

TRANSCRIPT OF PROCEEDINGS

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**CORONER'S COURT OF THE
AUSTRALIAN CAPITAL TERRITORY**

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MRS M. DOOGAN, CORONER

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CF No 154 of 2003

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CANBERRA

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**INQUIRY INTO INQUEST AND INQUIRY
THE DEATHS OF DOROTHY MCGRATH,
ALLISON MARY TENNER,
PETER BROOKE AND DOUGLAS JOHN FRASER
AND THE FIRES OF JANUARY 2003**

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DAY 88

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Thursday, 13 October 2005

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THE CORONER: Yes, this is a directions hearing that I foreshadowed last week. That we'd have a forum - rather than last week, the last time we met. For just finalising arrangements and making
5 sure that parties will be ready to proceed with the evidence of Mr Roche on 17 October, next Monday. Yes.

MR WOODWARD: Thank you, your Honour. I can
10 indicate for our part that Mr Roche will be here on Monday and ready to proceed with his evidence. What happens thereafter will depend a bit on how long the conclusion of his cross-examination takes. However, based on the estimates that were provided
15 on the last occasion it seems quite likely that with the exception of Mr Pike, whom your Honour will recall had sought and was given an indulgence permitting him to undertake his cross-examination of Mr Roche on Monday week, it would appear likely
20 that his evidence will conclude on about Wednesday of next week.

It had been our hope at that point to interpose probably Mr Nicholson at that point. A letter that
25 we'd received from Mr Walker and Mr Whybrow's instructor on 12 September would indicate that he is available that Thursday and Friday but that position may have changed and we'd need to find out the current status of his availability. If it were
30 possible for Mr Nicholson to give evidence on Thursday and Friday he may well conclude in that period, which would mean that the only thing remaining apart from the cross-examination by Mr Pike of Mr Roche on the Monday is - - -

35 THE CORONER: And Mr Nicholson.

MR WOODWARD: And perhaps Mr Nicholson if Mr Pike
40 is interested to cross-examine him as well. Then that will leave only those witnesses which were a little bit as I recall it up in the air as to whether or not they would be recalled. Your Honour will recall that the position on the last occasion I think was that it seemed unlikely that Mr Lucas-Smith
45 would be recalled, but likely that Mr Castle would be. If that position is still unchanged then that would mean Mr Castle being recalled on Monday or Tuesday and his evidence one assumes concluding

within a day or two.

5 So that assumes to be the timetable. There are one
or two other minor matters but perhaps if it's
convenient to your Honour it might be appropriate
just to check whether all parties are still in the
position indicated on the last occasion.

10 THE CORONER: I'll do that.

Yes, Mr McCarthy.

15 MR McCARTHY: Your Honour, from the Territory's
viewpoint we're certainly ready to proceed on
Monday the 17th. I've been asked by Mr Watts to
appear on behalf of his clients and by Mr Clark to
appear on behalf of his clients. And there's three
things I wanted to mention about that, none of
which clashes with anything said by my friend.

20 First on behalf of Mr Watts he's presently in the
process of finalising a statement from Mr Peter
Cartwright which will address ACT Fire Brigade
training on bushfire fighting. We certainly
25 understand there's every intention to have two
counsel assisting tomorrow, but in any event if
it's not tomorrow it will certainly be very soon
thereafter.

30 The second thing was on behalf of Mr Pike, there is
likewise a similar - a statement being prepared by
Mr David Ingram, who you might remember as the
logistics officer with ESB. And that will be
dealing with the preparedness of ESB prior to
35 January 2003, and in particular from a logistics
point of view. Again we anticipate having that
statement to counsel assisting tomorrow or shortly
in the following week.

40 The third thing I've been asked to mention is that
Mr Pike can confirm that he will be able to appear
on Monday the 24th. He is still unable to appear
on any occasion next week. And I'm also asked to
convey to you that he expects to complete his
45 cross-examination of Mr Roche on the 24th.

THE CORONER: Well, I suppose that depends on
whether Mr Nicholson is called on Thursday and

Friday that - and I think in relation to Mr Watts he also asked, and I would certainly grant him some leave, to ask Mr Roche a few extra questions. He had examined Mr Roche and he wants to do that. He indicated on the last occasion that he'd only be very brief about it.

MR McCARTHY: I'm grateful for that, your Honour. He did actually speak to me yesterday that he does have that intention and I'll convey to him that he has that leave.

THE CORONER: I'll certainly grant him leave to do that. I think I indicated that on the last occasion that would happen.

