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TRANSCRIPT OF PROCEEDINGS

CORONER'S COURT OF THE AUSTRALIAN CAPITAL TERRITORY

MS M. DOOGAN, CORONER

CF No 153 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

**10.04, MONDAY, 10 JULY 2006
(Continued from 17/5/2006)**

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5 HER HONOUR: Yes, just before we start, I made an order on 7 April regarding non-publication of any submissions. I simply wish to announce that that order is now lifted, so publication can be made of any submissions, any oral submissions that are made today regarding these submissions that have been lodged.

Thank you, yes, Mr Lakatos, thank you.

10 MR LAKATOS: Thank you. Before my learned friend, Mr Lasry, starts I wonder if I might hand up a table which corrects a number of references, mostly typographical references to documents and transcript in our submissions. I've given that to Mr Lasry and I think is the one most central interest, and other parties can have copies if they choose.

15 HER HONOUR: So copies haven't been provided to the other parties at this stage?

MR LAKATOS: Not at the moment.

20 HER HONOUR: No, that's fine, we can make - - -

MR LAKATOS: I'm sorry, I think Mr Archer has one., as I see.

25 HER HONOUR: We can make arrangements for that to happen, Mr Lakatos, thank you.

MR LAKATOS: I'm sorry, I'm informed reliably by my solicitor that everybody has them.

30 HER HONOUR: Thank you.

MR LAKATOS: So if they don't, they should come to us.

35 HER HONOUR: Yes, Mr Lasry, are we ready to - - -

MR LASRY: Your Honour.

HER HONOUR: Are you ready to proceed?

40 MR LASRY: Yes, your Honour. As those looking on would already be aware, the submissions in this matter have been made in writing now by, I think, all parties. So that the primary purpose of these hearings, as we understand it, your Honour, is to enable the parties to speak to their submissions and provide a level of overview, rather than cause to go
45 through the entire documents in detail. And as your Honour has just

ordered that the submissions themselves be now a matter of public record, of course, obviously our submissions and no doubt the submissions of our learned friends need to be listened to and, from the point of view of the media particularly, need to be reported in the context of the written document as well. And as I understand it, so far as the status of the material is concerned, the written document is being regarded by your Honour as though it had been read to you. It's a document before the court and the oral submissions are intended, not so much to supplement those submissions, but to provide an overview of what is in them.

In the case of our submissions, of course, given the amount of material that it was necessary to cover, the document is something of the order of 450 pages in length, and in small type as well. So it was a task sitting down and reading through it, and no doubt many of the other submissions are similarly lengthy, although not as long as ours, but for good reason, contain significant ...(inaudible)...

As your Honour knows, this Inquest began hearing evidence in October 2003, 9 months after the fires of January 2003 which obviously affected Canberra dramatically, particularly on 18 January 2003. There is no question that the hearing of this Inquest has taken considerable time to complete, and I'll deal subsequently with the time the case has taken.

I think to start with, a signatory observation that for the purpose of the Inquest, particularly in relation to the time that it's taken, needs to be understood, and I think I say this, with respect, in fairness to all the parties. Evidence was always going to be involved in the analysis, in effect, of four separate fires. They had ultimately a single effect, but four separate fires.

Those fires burned over a period of 10 days and this court has been called upon to analyse 28 and 18 January 2003. Of course well after 18 January 2003, although for obvious reasons because of the significance of the events on 18 January 2003 little attention has been paid to what occurred thereafter. Inevitably it meant that there was going to be a large amount of material to be considered in the form of evidence and documents, and so on. And of course as would be expected, and there are a large number of represented parties, as is often the case in any hearing of this kind.

Given the magnitude of the fires it meant that at the time, of course, all the Emergency Services of the Australian Capital Territory were involved, together with a substantial involvement from the Emergency Services of New South Wales. And of course it needs to be acknowledged, as your Honour has from time to time, that apart from the analysis that this Inquest is conducted, although it's now 3 years ago, an enormous effort

went into fighting the fires. There can be no question about that, and that needs to be recognised. But in our submission, and that's why we're making the submissions that we make, notwithstanding the effort, things still went wrong.

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In the course of the evidence there has therefore been some examination of the actions of a number of different agencies in both the ACT and the state of New South Wales, and as we've pointed out in our submissions, in Chapter 7 in particular at page 487, apart from the four deaths the property damage and personal injury was substantial. And we've already noted that there was some 407 homes and 3 commercial or government premises of urban Canberra were destroyed, a further 80 homes and 20 commercial buildings in rural ACT were destroyed, so a total of 487 homes and 23 commercial or government premises.

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And as our submission goes on to indicate on the evidence, there were a number of other premises which were damaged and 355 injuries of various kinds, various degrees of seriousness presented to the ACT hospitals as a result of the fires, and of course four tragic deaths. The evidence which is based on estimates gives a total financial loss for the ACT at about \$610 million, including the Stromlo observatory. And as I said in opening this Inquest, it may be that the total figure, if it could ever be calculated, is closer to \$1 billion.

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On 2 April of this year we filed and served the submissions of counsel assisting. Later, on 4 May of this year, we also filed and served further submissions in relation to the issue of recommendations. On 23 May of this year we provided by letter our further submissions in relation to the death of Alison Tener. That letter was a letter which followed your Honour's ruling of 19 May 2006 concerning our request to call further evidence. In the letter we outlined on the evidence as it stands what the final position of counsel assisting is in relation to the death of Alison Tener, and I'll refer to that later in these submissions.

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Submissions on behalf of New South Wales' represented parties were received by us on 20 June this year, and submissions for the remaining parties being sent to us on or shortly before 30 June. As I have already said, many of these submissions are lengthy, in two cases over 200 pages. In the time available we simply haven't been able to consider them all in their entirety. We do not propose to reply in detail to all these submissions in any event, but will select some matters which require, we think, elaboration by us.

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I will endeavour - and I will make reference, your Honour, to those submissions during the course of this oral submission today, but I think I

should make this clear, that as I said at the outset, our submissions, our written submissions to the extent that we don't reply to matters does not mean that our lack of reply means we accept what is said on the point by any of the represented parties.

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Ultimately, it's a matter for you to determine ...(indistinct)... the evidence and what findings you are proposing to make. Because one example, which I'll come to - two examples - where we actually withdraw our submission and I'll deal with that as I come to them. But our submission stands as our position on all the issues, and your Honour can make up your mind on the issues arising from the complete set of arguments.

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I think it would be likely that once we have made these submissions and our learned friends have gone through a similar exercise, at the conclusion of that process we may wish to make a further reply which will be verbal, rather than written, and to the extent that we wanted to make that reply and, in turn, it needed some further argument on the part of any of our learned friends we wouldn't object to that, provided of course that it can become a never ending evolving reply to a reply to a reply. But I think it's the only practical way that in the circumstances that confront us, particularly me, not having Mr Woodward here due to illness, that we can actually deal with the matter efficiently. To try to put something in writing by way of reply I think is now not feasible for us to do so.

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I come then to our submissions, your Honour. As is obvious from looking at the document, our submissions contain eight chapters, and during the course of the submission I'll refer to each chapter to some greater or lesser extent and emphasise some of the points that we have made. I refer first to chapters 2 and 3. As we've made clear on previous occasions, chapters 2 and 3 which are by far the largest chapters in the submissions represent our formulation of what we hope is a complete narrative of the origin and path of the fires, and the response to the fires.

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Your Honour would have noticed from reading those submissions that those chapters contain a substantial amount of factual material without argument, or without comment, and as we announced that we would do, they've been prepared on the basis that if the chapters are satisfactory then they can be adopted as, in effect, the factual basis for a narrative of what occurred, so far as your Honour's report is concerned. And of course subject to objection, change, correction, part of the reason we did it this way was so that in the course of submissions if our learned friends have discovered mistakes or wish to submit that there's material that we've not included in those chapters which is relevant to the important part of the narrative, and of course if your Honour agrees, then that material could be added. And the idea is that at the end of the exercise your Honour will

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have a factual basis on which you can come to findings, and hopefully a factual basis that after this evolution will be accepted by everybody.

5 In paragraph 123 of the submissions of the New South Wales represented parties, in fact in paragraph 122, my learned friends say the following. “Earlier Lasry QC dealt with the narrative in the submissions of counsel assisting and at page 49 of the transcript has said our submissions have been compiled on the basis that they contain the factual narrative of that argument, which is intended to be the platform on the basis on which your Honour might proceed further with the Inquest”.

10 Paragraph 123. This statement by itself was ambiguous, with respect. If it is intended to suggest that your Honour should simply adopt the narrative and submissions of counsel assisting then that would involve the abdication of your Honour’s responsibility to make findings for yourself. I don’t know how much more clearly I can put it, your Honour. I have not the slightest intention that we would provide chapters 2 and 3 as a factual narrative for your consideration.

20 Of course it almost goes without saying, despite that paragraph, that your Honour would need to consider and decide whether you accept that what’s in those chapters is accurate. We have not the slightest desire to cause you to abdicate your role to make findings, and that is the purpose of this exercise. We of course have not weighed the evidence in those chapters, we’ve simply endeavoured to describe what the evidence is. And as I say, if we’ve left out relevant evidence then, as indeed counsel for New South Wales suggests we have, then in their role as counsel whose role is, at least in part, to assist you as well as to represent their clients then of course they can make corrections. And if your Honour is satisfied that corrections should be made they of course can be made, but this is intended to be a starting point.

30 It’s not necessary for my in my submission to deal with chapters 2 and 3, other than by efforts in the course of these submissions, and I don’t anticipate it’s necessary for me to go through in excruciating detail the narrative that’s set out, but by reference of course I will refer to some of the material and obviously chapters 5 and 6 in our submissions are the chapters which deal with ultimately what we see is the two main issues relevant to the cause of the fire, being firstly the adequacy of the initial response to the fires and, secondly, the timeliness and adequacy of warnings to the public likely to be affected by the fires, particularly the conflagration, as we’ve called it, which occurred on 18 January 2003.

40 Going backwards for a moment, your Honour, chapter 1 in our submissions is described as preliminary, dealing with the broad nature of

5 the Inquest and early in chapter 1 we've set out the two issues, page 10, relevant to the cause of the fires, and it is largely, we would submit, then on these two issues that the Inquest is being conducted. And despite the level of detail that occurred in the evidence to questions over the initial response to the fires and the timeliness of warnings to the public are likely to be the main two areas of significance in your Honour's findings.

10 It is appropriate to refer to the period over which this Inquest has been conducted. Indeed, as I've already mentioned but perhaps should add this date, the Inquest was formally opened by your Honour on 16 June 2003, which is now in excess of 3 years ago. The evidence commenced in what was described as Phase 1 of the Inquest on 7 October 2003, and that evidence concluded on 15 October 2003.

15 Phase 2 of the Inquest began on 16 February 2004 and concluded, for all intents and purposes, on 25 October 2005. Of course the court was not sitting during the whole of that time. Indeed, during much of the time, for a variety of reasons which don't need now to be revisited, the court did not sit at all between 11 October 2004 and 17 October 2005, while proceedings were conducted before the ACT Supreme Court, as we have set out at pages 21 and 38 to 41 in the submissions.

20 The delay during that period was obviously substantial and regrettable for the continuity of the evidence, and regrettable of course for the intended completion date. It does seem to be a feature of these kinds of Inquiries, that inevitably the issues develop in a way that makes the early optimism about completion, to some extent ...(inaudible)...

25 As a result, paragraph 104 at page 41 of our submissions we have urged you to recommend to the Attorney-General the Coroner's Act be amended to provide that no application likely to result in any material delay to the commencement or continuation of an Inquest or Inquiry can be brought, except by leave of the coroner or the Supreme Court. Further, that such leave will only be granted if the coroner or the Supreme Court is satisfied the application raises a serious question to be tried and that deferring the hearing and the determination of the application until after the section 55 procedure will result in a real and substantial prejudice to the applicant, which outweighs the prejudice likely to result from the delay of the Inquest or Inquiry.

30 That's been a matter of some contention in the submissions, but even before you received our learned friends' submissions your Honour would have reflected on this. On balance, we think it's no longer appropriate to urge you to make that recommendation. It does seem to us that in lengthy matters sometimes there is simply no easy way around the complexity of

the case and the desire of individuals represented to protect their reputations.

5 An application based on apprehended bias is totally without foundation, is open to the supervising courts to decline to entertain the application. In this case that didn't happen and the matter proceeded to a full hearing. We do not think it is appropriate now, on reflection, to make a submission which might be seen to be aimed at reducing the capacity of courts to protect those before an Inquiry where they wish to assert that the laws of natural justice are not being complied with. So that's the first of the submissions that we would withdraw.

15 However, in that context and now dealing generally with the length of the Inquest we are, it would appear, criticised by the ACT about the manner in which we conducted the Inquest and we are criticised, I think generally, as having been adversarial, and in particular we are criticised for what was I think described in the ACT submission, as at paragraph 1 I think of 21, for keeping our cards close to our chest.

20 I suppose that's all a matter of interpretation but one in a sense only needs to look at the opening in October of 2003 to see the way in which we saw the issues developing, and where the issues were going to be significantly about initial response to the fires and the lack of warnings which appeared to us to be a matter of public interest, so far as the people of Canberra were concerned, inevitably that was going to involve an analysis of the conduct of individuals. It would be fanciful to suggest that such an Inquiry could have been conducted without that being done.

30 As far as we are concerned, it appears to us that those issues were always, as it were, on the table and always there to be seen, and ultimately it was going to involve particular people who had a particular role to play in both issues, and that's the way in which the Inquest has been conducted. It was certainly never intended that the nature of the issues that we intended to pursue, as counsel assisting you, would be in some way hidden in our submission.

40 I come then to the question of jurisdiction, and that means moving to chapter 4, before coming to the main issues. In chapter 4 at page 392 of the submissions we've dealt with the issues of the jurisdiction of the Coroner in a case such as this. As we note at page 393, the issue of jurisdiction was considered by the Court of Appeal in this territory and the proceedings involving this Inquest. As the court said in its judgment at paragraph 19 it was accepted by all sides in the course of that proceeding that the jurisdiction of the coroner is limited by the terms of section 18(1) of the Coroner's Act to the conduct of an Inquiry, to the cause and origin

of the fire that has destroyed or damaged property.

5 The court then considered what was meant by the words “the fire”, and secondly what is meant by the phrase “the cause and origin of such a fire”. As we read it, the court concluded that they were satisfied the term “the fire” section 18 of the Coroner’s Act should be construed to mean the fire that caused the damage to property, rather than merely the initial emission from which the fire ultimately developed. With respect to their Honours, that’s a sensible approach to the terminology.

10 In the present case their Honours observed that it was open to your Honour to enquire into the cause and origin of the fire that swept through parts of Canberra on 18 January and to consider all of the factors that might reasonably be regarded as having been causative of the entire process of that fire. Your Honour will find that at paragraph 22 page 8 of the judgment.

20 The more difficult issue identified by the court related to the concept of causation. In giving examples, paragraph 25 on page 9 of the judgment, the kinds of issues which might become remote from the primary issue of causation the court effectively dealt with the issues of fuel reduction and the amount of resources applied to that effort. In paragraph 26 of the judgment the court also referred to the construction of houses in particular areas, by way of example, and the issue of Building Codes.

25 The court noted in paragraph 27 while none of those suggested issues could be said to be irrelevant in the opinion of the court, they were somewhat remote from the concept of cause and origin of the fire, and that an adequate investigation involved not only time and expense, but also delved into areas of public policy which are probably the prerogative an elected government rather than the coroner.

30 In the course of the judgment at paragraph 29 the court noted that a line must be drawn at some point, beyond which, even if relevant, factors which come to light will be considered to be remote from the event, too remote from the event to be regarded as the cause of it. The court concluded that where the line was to be drawn was to be determined by the common sense test of causation, set out by the High Court of Australia in the case of *March v Stramare* (1991) 171 CLR 506. And at page 395-6 in our submissions we’ve set out some relevant submissions from that case, indicating - and I don’t think this would be in dispute - that the but for test is referred to and is not the definitive test of causation.

45 Ultimately, in our submission, it’s a matter for your Honour to determine as the Court of Appeal said in the judgment at paragraph 34 at page 13 it

is generally for you to determine whether any particular factor could be regarded as sufficiently proximate to fall within the concept of cause and origin of the fires in question, so that you can enquire into it. The court has said the line is to be drawn in accordance with the common sense test in *March v Stramare* and that is a question of fact for you to determine.

We've also made some further submissions contained in paragraph 1,093 at page 398. We have submitted that based on the judgment of the High Court in *Travel Compensation Fund v Robert Tambree* the issue of causation is to be considered in the context of the Coroner's Act and perhaps that ...(indistinct)...

In our submissions at page 401 commencing at paragraph 1,102 we've dealt with the jurisdictional issues as we have seen them in preparing these submissions. In relation to the question of initial response to the fires we have submitted that the jurisdictional basis for the examination of the court to the initial response to the fires is clear, and the judgment of the Court of Appeal in the action involving this Inquest.

We've already referred to the basis on which we make that submission. We have added in our submission there could be no question that the issue of initial response could never be too remote to be regarded as having been causative of the fire as it developed. Consideration of all the factors that it might have that might have been causative of the entire process of the fire necessarily involves the question of whether the fire developed into the conflagration that it did because the initial response was inadequate. And we have submitted that this is one of the central questions of the Inquest.

As to the question of warnings, we have in paragraphs 1,104 to 1,107 set out our submissions in relation to the jurisdictional basis for examining the adequacy of those warnings. We've made the point particularly at 1,106 the expert evidence and the evidence of witnesses involved in responding to and surviving the fires establishes that the presence of adequately prepared and informed residents is the single most important factor in house survival, and we refer back to the earlier portions in chapter 3.

We note that in that paragraph that the ESB's own policy for encouraging well prepared and able bodied residents to stay with their homes till the fire approaches is premised on that fact. It is trite to say that a person can only be well prepared for an event if they are given timely warning of the event, and we refer both to the opinions of Mr ...(indistinct)... that conclusion.

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5 Our submission is that if an issue arises, whether those threatened by the fires had insufficient time to prepare of the effect of the fires, either by preparing to defend their properties by being present, or by choosing to leave the area safely and taking with them precious possessions and documents, but otherwise being taken to a safe area, that is in the words of the Court of Appeal pertinent and relevant line of investigation, and in our submission your Honour is entitled to enquire into it.

10 Further, as we have recently made clear, the issue of warnings bears a particular relevance to the manner and cause of death in our submission, particularly in the case Alison Tener. We note that we had earlier submitted that it was also relevant to the death of Dorothy McGrath. We have indicated in our subsequent letter to which I've referred, that we withdraw that submission. We understand that the jurisdiction in relation to warnings is in contention, at least so far as Mr Lucas-Smith and Mr Castle are concerned.

20 A more complicated issue, to some extent, arises in relation to jurisdiction in connection with the role of the New South Wales Emergency Services, the rural fire service, and that part of the chronology which deals with the McIntyre's Hut fire between 8 and 18 January prior to that fire crossing the border into the ACT. In their submissions dated 20 June 2006 counsel for the New South Wales represented parties have made the point, paragraph 38 page 12, that your Honour is not given jurisdiction by statute to enquire into a fire outside the ACT.

30 The first point, they suggest, at which you acquire jurisdiction to enquire into the McIntyre's Hut fire is at the point where it crossed the New South Wales border because it was only then that it became a fire in the ACT. Therefore, according to the submissions of the New South Wales represented parties, the formal findings which are put forward by us in paragraph 265 in our submissions that the McIntyre's Hut fire was caused by a lightning strike at 3.41 pm on 8 January 2003, to give a date reference, is outside your Honour's jurisdiction. And indeed, that we make a submission to this court that your Honour should make such a finding as described in paragraph 47 of the New South Wales submissions as "nothing short of incredible".

40 However, the result of the New South Wales submission is that by virtue of the existence of the border between the ACT and New South Wales, ACT coroner has no jurisdiction to make any finding about the cause and origin of the fire, which is the very fire that caused the devastation that was caused on 18 January 2003. Paragraph 49 of their submissions, the New South Wales represented parties suggest that there is no proposed finding as to that fire that the court has jurisdiction to consider, and no

formal finding is proposed in respect of that fire.

5 It is in our submission in error to equate the role of the coroner, as they
do, with the wording of section 120 of the Legislation Act. The New
South Wales represented parties, as I understand it, submit that the effect
of section 122(b) of that Act is to amend the wording of section 18 of the
Coroner's Act effectively so that it would read "the coroner shall hold an
inquiry into the cause and origin of a fire in the ACT". With respect, we
entirely disagree with that submission. The trigger for your Honour's
10 jurisdiction is not just the commencement of a fire, but rather the fact that
a fire has destroyed or damaged property, and of course deaths. And as I
understand it, it is the destruction or damage which activates section 18(1)
of the Coroner's Act.

15 It is also to be noted in the course of considering this issue that under
section 13 of the Coroner's Act the coroner has jurisdiction to hold an
Inquest into a death even if it occurred outside the territory, if the person
was ordinarily resident in the territory and the death occurred in any of the
circumstances set out under subsection (1). Section 13(3) the coroner also
20 has jurisdiction to hold an Inquest, notwithstanding the body of a deceased
is not within the territory or has been destroyed or is in a place from which
it cannot be recovered, in the case of a suspected death, the body of the
deceased cannot be found.

25 That means, for example, that if - and this is entirely hypothetical of
course - if a member of the ACT Fire Brigade had in the course of the
fires travelled into New South Wales to assist in the fire effort and been
killed in New South Wales in the course of those duties, and provided that
person was ordinarily resident in the territory who, for example, died after
30 an accident where the cause of death appeared to be directly attributable to
that accident, then an Inquest can be held in the ACT. That might involve,
again for example, circumstances where an investigation into the accident
and the cause of death required an investigation into the actions of a New
South Wales agency, for example. There can be no question that in that
35 hypothetical example your Honour would be entitled to enquire.

We would agree, with respect, with what appears at paragraph 67 of the
New South Wales submissions. Perhaps I should just refer briefly to it,
page 19, "But the lessons to be learned" - perhaps I should read the
40 previous paragraph, paragraph 66:

45 "It needs to be borne in mind that an Inquest serves a particular
purpose in the working of good government. Apart from the bare
purpose of ascertaining accurately the cause of death of a person
and eliminating the possibility of arson in starting a fire, an

Inquest will sometimes expose matters of public safety that need to be addressed in the future. This is often popularly expressed and for once reasonably accurate as the lessons to be learned from a particular event.

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But the lessons to be learned are lessons for the good government of the ACT not New South Wales. It cannot be the function of an ACT coroner to expose matters of public safety that need to be addressed in future by the citizens and government of New South Wales.”

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We agree with that. We say that the purpose of analysing the evidence in relation to the McIntyre’s Hut fire between 8 and 18 January are centrally connected with the good government of the ACT. It’s axiomatic, we would submit, that the good government of the ACT entitles you to investigate a fire which does massive damage in the ACT, although it starts in another state for the purpose, among other things, of the citizenry of the ACT understanding why and how such an event occurred. To conclude otherwise would be absurd, in our respectful submission, suggesting in effect that the border is more in the nature of a brick wall than a notional line in the federation of states and territories.

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Paragraph 71 of the New South Wales submissions a question is posed which I’ll get to in a moment. Paragraph 71:

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“Of what relevance to the good government of the ACT is it to note the fire which came across the border began at a particular point of origin in New South Wales, or indeed anywhere else for that matter?”

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A hypothetical example is then given about a fire which originated in Victoria, which why that example is given except for a desire to vilify Victoria. But the answer to the question posed in the first part of paragraph 71 is that it is inevitably relevant for the people of the ACT to know the circumstances under which a fire which began in New South Wales did such dramatic damage in the ACT. And in particular, and for example and not limiting it to this, how by co-operation with the New South Wales government, inevitably, a repeat of such an event might be avoided in the future.

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What the New South Wales government makes of the event we agree, with respect, is entirely a matter for them and their coroner. The purpose of the Inquest is focused on the complete fire, as the ACT Court of Appeal noted. And it is absurd to suggest that in such a dynamic event the only portion that can be considered is that which occurred after the border was

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crossed. In our submission in paragraph 73 of the New South Wales submissions is simply in error.

5 In the example referred to in paragraph 78 where a fire crossing from Victoria is referred to the question is posed how would it be relevant to the good government of the ACT? The answer to the question posed in paragraph 78 is that it would be relevant to the good government of the ACT, and it's relevant in this case to know that the Victorian authorities in the hypothetical example did not fight the fire diligently, and therefore the
10 inability of the ACT authorities to cope with the consequence was not, for example, due to their inadequacy which needs rectification, but the inadequacy of some other effort beyond their control.

15 And as I say, you don't need to be hypothetical about this, it is relevant for the good government of the ACT to know why Canberra had declared the drought conditions was known by single members of ESB. That was known well before the fire season formally commenced. We've set out the detail of that in the course of chapter 2 of our submissions, particularly at page 74 of the submissions under the heading of deteriorating
20 conditions during 2002.

As that material indicates, from January 2002 onwards Mr McRae sent a number of emails discussing the deteriorating outlook for the fire season 2002-2003. In one of the emails, the terms of which are set out at
25 paragraph 193 of our submissions, Mr McRae indicates that they are on the way to what he described as a "full blown El Niño". That was updated on 13 May 2002 and Mr McRae provided an El Niño update, rating the prospect of 90%. This email that Mr McRae sets out what is to be done in the forthcoming fire season which includes the mitigation of risk by land
30 managers and, in particular, the community needing to be warned and take steps to protect themselves. It also noted that planning was needed to guide a response to large and complex fire situations and strategic planning needed for areas like the Cotter Catchment. That was updated again, as the material demonstrates, in August of 2002.

35 In October 2002 Mr Rob Webb from the Bureau of Meteorology circulated a seasonal climate briefing which presented a serious situation within New South Wales, given severe rainfall deficiencies. Among others, that briefing was provided to Mr Tony Graham and to Mr Nick
40 McRae. As the balance of that section of chapter 2 sets out, the warnings continued through to the end of 2002 and in our submission, nobody could have been in any doubt about the antecedent conditions.

45 We have submitted in paragraph 1,117 at page 407 of our submissions that even without a level of pre-season preparedness but with genuine rapid

and aggressive response to all the fires, there remained a strong likelihood that all the fires in the ACT that began on 8 January would have been able to be contained within the first 24 hours. If that had occurred there were equally good prospects of successfully controlling it and suppressing those fires before extreme weather hit.

We point out that the importance of aggressive response to fires in remote areas of the ACT had been reinforced in the Namadgi burn scenario and we set out the details of that in chapter 2. We do submit that Mr Tony Graham as the nominated operations officer was the wrong person to be making decisions about strategies and resource deployment at the time of the initial response to the fires. On that first night the problem was that Mr Lucas-Smith spent a large part of the evening at Queanbeyan, so it fell to Mr Graham to make decisions.

With respect, Mr Graham was without much experience, and experience in managing remote area wild fires and had no relevant experience in fighting them, however effective that controller of resources he was and however competent and dedicated the administrator he was, the role he was carrying out on the evening of 8 January went well beyond his day to day role in the ESB. In our submission it required a strong working knowledge of fire behaviour and fire fighting suppression tactics. In our submission, in the course of his evidence he effectively accepted that he did not have that knowledge or qualification.

In our submissions we have nominated those who should have been performing that role on the night of 8 January, being either Mr Bartlett or Mr Sayer, who were the other two deputy chief fire control officers. Mr Bartlett had offered his services at 4.20 on the afternoon of 8 January, which was not taken up either during either of the first two crucial days of the fires. There is no question about Mr Bartlett's experience and qualifications, and we've set out that material in detail in paragraph 1,123.

The other experienced officers, including Mr Sayer, had immediately recognised the immediate urgency of the situation and the need to respond as soon as possible with additional resources and heavy machinery, however Mr Graham did not appear to see that need. We have submitted in the course of our written submissions that Mr Graham's lack of experience in fire behaviour and fire suppression attributed significantly to the poor decision-making on the first night of the fires and on the following morning, and in paragraph 1,126 we have set out how the process might have worked if the operations officer had been carried out, for example, by Mr Bartlett. We see a general reference to that in paragraph 410 of our submissions.

5 We therefore have submitted that your Honour should find that the failure to identify the importance of the role of operations officer that Mr Graham would be fulfilling in the absence of Mr Lucas-Smith, to replace him with an officer with the necessary experience was a serious error of judgement and a cause of all the ACT fires, in the sense in which that concept was defined by the ACT Court of Appeal. In particular it is, in our submission, a factor that “might reasonably be regarded as having been the cause of the entire process of fires”. See paragraph 22 on page 8 of the judgment of the Court of Appeal.

10 Our submission also deals with the issues of the flaws in the structure of the service management team. You will find that material at page 412 in paragraphs 1,130 and following. In the course of our submission we refer particularly to the evidence in the narrative appearing to demonstrate that Ms Odile Arman, in effect the officer in charge of the Bendora fire, was initially seeking guidance on the question of whether she and her crews would remain in Bendora, only to be told by Mr Graham that it was her decision. We also in our submissions refer to the fact that Mr Hayes also seemed uncertain about his authority to demand additional resources on 9 January 2003.

20 However, the key deficiency identified in our submissions in relation to the service management team structure relates to the role of planning. In particular, there was no planning support in the field itself. This was the case up until 13 January 2003 when some limited administrative support was arranged for field controllers at Bulls Head. The evidence in our submission suggests that even the experienced field controllers were of the view that it was difficult in the circumstances to do effective planning beyond the next shift.

30 Planning was actually being undertaken at Curtin under Mr McRae’s direction. In his evidence he seemed unsure as to whether there were planning officers in the field capable of undertaking the work. Having said that, it is to be noted in our submission at paragraph 1,133 that we do not believe it is possible to draw a direct line between a particular aspect of the dysfunction of the service management team structure and the development of the fires on 8 or 9 January and thereafter.

40 The decision in relation to the Bendora fire, if I can deal with that, the decision to withdraw personnel from that fire on the night of 8 January was, as we have suggested in our submission, a most important issue. It is important to your Honour’s Inquiry, firstly, because the result was that the Bendora fire burned unchecked overnight on 8 January, thus raising the question as to what might have been achieved if crews had remained both at night and also what might have been achieved with a view to

preparations for the following day.

5 Secondly, and assuming the effect of the withdrawal was significant, in our submission you are entitled to examine whether the decision to withdraw, and the process by which that decision was reached, was carefully considered and appropriate. Paragraph 1,137 and following in our submissions we have set out what in our submission is the effect of the decision to withdraw.

10 Based on the evidence, it is our submission that if the work that had, for example, been suggested by Mr Roche and Mr Cheney had occurred on 8 January, including the construction of a hand trail or part of the support from a bulldozer the following morning in opening up the Bendora break, and the old control line between Wombat Road and the Bendora
15 Arboretum it is likely that the fire would have been contained and not spread, or at least not spread in a way that it did when the adverse weather arrived 10 days later.

20 As to the making of the decision to withdraw, we have submitted, paragraphs 1,143 and following, that the manner of the making of the decision left a great deal to be desired. There are in our submission several reasons for that. Firstly, the lack of involvement by Mr Lucas-Smith of the making of the decision. Secondly, the lack of enquiry of Odile Arman about what she had discovered at the scene on her
25 arrival and inspection. Thirdly, the lack of any real basis for suggesting, as Mr Graham did, that night time operations are only usually conducted when tactics have changed to indirect attack.

30 Our submission it should be accepted that an important reason in the mind of Odile Arman when she made the decision to withdraw was her concern for the safety and welfare of her crews. But as we have submitted at paragraph 1,151 this decision-making process indicates the flaws inherent in the way the service management team was being conducted, as we said earlier in the submission.

35 We have noted that Ms Odile Arman decision was not inflexible. She made it clear that she was willing to stay at the scene overnight if that is what the service management team thought should occur, thus her safety concerns while no doubt genuine were clearly far from overwhelming. As
40 we have submitted in paragraph 1,152 Mr Lucas-Smith and Mr Graham both failed to give the matter the thorough and urgent consideration it deserved, and so the process failed.

45 Paragraph 1,156 of our submissions we deal with the evidence of the experts, Messrs Cheney, Roach and Nicholson in this issue. Mr Cheney

5 and Mr Roche held the opinion that Ms Odile Arman did not have sufficient experience to control the fire in that particular type of environment and to make an appropriate decision in the circumstances that confronted her. They suggested that if the service management team was functioning correctly, that situation would have been remedied.

10 Paragraph 1,158 in our submissions we've dealt with the evidence of Mr Nicholson. In our submission his conclusion on the matter of the Bendora withdrawal is not credible and neither is he a credible witness, either on this topic or on the topic of warnings, which we deal with in chapter 6.

15 Paragraph 1,159 we have set out in detail the reasons why we submit that Mr Nicholson's evidence should be rejected. In summary, those reasons are as follows. Firstly, he failed to analyse the consequences of the withdrawal for the future effort against the Bendora fire. Secondly, he leave out of account the fact that Mr Lucas-Smith conceded that if he'd been in Odile Arman's position he might have made a different decision.

20 Thirdly, although Mr Nicholson went to the scene of the fire with Odile Arman he did not walk around the perimeter, as it was known on the first night. Fourthly, he conceded that sometimes, despite the risks, night time fire fighting becomes an absolute necessity. In our submission, in this case it was, not with the benefit of hindsight but with the knowledge of the antecedent conditions.

25 Next, he appears to have done exactly what we submit should have occurred on the night of 8 January in his own fire fighting career on analysis. Next, he also appears to have been selective in the details on which he relied to come to a conclusion. And finally, as we have set out on page 421, it would appear at least open that Mr Nicholson was taking irrelevant considerations into account in coming to what was supposed to be an expert conclusion.

30 As we have submitted at paragraph 1,160, Mr Nicholson's evidence is of no use to your Honour on this topic. Almost in spite of the evidence, he seems to have adopted a position which appears to be one he considers consistent with the interests of those who retained him, notwithstanding the evidence, much of which he has not considered.

35 The other important issue in relation to the initial response for the Bendora fire was the employment for resources the following day. As we've set out in our submissions at paragraph 1,161 and following, it is clear enough that Ms Arman had recommended a minimum number of personnel who should attend the fire, and in a mobile phone conversation

with Mr Graham it is clear that she mentioned four rake hoe teams to him.

5 The resources actually deployed did not meet the minimum requirement for initial response, let alone that which would be ordinarily necessary, the second day of the fire burning in very dry bushland in a remote national park. There were other resources available and we have submitted in our written submissions that Mr Graham's decision to adopt the minimum requirement suggested by Ms Arman again demonstrate his lack of appreciation of how the fire was likely to develop overnight and the following day.

10 The absence of overnight crews required Mr Hayes, who was the commander of the fire on the morning of 9 January to have to conduct further reconnaissance of the fire. The bulldozer which should have been deployed at first light on the morning of 9 January was in fact not offered to Mr Hayes until well into the afternoon, meaning it would be on the ground a day and a night later than it should have been.

15 Paragraph 1,168 we've set out the findings which should be made in relation to the initial response to the Bendora fire. In our submission, the court should find that the decision of whether or not to leave crews to continue suppression efforts overnight on 8 January was a decision critical of the future prospects of controlling that fire. Ms Arman's decision to withdraw took into account safety considerations, but also the fact that she believed ESB wished her to withdraw, and that she was insufficiently experienced to weigh all the competing considerations.

20 Our submissions also assert that Mr Graham was insufficiently experienced and formed a view as to what should occur without adequate information. In our submission, Mr Lucas-Smith displayed a casual approach to the decision which he must have known was important for the future fire suppression effort. His conduct, coupled with that of Mr Graham, seemed to be consistent with him wishing Ms Arman to withdraw.

25 30 35 Mr Graham failed to properly enquire of Ms Arman once being given her reasons for proposed withdrawal. The decision to withdraw from the fire on 8 January was the wrong decision in the circumstances, and effectively deprived ESB of any realistic chance of gaining control of the fire before the weather worsened.

40 45 In our submission, had crews remained overnight and the fires being adequately resourced throughout the next day, including the assistance of heavy machinery, it is likely that the fire would have been contained within 24 to 36 hours of initial ignition, and substantially controlled and

suppressed before the onset of the extreme conditions of 17 and 18 January. Finally, in our submission, as will be clear in the written material, Bendora was severely under-resourced.

5 In relation to the Stockyard Spur fire, the submissions in relation to this fire, including the initial response, are set out at paragraph 1,169 and following. In paragraph 1,170 we summarise the problem in relation to this fire. Essentially it is that the initial response was not in accordance with the way the response described for that day, and had it been
10 otherwise personnel could have walked to the fire that evening and done useful suppression work overnight.

As is the case with the Bendora fire, the presence of overnight crews would have greatly assisted the handover for the next day and the timely
15 dispatch of a bulldozer would have greatly assisted access to the fire via a remote area fire fighting teams, fire fighting vehicles, as well as assisting in the construction of control lines around the entire perimeter. Our submission is that had steps been taken in accordance similar to the evidence Mr Roche, it is likely that the Stockyard fire would have been
20 contained, likewise, within 24 to 36 hours of ignition, and in advance of the events of 17 and 18 January.

In relation to the Mount Gingera fire, our submissions in relation to this are at paragraph 1,173 and following, and the submission in relation to that fire is similar to the submission in relation to the Stockyard fire. Again, we refer to the evidence of Mr Roche and make the submission that had various steps been taken, as recommended in the evidence of Mr Roche and Mr Cheney, it is likely that that fire also would have been
25 contained within 24 to 36 hours of ignition. Contained, I'm sorry, and controlled and probably suppressed in subsequent days.
30

In relation to the McIntyre's Hut fire, it is agreed by everyone I think the McIntyre's Hut fire as a whole was not amenable to direct attack on the afternoon and evening of 8 January, or anytime thereafter. Our
35 submission is summarised in relation to McIntyre's Hut fire in paragraph 1,178 on page 428. In that submission we assert that the long distance indirect attack strategy adopted for the purpose of containing the McIntyre's Hut fire was in an area selected as being of the order of 10,000 hectares, which was far too large, given the conditions and the prospects
40 of completing the burn and gaining control before the likely onset of adverse weather conditions.

As we've said in that summary, the delay in the onset of those conditions beyond the typical 5 to 7-day cycle was fortuitous, but still not enough to
45 completely contain the burnout to a sufficient depth to prevent breakouts

on several fronts on 17 and 18 January. In our submission, the area to be burnt could have been reduced by about a quarter, using different containing lines to the east and west, and also to hasten the process of burning out from those containment lines once they'd been chosen. In our submission, those options were either not satisfactorily explored by the New South Wales authorities and examined, or were the subject of delay in applying resources. It is of no consequence and no consolation in our submission that it can be said that during the 10-day period that fire was kept within containment lines, given the size of the area and those containment lines surrounding.

In the remainder of our submissions concerning the McIntyre's Hut fire we deal with several matters in more detail. We deal with the fact that no time frame was set for the strategy that was agreed upon. We deal with the selection of the eastern containment line, we deal with the selection of the western containment line, and we also deal with the delay in the commencement of the burning and the issue of the area of incendiaries and conclude delay in proposed farming.

As we have said in our submissions, it does not appear to be the intention, that there was no discussion about the time it would take to burn out the area which had been selected. I don't think anyone in the course of giving evidence suggested that that matter was ever considered, and indeed the primary response was that they were driven by their tactics, rather than by a timetable.

In our submission, had some estimate been discussed it would have been reasonably clear that the area to be burnt was so large that work needed to be done so extensive that the prospects of completing the strategic within the usual weather cycle of 5 to 7 days was very poor. Such a discussion, if it had occurred, in our submission should have then prompted an urgent review of the strategy to examine tactics for reducing the burnout area, including urgent further reconnaissance at ground level and the viability of using alternative containment lines.

It is probably correct that the only boundaries or containment lines, where there were alternatives, were the east and west containment lines, rather than the north and south containment lines. As the debate during the evidence made clear, the alternative eastern containment line was the Baldy Range trail, subject to controlling a small area of the spot fire which had burned across that trail. The second alternative was the western containment line using the ...(indistinct)... and McIntyre's Trail, rather than ...(indistinct)...

In our submission, particularly at paragraph 1,181, we are critical of the

5 lack of reconnaissance of the fire on the night 8 January. We have submitted to your Honour that Mr Cheney was correct in his evidence when he expressed the view that there was opportunity for observers or fire fighting crews under the direction of the incident management team to undertake an on ground inspection of all the fires from about 8.00 pm on the night of 8 January, once the fire behaviour had subsided. In our submission this is an opportunity that should have been taken.

10 The detail of our submissions in relation to the eastern and western containment lines are set out on pages 430 to 432 of our submissions. Our submissions in relation to the delay in commencing burning and aerial incendiaries can be found at page 432-3, and proposed finding in relation to this fire is set out on page 434. In our submission, if the alternative east and west containment lines had been adopted and the commencement of burning out had not waited for two days we submit that it was likely the control lines would have been completed and burnt to a sufficient depth to undertake any remaining burning out by aerial ignition by 14 or 15 January.

20 We would therefore submit that the failure of the Queanbeyan incident management team on the evening of 8 January or before midday on 9 January to undertake an assessment of the time likely to be required to complete the long distance indirect strategy, together with the consequent failure to identify and implement with adequate resources as a matter of urgency, containing options that would have resulted in a smaller burnout area with speedier consolidation of the burning out operation, including most notably the failure to adequately resource the Baldy Range fire until the morning of 10 January 2003, was a cause of the fire that burned into Canberra on 18 January 2003.

30 Your Honour, I'm about to go to the issue of warnings.

HER HONOUR: I might take the morning adjournment then.

35 **ADJOURNED** [11.17 am]

40 **RESUMED** [11.42 am]

HER HONOUR: Yes, thank you, Mr Lasry.

45 MR LASRY: As your Honour pleases. Chapter 6 of our submissions deals with the issue of warnings, and ...(inaudible)... us that that issue

divided into three main sections. When I say warnings, it's a shorthand word but obviously what we're now discussing is the issue of warnings to the ACT public and the Canberra public in particular in relation to the onset of the fires.

5

The first issue that on the evidence seemed to us to arise was in the form of a question: When was it apparent to senior personnel at the ESB that there was a realistic risk of the fires in combination having some effect on urban Canberra where a large amount of the damage was done. Just in relation to that, your Honour, I think this is probably an area where, in a sense, the issue of hindsight would be most clear in the debate, and the debate will involve the difference between, on the one hand, not being able to say in precise terms when and where the fire might affect the Canberra suburbs, as opposed to, on the other hand, having some appreciation that there's a realistic or genuine risk that at some stage it will.

20

One of the difficulties that of course you will have is to determine what the knowledge was, what the state of thinking was amongst people whose responsibility it was to issue the warnings. For the purpose of our submissions, we have raised the question and I ask this first question as to when it was clear there was a realistic risk, and by realistic risk I don't mean certainty, and I don't necessarily mean in that submission knowledge of precisely where and precisely when the fire would have its effect.

25

The second issue seemed to us to be that assuming that the risk was realised prior to the afternoon of 18 January, which the evidence indicates that it was, was information about the risk conveyed to the public in an appropriate and timely way? The third question is, if the existence of the risk was appreciated and the information was not conveyed in a timely and appropriate way, then why did that occur?

30

Paragraph 1,199 of our submissions, we've summarised our submission effectively as follows. The realistic risk of an impact on the urban area of Canberra was appreciated as early as 13 January 2003 by senior ESB personnel, or at least some of them. It is clear that the existence of the risk was not effectively conveyed to the public of Canberra prior to about 2.40 pm on 18 January. Indeed, in our submission on occasions leading up to the events of 18 January the opposite of what was known was said publicly about the risk of an impact on the suburban area. The more complicated issue is why that occurred.

35

40

It may have been that the answer lies in part in the somewhat convoluted approach taken to the issue of warnings by Mr McRae in his evidence.

45

5 The answer may also lie in what we would submit would be a misplaced desire not to allow the community, as articulated by Mr Lucas-Smith and in particular as articulated by him at the briefing on 16 January of the ACT Fire Brigade and Ambulance. And it may also be connected with a breakdown in the co-ordination of particular activities within the ESB, particularly the planning section.

10 In our submissions we've put the proposition at paragraph 1,203 that by 13 January at the latest it was apparent that there was a realistic risk the fires might in some form affect the urban area of Canberra. We've set out in the submissions the basis on which we make that submissions. It relies in part on the request for Commonwealth assistance being made on behalf of the ESB by Mr Castle, and primarily I suppose we would have to say it relies on the discussion we've heard on or about that date between
15 Mr Lucas-Smith and Mr Cheney in which they discussed the risk of the fires burning into Canberra.

