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TRANSCRIPT OF PROCEEDINGS

CORONERS COURT OF THE AUSTRALIAN CAPITAL TERRITORY

MS M. DOOGAN, CORONER

CF No 154 of 2003

INQUEST AND INQUIRY

INTO

THE DEATHS OF DOROTHY McGRATH, ALISON MARY TENER, PETER BRABAZON-BROOKE, AND DOUGLAS JOHN FRASER, AND THE FIRES OF JANUARY 2003

CANBERRA

11.07 AM, FRIDAY, 19 MAY 2006
(Continued from 7/5/2006)

THE CORONER: Good morning, please be seated. Yes, thank you. Yes, gentlemen. Mr Craddock, Mr Gibb.

MR GIBB: Yes, may it please your Honour, I seek leave to appear with
5 my learned friend, Mr Craddock, for Mr McRae.

THE CORONER: Yes, that leave is granted, Mr Gibb, thank you.

MR GIBB: Your Honour, the purpose of the submissions that I'm about
10 to make is to make good the grounds on which, on behalf of Mr McRae, we challenge reception of the further evidence which counsel assisting have given notice of contention to reduce from David Tener and Amanda Taylor in the inquest into the death of Allison Tener and as to the cause of Mrs Tener's death and to adduce from Kerry Taylor, Kay Tobin and
15 Wendy Farrawell in the inquest into the death of Dorothy McGrath as to the cause of Mrs McGrath's death.

THE CORONER: Just before you go on, Mr Gibb, I presume that - I have read your submission and I presume that you propose to speak to the
20 written submission and I take it that there's no objection from anyone if that submission is tendered into evidence.

MR GIBB: No, your Honour. I will be speaking to the submission in a little more detail than the outline case.
25

THE CORONER: Yes. We'll just tender that submission. So the outline of submissions by Mr McRae with respect to the reception of further evidence, which is dated 17 May 2005, will become Exhibit 0131.

30

#EXHIBIT 0131 - OUTLINE OF SUBMISSIONS BY MR McRAE DATED 17 MAY 2006

35 MR LASRY: 2006 not 5.

THE CORONER: Did I say 5?

MR LASRY: I think you did.
40

THE CORONER: I beg your pardon. 2006.

MR LASRY: We also have provided our learned friends with a submission in reply, which I understand they have and was transmitted to
45 your Honour. So it might be appropriate to tender that at this stage as

well.

THE CORONER: And again I presume there's no objection to submissions - outline of submissions by counsel assisting concerning the further evidence?

MR GIBB: No, your Honour.

THE CORONER: There's no objection to that being tendered as well?

MR GIBB: No objection.

THE CORONER: Might as well do that at the same time. And that's undated but received yesterday's date?

MR GIBB: Yes.

THE CORONER: So dated 18 May, or received on 18 May. So that submission by counsel assisting will be Exhibit 0132.

#EXHIBIT 0132 - SUBMISSION BY COUNSEL ASSISTING THE CORONER

THE CORONER: Yes, thank you Mr Gibb.

MR GIBB: Your Honour, I will assume for the purposes of these submissions that your Honour is familiar with the material to which I've just referred. I don't propose to go through statements statement by statement. Your Honour, if your Honour's read them, will be familiar with what they contain and the way in which they're framed.

THE CORONER: Yes, I have.

MR GIBB: Your Honour, needless to say, we don't challenge counsel assisting's submission which is at paragraph 1,325 of their submissions dated 2 April. But at this stage, the evidence would not permit your Honour to find that what they describe as a lack of adequate warning by, amongst others, Mr McRae was a cause of these two deaths. What we do challenge is not only the propriety and the utility of your Honour receiving that further evidence, both generally and more particularly at this stage, of each inquest, but also the capability of the further evidence, even if received to permit your Honour to make any such finding to the standard of proof required and where the matter that would be the subject

of the finding would be very serious and would suggest criminal conduct on Mr McRae's part. We stress that each of the submissions that we make are submissions of law, not simply submissions as to the facts.

5 Your Honour, subject only to your Honour formally concluding the inquest into each death my making the formal findings which your Honour is obliged to make under subsection (52)(1) of the Coroner's Act 1997, which of course include a finding as to the cause of death and which findings, we respectfully submit, your Honour has already sufficiently and
10 properly made as interim findings which, pursuant to section 53 of the Act, your Honour made in the inquest into each death as long as go as on day 8 on 16 October 2003, and subject only to your Honour before formally concluding the inquest into each of those deaths, commenting, if you choose so to do, on any matter connected with either death, including
15 public safety, pursuant to section 52(4), your Honour will then become functus officio with regard to the inquest into each death.

However, if in reliance upon the further evidence in either inquest and before formally concluding the inquest, your Honour were to find that
20 what counsel assisting described as a lack of adequate warning by, amongst others, Mr McRae was a cause of death of either Mrs Tener or Mrs McGrath, then we would respectfully submit that such a finding would be beyond the parameters or permissible scope of this inquest, as well as being an impermissible finding because it would be incapable in
25 law of being sustained by the evidence including further evidence. Its tender in each inquest would therefore be a futile exercise, and for those reasons the tender should be rejected. That is our first submission. I'll come back to expand on that in a moment.

30 Our second submission is that reception of that evidence would, in the respects and for the reasons to which we will shortly refer, deny Mr McRae procedural fairness. For those reasons also its tender should be rejected. The third submission we make has two parts. The main one is that even if received, further evidence would have no probative value with
35 regard to the formal finding which it is open to your Honour to make as to the cause of death, and therefore can't rationally bear upon that matter, therefore your Honour must reject it.

Alternatively, as a subsidiary submission, even if the further evidence had
40 some probative value, which we strongly dispute, its probative value is so tenuous that when weighed in the balance against the overwhelmingly prejudicially effect, which it would undoubtedly have on Mr McRae, then again as a matter of law we submit there could be one conclusion only, that is that it could not be received. For that further reason as well its
45 tender should be rejected.

Now your Honour, assuming these submissions are soundly based, if in reliance on the further evidence and before formally concluding each inquest your Honour were to find that what counsel assisting describe as a lack of adequate warning by, amongst others, Mr McRae, and was a cause of the death of either Mrs Tener of Mrs McGrath, as they have submitted in reliance on the further evidence you could and might so find, then we would submit on one or more of these grounds the making of any such formal finding would constitute a jurisdictional error, or error of law on the face of the record, in the terms in which the High Court spoke in *Craig v South Australia* (1995) 184 CLR 163 at pages 177-178.

And we would further say that either in proceedings for judicial review or else in an application brought by or under the authority of the Attorney-General for irregularity of procedure or otherwise pursuant to section 93 of the Coroner's Act, would be liable to be quashed by the Supreme Court of the Australian Capital Territory. Now your Honour, we turn then to discuss each of those grounds in greater detail.

THE CORONER: And Mr Gibb, if I understand you correctly, you're saying that that is the case based on the evidence that is already before the inquiry, let alone the additional evidence that's sought to be found.

MR GIBB: No. What I'm putting to your Honour is that the further evidence admittedly doesn't get them there. And with that evidence added to the further evidence, they still won't get there. That's the argument. I deal then with the first submission, the parameters permissible, scope, nature of findings. The essence of what your Honour can inquire into is the identity of the deceased, when and where the death occurred, and the manner and cause of death at subsection (13)(1) and subsection (52)(1)(c).

At the conclusion of the inquest, your Honour must record your findings, if possible, in relation to these matters in writing. And that's subsection (52)(1) and (3). In that regard, the distinction can be drawn between the formal findings which your Honour is obliged to make under subsection (52)(1), any findings of facts en route to those findings and any interim findings which your Honour is authorised to make under section 53.

Section 53 was said to mean that matters flowing from the inquest such as registration of a death, probate or insurance matters, would still be able to be dealt with more quickly should an inquest be adjourned, in the presentation speech made by Mr Humphries to the Legislative Assembly in relation to the Coroners Bill (1997), when it was before that body.

There is similar material in the explanatory memorandum, I don't think I

need take your Honour to that to explain what its purpose was. That extrinsic material suggests that the power to make interim findings was intended to permit a coroner to make, as your Honour did, findings on all matters to which subsection 52(1) refers, but also to permit the coroner before formally concluding the inquest to reserve, as your Honour also did, any exercise of the coroner's power pursuant to section 53(2) to comment on any matter connected with the death, including of course public safety.

As long ago as day 1, 7 October 2003, counsel assisting said at page 29 of the transcript:

> "At the end of this phase of the hearings perhaps I should say we propose to present to you, and I emphasise these words, all the evidence in relation to the inquest into the four deaths which occurred.
>
> And we expect to invite your Worship to make findings in relation to those deaths, in a sense on a preliminary basis, so that at least for the families of these people the matter will be brought to a conclusion for their benefit."

It seems to suggest that that consideration is the only consideration that is relevant when your Honour is determining the question whether you should exercise your power under section 53. We submit that's quite an erroneous appRoche, and I'll develop that argument in a moment.

Counsel assisting, and your Honour of course are not one and the same persons, but your Honour as the coroner and counsel assisting must have discussed the manner in which the four inquests and the inquiry would proceed, your Honour didn't correct that plan then and there announced by counsel assisting.

Then on day seven, 15 October 2003, page 124 of the transcript, junior counsel announced that the inquests into the deaths would commence the following day. After discussion your Honour announced that as indicated the proceedings on the following day would be an inquest into the deaths.

Counsel assisting said:

> "That is so, your Worship. My learned friend Ms Cronan will be leading that evidence and at the conclusion of that evidence we'll be inviting your Worship to read some, as it were, provisional findings in relation to those individual cases, provisional in the sense of course so far as the totality of the inquiry is

concerned …”

Whatever that may mean.

5 “ … but sufficiently final to enable finality to be brought for the families of those who are interested in the process. Your Worship will of course either do that at the conclusion of the evidence or in a few days.”

10 Then there was discussion concerning the phase 2 issues list, with the announcement by counsel assisting, page 131, that:

“It would govern the evidence and it would be intended to govern cross-examination.”

15

Then on day eight, 16 October 2003, evidence was led in the inquest, that evidence detailed the police investigation into the finding of the body of each deceased and the findings of the forensic pathologist as to the cause of death.

20

Concerning the death of Mr Fraser, page 649, junior counsel assisting Ms Cronan said:

“That’s all the evidence we propose to lead for the purpose of 25 your Worship making a preliminary finding in the inquest of Mr Fraser under section 53 of the Coroner’s Act, perhaps it might be appropriate for that finding to be made before we move on to the other evidence so that Mrs Fraser can leave the court”.

