

TRANSCRIPT OF PROCEEDINGS

CORONERS COURT

R SPENCER, Coroner

CAIR-COR No 00000037 of 2003

IN THE MATTER OF AN INQUEST INTO THE
CAUSE AND CIRCUMSTANCES SURROUNDING
THE DEATH OF PHILLIP ALLAN WALTER TOGNOLA

CAIRNS

..DATE 15/07/2005

..DAY 3

FINDINGS

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

CORONER: This morning has been set aside for the delivery of my findings in relation to the cause and circumstances of the death of Phillip Allan Walter Tognola and I will now deliver my findings.

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An inquest having been held into the death of Phillip Alan Walter Tognola over a two day period, being the 28th and the 29th of October 2004, it is now incumbent upon me, pursuant to the provisions of the Coroners Act 1958, to deliver my findings in open Court and accordingly I do so.

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The purpose of any inquest under the Act is limited to establishing, as far as practicable:

(1) the fact that a person has died;

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(2) the identity of that person;

(3) when, where and how the death occurred; and

(4) whether any person should be charged with any offence referred to in section 24 of the Act.

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Throughout the inquest I have been mindful, amongst other things, of the observations of his Honour Mr Justice Toohey in *Ennetts v McCann* [1965] Australian Law Journal Report in which he followed the words of Lord Lane as follows:

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"It should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are not suitable for another. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial; simply an attempt to establish fact. It is an inquisitorial process, a process of investigation, unlike a trial. Although a coronial inquiry is not a judicial proceedings in the traditional sense, the rules of natural justice and procedural fairness are applicable, the content of such rules to be applied, depending on the particular facts of the case in question."

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In making my findings I am not permitted under the provisions of the Act to express any opinion on any matter outside the scope of this inquest, except in the form of a rider or recommendations. And I should also make it clear that any findings that I do make are not to be framed in any way which may determine or influence any question or issue of liability in any other place, or which might suggest that any person should be found guilty or otherwise of any proceeding. I should say at this stage that I am satisfied on the whole of the evidence before me that there is no evidence upon which any person should be committed for trial on any of the charges referred to in section 24 of the Act.

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I would like to express my personal sympathy and condolences, as well as those of the Court, to Phillip's parents, Keith and Erica Tognola, as well as other members of Phillip's family, at their sad loss. I have no doubt that appearing at this inquest was a difficult, painful and confronting experience. The issues canvassed in this inquest are incredibly emotive and tragic.

I would also like to thank Sergeant Michelle Dodds, who investigated this matter. Her investigation was as thorough an investigation as possible. She left no stone unturned, no possible evidence was left unexplored and all significant and relevant witnesses, including experts, gave evidence. Together with my assistant, Mr Tate, evidence and other most crucial information was gathered and placed before the inquest to enable me to be absolutely confident that findings could be definitive and recommendations hopefully far reaching.

One direction hearing was held in this matter on the 24th of June 2004. A total of 46 exhibits were received into evidence and ten witnesses were examined over the two days of the inquest.

The incident giving rise to this inquest occurred on the 19th of April 2003 at 6 Maina Street, Woree, Cairns; Phillip Tognola lived at 4 Maina Street, Woree with his parents. The residence at 6 Maina Street, Woree is situated on the southern side of Maina Street. The property was purchased by Con and

Minca Coronis in approximately October 2002. This residence is a bessa block home and has an inground pool at the rear of the property. The pool had no separate pool fence other than the premises boundary fences and gates. Access to the pool was via sliding doors from the dwelling-house. There was no self-closing mechanisms or self-locking mechanisms. An 1800 millimetre high timber paling fence was constructed on both side property boundaries and at the rear property boundary. The side fences end in line with the front of the dwelling. Double gates from the dwelling to the fence on the right-hand side close at the carport. These gates were lockable but not self-closing nor self-latching.

A Cairns City Council report (Exhibit 33) indicated that a fence, which had previously separated the dwelling residence from the swimming pool, had been removed. Direct access from the dwelling to the pool could be gained through the rear doors of the dwelling. Further, access could also be gained by the left-hand side of the yard. Three openings in the concrete block wall allowed access into the yard. The external staircase adjacent to this wall, which leads to the second story of the house, also allowed access through the stair gaps. The evidence was that when Mr and Mrs Coronis purchased the property. The prior owners had placed metal stakes behind the decorative openings of the concrete block wall to the left-hand side of the dwelling apparently to stop access through the openings into the rear of the pool area.

