

TRANSCRIPT OF PROCEEDINGS

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CORONER'S COURT OF THE
AUSTRALIAN CAPITAL TERRITORY

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MRS M. DOOGAN, CORONER

15

CF No 154 of 2003

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CANBERRA

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INQUEST AND INQUIRY INTO
THE DEATH OF DOROTHY MCGRATH,

30

ALLISON MARY TENNER,
PETER BROOKE, AND DOUGLAS JOHN FRASER

35

AND THE FIRES OF JANUARY 2003

40

DAY 87

Wednesday, 17 August 2004

45

[10.00 am]

THE CORONER: Just for the record, this is the
resumption of the inquest into the deaths of
5 Dorothy McGrath, Allison Tenner, Douglas Fraser
and Peter Brooke and the inquiry into the January
2003 fires.

MR LASRY: Good morning, Your Worship. I'm sorry,
10 Your Honour, my apologies. I think there's
nowhere in the Commonwealth now where you can say
"Your Worship".

Your Honour, the purpose of this mention obviously
15 is to discuss the resumption of the evidence,
bearing in mind that at the time that the initial
application in the ACT Supreme Court proceedings
arose Mr Roache was in the course of giving
evidence and indeed, as I recall, being
20 cross-examined by Mr Phillip Walker.

Mr Woodward has I think polled the parties by
e-mail and it hasn't been possible to come to a
date that suits everybody, but the date that suits
25 most people, subject to adjustment and further
discussion this morning, would be 17 October.

One of the matters to be considered, of course, is
the position of the witness himself and Mr Roache
30 has difficulties, although he can comply I think
with 17 October, but he has accepted an
appointment which I think comes from both the
Commonwealth and Queensland governments into a
quite separate matter in Queensland and he is
35 therefore both preparing for that and of course
needs to in a sense prepare again to continue his
evidence in this case. But I think in the end he
accepted that 17 October would be a date that he
could comply with.

40 THE CORONER: That's his earliest availability?

MR LASRY: That is in effect his - it's not quite
his earliest availability but I think given the
45 position of the other parties, and they will of
course tell Your Honour about that shortly, that's
the date that it seemed to us was appropriate.

There are difficulties. My learned friend Mr Pike has raised a difficulty and he has raised it with us just before Your Honour came onto the bench this morning and he will no doubt raise the matter with you in a moment, but that's the date that we would suggest that the evidence start. We think there's probably two or three weeks of evidence to go.

10 We have been asked by those representing in effect New South Wales, Mr Brett Walker and Mr Erskine, to accommodate them and I think the way in which we will probably do that is to invite Your Honour to permit them to cross-examine Mr Roache as soon as Mr Phillip Walker has finished, because I gather he is close to being completed and if they can participate in that process virtually straight away, as I understand it their purpose will be served and, apart from Mr Roache himself, there probably aren't more than another two or three witnesses. I think that's still to some extent up in the air, but it seems to us that the certainties are Mr Roache's evidence to be completed, the foreshadowed expert Mr Nicholson to give his evidence and I think it's clear that Mr Castle will also be recalled. It's not yet clear whether Mr Phillip Walker will take up the opportunity to recall his client, Mr Lucas-Smith. If he does that, there will be obviously another witness, but that would seem to be the extent of the evidence that then remains.

So, our proposal is that Your Honour will resume the evidence on 17 October and indeed that we perhaps meet by way of mention on the previous Thursday, which will be Thursday 13 October, at 10 am to just ensure that the matter is ready to proceed.

40 We should make this clear, Your Honour: We are anxious to make sure that on the 17th when the court resumes that the evidence starts immediately. We want to complete the evidence as quickly as we can, bearing in mind the time that has now been invested in this case and therefore it's obviously important that it be done expeditiously. We are anxious to make sure that

happens. There may be other issues, but that's our proposal as to this stage.

5 THE CORONER: Thank you, Mr Lasry. I will just ask counsel to indicate the dates that they are available, but it's certainly my intention as soon as the evidence does recommence that we just sit until the evidence is completed and I would be surprised if people did not agree with that. That 10 certainly has to be the intention now. So, if we just perhaps go around the table. Mr Archer, is the 17th suitable for you?

