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IN THE NEW SOUTH WALES STATE CORONER'S COURT

STATE CORONER BARNES

5 MONDAY 13 APRIL 2015

**INQUEST INTO THE DEATH OF SCOTT RUSSELL JOHNSON**

10 **NON-PUBLICATION ORDERS PURSUANT TO S 65(4) OF THE  
CORONER'S ACT I DIRECT BY NOTATION ON THE CORONER'S FILE  
THAT EXHIBIT 2 NOT BE SUPPLIED TO ANY PERSON UNTIL FURTHER  
ORDER.**

15 **PURSUANT TO S 74(1) OF THE CORONER'S ACT, EXHIBIT 2 NOT BE  
PUBLISHED UNTIL FURTHER ORDER.**

20 **PURSUANT TO S 65(4) OF THE CORONER 'S ACT, I DIRECT BY  
NOTATION ON THE CORONER'S FILE THAT THE CONFIDENTIAL  
AFFIDAVIT OF DETECTIVE CHIEF INSPECTOR, PAMELA YOUNG,  
SWORN ON 21 NOVEMBER 2014 NOT BE SUPPLIED TO ANY PERSON  
UNTIL FURTHER ORDER**

25 Ms S McNaughton assisting the Coroner  
Ms S E Pritchard for the Commissioner of Police New South Wales  
Mr J Agius for Johnson Family

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30 HIS HONOUR: Thank you ladies and gentlemen. The proceedings this  
morning concern an application for the granting of a fresh inquest into the  
death of Scott Johnson.

35 MCNAUGHTON: May it please the Court. My name is McNaughton, I appear  
with Ms Baker instructed by Ms Mulhotra from the Crown Solicitors Officer as  
counsel assisting.

HIS HONOUR: Yes, Ms McNaughton, thank you.

40 MCNAUGHTON: Your Honour I intend to give a brief background in relation to  
this matter and then briefly outline the issues for your Honour's determination  
today.

45 In relation to the background we are here today as your Honour has indicated  
because of the death of Mr Scott Johnson. His body was found at  
approximately 11 o'clock in the morning on Saturday 10 December 1988 and it  
was discovered by a fisherman on the rocks at the base of North Head in  
Sydney near Blue Fish Point, slightly north east of that location.

50 Two inquests have been held into Mr Johnson's death to date.

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5 The first inquest was held in 1989 before then Deputy State Coroner, Derek Hand. On 16 March 1989, his Honour found that Mr Johnson had died between the 8 and 10 December 1988 at North Head in Manly, north of Blue Fish Point after intentionally jumping from the cliff with a view to taking his own life.

10 A second inquest was held before Deputy State Coroner Carmel Forbes on 27 June 2012. Evidence was given in that inquest that Mr Johnson was a homosexual man and that he had been located in the vicinity of what police now know to be a gay beat.

15 In her Honour's findings in respect of the second inquest, Deputy State Coroner Forbes indicated that the investigation preceding this second inquest had not taken the case any further but she noted that information about some additional deaths in the Bondi area of Sydney connected with gay hate crime had sown a seed of doubt as to that positive finding made of suicide in the first inquest.

20 Her Honour then proceeded to make the following formal findings as required by s 81 of the Coroner's Act. Her Honour stated:

25 "Accordingly, I find that the evidence adduced in Mr Johnson's death does not enable me to make a finding as to how he fell off the cliff and I make an open finding and refer his file to "Cold cases" for further investigation in accordance with police procedure and protocol.

30 The formal finding that I make is that Mr Scott Russell Johnson died between 8 and 10 December 1988 at North Head, Manly, north of Blue Fish Point, from the effects of multiple injuries he sustained as a result of falling from a cliff.

35 The evidence does not allow me to make a finding as to how he fell."

Your Honour, as it can be seen from the above, her Honour was able to make statutorily required findings of a date, identity and cause of death. Her Honour's finding as to manner was in part a finding that the deceased had sustained injuries in a fall but was an open finding, that is a partial open finding, insofar as her Honour was unable to say whether the fall was accidental, intentional or self inflicted.

45 A New South Wales Police Force/Strike Force McNamia(?) was subsequently established to further investigate Mr Johnson's death. Further material has also been provided to the New South Wales Police Force by Mr Johnson's family.

50 Detective Chief Inspector Pamela Young of the Unsolved Homicide Team, has prepared a lengthy detailed statement for your Honour together with now two supplementary statements containing the further material that has been

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obtained by the New South Wales Police.

5 Some of the material within that is of a confidential nature and certain orders are sought in relation to those statements. They appear in the material I intend to provide your Honour in both redacted and un-redacted forms.

Although I think the third statement which we have only just been provided with is only in its redacted form.

10 In view of the new material which has been provided, Mr Johnson's family are seeking that a further fresh inquest be held into Mr Johnson's death under s 83 of the Coroner's Act.