20 In our submission the Lucas-Smith/Cheney conversation itself gives something of an insight into the general ESB approach to the fires and the risk of consequences. We would submit that your Honour would not have any hesitation in accepting Mr Cheney's account of what was said during that conversation, and to a significant extent the detail of the conversation doesn't appear to us to be in contention.

25 In addition, as we've noted in paragraph 1,207, Mr Cheney had long been recognised, including by Mr Lucas-Smith, as an expert in bushfire behaviour of considerable standing. The view that he held was the obvious view to hold in the circumstances. And refer again in that connection to the point that I made earlier on the issue of hindsight and in
30 particular I think at that stage I was dealing with the question of initial response to the remarkable antecedent weather conditions that had prevailed in the lead-up to this season.

35 We are critical in our submissions, particularly at paragraph 1,208 and following, of the manner in which the discussion between Mr Lucas-Smith and Mr Cheney was treated at the later planning meeting, and the criticism we make, effectively is this. That rather than deal with the substance of Mr Cheney's view and have a discussion about the seriousness of the risk to the urban area, the ESB discussion rather dealt with the conversation as a media issue because of the prospect that
40 Mr Cheney was going to express his view to a Channel 9 reporter, an interview which ultimately never occurred.

45 We make the point in paragraph 1,212 on page 442 that the process by which this matter was dealt with indicates an unwillingness on the part of

5 ESB personnel to confront or even acknowledge the issue of the risk to the more densely populated areas of Canberra. We have submitted that on the evidence it doesn't appear that ESB formed a collective view that there was no risk to Canberra, but rather that such risk as there was should not be discussed publicly, and certainly not without being from out of the ESB. And it seems to us also to be part of the policy that the risk to the Canberra suburban area should be downplayed.

10 Our submissions assert that there were significant flaws in the ESB approach to community information. Flaws are illustrated by the way in which the views of Mr Cheney were dealt with. The first flaw is treating the dissemination of information about the fires and their likely impact as a public relations exercise, rather than an integral part of the operational response to the fires. The second flaw seemed to be an unwillingness on the part of Mr McRae to admit of any view of potential fire spread that did not fit with his own somewhat rigid attitude.

20 The next step in the process to which we refer in relation to the three issues I've raised about warnings is the discussion between Mr Lucas-Smith and Mr Koperberg of the New South Wales Rural Fire Service on 15 January 2003. Paragraph 1,221 we set out the finding that we contend for and we ask your Honour to conclude that on 15 January during the discussion between Mr Lucas-Smith and Mr Koperberg, Mr Lucas-Smith was informed in substance that although the McIntyre's Hut fire remained within the containment lines the fire was by no means controlled or suppressed.

30 We'd also invite your Honour to conclude that at no stage as Mr Lucas-Smith told by Mr Koperberg or anyone else with the New South Wales Rural Fire Service in words or in substance the McIntyre's Hut fire would not be an issue to the ACT, and Mr Lucas-Smith's evidence to this effect in our submission should be rejected. We contend for the conclusion that if the discussions about possible developments in fire behaviour over the next few days and in the course of identifying possibilities Mr Koperberg expressed concern for Canberra, whilst Mr Lucas-Smith responded by saying that he did not need Mr Koperberg, coming from Sydney, to tell him what the threat to Canberra was.

40 Finally, we submit that at no stage did Mr Lucas-Smith reject such an eventuality as possible. We also invite your Honour to conclude that after Mr Lucas-Smith heard Mr Koperberg's television interview on the same date, 15 January, he clearly understood that Mr Koperberg considered that the first, in particular the McIntyre's Hut fire were a serious threat to the western suburbs of Canberra. Mr Lucas-Smith's own position, as at 45 15 January, was that he would also express concerns about the fires

having serious implications for the western suburbs or Canberra if they were not contained before the onset of predicted bad weather.

5 In the course of our submissions we then deal with other developments on
the afternoon of 15 January, including reference to Mr Castle's second and
third requests for Commonwealth physical assistance, also the discussions
at the planning meeting at 4.00 pm that afternoon, with particular
reference to Mr McRae's comments seemed to be well and truly across the
risk, at least the theoretical risk, under the heading of do the maths,
10 including references to a fire danger index for the following Monday of
110 to 140, being a 1 in 20 EFI and a 1 in 40 EFI weather forecast. As he
put it, the worst fire situation that they would see in their careers.

15 As the evidence indicates, the minutes of that planning meeting record
Mr McRae referring to the potential effect on public land, infrastructure,
property and assets. In our submission, your Honour should find that by
late afternoon or evening of 15 January 2003 and thereafter each of
Mr Lucas-Smith, Mr Castle and Mr McRae recognised and acknowledged
that the fires, including the McIntyre's Hut fire, presented a serious risk to
20 the Canberra urban area and the rural settlements west of urban Canberra.
In the case of Mr McRae, he considered that an impact on Canberra was
likely to occur by Monday, 20 January 2003.

25 As we've already said, no warning consistent with that state of mind was
given identifying a risk prior to 2.40 pm on 18 January. In paragraph
1,230 of our submissions we refer to the position taken by Mr Val Jeffrey
who had also recognised the risk on or before 15 January, despite limited
resources and the absence of any relevant personal responsibility took
steps to ensure that those in his area who might be affected by the risk
30 were notified of it, and given guidance on how to prepare. We contend
that had a warning to the effect of that sent by Mr Jeffrey on 15 January
been issued by ESB the residents on the western edge of urban Canberra
and rural residents west of there, the injury and property loss and damage
resulting from the fires would have been reduced.

35 On 16 January 2003 the ACT cabinet was briefed in relation to these fires.
As your Honour will recall, the record of the cabinet briefing is comprised
of the evidence of recollection, together with the cabinet briefing
document and notes taken at the discussion. It is clear that the cabinet
40 were told that there was a potential for spotting over containment lines for
the McIntyre's Hut fire, with a potential serious impact to the ACT forest
pines and subsequently the urban areas in paragraph 1,233. As we've
noted in our submissions, the briefing paper went on to include the urban
edge of Canberra, and of the assets under a potential threat.

45

5 In paragraph 1,235 we have formulated the kind of public statement that
might have been able to be issued by ESB at that stage. I accept the
wording of that formulation, hypothetical as it now is, is a wording which
is made well after the event with all the benefits of hindsight, but
nonetheless it is the kind of warning that we contend could have been
issued at that day and it reads:

10 “The Emergency Service Bureau informs the public of Canberra,
particularly those residents on the western edge of the urban area,
that there is a significant risk that in the next few days, possibly
by Saturday, more likely by Monday, fires currently burning to
the north-west of Canberra, in both the ACT and New South
Wales, will directly affect the urban area of Canberra to some
15 extent. Where that affect will occur cannot yet be more than
estimated. Suburbs in the Dunlop and Weston Creek area are at
greatest risk.

20 Residents in those areas should immediately commence making
preparations for such an eventuality and can refer to the ESB web
site for information about how to do that. ESB will be making
direct contact with residents in the areas likely to be affected over
the following days to assist in those preparation and provide
information on how residents might prepare for evacuation,
should that become necessary.”

25 We note that a warning in similar terms was in fact issued by ESB on
20 January for the following days. The overall submission we make in
relation to the cabinet briefing is contained in paragraph 1,234. In
essence, the point is that if the ACT cabinet were entitled to be informed
30 of a potential serious impact, then the public of Canberra was also entitled
to be informed of it. I’d also point out that at the briefing there was
discussion about which suburbs faced the greatest risk, threats to major
infrastructure, and the potential need to prioritise which assets to save, as
well as fixing a percentage chance of a state of emergency being declared.

35 One of the issues that’s arisen during the course of the submissions relates
to the evidence of the Chief Minister. Insofar as the Chief Minister is
concerned, we have made the submission in paragraph 1,236 recording his
evidence, or referring to his evidence. The evidence he gave was that the
40 cabinet briefing did not amplify the risk to Canberra in his mind. That it
was evidence which, in our submission, is hard to accept, given what the
record shows the cabinet was told.

45 We make the submission simply because, for whatever reason, it might be
the reason based on recollection rather than anything else, there seems to

be an inconsistency in our submission on the evidence between what the cabinet was actually told, according to the record of the meeting, and what Mr Stanhope and others can remember about those topics and they way they were discussed in the cabinet briefing.

5

The ACT submission in these proceedings is critical, in part, to the lack of particularity in the submission of paragraph 1,237 referring to Mr Stanhope's evidence. It should be obvious, based on the manner in which our submissions have been prepared that the evidence to which that submission refers is in the narrative, particularly at paragraph 683 to 692.

10

But in the end, to a significant extent that's a side issue, because we make the submission that, and we accept, that the ACT government of course was entitled to whatever they were told, and however the risk was amplified, they were entitled to rely on their officials who were conducting the Emergency Service response to do the work professionally that they were required to do, and that included of course warning the community.

15

20

We also in our submissions refer to the briefing on 16 January to the ACT Fire Brigade and Ambulance Service. At paragraph 1,244 of our submissions we have submitted that your Honour should conclude that Mr Lucas-Smith made the comments attributed to him by witnesses such as Mr Cartwright and said during the course of the briefing that the information was sensitive. We have submitted that the only explanation for this is that Mr Lucas-Smith did not wish to alarm the public, and that he would now acknowledge that he had said the things he did if public questioned about it.

25

30

Likewise, the importance of the information is, in a sense, highlighted by the fact that the AFP were not informed about Mr Lucas-Smith's prognosis either, and senior officers from the AFP, including for example, Commander Newton, provided your Honour with details as to the difference in the AFP response had they known the information that was provided to the Fire Brigade during the course of that briefing.

35

In the context of referring to the evidence given by Mr McRae about triggers, we have submitted that both Mr Lucas-Smith and Mr McRae came to a decision which might be inferred to be a consultation. I don't mean to imply by that in a conspiratorial sense, but simply by consulting. There is no evidence about such a conversation, so it can only be a inferential conclusion, that the Canberra public should not be informed of the risk of the fires affecting Canberra.

40

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For whatever reason that they came to that view, assuming that your

5 Honour is prepared to find that they did, the ultimate effect of such a decision was to deprive the people of Canberra of the chance to prepare for the risk that both Mr Lucas-Smith and Mr McRae saw as serious, and perhaps even likely, as we've set out in paragraph 1,250. The submission on this is straightforward and set out in paragraph 1,252, by the end of 16 January 2003 the Canberra public were entitled to the same information that was given to the ACT cabinet and the ACT Fire Brigade.

10 We have already referred in the course of our submission to the evidence of Mr Nicholson, but in dealing with 17 January 2003 we submit that the suggestion of the headline for that day in *The Canberra Times* "Next Five Days Critical" provides any genuine information for the people of Canberra. Your Honour will recall Mr Nicholson's evidence not just in relation to the headline but the article itself which failed to alert - not that 15 it was the responsibility of *The Canberra Times* - but failed to alert anyone to what was now an imminent risk.

20 At the morning planning meeting of 17 January there was alarm because the prospects of controlling the Bendora and Stockyard fires were now non-existent. Yet at the midday press conference Mr Lucas-Smith suggested that the prospects of a fire meeting the urban edge were "pretty slim". We urge, as we have in paragraph 1,259, that his evidence that he was only meaning to refer to the ACT fires should be rejected. It is, as we have suggested in paragraph 1,259 absurd that a media conference like 25 that he would leave out of account a fire that on any view was the most threatening to Canberra.

30 A regrettable feature of Mr Castle's written statement to the Inquest is referred to in paragraph 1,260 and following in our submissions. It refers to paragraphs 107 and 108 of the statement of Mr Castle about the arrangements with New South Wales concerning media. Paragraph 107 says,

35 "About noon on 17 January we held a media conference as usual. During that media briefing Peter Lucas-Smith made comment about the possibility of the fires causing problems in the ACT. He stated that there was not a great likelihood of the ACT fires coming and threatening the suburbs under a north-westerly wind. The agreement and the protocols we had in place with New South 40 Wales was that we would talk about the ACT fires only. If anyone wanted detail on New South Wales fires they needed to contact the New South Wales media staff. Phil Koperberg had immediate persons sent to the ACT I think on Thursday, 16 January.

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108. ESB press releases consistently only referred to the Bendora and Stockyard fires. It stated that information on McIntyre's Hut and Mt Morgan fires in New South Wales could be obtained from the Rural Fire Service media unit."

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Gave a phone number and the Rural Fire Service web site.

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"So right from the early days we agreed with New South Wales that they would talk about the fires they were managing and we would talk about the fires we were managing. Cameron Wade, the media spokesperson for New South Wales Rural Fire Service followed our midday press conference with his own press conference where he expressed optimism about the containment of the McIntyre's fire. He briefed the media on the fires in New South Wales."

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We note that the ACT in their submissions assist by saying that the substance of those paragraphs is true in the ACT submission and paragraph 674. We persist in our submission that so far as Mr Castle's statement is concerned, particularly in the submission in paragraph 1,262, it represents a concocted justification of Mr Lucas-Smith's comments at the midday press conference.

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Moving forward then the media release at 3.45 pm on 17 January we have submitted that the only realistic strategy left to ESB by the afternoon of 17 January was to warn residents of the areas likely to be affected that they should begin to prepare for the impact of fires on the suburbs. As we have submitted, almost the opposite happened; the media release saying that people should not be unduly concerned. Our overall submission is that by the end of 17 January the failure by ESB to warn the community that there was a likely impact by the fires on the suburbs was a direct cause of the extent of property damage and injury caused the following day.

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There is, with respect, the remarkable sentence in the submissions of the ACT at paragraph 713. ACT submits that with hindsight it would have been prudent to inform residents on the urban edge about the risk identified in the evening planning meeting, but that did not happen "because no one expected residents to be affected". With great respect, that is simply not so. The evidence doesn't support it.

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The risk had been identified as early as 13 January. It had been clearly passed to the ACT cabinet and to the ACT Fire Brigade. To suggest that no one expected the residents to be affected is fanciful. We understand the submission that days beforehand it was not possible to predict the

force of the impact or the precise location. Their suggesting that as at 17 January no one expected the residents to be affected is not supported by the evidence.

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Coming then to 18 January, in relation to that our submission is that there were opportunities for steps to be taken on the morning of 18 January that also might have materially reduced the extent of damage to property and injury. Firstly, in the morning there was no indication given - dealing with the things that weren't done - there was no indication given to the interviewer from the ABC that there was any risk to Canberra from the fires, despite their then collective mind of the Emergency Services Bureau.

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About this stage Mr Lucas-Smith had formed his view, now known as his heart of hearts view, the fires would affect Canberra and, as we have submitted, that was something that he appeared to have recognised was a risk as far back as 13 January. At the evacuation planning meeting at 8 o'clock on 18 January there was a discussion about the need for information to be given to people likely to be affected and suburbs of concern were identified. Despite the outcome of that meeting and discussions at the morning planning meeting at 9.30 no media release was in fact issued by ESB on Saturday, 18 January until midday, and paragraph 1,291 of our submissions that should obviously read "Saturday, 18 January" rather than Friday.

As far as Mr McRae is concerned, we refer in paragraph 1,295 of our submissions to the fact that Mr McRae suggested there was a sufficient degree of urgency by the morning of 18 January to ensure the ACT Fire Brigade and the ACT Ambulance Service were prepared to respond to impacts, but apparently no urgency about engaging the urban community. Despite the fact when engaging the ACT Ambulance Service must necessarily involve anticipation of injury to people in urban areas, Mr McRae seemed to suggest that there as no need to engage the people themselves.

The midday media release on 18 January is criticised by us in paragraph 1,296 because it did not contain any explicit material to the effect that the fires could affect the urban area from Weston Creek to Greenway. The terms of the release are set out in paragraph 918 of our submissions, provide a short summary of the fire status in respect of each of the three fires. As we understand Mr McRae's position he suggests that such an approach is consistent with the outcome of the morning planning meeting, and the absence of a trigger, the only warning in the media release is a health warning for asthmatics.

5 By midday on 18 January Mr Lucas-Smith actually said at the midday
press conference - I refer to paragraph 1,297 - that there has always been a
chance that the fire would reach the urban area. Our submission about
that is that if at that late stage, if the information provided during the
midday media conference had contained a full and frank account of the
potential from the fires then bearing down on Canberra and the nearby
rural settlements and adequately explained how residents should respond
to the likely impact this could have led to one or both of two results
relevant to this Inquest. Firstly, many residents would have had time to
10 save property from the effects of the fire, and secondly, in our submission
possibly one life would have been saved. In our submission there is no
excuse for not providing this vital information at or before midday on
18 January.

15 In their submissions, the ACT government suggest that the only
reasonable inference to be drawn about why this wasn't done is that the
officers failed to anticipate "the immediacy of the impact". The problem
with that is that the immediacy of the impact had been anticipated since
the night before and certainly on the morning of 18 January, as the
evidence demonstrates.
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Our submission in paragraph 1,300 is described by those who criticise it
as intemperate, however it is the fact, as set out in that paragraph, that the
public who were in the direct line of the rapidly advancing bushfire had
25 been entitled for days to know that there was a risk of an impact, and to be
withholding information at that stage, in our submission, was a dereliction
of the duty that the ESB and its senior officers owed to the public.
Further, a suggestion made by a number of witnesses the community
could not be warned until it was possible to identify particular sections of
30 the community known to be at risk is, we would submit with respect, an
insult to the intelligence of the people who were then affected.

We do submit that the court should conclude that there were no
35 meaningful warnings until the issue of the first issues in the later
declaration of the state of emergency, and that from the point of view of
the public affected by these fires who had a strong impression that they'd
not been given any useful warnings, they had that impression because the
evidence demonstrates that they were correct.

40 We've set out at paragraph 1,307 the findings that we submit should be
made in relation to the warnings. They are, firstly, that on or before
15 January 2003 each of Messrs Lucas-Smith, Castle and McRae and
through them the ESB recognised and acknowledged that the fires,
including the McIntyre's Hut fire, presented a serious risk to Canberra and
45 the urban area and rural settlements to the west of the urban area. That

each of those gentlemen accepted in the course of his evidence that each had a part, as a part of their duties and functions, a responsibility to ensure that people facing that risk were given adequate and timely warning of the risk, including advice on how to prepare for the risk.

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Each also acknowledged in the course of evidence that they had a capacity at all times after 15 January to give such a warning, either directly or by implementing a process by which such a warning should be given. In the case of ESB, its responsibility to give such a warning arose from its mission and objectives and its responsibility given to the residents of ACT and urban Canberra, and in particular the opportunity to help themselves and their neighbours.

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None of Messrs Lucas-Smith, Castle and McRae individually, nor the ESB as a corporate gave that warning or took steps to implement that process to give such a warning at any time before about 2.00 pm on 18 January. The failure came about because each of Messrs Lucas-Smith and McRae either independently or together made the decision that the warning would not be given. Mr Castle was aware and approved the decision and failed himself to take steps to ensure the warning was given.

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The failure to give that warning by or before midday on 18 January was a cause on the scale of loss and damage to property and injury experienced during the afternoon and evening of 18 January and thus was a cause of that loss and damage. It is open to the court to find that the failure to give the warning also was a cause of one of the deaths. Paragraph 1,308 and following we've dealt in our submissions with the expert evidence on the warnings issue, effectively submitted that your Honour should prefer the evidence of Messrs Koperberg, Cheney and Roach to the evidence of Mr Nicholson.

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Finally, in relation to the death of Alison Tener, we do submit that the issue of warnings and lack of appropriate and timely warnings is open to be found as a cause in relation to the death of Alison Tener. The reason for that is set out in a letter that followed your Honour's ruling in May of this year. The relevant evidence concerning the death of Mrs Tener is summarised at 3.7.6.2 of our original submissions. Evidence indicates that in the early afternoon of 18 January Mrs Tener had a short conversation with her neighbour, Mrs Taylor, during which Mrs Taylor told Mrs Tener she, Mrs Taylor, was leaving with her children and she was just putting a few things in the car.

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Personal items, including photograph albums were located in the boot of Mrs Tener's car which was located inside the carport of Mrs Tener's home. Mrs Tener's badly burned body was found in the bathroom on the

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rear left-hand side of her home. Her legs were bent to fit inside the bath and her arms were bent up in front of her face with three towels underneath her and one in her right hand. The towels were damp, the bath tub was plugged and a small amount of water remained in the bottom.

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In our 2 April submissions we also referred to the evidence concerning the preparation and broadcast of the SEWS, the state of emergency warning signal, including the evidence of Mr Castle - and this is at paragraph 939 and 942 - in which Mr Castle thought the form of the SEWS had been run past Mr Lucas-Smith before it came to him and that with his state of mind at the time he assigned the SEWS he was probably satisfied it contained enough information for people to know what to do if they were threatened by fire but that, with hindsight, more information could possibly have been given.

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Mr Castle's evidence which is set out and referred to in paragraph 1,044 of our submissions was to the effect that the warning to residents from about 2.30 pm on 18 January about filling the bath did not include an explanation as to the purpose for filling the bath until after 18 January. The reason for filling the bath was not made clear up to and during 18 January. He believed that the advice about a fatality of somebody in the bath was an impetus for a change of the message that was provided after 18 January, so that the instruction was to fill baths, sinks and buckets with water for extinguishing small fires and for drinking water.

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The evidence of Mr Roche concerning a model for the issue of warnings to the community referred to at paragraph 1,022, which we submit that your Honour should accept. And finally, the text of the warning issued by ESB to Canberra residents on 20 January 2003, the text of which can be found at paragraph 1,045 of our submissions.

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In our submission, having regard to those matters, it is open for your Honour to find that, firstly, based on the evidence of Mrs Taylor of her conversation with Mrs Tener and the evidence of the personal items located in the boot of Mrs Tener's car, as at about 2.00 pm on 18 January 2003, Mrs Tener was undecided about whether she should evacuate from her home in Duffy, but made some preparation should she decide to do so.

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Second, at some time after approximately 2.45 pm Mrs Tener became aware of the contents of the SEWS including the advice that residents of Duffy were urged to return to their homes, but if the fire approaches their homes those residents should fill the bathtub, any buckets, et cetera, and soak towels to place in any crevices, such as under the door. Consistent with that advice, Mrs Tener abandoned any plans to leave her home, filled her bathtub and soaked towels. At sometime after her home came

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under direct attack from the fire and, misunderstanding the purpose of the instruction to fill the bathtub and soak the towels, Mrs Tener sought refuge from the fire by immersing herself in the bathtub, partially covering herself with wet towels.

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Had the ESB implemented a community warning system of the kind suggested by Mr Roche, comprising as a minimum phase 3 is described by Mr Roche, including the issue of warning on 17 January, or even earlier on 18 January, describing a risk to the area of Duffy in similar terms to that issued by the ESB on 20 January Mrs Tener would, in the words of 20 January warning, temporarily relocated until weather conditions eased well before the issue of the SEWS at approximately 2.30 pm.

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In the circumstances, the absence of a warning to that effect and the times described, that I have just gone through, the late issue of the SEWS urging residents of Duffy to return to their homes, offering incomplete advice and the precautions to take if threatened by the fire and not suggesting the alternative course of temporary relocation were each a cause of the death of Mrs Tener.

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Your Honour, for the purpose of this hearing that completes an overview of the submissions filed and that's my oral presentation, if your Honour pleases.

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HER HONOUR: Thank you, Mr Lasry.

Yes, gentlemen, I don't know whether you've made a decision amongst yourselves as to who is next.

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MR LAKATOS: I think I'm next in line, your Honour.

HER HONOUR: Thank you, Mr Lakatos.

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MR LAKATOS: Your Honour, as Mr Lasry commenced, I think it's appropriate that I do. Our written submissions are comprehensive, although not as comprehensive as those of counsel assisting. The detail of our arguments are set out in that document and I do not propose to traverse the detail of that material for the reasons expressed by my learned friend.

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It should not be taken, your Honour, that if I don't mention something orally that you of course agree with it, your Honour, with respect will have regard to the written material which represents the complete position taken by my client. Your Honour may well have seen, if you've had the opportunity of looking at our submissions that there is a degree of

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repetition in them. We suggest that that was unavoidable because, with respect, there is a degree of repetition in those of counsel assisting. That is to say, in relation to the comments made about certain aspects, for example, of why warnings weren't given on progressive occasions.

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In the end, as your Honour may well have discerned, our response to that particular proposition is that the senior members of ESB who have come in for a significant amount of criticism for what they, more particularly, why they did or didn't do certain things, rather than what they did because what they did was, with respect, fairly self-evident from the material presented before this Inquiry.

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But in respect of that, your Honour, the submission is that it is, in effect, the terms of the criticisms, the imputing of personal blame to those senior officers which is of great concern to my client. Your Honour would have noted the foreword of the submissions as we have had them filed, and they say this. And I will read it because it's the position of my client:

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"The submissions of counsel assisting, to which this submission is a response, had urged the coroner to make findings assigning responsibility for short-comings to a small number of ESB officials. They have also sought to argue that these short-comings were a cause of the fires which impacted on the urban edge of Canberra on 18 January 2003. It is the position of the ACT that it is wrong in principle and unfair in the context of the events which occurred in January 2003 to us state the actions of a limited number of individuals and make findings of blame against them. That error we submit is compounded if the proposed findings of causation are made.

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Despite the course of these proceedings..."

The statement reads "the coroner", your Honour:

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"...should not overlook the contributions of a large number of ACT employees and volunteers whose significant efforts during January 2003 had not been properly acknowledged."

That of course was written in response to the written submissions of my learned friends and of course he's remedied that position today, and with respect, we submit appropriately so. The statement continues:

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"Immediately after the events of 18 January the Chief Minister public expressed support for 'each and every member of the Emergency Services Bureau, every member of our Fire Service,

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our Police Service, our volunteers, our Rural Service, all those New South Wales officers that were part and parcel of the defence of Canberra’.”

5 The statement continues:

“In his report enquiry into the operational response to the January 2003 bushfires in the ACT Mr R McLeod stated...”

10 And this has been a truncated quote:

15 “The individual government officials, employees and volunteers spared nothing in terms of their personal commitment during a long and difficult crisis. Any criticism directed at individuals because of the role they required to perform is in no way intended to question their integrity or their honesty in doing what they felt in the circumstances was the right thing to do at the time. The ACT wishes to acknowledge that all ACT employees and
20 volunteers involved in the January 2003 bushfires carried out their duties honestly and with a commitment for doing the best job they could in the difficult circumstances which they found themselves.”

25 In our submission these comments apply to the four or five individual officers who have been consistently criticised for various things they did or didn’t do in the submissions of counsel assisting, as well as others who have not been so criticised.

30 Your Honour will have gleaned I think that it is not the position of the ACT that things did not go wrong, that is self-evidently established by the material before this Inquiry. It is not the position of the ACT that things could have been done better. That is also self-evident, and for that matter, in fairness to all of the witnesses who have given evidence, including the ones who have been criticised, each and every one of them have said that
35 that was the case. Mr Lucas-Smith certainly in relation to warnings, certainly in relation to the proposition that the important decision concerning fire fighting at Bendora on 8 January might have been made differently had he or a more experienced person been involved.

40 All of that’s accepted. The position merely comes down to this, your Honour, in terms of the difference between counsel assisting and the ACT in this Inquiry, it comes down to, firstly, whether it is appropriate to attribute the blame in such stringent ways, as has been done in the written document to those individual officers. And secondly, whether or not, as a
45 matter of the proper application of the common sense legal principles

relating to causation, whether had things been done differently - and I'm putting this very broadly - that would have been a matter which caused either the fires which burnt into Canberra, or in the case of Mrs Tener caused her death.

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In our respectful submission, for reasons which we'll outline and had outlined in the document, we suggest that in relation to the issue of blame, both as a matter of principle and as a matter of fairness, your Honour ought not make those findings at all, particularly ones directed to, for example, the fact that there were deliberate and serious omissions to do things, that people were involved in the giving of false information to the Canberra public.

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Because, with respect, that kind of conclusion is built upon not direct material because each of those officers in specific evidence when they were asked, determined or at least indicated what their position was and what their thoughts were, and that was to the effect that what they were saying was reflective of their belief in the instances of the potential for the fires.

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So the position, as counsel assisting appeared to put it, is built on a certain set of basic facts from which an inference is drawn, from which a further inference is drawn and from which the ultimate conclusion appears to be drawn, that there was a decision, for example, in the issue of warnings to defer telling the Canberra public of something which was known to ESB officers.

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I will, your Honour, take your Honour to a specific paragraph because, in effect, this is the broad outline where those matters are raised. Your Honour, it is the submission of the ACT that there is no occasion, based upon a fair view of the evidence, to make findings which assert that the ESB officers acted wilfully, falsely, dishonestly or otherwise to conceal the true facts relating to the expected impacts of the fires on the Canberra public.

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As we argue in our submission, your Honour, there is no motive for them having done so, firstly. Secondly, they acted inconsistently with such a motive, whatever it might have been, and there has been a consistent denial by all witnesses, both above and below them in the hierarchy, that this occurred.

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And I just pause to say, your Honour, that above them in the hierarchy I refer to the Chief Minister who gave evidence, and the various governmental officers who attended that briefing. Below them in the hierarchy I refer to witnesses such as the note-takers at the planning

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meeting, Ms Keane and Ms Ferry. And as our submissions will make plain later on, if there is some sort of tacit agreement within the bowels of the ESB or otherwise, to specifically withhold information, then it defies belief that the lesser persons in the hierarchy - and I don't say that pejoratively - such as Ms Keane and Ms Ferry, would not have given evidence, honest evidence that that occurred, and they didn't.

Their evidence was that when these issues arose in the planning meetings from the 14th onwards, that they had no memory of the serious nature of the risk - I use that formulation - the Canberra urban edge. And as we argue in our written submissions, had the serious nature of that risk been articulated at those meetings, then those persons could not have failed to recognise what was being said and it was information of the kind, especially when looked at in hindsight, and they could have done so after the event of 18 January, that they must have been able to remember, had it been discussed. They must have been able to remember it, with respect.

And the fact that they did not, in our respectful submission is indicative of this proposition that ultimately the officers of the ESB in their various discussions, even really up to almost 18 January, had a view about the risks which was not consistent with that expressed by perhaps more senior and more experienced persons such as Mr Cheney. As we argue, their view of the risk is conditioned upon (a) not only the facts that they're aware of, but (b) their experience and their training in fire fighting.

And your Honour, I will take your Honour in a little detail to various comments by other witnesses in this Inquiry under the rubric the need for practical reality when we look at this particular issue. In short compass, your Honour, that was in essence by, for example, Mr Koperberg who clearly was probably the most experienced, if not one of the most experienced fire fighters who gave evidence in these proceedings where he said when he was asked about whether or not Canberra could have done better, that he said "Well, are you asking me with my experience or are you asking me to assume with the experience that they had?". And your Honour, I will take your Honour specifically to that matter.

In our respectful submission, your Honour, the submissions of counsel assisting, in particular in relation to the warnings issue, are an attempt to make the facts fit their theory that there was a deliberate decision not to tell the Canberra public, rather than drawing conclusions from an objective assessment of the facts, including what those officers said, and in particular what they said.

For example, the treatment of the cabinet briefing on 16 January in what seems to be an attempt to suggest that those who gave evidence were not

frank about the discussion concerning the risk or urban Canberra flies in the face, we submit, of a reasonable construction of the relevant documents and of the evidence of all those persons who attended. And I will take your Honour ultimately to an examination of the cabinet briefing document in particular, which was the key document involved in this issue.

When your Honour deals with the issue of warnings, in our submission, one important matter and difficulty to keep in mind is this. So far as warnings of prospective impacts of fires are concerned, the difficulty is that what is being spoken about is not something when a prediction is made which is capable of objective confirmation. It is not a fact but an opinion as to certain events.

We submit that it is a fact of the human experience that opinions are the product of an individual's assessment of facts and the application of that individual's judgement bringing to bear his or her abilities and experience. Whether or not the opinion proves to be correct is not determinative, we submit, of the issue of whether it was honestly held. Even though there are other factors which may militate against the opinion so formed, we submit that this is not determinative of whether the opinion is honestly held.

The person may not have known of these matters, or may not have accorded them the same weight, or may have honestly but erroneously excluded them as being inapplicable. These are all material considerations for the court to consider in determining whether what, in effect, amounts to wilful misconduct occurring in the present case.

I stop to pause, your Honour, and draw attention to comments in the Full Court of their Honours concerning a consideration of certain events said to be brought to your Honour's attention in the course of that particular application. They are of course different issues but in our submission the view taken by the Full Court is, with respect, apposite to the notion that I've read out.

Now, your Honour, in that case their Honours dealt with an argument put by the prosecutors, of course one of whom was the ACT, about whether or not certain notes were produced and whether they were edited, and who knew what about what was in the notes. And when the court dealt with that issue it said this, and this is at really paragraph 70 and 71 at pages 18 and 19 of that case.

As your Honour sees from the rubric ahead of paragraph 58, production of the notes at the view is the general topic and submissions were made

5 about whether or not what was said was deliberate, an attempt to mislead and so on. Those notions are set out at paragraph 70 and I don't need to take your Honour to those, but it is the approach, with respect, which I urge ought to be looked at and the approach which should be applied in our respectful submission to when one looks at the activities of the ACT officers in this present context.

In para 71 their Honours state:

10 *Arguments of this kind are usually worthy of little, if any, weight though much obviously depends upon the importance of the error. Judges and magistrates cannot be expected to intervene immediately in order to correct every mis-statement made by counsel. They may be pre-occupied with the essential issues and simply overlook the inaccuracy of the remark. Even if they appreciate the mis-statement has occurred, they may regard it as*
15 *a relatively unimportant or they may simply let it pass, perhaps with the intention of correcting any mis-apprehension in the subsequent reasons for judgment.*

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And then it goes on to say:

25 *In some cases, an insistence on immediately correcting every minor error would require such constant intervention that there would be a risk of distraction.*

30 And I won't go on with that. The point to be made is that merely because somebody accepts a particular proposition does not mean to say that there are not other equally applicable and, in this case, innocent or bona fide reasons why things were not done or why, for example, realisations were not made. In my submission, the kind of approach and of course is not, strictly speaking, analogous, they're different issues being spoken of, I don't suggest that they are. But the kind of approach to accord the view that there might be other innocent and honest explanations for something
35 which somebody asserts should or should not have happened, should be applied equally to the officers of the ACT, be it it's Emergency Services who are the subject of severe criticism in these proceedings.

40 Your Honour, we submit that this has been a lengthy and thorough Inquiry with little, if any, factual dispute or little, if any, complex questions of fact. That has been in large measure contributed to by the presence of contemporaneous records, notes in recording operational decisions, numerous radio logs, telephone transcript, media releases, radio transcripts and extensive statements by witnesses who participated in the events in
45 their roles.

Further, we submit it is extensive evidence about what decisions were made. In fact, there is no dispute at all as to what the decisions were. As we have said earlier, your Honour, the dispute seems to be whether the reasons given for them are honest or were the ones actually held bona fide by the persons. And indeed, much of the Inquiry, from the examination Mr Lucas-Smith onwards, has been directed to suggesting that what his statement of his view was was not correct and could not be correct.

So we've really gone even from examining a decision which, with respect, we submit is a relevant area for your Honour to examine, to examining the person's motivation for the decision which has been given, to contesting that motivation and then spending a lot of time, in effect, attempting to show that in the case of Mr Lucas-Smith and others their motivation was and is as they stated it to be.

There is neat question, with respect, as to whether or not such an examination in itself is truly within the common sense test of causation. It is fair to say, with respect, that if a decision was made, as there has been, and if the decision was upon a proper analysis not the right decision to be made of course your Honour should say so. We have no problem with that. The next question is as to why decisions were made can only, it seems to us, with respect, go to the issue of the attribution of blame, especially when the statement by those persons gives a reason, but that reason is not accepted and a more blameworthy reason is sought to be put in its place.

We note, your Honour, that there are very few factual contests between witnesses. The three most important we submit appear to be, in terms of the conversation between Messrs Cheney and Lucas-Smith on 13 January and that, in substance, is not materially different, as we say in our written submissions. The second is the terms of the conversation between Messrs Koperberg and Lucas-Smith on 15 January. And the third are the terms of the briefing given by Lucas-Smith to the Fire Brigade on 16 January. Perhaps I should say this, your Honour, if I very occasionally slip and do not give any persons their titled, as in our written submission, that is not done with a view to being disrespectful to them but simply as a matter of mere words.

In substance, your Honour, for the reasons given in our written submission little turns upon these differences because, as we have submitted in relation to each of them, that upon a fair analysis of them the conclusion should be drawn that these factual contests resulted from a misunderstanding between the parties. In our written submission we have examined in considerable detail, and I don't propose to do this particularly, the terms of the words used by the various participants, the

terms noted by other witnesses who witnessed part of the interchange, and in this particular instance I'm referring to the Koperberg conversation and the terms of Lucas-Smith indicated he believed was the net result for these three conversations and/or briefings which were had.

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And with respect, it goes back to this same issue which we have raised previously. When one looks at Mr Cheney, for example, and his appreciation of the risk, he comes to this event in January 2003, rightly described as one of the pre-eminent fire behaviour experts in this country. He comes with a vast and extensive knowledge of what wild fires can do, having seen them up close, having studied them in considerable detail.

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It is one thing for a person who's had that experience to look at a risk situation and say "I can see this getting totally out of control and my worst case scenario is something which is beyond what you have experienced". It is, with respect, not a dissimilar thing to, for example, the notion of people reading in text books about what World War II was like. It seems trite to say that very many people have read that and when asked, "Well, if you know war is coming do you think you know what it's like?", many will say, "Yes, I do". The fact of it seems to be - and I don't speak from experience, I have to say - but the fact of it seems to be that those who purport to say they know really do not know precisely what it is about until they've experienced it.

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And indeed, with respect, the various explanations given, particularly by Mr Lucas-Smith, seem to accord with the fact that he equated his expectations with his previous experience, particularly in relation to timings of when things would happen, opportunities for intervention which had been successful in the past, almost immediately in 2001. To say that because Mr Cheney conveyed a view necessarily meant that those who heard that view accepted the full extent of what was said, such that Mr Lucas-Smith therefore was dishonest in disavowing that view later on, in our respectful submission is not sustainable at all. And it would leave behind the common sense which your Honour no doubt has from sitting on the Bench for a long period of time, to consider that that one necessarily led to the other opposite result.

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Your Honour, in my submission this court would and should recognise that Inquiries of this kind - and I'm now talking about not the litigation where parties have an interest, not criminal proceedings where it might be thought defendants had a real interest in gilding the lily, or getting off - that it is rare to encounter people who act in bad faith or people who were acting with will to do other than their duty.

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Further, in my respectful submission the court would recognise that when

5 shortcomings are exposed, as they have been here, it's very often the product of deficient systems rather than only of - and I stress the only of - the acts and omissions of individuals. Your Honour, in various spheres where reviews are conducted with the stated purpose of identifying weaknesses and shortcomings, so that steps are taken to improve or remove those weaknesses or shortcomings, experience has shown that the attribution of fault or blame is counterproductive to that end.

10 Experience shows that people tend to try and cover up their mistakes rather than reveal them, that they tend to be defensive in offering a comprehensive account of what occurred, rather than being full and open. And further, that it tends to dissuade individuals from becoming involved in the areas where they see they might be ultimately subject to criticism of this kind.

15 That's not to say, and I hasten to add this, your Honour, because we don't want this to be taken to suggestion that this Inquiry should not say what went wrong. Of course it should. We don't want it to be taken that it is our submission that this Inquiry should not suggest where things can be done better. Of course it should. What we do say, with respect, is that if
20 this Inquiry becomes particular or personal, as it clearly has done in the operative chapters, chapters 4 and 5 of counsel assisting's submissions, that that is a totally counterproductive end and, with respect, contrary to the principles on which these Inquiries have historically been conducted.
25 And I will take your Honour to those in a moment.

Your Honour, to the extent that this Inquiry is a vehicle for change and improvement, it's to be noted that and entirely new regime was introduced in this territory in 2004, the Emergencies Act, and that even more were
30 required than merely the proper application of the principles relevant to Coronial law about the attribution of blame, this feature in the present case further reinforces that to attribute blame is not necessary and serves no other useful purpose.

35 Your Honour, the four significant questions and Inquiry with regard to this, firstly, the circumstances surrounding the decision to withdraw from Bendora. Secondly, whether senior ESB officers believed the fires of the kind involved might impact on the urban edge. Thirdly, were those concerns conveyed to the Canberra community? And finally, whether it is
40 proper to characterise the identified shortcomings as deliberate, wilful, intentional or otherwise.

In our submission, each of the senior officers has, as a general proposition, given evidence about the matters to which they had regard in making the
45 decisions they did. And counsel assisting had, in general terms, argued

5 that this evidence should be rejected because of various matters which were known or ought to have been known, including the history of previous fires, the volatile state of the fuels and other persons' views as to the potential of the fires, including your own. I now talk about the ...*(indistinct)*... and that line of country.

10 Your Honour, even accepting this approach we submit it is an insufficient basis upon which to reject their evidence because there is no direct contradictory evidence. As we will demonstrate, the way my learned friend has approached this is to build inference upon inference to ultimately arrive at conclusions in relation to the warnings, that those warnings were wilfully withheld. I use that as a perhaps inaccurate but some form of the ultimate submission made. We also submit that there was no motive for them having done so, and as we've already said that 15 their conduct was inconsistent with the inference that the withdrawing of the information was intentional.

20 Your Honour, when it comes to making findings of this seriousness it is useful to revisit the old cases of which your Honour is aware of *Briginshaw v Briginshaw*. The first point to be made before I go to that authority is this, that there is no doubt that the protection of a person's reputation is a legitimate interest which attracts to it the application of the rules of natural justice. So much is made plain by the High Court in *Annetts v McCann* and I apprehend that there is no real dispute by any 25 party to that proposition.

In *Annetts v McCann* before I go back to *Briginshaw* Brennan J said:

30 *Personal reputation...*

This is at 608:

35 *Personal reputation has now been established as an interest which should not be damaged by an official finding after a statutory Inquiry unless the person whose reputation is likely to be affected has had a full and fair opportunity to show why the finding should not be made.*

40 Going to *Briginshaw* your Honour will recall, no doubt, that *Briginshaw* was a case of what the standard applied to matrimonial proceedings and, in particular, to whether the issue of adultery had been established in the proceedings. And as old a case as it is, it is one which is quoted and has still significant relevance. The question was whether or not a simple standard of proof on the balance of probabilities, or the criminal standard 45 of proof beyond reasonable doubt, or some intermediate standard of proof

should be applied in those circumstances.

5 And Dickson J at page 361 and 362 dealt with that issue in a way in which, in our respectful submission, your Honour needs to keep firmly in mind when dealing with these criticisms of senior ESB officials. His Honour there said:

10 *Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved beyond the prosecution it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But the reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The*
15 *seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction*
20 *of the tribunal.*

I underline those, “the seriousness of the allegation made”. As I’ve indicated, your Honour, especially in relation to the warnings chapter and I’ll take you to some of that but not all, there have been assertions made
25 that false information was disseminated. That serious and deliberate omissions to tell people what officers knew or thought about a potential for impacts. That there were serious errors of judgement. These are serious allegations made against not people who are criminals, but people who are professional officers who, on 8 January, went to work as they
30 normally did and announced that they attempted to do the best that they could. They have serious consequences for those officers.

The next is the inherent unlikelihood of an occurrence of a given description, in that context I will elaborate further on this, your Honour.
35 The question that we ask your Honour to examine was and is, for example, why act inconsistently, so far as the urban edge residents are concerned and not others? What is the motivation to do such a thing? And that has to be answered, with respect, in only one way. That they viewed the risk and its immediacy in different terms to those various
40 individuals.

The third is the gravity of the consequences flowing from a particular failing. Well, that hardly needs to be said out loud, that if your Honour makes findings of the kind urged consistently, not just once but many
45 times, against these officers that the gravity of the consequences for them

are severe. I'll finish this quote, your Honour, I appreciate it's now 1 o'clock but the quote continues, and this is Dickson J at 362:

5 *In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect inferences.*

And with respect, it is the last of those which we submit applies to many of the conclusion urged by my learned friends, indirect inferences. His Honour continued:

10 *Everyone must feel that when, for instance, the issue is on which two dates an admitted occurrence took place a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was*
15 *whether some act had been done involving grave moral delinquency.*

If that's an appropriate time, your Honour.

20 HER HONOUR: We'll take the luncheon adjournment and resume at 2 o'clock.

25 **LUNCHEON ADJOURNMENT** [1.03 pm]

RESUMED [2.03 pm]

30 HER HONOUR: Thank you, Mr Lakatos.

35 MR LAKATOS: Your Honour, in our submissions in relation to particularly the criticisms relating to warnings we had drawn to attention on a fairly regular basis the proposition that in great many, if not all the instances, where what I shall term the serious criticisms to make, we suggest that those serious criticisms have not in terms been put to the witnesses to give them an opportunity to answer the specific serious allegations made.

