# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Jones v State Coroner & Anor* [2019] QSC 175 |
| PARTIES: | **MARK JONES**<br>(applicant)<br>**v**<br>**STATE CORONER**<br>(first respondent)<br>and<br>**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**<br>(second respondent) |
| FILE NO: | SC No 3589 of 2018 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating Application |
| DELIVERED ON: | 24 July 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7 June 2019; supplementary submissions from the second respondent received 11 June 2019 |
| JUDGE: | Wilson J |
| ORDERS: | **The order of the Court is:**<br>**1. The application for judicial review is dismissed.** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – EXTENSION OF TIME – where there is a delay of some six to seven years between the applicant becoming aware of the decisions and the applicant seeking judicial review of the decisions – whether the application for judicial review was made within a reasonable time pursuant to section 26(3) of the *Judicial Review Act* 1991 (Qld)<br><br>ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVEWABLE DECISIONS AND CONDUCT – REVIEW OF PARTICULAR DECISIONS – APPLICATION FOR JUDICIAL REVIEW – where an inquiry into a missing person was held under the *Coroners Act* 1958 (Qld) – where the second respondent directed the first respondent to reopen the inquest – where the inquest was reopened under the *Coroners Act* 1958 (Qld) – where the applicant seeks judicial review of the decision of the second respondent to direct the reopening of the inquest under the *Coroners Act* 1958 (Qld) – where the applicant seeks judicial review of the decision of the first respondent to reopen the inquest under the *Coroners* |

*Act* 1958 (Qld) – whether the inquest should have been reopened under the *Coroners Act* 1958 (Qld) or the *Coroners Act* 2003 (Qld)

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – where the applicant contends that the inquest should have been reopened under the *Coroners Act* 2003 (Qld) – where the issue turns on the meaning of "pre-commencement death" in section 100(4) of the *Coroners Act* 2003 (Qld) – whether there was a "pre-commencement death" within the meaning of section 100(4) of the *Coroners Act* 2003 (Qld), and if so, whether the *Coroners Act* 1958 (Qld) applies to the reopened inquest

*Coroners Act* 1958 (Qld) s 5, s 7, s 7B, s 8, s 9, s 10, s 40, s 43, s 47
*Coroners Act* 2003 (Qld) s 36, s 37, s 45, s 46, s 50, s 50A, s 100
*Judicial Review Act* 1991 (Qld) s 4, s 20, s 26, s 46, s 49(1)

*Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1; [2012] HCA 3, cited
*Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2007] QSC 286, cited
*Brown v West* (1990) 169 CLR 195, cited
*Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56, cited
*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, cited
*Copper Mines of Tasmania Pty Ltd v Cooper* [2018] TASSC 25, cited
*Director of Public Prosecutions (ACT) v Martin* [2014] ACTSC 154, cited
*Doomadgee v Clements* [2006] 2 Qd R 352; [2005] QSC 357, cited
*Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318; [2003] HCA 28, cited
*Fountain v Alexander* (1982) 150 CLR 615, cited
*Gerrits v Department of Corrective Services* [2003] QSC 281, cited
*Hoffmann v Queensland Local Government Superannuation Board* [1994] 1 Qd R 369, cited
*Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344; [1984] FCA 186, applied
*Hurley v Clements* [2010] 1 Qd R 215; [2009] QCA 167, applied
*Hytch v O'Connell* [2018] QSC 75, applied
*Ivins v James Cook University* [2001] QCA 464, cited

*Johns v Australian Securities Commission* (1993) 178 CLR 408, cited
*Johnson v Holmes* (1997) 49 ALD 430, applied
*Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56, cited
*Kuku Djungan Aboriginal Corporation v Christensen* [1993] 2 Qd R 663, cited
*Lee v Minister for Immigration and Citizenship* (2007) 159 FCR 181; [2007] FCAFC 62, cited
*Lindsay v Director of Professional Services Review* [2011] FCA 262, cited
*Lockwood v Commonwealth* (1954) 90 CLR 177, cited
*Lucic v Nolan* (1982) 45 ALR 411, cited
*Mustafa v Chief Executive Officer, Centrelink* [2000] FCA 1897, cited
*Newby v Moodie* (1988) 83 ALR 523, cited
*Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, cited
*O'Sullivan v Farrer* (1989) 168 CLR 210, cited
*PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301, cited
*Remondis Australia Pty Ltd v Ipswich City Council* [2015] 1 Qd R 329; [2014] QSC 27, cited
*Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, applied
*Wright v The State Coroner* [2016] QSC 305, related

COUNSEL: G McGuire, with S Cartledge, for the applicant
No appearance for the first respondent
M Eade for the second respondent

SOLICITORS: Cridland & Hua Lawyers for the applicant
No appearance for the first respondent
Crown Law for the second respondent

[1] Mr Anthony Jones disappeared on about 3 November 1982. His body has never been found. Following an inquiry into a missing person commenced under section 10 of the *Coroners Act* 1958 ("the 1958 Act") between 1998 and 2002, Coroner Fisher found that Mr Anthony Jones is deceased, having died on or around the date of his disappearance ("the initial inquest").

[2] On 17 September 2010 the Attorney-General for the State of Queensland ("the Attorney-General", or "the second respondent") directed the then State Coroner (or "the first respondent") to reopen the initial inquest, which occurred on a date between 17 September 2010 and 2013 ("the reopened inquest"). The inquest was reopened under the 1958 Act.

[3] By way of amended application for a statutory order of review ("this application"), the applicant seeks to review the following decisions pursuant to section 20 of the *Judicial Review Act* 1991 (Qld) ("the *JRA*"):[1]

1. the decision of the second respondent on or about 17 September 2010 to direct the reopening of the coronial inquest into the disappearance of Anthony John Jones pursuant to section 47(1) of 1958 Act ("the first decision"); and

2. the decision of the first respondent, on a date unknown between 17 September 2010 and 2013, to reopen the coronial inquest into the disappearance of Anthony John Jones under section 47(3) of the 1958 Act ("the second decision").

[4] The applicant seeks:

1. declarations that both the first decision and the second decision (collectively, "the decisions") were unlawful;

2. orders quashing the decisions and setting them aside from the day they were made; and

3. an order referring the matter to the State Coroner with directions that he consider holding a new inquest under section 50A of the *Coroners Act* 2003 (Qld) ("the 2003 Act") on the basis that the reopened inquest is nullified, and it is in the public interest.

[5] This application relates to whether the reopening of the initial inquest proceeded under the appropriate legislation, and involves the interpretation of section 100(4) of the 2003 Act, i.e. whether the initial inquest was in relation to a "pre-commencement death", or not.

[6] However, this application was made seven and a half years[2] after the decisions were made. The Court may refuse to consider an application for a statutory order of review in relation to the decisions if it is of the opinion that the application was not made within a reasonable after the decision was made.[3]

[7] The second respondent submits that this application should be dismissed:

1. the delay in the institution of the application enlivens this Court's jurisdiction to refuse to consider the application pursuant to section 26(3) of the *JRA* and it is appropriate the discretion be so exercised;

2. the second respondent's and first respondent's reliance on section 100 of the 2003 Act was correct and the decisions were lawfully made; and

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1 The applicant originally sought to challenge a decision of the first respondent not to disclose evidence admitted in the reopened inquest. This challenge was removed by the order of Jackson J on 25 July 2018. The applicant also sought to review the asserted "decision" of the first respondent on or about 26 June 2008, where he said in correspondence that he had "no jurisdiction in relation to the matter", and that the only way the coronial investigation into Mr Anthony Jones' death could be reopened would be if the Attorney-General were to so order. The applicant withdrew this ground at the hearing, see Transcript of the hearing on 7 June 2019, p 17, line 30.

2 This application was filed on 3 April 2018.

3 *Judicial Review Act* 1991 (Qld) s 26(3)(c).

3. in any event, even if the applicant's contentions are correct, the circumstances of this matter are such that it is appropriate this Court exercise its discretion to refuse relief.

**Background**

[8] Mr Anthony John Jones disappeared on about 3 November 1982. His body has never been found.

[9] Mr Anthony Jones was reported missing to the Queensland Police Service on 14 November 1982.

[10] In 1997 Detective Senior Sergeant Peter Wright reported to the coroner that Mr Anthony Jones was a person missing for over twelve months.

[11] An inquiry into the cause and circumstances of the disappearance of Mr Anthony Jones as a person missing for over twelve months was held under section 10(1) of the 1958 Act.

[12] The initial inquest commenced before Coroner Evans on 21 August 1988 (day one) and continued on 19 October 2001 (day two) and 19 February 2002 (day three). Coroner Fisher delivered his findings and recommendations on 20 February 2002.

[13] Coroner Fisher found that Mr Anthony Jones is deceased, and that he died on or around 3 November 1982 at the hands of a person or persons unknown.

[14] On 14 June 2009, Mr Brian Jones, the applicant's brother, wrote to the Honourable Cameron Dick MP, the then Attorney-General and Minister for Industrial Relations, and requested the Attorney-General reopen the inquest into the death of Mr Anthony Jones.

[15] On 17 September 2010 the Attorney-General directed the then State Coroner, Mr Michael Barnes, to reopen the initial inquest pursuant to section 47(1) of the 1958 Act. That direction was in the following terms:

> "Following further consideration of the issues and various submissions received with respect to the matter, I have decided to exercise my power under section 47 of the *Coroners Act 1958* to cause the inquest to be reopened.
>
> I therefore pursuant to section 47(1) of the *Coroners Act 1958* that the inquest into the death of Mr Anthony John Jones be reopened before the coroner who held the inquest or some other inquest."

[16] The Attorney General's direction to reopen the inquest into Mr Jones' death is the first decision being reviewed under this application.

[17] The initial inquest was reopened by the then State Coroner (the first respondent in this application) on a date between 17 September 2010 and 2013 (defined above as "the reopened inquest"). The reopened inquest was the reopening of the inquiry into the cause

and circumstances of the disappearance of Mr Anthony Jones as a person missing for over twelve months under section 10 of the 1958 Act.[4]

[18] A pre-inquest hearing for the reopened inquest was held on 14 April 2016. Counsel Assisting submitted that the State Coroner had been directed to reopen the initial inquest under section 47 of the 1958 Act, and that the reopened inquest was thus required to be held pursuant to section 10 of the 1958 Act as an inquiry the cause and circumstances of the disappearance of Mr Anthony Jones; a person missing for over twelve months.

[19] The reopened inquest commenced on 29 August 2016. The family of Mr Anthony Jones was represented in the reopened inquest by Counsel on the instructions of Legal Aid Queensland. The applicant and Mr Brian Jones were in attendance and participated in the reopened inquest, including by questioning witnesses. The applicant attended every day of the reopened inquest.[5]

[20] The reopened inquest was adjourned on 9 September 2016 (its tenth hearing day) to enable Supreme Court proceedings brought by Mr Kevin Wright to be heard and determined. Mr Wright sought a declaration that an inquiry into a missing person under section 10 of the 1958 Act does no abrogate the common law privilege against self-incrimination. On 16 December 2016, Henry J in *Wright v State Coroner* [2016] QSC 305 ("*Wright*") held that section 34 of the 1958 Act does abrogate the common law privilege against self-incrimination, but only with respect to matters or things relevant to an inquiry under section 10 (which his Honour styled "section 10 topics").

