

**REPLY ON BEHALF OF PETER LUCAS-SMITH AND MIKE CASTLE
TO THE SUBMISSIONS OF COUNSEL ASSISTING MADE ORALLY ON
18 JULY 2006**

We respond to the following comments made by Mr Lasry QC on 18 July 2006 pursuant to leave given by the Coroner on that day.

Compliance with rule of *Browne v Dunn* - Transcript 18/7/06 page 379

Counsel Assisting appear to question whether there was an obligation on them to comply with rule in *Browne v Dunn*. On 13 October 2003, this issue was raised by Mr Johnson and received comments from the Court itself. The discussion runs from transcript page 447 until 456. At page 454 Your Honour indicated in relation to Mr Cheney's evidence that the only fair way matters could proceed was for issues of dispute to be put to Mr Cheney. We have always assumed the same rule would apply to everybody else.

That Mr Lucas-Smith "could have taken a more active and detailed role in the decision about the withdrawal from Bendora" - Transcript 18/7/06 pages 380-381

Mr Lasry QC submitted that it was understandable that Mr Lucas-Smith attended the meeting with the NSW Rural Fire Service at Queanbeyan in relation to the McIntyre's Hut fire on 8 January, 2003. He went on however to say:

"In our submission however that does not mean that Mr Lucas-Smith could not have taken a more active and detailed role in the decision about the withdrawal from Bendora."

Later Mr Lasry QC also said:

"... It was still in our submission appropriate and important for him to analyse the reasons for the proposed withdrawal from Bendora, and to give directions, if necessary."

Our submission is that the Court should find that Mr Lucas-Smith received a telephone call from Mr Graham at a time when Odile Armon was still "in the bush". At this time he had received no report from her about the condition of the fire. We submit that the Court should find that it would have been totally inappropriate for Mr Lucas-Smith to have

directed fire fighters to remain on the fire ground at a time when he had not even so much as received a report about the conditions of the fire ground.

Subsequently, at the time when the decision to withdraw was made, Mr Lucas-Smith was actually in the meeting at Queanbeyan discussing the response to the McIntyre's Hut fire. We therefore submit that the criticisms Counsel Assisting make, in the circumstances of Mr Lucas-Smith not taking a more "active" role should be rejected. Mr Lucas-Smith was taking a very active role in relation to the largest fire and the greatest threat to the ACT by his participation in that meeting.

Mr Lucas-Smith and Mr Castle "knew something was going to happen and they knew [this] would involve fires affecting and burning into the suburbs to some extent" - Transcript 18/7/06 page 383

It is not accepted that at any time prior to 18 January 2003 either Mr Lucas-Smith or Mr Castle *knew* that fires would burn into the suburbs. There was identification of a risk of that possibly occurring before 18 January but there is no evidence that either Mr Lucas-Smith or Mr Castle ever knew as a matter of certainty before 18 January (as Counsel Assisting suggest) that there would be fire in the suburbs.

Our primary submission sets out at length the body of evidence that establishes beyond question that nobody within ESB, or NSWRFs at Queanbeyan "knew" the fires would "burn into the suburbs" before 18 January 2003.

Cause of the fire and the deaths - Transcript 18/7/06 page 388

Mr Lasry QC submitted that contrary to the suggestions in a number of submissions they "*did not and do not set out to blame someone for causing the fires or any of the deaths, in the sense in which the term 'cause' is used in the Coroner's Act.*" The findings which the Court is to make are in terms of "cause" and "origin" as expressed in the *Coroner's Act*. If Counsel Assisting's submission, as explained by Mr Lasry QC, is directed to some other sense of the word "cause" than the one which it carries in the Act it is not a matter for findings by the Court.

We interpret Mr Lasry QC's explanation of Counsel Assisting's submission at page 388 of the transcript (and submit that the Court should also) as asserting no individual could be blamed for "causing" the fires or any of the deaths within the meaning of that term in the *Coroner's Act*.

Paragraph 218 of the Submissions made on behalf of Mr Lucas-Smith and Mr Castle and the reference to an impact of the fire Transcript 18/7/06 page 389-90

With respect, Mr Lasry QC seems to have missed the essential point. The distinction which we were drawing here was between the concept apparently Counsel Assisting had in mind of a direct impact on the suburbs by a fire in the sense that the fire burnt houses and gardens and property in the suburban area i.e. incineration of the suburbs and (what Mr Castle had in mind), namely an impact on the suburbs by widespread disruption such as could have occurred by the fire damaging the electricity infrastructure. This would be the fire having an impact on the suburbs however it involves no incineration of the suburbs themselves. The disruption to electricity could have occurred by the fire impacting on electricity lines many kilometres from the suburbs themselves.

The fact two questions and answers were left out of the selection of transcript from page 1846 (as noted by Mr Lasry QC (at page 389 line 10)) does not in any way effect the meaning or thrust of our primary submission. For completeness, the full extract is as follows (emphasis added to the 'missing' parts):

MR WOODWARD: Just one general question. At the time of the cabinet briefing on the 16th at which I think you have agreed there was discussion with cabinet about the declaration of a state of emergency; in your mind what circumstances would have given rise to the need to have a state of emergency?

A. Widespread impact, widespread disruption on a very large scale.

Q. Can I assume when you say "widespread", does that mean including impact on the urban edge or the urban community of Canberra in some way?

A. I mean predominantly.

Q. Perhaps turning that around, can you envisage a circumstance in which a declaration of emergency may have been necessary if the fires, in effect, stopped short of affecting the urban community?

A. Sorry, I've got to get my mind around - turning it around.

Q. I think you said the sort of situation that in your mind might give rise to a need for a declaration of emergency was if there was widespread impact. I think you said that would be predominantly urban impact. If I can ask the question in reverse. At the time could you have envisaged a circumstance in which a declaration of emergency might be necessary if there had not been impact on the urban area?

A. No. No I don't think so.

Q. So we can take it as a general proposition then you, at least in your mind, were equating declaration of emergency with impact on the urban area?

A. Predominantly, yes.¹

Read in its entirety, this passage makes it clear, as we have submitted in our primary submission, that Mr Castle at no stage indicated that he was of the view that there would be an impact by fire on the urban community in the sense of incineration.

Paragraph 446 of the Submissions made on behalf of Mr Lucas-Smith and Mr Castle and the comments Transcript 18/7/06 page 390

At page 390 Mr Lasry QC suggests that our submissions allege Counsel Assisting did *not at any point* in their submissions set out what Mr Lucas-Smith said at the noon 18 January press conference. He quotes in full paragraph 446 of our submission going on to note that Mr Lucas-Smith's comments at that press conference are set out at paragraph 922 of his submissions.

¹ TR 02.03.04 p1846-39 – p1847

In Paragraph 445 of our submission we state “discussion of this press conference by Counsel Assisting merits only 4 lines of submission with no acknowledgement of the warnings then given.” (emphasis added).

It is, with respect, abundantly clear that the criticisms of Counsel Assisting we make at 446 are directed to their failure in Chapters 5 and 6 of their submissions to make any reference to Mr Lucas-Smith’s comments and warnings at the noon press conference.

As Mr Lasry QC himself stated (18/7/06 p376-377). “*In the end, we’ve made submissions in chapters 5 and 6 which are our submissions as to what can be made of the factual material in those chapters* [Chapters 2 & 3]. The fact Mr Lucas-Smith’s comments were set out in the narrative at Chapter 3 – para 922 is not to the point. Our complaint was the failure of Counsel Assisting to accord those comments any weight at all when discussing the warnings that were given (in Chapter 6).

Philip WALKER

Steven WHYBROW

Date: