IN THE CORONERS COURT **COR 2004 1710 & 1711**
OF VICTORIA
AT MELBOURNE

In the matter of the investigation into the deaths of Terence and Christine Hodson

Ruling on Applications of Paul Dale and Rodney Collins under section 57 of the *Coroners Act 2008*

1. Application has been made on behalf of Mr Paul Dale[1] and Mr Rodney Collins[2], both interested parties in these proceedings, that they be excused from giving evidence on the grounds of self incrimination.
2. Section 57 of the *Coroners Act 2008* (the Act) sets out the process to be followed where an objection on the grounds of self incrimination is made.
3. A person who raises an objection under section 57(1) must generally identify:
    - Whether the objection is based on apprehension that the evidence will prove the commission of an offence against an Australian law or whether it is an offence against a foreign country (and if so, which country);
    - The specific laws or class of laws which create the relevant offence that provides the basis for the objection (unless this is obvious); and
    - Whether the objection is based on exposure to a civil penalty, the nature of the civil penalty and whether it arises under Australian law or under the law of a specified foreign country.
4. Once the objection is made by a witness, a coroner must first determine under section 52(2) whether there are reasonable grounds for the objection. If satisfied that there are, the process set out in section 57(3) must be followed, and consideration given to whether the witness should be granted a

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[1] Mr Geoffrey Steward instructed by Tony Hargreaves & Partners Lawyers. Submission dated 20 June 2014, followed by oral submissions on 17 July 2014.

[2] Mr Chris Traill. Submission dated 23 June 2014, followed by oral submissions made by Catherine Boston on 17 July 2014.

certificate under section 57(5) and whether, if they remain unwilling to give evidence, they should be compelled to do so.

5. I was advised that Mr Dale was charged with the murder of Terence Hodson, and the charge was withdrawn by the DPP during a committal hearing '*due to the death of Carl Williams, who had implicated him in the murder.*' I was further advised that Mr Collins was charged with the murders of both Terence and Christine Hodson, and the '*charges were discontinued by the Office of Public Prosecutions during the course of a contested committal hearing*'.

6. Having considered these matters, a review of the written submissions of the applicants and a review of the coronial brief of evidence, I ruled on 17 July 2014 that Mr Dale and Mr Collins had reasonable grounds under section 52(2) of the Act as there is some risk that the evidence of each may tend to show that they have committed the offence of murder. I note that this matter was conceded by the Chief Commissioner of Police (CCP).

7. Following Mr Dale[3] being sworn and Mr Collins[4] being affirmed, each were advised by me that I would grant them a certificate under section 57(5) of the Act. Each of them said in response to my questions that, notwithstanding the certificate, they would not willingly give evidence.

8. It is necessary for me, therefore, to consider whether I should require Mr Dale and/or Mr Collins to give evidence under section 57(4). I may do so if I am satisfied, that the interests of justice require that the witness or witnesses give evidence.

The applicants' submissions

Mr Paul Dale

9. On behalf of Mr Dale, it was submitted[5] that it was not in the interests of justice for him to be compelled for reasons which included:

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[3] 17 July 2014

[4] 17 July 2014

[5] Written Submission dated 20 June 2014

- Mr Dale had been compulsorily examined on nine occasions in relation to the murders of Terence and Christine Hodson;
- Mr Dale had been charged with Commonwealth offences arising from evidence he gave to the Australian Crime Commission (ACC) concerning his relationship with Carl Williams and dealings with him prior to the deaths of Mr and Mrs Hodson, and that he has been acquitted of all charges by the Supreme Court (those charges related to perjury);
- Mr Dale has consistently denied that he arranged the murders under investigation;
- Mr Dale remains a person of interest (or suspect) by Victoria Police in relation to the murders and is still at risk of being indicted;
- Victoria Police had, subsequent to the charges being discontinued against Mr Dale, obtained further evidence which was included in the inquest brief;
- That the privilege against self incrimination may be invoked even if the question is innocuous on its face but seeks information which may form a link in a chain of incriminatory material;[6]
- The interest of justice do not require a person suspected of a serious criminal offence to give evidence in an inquisitorial proceeding: *'The public interest in requiring a prime suspect in the investigation of a murder to give evidence at the inquest which may incriminate him or her, subject to immunising the evidence under a s 33AA certificate, is less apparent.'*;[7]
- Mr Dale would be denied the ordinary privileges and safeguards of his right to silence and observance of the ordinary rules of evidence in the administration of criminal justice;
- There is a long standing practice in the Coroners Court not to call a witness who is likely to be implicated in a serious crime[8];

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[6] *Gamble v Pearson* [1983] 2VR 334

[7] *Correll v A-G (NSW) [2007]NNSWC 1385* at [42]

[8] *Decker v State Coroner of NSW* [1999] NSWSC 369 at [23]

- A certificate under section 57(5) of the Act would not provide sufficient protection against derivative use; and
- That the authorities suggest that the court must engage in a balancing exercise before deciding whether or not it is in the interests of justice to compel a witness to give evidence.