30 Your Honour then said:

“Just pending the ongoing inquiry in relation to the fire, I do not intend to make any comment regarding the circumstances surrounding the death of Mr Fraser at this time, but I may well do 35 so at a later time. But I will make a preliminary finding on the death of Mr Fraser and that finding is this, that Douglas John Fraser died between the hours of 4 pm and 6.15 pm on Saturday 18 January 2003 in the ACT. And the cause of death was most likely smoke inhalation from the fire which had entered the 40 suburb of Duffy at about 3.15pm on Saturday 18 January 2003.”

The inquests into the deaths of Mrs Tener and Mrs McGrath followed a similar course. The findings in like terms being made at page 720 of the transcript. In each instance the findings appear to state each of those 45 matters called for by section 52(1) of the Act. So we submit your Honour

was not intending to make interim findings as to the cause of death, but with a view to later revisiting - - -

HER HONOUR: Well, how can you say that when on page 720 when I make the finding in relation to Alison Tener I say again, "I will make interim findings."

MR GIBB: Yes. Well, that doesn't indicate that your Honour was going to say:

> "Well, I'll make a finding in these terms, that death was due to smoke inhalation, but three years down the track I'm going to make a new finding that in fact the cause of death was some act or omission by some person who has been given no notice that any such finding would ever be made."

HER HONOUR: Well, let me just understand what you're saying, Mr Gibb, because based on my reading of your submissions, based on what you have said so far, you're saying that my findings on the causes of death were final findings irrespective of the fact that I very clearly expressed myself that they - - -

MR GIBB: No.

HER HONOUR: Well, that's what your submissions say.

MR GIBB: No, no, that's not what I'm saying.

HER HONOUR: Paragraph 5 and 6 of your submissions say that.

MR GIBB: That's not what I'm saying and I will come to develop that in just a moment. If I've left any ambiguity I'll engage with your Honour about it in just a moment.

HER HONOUR: Because what I've read from your submissions, and the nature of your submissions, appear to imply a thought process to me as coroner which I have never expressed.

MR GIBB: There's a distinction between final in law and final in fact, and that's an important distinction to be borne in mind. And it goes to the way in which your Honour can exercise what is your Honour's undoubted judicial expression in the making of section 53 orders. In other words, one doesn't simply say that section 53 because it says "may" means that your Honour can make any interim finding that your Honour chooses to and then years down the track revoke that and make some altogether

different finding. That would be, with respect, an absurd proposition. Can I come back to the matter and I will answer directly what your Honour has just raised with me.

5 So we submit that your Honour was not intending to make interim findings as to the cause of death, but would be later revisiting cause of death and possibly finding a different cause. A difference cause I might say, your Honour, to the one announced to the world as it were, and in particular to the relatives of the deceased. Rather we submit the findings 10 as to cause of death were final and intended to be so in a factual sense, but your Honour was alive to the possibility of the power to make comments on matters connected with the deaths and determined to keep the inquest open so as to exercise that discretion if necessary at the conclusion of the inquiry into the fires.

15

Now from that analysis, your Honour, we submit counsel assisting, despite never having once directed examination of witnesses to the question of causes of any particular death, between the announcement of those findings and the delivery of submissions now wish to put a gloss on 20 what was done so as to clear the way for calling further evidence as to cause of death. The very fact that none of this further evidence was tendered during the primary hearing is eloquent to the absence of any live issue as to cause of death during those hearings.

25 So our first part of this submission is simply this, your Honour. We submit your Honour did not make findings that were preliminary, not findings that were preliminary in the sense now contended for by counsel assisting. They were not final in the legal sense, we acknowledge. But they were not preliminary in the factual sense.

30

In any event, and this is perhaps our main argument, we submit section 53 was never intended to widen the parameters or the permissible scope of an inquest, and therefore the nature of the findings which is open to a coroner to make, as those parameters and that scope and the nature of those 35 findings have been explained many times in the cases concerning coronial jurisdiction.

Section 53 confers upon your Honour an authority at any time before concluding an inquest to make an interim finding on any matter connected 40 with the inquest which could be, and in each inquest here was, in the form of a brief neutral factual statement as to the cause of each death.

Indeed each of those findings took the same theme as the formal findings your Honour is obliged to make under section 52(1) would ultimately take 45 before your Honour concludes each inquest, those findings included in

each inquest an entirely permissible finding as to the cause of death, each was a self-contained finding and subject to one matter only, to which we shall return, made with never any suggestion from counsel assisting or from your Honour, with all due respect, that despite its interim character as a matter of law, it was as a matter of fact, in some way provisional as to the cause of death.

Now your Honour, we respectfully submit that upon its proper construction section 53, when read with section 52(1), does not authorise your Honour to make such interim findings, including a permissible finding as to cause of death during the course of an inquest, and then merely because such a finding is at that stage, as a matter of law, interim only, receive before concluding the inquest further evidence, and then before concluding the inquest, replace that permissible interim finding in reliance upon the further evidence with another and formal finding as to cause of death where the matters that are the subject of the replacement finding, that a cause of death was conduct on the part of an identified person are very serious, or suggest criminal conduct or where the evidence, including the further evidence, could not in law sustain such a finding.

I hope in putting the matter that way I've clarified the submission we're putting to your Honour. That brings us to the cases on parameters, scope - - -

THE CORONER: Just before you move on to that, Mr Gibb, I just want to clarify exactly what you have said. Are you suggesting - and perhaps hypothetically speaking - let's say for argument's sake, and I stress that this is hypothetical at this stage, say for argument's sake that my findings, despite what I said about interim and what you have said about the factual and the legal context, legal findings under the provisions of the legislation, say that findings that were made by me in October of 2003 were final findings.

Now are you saying that any evidence given after I have made those findings would be inadmissible and should not be received by me, even if that evidence were, again hypothetically speaking, uncategorically and indisputably of the nature that indicated that the actual cause of death was something that was entirely different from the cause of death that I had found earlier?

MR GIBB: If they were final - - -

THE CORONER: Be they interim or final findings.

MR GIBB: Your Honour's slipping between two different concepts, with respect. If they were final findings and your Honour had concluded the inquest, then your Honour is functus officio. If they were final findings but your Honour had reserved the right to make comment, well then your Honour would still have the right to make comment, but not to make further and different final findings.

If your Honour had made only interim findings then as a matter of power your Honour could make further and different interim findings as a matter of power, but your Honour would have to consider whether the exercise of that power was acting judicially at the time that your Honour sought to act in that manner. Because the position may have been changed as result of that, and there may be certain other consequences that follow.

In other words, where you've got a situation like this, where your Honour has made, entirely appropriate with respect we would submit, interim findings, which could be final findings, they don't need anything further to be added to them, your Honour as a matter of power can say, "I scrub those and I'm going to make some new ones". But whether that's an exercise of power judicially, whether that's a permissible exercise of your Honour's power, is the matter we put in dispute here.

THE CORONER: This is what I want to clarify, because just taking your argument one step further, and still speaking hypothetically, and I stress again this is hypothetical, let's assume that irrespective of whether the findings are interim or final findings, in a coronial jurisdiction, in a coronial inquiry which is still continuing, and I still regard this as continuing in the evidence there may be the possibility of further - - -

MR GIBB: I'm sorry, I have to interrupt your Honour, if I may. One can't ignore the distinction between interim and final. One can't say, "Irrespective of whether they're final", or "Irrespective of whether they're interim".

THE CORONER: Well, I'm not talking about my findings, I'm speaking hypothetically. In a coronial jurisdiction, a coroner has made findings, interim - - -

MR GIBB: What sort of findings?

THE CORONER: Be they interim or be they - - -

MR GIBB: No, with respect, your Honour is begging the question.

THE CORONER: Well final, let's hypothetically say final findings. A

coroner has made a final finding at a stage of an inquest which is not yet completed. So findings, as say this type of an inquiry, where there are deaths and there are issues that also have to be considered, and let's assume that final findings in relation - for your sake, final findings have been made in relation to deaths, and medical evidence has come to light subsequent to those final findings that a deceased, say, suffered a fatal heart attack prior to his or her house being engulfed by fire.

Now it seems to me that what you're submitting, that in such a situation, the earlier finding, final findings be they, hypothetically speaking, that the death was caused as a result of fire should stand despite the fact that incontrovertible evidence that that finding was wrong has been presented. Now is that what you're submitting?

MR GIBB: Yes, it is. If it's a final finding. And I stress that there is a distinction which must be observed between what's a final finding and what's an interim finding. If it's a final finding then your Honour is functus officio if the inquest has concluded and it's a matter for another place.

THE CORONER: But what other place is there? It's the coronial jurisdiction.

MR GIBB: The Supreme Court has jurisdiction to make - or the setting aside a finding on appropriate cause being made.

THE CORONER: But would that not make a complete mockery of the coronial process?

MR GIBB: Not at all. If, as your Honour did here, your Honour makes interim findings, then your Honour can come back to those findings, subject of course to questions such as those that I'm about to take your Honour to, and look at the matter again. But that's not what happened here. What we're talking about here is a simple, straightforward findings as to cause of death in the normal terms that your Honour would make, made expressly on an interim basis, and then we're being told that your Honour, on the basis of what your Honour already has perceived, plus this further evidence, your Honour will be able to say, well that's all scrubbed. We're now going to make a finding about some particular named person's cause of death.

Now that's something we submit your Honour can't do, on the proper construction of the way these sections are intended to operate. And can I develop that argument? Your Honour, if one looks at the cases on matters of parameter and scope and findings, one finds support for this argument.

Lord Lane has described the process of the Coroner's Court as follows:

> *It should not be forgotten that an inquest is a fact finding exercise, ...*

And I stress these words.

> *... and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one, are not suitable for the other. 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 facts. It's an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance of the ring, whatever metaphor one chooses to use.*

One finds that, as I understand it your Honour, in the *R v South London Coroner ex parte Thompson* (1982) 126 Solicitors Journal 625. And if one looks at that report they won't find the passage there. But it is referred to by Simon Brown LJ as having come from that case in the case of *R v East Sussex Coroner ex parte Homberg*(?) which is to be found in (1994) 158 Justice of the Peace cases 357, and one will find that passage extracted at 372 of his Lordship's judgment.

Now your Honour, it's also conventionally said not to be the role of the coroner to determine or to appear to determine any question of criminal or civil liability, to apportion guilt or to attribute blame. The Supreme Court of the ACT, whose decisions are of course binding on your Honour, recently reaffirmed as much as regards the role of a Coroner in this jurisdiction and in regard to this very matter. And I refer your Honour to the decision in particular at paragraph 12.

Further, as Bryson J as he then was, put it in *Quinlan v The Deputy State Coroner*, which is a New South Wales case (2000) NSWSC 434. I think that's now in fact recorded in the New South Wales Law Reports, reference being one that I'll give you a moment, if I may.