40 If that matter is borne out by the transcript, and we submit that it is, we suggest that that is a matter which has deprived those various persons of the opportunity which is accorded to witnesses in proceedings generally to offer an explanation as to the serious allegations which are made. It might be thought, and it might be thought against us, that the section 55
45 procedure is sufficient to protect those persons' interests. Or certainly

from the point of view of your Honour ultimately adopting those findings, that much is true.

5 But we submit that it may well be that your Honour would not even have considered going to the section 55 level, had you had the opportunity to hear, for example - let's just put a hypothetical example. If somebody had have suggested to Mr Lucas-Smith that he was lying to the public on this particular occasion he would have had the opportunity of giving his considered reply to that. Your Honour then would be duty bound to take into account my learned friend's submission that in fact that's the finding he should make. Your Honour might have been satisfied with his explanation and then would never have gone to the section 55 level.

15 In the meantime, the submissions with respect are on the table and Mr Lucas-Smith's position, his reputation has been injured by them being aired in that way. It is our submission that when your Honour looks at these various matters which are put against the witnesses, the serious allegations, that you need to have regard to the fact that none of these witnesses were in terms given the opportunity to reply to these allegations. 20 That is the first matter your Honour needs to look at, and then you have to make a judgment based on that and other issues, as to whether or not the submission put against them has such weight that your Honour would then go to the next step.

25 Your Honour, in our written submission we review the various principles which we suggest bind and govern the way an Inquiry such as this is run. Page 4 we refer to the various provisions of the Coroner's Act, section 13 and 18 which found jurisdiction respectively in respect of the death of a person and fires. And sections 52 and 57 which found the jurisdiction to make findings, comments and recommendations. 30

We note, your Honour, that in *Harmsworth* a decision which was adopted in, if I might colloquially call it, *Doogan's case* if your Honour would not take objection to that, but that seems to be the shortform. That the power for comment is not free ranging, it must be something connected with the death, which is what was then in consideration in *Harmsworth*. In this case with the fires. But that the power is inextricably connected with but not independent of the power to enquire into the fire for the purposes of making findings. 35

40 Nathan J noted that they are not separate or distinct sources of power enabling a coroner to enquire, the sole or dominant reason of making comment or recommendation. In the Full Court case, as we note in that paragraph at paragraph 41, their Honours adopted that as a formulation which applies to the Coroner's Act ACT and therefore of course applies to 45

your Honour's consideration of the matter.

5 I pass over the Inquiry into the fires which are the following page and
under the heading "Cause and Origin and Circumstances of the Fires" we
make reference to a number of cases in which that issue has been dealt
with. In *Queensland Fire Rescue Authority v Hall*, Lee J did consider the
issue of cause and origin of the fires and we had extracted at the top of
page 170 his Honour's analysis of the difference between cause and
origin, and the circumstances.

10 We should say this at this particular point, that as the judgment of the Full
Court in this case fell, their Honours indicated that your Honour's
jurisdiction is limited to determining the cause and original of the fires.
That you don't have a jurisdiction per se to determine the circumstances in
15 which the fire occurred because their Honours noted the jurisdiction
giving section is section 18, which only refers to cause and origin of the
fires. Section 52 which deals with the findings you can make indicate that
you make findings in relation to cause and origin and the circumstances in
which the fires occurred.

20 The full court considered the latter power, that is to say, making comment
about the circumstances is not a free-standing situation. You are not
entitled to enquire into the circumstances, but you're entitled to make such
comment as falls from your mandate of Inquiry into the cause and origin.
25 May I take your Honour to - perhaps I'll do it in short-form, to the
relevant paragraph in the Full Court case which indicates that, in our
respectful submission.

30 In paragraph 19 at page 7 of the ACTR Report their Honours say:

*It is now accepted on all sides that the jurisdiction of the
coroner...*

35 I'm sorry, does your Honour have this? We have a folder of the various
cases which - - -

HER HONOUR: I do have the decision, yes.

40 MR LAKATOS: Would your Honour be assisted by the entire folder?

HER HONOUR: No, thank you. If I need it I'll ask you for it.

MR LAKATOS: By all means.

45 HER HONOUR: Thank you, Mr Lakatos, but I'll follow you so far.

MR LAKATOS: The offer is made if your Honour needs it.

HER HONOUR: Thank you.

5 MR LAKATOS: *It's now accepted on all sides that the jurisdiction of the
coroner is limited by the terms of section 18(1) of the Act to the
conduct of an Inquiry into cause and origin of a fire that has
destroyed or damaged property. While this proposition may seem
relatively clear two questions arise, first, what is meant by "the
10 fire" and second, what is meant by "cause and origin".*

If your Honour would then pass over to paragraph 37 at page 11 of the
ACTR Report, the duty to make findings. Your Honour sees at 36 their
Honours refer to the findings power and 52(2) of the Act. And then at
15 para 37 they say:

*The requirement to find if possible not only the cause and origin
but the circumstances is not augmented by any conferral of
jurisdiction to enquire into such circumstances. The section only
20 requires the coroner to make findings to the extent permitted by
the evidence adduced at the Inquiry conducted under section
18(1) seen as relative in a legal sense to the cause and origin of
the fire.*

25 Their Honours continue:

*It's clear both from the language in which this provision is
expressed and from the fact that the power must be exercised in
relation to an Inquiry under section 18(1) that the circumstances
30 to which the provision is directed are circumstances that are
related to the cause and origin of the fire.*

And then at 39 the Full Court refers submissions made by Mr Burnside
concerning the circumstances and about line 5 say:

35 *A coroner is not authorised to make findings in relation to any
circumstances arising from the fire, but only in relation to the
circumstances in which the fire occurred. The distinction
between a cause and a circumstance may essentially be one of
40 degree.*

The point to be made is that your Honour has obviously full and complete
power to enquire into the cause an origin. Your Honour may make
findings about the circumstances but does not have the power to enquire
45 into the circumstances. In other words, if evidence falls from your

predominantly mandated Inquiry under section 18(1) which allows circumstances to be made the subject of comment, well and good. But your Honour can't go further and say this is not to do with cause and origin, this is to do with only circumstances and I wish to enquire into it.

5

I was referring, your Honour, I think in the lead up to that to the decision of Lee J in *The Queensland Fire and Rescue Authority v Hall* which as I indicated dealt with the issue of a cause and origin, but also there the provision of the Queensland Act permitted an Inquiry into the circumstances as well. So to that extent that case is based on different legislation. But as we note, his Honour Lee J says:

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There seems to be little doubt that the scope of the Inquiry under section 7...

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Which dealt with the cause of the death and the circumstances of the death:

...is wider than under section 8.

20

Section 7 points to a wide ranging Inquiry which, with respect, does not apply here by reason of the Full Court's construction of your Act or of the Coroner's Act here. It is, with respect, interesting to look at *Hall's* case for this reason. That was a case of an Inquest or an Inquiry into the cause and origin of a fire, and it's instructive to see how Lee J dealt with issues of jurisdiction and the width of it. That case was to do with an Inquiry into the origin of a fire which damaged property of the respondents to the case, including the jurisdiction - I'm sorry, that was the subject matter of the case.

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The fire had been dealt with by the Rural Fire Brigade and issues became involved as to what extent the jurisdiction allowed enquiry into matters such as training and the like of the Fire Brigade, as encompassed within that jurisdiction. At page 172 his Honour said this, which is of some relevance to this case, at least in giving your Honour some guidance as to how far afield we would submit a proper Inquiry as to the cause and origin of these fires should go. His Honour said this:

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It is difficult to say that a failure to do relevant back-burning at a material time (as is suggested in the material) to prevent a pre-existing fire not caused by the Rural Fire Brigade members from spreading or a failure to engage in alternative conduct which might have prevented the ultimate damage is a relevant cause of the fire, or relevant to its origin, even though it may be said to be a cause of the pre-existing fire continuum, but that does

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not seem to be what the section is directed at.

5 In effect, his Honour saw a limitation as to when a fire was started, as to the degree to which you examine - I'm sorry not examine, that's not right - the degree to which findings can be made as to causation of what was done or not done by Rural Fire Brigade. In this particular case, even if you assume that his Honour was wrong, we've gone back a number of steps from that in the finding which are urged.

10 The findings which are urged in general nature ask your Honour to find that not only was the decision not to, for example, crew Bendora on 8 January a cause, but Mr Lucas-Smith alleged failure to see the inexperienced Mr Graham was a cause. Now, if one takes into account Lee J's formulation in Hall, we don't get anywhere near that issue, that is to say the failure by Lucas-Smith to appreciate Graham's inexperience, accepting all that has been proved and established, on the night of the 8th as being a cause of the fires which burn into Canberra on 18 January 2003.

20 Your Honour has been told by my learned friend and we adopt it, that the common sense test is the one which has been espoused by the High Court in *March v Stramare*. That of course has been affirmed time and time again in the High Court in *Allianz* which we refer to in our submissions, and also in *Tambree*. And in *Tambree* it's worthwhile viewing what Callinan J had to say about the common sense test because in our respectful submission that is critical to determining what findings of causation your Honour can make here.

25 *Tambree* 222 ALR 263 and the relevant passage in the judgment of Callinan J commences at paragraph 79 page 284. His Honour quotes the well known judgment of Mason CJ, *March v Stramare* which ends with the passage:

30 *It is all ultimately a matter of common sense and, in truth, the conception in question, that's causation, is not susceptible of reduction to a satisfactory formula.*

35 His Honour continues:

40 *With respect, I agree with his Honour's observations. It would be a delusion to think that a disputed question of causation can be resolved according to invariable scientific formula and without acknowledgement that common sense, that is the sum of the tribunal's experience as a tribunal, its constituent's knowledge and understanding of human affairs, its knowledge of other cases and its assessment of the ways in which notional, fair-minded*

people might view the relevant events is likely to influence the result.

5 This brings into play, as your Honour well knows, and I appreciate I may well be preaching to somebody who's full aware of these principles, but I wish to make it plain that in our respectful submission the court has to apply the thinking which notional, fair-minded people might view as to the relevant events. His Honour continued:

10 Of course it is possible to say that sometimes with force that tribunals may on occasions tend to become remote from the community and its values. Indeed, there is not a community value, as such, but a multiplicity of community values themselves shifting from time to time, and that one person's common sense
15 may sometimes be another's nonsense.

All of that is to say no more than that perfect justice, the availability of a perfect test for liability is beyond human reach. But tribunals of fact have to do the best they can, and that which
20 had to be done is better done with candour and candour demands the acknowledgement by any tribunal or judge called upon to resolve a matter of the use of his or her common sense in determining causation.

25 Value judgements may sometimes be inescapably involved, but that there may does not justify the division of the question to a but for test and a further Inquiry into whether the defendant as a matter of law should be held responsible.

30 To go back to the example, your Honour, would a notionally fair-minded person viewing the particular recommendations, so far as Lucas-Smith's failure to recognise the inexperience of Graham as constituting a cause of an event 10 days later. So the mental processes of the Chief Fire Control
35 Officer on 8 January being a cause, in my respectful submission that is not the application of the common sense test at all. Whilst it may be a fact linked, it is in no sense, and certainly no common sense, a causative factor of fires in our respectful submission.

40 And the same may be said for the thought processes of the officers, so far as warnings are concerned. The fact that warnings weren't given or weren't adequately given one might think is closer to the proposition, but what people were thinking and why they did things, with respect, cannot constitute a cause in any common sense assessment of things.

45 In our written submission we refer the two emanations of *Chivell's* case

5 which refer to the broad Inquiry which is mandated by the provisions of the South Australian Act. To some extent, the Full Court's decision has made your Honour's task easy because it there sets out and that my learned friend has taken you to this, a number of statements as to what the Full Court considered to be the limitations on the jurisdiction. And paragraph 15 at page 10 we refer to the Full Court in relation to its dealing with how the term "circumstances" in section 52(2) of the Act should be dealt with.

10 We do ask your Honour to have regard to paragraphs 28 and 29 in the Full Court case, and 31, and we've extracted those. Their Honours remind us that section 18(1) does not authorise the coroner to conduct a wide ranging Inquiry akin to that of a Royal Commission, with a view to exploring any suggestion of a causal link, however tenuous between some act, omission or circumstance in the cause, or non-mitigation of the fire. Their Honours continue, and I pass over some extra lines:

20 *A line must be drawn at some point beyond which even if relevant factors which come to light would be considered too remote from the event to be regarded as causative.*

They then make reference to the common sense test in *March v Stramare* and then continue:

25 *The application of that test will obviously depend upon the circumstances of the case and in the context of a Coronial Inquiry it may be influenced by the limited scope of the Inquiry which, as we have mentioned, does not extend to the resolution of collateral issues relating to compensation or the attribution of blame.*

30 And at the bottom of paragraph 31:

35 *The application of the common sense test of causation will normally exclude a question to apportion blame or a wide ranging investigation into antecedent policies and practices.*

40 Your Honour, in the next major section, and I pass over this relatively quickly but not because it is unimportant. In the heading "Nature of the Coronial Inquest and Inquiry" we refer to these propositions. Firstly, that the rules of procedural fairness apply and, as I think I've indicated, we doubt that there is any issue about that. The next proposition is that pursuant to the Full Court decision the present Inquiry is not a type such as a Royal Commission into Bushfire Fighting and Fuel and Land Management in the ACT. To the extent that your Honour has looked at those, so much is valid. To the extent that your Honour makes finding

about those, we'd submit that they have to be constrained only to findings about cause and origin of the fires.

5 Your Honour, at page 18 of our submissions we refer to the limits upon the Coronial jurisdiction. As we point out, unlike the predecessor of the ACT Coroner's Act 1956, there is no power to permit a finding that a person contributed to the cause of death or a fire. We then quote the well worn passage of Lord Laing CJ in the South London Coroner's case *ex parte Thompson*, and that commences:

10

Once again, it should not be forgotten that in Inquest is a fact-finding exercise and not a method of apportioning guilt. The procedure and Rules of Evidence which are suitable for one are unsuitable for the other. It should never be forgotten...

15

And I pass over some words:

...that there are no parties, no indictment, no prosecution, no defence and no trial. Simply an attempt to establish facts.

20

25 With respect, in this case we're content that the facts involved are were decisions made? Yes, they were. What was the effect of the decisions? Your Honour can certainly make findings about that. Did they have an affect on the cause and origin? They may well be within the purview. But to go back and search the thought processes and thinking of the individuals is, with respect, nothing more, in our submission, than an attempt to attribute accountability, responsibility or blame on people.

30 Now, my learned friend, and we've referred to this in the submission later on, earlier in the time put a formulation that he saw the role of having witnesses in this Inquiry come forward and if they're accountable to be made accountable. We have suggested in the written submission that if that means no more than witnesses who know something about relevant matters are here to answer questions, then no complaint can be made by that formulation.

35

40 But if it means, as the words seem to suggest, that it also involves imputing to them some responsibility and blame for bad decisions badly made, if that's the finding, well in our respectful submission that is not mandated at all by proper Coronial principles. As we'll later take you to the decision of *Perry v Chivell* which in turn refers to English authority, there is a traditional way of doing "an attempt to establish the facts in the Coronial jurisdiction", and that is not by imputing blame.

45 Your Honour, *Thompson's* case has been approved, as we note, by the

highest authorities, The House of Lords in the *McKerr v Armagh Coroner* for one, and also the High Court in *Annetts v McCann* in the areas that we have indicated. And also it has been referred to in *Perry v Chivell* which I will take your Honour to. I'm sorry, when I've referred your Honour to page numbers in our submissions I'm reliably informed that my page numbers may not well match up to the ones that you have.

HER HONOUR: I think there's only a difference of about one or so, so far

MR LAKATOS: Thank you, I'll refer to paragraphs that would make it simpler. In *Perry v Chivell* Nyland J in the South Australian Supreme Court was dealing with a Coronial Inquiry into the death of a police officer and had to consider whether issues of contribution to the cause for finding blame or responsibility for a part of Coronial function. His Honour discussed various provisions in various Australian jurisdictions concerning the power to make findings and comments and then said this. His Honour referred *Keown v Kahn* an authority my learned friend quoted this morning and continued at page 294 of the report at paragraph 52:

In reaching his decision Calloway J in Keown v Kahn had regard to some of the English authorities and referred to Thompson's case...

And then the passage is quote. His Honour then continued:

In R v The Coroner of North Humberside Sir Thomas Bingham in handing down the judgment of the court said...

And two paragraphs are quote:

...It may be accepted in the case of conflict the statutory duty to ascertain how the deceased came by his death must prevail over the prohibition of Rule 42.

His Lordship continues:

Plainly the coroner and jury may explore facts bearing on criminal and civil liability, but the verdict may not appear to determine any question of criminal liability on the part of a named person, nor any question of civil liability.

His Honour continued in the next paragraph:

There can be no objection to a verdict which incorporates a brief,

neutral, factual statement...

5 And he gives examples, for example, the deceased was drown when his sailing boat capsized, and he give other examples which I won't trouble your Honour with. He continues:

But such verdict must be factual, express no judgment or opinion and it is not the jury's function to prepare detailed factual statements.

10

His Honour continued by saying:

15 It is clear therefore that the jurisdiction of the coroner is limited to making findings of fact. It is not his or her task to attribute or hit at blame. Can it be said in this case the coroner exceeded his jurisdiction and therefore contravened the provisions of the Act?

20 And then he goes on to discuss the particular case. "It is not his or her task to attribute or hint at blame". Now, when with respect my learned friend in chapter 6 particularly talks about deliberate and serious omissions, talks about giving false information to the public, with respect, that can be nothing more than hinting or attributing blame. Nothing more. And in our respectful submission that's something which the principles say should not be done, probably with very good reason, some of which we referred to earlier, which is of course that in so doing it inhibits future processes where people are asked to come forward and give information which may be beneficial to preventing further occasions for loss, injury or harm.

30 Your Honour, the Full Court also indicated at paragraphs 12, 29 and 31 that such is the law in this particular territory. Your Honour, in the next section of our submissions we refer to the Coronial function of learning not blaming. We've drawn attention to provisions of the Transport Safety Investigation Act by way of analogy in which the objects of the Act are stated to exclude - and I'm now looking at section 7(3)(a) apportioning blame for transport accident or incidents.

40 Also referred in passing to a report of the Australian Transport Safety Bureau's investigation into the Bankstown mid-air collision in which, once again, in the preface to that report it states it is not the object of an investigation to determine or blame or liability. And at the end it says:

45 At all times the ATSB endeavours to balance the use of the material that could imply adverse comments with the need to properly explain what happened and why in a fair and unbiased

manner.

Your Honour said as much, with respect, at transcript page 1,742 when Mr Castle gave evidence. Your Honour said:

5

“I’m sure you know the purpose of this Inquiry is to try and find out what happened and, importantly, why it happened. The reason for this is that we as a community can prevent anything like this from happening again.”

10

And with respect, we adopt your Honour’s formulation. That is the principal function towards which this Inquiry and such Inquiries are directed. And in our respectful submission the various criticisms made, particularly as I shall term the extravagant ones, do not fulfil the function of not attributing the blame, to put it in a negative sense.

15

I indicated that my learned friend Mr Lasry did in the course of evidence talk about accountability, to those that need it, it’s at paragraph 45 of our submissions, transcript 4,832. Your Honour, we have referred to the benefit of hindsight as a separate heading under the principles, we have extracted passages from *Rae v The Broken Hill Pty Company* at paragraph 58 and 59 and I won’t trouble your Honour with those, except simply to say that their Honours in the highest court in the land had talked about:

20

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In such cases it is easy to be wise after the event. What is meant, and all that is meant is that the matter should be judged from a priori and not from an ex post facto point of view.

30

More recently in *Rosenberg v Percival* similar sentiments fell from Gleeson J at page 441 paragraph 16:

In the way in which litigation proceeds...

35

And I’ll only read one or two lines:

40

...the conduct of the parties is seen through the prism of hindsight, a foreseeable risk is eventuated and harm has resulted. That particular risk becomes the focus of attention, but at the time of the allegedly tortious conduct there may have been no reason to single it out from a number of adverse contingencies or to attach to it the significance it later assumed...

45

And it goes on. I’ve also quoted a similar passage from *Grinberg v Muller* at decision of Hamilton J in the New South Wales Supreme Court. In the next heading, your Honour, at paragraph 63 to 72 we’ve taken the

trouble of extracting what others who were part of this particular set of events in January 2003 have said under the heading “The Need for Practical Reality”. We state, your Honour, that the events of January 2003 are being examined in close detail, and properly so, but it is useful to observe what others have said and we draw particular attention to the evidence of Mr Koperberg, Kiltie and others.

The effect of the evidence of those to gentlemen, both of whom were involved in the 1994 New South Wales fires, was that significant lessons were learned in New South Wales from the tragedy of those fires. In the present case we draw your attention to Mr Lucas-Smith who’d been the Chief Fire Control Officer in the ACT 1987 said in evidence that 1985, and I’m quoting:

“...was the last round of what I refer to as major fires. And in my Curriculum Vitae I think I refer to a major fire being a fire in excess of 5,000 hectares. And the December 2001 fires were not in excess of 5,000 hectares.”

We note that the 2001 fires had been the largest fires experienced by Mr Lucas-Smith in the ACT and we also state, and this is with nothing other than a factual statement, that the 2003 fires were clearly beyond his prior experience. The ACT experienced for the previous two decades relatively small fires which were capable of being controlled and extinguished, usually by early and direct attack. We refer to the December 2001 fires which challenged the ACT resources, but in the event were controlled within 52 hours, as your Honour would know in passing, Chief Coroner Cahill acknowledged that these fires were effectively fought.

In some respects we say it may be that the satisfactory performance in the 2001 fires gave rise to an undue confidence and, in particular, the widely held perception that any fires which came upon the urban edge may behave and appear like the fires in December 2001. We submit that acknowledging the people thought in that fashion is simply an acknowledgement of the way humans generally act, not necessarily equating like circumstances with like, but basing their judgements on their own experience at the time.

That may, on a proper analysis after the event prove to be horribly wrong and tragically wrong, and in this case one might say that that is a fair comment. But it does not, with respect, as I’ve said from time to time in the course of this submission, reflect upon their bona fides and their honesties in attempting to do the job as they saw fit.

We quote from the evidence of Mr Koperberg at the relevant transcript

5 numbers and I will read this question in full, the question and answer because, with respect, we submit that out of all of those who gave evidence here, Koperberg is amongst the most experienced. There are others of perhaps equal experience but his experience is valuable. My learned friend asked him:

10 “What do you mean by that last answer, Mr Koperberg? Was Canberra defensible to a degree?---It’s a strange sort of question, of course, was Canberra defensible. Whatever we do as a matter of course in New South Wales is as a result of an evolution of procedures and practices, invariably as a result of having suffered a major catastrophe such as 1994 with the loss of many, many houses and 2001-2002 with the loss of some 204 structures and life, and procedures evolve and lessons are learned and remedial actions are taken. It is unrealistic for anyone to suppose that the ACT Authorities should have automatically assumed all of the procedures and methodologies that someone else uses, because this was a first time event, and therefore they did not have the advantage of previous experience. So when I answered that question it was in the context of somebody employing hindsight and saying ‘Well, if we knew then what we know now, we would have done X’. But it does not follow that not having had to deal with a similar experience in the past things which evolve as a result of experiencing similar circumstances automatically are employed.”

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30 Now, we submit that that’s a statement which should be in the forefront of your Honour’s considerations when dealing with and judging the actions of the senior ESB officials. We also agree that it cannot be an excuse for sitting on one’s hands and not fixing what are the identified shortcomings, and we don’t put it up that way. But what we say, with respect, is that when the very pointed and personal criticisms and statements attributing blame are made. It is fair and proper and reasonable and it applies the ordinary person’s notion of the common sense test of causation if we go down that track, to look at what was the experience of people at the time who were dealing with these issues. And it can come from no higher source in this particular inquiry than Mr Koperberg.

40 Calling upon that evidence Mr Koperberg emphasised that New South Wales had learnt is “A direct result of many bitter experience and losses” and pointed to the importance of hindsight.

He then said:

45 “Are you saying to her Worship the ACT authorities had enough

time to warn these people and they didn't do it in my opinion?---I think the ACT authorities had every right to make a judgement on the potential impact and the resulting consequence on their communities, I don't think I can make that judgement.

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You are not then saying, are you, that they didn't do enough?---It depends on whether I speak with the benefit of hindsight or - - -

With the benefit of hindsight obviously?---Obviously, no."

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And once again we don't dispute, and never have done, as has Mr Lucas-Smith, never have done, disputed that warnings were as he put it "sadly lacking".

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He continues:

"But if we assume that people should only be criticised for things that they should and could have done without the benefit of hindsight are you saying that what could have been foreseen, enough was done by the ACT?---One is in danger of making the error of assuming that what we do in New South Wales, which is a direct result of many bitter experiences and losses, automatically translates to the ACT which does not have that experience and I don't want to do that."

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So once again your Honour that is, with respect, the context that we respectfully submit, decisions as to how one should characterise what the various persons who are the subject of criticism did or didn't do, needs to be judged.

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And even though Mr Cheney was not inclined to agree with the proposition, Mr Koperberg indicated, and this is at para 72 that in his opinion the event which occurred was extraordinary. I may be doing Mr Cheney a disservice, I think maybe he said "It wasn't unique". But in any event both Mr McLeod, and we've referred to this elsewhere in our written submissions, Mr Koperberg and in my submission the other ESB officers have said that the events of January 2003 were extraordinary events, and have said that they were outside their previous experience, none of which can be seriously contested.

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Your Honour, I then pass to some specific comments which attempt to address some of the criticisms, but not all laid out by the counsel assisting in their submissions. I do so in the court to understand that one needs to read our written submissions to understand the full extent of what we say, these are brought forth in an oral sense to indicate the general types of

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issues which we have adverted to on a number of occasions in the course of what happened.

5 Your Honour, in our submissions we deal with the issue of the delay in the coronial process and we are heartened by the fact that my learned friend has withdrawn I've got the pages 48 and 52, those pages are out, we are heartened by the fact that our learned friend has withdrawn the suggestion that your Honour should make recommendations about avenues of appeals from proceedings such as these.

10 As he rightly pointed out, and we also pointed out, the fact is that even if it was within jurisdiction which we contest, in this particular case one of the proceedings was successful, and as we say it can hardly be criticised or there can hardly be proper criticism of a successful party when one asserts they were not fairly dealt with in relation to an issue. It then goes to a superior court and that court agrees that there was a deficiency in that regard, that any delays in that regard can be put down to the successful plaintiffs in the Supreme Court proceedings.

20 The second issue is the bias proceedings of the Full Court, and, as we say in our analysis: There was a serious question to be tried, so much is clear from the Full Court, the fact that those proceedings were not successful is - in effect it's the due course of proceedings before a superior court. We do say, however, that at least part of the delay involved in getting those proceedings on was not down to the prosecutors, there being problems with the availability of counsel as between the end of, I think, 2004 and early 2005.

30 There is some suggestion at paragraph 98 and I think 102 and 103 of my learned friend's submissions, it's not said directly and the concern we had is, there being some inference that the suggestion is being made that we and the other prosecutors have taken these steps somehow in a way to engineer delays. At paragraph 98 my learned friends refer to, "We continue to assume that that course was taken with a view to gaining some kind of forensic advantage, well I'm not surprised." And then at 102, 103 they then deal with issues about the long delay and the detrimental effect it has on the efficacy of proceedings and consequential matters involved in this coronial inquiry.

40 With respect, if it is intended to suggest, and the problem is that the way this is put it's not clear which is the only reason we feel we need to address it. If it is intended to suggest that this was done by way of some sort of forensic or tactical manoeuvre your Honour should reject that out of hand.

45 The matter was litigated, it took many days, it took many days of serious

consideration, the fact that it was dismissed by the Full Court is the result of the proceedings, the Full Court did not say that this had, to put it colloquially, “No legs at all”. It said there were some serious matters to be brought, if anything it is premature because such elements of bias as were identified as concerned their Honours, and there weren’t many it is conceded, were such that these proceedings before the Full Court may have been brought prematurely. But they also indicated, as we point out in our submissions, that it was understood that there was a need that when these issues arose the authorities dictated that one could not sit on one’s hands, and one needed to take action.

We simply make those submissions to in effect counter if this is what was intended, and we don’t know, that this was somehow some tactical advantage or manoeuvre, engineered at least by my client. I don’t speak for the others, they can speak for themselves. It was not.

Your Honour, at page 53 to 62 we deal with land management issues:

“We contend that because the matters were dealt with briefly and only as a secondary issue that any findings and comments and recommendations touching upon that issue should be confined”.

The first reason is that the discussion of jurisdiction in the Full Court indicated that land management issues are of limited relevance to the primary function of the Coroner, but their Honours noted that the state of the fuels, the course was a highly relevant matter and we readily concede that it be so.

Their Honours then posed a number of subsidiary questions as to how the fuels got that way, as to what policies might have been in place as to what the historical situation was. Now their Honour’s, on a correct reading of the relevant paragraphs in the judgement, were saying that the first matter is clearly within jurisdiction. Findings as to the second matter and subsequent questions are matters of some considerable doubt.

We accept that it gives a context, but if for example your Honour proposes to make findings to pick one example, the statements made by Mr MacBeth in 1994 and of course he gave evidence in the early part of the proceedings. We would submit that findings about those matters are outside your Honour’s jurisdiction.

The second broad reason articulated in our submission for the limited treatment of land management issues is that it has only received evidence from a limited number of persons who to group them together support broad scale hazard reduction with a particular view of fire prevention. It’s

not that we do not say that those opinions are valuable and should be brought in and considered, but we submit that it is not the only relevant consideration which needs to be weighed up. The issue is a complicated one. The issue is one where there is a conflict of a number of competing considerations such as conservation and wilderness values, recreation issues, water catchment and quality issues and fire management.

If one, with respect, is to make meaningful recommendations in the detail sought about what the program of hazard reduction could or should be, with respect, one needs to take into account the full range of opinion on that issue, because otherwise your Honour may be in all good will going down a certain path and has simply not been appraised of the legitimate other arguments which bear upon that issue.

Your Honour would be, we suggest, very alive to the fact that recommendations need to be accurate, need to be meaningful, and for those two considerations to obtain so far as land management issues are concerned, your Honour would need, we submit, to hear a further range of opinion to actually make those recommendations in a way which are useful and helpful for future administrators to deal with.

Your Honour, at pages 64 and following, we deal with the issue of operational preparedness for the 2002/2003 fire season. We note that the background against which these issues should be considered is that in general terms the ACT authorities had a good record in fighting the bushfires within their jurisdiction and working cooperatively with the New South Wales authorities. We further note that it is pertinent to contrast the size of the New South Wales and the ACT bushfire services. It is unarguable that the New South Wales Rural Fire Service, for example, is a significantly larger organisation. In contrast in January 2003 the ACT bushfire service comprised four full time persons, three departmental brigades and nine volunteer brigades.

So that when your Honour comes to consider what could or should have been done, what were feasible or not feasible, one needs to take into account and this of course applies to Mr Roche's opinions as well, with respect. One needs to consider that we are talking with a jurisdiction of considerably smaller size. This is not to say and I still have it ringing in my ears, your Honour's comments in the course of the proceedings, that that should mean that certain tragic consequences should flow to Canberra in the event the fires occurring and I won't repeat what your Honour said.

The point to be made is that the criticisms are aimed at people then one needs to take into account the context in which they operated and that context was four full time people and that context was a jurisdiction which

amounts to in effect a district for New South Wales Rural Fire Service. And when one says, things could have been done in the lead up to 2002/2003 one also needs to take into account those limitations.

5 We submit, your Honour, that there are two broad issues with the submissions of counsel assisting do not emphasise sufficiently in dealing with the issue of operational preparedness. They rely upon a number of statements by Mr Lucas-Smith and others and papers prepared by McRae in the period 2002, all of which indicate that those persons recognised, and this, of course, was the evidence, the volatile state of the fuels in the surrounding areas of the ACT in the lead up to this fire season, this being the one in question.

15 The first issue is whether or not there was sufficient time from the point those matters were realised to affect changes suggested by the experts of this inquiry. The second matter is whether or not a jurisdiction of this size could afford to have on standby equipment such as heavy plant and aircraft. We, of course, hasten to add, your Honour, that issues of the allocation of funds and the government policy in relation to the taking of such measures are, as the Full Court as told us, outside the jurisdiction of this inquiry.

20 However, we submit that in order for the inquiry to seriously consider criticisms of inactivity in these regards, it must countenance the fact that the issues such as time and resource allocation were not within the control of those who are being criticised for these omissions. One case in point about time is, as my learned friend correctly pointed out, the Phoenix imperative and the emails came from about May 2002 or slightly earlier, all the way up to November of 2002. Mr McRae recommended the commencement of broad scale, or targeted, hazard reduction over a number of areas, mosaic hazard reduction I think is what he referred to.

25 Well, with respect, upon that realisation there is a limited amount that could be done, given the expression of opinion at the time that it was and the fire season, which came up. Also, as we have said in relation to the acquisition of the heavy plant, there are problems in relation to that being done in a timely fashion. And indeed, as I'm reminded, McRae was, in his papers, speaking about longer term actions as opposed to shorter term actions as well.

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40 In any event, your Honour, we point out in our written submissions that many things were done in the lead up to the 2002-2003 fire season. We refer particularly to the matters addressed in paragraph 195 of our submission, which attempts to summarise Mr Ingram's statement in those regards. He gave a list of about eight or nine matters, from memory, and I

won't go through them. Some might be thought to be mundane, some might be thought not to be directed to what was, in the end, important considerations so far as these fires were concerned. It is still, however, unfair to say that these senior ESB officers sat on their hands and did nothing at all. They did things. They did things, we ask you to find, which it was within their power to do, so far as these issues were concerned. And we submit that it is neither realistic nor fair to criticise these persons, if that was the intention of the submissions, for these omissions.

10 Your Honour, having said that, I wish to make plain on behalf of the ACT what it is we do concede in terms, because we have done so in several places throughout our written submission. And it is the proper basis, in our respectful submission, which we start to deal with some very select and specific matters. As we have said, there is very little in the facts as contrasted with the inferences to be drawn from those facts as to which the ACT has any significant contest. In relation to the issue of initial response, particularly in relation to the Bendora fire, we submit that the fact that the crews did not stay overnight to combat that fire and the circumstances in which the decision in that regard was made have been clearly exposed in this inquiry.

25 In our written submissions we have made on a number of occasions various concessions concerning the inadequacy of the decision-making process and accepted the proposition that in hindsight others might have made a different decision concerning the question of whether crews should have stayed overnight at Bendora. Specifically, we have conceded that the way in which the decision was made was deficient in that (a) more information should have been requested from the incident controller about the fire conditions and the capacity and the safety of the crews, and (b) that such information should have received due consideration with a view to assisting incident control to make an informed decision. That, we accept, is a fair finding to make about that particular decision.

35 Furthermore, your Honour, the ACT has accepted, as Mr Lucas-Smith did in his evidence, that had more experienced persons been involved a different decision might have been made. We accept that these are proper matters to be considered and accept that judgements should be made in hindsight with a view to remedying these shortcomings. A perfectly proper exercise of the coronial jurisdiction for a proper end, namely to remedy, to the extent that it is now necessary to do so, given the new regime, but a perfectly proper judgement to make to remedy the shortcomings as identified.

45 However, we submit that criticism is not warranted of those who took part

in the decision making in the terms suggested by counsel assisting. In broad summary, we submit that what occurred was reasonable in the circumstances that those officers with their experience and background found themselves in. Furthermore, in relation to the Bendora decision, we submit that even if Graham had requested further information from the incident controller, the decision he would have made was unlikely to have been different to that which was actually made, and we have, in our written submission, given reference to the evidence he gave in that regard. So that even if he had done, as my learned friend's considered he should have and as we concede in hindsight he should have asked for further questions and further information, his evidence to this inquiry, and there's no suggestion that he's not a man of truth, his evidence to this inquiry is the decision would not have been different.

We submit that the court cannot and shouldn't make findings urged by counsel assisting that the decision or decision-making process ultimately contributed to the fires which burnt into Canberra on 18 January or that had crews stayed at Bendora and other ACT fires, those fires could have been contained and later controlled. As we'll detail below, these conclusions are speculative. They are based in large measure on the availability of heavy plant at a time that such plant was not available and, with respect, they failed to have due regard to the comparatively narrow window of opportunity to achieve containment between 8 and 9 January.

Your Honour may or may not recall, but the evidence from the incident controllers at Bendora stockyard and, indeed, Gingera on the 9th was that approximately, about 2 to 4 is the range, it varies between the various officers and we've noted those in our written submissions, there was a bad turn in the weather. All of a sudden what was a relatively benign day became one where fire behaviour took off and people had to, in fact, leave the fire ground by about 4 to 6 o'clock because nothing more could be done.

This is a matter, with respect, which is relevant to the issue of causation. What could have been achieved had people, the crews, stayed at these various fires or had attended them at an earlier point in time? Because, with respect, what is not, we submit, properly factored in is the fact that the window of opportunity was from time of report on 8 January, provided, of course, people could accessed the fires, and we have more to say about that, to whether or not enough had been done by about 2 to 4 o'clock on 9 January to prevent those fires escaping such hand containment lines as could have been constructed overnight, had crews stayed.

And in our submission, when one examines Mr Roche's opinions and the

5 various variables he took into account, the fact is that, we submit, he did not properly factor into account these various variables which detracted from the proposition they had (a) been present and (b) been present and (c) been present, it could have been contained within 24 to 48 or whatever hours it was that it was said.

10 Your Honour, in relation to the issue of warnings, the ACT has also made a number of concessions. We accept, as did Mr Lucas-Smith, that the immediate arrangements and the advice to the community were sadly lacking in the lead up to 18 January 2003. That is the starting point of any of our submissions. It was sadly lacking. The fact that he made those, one would have thought a concession against his interest, in frank terms would be a matter your Honour would weigh in consideration of where one deals with whether or not you should believe him on other aspects as well.

15 We further accept that warnings did not I've sufficient emphasis to the risk which ultimately eventuated, and were not adequate. We further understand that it is entirely proper for this court to examine the question why more effective warnings were not given to the ACT community in January of 2003. However, we do not accept, and in fact strongly refute the proposition, that the failure to provide warning so far as those failures are attributed to named individuals were in any way wilful or a deliberate attempt to withhold their genuine thoughts as to the risk presented to the Canberra community from them.

20 We suggest that there is no specific or direct evidence to that effect, and we also note the submissions by counsel assisting in this regard appear to be made as a matter of inference from other facts which have been established. And we draw to attention once again the discussion by Dixon J in *Briginshaw* whether or not serious assertions can be proved by indirect inference. The ACT submits that this is an extraordinary and unwarranted inference to draw against named officers, that is to say that they wilfully or deliberately attempted to withhold their genuine thoughts from the Canberra public.

30 The inquiry has heard from other senior officers and more experienced persons such as Mr Koperberg, who stated the community has learned from bitter experience with respect to bushfires. We submit that a key factor in explaining the absence of early warning were the extraordinary and unexpected nature of the event, including the speed and intensity of the fire that struck Duffy on the afternoon of 18 January 2003. And once again, our submission is that the fact that such speed and intensity were known to experts such as Mr Cheney does not detract from the honesty of the views held by the ESB officers. It simply underlines that those

officers did not have the level or the depth of experience in these sorts of wildfires that Mr Cheney did.

5 The New South Wales Rural Fire Service officers who gave evidence in these proceedings, and we specifically refer to the incident ...(indistinct)...
Mr Arthur and his deputy Ms Crawford acknowledged that there was an element of judgment in determining when warnings must be given, and at times they said it was a very fine balance as to when you warn people to leave their homes. We submit that that evidence makes it patently clear
10 that these are issues which call for the judgement of individuals. And how individuals exercise those judgements depends upon their knowledge, training, and experience.

15 Part of that experience, your Honour would have heard, was the evidence which suggested, so far as Mr Lucas-Smith was concerned that he, until the very latest times, maintained some confidence the fires could be held in the cleared areas around the Murrumbidgee River, and also in the setbacks approximate to the western area of the urban edge of Canberra.

20 Further, he maintained an expectation, so he said, and with respect there's no reason to disbelieve this, the fires which would arrive approximate to the western urban edge of Canberra would come at a time when there was a change in the weather that was due, and accordingly the intensity of the fire would be expected to be reduced. It was his evidence that he thought
25 therefore that he had more time and that there was some opportunity to suppress any fires to which did come. The fact that these judgements proved to be wrong, in our submission, does not affect the fact that he and the other held these views in a genuine way.

30 In substance, your Honour, we submit in this area that it would be wrong, indeed it would be against the weight of the evidence, and it would be, with respect, an improper exercise of the coronial function as referred to in the earlier authorities for your Honour to make findings to the effect that the nominated officers wilfully and deliberately withheld information
35 concerning their views as to the threat to the urban edge. It is diametrically opposed to the evidence they themselves gave in our respectful submission.

40 Your Honour, there are two matters which we submit your Honour should have particular regard to in weighing up the truth of what such officers have said. The first is a consideration of what motive, if any, senior ESB officials had for such omissions to tell the Canberra public; and the second is whether other actions of such individuals are consistent with the proposition that the omissions to warn were deliberate. We submit that in
45 order to fairly assess whether these serious allegations are sustainable

these two matters must be kept in the forefront of one's thinking.

5 And we should say, that they are the kinds of matters, namely the
unlikelihood of the occurrence as referred to by Dickson J in *Briginshaw*.
The serious consequences of the criticism that one scheme is referred to
by Dickson J in *Briginshaw*. These are the very kinds of matters that
your Honour needs to take into account in determining, do I believe that
these people acted in a false or a deliberately omitting way in this appeal.

10 Because if your Honour can't find, in our respectful submission, any
particular motive, there was a real question on whether it was delivered
and it tends, with respect, to the proposition that what was done was done
on a mistaken view. That can be the only reasonable inference open.

15 Your Honour, we submit that in relation to the issue of motive, that
counsel assisting do not suggest any reason why ESB officers might decide
to knowingly withhold information and we submit that no motive was
suggested by the circumstances which have been exposed in this inquiry.
20 In particular, there was no personal or other interest of those officers in
question to withhold warnings. They, as we suggest, were simply persons
carrying out their duties in the normal course of their employment, albeit
in an exceptional time.

25 The suggestion advanced the warning were withheld so as not to alarm the
public, we say is not sustainable. We submit that if the true state of mind
of these individuals was that there was a real risk, or even an inevitability,
that the fires would impact on urban Canberra, then the motive to avoid
panic cannot make sense because the fire would inevitable come. People
would know. The omission would be exposed in very short order.

30 We submit that the only sensible and rational construction of these events
is that whilst the offices were aware of a risk to the urban edge, they
thought that they had the time and the opportunity to implement
suppression as in such that that risk would not eventuate. We submit that
35 the notion of the motive was to avoid panic, is not worthy of serious
consideration and was, in any event, specifically denied by those officers
in their evidence.

40 Consequently, our submission is that there is simply an absence of
evidence of motive for the ESB officers to do it would be decided to
withhold warnings. In these circumstances, it would be a remarkable and
a serious finding to make that absent any motive, that these officers
wilfully and knowingly withheld information.

45 In our submission, the court should and will conduct its considerations

5 applying commonsense and will bring to the processes knowledge of human affairs and experience. We submit that the court must be satisfied to a very high degree in order to find that serious allegations such as these are made out and we submit there is simply no occasion for making those serious findings.

10 Your Honour, the second matter which ought to be considered is whether or not, assuming that there was such a motive against the interests of these persons to withhold deliberately, is it consistent with other actions that some or all of those officers took? We submit that there is no logical reason why the ESB officers would prejudice one section of the community in the ACT and that is to say that the members of the Canberra community on the western urban fringe and not another section of the Canberra community, mainly the rural residents who were warned on the night of 17 January.

20 Your Honour, in our submission, your Honour will recall the general thrust of the facts in that regard, but we have extracted the evidence of various witnesses of Marika Harvey, David Prince, of Mr McRae in which each of them said that on the night of the 17th, there was a discussion about the risk to the rural lessees essentially down to the south of Canberra.

25 And each gave evidence, as did Mr Lucas-Smith, that they were directed by the chief fire control officer to set about warning those people. And, as your Honour has heard, a lot was done in that regard. Now, in our respectful submission, when one considers that that was done and then one contrasts what was not done so far as the urban edge was concerned and its community was concerned, one needs to ask oneself why?

