

These findings seek to explain, as far as possible, how the death of Kelvin John Atfield occurred. Mr Atfield died on 18 February 2010 at about 8am, at a property near Ogmoo, Queensland, from a gunshot wound to the head. He was thirty-eight years old at the time of his death. Mr Atfield died from a gunshot fired by Matthew John Felhaber, in what appears to be a course of shooting at kangaroos on a rural property.

***THE CORONER'S JURISDICTION***

1. The coronial jurisdiction was enlivened in this case due to the death falling within the category of "*violent death*" under the terms of the Act. A Coroner has jurisdiction to investigate the death under Section 11(2), to inquire into the cause and the circumstances of a reportable death and an Inquest can be held pursuant to s28.
2. A Coroner is required under s45(2) of the Act when investigating a death, to find, if possible:-
  - the identity of the deceased,
  - how, when and where the death occurred, and
  - what caused the death.
3. An Inquest is an inquiry into the death of a person and findings in relation to each of the matters referred to in section 45 are delivered by the Coroner. The focus of an Inquest is on discovering what happened, informing the family and the public as to how the death occurred, but not on attributing blame or liability to any particular person or entity.
4. The Coroner also has a responsibility to examine the evidence with a view to reducing the likelihood of similar deaths. Section 46(1) of the Act, authorises a Coroner to "*comment on anything connected with a death investigated at an Inquest that relates to – (c) ways to prevent deaths from happening in similar circumstances in the future.*" Further, the Act prohibits findings or comments including any statement that a person is guilty of an offence or civilly liable for something.
5. Due to the proceedings in a Coroner's court being by way of inquiry rather than trial, and being focused on fact finding rather than attributing guilt, the Act provides that the Court may inform itself in any appropriate way (section 37) and is not bound by the rules of evidence. The rules of natural justice and procedural fairness apply in an Inquest. The civil standard of proof, the balance of probabilities, is applied.
6. All interested parties can be given leave to appear, examine witnesses and be heard in relation to the issues in order to ensure compliance with the rules of natural justice. In this matter, Mr Felhaber was represented at the Inquest.
7. I will summarise the evidence in this matter. All of the evidence presented during the course of the Inquest, exhibits tendered and submissions made have been thoroughly considered even though all facts may not be specifically commented upon.

**Background**

8. Kelvyn Atfield resided on Emu Park Road, Tungamull with his mother, Dorothy Joyce Atfield, and was thirty eight years old when he died. He was the youngest of five children. He was employed in the rail industry for about six years leading up to his death.
9. About three years prior to his death, Mr Atfield purchased a 60 acre property, on Styx Road, Ogmore, about 135 kilometres north of Rockhampton. Mr Atfield ran cattle on this property. The property has three dams, water tanks, some cattle yards and an old run-down shack on it. Roughly twice a month, sometimes less, Mr Atfield went to the property to check on it. He would also hunt on his property, generally kangaroos and wallabies which he considered vermin and which caused fence destruction, and he fished in the Styx River which bordered the property. When he went to the property, Mr Atfield was often accompanied by friends and family.
10. Mr Atfield had a weapons license, and had seven registered firearms. He had experience with firearms, and was a member of a pistol club with his uncle. Matthew John Felhaber is Mr Atfield's nephew. Mr Atfield taught Mr Felhaber firearm safety, and how to load and carry firearms. Mr Felhaber had, under the direction of Mr Atfield, shot kangaroos at the Ogmore property before, leading up to the time of Mr Atfield's death.

**Events on Day of Death**

11. At about 4:30am on Thursday 18 February 2010, Mr Atfield, Mr Felhaber and Mr Atfield's mother Dorothy Atfield left the Atfield residence to attend the Ogmore property. They arrived at the Ogmore property at 6:30am. Firearms were transported to the Ogmore property along with camping equipment.
12. Mr Felhaber has not provided a sworn version of events at any stage – he participated in two interviews with police, but declined to provide a sworn statement on legal advice. He also briefly reported events to police in two calls to 000 – one when he reported his uncle missing, and one where he reported his uncle deceased.
13. Mrs Dorothy Joyce Atfield is the mother of the deceased. She gave a statement to Police. She stated that her son, Kelvin Atfield, was experienced with firearms and they would travel, about twice a month, to the Ogmore property to fish, check fences, and tend to the cattle. Mrs Atfield doesn't like guns, but it was her son's habit to attend the property to shoot as well as the other tasks he undertook.
14. On 18 February 2010, on arrival at the property, they unpacked a makeshift kitchen, and Mrs Atfield, as she always did, stayed at the campsite to boil the billy. Often the deceased would walk around the property when they first arrived in the morning, as that was the best time to find kangaroos and wallabies if they were there.
15. Mr Atfield and Mr Felhaber took guns from the four wheel drive. Mr Atfield obtained a shotgun and Mr Felhaber obtained a .22 calibre rifle. Mrs Atfield recalls Mr Felhaber asking for some ammunition which was provided by her son. They walked off west, then north, talking as they walked.