In that case his Honour said, this is at paragraph 1:

> *An inquest is not an occasion for investigating offences or untoward behaviour or events which do not bear on the manner of death.*

Now while a key part of your Honour's function is to enquire into the manner and cause of death, to use the terms of the section, it's not your Honour's function to enquire into the underlying responsibility for every circumstance that might have contributed to the death. So it was, your Honour, that in the case I mentioned earlier, *R v East Sussex Coroner*, at page 371 of the report in Justice of the Peace cases, Simon Brown LJ held that, and I quote his Lordship's words:

> *It was wrong to incorporate within the verdict itself whatever in the way of contributory causes could ultimately found a successful civil liability claim, that would in my judgment broaden and complicate the appRoche to inquest verdicts beyond any possible compensating advantage.*

And once again, the Supreme Court of the ACT has itself already spoken, in a binding way, at paragraph 15 of the judgment in this matter, with obvious regard to section 52 in terms that:

> *It does not provide a general mechanism for an open-ended inquiry into the merits of government policy, the performance of government agencies or private institutions, or ...*

And I stress these words.

> *... the conduct of individuals even if apparently related in some way to the circumstance in which the death or fire occurred.*

But your Honour our submissions go beyond what might be described as those generalities, important as they are. Not without some significance, we submit, is the fact that there is no express provision in the Act for a finding that a person contributed to the cause of another person's death. However, we acknowledge that there is authority elsewhere, in particular in Victoria, where since 1999 there has also been no express provision for such a finding, when formally there had been, which authority may support the proposition that the findings of a coroner as to the manner and cause of death should, where that is possible, identify any person who contributed to the cause of death.

And we've referred your Honour to *Keown v Kahn* (1999) 1 VR 69 and the passage to that effect in Callaway J's judgment at page 76. Now the rationale for that may have more to do with a practice surviving legislative change or the special kinds of inquests where such an issue might legitimately arise, rather than it being regarded as an integral part of the public inquiry into the manner and cause of death, that it should involve

some assessment of whether the death occurred through the agency, intervention or involvement of some person or entity.

But whatever may be the true position, reference to the cases where this subject has been discussed reveal serious difficulties which may result from such an undertaking, more specifically your Honour as to how background circumstances are to be distinguished from those in the foreground when it's said that a person contributed to the death of another.

Those difficulties, we would respectfully submit, dictate that great caution should be exercised by your Honour, at least in this jurisdiction, before you embark upon this kind of inquiry in order to ascertain such an undertaking is capable in law and to the reckless standard of proof in this jurisdiction of permitting the making of such a finding. That is to say, the finding which identifies a person who contributed to the cause of death.

We submit that that need for caution is particularly high when circumstances where, firstly, as here, on no view could it be put and accepted, even we submit in reliance on the further evidence, that any person played a direct role in causing either of these deaths so as to justify a finding that the conduct of some identified person was a cause of death. And secondly, where the cases in which this kind of inquiry have been and may perhaps justify that it be undertaken, I'm referring to the Victorian cases, have been ones where it has been possible to identify a person who indubitably played a direct role in causing the death of another person without, at the same time, any suggestion of criminal conduct or civil liability being made in the finding.

Can I illustrate, your Honour, some of the difficulties that arise. An example is one that's not in apposite to the kind of further evidence which counsel assisting now wanted to adduce. And it's found in the case of *Secretary Department of Health and Community Services v Gurvich* (1995) Volume 2 VR 69 where Southwell J linked the concept of contribution to the cause of death closely to that of negligence. He determined in the report of page 74 that before a professional person can be found to have contributed to another's death within the course of his or her professional duties the coroner must arrive at:

> *Comfortable satisfaction that negligence has been established which contributed to the death.*

Now what his Honour there stated about the standard of proof in this jurisdiction is well established, and we wouldn't for one minute quibble with it. However, it's unclear whether his Honour's reasoning extends beyond professional persons to others within the community, and if not,

how widely, "Professional persons", as a designation is to be construed.

If it extends to all categories of persons found to have contributed to the cause of death, then the distinction between a civil finding of negligence and a finding of contribution to cause of death threatens to become almost nugatory. And for that reason we would respectively submit that the appRoche which his Honour took to contribution to causation of death is erroneous and certainly should not be followed in the Territory. It's well established that coroner's findings, as we've said, should avoid assessment suggestive of civil liability.

We submit that a coroner in this jurisdiction has no business attributing responsibility for a cause of death to a named person whether or not he's a professional person. Nevertheless, a finding of this kind is precisely what counsel assisting now submit that your Honour could or might do in reliance upon the further evidence. And we simply say, your Honour, that your Honour should decline counsel assisting's invitation to fall into legal error in their connections.

The difficulty that's created by Southwell J's decision was itself subsequently recognised, but not finally resolved, in another Victorian decision of Hedigan J in an appeal against the state coroner's decisions in one of the Victorian senatorial inquests in to fatal shootings by police, in a case called *Chief Commissioner of Police v Hallenstein* (1996) 2 VR 1. Hedigan J held at page 16 that:

> *The criterion of civil liability to found contributions is inconsistent with the principle driving the obligation to announce the necessary findings, namely, to state the essential facts found.*

His Honour made clear at page 19 of the report that there should not be a finding of contribution to death by anyone "*on the basis that it's arguably so or simply because of a person's employment*." That observation has particular relevance to the standard of proof that is required in this jurisdiction as well as to the quality of the evidence which counsel assisting may seek to adduce and upon which a coroner is invited, such as your Honour is, to make very serious findings.

The state coroner in that case had found that two main police officers contributed to the circumstances in which a reasonably foreseeable shooting had occurred, but without explicitly determining that the police should have foreseen that their conduct unreasonably threatened the safety of a person in the position of the victim. And that was the vice that the coroner's decision contained and which was identified by Hedigan J on the appeal. So his Honour decided in effect that in coronial findings

foreseeability of risk of injury to another person is not the sole determinant of contribution to cause of death.

And our submission is that at the end of the day, even if further evidence were received, that is all that your Honour will have. Merely evidence that you already have that these deaths may have been foreseeable, not that the conduct of any of the persons concerned, including Mr McRae, was a cause of those deaths. And I'll develop that submission further shortly.

But on this question of contribution further and perhaps more helpful analysis of the meaning of contribution to cause of death came from the Victorian Court of Appeal in the *Keown v Kahn* case that I mentioned earlier. That was a decision that related to an inquest finding that a deceased woman was the sole contributing cause of her own death and its corollary that the policeman who fatally shot her had not contributed to her death as he was justified in shooting her in his own self-defence. In addressing the appRoche which links this notion of contribution to culpability Callaway J at page 76 in paragraph 16 said:

> *In determining whether an act or omission …*

And I emphasize the word "Omission".

> *… is a cause of merely one of the background circumstances, that is to say a non causal condition, because sometimes it will be necessary to consider whether the act departed from a normal standard or the omission …*

Again, I emphasise that word;

> *…was in breach of a recognised duty but that is the only sense in which …*

His Honour's referring to the obligations to make a finding as to identity of person who contributed to the cause of death;

> *… mandates an inquiry into culpability.*

Now your Honour, we make two observations about that passage. The first is that his Honour's reference to a recognised duty was not, we submit, a reference to whether the omission constituted a breach of a duty of care which breach was a cause of death for the purposes of the law of negligence. The second is that there has been no evidence adduced before your Honour that Mr McRae was the subject of any recognised duty such

as may apply to others, perhaps police officers who discharge firearms in public places.

Callaway J, applied his analysis of the law of the facts before the court then, held that a person who kills necessarily contributes to the cause of death regardless of whether the killing was in lawful self-defence. However, he did go on to hold that this did not impede the coroner from setting out the relevant facts in the course of the finding the manner and cause of death. But that case is far removed from the inquest that your Honour is conducting into these two deaths. Where a person plays a direct role in causing death, such as by firing a gun, then he or she can and will be found to have contributed to the cause of death and a finding which relates those circumstances will be a permissible finding.

Your Honour, can we move then to the submission about the capability of the evidence? The submission is that the evidence, including the further evidence, would be incapable in law of sustaining the formal finding that what counsel assisting describe as a lack of adequate warning on the part of Mr McRae was a cause of the two deaths.

We so submit for the following reasons. While counsel assisting do make passing reference to Mr Koperberg's evidence of a two phase appRoche consisting of a general advising of the potential by the Thursday evening or the Friday morning followed by an intensive and more specific process commencing on the Friday evening, they refer to that at paragraph 1,312 of their submissions. They have not developed this notion further during the inquiry and they certainly have not adduced any evidence as to the appropriate later warning, particularly as to any which should have been given on the Saturday and before 2.00 pm that day with regard to the circumstances in which the two deceased may have then found themselves.

The warning, and indeed the only warning your Honour, which counsel assisting submit should have been given was a warning on or before 15 January that the fires, including the McIntyre's Hut fire, presented a serious risk to the Canberra urban area and rural settlements west of Canberra and that it should have included, I further submit, advice on how to prepare for that risk. That's the submission at 1,307.

Now your Honour, that submission fails to face up to the enormity of it's breadth and the complete and utter imprecision of it's enunciation. When I was a student, your Honour, I had the good fortune to be lectured by a professor in the University of Sydney in the Department of Government, as it was then known, who with Germanic precision was one who challenged arguments that weren't rigorous. And he had a habit of saying

to people who put arguments of that kind that the argument was vague, voolley(?) and vooferly(?).

We submit this submission falls into precisely that category. The first feature to notice about that formulation is that counsel assisting apparently postulate not only the giving of one warning only, but also the giving of a warning as early as three days before the deaths occurred and before the fire was anywhere near the residences of Mrs Tener and Mrs McGrath. That's the first matter.

The second feature to notice about it is that counsel assisting have been completely lacking in precision concerning the terms of the warning, which they submit should have been given, as to how recipients were prepared for that risk. None of those matters occur here. A third feature to notice about it is that counsel assisting do not specify in any way, shape or form the circumstances in which, according to the warning, the recipients could or should take particular courses of action, among which may have been either to stay and protect the recipients' property or else leave their residences, and most importantly when and how they should choose to decide to do the one or the other.

A fourth feature to notice about that formulation is that counsel assisting do not specify the meanings by which this warning should have been conveyed so that it would in fact promptly reach those to whom it was addressed, including Mrs Tener and Mrs McGrath. And there's a fifth, and perhaps most important feature to notice about that formulation, particularly given that the further evidence is to the effect that if the deceased had been advised by someone in authority to leave their residences, they would each have done so. It doesn't specify that if advised by someone in authority to do so the recipients should leave their residences.

