IN THE CORONER'S COURT OF THE ACT

INQUEST AND INQUIRY INTO THE 2003 ACT BUSHFIRES

Submissions on behalf of Odile Arman

1. Preliminary

1.1.1. These submissions will follow, as near as can be, the form of Counsel's submissions, for ease of reference by the Court. In following that format, given Ms Arman's limited involvement, some headings may have no content. It seemed that would probably, in the context of a surfeit of submissions, permit more ready reference between Counsel's submissions and these. It has to be acknowledged that whilst endeavouring to maintain consistency between 'us and them', the paragraph numbers within chapter headings here bear no relationship to Counsel's.

1.1.2. It should be steadily borne in mind that Ms Arman is a witness in these proceedings. She bears no onus to prove any matter of fact nor to rebut any evidence by any other witness, whether or not it concerns her directly. Counsel states, at paragraph 4 that the Court "may wish to adopt all or part of" their submission. It is submitted

here that would be an unwise course. Counsel have undertaken a role as advocates of a cause. The submissions are replete with personal criticism, often on slim or absent foundation. In the course of pursuing certain findings, it has not been the approach of Counsel to set out in summary form the body of available evidence upon an issue, and then to indicate why this or that evidence should be preferred upon the course to a finding. Rather, the treatment of the evidence is selective. The Court cannot treat the evidence in that way, and thus an adoption of Counsel's submissions, even by way of summary of the evidence is fraught with danger in terms of valid fact finding and for the purpose of valid findings, comments and recommendations within jurisdiction.

2. Conditions leading up to the fires

3. The fires: origin, path and response

3.1.1. Whilst strictly background material, it is appropriate here in the light of the issues raised to reprise Ms Arman's qualifications and experience. Ms Arman completed a Bachelor of Applied Science (Natural Resources) in 1981 at the University of Canberra. From November 1983 she worked as a technical assistant at the Australian National Botanic Gardens. In August 1984 she commenced work with the ACT Parks and Conservation Service. In that capacity she carried out ranger duties in the Namadgi National Park and the

Tidbinbilla Nature Reserve. She was the ranger at Bendora between June 1988 and April 1990. [1]

3.1.2. Ms Arman undertook fire suppression training when she commenced work at the Parks and Conservation Service as part of the Parks Brigade. She was involved in fire suppression work as part of that Brigade each year except two.[2]

3.1.3. Ms Arman has undertaken fire related training courses, amongst many other courses.[3] The undertaking of courses reflects a personal commitment to excellence and improvement in all aspects of her professional life, notwithstanding the substantial drain upon the personal time of a mother of young children involved in such exercises. Her history marks her as a person who does not take easy options, nor cut corners for personal convenience and as a person with a strong sense of community service.

3.1.4. Ms Arman's experience in fire suppression shows a progression involving a willingness to put herself to the test in service of her community, expanding her skills as new incidents were encountered. The progression towards leadership positions detailed in her statement indicates that she was a person who caught the eye of senior officers as someone who would respond well to further responsibility. Her attributes extended beyond fire suppression skills, leading to the invitation to her to be appointed Parks Brigade Captain in late 2002. [4]

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1 Arman statement ESB.AFP.0111.0001 at par 6 – 9.
2 Ibid par 10.
3 Ibid par 11 and annexure A thereto.
4 Ibid par 17.

3.1.5. This submission turns to the particular day of ignition, and prior to dealing with Counsel's submissions, and more especially in light of remarks under the preliminary matters heading, a fuller accounting of the evidence concerning Ms Arman's actions is called for. It is also acknowledged that the task of a complete recitation of the evidence relevant to all witnesses upon all real issues would not necessarily be an insurmountable task, but would probably have required of Counsel a good deal longer than the several months that were taken. That said, on 8 January 2003 Ms Arman was on standby at Mitchell Depot. The readiness status was orange. She became aware of reports of fires caused by lightning strikes. When units for which she was responsible were called to respond she queried Comcen as to whether she ought to attend also, and was told that was not the case.[5]

3.1.6. Around 16.50 Ms Arman was called to respond. She called her father at 17.00 and informed him that she would not attend a family gathering.

3.1.7. Ms Arman had a report from Comcen of the size of the fire from SouthCare 1 as a 750m firefront. She proceeded on, marking her trail as she went. She arrived at the fireground just before 18.50 hours. She was then advised directly by SouthCare 1 that the fire was 500 to 750 square metres in size. She noted the report to be at odds with the previous report.[6]

3.1.8. Ms Arman was the appointed Incident Controller. Operational decisions were her responsibility.

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5 Ibid par 22.
6 Ibid par 28.

3.1.9. She had available the following resources; Parks 12 and 22, Forest 25 and 15, Gungahlin 20, a volunteer light unit and Forest 7. In total, her personnel numbered about twelve or thirteen.

3.1.10. Consideration of the scene that confronted Ms Arman requires a proper understanding of the terrain and vegetation. Counsel for Ms Arman stressed on 27.5.04 the benefit to be gained by personally walking the fireground as identified by Ms Arman. The point was made that for all the assistance offered by the video 'walkthru' conducted by the AFP, critical insights would be gained by experiencing aspects of the terrain and vegetation first hand. The Coroner, one expects, misunderstanding the point that was made, indicated that she had seen that location. Release of the edited Cheney notes[7] of the field trip revealed that the Coroner had not been onto the fireground, and experienced first hand the terrain and vegetation.