## FINDINGS

## Inquest into the death of Kelvin John ATFIELD

16. Mrs Atfield made a cup of tea, wandered around and cooked some sausages. She heard both the shotgun and the .22 rifle being fired, both fairly close together, about fifteen or twenty minutes after her son and Mr Felhaber walked off. Some time later she heard more shots – she didn't pay enough attention to the second set of shots to determine which weapon fired them.
17. About half an hour to three quarters of an hour after Ms Atfield heard the shots, she saw Mr Felhaber walk back to the campsite and ask if Mr Atfield was back. He was not. Mr Felhaber was carrying the .22 rifle. Mrs Atfield and Mr Felhaber resolved to wait a few more minutes to see if Mr Atfield would show up. He did not, and Mr Felhaber became worried (as Mrs Atfield recalls). They got in the vehicle and drove around the car tracks on the property, looking for him. They drove around, couldn't find him, went back to the camp site, he still wasn't back, so they drove out again. They were yelling out but could not locate Mr Atfield.
18. Mr Felhaber then called the police. This call was made at 8:17am. During this recording Mr Felhaber sounds worried but not distraught, in contrast to the later call. Of some relevance is the fact that Mr Felhaber says that the deceased "*hasn't been shot*" as Mr Felhaber has looked everywhere.
19. The police operators, during the call, have some trouble pinning down the location of the property, and the advice to Mr Felhaber is essentially to keep looking around the property for the deceased, and the police will attend.
20. Mrs Atfield and Mr Felhaber drove around some more, looking more specifically where Mr Felhaber said he had been shooting. Mr Felhaber followed some tracks in the grass, and was walking ahead of Mrs Atfield, and then Mrs Atfield heard Mr Felhaber scream out. She describes Mr Felhaber "*screaming out like an Indian and I knew something was wrong.*"
21. Mrs Atfield saw her son lying on his back, with his gun to his right, with blood on his face. Mr Felhaber shook him and checked his pulse. Mrs Atfield saw that he was turning blue, and she knew he was deceased. Mrs Atfield put her son's hat over his face.
22. Mrs Atfield and Mr Felhaber got in the car and drove back to the camp site. Mr Felhaber called the police.
23. This phone call was made at 9:14am. During this phone call, Mr Felhaber sounds extremely distraught. This is the first version of events that Mr Felhaber provides. Mr Felhaber essentially tells police that his uncle has been found dead, and that he was shot by accident. He is told that the police will attend.
24. Whilst waiting for the police to arrive (about three hours according to QPS records – there were significant difficulties with access due to flooding), Mr Felhaber said to his grandmother, Mrs Atfield, that he could not believe this was happening – he was yelling and crying and hitting things. Mr Felhaber told Mrs Atfield "*he usually walks straight down, he never comes back around to where he was ... we usually yell out if we change direction, but I never heard him yell out ... I don't know why he would go across there.*" Mr Felhaber told Mrs Atfield that the plan was to shoot at roos and wallabies. He said "*Kel [Mr Atfield] would usually walk down the scrub side and I would walk on the river side, and if we needed to change direction we would yell to each*

## **FINDINGS**

## **Inquest into the death of Kelvin John ATFIELD**

*other to let each other know and I never heard Kel yell to say he was changing direction."*

25. While waiting for the Police, various calls were made to family members. Mr Felhaber called Mr Atfield's sister, Frances Joy Godfrey, who was crying and said "*I think I shot Uncle Kel*". At some stage in the morning, Mr Felhaber spoke with his uncle Leslie Cahill by telephone. He said "*uncle, uncle help me, Kel's gone*." Mr Cahill asked if he had had an accident in his car, and Mr Felhaber replied "*no, he's been shot and he's gone*." Mr Cahill asked how, and Mr Felhaber replied "*I shot at something in the grass*" or "*in that direction*", or something like this.
26. Mr Felhaber's father arrived at about midday, as did other relatives of Mrs Atfield's. These people arrived before the police arrived. Mrs Atfield recalls no-one went to where the deceased was lying. Over time, more of the family arrived to comfort Mrs Atfield and Mr Felhaber and each other.

### **Police attendance at the Ogmores property**

27. The police arrived on scene at 12:20pm – their travel to the property was made more difficult by flooding on some creek crossings, wet roads and the wet weather conditions. On arrival, they restricted access to the property.
28. The primary investigating officer, DSC Williams, was amongst the first to arrive. He took details from people present at the scene, then cautioned Mr Felhaber and took a recorded version of events from him. He declared a crime scene and commenced a crime scene log.
29. Police later took Mr Felhaber on a walk through of the property, to indicate the process of walking and shooting that he and the deceased went through. During the walk through, Mr Felhaber identified where he had been standing when he fired the shots. Police officers then marked this area by tying a pair of high-visibility fluorescent pants to the nearest fence post. During this process Mr Felhaber became too emotional to continue, and the interview was terminated.
30. Ambulance officers at the scene declared Mr Atfield life extinct. The body was wrapped in a tarp and moved, as due to the increasingly wet weather and the ongoing flooding in the area, there was an increasing concern that access to the property by vehicle might be cut off.
31. The body was taken away for autopsy, and the autopsy was later performed.
32. A search of the crime scene revealed three shell casings located nearby where Mr Felhaber said he had been firing from.
33. There were two vehicles located on the property – an unregistered four wheel drive, which was used to drive around the property but not off it, and the four-wheel drive which the deceased, his mother and Mr Felhaber arrived in. Ammunition was located in both vehicles, and a rifle bolt and a magazine were found in the second/registered four wheel drive along with Mr Felhaber's and the deceased's wallets.

34. Following the day of the incident, Mr Felhaber engaged legal representatives, being Mr Doug Winning of Winning Lawyers, and Mr Winning advised that Mr Felhaber would not be making any more statements to the police of any kind.

