the timing of my disclosure, among other issues.

**The test for disqualification by reason of apprehended bias**

41. I was assisted by the detailed written submissions of Senior Counsel Assisting. The written supplementary submissions received from Constable Worboys and the Commissioner do not appear to take issue with her guidance on the relevant law regarding the appropriate test I need to consider, although they may draw my attention to particular evidence or focus on particular matters in their arguments, as would be expected.

42. The test for disqualification for apprehended bias is well-settled. The principles were recently considered by the High Court in *QYFM.* In that matter, Kiefel CJ and Gageler J said at [37]:

> "The criterion for the determination of an apprehension of bias on the part of a judge was definitively stated in Ebner by reference to previous authority and has often been repeated. The criterion 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'. The 'double might' serves to emphasise that the criterion is concerned with 'possibility (real and not remote), not probability.'" (citations omitted)

43. I note that Counsel for Constable Worboys described the "double might test" as providing a low threshold.[37] Counsel for Constable Worboys was quoting *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209, in which Spigelman CJ stated at [14]:

> "Although the Australian test for apprehended bias, as pressed in terms of the two "mights", sets a low threshold, with respect to a pre-judgment case the identification of what constituted a lack of "impartiality" or of "prejudice" in the mind of the decision-maker involves an issue of some specificity".

44. The application of the criterion involves three steps:

    a. Identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits;

    b. Articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and

[37] 8/8/23 T 6.37; written submissions on behalf of Constable Worboys dated 8 August 2023 at [34].

c. Assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.[38]

45. While the application of these criteria depends on the circumstances of each case, disqualification decisions refer to a number of useful, but non-exhaustive, categories.[39] The High Court has recently held that "[i]t must be explained how the existence of the incompatibility, association, conduct or interest (or other identified matter) might be thought by the fair-minded lay observer possibly to divert the judge from deciding the case on its merits."[40]

46. Notwithstanding the "double might" test and the low threshold it sets, there is High Court authority for the proposition that reasonable apprehension of bias must be "firmly established" and should "not be reached lightly."[41] Parties must not be encouraged to believe that by seeking the disqualification of a judge they will have their case tried by someone thought to be more likely to decide the case in their favour.[42]

47. It is clear that the duty to disqualify for proper reasons is matched by an equally significant duty to hear any case where there is no proper reason to disqualify.[43]

48. I accept that the *Guide to Judicial Conduct*,[44] a document both Constable Worboys and the Commissioner drew my attention to, provides useful practical advice.

**Who is the fair-minded lay observer?**

49. It is important to keep in mind that when undertaking the test of apprehended bias, I should not focus on whether I will *actually* bring an impartial mind to the resolution of the relevant questions. Rather, "it is the court's view of the public's view" which is determinative.[45]

50. The attributes of the fair-minded lay observer have been summarised carefully by Senior Counsel Assisting on the application at [21] of her submissions. While I will not restate each of

[38] *QYFM* at [38], citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 ("*Ebner*"). At [8] of *Ebner*, the application of the test was said to involve the first two steps identified above with the third step occurring after the logical connection had been articulated.
[39] See written submissions of Senior Counsel Assisting on the Application of 20 October 2023 at [12].
[40] *QYFM* at [81] per Gordon J.
[41] *Re JRL; ex parte CJL* (1986) 161 CLR 342 ("*Re JRL*") at 352, 371; *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 ("*CNY17*") at 98.
[42] See *Re JRL* at 352.
[43] *Kostov v DPP (NSW) (No 2)* [2020] NSWCA 94 at [32].
[44] Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd ed. (revised December 2022).
[45] *CNY17* at 88.

the authorities she records, I understand her characterisation is accepted by the interested parties as setting out the law as it stands.

51. I accept that the fair-minded lay observer is wholly hypothetical and founded in the need for public confidence in the judiciary. He or she is neither complacent nor unduly sensitive or suspicious.[46] He or she is cognisant of "human frailty"[47] and is "all too aware of the reality that the judge is human"[48] and not a "passionless thinking machine" or "robot just assessing information."[49] He or she is not "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 the apprehension of bias."[50]

52. I accept that the fair-minded lay observer is reasonable and does not make snap judgements,[51] "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",[52] and "is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge."[53]

53. The fair-minded lay observer is not hasty, nor does he or she act on "insufficient knowledge". I also accept that the fair-minded lay observer is taken to have a "broad knowledge of the material objective facts"[54] and the "actual circumstances of the case".[55] He or she is also "taken to be aware of the nature of the decision and the context in which it is made, as well as to have knowledge of the circumstances leading to the decision".[56] The fair-minded lay observer does not have a propensity to draw the most sinister implications from every ruling or adopt the least favourable interpretation of every judicial comment.[57]