3.1.11. That situation is not best suited to reliable fact finding when 'experts', Messrs Cheney and Roche, neither of whom has walked the fireground as identified by Ms Arman[8] insist that direct attack upon the Bendora fire was possible on the night of 8 January. The Coroner is presently denied the benefit of that experience and should not fall into the error of presuming, whether at the suggestion of Counsel Assisting or otherwise, that a proper assessment is appropriately to be based upon no more than an observation from a distance.

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7 Exhibit 188.

8 See for example Mr Roche's evidence at T7499*ff*.

3.1.12. It is open to the Coroner to re-open the evidence in the inquest now in order to rectify the omission. Absent that step, there can be no lawful finding that the Bendora fire edge was amenable to the construction of a mineral earth line on the night of the 8th of January.

3.1.13. Ms Arman could not see the entirety of the fire from the roadway. She resolved to walk around the fire. She discussed that idea with Cliff Stevens, who said that she should not go alone "in view of the fact that we could hear falling timber and there was a considerable amount of debris on the ground making navigation difficult." [9] There has been no sworn denial of this account and it is to be accepted. Accordingly, the Coroner will find that, by about 18.30 on 8.1.03 there was already timber falling on the Bendora fireground. Counsel do not deal with it as other than a theoretical possibility.

3.1.14. Ms Arman asserts, and it ought to be accepted, there being no evidence to contradict it, nor the contrary having been put to her, that the way onto the fireground involved surmounting a steep embankment. Notwithstanding the impediments, her first thought was to employ direct attack with water upon that part of the fire that could, even with difficulty, be reached with hoses.[10] She directed that water be put on the fire whilst she undertook the reconnaissance with Mr Kane. Again, that is not consistent with any presumption in her mind that the trip to the fire was reconnaissance only and that it was not intended that the crews would fight the fire that night.

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9 Arman statement ESB.AFP.0111.0001 par 32.

10 Arman statement par 33.

3.1.15. Ms Arman commenced walking the fire at about 1900, marking the perimeter on her 1:100,000 map. The slope she assessed as moderate, but flattened out towards the top. The slope was later measured by Mr Nicholson, whose calculation ought to be accepted. The fireground was difficult to negotiate. Flame height was about ½ m at the fire edge. The western flank was on an uphill slope. She could hear timber falling occasionally. The head fire was moving upslope and to the north.[11]

3.1.16. Ms Arman noted upon her return from the reconnaissance that crews were experiencing difficulty on account of the terrain and obstacles in using the hoses to put water on the fire. She assessed the situation as quite dangerous since they were below falling timber.[12]

3.1.17. Ms Arman observed that some distance into the fire the flame height averaged about 2m, with "Some of the trees [burning] quite well, with tongues of increased intensity well up the trunks of the trees."[13] The actuality is depicted in Jeff Cutting's photo, and the photo depicts what Ms Arman has described. It is obvious from an analysis of the photo that flame is quite active up to about 10 metres into the trees.

3.1.18. At this point, there is a hotly contested issue arising from the evidence of the witnesses Cheney and Roche. Ms Arman simply described what she saw, and indicated the concerns that she entertained having regard to those observations. She did so in a

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11 Arman statement par 36 – 38.
12 Arman statement par 40.
13 Arman statement par 41.

straightforward way, without any hint of embellishment. On the other hand, Messrs Cheney and Roche, each of whom appeared determined to criticise decision-making on the 8th, asserted that the fire behaviour evident in the Cutting photo was less than is apparent from the photo itself. Mr Roche went so far as to make the bizarre assertion that the photo depicts benign fire behaviour.[14]

3.1.19. Leaving that debate to one side, (further observations being reserved for the section of these submissions dealing directly with the 'expert' evidence), it must be accepted that Ms Arman saw that which is depicted in the Cutting photograph, and having regard to the observation of the effects of that fire behaviour upon the trees under which she was considering asking her staff to work, she made certain decisions.

3.1.20. Ms Arman, on the basis of the pedestrian circumnavigation of the fire, estimated its size at 300m by 400m, albeit acknowledging it to be a crude estimate having regard to the circumstances in which it was undertaken.[15] She rejected as incorrect the SouthCare estimate she had been given of a 500 to 750 square metre fire, (being perhaps 20 x 25 m). Ms Arman's estimate may not be completely accurate, as she acknowledged. However, the nature of her means of estimation must be taken to demonstrate that the SouthCare estimation was substantially mistaken, and that her's is the preferable estimate for the purposes of this inquiry.

3.1.21. She noticed also on her return to the road that the Forrestry crew had not been putting water on the fire as she had directed.

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14 T7544.

15 Arman statement par 42.

They indicated the difficulty of doing so and she told them to attempt to get hoses to the fire.[16] It cannot be suggested, having regard to all of the above that Ms Arman had any pre-conceived idea that it was preferable not to commence direct attack upon the fire in the circumstances that then obtained. Indeed, nothing of the sort was put to her.

3.1.22. Ms Arman was informed by Mr Stevens that the water source he had located was a 22 km round trip from the fireground.[17]

3.1.23. Ms Arman is self-critical in noting that she failed to advise Comcen of the size of the fire when giving her situation report at 20.00 hours. [18]

3.1.24. She continued to attend to such fire suppression as was possible by asking SouthCare to direct water to an inaccessible area of the fire.[19]

3.1.25. Ms Arman was obviously concerned for the safety of her crews. She called Comcen and asked that the Duty Coordinator be asked "what he'd like us to do given that its going to be dark soon [and she was] not really sure whether we should be sending a rake hoe team in." The Comcen operator said he understood "that teams will be removed from location this evening and returned tomorrow but I will check with the Duty Coordinator to confirm that."