15 The previous inquest as I have already indicated concluded with an open finding as to manner of death. It is our respectful submission that prior to your Honour's consideration of whether a third inquest should be held into Mr Johnson's death pursuant to s 83, it is necessary to consider whether Deputy State Coroner Forbes, that is the Deputy State Coroner from the second inquest, remains seized of jurisdiction.

20 If her Honour does, by virtue of the partial open finding, then it would be necessary for her Honour to consider whether there should be any further oral hearings in that inquest.

25 On the other hand if Deputy State Coroner Forbes does not remain seized of jurisdiction, it would be appropriate for your Honour to consider whether a fresh inquest should be held under s 83 of the Coroner's Act.

30 As your Honour is well aware we have provided written submissions and in those written submissions it is submitted by the team of counsel assisting, that Deputy State Coroner Forbes jurisdiction was exhausted by her statutory findings and we would submit that it is accordingly appropriate for your Honour to consider whether to order that a fresh inquest be held under s 83 of the Coroner's Act.

35 Your Honour in determining whether or not to hold a fresh inquest will need to consider the material over which the Commissioner of Police has sought a non-publication or non disclosure and non disclosure orders in relation to some of the material within the material provided by the police.

40 It is submitted that provided your Honour is of the view that we submit that Deputy State Coroner Forbes is functus officio of her jurisdiction has been exhausted and that your Honour has jurisdiction to consider whether a fresh inquest should be conducted, it would be appropriate for the orders sought by the Commissioner of Police to be made over the material tendered that I will be tendering in due course. That is the un-redacted versions of that material.

45 We also submit, your Honour, that it would be appropriate for your Honour to order that a fresh inquest be held under s 83 of the Act.

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5 Just going very briefly as to what is set out in our written submissions in relation to the question of whether or not Deputy State Coroner Forbes remains seized of jurisdiction, we set out there an analysis of cases and also very importantly the structure of the Coroner's Act which indicates, in our respectful submission, that the entry of an open finding is of the nature of a finality such that her decision is a final decision and you are free to order a fresh inquest should you make that determination.

10 It is ultimately a question of statutory interpretation as we've set out at paragraph 16 and following. There are various indicators within the Coroner's Act that there are three ways of determining whether or not a matter has been concluded or resolved. Interestingly part 6.5 of the Coroner's Act deals with what is called the Resolution of Coronial Proceedings and there are three ways it would appear that they are to be resolved.

15 The first is that an inquest maybe terminated.

The second is where it maybe concluded.

20 The third where it maybe suspended.

25 There are various indicators within the structure of the Act in our respectful submission which show that the partial open finding of the second inquest should be regarded as a resolution of coronial proceedings.

30 There is one decision your Honour which may impinge upon your Honour's decision in relation to this question but we say it provides no binding authority on your Honour and that is the decision of Adams J of the Supreme Court, in *John Fairfax Publications v Abernathy (1999)* Supreme Court decision, single judge, but we have set out in some detail there why that decision firstly of all does not have a clear ratio and his Honour indeed at paragraph 17 of his decision made the decision there on two alternative bases such that there is no clear ratio in that decision.

35 So in conclusion we say after considering the material in detail and our written submissions that the text, structure and purpose of the Coroner's Act indicates that the making of an open finding constitutes the conclusion or resolution of an inquest such as to render the previous coroner functus officio that the decision in Fairfax does not contain a binding ratio and that Deputy State  
40 Coroner Forbes jurisdiction was exhausted by her statutory findings and it is, therefore, appropriate in our respectful submission for your Honour to consider whether to order a fresh inquest under s 83 of the Coroner's Act.

45 If it is appropriate now your Honour may I tender the following documents which have been placed into a folder under nine tabs. They include or constitute first of all our submissions, the submissions of counsel assisting. They are not dated but they were provided on 18 March 2015.

50 Second the submissions of the Commissioner of Police dated 1 April 2015.

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Thirdly the submissions of the Commissioner of Police re the claims for non-disclosure in relation to the statements and supplementary statement of Inspector Young. They were dated from last year when this issue was being considered, the 21 November 2014.

5

Fourthly, the redacted affidavit of Detective Chief Inspector Pamela Young of 1 April 2015.

Fifthly, the submissions of the deceased's family dated 10 April 2015.

10

Sixthly the transcript of proceedings before Deputy State Coroner Forbes that is in relation to the second inquest dated 27 June 2012.

Seventh, the ammonised statement of Detective Chief Inspector Pamela Young dated 17 March 2015.

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Eighthly the ammonised statement of Detective Chief Inspector Pamela Young of 17 March 2015.

Ninthly something that has only become available today to our team, the ammonised statement of Detective Chief Inspector Pamela Young, a redacted version of a statement dated 9 April 2015 in its redacted form.

HIS HONOUR: Thank you, we will make all of those documents Exhibit 1, and they can be distinguished by the tab numbers.