54. Kirby J summarises in *Johnson* at [53]:

> "Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. …The fictitious bystander will

[46] *Johnson* at [53]. See also *QYFM* at [47] per Kiefel CJ and Gageler J.
[47] *Ebner* at [8].
[48] *QYFM* at [47] per Kiefel CJ and Gageler J.
[49] *QYFM* at [70] per Gordon J. See also *QYFM* at [171] per Edelman J.
[50] *QYFM* at [49] per Kiefel CJ and Gageler J.
[51] *Johnson* at [14].
[52] *QYFM* at [13] per Kiefel CJ and Gageler, quoting *CNY17* at 90.
[53] *QYFM* at [48] per Kiefel CJ and Gageler J.
[54] *QYFM* at [72] per Gordon J.
[55] *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87.
[56] *Isbester v Knox City Council* (2015) 255 CLR 135 at [23].
[57] *R v Doogan; ex parte Lucas-Smith* [2005] ACTSC 74 ("*Doogan*") at [78]; *Kontis v Coroners Court of Victoria* [2022] VSC 422.

> also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. … Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious." (citations omitted)

**The particular nature of coronial proceedings and the questions I am required to decide**

55. There is no doubt that the rules against bias and apprehended bias apply to coronial proceedings.[58]

56. The fair-minded lay observer is taken to have knowledge of "the nature of the decision and the context in which it was made, and the circumstances leading to the decision."[59]

57. In the coronial context, the primary function of an inquest is, pursuant to s. 81 of the *Coroners Act 2009* (NSW), to identify the circumstances of death and to record:

    a. the person's identity;

    b. the date and place of the person's death; and

    c. the manner and cause of death.

58. The task is sometimes referred to as the need to answer five questions; who died, when and where he or she died, how he or she died, and what caused his or her death?

59. Another purpose of an inquest is to consider, pursuant to s. 82 of the *Coroners Act 2009* (NSW), whether it is necessary or desirable to make recommendations in relation to any matter connected with the death. That can involve identifying any lessons that can be learned from *the particular death*, and whether anything should or could be done differently in the future to prevent a death in similar circumstances. It has often been pointed out that an inquest is not a Royal Commission with wide ranging power – recommendations must be necessary, desirable, and connected with the death in question.[60]

60. A coroner has the power to grant leave to parties to appear at the inquest and to make various orders regarding the disclosure of information. Once an inquest has commenced, parties with sufficient interest may be represented or appear in person to cross examine witnesses and to make submissions on the evidence.[61] Parties can request that witnesses be called or that

[58] *Doogan* at [10].
[59] *QYFM* at [72] per Gordon J.
[60] See, e.g., *Waller's Coronial Law and Practice in New South Wales* (4th ed, 2010) at 221. See also *Doomadgee v Deputy State Coroner Clements* [2005] QSC 357 at [29].
[61] *Coroners Act 2009* (NSW) ss. 57, 59, 61, 66, 69, 74, 75.

evidence be tendered. While coroners are not bound by the rules of evidence,[62] they are required to afford all parties procedural fairness.[63] Only the State Coroner or senior coroners such as myself may preside in matters concerning deaths in custody or as a result of police operations, such as the death of Mr Chee Quee.[64]

61. Coronial proceedings are somewhat unusual within the NSW court system. The hybrid nature of the jurisdiction must be understood as encompassing investigatory, adversarial, and inquisitorial elements. There can also be an element of therapeutic jurisprudence in coronial law, where the recommendatory function can attempt to promote both change and healing. A fair-minded lay observer would understand that the coroner's task is not to determine the legal rights of the parties or to apportion blame. A fair-minded lay observer would appreciate that coroners, wherever possible, attempt to create an atmosphere of compassion for the deceased's family, whatever the circumstances of the death.

62. It is usual that at some point during the investigatory stage of the inquiry, but prior to commencing an inquest, a coroner will release a draft Issues List. This will involve already having a close knowledge of the evidence collected to date. The Issues List is by no means a pleading in the civil sense. While it is a changeable list, it foreshadows the areas of likely concern.

**The proceedings in question**

63. As I have previously stated, the proceedings which are the subject of the application concern the death of Andrew Chee Quee. It is necessary to have some understanding of the particular proceedings in relation to Mr Chee Quee to later consider whether the fair-minded lay observer might apprehend that I might be diverted from properly discharging my statutory functions.

64. Mr Chee Quee was 51 years old at the time of his death. There is evidence that throughout his adult life he had experienced mental health issues, including major depressive disorder, substance abuse disorder, and gambling disorders. He may have had a generalised anxiety disorder and while he had been employed and had close and longstanding friendships, evidence indicated a concerning pattern of instability in some of his adult interpersonal relationships. He had previously attempted suicide. The records do not suggest cognitive impairment or intellectual disability.