30 Now nothing has been suggested by my learned friends. In my submission, there's nothing in the evidence to suggest it. It is a glaring illogicality and an inconsistency. And the answer has to be, with respect, that rightly, wrongly or indifferently, there was an expectation that there was an immediate risk to the rural lessees and proper and timely steps were taken to address that issue by warnings. The inference has to be, and this is with respect supported by Mr Lucas-Smith's evidence and others that, at that time, there was no expectation, that the urban edge committee members would be so impacted.

40 And as your Honour recalls, that refers to a timeframe in which the McIntyre's Hut fire was still on the New South Wales side of the border. Your Honour will recall that that was on the night of 17 January. It crossed the border, so we were alive we're told by Mr Bartlett who was the person best known to, or best outfitted to make that judgment because

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he took the helicopter flight earlier that morning that it in his assessment, it crossed the border on the morning of 18 January.

5 Now with respect, with a more experienced fire academics and practitioners expected on the blow up day on the 18th when things would travel exceptionally fast, and that may be accepted as being their truthful view, we don't suggest any differently, does not necessary mean that Mr Lucas-Smith and others thought that at that time, they had 13 or 20 kilometres to play with, that there was a long way to go, that there was the Murrumbidgee was there in order for some suppression activity to take place, that if that failed, there was urban edge, that if that failed, the timing was Narrabundah Hill at 8 o'clock that night approximate to the time when a mild change would come and might be thought to ameliorate conditions.

15 As your Honour has heard, in our submission, and there are specific references, Mr Arthur and Ms Crawford said, "All of this really comes down to a matter of judgement. When is the proper time?" Mr Lucas-Smith and the others exercised their judgment and their judgment was, rightly or wrongly, that there wasn't then a need.

20 It wasn't as my friend has put in his submissions that there was a conscious decision to defer. You see that's putting it around the wrong way with respect so far as their personal thinking was concerned. What it was, was do the circumstances warrant us to take that step? Not, should we defer a warning which we now think needs to be made. It reverses the process. His way of looking at it with respect, Mr Lasry's, is a hindsight view. And in hindsight, we can categorically say he was absolutely right, it's the others who have made a judgement on it. Looking forward, the view was a little different and that was, there was time, there was space and there were circumstances.

25 I draw this to your Honour's attention, and this is at paragraph 713 of our submissions. It is in the form of a concession as well that the territory agrees that with hindsight, it would have been prudent to inform the rest of the risk identified during the evening planning meeting. However, it didn't happen because those officers didn't expect the residents to be affected. This should be contrasted with the rural lessees where a potential for them to be affected is recognised and consequent steps taken to warn him.

30 Your Honour, the last matter which I'd ask your Honour to have regard to in determining this issue about whether or not any withholding which is said to have occurred was wilful or otherwise, is the evidence or the Fire Commissioner, Mr Bennett.

Now he, of course, is not one of the ones who was subjected to criticism for withholding information, but his evidence is pertinent for this reason. He was, as it were, an adjunct member of the services management team, he being the fire commissioner. He sat in, so the evidence would indicate, on the planning meetings between 10 and 12 January and 14 to 18 January, so much is clear from his statement in this inquiry. He was a party to the briefing my Mr Lucas-Smith of the fire brigade on 16 January and he was also present at the meeting on 18 January in the morning when Mr Bartlett gave his assessment of the McIntyre's Hut fires and the other fires.

We submit that no one was better placed than him to recognise the potential of the fires at that potential was explained and understood at the various meetings. He was there. If they were genuinely talking about it, he would have known. Mr Bennett's evidence as to what he did on the morning of the 18th is enlightening. What he said was this:

“Although the increased fire danger was recognised, there was no specific indication that the fires would impact on the suburbs of Canberra that day (although the potential of fire runs from McIntyre's at Tidbinbilla was discussed during the morning briefing).”

He's referring to 18 January:

“At about mid morning, I travelled to my parents home at Warragamba Avenue Duffy to check on how they were. My parents at that stage were aged in their mid-70s and I'd not seen them for a couple of days. At this time, many people in the street were filling their gutters with water and clearing away general debris. I was concerned that there was nobody to do this for my parents so I did this task while at Duffy. However, I had no real sense that the fires would have hit Canberra later that day. I certainly would not have left my parents there and had I realised this. In fact, I assured them that the fires were still some distance away and that I saw no real immediate risk to them.”

That's at paragraph 48 of his statement which is referred to at paragraphs 604 and following of our written submissions. He was the person, with respect, that was privy to the internal workings of the ESB. He was privy to what the services management team and the senior officers were saying to each other in the privacy of their own headquarters. If my friend's submissions are to be accepted, those people who knew and were readily and seriously acknowledging the risk amongst themselves, but deciding to

defer telling the Canberra public. That's the scenario which is put again the ESB officers.

5 In our submission, Mr Bennett was also part of that select group of people and if what my learned friend suggests is the case, your Honour has to decide that either Mr Bennett has come here and lied about this matter and your Honour would not decide that, it was never put, never suggested. Or alternatively, that the view held in those meetings was that, to put it this way, there was no real sense that the fires would hit Canberra that day, 10 that there was no real sense that there was an immediate risk to Duffy.

How naïve that might sound now is a different issue. One might say it's naïve given a hindsight view of matters. But that that reflected the honest sense of what went on in the meeting in my respectful submission cannot 15 be denied if one accepts what Bennett has to say. We submit as a general proposition that an obvious explanation for the omission to tell the Canberra public was that there is clear evidence that the senior officers worked for long hours, up to 10 hours a day in a critical period leading up to that time.

20 We submit that it can't be doubted that the operated in stressful conditions dealing with the multiplicity of decisions both simple and complicated and making judgment calls about matters having serious consequences. Ordinary human experience indicates that under those pressures, a 25 physical toll is taken and, I'm sorry, even on the most robust individuals. We submit that it is in these very circumstances that individuals are likely to be distracted from important issues and may make judgements which, on closer analysis, are not the best judgements which could be made.

30 To recognise this, we suggest to recognise a facet of the ordinary human condition. Once again, the submission on behalf of the ACT is that the ACT officers work hard with the best intentions in the course of these events. And further we submit that when consideration is given to making findings adverse to such persons, there should be a recognition of being 35 constraints and pressures under which they're operating.

I should say your Honour, that it wasn't only officers such as Mr Lucas-Smith, Mr Castle and others who had no real appreciation of the size and the magnitude and the speed of what was to come, because my 40 learned friend has rightly said, and we don't debate this issue, Mr Bartlett was one of the more experienced if not the most experienced fire fighter in this jurisdiction at the time. Mr Cooper was, to put it colloquially, a seriously experienced fire fighter as well. And I will take your Honour very briefly to the evidence of both those gentlemen, each of which was to 45 the effect that the ACT Forests Office which was in the path of the

McIntyre's Hut fire was going towards Duffy, it got burnt out and it was a situation which took both of those men by surprise. I put that compendiously.

5 So there were people who were also in the thick of things. There may be answers to that. Both of them may well have been deflected from larger issues and not dealing with these things. But the fact is, it gives a sense of what people on the ground then had in their minds on the 18th and how quickly things turned around and how quickly things happened. And it is, with respect, those matters which need to be factored into any judgments about personal blame worthiness is your Honour is contemplating making them, which of course we suggest you should not.

15 Your Honour, dealing with some specific matters, and I do so by way of example only. In Chapter 5 of their submissions, counsel assisting press a number of findings as to whether, to put it compendiously, the lack of genuine, rapid and aggressive response to all of the fires could or would have resulted in containment and ultimate suppression and were therefore a cause of the fires on 18 January 2003. I haven't put that as accurately as they've stated it, but your Honour knows the territory that I'm entering into.

20 The first submission that we wish to make about that is that the submission is made in about five places and it is useful to compare the way the submission is worded to determine whether it's internally consistent with each of them in order to determine how reliable is the ultimate proposition that these were a cause of the fire. In paragraph 1117 this submission is put, and I quote the relevant part:

30 "With a genuine, rapid and aggressive response to all fires, there remain a strong likelihood that the ESB would have affected containment of all the fires in the ACT that began on 18 January within the first 24 hours. Had that initial containment been achieved, there equally were good prospects."

35 Perhaps I'll read from the original rather than my summary:

40 "There equally were good prospects of thereafter successfully controlling and suppressing those fires before the onset of extreme fire weather"

45 And I won't read on further. I direct your Honour's attention to these facets of that formulation because they are different to the others. Firstly, the issue of strong likelihood. Now these are submissions directed towards whether or not your Honour has sufficient material on which you

can be reasonably persuaded as a matter of causation that certain things could have been done and therefore the fact that they weren't was a matter causative of what happened on the 18th.

5 So the first issue is there remained a strong likelihood. The next issue is, containment within the first 24 hours. The next issue is, there were equally good prospects, I interpolate to say, with respect when making findings, the terms of such variable content with respect, are quite troubling. One doesn't know what equally good prospects are insofar as
10 whether or not 10 days the track you are comfortable in making findings that they were a cause. And then the next formulation successfully controlling and suppressing those fires before the onset of extreme weather.

15 That's the first formulation. One then turns to - that's in relation to all fires, is the general submission. At paragraph 1127 in relation to the Bendora Fire, counsel assisting submit that had the approach referred to in paragraph 1126 occurred, it is likely and I stop to pause to note that between 1117 and 1126, a strong likelihood is being reduced to it is likely.

20 Now once again, we hasten to add, we don't mean to be nitpicking in this. What we mean to point out is that the ultimate submission will be any finding as to causation concerning these matters is speculative. That its speculative nature is made plain by the fact that there are different
25 formulations even by those who have considered this matter long, and at length, and if they make different variable content in the way they formulated it, how can your Honour be satisfied as to a causation matter in relation to a commonsense test of causation?

30 The answer is, we would submit, you cannot be reliably be satisfied. So going to 1127, "It is likely that initial attempts at containment in the first 24-48 hours," so now we have a situation where there has been a change of heart or perhaps it underlines a difficulty in speculating as to what might have occurred in what given time period. They then go onto say at
35 1127, "Would have been successful" as opposed to, "Strong likelihood." And they say, "A significant degree of control" as opposed to, "Equally good prospects of successfully containing it." They then say, "Over the next 10 ensuing days," and there's no material difference between that and the onset of the extreme fire weather.

40 So there are differences, albeit it slight one might think, but nevertheless serious enough to cause one, with respect, to pause and say, "Can I be satisfied that this was truly a matter causative of what happened 10 days later." If then one goes to the finding in relation to Stockyard Spur fire at
45 1172, they submit that if the steps taken - I'm sorry, the steps which have

been recommended in the evidence of Mr Roche had been taken, it is likely, so that formulation stays the same, that Stockyard Spur would have been contained in 24 to 36 hours.

5 Now what we have is firstly 24, nextly 24 to 48. Stockyard Spur, 24 to 36. And then the next formulation is control and probably suppressed. We've got good prospects of suppression in the first formulation, a significant degree of control in the second formulation, probably suppressed in the third formulation. Then they say, "Well in advance of
10 beyond extreme fire conditions." Now that means sometime within the next 10 days and well in advance of - with respect, we're not enlightened as to how. So that's a third formulation.

15 So much is true *Gingera* at 1176. Now the point of the submission is to say that even in circumstances where counsel assisting have had, as we all have had, the benefit of hearing all of the evidence of this enquiry, including the expert evidence called by them on behalf of the enquiry, and considering that evidence, that when they're asked to suggest a finding to your Honour about the initial suppression and causation, that we have
20 such a multiplicity of ways of stating it that your Honour, could not, on any reasonable standard applicable here be satisfied that such a lack of initial rapid aggressive response was a cause of the fires on 18 January.

25 The other thing I should bring your Honour's attention to, the last authority I think that I want to raise but it is relevant to the issue of causation. In the *Harmsworth* case, Nathan J had a caveat in relation to causation. This is at page 999 at line 10 which we submit is extremely relevant in the present situation, especially of causation be it in effect commencing on 8 January and ending up on 18 January. His Honour had
30 this to say:

35 "Not all questions of causation can be related to time. As a general proposition, the greater the time lapse between the event inquired of is from the allegedly causative a factor, the less relevant as an initiating cause that factor will be."

40 One would have thought a fairly self-evident statement. The longer the time lapses, the more problems there are in being certain or satisfied to a requisite extent that a matter is causative. And in our respectful submission, that applies with particular force to firstly, even to go back for initial response, the decision to withdraw from Bendora, to go back to ...*(indistinct)*... Lucas-Smith's alleged deficiency in failing to recognise Graham's inexperience.

45 In our respectful submission, your Honour, those things are so removed in

time and place from what happened on 18 January that whilst there is a link, there's no doubt they are connected in point of time with the same subject matter, it is not a sound basis on which your Honour can find that those matters are causative matters, as a common sense application.

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Your Honour, the second matter, apart from the different formulations urged by my learned friends that we wish to raise concerning whether such a finding of causation can and should be made are three or perhaps four reasons in number. In our respectful submission, the predictions overlook the particular limitations and difficulties which existed on 8 January.

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For example, we submit that the formulation fails to take into account the fitness, training and experience of the ACT crews who were present at the time, not that we're suggesting that they weren't fit, trained and experienced, but if one reads the statements of those who accompanied the incident controller to Bendora on 8 January, there is a mix of experience, a mix of ages and a mix of abilities.

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To arrive at a conclusion without having regard to those matters specific to those persons that something could have been done, when for example some with one or two years experience who weren't arduously trained and there are others who are more elderly people and with respect, one can't make full assumptions about this but the fact is it's a different thing to say a notional, fully fit, rested, raft crew can do this, and then on the other hand say, we need to look at what was there at the particular time in order to determine whether this real group of people with their experience, limitations and skills could have achieved a certain amount. In our respectful submission, to find that a factor was causative one needs to look at this, that is to say those who are there, not the notional raft crew who might be able to do something different.

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Further it fails to pay regard to the fact that two of the fires were not able to be accessed in good time on the night of 8 January. Your Honour has the evidence of, I think it's, Mr Gray who was the incident controller appointed to the Stockyard fire on 8 January and Mr Gray gives evidence he got to a certain point, I think along the Mount Franklin Road - Morass Flats, I'm sorry, I'm reminded, I've got the wrong place - after which he needed to gain access on foot. Now we've extracted in our written submissions at the relevant part what their evidence was but the effect of the evidence was, we could not have got in to that fire that night going on foot. So Mr Gray called off that effort.

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Now Mr Roche, on whose opinion the ability to suppress Stockyards Spur fire, originally mistook Mr Gray's evidence. As your Honour may well

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recall, there was cross-examination of his that related to whether he believed there was access by vehicle and until he was cross examined on that issue, he said that he did believe that to be so, that ultimately acceded to the fact that Mr Gray's evidence was to the opposite effect, that the vehicles could only take them to Morass Flats.

So when one looks at if there had been this and if there had been that then Stockyard could have been suppressed, in our respectful submission, one needs to look at what was the position on the ground. The position on the ground was they did not and they could not reasonably have got in. So the question is, is this omission a causal finding? The answer is in our submission, no, it's not. The fact that there was such a long lead time getting into Stockyard's Spur fire was also addressed and confirmed by Mr McNamara who was the incident controller the following day.

So it's not, with respect, good enough to say had we had the Erikson crane, had we had this, had we had that, we could have snuffed it out very quickly. We would agree probably the fact is, with what they had at the time, with the ability to access at the time, could they have done something? Answer, no. If that's right, then making a finding of that kind in relation to Stockyard's Spur, with respect, is unwarranted and futile.

The next matter, your Honour, is that, and I've mentioned this in passing, that it fails to take into account the fact the - what we've termed the potential cancel and effect of any progress in containment and control of the fires as a result of the weather change between 1400 and 1600 hours on 9 January. One sees the formulations my learned friends have given, 24 hours, 24 to 36, 24 to 48. They start to come into the afternoon of 9 January. And the evidence of all of those who were there, I think it was Mr Hayes and others, in fact all others, was that at about 4 o'clockish - McNamara as well, Mr McNamara - at about 4 o'clock the weather picked up and the fire behaviour started to take off in a way which made it unsafe for crews to stay.

What that meant, your Honour, was there was a window of opportunity, had there been sufficient control in that window of opportunity when Mr Roche's opinion had some force. But with respect we submit that he has not properly factored into his equation that if things had not have been done according to best practice and the way he set them out, what was the effect on the suppression if it's of that particular blow up condition, as I choose to call it, on 9 January?

In relation to Bendora, I'm reminded that on 9 January in the afternoon the fire jumped Warks Road. Now that was probably as big a firebreak as one could have reasonably had in that area. If it jumped Warks Road then it

would have in all probability jumped any hand ...(indistinct)... line which had been made on parts of that fire. So when your Honour thinks causation, your Honour has to factor into the equation, in our respectful submission, the fact that on the 9 January things happened which may well have put to nought everything which had hoped to be and had been achieved on the night of 8 January and in the course of that day

The third matter is that, and this relates to Bendora in particular, is that there was a breach of the Bendora break either late on 8 January or early on 9 January so much is clear from, I think, Mr Hayes' evidence which we have extracted, referred to in our written submission. And in effect that occurred before there was any possibility for a 'dozer to have access to that break to clean it up to make it, in effect, a firebreak. And so once again when one talks causation, in our respectful submission, one has to factor in whether or not in those circumstances it is a reliable conclusion to draw in a common sense way that had what was suggested been done then things would have been contained or suppressed.

The final matter in relation to paragraph 117 in particular is that even as then formulated there are aspects of the formulation which are variable. There is, for example, no indication of what constitutes an immediate response, having regard to the location of the two fires. And once again this really refers back to the problems that Mr Gray had in getting in. What is an immediate response? How does Mr Roche, if it's his opinion which is relied upon, suggest that these crews should have got in to immediately respond? Do they say that Mr Gray was not fit enough or he was sleeping on the job or what?

The only evidence you have is the evidence of Mr Gray, a fire fighter of 22 years' experience. He wasn't challenged on this. Your Honour, in our respectful submission, has to accept from him that here was a man, and his crews, who were willing to go in and fight the fire but could not. And if that's the true construction then there is no issue, with respect, that things could have happened if the crews had got in, no sensible causation issue in that regard.

Furthermore, your Honour, there's no consideration of whether the raft crews, if they could have obtained sufficient numbers, were available and fit enough to complete a full shift, having regard to their having been on duty since the morning. Your Honour will remember the issue referred to by Ms Arman from the Bendora fire, that one of the issues she had concerns with was that these men and women had been employed, some in the morning doing heavy work.

Now as to how those people might have ultimately worked and

constructed ...(indistinct)... lines is really something which is so speculative it does not seem to have been, with respect, factored in by Mr Roche. And the final and more important issue is the definition fails to grapple with the issue of what heavy plant was then available, and where what was available was suitable to deal with each of the fires and in what timeframe they could be deployed. In other words, there is no indication of what constitutes “At the earliest opportunity” in the formulation at 1117.

10 In paragraph 285 and following, in our submission, as we summarise what the evidence was in relation to the availability of heavy plant. Mr Lucas-Smith gave evidence to the effect that the ACT authorities had arrangements to have available to them two bulldozers for the purposes of suppression. Peter Beutel was the agency representative for ACT Forests and he was the person charged with the responsibility of organising the relevant heavy plant.

20 He made a statement to this inquiry and he wasn't called, his statement says these things, that on 8 January in the afternoon he was asked to begin sourcing bulldozers, it should be said he wasn't asked by ESB to do so, he was asked by a Forestry person, so much is clear. But the issue is whether or not had he been asked by ESB, was the plant available in any event? He stated that he arranged for a D9 bulldozer to be available to make firebreaks at the north west side of Uriarra Forest and to assist in the fire fighting effort in the Brindabellas.

30 That 'dozer was delivered to the Blundells/Brindabella Road intersection at about 8.30 pm, it seems clear from his evidence, your Honour, that the bulldozer would not have been available to be deployed to any of the fires before nightfall on 8 January, and furthermore, by reason of the limitations of the access roads and trails, it would have had to have then walked into the Bendora fire, a distance of some 7½ kilometres, that process would have taken approximately 3 to 4 hours or slightly longer.

35 Now, if one does the tallying, those fires first came to light about 3 o'clock. The time now escapes me when the ESB was responded to. It was probably, I think, 4 o'clock or thereabouts. Earlier, a little before 4. Even if there could have been an immediate dispatch of the D9 'dozer, it would not have got there before nightfall if it would have got there at all, by reason of the amount of walking and time that was required.

45 Now, there may be comments made about why there was not enough foresight to have pre-positioned 'dozers such as this. They might or might not be fair, depending on where one stands on that issue, but what it does mean is that when you're looking at formulations by people such as

Mr Roche that had there been a timely availability of 'dozers, things could have been done and there was not, then his opinion about what could have been done really is a theoretical analysis removed from the facts on the ground.

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Mr Beutel stated that the D9 'dozer, in any event, was required for track repairs for most of 9 January and was running by 6 pm that day. So on the 8th it was difficult to get to the fire ground. On the 9th it was inoperative by reason of track repairs. He also gave evidence that on the afternoon of the 8th he contacted a person at Bathurst to organise a D6 replacement for the broken down D4 bulldozer that was previously available. So, as your Honour may recall, there were two 'dozers which were said to be available to ESB through the auspices of the ACT Forests. The D4 had broken down.

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In any event, the replacement D6 'dozer left Bathurst at 1 pm on the 9th and arrived at Belconnen at 7 pm on the 9th. In relation to both 'dozers, that is to say, the D9 and the D6, on 9 and 10 of January there was one operator for each of those 'dozers, so that only one shift per day could be worked. The net result of all of that is, your Honour, that when one talks about 'dozers and heavy plant being immediately available, they weren't. And if they weren't, then Mr Roche's assessment as to what could be done, with respect, is seriously flawed as a basis of saying that this deficiency was a causative factor.

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Mr Beutel gave further evidence of obtaining various 'dozers from the New South Wales authorities at Goulburn and also from Captain's Flat. He stated that the D6 'dozer which had been deployed at Bendora on the 11th had transmission problems at 3.15 pm and was not much used while being fixed. The same piece of equipment was stopped due to a radiator leak on 12 January. Now, once again these are, to seize a term from another area of the law, part of the vicissitudes of life which occur when one tries to factor in what might ultimately happen. These are the things which go wrong.

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It's not reliable enough to say had we had a 'dozer and had we had 10 fit men or women that things could have been done. You must factor in, with respect, that things like this happen. Now, track repairs were required. There's only one shift available. There's radiator leaks. There's transmission problems.

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We ultimately submit, therefore, that as events stood on 8 and 9 January it would not have been possible to have had heavy equipment at any of the fire grounds before the evening of 9 and more likely not until the morning of 10 January. Now, whether this comes within the formulation urged by

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counsel assisting of heavy plant available “at the earliest opportunity” doesn’t seem to be made clear, but one might assume that if 24 hours was the time of control, I’m sorry, or 24 to 48 or 36, there might be significant difficulties in upholding that conclusion.

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Generally, your Honour, we submit that speculation about likely outcomes based upon best practice without regard to unforeseen setbacks is of limited value. Invariably, predictions of the course of events in a situation differ from how events actually unfold in the real world when everything doesn’t go according to plan. We also advert to various other problems which occurred. There was the helicopter crash of the 13th which, of course, took Mr Lucas-Smith out of the equation for a period of time. There was the tanker falling through the bridge at ...(indistinct)... on 16 January which ultimately disrupted suppression plans on that occasion, and on it goes.

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Now, with respect, these are the matters which we ask your Honour to have regard to when deciding whether or not the certainty with which my learned friend’s urged that if things could have been done certain results would have happened, that that certainty is somewhat shaken and not, with respect, a sound basis on which to make findings of causation.

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Is that an appropriate time, your Honour?

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HER HONOUR: Yes, thanks, Mr Lakatos. Thank you.

ADJOURNED TO 11 JULY 2006 AT 10 AM

[4.01 pm]

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TRANSCRIPT OF PROCEEDINGS

CORONER'S 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

**10.03 AM, TUESDAY, 11 JULY 2006
(Continued from 10/7/2006)**

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CF 154/03

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HER HONOUR: Yes, Mr Lasry.

5 MR LASRY: Your Honour, just before Mr Lakatos continues, I've been approached by Mr Lowe, who your Honour will recall was given leave to appear on behalf of the ACT Sustainable Rural Lands Group. He's shown me a copy of a submission that he wants to make to your Honour, it's in writing but I think he wants to make it verbally as well, and I've suggested that perhaps I raise the issue with you and perhaps your Honour would say at a particular time you'll take that submission.

10 He doesn't want to interrupt any of, in particular Mr Lakatos at the moment, but it might be convenient if your Honour said, for example, that you would hear his submission at, say 10 o'clock tomorrow morning or at some nominated time so that he can come and go as he needs to.

15 HER HONOUR: Is Mr Lowe here this morning?

MR LASRY: He's here at the moment, your Honour, yes.

20 HER HONOUR: Yes. I don't know what order had been discussed between counsel as to the order of submissions but - - -

MR LAKATOS: May I enlighten your Honour as to that.

25 HER HONOUR: Yes, Mr Lakatos, thank you.

30 MR LAKATOS: So far as there is agreement between us at the Bar table. I think after I finish which, hopefully, is sometime either mid-morning or by the latest 12.00, Mr Hastings I think will go after me. I think Mr Archer is the nominated batting order, and then Mr Watts. So that's our perspective line of submissions, if that doesn't put anybody's nose out of joint.

35 HER HONOUR: So would it be convenient, Mr Archer and Mr Watts, say if we presume that Mr Hastings will probably what, Mr Hastings, finish this morning, the morning?

40 MR HASTINGS: Your Honour, can I mention my appearance on behalf of Mr Lucas-Smith and Mr Castle.

HER HONOUR: Certainly, yes.

MR HASTINGS: With Mr Whybrow and Mr Walker.

45 HER HONOUR: Yes, thank you, Mr Hastings. And Mr Hastings, is there

any prospect that you might be finished this afternoon, or if you start indeed straight after lunch perhaps. I mean, that depends on how long Mr Archer will be.

5 MR HASTINGS: I doubt that I'd finish if I don't start until lunch time.

HER HONOUR: No.

MR HASTINGS: But if I start earlier there might be a chance.

10 HER HONOUR: All right.

MR HASTINGS: But I've no problem with interposing Mr Lowe at a time which is convenient to you.

15 HER HONOUR: Thank you. Thank you, Mr Hastings.

MR HASTINGS: Even before me, if that suits.

20 HER HONOUR: Thank you. Mr Archer, are you able to say how long you - - -

MR ARCHER: I'm not. It depends a little bit on what happens otherwise. I'll be very short, in any event, and I suspect if Mr Hastings is finished today that I certainly would be. So if Mr Hastings is finished by 3.00 or half past three.

25 HER HONOUR: I don't think that's what Mr Hastings was indicating there. Well, what about you, Mr Watts, do you have a difficulty if Mr Lowe - - -

30 MR WATTS: No, I've got no difficulty. I won't be long, but I've got two sets of written submissions I wish to address and I want to say something orally shortly in relation to on behalf of another client who gets a mention in submissions on behalf of Mr Walker and Mr Whybrow, that is Mr Cartwright, but that will be very short. So I'll be less than an hour altogether.

35 HER HONOUR: Well, would it be inconvenient to any counsel if we did say just for, I suppose, some indication to Mr Lowe that 10 o'clock tomorrow morning, and we start? Although, Mr Hastings, if you're part way through yours that might not be convenient for you. I wouldn't like to - - -

40 MR HASTINGS: I don't mind, your Honour.

HER HONOUR: To stop you in the middle.

MR HASTINGS: That's fine with me, your Honour.

5 MR LOWE: Your Honour, I don't want to interrupt anybody, I was just trying to get an idea when - - -

10 HER HONOUR: And I don't know whether or not other counsel have a copy of your paper, that might give an opportunity as well for counsel to consider that through the day and overnight.

MR LOWE: I'm quite happy to wait till after Mr Hastings.

15 HER HONOUR: All right. Well, we'll say not before 10 o'clock and if it's later in the morning, then it will be later in the morning. But we'll say tomorrow, Mr Lowe.

20 MR HASTINGS: Your Honour, could we perhaps have a copy of whatever is in this document by lunch time today?

HER HONOUR: Yes. Yes, certainly, we'll make arrangements for Mr Lowe's papers to be distributed before lunch time today.

25 MR LAKATOS: Just another very brief matter, not having Mr Woodward or an instructing solicitor at the moment, would your Honour object if I, from time to time, left the Bar table, albeit that nobody will be here for a short time, if I need to?

30 HER HONOUR: Yes. No, that's fine.

MR LAKATOS: Thank you, your Honour.

35 HER HONOUR: And that goes for all counsel as well, if they need to pop in and out through the day, please feel free.

40 MR LAKATOS: Your Honour, concerning the findings urged at 1,126 and following counsel assisting's submissions, that is to say relevance to cause, those five findings appear to be urged on the basis of evidence given by Mr Bartlett, and particularly in questions 74 and 75 of the record of conversation, where he prefaces his response by stating that "It was a difficult question" because he was not given the role and he preferred to answer the questions hypothetically, as if he were assigned the role of incident controller. He then outlined what he would have done and, in particular, stated that he would "use whatever mechanism was efficient" to deploy all available resources onto the fire.

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We'd submit, your Honour, that it's important to note that Mr Bartlett was speaking hypothetically. It may be accepted without question that what he stated is what he would have intended to have done, and there is no submission to the contrary. But what is more problematical, with respect, is whether or not those steps would have been successful or the expected outcomes achieved, in particular, his attention was not drawn in specific terms to the problems relating to access to two of the fires and the problems relating to equipment availability and subsequent failure. It follows therefore, your Honour, that any finding based on Mr Bartlett's hypothetical evidence of what he would have done relating to the successful intensive containment of the fire is problematical in the extreme, so far as the issue of causation is concerned.

We submit, your Honour, that in any event there are so many variables underpinning the proposed finding that it shouldn't be made. As experience has shown in the present case, there are many things which may go wrong, many areas where performances are not up to the standard that was expected when certain predictions and opinions were made.

At 1,128, your Honour, my learned friends urge findings concerning essentially revolving around Mr Graham's asserted inexperience as being a cause of the fire. We submit your Honour shouldn't make those findings. Once again, it was an assertion with which Mr Lucas-Smith was not able to deal. It was never, in terms, specifically put to him, namely that he should have recognised Graham lacked experience. Secondly, we submit that the link between the asserted failure by Lucas-Smith and the fires on 18 January is so remote and tenuous, in terms of the principles of causation, that it would be, with respect, outside your Honour's jurisdiction to make such findings.

There are six or more steps involved in the proposed chain of causation, each of which might not necessarily follow one after the other. Firstly, that Graham lacked experience in the circumstances. Second, that Lucas-Smith should have, but failed to, realise this fact. Thirdly, that had he done so he would have replaced Graham. Fourthly, that the replacement would have been of greater experience than Graham. Fifth, that the person would have had available to him crews and heavy equipment. Six, that the crews and heavy equipment would have been deployed that night to all of the fires. And finally, that the crews and the heavy equipment, assuming they had reached the fires, would have achieved containment. It's a 7-step process.

Now, it may be so that that is a possible version of events. I don't necessarily say, your Honour, that it isn't. But when one looks at a common sense test of causation the more links in the chain one has,

self-evidently, the less likely the end result can be. We submit, your Honour, that in the light of this 6 or 7-stage process the finding is speculative. We submit it is wholly inconsistent with the common sense element in the test of causation. That is to say, that a cause of the fire is “the failure to identify the importance of the role of the operation officer”.
5 And we submit that a reasonable person - I have here in my note the Clapham Omnibus, perhaps I should say the Canberra omnibus, would quickly reject that asserted causal connection.

10 We also say, your Honour, that based on the facts and circumstances as they appeared on 8 January 2003 it was not unreasonable of Lucas-Smith to rely upon Graham to undertake the task that he was assigned. Graham, we submit, went through, one might infer, a routine employment process, submitting an application and being selected based on his suitability for
15 the job. We further submit that Graham had successfully discharged his job since July 1997, including with respect, dealing with fires and the 2001 fire. That they were not of this scale and magnitude is quite clear, but as to what, looking forward, a person in Mr Lucas-Smith’s position might be expected to consider and act upon, we submit that what he did
20 was in those circumstances reasonable.

It is, with respect, unfair as counsel assisting orally has done, to characterise Mr Graham’s activities preceding 2003 as day to day activities somehow disassociated with the fighting of fires. True it is
25 much of what he did was involved in matters which were incidental to the fighting of fires, but the fact is that in the four or so odd years or more since 1997 he had significant roles in the fighting of fires. This was his biggest. This was what was going to test him and the others in the ESB as to whether they had perhaps weaknesses which might be identified by the pressure of the event. But as one looks forward, your Honour, we submit
30 that it was not in those circumstances unreasonable for reliance by Lucas-Smith upon Graham.

We also submit, your Honour, that the incident controller at Bendora had, as at 8 January, sufficient experience to determine whether the fire
35 fighting should have continued that night and to make relevant decisions in relation to the issues. It is not, with respect, to the point that somebody more experienced would have decided differently, in terms of judging her actions and judging those at ESB.

40 In all of these circumstances, we submit that as things appeared on 8 January, it wasn’t unreasonable for Lucas-Smith to rely upon Graham to discharge his duties and to rely upon the incident controller to discharge her duties. The finding urged by counsel assisting comes, in large
45 measure your Honour, from hindsight, having regard to the very serious

and disastrous consequences of the fire some 10 days later.

5 Your Honour, at paragraph 1,129 counsel assisting urge what appears to
be a similar finding of error of judgement against Graham in declining
Bartlett's offer of assistance. We do not understand whether this is also to
be taken as a submission Graham's error of judgement was also a cause of
the ACT fires. That of course is not put, but as a matter of logic, if one
10 accepts that Lucas-Smith's error of judgement was such a cause which we,
of course, refute then it must also mean, logically speaking, that Graham's
decision, as we would see it, not to recognise his own inexperience, not to
take up an offer given in the very early stages of the fire must be seen to
be a cause of the fire, if the submissions of counsel assisting are
consistent.

15 And when one states that proposition, your Honour, the difficulty in the
first proposition, so far as Lucas-Smith is concerned, is made a little bit
more evident. We submit, your Honour, that Graham made no error of
judgement in the particular circumstances. Evidence was, according to
Bartlett, that he, Bartlett, attended the ESB to enquire as to what he could
20 do at about 4.30 pm. His offer was made, we suggest, very early in the
piece at a time when Lucas-Smith and Graham were still trying to confirm
the number of fires and their specific locations.

25 We suggest that in these circumstances it was not unreasonable for
Lucas-Smith and Graham to attempt to assess the dimensions of the tasks
before taking up Bartlett's offer of assistance, and that neither Graham nor
Lucas-Smith made any error of judgement in that regard. Finally, we
submit that as viewed at 8 January they had in place, both at the
30 Headquarters at Curtin and on their way to the known ACT fires,
competent and reasonably experienced personnel. Once again, we hasten
to add that that experience did not encompass this event. So much is
made clear by the evidence in later events.

35 We submit that a proposed finding in the terms suggested here relating,
as it does, to an asserted error of judgement concerning whether or not an
individual would be replaced, is so far removed in cause and origin of the
fires, that such a finding cannot, and should not be made. It is a matter
well antecedent to any relevant decision-making relating to what fire
40 fighting should take place, and it is not connected in any common sense
way to the cause of the fire.

Your Honour, it is our submission that when one looks at the way counsel
assisting had dealt with the so-called flaws in the SMT structure that the
logic of our contentions is made good. We adopt the analysis of counsel
45 assisting at paragraphs 1,133 of their submissions in relation to the

5 suggested flaws in the SMT structure in this regard. That was to the effect that the suggested flaws contributed in a small way to the poor decision-making by them, and that it was not possible to draw a direct line to the particular aspect of dysfunction, so asserted, and the development of the fires.

10 In our respectful submission, consistently with that line of reasoning, any asserted errors of judgement as to Graham's suggested inexperience is only relevant to the issue of decision-making and "it is not possible to draw a direct line between that and the development of the fires". We submit that that is the finding your Honour should make, so far as the those findings 1,128 and following are concerned.

15 1,146 and 1,148 of their submissions, counsel assisting make a number of claims concerning Mr Lucas-Smith and his involvement in the decision-making process. They assert that he had a responsibility to be much more involved in the decision than he was. They also assert that he failed to respond to Graham's doubt in the conversation in question, by emphasising the importance of overnight fire fighting and rapid aggressive attack which constituted a serious error of judgement. They are critical of his error of judgement in treating so casually, and even flippantly, as they put it, such an important decision.

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25 In response to these various criticisms, we submit that Lucas-Smith made a decision at the time that the best course was to meet with Rural Fire Service personnel at Queanbeyan to deal with what he, as it turned out correctly, considered to be the fire causing most concern for ACT assets at that time. We note that when examined about this, it appeared that senior counsel assisting was not being critical of his being at Queanbeyan, and there's a reference in our submissions to Mr Lasry saying at transcript 30 835, prefacing a question, "I'm certainly not criticising you for being at Queanbeyan".

35 Now, with respect, that stream of consciousness thought, if I might without doing Mr Lasry a disservice, describe his preface to the question, in fact fairly states how one would react to what Mr Lucas-Smith did that night. But one isn't critical. He made the decision. We submit, your Honour, that to be now critical of Lucas-Smith for making such a judgement call, in circumstances where the competing priorities were, as they were, is wrong an unwarranted.

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45 In considering any criticisms of that process we submit that regard should be had to the following circumstances of what was then occurring, so far as the call between he and Graham was concerned. Lucas-Smith was taking the phone call in a motor vehicle en route to a meeting relating to

the McIntyre's Hut fire. The phone call was of a general update of the fire situation, not then well understood. There was then no incident controller on site, there were no reports of the details of the fires or specific matters relating to location, terrain and other relevant matters. The interchange and the comment made by him was short and not determinative of any proposed course of conduct. Not to have regard to these matters, we submit, fails to take into account the realities and practicalities of the situation, and any criticism can only be justified, if at all, in hindsight.

10 In the result, your Honour, we submit that Lucas-Smith gave evidence and there was the fact that he was not present when the decision to withdraw was made from Bendora, and that was only known to him after he had returned to the ESB Headquarters and after the crews had been stood down. We submit that the evidence is clear that he played no part in that decision. It follows that whatever second thoughts he might have had about it, there was no practical method that night where he could have reversed the decision.

20 The ACT submits, your Honour, that it is unfair and devalues the efforts of Lucas-Smith at that time, to characterise his treatment of that issue in those circumstances as casual and flippant. We submit that this is so because that proposition was not put to him in express terms. Secondly, he went to the meeting at Queanbeyan because the McIntyre's Hut was perceived by him to present the most serious and immediate threat to the ACT. And finally, we submit that with some justification, he had confidence in the skill and the experience of his subordinate officers to handle that particular situation. We submit that on a proper analysis Lucas-Smith made a decision in regard to his priorities as he saw them and, whilst in hindsight different decisions might have been made, his conduct cannot be characterised as unreasonable in those circumstances.

35 Your Honour, a number of findings are urged at 1,168 concerning the Bendora fire. In relation to those findings, we say in summary that the first finding in lieu of the word "critical", for reasons which we will explain, the finding is correct. We would submit that the acceptable and correct finding is, if it needs to be made, that the decision to leave the crews overnight or not was an important one relating to the future prospects of controlling the fire, so much is unarguable. To characterise that decision as critical is to make, we would suggest, assumptions concerning the success efforts to control the fire and, as we have earlier submitted, no such assumptions can or should be reliably made.

45 The second finding relates to the matters which the incident controller took into account in making that decision. In particular, the finding is urged that, notwithstanding that she took into account safety

5 considerations, “ultimately, she reached the decision” because she believed that the ESB wanted her to make that decision, and she was insufficiently experienced to weigh competing considerations. We submit that that seems to be a concerted effort to move essential responsibility to the ESB and, in fact, your Honour should read both her evidence and the evidence of Mr Graham in order to determine whether such a proposed movement of responsibility is fair in the circumstances.

10 One of the matters which we refer to in submissions, and I simply highlight it here, is that my learned friends, counsel assisting, overlook in their submission at all, the proposition that the safety of the crews is something dictated to by persons in the incident controller’s position and other employers, by a law of this particular territory and laws of other states concerning Occupation Health & Safety.

15 There is a discussion, and I won’t elaborate greatly because your Honour has our written submissions on this issue, but the fact is that it was a matter for the incident controller to make a determination on whether or not she considered that matters were safe at that time. That was a legal duty imposed upon her. If somebody at the ESB had have said to her, “Look, you are wrong in that” and she believed that she was not wrong, and she acceded to being overridden in that sense, any potential liability for her, had something gone wrong, would not have been excused. The issue here, your Honour, is that it is unfair to look at such decisions now and say she was insufficiently experienced to weigh competing considerations, those being the potential of the fires, when one does not have regard, or sufficient regard, to the fact of the requirements of the law.

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30 Your Honour, we submit that upon analysis of the incident controller’s evidence in this regard, there is no occasion at all to elevate her belief as to what ESB expected as the critical or ultimate factor which influenced her decision. It was one of the things that played a part in her consideration. Indeed, your Honour, she stated that she made her decision in good faith, having regard to what was presented in front of her and with the experience that she had, stating that her main interest was “the safety and welfare of the crews”.

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40 We submit that there’s no evidence, and certainly none that’s been suggested by counsel assisting, which point to the proposition that it was her belief as to the desires of the ESB, which was the critical factor. Accordingly, there’s no occasion to make findings urged by counsel assisting in relation to the incident controller’s decision of that night. In any event, we submit that such a finding is not a finding relating to the cause and origin of the fires and shouldn’t be made.

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5 In relation to the third, fourth and fifth findings, it is our submission, your Honour, that no findings should be made because there is an insufficient evidentiary basis for them. They are too remote from any issues relevant to the cause or origin of the fires. We submit that the sixth finding correctly states facts, in hindsight, but we dispute the need for your Honour to make any formal findings in these regards, bearing in mind it's your Honour's findings about cause and origin of the fires which are relevant.

10 In relation to the second proposed finding, namely that the decision was wrong, we submit that there is no basis for making such an unqualified finding of error, when that finding relies upon considerations by, for example, Mr Roche as to what would have happened based on hypothetical, rather than actual events. We submit this is, in any event,
15 the hindsight consideration, at best.

The last finding relates to the proposition that given the crews would have remained overnight, and given that the fire fighting effort would have been adequately resourced the next day, including with the assistance of
20 heavy machinery, it is likely that the fire would have been contained within 24 to 36 hours, and substantially controlled and suppressed before the onset of extreme fire conditions.

25 We have made some submissions about a compare in formulations and I won't revisit those. However, your Honour, there is a further matter to be considered, concerning that particular prediction. It appears that the claims of the eighth proposed finding are predicated on the assertion by Mr Roche in his report that, given specified resources and an assumed construction rate of rake hoe lines at the Bendora fire could have been
30 contained, as he puts it, within 24 hours we pause to note two things. His opinion appears to be 24 hours, the various formulations of course have expanded that up and there appears to be no explanation as to why that occurred. But in any event, it underlines the problems concerning making reliable assumptions for the purposes of the causation.

35 We also pause to note that the proposed finding here refers to the terminology "would have" been contained, whereas Roche's report at the relevant page refers to the fact that it "could have" been contained. The finding we submit involves the proposition of greater certainty than that
40 urged by Roche, although it is accepted that it is a matter of degree. However, if the Roche opinion is the basis of the finding, we'd submit that it is inappropriate, in any event, to vary the words, even if it only amounts to a matter of degree.

45 In examination of the relevant portions of the Roche report, which are

referred to in more detail in our written submissions, indicates that even his opinion is based upon a number of variables which cast doubt upon the certainty of the ultimate propositions. We note that in his report he refers to the availability of three raft teams with tanker and light unit support.
5 We note that he considers that the teams should have been able to achieve a construction rate of around 100 metres per hour.

He does not detail a number of tankers and light unit support involved in this calculation. Further, his estimate of rake hoe line construction of
10 100 metres per hour is stated to be a rate that such teams “should have been able” to achieve. It’s not clear whether he factored into this particular calculation whether or not there were fresh crews available or that the crews had already been working for part of that day, or the whole of the day.

15 Furthermore, your Honour, an analysis of the evidence of Roche indicates that his evidence for rake hoe line construction rate varied from time to time. He said in evidence that he agreed that constructing a rake hoe line was extremely arduous work. Further, he referred to the rate of
20 construction as “80 to 100 metres per hour”, that rate being dependent on conditions such as terrain, slope and debris on the ground.