25

**EXHIBIT #1 SUBMISSION DOCUMENTS TENDERED, ADMITTED WITHOUT OBJECTION**

MCNAUGHTON: Your Honour, if it is appropriate at this point to tender the un-redacted statements of Detective Chief Inspector Pamela Young. There are two folders containing the first two statements of Inspector Young. The first statement is very lengthy so that goes right into the second folder and that's 445 pages and the second statement is much shorter and that's at the back of the second volume.

35

In relation to these two folders we will be seeking non-publication orders.

HIS HONOUR: Yes, I understand that. Make those two folders exhibit 2.

40

**EXHIBIT #2 TWO FOLDERS CONTAINING STATEMENTS OF INSPECTOR PAMELA YOUNG TENDERED, ADMITTED WITHOUT OBJECTION**

MCNAUGHTON: Thank you. We will be seeking in relation to those statements, that is the un-redacted ones an order in relation to those under s 65(4) of the Coroner's Act and also in relation to s 74(1) of the Coroner's Act.

45

If your Honour would like to hear briefly in relation to the issue of fresh inquest now or whether or not --

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HIS HONOUR: Yes, no, I will hear from you now in relation to that Ms McNaughton.

5 MCNAUGHTON: We have set in brief matters in our written submissions, which are now before your Honour, exhibit 1, s 83 of the Coroner's Act provides for the circumstance in which a new inquest or a fresh inquest concerning the death or suspected death of a person maybe held, even though there has been a previous inquest.

10 Section 83 subs (4) provides:

15 "That a fresh inquest must be held where (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 interest of justice to hold a fresh inquest or inquiry."

20 It is clear now that there is an application by or on behalf of the Johnson family for a fresh inquest. So s 83(4)(A) is satisfied. The question for your Honour is under 83 (4)(B) whether there is new evidence or facts and whether or not such evidence or facts make it necessary or desirable in the interest of justice to hold a fresh inquest or inquiry.

25 In short we say that there is material within the new statements that are now before your Honour which are sufficient to satisfy the requirement of new evidence or facts and importantly in your Honour's discretionary judgment in relation to necessary or desirable in the interest of justice, we would respectfully submit that there are other legitimate considerations which would weigh upon your Honour.

30 One of those matters is, as noticed by as he then was President Kirby, later Kirby J, that the community and relatives have an interest in having the circumstances of the deceased's death fully exposed and to thoroughly re-evaluate it.

35 His Honour stated that in the case of *Heron v The Attorney General for New South Wales & Ors (1987)* case, other matters which have been referred to in texts include the wishes of the family or community members and whether an inquest may allay suspicions, rumour or doubts or concerns held about the circumstances of a death.

40 As McHugh J, as he then was, also noticed in *Heron*, his Honour stated:

45 "The paramount public interest in ascertaining the truth about the manner and cause of the person's death."

50 In our respectful submission the circumstances in relation to both the new material and the circumstances surrounding the death of Mr Scott Johnson are sufficient for your Honour to make an order that a fresh inquest should occur. Thank you, your Honour.

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HIS HONOUR: Thank you. Ms Pritchard I have, of course, read your very helpful written submissions and as you are aware they have now been tendered. Is there anything you wish to add?

5 PRITCHARD: No, your Honour, other than perhaps to ask the Court whether I should formally read the affidavits, confidential and redacted affidavits of Pamela Young sworn in support of the non disclosure orders but given that they seem to be agreed by all at the bar table it may not be necessary.

10 HIS HONOUR: They've been tendered so I think that's sufficient.

PRITCHARD: Your Honour has read our written submissions so I won't detain the Court with revisiting those other than to note that the Commissioner would certainly not resist a fresh inquest being held nor would the Commissioner  
15 wish to be heard to speak against the holding of a fresh inquest. This is a matter for the Court on the family's application.

The Commissioner readily accepts that the Coroner may weigh in the exercise of the discretion to hold a fresh inquest in consideration of the public  
20 importance of the case. The wishes of the family or community members and whether an inquest might allay suspicions, rumours or doubts or concerns held about the circumstances of a death.

The Commissioner is in ready agreement with what has been put by counsel  
25 assisting.

Third the Commissioner accepts that there have been suspicions, rumours, doubts and concerns in some parts of the community about gay hate related crimes in the northern beaches area of Sydney in the 1980s and about the  
30 attitudes of police in relation to such crimes.

It would certainly be open to the Coroner, to your Honour, to form the opinion that a fresh inquest would allay those suspicions, rumours, doubts or concerns or could serve an interest in making known to the wider public information  
35 relevant to matters of public health and safety.

There are, of course, as noted in the written submissions considerable resource implications in relation to a further inquest and in relation to that we just seek to put on the record your Honour as is noted in our submissions, that  
40 as presently instructed the Commissioner and Detective Chief Inspector Young do not consider that an inquest would result in any findings being made that would produce a different result from the open finding made by Deputy State Coroner Forbes on 26 July 2012.

45 Finally, in relation to the logistical issues, it ought not be beyond the skills of those assembled here to assist the Coroner in relation to those.

HIS HONOUR: Thank you ma'am. Mr Agius.