[62] *Coroners Act 2009* (NSW) s. 58(1).
[63] See *Annetts v McCann* (1990) 170 CLR 596 at 598-603.
[64] *Coroners Act 2009* (NSW) s. 23(1).

65. On 19 April 2020, Mr Chee Quee had an argument with a friend and left his home, armed with two knives and a hammer. There is evidence that earlier that evening he had made serious and quite specific threats to harm or kill family members. Police were called and subsequently located him in a park in Rockdale. He made threats to kill police if they approached. He advised police that he had a gun. At about 12.37am, he ran towards police, brandishing two hammers. Two police officers discharged their Tasers, but that did not stop him. He ran at one of those officers and attempted to hit him with a hammer. Probationary Constable Worboys then drew and discharged his firearm, striking Mr Chee Quee in the chest. His death was declared at St George Hospital at 1.44am the following day.[65]

66. I commenced my investigation of Mr Chee Quee's death well before the incident which occurred at my mother's nursing home. Being the on-call duty coroner at the time, I was personally notified by telephone that a critical incident had occurred in the early hours of the morning of 20 April 2020. Later that day, at the request of officers of the NSWPF, I issued a number of coronial scene orders pursuant to s. 43 of the *Coroners Act* 2009 (NSW) to permit NSWPF officers to search various relevant properties. I ordered an autopsy on 21 April 2020. Later, I engaged the assistance of the Crown Solicitor's Office, who in turn briefed counsel. Many statements were requested and policy documents were sought. I approved the briefing of an independent psychiatrist and took a number of other steps to commence compiling a comprehensive record of what had occurred.

67. In November 2022, a draft Issues List was circulated well before what parties have described as my sister's "re-agitation" of events involving my mother. I note that the Issues List remains unchanged today. It identified the following issues:

    1. Did Andrew intend to provoke police to shoot him, and intend thereby to cause his own death?

    2. Was the negotiation with Andrew undertaken by A/Sgt Assaf by phone in accordance with NSW Police Force policy and training? What alternatives were there?

    3. Was the police response planned by A/Insp Gemmell in accordance with NSW Police Force policy and appropriate in the circumstances? In particular, was it appropriate to wait for police dog units to attend before approaching Andrew?

[65] A longer set of facts is set out in the written submissions of Senior Counsel Assisting on the Application of 20 October 2023 at [48]-[65].

4. Prior to the shooting, what was known about:

    a. the weapons Andrew had with him?

    b. Andrew's state of mind?

5. Was the action taken by police in Bay Street when Andrew walked towards them appropriate in the circumstances? What alternatives were considered, and why were these not used?

6. Was the decision to shoot Andrew a justifiable use of force and in accordance with NSW Police Force policy?

7. Is it likely that other resources or equipment would have affected the outcome, including mental health resources such as those available through the PACER program?

8. Is it necessary or desirable to make any recommendations in relation to any matter connected with the death?

68. There has been no suggestion then or now that any of the matters set out as issues are inappropriate or beyond scope. There has been no suggestion that the Issues List demonstrates any pre-existing or rigid view has already been taken or that the list might appear that way to the hypothetical fair-minded lay observer.

69. At a directions hearing on 20 September 2022, I set the matter down to commence on 7 August 2023.

70. I pause to say that I have carefully considered the facts reported in relation to the assault on my mother and the facts as I currently know them from the investigation of the death of Mr Chee Quee. I accept that the fair-minded lay observer would understand that the incident involving my mother in 2020 involved an exercise of police power in relation to a vulnerable person. In my view, there are also compelling differences in the events, including:

    a. the incident in relation to my mother did not result in her death or in any coronial investigation;

    b. the incident in relation to my mother did not involve danger to the police or the use of firearms which are critical to understanding the cause and manner of Mr Chee Quee's death and which lie at the heart of this coronial investigation;

    c. my mother was not armed with a weapon, nor had she ever made threats to kill others either prior to her apprehension or while she was restrained, whereas Mr Chee Quee was

armed and appears to have made threats to kill others prior to and during the police operation;

d. there has never been a suggestion that my mother may have been attempting to provoke police to cause her own death, as is a consideration in relation to the death of Mr Chee Quee;

e. the incident involving my mother occurred in a secure Dementia Unit of her nursing home with nursing staff present, not in a public area as was the case with Mr Chee Quee; and

f. my mother lacked capacity due to cognitive impairment from dementia and Mr Chee Quee is not known to have suffered this or any similar condition.

**Bringing the law to the facts of this case**

71. Having set out the nature of the application made and the nature of the determinations necessary in the inquest into the death of Mr Chee Quee, it falls to me to decide whether Constable Worboys and/or the Commissioner have established a clear basis for a finding that a reasonable apprehension might be held by the fair-minded lay observer that I might not decide this case on its merits.

72. A logical connection must be established between the public comments of Emma Grahame (or more indirectly Sue Higginson MLC) and the apprehended deviation from determining identity, date, place and "manner and cause" of Mr Chee Quee's death and/or making comments or recommendations other than on the merits of the evidence and/or conducting proceedings without due regard for procedural fairness.

73. Before embarking on the task, I pause to say that it would be difficult to believe that Counsel for Constable Worboys and Counsel for the Commissioner would suggest that a fair-minded lay observer might apprehend that anything my sister has said might cause me to stray so wildly from my task so as not to bring an impartial mind to the question of the deceased's identity, or to the date, place, or medical cause of his death. These matters do not appear to be doubted or contested by the interested parties. For that reason, I understand the application to focus primarily on what the fair-minded lay observer might apprehend about any determination I might make about *the manner* of Mr Chee Quee's death or in relation to the way in which I might conduct proceedings or the recommendations I might consider.

**My association with Emma Grahame and her comments**

74. While the application does not, in my view, fit neatly into any of the (non-exhaustive) list of established categories, I understand the nub of the argument revolves around my *association* with Emma Grahame, given the views she has publicly stated about an incident involving my mother which occurred in 2020. There has been no suggestion that I am actually biased because of the assault on my mother. Rather, it is my sister's public statements about the events which appear to ground Constable Worboys' and the Commissioner's concerns. It appears there is also a concern that following my sister's comments, a member of the NSW Legislative Council raised related issues in Parliament. That connection is more indirect. I have seen no evidence that either myself or my sister have any association with or have ever spoken to or have any control over that person. It is an issue to which I will return.

75. As I have said, I have not commented or shared my views publicly in relation to the incident concerning my mother or the related lawsuit or, indeed, in relation to the recent death of Mrs Nowland, which is linked in some of the reporting about my mother's assault.[66] My actual views are unnecessary to state when the current application is based solely on apprehended bias and grounded in the reported views of my sister. It was submitted that the views of my sister are linked to me primarily by the fact that we are sisters and by reports which refer to "family."

76. In my view, the fair-minded lay observer can be taken to be aware that judicial officers have friends and family who have their own opinions and projects. Opinions may be shared or they may conflict. There is no doubt that views expressed by a family member *could* properly ground a disqualification application in particular circumstances, but in my view, the fair-minded lay observer might not be quick to assume a concurrence or to believe that a judicial officer might be unduly or easily influenced by the views of a relative.

77. I have not been referred to an apprehended bias case relating to out of court comments made by a judicial officer's adult sibling. Many of the reported cases appear to refer to spouses. However, I accept that there is a continuum of sorts where the public comments of a very distant relative might be more easily disregarded by the hypothetical fair-minded lay observer while the public comments of one's spouse or closer relative might require closer examination.

[66] According to material tendered on the application, Mrs Nowland had dementia and, as at 22 May 2023, she was receiving end-of-life care in Cooma Hospital after having been tasered by a NSWPF officer. Mrs Nowland died in Cooma Hospital on 24 May 2023.

I accept and understand that the guidance offered in the *Guide to Judicial Conduct* classes one's sibling as a personal relationship of the "first degree".[67]

78. The Court of Appeal of the Northern Territory considered the significance of familial relationships in the context of apprehended bias in *Attorney General v Director of Public Prosecutions* [2013] NTCA 2. That case involved the question of whether an acting Magistrate might be inclined to favour clients of the Central Australian Aboriginal Legal Aid Service ("CAALAS") where her husband was a Principal Legal Officer. In the facts of that case, the Court held at [31] that "a fair-minded lay observer would not reasonably apprehend that the judge might not have brought an impartial and unprejudiced mind in the resolution to cases involving CAALAS' clients merely because her husband was the Principal Solicitor" and undertook a range of duties in accordance with that role.

79. The spousal relationship in that matter would seem to me a much closer association than the one in the instant case given that spouses are likely to live together and in the course of daily life discuss their work, particularly perhaps when they are both legal practitioners. The difficulty referred to in that case was that the relationship might involve a potential conflict of interest and that, for reasons wholly unconnected with the matter at hand, the association might cause the judicial officer to favour persons connected with CAALAS. In that case, husband and wife were both involved in a small legal community and it can be assumed that some of the cases they were each involved with were apparently occurring in the same court.

80. I accept that a sister is not a distant relative. Nevertheless, in my view, a fair-minded lay observer would give very careful consideration to whether an adult sibling's stated public concerns might affect or might improperly influence decisions the legislature has tasked me to make. The fair-minded lay observer would note that Emma Grahame never refers to me and never calls herself the "family spokesperson" or purports to put my opinion on any issue. In my view, the fair-minded lay observer would not be troubled by a journalist's reference to "the family's view" or readily assume that the view was held by every person related to Rachel Grahame.