10. In further oral submissions made on 17 July 2014, the following was submitted on behalf of Mr Dale:

- That Mr Dale had been the subject of a '*relentless and fruitless pursuit ... by Victoria Police, the state DPP and the Commonwealth DPP for almost 11 years.*';
- That Mr Dale has consistently denied involvement in the deaths of Mr and Mrs Hodson, including in police interviews;
- That in particular, Mr Carl Williams, on whom the charges of murder against Mr Dale were largely based,

  was taken out of prison over the Christmas period of 2008, to a secret location, spending Christmas with his father and police officers, and subsequently made statements to police implicating Paul Dale. In circumstances where he sought and it would seem gained approval for the following demands: Payment of his father's $750,000 tax bill. Payment of his daughter's school fees. Eligibility for the million dollar reward, pertaining to the arrest and conviction of persons responsible for the killing of the Hodsons, notwithstanding that on Carl Williams' account, he had organised it or them. Thirdly, immunity from prosecution for the Hodson murders, and an application to be made to the DPP, supporting a reduction in his 35 year minimum gaol term. It was on the basis of a serial killer, one of the most notorious criminals in this country's history.;

- In addition, Justice Betty King had so described Mr Williams during sentence in the following terms:

  "You've also made a statement to the police, which I've had the opportunity to read. You offered to give evidence in respect of that statement, but the prosecutor, who I understand was Mr Horgan has

informed the court that since you've given evidence in the manner that you have in this case, they would not consider calling you, as they do not consider you a witness of truth....

That concurs with my observations of your evidence. Accordingly, while there is some benefit to you by the provision of the statement, it is of little significance when compared to your criminality.";

- Mr Dale has already provided the following evidence on oath as disclosed on the inquest brief:

"I don't deny knowing Carl Williams for the brief time that I did know him. It was always of my view that I was meeting him for legitimate reasons. I've never asked Carl Williams to kill anyone, or arrange anyone to be killed. So clearly, that's where this is leading. I've - I don't know whether - well, who would know that information? Who said that? They - it's not true. I've never asked him to do anything like that.

"I've never asked Carl Williams to kill anyone. I've never asked - to kill anyone, or - to kill anyone, or - and if any of them have said I've then - I have, then they are lying. The only way of all those names I've actually physically met, that I know I've physically met, is Carl Williams.

...And I've been put the ringer so many times over this so-called friendship association and all that sort of stuff. I've never done a criminal act with Carl Williams. And sitting here trying to put dates and times and locations, is to me a little bit of a nightmare, to be honest.....I'm here answering questions I've answered for the last five years, and to the best of my knowledge, right now, and - but that knowledge has become very muddled over the years, as a result of where I may have heard certain things."[9]

[9] Page 56, ACC transcript dated 26 November 2008

- That some *direct* knowledge of who arranged and carried out the killings is currently contained in the inquest brief - based on the evidence of Carl Williams;
- That in the 18 months between the examinations of Mr Dale by the ACC, he did not have the benefit of the earlier transcripts;
- That the evidence of Mr Dale would not shed light on who killed Mr and Mrs Hodson, as the evidence he would give would be consistent with that already before the Court;
- Whilst the CCP wished to cross examine Mr Dale as to the relationship between Mr Dale and Carl Williams, that matter had already been the subject of the Supreme Court trial;
- That compelling Mr Dale would not be in the interest of justice, particularly given the '*manner in which he has been treated by the ACC, the OPI, Victoria Police, the State DPP and the Commonwealth DPP.*';
- All reasonable lines of inquiries have been pursued, with an exhaustive inquiry over 10 years, and section 7 of the Act, requires that a coroner not duplicate other investigations and inquiries;
- That as far as Victoria Police are concerned, the case is still open and there are only two suspect – one being Mr Dale;
- The Coroner should have regard to the preamble to the Act when considering the interests at justice, and none of the purposes would be served by calling Mr Dale. That is, it would not assist with the resolution of the cause or prevention aspects of the deaths, including the making of recommendations;[10]
- That it is not accurate to suggest that Mr Dale is unlikely to be prosecuted in future. In the months after the charge of murder was withdrawn against Mr Dale, Victoria Police continued to pursue him,

[10] This was put in contrast to the Rich case

including obtaining a witness statement from Witness M (who is giving evidence in the inquest);

- That an examination of section 8 of the Act provides little assistance with the interest of justice test, but as noted above, it would not promote the administration of justice;
- That Mr Dale may be exposed to a forensic disadvantage in relation to any future criminal prosecution[11]; and
- Reference was later made to the following extract from Qing Zhao and Xing Jin v The Commissioner of the Australian Federal Police [2014] CSCA 137 at [53]:

  the High Court's reasoning in Lee No 2 appears to dictate that:

  a) the privilege against self-incrimination consists as much of the right of an accused to require the Crown to prove its case without the accused's assistance as it does of the accused's right to refuse to answer incriminating questions;

  b) as a constituent of the privilege against self-incrimination, the right to require the Crown to prove its case without the accused's assistance, like the right to refuse to answer incriminating questions, may only be abrogated by statute; and

  c) perforce of the principle of legality, as a constituent of the privilege against self-incrimination the right to require the Crown to prove its case without the assistance of the accused may only be abrogated by express statutory terms or clear necessary statutory implication.