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16 Arman statement par 44.
17 Arman statement par 45.
18 Arman statement par 45-46.
19 Arman statement par 48.

3.1.26. That conversation is revealing in its context. There *might* have been a determination on the part of some person or persons in senior management that teams would not be tasked to fight the fires overnight. That has been denied. However that may be, Ms Arman certainly did not have a pre-conceived approach. Indeed, her actions and directions evidence an intention to fight the fire.[20] It was her observations of the conditions that caused her to re-think the position.

3.1.27. At 20.06 Concen called and asked if Ms Arman intended remaining on the fireground. She asked for a few minutes to "work that out" and then she "reviewed everything that was occurring." Had she had a pre-conceived mindset in favour of abandoning overnight fire suppression, her response would have been immediate, reviewing matters would not have been called for. The objective record, entirely free of hindsight, demonstrates that Ms Arman attended when called upon intending to remain on the fire ground and fight the fire, and that the decision to leave the fireground was taken in response to observations on the fireground.

3.1.28. Ms Arman sets out her thinking at paragraphs 55*ff* of her statement. The fire was already too large to contain. (Any suggestion to the contrary from persons who were not there is fatuous.) The perimeter could not be reached with hoses. Thus, any suppression efforts would require the construction of a mineral earth line using rake hoes. There were two difficulties with that. In the circumstances, even in daylight, that would be extremely difficult and slow work. At this point, a real appreciation of the nature of the

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[20] See also Arman statement at 50; running out hoses, water drops continuing as ordered by the IC.

ground underfoot becomes crucial. It may legitimately be submitted by Ms Arman's counsel that by reason of a combination of rock, gradient and fallen timber, rake hoe work on that fireground is almost impossible to conceive. That observation is made with the benefit of having taken a rake hoe onto that area in company with Ms Arman, (and Mr Lakatos SC and Ms Prosser). Firefighters are made of sterner stuff, but the obvious impediments and hazards cannot be dismissed. The Coroner has not been onto the fireground, (as identified by Ms Arman or at all), but has observed the general area from the roadway. That of course is no substitute, as was noted during the course of the hearing.

3.1.29. The second matter is that Ms Arman was "becoming increasingly concerned about the safety of the crews because of the increased likelihood of falling timber as the fire progressed during the night and the possibility of an accident arising from this and potential fatigue caused by the demanding terrain." The risk of falling trees or limbs was accentuated by the increase in wind.[21] After "weighing up all these concerns, [Ms Arman] decided to recommend that we not undertake overnight firefighting."

3.1.30. There can be no doubt that these safety concerns were genuinely felt by Ms Arman and they led to the decision to remove firefighters from the fireground. It was not put to Ms Arman that her reasoning was other than was asserted by her. That is to say, it is simply not open to the Coroner to make a finding that Ms Arman did not determine to remove the crews for the reason that she was concerned for the safety of the crews. Ms Arman's personal actions

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[21] Arman, record of interview, A257.

and motivations are above reproach; and given the sometimes spiteful, and almost always uninformed, allegations that have been bandied around in the media in this town, that fact ought to be acknowledged by the Coroner, if for no other reason than to focus attention upon issues that do bear analysis.

3.1.31. It is open to the Coroner to determine whether there were options that ought to have been explored and were not. It is open to the Coroner to determine whether in similar circumstances in the future a different approach might be recommended. It is not open to the Coroner that Ms Arman made her decision other than upon the crew safety reasons she identified.

3.1.32. If those questions are to be explored, that must be done in a rational way. Findings based other than upon reason are worthless, and in this context, probably dangerous. The analysis needs to be grounded in law and policy before there is resort to the first resort of lazy decision-makers; so-called expert opinion. It was somewhat startling to observe that despite the apparently painstakingly thorough preparation undertaken by Counsel Assisting, on this issue the Coronial team saw fit during the hearings to start with opinion, flirt briefly with policy, but ignore the law altogether. Of course it is not open to the Coroner to ignore the law.

3.1.33. One must start with the *Occupational Health and Safety Act* 1989. Step one is to determine whether the Act applies to the conduct of fire suppression activities. Workplace is defined as "any premises where employees of self-employed persons work." (s. 5). Premises is defined to include "(b) a place (whether or not enclosed

or built upon or not).” Employee is defined to mean a “natural person who is employed under a contract of service.”

3.1.34. Ms Arman was employed under a contract of service. She was working for her employer on 8.1.03 when directed to attend the fire at Bendora as Incident Controller. The others in her crews were also employees, and they were working under her direction. The Bendora fireground was a workplace. The Act applied to Ms Arman, and her employer.

3.1.35. One finds the duties of Ms Arman’s employer with respect to the work to be carried out at the Bendora fireground in section 27:

3.1.36. The employer’s responsibilities towards volunteers who attend upon the workplace are spelt out by s. 28:

3.1.37. These are penal provisions. They are no mere guideline observance of which is desirable but not compulsory. The policy of the Act has been the subject of repeated observation by the Supreme Court of the Territory.

3.1.38. The legislative requirement is that the workplace be “safe.” That means what it says. It does not mean “almost safe”, or “safe in so far as a dangerous job can be made safe.” The legislative requirement is also that the workplace is “without risk to health.” Again, the meaning is plain, and isn’t amenable to qualification by degrees of risk or safety.

3.1.39. The provisions are intended to provide strong deterrence, and the imposition of substantial monetary penalties is the chosen

means of implementing the policy; Boral Building Services Pty Limited v Gazley [1997] ACTSC 68.