Now to sustain a formal finding that Mr McRae's admission of the warning for which counsel assisting contend was a cause of either of the two deaths, the evidence, including the further evidence, would have to be capable of requisite standards of comfortable satisfaction for this jurisdiction, that firstly the time when it should have been given, the warning contained clear and specific advice as to possible courses of action which the recipient's could and should take in their particular circumstances, including those circumstances in which the deceased found themselves before 2 pm on 18 January as to whether to stay and protect the recipient's property or to leave their residences, and when and how they should choose to do so.

Secondly, that if the warning had been conveyed by those means it would

in fact have promptly reached those to whom it was addressed, including Mrs Tener and Mrs McGrath. Thirdly, that if they had received the warning both of them would have promptly acted in conformity with the warning, at the time conformity with it was required in order to prevent their deaths. And fourthly, that if each of then had promptly acted in conformity with the warning at that time neither of them would have died.

Now your Honour, we submit that the further evidence, whether standing alone or in combination with the existing evidence before you, is simply incapable of establishing anything more than that if at some particular but identified time, which not even counsel assisting are prepared to specify, either Mrs Tener or Mrs McGrath had been advised by anyone in authority that they must leave their residences, they would probably have done so.

However, that alone is incapable, we say, of proving the chain of other matters, the proof of which would be necessary before your Honour could make the formal findings that the failure to give the warning for which counsel assisting contend, whatever that may be, was a cause of their deaths.

That chain of other matters would be that at some time, which not even counsel assisting are prepared to specify, Mr McRae should have given a warning, the content of which again not even counsel are apparently prepared to specify, recipients to whom it was addressed, including Mrs Tener and Mrs McGrath, could and should leave their residences which course of action, yet again not even counsel assisting are apparently prepared to specify.

But if Mr McRae had conveyed that warning by means which, once again, not even counsel assisting are prepared to specify, Mrs Tener and Mrs McGrath would have promptly received it and each of them would have promptly acted in conformity with the warning when conformity with it is required, by each of them leaving their respective residences and that if each of them had done so neither of them would have died.

Now your Honour in the absence of there being evidence capable of proving each and every one of those matters in the chain of causation, well clearly there is not, and there won't be even with further evidence, even if the further evidence is received by your Honour over our objection, the reception of the further evidence will be a futile exercise with regard to a formal finding as to cause of death that departs in no way from the interim finding that your Honour has already made.

In any event, we submit that on Mr McRae's evidence, there being no other evidence that he had responsibility for anything, counsel assisting

are limited by that evidence at the highest against him, if anything against him at all, which we don't concede, to submitting that he ought to have observed at some particular time, which hasn't been identified, that it was time for a warning to be given and to pass that information on to his superiors for them to determine whether, how and when to warn.

Mr McRae's evidence that it was never any part of his job to determine what to say or how to say it, and that's at transcript 3,353, 55 and 56, has never been contradicted and there's no reason not to accept it. That's all we want to say about that point.

We move then to the question of procedural fairness. Procedural fairness or a duty to act fairly has been synonymous with natural justice, Australian law now prefers the term procedural fairness because as Sir Anthony Mason said in *Kioa v Minister for Immigration and Ethnic Affairs*, which is at 159 CLR 550 at 585:

> *It more aptly conveys the motion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.*

And your Honour understands that Coroners Courts have a duty to comply with the rules of natural justice, a matter much discussed in the case of *Annetts v McCann* (1990) 170 CLR 596, particularly at 598 to 603, 608 to 610, and at 617, and your Honour also knows and understands that coroners are obliged to act dutifully.

That means, amongst other things, that coroners are bound to provide a fair hearing to persons who may be adversely affected by their findings, that's simply the altaram partum(?) rule. And a duty of procedural fairness arises because the power involved is one that may destroy, defeat or prejudice a person's rights, interests or legitimate expectations, it's a matter much discussed in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

A notion of the same or a similar kind is presumably what lay behind the decision in *R v Coroner for Southward ex parte Hicks* in 1987 1 WLR 1624, where it was held that fairness dictated that documents of consequence referred to at an inquest should be shown to the person at risk of being held responsible for the death that was the subject of that inquest, and no doubt the same concept lies behind counsel assisting's decision to make the further evidence available to the legal representatives of Mr McRae.

Now your Honour, the principal basis upon which a witness before an

inquest can decline to answer questions is by invoking the privilege against self-incrimination. The traditional common law version of that entitles a person to be excused from answering questions which tend to place the person in jeopardy of serious criminal proceedings, and that is a fundamental common law principle applicable to all courts including Coroners Courts, and there is a Victorian decision saying precisely that, it's *R v Coroner ex parte Alexander* (1982) VR731 at 735.

And clearly the Coroners Act 1997 has not purported to take it away, either expressly or implied. On the contrary, the Act in particular in section 48(2) and (3) has been drafted on the footing that the privilege exists and continues to exist. And in respect of the privileges application in coroners' hearings the tendency, certainly in New South Wales, but I believe wider than that, was formerly for a witness for who had genuine risk of self-incrimination not to be called at all. That is to say, to allow the witness to refuse to answer questions at all.

The version of the privilege found in the Evidence Act 1995 in section 128 is one where a certificate can be granted compelling a witness to give incriminating evidence but providing protection against the words uttered being used in other proceedings. There was, your Honour, a decision of Adams J in New South Wales in a case called *Decker) v State Coroner of New South Wales*, which I think is the decision I was thinking of that is now reported in NSWLR in (1999) 1 NSWLR, I'll get the page for you later if I may, which was to this effect, that the provision in section 33 of the Coroners Act 1990 of New South Wales, which is in substance the same as section 47(1) of the local Act, to the effect that the coroner is not obliged to follow the rules of evidence and procedure.

And the investigative responsibilities imposed on a coroner had the consequence that the section 128 procedure would be inappropriately imposed on a Coroner's Court, that decision would probably have also been picketed in the ACT because of the adoption of the Commonwealth legislation and therefore in this court, but for the fact that we have here of course specific provisions applying to this court which have been enacted to clarify the coroner's right to obtain necessary evidence and to identify a witness's right to decline to incriminate himself.

So you have under subsection 48(2)(a) the fact that a coroner may - not shall, may - require a witness to answer a question put to the witness. And you've got under 48(3) a record of evidence made from the inquest or inquiry is not only because of such a record admissible in any court as evidence that the person made the deposition and included it in the record. But then there's an out in section 48(4), it says that 48(3) doesn't apply in relation to the prosecution for an offence against part 7 of the Criminal

Code, chapter 7, which deals with administration of justice offences.

Now your Honour, section 48(3) is curiously drafted. One possible view of it is that because, firstly, it refers to a record of the evidence given rather than the actual evidence, and because secondly it doesn't operate to render the actual evidence given inadmissible but only the record of it, it leaves open the possibility that evidence given before a coroner and treating admissions and other material of an incriminating matter might still be receivable in subsequent proceedings against the witness who gave that evidence. One view.

The other possible here is that despite the curious drafting of 48(3) it appears that it was intended to, or perhaps does, mirror or else at least to a large degree the operation section 128 of the Evidence Act 1995 of the Commonwealth. Nevertheless, in our respectful submission, 48(3) would only apply in circumstances where a coroner had required a witness to answer, assumed 48(2), not where the witness answered voluntarily and without obligation to do so.

So your Honour, clearly in the case of Mr McRae, your Honour made no such requirement of him before he gave his evidence, and counsel assisting never submitted that your Honour should have acted to make it clear that your Honour was requiring him to answer pursuant to section 48(2). Indeed your Honour, we would submit that he was lulled into a false sense of security by counsel assisting's phase 2 issues list, which was settled before he gave evidence and was stated to contain the only relative issues.

If one looks at that list it somewhat benignly refers to issues in the context of community education, that's paragraph 3.1, community warning systems, 3.2, information and warnings, 5.4, 6.4, 7.3, without the faintest hint that those issues encompassed a formal finding that the conduct of some identified person was a cause of these two deaths.

Now before counsel assisting referred your Honour to the material on further findings on factors contributing to the death, that's paragraph 8.1.1, we submit that the only reasonable construction of that reference is that they'd intended to refer to the reservation which your Honour made with regard to your right to comment on the deaths pursuant to section 54. There is no hint in that formulation of the issues that counsel assisting will either be at liberty to round on the conduct of one person as to the cause of any of those deaths, which is quite a different matter indeed.

Alternatively, if that is now counsel assisting's position, or else it's your Honour's view, then we submit that counsel assisting should have

expressly and publicly informed your Honour, and the legal representatives that the persons potentially affected of that at the time the issues were settled, so that your Honour could decide whether the hearing should not proceed and, if appropriate, comply with the requirements of section 58 of the act for referral to the DPP. And otherwise, as the section describes, instead persons potentially affected subsequently questioned or not afforded the grounds to seek the opportunity ought to exercise their right to invoke the privilege, with the result that their position, including that of Mr McRae, has now been irremediably prejudiced. And even if this occurred without counsel assisting bearing some of the blame, the prejudice would only be compounded by receiving the further evidence in what we submit must inevitably be a futile attempt to persuade your Honour that the failure to warn, for which counsel assisting now contend, was a cause of the two deaths.

Negligence can give rise to liability in respect of a number of crimes, of which manslaughter appears the most significant. In the ACT, as your Honour knows, an unlawful homicide which is not murder is manslaughter under section 15(1) of the Crimes Act. There is in the electronic version of Hallsbury's Laws of Australia, 1991 paragraph 1303630, a very useful, commendably economical, summary of the law regarding manslaughter by criminal negligence, and that's to this effect: "In common law jurisdictions, an offender is guilty of manslaughter where debt is caused by a criminally negligent act or omission," and I emphasise the words "omission".

> "Negligence is a wrongful failure to observe a standard of case that an ordinary person in that situation would adopt. The degree of negligence required for the offence of manslaughter is very high and is greater than the standard requirement for civil liability. The act must be done with such a great falling short of the standard of care which a reasonable person would exercise, it must involve such a high risk of death or grievous bodily harm would follow and that the doing of the act merits criminal punishment. "
>
> The test is an objective one based upon a reasonable person's appreciation of the risk of death or grievous bodily harm. The act must be done consciously and voluntarily, but the offender need not be aware of the risk. The act need not be unlawful and negligence must be a direct and substantial cause of death, although it need not be the sole cause. Death caused by a negligent omission is not manslaughter unless the offender is under a duty of care to the victim. The duty must be a legal one imposed by statute or common law and must tend towards the

preservation of life."