Mr Rodney Collins

11. On behalf of Mr Collins, it was submitted[12] that it was not in the interests of justice for Mr Collins to be compelled, and in so far as relevant, the

[11] X7 v Australian Crime Commission & Anor [2013] HCA 29 at [124], Lee v NSWCC [2013] HCA 39 at [54]

[12] Written Submission dated 23 June 2014

submissions made by Mr Dale were adopted. His submission emphasised the following:

- That the public interest to compel was less obvious for matters involving serious charges, such as murder[13]; and
- Compulsion would contravene '*the principle of the common law respecting proof by the prosecution, unaided by accused, which...(is)...fundamental to our system of criminal justice*'.[14]

12. In further oral submissions made on 17 July 2014, Mr Dale's oral submissions were also adopted, where relevant (and not repeated here), and the following was submitted on behalf of Mr Collins:

- Mr Collins has been examined by a coercive body, but the details of same are unable to be disclosed;
- Mr Collins denied involvement in the deaths to the police at the time it was proposed he be interviewed, and via correspondence to the Court dated 15 July 2013;
- Mr Collins is at risk of being prosecuted in future (section 177(7) of the *Criminal Procedure Act* 2009) and that the '*central police theory clearly remains that Mr Collins was the gunman*';
- Reference was further made to the common law principle against self incrimination which, despite section 57, was submitted to be relevant when weighing the interests of justice;
- That Mr Collin's evidence, in contrast to the case of *Rich v Attorney-General of NSW & Ors*[15] where there was no question that the police officer on duty had shot the deceased, would not assist the investigation in light of the preamble and purposes of the Act;
- Mr Collins had denied involvement in the deaths and so could not assist with the resolution of the identity of the perpetrators or any prevention issues; and
- There is material on the inquest brief including recorded material and statements regarding conversations with Mr Collins.

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[13] *Correll v Attorney-General of NSW [2007]NSWC 1385* at [42]

[14] Lee v R [2014] HCA 20 at [45]

[15] [2013]NSWCA 419

Submissions by other interested parties

The Chief Commissioner of Police

13. The CCP submitted[16] that it was in the interest of justice for both Mr Dale and Mr Collins to give evidence at this inquest. The submission was put as follows:

- Compulsion will assist with the determination of the identity of the perpetrators of the murders, which is consistent with one of the scopes of the inquest;
- Compulsion would promote public confidence in the administration of justice, one of the reasons why I decided that an inquest would be conducted as part of this investigation;
- Authority to compel is found in two Court of Appeal decisions. Firstly, *Priest and West*[17], which says that a coroner must '*pursue all reasonable lines of inquiry*' and '*do anything possible to determine the cause and circumstance of the death*' and secondly, the case of Rich[18] in which the decision to compel a police officer was upheld on review;
- The interest of justice argument must *'be informed by consideration of all the provisions in the Coroners Act, the purposes of the Coroners Act and the important functions of the Coroners Courts'* (reference were made to sections 6, 8 and 67 of the Act) and a decision to compel was consistent with the provisions, purposes and functions of the Act;
- Mr Dale and Mr Hodson would be protected by the granting of a certificate (and the case of *R v Ross Edward Seller* relied upon by the applicants can be distinguished);
- That I agreed that persons should be called at the inquest that are capable of providing primary evidence (when I determined that an inquest should be conducted), and the applicants fall into that category;
- The probative value of the evidence is likely to be significant and the applicants may be the '*only witnesses capable of shedding light' on the*

[16] Written Submission dated 2 July 2014

[17] [2012]VSCA 327

[18] [2013]NSWCA 419

'central question' [in contrast to the decision in Patricia (Kwai) Chan of the former State Coroner[19]];

- Whilst the applicants have given accounts, they have not been tested in a public forum;
- It is unlikely that the applicants face any real threat of prosecution, as a prosecuting authority could not use evidence given under certificate; and
- That it is appropriate for the Court to engage in a balancing exercise before deciding whether or not it is in the interests of justice to compel a witness to give evidence.

14. In further oral submissions made on 17 July 2014, the following was submitted on behalf of the CCP:

- Once the section 57 provision is enlivened, the legislation modifies the longstanding common law privilege, and it is not appropriate to '*keep feeding back the privilege into the interests of justice test.*';
- The starting point for the analysis can be found in the Second Reading Speech to the Act recognising that: '*there has been a change, that things are different now, and that the interests of justice may trump the old privilege.*';
- The certificate, *'in the broadest possible terms, protects from direct and indirect use, with respect to criminal charges in Victoria*';
- The premise of section 57 of the Act is that a person may be exposed to risk which then obliges the weighing of factors to consider what was in the interest of justice;
- The '*nature of the murders and the nature of the victims, ...is ...a matter of concern to the community and to the family to investigate the circumstances in which these two were murdered, in particular the status of Mr Hodson as a police informer and prospective witness in criminal proceedings*'. In theses circumstances, it would promote the administration of justice and public confidence '*in the detection and*

[19] COR 2006 3226, dated 20 January 2012

prosecution of crime and that witnesses who are going to attest in criminal proceedings be free of risk to their security';

- The compulsion of the applicants is consistent with the requirements under s67 of the Act and that everything must be done by a coroner to answer those questions;
- The seriousness of the charge the applicants may face, takes the interest justice balance no further;
- The risk of perjury is not covered by a certificate (and it is not intended to do so) but this should not weigh in the balance;
- Mr Dale has in the past had *'a propensity to cherry-pick which matters he wishes to answer and which he does not. That is not the same as someone who steadfastly and solely maintains their right to make a "no comment" interview'*. (referring to his records of interview on 17 May 2004 and 13 February 2009);
- In addition, Mr Dale has authored a book and is currently engaged in civil proceedings against the State of Victoria regarding his treatment in prison. In the latter it was noted that it could be anticipated that he would be give evidence about matters concerning factors contributing to any psychiatric illness he may allege he suffers as a result of that treatment;
- Similarly, Mr Collins has *cherry* picked where he has wanted to engage in discussions with the authorities (for example, a discussions about eligibility for the reward);
- In contrast to the Chan case, '*there's nothing in the inquest brief at this stage from any person who might have direct knowledge of the shootings, in the sense of being in the room, or direct knowledge of who, if anyone, authorised them or directed them to occur or contracted for them to occur*' and compulsion of the applicants, could shed light on this; and
- There are different versions given by Mr Dale in relation to his interaction with Carl Williams. It was said *'that different versions have been given, which are capable also of being contradicted by other*

information, ... would legitimately form the basis of examination of the witness.'