3.1.40. The public policy requiring that workplaces be safe is reflected in the imposition of obligations upon employees and other persons in control of workplaces; ss. 29 and 30:

3.1.41. Again, these are penal provisions.

3.1.42. These penal provisions applied to Ms Arman as Incident Controller at the Bendora fireground.

3.1.43. It is pointless engaging in any analysis of what occurred at Bendora on 8.1.03 without first acknowledging the application of the Occupational Health and Safety Act to the fireground and acknowledging the requirements of the Act. There can be no lawful finding or recommendation that might involve or call for a breach of the Act.

3.1.44. The second essential element of the context for the discussion of the Bendora decision is the policy that had been developed by the relevant authority, and that which applied to the task being undertaken. The Rural Fire Control Manual was approved under s. 5KA (7) of the *Careless Use of Fire Act 1936* on 25 September 1992 by Terry Connolly, Minister for Urban Services, (as his Honour then was). Chapter 6 of the Manual deals with safety. In the introduction to the chapter it is observed that "Safety is a prime responsibility of every person at an incident, not just the Field Controller." Under the heading "Fire Ground Safety" it is stated that:

The Field Controller bears the responsibility for the welfare and safety of each person assigned to his/her fire ground workforce. This responsibility extends much further than establishing good field welfare conditions during firefighting operations and encompasses:

* developing a high level of safety consciousness in each firefighter;
* ensuring that performance of individuals engaged on continuous fireline suppression duties is monitored for effects of fatigue and nervous tension.

3.1.45. Under the heading “Protection of Firefighters From Fire Hazards” appears the following, as relevant:

Hazards of the fire control situation which may be encountered in the daily work situation are:

...

* falling objects;

...

6.4.2 Falling Objects

Burning trees can drop limbs without any warning noise. In some mature and long unburnt eucalypt forests, trees may start falling within 30 minutes of a fire and continue to drop for several days after the fire.

The type and condition of the trees should be examined before mopping up in treed areas. Look-outs must be posted when stags are to be felled, to warn of falling limbs. On steep slopes all firefighters are to avoid dislodging rocks and logs, and to watch for rocks rolling from above.

3.1.46. Those prescriptions applied to Ms Arman on the night of 8.1.03.

3.1.47. The proper context for any evaluation of the situation at Bendora on the night of 8.1.03 must be based upon the application of the law and policy to the circumstances that obtained. Bendora is remote, and access and egress is rendered difficult by poorly or unmarked unsealed roads. The fireground itself was upon a steep slope. The ground cover was heavy, with many fallen trees and tree limbs, and the ground very rocky and uneven. The gradient, and the conditions underfoot eased towards the top of the fireground.

3.1.48. By the time Ms Arman arrived at the fireground limbs were already falling from trees. She did not rush to judgment, but directed that fire suppression efforts commence whilst she carried out reconnaissance on the fireground, and whilst Mr Stevens located a water source. Her assessment was that the fire could not be controlled overnight. Having seen the nature of the terrain, the gradient, and assessed the size of the fire, her assessment of the risk posed to firefighters led her to conclude that the risk was unacceptable and thus to determine not to fight the fire overnight.

3.1.49. The decision was sound. The risks were real, and could not, in the circumstances be eliminated or rendered so slight as to be immaterial. The construction of a bare mineral earth line close to the fire's edge necessarily meant that firefighters would be working in the dark, upon a steep slope, upon very rocky uneven ground, amongst many fallen trees and limbs and, necessarily, underneath trees that were already losing limbs on account of the fire.

3.1.50. Neither of the so-called experts who said they would have decided differently had considered the law and policy that bound the decision-maker. Of course, their opinions must be discounted to some degree in any case because they are offered ex post facto and in the context of this inquiry which has focussed so heavily upon criticism of the actions of firefighting personnel. Their opinions ought to be put aside entirely when it is recognised that they failed to take account of the two primary sources of obligations upon the actual decision-maker.

3.1.51. Ms Arman did not, herself, consciously advert to the *Occupational Health and Safety Act*. That is of no moment. What she did was to acknowledge her responsibility to look to the safety of her firefighters, to assess the situation, and to make a decision which took account of the risks to the safety of her firefighters.

3.1.52. It may be that others, placed in the same circumstances at another time, would make a different decision. That is also irrelevant in the present context. The point is that the situation cannot be replicated and there can be no useful opinion as to what a person would or would not do. There should certainly be no criticism of Ms Arman or her decision because someone who cannot be in the situation she was in on that night in that place now claims that he or she would have decided differently.

3.1.53. That is not to say that there can be no useful comment upon that situation for the benefit of future firefighting efforts. It is to say that any such comment must recognise those realities. For example, it might be said that a fire authority ought, in recognition of the risk and the obligation to afford a safe system of work, develop a method

of indirect attack at a remove sufficient to obviate the risk to firefighters. Of course, that would require evidence. The only evidence upon the point was given by Mr Cheney in cross examination. He said that it was necessary to construct the mineral earth line within metres of the flame so that in the event of a sudden surge in fire spread firefighters can quickly move to burnt, and therefore *relatively* safe ground. That's as far as the evidence went. It is a shame that the focus of Counsel Assisting was upon whether it could be said that Ms Arman made the wrong decision, or that others could be criticised for failing to intervene rather than an examination of other safe options that could form the basis of a recommendation.