Some three weeks prior to the incident, the pool pump on the swimming pool at 6 Maina Street broke down. A large amount of water was subsequently pumped into 4 Maina Street.

Mr Tognola, in his statement, stated that he got his 14 year old stepdaughter to go to the concrete fence and climb through the gap in the wall to allow her to get into the rear of the yard to open the carport gates. This allowed entry into the yard and turn the pump off. At about 2.40 p.m. on the 19th of April 2003, the deceased child was playing in the back patio area while Mr and Mrs Tognola were with a computer salesperson, Mr John Bleakley, inside the residence. Upon Mr Bleakley's departure at about 3.15 p.m., Mr Tognola called out to locate the children and ran upstairs to check the bedrooms. He immediately ran straight back down yelling the words, "Phillip's floating face down in the next-door pool." He immediately ran next-door and tried to get through the gates. He climbed over the lattice work adjacent to the boundary fence.

The residence of the premises, which is approximately two houses from the Tognola residence, Mr Neil McAlloon, was requested by a number of girls next-door for a pair of bolt cutters as they needed to cut the gate of the house next to the Tognola's. Mr McAlloon, who had some First Aid certificates, went to the residence and jumped over the fence where the deceased child and Mr Tognola were. He attempted CPR, after clearing the deceased's airways by putting his fingers down the deceased's throat and then turning him on his

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side. He then passed the deceased over the fence to Mr Tognola, who was on the street side of the residence, waiting for the ambulance.

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Queensland Ambulance Intensive Care paramedics Lara Darby and Peter Schnell arrived at 3.26 p.m. and, after a brief conversation with Mr Tognola, commenced CPR. A monitor was set up to monitor cardiac activity; no cardiac activity was detected. First response treatment was continued and Ms Darby administered adrenalin, but the deceased displayed no vital signs. The deceased was then transported to the Cairns Base Hospital.

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A postmortem examination was conducted on the 23rd of April 2003 by Dr Maxwell Stewart. The autopsy report is produced to the inquest as Exhibit 4. The doctor expressed the opinion that the medical cause of death was drowning due to or as a consequence of fresh water immersion.

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Kerry Maggs, a senior building officer with the Cairns City Council, in his report (Exhibit 33) said that the pool fence was approved on the 7th of July 1983 and finished on the 6th of December 1994. His inspection on the 23rd of April 2003 found the pool fence that had been previously approved had been replaced and that the new fence did not comply with division 4, part 5, section 62 of the Standard Building Regulations in that there was direct house access and access to the public through a lattice panel at the left-hand side of the dwelling. He said the premises required:

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(a) a pool fence to be constructed between the dwelling and the pool from the side boundary to the side boundary, incorporating a self-closing or self-latching gate opening away from the pool area, to give access;

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(b) the double gates in the back right-hand corner needed to be made to open outwards away from the swimming pool and be self-closing and self-latching;

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(c) the timber pickets in the fence had been damaged or had come loose; needed to be repaired.

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Dr Robert Pitt, a qualified paediatrician and specialist in Emergency Medicine attached to the Mater Hospital, gave very detailed and sobering evidence of the dangers of swimming pools. In summary he said:

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(a) In Australia, the number of home swimming pools is high.

(b) Over the past 10 years the Queensland Injuries Surveillance Unit, of which he has been a director since its incorporation in 1988, in their injury bulletins, has shown a reduction in toddler drownings is possible and that swimming pool fencing is said to be the most effective life saver.

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(c) In 1991 there was an estimated 13,200 swimming pools and spas; in 2002, the office of Economic and Statistical Research established that approximately 310,000 homes in Queensland had outdoor swimming pools or spas.

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(d) Child drownings in Australia account for one quarter of all pediatric injury deaths and is the most common cause of traumatic death for children aged 1 to 4; and approximately all drownings involving children under the age of 5 occurred in residential swimming pools.

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(e) Between 1992 and 2001, 73 children aged under five died as a result of drowning in residential swimming pools; it is also estimated that for every child taken to hospital emergency departments there are ten near misses.