MR McCARTHY: With respect to Mr Pike I will convey to him the intentions about Mr Nicholson and - - -

THE CORONER: Yes. I'll just find out whether or not Mr Nicholson is available on Thursday and Friday but if he is then Mr Pike should be - if Mr Nicholson is finished his evidence on Thursday/Friday then Mr Pike should be prepared also to cross-examine him if he wishes. We'll ask him then.

MR McCARTHY: I have to say that my understanding is Mr Pike I'm told has made careful arrangements in order to be here on the 24th. But as I understand it it is only for that day that he is available. Now I accept that that's an issue that he will need to - - -

THE CORONER: That's a matter for him, yes.

MR McCARTHY: I will bring that to his attention. I am just telling you that I anticipate that - - -

THE CORONER: You're saying that that's the only day that he's available.

MR McCARTHY: The 24th. But the acknowledgement of the coronial to proceed, he certainly asked me to convey that he intends to complete his cross-examination of Mr Roche that day.

THE CORONER: That's fine.

MR McCARTHY: The issue about Mr Nicholson, I'd consider bringing that to his attention, but I just bring your Honour's attention that that might present a problem for him. I just pass that on.

THE CORONER: Thank you, Mr McCarthy. Yes, thank you.

Mr Whybrow.

MR WHYBROW: Your Honour, firstly I indicate for the benefit of my friend in relation to Mr Roche I don't expect to be a very long time with him.

THE CORONER: I think you said about half a day on the last time.

MR WHYBROW: Yes. I think that's even being a little bit optimistic - or pessimistic.

Your Honour secondly, given that my understanding is that counsel assisting do not intend to recall Mr Castle his instructions are that he does not intend to give any further evidence so he will not be recalled by myself. And I assume based on previous indications there'll be no need for his - to give any further evidence in the witness box.

As of I think it was approximately 12 September it was the understanding of myself, Mr Walker, and our instructing solicitor through Mr Nicholson that he would be available Wednesday, Thursday, Friday, and indeed as late as last Friday I received an email from him where he indicated that he was intending to drive up early last week and be available. I don't know what's happened between then and the Monday, but on Monday afternoon we were advised that he is unavailable next week at all and is not available until the following Monday.

Now that's something which is no doubt concerning to the inquiry in terms of finishing but, as Mr Walker will indicate to you, certainly not something that doesn't suit either myself or him.

THE CORONER: Has he given any explanation or any reason as to why he's not available?

MR WHYBROW: I didn't go into that with him. I received an email and then made some enquiries as to locking him in for the following week as soon as possible so there's no further possibility of things dragging out. And confirmed with him yesterday - had a short conversation trying to find out if there's any possibility he could turn up. I'm told that he cannot that week. So he's unavailable until the Monday and the Tuesday and he's available that entire week until his evidence is completed. Monday the 24th.

THE CORONER: Monday the 24th, yes.

MR WHYBROW: In case there's any confusion I think everyone was proceeding on the basis that he might be available Wednesday, Thursday, Friday of next week.

THE CORONER: Next week. That's right, yes.

MR WHYBROW: Yes. And that was what we were working on. That's no longer the case.

THE CORONER: Yes. No, I understand that he's not available until Monday the 24th.

MR WHYBROW: Yes. And finally, your Honour, I've indicated Mr Castle's not going to give any further evidence. I note Mr Watts has been distributing some short statements dealing with some peripheral but important matters on behalf of various of his clients. I expect to provide some further documents, nothing unexpected in the nature of ESB budgets and the analysis of the statistics that were undertaken by a lady who's going to provide a short statement. Other than that, unless there's anything further your Honour?

THE CORONER: No, thank you. And when will these documents be available, Mr Whybrow?

MR WHYBROW: Hopefully by tomorrow.

THE CORONER: By tomorrow.

MR WHYBROW: Yes.

THE CORONER: Thank you. Yes, thank you.

Yes, Mr Walker.

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MR WALKER: Your Honour, there's nothing I can usefully add in relation to Mr Nicholson beyond what Mr Whybrow has said. The only thing I will mention is this recent unavailability is a problem for me, but I think it's just something I'm going to have to live with. I can't expect given the lateness that ...(indistinct)... can be changed as a consequence, but I personally am committed in another matter, which I cannot get rid of, for the first three days of the week beginning the 24th. And if I am not here when Mr Nicholson is here I might just endeavour to get Mr Whybrow to ask the questions in the areas that were of interest to me.

20 THE CORONER: You have his report in any event.

MR WALKER: Indeed. That's right. So the late change certainly has done me no favours. The only other thing I need to say is on the question of whether Mr Lucas-Smith will be recalled, it won't be my request. I can now confirm that I do not request that he be recalled.

30 THE CORONER: Thank you. And I think on the last occasion with Mr Roche you indicated that you only had a short time to go and Mr Whybrow on your behalf at the last directions hearing said that you people can probably only have a very short time, about half an hour or so. Can you just confirm that?

MR WALKER: That is correct.

40 THE CORONER: That's very helpful. Yes, thank you. Thank you, Mr Walker.

Yes, Mr Erskine. Do you want - - -

45 MR ERSKINE: Your Honour, we were actually I think the next cab off the rank to cross-examine Mr Roche last year.

THE CORONER: Yes.

MR ERSKINE: And on that occasion I wasn't going to be doing it, Mr Brett Walker was unavailable, so he and I had talked about the questions we needed to ask and the estimate at that stage would have been a couple of hours. Since then with the change of date Mr Walker is now available, I'm conferring with him tomorrow, I can't imagine that we would suddenly invent a whole new line of cross-examination that wasn't apparent to us 12 months ago. So I would expect that he would be cross-examining on Monday for a couple of hours.

THE CORONER: Thank you.

MR ERSKINE: Certainly well less than a day.

THE CORONER: And what we'll do then is we'll say that Mr Walker can follow - - -

MR ERSKINE: Mr Walker.

THE CORONER: - - - Mr Phil Walker.

MR ERSKINE: Yes.

THE CORONER: Yes, thank you. Thank you, Mr Walker.

Yes.

MR WOODWARD: Your Honour, obviously the only difficulty that's arisen as a result of that discussion concerns Mr Roche - I beg your pardon, Mr Nicholson. There's no real difficulty, your Honour, other than minor inconvenience in relation to deferring Mr Nicholson's evidence to the commencement of the following week, presumably to follow Mr Pike's cross-examination of Mr Roche on the Monday. I should say I hadn't understood on the previous occasion that Mr Pike's difficulties were such that he would only be available on the 24th.

THE CORONER: I didn't either. I thought that he was going to be available for that whole week.

MR WOODWARD: That was my understanding, or at

least most of it. But perhaps, your Honour, this can be resolved at the beginning of next week. It may be necessary to somehow structure things so that Mr Pike can cross-examine Mr Roche. There can be - and this may depend a bit on discussions with Mr Whybrow which I can have after court concludes about how long any examination he may have of Mr Nicholson may take, but we may have to try and squeeze in Mr Pike's cross-examination of Mr Nicholson on the Monday as well. And one would hope that - - -

THE CORONER: If Mr Pike wishes to cross-examine.

MR McCARTHY: That's obviously a ...(inaudible)... quesiton.

THE CORONER: Yes.

MR WOODWARD: So that's something we'll endeavour to deal with as best we can, your Honour. But it will have to await obviously further discussion.

THE CORONER: It was certainly my understanding, and maybe I misunderstood, but I thought that Mr Pike indicated - certainly indicated that he wouldn't be available next week but that he would be available for the following week.

MR WOODWARD: My recollection was he explained he had a longstanding commitment in a coronial inquest which would finish in that week, but perhaps it's run over. In any event, your Honour, we'll certainly try and accommodate that as best we can, although it may take some co-operation from those who have retained Mr Nicholson to see if we can have Mr Pike also conduct any cross-examination that he has of Mr Nicholson on the Monday.

Two other minor matters. Or perhaps I should just say apart from that hiccup it would appear that without a recall of Messrs Lucas-Smith and Castle subject to one matter which I'll mention in a moment it would seem likely that we will finish the evidence early in that second week.

Your Honour, there are two other matters. I've provided this morning to the parties a copy of a

letter that was sent to your Honour, it's dated 12 August, in relation to matters concerning the McIntyre's Hut fire and the meeting at Yarralumla on 9 January 2003.

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I've only done that to enable the parties to have a little bit of background so I can then indicate to your Honour that having received that letter arrangements were made for a representative of the AFP to contact the author of the letter and to follow him up on the matters raised. In the course of that discussion his attention was drawn to the fact that the evidence would indicate, I think uncontested evidence, that in fact on 8 January a series of decisions were made about how the New South Wales Rural Fire Service should respond to the McIntyre's fire. And it seems clear, and the evidence is largely consistent, that decisions were then made about a controlled burn within a certain defined area and so on.