The Hodson family

15. The Hodson family support the written and oral submissions made by the CCP.

Counsel Assisting

16. Mr Chris Winneke, Counsel Assisting made submissions with respect to the law, without urging me to take a particular position with respect to the application of the interest of justice test:

- He clarified that the position with respect to Mr Collins. That is, Mr Collins denied the allegations with respect to the murders and the police withdrew their application to interview him (as stated in the summary contained in the Inquest Brief);
- That the interests of justice must be guided by an examination of the Act and referred me to the preamble, purposes and the objects of the Act. Particular reference was made with respect to the preamble, sections 7 (duplication of inquiries), 8(f) (the promotion of public health and safety and the administration of justice) and 9 (fair and efficient coronial system);
- Counsel Assisting noted, that as part of the administration of justice, the coroner is unlikely to weigh the detection of crime as a factor. Whilst a coroner must refer a matter to the DPP (in some circumstances), a coroner is prevented from commenting that a person may have committed an offence;
- The role of coroner is significantly focussed on prevention as part of its function;
- Reference was made to the discussion and conclusions of the *Victoria Parliament Law Reform Committee*, which recommended the introduction of the current provision in the Act:

"The Commission considers that the abrogation of the privilege is justified in relation to evidence which touches on issues of major public importance which have a significant impact on the community in general or a section of the community. The Commission considered that, for example, abrogation could be justified where there was an immediate need for information to avoid risk, such as danger to human life or serious personal injury, or where there is a compelling argument that the information is necessary to prevent further harm from occurring.....Applying the criteria in relation to self-incriminating evidence at inquest, the Committee considers that in many cases in could be successfully argued that the abrogation of the privilege is justified in order for a coroner to establish the facts surrounding a person's death and to make recommendations to prevent future deaths and injuries....The Committee is, however, mindful of the fact that there are also maybe particular cases in which the abrogation of the privilege may not be justified because there may no longer be an immediate need for the evidence in order to prevent further danger"[20]
[my emphasis]

- He said that this reference serves to highlight *'what is a significant component of the coronial jurisdiction and that is the health and safety of the public and it may also give some guidance as to what the interests of justice might be when considering the question in respect to s.57*;
- That a coroner must pursue all reasonable lines of inquiry to identify the perpetrator of a murder (*Priest v West*) and that the applicants had been placed on the witness list consistent with this approach. Accordingly Counsel Assisting submitted that the need to make findings as to the identity of the killer or killers *is probably the main factor in the balancing exercise which sits on the compulsion side of the scale*;
- If the applicants could shed light on the circumstances of the death – that would be a significant matter to weigh in the balance. However, the CCP have submitted that what is proposed is *'an exercise in cross-examining, putting to*

[20] Page 287, Final Report

these witnesses varying statements, varying piece of evidence, cherry-pick statements, some questions that have been answered, some questions that haven't been answered with a view to - attacking the credit of these witnesses, one assumes, and with a view to making a submission to Your Honour that these witnesses were or probably were involved in the death. In the context of my investigation this line of inquiry would be less helpful;

- There are no previous cases in which a murder suspect has been compelled to give evidence in the coronial jurisdiction;
- That it would be appropriate to consider whether there is a risk that the applicants may be charged with a criminal and the seriousness of the potential charges and both these matters should be weighed in the balance[21];
- It should be noted in relation to the case of Rich, that the DPP had already determined that the police officer would not be charged and there were important issues of public health and safety that arose (the shooting involved a mentally unwell individual). In contrast to the present case, those important prevention functions do not arise. *'So what they appear to be saying there is issues to do with public health and safety, yes we can see why there's a discretion and that ought be compelled. In circumstances where we're dealing with or we might have to deal with facts which are coming closer to whether or not a person might have committed serious criminal offence, that's a different issue.'* (and this is consistent with other authorities such as Correll)
- That it is appropriate to weigh in the balance the potential that compulsion will restrict the forensic choices open to the applicants which can amount to *real prejudice.* [22]
- That there is material said to be relevant to the investigation which the applicants (and all other parties) are unable to access and it is appropriate to weigh this matter into the balance; and

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[21] Kan-Kem V Paine [2003]NSWSC 916 at [8]
[22] Hammond v The Commonwealth (1952) 152 CLR 188, X7 v Australian Crime Commission & Anor [2013] HCA 29 at [124]

- Consideration should be given to whether there are any other means of obtaining the evidence, although cross-examination of witnesses is the ideal approach.