81. Whatever the closeness of our actual relationship, I have not lived in the same home as my sister Emma Grahame since the late 1970s. She is not a lawyer or someone I might be expected to turn to for legal advice. While I do not expect the fair-minded lay observer to know this detail,

[67] Australasian Institute of Judicial Administration, *Guide to Judicial Conduct*, 3rd ed. (revised December 2022) at 15.

I expect a fair-minded lay observer would approach with real caution any assumptions about the effect of the relationship between adult siblings on a judicial officer's professional decisions.

82. While it was not expressed in precisely these terms, I understood the application to also suggest that Emma Grahame's comments disclosed an identifiable *interest* (albeit quite indirect) in the inquest of Mr Chee Quee. Of course, it has not been nor could it possibly be suggested that my sister is involved in the inquest into the death of Mr Chee Quee or that she has ever spoken to me about the proceedings involving Mr Chee Quee or that she is even aware of them. This case is wholly different to those where it is established that there is a troubling and tangible connection to actual proceedings at hand (such as where there is an impermissible or secret relationship between a judge and appearing counsel) or where a clear and direct financial interest is disclosed (such as cases where a judge's family could benefit financially from a decision). It is also very different to the circumstances outlined in *Maules Creek Coal Pty Ltd v Environmental Protection Authority* [2023] NSWCCA 275 where there was evidence of a direct communication, albeit mistaken, outside court processes.

83. Thus, it is necessary to grapple with exactly what interest, if any, might trouble the fair-minded lay observer in this case. While it is not completely clear to me, it appears that the application asserts that Emma Grahame's "re-agitation" of the 2020 assault on my mother in the context of the tasering of Mrs Nowland is the nub of the problem. It was suggested that the "re- agitation" discloses Emma Grahame's wider interest in *any* matter where vulnerable people are the subject of police power. The net is thus so widely cast that the circumstances of Mr Chee Quee's death are included in a class of matters with which she is concerned or might be relevantly interested. I understand the application to suggest that while Emma Grahame has not commented on Mr Chee Quee's matter, her pronouncements are considered to be so broad such that they might cause a fair-minded lay observer to apprehend that her general comments about police conduct might, because of our close association as siblings, affect my ability to properly discharge my duties in relation to this inquest. In other words, it is submitted that she has not just commented on the events concerning my mother in 2020 but made general comments which are relevant to matters I am tasked to consider in this inquest.

84. In oral submissions, Counsel for Constable Worboys argued that it was Emma Grahame's expressing sentiments such as "no this not [sic] resolved, this is not the end of it. I am releasing body worn footage, I'm making comments that nothing has changed in the police, something has got to [be] done"[68] that lay at the nub of the issue. I understood the application to suggest

[68] 8/8/23 T 8.22-24.

that Emma Grahame's tweets and contact with the media demonstrated an interest in what was described as "police misconduct"[69] more generally – a concern which was later taken up by Ms Higginson in her parliamentary role. Counsel for Constable Worboys expressed this concern "[i]n circumstances where my client is the officer who fired, the one officer who fired the shot and may be the subject of criticism either in evidence or at the end of the inquiry."[70]

85. Of course, Counsel for Constable Worboys was not concerned that her client might (or might not) be criticised after all the evidence had been properly considered. Rather, she was concerned that the fair-minded lay observer might, upon knowing that my adult sister had an ongoing interest in "police misconduct" and had expressed views that the police "had not learnt a lesson" from the past, apprehend the real possibility that I might approach my statutory tasks in error.

86. In my view, Emma Grahame's comments are taken out of context.

87. I do not accept that the views publicly expressed by my sister go anywhere near as far as has been suggested. While Ms Higginson's statements may reflect broader concerns and refer to the Law Enforcement Conduct Commission, Emma Grahame's reported comments, where they go beyond comment on my late mother's situation, refer only to dementia units and nursing homes. Emma Grahame refers to her view that police "shouldn't be there in the first place".[71] She states "If the police are called, surely they're quite within their rights to say, 'this looks like a health situation'".[72] She comments that staff called police or "ambos" whenever "they couldn't cope, as they had no training and were understaffed."[73] The only "police training" she calls for is "in dealing with dementia sufferers."[74] On the material tendered, at no time does her commentary, when read in its context, extend to any class of persons beyond "dementia sufferers".[75] She certainly makes no link to other persons who may be considered vulnerable or those "experiencing mental health episodes."

[69] See for example 8/8/23 T 8.31-39.
[70] 8/8/23 T 8.37-39.
[71] Exhibit 1 at p. 26.
[72] Exhibit 1 at p. 22.
[73] Exhibit 1 at p. 32.
[74] Exhibit 1 at p. 13.
[75] I note that in Exhibit 1 at p. 22, Emma Grahame is quoted as saying "They [NSWPF] need to feel the effect of what their staff are doing to people who can't defend themselves". When read in the context of the one indirect quote and two direct quotes of Emma Grahame immediately following this quote, the reference to "people who can't defend themselves" is understood to be a reference to dementia sufferers in aged care facilities.