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(f) Of the 73 deaths, 21 percent drowned because the swimming pool was not fenced; 46 because they gained access through the fence, that is, the gate was defective in some form; 13 percent gained access through defective house doors; and in 4 percent the method of access was unclear.

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(g) The Brisbane City Council instituted a Splash Program about two years ago, which involved employing a staff of 12 at an annual cost of about \$790,000 to carry out inspections and issue on the spot fines; an estimated \$300,000 was recouped through on the spot fines.

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The evidence of Mr Tabulo, the general manager of City Development, an arm of the Cairns City Council, was: 1

(1) That from an audit of the Cairns City Council records it is established that there are 9,136 swimming pools under the Cairns City Council area. 10

(2) In this year's operational plan, the building services area undertook to do an audit of pool fences by December 2004. 20

(3) That the council and building services area wears two hats, that is:

(a) actual development and assessments conducted by council officers and private certifiers; and 30

(b) direct compliance checks or regulatory checks when requested to do so by owners or by way of complaint. 40

(4) The Cairns City Council has no system of random inspections, although the issue has arisen for consideration; and contact was made with other local authorities about their procedures on this point. 50

(5) No prosecutions have ever been taken by the Cairns City Council against noncompliant fence owners.

(6) That the documents issued by the Department of Local Government and Planning do not clearly set out who is the enforcing authority in respect of swimming pool legislation.

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(7) That one of the major impediments to enforcement of requirements associated with swimming pools is the right of the council officers to access private property.

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(8) That the estimate of 40 to 50 percent of pools being noncompliant was fairly accurate.

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The principal advisor with the Department of Local Government and Planning, Sport and Recreation, Mr Peter O'Rourke, outlined the interaction between the State Government responsibility to produce legislation and the power of local governments to override State legislation, provided local laws are more stringent than those of the State legislation. He further explored the department's view on the interaction between local authorities and private certifiers.

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David Farmer, the Chief Executive of the Cairns City Council, after detailing the council's records system, said no complaint had been made to the council about the pool at 4 Maina Street prior to the incident, the subject of this inquest. He admitted that council records may be deficient regarding pools built pre1980 and those built illegally, that is those built without a certificate of compliance. He then

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dealt with random inspection programs, which had been talked about during the course of the inquest, and that which he has had some experience with. He told the inquest:

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(a) That they were expensive.

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(b) That they were disruptive.

(c) The councils could not agree or implement them without Government legislation.

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(d) The legislation primarily gives the primary responsibility regarding fences and pools to the owner of the pool; and the State or Government intervention involves what he termed "a significant leap in public policy".

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(e) He says that a random inspection regime would be difficult to implement, but at a practical level and at a political level, because of what I call the invasion of privacy type issues.

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In relation to the council's lack of prosecution he said it was largely historical. He agreed with the following proposals:

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(1) Legislation giving local authority powers to have serious defects immediately attended to.

(2) Any requirement requiring certificates of compliance being mandatory prior to settlement of any sale of property.

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Quite properly, he said, in my view, that it gives vendors motivation to ensure compliance and points out that, in Cairns, the average turnover of ownership of homes is almost is about every five years and that, therefore, this represents, in a way, a random inspection of properties each five years. He described it as a "politically palatable and a genuinely feasible situation". He likened it again with the legislation requirement to have a roadworthy certificate for transfer of a motor vehicle registration. He commented on the Brisbane City Council random inspection programs.

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Effectively, he said, that in raw figures it may sound effective but the figures show that they are only inspecting a little bit over 1 percent of the properties. What needs to be looked at is a risk analysis and the resources required to reduce the risk.

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I would say that Mr Farmer's evidence certainly raised many issues to be considered in this vexed area. His contribution to the inquest and debate generally was most constructive. I think he summarised the issues correctly, that society has to make a judgment of what point it wishes to maximise its intervention in private affairs, that is the public good versus private affairs. Under questioning from myself about the issue of the on the spot fines he said, "It would be fair to say that at a senior level and at council level, the

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discussion has not been had as to the appropriateness of
punitive powers versus encouragement. And I think clearly, as
a result of this inquest, that would be an appropriate thing
to do."

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I therefore make the following formal findings in this
inquest:

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(1) I am unable to make any precise finding as to how the
deceased got into the pool area, there is simply no
direct evidence on this point. The inference that I have
drawn is that access to the swimming pool at 6 Maina
Street, Woree by the deceased child occurred because the
relevant fencing did not comply with the building
standards set in place by the relevant legislation.

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(2) The identity of the deceased was Phillip Allan Walter
Tognola.

(3) His date of birth was 1 March 1998.

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(4) His last known address was 4 Maina Street, Woree.

(5) At the time of death he was a child.

(6) His date of death was the 19th of April 2003.

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(7) The place of death was the Cairns Base Hospital.

(8) The formal cause of death was drowning.

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I make the following recommendations and request that such recommendations be provided to all Federal, State and Local Government departments responsible for swimming pool construction and fencing in the hope that each and every recommendation will be taken positively and acted upon with a view to preventing any further waste of life and further distress to families and friends. These recommendations are as follows:

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(1) different regulations apply to pool fences, depending on whether it was built before the 1st of February 1991; between the 1st of February 1991 and the 29th of April 1998; between the 30th of April 1998 and the 30th of September 2003; and on or after the 1st of October 2003. Different legislation applies to each of these periods.

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Full details are set out in a document produced by the Department of Local Government and Planning entitled "Guidelines for the Interpretation of Swimming Pool Fencing Requirements." Although the document is extensive, it highlights the maze and complexity of legislation that intending pool owners must comply with, for example, the Local Government Act, the Building Act, the Building Act Amendment Act, the Local Government Swimming Pool Fencing Amendment Act, the Standard Building By-laws, the Standard Building Regulations, the Integrated Planning Act and various Australian standards.

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I recommend that the Queensland Parliament consider providing a single piece of legislation containing an uniform set of rules and requirements relating to the construction and fencing of pools, irrespective of their date of construction. I appreciate that this might require retrospective legislation, but I believe it is justified to protect the life of children.

(2) That local authorities institute a system to identify all properties in their local authority areas which have swimming pools, both inground and above ground. For example, a highlighted tick box on rate notices requiring each rate payer to identify if a swimming pool is on that particular property to which the rate notice relates, which may ensure an accurate or a better database than currently exists.

(3) As previously recommended by the Deputy State Coroner in 2002, legislation to require a compulsory inspection of all properties and issue of a certificate of compliance with pool fencing legislation prior to settlement of all properties.

(4) I recommend that the Queensland Law Society and the Real Estate Institute of Queensland review the standard contract of sale to provide a mandatory condition that a certificate of compliance and clearance be received from the local authority before any premises having a swimming

pool be settled and that settlement not able to be effected until there has been full compliance. 1

In respect of this aspect, I also recommend that this be reinforced by legislation, requiring the certificate to be produced to the Department of Natural Resources before registration of a transfer is perfected. 10

(5) That the Australian Standards which relate to swimming pools be updated and upgraded. 20

(6) That all local authorities be required by legislation to institute a regular system of inspection of swimming pools (whether they be random or not) to ensure compliance by pool owners. 30

(7) Legislation giving local authorities appropriate powers to have serious defects attended to immediately as the current legislation allowing 24 hours to rectify defects allows a dangerous situation, when a swimming pool is full of water, to remain as an unacceptable risk. And 40

(8) That all local authorities, and in this matter the Cairns City Council, be required to compile policies, practises and procedures and inspections regarding applications for the approval of domestic swimming pools and implement the same. 50

(9) That all local authorities implement a more proactive inspection campaign on existing swimming pools and their compliance with all legislation.

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(10) An awareness campaign be undertaken by all authorities, both State and local, to promote training on resuscitation techniques, and an awareness to home owners of the extreme dangers of swimming pools and young children.

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(11) That all local authority websites provide information or links to the relevant information relating to the swimming pool legislation and requirements.

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(12) That legislation clearly set out the right of enforcement officers to enter private properties to monitor compliance.

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(13) That the local authorities utilise their powers to issue on the spot fines in order to create an awareness by property owners of their obligations to comply with fencing legislation.

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Again I would like to thank my assistant, Mr Tate, and Sergeant Dodds for their valuable assistance in this inquest. I would also take the opportunity of thanking all the parties and their legal advisors for their contribution to this inquest. I therefore, on that basis, close the inquest.

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CORONER: I will make a direction that, subject to any requirements that have to be met in terms of payment of fees, that copies be available to all parties.

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JENNIFER MARGARET KITE APPOINTED AS RECORDER

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