3.1.54. It is now intended to deal directly with submissions made by Counsel under the heading of Chapter Three; The Fires: Origin, Path and Response. Things go well enough through paragraphs 279 to 283, but at 284 it is asserted that Mr Stevens had cautioned Ms Arman not to go on the reconnaissance alone because the "*ground was rough and there were a lot of large trees with the fire burning actively. According to Ms Arman, there was a danger of trees or timber falling.*" Actually, it was Ms Arman's account that "we", that is, she and Mr Stevens, could already hear timber falling.[22] She wasn't challenged, and was a reliable witness.

3.1.55. Counsel concede that orders for direct attack were given; par286-7. If there was a pre-conceived notion on the part of Ms Arman, it was to put the fire out. She judged that so far as fire intensity was concerned, it was, at the fire edge, amenable to direct

[22] See above, 3.1.13.

attack; par 291. However, she could hear timber falling, but not see it. She couldn't be sure whether it was timber or trees. So much for the evidence that it is easier to fight fires at night because you can see the limbs or trees that are actively burning and in danger of falling. Counsel note, but only in relation to the issue of tasking on the following day, that Mr Graham, when speaking to Mr Hayes, mentioned that Ms Arman was saying to be wary of big trees that are falling; par 368.

3.1.56. Even after her reconnaissance, finding the Forestry crew not putting water on the fire, she directed them to do so before she went to put her report to Comcen; par 293.

3.1.57. Counsel reprise Ms Arman's 'sitrep' at par 306. As noted above, Ms Arman is self-critical of her failure to describe the size of the fire as she had assessed it. That was important information to impart, but in the circumstances, especially in the context it is also, obviously, a fairly simple omission to make. The fact that it has been discussed in this inquiry/inquest probably serves as an adequate reminder to Incident Controllers of the checklist of critical matters to convey in situation reports.

3.1.58. At par 310, Counsel refer to the Comcen operator's conversation with Ms Arman about the decision to stay or go, and in relation to tasking for the following day. Even then there appears no suggestion whatever that Ms Arman had any mindset against remaining and conducting direct attack. The communication referred to in par 312, "*Keep an eye on those trees, Parks 12 clear*," is just a further piece of evidence that concerns for the danger posed by the trees was not limited to Ms Arman.

3.1.59. *Ex post facto* examinations of one's own decision-making is a difficult thing at the best of times. The aftermath of a disaster like 18.1.03, with a Court hearing, people with agendas, hostility from some quarters, is the worst of times. Counsel Assisting plainly see as their task the dissection *ex post facto* of Ms Arman's thought processes in order to move to the forefront the issue of a policy, tacit or otherwise, tending against overnight tasking in the early period of a fire event. That approach seeks to expose the issue as critical, and thence to use it as a springboard from which to criticise those perceived to be responsible for the policy, which policy is attacked as wrong-headed and foolish, in the lost opportunity to attack the fire at its supposedly weakest point.

3.1.60. In seeking to re-write Ms Arman's thought processes, initially months, and then years after the event, Counsel draw together threads from discussions with police investigators and the evidence of a witness, Ms Arman, who was open to engagement in that attempted reconstruction because that is what was asked of her by this inquest/inquiry. Under interrogation before this Court she was asked to ruminate on what might have almost been subliminal messages, for example in the way that Comcen asked about her intentions. That she was asked to revisit her thought processes in that way is not the subject of criticism here. It is not submitted for a moment that there was anything untoward about the nature of Counsel's interrogation. However, one must be careful when analysing the value of the evidence thereby obtained.

3.1.61. There is, it is submitted, a better, more realistic approach. The Court should look primarily at the actions taken, and things said

contemporaneously by Ms Arman. We have referred to those matters above. They lead unmistakeably to the conclusion that Ms Arman went to the fire intending to put it out if at all possible using direct attack methods and staying all night if that's what it took. There is no other way to regard her actions and utterances. She made her decision based upon concerns that she genuinely held for the safety of the people under her command by reason of threats that were real and not merely theoretical.

3.1.62. Against those recorded, tangible actions and utterances, all telling in favour of a straightforward process of decision-making, the intangible *ex post facto* "back of the mind" feelings pale into insignificance.

3.1.63. This inquiry/inquest should infer that Ms Arman, with no mindset in favour of abandoning the fire ground, made a safety based decision against subjecting firefighters to a real risk that in her judgement was too high in all the circumstances. <u>That does not mean, as noted earlier in this submission, that the general question of overnight tasking is somehow beyond the reach of this inquest/inquiry.</u> What it does mean is that the discussion must be upon a sound footing. Here was a situation where a conscientious Incident Controller acting upon a real and not merely theoretical risk decided that she was obliged to place firefighter safety above early direct attack. The context for that decision is the law with respect to occupational health and safety and the policy as to rural fire fighting as set out in the Manual. There, then, is the issue, starkly drawn. How should the law, the policy, the practices of fire fighting properly

accommodate both the reasonable expectation of safety for firefighters *and* the advantages of aggressive attack when a new fire *might* be at its most benign.

3.1.64. This approach rejects as shallow, and counterproductive, the approach taken here whereby every attempt has been made to belittle the earnest decision of an earnest firefighter as being just plain wrong. It is shallow because it ignores the weight of the evidence, both as to background and to the events of the evening. Ms Arman was no babe in the woods, if that semi-pun may be permitted. She did have firefighting experience even if her experience of remote forest firefighting in a command position was limited. The real reasons for her decision, firefighter safety, cannot be simply put aside on the basis that another, *more* experienced, firefighter would have sent the rake hoe teams in regardless. It is counterproductive because there is a real tension between the needs of safety and of early aggressive attack and no advance in resolving that tension is to be had by the device of attacking the decision on the basis of the firefighter's experience. Even if Ms Arman did not have the experience that she did, that would still be a wrong approach. The exigencies of the ignition of forest fires do not admit of any confidence that there will always be some gnarled, fire-hardened veteran sitting in the shed awaiting tasking when lightning next ignites the Namadgi.

3.1.65. Part 3.2.2.7, the **attitude of the crews**, involves an approach fraught with danger. Ms Arman conceded that she didn't consult the crews. She thought perhaps she should have, in hindsight. However, this was not a democracy. Three reckless votes to stay versus two votes to put safety first is no better than three

timid votes to go versus two votes to use the resources and the opportunity. There is a *command* structure in place, and that means that somebody is the decision-maker. It is the decision-maker who is responsible and who must take responsibility. The penal provisions of the *Occupational Health and Safety Act* that apply to Incident Controllers presume that to be the case.

3.1.66. It is also the case that evidence from people as to what they *would* have done in a given set of circumstances has been strongly criticised by the High Court. The answer is often rendered unreliable because the circumstances in which the question was asked strongly influence the answer. In the medical cases, of course the plaintiff is going to say that, had he or she been warned of the one in a million chance of exactly that which has come to pass, he or she would have avoided the operation. Here, in the wake of a devastating and deadly firestorm the question whether a firefighter, not asked to turn his or her mind to the question then, will likely be answered in the affirmative. The same affirmative answer is likely to follow the question whether he or she thinks they might have put the fire out. Mr Stevens is reported to have so affirmed despite his scant opportunity to inspect the fire and the fact that he didn't walk the fireground and see first hand the upper reaches of the fire, the terrain, the ground cover, the rocks, the fallen trees and so forth. His time was devoted in the main, it will be recalled, to locating the nearest source of water.

3.1.67. Moreover, the question asked of other crew members has too many necessary assumptions to permit of reliable answers, even as to what any individual crew member really would have done. It requires the person being questioned to place him or herself in the

position of the Incident Controller, and *personalise*, (to borrow a concept from Mr Roche), the assumption of responsibility for crew welfare, and to then indicate what he or she would have done, upon the assumption that he or she had also walked the fireground and seen and experienced what Ms Arman saw and experienced.

3.1.68. The final reason to put aside as of no real assistance the *ex post facto* survey evidence is that none urged a different course on the night. There is no basis for thinking that any of them felt that they couldn't speak up. It is a little difficult to imagine Mr Stevens saying, hat clutched to chest, "If it isn't too much trouble, ...begging your pardon Ma'am, ...might we please put just a little water on this fire so the guys back in the shed don't call us sissies?" For an Incident Controller in Ms Arman's position, it might in fact be expected that a survey would result in a vote to stay and fight. Their mindset would naturally incline them to want to do that which they have trained to do. Of course the crew would not have personalised the responsibility each for their safety of each of the others that the Incident Controller must bear, and so it is the Incident Controller who must, whatever the views of the crew, make the judgment call.

3.1.69. That is not to say that consultation is forbidden. Far from it. Ms Arman so acknowledged. If there were more experienced firefighters present, especially if they had strong backgrounds in remote forest firefighting in those conditions, their views would be very valuable in assisting the Incident Controller to arrive at his or her decision. It might, with the benefit of hindsight, have been better to have taken aside one or two of the most experienced and discussed the situation, the resources, the risks and so forth. That does not mean that the decision was wrong, but it might be a

worthwhile enhancement of the decision-making process for the future.

3.1.70. Contrary to what is said in paragraph 338, Ms Arman did not think that she *lacked* the experience necessary for the decision. She merely acknowledged that someone with *greater* experience might have made a different decision. Counsel's submission misstates the evidence. It is interesting to note in this section that, when it suits, Counsel actually refer to evidence that contradicts the proposition that the fire behaviour was benign. Mr Cheney is quoted as saying that "*The dought index was such that the fires weren't going to go out overnight and in fact weren't going to slow down much overnight, as subsequently turned out.*" (par 339). They can't, or at least they shouldn't, have it both ways.

3.1.71. Mr Cheney's evidence about the decision provides an interesting illustration of an essential point. Leave to one side for the present the fact that his evidence on the matter is a fudge in any event because he is not an expert in suppression, not having done active suppression work since 1972 save on fires that he has lit himself, (perfectly legitimately of course!). He is quoted to say, at par 340:

> *I think you have to look at safety from both angles. You have to look at safety for the firefighter and you have to look at safety for the public as a consequence of the firefighter not taking action…If it comes to a choice, and I think this is a decision that undoubtedly is a legal one, then I think the weight has to be given that the risk to the firefighter must be expected to be higher because they are trained, than the risk to the untrained resident or citizen of*

> *Canberra who may be threatened by the fire. Now there is no doubt that firefighting is a dangerous business and there is no doubt that people can get injured in that situation, but that is a risk that is inherent in the job. If it is not faced with the associated risk of the consequences of not controlling that fire, then we are not going to progress very much at all in the firefighting business.*

3.1.72. Extraordinary stuff! Surely the wellspring for Counsel's views and the findings urged in Chapter 5. Mr Cheney was correct as to one matter. That is, it is a legal question. It may be posed thus: ought the Bendora firefighters have been required by their employer to remain at the fireground overnight, in spite of the risk to health, because at least they as firefighters were better equipped to deal with the risk than untrained residents some days later. It is so patently obvious as not to admit of argument that such a mode of reasoning would be in flagrant breach of the *Occupational Health and Safety Act*. The approach of the Courts must, as has been noted earlier in these submissions, form the essential foundation to discussion of this issue. Reasonable attention to the pronouncements of the Supreme Court of the Territory to the policy and strictures of the Act, or to that of the Courts of NSW applying materially identical will permit a decision-maker to apply an educated mind to an analysis of Mr Cheney's views.