50 AGIUS: Your Honour, of course, has our written submissions.

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HIS HONOUR: Yes, thank you.

5 AGIUS: We were under some disadvantage in relation to the written submissions as your Honour would have noticed. because we do not have the 175 annexures that are referred to in those written statements and if your Honour is not in favour of granting a third inquest, we would like the application to be extended to such point as would permit us access to those 175 annexures so that we might be able to supplement our written submissions on that application because that is our gateway.

10 We provided some of that material, that is the Johnson family provided some of that material but there is a deal of that material that we have not been provided with, we haven't seen although there is a purported summary of it in the larger statement from Detective Chief Inspector Young.

15 Additionally we have not yet seen the fresh statement of the Detective Chief Inspector which is dated 9 April. My learned friend, Ms McNaughton, showed me a copy of it this morning and I understand that once the orders are made in relation to the non-publication we will be provided with a copy of it. It is already redacted and so we cannot speak to the contents of that statement in our application.

25 In our respectful submission there is more than enough evidence available in the two statements to which we have had access in redacted form which supports an order for a third inquest. Those statements between them, disclose that there were no fewer than 50 people of interest, that is who held material that maybe relevant to the issue of the circumstances of Mr Scott Johnson's death and the statements also identify the existence of five gangs or loose groups of people who themselves were reported to be engaged in the bashing of gay men in timeframes which are relevant to the timeframe of Mr Scott Johnson's death and in the same general geographical area.

30 That material alone, in our respectful submissions satisfies the requirements of s 83 subs (4) of the Coroner's Act.

35 It is, we recognise as a matter of history, an exceptional matter for a third inquest to be granted and some may regard that as a significant factor in consideration and in our respectful submission there is little or no significance in the rarity of an order for a third inquest and we say that because one needs to pay, with respect, close attention to the history of this matter.

40 When the first inquest was held, and a positive finding of suicide was made, no member of the family had been interviewed as to their relationship with the deceased. No member of the family had had an opportunity to provide any material relating to the close knit nature of the family relationship or for example in relation to Scott's intention to return to the United States very shortly to celebrate the birth of his first niece.

45 So none of the material which would have militated against a finding of suicide was before the Coroner and in our respectful submission that inquest, having



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been - and in particular the finding of suicide which was made having been effectively set aside by the second inquest really places this matter in a special area for consideration.

5 Prior to the second inquest there was very little further investigation undertaken by police. Such investigation as was undertaken is reflected in the evidence of Detective Wilson who gave what appears to be very frank evidence before Coroner Forbes, he himself indicated that he did not regard suicide as a likely cause of Mr Johnson's death and he went on to detail a  
10 number of investigations which could have been made but which had not yet been made by the New South Wales Police in relation to the circumstances of death.

15 Now some, but not all of those investigations, have been undertaken by New South Wales Police but the major investigation into this death didn't take place until after Deputy State Coroner Forbes findings were delivered in 2012.

20 The bulk of the material that your Honour has, 444 pages or 445 pages of statements, the 175 annexures which your Honour doesn't yet have, we understand, the bulk of that material was created after the second inquest and that is a circumstance which is very rare and in our respectful submission needs to be taken into account if one is to consider the rarity of the order of a third inquest.

25 The Johnson family recognises that resources will be expended and will be used if a third inquest is ordered but through me they ask what price is the certainty of knowing the circumstances of Mr Johnson's death in a sophisticated society that we have. The fact that there will be costs and there will be resources, should be recognised but should not in any way be a reason  
30 for not further investigating and having a ruling upon the true circumstances that pertain in relation to his death.

35 The police statement for reasons frankly are beyond comprehension spends a great deal of time covering territory of a possible finding of suicide. In our respectful submission that finding has been put to death itself. There is no evidence and your Honour we are confident will find that there is not a skerrick of evidence which would support even the notion of suicide in relation to this young man who had just received very favourable news about the prospects of his candidacy for PhD in mathematics.

40 We endorse what Deputy State Coroner Forbes said when dealing with the issue of suicide that left open the possibility of accidental death or death by some form of unlawful homicide or by assault which led to death. In our respectful submission upon a third inquest it will be clear that the only available  
45 finding available for the Court on the balance of probabilities to the requisite standard of proof, is that Mr Johnson sadly met his death because of unlawful homicide.

50 The inquest may not discover the perpetrator of perpetrators, although we believe that with appropriate use of the powers available to a Coroner under

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s 61 of the Coroner's Act, that is also a likelihood.

5 We think that the Court would not be detained for very long in dealing with the notion of an accidental death. The man's clothes were found neatly folded a distance some way from the edge of the cliff and there is absolutely no reason to suspect that this man with all of his senses could have met an accidental death at the cliff. It is our submission that there is a very real prospect that this man met his death because of the unlawful intervention of others and eventually the finding of this Court would reflect that.

10 Even on the material provided by the police so far without further investigation we believe that that is an available finding and a finding that on the preponderance of the evidence should be made.