**Mr Felhaber's Police Interviews**

35. Mr Felhaber's first interview with police commenced as the police arrived at the scene and commenced about 12:30pm. Police gave Mr Felhaber the usual warnings. He was in company of his father (as he was aged 19 years at the time and very distressed). When asked to describe what happened, Mr Felhaber said as follows (see page 14 and 15 of the transcript):

*"We went shooting ... roo shooting like we usually do. When we get down the bottom of the paddock Uncle Kel sends me ... he has his shotgun ... round the back up the scrub about ten metres wide. You can ... the grass is real long we usually walk, I'll chase them and he shoots them. We usually walk level and then he goes off like that. Today he walked and then he went downhill down the lower grounds than where I was standing I can't see then he was down there. And I was about three hundred, two or three hundred metres away from him couldn't see anything except for what I thought was a roo against a tree so I shot at it. I shot a few times. I shot at it a few times and I know the bullets ricocheted off something hit him or he walked in front of ... I didn't mean to do it. It was an accident. We always, we always ... I stood there for ages and usually sings out if he's going to be ... he's going to be anywhere near but he didn't say anything."*

36. Mr Felhaber went on to confirm as follows:

- (page 17) he didn't load the magazine for the gun initially, but he fired it four times at the tree, and then again once on the way back, shooting into a dam, but he loaded it again before firing into the dam.

- (page 18) he fired two shots into the dam

- (page 30) he was walking around, out of sight of his uncle, and saw a kangaroo. He had walked about three hundred metres when he saw the kangaroo.

- (page 31) Mr Felhaber fired at the kangaroo, about four shots, firing over the open sights of the rifle

- (page 32) kangaroos jumped past Mr Felhaber, so he turned and fired back towards them, a total of four shots forward and two shots back

- (page 34) Mr Felhaber called out to his uncle, didn't hear anything, and then walked back to the camp following the same path as when he had come out

The first interview terminated when Mr Felhaber was too upset to continue.

37. The second interview (conducted on the same day, commencing 1:05pm) involved the police walking with Mr Felhaber and Mr Felhaber's father over the scene, the intention being to show the police where the shooting had happened but Mr Felhaber did not want to go to where Mr Atfield was lying. Mr Felhaber confirmed that he had been out to shoot at the Ogmore property at least ten times (page nine), and had last been there a month ago (page

nine). The arrangement was that the deceased and Mr Felhaber stick together when they shoot (page 10). The deceased had split off from Mr Felhaber about five minutes before the shooting (page 13). At about this point, the interview is terminated as Mr Felhaber is too upset to continue.

**Physical description of the scene of the shooting**

38. At the time of the shooting it had been raining heavily, and, during the morning, was raining with moderate intensity off and on. The Ogmore property had longer grass than usual, due to the extended period of rain.
39. Mr Felhaber identified to police from where he had fired the shots in question. This location was marked with pants tied to a fence post, and the location was corroborated by the location of three spent .22 shell casings nearby.
40. Police tests on the day of the search identified that a person standing where Mr Felhaber said he was standing could not see someone standing at the point where the deceased was found, because of the long grass. The position of the shooter is higher than the position of the deceased – the statement of SC Hill (the forensic mapper) indicates that the height difference is 1.4 metres. The distance from shooting position to the deceased's position is 137 metres. It is not contested that a person standing in that position, given the fall of the land and the long grass, would not have been able to be seen by the person in the position of Mr Felhaber.
41. There is quite some distance between the deceased at the position he was found, and any tree. However, looking from the point where Mr Felhaber fired, there are trees in the general vicinity of line-of-sight to where the deceased was found.

**Autopsy results**

42. Mr Atfield was found on his back, with a hat over his face (put there by Mrs Atfield). He had a wound to the inside of his right forearm (this was found not to be a bullet wound), and a bullet wound to his right temple. Blood was pooling on his face, running from his nose and mouth. He had a shotgun next to him, still loaded.
43. Dr Nigel Buxton performed the autopsy. Death was as a result of a single bullet entering the right temporal bone, travelling at a 40 degree down angle, travelling through the lower part of the parietal lobe, through the temporal lobe and destroyed the pons. Destruction of the pons is instantaneously fatal. The bullet was recovered. Inquiries from the police reveal that the right temporal bone is the most delicate point in the skull, and there would be no difficulty with a bullet of low calibre penetrating the skull at that point and causing death.
44. The deceased had some mild hypertensive heart disease (he had been diagnosed with high blood pressure and took medication for it), but otherwise nothing which contributed to his death.
45. Toxicology results revealed that the deceased had a low level of alcohol in his system – going by a femoral vein sample, the reading was 27mg per 100 mL of blood (.027%), going by a urine sample, the reading was 14 mg per 100 mL of blood (.014%).

**Ballistic evidence**

46. The weapon used by Mr Felhaber was a Slazenger .22 calibre bolt-action Rimfire rifle (not a self-loading rifle), a Category A weapon. The three shell casings found on the ground at the position that Mr Felhaber said he had been in at the time he fired were matched to the ejection signature of the rifle.
47. Two bullet fragments were recovered from Mr Atfield's body during the autopsy. One was too small for comparison, and the other fragment demonstrated characteristics consistent with the Slazenger rifle or a firearm with similar rifling characteristics. The size of and damage to the fragment precluded more specific findings.
48. The ammunition used in this instance was CCI Brand 22 Long Rifle Stinger ammunition (32 grain copper-washed hollow point). Physical analysis of the bullet fragments recovered from the deceased in the autopsy reveals that the ammunition was consistent with CCI Brand 22 LR Stinger ammunition, but it cannot be positively matched due to sample damage.
49. CCI 22 LR Stinger ammunition is hypervelocity ammunition, that is, high-powered, designed to travel at a higher velocity than other .22 rounds. The hollow point nature of the bullet indicates it would deform and flatten on impact, expanding and causing more damage as it travelled through the body.
50. Firearms testing revealed that that ammunition has a velocity of 291 to 299 metres per second, and can travel 1372 metres to 1381 metres on level ground with a 26 to 27 degree barrel elevation. This means that the rifle ammunition, despite its relatively small calibre, is well and truly capable of travelling 137 metres.