3.1.73. The effect of Mr Cheney's views is that firefighters are entitled, by reason of their decision to enlist, and their training, to a lesser standard of workplace safety than other workers. They must accept that the job is dangerous and simply do the best they can because of the possibility that, hours, days or weeks later, the fire

that is not extinguished may challenge somebody who is not employed or trained as a firefighter. Thank god he's not involved in operational firefighting!

3.1.74. Perhaps acceptance of the Cheney "hardline" view explains why, notwithstanding the depth and breadth of the investigation of the response to the fires absolutely no attention was directed to the legal constraints upon firefighting authorities or firefighters. The Court cannot duck the issue either by simply finding that there was no danger, plainly there was, or by finding that firefighters have to accept a dangerous workplace for the common good.

3.1.75. In Counsel's treatment of Mr Roche's evidence on the decision they omit entirely the evidence in relation to occupational safety, as if it were irrelevant, or had not been given. That is quite unfair to Ms Arman, and it is unfair to Mr Roche and most importantly, it is unfair to the Court. Mr Roche did acknowledge that the fireground is a workplace.[23] He acknowledged that there is a requirement for a safe workplace. He acknowledged that the requirement of the law for the provision of a safe workplace lay with the Incident Controller, who bears responsibility for those under his or her charge.[24] He agreed that the situation on the fireground is often so dynamic that it is important to have the person at the fireground, who bears the responsibility, making safety-based decisions.[25]

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23 T7534.
24 T7539.
25 T7540.

3.1.76. He agreed with Ms Arman's counsel's proposition that:[26]

> *Firefighting, whether in forests or elsewhere, is an inherently dangerous job but it doesn't need to be done dangerously.*

3.1.77. Mr Roche also agreed that:[27]

> *In the course of making a decision as to whether to attack a fire and, if so, how to attack the fire, the safety of the firefighters is not just one of the considerations but is a pre-eminent consideration.*

3.1.78. His perspective is quite different to that offered by Mr Cheney. He still thought it was the wrong decision, albeit, like Mr Cheney, he did not blame Ms Arman for making the decision. However, his acceptance of the pre-eminence of firefighter safety in such decision-making is a good deal more realistic than that offered by Mr Cheney. Perhaps the difference in views are explicable, at least in part, by Mr Roche's more recent operational role, and especially during the period of the 70s to 90s in which workplace safety took on a greater emphasis in the community, reflected in legislation the judicial approach.

3.1.79. The proper foundation for discussion of the Bendora decision is then, it is submitted:

(1) The law must be applied.

(2) Policy must be taken account of, albeit, there is no reason why the Court ought feel constrained against

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26 T7537.

27 T7538.

recommending a change in policy if the evidence warrants that course.

(3) Safety of firefighters must be recognised as the pre-eminent consideration.

(4) Whilst consultation of others is permissible and in many situations desirable, it is for the Incident Controller to make a decision when a real threat to safety is perceived because that is the essence of a command structure and the structure recognises the legal responsibility borne by the Incident Controller. Consultation may, of course, be had with more senior persons off the fireground, perhaps persons with particular knowledge of the area, or the fire weather predictions or whatever may be relevant, but the Incident Controller would in most cases be unwise to defer elsewhere a decision that must be based upon what may directly be observed.

(5) An Incident Controller ought not be asked to weigh up the safety of his or her crew against a risk to others or to property.

3.1.80. It is submitted that it is beyond the reach of this inquest/inquiry to determine whether the decision was right or wrong. It is probably not a question that admits of such a black and white answer leaving aside questions of jurisdiction. It certainly isn't appropriate so to determine on the basis of the opinions of those who were not there and cannot directly appreciate the observations that moved Ms Arman to decide as she did. However, those observations do not prevent this inquiry/inquest from making recommendations for the development of a more explicit policy or published set of

principles or practices with respect to remote night time firefighting. This inquiry/inquest does not have before it the evidence, and does not possess the expertise, to complete that task itself, but may recommend that it be taken up by the ACT fire authorities.

4. Jurisdiction of the Coroner

5. Initial response

5.1. The material under the heading **5.2.2.1 The Effect of the Decision** involves, it is submitted, impermissible speculation. There are simply too many variables. Neither Mr Cheney nor Mr Roche, (nor for that matter Mr Nicholson), were there on 8.1.03 and did not inspect the area until well after the event. Each is restricted to second-hand reports of the size, layout, intensity of the fire and so forth. Neither is truly in a position to say with any reliability that a particular set of tactics would, if employed at a time they, with hindsight, suggest, the fire would in fact have been controlled.

5.2. For the proposition that might be of importance, this arid speculation is probably unnecessary. It is submitted that the Court cannot second-guess the correctness of the decision; it is not a matter capable of a black and white answer. However, *if* others might have made a different decision, that of itself means that there was the potential for a different outcome. It is impossible, it is submitted, to find as a fact, certainly not a legally valid one, that overnight tasking by the 8.1.03 crews would, together with tactics designed *ex post facto*, have controlled the fire. It is not necessary for the Court to be able to quantify that outcome in

order to go to the question which is raised as to the need, if there be one, to urge that attention be directed by those in authority to designing the procedure to be followed for the future.