Now in this jurisdiction section 11 of the Criminal Code provides that offences consist of both physical and mental elements, both of which must be proved, that's section 12, section 17 provides a fault element which include negligence in relation to a physical element. And section 21 provides that a person's negligent in relation to a physical element if the person's conduct merits criminal punishment for the offence because it involves and then it adopts those two alternatives that I've referred to, such a great falling short of the standard of care that a reasonable person would exercise in the circumstances. And such a high risk that the physical element exists or will exist.

Now your Honour, we make this submission. It is now abundantly clear that counsel assisting submit that the evidence given before your Honour by a number of persons, including Mr McRae, as to their beliefs concerning when the fire might impact urban Canberra and as to the adequacy of warnings, would go to establish the necessary court element for manslaughter by negligence and provide evidence of some links in the chain of causation between the acts or omissions of those persons and these two deaths.

What counsel assisting have now submitted to your Honour is also highly relevant, that the risk of self-incrimination as it now confronts these persons, including Mr McRae, because those submissions you've accepted only highlight the risk. Some examples, false advice. It's been submitted that Mr Lucas-Smith and Mr McRae "independently or in consultation" determined not to warn Canberra residents of what they saw to be "serious or even likely risk". That's at 1250 of the submissions.

But by the end of 16 January 2003 Lucas-Smith, Castle and McRae were involved in "serious and deliberate omission in warning Canberra residents." Paragraph 1252. The afternoon media release of 17 January was "a further illustration of the implementation of a decision, and it's caused by persons unspecified, but obviously including Mr McRae, "to conceal from the people of the ACT the true position concerning the seriousness of the risk from the fires." That's at 1270. And that by midday on 18 January "the ESB and Messrs Lucas-Smith, Castle and McRae in particular are continuing knowingly to withhold vital information from the people of the ACT and Canberra." And they failed to give a full and frank account of the potential from the fires. That's at 1299.

Now your Honour, our submission is very simple. Had counsel assisting opened these two inquests, and that's what we're talking about, the two

inquests, or indeed the inquiry to your Honour, by foreshadowing that they would or might adduce evidence in the form of the further evidence which they now want to adduce, and in reliance upon which they would or might submit that your Honour could or might make a formal finding that what they describe as a lack of adequate warning by, amongst others, Mr McRae was the cause of the two deaths, then Mr McRae's legal advisors could and would have advised him then and there of his right to decline to answer questions by invoking the privilege against self-incrimination of common law.

In those circumstances Mr McRae would probably not have been entitled to the benefit of section 128 of the Evidence Act. But he may have been entitled to the benefit of section 48(3) of the Coroner's Act, whatever may be it's true legal effect, and could and would have been so advised. Now the fact that counsel assisting now seek to adduce the further evidence, after your Honour had otherwise concluded the reception of evidence relevant to a formal finding as to the cause of death, and in the inquiry, and was in the process of receiving or being about to receive submissions, that is to say that what one may fairly describe as the heel of the hunt so to speak, means that if counsel assisting were now to be permitted to adduce the further evidence Mr McRae could suffer irreparable damage, not only in terms of potential criminal liability as a result of having given the evidence to your Honour without having been properly so advised before he did so, but also in relation to other potential liabilities.

The only way in which that result can now be avoided is by your Honour rejecting the tender of this evidence. Prejudice to the persons concerned simply can't be remedied by resort to section 55 of the Act which precludes your Honour from including in any finding a comment adverse to a person identifiable from the finding unless your Honour has adopted certain procedures and so on. To use an appropriate phrase, the horse has already bolted. In any event even if that stage had now been reached, we would be making the same submission then, as we do now, that is to say that no comment adverse to Mr McRae should be made in the sense that no finding can, and therefore should, be made that any omission on his part was a cause of the two deaths. If your Honour can't, and therefore shouldn't, make such a finding after invoking section 55, your Honour should not make such a finding at any time before formally completing these inquests.

Your Honour, there's a second respect in which, and a second reason why, the reception of the further evidence would deny him procedural fairness. Had counsel assisting directly indicated that cause of death by reason of lack of adequate warning by him was a live issue, not only would he have either, to use the vernacular, taken the fifth, or else had an opportunity to

decide whether or not he should or would do so, but he would also have challenged, or would have the opportunity to decide whether he should or would do so, witnesses whose evidence might have touched upon that issue.

Now while our learned friends might say that this denial of procedural fairness might be cured by recalling such witnesses as Mr McRae might wish to challenge, this would have the potential to significantly prolong the inquests and the inquiry more than it already has. Neither Mr McRae nor his counsel appeared during the course of the giving of that category of evidence which would include all those witnesses who gave evidence touching upon the process of determining the timing, content and means of delivery of community information such as the Messrs Lucas-Smith, Castle and Keady, as well as Ms Harvey, and all of whom have concluded their evidence before Mr McRae has even had the benefit of separate representation. It would also include Mr Bartlett who was an incident controller on 18 January, who flew over the fires, spoke to the relevant personnel and didn't instruct anyone to issue a warning.

This submission, your Honour, addresses the situation if your Honour is against our submission that the finding for which counsel assisting contend that a lack of adequate warning by others could and might be a cause of the two deaths would not, on the evidence including the further evidence, be open. Of course, if you accept our submissions to that effect we don't need to rely on this procedural fairness submission for the result for which we contend, namely that the further evidence shouldn't be received.

Your Honour, that brings me then to the final submission with regard to probative value of the further evidence. Your Honour, as we have previously noted your Honour is not bound to apply the rules of procedure and evidence which apply in other courts of record, and that means that normally objections as to admissibility based on the common law or statutory laws of evidence are not particularly helpful at inquests. And indeed the freedom from the constraints of the rules of evidence is an inquisitorial aspect of your jurisdiction that sometimes has been described as one of it's advantages. On the other hand, of course, summary and speedy hearings are also highly desirable objectives in this as in any other jurisdiction.

Be all that as it may, we submit that the preferable view is that all decision-makers, including coroners, should not act on material that has little probative value but significant prejudicial effect. In a case called *Straker v Queen* (1977) 15 ALR 103 by way of illustration the High Court held that a medical practitioner should not have been allowed to speculate

on the possibility that a deceased person may have been subjected to anal intercourse shortly before or after death. Jacobs J in that that case at 114 said:

5 *In many circumstances, an expert witness is entitled to explain the steps by which he reaches his expert opinion but he's not entitled to speculate on the possibility directly relevant to the issue or to a fact at issue when the speculation is adverse to the interests of the accused persons and when there is no evidence which would support a* 10 *conclusion that the fact was established.*

Your Honour, we say what his Honour was talking about there is analogous to the position which has been reached with regard to the evidence including the further evidence that counsel assisting had given 15 notice of intention to adduce. The discretion to exclude that kind of material in a civil context where the rules of evidence do apply was something that was suggested by Kirby J, as he then was, as President of the New South Wales Court of Appeal in a case called *Polycarpou v Australian Wire Industries* (1995) 36 NSWLR 49 64-5, and of course is 20 now specifically provided for in section 135 of the Evidence Act.

Now while the rules of evidence need not be applied by your Honour in this jurisdiction, we submit that those who exercise judicial functions need to be vigilant in the use that they make of evidence of low probative value 25 and that there should be substantial compliance with the notion that only reliable evidence should form a basis for formal filings including, in this instance, formal findings as to the cause of death. The rules of evidence obviously provide a useful yard stick for distinguishing between what's reliable and what's unreliable. Obviously the question has to be resolved 30 in a way specific to each instance and that depends on the probative value of the evidence in question.

However, we submit that the relevant rule is likely to be applied by courts superior to this court in looking at the way in which findings are made. 35 Therefore, they should be applied by coroners to exclude material that logically can't bear on the matter in dispute. That brings me, your Honour, to why we submit the further evidence has no probative value. Declarations of persons as to their intention to act in a particular way, even if they are not those of a party, are admissible in civil cases under 40 statutory exceptions to the hearsay rule and probably also in criminal cases under an ill-defined exception to that rule.

But what your Honour is being invited to receive here in this further evidence, is not evidence of that character at all. Not a single one of the 45 witnesses gives evidence about either of the deceased ever stating what

she would or would not do if she had been given the warning for which counsel assisting contend. Of necessity, those witnesses could not give such evidence because the circumstances in which they were invited to speculate, as invited to speculate they were, as to what the deceased would have done, were never and still haven't been spelt out with any precision by counsel assisting.

Instead, what you have in those statements is the witness simply speculating in a vacuum on what the one or other of the deceased would have done if at some identified time in unspecified circumstances, she'd been advised by someone in authority to lease her residence. Now your Honour, it's not surprising that each witness speculates that the deceased would have left her residence if advised by someone in authority to do so rather than staying to protect her property from the fires.

Not even the issues as to when or in what particular circumstances otherwise form part of the background against the witnesses are being invited to speculate. Yet any other prediction as to what either of the deceased would have done other than that each would have left her residence, would with the benefit of hindsight have implied that neither deceased had any regard for her own life or limb or perhaps that if either had been prepared to stay and protect her property in those circumstances, then she must have been suicidal.

Now your Honour, who would likely imply that about a deceased spouse, family member, relative or friend? The relevant question is what would the deceased have done in the particular circumstances in which she found herself at a particular time and when. Not, which may be much easier to answer and is inevitably also being addressed in this evidence, what a reasonable person would have done in those circumstances and at that time.

The question was apparently posed to each witness in the abstract without specificity or precision as to time or particular circumstances within which to ground even speculation. And there's guidance from the highest authorities on this point, your Honour, because in civil cases the High Court has repeatedly warned about the dangers of accepting a plaintiff's own evidence concerning what he or she would have done if he had been warned about some risk or advised to take some course of action.

For example, *Chappel v Hart* in 1998, 195 CLR 232 at 246, McHugh J had this to say:

> *Human nature being what it is, most plaintiffs will generally believe that if he or she had been given an option that would or*

might have avoided the injury, the option would have been taken....

And I emphasise these words.

... the reliability of their evidence can only be determined by reference to objective factors, particularly the attitude and conduct of the plaintiff at or about the time when the breach of duty occurred.

More recently, your Honour, in *Rosenberg v Percival* which is in 2001, 205 CLR 434, Gleeson CJ warned that 441-2 paragraph 16, as follows:

In the way in which litigation proceeds, the conduct of the parties is seen through the prism of hindsight. A foreseeable risk has eventuated and harm has resulted, but at the time of the conduct, there may have been no reason to single it out from a number of adverse contingencies, or to attach to it significance it later assumed.

Recent judgments of this court have drawn attention to the danger of a failure after the event to take account of the context before and at the time of the event in which the contingency was to be evaluated.

And we emphasise this passage, your Honour:

This danger may be of particular significance where the alleged breach of duty of care is of failure to warn about the possible risks associated with a course of action where there were at the time strong reasons in favour of pursing the course of action.