[21] The reopened inquest resumed on 24 July 2017 before the present State Coroner and ran for a further six days.

[22] The hearing of the reopened inquest finished on 31 July 2017 and was adjourned to a date to be fixed for the delivery of findings.

[23] On 29 March 2018 the State Coroner adjourned the reopened inquest pending the result of these proceedings.

[24] This application were instituted on 3 April 2018.

**Application of *JRA***

[25] Section 4 of *JRA* sets out that if there is a "decision" of an "administrative character" made "under an enactment" then statutory review is, potentially, available.

[26] The second respondent does not dispute that:

1. the first and second decisions are "decisions to which the [*JRA*] applies" within the meaning of section 4 of the *JRA*; and

2. the applicant is a person aggrieved within the meaning of section 20(1) of the *JRA*.

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4 Amended Statement of Agreed Facts and Issues received 14 June 2019, p 2, [11].

5 Transcript of the hearing on 7 June 2019, p 83, line 41.

[27] The second respondent does however submit that this application for statutory order of review was not made within a reasonable time and pursuant to section 26(3) of the *JRA* I should refuse to consider the application.

**Agreed outline of legal issues**

[28] The parties have agreed to a list of issues that need to be determined on this application:[6]

1. Whether the application was made within a reasonable time after each of the decisions complained of and, if it was not, whether this Court should exercise its discretion to refuse to consider the application pursuant to section 26(3) of the *JRA*.

2. Whether the facts, matters and circumstances with respect to Mr Anthony Jones as at the date of each of the decisions constituted a "pre-commencement death" within the meaning of section 100(1) of the 2003 Act, specifically:

    a. was there a death that was reported to a police officer or coroner before the commencement of a section 100 on 1 December 2003; further and alternatively

    b. was there a death in relation to which an inquest was held and, if yes:

        i. was the inquest held before the commencement of section 100 on 1 December 2013; and

        ii. was the inquest validly reopened after that date.

3. For the purposes of 2(b)(ii):

    a. does a valid reopening of the inquest:

        i. require it to be reopened under section 47 of the 1958 Act; or

        ii. require it to be reopened under section 50 or section 50A of the 2003 Act;

    b. if yes to (ii), whether the [Second] Decision to reopen the inquest under section 47 of the 1958 Act could have been supported by section 50A of the 2003 Act and, if so, was it the legislative intention of the 2003 Act that the [Second] Decision should be invalid.

4. If the facts, matters and circumstances with respect to Mr Anthony Jones as at the date of each of the decisions did not constitute a "pre-commencement death" within the meaning of section 100(1) of the 2003 Act, what relief should be ordered.

**Whether this application was made within a reasonable time?**

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6 Amended Statement of Agreed Facts and Issues received 14 June 2019, p 4-5.

[29] Section 26 of the *JRA* prescribes the period of time within which an application for a statutory order of review must be made:

> "**26 Period within which application must be made**
>
> (1) An application to the court for a statutory order of review in relation to a decision that has been made and the terms of which were recorded in writing and set out in a document that was given to the applicant (including a decision that a person purported to make after the end of the period within which it was required to be made) must be made within—
>
> (a) the period required by subsection (2); or
>
> (b) such further time as the court (whether before or after the end of that required period) allows.
>
> (2) The period within which an application for a statutory order of review is required to be made is the period beginning on the day on which the decision is made and ending 28 days after the relevant day.
>
> (3) If—
>
> (a) here is not a period prescribed for the making of an application for a statutory order of review in relation to a particular decision; or
>
> (b) there is not a period prescribed for the making of an application by a particular person for a statutory order of review in relation to a particular decision;
>
> the court may take the following action if it is of the opinion that the application was not made within a reasonable time after the decision was made—
>
> (c) if paragraph (a) applies—refuse to consider an application for a statutory order of review in relation to the decision;
>
> (d) if paragraph (b) applies—refuse to consider an application by the person for a statutory order of review in relation to the decision.
>
> (4) In forming an opinion for the purposes of subsection (3), the Court—
>
> (a) must have regard to—
>
> (i) the time when the applicant became aware of the decision; and
>
> (ii) if subsection (3)(b) applies—the period prescribed for the making by another person of an application for a statutory order of review in relation to the decision; and
>
> (b) may have regard to such other matters as it considers relevant.

...".

[30] There is no evidence that the decisions were set out in a document that was given to the applicant. The applicant was not the person who corresponded with the Attorney-General. That was his brother, Mr Brian Jones.

[31] Further, there is no document recording the second decision.

[32] The State Coroner did write to Mr Brian Jones on 20 September 2010 stating "as you are aware the Attorney General has directed that the inquest be re-opened".[7] This letter provides some general information about how the coroner will proceed. It does not refer to what legislation the coroner was proceeding under.

[33] Therefore, it is accepted by both parties that section 26(1) of the *JRA* does not apply to the decisions under review and section 26(3) of the *JRA* is the relevant provision.

[34] Accordingly, the Court, pursuant to section 26(3) of the *JRA*, may refuse to consider this application if it is of the opinion that the application was not made within a reasonable time after the decision was made.

*Was this application made within a reasonable time?*

[35] The term "reasonable time" is not defined in the *JRA*.

[36] Section 26(4) of the *JRA* sets out matters which the Court *must* and *may* have regard to when forming an opinion as to whether this application was made within a reasonable time after the decision was made.

[37] As to the mandatory matters, section 26(4) of the *JRA* sets out two matters which the court *must* consider in determining this issue:

1. the time when the applicant became aware of the decision;[8] and

2. the period prescribed for the applicant's brother, Mr Brain Jones, to make an application for a statutory order of review in relation to the first decision.[9]

[38] Section 26(4)(b) of the *JRA* then states the court *may* have regard to such other matters as it considers relevant. The *JRA* does not contain any criteria as to what is, or may be, relevant in relation to such matters as the Court considers relevant. There are no Queensland decisions in which any relevant principles have been addressed.[10]

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7 Affidavit of Anne-Maree Russo filed 1 June 2018, exhibit AMR-5, p 36.

8 *Judicial Review Act* 1991 (Qld) s 26(4)(a)(i).

9 *Judicial Review Act* 1991 (Qld) s 26(4)(a)(ii).

10 In *Remondis Australia Pty Ltd v Ipswich City Council* [2015] 1 Qd R 329; [2014] QSC 27, Peter Lyons J identified the time the applicant became aware of the decision and then determined that the application was made within a reasonable time without express consideration of any other factors (at 335 [43]-[44]).

[39] However, a body of case law has developed a series of non-exhaustive principles that may be relevant to an application to extend time beyond 28 days under section 26(1)(b) of the *JRA*. Those principles have been applied by this Court.[11]

[40] Those principles, in relation to extension of time, were distilled by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen*[12] and often cited since[13] and include the existence of a satisfactory explanation, notions of what was fair and equitable in the circumstances, whether any prejudice would be occasioned to the respondent, the public interest and (where such a view was possible) the merits of the substantial application for review.[14]

[41] In *Johnson v Holmes*,[15] O'Loughlin J, when considering an analogous federal provision to section 26(4) of the *JRA*, held that the extension of time principles have "equal force and effect when considering whether or not an application has been made within 'a reasonable time' after the making of the relevant decision where no time constraints are imposed".[16]

[42] To those factors should be included:

1. the extent of the delay;[17]

2. the effect on the applicant if this Court refused to consider this application;[18] and

3. the seriousness of the consequences of any error to the applicant.[19]

[43] Those principles are non-exhaustive, and their application and weight depends upon all of the relevant factual circumstances at play.[20]

[44] The applicant's alternative application for review is under Part 5 of the *JRA* and that too is subject to an express time period; "as soon as possible and, in any event, within 3 months".[21] This Court has power to extend that time period.[22] It does not appear controversial that those principles outlined above relevant to an extension of the 28 day time period under section 26(1)(b) will apply to any application to extend time under

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11 *Hoffmann v Queensland Local Government Superannuation Board* [1994] 1 Qd R 369 at 372 (Thomas J). See also *Kuku Djungan Aboriginal Corporation v Christensen* [1993] 2 Qd R 663 at 665 (Moynihan J).

12 (1984) 3 FCR 344; [1984] FCA 186.

13 *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344; [1984] FCA 186 at 348-350. See also *Hoffmann v Queensland Local Government Superannuation Board* [1994] 1 Qd R 369 at 372 (Thomas J); *Kuku Djungan Aboriginal Corporation v Christensen* [1993] 2 Qd R 663 at 665 (Moynihan J).

14 *Hoffmann v Queensland Local Government Superannuation Board* [1994] 1 Qd R 369 at 372 (Thomas J) referring to *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344.

15 (1997) 49 ALD 430.

16 *Johnson v Holmes* (1997) 49 ALD 430 at 435.

17 *Lindsay v Director of Professional Services Review* [2011] FCA 262 at [12] (Edmonds J).

18 *Mustafa v Chief Executive Officer, Centrelink* [2000] FCA 1897 at [11] (Whitlam J).

19 *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2007] QSC 286 at [40] (a factor considered by Douglas J). Overturned on appeal but not on that point: *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] 2 Qd R 495; [2008] QCA 213.

20 *Lucic v Nolan* (1982) 45 ALR 411 at 417 (Fitzgerald J).

21 *Judicial Review Act* 1991 (Qld) s 46(1)(a).

22 *Judicial Review Act* 1991 (Qld) s 46(1)(b).

section 46(1)(b) of the *JRA*.[23] No application to extend time under this section has been made.

*The time when the applicant became aware of the decisions*

[45] Pursuant to section 26(4)(a)(i) I must have regard to the time when the applicant became aware of the decisions.[24]

[46] The applicant accepts that he became aware that the procedures were to be conducted under the 1958 Act in 2011;[25] some six to seven years before making this application.

[47] It is noted that Mr Brian Jones received, from the first respondent, correspondence dated 17 February 2011 enclosing a thorough and comprehensive written advice of barrister Mr Le Grand who had been retained by the first respondent.[26] That advice provided by way of introduction:

> "The Hon. Cameron Dick MP, The Attorney General for Queensland, has exercised his authority under section 47(1) of the Coroners Act 1958 (Qld) [the old Act], as preserved by section 100 of the Coroners Act 2003 (Qld) [the new Act], to order the re-opening of the Inquest into the death of Anthony John Jones …"

[48] The applicant deposes to having received a copy of Mr Le Grand's advice dated 9 February 2011 from Mr Brian Jones by email on 20 February 2011, but that he "cannot recall whether [he] opened the advice".[27] The "Further Inquest Advice" of Mr Le Grand confirms that the applicant had a conference with Mr Le Grand on 29 March 2011:[28]

> "This advice is supplemental to my advice dated 9 February 2011. It is consequent upon a full day conference I held in Sydney on Tuesday 29 March 2011 with the deceased's brother, Mark Jones, at which much additional material was supplied by him both orally and in writing
>
> ...
>
> My conference with Mark Jones gave greater detail on several of the matters raised in the submission of Brian Jones to the Attorney General ...".