15 MR ARCHER: Certainly that's suitable. Yes, certainly.

THE CORONER: Thank you. Mr Pike?

20 MR PIKE: It's not suitable for me, Your Honour. Can I just indicate perhaps some of the background to the reason as well.

25 THE CORONER: You still have to cross-examine, don't you, Mr Pike?

MR PIKE: I still have to cross-examine Mr Roache. When I received Mr Woodward's e-mail the other day, I responded to him saying that I am available the two weeks commencing 26 September, but for the 30 two weeks following that I have got a commitment in a matter which I have been retained in almost for two years now, since well before I was retained in this matter, which has been especially fixed for my convenience in October. It's a 35 serious matter; I have conferred at length, I have advised at length. It involves an industrial accident resulting in death.

40 THE CORONER: And what about it makes you not available in October?

45 MR PIKE: That is the 10th to 21st of October, which takes in that second week. I would have some flexibility in the first week of that potentially, but certainly not the second week because - - -

THE CORONER: Can you see this matter continuing through to the 21st?

MR PIKE: Yes, it's a very serious industrial
5 matter. There's been WorkCover inspectors
investigating at length. Their evidence will take
quite some time, leaving aside the issues relating
to the other aspects of it. There's no way I will
10 be free at all that week and, as I say, that's a
matter which I have been retained in for a long
time. It would be a very significant disadvantage
to my clients and to the coroner of that case who
has changed the date for me on that occasion to
15 specially fix it to suit my convenience in
October.

As Your Honour pointed out, I have yet to
cross-examine Mr Roache and I would need to do
that, so I just can't accommodate that date. It
20 wasn't a situation where we could in any way
predict when this matter would come back.

THE CORONER: It was always going to be difficult
for someone.
25

SPEAKER: Of course, and life had to go on in the
meantime and we can't hold our practices in
abeyance. That was one of the things that I had
to do and I'm in that position, Your Honour.
30

One thing that was (indistinct) by Mr Lasry as a
possibility was that Mr Roache's evidence be taken
as much as it can be in that week and then he be
recalled to be cross-examined by me later in the
35 proceedings. That's of course an available
option. If that were to be the path that would be
followed, my request would be that in that week of
the 17th, if that was chosen as the week for the
continuation or the commencement of the
40 continuation, only Mr Roache's evidence be taken,
then the matter be adjourned until the
commencement of the following week for the
remainder of the evidence and thereafter, at a
time obviously to suit Mr Roache, he be recalled
45 so that I could cross-examine him and then
thereafter obviously Mr Lasry would re-examine.
That's the best I can come up with, leaving aside

the prospect of simply not sitting that week of the 17th at all.

5 THE CORONER: I will take that into account,
Mr Pike. But you would be available if, looking
at the worst case scenario, that Mr Roache needs
to be recalled, say if we do start on the 17th and
he finishes his evidence by the 21st, then you
would be available, say, on Monday the 24th to
10 cross-examine?

MR PIKE: Or course. Yes. I don't as yet know
what by way of examination I will need to conduct
of the other witnesses. That really will depend
15 largely on the nature of the evidence they give.

THE CORONER: The only other witness at this stage
is Mr Nicholson, as far as I'm aware.

20 MR PIKE: The suggestion I think my friend
indicated a moment ago, Mr Castle, that hasn't
been fully determined but that certainly is in the
air or in the offing, so those two witnesses and
I can't make any assessment about that.

25 THE CORONER: Mr Castle will be recalled and I
will just find out from Mr Whybrow whether or not
that will happen.

30 MR PIKE: Quite so.

THE CORONER: Yes. Mr McCarthy, thank you.

35 MR McCARTHY: The resumption on 17 October is
convenient.

THE CORONER: Are you able to indicate which
counsel will be appearing?

40 MR McCARTHY: Mr Tracey is briefed on behalf of
the territory and I anticipate him being here on
that day.

45 THE CORONER: Thank you. Yes, Mr Stitt.

MR STITT: Good morning, Your Honour. I wasn't
polled, but 17 October is a date that - - -

THE CORONER: Do you feel left out?