- Mr Winneke drew my attention to paragraph 39 in Rich and he "real prejudice" discussed by Hayne and Bell JJ in the X7 v Australian Crime Commission case, the relevant passage in Rich is:-

  'Mr Thangaraj SC correctly pointed out in argument that even in a court where s61 prevents any evidence being adduced, if the witness' lawyers know the evidence that has been given under compulsion, that will restrict the forensic choices open to them, which can amount to real prejudice. That same rejudice was discussed by Haybne and Beel JJ in X7 v Australian Crime Commission [2013] HCA 29; 87 ALJR 858 at [124], with whom on this point French CJ expressed his agreement in Lee v New south Wales Crime Commission [2013] HCA 39; 302 ALR 363 at [54]; see also at [79]-[82] (Hayne J) and [211] (Kiefel J); cf [323]-[344] (Gageler and Keane JJ). But s61 requires that prejudice to be weighed in the balance of the interests of justice favouring obtaining the evidence. The premise of the section is that a witness is exposed to a risk, in which case, s61(4) obliges the Coroner to undertake an evaluative assessment of the interests of justice. That is precisely what the State Coroner did."[23]

- In summing up on the point Mr Winneke put it this way:-

  'So it does seem to be the case, Your Honour, that these authorities, including Rich, do give some consideration to the seriousness of the allegations and certainly, Your Honour, it would seem reasonable to have regard in considering whether it is in the interests of justice to compel a witness to give evidence that the possible offence, bearing in mind what is alleged against, and has been alleged against Collins is the very serious offence of murder.'[24]

The coronial jurisdiction

17. The deaths presently under investigation are clearly the result of murder.

18. Section 67(1) of the Act requires that a coroner must find if possible, the identity of the deceased, the cause of death and the circumstances in which a death occurred.

19. The purpose of an inquest is to establish the findings required by sections 67 of the Act and to make such comments or recommendations as are appropriate in the circumstances of the case.

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[23] *Rich v Attorney-General of NSW & Ors*, [2013]NSWCA 419

[24] Transcript of Hearing – 17 July 2014 pages 131 - 132

20. While it is no longer mandatory to make findings of 'contribution' in the coronial jurisdiction, such findings will be appropriate in some cases.

21. The precise scope of an investigation into the circumstances in which the death occurred depends on the facts of the case.

22. In the present case, it is clear that the identity, cause of death and most of the circumstances in relation to these deaths is known and was known before the commencement of the inquest.

23. The scope of this inquest has been determined by me and is confined to two discrete issues. That being, the identification, if possible, of the perpetrators of the homicides.

24. The second issue is the adequacy of the protection provided to Mr Hodson, as a crown witness, at the time of his death.

25. I make the observation that there are no current prevention issues within the scope of this investigation and inquest.

26. I note that the preamble of the Act states that the purposes of a coronial investigation are (as they relate to a death) as follows:

    a. to find the causes of a death;

    b. to contribute to the reduction of the number of *preventable deaths*; and

    c. to promote public health and safety and the administration of justice.

27. Pursuant to section 7 of the Act, the Parliament has also directed that I should avoid unnecessary duplication of inquiries and investigations, by liaising with other investigative authorities, official bodies or statutory officers.

28. I further note that Section 8 of the Act provides as follows:

    When exercising a function under this Act, a person should have regard, as far as possible in the circumstances, to the following—

    (a) that the death of a family member, friend or community member is distressing and distressed persons may require referral for professional support or other support;

    (b) that unnecessarily lengthy or protracted coronial investigations may exacerbate the distress of family, friends and others affected by the death;

(c) that different cultures have different beliefs and practices surrounding death that should, where appropriate, be respected;

(d) that family members affected by a death being investigated should, where appropriate, be kept informed of the particulars and progress of the investigation;

(e) that there is a need to balance the public interest in protecting a living or deceased person's personal or health information with the public interest in the legitimate use of that information; and

(f) *the desirability of promoting public health and safety and the administration of justice.*

29. Section 9 of the Act provides that the coronial system should operate in a fair and efficient manner.

30. Section 64 of the Act provides that the coroner holding the inquest determines the witnesses to be called.

31. In present case, I determined that it is appropriate for Mr Dale and Mr Collins to be placed on the witness list. I have determined to do so, as they may be able to assist me with my investigation. In addition, they may be subject to adverse comment as part of my finding. I have also granted them interested party status.

32. It is clear that in the exercise of a coroner's powers under the Act this may *'affect an interested party's reputation and livelihood. Accordingly, the hearing rule of natural justice applies to an interested party...'* [25]

Assessing the "interests of justice"

33. Having undertaken a review of the authorities, I must undertake a balancing exercise of a number of relevant and sometimes competing factors to

[25] *Danne v Coroner*, paragraph 21

determine whether the interests of justice require the compelling of one or both applicants.[26]

34. This is consistent with the approach adopted by the former NSW State Coroner, which was reviewed by the NSW Court of Appeal[27]. I note that Barr AJ in the lower Court found that the coroner made no error of law by undertaking such a balancing exercise, and this finding has not been criticised. As to what factors to take into consideration I note the following:

'*If the statute expressly states the considerations to be taken into account, it will often be necessary for the courts to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors....are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act.*'[28]

35. The factors I must consider are not articulated in section 57 of the Act and therefore I must primarily have regard to the Act to determine the appropriate factors to weigh in the balance.[29]

36. I note that no interested party could refer me to a case where a coroner had compelled a person to give evidence in circumstances where the witness had been charged with the offence of murder. Clearly, the provisions of the Act do not preclude me from doing so but, I note the submissions regarding what is said to be a *long standing* approach in the coronial jurisdiction of not calling persons charged with serious offences.