[49] The Jones family were represented by a solicitor of Butler McDermott Lawyers at the pre-inquest hearing on 14 April 2016 and provided written submissions.[29] During that pre-inquest hearing, Counsel Assisting remarked:[30]

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23 That was the position adopted by the parties in *Remondis Australia Pty Ltd v Ipswich City Council* [2015] 1 Qd R 329; [2014] QSC 27 at 335-336 [46] (Peter Lyons J).

24 *Judicial Review Act 1991* (Qld) s 26(4)(a)(i).

25 Transcript of the hearing on 7 June 2019, p 84, line 10.

26 Affidavit of Michael Prowse filed 3 August 2018, exhibit MGP-6, p 11-52.

27 Affidavit of Mark Jones filed by leave on 7 June 2019, p 2, [6.g].

28 Affidavit of Michael Prowse filed 31 May 2019, exhibit MGP-5, p 52.

29 Affidavit of Michael Prowse filed 3 August 2018, exhibit MGP-9, p 66-67 (transcript of proceedings on 14 April 2016).

30 Affidavit of Michael Prowse filed 3 August 2018, exhibit MGP-9, p 57-59 (transcript of proceedings on 14 April 2016).

1. the second respondent directed the first respondent to reopen the initial inquest under section 47 of the 1958 Act;

2. the reopened inquest was being conducted under section 10 of the 1958 Act, which was preserved by section 100 of the 2003 Act;

3. the findings required by the first respondent were those outlined in section 43(4) of the 1958 Act;

4. the scope of the reopened inquest was as outlined in section 24 of the 1958 Act;

5. the first respondent had the power to commit any person or persons for trial, such power being available only under the 1958 Act; and

6. the first respondent was prevented under the 1958 Act from expressing any opinion outside the scope of the reopened inquest except by way of a rider designed to prevent the recurrence of similar occurrences.

[50] The applicant was in court every day of the reopened inquest hearing.[31] In particular:

1. the applicant (with Mr Brian Jones) was in court on 29 August 2016 when the hearing of the reopened inquest commenced,[32] and personally examined witnesses during the hearing in 2016;[33]

2. on 7 September 2016, the applicant was in court when an issue as to the abrogation of the privilege against self-incrimination under the 1958 Act arose. During legal argument, the history as to how the initial inquest was reopened was canvassed by various Counsel;[34]

3. the reopened inquest was adjourned to permit a witness in the inquest, Mr Kevin Wright, to apply for declaratory relief with respect to what he contended was the non-abrogation of the privilege against self-incrimination. That culminated in a judgment of Henry J dated 16 December 2016 in which his Honour outlined that the inquest was being conducted under the 1958 Act;[35]

4. at the resumption of the reopened inquest on 24 July 2017, the Jones family (including the applicant) were represented by Counsel instructed by Legal Aid Queensland;[36] and

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31 Confirmed by counsel for the applicant, see transcript of the hearing on 7 June 2019, p 83, line 40.

32 Affidavit of Michael Prowse affirmed 25 July 2018, exhibit MGP-2, p 11 (transcript of proceedings on 30 August 2016).

33 See, for example, affidavit of Michael Prowse filed 25 July 2018, exhibit MGP2, p 13-14 (transcript of proceedings on 30 August 2016).

34 Affidavit of Ann-Maree Josephine Russo filed 1 June 2018, exhibit AMR-1, p 37-46 (transcript of proceedings on 7 September 2016).

35 *Wright v The State Coroner* [2016] QSC 305.

36 Affidavit of Michael Prowse filed 25 July 2018, exhibit MGP2, p 16 (transcript of proceedings on 24 July 2017).

5. the reopened inquest was adjourned for submissions and delivery of findings on 31 July 2017[37] (some 8 months prior to the applicant receiving legal advice in relation to this application).[38]

[51] The second respondent submits that it is not to the point that the applicant did not become aware of the "impact" of the decisions to proceed with the reopened inquest under the 1958 Act until 2018.[39]

[52] The relevant factor, as set out in section 26(4)(a) of the *JRA*, is not the date when an applicant understands and appreciates the consequences of a decision, but rather when an applicant becomes aware of the decision.

[53] If it were otherwise, and time periods were contingent upon a prospective applicant receiving specific or technical advice as to the impact or possible impact of decisions, the time limitation periods the legislature sought fit to impose (which *prima facie* must be adhered to) would be seriously undermined.

[54] However, when an applicant appreciates the impact, or consequence, of a decision may in certain circumstances fall into the catch-all category of section 26(4)(b) of the *JRA*, i.e. the Court may have regard to such other matters as it consider relevant.

*The prescribed time period if Mr Brian Jones made this application*

[55] I am required to consider the prescribed time period if it was Mr Brian Jones who made this application.[40]

[56] In relation to the first decision, the applicant's brother, Mr Brian Jones, received correspondence dated 20 September 2010 from the first respondent that the second respondent had directed the inquest be reopened.[41]

[57] Therefore, pursuant to sections 26(1) and (2), an application for statutory order of review in relation to the first decision would have been required to be made by Mr Brian Jones by (on or about) 17 October 2010.

[58] In relation to the second decision, the relevant day is unclear.

[59] The second decision relates to the decision of the first respondent to reopen the coronial inquest under the 1958 Act. The first respondent was directed by the second respondent to reopen the inquest in a letter dated 17 September 2009.

[60] However, there is no document recording when the first respondent made the second decision to reopen the inquest.

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37 Affidavit of Michael Prowse filed 25 July 2018, exhibit MGP2, p 24 (transcript of proceedings on 31 July 2017).

38 Being in February or March of 2018 per Applicant's Outline of Submissions filed 24 May 2019, p 6, [30].

39 Second respondent's Outline of Submissions filed 31 May 2019, p 8, [35]. *Cf* Applicant's Outline of Submissions filed 24 May 2019, p 6, [32].

40 *Judicial Review Act* 1991 (Qld) s 26(4)(a)(ii).

41 Affidavit of Michael Prowse filed 3 August 2018, exhibit MGP-5, p 10.

[61] The second decision was conveyed to Brian Jones in a letter dated 20 September 2010, however, the legislation that applied was never referred to in this letter.[42]

[62] In relation to the second decision, as it was not set out in a document, an application was required to be made within a reasonable time by Mr Brian Jones under section 26(3) of the *JRA*. Both parties agree that this is the case.

*The decisions were made many years ago*

[63] Section 26(3) of the *JRA* states that the Court may refuse to consider an application if it is of the opinion that this application was not made within a reasonable time after the decision was made.

[64] As such, the Court needs to consider when the decision was made.

[65] The first decision was made on or around 17 September 2010, about seven and a half years prior to this application.[43]

[66] The second decision was made on or about 20 September 2010 (given that on that date the first respondent retained a retired senior detective to review all material,[44] something which the first respondent would only have power to do under section 47(3) of the 1958 Act upon the initial inquest having been reopened), about seven and a half years prior to this application.

[67] It is those time periods which are relevant to the question pursuant to section 26(3) of the *JRA* as to whether this application was made a reasonable time after the decisions were made.[45]

[68] This application was made well-outside the prescribed legislative time frames considered reasonable for other decisions.[46]

[69] Decisions dealing with a delay of this magnitude cannot be found.[47] It is noted that some cases of delay around the year mark are regarded as "exceptional".[48] The second

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42 Affidavit of Michael Prowse filed 3 August 2018, exhibit MGP-5, p 10.

43 This application was filed on 3 April 2018.

44 Affidavit of Ann-Maree Josephine Russo filed 1 June 2018, exhibit AMR-1, p 36 (letter State Coroner to Mr Brian Jones dated 20 September 2010). See also Affidavit of Michael Prowse filed 3 August 2018, exhibit MGP-6, p 11 (letter State Coroner to Mr Brian Jones dated 17 February 2011).

45 *Remondis Australia Pty Ltd v Ipswich City Council* [2015] 1 Qd R 329; [2014] QSC 27 at 335 [44] (Peter Lyons J); *Ivins v James Cook University* [2001] QCA 464 (McMurdo P, with whom Thomas JA agreed).

46 *Judicial Review Act 1991* (Qld) s 26(2) (28 days); s 46(1)(a) (3 months). See *Reid v Rockhampton District Aboriginal & Islander Co-operative Society Ltd* [2009] QSC 330 at [21] (McMeekin J).

47 In *Newby v Moodie* (1988) 83 ALR 523, a delay of more than eight months was not reasonable (at 526 per Sheppard, Morling and Pincus JJ). In *Johnson v Holmes* (1997) 49 ALD 430, a delay in excess of twelve months was not reasonable (at 436 per O'Loughlin J). Conversely, in *Remondis Australia Pty Ltd v Ipswich City Council* [2015] 1 Qd R 329; [2014] QSC 27, a delay of approximately two months was reasonable (at 329 [44] per Peter Lyons J). In *Hoffman v The Queensland Local Government Board* [1994] 1 Qd R 369 the delay of four months was regarded as "fairly substantial", however the applicant at all times desired to bring the application and remained in contact with the decision maker (at 373). Thomas J regarded this matter as "fairly evenly balanced". In the end, the absence of prejudice and the potential case for suggesting that he was denied natural justice was sufficient to tip the scales in the applicant's favour (at 374). In *Director of Public Prosecutions (ACT) v Martin* [2014] ACTSC 154 there was a delay was fourteen months which was regarded as excessive. The Court noted at [177] that "while it is not unheard of for a court to grant an extension of time where there has been a delay of this

respondent submits that the unprecedented period of time since the decisions were made weighs strongly in favour of this Court's discretion being exercised to refuse to consider this application.

*Explanation for delay*

[70] The applicant's explanation is that he did not receive advice as to the impact of the decisions until March 2018[49] through his new legal representation and this application was filed shortly thereafter.

[71] The applicant was granted legal aid funding in June 2017.[50] At the resumption of the reopened inquest on 24 July 2017, the applicant was legally represented by both a solicitor and a counsel.[51] The applicant was legally represented at the completion of evidence on 31 July 2017.[52]

[72] The applicant states that on 1 March 2018, his new counsel advised of her concern that the reopened inquest was conducted under the wrong Act.[53]

[73] By way of further explanation as to the delay, the applicant states the following:[54]

> "2. For many years, my brother, Brian Jones was the primary advocate and lobbyist concerning Tony's disappearance and other matters pertaining to that investigation.
>
> 3. Though I always maintained an interest in Tony's disappearance, there was a significant amount of work conducted solely by Brian. Brian was living in Korea during this period until his return to Perth in approximately 2012. I understand he wrote and received an enormous number of letters in relation to Tony's matter, but ultimately I and other family members were not familiar with the work Brian was doing. Indeed the decision of the Attorney General on 17/9/2010 came as a great surprise to me.
>
> 4. The geographical distance between Brian and I over the years and our circumstances did not facilitate a collaborative approach to the lobbying etc.

