An application by the family of Mr Scott Johnson for a fresh inquest into the manner and cause of his death

Outline of Submissions on behalf of the family of Scott Johnson

Background

1. This matter has a sad and long history. As Counsel Assisting have indicated in their submissions there have been 2 earlier inquests. Following the first inquest, and following the inquests which related to the police operation Taradale concerning a series of suspicious deaths in the eastern suburbs of Sydney, Senior Deputy State Coroner Milledge by letter dated 13 August 2007 wrote to the Commander, Coronial Investigation Team and expressed her support for the concerns held by Daniel Glick and the Johnson family that Scott Johnson's death had resulted from a "gay bashing". Senior Deputy Coroner Milledge indicated that the State Coroner had agreed to revisit the investigation and that the State Coroner sought the Commander's assistance in guiding and or undertaking a full investigation into the circumstances of Scott Johnson's death.

2. For reasons unknown, Senior Deputy State Coroner Milledge's request was not taken up.

3. In May 2011, representatives of the Johnson family met with Coronial Manager Don McLennon and members of the NSWPF. After the meeting, he directed the Manly LAC to review new investigative information provided by the Johnson family.

4. That review led to the second inquest held by Deputy State Coroner Forbes. As indicated by Counsel Assisting that inquest removed the finding of suicide which had been made at the first inquest and concluded with an "open" finding and a reference of the file to Cold Case police for further investigation.

5. Since then there has been a further investigation the results of which have been summarised in two statements by Detective Chief Inspector (DCI) Young.

6. It is apparent that the Office of the State Coroner was led to believe that the NSW Police Force (NSWPF) sought a fresh inquest in to the death of Scott Johnson. This was reflected in correspondence to the family. In more recent times the NSWPF has denied that it has sought a further inquest.

7. Whatever may be the fact about that matter the family of Scott Johnson who had leave to appear at each of the 2 earlier inquests sought and continue to press for a fresh inquest pursuant to s 83 of the *Coroners Act 2009* NSW (the Act).

8. A number of matters now arise for consideration:

   (a) Does the State Coroner have jurisdiction to entertain the application?
   (b) If so, should a fresh inquest be ordered?
   (c) If so, how should the two statements of C/I Young be dealt with?
   (d) There are also the two related matters concerning the two statements
      (i) The NSWPF have made a claim for Public Interest Immunity over certain aspects of the statements and seek redaction of various names and other material from them;
      (ii) The NSWPF seek non-publication orders over the redacted statements.

9. In respect of each of these matters the family of Scott Johnson generally supports the position taken by Counsel Assisting in their written submissions. These submissions will deal with each matter briefly seriatim.

Jurisdiction

10. It is submitted that the State Coroner has jurisdiction to deal with the application for a fresh inquest. The question of whether Deputy State Coroner Forbes is "functus officio" is, in our submission, the wrong question. The appropriate question is whether the State Coroner has jurisdiction to entertain an application to entertain an application for a fresh inquest.

11. The office of State Coroner is referred to in the Act in Chapter 2 s.7 which provides for the appointment of "the" State Coroner and for the appointment of "a Deputy State Coroner" in a context which makes plain that the Act contemplates on holder of the office of State Coroner and possibly multiple holders of the office of Deputy State Coroner.

12. Section 83 (4) of the Act provides:

   83 When fresh inquests and inquiries may be conducted
   (cf *Coroners Act 1980*, ss 23 and 23A)
   (1) This section provides for the circumstances in which:

(a) a new inquest (a **"fresh inquest"**) concerning the death or suspected death of a person may be held even though the death or suspected death was previously the subject of another inquest (a **"previous inquest"**), and
(b) a new inquiry (a **"fresh inquiry"**) concerning a fire or explosion may be held even though the fire or explosion was previously the subject of another inquiry (a **"previous inquiry"**).
(2) A fresh inquest may be held if:
(a) a previous inquest was terminated before its conclusion because it appeared to the coroner that the person did not die, or
(b) a previous inquest was concluded and the coroner's finding, or the jury's recorded verdict, was that the person did not die or that it is uncertain whether the person had died.
(3) If the remains of a person are found in the State, a fresh inquest may be held concerning the death of the person even though a previous inquest was held concerning the suspected death of the person.
(4) A fresh inquest or inquiry must be held if:
(a) an application for a fresh inquest or inquiry is made under this section, and
(b) on the basis of the application, the State Coroner is of the opinion that the discovery of new evidence or facts makes it necessary or desirable in the interests of justice to hold a fresh inquest or inquiry.
(5) An application for a fresh inquest or inquiry may only be made by a police officer or by a person who was granted leave to appear or be represented at a previous inquest or inquiry.
(6) If a successful application for a fresh inquest or inquiry is made under this section, the State Coroner can hold the fresh inquest or inquiry or can direct another coroner to hold it.
(7) The findings on the fresh inquest or inquiry may be expressed to be in addition to or in substitution for the findings on any previous inquest or inquiry (even if the previous inquest or inquiry was a fresh inquest or inquiry).
(8) This section does not limit or otherwise affect any other power of a coroner (including the State Coroner) to hold a fresh inquest or inquiry and does not limit or affect the provisions of this Act with respect to the termination or suspension of inquests. (Emphasis added)

13. Sub-section 4 (the sub-section) refers specifically to "the State Coroner". This evinces a clear intention on the part of Parliament to empower the person holding the office of State Coroner to determine whether criteria set out in the sub-section have been met. This is a clear statement that it is the State Coroner who has the jurisdiction to hold a fresh inquest and not any other coroner.

14. The question of whether a coroner who made findings of identity of the deceased, date and manner and cause of but otherwise delivered an open

finding indicating that police investigations would continue was "*functus officio*" (functus) arose in *Fairfax Publications v Abernathy* [1999] NSWSC 820 before Adams J. However it arose in an entirely different factual context to that which presents here. Deputy Senior State Coroner Abernathy (as he then was) purported to re-open an inquest into a death in circumstances where he had previously made formal findings and declared an open finding indicating that police investigations would continue. Those investigations did continue and the Coroner re-opened the inquest some time later to receive a detailed report from police, which he then covered by a statutory suppression order. The order was challenged by Fairfax Publications as being beyond power on the basis that the Coroner was functus and had no power to re-open the inquest. Adams J held that the Coroner had validly re-opened the inquest and that the suppression order was within power.

15. It is apparent that the Supreme Court was not dealing with a question of whether a fresh inquest could have been held if an application had been made. The decision in Fairfax is authority on the question as to whether on the facts as disclosed in that case it was within power for the Coroner to re-open. It says nothing about the power of a State Coroner to entertain an application for a fresh inquest.

16. Additionally it is apparent that Adams J formed the view that the Coroner had never intended to close the inquest when he delivered an open finding. In delivering his open finding the Coroner had said:

> "With an open finding, the police, I can assure you, are still interested - very interested - in it and will be seeing whether they can take the matter any further. *They know that the Coroner is still very interested in it* and for that reason alone will analyse the evidence and see what more can be done. If anything comes out, of course they will follow it up." (Emphasis added)

17. This is another point of distinction from the present case. Although Deputy State Coroner Forbes had recommended that the investigation into Scott Johnson's death be referred to the "Cold Cases in accordance with police procedure and protocol" her Honour did not go so far as to indicate that the Coroners Court would continue to exercise jurisdiction over the matter from that point.

18. For the reasons set out above and for those reasons set out in the submissions of Counsel Assisting it is therefore submitted that the State Coroner has jurisdiction to determine the application for a fresh inquest.

There should be a fresh inquest

19. There are two criteria for the holding of a fresh inquest set out in the sub-section. If they are made out then "a fresh inquest must be held". Those criteria are:
    a. there are "new evidence or facts", and
    b. the discovery of the new evidence or facts "makes it necessary or desirable in the interests of justice" to hold a fresh inquest".

20. Significantly the State Coroner is not required to determine the scope of the fresh inquest when considering whether the two criteria are made out.

21. The expression "new evidence" is broader than "fresh evidence". Unlike the expression "fresh evidence", "new evidence" is not confined to evidence that was not available at a previous inquest.