88. Taken fairly and considered as a whole, her concern, if general, is about the intersection of dementia care and policing. This is just not an issue in the current proceedings.

89. It is interesting to note that the High Court has indicated that there are certain general societal preconceptions that would not typically give rise to apprehended bias.[76] It is recognised that there can be underlying general preconceptions which reflect generally held or embedded community values which will not rise to the level of an apprehension of bias unless it is concluded that they are so strongly held that they may affect the proper application of the law. An antipathy to drug importation is given as an example. While I make no particular finding in relation to this issue, it appears that much of what Emma Grahame says – such as the inappropriateness of arresting and double handcuffing a 45 kg, 81-year-old dementia patient "howling in pain" in her own home – might be generally accepted in the community. Certainly, it appears from the material tendered by Constable Worboys to have been accepted by the Aged Care Quality and Safety Commission. I note that the material tendered also discloses that the tortious action was not fought, but rather settled and compensation was paid to Rachel Grahame.

90. In my view, the application characterises the comments of Emma Grahame far too broadly. On what has been tendered, the fair-minded lay observer might note her views on the forcible arrest of vulnerable residents in dementia units but be none the wiser on what her thoughts might be on the manner and circumstances of police involvement in Mr Chee Quee's death. The circumstances are just too remote. Further, in relation to police training, Emma Grahame appears only interested in it in relation to contact with dementia patients.

**Might the fair-minded lay observer apprehend that Emma Grahame's expressed views might influence me to such a degree as to decide the matter otherwise than on its merits?**

91. As I have said, in my view, the application characterises the views of Emma Grahame too broadly. Nevertheless, I must grapple with how her views and conduct might be seen by the fair-minded lay observer to influence the task before me.

92. I have been a legal practitioner for decades, both as a solicitor and at the NSW Bar before being appointed a Local Court Magistrate. In April 2010, I made a solemn promise before a packed court room to "do right to all manner of people according to law without fear or favour, affection or ill will." It is a promise that I take extremely seriously and one upon which I regularly reflect. Since that important promise I have received formal judicial education on the need for

[76] *QYFM* at [168] per Edelman J.

impartiality and on the operation of unconscious bias. I am conversant with publications such as the *Guide to Judicial Conduct*.

93. I accept that the fair-minded lay observer is not to be assumed to have a detailed knowledge of these precise matters or of my character or ability.[77] Nevertheless, the hypothetical fair-minded lay observer may be taken to understand that by reason of my professional training, experience, and fidelity to my judicial oath or affirmation that I will have a greater capacity than most to "discard the irrelevant, the immaterial and the prejudicial".[78]

94. I have been a Deputy State Coroner since 2015 and since that time I have been required to investigate individual deaths every single day of my working life. While only a small percentage of deaths proceed to inquest, over 6,000 deaths are reported to the NSW State Coroner each year. I have personally investigated many hundreds of deaths. I have also held numerous mandatory inquests into deaths involving the operation of police powers and vulnerable people both before and since the police incident involving my mother in 2020.[79] There has been no complaint of actual bias and this is the first of apprehended bias. While the fair-minded lay observer is not assumed to have knowledge of these precise matters, one would expect that he or she would understand that I am well used to investigating the kind of subject matter which will be disclosed in the inquest into the death of Mr Chee Quee and that I have received judicial training and understand my responsibilities.

95. The fair-minded lay observer might imagine that a coroner such as myself, entering the seventh decade of life, would also have experienced the death of family or friends along the way, might have had some exposure to vulnerable people, and also be aware of the operation of police powers. The fair-minded lay observer would not know the details of my personal experience but I am confident he or she might accept that all coroners, especially senior coroners such as myself, would have a well-honed ability to compartmentalise aspects of deaths which have occurred in their own personal circle from issues raised every day in coronial investigations, just as a judge in a criminal court would routinely put aside his or her own family experience of crime

[77] *QYFM* at [48] per Kiefel CJ and Gageler J.
[78] Ibid.
[79] For example, Inquest into the death of John Bale (30 March 2017), Inquest into the death of Benjamin Gilligan (7 July 2017), Inquest into the death of Brittany Jane Rawlings (1 August 2017), Inquest into the death of MC (17 August 2017), Inquest into the death of KE (25 October 2017), Inquest into the death of Corey Kramer (9 April 2018), Inquest into the death of Levai (5 July 2019), Inquest into the death of Yousif Yousif (18 December 2019), Inquest into the death of XY (11 December 2020), Inquest into the death of Brooke Carroll (22 May 2020), Inquest into the death of MF (23 September 2021), Inquest into the death of Tyrone Adams (9 December 2022), Inquest into the death of Ziad Hamawy (21 July 2023), Inquest into the death of William John Torrens (14 July 2023), and Inquest into the death of BW (8 September 2023).