5.3. In response to paragraph 1151, for the reasons advanced in relation to chapter 3, it is submitted that Ms Arman's operative motivation was based upon the safety concerns perceived by her. The second reason referred to by Counsel is not a reason for the decision but rather a doubt about the process to be followed in arriving at the decision. The third, the question of influence, was really only the consequence of close questioning, it was really more a matter of a niggling thought at the back of the mind, something not ruled out, rather than a matter at the forefront of the thinking. As has been submitted here by reference to the actions and contemporaneous utterances she went to stay and set about fighting the fire, but re-thought the position in light of actual fireground observations. And as Counsel acknowledge, she was prepared to stay if that's what was asked of her.

5.4. The issue of the attitude of the crews has been dealt with above, but agreement should acknowledged here with the point made by Counsel that it was for Ms Arman to make the choice, and to be assisted if necessary. That point was, as was addressed in Ms Arman's counsel's cross examination, made by Mr Roche in the Linton inquiry; it is not appropriate to have remote safety-based decision-making. That is to say, it was appropriate for advice to be obtained from a remote location, but it would not have been appropriate for a person at a remote location to direct the Incident Controller and crews to remain if genuine safety issues had been raised – unless of course the risk could in some way be eliminated.

5.5. The question of expert evidence on this issue has been addressed above. It is inappropriate that the so-called experts, neither of whom were there on the night, brush away the safety concerns in terms of generalities. Such generalities include fire behaviour being benign at night, the fire within burning trees behind the fire line being visible and so forth are in a real sense here irrelevant. Those matters really, upon logical analysis, go to the question whether trees are in fact going to burn to the point of collapse at a time when they will be dangerous to firefighters working below them on a slope or within the arc of a tree that falls. Here, Ms Arman, in uncontradicted evidence, has said that wood **was** falling. She was unable to see whether it was trees that were falling or only branches. That is to say, the danger was real, and the generalised observations made by Messrs Cheney and Roche offered, *in this case*, no measure of protection to the firefighters.

5.6. The critical issue to be taken with Counsel's submissions in this section appears in paragraph 1157. There Counsel assert that "*the consequences of* not *fighting the fire that night were clearly given insufficient attention by all those involved in the decision that night. Although, in the case of Ms Arman in the absence of the planning support as discussed above, the fact that she may not have looked beyond the next shift is understandable.*"

5.7. It is submitted that the submission involves a logical disconnection. Ms Arman could not look to the consequences beyond the night if her concerns were as to the dangers posed to firefighters from existing threats that night. As Mr Roche acknowledged, firefighter safety must necessarily be the pre-eminent consideration. Nor can the obligations of the statute be met by permitting an unsafe workplace upon the basis that

it is conceivable that, in the future, depending upon what occurs over a period of days, a threat may be presented to some other persons.

5.8. Counsel's submissions appear to be drawn from an acceptance of Mr Cheney's opinion, quoted at 3.1.71, above. As submitted above, Mr Cheney's opinion, no doubt genuinely felt and borne of a concern to avert a similar tragedy, is nevertheless out of step with the law and community expectations as to workplace safety. Accordingly, unless the law, and community expectations, as embodied in the legislative enactment of the will of the people is to change, there must be developed an answer to the conundrum that does not fall foul of the statute. As has been submitted above, that cannot be the work of this inquest/inquiry, since the evidentiary foundation is lacking. That does not prevent this Court from making a recommendation that the matter be addressed by those in authority.

5.9. Finally, upon the discussion of the decision, it is submitted on behalf of Ms Arman that the evidence of Mr Nicholson be put aside altogether, save for one matter. The reason for that is that Ms Arman did not qualify Mr Nicholson, although she agreed to show him the fireground at Bendora as it was on the 8.1.03. The cross examination of Mr Nicholson demonstrated that he was not in fact qualified, in the relevant sense, upon any topic, having had only a limited amount of the relevant material placed before him for consideration. That being so, opinions that he has expressed lack the proper foundation for expert opinion and should simply be put to one side. Minute dissection of an opinion that has not been properly formulated is of no real assistance to the Court.

5.10. The one exception is, for what it is worth, his measurements of the gradient at Bendora. It is not a matter of opinion but rather one of

measurement. He has the skills to carry out such a measurement. It is of some assistance to the Court because the actual terrain is one of the critical factors in a proper understanding of the Bendora fireground, and of the reasoning towards the decision. Of course, it is open to the Coroner, should there be any question about it, to attend the fireground, at the position identified by Ms Arman, and to actually go onto the fireground and experience first hand the terrain, the ground underfoot, the slope and to obtain a perception of the relevance to the decision of working such a fireground downslope from burning trees that are either falling or dropping branches.

5.11. The **Proposed Finding** at paragraph 1168 is, with all due respect, unacceptable. Firstly, paragraph 1168a involves impermissible speculation. Paragraph 1168b flies in the face of the evidence and is unsustainable. Here Counsel purport to rewrite Ms Arman's thought processes for the ostensible purpose of blaming others for her decision. Her decision was based upon safety considerations, not a "belief", as claimed, that "ESB wanted her to make [that] decision and she was insufficiently experienced to weigh all the competing considerations." This was not put to Ms Arman, and consistently with her evidence she would have rejected it. She was a witness of truth who openly did her level best to engage in a review of her decision under cross examination. It is both unfair and wrong for Counsel to seek to relegate the safety considerations that were at the forefront of her thinking in favour of Counsel's paternalistic theory of some subliminal influence.

5.12. It is far better that this Court acknowledge that she did experience genuine and serious safety concerns for those under her charge, and that she decided as she did because of those concerns. The Court ought then

to address the reality of the tension between the law, the policy and the concern for vigorous early attack of remote forest fires.

6. Warnings

G P Craddock
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30 June 2006