15 I don't want to get ahead of myself but I make those submissions purely to identify why it is that we say that there is value in looking again at the available evidence albeit that we are nearly 30 years away from the date of death. It is a grave sadness that the matter wasn't properly investigated at the time of death. It is a distraction that it appears that a decision by the police that this was a probable suicide was made early and it is a distraction although necessary distraction to consider that that has probably tainted a proper investigation of this death from the time that the body was located.

20 Our purpose is not to criticise the police. We raise these matters simply to put in historical context the evidence and the depth of the evidence or in some cases the absence of evidence in relation to this death. It suffers the features of many investigations which are conducted where the investigation is of a "Cold Case" nature.

25 We embrace that, that is just a fact of life and it is a fact of the passing of nearly 30 years of time. Nevertheless we say there is material which even at this stage appears to support a finding of death by unlawful homicide. We otherwise rely upon our written submissions.

30 I will just add some supplementary matters. We would urge the Court to make orders that at least redacted copies of the 175 annexures be provided to counsel assisting but Coroner if your Honour is minded to order a third inquest, that we have access to that material. We expect that it will be redacted in the same way in which - applying the same principles which were applied in the redaction of the police statements. The two that we have and the one we are yet to receive and we expect that with access to that material, plus material that the family itself has gathered, plus insights we are able to add that perhaps the counsel assisting is not yet aware of because they are not steeped in the background of this matter as we are. We should be able to come to agreement about the scope of the inquest and we should be able to allay the Commissioner's concerns about the large number of documents that apparently relate to the investigation to date we would like that opportunity.

45 If there are difficulties about narrowing the scope or refining the scope or perhaps extending the scope, then your Honour no doubt would always be

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available to deal with the matter at a directions hearing on reasonable notice but we have provided the police with an enormous amount of information up to this time.

5 It is in our interest and no doubt it is our fervent desire to assist in the further investigation of this sad death and we would like that opportunity. An order for a third inquest would give us that opportunity and we will work with counsel assisting to ensure that the valuable resource which is the resource of this Court is used properly and effectively.

10 On the question of jurisdiction we embrace the submissions of counsel assisting. We have offered some submissions of our own. The decision of Adams J in our respectful submission can be distinguished there was no doubt on the face of the record that Coroner Forbes did not intend that the  
15 proceedings before her would remain on foot. It is apparent that Adams J believed or at least formed the form and it appears ruled, that Deputy State Coroner Abernathy had a contrary view about the inquest before him and I think we are all in agreement that this Court has jurisdiction to make the order for a third inquest.

20 The factual circumstances that pertained at the time that Adams J ruled in Fairfax and Abernathy are entirely different to the factual circumstances that pertain now.

25 They are our submissions together with our written submissions, your Honour.

HIS HONOUR: Thank you Mr Agius. In view of the order I propose making it will not be necessary for me to deal with your application for adjournment to provide further material.

30 I have prepared a draft order based on the written submissions, just give me a moment to check that we do not need to change anything based on your oral submissions.

35 MCNAUGHTON: Just in relation to the non-publication aspect. Would it be convenient if we had a short amount of time just to finalise exactly what must be --

40 HIS HONOUR: Yes, the dates were confusing, we need to add the third statement in there as well.

MCNAUGHTON: Indeed, and also the original un-redacted affidavit as well.

HIS HONOUR: Yes.

45 MCNAUGHTON: So if we could have a short amount of time at some suitable moment.

50 HIS HONOUR: Yes, all right that will give me time to tidy this up.

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## SHORT ADJOURNMENT

HIS HONOUR: Thank you ladies and gentlemen.

5 MCNAUGHTON: Thank you for that time. In the time you have kindly given us we have been able to obtain a signed copy of that third statement of Detective Chief Inspector Young. It has been signed today. The un-redacted version of the third statement. If I could ask your Honour to add that to exhibit 2.

10 HIS HONOUR: Thank you.

MCNAUGHTON: So the attention is that exhibit 2 is all the un-redacted material except for this. That is the confidential affidavit of Detective Chief Inspector Pamela Young of 21 November 2014. That is simply on the file. In light of that we propose the following orders, if I can hand them up. Which hopefully are a simplified version of what occurred earlier.

15 HIS HONOUR: Yes, thank you. Ms Pritchard you are content with the order provided by counsel assisting?

20 PRITCHARD: Yes, thank you, your Honour.

HIS HONOUR: The primary purpose of the proceedings today is to consider whether to convene a fresh inquest into the death of Scott Johnson.

25 Two previous inquests have been held into that death. Pursuant to s 83(5) of the Coroner's Act an application for a fresh inquest can be brought by a police or by a person who was granted leave to appear at a previous inquest.

30 The family of Mr Johnson were granted such leave in the previous inquest and they apply for a fresh inquest.

I am satisfied that I have jurisdiction to grant the application. As each of the parties agrees with this conclusion, my reasons will be brief.