Further, he stated that there was a 30% reduction in efficiency towards the end of a 10-hour shift. He accepted that he would expect that the capacity
25 to maintain that rate would be affected by the previous activity of the particular fire fighters in question. He also accepted that in relation to a selection of the figure of 100 metres per hour “there are a number of different figures bandied about from time to time” and “that’s a reasonable mid-point to start from”. It appears to be the case, your Honour, that he
30 didn’t speak to anybody who was present at Bendora who could say whether the figure that he postulated was realistically achievable or not.

In summary, therefore, we submit about this evidence that it appears that there is a variety of opinion about what rates of construction can
35 reasonably be achieved. Secondly, the starting point for his calculations of 100 metres per hour is higher than the range he gave in evidence, namely 80 to 100 metres per hour. And if the lesser figure were to be adopted, even if we took that starting point, what could have been achieved must of course have been reduced.

40 Thirdly, he conceded that the achievable rates depended on the individuals involved and the circumstances of the task. Furthermore, he didn’t check with the crews on the ground, whether the rate he proposed was achievable. And finally, it is not apparent whether the rate selected by
45 him allows for the reduction in efficiency due to fatigue, as a general

matter, and whether he allowed for fatigue in the particular circumstances of the Bendora crew having to work a double shift. Further, it's not clear whether, in making this prediction, he took into account the steep, rocky and heavily vegetated terrain that existed at the site at the Bendora fire.

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We submit that whilst Roche's opinions and calculations may be suited for other purposes, such as operational purposes, it provides no sound basis upon which to form a conclusion that the fires could or would have been contained within a certain period of time, and the conclusion accordingly that lack of such work was a cause for fires which impacted on Canberra on 18 January.

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Furthermore, in his report Roche stated that "the deployment of heavy machinery should have been ordered ready to commence work at first light on 9 January". And it was, as we apprehend it, on the basis of the availability of this equipment that his opinion as to likely containment was based. Contrary to those assumptions, the evidence discloses a number of things. One is that on the night of the 8th there weren't three raft teams available then. Some of the crew were inexperienced, many had worked that day, as I've indicated.

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Furthermore, it was not self-evident, as we have said that the rate of the rake hoe construction could have been achieved. The description of the fire the following day was that the fires were moving in large fingers of fire which was observed by the incident controller, which we submit would have added considerably to the length of the containment lines proposed by Mr Roche, even allowing for the shortest route between those particular fingers.

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And finally, your Honour, as we have indicated yesterday in review of Mr Beutel's evidence, the assumption that heavy equipment and bulldozers would have been or were available on 8 or 9 January simply was not the case. Accordingly, to the extent that the proposed finding of causation relies upon Mr Roche's opinion, and to the extent that Mr Roche's opinion relies upon the assumption of certain matters which were not the case, or could not have been the case, your Honour could not reliably, in any sense, use his opinion to form the basis of any finding as a common sense matter that omissions on the night of the 8th were a cause of the fires on the 18th.

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Moving to section 5.3 in the Stockyard Spur fire, at paragraph 1,170 the findings urged by counsel assisting appear to be predicated on the basis that raft crews "could have walked into the fire and done useful suppression work", and that there would or should have been a timely dispatch of a bulldozer which would have greatly assisted the raft crews

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on the following day.

5 Your Honour, we don't dispute, given those preconditions, that useful
work could have been done, but those assumptions fly in the face of what
was then able to be done. The evidence given by the incident controller
assigned to that fire on 8 January, and that was Mr Gray, and the incident
controller the following day, Mr McNamara, was that the fire was not
10 accessible in a timely fashion that night. The incident controller on
8 January, Mr Gray, radioed his assessment at 7.14 pm on 8 January,
which was to the effect that he didn't think the fire could be reached that
evening, and he conveyed this to Comcen. Based on that, he initiated the
decision to withdraw and he believed that was the correct decision. As we
apprehend it, reviewing his evidence, that evidence was not challenged.

15 If the finding is an implicit criticism of the incident controller in failing to
reach the fire ground, and also making the decision to withdraw, we
submit that criticism should be rejected. Gray, according to his evidence,
was a fire fighter of some 22 years' experience. He was the person at the
scene at the relevant time. We submit that your Honour should place
20 greater reliance on his evidence, rather than the hypothetical opinion
based on hypothetical facts that access would have been gained by a
notional raft team. As we've also said, furthermore, the issue of the
availability of the bulldozers the following day is a matter which we have
dealt with, and I don't propose to revisit that.

25 In our written submission we have drawn attention to the relevant parts of
the Roche report where he gain opinions concerning respective
containment at the Stockyard Spur fire. In giving those opinions, your
Honour, he referred to access being gained more readily. However, he did
30 not indicate what manner of access he had in mind, or the suggested time
of arrival of the crews. Furthermore, it appears that he proceeded initially
on the basis that the evidence of the incident controller, Gray, was to the
effect that fires could have been accessed by vehicle, when in fact that was
not so, and he later corrected that evidence.

35 Even in his own report at page 83 Roche stated that whilst Bendora and
Mt Gingera could have been contained in the first 24 hours, "the
Stockyard fire was a little more problematic, given the difficult access".
Now, that's the first time some recognition of what the circumstances on
40 the ground on the night of the 8th were. We submit therefore that the
proposed findings in paragraph 1,172 of counsel assisting's submissions
cannot be reliably made. The notion that the fires would have been
contained within the time he suggested and that the failure to take the
steps suggested was a cause of that fire burning into Canberra cannot
45 reliably be made, given these variables.

5 Section 5.4 counsel assisting deal with the Mt Gingera fire. Your Honour, once again, it is accepted, firstly, that the facts establish that there was no resourcing of this fire at any time before 12 pm the following day. The reasons for such decisions are set out in the evidence of Mr Lucas-Smith and Mr Graham and relate to, in part, the accessibility of the location and their perception at the time of its relatively small size.

10 The evidence discloses that the following day it took crews who responded from the Tidbinbilla Nature Reserve about 3½ hours to reach a position along Mt Franklin Road from which they needed to walk to the fire ground. They then reached the fire ground about a half an hour later, and it took them a further 2 hours, or thereabouts, to walk around the fire and complete a sitrep for Comcen. That's evident from the statement of Callan who was the incident controller, and also from various radio logs, 15 to which I'm not sure we've given specific reference but it's ESB DPP 00030002 at pages 5, 25 to 28, 41, 48 and 51. I descend to the detail, your Honour, because I think that may have been one of the things we've omitted referencing.

20 Your Honour, it follows therefore that if crews had been responded immediately at 1800 hours on 8 January when the fire was initially reported they would have reached the fire ground in darkness, at the earliest at about 9.30 pm. They would have not been in a position, we submit, to commence work for some time thereafter, and we submit that 25 based on the principle that crews should not commence work on the fire ground if they have not arrived before darkness, and based on the long lead time of their arriving at the fire ground there is considerable doubt as to whether or not they might have achieved any significant gains in containing that fire on the night of 8 January, had they been responded to it. Furthermore, it appears plain that counsel assisting's submissions are 30 based upon Roche's opinions expressed in this report which, in turn, as we've already said, indicated the availability of dozers and they were not available.

35 I'm reminded, and I should do so, that when your Honour comes to read my learned friend's paragraph 421 in the written submissions, the times are not correct there, that is singularly my error in not understanding the 24 hour clock. We have suggested the crews may not have reached the fire ground until midnight, that is not correct. My oral submission is 40 correct, which is until 9.30 and thereafter. So if my learned friends perhaps pencil that in as one of the many mistakes we have made on our side of the Bar table.

45 Perhaps I'll allow your Honour to mark that. Your Honour, the oral submission as your Honour is marking it, is they would have reached the

access road at 9.30, half an hour into the fire, 2 hours to do the - your Honour has that, in any event. I've misstated the effect of my submission but, in the end, 421 needs to be changed consistent with the oral submission I first made.

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Your Honour, going to the issues of warnings, as I've said earlier on and I won't repeat this *ad nauseam*, there is considerable concern that the substance of the criticisms made and their terms were not put specifically to any of the persons against whom these issues have been raised. It is our submission that purely as a matter of fairness to have allowed those individuals to respond to assertions of falsity, to respond to assertions of deliberately and wilfully omitting things, purely as a matter of fairness that should have been put and it wasn't.

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Your Honour, there are a number of criticisms put in relation to this area and I don't propose to deal with all of them. I propose to select a number, in order to underline the kind of responses that we think are available and should be taken into regard when your Honour considers the various of them. Your Honour, at 1,203 my learned friends assert that by 13 January 2003 it was apparent that there was a realistic risk the fire, in some form, might impact on the urban edge of Canberra. It is further submitted that Lucas-Smith's evidence to the contrary should be rejected.

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As we have indicated in the written submission in more detail, central to a proper understanding of this discussion is what degree of risk constitutes a realistic risk of impact which should have been realised. Counsel assisting themselves used that term in somewhat of a variable context, for example in paragraph 1,202 the phrase is used "a degree of risk" to those homes. And we submit that any judgement as to whether or not warning should be given, and the time frames that those warnings should be given in, of necessity, must be influenced by "the degree of risk" to the particular asset in question, in this case the urban edge. And more particularly, it is the perceived degree of risk when we're talking about whether or not things were done wilfully or otherwise.

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We submit that there is no cause to reject the evidence of Lucas-Smith that he did not have a perception of a realistic risk in relation to the impact on the urban Canberra on 13 January 2003. Counsel assisting rely essentially on two matters in support of that contention. The first is the terms of Mr Castle's request for Commonwealth assistance, which was the first one made on that day, and secondly, a conversation between Messrs Cheney and Lucas-Smith on the afternoon of that day.

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We submit that no reliance whatsoever as to Lucas-Smith's state of mind can be drawn from the terms of Castle's request for Commonwealth

assistance. Lucas-Smith's plain and uncontradicted evidence was that he neither contributed to, nor approved of the text of that document. The novel suggestion by counsel assisting seems to be that the court should make a finding adverse to a person, based on a statement made by another person, a statement to which he neither contributed to, nor approved. In our respectful submission such a proposition is plainly untenable, and that evidence cannot be used to support a state of mind in Lucas-Smith.

The second matter why reliance cannot be placed on the request for Commonwealth assistance is the terms of the document itself, even accepting the terms could be attributed to Lucas-Smith. That indicates that there was no explicit statement from which it could be inferred that any identified threat existed to the Canberra urban area. The references in the document are to areas throughout relating to "the ACT water catchment areas" and "to the ACT". Having regard to the size, and particularly the location of the fires at that point of time, the references in the Commonwealth assistance document can only be sensibly read as perceived threats to ACT assets which were then proximate to the fires in consideration.

Your Honour, the second reason relates to the discussion between Mr Cheney and Mr Lucas-Smith. We have set out in some detail our arguments in relation to that issue at 550 onwards, and the substance of it, your Honour, comes down to this. That whilst it is not doubted at all that Mr Cheney had a clearer appreciation of what might happen, and whilst on the balance of the evidence it seems that his best efforts in recalling would indicate that he stated the fires would be driven into Canberra, or words to that effect. And I'm now being imprecise and perhaps I shouldn't be. There was, we submit, if one reads our submissions on the point, a genuine scope for misunderstanding or disagreement as to those opinions.

It wasn't a situation of, as seems to be suggested by counsel assisting, Mr Cheney says this is his opinion, 'We acknowledge that Mr Cheney is right in his opinion and accords precisely with our opinion, therefore we will make a conscious decision not to say anything more'. With respect, that is an unfair analysis and when one reads our submissions and we have detailed with transcript references how the matters unfolded that is, with respect, not the proposition that this court should arrive at.

And at 555 perhaps I should say this, I'm reminded and I thank Mr McCarthy for this, after analysis of the material we suggest that what is in question is a matter of degree as to how matters are formulated, the differences are significant. Accordingly, it is not surprising that Lucas-Smith interpreted Cheney's comments as indicating a possible

outcome, without the degree of certainty which Mr Cheney may have wished to convey, and which was pressed by counsel assisting.

5 In our respectful submission, your Honour doesn't have to arrive at a determination of who was telling the truth or not. We suggest that both parties were. In this particular sort of case you wouldn't expect anybody to be lying about issues, in any event. And we submit that the most likely inference to be drawn from all of this is that there was a different view as to the level of risk.

10 Your Honour, at paragraphs 1,208 to 1,212 my learned friends deal with the issue of the planning meeting on 14 January when the Cheney issue was debated. Counsel assisting assert in relation to that, that the evidence was "entirely unsatisfactory and many witnesses failed to grapple with the issue". We, with respect, submit that that is an entirely hindsight observation. It is one of the many classic instances where this Inquiry at 15 18 January has focused upon, quite rightly we say, issues which rightly involve centre stage, namely, why weren't there warnings and the extent of them.

20 When one looks at what happened at the time that people's perceptions had not focused upon these issues because the serious events which had come to pass had not been yet eventuated. It is, with respect, as Gleeson CJ said, that the error, or what occurred later on, focuses the mind upon the specific matters.

25 On 14 January this was one of many instances, the initial ones obviously being primarily: What can we do to combat these fires? What resources should we put in place? Do we have sufficient resources? All of the matters which one would think a proper and competent chief fire control officer and his subordinates would have in mind. We submit that rather than being indicative of an unwillingness to remember, that this alleged failure to grapple is more reasonably construed as an appreciation by those witnesses of a level of risk significantly less immediate than Cheney's view.

30 As we've put in the written submissions, if you accept counsel assisting's submissions, there seem to be two alternatives. The first is that there was a conspiracy of silence amongst all those who attended that meeting. And secondly, a different view. The second view is that there was a legitimate different view of the risk which was then presented. As a matter of common sense and experience, we submit that it is the latter which would be supported. We further submit that the evidence of these witnesses and others, and their later course of conduct, strongly support that it was the latter consideration which was then operative.

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5 Counsel assisting are implicitly critical of the fact that none of the witnesses identified as being at the meeting had any recollection of this discussion. They even appear to be critical of the fact that Graham, even though there appears to be a distinct possibility he wasn't there when this was discussed, that he should also be criticised for a lack of memory.

10 We note that the evidence of the note-takers also lack any specific memory of this discussion. We submit, your Honour, that it is hardly likely that the Cheney prediction, having regard to its serious nature, would have been easily forgotten, and yet it appears to have been. We submit that it can't be suggested that the note-takers were part of any conspiracy of silence and that their lack of memory supports the more likely inference that the level of threat recognised by those at the meetings was not the same as that of Cheney.

15 Furthermore, we submit that there is nothing in the notes or in the Minutes or, for that matter, in any of the evidence given by the witnesses who attended, which supports the proposition that Cheney's views were "to be kept under wraps, downplayed or ignored or kept confidential". The evidence suggests that the people present at the meeting came from a diverse number of areas with different interests.

20 The documentary evidence suggests and records no dissent or dispute about the credibility of Cheney's view. The notes record a discussion as to the prospects of the weather patterns then in issue realising the threat adverted to. One would have thought the discussion quite clearly directed towards the question about the issue of a reasonable assessment of the imminence of the risk. We submit that that was a discussion which was perfectly proper and appropriate in the circumstances. Even though the assessment of that meeting as to the prospects of controlling the fires proved to be wrong, it was not an unreasonable view to hold at the time.

25 Paragraph 1,216 and 1,315 amongst others, my learned friends rely or characterise the response to the Cheney indication and the issue of warnings generally as being a matter which was treated by the ESB as a "public relations exercise" rather than part of its operational response to the fires. The evidentiary basis for this criticism is apparently on three matters, although this is not absolutely clear from the submissions.

30 The first is the reference in the hand-written notes of the morning planning meeting of 14 January to the discussion of the comments of Mr Cheney. We submit that there's nothing in those notes which gives rise to any inference other than that the Cheney comment was a potential media issue, as it clearly was, and that the source of warnings should be from the ESB. Any further inference that community information warnings were treated

as a public relations exercise is not open.

5 As we submit, it is the role and should be the role of the Emergency Services Authority to issue co-ordinated warnings, and one can imagine there being problems if people from a number of different areas start to issue warnings, and the problems that that may raise. It is a perfectly proper organisational decision.

10 The second apparent basis for the claim is the evidence of Mr Gellie to the effect that - and it's quoted - "a lot of stress was placed on public relations by the media". We note that Mr Gellie did not expand upon this matter in his evidence. We submit that the apparent context of his comments do not support the inference sought to be drawn here.

15 The comment was given in response to a question concerning the effectiveness of operational communications with, amongst others, the public. His point was not that such efforts were a public relations exercise, but that creating a string of local networks was a more effective means of conveying information to the public. It follows that counsel assisting's use of Mr Gellie's evidence to support their proposition is
20 unfounded.

25 The third apparent basis for this submission is the entry in the morning planning meeting Minutes of 15 January relating to the fact that certain positive aspects of the suppression efforts should be made public. As Mr Castle made clear in his evidence, the purpose behind this suggestion was that there was value in people being recognised for the efforts they have actually done in a positive sense. We submit that the fact that such positive publicity was disseminated, apparently only on one occasion in
30 the 10 days under consideration, considerably detracts from the more general proposition that the issue of warnings was treated as a public relations exercise.

35 A cursory analysis of the media releases and media reports makes plain that this success was put forward as an exception to the general pattern of bad news, namely that day after day the ESB was unable to state that the fires were contained and were saying so. There was talk about worsening weather and the prospects of bringing fires under control being bad. There was talk about the requests for Commonwealth assistance.

40 Now, whilst it's accepted that these were not specific enough in the end to bring home the message, the fact is that they were issues which were being put forward as indicative of the proposition that far from being in control and no worries, there was a serious issue going on, on the western side of Canberra.
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5 We submit that on a fair analysis of this material, there simply can be no basis for the assertion by counsel assisting that the ESB treated the issue of warnings as a public relations exercise, and further, that such a characterisation is unfair and fails to acknowledge that the personnel at ESB worked long and hard in the ultimately unsuccessful effort to keep on top of the tasks that they were required to do.

10 Your Honour, paragraph 1,231 and following my learned friends make a criticism that Lucas-Smith - and I quote this - probably with the compliance of Castle had “determined that the public would not be told of a serious risk of impact to the Canberra suburbs”. They say that if such a finding is proposed in those terms, it is of great concern that my friends would say, probably with the concurrence of. With respect, that’s a serious allegation to make against anybody.

15 One would have thought that if you were going to make it, it should be made based on firm evidence with a little more certainty than saying “probably” somebody was involved. By a side wind, it means that whether Castle was involved or not they can’t say, being counsel assisting, but they urge you to make a finding which, in terms, has an adverse and prejudicial effect upon him, in such a vague term.

20 In our respectful submission, it is simply not proper to put that. He’s either included on the evidence or he’s not. If he’s not he should be omitted from that proposed finding. If he is, then the terms of that should be changed. In our respectful submission, it indicates an undue lack of the fact that formulations such as this can have extreme and adverse effects upon people’s reputations. If they are warranted, that’s one thing. But if it’s put in that way it is, with respect, simply not warranted in my respectful submission.

25 That finding appears to be based upon the three matters adverted to in 1,229. The first relates to the general matters of the Rural Fire Control Manual, the history and so on, and at 1,229 that’s put as “these matters formed part of the thinking and are likely to have influenced the view” of the various senior officers. Now, with respect, what that makes plain is that whilst the various matters adverted to, the Rural Fire Control Manual and the history and so on were known, because each of the officers gave evidence to that effect in this Inquiry. It is used to support a basis that on a particular day, 15 January, that was “likely to have influenced them and been part of their thinking”.

30 Now, once again, we submit that when you make findings of this kind, or even countenance them, it’s not good enough to say these things were mentioned 5 days ago in evidence and you’re taken to know this, and it’s

5 taken to be part of your thinking. If it is to form the basis of a serious allegation the proper way would have been to go through the process, as at the 15th, and say Mr Lucas-Smith, when you came to this state of mind on the 15th you had it in your mind, didn't you, that the Rural Fire Control Manual said X. You had it in your mind this, this, this. Because otherwise, with respect, we're left with an inference that these things were matters to which he had regard, as at that particular point in time.

10 So the first comment to be made, with respect, in our submission is that the first consideration in 1,229 is not a fact, as at 15 January concerning their state of mind, it is an inference which might be drawn, and perhaps a conclusion. The second matter, your Honour, is in paragraph 1,229 that each recognise and acknowledge that fires "including McIntyre's presented a serious risk to the urban areas of Canberra".

15 Now, once again, with respect, they are matters which are arrived at as a conclusion by having put to Lucas-Smith and others that you should have seen this and you should have seen that. There is no evidence, in my respectful submission that they acknowledge, as at that time, that they appreciated that this was a serious risk to the Canberra urban areas. So that's another inference.

20 Now, your Honour may recall yesterday, and I know it's a long time ago and I apologise for the length of this submission but, with respect, it needs to be made, that when one referred to *Briginshaw* Dickson J said that when looking at serious allegations one could not rely upon indirect inference to make serious allegations. In our respectful submission, the criticism at 1,231 and following, is made on the basis of evidence of indirect inference. And if it was sought to be properly made, it should have been made by specific questions put specifically to these witnesses and it was not.

25 The next issue, your Honour, that we wish to deal with is the issue of the cabinet meeting. I preface our comments by saying this, that it is difficult to understand how anything which occurred between any of the officers involved in the fighting of these fires and their briefing to the cabinet can have any effect on the findings as to cause and origin of the fire. But it appears to have gained some central significance, a deeper significance with my learned friends apparently read into it than we suggest is a fair way of doing it.

30 Your Honour, our submission is that there is no evidence whatsoever, if this is the effect of the submission, that the Chief Minister or other members of the cabinet withheld information or determined to, or decided to, concerning any serious risk to the Canberra urban area on 16 January

or at any other time.

5 We submit that the Chief Minister and the members of the cabinet are clearly sworn to act in the best interests of this territory and its community. We submit that they would have had as their primary concern, and your Honour will have little doubt in drawing these inferences, that an event such as this their primary concern would have been and was the welfare of this community.

10 Our submission is that it is simply unsustainable to say that cabinet might, if this is what's suggested, and we don't know. The problem is - and I'll take your Honour to some of the indirect assertions which are made - the problem is we don't quite know what it is that is being suggested when references are made to the temptation to reduce the impact of the
15 discussion, when suggestions are made that people are not apparently or conveniently forgetting to remember things. So we don't know if this is made. If that's really what's made then, with respect, we put these submissions in response to it.

20 The premise on which the unsustainable allegations are made, we suggest, are that cabinet might or would withhold information from the Canberra community and that, with respect, simply defies any logic whatsoever. It assumes that cabinet would act contrary to its duties in the ACT, and there is, with respect, in this regard no possible motive for such a view, and no
25 evidence is advanced for any view of that kind.

Your Honour, the basis on which the submissions appear to be made are on a review of a number of documents which were (a) before the cabinet meeting, and (b) resulted from the cabinet meeting, namely the cabinet
30 briefing being a primary document, and secondly, the notes taken by the various note-takers. Your Honour, in our respectful submission a fair reading of the cabinet briefing unavoidably leads to the proposition consistent with the oral evidence of the witnesses, namely, that the threat to urban Canberra was not perceived as a high or significant one at that
35 time.

At paragraphs 1,233 and 1,234 my learned friends make reference to the Canberra briefing and reference to the potential impacts on the urban area. The first reference, with respect, has only been partly quoted and we
40 submit it gives a misleading view as to what it was that cabinet was told. The first line which is omitted is "McIntyre's fire to the north-west has secure containment lines to the south and east, following back-burning operations". Then the part which is quoted in the 1,233 and 1,234 is made.

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We make two submissions about that, one is a hindsight submission which, of course, it is fair if one is looking at particular issues to have omitted something which one might consider to be not as relevant to the issue one is pursuing in hindsight, and that appears to have been done.
5 But on the other hand, when one's looking forward one has to look at the document which was there. And we submit that when one is determining the level of risk of a fire further down the track, one has to look at the statements which impact fairly on any assessment of that level of risk. And the first is, that there was secure containment lines of that fire.
10 People who are better placed might have known that that wasn't the full answer.

We don't suggest it is an iron clad guarantee that cabinet was told there was never any prospect, but it is a fair matter to be taken into account in the determination of that issue. We submit that cabinet and any member of cabinet who read that document would have had confidence, we say considerable confidence, that the fire could be controlled with that opening statement, with the rider that if and when the weather turned bad that may change.
15

We submit that a plain reading of the words "potential serious impact" in the later formulation is directly linked to the risk to the pines. It reads "With stronger winds from the north-west there is always the potential for spotting over containment lines which has potential serious impact to the ACT forest pines". I'll stop there for a moment, it continues on. When one reads that, clearly the potential serious impact is a reference to the pines, and we submit that is the reasonable inference drawn by any reasonable reader. It is the inference, your Honour, that should be drawn, having regard to the fact that the fire was then close to the pines, and secondly, that at that stage the McIntyre's Hut fire was a considerable distance from the urban area.
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We further submit that the later reference in the document of the urban area, to which we now turn, also supports that construction. Later in the document under the rubric "Assets under potential threat" there is listed some seven or so odd dot points, commencing with the Cotter Catchment area, the ACT pines, Tidbinbilla Nature Reserve, rural leases and, lastly, the urban edge. There is a further dot point which asserts or talks about said assets.
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Now, on any reasonable reading of that document, we suggest, it appears to list the assets at risk in a descending order of risk. That the Cotter Catchment and the ACT pines are the most at risk, going down to the last nominated area, being the urban edge which is least at risk. We submit that a reader would be most likely to infer that of the assets listed the
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urban edge, whilst under some threat no doubt, was the least threatened asset. It is submitted that the reference in the notes to be suburbs at risk should be understood in this context.

5 Furthermore, your Honour, Lucas-Smith gave evidence to this effect about that document, “I would have thought that if I was making a statement to cabinet and I thought that the most serious potential impact on the urban edge existed, I would have made it far more prominent than make it the second last dot point”. One would have thought a very self-evident
10 common sense statement.

Your Honour, the various witnesses who gave evidence, Mr Keady was one, Mr Lucas-Smith was another and Mr Stanhope, talked about the risk as variously being described as a potential serious possibility, not a
15 probability, as something that may occur eventually in intervention failed and the potential existed, and is a theoretical possibility that the fire would advance on the urban edge. We submit that none of these formulations, which should be accepted as honest and a truthful and credible account of what occurred, equate to a serious risk of an impact on the suburbs of
20 Canberra as put in counsel assisting’s submissions.

Your Honour, there are two aspects which are a cause for concern. At para 1,237 counsel assisting are critical of the evidence given by the Chief Minister as being difficult to accept. Now, we submit that if that
25 translates into a proposition that the Chief Minister’s evidence should not be accepted, the way it unfolds is most regrettable. That should have been put to the Chief Minister, it wasn’t. And with respect, it doesn’t seem to be put as an affirmative proposition at 1,237 but it’s vice is precisely that it seems to say we can’t really put that proposition, but nevertheless we’ll
30 make a side comment. It’s difficult to accept inferring you read these submissions should really think that this is our thought processes, to put it colloquially, that his evidence is dodgy on this point.

In my respectful submission, that is a wholly improper way to go about
35 making such an assertion, if it is to be made at all. The same thing can be said at para 1,237 that it was no doubt tempting to reduce the impact of the discussion about the risk to urban Canberra, having regard to what later occurred. Well, once again, we’ve said this in the submissions and we will emphasise it, it does counsel assisting no credit, with respect, to
40 put such a proposition in that way. It accords the witnesses no procedural fairness to answer it, and it is an improper and indirect way of making such an assertion.

There is one final matter, your Honour, that I deal with in relation to the
45 cabinet submission. The summary of that material is contained in chapter

3, as my learned friend rightly said, and one would have to say and agree that the summary of the general matters before this Inquiry was extremely extensive, and we acknowledge Mr Woodward, if it is his work, for that. But one of the things which causes some concern, and really emphasises the fact that when your Honour comes to considering making some of these grave findings which are urged, is whether or not what's in these submissions is precisely accurate.

In 667 of the submissions this is stated, "In his evidence Mr Castle confirmed that paragraph 100 of his statement was true" and I don't need to go into that for a moment:

"Mr Castle agreed that in the course of speaking to the briefing paper the issue of the risk to the urban area was discussed in general terms. Mr Castle also agreed that the sentence in the briefing paper dealing with the urban area would..."

And I stress that for a moment:

"...would be read as referring to a potential serious impact to the urban area".

There is no specific attribution given to that statement, although it does come from the evidence and I'll take your Honour to it. There is an attribution on the following page to Mr Castle's evidence at 1,573 and 1,575. At 1,574 and 1,575 the evidence is to be unfolded in this way. Mr Woodward who was conducting the examination said:

"You will no doubt have noted from the evidence of Mr Lucas that emphasis was given to the sentence on page 2 of the briefing paper and the third bullet point, where it says in the second sentence..."

And Mr Woodward quotes "However, with the strong winds" and finishes the quote with "...subsequent to the urban area".

"So we just delete the reference there to the pines for a moment, that would be read, I suggest to you 'which has potential serious impact to the urban area', do you agree with that?"

Now, before I go to the answer to the question, and there's only two or three more questions involved, with respect, that is also another classic hindsight application. The first is of course that Mr Woodward thought it wasn't necessary to read the containment line in giving this witness a fair view of what was being said in the document.

5 Now, I don't make any assertions against Mr Woodward for that, I simply say this, that it is an indication, as the Chief Justice in *Rosenberg* said, of when later on you start to focus on the matters central to you that all of a sudden something can take a totally different complexion to what it might have been to those at the time looking at the document in its entirety. And a second indication of that is, "Just delete the reference to the pines". Well, with respect, in the reading of the document you can't just delete the reference to the pines, you have to read the whole thing as it was written and as people would sensibly read it.

10 Mr Castle's answer is, "It could be read that way". So he's saying it could be read that way. The next question:

15 "But that's what - that's the way you would read it, wouldn't you, as a matter of English grammar?---Well, that's the way you would read it."

20 Now, it's only a word, with respect, but it's a word which may have potential serious ramifications. We have in 667 Mr Castle agreeing that that's the way it would be read. If that's the evidence which is apparently relied upon, quite the contrary. He said, "No, you might read it that way, others could read it that way. I don't read it that way".

25 We simply say in relation to that, that that is, with respect, an indication where - and I don't suggest this summary is replete with such areas. Far be it from me. I want to say that we acknowledge credit where credit is due, but you need, with respect, your Honour needs - and I say this with the greatest respect - to be very careful when one's looking at making findings of this kind, to make sure that it is soundly sourced in the evidence, and in our submission it's not, at least on that occasion.

30 HER HONOUR: If you're moving on to a new point, Mr Lakatos, we might take the morning adjournment. Is that convenient?

35 MR LAKATOS: It certainly is, thank you.

HER HONOUR: All right, thank you.

40 **ADJOURNED** [11.22 am]

RESUMED [11.50 am]

45

HER HONOUR: Yes, thank you, Mr Lakatos.

5 MR LAKATOS: Thank you, your Honour. Your Honour, may I make two further corrections, for which I apologise. At para 602 of our submission we refer in parentheses to transcripts relating to Mr Tonkin, that is an incorrect reference and should be omitted.

HER HONOUR: So it's just to read "See Stanhope"?

10 MR LAKATOS: That's correct.

HER HONOUR: See 3631, and just remove "Tonkin" and the reference after that?

15 MR LAKATOS: Quite so. And in a similar vein, your Honour, at paragraph 622 a couple of pages further on, the final sentence referring to Mr Tonkin again, the same subject matter is incorrect, and we would ask that that be removed. I'm sorry, is your Honour ready?

20 HER HONOUR: Yes, thank you.

25 MR LAKATOS: Thank you. Yesterday my learned friend orally and also in the written submission made reference to the discussion between Mr Koperberg and Mr Lucas-Smith as a source of, as I apprehend it, knowledge of what Lucas-Smith believed at the relevant time, a matter going towards warnings and whether they were honestly or reasonably given.

30 Your Honour, we have dealt with that issue and I've summarise our submission on that at paragraphs 581 and following. As we note there, counsel assisting in their submissions, 581 to 586, refer to the different formulations of the content of that conversation of Lucas-Smith. We also observe Mr Koperberg similarly provided a number of different formulations. At 583 we set out what the differences are on the three
35 major topics, whether Koperberg mentioned his view that the western suburbs of Canberra were are risk, as we note Mr Lucas-Smith gave evidence that he says no. Mr Koperberg we suggest says that even though his statement says otherwise he said in evidence that it was likely he did not, and the transcript reference is given. And Ms Crawford says he did
40 not.

45 Relating to, as we've described it, the florid term Canberra being hammered, the evidence there seems to be that Mr Lucas-Smith said that he was not a party to such a conversation in which that term was used. Mr Koperberg, as we note, made no such comment until much later and

could not attribute it to any person. And Ms Crawford couldn't remember when or where that comment had been made.

5 In terms of the request for assistance, and the purpose for which the request was made, Mr Lucas-Smith gave evidence that he required the resources to assist in relation to the New South Wales fires. Mr Koperberg's view of that was that the ACT resources would be insufficient in the event of the fire impacting upon Canberra and its suburbs. And the last issue was whether Mr Koperberg said it was his view that the containment lines would or would not be breached and he, I think, gave evidence that it was more likely than not that they would be breached.

15 As we say, your Honour, each of those witnesses we would have thought was doing the best that he could to recall what was occurring, and bearing in mind that it was a conversation which obviously not until some later point of time bore some significance, and considerable significance, difficulties in expressing what they thought and what they said are understandable.

20 As we submit, the significant difference between the versions seems not to be that there was the existence of some kind of risk to the urban Canberra, but the likelihood and the immediacy of that risk eventuating, based upon the anticipated levels of success and containment. Mr Lucas-Smith indicated that he asked Mr Koperberg what his level of confidence was and he, Mr Gilligan and Mr Arthur expressed great confidence that they had the fire contained, and it was not going to be an issue for the ACT. We've given the references, your Honour, in the transcript at 1,032 and 1,049 to where Mr Lucas-Smith dealt with that issue and I don't propose to read them.

30 However, of greater significance is what other witnesses gave about that or similar conversations, and as your Honour notes in our submission, Mr Corrigan at the transcript reference 4,680 was asked questions about issues of the fire at McIntyre's Hut being in containment lines and he said:

40 "I think the INT was quite confident of maintaining the fire within the containment lines, especially if they could get some depth to burnings before bad weather which was forecast on the weekend."

45 And then Mr Arthur, and that has to be at transcript 4,592 and it should be probably 4,593, there's a repetition in mine, I don't know if that's been changed. In any event, at 4,592 should be the correct one. Mr Lucas-Smith's account is put to him about not being an issue and he

disagreed with that. He said:

5 “We didn’t achieve containment until somewhere near 2000
 hours that evening. We anticipated it was going to be contained.
 Our expectation then was we would maintain it there.”

10 Now, whilst we say that the Inquiry is not able to determine the precise
 words which were used at that meeting, we ultimately submit that there
 was, based on these views by the different witnesses, obviously some
15 different way of apprehending what was actually said. As we’ve noted,
 Corrigan and Arthur did refer to there being some sort of confident. And
 our ultimate submission on this, your Honour, is that the view which
 Mr Lucas-Smith ultimately articulated was one which was not materially
 dissimilar to the Corrigan/Arthur view, but obviously dissimilar to what
20 Mr Koperberg either did convey or was intending to convey.

 The other way of testing it, your Honour, is to look at the media releases
 from New South Wales Rural Fire Service at that time, and as we note in
 para 593 the media release for 4 o’clock that day listed the threat analysis
25 for McIntyre’s Hut as follows:

 “Current threat: ‘Fire no threat to life and property at present time
 which in containment lines. Fire still poses a threat to the ACT if
 it escaped from the current containment lines’

25 Potential threat: Major pine plantations in the ACT in the ACT
 water catchment areas, private property to the north and east, pine
 plantations to the south and state forest to the west.”

30 Now, as we’ve said many times in our submissions later on, it is of course
 not that the duty of the Rural Fire Service to have in its mind, its corporate
 mind, the issue of warnings to this state or this territory, and we don’t
 suggest otherwise. But it is, with respect, fair and reasonable and proper,
 and in fact essential, to look at how other fire fighting services who were
35 looking at the same fire and presumably considering the same risks,
 expressed their views amongst themselves.

 And in our respectful submission, both Corrigan and Arthur, and the
 media release of the 15th, the situation report, I’m sorry, the situation
40 report of the 15th, deal with the extent that the risk, if I can put it that way,
 in a way which was not materially dissimilar to the way Lucas-Smith had
 regard to it that particular day.

 Your Honour, moving on to 16 January, at 1,239 in the submissions of
45 counsel assisting they there assert that Lucas-Smith was not telling the

5 truth to the midday press conference, in terms of his perceived assessment of the risk and potential of the fires. We submit that that assertion should be rejected out of hand for this reason. The particular sentence which is put against him is, “At the moment, I don’t think there’s any risk to the urban areas”.

10 Counsel assisting did concede at 710 of their submissions that he was not questioned about these particular comments because the transcript was no then available but stated that he was asked about these comments in the context of *The Canberra Times* article on 17 January 2003. In our respectful submission, contrary to the submission made, that statement is not in stark contrast with what the cabinet was told earlier, which we’ve already discussed.

15 On the same day the Rural Fire Service release, to which we’ve given reference, stated that the control lines are complete. Once again, that may not translate precisely into, “I don’t think there’s any threat to the urban area at the moment”, but it is a matter which gives more confidence than perhaps was ultimately warranted, given the events of 18 January.
20 Furthermore, we submit that Mr Koperberg and Mr Wade used similar language the following day, and there was no assertion against them that they weren’t telling the truth about their perceived view of the extent of the risk.

25 Mr Wade said, and the reference is given at para 34, “At this stage” - this is on the 17th, not the 16th, mind you, your Honour - “At this stage there is no threat to any property in the area. It is more those pine plantations we’re keeping a close eye on”. In our respectful submission, in the light of these other contemporaneous expressions of the level of risk, your Honour should accept that Mr Lucas-Smith genuinely held the views that
30 he expressed at the press conference.

35 In para 1,240 counsel assisting assert that, “It is inconceivable” that Lucas-Smith would expect to be understood in the midday press conference as referring only to the threats from the ACT fires. And my friend also indicated that - I’m not sure if he used the term “fanciful” for this submission, but the fact that the ACT continues that submission is fanciful.

40 In our respectful submission, when one descends to the detail of that media press conference, far from being fanciful it is the correct and the reasonable analysis of what occurred. As we state in our submission, the press conference commenced with Mr Lucas-Smith giving a report about the Bendora and Stockyard fires, after which he fielded a number of
45 questions. The first question related to the possible evacuation of

residences in the Brindabella Valley region and Lucas-Smith responded by stating, “You need to ask New South Wales that”.

5 The second subject matter generally of the questions was the extent to which the Bendora fire had progressed. The third subject matter was a similar question in relation to the Stockyard Spur fire. It was, your Honour, in connection with that latter question that Lucas-Smith made his “at the moment” comment about the threat to the urban areas. The fourth question which was posed to Lucas-Smith then related to the McIntyre’s
10 Hut fire.

We submit that the sequence of these questions clearly evinces the proposition that Mr Lucas-Smith was answering the questions he was being asked. One may say that there is additional criticism of him that he
15 should have taken the opportunity to do this and that. To say that he was telling a lie or not telling the truth in these circumstances is, with respect, unwarranted and unfair, and is not a reasonable construction of that particular document.

20 Similar comments, your Honour, may be made about the assertions at para 1,251 being the situation at the end of the day at 16 January. That apparently is based upon the radio interview given by Mr Lucas-Smith at about 5.00 pm that day and the assertion appears to be that Mr Lucas-Smith “apparently chose not to inform the Canberra
25 community”. On says that’s, as we’ve said earlier in the submission, quite the wrong way to look at it. It infers that there was (a) a consciousness of the seriousness and the immediacy of the risk, (b) a decision to say no, I choose not to do this, and (c) therefore I wilful choice not to do so.

30 As we’ve attempted to illustrate time and time again, this is a product, with respect, of that particular individual’s assessment of the risk as he saw it, given the influences that he had. And it’s wrong to say he chose not to. The better way of saying it was he did not appreciate the risk as being significant enough at that time to warrant what occurred.
35

At 1,251 as we have indicated, the complaint is made that he apparently chose not to inform the Canberra community. The transcript of the 5.00 pm interview once again commences with a question to Mr Lucas-Smith regarding the situation of the Namadgi bushfires. We
40 submit that it’s tolerably clear that he was answering the questions in that vein, and once again, there may be observations made about his media skills but, with respect, no observations should be made about his honesty or his integrity in that regard.

45 We also indicate in our submissions that had one had reference to the New

5 South Wales Rural Fire Service press release at approximately that time,
that release was saying that in their view the lines would be pressured, that
is to say the containment lines, and the fire forced to the ACT border. We
submit, with respect, that even if that formulation were adopted, it would
not be such as to bring home the ultimate and immediate risk which
eventually occurred some two days later. Your Honour should, on this
basis, with respect, reject the submission that Lucas-Smith and Castle, as
it's put, seriously and deliberately omitted to impart to the Canberra
public their knowledge of the risk of a fire impact.

10 At paragraph 1,256 to 1,259 and following counsel assisting make claims
against Lucas-Smith that he provided false and insupportable information
to the Canberra public, as to which we say that should be rejected as well.
That was the 17 January media press conference. And once again, your
Honour, this was a press conference which you may recall was attended
by the ESB and its officers, being Messrs Castle and Lucas-Smith, and
also Mr Wade from the Rural Fire Service, and this was a press
conference that Mr Lucas-Smith stated that the risk to the urban edge was
pretty slim.

20 The transcript of the conference, and I invite your Honour to read this
somewhat carefully, but the similar comments apply. It indicated that
Lucas-Smith and Castle directed all of their comments and were asked
about Namadgi National Park fires. We submit that there is no mention at
all of the McIntyre's Hut fire in that press conference, nor is there any
mention made by those officers of the New South Wales fire. In the
second part of the news conference Mr Wade addressed the McIntyre's
Hut fire.

30 As we note in our written submission, whether this was done by
agreement, arrangement or protocol, with respect, does not much matter
and what counsel assisting have sought to do is to elevate this into a
situation as to which Mr Castle should not be believed and they suggest
certain consequences. With respect, it doesn't much matter what you call
it. The choice of words in the statement, whether it's strictly speaking
accurate or not, in our submission not much turns upon it.

40 The fact was that these media conferences demonstrated what was, in
effect, a practical demarcation as to who should be talking about what.
One might think, your Honour, that it was a sensible practical demarcation
because Mr Wade and those whom he represented at the media conference
of course were the ones who had the best and most immediate knowledge
of what was being done on that particular fire. Mr Lucas-Smith and
Mr Castle had the best and most immediate up to date knowledge as to
45 what was happening on the Canberra fires. The fact that it was, if one

looks at those media conferences, however it came about, each decided that this seemed to be the most efficient way to deal with the issue.

5 Now, in retrospect it may well have been thought that Mr Lucas-Smith or Mr Castle should well have come in over the top and added some additional comments. The fact that they didn't only indicates that they drew a level of comfort from the fact that the McIntyre's Hut fire was being professional and competently attempting to be dealt with by the New South Wales authorities.

10 Counsel assisting also point to remarks in the morning planning meeting to the winds turned westerly the following day, in a view to counter the proposition that even if Castle and Lucas-Smith were only dealing with the ACT fires, if the winds were westerly then the ACT fire may well impact on the urban edge. As we say in our written submission, the forecast recording at the planning meeting was described as north-west winds, gusting between 45 and 50 kilometres an hour, pulling back to a westerly direction and easterly change is expected after 2200 hours.

20 We submit that the reference in the forecast to strong wind gusts appears to be more directly linked to the north-west winds. There is no indication as to when the winds might pull back to a westerly direction, and more particularly, when in relation to the easterly change, which is mentioned. We submit that in the light of these matters Mr Lucas-Smith's construction for a predominant direction of the winds, whilst not precise and not comprehensive, reflected the substance of that weather forecast, and does not take away from the proposition, which is self-evident from that media press conference transcript, that he was answering the questions he was asked about what he, perhaps narrowly or otherwise, considered was his immediate matter for attention.

30 The other thing one needs to take into account, your Honour, when looking at the statements which were made was what Mr Wade actually said in that press conference concerning the McIntyre's Hut fire. And we've extracted a large portion at para 668 of our submissions of what was said. I don't read the entirety of it but he gave some direction as to the location of where it was, how many hectares had been burnt out, the extent and depth of the containment lines, the fact that the wind conditions were expected to strengthen from the north-west. He then says this:

40
45 "The fire is about 2 kilometres from pine plantations in the ACT. We do have resources on the edge of the border there and on the edge of the pine plantations. At this stage, also some 13 aircraft are working in the area, keeping a very close eye out for spot fires and so forth. At this stage, there is not threat..."