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So that the suggestion in the letter that no decisions had been made as at the morning of 9 January appears to be inconsistent with that evidence. That was pointed out to the author. He conceded that he'd come into the meeting late and perhaps there were things said prior to him being in the meeting. But he did stand by what he says about the remarks that he heard. However, he has indicated that at this stage he is unwilling to provide a statement and in those circumstances unless any other party wishes the matter to be pursued further, having read the letter and having heard what I've just said, we would not be proposing to take the matter raised by him any further.

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Your Honour, the second matter that I wanted to raise relates to two folders of documents that were provided to us by the ACT Government Solicitor last week. They comprise, if you like, a number of different categories of documents. Some of them were documents that are already part of a coronial brief. Others are documents that appear to have been provided by the ACT Government to the investigators at some point but were not included in the brief as part of the initial decision making process.

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Discussions I've had this morning indicate that there's a request that those be made part of the brief and we'll be considering that request over
5 the next couple of days. They relate largely to issues of land management planning in the period leading up to the fires. And at this stage I don't anticipate any difficulty in accommodating that request.

10 Finally, your Honour, there's a small number of documents which comprise emails sent by Mr Rick McRae to Messrs Lucas-Smith, Castle, Graham, Bennett, and others, which had not previously been
15 identified by either the investigators or any of those assisting you amongst the material that had been gathered. And they do appear to be of some significance. I'll be providing copies of those emails to all parties who don't already have them
20 and to your Honour this morning. In fact I might just give a set to your Honour now before I forget.

I don't propose to take the matter any further this morning except to indicate that we'll be
25 considering over the course of the next couple of days how best to deal with these documents. They clearly contain matters that were relevant and had they been available at the time, or had we been aware of them at the time those persons I've
30 mentioned gave their evidence, they would have been amongst the material put to them.

So we will need to consider, among other things, whether it is necessary to recall any of the
35 persons concerned for the purposes of asking them about this material. There may be a way of dealing with it which would not necessitate that recall, but we'll consider it over the course of the next couple of days and let the parties know on Monday
40 how we propose to deal with it.

Those are the only matters I wish to raise, your Honour.

45 THE CORONER: Yes, thank you Mr Woodward. And do you say these emails are going to be distributed to the other parties?

MR WOODWARD: I understand the parties have all had an opportunity to review the two folders of documents which the ACT Government Solicitor compiled, which have been provided to us last week.
5 So some parties may have seen them, but in case they haven't I've got 12 copies here so any party who hasn't seen them or hadn't noticed them in the folders is welcome to take a set so that they'll know what we're talking about when we address this
10 on Monday.

THE CORONER: And if I could just ask if anybody does wish to consider recalling or have some issue with these emails or indeed the other documents
15 that have been provided, if they just let counsel assisting know prior to next Monday and then we can discuss that and arrangements can be made if that indeed is considered to be ...(inaudible)...

MR WOODWARD: Sorry perhaps I should just say, your Honour, on a similar issue, in relation to statements that have been produced and have been foreshadowed, including those that have already
20 been provided, amongst which include a short supplementary statement by Mr Bartlett, there is of course an issue as to how those will be dealt with.
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We would hope given the indication that - as I understand it most of the material that's in those statements is generally uncontroversial, but they
30 can be put into the category which parties may recall we developed in about June of 2004 where we had a category, "witnesses", which we described as make available witnesses.
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And as the transcript discloses the arrangement in relation to those witnesses was that their evidence would be treated as if they had been called and sworn as to the truth of their statements. And any
40 party who wish to cross-examine any of those witnesses was invited to let us know and they would have been made available. That didn't occur in respect of any of those witnesses. So that evidence has that status and I suspect we can take
45 a similar position in relation to these additional statements. But again we'll need to obviously see and read them before we can - - -

THE CORONER: Before the decision's made.
Certainly.

5 MR WOODWARD: Yes, as your Honour pleases.

THE CORONER: Yes, thank you. Yes, thank you Mr
Woodward.

10 Yes, any other matters at this stage? Mr Walker.

MR WALKER: Your Honour, you heard what I said
about Mr Lucas-Smith. I hadn't read this letter at
the time I made that comment. I'll draw it to his
15 attention. I don't anticipate that it will cause
anything to change, but I made my remarks without
having read the contents of that letter. I'll also
more closely examine those emails, I haven't had an
opportunity to have a look at them yet. But again
I do not anticipate what I told you will change.

20 THE CORONER: That's why it's been provided to you,
to give you that opportunity.

MR WALKER: Thank you.

25 THE CORONER: All right. So we'll adjourn till
Monday the 17th at 10 o'clock.

30 **ADJOURNED TO MONDAY 17 OCTOBER 2005 AT 10.00 AM**
[10.20 am]

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