MR STITT: No, I don't. 17 October is a date
that's convenient. Your Honour, the only matter
5 from our point of view which with respect should
be decided today is the question of what other
witnesses are to be called or recalled. If that
is to happen, then it would be our submission that
Your Honour should give a direction that the
10 topics or subject matters over which those
witnesses are to be recalled should be identified
now or certainly within a very short period of
time because, as Your Honour knows, the leave
which was granted to my client was of limited
15 leave.

I need to know whether there's to be additional
evidence led or recalled which may directly or
indirectly touch my client's interests. If it
20 doesn't, then plainly I won't be here, but it's
not satisfactory for me or for my client or I
suspect for the inquiry itself simply to not know
the scope of the evidence which is sought to be
recalled or any additional witnesses and with the
25 past history of this matter one would need the
benefit of chickens' entrails to predict what was
likely to happen unless we are told at the outset
and it's my submission that Your Honour should
make some order this morning requiring each of the
30 parties to indicate, one, whether they are going
to call further evidence and, two, if so, what
topics it's directed to and if any witness is to
be recalled, the same should apply.

35 THE CORONER: Yes. That's a very sensible
suggestion. Thank you, Mr Stitt. On that basis,
I might go back to you, Mr Archer. There's
nothing that you have indicated, Mr Archer, no
other witnesses that you want to recall?

40 MR ARCHER: No.

THE CORONER: Or other witnesses to be called. In
light of that, you haven't indicated anything as
45 well, Mr Pike. Mr McCarthy?

MR MCCARTHY: We are in the same position.

THE CORONER: The same, so so far that's the position, Mr Stitt.

MR LASRY: Perhaps I should just, in relation to that, first of all say that we agree with Mr Stitt's submission and it may go without saying, but I should say it, perhaps. We don't intend to call any more evidence so there's nothing else coming from us that Mr Stitt needs to be interested in. Mr Roache for all intents and purposes is our last witness, save for the recall of Mr Castle, at Mr Castle's instigation, if that's happens.

THE CORONER: Mr (indistinct), do you have anything in reply?

MR WHYBROW: Yes, Your Worship. Mr Walker sends his apologies. He might be along in a couple of moments. Your Honour, 17 October is suitable for both myself and Mr Walker. I can indicate that at the outset. I'm not in a position today to indicate with certainty whether or not my client wishes to give evidence or be recalled. On about 12 August Mr Bayliss sent a letter to counsel assisting seeking some clarification of matters in relation to jurisdiction and both Mr Walker and myself adopt the terms of that letter in relation to what matters does counsel assisting see in light of the various pronouncements in the Supreme Court judgment as falling within the jurisdiction of the inquiry, because depending on what counsel assisting indicates they intend to make submissions on will determine to a large extent whether or not Mr Castle will be recalled, for example questions of community awareness campaigns and things of that nature.

If counsel assisting takes the view, for example, that that matter is not one that they would seek to pursue any further, then Mr Castle will not need to be recalled to answer questions that have arisen, so I appreciate Mr Stitt's request for certainty today and once those issues are resolved I can sit down with my client and we can ultimately provide an indication of the issues to which he does intend to give evidence and we can

provide a list of the topics that will be covered or intended to be covered. My feeling I can indicate today to Mr Stitt is that none of them would be ones that affect his client.

5

THE CORONER: I don't propose to discuss the issue of jurisdiction.

10

MR WHYBROW: No, that's why I was going to raise it.

THE CORONER: Prior to the end of the evidence and my priority today is to set a date for the conclusion of the evidence.

15

MR WHYBROW: Yes. Those dates are suitable.

20

THE CORONER: I suppose what I'm saying to you, Mr Whybrow, is that you have to make a decision based on your knowledge of the brief and your knowledge of the evidence to date and your appreciation of what issues have already been raised and I suppose further to discussion with Mr Castle as to whether or not you wish to recall him on any of the issues that have been raised to date. As I say, I don't propose to canvass the issue of jurisdiction prior to the conclusion of the evidence. So if you are waiting for that to happen before you make the decision - - -

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MR WHYBROW: No, I wasn't canvassing it with Your Honour.

35

THE CORONER: I'm sorry, I must have misunderstood you.

40

MR WHYBROW: I just noted that a letter canvassing these issues with counsel assisting had been provided. The terms of that letter aren't adopted by myself and Mr Walker. I understand that counsel assisting has indicated to the ACT government essentially what you have just indicated, Your Honour, and if that be the case, then at least that makes that clear.