I think that is as it's transcribed:

5 "...not threat to any property in the area. It is more those pine plantations we're keeping a close eye on."

10 Now, once again, we make no criticism of Mr Wade for anything he said. What we say is that when you judge whether Lucas-Smith and Castle were doing their best, one needs to judge what other people, looking at the same fire, assessing the same risk, also said publicly. And if it matches up then perhaps the likely inference is not that one party sat on the information and the other party didn't, but the likelihood is that both parties had a similar view of the risks as they saw it.

15 And I read it again, "At this stage, there is no threat to any property in the area". If there's no threat to any property in the area, that may be an overstatement perhaps and one might do this at a press conference when one's not reading a statute or writing something of this nature, the language may be a bit loose. The sentiment that it conveys is entirely consistent, in our respectful submission, to the sentiment conveyed by Lucas-Smith. And once again, as Mr McCarthy rightly reminds me, Mr Wade is also saying "At this stage". That is not a dissimilar comment to what Mr Lucas-Smith was talking about.

20 Your Honour, once again, to look at Rural Fire Service media releases, as we note at 671 in our submission, the release for 1200 hours on 17 January says:

25 "Containment lines are complete on this fire, however, they will be tested today. There is currently no immediate threat to any property. Fire fighters are concerned that strong wind gusts could cause spot-overs which could impact major pine plantations in the ACT."

30 Now, once again, without belabouring the point, we have a similar indication from the counterpart fire fighting body. So in our respectful submission in summary, New South Wales were saying similar things in similar terms as Lucas-Smith was saying. The better view was that they had both together a similar view about the risk. The better view was that risk unfortunately, in retrospect, appeared to downgrade the risk. The fact that it did so was not conscious, was not intentional, was not wilful in any sense whatsoever, and those notions should be rejected.

35 Your Honour, there are two other discreet areas which I propose to cover. I'm sorry, there is one matter concerning pronouncements on 18 January 2003. Once again, the similar criticisms were made at 1,288 to 1,290

5 about deliberate decisions being made to defer warnings to the public, et
cetera. We have in our written submission referred in some detail to what
Mr Lucas-Smith's expectation was concerning setbacks, concerning
opportunities to intervene and so on. Counsel assisting have sought to
demonstrate by evidence of experienced persons such as Mr Cheney and
otherwise, that those were really forlorn hopes and should have been
recognised or were recognised as forlorn hopes as at that time.

10 In the event, they did prove to be forlorn hopes, but we contest that this
court should ultimately conclude that Mr Lucas-Smith either did or should
have so recognised. And once again we draw attention, your Honour, to
what was said by other people on the ground at the time when these tragic
events did occur. At paragraph 743 and following of our written
15 submission we refer to the evidence of various of the persons on the
ground. Mr Neil Cooper, who I think has been acknowledged to be an
experienced fire fighter in this area. We've extracted something which he
said, namely, that on the 18th he said he still strongly believed that once
the fire came out of the plantations or out of the timber "we would be able
to contain it on the grassland". Forlorn hope? Yes. Honestly believed?
20 Clearly, Mr Cooper did. He wasn't taken to task on that comment. We
ask rhetorically if he's not taken to task why is Mr Lucas-Smith taken to
task?

25 Then Mr Lucas-Smith we have, your Honour, extracted Mr Lucas-Smith
lengthy answer at transcript 1,205, this is at para 744 of our submissions,
in which he says he didn't anticipate the extent or the ferocity, didn't
expect an impact on the ACT interface of that sort of ferocity at all. And
then at the bottom of that paragraph indicates what he thought would
happen, which was significantly a more benign fire than what ultimately
30 came. We've also extracted Mr McRae's thoughts as to that matter in
paragraph 745.

35 We draw attention also to Mr Bartlett and members of the Rural Fire
Service. Mr Bartlett was asked, and this is at transcript reference 510, on
the 18th, a 2.39 he agreed - and I'm reading from 747 - the fire was within
a couple of metres of the urban interface. He gave the following evidence
about those events at that time:

40 "This is the point where you indicate that the fire was developing
rapidly, heading towards the ACT forestry office?---Yes.

Was this the first time you had concerns for your forestry
office?---Yes.

45 Not long after that your depot was destroyed by fire?---That's

correct.”

5 Your Honour, we've extracted Mr Cooper at 749 and I won't read that. I
think your Honour has the general drift of what we've said. At 750 we
draw attention to the fact the New South Wales Rural Fire Service
constructed its camp in the path of the McIntyre's Hut fire, were it to run
towards Canberra under the influence of a north-west wind, and it lost its
camp. As at the 14th when it was said that Lucas-Smith and others had a
realistic prospect that Canberra was going to have a serious impact, they
10 were saying that the location of their Stromlo base camp would not come
under threat from the fire.

15 Now, once again, with respect, I ask rhetorically what is a better indicator,
those who were at the scene at the time fighting the fires, or an ex post
facto review in hindsight of what ultimately occurred? In our respectful
submission the answer is clear and it is the former.

20 We note at 752, and it should be explained, the lack of appreciation of the
potential impact of the speed of the runs is evidenced by how fast it
moved. McIntyre's Hut we state crossed the border in one location about
7.30 am on 18 January. By noon it was burning in the timber behind
Uriarra station, that is to say a distance of about 2 to 3 kilometres. By
1.00 pm the fire had made a run through Uriarra Settlement which was
about 1.5 kilometres from the station. We note this is a total of
25 approximately 4.5 kilometres in 5½ hours.

30 By 2.00 pm the fire was burning in the pine plantations on Mt McDonald,
a distance of about 4 kilometres from the settlement. In the next hour it
crossed the Murrumbidgee and burnt through Stromlo Forest reaching the
urban edge, a distance of about 8 kilometres. Therefore between 1.00 pm
and 3.00 pm the fire travelled a distance of about 12 kilometres and, as it
transpired, your Honour, even the fire spread in the morning of 18 January
was not any reliable indicator of what would occur after 1.00 pm.

35 That was the situation which confront the ESB officers and others on
18 January. That miscalculations were made, with respect, is
understandable. What one cannot say, with respect, at all is that people
didn't act bona fide, that people didn't act properly.

40 The two last matters, your Honour, I wish to address and I'll then resume
my seat, and I'm sure everybody will be glad about that, is the causation
matter relating to Mrs Tener and a chapter that we have in our written
submissions which I'll summarise very briefly entitled "Road To An
Expert Witness".

45

5 Your Honour, we have in our written submissions set out in some detail our argument on the causation issue. We wish to make it plain that when we refer to Mrs Tener that it's not done in any way disrespectfully, that the arguments we advance are matters of construction and of law, and should not be taken to be insensitive to the feelings of that family.

10 But the simple proposition is that after 9 months of preparation when the initial submissions of counsel assisting came out, presumably with the combined mental fire power of my learned friend and his very able junior and their expert witnesses, the considered decision was that the evidence at that stage could not allow a finding to be made of the type now urged.

15 Then on 23 May there is a reconsideration of that matter. In our respectful submission nothing has changed. In our respectful submission the first instinct is the correct one, and the change of heart seems to be a wish, as we would see it, of continuing to attribute blame in circumstances where that is not proper to be done.

20 In our respectful submission, when one looks at what evidence there is concerning Mrs Tener, you simply could not be satisfied, there being an absence of any evidence from her as to what her intentions were, as to what she would or she would not have done, had a certain warning of a given type been given, within a given time frame. It is simply impossible to do with any degree of reliability we would, with respect, submit. And really, with respect, this is stretching the bow so long that your Honour should ignore it entirely. We contend that that finding should not be made.

30 Your Honour, from paragraphs 427 and following we outline the various principles which are applicable to expert evidence given in the court context. We start off with *Makita v Sprowles* and your Honour can read our references and I don't propose to go through them. The summary, with respect, is for the reasons we have given in some detail in that particular submission we contend that Mr Roche in approaching his task
35 prejudged issues and showed himself to be a partisan witness. We submit, and our references bear this out, that he was involved in the gathering of evidence of the type that he wanted to attain, an attempt to secure evidence to bring about particular outcomes. We do hasten to add that where he made those concession are perhaps matters where the end was
40 quite clearly a noble end. He talked about the AFAT guidelines and so on. Nobody would take issue with getting to that result.

45 What we ask your Honour to do is to measure against the normal principles whether or not such an approach, whether it's directed towards the noblest ends or not, is such that when assessing his evidence you can

5 have confidence that he approached the task in an unbiased objective way. And quite frankly, with respect, if an expert witness admits quite candidly, and he was proud of the fact, one might think, that he wanted to bring about certain recommendations from your Honour, and he's given the evidence to that end.

10 The fact is that when one looks at the various principles which have from time immemorial applied to expert witnesses, by reason of the fact that expert witnesses, as we've said in our submission, hold a special place in the consideration of the courts, their opinions hold considerable sway. They therefore need to be punctilious and extremely careful with the proposition that they are objective, that they are not an advocate for any particular person or a party in a case, and that they fairly assess evidence which obtained.

15 Now, when he then acknowledged that he was a party to the obtaining of evidence of a particular type to encourage your Honour to make certain recommendations, that is a matter of grave concern when one looks at what reliability one attaches to him. We further assert, and we have elaborated, that he formed adverse opinions based on the absence of evidence, rather than on specific evidence establishing that proposition, as is evidenced by his consideration of the issues relating to pre-preparation for the years 2002-2003 fire season, and also for the assertion in his report at page 53, which was that the fact there were burn overs, and I don't do it in the justice of completing the sentence in its entirety, but the ultimate conclusion was that it was tantamount to negligence that officers involved in this fire fighting experience in the course of their duties were subjected to burn overs.

20 Now, your Honour will remember that he was cross-examined about at least two officers who he thought evidenced that particular shortcoming, those being Mr Neil Cooper and Mr McNamara. And the fact of it was that he was driven to acknowledge that neither of those two persons were in the course of their duties when the burn overs occurred. Now, there still remains at page 53 his opinion that it was tantamount to negligence, that officers were burning over, but he has had to concede that some of the material on which that was based was not properly construed by him and it was a misconstruction of their evidence.

30 Once again, when your Honour looks at what reliance you place on him, we strongly submit that you must have regard to the fact that he, in effect, jumped the gun, got to a conclusion without a proper consideration of the matters that he had to consider and ultimately came out with a pronouncement which is highly prejudicial and which is not soundly based, at least in those two instances.

5 And the third matter which has been demonstrated by the cross-examination is that whilst he was prepared to make criticisms that there weren't enough heavy plant, or weren't enough aircraft, or in the case of the New South Wales fire fighting effort, a bit more should be done in relation to the Baldy Range spot fire, three matters I take off the top of my head. He was not prepared to advance what viable solutions there were. He said, "Well, it's not my place. I didn't need to consider that matter".

10 We point out in our submissions one which we suggest is an extremely significant one, given the outcome in this Inquiry. It's at paragraph 477 and it was as a result of a question asked by Mr McRae's representative but, with respect, it illustrates the difficulty of being reliant on Mr Roche. We say that Mr Roche was critical of warnings given by the ESB during
15 the period up to 18 January. The transcript reference which is given, and your Honour can read that. He was asked to say what warning he would have given if he was the incident controller at 11.00 am on 18 January and he stated he couldn't do so. The reason he gave as because he would have given the warning earlier and there were too many other variables.

20 As we say, much has been made by counsel assisting and Mr Roche about how loss and damage could have been avoided by proper warnings. It's difficult to attribute any weight to the criticisms of an expert when he is unable or unwilling to offer an opinion on a critical matter in the Inquiry
25 some 2 years after the event, and having had the benefit of the extensive evidence given in this Inquiry.

30 For all of these reasons we submit that your Honour would have grave misgivings in relying upon the evidence of Mr Roche to support the critical findings upon which his evidence appears to be based. I've said that the wrong way around. The critical findings which are based on his evidence. We say, with respect, that it is unsafe to do so, having regard to the various limitations that we've addressed in that part of our submissions.

35 Your Honour, finally, we say this in closing, that it is a reasonable assumption that all fire suppression authorities are keenly observing the progress of this Inquiry, as they do in all others. They, we respectfully suggest, will no doubt have observed that it has proceeded on the basis of
40 seeking to apportion blame to senior officers in these events. We suggest that that kind of exercise had counterproductive consequences and we referred to those.

45 We suggest that these counterproductive consequences are ones which have sought to be avoided in other areas, such as civil aviation

investigations where it has been considered that the primary aim of the proceeding is to determine what went wrong, with a view to fixing the system, to identifying matters which are capable of being fixed for the ultimate public benefit and public safety.

5

We submit that it is in the long-term public interest to avoid, so far as it can be done, these consequences in these proceedings, and we apprehend that these kinds of considerations form the rationale of the highly applicable principles against the attribution of blame in Coronial proceedings. We respectfully submit that your Honour in undertaking the functions and duties should have regard to all these matters.

10

I'm sorry, there is one thing I should fix as well before my learned junior says something. In relation to the submissions advanced by the other parties there's only one comment that we would wish to make. Our silence is not taken to be either an acceptance or a rejection of their submissions, to the extent that they coincide with ours an inference can be drawn clearly enough. But in the submissions of ACTEW, that body puts forward a draft protocol in some detail as to the relationship between ACTEW and the fire fighting authorities or the ESA.

15

20

We will certainly look at that material but say that it is inappropriate that your Honour, even if it were within your jurisdiction to make such recommendations in such detail, without a proper consultative process of all the people involved, and that's of course not been done. I'm sorry, but for one thing which my learned junior will remind me of, I'll resume my seat. Thank you, your Honour.

25

HER HONOUR: Thank you, Mr Lakatos.

30

Yes, thank you, Mr Hastings.

MR HASTINGS: I think the understanding is that I go next, your Honour. What we had thought convenient was that I would relocate.

35

HER HONOUR: You should. You have to do that because there are no microphones in back.

MR HASTINGS: If your Honour would give us a moment I will do that.

40

HER HONOUR: Certainly. The other alternative is, and I know you probably haven't had an opportunity to read what Mr Lowe has to say - - -

Mr Lowe, how long do you see yourself as being in your oral submissions? A copy has now been distributed, I appreciate counsel

45

hasn't had an opportunity to read this but if there's oral comment. So presumably you'll be addressing this.

5 MR LOWE: I would say less than half an hour.

HER HONOUR: Well, it seems to me to be sensible if you're prepared to go now, Mr Lowe?

10 MR LOWE: I don't mind.

HER HONOUR: Is that going to put you out? And that way you don't even have to bother coming back tomorrow if you don't wish to do so. Of course, you're quite welcome to if you wish, but it may be rather than being part-way through Mr Hastings and it'll just save you some time tomorrow. If you just come to where Mr Lakatos was seated, Mr Lowe.

15 MR LOWE: Thank you, your Honour. We have circulated these notes.

20 HER HONOUR: Yes.

MR LOWE: We have limited resources available to our group so we hadn't prepared detailed submissions.

25 HER HONOUR: No, they have been copied and circulated, thank you.

MR LOWE: And I just apologise for any grammatical inadequacies.

HER HONOUR: That's fine, Mr Lowe, thank you.

30 MR LOWE: And I think as some of the other parties have mentioned, we're confining our comments to certain areas of interest to us, so they can't be interpreted as being having a few one way or another on what other parties are saying, other than what we say in here. Our membership of this activity related to us being rural landholders and our focus is on the grasslands that we hold.

35 One of the strengths that we have as a group is that we have long-term district knowledge and a historical perspective on the management of lands and activities which are relevant to this Inquiry. I'd also like to make a note that this Inquiry had received a large volume of information, but that it is really impossible for every little bit of information about what happened in 2003 and the lead-up to it to be made available and we'd like to draw attention to one aspect of that in our submission.

40 45 If you look at the map of the western part of Canberra our members'

landholding stretch north/south from the southern boundaries of Belconnen adjacent to William Holden Drive, right to the northern boundary at the Murrumbidgee River west of Kambah Pool. So we had the experience that the fires that came into Canberra actually passed over each of our lands that are specifically managed by our members and hence our concern about comments that were made in relation to possible adverse contributions by grasslands.

There's only one section in the middle where our members don't control, and that is the Stromlo Forest area between Uriarra Road and the Cotter Road. We've heard the description of the fire's progress put to the Inquiry Mr Cheney and others and we are generally satisfied with them, but we don't agree 100% with the details that have been put in them. But with the exception of the progress of the fires in the northern boundary don't wish to be concerned with the other areas.

In relation to the northern boundary, we observed a difference to what has been reported, in that we observed that there was a specific fire that travelled separately along the Molonglo Corridor and that occurred after the main front hit Stromlo and Duffy. And we assert that the containment of that fire was possible because of the grazing practices on the farmland in the northern part of the valley, and that without that fuel reduction the fire would have burnt into Belconnen urban area with the southerly wind change that occurred later in that afternoon.

If it was also significant to that fire's containment that the Christmas 2001 fires, which were really in effect an involuntary burn off, had occurred as the 2003 fires would have been much more intense and very likely would not have been able to have been stopped, and they would have reached Black Mountain and the urban areas beyond. I believe that Mr Cahill made a comment to that effect in his findings in the 2001 fires. In relation to the shape and extent of the northern boundary, our understanding is that a relatively few rural landholders and their friends played a critical role in lifting that fire, and we'd like these contributions to be recognised in the report you might make.

As far as grasslands as such are concerned, we note the comment by Mr Cheney earlier in the Inquiry that in his view the grasslands to the west of Canberra reduced the intensity of the fire as it travelled towards the urban area, and we've heard further evidence that the expectation was that lower intensity of fire in grasslands would allow them to be reduced.

Mr Cheney also made the point that whilst the landholders in managing the fires on those grasslands, it might not have felt like it, but that the fire intensity reduced. And that was also our observation. It certainly didn't

feel any cooler than anywhere else. But we'd ask at this point that the intensity of the fire in the grassland was reduced and that this be recognised in your report and be directed towards future land management option considerations.

5

And members have argued for some that the pattern of land usage to the west of Canberra and west of the Murrumbidgee River ought to be a mosaic of grassland and forest, such as to enable better fire control and fuel reduction practices. The submission to that effect was put in our comments to the ACT government in 1997. We see no reason why some of the forested land to the west could not be returned to grasslands as it was in earlier times. There have been rural grazing holdings which were pine forested prior to 2003.

10

15

We believe that by converting the grasslands this would add to the ACT's community asset stock. Properly managed grassland areas, for instance, in smallholdings will be a higher asset value than forest and would support higher economic functions. It would provide increased income to the ACT budget, structurally improve the fire risk pattern to the high risk fire source area, and provide a sound financial basis for increasing, rather than reducing, fire management resources in the area. We'd like you also to consider this aspect in your report.

20

25

Our members are very concerned about the propose bushfire abatement zone. It is technically questionable, will provide a mirage of protection to urban and other dwellers and, critically, its existence we believe will be used, very appropriately, to limit the extent of the overall bushfire litigation actions that are necessary in this fire prone area. And I mean by fire prone area, I mean the whole of the ACT and the south-eastern part adjacent to the ACT.

30

Almost the entire area of the bushfire abatement zone is uphill. Once a fire in that type of country occurs every 10% of slope double the speed of the fire, technically it plateaus a bit after 30%. The logic is if we are seeking protection from an approaching fire from the west, apart from dealing with fires that occur on the eastern side, we ought to be more alert when the fire is travelling downhill, and so seeking to extinguish it on the west of the river, and making sure that any spot fires are contained to the east.

35

40

The bushfire abatement zone objective is really most economically managed, in terms of the area burnt, the assets destroyed and the environment obliterated by dealing with the lands to the west, reducing fuel loads and putting out fires as soon as they light during high risk periods.

45

Of particular concern to us is that the majority of the land west of the river is government land, but my recollection is that somewhere around about 80% of lands outside the urban area of the ACT are actually owned or managed by the ACT government on behalf of the Commonwealth. Those lands generate very little direct income and the reality is that parks don't pay cash. The economic rationale for having parks relies on them being a public good.

In budgetary terms, this means that there is no income against which to offset the cost of ongoing fire mitigation services. There are always budgetary pressures, have been in the past and will be in the future and are now, and we can see already that what was set up, supposedly set in stone less than 3 years ago, the Emergency Services Authority has been offered up as a budgetary saving.

The responsibility for management of public land in the ACT is confusing, in terms of who actually takes responsibility for it, and the loss of the independence of the ESA is that no real accountability exists for the fire risk outcome with management practices in ACT government lands. We know that this has been a concern to the Chief Fire Control Officer in the past.

In 1994 Howard McBeth said that it was not a matter of if, but when a major fire again strikes Canberra. I believe this is the maximum that needs to be imprinted in the ACT management cycle so that an event which is likely does not become a disaster, such as we witnessed in 2003, which brought so much heartache and debilitation to people who had been told, they had been told and their representatives in the Legislative Assembly were told and re-assured on a number of occasions that they were safe, and so rightly believed that they were being protected. They were not.

It seems to us that this is a fundamental management failing. The warnings are there. Experienced older people in the regional areas, Val Jeffery has mentioned that on a number of occasions, he's been a witness, but there are other people such as Bill Flint who experience the 1939 fires and other members of our group who publicly ask responsible officers in the years leading up to the 2003 period, including then ministers of the ACT to take action to avert the risk.

How do we incorporate wisdom into our equations of risk management in environmental matters such as these? The managers of the ACT seem unable to deal with these, and seem to have had little regard to these warnings. The ACT is a small jurisdiction and we will benefit as a community in what it costs us and the managers being more open to

outside advice and at times criticism, however unwelcome.

5 If you look at the skills and knowledge available in the ACT community it is hard to believe the outcome we experienced 3 years ago. Representatives of our group were meeting with senior officials, including the Director of Forests in Macarthur House at 3 o'clock on 8 January 2003 and that meeting was being held as a result of continuing representations our group had been making concerning excessive fuel loads in ACT forests.

10 We were there when the first of the fires was called in on the cell phone, and one of our older members familiar with the local area and with dealing with fires in the region over the last 60 years, in fact his father built Yarralumla Wool Shed, made the comment to the officials that "I would not like to be living on Eucumbene Drive, Duffy". I appeared nothing was done in response to that comment, and I think we ask is: Why not? And I think that is a real risk to the ACT. Experience is not being taken seriously and not being put into the kind of management situation.

20 I think that we need to understand that we live in an extremely fire prone area and that we should really look at what's going to happen. And I think, your Honour, I'd like to say that, make no mistake, the so-called red steer which is a running fire will return. It's just hiding in the bush waiting for the right time to jump out, and it must be planned for and managed on an ongoing basis. That's all I'd like to say, your Honour.

HER HONOUR: Thank you very much, Mr Lowe.

30 MR LOWE: Thank you. Thank you for the way you've conducted this Inquiry.

HER HONOUR: Thank you, Mr Lowe.

35 We might take an early luncheon break, I would think, and then you can set up your team at the table, Mr Hastings. Thank you. All right, so we'll resume at 2 o'clock then.

40 **LUNCHEON ADJOURNMENT** **[12.48 pm]**

RESUMED **[2.05 pm]**

45 HER HONOUR: Yes, Mr Hastings.

MR HASTINGS: Your Honour, to a large extent Mr Lakatos has covered much of the ground which I had anticipated covering myself, so I'll endeavour not to be repetitive, although I will deal with a number of issues that he did, but for the purposes of having what we see to be some particular material relevant particularly to Messrs Lucas-Smith and Castle.

Your Honour, on a general level, as has been put already, we would see the relevant facts concerning the cause and origin of the fire and the cause and manner of death being relatively clear. In the end result, from a practical point of view, it would seem to us that the ultimate and legitimate question that the people of Canberra would want answered by this Inquiry is why they weren't provided with a better warning of the fire which caused the damage.

Again, in our submission, the answer is relatively simple. Nobody predicted what would happen in the time frame in which it did on 18 January. Again, it needs to be recognised, we suggest, that those facts are relatively straightforward and contain what we then say is that, as counsel assisting have done by going beyond that point, and endeavouring attribute blame, falls straight into the error which was identified by the Full Bench in the relevant proceedings, particularly if it was to do so seems to invoke largely the use of hindsight.

What we also submit is that what has been done is to carefully construct a case of blame against Messrs Lucas-Smith and Castle, which if your Honour were to follow would lead you into error. The high water mark, as we see it, of the industry with which counsel assisting have scoured the evidence is the elaborate development of the case theory which has now emerged that Messrs Lucas-Smith and Castle have colluded deliberately to deceived the Canberra community as to the truth of the circumstances surrounding the threat comprised by the fires.

What we generally submit is that the purpose of going to such lengths to construct such a theory, and it is only that, is quite transparent, and that is that it is designed to give to their actions the character of impropriety or misconduct of misfeasance, which in the end will no doubt be relied upon colour, or create the link which is finally taken, to connect them to the death, particularly of Mrs Tener. All of that, we suggest, is impermissible.

What I'll do firstly, your Honour, is to take you to the various references in the submissions of counsel assisting to illustrate that there is no ambiguity in what counsel have put. What they have set out to do, we suggest, is to deliberate construct a thread of inferences from which it is suggested to you that the two officers were guilty of a form of misconduct, which finally leads them to the proposition that there is a

connection with the circumstances in which Mrs Tener was deceased.

5 The references are several in counsel assisting's submissions but I just
need to take you to them to make clear just how specific and serious the
allegations against Mr Lucas-Smith and Mr Castle are in the concluding
paragraphs of the submission of counsel assisting. I certainly won't pick
up all of the references but start, for example, at paragraph 216 where
counsel assisting start to sow the seeds by referring to the suggestion that
10 the response to the views of Mr Cheney revealed an early demonstration
of two fundamental ultimately significant flaws in the approach of the
ESB and its senior officers to the growing risk of the fires.

15 The first of which in paragraph (a) is said to be treating the dissemination
of information about the fires and their likely impact as a public relations
exercise. That of course has the same flavour of deliberately tailoring
information in a way which is designed not to reveal the truth, but to put
the interests of ESB in their best light.

20 Then on the next page at paragraph 1,218 the same - I'm sorry, your
Honour, I was talking about 1,216 on that - - -

HER HONOUR: 1,216, yes, thank you.

25 MR HASTINGS: And 1,218. In the middle of which it is put:

30 "In our submission, the ultimate responsibility for the
dissemination of information to the community rested with those
to whom Mr Harvey and Ms Lowe reported, namely
Mr Lucas-Smith and Mr Castle, and primarily the latter. Mr
Castle's focus on ESB public relations over community
information and warning is no more amply demonstrated than by
his remarks referred to in the notes of the planning meeting on the
morning of 15 January, but he was looking for some positive spin
which he said in the evidence reflected a concern to make some
35 positive aspects public."

40 Again, the inference is clear that there was alleged a deliberate decision to
distort information to emphasise public relations, rather than to convey
information and warnings.

45 Then again at paragraph 1,231 the same things continue in the context of
previously submitting that by then there had been a realisation that there
was a serious risk to the Canberra urban area, it is said in paragraph 1,231
in the last sentence:

5 “However, in our submission, for reasons that are at best obscure, Mr Lucas-Smith probably with the concurrence of Mr Castle, based on his conduct had by the time of the cabinet briefing determined that for the time being the public would not be told of the view he and others at ESB had formed on 15 January 2003, at the latest, that there was a serious risk of impact on the suburbs of Canberra.

10 Again, at paragraph 1,244 on page 454 of my print in the last sentence the theme continues:

15 “This statement made seriously by Mr Lucas-Smith to his senior colleagues in the ACT Fire Brigade and ACT Ambulance Service in regard as to whether or not those who heard it felt constrained by how they used the information further evidences the decision by him to withhold from the media and the public his true state of mind concerning the risks from the fires, including the McIntyre’s Hut fire, which had occurred in the Canberra urban area.”

20 And on the next page, sorry paragraph 1,250 the allegation continues in the last sentence:

25 “But what is clear in our submission is that independently or in consultation, both arrived at a decision that had the effect of depriving the people of Canberra the reasonable opportunity to prepare for a risk they both saw as serious or even likely.”

30 That was in the context of Mr McRae and I think Mr Lasry said yesterday in passing that was not said to be some conspiratorial consultation or agreement, but that concession doesn’t seem to fit well with what is then alleged at paragraph 1,252 where in almost the same context in the last sentence of that paragraph it is said:

35 “The fact that it was not done is, in our submission, a serious and deliberate omission, primarily by Mr Lucas-Smith as the experienced senior officer of ESB, but also by Mr Castle and Mr McRae, since they were all invested with the knowledge of the risk and were each in a position to take steps to impart the necessary information.”

40 The previous concession that Mr McRae was not involving in conspiratorial agreement to withhold the information doesn’t seem to fit very well with what is then said to be, presumably, a deliberate agreement

45 between Mr Castle and Mr Lucas-Smith to do just that. Then at paragraph

1,256 the theme continues, counsel say:

5 “Despite this, at the midday press conference on 17 January 2003
an important opportunity to state what was now obvious to both
Mr Lucas-Smith and Mr Castle was lost. Instead of saying that it
was likely that the fires fanned by north-westerly winds could
collide with the urban area at sometime over the next few days.
Mr Lucas-Smith chose to compound the harm by that morning’s
10 newspaper by saying that the north-west wind, the chances of fire
meeting the urban edge were pretty slim.”

And then in paragraph 1,257 in the second sentence you see that:

15 “But to a media person at the press conference or the public
hearing reports of the press conference untrained in fire
suppression, the impression given and intended to be given by
Mr Lucas-Smith was that there was some kind of barrier that he
considered had a realistic prospect of holding the passage of the
fires under full scale conditions. Your Honour should conclude
20 that this was an impression that was false, and that
Mr Lucas-Smith knew to be false, but your Honour would draw
the same conclusion concerning the ESB’s noon media update.”

25 Then a couple of paragraphs later over the page at 1,262 more is added
and the fourth sentence where your Honour is urged by this:

30 “However, as a minimum, your Honour would conclude that at
the time Mr Castle prepared his statement he was acutely
consciously of the fact that at the press conference at midday on
17 January 2003 Mr Lucas-Smith had made a prediction
concerning the risks to the urban area that Mr Castle knew to be
insupportable, based on what was known by ESB and its senior
officers, including Mr Castle, at the time the prediction was
made. And he therefore set about attempting to concoct a
35 justification for the prediction which he must have known would
not stand up to close scrutiny.”

40 And then in paragraph 1,263 the point is crystallised by the submission
that:

45 “It is open on the evidence to conclude that the media conference
at midday on 17 January 2003 and the explanations offered both
by Mr Lucas-Smith and Mr Castle were the words used by
Mr Lucas-Smith (a) constituted a further instance of
implementation by Mr Lucas-Smith of his decision to defer

5 telling the people of the ACT and Canberra, in particular, the true
 position concerning the risk presented by the fires, including the
 McIntyre's Hut fire, and (b) confirm that Mr Castle participated
 in the deception either by condoning the decision or not acting to
 correct an impression left by Mr Lucas-Smith's predict which
 Mr Castle knew to be insupportable."

10 Your Honour, in those circumstances we say there's little doubt about the
 nature of the allegations being made. I suppose I can just take your
 Honour one further step to paragraph 1,307 where various matters are then
 collected in the context of the position of the time of the warning on
 18 January and in subparagraph (f) it is alleged that the failure to give the
 warning came about because each of Mr Lucas-Smith and Mr McRae,
 either independently or together, made a decision or decisions that the
15 warning could not be given, and Mr Castle either knew of and condoned
 the decision or decisions, knowing of the decision or decisions, failed to
 take steps to ensure the warning was given.

20 And (g) then establishes the link which is laboriously being established by
 asserting that the failure to give that warning by or before midday
 contributed in a material way to the scale of loss and damage to property
 and injury experienced during the afternoon and evening of 18 January
 2003, and thus was the cause of that loss or damage to property.

25 And then finally, I suppose, the final leap it taken by counsel assisting in
 paragraphs 1,323 and following to the assertion, in our submission, in the
 case of two of the deaths:

30 "*prima facie* the lack of warning may be able to be identified as a
 cause of death."

35 And of course that position has been modified to the extent that the death
 of Dorothy McGrath has been removed from the ambit of the submission,
 but nevertheless the final step has been taken in endeavouring to link what
 is said clearly to be misconduct by Messrs Lucas-Smith and Castle to the
 death of Mrs Tener.

40 Your Honour, there are in our submission obvious difficulties in
 sustaining the argument which has been so carefully constructed by
 counsel assisting. Some of these matters have already been dealt with
 Mr Lakatos and I hope that I won't repeat all of it in too much tedium.
 One of the matters which Mr Lakatos pointed to is one identified in our
 written submissions, and that is the lack of motive. There just seems to be
 no sensible reason why Messrs Lucas-Smith and Castle would engage in
45 such a serious deception of the public. There's simply no benefit to them

and no benefit to anybody else that one can immediately identify, which would rationalise them engaging in such misconduct or impropriety, as would be involved in deceiving the public by not telling the truth.

5 We also adopt what Mr Lakatos has put in relation to the failure to put these allegations to both Mr Lucas-Smith and Mr Castle. It seems to me there are two features to that observation, one is that on the assumption which we readily make that if counsel assisting had been aware of the propositions which are now being put in the course of the two gentlemen
10 giving their evidence, then in fairness those matters would have been put. So that the absence of the allegations being put to them, one can only conclude that counsel assisting have come up with the idea since they gave evidence.

15 The second is that whilst, as is self-evident, I haven't been in these proceedings long, I'm sure that'll become increasing evident the longer I speak, I had had the opportunity to speak to Mr Lucas-Smith and Mr Castle and there are, undoubtedly, matters which they could have advanced in the context of these allegations, had they been put to them.
20 One of the matters which is relatively simple is that for at least the first week after the commencement of the fire, the media were actually operating out of ESB's premises.

25 And indeed, as we understand it, or as we're instructed - this is not a matter of evidence because these issues were not raised - using a desk in the information officer, Amy Lowe's office and thereby had the facility to talk to anybody who was walking there and of course listening to whatever communications were being directed to Amy Lowe. Now, that circumstance which if properly developed, we would suggest, is
30 something which flied directly in the face of the suggestion that there was this covert agreement between Mr Lucas-Smith and Mr Castle to shield the truth from the public.

35 Similarly, my attention has been drawn to the fact, and your Honour would already know, that when the helicopter crashed on 13 January, on board was a WIN TV cameraman who was given the opportunity to travel on the plane for the purposes of being able to observe and record the fires which were then in existence and I'm instructed that I don't think your Honour has been specifically informed that thereafter that procedure was
40 repeated when flights were available on reconnaissance planes which were being used to monitor the progress of the fire.

45 And again that would seem to me to be a significant fact in the context of an allegation that these two officers were deliberately concealing from the public the truth as to the nature and extent of the fires when, at the same

time, they were prepared to permit television cameras to be on the plane for the purpose of recording and observing the extent of what was happening on the ground.

5 So that this is not just a technical complaint that there's been a failure on the part of counsel to put the matters to the two officers, but an indication that there is a real disadvantage that these matters were not put at a time which enabled the proper emphasis to be directed to many of the surrounding circumstances which fly in the face of the allegations which are now put.

10 What I will proceed to do, your Honour, is to distil, I hope, from the written submissions submitted on behalf of Mr Lucas-Smith and Mr Castle the important aspects of the evidence in the light of the serious allegations which are now made, but before doing so can I add to them an observation of my own concerning the plausibility of the fundamental allegation that Mr Lucas-Smith and Mr Castle were party to the arrangement alleged in counsel assisting's commissions to deceived the public.

15 What I say is this, your Honour, that it just seems to be an insurmountable obstacle to making good such a submission that the process of gathering information and assessing it, and the making of the decisions and the implementation of the decisions made, not only by Mr Castle and Mr Lucas-Smith but others, were conducted in such an atmosphere of transparency. There are so many people who were involved in the process providing them information and then dissecting it and making the decisions, and the implementation of them, that it really is just inconceivable that in the midst of all of this activity, these two men were able to formulate and implement a secret agreement to deceive the public.

20 Your Honour has heard a fair bit of the evidence on the topic, but there's probably more if it had been earlier indicated that this was a relevant issue, but it really seems that the circumstances in which the two men operated at Curtin was very much similar to a goldfish bowl. There were people coming and going without restriction at, for example, planning meetings, people came sometimes and Mr Cheney didn't come other times.

25 There was no restriction on who attended. People were wandering in and out the rabbit warren of rooms, consulting with each other. There were any number of external agencies who were briefed, and thereafter carried out roles which had all the potential to expose any such deceptions. And it really seems to be a situation in which we submit there's absolutely no possibility that these two men could have, in the midst of all of that

activity, acted improperly or dishonestly or deceptively.

5 I took the short course, I suppose, and had a look at the statements of
Mr Lucas-Smith and Mr Castle, as a ready reference to the circumstantial
issues concerning the way in which they went about their job, and one
only has to have brief reference to their statements to appreciate the point
that I'm making. For example, with Mr Lucas-Smith on my count, by the
end of 8 January he had been in consultation with what I estimate to be
11 people whom he had named as being involved in the events of
10 8 January alone.

15 He starts by referring to the fact that when he became aware at about
1600 hours of the fires near Bendora Dam he had a conversation with
Tony Graham and then assembled the service management team which
comprised Mr Graham and Rick McRae, David Ingram who would
normally be in it was already carrying out reconnaissance. And then by
the time he had been to Queanbeyan that evening, apart from Messrs
Graham and McRae, he'd by then consulted with Mr Bartlett and
Mr Cooper, who of course accompanied him in the car to Queanbeyan,
20 where he then spoke to the New South Wales officers, Bruce Archer and
Jim Lomas and the Julie Crawford and Rob Hunt and Scott Seamore
before meeting or speaking to the National Parks regional director, Tony
Fleming.

25 And that just set the scene, it seems to me, for the way in which the
decisions were thereafter made. There was just almost an unlimited
number of people who became necessarily involved in the process of
absorbing information and formulating the plans which were to be made
to deal with the situation as it arose.

30 What your Honour knows and I don't need to elaborate that the Fire
Brigade, the Ambulance and ActewAGL, Environment ACT, where
Maxine Cooper, the executive officer had been involved by the afternoon
of the 9th, Urban Services, ACT Forest, Community Services, the AFP,
35 the chief executives, Messrs Keady, Thomson and Tonkin, and a whole
series of personnel from various organisations under them.

40 And recognise of course that there are some issues as to the extent to
which information was conveyed to some of the officers whom I have
mentioned, but the fact is that those persons were consulted and had the
opportunity to ask questions and, to some lesser extent, formulate their
own view as to what was going on, and whether what was proposed was
an adequate response.

45 The involvement of the ACT Fire Brigade is particularly significant, with

5 Mr Bennett being briefed very early in the piece. It may be said that in relation to some of the officers whom I have mentioned, they may not have had the expertise to enable them to form a final view. Certainly that wouldn't apply, we would suggest, to someone of the seniority of Mr Bennett and those such as Mr Newham and Mr Prince who worked under him.

10 So that these were all senior professional people in their own fields, not underlings or people who just sat there with their mouths open. They all brought to the discussions and the meeting independent minds, and all had their own responsibilities which stood to be jeopardised if they had the slightest hint that what was being done by Mr Lucas-Smith and Mr Castle was deliberately deceptive in a way which could undermine the discharge of their own obligations within their own public sector environments. So
15 I've added to our written submissions that preliminary observation that it just seems very difficult to give credence to the suggestion that these two men were party to a private agreement to act deceptively in the light of the transparency with which they went about their duties.

20 Your Honour, the other fundamental matter which - well, I might just take your Honour to some specific aspects of the written submissions where we've dealt with in the various contexts of the allegations, which have been specifically made. The evidence which reveals that in fact no secrets were being kept. In our written submissions if your Honour has them, at
25 paragraph 259 there is such an example.

The submissions there are dealing with briefing of the ACT Fire Brigade and the Ambulance Service and what seems to be the high water mark of the case being mounted by counsel assisting through the evidence of
30 Mr Cartwright in asserting that Mr Lucas-Smith had said at the briefing that the information was not to leave the room. In the light of that assertion, we have dealt with under the heading "There was no attempt to keep information conveyed by Mr Lucas-Smith secret", various references in the evidence to the response of those who were present to the
35 suggestion that there had been a request to maintain some form of secrecy. We refer to Mr Newham saying in the paragraph we've quoted in paragraph 259 in the latter part, but on the same hand:

40 "I don't - I don't recall any suggestions or anything saying no one else must know. I think it was more or less I'm briefing the ACT Fire Brigade staff and I'm giving you what I believe is a current and accurate briefing, so that you can do some amount of your own plan".

45 In paragraph 260 we specifically refer to the fact that he said that he felt

5 under no constraint about using the information which had just be passed on by Mr Lucas-Smith and the last question and answer quoted specifically supports that proposition. In paragraph 261 we refer to the evidence of Mr Collins on the same point, insofar as he said he had the impression that the information should not be passed onto the media, but he saw this as part of the balance Mr Lucas-Smith struck between not causing undue alarm when informing the appropriate people of developments.

10 Mr Dutton is quote in the next paragraph to the effect that he could recall no specific comment that the information was restricted and was not to be discussed with any other persons attributed to Mr Lucas-Smith or anyone else. Mr Prince was able to give similar evidence, even referring to Mr Lucas-Smith as being more concerned that he, Mr Lucas-Smith, be the person who managed the information which went to the media. He was asked:

20 “What did he actually say about not alarming the media or the public?---I think something along the lines that he wanted to make sure that the information stayed within the room, and that he managed it. I can’t remember the exact words.”

He went on to say that it was in accordance with the protocol:

25 “But a person who has operational control has the right to advise how to deal with information”

And we quote his evidence, the answer the beginning of the bottom of the page in which he said:

30 “I think that any protocol, if an individual has responsibility, it is their right to advise you how to deal with it. We are often given confidential information. We’re often given information during our everyday life where we are required to hold that until we are given the go ahead to inform people.”

Your Honour then intervened and asked Mr Prince to deal with the question:

40 “Did you feel under any constraint to deal with the information in any way that you saw fit?---No, I did not.

45 Let me ask you the same thing another way, did you not feel impeded in the discharge of your duties in any way?---No, I did not.”

And there were more questions asked on the same theme, but with the same response. At paragraph 265, we refer to the evidence of Mr Cannon on the same issue, his answer set out included this:

5 “...but we usually treat most matters in relation to those meetings
as being sort of sensitive to the media. I mean, we had a - I know
the Fire Commissioner has a policy that, you know, we don't go
out and speak to the media off your own bat you run things past
10 normally through the chain of command. You just don't go out
and talk to the media off your own bat in relation to things that
are discussed for operational purposes. Now, I can't recall
anything, I can't recall the specific mention, you know, the
sensitive - or don't - don't tell the world about it sort of thing.”

15 At paragraph 267 Mr Dutton's evidence is to similar effect, the answer
that he gave on the relevant question was:

20 “Not at all, by virtue of the meeting being called and the
information being provided I left with no understanding or
impression of limitations or restrictions attached to that
information.”

25 And we then go on and deal with Mr Cartwright and the extent to which
one can rely on his account, and I won't repeat the matters which are set
out there, both as to the form of the record that he made and the substance
of it.

30 What your Honour, I've proceeded on is the assumption even if your
Honour were to accept the full force of what Mr Cartwright said, the other
evidence indicates quite clearly the context in which any such remarks
were made, and it is in the atmosphere of what seems to be, not only in
this context but in other areas as well, accepted as a convention or
protocol that the operational entity having responsibility for a particular
activity, which is the subject of the briefing, has the responsibility for
35 ensuring that information on that topic is disseminated.

40 And of course that emerges again in the context of dealings with New
South Wales, and seems to be a common theme and a sensible theme that
the public sector organisations accept that information is, in effect, the
property of the organisation handling the exercise, but at the same time of
course that doesn't prevent people from, if they independently felt
concerns about the way the matter was being handled, from adopting their
own course as to putting in place measures which they might think more
appropriate if they were of a different view.

45

5 Even Mr Cartwright as we record in paragraph 279 agreed with that as a general principle and indicated that within his own organisation it would only be with the district officer's approval, but comments would be made. And in the last question and answer recorded he confirms what I have been putting, he said in answer to the question:

10 "So there is nothing either wrong or sinister for an organisation to say that comment to the media should not be made by anybody and everyone?---Correct."