37. The privilege against self incrimination has been described as a fundamental freedom central to the criminal justice system[30], and that a person should be

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[26] There was agreement amongst the interested parties on this matter.

[27] *Rich v Attorney-General of NSW & Anor* [2013] NSWSC 419

[28] *Rich v Attorney-General of NSW* [2013] NSWSC 877 at [29]

[29] There was agreement amongst the interested parties on this matter.

[30] Hammond v Commonwealth of Australia, [1982 HCA 42 at [199-200]

denied that right only if the interests of justice clearly require it. This is reflected in the drafting of the provisions of the legislation, which permits compulsion only where I am positively satisfied that the interests of justice *require* it.

38. I make the observation that, whilst the coronial jurisdiction is mainly concerned with the investigation of deaths, investigations and inquests involving unsolved murders are unusual. In practice, section 57 applications generally deal with much less serious offences. Often applications relate to offences that only have relevance to the context of the death, rather than the cause of the death (for example, drug use, motor vehicle theft). Other applications relate to matters central to the death. For example, the police officers who shot young Tyler Cassidy (a death investigated by the former State Coroner[31]) gave evidence voluntarily with the benefit of a certificate. I note that prior to the new provisions, police officers involved in deaths in the course of their work, did not generally give evidence at the Coroners Court on the basis that the evidence may be incriminatory.

39. I was referred to the following words in the Second Reading Speech which introduced the *Coroners Bill* (introduced in 2008), and stated that the proposed section 57 would *'allow the coroner to more thoroughly conduct an investigation and may provide more answers for the families about what happened to their loved ones.'* The examples I have noted above, demonstrate that the provision has achieved this purpose.

40. In addition, Counsel Assisting drew my attention to passages of the Parliamentary Committee, tasked with the reform of the coronial system. I note in their discussions that the focus of the abrogation of the privilege was to establish the facts surrounding a person's death and to make recommendations to prevent future deaths and injuries but the Committee

[31] COR 2008 5528. This was the first time a certificate was granted under the Act.

noted that it may not be justified where there was no longer an immediate need to prevent danger.[32]

41. Having considered the submissions of all the interested parties and the relevant authorities I consider the following factors relevant to the balancing exercise I must undertake to determine whether the interests of justice require me to compel the applicants (one or each) in this case.

a. The character and nature of the deaths under investigation and the subject of the inquest

b. The evidence that is likely to be adduced from the witnesses

c. Other evidence the witnesses have provided

d. Other means of obtaining the evidence

e. The significance of the witnesses' evidence in the context of the Act

f. The nature and extent of the risk to the witnesses

g. The seriousness of the potential criminal charges faced by the witnesses.

a. The character and nature of the deaths under investigation and the subject of the inquest

42. The deaths under investigation can be described as callous executions. Mrs Hodson may have been murdered simply to protect the perpetrator's identity. The murders clearly remain unsolved, although I note that an extensive police investigation has been undertaken over 10 years which continues to the present time. In addition, Mr Hodson was a crown witness and a police informer at the time of his death. With respect to these matters, I make the following comment.

43. There is always a public interest in the resolution of unsolved murders in our community and, in this case, the resolution remains of great public concern.

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[32] *The Victorian Parliament Law Reform Committee, Coroners Act 1985: The Final Report (2006), p.287*

The identification, if possible, of the perpetrators, falls within the scope of this inquest.

44. I further note that the obligations set out in Priest and West that a coroner must pursue all reasonable avenues of inquiry[33] and the submission of Counsel Assisting that, the need to make findings as to the identity of the killer or killers is, *probably the main factor in the balancing exercise which sits on the compulsion side of the scale*. I accept this submission. Although clearly the case is not an authority for the proposition that, where persons are suspected of murder and the case remains unsolved, compulsion will always be required. In my view, that cannot be the intended effect of the expression, in pursuit of all reasonable lines of inquiry, when applied to the facts of this case.

45. The protection that Mr Hodson was afforded as a crown witness at the time of his death is also within the scope of the inquest. It is however being addressed through another witness called to give evidence at this inquest. The evidence of the applicants will not assist me with the resolution of this matter.

b. The evidence that is likely to be adduced from the witnesses

46. I have determined that the evidence of both applicants could be relevant to the matters currently under investigation. Persons called to give evidence, may do so voluntarily with the benefit of a certificate. This is not known until the witnesses are called.

47. Mr Dale and Mr Collins have both been charged in relation to one or more of the murders and they both remain persons of interest in relation to the deaths under investigations. They are also persons who are at risk of adverse comment as part of my finding.

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[33] '*pursue all reasonable lines of inquiry*' and '*must undertake such investigations as may lead to the identification*' of a person who may have caused a person's death.

48. It was submitted that their evidence may firstly assist me with answering who ordered the killings and/or who actually performed the killings and any matters connected to this matter.

49. Secondly, the applicants may have other information which could assist me with the resolution of who killed Mr and Mrs Hodson.

50. Information of this kind, if given by the applicants, would certainly assist me with my investigation.

51. In addition however, it was proposed by the CCP that it would be appropriate to cross examine Mr Dale on inconsistencies in the evidence already given by him in relation to his dealings with Carl Williams.