**Motive**

51. The evidence is clear that there is no motive for Mr Felhaber to want to shoot his uncle. The evidence suggests that they were very close – all the witnesses agree that, based on motive alone, this could be nothing more than a non-intentional shooting. Witness evidence suggested that Mr Felhaber idolised his uncle, attempted to emulate his uncle, was always taking about him and loved spending time with him.
52. Mr Felhaber had nothing financially to gain by killing the deceased – the deceased's will left all of his estate to his mother. Various statements taken after the incident from family members indicate that Mr Felhaber is still significantly distraught about what happened, and has tried to remain close to the rest of the family as best he can, albeit in obviously difficult circumstances.

**Mr Felhaber's experience with firearms**

53. Mr Felhaber held no weapon licenses of any kind. Mr Leslie John Cahill is the uncle of the deceased, and Mr Felhaber is his niece's son. He has knowledge of the Ogmore property. He is also a man with some experience with firearms. He had the occasion to observe Mr Felhaber shooting targets on Mr Cahill's property, and in Mr Cahill's view Mr Felhaber was proficient with the safe use of firearms.

54. As against this, there is some anecdotal evidence about Mr Felhaber acting recklessly with a firearm. Reportedly, on one occasion he went and shot a kangaroo when others were camping on the property, and the deceased appeared angry at Mr Felhaber. This event is contained in the statement of Linda Margaret McLelland (exhibit E4). It is submitted that this evidence is, at best, quite vague and insufficient as a basis for finding past inappropriate use of a weapon by Mr Felhaber.

**Inconsistencies in Mr Felhaber's statements to Police**

55. Mr Felhaber has provided contradictory versions of events but it is noted that all of his versions of events to Police were provided in circumstances of extreme upset, and many of them could be seen as him trying to explain what to him is inexplicable – how he came to shoot his uncle. Mr Felhaber indicates variously that he shot at a kangaroo near a tree, which he shot at something in the grass, and that some of his shots must have ricocheted.
56. The ballistic evidence allows for the possibility of deflection of a shot by hitting the long grass that was in the area. Regardless of this possibility, Counsel Assisting submits that it must be the case that Mr Felhaber fired his weapon in the general direction that Mr Atfield was in, and fired into long grass in a situation where his visibility was limited by the grass and at a further distance, the lay of the land. Further it is submitted that If he was shooting at something he couldn't see, an enormous risk was created by shooting in the direction he did because of the grass, and to fire (especially more than once) in these circumstances is inherently and obviously dangerous.
57. Mr Felhaber told Police of the arrangements for shooting that had been in place with his uncle – that is what safety measures were adopted. Some of his statements to the police indicate that he was surprised that the deceased was in the position that he was and he could not understand what he was doing there. The arrangement was for the deceased to call out if he was moving in a manner inconsistent with what had been done in the past, and also beyond or forward of Mr Felhaber's position. Mr Felhaber did not hear any such call from his uncle.
58. Mr Felhaber's firing position was essentially against a fence line. He had been previously told not to fire in the direction of houses that were off the property, and he had no reason to fire at anything off the property. The aerial shots and plans taken by the police indicate that he was firing into the Ogmore property itself, generally towards the river (over the land between him and the river).
59. It is submitted by Counsel Assisting that material contained in the various statements of the deceased's family raises the following questions:
- If the deceased and Mr Felhaber had split up, how did he know where the deceased was at the time he was shooting at whatever he was shooting at?
  - If the grass was so long, how could he see where the deceased was, let alone a kangaroo if that was what he was firing at?
  - Surely it is unsafe to fire repeatedly in circumstances where he did not know where the deceased was?



- If Mr Felhaber was actually shooting at something, surely he would go and see if he hit what he was shooting at after he had fired his shots?
60. The statement of Jeremy Nichols (a friend of Mr Felhaber's) indicates the approach taken to going shooting for kangaroos on an occasion when the people involved were Mr Felhaber, Mr Nichols and Mr Atfield. In summary, Mr Atfield was armed with a shotgun, he went to the right of the track and told Mr Nichols and Mr Felhaber not to fire until the kangaroos were to their left (ie on the other side of their line of fire from the deceased). He then went into scrub in an effort to flush any kangaroos across the line of fire of Mr Nichols and Mr Felhaber.
61. If this approach was followed on the day of the shooting, then the deceased would have told Mr Felhaber not to shoot in the direction from which he was flushing the kangaroos. This would be consistent with the weight of the evidence which points to the deceased being very safety conscious with firearms.
62. Other matters of concern on the submission of Counsel Assisting, highlighted by the investigating officer in his report to the Coroner, are as follows:
- Mr Felhaber says to the 000 operator in the first call *"I'm pretty sure he hasn't been shot."*
  - There are inconsistencies between what Mr Felhaber has recounted as what happened, as outlined above.
  - There is a difficulty with Mr Felhaber's assertions that generally he and the deceased would stick together when shooting, and then Mr Felhaber's assertion that at one point on the day in question he was off flushing kangaroos in the scrub.
  - On any version of Mr Felhaber's statements, he was firing largely blind.
63. A further difficulty arising in the Police interviews is that in the first interview, he appears to identify the roles had by each of him and his uncle – Mr Felhaber was flushing the kangaroos, and his uncle was to shoot them, which appears to be inconsistent with their respective positions and the way in which Mr Felhaber described the events unfolding.