when sentencing offenders or as a family court judge would put aside his or her own personal experiences of divorce. In a general sense, the fair-minded lay observer would usually accept this ability to compartmentalise the personal from the professional as a commonplace or everyday occurrence in judicial life. We would have no judges in our criminal courts if it were required that judges have no wider family experience of crime, no family court judges if they were to have no experience of separation or divorce, and no coroners to conduct proceedings if they were required to have no experience of any of the circumstances pertaining to the very wide range of deaths reported to this Court. While these personal experiences may not be reported in the media, the fair-minded lay observer would, at least in general terms, accept that being able to separate one's personal life from one's judicial life is a requirement of the role.

96. My work as a senior coroner involves conducting mandatory inquests that require close consideration of police conduct. Over the years I have had reason to commend and criticise individual NSWPF officers. There are over 18,000 police officers in NSW of varying abilities and talents. Counsel for Constable Worboys submitted that as a result of considering the material tendered, "[a] lay observer may think that there is a possibility that, unconsciously, sympathy may shift away from Constable Worboys towards Mr Chee Quee."[80] Leaving aside the fact that this comment appears to misunderstand the true nature of coronial proceedings which do not involve that kind of contest between parties, the approach remains concerning. It asserts that there is a real possibility that a fair-minded lay observer might apprehend that views held by my sister (and reported in the media) about officers involved in an assault of my mother might infect my findings in relation to completely different officers in substantially different circumstances. In my view, it is more likely that the fair-minded lay observer might place less weight on reports of my sister's views when they are seen in the context of the many individual findings I have made about the NSWPF officers – complimentary and critical – before and since 2020. I do not suggest this fact alone is determinative, rather, it is useful to remember that the fair-minded lay observer is not overly suspicious or sensitive and might also place weight on the context of my decision-making.

**Comments made by Ms Higginson**

97. With respect, I find it difficult to understand how reported comments made by Ms Higginson, a person I have never met, might cause the fair-minded lay observer to apprehend bias in these proceedings.

[80] Written submissions on behalf of Constable Worboys dated 8 August 2023 at [62].

98. In oral submissions, Counsel for Constable Worboys placed the concerns squarely in the context of Ms Higginson's recent call for a parliamentary inquiry into police powers and her mention of Rachel Grahame's case and the payment of compensation. Counsel stated:

> "Following on from the tweets and the newspaper articles a call for a parliamentary inquiry into police powers and matters that will be canvassed within this and use of force that will be canvassed within this inquiry. In circumstances where my client is the officer who fired, the one officer who fired the shot and may be the subject of criticism either in evidence or at the end of the inquiry."[81]

99. A politician can say what they like and take up matters as they see fit. The assault on my mother has been reported and a NSWPF spokesperson confirmed to the media that District Court proceedings had been settled. A fair-minded lay observer is unlikely to associate Ms Higginson's calls with me or see her calls as something which might influence my determinations in the matter concerning the death of Mr Chee Quee. The fair-minded lay observer may be taken to have a rudimentary grasp of the separation of powers. Courts are well used to making independent decisions while politicians go about their business.

100. In my view, Ms Higginson's comments are too remote from me to ground a reasonable apprehension of bias in this matter.

**Is the fair-minded lay observer's apprehension reasonable?**

101. I have considered the application carefully, noting the "double might" test and the low threshold it sets.

102. I accept my sister's comments go beyond expressing facts about my late mother's assault and make a more general point, in the context of Mrs Nowland's death, that the "NSW Police learnt nothing"[82] in relation to their contact with dementia patients in nursing homes. However, I do not accept that the broad ranging characterisation of her views put forward by Constable Worboys or the Commissioner has been established on the evidence tendered.

103. I certainly accept that public comments by a family member could, in certain circumstances, ground an application for apprehended bias. However, there are a number of factors which, in my view, when combined, make an apprehension of bias unreasonable in this case.