52. Counsel for Mr Dale indicated that this had already been the subject of a criminal trial at which Mr Dale had been acquitted. He submitted that this would therefore be a duplication of work already carried out.

53. I agree with the submission of Counsel Assisting that this type of evidence, if proffered would be of less assistance to my inquiry. I note that these matters are likely to be the subject of cross examination in any future criminal trial. It is obvious that the inquest cannot become a substitute for a criminal trial.

54. Counsel for Mr Dale indicated that Mr Dale had already denied the allegation and provided any assistance that he was able to offer in relation to who may have committed the murders. He indicated that this material was already on the inquest brief and this would be the evidence likely to be given by Mr Dale.

55. Similarly, Counsel for Mr Collins indicated that he had already denied the allegation and could not usefully provide any assistance to my investigation.

56. Counsel for the CCP said of both applicants that they had in the past *cherry* picked when they wanted to provide information and indeed Mr Dale had also written a book on the subject matter. The CCP said that this matter should be weighed in the balance.

57. In response, counsel for Mr Dale said that the foundation for Mr Dale's objection was not that he had always maintain his right to silence and so this matter was not relevant to my weighing exercise.

58. I have considered this CCP submission and in the circumstances of this case I am of the view that it has little, if any weight.

59. In addition, counsel for Mr Dale noted that, unlike in the case of Rich, where it was accepted by all parties that the proposed witness had caused the death (a police officer shot the deceased in the course of his duties), the case theory (or allegations) against Mr Dale was disputed by Mr Dale.

60. It is also clear that the evidence likely to be adduced by the applicants would not assist me with any prevention issues in relation to the deaths, again in stark contrast to the case if Rich, where matters of public health and safety were central to the coroner's investigation.

c. Other evidence provided by the witnesses

61. In relation to Mr Dale, I note the evidence currently on the inquest brief includes:

- Statement dated 2 October 2003;
- Transcript of audio recorded interview dated 5 December 2003;
- Transcript of interview dated 13 February 2009;
- OPI examinations; and
- ACC examinations.

62. There are no formal statements from Mr Collins but I was referred to transcripts of intercepted conversations[34] and a statement of Detective Sol Solomon which is contained in the coronial brief of evidence.[35]

63. I also note that on 20 March 2009 an application to interview Mr Collins was scheduled in relation to the murders and that Mr Collins indicated that he would deny any allegations and so the application for interview was subsequently withdrawn.

64. I am further advised by counsel for Mr Collins that he has been examined by a coercive body but that the details of that examination is subject to an existing suppression order.

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[34] Appendix CW

[35] Page 611

65. I accept that there is considerable evidence from Mr Dale (including that of two coercive bodies) available in which he has denied the allegations and some evidence from Mr Collins of the same character.

66. There is every likelihood that the evidence the applicants would give at the inquest would be consistent with the material already contained in the inquest brief and, if this was the case, the evidence likely to be adduced would add little to the question I am seeking to resolve (the identity of the perpetrators).

67. However, I make the observation that it would be desirable for Mr Dale and Mr Collins to give evidence about what they know (even if repetitious), and, that they be examined by all interested parties on the evidence contained in the inquest brief.

d. Other means of obtaining the evidence

68. Mr Collins and Mr Dale were previously charge with murder and I am advised that the process reached the committal stage. A prosecution brief was prepared for the purpose of criminal proceedings by the Homicide Squad, which had spent many years at that time compiling the evidence against each of the applicants.

69. The inquest brief which also includes the prosecution brief (except where public interest immunity applies), is extensive and thorough.

70. I note the inquest brief contains other documentary evidence both circumstantial and direct regarding the allegations against Mr Dale and Mr Collins in relation to the deaths, which I can have regard to.

71. In particular, I was referred to the statements of Mr Carl Williams (deceased), Mr George Williams, Witness A, Witness B and Witness M (amongst others). I also note there is other *objective evidence* such as telephone intercepts and records contained on the brief.

72. It is clear therefore that I have considerable material to have regard to as part of the inquest brief as well as the oral evidence of witnesses who are currently on the witness list (Witness A, Witness B and Witness M) and will give evidence at the inquest.

e. The significance of the witnesses' evidence in the context of the coroner's functions

73. All parties agreed that I must consider the Act to guide me in relation to the significance of the applicant's evidence to this investigation. This was canvassed extensively by the submissions of all interested parties, including counsel assisting, and there is general agreement that the preamble, purposes, objects as well as section 67 were relevant to my considerations.

74. Clearly I have a statutory duty to make findings under section 67 of the Act if possible. I note however that an inquest in this case was *not mandatory* but is being conducted as an exercise of my discretion.

75. Distilling the relevant provisions of the Act made it clear that the applicants could not assist with the cause of the deaths, which had already been determined, but that they may be able to assist with the identity of the perpetrators.

76. In addition, it was clear that the applicants could not assist with a reduction in preventable deaths in Victoria. Counsel assisting emphasised that this was as a fundamental purpose and focus of the coronial system. I agree with him.

77. It was agreed that a consideration under the Act was the promotion of the administration of justice. On this point, competing and opposite conclusions were submitted. The CCP referred to the nature of the deaths (as discussed in a above). The applicants referred to the fundamentals protections and the administration of criminal justice (as discussed in f below).

f. The nature and extent of risk to applicants

78. I have already ruled that the applicants have reasonable grounds to apprehend that they will incriminate themselves in the relation to the charge of murder.