**Mr Felhaber's evidence at Inquest**

64. Due to the inconsistencies and brevity of the information provided by Mr Felhaber to Police on the day of the incident, an Inquest was convened to determine the circumstances surrounding and leading to the death of Mr Atfield. Mr Felhaber was the primary witness. Mr Felhaber claimed privilege against self-incrimination and was directed to answer questions under section 39.
65. Mr Felhaber was aged 22 at the time of the Inquest and 19 years at the time of the incident. He described Mr Atfield as his uncle and his best mate. He was very upset at various times during the giving of his evidence.

## FINDINGS

## Inquest into the death of Kelvin John ATFIELD

66. Mr Felhaber had been to the property shooting at least 10 times previous to the day of the incident, over a period of about 2 years. He was always with his uncle and did everything he said. His uncle owned the weapons and Mr Felhaber always used the .22 rifle and his uncle had a 12 gauge shotgun which he always used. Mr Felhaber had been given the .22 as it was the less powerful firearm and he was under his uncle's instruction. Mr Felhaber did not hold a weapons licence and was learning under his uncle's tuition. The shot gun used buckshot ammunition which was better to shoot the roos and ducks with as it spread the shot. The .22 used hollow point ammunition which was considered ideal to shoot roos as the projectile spread out and flattened on entry and "did more damage".
67. His uncle had instructed him on safety in relation to firearms including never walking with the firearm loaded, point the firearm to the ground while walking, and always stand behind the shooter. Mr Atfield taught his nephew how to load and unload the firearm and would watch him load the magazine with ammunition which was kept in his pocket during any walking.
68. Mr Felhaber always shot in the direction that his uncle told him to and nowhere else. He said that "*Uncle Kel was the boss*", he never challenged his authority in any way and always did what he told him. He only ever shot with his uncle and knew a breach of the rules would mean he couldn't go back. The rules were the same on two occasions when Mr Felhaber had taken 2 friends with him to the property.
69. They shot kangaroos on the property as they were prone to breaking fences. The carcasses were used to feed Mr Atfield's dogs.
70. Mr Atfield had set tracks established on the property which were used for the shooting forays. They used the same route each time and Mr Felhaber always went where his uncle told him to go. The tracks were 4WD tracks and were worn dirt tracks.
71. He and his nephew alternated between the roles of shooting and flushing the kangaroos from cover, sometimes taking up one role on each trip and at other times alternating during a trip. The flusher stayed on the track which runs behind the bushes where the kangaroos hide. If the flusher was to move position, he would call out to the shooter and establish contact before doing so. The flusher would not go into the shooting zone and would only move about 5 metres from the track into the bushes to flush the roos. His uncle has never moved from that position in the previous outings. Both of them knew where they and the other person were meant to be. It was easy to call out to each other and be heard given the distances involved.
72. The shooter stays at the point they shoot from and does not move from that point unless there has been positive contact with the flusher (see or hear them) and always only after shooting was finished. Mr Felhaber's practice was to yell out "righto" after he had finished shooting and unloaded his firearm and then walk to meet his uncle on the track. The purpose of calling out at this stage was to advise that shooting had ceased. They would contact each other during this time by calling out to each other. If any roo/s were shot, they would walk back to the camp area and collect the vehicle then drive to the roo/s and collect them.

## **FINDINGS**

## **Inquest into the death of Kelvin John ATFIELD**

73. They always shot on the northern fenceline towards the river and at the furthest point, in an area parallel to the fenceline in the same direction. There was a rule not to shoot towards houses, the road, and the railway line, off the property or in the direction of cattle, which was strictly adhered to. Mr Felhaber described that it was very important to not follow kangaroos outside of the shooting range that his uncle had told him to shoot in.
74. On the day of the incident, the pair had their usual discussions on the way to the point at which they split up to take on their roles. They walked on the usual track. Mr Atfield said to his nephew, "you shoot today, go up to your point" which was the usual position. It was a static position for the shooter. Mr Felhaber saw his uncle walk back down the normal track for a short distance to the split up point (where they could see each other), and then disappearing behind the tree line.
75. When Mr Felhaber arrived at the shooting position, he waited for a bit and then saw some kangaroos (4) on the fenceline. They were grey and about 4-5 feet high, situated about 30-50 metres away from him. They had not been flushed out of the bushes, they were just there at the fence. No roos were actually flushed out that day and Mr Felhaber did not hear his uncle make any noise attempting to flush the roos.
76. One of the roos was near a tree and Mr Felhaber had a shot, heard the shot hit the tree and the roos moved off to his left. He took three more shots at them as they were moving. They were still in the shooting zone at this time. He did not hear any of those shots come into contact with anything. He had missed the roos and they moved out of the zone so he stopped shooting.
77. The grass over the whole property was very long at that time due to prolonged rainy weather. The adjacent river was in flood. The ground was wet, muddy and slippery. The property was in very different condition to other visits. The weather was very cloudy and rainy on the day in question and visibility was not very good.
78. Mr Atfield had no second thoughts about going shooting that day though it appears his mother may have expressed some concerns on the drive to the property. It appears Mrs Atfield was generally not in favour of going to the property in the wet. All of them had some level of interest in the river being swollen but there was no particular discussion about going to look at the river.
79. Mr Felhaber could see the kangaroos in the grass as their weight was pushing the grass down and once they started moving were partially above the grass as they hopped. The kangaroos were 30-50 metres from Mr Felhaber. Further away, the land falls down to the river and is generally at a lower level. The grass was as long (about the bottom of Mr Felhaber's head – he is 1.6 metres tall) in both locations and it was hard to see anything further away than the kangaroos. Mr Felhaber could see the kangaroos the whole time (slightly obstructed by the grass) including as they were moving away, they maintained a fairly equal distance from him as they moved off.
80. After shooting at the kangaroos, he unloaded his firearm and called to his uncle. There was no answer. He had heard nothing from his uncle during the shooting period. He had thought that his uncle might have returned to the camp. He returned to the camp and saw his Nan. On the way back to the camp, he stopped at the larger dam, and, standing on the northern bank, shot