104. These include:

[81] 8/8/23 T 8.34-39.
[82] Exhibit 2 at p. 3.

a. The details of my late mother's assault and the details of Mr Chee Quee's death, while both could be said to involve "the operation of police powers", are factually very distinct.

b. The relationship between adult siblings, while not remote, is somewhat removed from the direct relationship usually contemplated in the relevant case law. The fair-minded lay observer might look to his or her own hypothetical family and consider whether adult siblings might always agree and influence each other when taking professional decisions. The fair-minded lay observer might not be overly suspicious that the views of a sister (even when publicly expressed) might influence a judicial officer to conduct her investigation in a biased or partial manner, particularly a judicial officer who has had cause to consider the operation of police powers over many years.

c. My relationship with Ms Higginson is non-existent and the fair-minded lay observer would accept that members of parliament may take up issues from time to time without the "permission" or knowledge of family members.

d. While there is a "family" connection between Emma Grahame and myself, at no time does my sister claim to speak for me, call herself "family spokesperson", or publicly suggest that I share her views or that I should adopt them. A reasonable fair-minded lay observer would understand that a journalist might use shorthand such as describing "the family view".

e. My sister has never commented on the death of Mr Chee Quee or had any involvement in the matter. I have seen no evidence that she is even aware of the proceedings. On any calculation, her interest in the current proceedings must be regarded (at best) as extremely remote and has not been clearly identified.

f. The broad characterisation of my sister's reported views contained in the parties' submissions is somewhat inaccurate. Her reported views are not broad enough to safely assume what she might think of police conduct in relation to the death of Mr Chee Quee, if she were even aware of it. My sister's comments, beyond those directly related to my mother, appear to be firmly grounded in her concern about the use of police in under-staffed or under-trained dementia wards. The only other case on which she appears to specifically comment is in relation to another woman in a nursing home, Mrs Nowland. I accept that my determination might be different if I were about to commence an inquest into Mrs Nowland's death (which I am not) given the recency of my sister's comments in

the media and the way the incidents have been linked. However, the current application is quite removed. Each case must be decided on its particular merits.

g. My involvement in the matter concerning Mr Chee Quee commenced well before the incident involving my mother. The Issues List (which has not been objected to or altered), sets the clear parameters of the inquest, and was settled well before any of the reports or comments referred to in evidence were made. The fair-minded lay observer is likely to accept that having set the parameters, it might be unlikely for a judicial officer to become overwhelmed by media reports and resolve those issues other than on their legal or actual merits. This is particularly so when a complete brief has already been served and the matter is set to begin.

h. The matter concerning Mr Chee Quee will proceed in open court. The bulk of the documentary evidence has been in the possession of the legal representatives for some time. The fair-minded lay observer is likely to understand that the interests of Constable Worboys and the Commissioner will be protected by experienced counsel in circumstances such as these where clear parameters have already been set and do not appear to be in dispute.

i. My long history as a judicial officer, in particular my extensive experience in dealing with matters involving allegations of "police misconduct" both before and after the media reports, might give the hypothetical fair-minded lay observer some comfort. As would my oath of office, judicial training, and years of experience in separating personal from professional matters.[83]

j. I made a disclosure as soon as possible after being advised that the Commissioner had written privately to the State Coroner requesting consideration be given to the "appropriateness" of me "continuing to preside over matters involving the Commissioner and NSWPF officers."[84] While it has been suggested that the issue should have pricked "my judicial conscience" before that time, I did not see a close connection between my mother's situation, my sister's comments, and the death of Mr Chee Quee. This remains the case.

[83] In the sense that the fair-minded lay observer would keep in mind that a judicial officer whose training, tradition and oath require the judicial officer to discard the irrelevant, the immaterial and the prejudicial: *Gaudie v Local Court of New South Wales & Anor* [2013] NSWSC 1425 at [103]-[108], referring to *Johnson* at [12].
[84] Exhibit 4.

105. It is extremely important that judicial officers do not lightly accede to disqualification applications. Justice must be seen to be done and the random selection of a coroner in each case is part of that process. It is an important principle of our legal system that parties cannot privately pick and choose judicial officers. If parties apprehend bias, it should be ventilated in a transparent process in open court. My disclosure was made to allow this to occur.

106. The criterion for determination of an apprehension of bias on the part of a judge (or judicial officer such as a coroner) is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions the judge is required to decide. In considering this, I have kept in mind that the "double might" formulation serves to emphasise that the criterion is concerned with "possibility (real and not remote), not probability".[85] However, a fanciful or speculative possibility must be clearly distinguished from a "firmly established" apprehension of bias.[86]

107. The logical connection drawn in this case is not reasonable. In my view, it is entirely fanciful. It is based on extending my adult sister's stated views on police in nursing homes and in relation to dementia patients to include *any* operation of police powers on vulnerable people or what the application described as the possibility of "police misconduct". The application asserts that because she is my sister, Emma Grahame's reported views (and by extension the views of Ms Higginson) are sufficient to ground an apprehension of bias in the Chee Quee proceedings. In my view, the logical connection asserted has not been established to the requisite standard and is unreasonable.

108. For the reasons set out above, I refuse the application to disqualify myself and I will now make the necessary arrangements to re-list the matter before me at the first available opportunity.

Harriet Grahame

Deputy State Coroner

30 November 2023

[85] *Ebner* at [7].
[86] *Re JRL* at 352, 371; *CNY17* at [19].