22. The words "in the interests of justice" are of the widest import. See Kirby P in *Herron v The Attorney General* (1987) 8 NSWLR 601 at 613 whereat Kirby P expressed the view that those words in a similar context were "*of the widest possible reference*" and that "*there could scarcely be a wider judicial remit. They enliven a discretionary judgment...*" Kirby P went on to say that "*the community and the relatives have an interest in having the circumstances of the deceased's death fully exposed and thoroughly re-evaluated*"

23. Most of the independent investigation of Scott's death did not take place until ***after the second inquest in June of 2012.***

24. The NSWPF has provided two statements through DCI Young. They are replete with references to new evidence including admissions of complicity in the death of Scott Johnson. Persons who had not been spoken to about the death prior to the second inquest have been identified and spoken to. People alleged by others to have made admissions have denied them. The truth remains to be exposed in Coronial proceedings where the Court has power to compel answers under the cover of the protection of a certificate under s.61 of the Act. Additionally the two statements identify avenues of investigation that remain open for inquiry by this Court.

25. The two statements of DCI Young disclose no fewer than 50 people of interest and 5 gangs or loose groups of young men who were reported to be engaged in gay bashing in time frames not significantly removed from Scott's death in the same general geographic area, i.e. the Northern Beaches. In some cases we have a witness report of being told that the bashing of an American had "gone to far."

26. The position of the NSWPF is, with respect, difficult to discern with clarity having regard to the task envisaged by s 83 of the Act.

27. At paragraphs 7 and 8 of the submissions of the Commissioner of Police it is urged that the family and Counsel Assisting be required, by further submission, to address "the discovery of new evidence or facts" which "makes it necessary or desirable in the interests of justice to hold a fresh inquest". Yet the it is apparent, at the same time, that the Commissioner proposes, in making those submissions, the family, Counsel Assisting and presumably this Court be denied access, not just to the files that stand behind the apparently detailed investigations that have been undertaken since the second inquest, but also in the absence of access to the 175 documents referred to as attachments to the two statements produced in redacted form, which 175 have not been provided.

28. To accede to the Commissioner's submission in this regard would amount to a denial of procedural fairness. It would mean that the Court, the family and Counsel Assisting would be denied access to the new evidence and facts and be restricted to the purported summaries and opinions expressed in the statements.

29. It must be steadily borne in mind that originally and until after the first inquest the NSWPF maintained that the area where Scott Johnson met his death was not a gay beat. It subsequently conceded during the second inquest, only because of material and leads provided by the family or those acting on behalf of and in the interests of the family, that it was wrong about this and that the area was a gay beat.

30. It must also be steadily borne in mind that up until the second inquest the NSWPF had not made it known to the Coroner or the family that persons had been charged in connection with a very large number of assaults committed

upon gay men in 1986, two years before Scott's death, including those in the vicinity of a nude bathing beach, which in geographical terms was not very far from North Head. (See page 12 of the transcript of the second inquest.)

31. Against that background the family could not be criticised for being wary of relying only upon the opinions and conclusions of the NSWPF when the matter could be ventilated in a fresh inquest without testing those opinions.

32. Beyond the 2 statements of DCI Young none of the investigation by Strike Force Macnamir (which was not created until February of 2013) has been presented to any Coroner to date. What the Johnson family presses for is the antithesis of a rehashing a previous inquest; it will be the first hearing of evidence reflecting information compiled by the police in any inquest.

33. To not order a new inquest under these circumstances because the brief of evidence would be too long and hard to assemble would be a profound denial of due process to all concerned and certainly not in the public interest.

34. The family submits respectfully that the statements themselves demonstrate new evidence that makes it necessary or at least desirable in the interests of justice for a fresh inquest to be held.

35. In paragraphs 10 and 11 of his submissions the Commissioner of Police appears to concede that the Coroner could determine and possibly, although it is not clear, that it may be in the interests of justice for a fresh inquest to be held. To the extent possible without diminishing the submissions made above the family adopts the submissions in these paragraphs.

36. Paragraphs 12 and 13 of the Commissioner's submissions can rightly be rejected for they again seek to have the Court accept the opinions and summaries expressed in the statements without any access to the underlying material and in particular the annexures to the statements. The Court is asked to accept that the new evidence and facts, the existence of which appears to now be conceded by the Commissioner, are not such because of their reliability and weight that would lead to any findings being made which would lead to any different result from the last inquest.

37. This is a curious submission. It appears to concede the existence of new evidence and facts. It then seeks the acceptance by the Court of DCI Young's or the Commissioner's opinions (it does not indicate which, if either) as to reliability and weight and offers a prediction as to findings and end result. With respect to the Commissioner, this submission subverts the operation of s 83 and supplants the opinion of the State Coroner with that of one or both of the Commissioner and DCI Young.