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magnitude (see, for example, *Wedesweiller v Cole* (1983) 71 FLR 256 where the delay was in the order of 11 months), cases of this kind are exceptional". The Court also noted "On balance, having given the matter anxious consideration, we are of the opinion that the Director should have an extension of time to bring these proceedings. This is no ordinary case. While the Director's forensic decision not to challenge the orders in the first place and the length and consequences of the delay count against him, the interests of the administration of justice and the broader public interest favour the resolution of the questions it raises. Given the merits of the application, the importance and gravity of the issues and the fact that the matter has been fully argued, the better course in the circumstances is to grant the Director leave, deal with the parties' arguments and weigh in the balance the matters raised against the grant of leave in the context of deciding whether the Court should exercise its discretion to refuse relief" at [210].

48 See, e.g., *Director of Public Prosecutions (ACT) v Martin* [2014] ACTSC 154 at 157 [177].

49 Affidavit of Mark Jones filed by leave on 7 June 2019, p 4, [6.s].

50 Affidavit of Ann-Maree Josephine Russo filed 1 June 2018, p 1, [3].

51 Affidavit of Mark Damian Jones filed on 7 June 2019, p 3, [6.l]. Affidavit of Michael Prowse filed 25 July 2018 at exhibit MGP2, p 15-16 (transcript of proceedings on 24 July 2017).

52 Affidavit of Michael Prowse filed 25 July 2018 at exhibit MGP2, p 17-24 (transcript of proceedings on 31 July 2017).

53 Affidavit of Mark Jones filed by leave on 7 June 2019, p 4, [6.s].

54 Affidavit of Mark Jones filed by leave on 7 June 2019, p 1-2, [2]-[5].

5. My involvement increased markedly when:-

a. We received the brief from the Coroner in early 2016; and

b. When I received legal aid funding in June 2017, i.e just prior to the resumption of the re-opened inquest in 2017."

[74] The second respondent submits the explanation is not reasonable, nor would it be fair and equitable to formally proceed to consider this application. The second respondent notes that there has been no reason or explanation provided by the applicant as to why it took him until March 2018 to seek advice as to the impact of the decisions in circumstances where:

1. the Jones family, including the applicant, were legally represented in the pre-inquest hearing on 14 April 2016 and no suggestion was raised that the State Coroner was about to proceed under the wrong Act;[55]

2. the redacting of information sought by the Jones family was the subject of a ruling of the State Coroner under the 1958 Act on 30 August 2016, yet no question as to the impact of the 1958 Act was raised at that time;[56]

3. the issue as to the abrogation of the privilege against self-incrimination under the 1958 Act was raised as an issue and determined in late 2016,[57] yet no inquiry or consideration of the effect of the 1958 Act occurred at that time;

4. the State Coroner made a series of rulings on 12 June 2017 as to the witnesses to be called, and further investigations to be undertaken, pursuant to the 1958 Act. A number of these rulings were adverse to the agitations of the Jones family.[58] No question was raised as to the impact of the 1958 Act at that time;

5. the applicant's former solicitors (who filed this application on 3 April 2018) were the solicitors on the record for the Jones' family from 24 July 2017 until 31 July 2017[59] and were representing the applicant on and from 9 March 2017.[60] The suggestion that the reopened inquest had proceeded and continued to proceed under the wrong Act was not raised with the State Coroner during that time; and

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55 Affidavit of Michael Prowse filed 3 August 2018, exhibit MGP-9 (transcript of proceedings on 14 April 2016).

56 Affidavit of Michael Prowse filed 31 May 2019, exhibit MGP1, p 1-4 (transcripts of proceedings on 30 August 2016).

57 Affidavit of Ann-Maree Josephine Russo filed 1 June 2018, exhibit AMR-1, p 37-46 (transcript of proceedings on 7 September 2016); affidavit of Michael Prowse filed 31 May 2019 at exhibits MGP2 (transcript of proceedings on 8 September 2016) and MGP3 (State Coroner's ruling on 8 September 2016); *Wright v The State Coroner* [2016] QSC 305.

58 Affidavit of Michael Prowse filed 31 May 2019, exhibit MGP4 (State Coroner's ruling on 12 June 2017), p 33-51.

59 Affidavit of Michael Prowse filed 25 July 2018, exhibit MGP2, p 15-16 (transcript of proceedings on 24 July 2017) and p 17-24 (transcript of proceedings on 31 July 2017). See also Statement of Agreed Facts and Issues filed 17 May 2019, p 3, [15].

60 Affidavit of Ann-Maree Josephine Russo filed 1 June 2018, exhibit AMJR-1.

6. the reopened inquest was adjourned for submissions on 31 July 2017,[61] yet the impact of the reopened inquest proceeding under the 1958 Act – which is said to have been identified during the course of submissions[62] – was not raised until March 2018.[63]

[75] The second respondent submits that although the absence of an explanation for the applicant's delay during 2016 and 2017 is not fatal, it is a persuasive factor against the applicant.[64]

[76] The applicant submits that it is a highly unusual case where the applicant fairly placed reliance on the State Coroner and the Attorney-General's assertion of what was a relevant piece of legislation.[65]

*Prejudice and the public interest.*

[77] The second respondent accepts there is no material prejudice to the second respondent.[66]

[78] The second respondent submits that what (fatally) affects the applicant's prosecution of this application is the effect of the decisions having stood unaffected from 17 September 2010 until April 2018, and the prejudice to other persons consequent upon the applicant's delay in bringing this application.[67] The second respondent submits that that effect cannot be overstated and without being exhaustive:

1. a retired senior detective was engaged to review the material;[68]

2. Mr Le Grand of Counsel was instructed to prepare detailed and thorough advice;[69]

3. a considerable number of investigations were undertaken during 2011 to 2016;

4. approximately 336 separate exhibits were tendered;[70]

5. 17 hearing days took place over the course of a year, impacting upon the hearing of other inquests and finite coronial resources;

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61 Affidavit of Michael Prowse filed 25 July 2018, exhibit MGP2, pages 17-24 (transcript of proceedings on 31 July 2017).

62 Applicant's outline of submissions filed 24 May 2019, p 6, [32].

63 Affidavit of Mark Jones filed by leave on 7 June 2019, p 4, [6.s].

64 *Gerrits v Department of Corrective Services* [2003] QSC 281 at [4] (McMurdo J), citing *Hoffmann v Queensland Local Government Superannuation Board* [1994] 1 Qd R 369 at 372 (Thomas J).

65 Transcript of the hearing on 7 June 2019, p 84, line 19-21.

66 Second respondent's outline of submissions filed 31 May 2019, p 10, [42].

67 *Kuku Djungan Aboriginal Corporation v Christensen* [1993] 2 Qd R 663 at 665 (Moynihan J).

68 Affidavit of Michael Prowse filed 3 August 2018, exhibit MGP-6, p 11 (letter State Coroner to Mr Brian Jones dated 17 February 2011).

69 Affidavit of Michael Prowse filed 3 August 2018, exhibit MGP-6, pages 11-52 (letter State Coroner to Mr Brian Jones dated 17 February 2011); Affidavit of Michael Prowse filed 31 May 2019, exhibit MGP5, pages 52-81.

70 Affidavit of Michael Prowse filed 31 May 2019, exhibit MGP7, p 84-95.

6. six parties were given leave to appear (in addition to Counsel Assisting), all of whom were legally represented (save for the Jones family during 2016);

7. in excess of 50 witnesses were called and questioned, a number of whom were legally represented;[71]

8. Mr Kevin Wright instituted Supreme Court proceedings,[72] represented by Queen's Counsel and solicitors, in relation to a question that will be rendered obsolete, diminishing finite judicial resources;

9. the State Coroner had reserved his decision for 8 months prior to the institution of this application;[73]

10. Counsel Assisting and the Commissioner of Police had provided their written submissions on 16 October 2017 and 20 December 2017 respectively.[74]

[79] The second respondent submits that those factors considerably outweigh any public interest in the determination of a question of statutory construction, and any public interest in an inquest into the disappearance of a member of the community (pre-2003) being conducted under the correct legislation if the applicant is correct.[75]

[80] It is noted that section 37 of the 2003 Act provides:

> "**37 Evidence**
>
> (1) The Coroners Court is not bound by the rules of evidence, but may inform itself in any way it considers appropriate.
>
> (2) The Coroners Court may require a person to produce a document to the court before the start of an inquest.
>
> (3) The Coroners Court may inspect anything produced at an inquest, copy it, or keep it for a reasonable period.
>
> (4) The Coroners Court may do any of the following—
>
> (a) order a person to attend an inquest, until excused by the court—
>
> (i) to give evidence as a witness; or
>
> (ii) to produce something;
>
> (b) order a person called as a witness at an inquest—
>
> (i) to take an oath; or

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71 Affidavit of Michael Prowse filed 31 May 2019, exhibits MGP6A and MGP6B, p 82 and 83.
72 *Wright v The State Coroner* [2016] QSC 305.
73 Affidavit of Michael Prowse filed 25 July 2018, exhibit MGP2, pages 17-24 (transcript of proceedings on 31 July 2017).
74 Affidavit of Michael Prowse filed 31 May 2019, p 3, [11].
75 *Cf* Applicant's Outline of Submissions dated 24 May 2019 at [31].

(ii) to answer a question.

(5) In addition to the ways in which something may be served under the Acts Interpretation Act 1954, section 39, the Coroners Court may authorise service of an order in another way.

(6) A person must comply with an order of the Coroners Court, unless the person has a reasonable excuse.

Maximum penalty—40 penalty units.

(7) If a person fails to attend an inquest as ordered, the court may issue a warrant for the person's arrest.

*Note—*

For particular police powers relating to the arrest of a person, see the Police Powers and Responsibilities Act 2000, sections 21 (General power to enter to arrest or detain someone or enforce warrant) and 615 (Power to use force against individuals) and, for what happens if the person can not be taken before the coroner on the day of the arrest, see section 395 (Duty of officer receiving custody of person arrested under warrant other than for offence).

(8) However, the court may issue the warrant only if satisfied the person was served in time for it to be practical, in normal circumstances, for the person to appear before the court.

(9) The police officer must, as soon as practicable after the arrest, cause the person to be brought before the Coroners Court.

(10) Once arrested, the person may be detained in custody until the Coroners Court excuses the person from attending the inquest.

(11) The issue of a warrant, or the arrest of the person, does not relieve the person from liability incurred by the person for not complying with the order to attend."

[81] The second respondent acknowledges that it is conceivable that all, or some, material acquired to date may be used by the Coroner upon any reopening under the 2003 Act, however, also sets out possible arguments as to why this may not occur:[76]

1. first, as is made express in section 37(1) of the 2003 Act, such a procedural freedom is discretionary. The admissibility of material acquired under the reopened inquest will be a matter for the coroner and is a matter upon which reasonable minds may differ.[77] Respectfully, it cannot be presupposed that any or all material will automatically be admitted into evidence;

2. second, regardless, all documentary evidence from the reopened inquest will need to be acquired afresh using the coercive powers afforded to the coroner under section 37(2) and section 37(4)(a)(ii) of the 2003 Act. This is because all

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76 Second respondent's supplementary outline of submissions dated 11 June 2019, p 3, [10]-[15].

77 *Doomadgee v Clements* [2006] 2 Qd R 352; [2005] QSC 357 at 361 [36] (Muir J).

previously acquired documentary evidence will not be lawfully within the State Coroner's possession or control;

3. third, there is a real possibility that witnesses will need to be recalled at any reopened Initial Inquest under the 2003 Act because:

    a. the scope of any reopened Initial Inquest will include the ability for the coroner to comment upon matters of public health or safety or the administration of justice under sections 46(1)(a) and (b) of the 2003 Act, and witnesses may need to be recalled so as to ensure:

        i. procedural fairness is afforded to those witnesses;[78] and

        ii. each interested party's rights to examine witnesses under section 36(1) of the 2003 Act as to those issues is not curtailed;

    b. another person or other persons may seek leave to appear at any reopening of the initial inquest (including to address any comments upon matters of public health or safety or the administration of justice) and to admit prior transcripts of witness testimony without permitting a right of examination is tantamount to rendering that person's or those persons' right to examine witnesses nugatory under section 36(1) of the 2003 Act;[79] and

    c. the privilege against self-incrimination is abrogated under the 2003 Act in wider terms than the 1958 Act, such that it is possible a witness or witnesses may need to be recalled;

4. for those reasons, whilst conceivably transcripts of witness testimony from the reopened inquest will be admissible under section 37(1) of the 2003 Act, there is a possibility such material would (legitimately) not be admitted into evidence and, even if it was, there is a real risk that witnesses will need to be recalled in any event with all attendant cost, inconvenience and delay.

5. Notwithstanding the broad procedural freedom afforded by section 37(1) of the 2003 Act, an unanswered question, for which no authority could be identified (one way or the other), is whether it will be open for a witness to argue that, because he or she was summonsed and compelled to answer questions unlawfully, any answers provided by them are tainted by that unlawfulness and are thus cannot be used against them.

6. That is, a serious question arises as to whether the admitting into evidence of those transcripts disadvantage or are unfair to those witnesses within the meaning of *Kostas v HIA Insurance Services Pty Ltd*[80] and *K-Generation Pty*

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78 *Copper Mines of Tasmania Pty Ltd v Cooper* [2018] TASSC 25 at [22] ("there is no doubt that the principles of natural justice apply to coronial proceedings…": Estcourt J).

79 *Copper Mines of Tasmania Pty Ltd v Cooper* [2018] TASSC 25 at [30] (Estcourt J), citing *R v Avon Coroner; ex parte Bentley* [2001] EWHC Admin 170.

80 *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390; [2010] HCA 32 at 396 [17] (French CJ).

*Ltd v Liquor Licensing Court*,[81] or constitute a curtailing of the rights of those witnesses who have been affected by the inappropriate use of administrative powers.[82]

[82] I do not intend to resolve any of these issues raised by the second respondent.

*The effect on the applicant if this Court refuses to consider this application*

[83] The second respondent submits that the applicant will be provided with, in due course, the findings of the State Coroner after 17 days of hearing pursuant to section 43 of the 1958 Act, namely:

1. the cause and circumstances of the disappearance of Mr Anthony Jones;

2. whether Mr Anthony Jones is alive or dead;

3. when, where and how Mr Anthony Jones cane by his death; and

4. any rider designed to prevent the recurrence of similar occurrences,

5. in circumstances where the Jones family were intimately involved in the reopened inquest; were granted leave to appear at the reopened inquest; sought and received documentation; cross-examined witnesses; applied for (and were granted in part) the undertaking of further investigations; and applied for (and were granted in part) the calling of additional witnesses.

[84] This can be contrasted with what will happen if the Court considers this application and finds in the applicant's favour.

[85] As the second respondent submits, there is no guarantee that the initial inquest will be reopened under the 2003 Act:

1. the State Coroner will have a discretion as to whether to reopen the inquest into Mr Anthony Jones of his own volition;[83] and

2. the Jones family will have the right to apply to the State Coroner, or the District Court, for the initial inquest to be reopened, which will be subject to the exercise of discretion.[84]

[86] The second respondent submits that conceivably the Jones family may be placed in an uncertain, and possibly worse position, than if the reopened inquest was permitted to take its course.

*The seriousness of the consequences of error to the applicant*

[87] There are some material differences between the 1958 Act and 2003 Act.

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81 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; [2009] HCA 4 at 528 [82] (French CJ).

82 *Walter Mining Pty Ltd v Hennessey* [2010] 1 Qd R 593; [2009] QSC 102 at 603 [56] (McMeekin J).

83 *Coroners Act* 2003 (Qld) s 50A.

84 *Coroners Act* 2003 (Qld) s 50.

[88] The applicant submits that one of the major criticisms of the 1958 Act was the lack of involvement and consideration accorded to families of the deceased person and that an inquest conducted under the 2003 Act allows the applicant greater rights and involvement as a family member of Anthony Jones.

[89] The material differences not afforded to the Jones family in the reopened inquest proceeding under the 1958 Act are as follows:[85]

1. to make submissions as to the coroner's (mandatory) findings under section 45 of the 2003 Act (questions of fact);

2. to make submissions as to the coroner's (discretionary) comments under section 46 of the 2003 Act; and

3. to receive comments (in the coroner's discretion) as to matters of public health or safety, and the administration of justice, under section 46(1)(a) and (b) of the 2003 Act.

*Merits*

[90] Finally, as to the merits of the substantial application, the second respondent accepts that this application is arguable, although not the preferable construction of section 100 of the 2003 Act.[86]

*This application was not made within a reasonable time after the decision was made*

[91] After considering all of these matters, I am of the opinion that this application was not made within a reasonable time after the decision was made.

[92] Both of the decisions were made in 2010.

[93] The applicant accepts that he knew from at least 2011 that the procedures were to be conducted under the 1958 Act;[87] some six to seven years prior to making this application.

[94] It must be noted that the applicant and his family have been unrelenting in seeking answers to their brother's death. Their devotion to their brother is admirable.

[95] The applicant submits that this is a highly unusual case where the applicant placed reliance on the State Coroner and the Attorney General's assertion of what was the relevant operative Act and he was entitled to infer that they were acting in accordance with the law.[88]

[96] However, the applicant has had legal representatives since 2017; although it was only on 1 March 2018 that he was advised by his new counsel of her concern that the reopened inquest was conducted under the wrong Act.

[97] I have no evidence as to whether any other of the applicant's representatives considered the issue and came to a different view.

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85 Second respondent's supplementary outline of submissions dated 11 June 2019, p 3, [18].
86 Second respondent's outline of submissions filed 31 May 2019, p 14, [60].
87 Transcript of the hearing on 7 June 2019, p 84, line 10.
88 Transcript of the hearing on 7 June 2019, p 84, line 19-22.

[98] I have insufficient evidence to make any finding that there has been any fault of any of the applicant's legal representatives. I note that although fault by legal representatives is not to be disregarded it might often be regarded as less damaging to an applicant's case for an extension of time than personal fault of the applicant.[89]

[99] In my view, too much time has passed to consider that this application was made within a reasonable time. The delay is excessive and overwhelms any of the other considerations.

[100] Ultimately, considering all of the matters that I must, and may do so, under the *JRA*, I am of the opinion that this application was not made within a reasonable time after the decisions were made and refuse to consider this application made by the applicant.

**The statutory construction issue**

[101] The applicant has raised an interesting statutory construction issue in relation to the meaning of section 100 of the 2003 Act.

[102] Even though I have refused to consider this application due to the application not being made within a reasonable time, I am of the view that this application would have failed in any event as the 1958 Act applies to these circumstances. I provide these reasons more so for the Jones family to have finality as to this issue.

[103] Each of the decisions were decided on the basis that the circumstances of Mr Anthony Jones as at the date of the decisions constituted a "pre-commencement death" within the meaning of section 100 of the 2003 Act and thus the 1958 Act continued to apply.

[104] The applicant's submission "in a nutshell" is that there was never an inquest into a death.

[105] Rather, what occurred was an inquiry into a missing person and accordingly, section 100 of the 2003 Act did not apply:

> "So a simple point is that it wasn't an inquiry into a death, it was an inquiry into a disappearance. Therefore, section 100 didn't apply and, unfortunately, the coroner made an error and the continued inquest should have been held under the new Act. Now, that's our submission in a nutshell. What effect that may or may not have practically, it is submitted, will be a matter for the coroner."[90]

> "But what I'm trying to stress is that there is quite clearly within the old Act important distinctions between inquiries as to missing persons and inquests into death. And so when one looks at what happened, there was never an inquest into the death. There were findings made as to the inquiry into the missing person. So in those contexts, the submission simply is that when one looks at the definition of pre-commencement death, where it says:
>
> *...means a death in relation to which an inquest was held –*".[91]

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89 *Hoffmann v Queensland Local Government Superannuation Board* [1994] 1 Qd R 369 at 373 (Thomas J).

90 Transcript of the hearing on 7 June 2019, p 8 line 4-8.

91 Transcript of the hearing on 7 June 2019, p 85 line 42 to p 86 line 5.

[106] The applicant refers to *Wright* which arose from the reopened inquest where a witness appealed to the Supreme Court for a declaration that the 1958 Act did not abrogate against self-incrimination.[92] Henry J dismissed the application stating that the privilege against self-incrimination can be overridden in an inquiry under section 10 of the 1958 Act, in relation to missing persons. Importantly, the applicant submits, his Honour noted:[93]

> "[6] The present inquest results from a direction of the Attorney-General that a previous inquest into Mr Jones' disappearance be re-opened. The earlier inquest was conducted as an inquiry in respect of a missing person pursuant to s 10 of the Act. It is common ground that the present inquest is also being held pursuant to s 10 of the Act, being an inquiry into the "cause and circumstances of the disappearance" of Mr Jones and "into all such matters and things as will or will be likely to reveal whether" Mr Jones is alive or dead.
>
> [7] Such an "inquiry" conforms to the Act's definition of "inquest". An inquiry under s 10 is one of four different types of inquests for which the Act provides. The inquest's specific status as an inquiry under s 10, a missing person inquiry, is of particular significance. Sections 33 and 34 of the Act single out such an inquiry for exceptional treatment in respect of self-incrimination."

[107] The applicant makes the point, by reference to this case, that there has not been an inquest into the death of Anthony Jones. The initial inquest was held under section 10 of the 1958 Act as an inquest into a missing person. [94]

[108] The findings of the initial inquest included that Anthony Jones was dead. The applicant submits that the findings do not alter the type of inquest that was conducted; this is supported by the wording of s 47(4) of the 1958 Act which states that "…and such findings and inquisition shall for all purposes replace the finding and inquisition respectively previously given and certified…".