15 And we then set out in the submissions what Mr Lucas-Smith said as to what he recalled saying at the time and what his state of mind was at the time, and in paragraph 282 we refer to what seems to be the substance of his position when he said:

20 "I certainly don't recall saying that, and that does not sound like the sort of thing I would say. I might have said we were having a co-ordinated media response or that we needed even one to be co-ordinated through the same media response arrangements, but that does not sound like me."

And again in the passage at paragraph 285 he repeated his position by saying:

25 "No, I don't recall saying that but there was a fair bit of - as I said, there was this discussion amongst fire fighters. There was a fair bit of free discussion and there was a fair bit of humour, I suppose, added into the discussions towards the end. There was a whole range of different things that may have been said, but I find it extraordinary and I am having great difficulty in understanding
30 the logic of me making such a statement, when the whole reason for that meeting was to engage the Fire Brigade into the fire fighting process and to alert them to the potential for impact on rural properties."

35 Your Honour, we would say that is a very valid point, regardless of what happened at the meeting, and that is to draw attention, as we have elsewhere in the submissions, to the fact that the purpose of the briefing was to fully engage the Fire Brigade and, to a lesser extent, the
40 Ambulance Service, in the process which was then being undertaken of dealing with the fires which were beginning to escalate.

45 It would defeat the purpose of such a briefing if, in some way, there was then to be an attempt to bind those who were present in some agreement of secrecy, which would then preclude them from going ahead and acting

5 in a way which was appropriate in the light of the information which was being conveyed to them. Now, as we say in paragraph 2 of 187, the final flaw in the way in which this argument has been developed by counsel assisting we suggest is that in *The Canberra Times* on the following morning the substance of the information provided by Mr Lucas-Smith at the meeting was published.

10 Your Honour, the same theme travels into what counsel assisting have put in relation to the motive behind the separate briefing of the Australian Federal Police, and we've dealt with that contention at paragraphs 293 and following. What can be added to the matters that we have there set out is the basic fact that on the day before the briefing of the Australian Federal Police, that is on the 15th, Commander Newton had in fact been taken on the flight on which the Chief Minister travelled to see for herself the extent of the fires and absorb, and no doubt seek any additional information which was being sought.

20 So the AFP had already been engaged in what was happening in ESB by Commander Newton being taken on that trip with the Chief Minister before the actual briefing itself. So it's very difficult to see how that any credence can be given to the suggestion that the briefing of the AFP was in some way hived off because there were some matters that they were not to be told of, when there'd already been communications unfettered with Commander Newton before that meeting even took place.

25 What we've also sought to develop in our written submissions is the evidence in relation to the responses from Mr Murray and Sergeant Kirby and Commander Newton to the various propositions which counsel assisting had put about extra information that they were allegedly not given, and what seems to be a common theme in the passages which we've cited in our written submission is that they would not have done anything different to what actually happened, had they known any more than they were actually told on 16 January. And at paragraph 306 and following reference is made to what Commander Newton said about that in the question which is set out by reference to information being made available to the cabinet on the morning of the 16th and her answer was:

40 "We would have worked completely with Emergency Services Bureau in regard to that. Our arrangements and working relationship with them meant that we would stay in contact with them. They were the lead agency, under these circumstances, and had the majority of the information around what was happening in regard to the fires. Therefore we would have taken their advice and I would have consulted closely as well as the Chief Police Office with Mr Mike Castle and the staff of Emergency Service

Bureau in any action that we would take.”

5 And in the answer is set out in paragraph 308 much the same was said by
Commander Newton in relation to treating of the media when she said in
the answer set out:

10 “Our process would have our media liaison officers or media staff
working with the Emergency Services Bureau’s staff to ensure
that we provided consistent messages across the community,
particularly when we didn’t have the full level of information the
Emergency Services Bureau had at hand, to advise the
community of where the fires were moving. We do have an
independent capability to advise the community and, in
15 particular, our role rests around road closures and general safety
issues, and messages that we will give to the community.”

And then the next answer:

20 “If I had suitable information that that was the case and it was
correct information, then we would be in a position, and I would
always, once again, liaise with Emergency Services Bureau on
that, because it is fire related, to attend in the suburbs and assist
Emergency Services Bureau with fires in the community and
provide additional staff to be able to do that.”

25 And we draw attention to those answers, and there’s more in the following
paragraph 310 to point to the futility of any action taken by Mr Castle or
Mr Lucas-Smith to deprive the Australian Federal Police of full
information concerning the extent of the risk, in the light of having
30 provided that information to cabinet and to the Fire Brigade and
Ambulance Services. It would be a circular situation, we suggest, in any
event, because as Commander Newton pointed out, any action they took
would be in consultation with Emergency Services, in any event.

35 I think in our submissions we also make the point that it seemed to be
little practical consequence, and we do say this at paragraph 295, because
Mr Bennett, the Fire Commissioner, who’d been at the briefing of the Fire
Brigade and Ambulance Services, attended the briefing with the Chief
Police Officer, Mr Murray and Commander Newton. So it would just
40 seem to be extraordinary that Mr Lucas-Smith or Mr Castle had provided
information to one group of officers, a senior member of which then
attended the briefing with the AFP, in circumstances in which it was said
that some of the information should not be conveyed to the Australian
Federal Police.

45

5 So in all the circumstances, your Honour, we'd say that the high water mark, as I put it, the attempts by counsel assisting to provide some specific evidence of an attitude by Mr Lucas-Smith, at least, of withholding information simply doesn't fit in all the circumstances which took place.

10 I'm sorry, your Honour, I'm trying to take too many shortcuts. The part that I glossed over in the submissions related to it was Sergeant Kirby's role and we deal with that at paragraph 302 by quoting the evidence that he gave as to his understand of the position, in the light of the fact that, as we reveal or record in paragraph 300, that he had been to the planning meeting at ESB at 1600 hours on that day.

15 Again, it would just be an extraordinary situation that Mr Lucas-Smith or Mr Castle would seek to withhold information at a briefing of senior officers, but then be content with Sergeant Kirby coming to the planning meeting, at which he had every opportunity to absorb the latest discussions and the latest information which was available at that point in time, and it is in that context that we have quoted his evidence in
20 paragraph 302, again indicating that nothing changed, as far as he was concerned, in the middle of the quote he was asked this:

25 "So are you aware of whether or not any additional resource planning was done overnight as a result of the information that you gave to Commander Newton and Superintendent Lines?---No, based on the information I had from the possibility of the fire reaching the urban fringe, I was satisfied that the plan I had put in place was adequate for that time.

30 The question you had put in place?---The plan that I'd already put in place and the amount of people I had on-call was satisfactory.

35 How many people did you have on-call through the SRS?---I had approximately 30 people, and then with the time delay that we had I knew we'd have another 60 to 80 people the could be utilised from the day shift working on, and the afternoon shift coming in early, if required, being a changeover at 3 o'clock and again the possibility of four fire impact on the urban fringe being
40 8 o'clock at night."

And generally he had indicated that nothing changed as far as he was concerned. And in the light of the information that he was given, as far as he was concerned, the necessary arrangements were in place.

45 Your Honour, following the survey of the evidence dealing with the two

meetings on the 16th we move in our submissions to deal with issues concerned with 17 January. I just want to take the opportunity to refer to what we've said in paragraph 316, harking back to the communications with Mr Cheney and the possibility of him appearing on WIN TV earlier.
5 We picked up what is said in counsel assisting's submissions that someone considered that the ESB, and your Honour should infer to the inclusion of the Mr Cheney, should be the source of reasonable advise to or threats to the public, and that such risk as there was should not be discussed publicly and certainly not without the imprimatur of the ESB.

10 Further, if confronted with a position by someone in a position to speak with authority on the subject the risk would be downplayed. What we've drawn attention to is the fact that if that had been the position of ESB, and particularly of Mr Lucas-Smith and Mr Castle in relation to Mr Cheney,
15 that they were most anxious that he should not spill the beans, as we've said, on television.

That, first of all, they were aware that nothing would stop Mr Cheney doing that if that's what he choose but, in any event, no attempt were
20 made to preclude him from the subsequent planning meeting, which thereby providing him with a further opportunity to gather information as to the present position, both in terms of the extent of the fire and what was or was not being done to either prepare for it or to inform the public of the position.

25 So the fact that Mr Cheney was permitted to wander in and out of planning meetings generally, but specifically allowed to attend the meeting on 17 January again we submit is at odds with there being on foot, this sinister plan to deceive the public from knowing the truth in
30 relation to the risk posed by the fire. The fact that Mr Cheney didn't do anything, by way of going on television or otherwise taking steps is immaterial. The fact is that he had every opportunity to inform himself of what was going or not going on, and nothing was done Mr Castle or Mr Lucas-Smith to deny him that opportunity.

35 So your Honour, we would say that the proposition that there was this quite improper agreement between Mr Lucas-Smith and Mr Castle just does not survive in the light of the evidence which I have taken you to, and which is otherwise set out more expansively in the written
40 submissions. And with the earlier remarks which I have made about the transparency and the collegial environment in which information was being received and disseminated and decisions were being made and implemented, it just seems implausible in the middle of all of that activity, these two men could conceive and implement an arrangement of the type
45 alleged by counsel assisting.

Your Honour, the other dimension to the basic question of the adequacy of the warnings is what we suggest to be the situation that nobody predicted or had an expectation that the fire would act in the manner in which it did, and in the time frame in which it did on 18 January. That becomes of
5 added significance because of the submissions by counsel assisting that, based on Mr Cheney's evidence your Honour could be satisfied that, as was said, both these fires travelled more or less as would be expected from a substantial wildfire burning through severely drought affected forest and
10 grassland country under extreme conditions. Your Honour, we would say that is a conclusion that you clearly should not reach.

Mr Lakatos yesterday took you to the evidence of Mr Bennett and I won't repeat what he read to you concerning Fire Commissioner Bennett's activities and view on the morning on 18 January in attending to his
15 parents in Duffy. And we've set out in paragraph 62 of our submissions the evidence which Mr Bennett gave and which Mr Lakatos read to you yesterday and I won't repeat it, but the thrust is clear and that is that Mr Bennett certainly would not have allowed his parents to remain in the circumstances in which they did had he envisaged in any way the extent
20 on impact of the fire, or the extent of the embers.

His view is particularly significant because of the role that he had in the planning of the operations directed at containing the fires, since almost their outset and his expertise in fire fighting, which meant that if he of all
25 people failed to appreciate the dangers which were present at Duffy on 18 January, then it's highly unlikely that anyone else would as well.

Your Honour, what I would like to do is take you through our submissions which involves jumping about a bit because we've raised the issue in
30 response to a number of occasions on which the issue of expectations have been raised prior to counsel assisting submissions. What I would seek to do is to effectively gather together that material for demonstrating the consolidation of all of that evidence to the one effect, namely that nobody, but nobody, was able to predict precisely what happened on 18 January.
35

It's slightly out of order, but nevertheless doing what I forecasted and picking up the references as I go through, can I take your Honour to
40 paragraph 59 of our submissions where we refer to the evidence of Mr Cooper, whose views otherwise seem to have been treated with respect by counsel assisting. He was asked this question which we've set out in full:

45 "In any event, you set out there your thoughts and actions at the time given all of the things that you experienced on that day and taking into account your experience and your knowledge of what

the weather was like that day, would it be fair to say that what you experienced was many factors beyond any worse case scenario that you could have imagined occurring that day?"

5 And his answer was, "Yes, I think that is a fair comment." I've referred your Honour to Mr Bennett's evidence and I won't go back to that. What I'd like to do is take your Honour to paragraph 321. We there deal with Mr Cheney, having dealt with some of his evidence in other aspects of our submission. The points that are made in paragraph 321 seem to crystallise
10 what we suggest is important in relation to the question of agreeing to which you accept Mr Cheney's evidence particularly in the light of what seems to be the unqualified admiration of counsel assisting.

15 What is clear of course is that Mr Cheney would not be, I would suggest, someone who would be certainly under the new uniform Civil Code which operates under the Supreme Court and District Court of New South Wales an independent expert. The fact that he was a witness to the events and a person who is, to some extent, in conflict with people such as Mr Lucas-Smith would mean that he's not a person who would gain
20 acceptance under the new code as an independent expert.

That similarly needs to be recognised that his expertise was limited in the sense that there's no doubt that he spent a long time in the recent years investigating fire spread and other fire behaviour but had little opportunity
25 in the last 35 years since 1971 of gaining operational experience in other than fires which were conducted in a controlled environment. His role, generally, we would suggest is curious in that notwithstanding his obvious interest and expertise in some areas, his intermittent participation in planning meetings was an unusual approach for him to adopt. As I
30 mentioned earlier, he had unfettered access to not only the planning meetings but anything else that was happening in ESB, and the fact that he chose to turn up a couple of times, not others, is interesting to say the least. And the fact that he then made little or no contribution to the discussion when he was there, again is an interesting aspect of his
35 behaviour.

I suppose I have the advantage of not having heard or seen Mr Cheney, but I must say in reading some of his evidence it does seem that he seemed to be very much motivated by a desire to demonstrate his
40 intellectual superiority from a forestry point of view over ESB personnel, particularly those who came from a background in national parks.

But your Honour putting all of those matters to one side, what we say really is significant in his credibility on fire predictions throughout the
45 period, is the evidence of what he did on 18 January, and we deal with that

in paragraph 321. To adopt a colloquialism, I suppose the proof of a pudding is in the eating and what we say is significant is that on the very day when what was undoubtedly the biggest fire event in his professional career, he went to the wrong place.

5

We preface the list of circumstances which undermine the reliability of his predictions by pointing out that even if he was of a view that the risk was greater than what was being acknowledged by others on the day before, he hadn't conveyed those views. In the course of the planning meeting on 17

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January and then on the 18th, as we list the circumstances, he sent his son and Peter Hutchins up to Mt Stromlo to adopt a vantage point from which they could observe the behaviour of the fire when of course as we all know that left them very much exposed to the fire and in circumstances in which they had to beat a hasty retreat.

15

Consistently with Mr Cheney failing to predict what was happening, he had spent most of the significant fire activity day in his career at the southern end of the territory anticipating the fire crossing the Monaro Highway and only late in the afternoon I think, returned to the urban areas where he was able, well 4 o'clock in fact we say in the next point, where he was able to make any observations of what have been the most serious part of the fire.

20

Similarly, and consistently, we say that it's significant that he took no steps whatever to tell the CSIRO management, of course by whom he was employed, that their facilities at Black Mountain were significantly threatened on his view of the likely course of the fire. And then conceded that the extreme fire spread in the grasslands from 2 pm was, without hindsight, unable to be predicted and we refer to his evidence to this effect:

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“On your expectations moving through grassland the fire danger index was 60 would be, on the latest information available in terms of predictive devices, would be a rate of approximately 3.5 kilometres per hours?---That's correct.”

35

“As it turned out from your work, the fire travelled about three times of that between two and two thirty through the eaten out grasslands to the west of Canberra?---That's correct.”

40

“In terms of say 6 o'clock Saturday morning, and making predictions that if the fire gets into the grasslands, the best prediction that you would make at that time not using hindsight would have been using the available metres, 3.5 kilometres per hour?---That's correct.”

45

5 And again that indicated that what had happened was far different to what
he had expected from his earlier calculations in relation to the behaviour
of the fire. So we've set out that evidence in a little detail. your Honour,
firstly as part of the theme which has developed throughout the
10 submissions of demonstrating that nobody predicted precisely what was
happening on, or what happened on 18 January and secondly, for the
collateral point of demonstrating that rather than accepting without
question, as you are urged by counsel assisting, the evidence of
Mr Cheney, there needs to be some scrutiny applied before his evidence is
15 used as a basis of any adverse findings against Messrs Lucas-Smith and
Castle.

15 Now, your Honour, as we come back to the same these at paragraph 336
in dealing with the fire prediction map prepared by Nick Gellie
Hilton Taylor, and Mick Lhuede I pause to draw attention to the fact that
the presence of someone like Nick Gellie who's outside the public sector
employment environment released into the ACT is again inconsistent with
20 any attempts by Messrs Lucas-Smith and Castle to control access to and
dissemination of information, his presence at planning unit meetings is
inconsistent with that ever being a motivating factor.

25 However, we go onto point out that the map indicates the fire spreading
predictions for McIntyre's Hut fire to be in the vicinity of Mt Stromlo by
8 pm and that the concentric lines never touched the suburbs in Weston
Creek. Mr Lhuede indicated that the reference to Narrabundah Hill was to
the Pines and explains why that was not a specific reference to the suburbs
because of the simple fact that they had not predicted the fire getting that
30 far even, as we pointed out, assuming the unattended spread as the worst
case scenario and the answer quoted in paragraph 338 confirms that
Lhuede he said:

35 "No, it just wasn't specifically identified reaching the urban edge.
We just identified the Narrabundah Hill Pines, I suppose, as the
last eastern most component of the rural land to be affected."

40 We draw attention to the fact that it was not Mr Lucas-Smith or Mr Castle
conducting this aspect of the meeting and that it was Mr McRae in
consultation with the other planners who prepared the map.
Sergeant Kirby was at the meeting and his evidence indicates that
although he heard the predictions of the fire reaching Stromlo by 2000
45 hours, he thought that these were only possibilities and it might occur and
we set out his answer to that effect:

45 "And the word prediction in the case simply means the worse
case scenario or a possibility that this would happen. It wasn't a

5 definitive statement saying the prediction is this is how it's going to happen. Probably a wrong a choice of word in my statement, it was a possibility. It was a consideration it might occur that it was something that was predicted so again it was a wrong choice of word in my statement."

10 Similarly Commander Newton's evidence about the information she was provided by Sergeant Kirby is to the same effect and we set out answer in paragraph 342:

15 "To this effect on Friday night I was advised that it may hit the Uriarra area by midday on Saturday, the Cotter by 4 pm and Stromlo by 8 pm. On the advice I was given by Sergeant Kirby, the indication was it would be still within the pine forest area and there was indication it would hit the suburban area and that this was the worst case scenario."

"This was on Friday night?---Yes."

20 So as we point out, even in the worst case scenario, there was no positive suggestion the suburbs would be impacted by a fire on the following day and we'd take issue with the contention by counsel assisting that the could be no question that there was a significant risk that the urban area would be affected as revealed by the evidence. If I can just jump a couple of pages, your Honour, to paragraph 350 where we specifically deal with this issue of expectations.

30 This passage of our submissions is in the context of the submission by counsel assisting that notice 30 minutes before the fires hit the urban fringe was not sufficient and in that context, we make the opening remark that counsel assisting failed to properly differentiate between what actually happened and what people expect to happen. And we set out the reference to the submissions in which the suggestion is made that there was no basis to assume that a warning of 30 minutes was ever going to be sufficient.

40 We draw an issue later as to the timing and the notice, but nevertheless leaving that to one side, and bearing in mind Mr Bennett's evidence to which I have already referred, that of his understanding when he was visiting his parents in Duffy, we proceed to deal with specific aspects of the evidence on this question of expectation. In paragraph 352, we refer to the fact that the SEWS was being prepared between 1330 and 1400 hours at which time the McIntyre's Hut fire was still west of the Murrumbidgee. According to Mr Cheney's scale map, it was at 1330 hours over 12 kilometres from the interface.

Pursuant to the direct observation by Mr Bartlett, the fire did not spot over the Murrumbidgee until 1420 and we set out Mr Bartlett's evidence on that point. Then we go onto say at 1430, Mr Cheney's map has the fire front over 5 kilometres from Duffy at 1400 when the SEWS was being finalised, the fires were still over 8 kilometres from Duffy, a distance (approximately 4 times further away from the urban edge than when the SEWS issued in 2001.) And parenthesis have been used in that sentence to emphasis the significance of that fact. Experience was of no assistance in this context if the precedent in 2001 was to be followed because what was done here was far more a cautious approach than that which had been adopted then.

And we go onto to say the speed at which the fire moved from 1300 to 1500 hours is something that must be properly acknowledged. Even Mr Bartlett in the helicopter seems not to have appreciated the speed with which the fire front was moving towards the interface. He didn't foresee danger to his own depot until the fire was a few hundred metres away and didn't mention a concern for the urban interface at, or until, or first until 1358 when he made radio contact. Which again was effectively too late.

In paragraph 354 we refer to the evidence of Mr Taylor who was part of the planning unit who prepared the fire prediction map and in his statement we remind your Honour he said this:

"I don't think anyone comprehended or could have comprehended the rate which the McIntyre's Hut fire jumped the Murrumbidgee River and came across the open ground between the Murrumbidgee Corridor and Stromlo Forest. This happened during the early afternoon. The fire just seemed to burn across bare ground defying all the models."

Your Honour, the reference to "a bare ground" leads to the related topic, which is dealt within the next part in the context of counsel assisting claiming that Mr Lucas-Smith had falsely and deliberately given the public the impression that there was a kind of barrier that he considered had a realistic prospect of holding the passage of the fires. We deal with that in the context (a) of refuting that proposition and (b) in the context of expectations, because it was clearly the expectation of a number of people whose evidence we cite that the grasslands would have a major effect on the progress of the fires, which turned out unexpectedly not to be the case.

In paragraph 357 we refer to the proposition that there was a justifiable level of confidence within ESB as to its capacity to deal with the fires, should they eventually make a run towards Canberra. This was in part

based on the experience in 2001 where the fires were successfully fought on the interface. And we refer to the fact that there was a historical basis beyond the 2001 fires which similarly justified that confidence, and we point to ...(inaudible)... in counsel assisting's submissions a quote from the Rural Fire Control Manual by reference to the 1939 fires that left out what seems to be relevant in this context, namely the statement due to the eaten-out nature of the grasslands, the firebrands did not start significant spot fires, as there was little grass fuel available to burn. So that from many years back there have been an amply justified basis for coming to the view that the grasslands have an established capacity to contain the fire or at least provide circumstances in which it could be contained.

And we then proceed in paragraphs 360 and following to refer to the evidence of various witnesses who gave evidence of that expectation of the likely negative effect of the grasslands. In paragraph 361 we refer to the evidence given by Ms Vivian Raffaele, an experienced bushfire fighter, who said:

“The thing that's done me was when it hit the property boundary where the tree line virtually stopped and you got into the drought-affected paddocks. The fire just virtually stopped. It just stopped at that point. When I went home that day I thought we would still have a reasonable chance, if anything did crop up further, that we would be able to contain it out in those grasslands because it just stopped. It just stopped dead in its tracks.”

Being, of course, a reference to what had happened only the day before. Mr Graham gave similar evidence in the passage we quote in paragraph 362 when he said, “My view at that point was still that when the fires left the forested areas containment may have been possible in the grasslands.” And in the next answer which is also quoted in paragraph 363, he said:

“But I think that my expectation was that once it hit the river and hit even our grasslands, that the containment was possible and never envisaged it doing the impact that it did, maybe until the morning of the 18th.”

Mr Cooper, again as I indicated earlier, someone who seems to have the respect of counsel assisting, gave an answer to the like effect when he said in the passage we quote, “There was a general expectation as soon as it hit the grazing land it would be containable.” He went on to say:

“I thought that it would stop as soon as it came out of the plantation. I never perceived that with all my experience that it was going to burn the depots and the houses. I still have those

thought processes. I still thought it would stop. I expected that once it came out into the open grazing country which was just bare dirt we would be able to undertake successful suppression efforts.”

5

It’s significant, we suggest, that none of these passages are referred to in counsel assisting. They are inconsistent with the assertion made that Mr Lucas-Smith was being deceptive when asserting publicly as he did that there was a containment process available and secondly, supportive of the proposition that we make that no one predicted the outcome of the fire in the light of the expectation in this particular instance that once the fire, if it ever did reach the grasslands, particularly in view of the drought conditions, which seemed to prevail, it would be containable.

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Mr Cooper, we refer in paragraph 367, repeated it in an answer during re-examination by Mr Lasry when he said, “I assumed that once it came into that open country we would be in a better position to be able to undertake a successful suppression operation.” And in paragraph 368 the question is quoted where he was asked, “Until 9.30 on the morning, at least at 18 January the prospects of the fires coming to the urban interface was not one that you were seriously considering at that time?” His answer was, “No, it’s not.”

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And paragraph 369, we quote him again when he said, “The grasslands in early January were largely eaten out around much of the ACT,” - I’m sorry. I’m sorry, I jumped ahead. Mr Cheney’s evidence, sorry, which I referred earlier, is quoted again with specific reference to his expectation that the grasslands would be a deterrent to the progress of the fire when he stated:

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“The grasslands in early January were largely eaten out around much of the ACT and New South Wales and that did have a considerable impact on slowing down the fire spread when it came out of the forest. Elsewhere in New South Wales the fires largely came out of the forest and stopped on the eaten out grasslands and it is a fairly common event that when we have a bad forest fire season we usually have an easier grassfire season because the grasslands have been eaten out.”

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Again, that significant passage does not find its way into counsel assisting’s submissions. Paragraph 370 quotes the New South Wales officer, Ms Julie Crawford, who was quite extensive on the topic. Her evidence is significant, we suggest, because of her experience. She gave evidence to like effect when she said:

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“If you just look at it, there is the Murrumbidgee River to cross.

5 There is a huge amount of rural paddocks, which were in the
middle of a drought. There were no fuels in them. A lot of them
were just dustbowls. The advice I got back through my divisional
commander was there is nothing you can do once it is in the
10 timber. Once it gets out in the cleared country, that's when you
hit it. That's what you would expect. When it came out in the
clear country is when you would attack the fire and when you
would be able to get it. At least the rate of spread would drop.
What happened when it came out into the cleared country, from
15 my discussions I had with people who were there at the time, they
couldn't believe it. It hit the clear country and just took off. It
was a wall of flame across paddocks that had nothing in them.
The rate of spread was far more excessive than what people
expected. What are you going to tell the people of Canberra?
20 That it is coming and yes, you will get it in the cleared paddock,
which is what everyone was hoping would happen."

And specifically in the context of warnings, she went on to say this as we
quote in paragraph 371:

20 "It would be a really difficult decision because you've got big
roads, you've got rivers, you've got open paddocks. I don't think
anyone expected the fire to get to the urban area in such a short
time. When it did get there I think we all had the same
25 confidence that we have had for a long time, which is that the
ACT Fire Service have such a fantastic ability to hold it on the
edge."

Similarly, Mr Bruce Arthur from the New South Wales Rural Fire Service
30 said this, as we quote in paragraph 372:

35 "Our consideration at that time was that if it did hit the
grasslands, given the degree of overgrazing and the bareness of
the paddocks, we had a very good chance of dealing with it once
it came down off the hills."

We refer then to the evidence of Ms Ferry, who quoted somebody at the
meeting, probably Mr McRae, saying that, "The grasslands today may put
40 the fire out," on the morning of the 18th. Mr Prince expressed the same
sentiments in the passage we quote in paragraph 375 when he said this:

45 "Obviously, with the expanse of grasslands between the pine
forests and the urban interface, a lot of people thought there was
an opportunity there or a chance that the fire-fighters would be
able to deal with those fires in those areas. I think a number of

fire-fighters would have thought that if fires had come out of the pine forests in the grasslands, that fire-fighters would have been able to deal with it.”

5 We then quote the evidence of Mr Lucas-Smith to the effect that he genuinely held the same view as that shared by the witnesses to whom I’ve just referred, and in the answer quoted in paragraph 376 he said this:

10 “I think it also points out that this is a fire spread without intervention. This is unattended fire growth. There were a number of things in the way there. Certainly from our point of view we had in our minds the strategy of the extensive clear area or open area of the grasslands to the east of the Murrumbidgee River which gave us very strong, certainly in my view, gave us
15 very strong control line opportunities to prevent that. I had to say that I had a fair bit of confidence that we could do something”.

He then goes on to quote his experience in over 3,000 fires and particularly with the Stromlo fire in December 2001 and then in the
20 passage we’ve underlined towards the bottom of my page, he says this:

“So I have some, I believe, reasonable expectation that some suppression effort would be successful and there would be some amelioration of the impact on the ACT.”
25

And then he goes on to say, “I think events overtook us quite significantly as things started to accelerate at around 1 o’clock.” And then in the passages which are underlined which follow, he went on to say this:

30 “At 1400 hours, as Mr Cheney has quite rightly pointed out in his evidence, the fire at that time was still to the west or just on the western slopes of Mount McDonald which is about 13 kilometres or more from the urban edge of the ACT and still a number of kilometres west of the Murrumbidgee River. It was really the
35 Murrumbidgee River and the open between the Murrumbidgee River and the western side of Stromlo and the western side of the urban areas which gave us our best opportunity for fire suppression of this fire as we moved out of the forest environment into the grass environment and into a grass
40 environment that in fact with very little grass on it because of the drought conditions of the ACT was currently in. I think that then the speed and the spread of that fire in fact went across the Murrumbidgee River and impacted into Duffy and the first instance was an hour, or an hour and ten minutes at the very most
45 from that time out, so to be able to travel 10 or 11 kilometres in

that short period of time I think took everybody by surprise.”

5 Mr Castle of course was not an operational officer but nevertheless had from his own involvement in the discussions which have been taking place, the same understanding which we set out in paragraph 378 in the evidence which he gave when he said:

10 “I think there was always the understanding that between the pines between the Murrumbidgee and the urban edge, there was grasslands as I think I said in my - my expectation and my understanding was that there was likely to be success when it comes out into the grasslands and there were grasslands in between there.”

15 So Mr Castle, although not someone qualified to form his own view, certainly, has certainly been led to believe that that was the expectation that would effect the future progress of the fire.

20 It’s relevant in this context, your Honour, to bear in mind the assertions of counsel assisting that the tornado was largely irrelevant. We would say one just can’t discount the tornado feature of the fires, partly because the tornado effect was the product of the fires which were in existence and thereby demonstrated their intensity in that they were created this phenomenon, but secondly in relation to the extent to which damage escalated once the fire approached the urban edge.

25 Again, your Honour, nobody in the evidence had any inkling of an expectation of that effect and in the general upshot, your Honour, we would submit that it is just overwhelmingly established that nobody who gave evidence, Mr Cheney included, had a real expectation that by mid afternoon on 18 January the fire would have reached the urban edge with the intensity which it did.

30 That’s a fundamental finding we submit which largely effects many of the submissions made by counsel assisting, none the least of which is the alleged deception by Messrs Lucas-Smith and Castle of the public by concealing the truth, and secondly any failure on their part in promulgating a warning in a timely fashion. It’s unrealistic, we submit, in the light of the evidence which was lead as to what happened to have demanded of Mr Lucas Smith and Mr Castle some degree of prescience that no one else who was involved shared.

35 Your Honour the final dimension to the evidence on this aspect comes in paragraph’s 387 and following when we deal with the expectation’s of the New South Wales personnel. Like the officers to whom I have referred already, we do not in any sense mean to criticise them over their failure to

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5 be more precise in their predictions as to the behaviour of the fire. Similarly we make no such criticism of the New South Wales Rural Fire Service in this context but we simply point to the circumstances of their operations at the time as circumstantial evidence objectively demonstrating that they, with all their resources and experience, had no better expectation of the future conduct of the fire than any of the witnesses from the ACT to which I have already referred.

10 We set out in paragraph 389 the evidence of Mr Winter to confirm the obvious and that is that there was a sensitivity within the New South Wales organisation of the position of residents within the ACT so that it can't - it can't be said that the evidence of the views of New South Wales were irrelevant because they took into account the possibility of harm being suffered in the ACT. Now quite clearly because of the McIntyre's Hut fire they had a consideration of the potential for damage occurring within the ACT, notwithstanding their primary role was to control the fire in New South Wales. That is confirmed by the passage we quote from Mr Winter in which he refers to the fact:

20 "The National Parks and Wildlife Service officers had established a public information ...(indistinct)... in part resulting from the existing fires on the southern part of Kosciuszko National Park as appreciation grew regarding the sheer number of new fires on the northern part of Kosciuszko National Park. This team began working to promote additional information about the progress of the fires within that park. One of their key communication targets was Canberra media. I was kept constantly apprised of their activities in promoting the bushfire situation to residents in that area and directed my staff to ensure that their updates were posted on our web page. Comprehensive written daily updates were provided to all southern New South Wales media by this group in relation to the fires within the Kosciuszko National Park."

35 We then refer to a number of situation reports prepared by the New South Wales Rural Fire Service. The first of which was at 1600 hours on Thursday 16 January in relation to the McIntyre's Hut fire. I think Mr Lakatos might have drawn attention to this so I won't dwell on them other than to point to the fact that under the heading "threat analysis" reference is made to the fact that the fire still poses a threat to ACT if it escaped from the current containment lines, but it identified the threat as being the major pine plantations in the ACT and the ACT water catchments, and any private properties in those particular rural areas that didn't as late as Thursday 16th, make any reference to an analysis of the outcome leading to a prediction of damage to urban areas.

5 We refer in paragraph 392 to the evidence of Mr Wade who arrived in
Curtin on 16 January. He was alert to the fact that two information
officers from ESB had little practical experience and that he had added
responsibility as a result. We refer to Mr Winter, the Director of
Corporate Communications, who had maintained an awareness of what
was happening in the ACT through Mr Wade and then to Mr Wade's
evidence. He in his statement in paragraph 8 where we remind you that he
said the next morning 17 January:

10 "I called into the Yarrowlumla Fire Control Centre in
Queanbeyan, there I was given a brief run down on the
McIntyre's Hut fire, and it was explained to me by the Operations
Officer the potential threat to the pine plantations on the outskirts
15 of Canberra".

And he then went on to talk about the incendiary drops, which were
contemplated, but significantly only became aware of the potential threat
to the pine plantations in the ACT. The submissions then go on to refer to
20 the press release of Mr Winter upon the 16th, again not making any
reference to anything beyond the ACT border. In paragraph 397 we refer
to the situation report published at 1100 hours on 17 January 2003 where
the same language was used in the sit rep to which we referred earlier on
16 January as identifying the threat to the major pine plantations in the
25 ACT and the ACT water catchments. And then at 1200 hours on the 17th
we refer to Mr Wade's participation in the press conference which he
described in his statements in these terms:

30 "I returned to the ESB Control Centre and participated in a press
conference. I commented on our involvement in operations
within the ACT and the current threat which existed based on
forecast weather from the briefing I had at Queanbeyan, I was
constantly recording information that I handed back to
John Winter".

35 During the press conference he was recorded as saying this in answer to
the first question from the media:

40 "It certainly has - as similar to the ACT situation the threat was
on the western side with the easterly and south easterly, that has
totally turned around, the threat is now to the southern and eastern
sides and of course that means it's more heading back towards the
ACT."

45 And then on the top of my next page the last question and answer in the

media was “What’s the level of threat to the pine plantation that you referred to from which the fires” something - confirming again that the identified threat at that point still was only in relation to the pine plantation in the ACT. And Mr Wade told the press this speaking with the Incident Controllers:

“There is a certain concern for it, it’s 2 kilometres or so, we’ve seen spotting activity to a kilometre, a kilometre and a half with these fires, so we’ve staged resources on the border. We certainly are looking at what we can do as a secondary containment. Should it break that containment there, there is a real threat to that pine forest but everything is holding at the moment”.

And then at 1200 hours Mr Winter issued what was to be the last media release, contemporaneous with the press conference in which he again identified the major pine plantations in the ACT as the area likely to be the subject of any impact.

So we refer to those passages, your Honour, to demonstrate that, certainly prior to 18 January there was no indication of documentation being issued by New South Wales or by statements being made internally or externally within that organisation of threats to the urban areas of Canberra. That position continued as we’ve demonstrated in paragraphs 404 and the next sit rep issued. And then in paragraph 405 we point to a circumstance which again reflects the lack of concern by the New South Wales organisation for what was happening in the ACT because Mr Koperberg relocated Mr Wade to Jindabyne apparently on the basis that the area there was likely to be one of greater concern.

And it wasn’t until 3.30 pm on 18 January that Mr Wade was finally deployed back to Canberra when it became obvious that the serious threat of the fires had already manifested itself in that area. And again whilst it’s a simplistic matter to refer to, it is consistent, we suggest, with the expectations of everybody that it was not likely to be a major drama within the ACT urban areas on or as early as the afternoon of 18 January.

Reference is made by Mr Lakatos and we point to them in passing of the fact that where there was a genuine concern for the residents of the rural areas, those lessees were given warnings on the evening of the 17th consistent with the view then current that they were the persons most likely to be at risk. And if particularly Mr Lucas-Smith and Mr Castle were in any way reluctant to issue warnings in the light of any view that they held concerning the real possibility of risk it would be inconsistent, we suggest, that they had gone around on the evening of 17 January causing warnings to be given to occupants of premises in areas where they

had in fact formed the view that a degree of risk was present.

5 We also refer in the paragraphs in the submissions which follow, again neutrally without in any sense being critical of those involved, of the fact that the New South Wales authorities have suffered significant harm from the progress of the fire which, logically enough, they would not have suffered willingly or in circumstances in which they had any expectation that the fire would have followed the course which it did in causing what I think was said to be over \$1.5 million damage to their property.

10 We refer in paragraphs 408 and following to the base camp at Greenhills which caused problems in the sense that the crew eventually had to go into self-protection mode in a concrete bunker and survived, but all other buildings and property in the camp was destroyed. And we point also to the events which occurred at the Stromlo settlement where the New South Wales Rural Fire Service had established a base camp which was occupied by those who were ...(indistinct)... until the sudden realisation that the fire was upon them whereupon they had to evacuate, and again the loss of significant property.

20 The point, as I've said earlier in referring to those circumstances, was simply to confirm what we have already contended, namely that nobody at this time had any idea that the fire would travel at the rate it did or certainly they would have acted in a manner which was different. As late as mid-morning on the 18th as we refer in paragraph 413 the sit rep issued by New South Wales made no reference to threats to the urban areas and confined its analysis to the identification of the threat to private property and major pine plantations in the ACT and for the ACT water catchments, specifically in Uriarra without going further to identify the threat to the urban interchange.

30 Paragraph 414, we conclude by referring to the evidence of Mr Lhuede, who described the extent of the worst case scenario fire prediction in the message form he signed off on the previous night as not specifically referring to or identifying touching the urban edge, but just identifying the Narrabundah Hill pines as the last Easternmost component of the rural land to be affected.

40 So your Honour, we would say all of that evidence comes together in a compelling demonstration of the fact that there simply was no expectation by anybody of the circumstances, which prevailed on 18 January. And insofar as it is relevant for your Honour to concern yourself with the question of why no better warning was given to the community of Canberra, the answer lies in that factor.

45 Your Honour, I'm about to go on to something else. Would it be

convenient we finish slightly earlier and I resume in the morning?

HER HONOUR: Yes, that's fine.

5 MR LASRY: Your Honour, could I just raise just a timetable issue? I
understand that Mr Archer can't be present tomorrow and therefore
proposes to make his submission next Monday, which is certainly
convenient so far as we're concerned and I'm sure won't inconvenience
10 anyone else. And I think that means that the only other submissions to be
made or that can be made this week are the submissions to be made by
Mr Watson.

MR LASRY: And I assume that therefore means that for this week we'll
conclude at some stage tomorrow.

15 HER HONOUR: In all probability we'll finish tomorrow.

MR LASRY: I'll just ask my learned friend Mr Hastings to indicate how
much longer he thinks he's got to go and then we can work out the time.

20 MR HASTINGS: I'm not quite confident. I think I'd finish well before
morning tea, your Honour.

HER HONOUR: Fine.

25 MR ARCHER: Concluding by lunch then, I would think.

HER HONOUR: That gives some indication to all persons concerned
then.

30 MR LASRY: Thank you, your Honour.

HER HONOUR: All right. Well, we'll adjourn until 10 o'clock
tomorrow morning. Thank you.

35

ADJOURNED TO 12 JULY 2006 AT 10 AM

[3.53 pm]

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TRANSCRIPT OF PROCEEDINGS

CORONER'S 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

**10.03 AM, WEDNESDAY, 12 JULY 2006
(Continued from 11/7/2006)**

2003 Bushfire Inquiry 12/7/2006 305

CF 154/03

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HER HONOUR: Yes, you ready, Mr Hastings?

5 MR HASTINGS: Yes, your Honour. Your Honour, before I continue, there are a number of more discreet issues that I wish to briefly canvas by reference to what is already in our submissions. One of the matters that I wish to go to is a response to matters which have been raised by counsel assisting in relation to the reaction of, particularly Mr Lucas-Smith, to the outbreak of the Bendora fire on 8 January.

10 Mr Lakatos has already covered some of the matters that are put in reply, particularly in relation to the suggestion that the available resources were not adequately exploited, and I won't go through those issues again. At around paragraph 88 of our submissions we deal with some additional matters which I'd briefly remind you of on that question of the adequacy
15 of response to the Bendora fire and in relation to the propositions which have been put to the effect that had an adequate response then been made, many of the issues which arose thereafter would not have occurred.

20 What we emphasise in paragraph 88 and following is the reaction of Mr Lucas-Smith to the information which came in on the afternoon of 8 January about the various fires, including the Bendora fire, which led him to the view that comparatively the Bendora fire was small, and that the McIntyre's Hut fire constituted the main cause for concern.

25 We've set out in paragraphs 90, 91 and 92 the original information which came in by radio concerning each of the fires, being the Bendora fire, the Stockyard Spur fire and the Gingera fire, and then in paragraph 93 we refer to the information by way of contrast which Mr Lucas-Smith received concerning the extent of the McIntyre's Hut fire which, as he
30 later said in evidence, was of a far greater magnitude being, as we set out in paragraph 93, reported as 2.5 kilometres long by 200 metres wide, with flames 2 to 2.5 metres high. That was confirmed by the telephone conversation with Mr Prince, which is also quote in our submission in paragraph 94.

35 So that we say that Mr Lucas-Smith quite appropriately had come to the view that comparatively the fire in the area of McIntyre's Hut was a much more significant event. In those circumstances, we suggest it's quite unrealistic to suggest that more attention should have been given to the
40 Bendora fire in circumstances which could well have avoided the events that followed.

We set out in paragraph 98 what Mr Lucas-Smith said on that topic, quite specifically indicating, as he said:

45

5 “The data that we received back from the field on the evening of
8 January indicated the fires in the ACT were small. One
information we had on the McIntyre’s Hut fire was indicating the
fire was large and had the potential to be much larger, and also
the potential to impact on ACT assets. As a result of that, it was a
higher priority in my view than the Bendora and Stockyard fires.”

10 Your Honour, we say that is a further significant matter in the matrix of
circumstances which prevailed in the light of the attack on
Mr Lucas-Smith is being now made by counsel assisting. In the light of
the information which was available to him, we suggest it’s quite
unrealistic that he should have been concerned to deploy all available
resources in the direction of Bendora when his main preoccupation,
because of the size and the immediate threat to the forests of the ACT,
15 was reasonably focused upon the McIntyre’s Hut fire.

20 Your Honour, the other circumstance which I just want to mention is - I’m
sorry, perhaps I should just take you to the further passage of
Mr Lucas-Smith’s explanation at paragraph 108 where he reiterated the
same point of view in the answer we quoted when he said:

25 “The problem I am describing is we had multiple fires. We really
had to make a decision very early in the piece as to where that
priority lay. The McIntyre’s Hut fire was the fire that was
reported in the first instance and is growing rapidly, and had the
potential to impact upon the Uriarra pine plantation if it continued
to spread eastward in the direction it was going, so we deployed
our heavy plant to construction of fire breaks around the Uriarra
pine plantation.”

30 And as I’ve said, your Honour, we would submit that was quite an
appropriate and reasonable decision in the circumstances, and it is only
with the benefit of hindsight that one can support, in any way, the
submissions now made by counsel assisting that that was erroneous and
35 that with some unpredictable foresight he should have realised that
resources should have been deployed at Bendora, in order to nip in the
bud what turned out to be a major threat to the ACT.

40 Your Honour, at paragraphs 113 and following we take umbrage at what
has been said in the submissions of counsel assisting that the decision
made by Mr Lucas-Smith, which we submit in fact was not a real decision
but his acquiescence in the decision not to send in personnel that might to
deal with the Bendora fire was done casually, even flippantly, to use the
words of counsel assisting in paragraph 1,148 of their submissions. We
45 say that is quite unjustified and, indeed, a gratuitous slight on

Mr Lucas-Smith in the circumstances in which he approved of the decision not to send personnel back into the fire that night.

5 We've set out in paragraph 113 the full text of the telephone conversation that he had when in the car travelling to Queanbeyan, when he conveyed his approval to Mr Graham. Again, if one looks at what is page 44 of my print of the submissions in paragraph 113, the conversation between Mr Lucas-Smith and Mr Graham commences with the reference to the Bendora fire being relatively small, approximately 500 square metres
10 burning very slowly. That reinforces what I've already put in my submission about the comparative significance of the fires which were then in existence.