79. Both applicants have been charged with the offence of murder, the deaths remain open homicide investigations and each clearly remain persons of interest by Victoria Police.

80. Pursuant to section 57(7) of Act, evidence covered by a certificate and any information obtained directly or indirectly as a consequence of that evidence

cannot be used against the witness in any court or before any body authorised to hear, receive and examine evidence. That is, the Act prevents both use and derivative use of the evidence. The prohibition on derivative use protects against the risk that disclosure sets off a chain of inquiry that leads to the discovery of additional incriminating evidence. The Act does, however, allow the use of the evidence in proceedings for perjury.

81. I accept that the Act provides protection from future use in criminal proceedings.

82. I am however persuaded that the applicants are exposed to the risks that have been described in submissions as forensic risks and that there is authority for this proposition. As put by Counsel Assisting, it is appropriate to weigh in the balance the potential that compulsion will restrict the forensic choices open to the applicants which can amount to *real prejudice.* [36]

83. In the case of Chan, the former State Coroner, Judge Jennifer Coate, similarly engaged in a balancing exercise following which she determined not to call the husband of the deceased who had been charged with manslaughter. She noted that, the husband '*is not protected from the prosecution's decision to re-charge him with this extremely serious offence. Evidence may still emerge in this inquest which causes the DPP to do exactly that. Indeed, it may be that as a result of what emerges that I make a decision to refer the matter to the DPP for reconsideration.*"

84. Those words are equally applicable in this case.

85. In addition, I am mindful that there is some considerable material that relevant to the investigations which is not available to the applicants (as well as all other parties) and this is a matter that I should have some regard to.

<u>The seriousness of the potential criminal charges faced by the witness</u>

86. The offences the applicants are faced with are at the extreme end of the scale – that of murder.

[36] Hammond v The Commonwealth (1952) 152 CLR 188, X7 v Australian Crime Commission & Anor [2013] HCA 29 at [124]

87. It is alleged that Mr Dale arranged one of the murders. It is alleged that Mr Collins carried out both of the murders (in the manner of contract killings).

88. I am persuaded that the seriousness of the potential charges a witness may face is a matter that I am required to consider in the balance of factors and that there is some precedent for this proposition.

89. I agree with Mr Winneke that the authorities, including Rich, make it clear that I should have regard in considering whether it is in the interests of justice to compel Mr Dale and Mr Collins, to what is alleged against them – in this case the serious offence of murder.

90. In my opinion the paragraphs set out from the decision in Rich above, the observations of Justices Hayne and Bell in the X7 case which are in my view consistent with the remarks of Bell J in Correll, constitute a pervasive body of authority to support the proposition that the nature of the potential charges (and the previous charges here) is something I am required to consider in balancing the various factors.

91. I note also the passage in Rich:-

> *'It is easy to see a more powerful case for the exercise of discretion under s61(4) if objection were taken to, say, questions directed to the nature and extent of training the applicant received in dealing with the mentally ill (the prejudice to the applicant will be nil or minimal). It may be a quite different thing to determine whether, say, counsel for the deceased's father were to be permitted to cross-examine the applicant, including on his credit, in relation to the whether the deceased was charging at him with a drawn knife.* [37]

92. This passage further supports the proposition that the balancing exercise being undertaken should take into account what Justices Hayne and Bell refer to in the X7 decision and that this would be consistent with the approach taken by Bell J in Correll and the passage set out above, paragraph 39 from the decision in Rich.

Conclusions

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[37] *Rich v Attorney-General of NSW & Ors*, [2013]NSWCA 419

93. In order to compel the applicants to give evidence I must be positively satisfied that the interests of justice require that they do so.

94. I have considered carefully whether any distinction can or should be drawn between the applicants such that one ought to be compelled and other not. It might be possible to draw such distinction on the basis that Mr Dale has given evidence in a number of forums in comparison to Mr Collins. In the alternative, it is alleged that Mr Collins has committed both murders by his own hand whereas the allegation in relation to Mr Dale relates to one murder. At the conclusion of my deliberations, I have however decided that any distinction between the two makes no material difference to my ultimate decision.

95. When regard is had to all of those factors relevant to the 'interests of justice' test as discussed above, I cannot be satisfied that the interests of justice require that the applicants give evidence, although it would be highly desirable to hear from both witnesses.

96. What weighs heavily in my decision making is the expected value of their evidence, particularly in respect of the purposes of the coronial functions, the other sources of available evidence and the risks faced by the applicants in light of the seriousness of the potential charges. Against this, I have balanced, amongst other matters, a strong public interest in the resolution of these unsolved murders and the requirement for me to pursue all reasonable lines of inquiry.

97. It is important to note that the absence of oral evidence from the applicants will not prevent me from making an adverse finding, where this course is open on the evidence of others.

98. It also needs to be understood that this inquest has barely commenced. There is some distance to go. There is evidence to be called in respect of both Mr Dale and Mr Collins. It is contained in the inquest brief.

99. Depending on that evidence the matter may be referred to the DPP.

100. The criminal investigation in respect of these two deaths remains open in any event.

101. For the above reasons, I rule that I will not require Mr Dale or Mr Collins to give evidence under section 57(4) of the Act.

JUDGE IAN GRAY
State Coroner
22 July 2014