[109] Similarly the 2003 Act states that an inquest can be reopened and a Coroner may set aside a finding.[95] The applicant submits that as an inquest can be reopened and the findings "set aside" it would be inconsistent with the intention of the legislation to have the type of inquest conducted dictated by the ultimate findings, which can be set aside or changed.[96]

[110] The applicant submits that the inquest into the disappearance of Anthony Jones was held before 1 December 2003 and that inquest was reopened after 2003; the reopening of an inquest does not alter the type of inquest that was held, particularly when reference is had to the wording of section 50(6)(a) of the 2003 Act which states that the State Coroner may reopen the inquest to re-examine the finding; or hold a new inquest. The applicant submits that a new inquest was not held here; rather the inquiry was reopened.[97]

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92 *Wright v The State Coroner* [2016] QSC 305.
93 *Wright v The State Coroner* [2016] QSC 305 at [6]-[7].
94 Applicant's outline of submissions filed 24 May 2019, p 9-10, [54].
95 *Coroners Act* 2003 (Qld) s 50(4).
96 Applicant's outline of submissions filed 24 May 2019, p 9, [54].
97 Applicant's outline of submissions filed 24 May 2019, p 9, [56].

[111] As there has not been a death reported to police or a coroner before 2003 and there has not been an inquest into the death of Anthony Jones, then, the applicant submits, it is not a pre-commencement death and section 100 of the 2003 Act (which states that the 1958 Act applies to the relevant inquest) is not enlivened. Accordingly, the applicant submits that the 1958 Act does not apply to the reopening of the inquest into the disappearance of Anthony Jones.

*The 1958 Act*

[112] The 1958 Act defines "inquest" to mean any inquest under this Act, and includes an inquiry pursuant to section 9 or 10 of the Act.[98]

[113] Part 2 of the 1958 Act sets out the functions and powers of coroners, relevantly:

> "**7 Inquiries by coroners**
>
> (1) A coroner shall have jurisdiction to inquire and shall inquire forthwith whether the death has occurred and into the cause of the death and the circumstances of the death of a person where the coroner is informed that the person is dead and—
>
> (a) in the coroner's opinion there is reasonable cause to suspect that the person—
>
> (i) has died either a violent or unnatural death (but so that the meanings of the terms 'violent' and 'unnatural' shall not be affected by anything contained in subparagraphs (ii) to (ix));
>
> (ii) has died a sudden death of which the cause is unknown;
>
> (iii) has died in any circumstances of suspicion;
>
> (iv) has died by drowning;
>
> (v) has died while under an anaesthetic in the course of a medical, surgical, or dental operation or operation of a like nature;
>
> (vi) has died but no certificate of a medical practitioner has been given as to the cause of death;
>
> (vii) has died not having been attended by a medical practitioner at any period within 3 months immediately prior to the person's death;
>
> (ix) has died in such circumstances as to require the cause of death or the circumstances of death or both to be ascertained or more clearly and definitely ascertained; or

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98 *Coroners Act* 1958 (Qld) s 5.

(b) that the person has died within the State while detained in any prison or psychiatric hospital; or

(c) in the coroner's opinion the person has died within the State in such a place as to require that inquiry; or

(d) the Minister has directed the coroner to so inquire (the Minister being hereby empowered to so direct at any time when the Minister is of the opinion that the person has died in such a place or in such circumstances as to require such inquiry).

(2) However, a coroner shall not inquire or hold an inquest into the death of any patient who dies in any psychiatric hospital to which the coroner is an official visitor.

(3) Where under this Act a coroner inquires into any death, the coroner may from time to time make or cause to be made such inquiry, investigation, inspection, examination, and test, or any of these, as the coroner considers fit.

**7B Inquests on death**

(1) If as the result of a post-mortem examination, or otherwise as the result of the coroner's inquiry the coroner is of the opinion that—

(a) there is reasonable cause to suspect that the person—

(i) has died either a violent or an unnatural death; or

(ii) has died a sudden death of which the cause is unknown; or

(b) the person has died within the State—

(i) while detained in any prison or psychiatric hospital; or

(ii) in such a place as to require an inquest to be held; or

(c) the person has died in such circumstances as to require an inquest to be held;

the coroner shall hold forthwith an inquest into the death of that person unless, in a case specified in paragraph (a) or (b) it is decided, pursuant to section 16, that the holding of an inquest is unnecessary.

(2) In any case in which pursuant to this Act the coroner may inquire into the death of any person, the coroner shall hold forthwith an inquest into the death of that person if so directed by the Minister.

(3) The Minister is hereby empowered to give at any time such a direction.

(4) The commissioner of the police service or an inspector of police or a person authorised by subsection (6) may, at any time, request the coroner to

hold an inquest into the death of a person in any of the circumstances specified in subsection (1), but before so doing the coroner may require a statement in writing of the grounds for such request.

(5) If the coroner is of the opinion that such grounds do not warrant the holding of an inquest, the coroner may refuse to hold the inquest but in that event the coroner shall forthwith notify the chief executive in writing of such refusal and forward with such notification a copy of such grounds.

(6) The persons authorised to request a coroner to hold an inquest shall be the husband or wife, father, mother, sister, brother, son, daughter, or guardian of the deceased person concerned or any other person having, in the opinion of the coroner, a sufficient interest in the cause and circumstances of the deceased person's death.

**8 Inquests into fires**

(1) A coroner shall have jurisdiction to hold and shall hold forthwith an inquest into the cause and origin of every fire whereby any property of any kind has been endangered, destroyed, or damaged, or whereby the life of human or beast has been lost or endangered—

(a) if the coroner is of opinion that the inquest should be held; or

(b) if the Minister directs the coroner to hold the inquest; or

(c) if requested to hold the inquest by any person and upon payment by that person to the coroner of such sum as may be prescribed by the rules, or, if no such sum is prescribed, the sum of $50 and in every case upon the giving, at the same time, an undertaking, under security to the satisfaction of the coroner, to pay such further costs as may be entailed in the holding of such inquest;

and the provisions of this Act shall, with and subject to all necessary adaptations, apply to any such inquest.

(2) The certificate of the coroner shall be final and conclusive as to the amount of the further costs mentioned in subsection (1).

(3) All such further costs may be reimbursed out of the security given and if such further costs are not thus fully satisfied the Crown may recover from the person so requesting the holding of the inquest the balance not so reimbursed by action in any court of competent jurisdiction.

**9 Inquiry when body destroyed or irrecoverable**

Where a coroner has reason to believe that a death has occurred, whether within or outside the State, in such circumstances that an inquiry under this section into the death ought to be held in the State but, because the body has been destroyed or cannot be recovered, an inquest under the provisions of this Act other than this section cannot be held, the coroner may report the facts to the chief executive and the Minister may, if the Minister considers

it desirable so to do, direct the inquiry to be held and the inquiry shall be held forthwith upon receipt of the direction by the coroner making the report or by such other coroner as the Minister may direct, and the provisions of this Act shall apply, with and subject to all such modifications as may be necessary in consequence of the inquiry being held otherwise than on or after view of a body.

**10 Inquiries respecting missing persons**

(1) Where any person has whether before, on or after the commencement of this Act, been reported to the police as a missing friend and the police have not, within the period of 12 months next succeeding the date of such report, found such missing person or the body of such missing person, a coroner shall, if—

(a) the coroner is of the opinion that such an inquiry ought to be held; or

(b) the Minister directs the coroner to hold such an inquiry; or

(c) a person authorised in that behalf by this section requests the coroner to hold such an inquiry;

have jurisdiction to inquire into and shall inquire forthwith into the cause and circumstances of the disappearance of such missing person and into all such matters and things as will or will be likely to reveal whether such missing person is alive or dead and, if such person is alive or likely to be alive, the whereabouts of such person at the time of such inquiry, and the provisions of this Act shall, with and subject to all necessary adaptations, apply to every such inquiry.

(2) The persons authorised to request the coroner to hold an inquiry under this section shall be the commissioner of the police service, or an inspector of police, or the husband or wife, father, mother, sister, brother, son, daughter, or guardian of the missing person concerned or any other person having, in the opinion of the coroner, a sufficient interest in the cause and circumstances of the missing person's disappearance."

[114] The findings of the coroner are set out in section 43 of the 1958 Act:

"**43 Finding of coroner**

(1) After considering all the evidence before the coroner at the inquest the coroner shall give the coroner's finding in open court.

(2) Where the inquest concerns the death of any person, the finding shall set forth—

(a) so far as has been proved—

(i) who the deceased was;

(ii) when, where, and how the deceased came by his or her death; and

(b) the persons (if any) committed for trial.

(3) Where the inquest concerns a fire, the finding shall set forth—

(a) so far as has been proved the cause and origin of the fire; and

(b) the persons (if any) committed for trial.

(4) Where the inquiry concerns a missing person the finding shall set forth—

(a) so far as has been proved—

(i) the cause and circumstances of the disappearance of such missing person; and

(ii) whether such missing person is alive or dead; and

(iii) if such missing person is alive or likely to be alive—the whereabouts of such missing person at the time of the inquiry; and

(b) the persons (if any) committed for trial.

(5) The coroner shall not express any opinion on any matter outside the scope of the inquest except in a rider which, in the opinion of the coroner, is designed to prevent the recurrence of similar occurrences.

(5A) A rider shall not be or be deemed to be part of the coroner's finding but it may be recorded if the coroner thinks fit.

(6) No finding of the coroner may be framed in such a way as to appear to determine any question of civil liability or as to suggest that any particular person is found guilty of any indictable or simple offence."

[115] Inquests may be reopened pursuant to section 47 of the 1958 Act:

"**47 Inquests may be reopened**

(1) Where any inquest has been concluded and it is shown to the satisfaction of the Minister that the inquest ought to be reopened, the Minister may direct that the inquest be reopened before the coroner who held the inquest or some other coroner.

(2) Where any inquest has been concluded the commissioner of the police service or an inspector of police or a person authorised in that behalf by this section may request the coroner who held the inquest to reopen the inquest but before so doing the coroner may require a statement in writing of the grounds for such request.

(2A) If the coroner is of the opinion that such grounds do not warrant the reopening of the inquest, the coroner may refuse to reopen it, but in that event the coroner shall notify the chief executive in writing of such refusal and forward with such notification a copy of such grounds.

(3) Where any inquest has been concluded—

(a) the coroner who held the inquest or some other coroner, if so directed by the Minister shall; and

(b) the coroner who held the inquest, if upon the request of the persons specified in subsection (2) or upon the coroner's own volition the coroner is of opinion that such inquest ought to be reopened may;

reopen such inquest and conduct such inquiries as may appear necessary to the coroner and the coroner may accept such of the findings and of the evidence given at the previous inquest as appear to the coroner to be correct.

(4) At the conclusion of the reopened inquest the coroner shall give the coroner's finding in the manner provided by section 43 and certify it by the coroner's inquisition in the manner provided by section 44 and such findings and inquisition shall for all purposes replace the finding and inquisition respectively previously given and certified, as the case may be.

(5) The persons authorised to request a coroner to reopen an inquest shall be the husband or wife, father, mother, sister, brother, son, daughter, or guardian of the deceased person or missing person concerned or any other person having, in the opinion of the coroner, a sufficient interest in the reopening of the inquest."

*Section 100 of the 2003 Act*

[116] Section 100 of the 2003 Act needs to be understood in its statutory context and applied to the circumstances of the case.