35 Section 83 of the Coroner's Act provides for circumstances in which a fresh inquest concerning the death of a person maybe held even though the death was previously the subject of another inquest.

40 Senior counsel for the Johnson family submit that s 83(4) empowers the State Coroner to determine whether a fresh inquest should be held irrespective of whether a previous inquest is continuing. However, I accept the submission of senior counsel assisting that the s 83 power does not arise until a previous inquest has been concluded. That is the s 83 power does not enable me to take over an inquest that has been conducted by another Coroner or to preside over an inquest running parallel with a previous not yet concluded inquest..

45 As Deputy State Coroner Forbes returned an open finding in respect of the

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second inquest, the question has been raised as to whether her Honour is functus officio or whether her Honour remains seized of jurisdiction in respect of the inquest.

5 As submissions of counsel assisting set out the texture, structure and purpose of the Coroner's Act, indicate that the making of an open finding constitutes the conclusion of an inquest such as to render the Coroner functus officio. I agree with that.

10 I also accept the submission that the decision in Fairfax to the contrary does not contain a binding ratio on this question applicable to the circumstances of this case.

15 It can surely not be the law that a Coroner retains jurisdiction over an inquest indefinitely whenever some aspect of the death has not been ascertained. Moreover as the submissions of Mr Agius SC observe in contrast to the findings in Fairfax the open finding of Deputy State Coroner Forbes, does not suggest that it was intended that the Coroner would retain ongoing oversight of the investigation with a view to hearing further evidence at some future point.

20 I am satisfied that Magistrate Forbes' jurisdiction was exhausted by the publication of her findings.

25 I am satisfied the second inquest has concluded and the power in s 83 is enlivened.

30 In these circumstances it is appropriate for me to consider whether to hold a fresh inquest having regard to the criteria in s 83(4) of the Act. That section provides a fresh inquest maybe held where an application for such an inquiry is made under the section and on the basis of the application, I am of the opinion that the discovery of new evidence or facts makes it necessary or desirable in the interest of justice to hold a fresh inquest or inquiry.

35 The Johnson family seeks a fresh inquest. Counsel assisting supports this application. Commissioner for the New South Wales Police Force does not oppose the application.

40 I do not consider that it is necessary for me to receive further submissions on the question. There is new evidence in the form of three statements from Detective Chief Inspector Pamela Young. Those statements set out a number of further investigations that have occurred since the findings were made by Deputy State Coroner Forbes in the second inquest.

45 The New South Wales Police Force suggests it is unlikely that the findings as to manner and cause of Mr Johnson's death will be altered by any of the further investigations that have occurred.

50 I express no opinion on this issue but I note that since the second inquest, numerous other witnesses have been located and interviewed and some purport to have evidence that could well lead to a different finding were it

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accepted.

In any event it is not necessary for there to be a probability of a different result for a fresh inquest to be ordered. It is sufficient if there is a realistic possibility.  
 5 Further there are other legitimate considerations such as the right of the family and the public to have new evidence tested in open court. That may allay suspicions and concerns that are held by the family and perhaps some members of the community. It may lead to a different finding as to how Mr Johnson died. In my experience the questioning of witnesses by expert  
 10 counsel in court can lead to a different conclusion to that which may seem reasonable when the written versions of those witnesses are merely read in isolation. The process itself may cause other witnesses to come forward or in other ways identify other investigative leads.

15 The discretion granted by the section when the State Coroner is considering an application for a fresh inquest is very wide.

Senior counsel assisting and Mr Agius SC submit that it would be in the  
 20 interest of justice for a fresh inquest to be convened.

Senior counsel for the New South Wales Police Force acknowledges that the grounds which could justify a fresh inquest exists. I note the concerns of the police in respect of the workload of any further investigation. In my view such concerns maybe addressed in my considering the scope of the future inquest  
 25 when that proceeds. Accordingly I grant the application.

I note that all parties agree that it is appropriate for the non-publication orders sought by the police be made. Accordingly I make the following orders pursuant to s 65(4) of the Coroner's Act, I direct by notation on the Coroner's  
 30 file that exhibit 2 not be supplied to any person until further order.

Pursuant to s 74(1) of the Coroner's Act, exhibit 2 not be published until further order.

35 Pursuant to s 65(4) of the Coroner 's Act, I direct by notation on the Coroner's file that the confidential affidavit of Detective Chief Inspector, Pamela Young, sworn on 21 November 2014 not be supplied to any person until further order.

40 We now need to plan how to go forward.

MCNAUGHTON: Yes. As I understand it from the police, the brief of evidence which I also understand is co-extensive with the annexures to the statements of Detective Chief Inspector Young would take four months and that is a tight estimate as it can be seen from the written submissions that there a period of  
 45 four months with two investigators working fulltime, whereas now they are offering four months when they acknowledge that there will not always be fulltime investigators on it so it will take that long to produce the redacted version of the brief. It is the redactions which are the problematic areas and they need to be done, as I understand it, in the main manually, and that is  
 50 simply a very long exercise. We accept that it is a long exercise. We also

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5 accept the value of it being done properly given that your Honour has just ordered a third inquest and that there is value in doing things this time properly, fully and that if the police are allowed that period of time, we will then be able to progress the matter to the next stage which would be for counsel assisting, with the input of the family, to determine what matters should be put before your Honour in a coronial inquiry.