Now your Honour, without specificity as to time or precision as to circumstances, how could one ever reliably conclude that a person in the position of the deceased, whatever that may mean, could not, and should not and would not have stayed to protect her property, or else could or should or would have left her residence if requested by someone in authority.

It's been dangers of the very kind to which I've just referred that have led to the law being changed in, for example, New South Wales so that statements by the plaintiff after suffering the harm about what the plaintiff would have done have now been rendered inadmissible in civil proceedings under section 5(d)(3) of the Civil Liability Act 2002, except to the extent that such a statement's contrary to the plaintiff's interest.

Although evidence of statements made by the plaintiff prior to suffering the harm will be admissible subject to provisions of the Evidence Act as to out of court representations or other evidence from which it can infer that 5 it was more likely than not that the plaintiff would have acted at particular time in a particular way.

Now your Honour, the point of this diversion is this, while this civil law appRoche doesn't limit your Honour's inquisitorial powers, we submit it 10 does support the proposition that if evidence of a plaintiff in a civil case as to what he or she would have done, suffers from these dangers, how much more so the evidence of third parties such as spouses, family members, relatives or friends, who give no evidence at all of what the deceased actually stated at the particular time and in the particular circumstances 15 that are the subject of the inquiry, but simply speculate on what the deceased might have done.

A mere belief of a witness as to how a deceased would have reacted in entirely hypothetical and undefined circumstances, not rooted in anything 20 that the deceased herself stated contemporaneously with those circumstances, is, we submit, incapable of rationally affecting a decision as to how the deceased would in fact have reacted in particular circumstances.

25 Your Honour is here considering very serious findings that undoubtedly have legal and other potential consequences for those who may be affected by their making. Your Honour has, as is clear, a duty to act judiciously. In those circumstances, even though your Honour is not restricted to receiving evidence that's legally admissible, your Honour is 30 nonetheless not entitled, we submit, to act upon evidence that is not rationally probative.

It's been said on a number of occasions by superior courts when supervising conduct of inferior courts and administrative tribunals, that 35 the rules of evidence and the rationale behind them are relevant to assessing the weight to be given to any evidence. And I refer your Honour to the case of *Minister for Immigration and Ethnic Affairs v Pochi* (1990) 31 ALR 666 and particularly to what is said in that case in the judgment of Dean J at 688 and 690 with whom Evatt J agreed.

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That was when that matter was before the full Federal Court. That is, the rules of evidence are not to be ignored. Evidence which doesn't meet the standard of being rationally probative, whether because it's considered to have very slight weight only, was unsafe to receive, may be, indeed 45 should be, we submit, rejected and not relied upon. For those reasons, we

submit that the further evidence has no probative value on the limited question as to what the deceased would have done had they received, at whatever time this is supposed to have been, the warning, in whatever terms this is supposed to have been given, for which counsel assisting now contend whatever in fact they do contend.

Alternatively, even if further evidence was capable of forwarding some slight evidence as to the deceased likely response to the warning for which counsel assisting contend, whatever it may be, we submit that it would have to be weighed in the balance against the fact that the matter the subject of the finding, which this is said to refer to, that the conduct of an identified person was a cause of the deaths would be very serious, would suggest criminal conduct, as well as being incapable, as a matter of law in combination with the evidence your Honour's already received, of committing your Honour, with the comfortable satisfaction that is necessary for your Honour to feel before making such a finding, to make a finding that the conduct of the person's concerned, including Mr McRae, was a cause of the two deaths.

The result of the balancing exercise could only be that the further evidence should be rejected. Therefore we submit for that alternative reason the further evidence should not be received. Your Honour, they are our submissions. If I haven't addressed a concern that your Honour has raised, then I'm more than happy to attempt to do so.

HER HONOUR: Thank you, Mr Gibb.

Yes, Mr Lasry, do you have anything to say in response?

MR LASRY: Your Honour our submissions are set out in the written document and as express were intended to be in a sense full submissions, but let me deal with some of the matters that have been raised by our learned friend in the course of his oral submissions this morning.

As a preliminary it should be noted that the issue of warnings, as we've said in our submissions, has been a pre-eminent issue throughout this inquest. In our submissions at paragraph 14, that is, in our final submissions, we've noted that fact and indeed quoted some of what was referred to in the original opening. Paragraph 14 we submitted in the course of opening. We also indicated that the nature and timing of public warnings would be examined with some care and that has occurred.

We submitted that the evidence may suggest that the community in the ACT were not given anywhere near the information they needed to cope with this catastrophe. In our submission this is what the evidence shows.

That the reasons why proper information and warnings were not disseminated is a matter of some contention. Although a number of qualified people had expressed the view to the senior personnel in the Emergency Services Bureau that Canberra was under threat from the fires, those personnel either could not accept or were unwilling to accept - admit publicly that the threat existed.

In our submission there was no valid reason why the ACT community was not given adequate warning of the prospect of the fires burning into Canberra. Suggestions of not wanting to cause panic or not being able to be specific about exactly where and when such an event would occur do not justify the failure to give timely and informative warnings.

It is correct to say that at the outset in that opening we did not open that we intended to submit to your Honour that the lack of warnings would be open to be found as a cause of death. And of course this inquest, like any other inquest, being investigative in nature with all the other qualifications that our learned friend has applied to it, is evolving, developing as the evidence is given.

Now your Honour, the position was that throughout the inquest, that was, apart from the issue of initial response, the pre-eminent issue. Because it was also an issue obviously in the public mind, as the public mind has been recorded in the local media. It was clear that that was an issue that the public were interested in. So although not particularising the submission that we now make in our final submissions, that information and the emphasis that we placed on the issue of warnings as an issue in this inquest was apparent to all, including Mr McRae, from the outset.

Now your Honour, as to whether your Honour is functus officio as to the cause of death. And we have in our submissions dealt with that issue and referred to the judgment of the federal court in *Jovanovich*, which at the particular point referred to identifies broadly the principle. And we make the three points in paragraph 2 of our submission.

Firstly, that your Honour is conducting an inquiry rather than acting as a judicial officer resolving litigation. That is not to say that your Honour is not required to act judicially. Secondly, and perhaps importantly in view of the way in which these submissions have been made this morning, the evidence proposed to be called in the terms in which the matter was set out in *Jovanovich* will not result in a review, rehearing, variation or setting aside of the findings already made.

We, for the purpose of the debate - and I don't suggest that this was terminology that was used during the course of the proceedings, but it is

clear from analysis of the transcript that what your Honour made in effect were partial findings. It is absolutely clear that your Honour made findings which concerned, as we've called it in paragraph 4 of our submissions, the direct reason why life was extinguished in both Mrs Tener and Ms McGrath. The medical reason, if you like. And we've set out there briefly the findings that you made.

In the course of their judgment in the Court of Appeal in this Territory effecting this case, the Court of Appeal noted in relation to the phrase of the Coroner's Act, "Cause and origin of a fire", quaintly using the word, "Hendiadys", that cause and origin was not a hendiadys at paragraph 23 of the judgment. And I cheerfully admit that I was glad to hear it wasn't, but I had no idea what it meant when I first read that paragraph.

A hendiadys, as I follow it, is a phrase which conveys through two words one notion. The court went on to demonstrate that cause and origin are different things combined into the same phrase and in our submission manner and cause of death is also not a hendiadys. It would be ludicrous to suggest otherwise. And in the submissions that we have filed in paragraphs 9 and 10 we deal with that issue.

In any death, particularly deaths caused other than by deaths from illness or old age for that matter, there is an immediate cause and we give two examples in the course of our submissions. In the case of a gunshot the immediate cause of death is the medical affect of the projectile passing through the brain. In the case of a motor vehicle accident where, for example, a pedestrian is killed, the immediate cause of death is no doubt the head injury or some other serious injury that causes the death.

But that would not be described by any means as the complete manner and cause of death. Because in both of those examples one would inevitably - any coroner examining the phrase, "Manner and cause of death", would of course wish to examine the circumstance in which either the gun was fired or the car was driven. Not for the purpose of apportioning blame and not for the purpose of coming to any conclusion about criminality, but for the purpose of recording a finding as to the manner and cause of the death. The coronial process would be of no utility if the only thing a coroner was able to deal with was the immediate medical cause of death.

Our submission is that what your Honour was doing in those early stages when the evidence was given - and it needs to be borne in mind that the evidence that was given - we've referred to it by page reference at around page 620 and following. My learned friend referred to the actual dates on which this evidence was given. What your Honour was hearing was

evidence essentially about the immediate circumstances, the medical cause of death. And ultimately that was the finding that you made.

And in my submission - and ultimately really it's a matter for your Honour, because as we note in the course of the submissions your Honour no doubt has a recollection of your Honour's intention. But to the extent that there's any debate about what the wording indicates, the wording particularly in the inquests in relation to Mr Bradazon-Brooke, Mrs Tener and Mrs McGrath all carry the words, "Preliminary or interim findings." And they're set out in paragraph 7 and 8 of the submissions.

And with great respect to my learned friend, the thing I simply don't understand about his submission is that he used words like, "a finding which might," I think he said, "revoke or replace the findings that your Honour's already made."

Now leaving aside the other issues that he's raised, if the evidence were given, and if in the end your Honour was of the view that the lack of warnings was a cause of the death of these people, such a finding would neither revoke nor replace the finding you've already made. It would be supplementary or additional to it, or more expansive, dealing both with the manner and cause of death. In a sense, the thing that's being dealt with at the moment is the medical cause of death.

The exchange between your Honour and our learned friend in relation to a completely different set of circumstances arising during the course of an inquest after a finding had been made really doesn't apply, because our submissions don't suggest that your Honour should in some way vary the original cause. Our submissions suggest that, based on This evidence, it would be open to your Honour to add to it, to expand it, and that if your Honour hears the evidence and were persuaded by our argument, we would submit, dealing with the issue of causation as the Court of Appeal dealt with in the proceedings in relation to this case, there's a direct link, a direct causal link, on that view of the evidence between the lack of warnings and the death of either or both of these people. That, of course, is a matter for subsequent debate.

The other matter which is important, and I think I know what our learned friend would say because - about this - you know, hearing what I'm about to say, he would probably rely on the phrase, "practical effect" of the submission. But the fact is that there is no submission we make which urges a conclusion which leads to criminality. There's no submission that we make which urges a conclusion which leads to the existence of duty of care. Your Honour would not be permitted to make such a finding and would not be permitted to make a finding of the earlier kind. The

submission is clear in the submissions we make at paragraph 13(23). In our submission in the case of the two deaths, prima facie the lack of warning may be able to be identified as a cause of death. Hence the question arises as to whether or not this further evidence should be given.