[117] Section 100 of the 2003 Act states:

"**100 When repealed Act still applies**

(1) The *Coroners Act 1958* continues to apply to the following, as if this Act had not been enacted–

(a) a pre-commencement death;

(b) a pre-commencement fire.

(2) However, despite subsection (1), this Act applies to–

(a) the release of an investigation document relating to a pre-commencement death or fire for research purposes; and

(b) the fees payable for the release of an investigation document for any purpose.

(3) For a pre-commencement death or pre-commencement fire, the State Coroner has the functions and powers of a coroner under the *Coroners Act 1958*.

(4) In this section–

***investigation document*** includes a document obtained under the *Coroners Act 1958* that is similar in nature to an investigation document as defined under this Act.

***pre-commencement death*** means a death–

(a) that was reported to a police officer or coroner before the commencement of this section; or

(b) in relation to which an inquest was held before the commencement of this section, but reopened after the commencement.

***pre-commencement fire*** means a fire in relation to which–

(a) a coroner has formed the opinion, before the commencement of this section, that an inquest should be held; or

(b) the Minister has, before the commencement of this section, directed a coroner to hold an inquest; or

(c) a person who requested that an inquest into the fire be held had complied with the *Coroners Act 1958*, section 8(1)(c) before the commencement of this section."

[118] Section 100 of the 2003 Act commenced on 1 December 2003.[99]

[119] The objective of statutory construction is to give the words of a statutory provision the meaning which the legislature is taken to have intended them to have. The task begins and ends with the statutory text, construed in context, and within the framework of the rules of construction. The relevant context includes the statutory purpose, as the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.[100]

[120] The relevant context and purpose of the 2003 Act, including section 100, is to be derived from the text and structure of the Act as a whole.[101]

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99 *Coroners Act* 2003 (Qld) s 2(2); Proclamation - Coroners Act 2003 (commencing remaining provisions), subordinate legislation 2003 No. 296.

100 *Wakefield & Ors v Commissioner of State Revenue* [2019] QSC 85, [47]

101 *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56 at 388-390 [23]-[25] (French CJ and Hayne J).

[121] The statutory context of the 2003 Act was set out by Applegarth J in *Hytch v O'Connell* [2018] QSC 75 ("*Hytch*") at [15]-[16]:[102]

> "[15] The 2003 Act made significant changes to the coronial system. A "principal object of the Act was to establish the position of the State Coroner. The newly-established State Coroner's functions include the following:
>
> "(a) to oversee and coordinate the coronial system; and
>
> (b) to ensure the coronial system is administered and operated efficiently; and
>
> (c) to ensure deaths reported to coroners that are reportable deaths are investigated to an appropriate extent; and
>
> (d) to ensure an inquest is held if—
>
> (i) the inquest is required to be held under this Act; or
>
> (ii) it is in the public interest for the inquest to be held; and
>
> (e) to be responsible, together with the Deputy State Coroner, for all investigations into deaths in custody; and
>
> (f) to issue directions and guidelines about the investigation of deaths and for other matters under this Act; …"
>
> [16] Other objects of the 2003 Act were to:
>
> - require the reporting of particular deaths; and
> - establish the procedures for investigations, including by holding inquests, by coroners into particular deaths."

[122] Considering the Act as a whole, notwithstanding that it self-evidently was intended to effect significant changes to the entire coronial system on and from 1 December 2003, the legislature enacted transitional provisions in Part 6 of the Act.

[123] Within those transitional provisions, the legislature saw fit, in section 100, to carve out and define circumstances in which the 1958 Act remained in force as if the 2003 Act "had not been enacted", and to provide the State Coroner all the functions and powers of a coroner under the 1958 Act.

[124] Applegarth J in *Hytch* determined that death in section 100(4) of the 2003 Act should be given its ordinary meaning, rather than any extended meaning so as to include a "suspected death".[103] Applegarth J considered the circumstances in which the meaning of "pre-commencement death" might apply. His Honour relevantly observed:[104]

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102 *Hytch v O'Connell* [2018] QSC 75, footnotes omitted.
103 *Hytch v O'Connell* [2018] QSC 75, [45].
104 *Hytch v O'Connell* [2018] QSC 75, [42]-[43].

> "[42] In my view, each part of the definition of "pre-commencement death" in s 100 has separate work to do. The first limb is apt to cover a case in which an actual death was reported to a police officer or coroner before 1 December 2003, but an inquest had not been held into the death before that date.
>
> [43] The second limb of the definition might apply to a case in which an actual death was not reported, but in which there were inquiries by police and also a missing person inquiry undertaken by a coroner pursuant to s 10 of the 1958 Act into the cause and circumstances of the disappearance of the missing person. Those inquiries might lead the coroner to conclude that the missing person was dead, and to be of the opinion that the person died either a violent or unnatural death or in such circumstances as to require an inquest be held. Such an inquest would be into a "death", not a suspected death. However, it would not necessarily be the result of the report of "a death", as distinct from the report of a missing person, to a police officer or coroner."

[125] Applegarth J then considered the explanatory notes to amendments effected to section 100 and concluded:[105]

> "[50] I doubt whether the extrinsic material illuminates the present issue of statutory construction. As earlier discussed, s 100(4) of the 2003 Act has a sensible operation if the word "death" is given its ordinary meaning. It would permit the State Coroner to continue to investigate a case in which a person who had disappeared had been the subject of a missing persons inquiry held by a coroner under s 10 of the 1958 Act. The State Coroner would be permitted to continue that investigation by virtue of ss 11(5) and (6) [of the 2003 Act] if the case was one of a "suspected death". If, however, what had commenced as a missing persons inquiry under s 10 culminated in the conclusion that an actual death had occurred, then s 7 of the 1958 Act permitted an inquiry by a coroner into that death, and s 7B of the 1958 Act permitted the coroner to hold an inquest into such a death if the coroner had reasonable cause to suspect that the person had died either a violent or unnatural death or that the person had died in such circumstances as to require an inquest to be held. In such a case the inquiry being undertaken by a coroner or the inquest being held by the coroner under the 1958 Act would be in relation to a "death". The introduction of what became of s 100(3) permitted the newly-established State Coroner to undertake the functions and power of a coroner under the 1958 Act in such a case. At the date of each of the decisions until the Initial Inquest was formally reopened, Coroner Fisher's finding that Mr Anthony Jones had died on 3 November 1982 had legal effect."

[126] In this case, Coroner Fisher found in 2002 (prior to the commencement of the 2003 Act) that Mr Anthony Jones is deceased and that he died on or around 3 November 1982 at the hands of a person or persons unknown.[106]

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105 *Hytch v O'Connell* [2018] QSC 75, [50].

106 Affidavit of Michael Prowse filed 25 July 2018, exhibit MGP1, p 6-9.

[127] Two possibilities arise to satisfy a pre-commencement death pursuant to section 100(4) of the 2003 Act:

1. A death that was reported to a police officer or coroner before 1 December 2003; (first limb);

or

2. A death in relation to which an inquest was held before 1 December 2003, but reopened after 1 December 2003 (second limb).

***There was a death in relation to which an inquest was held prior to 1 December 2003***

[128] In my view the circumstances of this case fall into the second limb.

[129] The applicant's submissions, at times, proceed from the erroneous position that section 100(4)(b) requires there to have been an inquest into "the death".

[130] It is notable that the legislature deliberately adopted the words "a death in relation to which an inquest was held".

[131] The phrase "in relation to" is of wide and general import and should not be read down "in the absence of some compelling reason for so doing".[107]

[132] Ordinarily the phrase "in relation to" is designed to catch things which have a sufficient nexus to a subject.[108] What is sufficient (in the sense of relevance and appropriateness) will depend upon the particular statutory context.[109]

[133] In this context the legislature contemplated that the 1958 Act would continue in force for certain types of inquests under the 1958 Act which had occurred prior to the enactment of the 2003 Act.

[134] It is noted that under the 1958 Act "inquest" means any inquest, including any reopened inquest, under this Act, and includes an inquiry pursuant to section 9 or 10.[110] As Henry J stated in *Wright*, an inquiry under section 10 of the 1958 Act is one of four different types of inquests for which the Act provides:[111]

1. an inquest into a death (section 7B);

2. an inquest into a fire (section 8);

3. an inquiry where a coroner has reason to believe a death has occurred, but the body has been destroyed or cannot be recovered (section 9); and

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107 *Fountain v Alexander* (1982) 150 CLR 615 at 629 (Mason J), cited with approval in *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at 440 [217] (Kiefel J).

108 *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 330 (Toohey and Gummow JJ), cited with approval in *Kennon v Spry* (2008) 238 CLR 366; [2008] HCA 56 at 440 [217] (Kiefel J).

109 *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 330 (Toohey and Gummow JJ).

110 *Coroners Act* 1958 (Qld) s 5 (definition of "inquest").

111 *Wright v The State Coroner* [2016] QSC 305, [7].

4. an inquiry into a missing person (section 10).[112]

[135] The question is whether the legislature intended that only inquests into a death under section 7B of the 1958 Act were to fall within the meaning of section 100(4)(b) of the 2003 Act.[113]

[136] Had the legislature so intended, it could have easily defined "pre-commencement death" as being an inquest into a death or otherwise referred to section 7B of the 1958. It chose not to do so. Instead of narrowing the scope of pre-commencement death, the legislature deliberately chose to provide a wider application by the use of the term "in relation to".

[137] If the words "in relation to" are to have any work to do within that context, they could only refer to "inquiries" or "inquests" under section 9 or 10 of the 1958 Act that, by reference to the word "death", resulted in a finding that a person was deceased.

[138] That was the case with Mr Anthony Jones. The finding of his death was (directly) connected to and associated with the holding of the inquest into his disappearance.

[139] The actual death, for the purposes of section 100(4) of the 2003 Act, is not a death at the time when the inquiry first commenced. It is a death as at 1 December 2003. It matters not that the findings of the initial inquest can be set aside and substituted upon the inquest being reopened.

[140] As was identified by Applegarth J in *Hytch*, "a well-established principle of construction is that words and sentences are not to be treated as superfluous or insignificant, and that all words must, prima facie, be given some meaning and effect".[114]

[141] If the second limb was only intended to cover circumstances where there had been an inquest into a death prior to 1 December 2003, it adds nothing to the first limb.

[142] That is, it is inconceivable that that any inquest into a death prior to 1 December 2003 would not have been reported to a coroner. The construction of "pre-commencement death" contended for by the applicant would give the second limb no work to do.

[143] Instead, I accept that the preferred construction is that the legislature intended to carve out from the operation of the 2003 Act all circumstances in which a death had been inquired into in some manner by a Coroner under the 1958 Act:

1. inquiries into deaths under section 7 of the 1958 Act as, by necessity, these deaths must have been reported to a coroner prior to 1 December 2003 (under the first limb as these are not "inquests" and thus would not fall under the second limb);

2. inquests into deaths under section 7B of the 1958 Act (under both limbs); and

3. inquiries under sections 9 and 10 of the 1958 Act that result in a finding of death (under both limbs or alternatively solely the second limb).

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112 Included in the definition of "inquest" in *Coroners Act* 1958 (Qld) s 5.