10 So if your Honour was of the view that four months was a reasonable period of time to produce the brief, that would take us to mid August about say 17 August. It could possibly - I'm not aware although the suggestion has been made by Mr Agius and I would respectfully agree that it is a sensible one that could be done in tranches(?) perhaps with input from their team as to what would be the priorities in the exercise of producing the redactions.

15 But that would in any event, the four months would be 17 August, we would then need, that is counsel assisting team a period of time, we would say two months to - with the input of the family, to review the material and to assess what, if anything, should be done further and what witnesses, if any, should be called.

20 would take us to say 19 October, and then it would be a matter if we were all in furious agreement, to come back shortly before your Honour, or if we were not in agreement the family would need time to put on their submissions as to what further material your Honour should consider being in the inquest proper.

25 So that would be a matter for your Honour after the 19 October.

So that's the sorts of timeframes our team were considering your Honour.

30 HIS HONOUR: Do you want to be heard Ms Pritchard?

PRITCHARD: Your Honour I am just seeking instructions in relation to one aspect of what has just fallen from counsel assisting if I might be heard shortly?

35 HIS HONOUR: Certainly.

40 PRITCHARD: I have the instructions, your Honour. Ms McNaughton referred several times to receiving the input of the family in relation to assessment of what witnesses might be called if any. What structure the inquest might take if it could be understood that the Commissioner would also wish to have some input in relation to those matters.

45 HIS HONOUR: I was going to propose that counsel assisting produce written submissions dealing with those two issues, circulate them to both of you, and then invite you to make your response.

PRITCHARD: That would be suitable, thank you.

50 HIS HONOUR: Do you have any concerns with that Ms McNaughton?

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MCNAUGHTON: No, thank you.

HIS HONOUR: Do we need to set a date then to come back after those three steps are taken?

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AGIUS: I wonder if I might be heard.

HIS HONOUR: Sorry Mr Agius, certainly.

10 AGIUS: My friend has dealt with - at the outset we object to the Commissioner having any say at all in relation to the scope of the further inquest. The Commissioner, as a police officer, ought not in our respectful submission have a say in relation to that.

15 There is no public interest in the police having a say in determining the breadth or otherwise of this inquest. The police had until this morning opposed this inquest and I don't know who has fallen off their horse since last week but we heard for the first time today at the bar table that the police were not opposing the inquest.

20

Their written submissions suggest that it is not appropriate that an order for an inquest be made. We have absolutely no confidence in the police position in relation to this. So we appreciate it is a matter for your Honour but we do not understand any reason why the police should have a say in the breadth of the inquest.

25

Secondly, we also learnt today during the adjournment of a significant of a significant error in counsel assisting submissions. The submissions at para 14

30

MCNAUGHTON: That is the police submissions, not counsels.

AGIUS: I'm sorry, my mistake. I was actually reading the words "counsel assisting," but thinking the words Counsel for the Police Commissioner. In  
35 Counsel for the Police Commissioner's submissions, in title they are submissions of the Commissioner, there is a reference in para 14 to 27,000 pages of information and 13,000 pages of passive data, making 40,000 pages as we add those two figures.

40 Today we learnt a few moments ago that that is in error and that 27,000 pages of material incorporates the 13,000 pages. We are not aware of that error having been corrected before we were told a few moments ago. But it does seem to us that if there is only 27,000 pages of information, then there is no way that would take two persons four months to go through and I have done a  
45 simple mathematical or arithmetical calculation that is 1,500 pages a week over 17 weeks or two lever arch binders per person per week and if somebody can't get through 10 lever arch binders in a week, when all they are doing is redacting names, and addresses, we just cannot see any substance in the claim that the Police Commissioner can only afford to release two officers and  
50 that those two officers would then take 17 weeks or four months to redact this



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material.

5 This material is no doubt all in electronic form. Every laptop or PC that one purchases from Harvey Norman contains software which enables you to find and delete or find and replace, finding somebody's name and replacing it with a code number, cannot be a problem.

10 In terms of the thoroughness of the exercise and we with respect commend my learned friends, Ms McNaughton's submissions about it being important for the police to finally get this right. Getting it right involves a proper selection of the 27,000 pages. If there is an error and somebody's name is not properly redacted, or their address is not properly redacted, that is not an error that would bring down the wall, that is an error that can be readily corrected once it's drawn to attention.

15 There is no doubt that if drawn to attention it would be readily corrected. We are talking about an editing exercise and to delay justice for four months for that to go on in our respectful submission, in the absence of even an index of what's in the 27,000 pages, is in our respectful submission an over estimate and must be regarded as such.