45

THE CORONER: Yes.

MR WHYBROW: This is not something that I can indicate today.

5 THE CORONER: No, I understand. Hopefully you will be able to in the next short time, perhaps before we have the next directions hearing?

SPEAKER: Before the next directions hearing, yes.

10 THE CORONER: That's fine. And it would only have been Mr Castle. That's the only witness to be recalled. Are there any other witnesses who you wish to call?

15 MR WHYBROW: At this stage, Your Honour, I'm not aware of any, no.

THE CORONER: And what about - - -

20 MR WHYBROW: Mr Nicholson, we are still waiting on his availability, but given that we are talking about six weeks down the track I would be confident that he can fit in with the timetable so there's no hiatus.

25 THE CORONER: Perhaps in that second week after we start on the 17th.

MR WHYBROW: Yes.

30 THE CORONER: And are you able to indicate how long you will be with Mr Roache? I'm only asking this perhaps for Mr Pike's benefit to see how long Mr Roach's evidence will take.

35 MR WHYBROW: I would have thought half a day.

THE CORONER: And I think Mr Walker on the last occasion - - -

40 SPEAKER: He said half an hour, I think.

THE CORONER: He said half an hour on the last occasion, so about half a day. Thank you, Mr
45 Whybrow.

MR LASRY: Your Honour, can I just deal with

Mr Whybrow's matters as we go. With respect, we agree with the observation that Your Honour just made and we would simply add that of course to date the issues in the issues list as it stands have all been the subject of evidence, I think, during the course of the inquest, so it's appropriate at this stage to continue on that basis and to have the discussion or debate about jurisdiction in the course of submissions.

10

The other matter to be raised, if I may through you remind my learned friend of a letter written on 5 October of last year addressed to his instructing solicitors requesting particular documents in relation to Mr Nicholson. We would still like to have those documents. There's a list of them which include letters and draft reports and all the things that are relevant to an expert giving evidence and we would be pleased to be informed when we might have access to those documents.

20

MR WHYBROW: They were provided to the court and left here for some days or weeks last year. They have been removed. I understand they might be in Mr Walker's chambers. Access can be facilitated.

25

THE CORONER: Thank you, Mr Whybrow. Yes, Mr McCarthy.

30

MR MCCARTHY: Your Worship, perhaps I should clarify. You might recall the Territory was, as it were, last to cross-examine Mr Roache. That still remains the case. I just noticed you have been canvassing the time that parties might require. The Territory still wishes to cross-examine Mr Roache. I imagine perhaps an hour to two hours would be sufficient.

35

THE CORONER: Yes. Thank you for that, Mr McCarthy. Mr Watts.

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MR WATTS: Thank you, Your Honour. 17 October suits me and I have been asked to mention Mr Craddock's appearance and that day suits him. For our part we don't wish any witnesses to be recalled.

45

THE CORONER: Or to call any other witnesses?

MR WATTS: No, nobody else.

5 THE CORONER: Mr Erskine?

MR ERSKINE: "Ditto" is about the easiest way to
sum it all up, Your Honour. The dates are
suitable and we are not going to recall or seek to
10 recall witnesses.

THE CORONER: Are you able to estimate how long
you will be with Mr Roache?

15 MR ERSKINE: I won't be very long, a couple of
hours.

THE CORONER: Thank you.

20 MR WATTS: Your Honour, there's just one other
matter. I have indicated to counsel assisting
that I will be seeking Your Honour's leave on the
next occasion to - I had finished cross-examining
Mr Roache and there are some matters which have
25 arisen of which I have become aware and I would be
seeking Your Honour's leave on this occasion to
ask some more questions. It won't be long, it
would be an hour at the most if Your Honour grants
me leave on that occasion.

30 MR LASRY: Your Honour, the only submission I
haven't responded to was that of Mr Pike in
relation to the timing. In view of what he has
told you, it does appear that it will be necessary
35 to facilitate that and to bring Mr Roache back in
the following week and we can perhaps liaise with
him, but it does appear that there's no option but
to do that in order that he can cross-examine him,
so we would accept that that appears to be
40 necessary in the circumstances.