## **FINDINGS**

## **Inquest into the death of Kelvin John ATFIELD**

twice at ducks on the dam (shooting into the water). He missed the ducks and continued onto the camp. The duck shooting was a regular practice of both of them on the return walk to camp.

81. After his uncle did not return to camp, Mr Felhaber set off around all the tracks to look for him. He could not find his uncle and returned to camp and called 000 to report him missing as he was a bit worried. He was concerned that due to the rain and muddy tracks and that his uncle was wearing thongs, that he could slip and hurt himself on the muddy tracks. The Police informed him to keep looking.
82. He took the vehicle and drove around the property for about an hour and then pulled up when he saw what he thought was a wallaby track as it appeared that the grass was a bit flattened from being walked on. The grass was long and thick. This was a "new" track that he had never seen before and appeared to be newly made. He walked down it and found his uncle on the ground.
83. That position was inside the shooting zone and Mr Atfield shouldn't have been there. It is interesting to note that Mr Felhaber did not search the shooting zone as he considered it impossible that his uncle would be in that area. He said he didn't think that it could ever have happened as his uncle had told him so many times, every time he went shooting, not to go into that area and they both knew where to go. Mr Felhaber had never entertained the possibility that his uncle would go into that zone. He consistently expressed this to the Police.
84. Mr Felhaber gave evidence that he was very upset (shattered) while speaking with Police and can't remember much of what he said to them. He could not remember talking to various people during the afternoon, he was upset and it was possible that he had said the wrong thing due to his state. At times he didn't know where he was and was distraught. He was not seen by the QAS officers who attended that day and did not receive any medical assistance in the time shortly after the day in question. He has since been treated for depression.
85. After reviewing the transcripts of the conversations with Police, he felt that some of the answers he gave were incorrect to the extent that they were expressed badly. Mr Felhaber was asked about why he initially told the 000 operator that his uncle wasn't shot. Doing the best he could to explain why, he suggested that his grandmother may have queried whether her son might have been shot and he said no because he wouldn't have been in that area and that conversation would have been on his mind when he rang 000 shortly after.
86. In relation to the potential reasons for the shooting that he gave the Police including the ricochet, or he walked in front etc, he said that he was misunderstood, he was trying to work out what happened but he clearly remembered seeing a roo near a tree and shooting at it, missing and then following the roos across the shooting zone. He clearly saw the kangaroo. He could not explain telling Police that he fired more than 4 times in the paddock and he denied telling the Police that he fired off the trajectory of the shooting zone as he did not do that.

***FINDINGS required by s45(2)***

87. I am required to find, so far as has been proved on the evidence, who the deceased person was and when, where and how he came by his death.

After consideration of all of the evidence and exhibited material, I make the following findings:

**Identity of the deceased person**– The deceased person was Kelvyn John ATFIELD who was born on 14/4/71.

**Place of death** – Mr Atfield died at his property situated at Lot 1 Styx Road, Ogmore, north of Rockhampton, Queensland.

**Date of death** – Mr Atfield died on the 18th February 2010.

**Cause of death** – Mr Atfield died from an instantly fatal gunshot wound to the head. Mr Atfield had visited his rural property as was his usual twice monthly practice. On this occasion he attended with his mother and nephew, Matthew Felhaber. Shortly after arrival at the property early on the morning of 18/2/10, in rainy and heavily overcast weather, Mr Atfield and his nephew left the camp area to shoot kangaroos on the property. They had done this together at least 10 times previously. Mr Atfield provided the firearms, ammunition, instruction and supervision on the use of the weapons and the regime to be followed in the shooting expedition which were in accordance with all of the previous outings. Mr Felhaber followed those instructions. After directing Mr Felhaber to the static shooting position on the fenceline of the property, with the shooting zone in the direction of the river, Mr Atfield went to another location to flush the kangaroos from their resting place and into the shooting zone. This accorded with the standard procedure they always followed. During that time, Mr Atfield unilaterally strayed from the consistent practice he employed by moving into the shooting zone during the shooting period without making positive contact with his nephew and for an unknown reason. Mr Felhaber shot 4 times at kangaroos in the zone and one of those shots has struck Mr Atfield who, unbeknown to Mr Felhaber, had placed himself in an area of long thick grass, on land much lower than the shooting position, near the river fenceline. He was unable to be seen from the shooting position.