38. At paragraph 14 the Commissioner's submissions fall into the error of confusing the issue of whether there ought to be a fresh inquest with what the scope of that inquest ought to be. At this time, and in the absence of the annexures to the two statements and other material referred to therein it is not possible to determine how much of the 27,000 pages and the 13,000 pages of "passive" material will be required to be produced and if produced to the Court will require editing or "anonimisation". It is entirely speculative on the limited material available, and in the absence of any evidence, as opposed to submissions which cannot be tested, to determine how much of the total of 40,000 pages will be relevant.

39. Attached to these submissions is a schedule of the 175 documents referred to in the statements of DCI Young. Most of those can be sourced to the family or those acting on behalf of or in the interests of the family. The task of editing those documents to remove the names of informants and the like is hardly daunting especially when one considers that most of the documents requiring redaction are in soft copy and therefore amenable to electronic find and replace functions available commonly as software. The same consideration probably applies to the 40,000 documents, although no estimate is given of how many of those would require redaction. Further it must be recalled that most of the persons whose names have been redacted from the two statements are known to the family due both to the context in which the names appear and to the fact that the family and its lawyers has had lawful access to the primary material before the first statement was recalled. Further most of those names were provided to police as a result of work by the family or those assisting the family. Indeed a great deal of the information in the two statements has been sourced from leads provided by the family.

40. Finally, either the NSWPF has already assembled and reviewed the documents at issue (27,000 or 40,000) or not. The inference from the Commissioner's submissions is that these documents have been compiled and that they are readily accessible. If the NSWPF has not assembled and reviewed this material, then the submission, which seeks to have this Court

accept the police view of the value of the information obtained, must itself be without weight. Whilst the Johnson family recognises the importance of issues relating to the use of police resources, the fact remains that we are here dealing with the still officially unexplained death of a vital member of the community, who went out one day "without a scintilla of evidence to indicate otherwise" than he was in a very happy and positive state of mind" given the evidence of Det. Wilson as expressed in his evidence during the second inquest (page 14). Of their nature, cold case investigations conducted more than 25 years after an unexplained death, are bound to produce many files and 1000s of pages of material. The holding of a fresh inquest in these circumstances can only be in the interests of justice even if it does involve the use of police resources.

Non-publication orders and what should become of the two statements

41. The family does not oppose the non-publication orders sought by the Commissioner and does not wish to be heard on the question of the scope of the Court's power to make the suppression orders sought.

42. It is submitted that the two redacted statements of DCI Young should be received into evidence on the application that a fresh inquest be held as should the brief of evidence before Deputy State Coroner Forbes and the transcript of that second inquest.

43. If an order for a fresh inquest is made it is submitted that material should be received into evidence in that inquest.

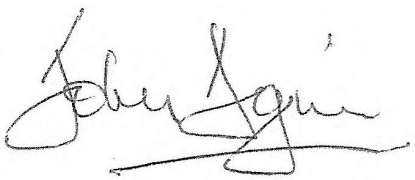
44. It is further submitted that, at this time, as part of the orders for a fresh inquest the Commissioner should be requested to provide copies of the documents referred to in the statements and or described as annexures, redacted to reflect the redactions in the statements and to remove other like material. It is submitted that this additional material be made available to the family and Counsel Assisting and that, until further order, it too be covered by suppression orders in keeping with those granted over the two statements.

45. It is further submitted that if an order for a fresh inquest is made and the documents received into evidence as indicated above, the inquest be adjourned to a date to be fixed for further directions to allow the family representatives and Counsel Assisting to discuss and attempt to agree upon

the scope of the inquest. It is submitted that liberty to approach on reasonable notice be granted in any event.

46. It is further submitted that copies of the redacted statements, the annexures and other documents referred to in the statements be made available to the Johnson family, their legal representatives and those assisting them both in Australia and in the United States of America where the Johnson family resides. Of course it is accepted that, *until further order*, the family and their legal representatives and assistants would be bound by the suppression orders made.

47. It is, however, anticipated that at some time the family is likely to seek to have the suppression orders varied by the Court to permit publication of some of the material. However that time has not arrived and may not arrive.



John Agius SC
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