5

Now the other matter that I want to deal with specifically is that in the course of indicating that in their submission our learned friends urge your Honour to conclude that the evidence that is not capable of leading to the conclusion we contend for, they criticise our submissions for their
10 generality or their lack of specificity. In particular my learned friend dealt with, I think, the submissions set out - paragraph 1,307 at page 478 of our submissions. And indicated that in those submissions the details and particulars of the kind of warning that we submitted should have been given were missing, and therefore the credibility of the submission and the
15 usefulness of the submission was completely flawed.

At paragraph 1,314 - and perhaps before I go to that, your Honour would not have and difficulty understanding, tedious and as difficult as it might be, the entirety of the 484 pages of submissions are relative to the issues
20 developed in them. Page 1,314, we submit to your Honour in those final submissions, that as an experienced fire-fighter Mr Roche(?) expressed the view which, in our submission your Honour should accept, that general warnings are, in fact, useful and that it is not necessary to wait until the precise point of impact can be predicted, as Mr McRae appeared to
25 believe. Mr Roche was unaware of the concept of triggers and instead described a structured process similar to that referred to by Mr Koperberg, early general but accurate warnings and then escalating the level of warning and targeting particular areas as the situation unfolds.

30 That submission is footnoted to paragraph 3.7.4.1 - - -

MR GIBBS: 2.

MR LASRY: 3.7.4.2, thank you, at page - - -

35

MR GIBBS: Page 372.

MR LASRY: 372, thank you. Under the section, in our submissions, 3.7.4, expert evidence on warnings. And in that section, in our
40 submissions, we review the evidence of Mr Koperberg, Mr Roche, Mr Nicholson, although we're critical of parts of his evidence, and in particular for the purpose of understanding what our submission is, in a paragraph dealing with Mr Roche, in paragraph 1,021, we set out in detail what Mr Roche said, detail which we invite your Honour to accept as
45 being correct and appropriate.

The realistic position, your Honour, for us to adopt in a situation like this, bearing in mind that neither of us are experts, is to put forward the expert evidence and then make submissions about the manner in which the court should deal with that evidence. And it is clear, as part of our submissions, that we have put forward this material and we invite your Honour to accept it and act on it for the purpose of coming to conclusions, making comments and reporting generally.

So to have plucked out what is, I accept, a general set of paragraphs in isolation, and then to suggest that in some way that means these submissions - one of the reasons you don't hear this evidence is because these submissions don't descend to specificity in relation to the kinds of warnings that should have been given is just plain wrong. And the entirety of the material in these submissions in relation to warnings needs to be considered, in our submission, not just by our learned friends but also, of course, by your Honour, and we would urge you to do so.

Your Honour, I'll finish in 10 minutes or so, so I'm happy to keep going. Can I come to the question of procedural fairness? In our submissions, and I won't read this because it's set out in the brief submissions in paragraphs 13 and 14, particularly in paragraph 14, we recite some of the reference to some of the history nearer the commencement of this inquest in paragraph 14 of the submissions on the current issue. We say in our submissions of April 2006 we have set out at length the concern originally expressed by the Coroner about the lack of representation for senior members of ESB at the time they gave evidence. Having been present and, we assume, understanding the options, they nonetheless gave evidence.

Now your Honour has your Honour's own recollection, and there is a record of the way in which the matter proceeded. But when you read those pages of our submissions, paragraphs 9 and 27 to 31, they summarise the history in which we expressed concern at the outset of these proceedings about the role of the ACT Government, about whether it was feasible for the ACT Government to act, in a sense, on a corporate basis for all those employed by the ACT Government, and ultimately reached a point where I think either Mr Bayliss or Mr Johnson, and the record will tell us, ultimately said that they no longer acted for the individuals. And then we went through a process where, from time to time, the individuals as usually as - with the exception of Mr Lucas-Smith, Mr Castle and Mr McRae, but as other individuals came to the point where they were going to be called to give evidence they sought legal advice.

Now that occurred in the circumstances which commenced with an opening which made it clear that we as counsel assisting, on the material that we had available to us in the brief, were going to examine very closely the issue of the lack of warnings. This is not a new issue. It's new to the extent that we, as I unhesitatingly accept, did not foreshadow the submission we'd be making at the end of the evidence, no question about that. But the issue of warnings was clear and apparent from the outset. And these witnesses including Mr McRae, must have sat through the beginning of the inquest having heard that it was going to be an issue, having seen what was on the issues list, having heard the opening, and indeed heard, I assume, and thought about, the way in which Mr Lucas-Smith and Mr Castle were cross-examined about that very issue.

Your Honour will recall, and it's set out in submissions, and I don't need to go through it, the extent to which we asked questions of both of those first two witnesses about why warnings weren't given. And it was implicit throughout that cross-examination, and it was cross-examination at times, it was certainly testing the evidence, that the lack of warnings was a significant factor in the damage that was done to the suburbs of Canberra.

Mr McRae must have considered, as he sat there listening to that, his position, which was "I was in charge of the planning section, I was involved in and am conscious of being involved in issues about whether warnings should be given." He would have been conscious about his view that certain triggers had to occur before such warnings were given. And yet he did not obtain - can I just correct that, your Honour? I withdraw most of what I've just said. I omitted to recall that at the time Mr McRae gave evidence he was in fact represented.

THE CORONER: He was, by Mr Craddock.

MR LASRY: Yes, quite right.

THE CORONER: Mr McRae gave evidence on 7 April and I think Mr McRae - or rather Mr Craddock - - -

MR LASRY: As Mr Wilbur points out to me, the real point was that at the time that Mr Lucas-Smith and Mr Castle gave evidence he was not represented and therefore on his behalf those witnesses weren't cross-examined, and we make the point in our submissions of course that an application could have been made.

And in the end the judgment about Mr McRae giving evidence of course

in a sense is all the more so by the fact that he was represented in circumstances where all of those events had occurred, and yet still gave evidence.

5 I don't accept, with respect, that it is realistic for us to have been in a position to say at that stage of the evidence, and before Mr McRae gave evidence, that at the end of all the evidence, which was of course going to be significant in its volume, we would be submitting that the lack of warnings would be submitted by us to be a possible cause of death. What
10 I do say is that the groundwork for that had been laid, the risk of that prospect certainly I would have thought to someone in Mr McRae's position would have been clear.

Now your Honour, ultimately how that matter is dealt I suppose, before I
15 leave it, is a matter for your Honour. As to whether or not your Honour was prepared to hear the evidence which we now submit your Honour should hear, whether Mr McRae should make a further application to cross-examine Mr Lucas-Smith and Mr Castle, whether your Honour would deal with that really is a matter to be dealt with as and when the
20 application is made, if it is.

But in our submission, in dealing with the issue of procedural fairness and the circumstances in which Mr McRae was in at the time Mr Lucas-Smith and Mr Castle gave their evidence, the surrounding
25 discussion about representation and the concerns expressed both by you and by us needs to be taken into account.

Your Honour, finally in relation to the issue of probative value, our primary submission about that is that that is a judgement to be made after
30 the evidence has been tested. And indeed, when you look back at the submissions that are made on our behalf, the reason why we now propose that this evidence be called is so that it can be tested to determine exactly, among other things, the probative value of that evidence.

35 My learned friend refers to particular cases, and in particular the undesirability of calling evidence where the prejudicial effect outweighs the probative value. And of course that's a phrase most commonly used in the criminal jurisdiction when the question being discussed is what a jury would make of the evidence, how they might be able to use it as
40 probative evidence, but on the other hand how they might be diverted from the prejudicial effects of the evidence away from a true verdict or an appropriate verdict on the evidence.

We're not in that situation. Your Honour's well and truly alive to the
45 shortcomings of the evidence. Your Honour has already had the

authorities in relation to this matter laid out for you. The appropriate timing for that in my submission is really after the evidence is given and in a sense that attack on the evidence as being evidence which is, I think they now say, evidence without any probative value, is after the evidence has been given. And bearing in mind, particularly in relation to the evidence affecting Mrs Tener, the contemporary circumstances may not include an utterance on the part of Mrs Tener beyond the utterances I recall that she made to her neighbour that she was frightened.

But the contemporary circumstances also include the fact that at the time Mrs Tener's body was found it was found in the bath of her house in circumstances where the warning which had been issued had included an instruction that the bath be filled, without instructions as to how to use the water in the bath, and in circumstances, and I can locate the passage its referred to in the submissions, where Mr Castle I think accepted in the course of his evidence that that particular warning was inadequate.

It might be able to be said subsequently in relation to the probative value of the evidence about Mrs Tener and the witnesses, particularly her husband who it is proposed give evidence, is that that in itself is some evidence that Mrs Tener followed an instruction because she was in the bath and apparently not understanding the use that was to be made of the water that was placed in the bath.

Now these are all matters of - really argument as to the probative value of this evidence in our submission to be made after the evidence has been called. There's no jury to be prejudiced by this. If your Honour agrees to hear this evidence then you will of course be well and truly conscious of the matters which have been raised by our learned friend in the course of his submissions. But at this point in our submission, that is not a reason to accept the evidence for the purpose of it being examined and then the debate as to whether or not our submission is able to be maintained and can continue in the course of submissions.

For those reasons, your Honour, and likewise subject to any matters that your Honour wishes to raise with me, we would submit that your Honour ought to hear the evidence on Monday.

HIS HONOUR: Thank you Mr Lasry. Yes, Mr Gibb.

MR GIBB: Your Honour, I have three, sorry, half a dozen very short reply points. Firstly in relation to the document described as the phase two issues list, paragraph 8.1.1 refereed to the word "cause" in connection with the origin of the fires. It didn't use that phrase in connection with any death. 8.1.2 talked about further findings on factors contributing to

the death. It didn't use the term "causes". We submit there's an important distinction between the way 8.1.1 and 8.1.2 were framed.

Secondly, we submit to your Honour that the Act doesn't distinguish between direct and indirect causes, those words don't appear, and nor does the word "contribution" to a cause of death appear. And I don't want to go out of the submission I've already put to your Honour in relation to that. But they're important considerations that need to be kept in mind. Otherwise your Honour, with all due respect, is going to fall into the error that the full court of the Supreme Court suggested would follow if your Honour were to embark on some general inquiry about contribution and link that to the death.

Your Honour has two distinct matters here. Your Honour has the inquests and your Honour has the inquiry. What may be legitimate to be investigated relevant to the one isn't necessarily legitimate to be investigated in relation of the other. The fact of the matter is, and my learned friend's submissions have just demonstrated this, that sooner or later, sooner or later, counsel assisting are going to have to come to grips with the huge chasm that exists between this submission that there is some relationship between adequacy of warnings, and the death of these two particular people.