**Consideration of referral for prosecution**

88. Section 48 (2) *Coroners Act 2003* provides that a Coroner who, from information received in investigating a death, reasonably suspects that a person has committed an offence, must give the information to the appropriate prosecution agency for consideration. Information for the purpose of this section does not include information obtained under section 39 (2) *Coroners Act 2003*.
89. In the present matter, Mr Felhaber did give evidence but claimed privilege against self-incrimination and was directed to answer questions under section 39.
90. The threshold provided for in section 48(2) of the *Coroners Act 2003* is reasonably low. The test applied in cases such as this is whether the Coroner reasonably suspects that a person has committed an offence. This is a lesser test than that required at a trial.

91. The Guidelines issued by the State Coroner note that simply referring a person to an appropriate agency based on information received does not itself carry inherently serious consequences. For this reason, it is not necessary or advisable to apply a stricter standard of proof than that set out in section 48 (2) – for example, the use of a higher standard of satisfaction on the *Briginshaw* test is not required and it is opined that a similar test to that used in a committal proceeding would be appropriate.
92. The relevant criminal offence in the circumstances of Mr Atfield's death is manslaughter which is found in sections 302 and 303 of the *Criminal Code Act 1899*.
93. Section 289 *Criminal Code* is relevant in this instance and provides as follows:  
**Duty of persons in charge of dangerous things**  
It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.
94. The negligence necessary to establish a criminal charge is greater than that required in a civil case. The test as to criminal liability is set out in *R v Bateman* (1925) 94 LJKB 791 where Hewart LCJ said: "*In explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, judges have used many epithets, such as culpable, criminal, gross, wicked, clear, complete. But, whatever epithet be used, and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment....It is desirable that, as far as possible, the explanation of criminal negligence to a jury should not be a mere question of epithets. It is in sense a question of degree and it is for the jury to draw the line, but there is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.*"
95. In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused person consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment: *Nydam v R* [1977] VR 430.
96. It is noted that the defence of accident (ie section 23 *Criminal Code*) is not available in a criminal negligence manslaughter case. Section 24 (mistake of fact) is an available defence. It is submitted by Counsel Assisting that the availability of a defence should not be considered in deciding if a referral should be made but the position on this issue is not settled.

**Counsel Assisting Submissions on Referral**

97. It was submitted by Counsel Assisting that Mr Felhaber had in his control a dangerous object, namely a firearm capable of firing multiple bullets in a short space of time. In firing as he did, he caused the death of the deceased. The firing was, it is submitted, reckless and irresponsible in the circumstances. The circumstances of the firing of the rifle by Mr Felhaber were outside the standard of reasonable care and devoid of the reasonable precautions required. It was submitted that this is demonstrated on the evidence, as Mr Felhaber fired multiple times at something he could not properly see or he should not have been firing at, in circumstances where he had to have known that the deceased would be within the general wide arc of firing and the onus was on him to ascertain the location of the deceased before firing.
98. It was further submitted that Mr Felhaber's varying accounts of what he was firing at suggests, at the very least, that he was significantly unsure of what he was firing at, be it a kangaroo or a tree. Especially when firing multiple times, it is submitted that this is unacceptable to the criminal standard. The tragic consequence of his uncontrolled and unsafe firing of the weapon is such that he ought be referred to the ODPP for consideration of the offence of manslaughter, on a criminal negligence basis. It was submitted that Mr Felhaber had a duty to act reasonably and with appropriate care in being in charge of a dangerous object like a firearm. His actions are inconsistent with his duty, and the failure resulted in the death of Mr Atfield.

**Mr Felhaber's Submissions on Referral**

99. It was submitted by Mr Winning on behalf of Mr Felhaber that the evidence he gave under direction at the Inquest was essentially not new information but further explained his statements to Police on the day of the incident.
100. Mr Winning addressed the issue of the use of firearms under the Weapons Act which was not a contentious issue at the Inquest. In effect, Mr Atfield would fall within the category of a primary producer under section 54 of the *Weapons Act 1990* and was engaged in vermin control at the time of the incident. S.54(2) authorises a person to use a weapon on land when assisting a primary producer with the consent of that person and in a position where he is eligible to obtain a weapons licence. There is also an inclusion of this nature for direct family. Mr Felhaber would fall into both of these categories.
101. It was conceded in relation to the operation of s. 289 *Criminal Code* as it relates to this matter, that Mr Felhaber, despite being under the instruction of Mr Atfield in relation to the use of the weapon, clearly owed a duty of care under the section regarding the use of the firearm.
102. The issue of contention for Mr Felhaber was the element of criminal negligence in relation to the performance of the duty under s.289. Mr Winning relied on the decision of the Court of Appeal in the matter of *R v. BBD* [2006] QCA 441. The comments refer to the degree of fault required for criminal negligence to be established and the meaning of "recklessness". His Honour Justice Jerrard at paragraph [1] of the unreported decision made reference to the matter of *Andrews v. Director of Public Prosecutions* [1973]

AC 576 (at 582-583) where Lord Atkin approved the statement from Bateman referred to above. Lord Atkin went on to say:

*“[A] very high degree of negligence is required to be proved before the crime is established.”*

103. His Honour Justice Jerrard went on to refer to the “majority decision in R v. Scarth [1945] St R Qd 38 which approved the application in Queensland for the common law test for criminal negligence. In Evgeniou v. The Queen (1964) 37 ALJR 508 at 509, Mc Tiernan and Menzies JJ wrote that:

*“[T]o constitute a breach of s 289 [of the Code]; there must be negligence according to the standard of the criminal law, which may be described shortly as recklessness involving grave moral guilt.”*

Further, at [3] His Honour Justice Jerrard considered that the pronouncement in Bateman