20 We do commend the concept of providing this material in tranches and for our part we will - and I have discussed this with Ms McNaughton, we will provide a suggestion of an order of priority in which the material might be looked at. It is only a suggestion, obviously it won't carry any weight but that is what we will do in order to assist.

25 If the 27,000 pages is co-extensive with the annexures than it is apparent from the annexures that very many of the 175 have either been provided by the family or are sourced to the family, they include references to newspaper articles and things of that nature. On a rough assessment that 27,000 if it includes all of that material is probably truly in the order of something less than half of 27,000 which would require redactions or extensive redactions and so really this four months figure is way too long and we accept that counsel assisting will need two months or eight weeks to go through the material and to weigh it and to determine a view of the scope of the upcoming inquiry and we value an opportunity to have input into that exercise because of our own particular insight into the matters, given that we have lived with this for 26 or 27 years.

30 So we would urge that the timetable be compressed and that that four months be reduced. That the police be encouraged to at least produce an index of the 27,000 pages so that we might assist them in culling irrelevant material and so that that process of four months can be reduced down to what we think would be appropriate, something in the order of 6 to 8 weeks.

35 Other than that, we have no other submissions to make on that topic.

40 HIS HONOUR: Do you wish to be heard Ms Pritchard?

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PRITCHARD: Yes, your Honour. The first matter to record is that the Commissioner has not previously opposed the inquest. The Court has read the Commissioner's filed submissions in relation to that. It's never been a case that an inquest has been opposed.

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HIS HONOUR: Indeed the correspondence had the police applying for the inquest at one stage.

PRITCHARD: Well that's open to debate --

10

AGIUS: That was retracted.

PRITCHARD: -- your Honour, but the most recent submissions filed make clear that it is not a position of opposition to the inquest.

15

The second matter is there is so-called significant error concerning 27,000 as opposed to 13,000 pages. If I might say from the bar table that is an error of counsel for the Commissioner. The instructions were 27,000 including the 13,000 pages of data and unfortunately that slips through to the keeper and that was raised with counsel assisting this morning, that is not - we don't suggest for a moment 40,000 pages.

20

My instructions in relation to that are set out in the written submissions. DCI Young, best estimate four months and that would involve two officers working fulltime and the instructions were that two officers fulltime aren't available in the homicide squad.

25

So we accept for the purpose of directions to be made today that concessions can be made and the concession that can be made is four months fulltime officers working on that but it can't be done in any shorter period of time. They're my instructions in relation to that.

30

HIS HONOUR: Thank you. Ms McNaughton anything you want to raise?

35

MCNAUGHTON: Just one thing. Mr Agius suggested that certain matters could be culled but with respect we can't see how that could happen. Certainly matters could be prioritised but a brief is a brief and it has to be produced so I don't know that it could be culled. Thank you.

40

HIS HONOUR: Mr Agius I am inclined to grant the time sought by the police force to make the redactions. I am also inclined to grant the police force an opportunity to make submissions as to the scope of the inquest. They have special knowledge about the matter that we may not be aware of. Obviously you will be entitled to respond to any submissions they make. So I see no harm in and only benefit in hearing from them.

45

I propose to order that the New South Wales Police Force provide to the Court a brief in this matter by 17 October 2015 with the organisations suggested redactions.

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I also order that counsel assisting will make submissions as to which witnesses should be called to give oral evidence and what further inquiries, if any, should be made. Those submissions should be distributed to the two other parties granted leave to appear by 17 October 2015. Each of those two other parties will have 28 days to reply.

We will then reconvene for a directions hearing.

MCNAUGHTON: Just in relation to those dates, your Honour has in relation to the service of the brief was 17 October.

HIS HONOUR: Sorry, I've written 17 August.

MCNAUGHTON: Yes, and also in terms of our submissions to your Honour, your Honour said 17 October again but with respect it should be the 19th which is a Monday. The 17th is a Saturday.

HIS HONOUR: Ms Baker can spend her weekend on it, that's a very good idea.

DISCUSSION RE SUITABLE DATE FOR DIRECTIONS HEARING

Thank you ladies and gentlemen those orders will be typed up and distributed and we will resume at 9.30am in this Court on Monday 30 November 2015.

AGIUS: Can I raise one consequential matter, your Honour.

HIS HONOUR: Certainly.

AGIUS: As a result of the non-publication orders that have been made and the fact that now there is no objection to the release of the redacted police statements, I ask on behalf of my instructing solicitor, Vivienne Evans, and myself that we be released from the written undertakings we gave concerning the police statements.

HIS HONOUR: Yes, that seems appropriate. Ms Pritchard?

PRITCHARD: Yes.

AGIUS: Yes, there are still written undertakings in relation to the confidential material and we of course would not disclose that in any event but we don't seek any change in that situation.

HIS HONOUR: Thank you, those undertakings are discharged. Anything else ladies and gentlemen. Thank you for your assistance.

ADJOURNED TO MONDAY 30 NOVEMBER 2015 AT 9.30AM FOR DIRECTIONS HEARING.