Now it's all very well to talk about experts giving evidence about general warnings being useful, but that is not an answer to the problem that this evidence is going to go nowhere at the end of the day. It's not going to establish the chain of causation and it's not going to enable your Honour to make a finding with the degree of comfortable satisfaction that is required, and if your Honour procedures down that path, in our respectful submission, your Honour will fall into legal error.

The other matter that I'll just comment on briefly is, I referred to section 135 of the Evidence Act. I acknowledge that it doesn't bind your Honour because your Honour is not bound by the rules of evidence, but section 135 is quite a general section. It's not confined to criminal cases. It's concerned with the quality of evidence, whether they be in a civil case or a criminal case or somewhere else. The submission we put to your Honour was simply this, that your Honour gets some assistance from the importance of that weighing exercise on the alternative submission we put to your Honour. It's interesting to look at what that section says because it talks about the court refusing to admit evidence if it's probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party or might be misleading or confusing or cause or result in undue waste of time.

They're all the reasons why we submit this material is not going to take your Honour any further and it's going to be a complete waste of resources. They're submissions, your Honour.

HIS HONOUR: Thank you. Thank you, Mr Gibb. What I'll do - I'll take an adjournment and consider my position. I'll say not before 2.30 pm.

MR LASRY: If the court pleases.

LUNCHEON ADJOURNMENT **[1.13 pm]**

RESUMED **[2.41 pm]**

THE CORONER: An application has been made by Mr Gibb of senior counsel supported by Mr Craddock on behalf of Mr McRae that I not receive further evidence as foreshadowed by counsel assisting. The further evidence is from three persons who have already provided information which is before this inquiry in the form of taped records of conversation and one who has not.

Additional statements have been provided from these four persons, three of whom are relatives of two of the persons who died during the fires of 18 January 2003. Mr Gibb has submitted to me in a written submission and oral argument that there are three reasons why I should not receive further evidence. These reasons being, and I quote from the written submission:

> "1. The Coroner has exercised the power with respect to findings as to the cause of the deaths.
> 2. Having regard to the manner in which the inquests have been conducted, the reception of further evidence would be such as to give rise to a denial of procedural fairness.
> 3. The proposed evidence has no probative value."

Mr Gibb has submitted firstly that I am functus officio as to the causes of the deaths because, as I understand his submissions, the findings that I made on 16 October 2003 were final findings and not interim findings. And this is submitted despite the fact that I said the findings were interim in all cases. I think I used the term "preliminary findings" in the case of Mr Fraser.

Mr Gibb also submitted that my clear and stated intention was somehow not my intention. Now this is wrong. The transcript of the inquiry proceedings shows that the findings on the deaths were interim. As well in *R v Coroner Maria Doogan ex parte Peter Lucas-Smith & Anor* and *R v Coroner Maria Doogan ex parte the Australian Capital Territory,* the Full Court of the Supreme Court noted in its judgment delivered on 5 August 2005 at paragraph 2, that interim findings were made pursuant to section 53 of the Coroner's Act.

Mr Gibb has not provided me with any authority directly on point where a coroner in the course of an inquiry which has not been completed is functus officio and prohibited from receiving evidence which could be relevant in determining what a coroner is obliged by law to find, namely manner and cause of death. The first argument, in my view, is without merit and must fail.

On the issue of procedural fairness, the taking of further evidence of the type envisaged by the statements in question does not, in my view, deny procedural fairness to Mr McRae because the nature of the proposed additional evidence merely adds, potentially, to information already in evidence. In other words, there is no smoking gun here that I can see.

As Mr Gibb has acknowledged in his written and oral submission, that it is no part of a coroner's function to apportion guilt or blame. I agree. Therefore, any additional evidence can only be used by me to further assist me in establishing the truth and reaching soundly based findings. Mr McRae is in no danger of being ambushed by any adverse conclusions about him on my part, as section 55 of the Coroner's Act 1997 requires me to inform him of any potential adverse findings and allow him to make a submission or written statement. And he may also insist that such a statement be concluded in my report.

In short, section 55 of the Coroner's Act guarantees Mr McRae procedural fairness in the context of a coronial inquiry. I should at this point also make reference to a statement in paragraph 12 of Mr Gibb's written submissions that Mr McRae was offered representation only shortly before he was called to give evidence. That is not strictly correct. The transcript shows that at the first directions hearing on 16 June 2003, Mr Bayliss, from the Office of the ACT Government Solicitor, sought leave to appear on behalf of the Australian Capital Territory and foreshadowed that in relation to those employees of the Territory who were to be called as witnesses, of which Mr McRae is one, leave to appear on their behalf would be sought.

He added, and I'm quoting from page 4 of that transcript of 16 June 2003:

> "Until I see a witness list and we know which individuals may or may not be called, I can't put it any higher than that. But as employees of the Territory we would act for them in the usual course and as individuals are called, decisions can be made about the need for representation, and I've had discussion with counsel assisting in that regard and I have had some discussions already with counsel assisting."

Now subsequently, on 19 February 2004, Mr Johnson of senior counsel indicated that he was acting for the Australian Capital Territory and he went on to say firstly, and I'm quoting from page 1,185 of the transcript dated 19 February 2004 at line 25, Mr Johnson says:

> "I'm acting for the Australian Capital Territory. There is only one client. There are a number of witnesses who are coming forward, the first being Mr Lucas-Smith. There will be others. It is certainly not my intention at this stage to take one side or another on issues of that sort. In an inquiry of this sort there will be differences between witnesses. In particular in operational settings on different matters. Those persons will be called. They are all witnesses called by the inquiry, called by your Worship. Counsel assisting will question them. We are not acting for individual witnesses, we are acting for the Territory."

And then shortly after he added, on page 1,186 at line 21:

> "We are acting for the Australian Capital Territory, which is a legal entity. There are employees of the Territory who will give evidence and we will seek to defend the interests of those individual witnesses as they come forward. If there are areas of conflict, and of significant conflict, then obviously we will have to give consideration as to whether that poses a difficulty at some stage."

A little over a month later, on 25 March 2004, Mr Johnson again stated that he was defending the interests of officers of the Territory. Ultimately on 5 April 2004 Mr Craddock sought leave to appear for Mr McRae and has continued to appear for Mr McRae for the last 2 years. In short, in one form or another Mr McRae has had representation since 16 June 2003, some 10 months before he gave evidence on 7 April 2004. From what I have said thus far it will be apparent that I have not been persuaded by the arguments advanced on behalf of Mr McRae.

Now the third basis argued by Mr Gibb is that the proposed evidence has

no probative value and, notwithstanding that acting as coroner I'm not bound by the rules of evidence, it would nevertheless be contrary to prudent judicial behaviour to accept such evidence. In fact, Mr Gibb submitted, to do so could be seen as contrary to the provisions of section 135 of the Evidence Act. There is force in this argument. But on the other hand there is also force on this point in Mr Lasry's submissions that a judgment of probative value ought to be made after the evidence is given rather than beforehand.

Having said that, however, I've carefully reviewed the evidence previously given in relation to warnings and to the four deaths. As well I've read the four statements which are the subject of these submissions and have also given careful consideration to the nature of the evidence the four persons who are proposed to be called could give. And I've come to the conclusion that in the circumstances nothing that they could say would add to the detailed information already in evidence because their statements indicate that the nature of the evidence they could give would, of necessity, be speculative.

Consequently, no matter how well informed that speculation may be I do not believe that it would any further assist me in reaching conclusions on the evidence which is already before me. So accordingly I direct that the further evidence, which was proposed to be called next Monday, not proceed. And the four persons who provided the statements are excused from attendance in the event that they have been subpoenaed to give evidence.

Now gentlemen, is there anything else?

MR LASRY: Your Honour, the only question that arises from that - and I think it's perhaps clear from your Honour's ruling, as I said earlier the material in a sense is already before you. The original purpose of Monday's proceeding was to enable that evidence to be the subject of testing in the examination. In view of your Honour's ruling it would seem appropriate that we place no reliance on the evidence because if it's not reliable enough to justify the witnesses being called to give it, then it can't obviously be relied on for any other purpose. I take it that's your Honour's view.

HER HONOUR: This is in relation to the extra statements, because the other evidence is already in evidence.

MR GIBB: And there's no dispute about that, your Honour.

HER HONOUR: The records of interview. It's just the supplementary

statements and I think that is from two of the witnesses as I understand it.

MR LASRY: Yes. Well, the question - what I'm raising is really the question of the status of all of the material, not just the recent statements, 5 for example in the case of Mr Tener, but all the material on behalf of those witnesses which has been before the court now since the brief was complied.

HER HONOUR: The only statements which I will not place any reliance 10 on are the fresh statements that have been provided, and I think that is by Mr Tener and one other witness. The other evidence is already in evidence, the records of interview that have been taken, the transcripts are in evidence, and comment has already been made in submissions on those. But it's simply the new evidence, the new statement from Mr Tener, and I 15 think it was - - -

MR LASRY: We may be at cross-purposes, your Honour, but I just want to be clear so that we understand and so it's recorded that we all understand the status of the original evidence. Mr Tener obviously hasn't 20 given evidence.

HER HONOUR: No.

MR LASRY: If I can take him as an example, the reason the statement 25 was obtained from him was with a view that in doing so your Honour has ruled that that evidence ought not to be proceeded with. It seems to me, and I just want to be clear about this, that that affects all of the information that he has provided.

30 HER HONOUR: That's not my ruling.

MR LASRY: I appreciate that.

HER HONOUR: The record of conversation, which is in evidence, that 35 stays in evidence. There was no objection taken to that when it was put into evidence. The only issue here is the recent statement of Mr Tener.

MR LASRY: Yes.

40 HER HONOUR: I will not take any notice and I will not be considering any information contained in that statement of Mr Tener. And likewise the other witness - and I won't mention any names here as it is not necessary to mention any names, the other witness in relation to Mrs Tener's death, her statement, her record of conversation has been 45 transcribed and that is already in evidence. Everybody has had a copy of

that and has had that since it was provided in the brief. And no objection has been made to that. Likewise one of the witnesses in relation to Mrs McGrath. But one of the other witnesses where a fresh statement was provided, I will take no notice of that statement.

5

MR LASRY: As your Honour pleases.

HER HONOUR: And now, gentlemen, I look forward to receiving the submissions which I think are due shortly and adjourn for oral argument,

10 and I think the first lot of oral argument is on 10 July. If there's nothing further we'll adjourn.

ADJOURNED **[2.54 pm]**

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EXHIBIT LIST

NUMBER DESCRIPTION PAGE NO.

EXHIBIT 0131 - OUTLINE OF SUBMISSIONS BY MR McRAE DATED 17 MAY 2006 89

EXHIBIT 0132 - SUBMISSION BY COUNSEL ASSISTING THE CORONER 90