113 The legislature sought fit for inquests into a fire to be separately defined in section 100 of the 2003 Act (meaning of '***pre-commencement fire***').

114 *Hytch v O'Connell* [2018] QSC 75 at [40].

*The inquest was lawfully reopened after 1 December 2003 pursuant to section 47 of the Coroners Act 1958 (Qld)*

[144] The second limb requires:

1. a death in relation to which an inquest was held before 1 December 2003;

2. but which was reopened after 1 December 2003.

[145] The reopening of the inquest crystallises the application of the second limb. In this case the inquest was reopened pursuant to the 1958 Act.

[146] The question was raised if there is a "death… in relation to which an inquest was held", under what Act is it required to be reopened: the 1958 Act or the 2003 Act?

[147] Ultimately it is of no consequence in relation to this application. Because, even though the inquest was opened under the 1958 Act, it could have been validly reopened under either section 50 or 50A of the 2003 Act.

[148] Section 100 of the 2003 Act is not patently clear on its face and the explanatory notes do not assist. The second respondent's submissions encapsulate the question that arises:

> "Very difficult question arises whether it can be reopened under the old Act, which technically doesn't apply and is otherwise repealed, unless there is a pre-commencement death. But the second you get a pre-commencement death, only the '58 Act applies. And so the question is could it be reopened under the old Act, or did it have to be reopened under the new Act? And therefore, as at that point in time, from then on, the '58 Act applied. And it's a difficult point, because on its face, one would think, if the old Act's repealed for all intents and purposes until we get a pre-commencement death, once it is to be reopened it must be reopened under the old Act, and then the '58 Act applies. But we submit[115]
>
> ...
>
> Yes, which would be – which is not what occurred here, and that's one construction. The other construction is it could be reopened under the '58 Act, the old Act through, in effect, putting – it's a chicken and egg situation, and we submit that you do construe it for reasons that we put in our written submissions as to if you had to reopen it under the new Act, first you actually create some patent distinctions for the purpose of that reopening which do not fit within the scope of the '58 Act.
>
> A good example is it's compartmentalised under the new Act. If you want to reopen something, you actually say, "I want to set this finding aside", and a finding is a who or a what or a how or a where, and you might say, "I want to set aside not the fact that this person died, but how they died or when they died." And so you actually apply to set aside that finding. And the inquest is then reopened, if you're successful, to look into that finding, and everything else stands. Or a new inquest in its totality can be ordered,

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115 Transcript of the hearing on 7 June 2019, p 69, line 25-35.

> but that's in the discretion of the State Coroner. Now that compartmentalising view of different findings does not fit within the '58 Act then applying for all intents and purposes thereafter, because that will then permit, in affect, everything to be on the table. That's, for example, one argument. The others are in my written submission, which I can take your Honour to."[116]

[149] The second respondent acknowledges that a construction that allows for the inquest to reopened under the 1958 Act when the 1958 Act has been repealed is a bold argument.[117] However, the second respondent sets out strong reasons why such a construction should be preferred.

[150] Essentially, the second respondent submits that the application and operation of the 1958 Act would be fettered if the 2003 Act is required to reopen to the inquest.

[151] The reopening provisions are materially different in the 1958 Act compared to the 2003 Act. Practical and legislative absurdities thus arise when the 1958 Act applies to an inquest that has been reopened under the 2003 Act.

[152] The 2003 Act contemplates a more compartmentalised process of reopening through the setting aside of an individual finding or findings.[118] It is not the case that the entire inquest is necessarily reopened with all findings open for reconsideration.[119]

[153] In the 2003 Act, the power to reopen inquests is derived from section 50 and section 50A. These sections provide the power to set aside a finding and:

1. reopen the inquest to re-examine the finding made under section 45 of the 2003 Act; or

2. hold a new inquest.

[154] Sections 50 and 50A of the 2003 Act only allows a reopening to re-examine the finding, thus potentially limiting the application of the 1958 Act, which provides for the reopening, without qualification of the inquest. In contrast, section 100(4) of the 2003 Act is not limited to reopen the inquest to re-examine the finding.

[155] Further, a new inquest is not in contemplation within section 100(4) of the 2003 Act. Section 100(4) of the 2003 Act expressly refers to an inquest which is reopened after commencement of the 2003 Act.

[156] Section 100(1) of the 2003 Act states that the 1958 Act continues to apply to a pre-commencement death as if the 2003 Act had not been passed. Such an express statement by the legislature is inconsistent with the inquest having to be re-opened under the 2003 Act.

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116 Transcript of the hearing on 7 June 2019, p 69 line 42 to p 70 line 11.

117 Transcript of the hearing on 7 June 2019, p 70, line 22-23.

118 A finding is a reference to those matters outlined in section 45(2) of the *Coroners Act* 2003 (Qld): *Hurley v Clements* [2010] 1 Qd R 215; [2009] QCA 167 at 234 [29] (McMurdo P, Keane JA and Fraser JA).

119 *Coroners Act* 1958 (Qld) ss 50, 50A.

[157] Also, theoretically, a person could successfully apply to the State Coroner or the District Court under section 50 of the 2003 Act for the reopening of a finding into a cause of death but not the finding that the death had occurred. However, once reopened, section 47(3) of the 1958 Act would inconsistently permit the coroner to reject all previous findings. Such an outcome is incongruous.

[158] It is noted that an application under section 50 of the 2003 Act may result in the State Coroner or District Court directing the holding of a "new inquest".[120] If that occurred, arguably the "death… in relation to which an inquest was held" was not "reopened" for the purposes of section 100(4)(b), thus bypassing the mandatory requirement to proceed under the 1958 Act.

[159] The same result could be effected by the State Coroner acting on their own initiative under section 50A of the 2003 Act.

[160] That section 100 of the 2003 Act could be rendered obsolete in such circumstances supports the construction that the word "reopened" in section 100(4)(b) means reopened under the 1958 Act.

[161] It is noted that those persons with standing to apply for a reopening, and the procedure for reopening, differs between the Acts. Under section 47 of the 1958 Act only the Minister or the State Coroner who actually conducted the inquest are afforded power to reopen the inquest (the Minister by way of direction).

[162] Conversely, sections 50 and 50A of the 2003 Act do not permit any direction to be made by the Minister but instead afford power to both the State Coroner and the District Court to set aside a finding or findings and either hold a new inquest or reopen the inquest to re-examine that finding or those findings set aside.

[163] Given the 1958 Act is otherwise applicable to any reopened inquest in such circumstances, it would be an odd outcome if those provisions that relate to its reopening, including the ability to seek a direction from the Minister, were excluded.

[164] A reopened inquest under the 2003 Act could fetter the application of the 1958 Act.

[165] Further, it is noted there is no express requirement in the terms of section 100(4)(b) that the inquest be reopened under the 2003 Act. Had that been the legislative intention, it was open for those words to be included.

[166] Accordingly, where there has been "pre-commencement death", it remains subject (solely) to the provisions of the 1958 Act, including that Act's reopening provisions (save only for the effect of section 100(2)). This is the interpretation that will best achieve the purpose of section 100 of the 2003 Act.

[167] In any event, the question of which Act the inquest had to be reopened under is not determinative of this application.

[168] Even if the inquest had to be reopened under the 2003 Act, it does not make the decisions invalid. It is noted that:

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120 *Coroners Act* 2003 (Qld) ss 50(6)(a)(ii); 50(6)(b)(ii).

1. "the validity of [the decision-maker's] determination[s] is unaffected by mistaking the source of the power to make [it]";[121]

2. "the validity of an administrative act is not necessarily impugned by there having been a mistake as to the source of the power stated by the decision-maker as that upon which reliance was placed…";[122]

3. "an act purporting to be done under one statutory power may be supported under another statutory power";[123] and

4. "[w]hen a power is exercised, a mistake in the source of the power works no invalidity. Validity depends simply on whether a relevant power existed".[124]

[169] To those principles may be added the observations of Heydon J in *Eastman v Director of Public Prosecutions (ACT)*:[125]

> "…[if] the maker of an administrative decision purports to act under one head of power which does not exist, but there is another head of power available and all conditions antecedent to its valid exercise have been satisfied, the decision is valid despite purported reliance on the unavailable head of power."

[170] Heydon J's observations were endorsed by French CJ, Hayne, Kiefel and Bell JJ in *Australian Education Union v Department of Education and Children's Services*. Their Honours framed the question thus:[126]

> "Whether [the decision] can be supported by the other source of power will depend upon whether that power is subject to requirements which the decision-maker has failed to meet because of his or her belief as to the source of the power or for some other reason."

[171] An application of those principles to the present circumstances leads to the result that the decisions were not invalid due to the State Coroner's reopening of the initial inquest under section 47(3) of the 1958 Act.

[172] If the initial inquest could not be reopened under the 1958 Act, it could have been validly reopened under either section 50 or section 50A of the 2003 Act:

1. section 50A of the 2003 Act affords the State Coroner a wide discretion to reopen an inquest on his or her own initiative;

2. there are no formal procedural requirements that the State Coroner failed to meet if he was to have exercised his discretion under section 50A (as opposed to

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121 *Brown v West* (1990) 169 CLR 195 at 203 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).
122 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 618 (Gummow J).
123 *Lockwood v Commonwealth* (1954) 90 CLR 177 at 184 (Fullager J).
124 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 426 (Brennan J).
125 *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318; [2003] HCA 28 at 361-362 [124].
126 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1; [2012] HCA 3 at 16-17 [34].

section 50 which would have required an application to have been made to him); and

3. the State Coroner's discretion under section 50A turns upon his or her satisfaction of whether there is new evidence, or it is otherwise in the public interest to do so. Satisfaction as the reopening being in the public interest comprises a "discretionary value judgment made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'".[127] Upon any reopening under the 2003 Act, the prerequisites for the application of section 100(1)(a) and (3) of the 2003 Act would have been met and the State Coroner would have been mandated to apply the 1958 Act from that point on and would have been afforded the functions and powers of a coroner under the 1958 Act to do so.

[173] Even if all conditions antecedent to the valid exercise of section 50A of the 2003 Act were not met by the State Coroner, that is not the end of the matter.

[174] Setting aside the second decision would be futile[128] because, if the State Coroner determined to reopen the initial inquest under section 50 or section 50A of the 2003 Act, that reopened inquest would then immediately fall within section 100(1)(a) and (3) of the 2003 Act, necessitating the application of the 1958 Act. That is, the same result is inevitable.

**Summary**

[175] I am of the opinion that this application was not made within a reasonable time after the decision/s were made, and as such the application is refused pursuant to section 26(3) of the *JRA*.

[176] Jackson J previously made an Order in this application that the applicant bear only the applicant's costs of the proceeding regardless of the outcome of the proceeding, pursuant to section 49(1)(a) to (e) of the *JRA*.

**Order**

[177] The application for judicial review is dismissed.

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127 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).

128 *Lee v Minister for Immigration and Citizenship* (2007) 159 FCR 181; [2007] FCAFC 62 at 194 [48] (Besanko J): "In my opinion, before a Court will exercise its discretion to refuse relief on the ground of futility, it must be quite clear that a rehearing or reconsideration is or will be futile".