*“accords with the judgment of Thomas J in R v. Hodgetts & Jackson [1990] 1 Qd R 456 at 463, where His Honour wrote of s 289 that a defendant could not be found criminally negligent unless at least some serious harm was reasonably foreseeable by the defendant. To prove criminal negligence the prosecution had to show that [the defendant] disregarded such an obvious risk of injury to the [person of another] that, beyond reasonable doubt she breached a duty of care to a degree amounting to a crime and deserving punishment.”*

104. His Honour Justice MacKenzie in BBD stated at [16]

*“Where duties such as those in s 286 or s 289 are relied upon as the foundation for a criminal offence, criminal negligence must be proved (Scarth). That concept involves a departure from reasonable standards of care that is serious enough for the State to intervene and punish the person because he or she has behaved with so little regard for the safety of others that the person deserves to be punished as a criminal. The conduct must demonstrate a serious departure from the standard of care that a reasonable member of the community would observe in the same circumstances. Since it involves an assessment of the standard of care a reasonable member of the public would use in those circumstances and the seriousness and degree of departure from it by the accused, once there is evidence sufficient to reach the threshold at which criminal negligence may be left to the jury, it is a matter for the jury to decide whether the conduct was criminally negligent or fell short of the degree of deviation from proper standards necessary to prove criminal negligence beyond reasonable doubt.”*

105. Mr Winning argued that it was not foreseeable to Mr Felhaber that his uncle might get shot, demonstrated by his statements to the Police that his uncle was not meant to go into that area (the shooting zone) and he never had done that before. The evidence of Mr Felhaber was uncontradicted on the point of the regime that Mr Atfield had set in place for the culling of the kangaroos and Mr Felhaber repeated to the Police many times that his uncle was not meant to be in that area. Mr Winning submitted that it was clear on the evidence that Mr Felhaber deferred to the authority of his uncle, took up the position he was told to (and from which he had shot on each other occasion) and held that position.



## **FINDINGS**

## **Inquest into the death of Kelvin John ATFIELD**

106. It was obvious that Mr Atfield was shot in the shooting zone (which was proscribed by him as a no go area). Mr Winning submitted that it was not reasonably foreseeable that Mr Atfield would go into this area during the shooting given the longstanding relationship and practice between the two men, Mr Atfield's extensive experience with firearms and Mr Felhaber's idolisation of his uncle and deference to him for guidance in relation to firearm use.
107. Mr Winning's submission was that Mr Atfield's departure from the usual and unchanging routine, and straying from the usual tracks into the shooting zone, lay at the heart of the tragic incident. In those circumstances, the high level of negligence required by the case law for criminal negligence could not be established. He further submitted that the weight which could be attached to the reliability of the statements of Mr Felhaber to the Police would be limited by the extreme distress that Mr Felhaber was suffering at the time. Mr Felhaber's belief that his uncle would never have been in the shooting zone at that time, was evidenced by his search pattern and the length of the search before the new track was discovered leading into the area where the body was.
108. Mr Winning acknowledged that in a perfect world, a shooter would have eyes on his companion at all times which did not occur here but neither is that the test to be applied. Mr Winning argued that Mr Felhaber should not be referred to ODPP.

### **Family Concerns**

109. The views of the family of Mr Atfield were put in the form of a tendered letter and oral submission through Counsel Assisting. Those views were, in effect, that the family considered this matter a "one in a trillion" tragic accident and felt that Mr Felhaber had suffered for the 2 and a half years that the coronial investigation had been on foot and was still suffering the loss of his uncle in such circumstances. The family are strongly opposed to any further action against Mr Felhaber.

### **Conclusion**

110. A coroner does not need to be satisfied that the elements of the offence have been met or that the offence has been committed; the standard for a referral to the DPP is much lower than that. The Coroner need only have a reasonable suspicion that an offence has been committed. A reasonable suspicion must be based on grounds that are reasonable in the circumstances.
111. Mr Felhaber did owe a duty of care to his uncle under s.289 *Criminal Code* due to the use of a firearm, an inherently dangerous object. Mr Felhaber followed his uncle's instructions, considering him the ultimate authority on procedures to be followed for this activity.
112. I generally accept the submissions of Mr Winning as to the weight to be attached and the interpretation to be placed on the evidence before the Inquest. My findings make it clear the facts which I have accepted forming the circumstances surrounding the death.

## **FINDINGS**

## **Inquest into the death of Kelvin John ATFIELD**

113. I am satisfied on the evidence before me that on 18/2/10, Mr Atfield unilaterally strayed from the consistent practice he employed and instructed Mr Felhaber to employ over some 10 such expeditions on the same property. He did this by moving into the shooting zone in a position in which he was not able to be seen during the shooting period without making positive contact with his nephew and for an unknown reason (it has been hypothesised that he may have been intending to look at the swollen river but beyond an expressed interest in the river there is no evidence on this point).
114. There was no reason for Mr Felhaber to foresee this possibility taking into account the established and unchanging practice of the shooting expeditions which were under his uncle's control, direction and supervision. I do not consider Mr Felhaber's actions to be a "serious departure from the standard of care that a reasonable member of the community would observe in the same circumstances".
115. For those reasons, I do not consider (and I do not hold a reasonable suspicion) that the very high standard of negligence required for criminally negligent manslaughter to be established has been met sufficient for Mr Felhaber to be referred to the ODPP for consideration of prosecution and I do not do so.
116. I do not consider that there are any issues requiring comment under section 46.
117. I again express my condolences to the family of Mr Atfield for their sad loss.

A M Hennessy  
Coroner  
4 /9/12