THE CORONER: As I said, it was always going to be
difficult to try to work out a time, Mr Pike, for
everybody and I'm rather pleased that we have been
45 able to get as far as we have. I mean one of the
main considerations was always the availability of
Mr Roache and if he is not available on the 17th,

then it really is essential in my view that we start as soon as we can and that seems to be the 17th. But, having said that, I will make efforts to accommodate your cross-examination of Mr Roache and I appreciate you are not going to be available that week between the 10th and the 21st but you never know what might happen, Mr Pike. It just might be - - -

10 MR PIKE: The difficulty is the matter I have got for that week is not a matter that can settle. It's an inquiry and there is a prospect that it blows out, but leaving that aside there is the other issue that I did raise in my submission as
15 to, if we are going to commence on the 17th and that certainly seems to be the writing on the wall at the moment, whether we can just take the evidence of Mr Roache and leave the rest of the evidence until the following week. Given the fact
20 that I'm just not aware of precisely where the evidence is going to be, it will create problems.

THE CORONER: Whose evidence?

25 MR PIKE: Mr Nicholson and Mr Castle, if he is recalled.

THE CORONER: Yes. I think that's something that we might have to give some thought to closer to
30 the time. It will probably depend on how long it takes to cross-examine Mr Roache. If it means wasting three days of that week, I'd be most reluctant to do that. If it means perhaps stopping half way through the last day or
35 something like that, then I think it's just a matter of waiting and seeing how long Mr Roache's evidence will take.

MR PIKE: That's probably likely. The other thing
40 of course is that Mr Nicholson, being an outer territorian, as it were, he would have to be brought back from where he comes from as well, if that were to happen, but we can consider those things later on.

45 THE CORONER: It would certainly be my preference and my intention that once we start the evidence

we sit until we complete all the evidence rather than breaking because I suspect there might be other people who might become unavailable if we did delay it beyond that timeframe, so that
5 certainly be my preference, that once we start taking the evidence on the 17th we sit until the evidence is completed and accommodate counsel as best we can.

10 MR PIKE: Yes. Thank you.

THE CORONER: Mr Stitt, as soon as we know whether or not Mr Whybrow intends to recall Mr Castle, we will pass that information on, but apart from Mr
15 Nicholson, Mr Castle appears to be the only other witness who will be recalled at this stage.

MR STITT: As Your Honour pleases.

20 MR ERSKINE: Might I raise one matter? In the light of Your Honour's remarks just then, which is that the evidence is likely to complete in a reasonably strict period from in October, may I
25 inquire through counsel assisting whether any consideration has yet been given as to where we then go to, into a submissions timetable of some kind or other into which will have to be slotted the jurisdiction argument of some kind or other,
30 as to the precise scope of issues that are relevant to the inquiry. And if we are going to be having evidence through October, that takes us into November and December and then (indistinct) January, so I simply flag it at this stage to ask whether consideration has yet to be given to a
35 submissions timetable beyond the end of the evidence.

THE CORONER: I think it probably has.

40 MR LASRY: It has, your Honour. In fact, I was asked I have to say extraordinarily optimistically whether it was likely that within four weeks of the end of the evidence our submissions would be in the hands of the various parties and they
45 clearly won't be. It seems to us that we would be unlikely to have our submissions completed before the end of January and beginning of February of

next year without being committed to a timetable and obviously the parties would need time beyond that to respond.

5 Where the discrete argument about jurisdiction fits in in the timetable, we are not yet sure. We had always envisaged that when all the submission were completed that Your Honour would sit for however long it took in order that each of the
10 parties could address argument, in effect speaking to their written submissions, before you finally adjourned the inquest for the purpose of preparing a report and that's still broadly the timetable, but it's just too early to tell at this stage how
15 that timetable will actually be defined. But that's broadly the approach we are taking.

THE CORONER: Thank you, Mr Lasry. That gives some indication, Mr Erskine.

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MR ERSKINE: Yes. Thank you, Your Honour.

THE CORONER: Yes. Are there any other matters? If it is convenient we will adjourn now to a
25 directions hearing on Thursday 30 October at 10 o'clock and that's to deal with any issues that might arise so that hopefully we can dispose of those issues before Monday 17th so when we start on the 17th we will start with the evidence and
30 continue the evidence of Mr Roache.

MR LASRY: If Your Honour pleases.

MATTER ADJOURNED

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