15 There's a reference to Odile Arman "being in the scrub at the moment" and Mr Lucas-Smith then saying, "Okay, so what the - are they going to be able to do anything tonight, do you think?". Mr Graham says, "I'd be very doubtful that they could, I'd - - -", Mr Lucas-Smith says:

20 "So are we looking at crews back tomorrow?---Yep.

Okay, I wonder if you could organise that - - -?---Okay.

- - - that with Odile."

25 In my submission it is unjustified to construe that exchange as a casual, even flippant decision by Mr Lucas-Smith approving the situation in which the crews would not be sent in that night, but sent back tomorrow. I'm not quite sure what else he was supposed to have done in the circumstances, being in a car travelling to Queanbeyan for a meeting
30 which was necessary and, in our submission, not only was the decision correct, but it was done in circumstances which were appropriate, without the need for a prolonged discussion.

35 His emphasis is evident from what he then went on to say, because he then went on to say, consistent with his subsequent explanation that the McIntyre's Hut fire was more important in his mind:

40 "...need to make sure that we ah - that we don't commit ourselves beyond what we might end up needing to commit to the McIntyre fire, but I think we need - if we can get them out of the way the better, but McIntyre's will mostly be tankers with back burning operations anyway, so we might use other resources for that."

45 Your Honour, we would say any criticism of Mr Lucas-Smith for having made the decision in that form and on those grounds is completely without

5 foundation and should be rejected by your Honour. We point to a number of reasons why the decision was correct, including the last, being that Mr Bartlett and Mr Cooper and Mr McRae were in the car at the time and were able to listen to the conversation because it was on a speaker phone, and none of them seemed to cast any doubt or raised any query or objection to the course that was then being taken.

10 Your Honour, we then go on to mention a topic which is picked up by submissions already made by Mr Lakatos and which are embellished even more fully in the submissions on behalf of Mr McRae concerning the Occupational Health & Safety factors. We would submit that it was self-evident that those matters were high relevant and persuasive in the context of any decision to send back into the Bendora fire personnel that night, in circumstances which there was clear evidence of falling trees and other dangerous which were apparent.

20 The contribution that I would seek to make to what has already been put in writing by the parties is perhaps a benefit to my own unfortunate experience, in endeavouring to persuade the Industrial Relations Commission of New South Wales that Emergency Services, such as police and fire fighting organisations, should in some way be immune from the statutory duty which exists in Occupational Health & Safety legislation, from ensuring or guaranteeing the safety of workers whose job inherently exposes them to risk.

25 In the case in which I was involved, one of the judgments of which I have available for your Honour, in the matter of Workcover Authority of New South Wales v. Crown and the Right of the State of New South Wales Police Service of New South Wales, a judgment of Hungerford J on 7 January 2002, copies of which I have for other parties.

35 The situation was analogous in a broad sense, in that the Police Service were prosecuted under the Occupational Health & Safety Act of New South Wales, which contains I think essentially the same statutory formula, whereby employers are required to ensure the health and safety of workers in circumstances in which two police had been killed, as a result of attending what seemed to be an innocuous domestic disturbance complaint, only to find themselves being completely unexpectedly greeted by an armed gunman who proceeded to shoot one of them on the spot and then eventually shoot the other.

40 As is evident from the judgment, Workcover then proceeded to prosecute the Police Service for an offence against the Occupational Health & Safety Act for failing to provide a safe working environment without risk to health, et cetera, in accordance with the statutory provision that creates

that offence.

5 I had made earnest endeavours to persuade Hungerford J at a no case stage
of the proceedings that the statutory duty in the Occupational Health &
Safety Act just doesn't fit with Emergency Services, such as the police
and, in fact, without knowing, I had also given by way of analogy fire
fighting where, first of all, the occupation itself carries with it an
unpreventable risk of injury and, secondly, a complete inability on the part
10 of the employer to protect workers such as police and fire fighters
absolutely from injury.

15 That argument didn't find favour with his Honour, either at the case to
answer stage or in the stage which is the subject of this judgment on the
question of penalty. And at the bottom of page 7 - sorry, your Honour, the
paragraphing is a little confusing, but it's at the very bottom of page 7 - he
picked up the argument which I had put which he, in turn, rejected. And
it's quite a simple process, in my submission, to substitute the risk of fire
for the criminal conduct of McGowan, who was the person who shot the
police. He quotes my argument as saying at the bottom of that page:

20 *It follows I would conclude that Mr Hastings' general submission
of avoidance of all the charges, namely that the relevant risk here
was created externally from the defendant by the unpredictable
and criminal conduct of Mr McGowan, over which the defendant
25 had no control must fail.*

30 *I accept as the correct approach, as stated by Mr Crossshore, to
the effect that any failure by the defendant here was its acts or
omissions as alleged in each charge, in circumstances where the
relevant risks to the two officers' safety were not created by
Mr McGowan but by the officers being required by the defendant
to work in an environment where they were at risk of being shot
or otherwise suffering physical harm. In other words, risks faced
35 by officers engaged on operational type duties were well known
to the defendant, even though the specific risk of Mr McGowan
may not have been known, and who was therefore responsible
under section 15 for its failures in ensuring against those risks.*

40 As I have said, your Honour, in our submission the simple substitution of
risk posed by a fire for the criminal conduct of Mr McGowan indicates
that the same principle would apply with full force to a situation such as
that which prevailed, particularly in relation to the Bendora fire, where
there were known risks from falling trees and branches and other
circumstances. particularly at night, and a requirement of sending in
45 workers into that situation where their safety could not be guaranteed.

And if I can just take your Honour briefly to page 13 where his Honour repeated the same repudiation of my argument where he said towards the top of page 13:

5 *One may readily concede, as Mr Hastings urged, that policing is*
 inherently dangerous but in my view that condition is not unique
 to policing, as I observed in the earlier judgment by reference to
10 *the building industry and certain other occupations. In the light*
 of Mr Hastings' continued reliance on this aspect of the nature of
 policing, initially in the no case to answer proceedings and now
 mitigation of penalty after a plea of guilty, it is necessary to
 repeat what I said in the earlier judgment, that in that respect as
 being relevant also for present purposes, that is, although the
15 *defendant may not be able to control or otherwise affect the*
 conduct of persons such as Mr McGowan...

And again substitute fire:

20 *...who confront police officers from time to time in the*
 performance of their duties, the defendant is able to directly
 control and dictate the measures which should be properly made
 in preparing and equipping police officers to perform operational
 duties which are of such in nature as to ensure the health, safety
 and welfare of those officers.

25 Your Honour, I mention that to reinforce what has been put in our
 submissions and by Mr Lakatos and by counsel for Mr McRae, and I'm
 reminded on behalf of Ms Arman who was equally liable, within the
 definition of the legislation, of failing to ensure the safety of those who
30 she may have directed return to fight the Bendora fire that evening.

 The proposition of course is not novel, in that it was entrenched in the
 manual, the Rural Fire Control Manual, that the safety of personnel should
 be a priority at all times in the Wild Fire Safety And Survival Guide
35 which was Exhibit 37, the very first responsibility identified for officers in
 charge, group officers, crew and strike team leaders is for the welfare and
 safety of their crew.

40 It is interesting perhaps, your Honour, that in some jurisdictions some
 exemptions are made for certain occupations in limited circumstances.
 For example, under the Commonwealth legislation there is an exemption
 for Defence personnel and for certain police operations which involve
 covert or dangerous operations by the Australian Federal Police. There is
 no such exemption which exists in the ACT and, in fact, I think what has
45 happened since is that there's been a declaration made under the ACT Act

to the effect that volunteers, to the extent that it was not otherwise clear, are to be taken to be employed persons under the legislation and subject to the same statutory protection.

5 Your Honour, not only do we raise those matters by way of general submission in order to substantiate the validity of the decision taken that night not to send personnel back into the Bendora fire, but also to challenge directly what is said in paragraph 1,157 of counsel assisting's submissions. In the fourth sentence of that paragraph we submit a
10 "erroneous proposition" is enunciated. What is said - this is 1,157, your Honour - is this:

15 "Mr Cheney is similarly correct in his assessment that issues of safety of trained fire fighters, including on the issue of falling trees, has to be looked at against the consequences of not fighting the fire and the consequences for the ACT community."

Your Honour, we would say that is fundamentally wrong. It is no part of an employer or a supervisor such as Ms Arman, to take into account the
20 consequences of not fighting the fire and the consequences for the ACT community. Their statutory duty is to ensure the safety of the workers in their workplace. It would be absolutely no answer to Ms Arman or to Mr Lucas-Smith or to the territory to say well, sure we put these workers at risk but we were more concerned about the consequences for the ACT
25 community. The statutory responsibility does not permit of an employer to be excused, or even have his offence mitigated, by a suggestion that it was all done for the greater good of the community, even if of course at this stage that could be foreseen.

30 So your Honour, we would say, first of all, Mr Cheney was wrong in making that submission and perhaps it's an example of him going beyond his expertise. And secondly, it was wrong of counsel assisting to endorse that as a general proposition, that in some way the workers that night should have been asked to put their bodies on the line for the ACT
35 community, even though there was a risk to their health and safety. That, we would submit, is clearly not how the legislation works and not a valid basis upon which anybody in authority that evening should have determined to send the staff back into the dangerous situation which then existed.

40 So your Honour, for those and the other reasons which are set out in our submissions, we join issue with what has been suggested concerning the failures of Mr Lucas-Smith, in particular on that evening, to treat the Bendora fire more seriously and to effectively overrule Ms Arman by
45 ensuring that workers were sent back in. We join issue in the course of

those submissions with any suggestion that Mr Lucas-Smith in fact made the decision. What he did in the course of the trip to Queanbeyan was to agree in the circumstances that then prevailed with the proposal to deal with the matter the next morning. There was no suggestion that thereafter
5 he made a more emphatic decision, or indeed as is put, wanted Ms Arman to take a certain course of action. So on that basis again, your Honour, we would submit you should not follow the recommendations of counsel assisting in making the findings which are urged.

10 Your Honour, there are then just a number of relatively short issues which I will elaborate upon before concluding. One of those is over at paragraphs 420 and following of our submissions, concerning what is put as to the time of the warning on 18 January, the proposition being
15 advanced by counsel assisting on a number of occasions that the existence of the risk was not conveyed to the public of Canberra prior to about 2.40 pm on 18 January 2003, as the quotes in the paragraphs which follow indicate. This is an assertion which is made on a number of occasions and in our submission is inconsistent with the evidence before you.

20 I mean, in a sense, it has a lack of realism because it ignores the fact that there has been over the previous week not only a series of public reports of the escalation of the fire, through the various media outlets, but also a general awareness which was inevitable to the public of Canberra because
25 of the circumstances which prevailed, in terms of smoke in the air, and in some areas embers and so forth, well before the crisis occurred on 18 January. So it's not as if this issue needs to be looked at in a vacuum, on the basis that suddenly out of the blue at 2.40 pm on 18 January 2003 the SEWS issued.

30 What we indicate, your Honour, by reference to various passages in the evidence, commencing at 430 is that there was clearly evidence in the material that you have of various warnings being issued on the 18th prior to the SEWS being disseminated at 2.40 pm. Just above paragraph 434
35 we commence a chronological review of what had happened that day, commencing with the reference to the fact that *The Canberra Times* had quite dramatic reports on its release, presumably late the night before and certainly earlier that morning on that of the day of 18 January, dealing with quite significant developments in relation to the fire and quoting
40 Mr Castle about problems which were then being encountered, as well as the statement from the ACT Chief Minister who expressly indicated that the bushfire situation was of great concern to all Canberra residents.

We join issue in paragraph 436 with the speculation that the Canberra Connect web site probably did not have any information on it as to what
45 to do. There's no evidence one way or the other, and there's no reason

5 why your Honour should accept that matter of speculation. We refer to the fact that Mr Castle gave a number of interviews, having arisen at 6.05 in the morning for the purposes of informing himself as to the current situation, and thereafter spoke to the ABC at 7.30, as we refer in paragraph 438.

10 Reference is made to the fact that Natalie Larkins had complained that she had made an attempt to speak to Mr Castle but without success, as if to imply that Mr Castle was in some way endeavouring to avoid speaking to her. I mean, that just doesn't fit in view of the fact that he'd been interviewed at 7.30 am, and as the phone records indicated, he had tried to return her call at 11.36 when he rang the ABC news room and gave other radio interviews at 11.36 and 11.41 to other radio stations in Canberra.

15 At paragraph 444 we refer to the fact that even though the McIntyre's Hut fire was still 13 to 14 kilometres from the urban edge of Canberra at the midday press conference Mr Lucas-Smith made some quite express statements indicating that precautions need to be taken by those who lived adjacent to the grassland area on the western side of the suburbs of Canberra and repeated that later in the statements that he made during that news conference.

20 What also happened at about the same time, your Honour, was that a media release was made at 12 noon, which is in evidence, which expressly referred to the dangers which were developing and provided instructions to be conveyed to the public in relation to taking the necessary precautions in the event that fire should approach the property of the occupants to whom the information was being conveyed.

25 That is consisted with the fact that, as we say in paragraph 447, on the 1 o'clock news the ABC made specific reference to the warning in the quotation we have repeated, even though at that stage the fire seemed to be over 12 kilometres away and was not expected, on the then rate of travel for the next 6 hours, but nevertheless and you would be reminded by what we've quoted in paragraph 449, the ABC broadcast, no doubt based on the media release which had been issued at 12 o'clock, referred to effectively the same advice which was provided in the SEWS. And you'll see in the passage that we quoted at paragraph 449 almost verbatim the wording of the warning in the SEWS when the broadcast contained the words:

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45 "...now indoor. If fire approaches your house close all the doors and windows, fill the bathtub, any buckets, et cetera, and soak towels to place in any crevices, such as under the door."

One wonders what additional information was conveyed by the SEWS in addition to that which was conveyed by the media release and repeated by the ABC in the course of its 1 o'clock broadcast.

5 As we remind your Honour in paragraph 450 Ms Larkins then gave a live report reiterating to some extent the warnings that had been given and the advice which had been issued. And then again before 1400 we remind you that the Grandstand program on the ABC was interrupted by the quite specific announcement that people in Weston Creek were in danger and should be taking various preparations, and it was only effectively at about 10 that time that the fire then gathered momentum and moved much quicker than had been previously anticipated.

15 So your Honour, we'd remind you of those passages in the evidence, specifically for the purposes of refuting what is put repeatedly in counsel's submissions to the effect that it was not until 2.40 pm that an effective warning was made of the proximity of the fire, certainly by the media release at 12 o'clock, which conveyed essentially the same information, that process of warning the public had already commenced.

20 Your Honour, can I now turn to what we regard as quite an important matter concerning the submissions of counsel assisting in relation to what Mr Castle said in paragraphs 107 and 108 of his statement, and the justification for those statements in his evidence which counsel assisting submit you should treat, effectively, as perjury.

25 Your Honour, we would say, with respect, this is quite a disappointing submission to be made, in the light of the circumstances which prevailed. It really, in our submission, has absolutely no substance and perhaps is 30 another manifestation of the quite inappropriate efforts made by counsel assisting to develop this thread of misconduct by Mr Castle, in particular, and Mr Lucas-Smith as well, as providing a colour or a flavour to the last leap in logic which endeavours to connect their conduct with the death of Mrs Tener.

35 We would submit when you go to paragraphs 107 and 108 of Mr Castle's statement which we've, for convenience, have set out in paragraph 459 of our submission, it is self-evident that Mr Castle was simply talking about an informal situation which existed with New South Wales whereby each 40 entity would confine their media discussions to those matters which were being controlled by each authority. The terminology which is used, namely "the agreement and the protocols we had in place with New South Wales" are completely inconsistent with any assertion that there was a specified 'Agreement' or a 'Protocol' which would constitute an 45 indication that he is referring to a quite discreet and specific agreement on

5 that topic. The way in which he refers to the understanding as “the agreement” and “the protocols” can only be fairly construed as in quite a broad reference to a general understanding which existed on that topic. And of course that was precisely what he said when he was first asked about the matter when he gave evidence, and we refer to that in paragraph 461 of our submissions.

10 I’ll just take you firstly to what Mr Castle said, which is quoted at 469, I’m sorry. When Mr Castle was first questioned about the matter without being provoked or forced into a corner, or in any other way being called upon to justify in a defensive way what he had said, he immediately volunteered that what he’d said in paragraph 107 was an overstatement, and that what he was referring to was more of an understanding, as he said more an understanding was probably the case.

15 That explanation we suggest fits very squarely with the terminology which he in fact used in paragraph 107 and notwithstanding the quite strenuous efforts of junior counsel assisting thereafter to pursue Mr Castle on the issue, he never wavered from that being his explanation of what he put into his statement. And it really some seem to be in our submission a storm in a teacup. I mean, in the context of all the serious issues that need to be resolved in the context of this Inquiry, the amount of attention which was dedicated to this point we say is completely unwarranted.

20 What was said by Mr Castle was innocuous and, as he explained it immediately in evidence, completely accurate. There is no doubt that here was in place a convention whereby authorities in New South Wales and the territory would confine their media activities to those operations which were under their control.

25 And indeed, as I referred yesterday, in the context of the ACT Fire Brigade and Ambulance Service briefings and the evidence given by people who attended that, as to their understanding, it was an arrangement which not only operated externally, as between the ACT and New South Wales authorities, but operated internally, in terms of the respective functions of particular Emergency Services organisations here, whereby they all understood that if a particular authority was in charge of a particular operation, then that group would be responsible for disseminating information. And as I said yesterday, that can only be an understanding which is logical and based on common sense, and would otherwise leave quite important emergency situations liable to confusion if everybody was rushing off to the press to put forward their view.

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45 So we set out in the submissions which follow the justification for what Mr Castle was referring to. We refer in paragraph 462 to what

Mr Koperberg said in response to being asked as to whether there was a protocol, an agreement in force, as at 17 January under which ACT ESB would not talk about New South Wales fires and would only talk about the ACT fires, his answer, as we remind you was:

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“It is an over-simplification. General convention has it that New South Wales does not talk about fires in Adelaide or Melbourne or Brisbane, and they don’t talk about fires bearing down on Sydney. However, it’s not at all uncommon for us to talk about a fire crossing the Queensland border and threatening properties in Glen Innes or Tenterfield, or any of those places. So it is only a reflection of a general standard.”

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And we’re comfortable with that description of the situation as well, because we submit that is very much on all fours with the description given by Mr Castle of his understanding of the situation.

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And I had started to refer your Honour to what Mr Lucas-Smith said on the question at paragraph 461 and I might just go back to it briefly. His explanation, as you will be reminded by the answer we have quoted was:

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“I don’t know if there is anything as formal as a protocol, nor as formal as couldn’t, it was just we were fighting the Bendora and Stockyard fire and New South Wales were fighting the McIntyre’s fire, and it was appropriate for them to answer their own questions in relation to those fires.

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Although Mr Castle seems to think there was a protocol, you don’t think it was as formal as that?---No, my response - I think I was even asked that question more than once and my response was really you need to address that question to New South Wales.”

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In paragraph 467 we complain as to the way in which that statement by Mr Lucas-Smith was dealt with in questioning of Mr Castle. Your Honour will be reminded from what I’ve just read that Mr Lucas-Smith had in fact said, “I don’t know if there was anything as formal as a protocol”. The question which was then put to Mr Castle was:

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“You heard Mr Lucas-Smith in his evidence say he was not aware of any agreement or protocols.”

That would be unremarkable, had it not been for the fact that counsel assisting had endeavoured to make so much of the way in both officers gave evidence on this question. In that context, it does become significant

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to note that the question which was put to Mr Castle was not accurate, in the light of what Mr Lucas-Smith in fact had said, and it's not just an exercise in semantics because what Mr Lucas-Smith has said, "Well, there was nothing as formal as a protocol" but he did go on to say that it was appropriate for each to talk about their own activities. To convert that into an assertion that Mr Lucas-Smith had said that he was not aware of any agreement or protocols, we say in the light of the emphasis which is now put on this evidence, quite unfair and not something that your Honour would now take into account.

We've referred your Honour in some detail to what was subsequently asked of Mr Castle in paragraphs 472 and following, only to demonstrate, we submit, a quite consistent approach that Mr Castle adopted to that which he had immediately offered when the matter was raised with him. He made an absolute rejection of any suggestion that in some way he was distorting the position in order to improve his position in the light of an alleged failure to disseminate information.

He expanded on a number of occasions by reference to situations in which there had been a delineation between information relating to New South Wales and information relating to ACT fires. We remind you of those passages in paragraphs 477 and 478, in particular. In the last answer quoted in paragraph 478 you may be reminded of what Mr Castle said was:

"Nothing formal. I suppose a courtesy, in that they are not under our jurisdiction, those fire fighters, and the management of it was not under our jurisdiction, so it was more a courtesy."

Again, it just seems to be an exercise in semantics for counsel assisting to seize on that as a further basis for criticising Mr Castle and suggesting that he was engaging in a form of perjury, simply because he's varied from "agreement", "protocol", "understand" or "courtesy". He might have used "convention" or any other synonyms. In the end result, we say there was no doubt as to the nature of the understanding that he was referring to, and there's no doubt, we would say, that it was a genuine understanding which was in fact implemented by the respective parties during the crisis.

What has been subsequently discovered, as we bring to your Honour's attention in paragraph 480 and following, is that an examination of the guidelines for interstate disaster assistance in fact document the very point that Mr Castle has been making. We don't say that Mr Castle specifically had those provisions in mind, or indeed, necessarily was aware of them, in terms of his capacity to specifically cite them, but what we do say is that the guidelines which were in existence at the time clearly demonstrate that

Mr Castle was correct in his assertion that that was the basis upon which joint operations were to be conducted. And your Honour will see that we quote from Guideline 13 which deals with the media, and in particular paragraph 13.2 which says:

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“It is recognised that there will normally be significant interest by media in activities of personnel from an assisting state. Comments to the media by assisting state personnel should be restricted to administrative matters as far as possible, with questions on operational matters, in particular, being referred to the requesting state, unless there is a prior agreement from the requesting state to the contrary.”

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Again your Honour, we say there’s no great moment in the existence of that document, it simply records what one would expect to be a basis upon which joint operations were to be conducted.

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We also refer in paragraph 483 to the statement by Mr Winter, the New South Wales Director of Communications, that he had told Cameron Wade, the media officer for the New South Wales Rural Fire Service, to confine his comments to fires within the New South Wales jurisdiction. Again, we say that’s just a manifestation of a common understanding by all participants that that was the basis upon which media information was to be conducted.

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We then repeat somewhat lengthily and I won’t take your Honour to it, more of the cross-examination of Mr Castle, simply for the purposes of demonstrating the consistency of the way in which Mr Castle justified paragraph 107 of his statement by his emphasis upon the informality of the understanding that he had in mind when he used the terms in his statement. And as we say at paragraph 490, we say that the understanding that Mr Castle was referring to is demonstrated by the way in which the parties conducted themselves at various times.

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Overlooking the fact that there was substantial cross-examination of Mr Castle as to the fact that in some instances media statements by the ACT authorities and personnel, in fact, referred to the McIntyre’s Hut fire but not in an operational sense, we suggest, but only as to its existence and its relevance to ACT assets. And that one can’t demonstrate by reference to anything said by him or Mr Lucas-Smith at any time that they ever breached the protocol which he has spoken of in his statement.

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And we conclude, your Honour, around paragraphs 491 that there was a classic example on 16 January when Mr Lucas-Smith specifically answered a question by reference to the fact that it should be directed to

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New South Wales. And then on 17 January where Mr Lucas-Smith spoke first, specifically about the ACT fires at the press conference, and then was followed by Cameron Wade who directed his remarks to the New South Wales fires.

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Your Honour, we would submit that the submissions of counsel assisting that in some way these events should be construed as a basis for a finding of perjury is completely unwarranted. It's a further example, we suggest, of counsel overreaching the legitimate bounds of inference from the evidence available on a basis which can only be explained by inappropriate attempt to colour the conduct of Mr Castle and Mr Lucas-Smith for the purpose of subsequently linking them to the death of Mrs Tener.

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Your Honour, the other matter which I just want to take you to very briefly is at paragraph 541 and following, where we deal with, in general terms, the relevance of the working conditions of Mr Lucas-Smith and Mr Castle. In paragraph 542 we refer to the fact that in the submissions of counsel assisting recognition is made of the fact that the ESB Headquarters at Curtin, as they say, hampered the efficient management of the fire emergency, but then diminished the effect of that concession by saying that no witness suggested that this contributed in any material way to any deficiencies in the initial response.

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Well, perhaps that's a valid proposition, if that's a reference to what happened on or about 8 January, but we would submit that what follows is an unwarranted assertion when it is said that "nor to the development and the dissemination of timely information and warnings to the ACT". Your Honour has had the benefit of seeing the premises and I don't need to remind your Honour of their general appearance and effect.

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It certainly wasn't a situation where Mr Lucas-Smith and Mr Castle, in particular, had the luxury of sitting in some control tower where they could see in one glance what was happening and assimilate the information that was being received. The term "rabbit warren" seems to be generally accepted as a fair description of the premises at Curtin. We refer to the fact that Mr Taylor gave evidence that at a critical time on Saturday morning he simply couldn't find in the rabbit warren people that he needed to consult urgently, and your Honour no doubt can form your own view, but we would submit in the light of the confusion which was in existence on the morning of the 18th and, in view of the number of personnel involved at that point of time, that the premises were completely unworkable for dealing with the crisis that had developed.

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In so saying, your Honour, we recognise that in a number of

circumstances rural bushfires need to be dealt with in situations that are less than ideal. There's no doubt many situations in which Rural Fire Services need to operate on a temporary basis in country towns in which they don't have the luxury of a fully co-ordinated system. But your Honour, this is not a simple rural fire, this was a complex and, in the end, serious threat to a substantial number of urban areas which is a distinguishable situation from that which rural bushfire supervisors may find themselves from time to time.

10 In a way, it started off as a relatively simple operation, as I mentioned yesterday, by looking at Mr Lucas-Smith's statement, by the end of 8 January he'd consulted with 10 people. By the time of 18 January it reached the point I think, as the lady from Education and Community Services indicated, there were so many people at the planning meeting on the evening of 17 January that she couldn't get into the room. So that there had been this proportional involvement of personnel and resources, as the extent of the fire increased, to the point that in those circumstances, the premises we say were simply inappropriate for the gravity of the task which had to be dealt with.

20 We referred in some of the paragraphs to statements by various witnesses as to the nature of the premises, and perhaps those references are superfluous because you have been there yourself and could see for yourself the situation which existed. However, we do remind you that a number of witnesses expressly indicated that they were of the view that the facility was inappropriate.

25 The AFP witnesses, in particular Mr Murray and Sergeants Burns and Kirby, were quite explicit in their criticism of the facility, in particular, I suppose, because they had their own Operations Centre which was purpose built and which provided a ready reference to facilities which were appropriate to dealing with crises such as that. So that, your Honour, we would ask you to take into account in assessing the conduct of Mr Lucas-Smith and Mr Castle, in particular, the circumstances in which they were called upon to operate.

30 What I might also mention, your Honour, again is the obvious, in terms of the relevance of the jurisdictional issues which form an undercurrent to the operations and to the decisions that have to be made. It's not a major matter, but in the context of the rapidly developing situation on the morning of the 18th one needs to bear in mind that the division between the New South Wales operations and the ACT operations, in itself was an inefficiency in enabling those in the ACT to fully appreciate the situation and make appropriate decisions.

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5 Because those in New South Wales were dealing with their operations and had a line of communication which involved contact with Queanbeyan where the information was processed, and then made available to the liaison officers, who would then convey that to the ACT personnel. And whilst over the period during which the activity was done at a more leisurely pace, in the activities which took place on 18 January that's something again we submit needs to be factored into the scene which existed in properly assessing what was done or not done in those frantic hours around the middle of 18 January.

10 Your Honour, finally, can I reach the point which counsel assisting finally reach, of endeavouring to link the actions of Mr Lucas-Smith and Mr Castle with the death of Mrs Tener. To a large extent, your Honour, again Mr Lakatos has covered this ground and I won't repeat in detail the
15 fundamental propositions that he made concerning the lack of plausibility of these submissions, in the light of the earlier concessions by counsel assisting that at the time of the original submissions there was insufficient evidence to justify that proposition, and that it was proposed to call further evidence which has not then been called. Yet there now seems to be some
20 backtracking going on, to the point that counsel now press the submission, at least in relation to the death of Mrs Tener. In those circumstances alone, we would submit would cause your Honour to have grave reservations about the plausibility of what is now put, and indeed, on our submission cause you to reject it.

25 It's significant, equally, in that context to note that the submissions are now only pressed in relation to the death of Mrs Tener and not Mrs McGrath. There's no explanation in the email of 23 May which conveyed counsel assisting's final submission on the topic as to why that
30 distinction has been drawn, and it's difficult to see why logically, if the basis of the connection is said to be the warning and the terms of it, why there is said to be a distinction to be drawn between the circumstances in which Mrs McGrath was found and Mrs Tener was found, other than of course Mrs Tener was found in the bath.

35 One would think that if the system of warning and the content of it was so flawed in a way which was sufficiently substantial to establish this link which is now urged, then those circumstances would operate equally in relation to Mrs McGrath. The fact that the submission is now pressed
40 only in relation to Mrs Tener, we suggest again highlights what we submit to be its lack of foundation and the speculative basis upon which the submission is finally pressed.

45 As we develop in our submissions, your Honour, the matters which are relied upon, particularly the content of the SEWS dealing with the

5 warning to fill the bathtub and buckets, et cetera was not only conveyed in the SEWS it was almost in identical terms, as I've earlier said, in the ABC news report at 1.00 pm, as we remind you at paragraph 516. And the source of any information to Mrs Tener could equally have been from the ABC broadcast, as much as from the SEWS, and there's no basis upon which your Honour should conclude to come to the view that it could be concluded that it was the SEWS signal that conveyed what is said to erroneous advice.

10 As we've set out in paragraphs 519 and 520 and 521, the terms of the advice in the SEWS seems to be identical with the formulas used in the standard warnings for which provision is made in Western Australia in the terms in which we point out in paragraph 521, in Queensland in the terms in which we set out in paragraph 522, and in Tasmania in the terms in which we set out in paragraph 523. None of the short forms used in those jurisdictions embellish in the way now suggested by counsel assisting as being necessary the purpose expressly of filling basins, sinks, baths, buckets, et cetera, with water.

20 So that by the prevailing standard we would submit that what was included in the SEWS was consistent. True it is that since the experience of this fire the standard warning has now been expended to the more explicit, in relation to the use that should be made of the water put into the bathtub and buckets, et cetera. But that should not in any way, in our submission, be construed as some form of admission that what was previously said was inadequate, particularly in the light of what we have drawn your Honour's attention to, as being the terms of the messages disseminated in other jurisdictions.

30 In any event, your Honour, we would join issue with the construction placed on the message urged by counsel assisting, and in paragraph 530 we deal with the question of whether a listener would in fact be misled by the message which was conveyed by the SEWS. Really, in our submission, and it's unfortunate in a way that one has to demean the distressing circumstances in which Mrs Tener died by resorting to this form of analysis, but the terms simply don't support the construction urged by counsel assisting when it's said "fill the bathtub or any buckets, et cetera and soak towels to be placed in any crevices, such as under the door".

40 I mean, why one would isolate out of that statement an inference that the filling of the bathtub was for the purposes of providing a form of retreat, when it is juxtaposed with the instruction to fill buckets, et cetera. That really doesn't stack up, in our submission, and we would say that in a context such as this, the logical conclusion to be drawn is that the

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instruction was to provide reservoirs of water to be available in the event that water supplies should fail. And the linking of filling the bathtub and the buckets would not lead any ordinary person to construe that as an instruction to fill the bath in order to provide a place of refuge.

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And as we point out in paragraph 531, if the message is to be taken literally in the way urged by counsel assisting the use of the towels, which one can imply from the circumstances in which Mrs Tener was found, is not consistent with the message which was sent. If she was to be guided, as is suggested, by the message one would think that the towels would have been placed in the crevices, such as under the door, rather than to be found underneath her body in the bath, as they were.

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What we have sought to demonstrate, your Honour, is that again with, we concede, limited foundation there is an alternative hypothesis that explains why Mrs Tener may have been suddenly caught by the fire, and without a form of exit finally had to take refuge in the bathroom and eventually the bath, as being in those circumstances the last resort. That being a developing situation rather than some preconceived plan based upon an ill-founded construction of the message contained in the SEWS.

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And what we point out in paragraphs 535 and following is that by reference to an examination of the layout of her house, it could well be that progressively she retreated, to the point where she found herself in the bathroom with no avenue of escape, and took refuge, not as I said as some pre-conceived plan, but as a final desperate attempt to find a place of safety.

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Again, we point out that that is not something that is established in any positive sense by the evidence, but what we do say is that it does provide an equally feasible speculative hypothesis to that urged counsel assisting, which provides a sufficient basis to refute the suggestion that there is a connection, a cumulative connection between what had been done Messrs Lucas-Smith and Castle in the progressive failure to issue warnings, and the terms of the warning which finally issued in circumstances in which counsel say was too late.

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And at page 537 we summarise the points which we say that leave the matter so doubtful that your Honour cannot in any way form a view of the circumstances of Mrs Tener's death which would enable you to make the positive finding urged by counsel assisting. We would indicate that in order to come to that view, you'd have to conclude, first of all, that she left the house, or would have left the house, secondly, that she then changed her mind about leaving the house, thirdly, that the cause of her changing her mind was that she'd heard the SEWS warning, fourthly, that

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5 she heard it and misunderstood it, and then relied upon it, in order to take shelter in her bathtub as an erroneous construction of that advice. And in short, your Honour, we would say there's simply no basis upon which you could be satisfied of that course of events in order to, in any way, give credence to the submissions of counsel assisting on that matter.

10 Your Honour, finally, can I just say this, in our submission there is not one single piece of evidence which casts any doubt on the fact that Mr Lucas-Smith and Mr Castle applied extraordinary dedication and commitment during what was clearly the most complex and serious natural disaster in the modern history of the ACT. Your Honour will be aware from the evidence that they worked day after day after day without break, and often in circumstances in which they had little sleep.

15 Their commitment didn't extend just over the period from 8 January to 18 January, as is the subject of the scrutiny during this Inquiry, but continued on until the early days of February at the same rate, until the fire was finally extinguished. If they made mistakes in the course of their operational activities, then so be it, and let your Honour say so. But what we do say is, your Honour, that it would be completely unjust if their efforts result in the form of public condemnation contrived by the considerable ingenuity of counsel assisting, and unsupported by the evidence which has been put before you, that in our submission would be completely unfair and completely unjust.

20 We remind you of what Mr McLeod said in his report, which we've quoted in paragraph 558, as to the extraordinary efforts of government officials and volunteers, which no doubt include Mr Castle and Mr Lucas-Smith, in the course of the stressful and demanding circumstances. And in the end result, we would urge your Honour to endorse Mr McLeod's sentiments and reject the propositions of counsel that there has been throughout this time any form of misconduct or misfeasance or deception of the type particularised by counsel assisting in their submissions.

35 Yes, thank you, your Honour.

40 HER HONOUR: Thank you, Mr Hastings. I note the time, we'll take the morning adjournment and then over to you, Mr Watts.

ADJOURNED

[11.18 am]

45 **RESUMED**

[11.47 am]

HER HONOUR: Yes, thank you, Mr Watts. Thank you.

5 MR WATTS: Your Honour, as you know, throughout this Inquiry I've
acted for 12 individuals. The submissions I intend to make today are on
behalf of three of them, and they relate to quite discreet issues, so the
submissions will not be in any sense lengthy. On behalf of Superintendent
Newham with the Fire Brigade I have put in some written submissions
which I'll speak to briefly. Those submissions are also now on behalf of
10 Ian Bennett, for whom Mr Pike has acted. So it can be taken that those
submissions are on behalf of both Ian Bennett and Superintendent
Newham.

HER HONOUR: The same submissions that you've - - -

15 MR WATTS: The same submissions.

HER HONOUR: Thank you. Because there are some separate
submissions that have been put in regarding Mr Bennett.

20 MR WATTS: I don't think so. Mr Pike.

HER HONOUR: Graham, I beg your pardon.

25 MR WATTS: Yes.

HER HONOUR: Yes, that's right, there's nothing for Mr Bennett.

30 MR WATTS: No. No, Mr Pike has acted for him and has asked me to
indicate that he adopts what I have put there. How he adopts what I might
say I don't know when he's not here, but that's the position. I have some
submissions on behalf of Mr Tony Bartlett who was given leave to appear.

HER HONOUR: Yes.

35 MR WATTS: And I also want to say a few words on behalf of
Superintendent Peter Cartwright of the Fire Brigade, and this is simply
arising out of something that's in the submissions on behalf of
Mr Lucas-Smith and Mr Castle. I might deal with that first because it's
quite short.

40 At paragraph 270 on page 101 of their submissions they deal with the
question of what was said or not said by Mr Lucas-Smith in the Fire
Brigade and Ambulance briefing on 16 January. Now, I want to make it
clear that not for a moment am I making any submissions as to what
45 conclusion your Honour should come to about what was said or not said

by Mr Lucas-Smith at that meeting. But your Honour will recall that Mr Cartwright gave evidence about that and was cross-examined at some length by Mr Walker.

5 Mr Cartwright had a note in his diary of what he had recalled was said and those matters are discussed in page 101 of their submissions. And at paragraph 270 it's said that the extract from Mr Cartwright's diary was a transcription of notes which he jotted down on a notepad. Now, what had
10 happened was that he'd had a notepad with him, he'd made rough notes and then he had transcribed them later into his diary.

Does your Honour have paragraph 270 of the submissions of Lucas-Smith and Mr Castle?

15 HER HONOUR: I do have that, thank you.

MR WATTS: I just want to take issue with the word "believes" is put in here and "believed" and it's put in in inverted commas and it's put in italics in order, apparently, to give it some emphasis. It seems perhaps
20 what's being suggested is there that in the answers Mr Cartwright was giving he had some uncertainty or was unsure of perhaps what his answers were and that's why he used the words "believed".

It's unclear why it's put in that way, but that seems to be what's being suggested, and can I say this to your Honour that that word "believe" or
25 "believed", when one looks at all of Mr Cartwright's evidence is simply a manner of speech, because he uses that kind of phrase about 31 times in giving answers. So it's not as though he's saying, "Well, I think this is the response" or "This could be the response", that's simply a turn of phrase
30 which he's using. And so nothing should be drawn from the fact that he uses that word before he answers the question.

At paragraph 274 in the second line it's suggested that during the evidence at some point Mr Cartwright reluctantly conceded something. In my
35 submission, when you look at all of the answers he's given, it wasn't a case of reluctant concession, he simply made the concession. And in my submission it's unfair to suggest that in some way he was begrudgingly conceding something. He was simply making a concession.

40 Finally, he was cross-examined at some length about this note and when he'd made it, and in some way it might have been suggested that this was made well after the event. Well, it's quite apparent from his evidence that the diary note he made was a transcript of the note he had made at the meeting, and it was certainly transcribed, on his evidence, at transcript
45 5,341 line 5 he said, "Most likely on the 16th", that is the same day that

the meeting took place.

5 At 5,338 he said it was within 24 hours, but at 5,336 of the transcript he
tells your Honour that he could be very specific about the fact that it was
certainly made by the 20th, because on the 20th when he was dealing with
traumatised fire fighters he had that diary with him and the note had been
made by that time. So it's quite apparent on all the evidence that that note
which he relied upon refresh his evidence in the witness box was very
much a contemporaneous note. He unfortunately couldn't find the note he
10 made at the meeting, but it was made within a very short space of time
thereafter.

15 Now, in drawing your Honour's attention to these matters it's not my
function, and I don't intend to make any submissions as to what your
Honour should conclude about exactly what was said, nor about what
Mr Lucas-Smith might have meant by whatever your Honour concludes
he said. That deals with Superintendent Cartwright.

20 Your Honour, I might next deal with the submissions on behalf of
Mr Bartlett. Your Honour, as your Honour knows, Mr Bartlett is and was
a very senior fire fighter. He gave evidence at this Inquest. He has been
actively involved in fire fighting matters. At the time of the fires he was
the Director of ACT Forests, he's now in a senior position with the
Commonwealth looking after forests, and the purpose of these
25 submissions is to provide assistance, as best Mr Bartlett can through me,
on matters that your Honour may wish to make recommendations about or
matters where your Honour may wish to urge that matters be considered.

30 Your Honour, in the written submissions I've dealt with six issues, the
first is management of public lands and fuel management. The second is
direct suppression tactics and strategies. The third is indirect suppression
strategies. The fourth is ICS matters, AIIMS issues. The next is
co-ordination with New South Wales, and finally, matters arising and
concerning management of the urban interface between the bushland and
35 the city.

40 Your Honour will see in the written submissions that a number of the
ideas put forward by Mr Bartlett are in significant detail. Your Honour
might, of course, conclude that some of these are not appropriate for direct
recommendations as to what must be done on each occasion, some of
them I would suggest, could be and should be put in as recommendations,
but others might be put more as ideas which your Honour would urge that
those who have to make the decisions in these areas should seriously
45 consider and take into account in the future.

5 In relation to the question of fuel management, Mr Bartlett of course has both in his evidence and in the submissions significant things to say. It's put of course, particularly by the ACT in their submissions, at pages 54 to 63 that there need to be strict limits upon what your Honour's jurisdiction is in relation to fuel management and tracks and trails. And learned counsel assisting has made some recommendations and submissions in relation to these matters, and in my submission your Honour should accept that the kinds of submissions made by counsel assisting on those areas ought to be adopted because they are important.

10 The case that went to the Full Court of course, their Honours had things to say about the limits on your Honour's jurisdiction and I think it's important that that case be understood as not saying that these issues are not important. What was being decided in that case of course was a question of apprehended bias, and the way the case progressed was that there was a series of acts and decisions which were put forward as being indicative of apprehended bias. And in some respects the question of jurisdiction and the extent of your Honour's jurisdiction, when you look at the way the court decided the case, perhaps the extent of jurisdiction is not vital to the way their Honours decided the question.

20 I'm not suggesting of course that your Honour would ignore what their Honour's had to say about the examples they gave, but in some respects they were examples, and the court made it abundantly clear that at the end of the day it's very much a matter for your Honour to decide the extent of your jurisdiction when you're analysing the cause of the fire.

25 They concluded at paragraph 19 that your jurisdictions are limited to cause and origin of the fire. Well, there's no surprise there. The heart of the question is of course: What is the cause of the fire? Through Mr Bartlett I want to put to your Honour that the fuel that was present in the bushland to the west of Canberra was very much a matter which caused the fire, because it was, on all the evidence, there was very dense fuel out there and it impeded the fighting of the fire. And secondly, of course, it assisted the fire spread and contributed to the intensity with which the fire came through.

30 Your Honour, in the case the court specifically said well, you might look at the fuel that was there but you don't go back and look at an analysis of what had happened and the history of why it got that way. Well, we haven't had evidence of the history of the fuel here and why it got that way, but nonetheless your Honour is entitled, in my respectful submission, to start with the premise that there was heavy fuel and then make recommendations and comments about that, and recommendations which might assist in avoiding the same problems in the future. And the same,

with respect your Honour, goes for the existence or non-existence of tracks and trails in the bushland.

5 So the tenor of these submissions is not to make critical comment about past practices, but to comment about the way things were, the difficulties that were encountered in fighting the fire, because of the way things were, and then urge your Honour to make recommendations for the future which might avoid those kinds of problems.

10 Of course the court said that your Honour can make - this is at paragraph 41 in the case - your Honour can make comments which may obviously extend beyond the scope of findings, and I would urge your Honour to make comments in these areas and not simply pass over the question of fuel management and the question of tracks and trails. The court said it
15 may extend to recommendations intended to reduce the risk of a similar fire.

Now, the ACT at paragraph 157 of their submissions put that fuel management and the question of tracks and trails, where they're put, and
20 so on, is a complex and difficult issue. Well, with respect your Honour, the fact that an issue might be difficult is never a reason for a Coroner in your position to not comment on those and make some recommendations, particularly recommendations which might avoid problems in the future of the kind that were encountered in these fires.

25 Every day of course Coroner's hear cases involving complex medical negligence matters or medical matters and there's no bar to your Honour because it's complex to making recommendations. And of course, the recommendations here are in the context of fires and containment of fires,
30 and it may be there are other policy issues which the authorities would want to take into account, but that shouldn't preclude your Honour from making recommendations.

35 So in my respectful submission, the recommendations and ideas that Mr Bartlett puts to your Honour are well within jurisdiction, they are very details of course, as I've noted, and again I indicate that some of them may be not regarded as appropriate for recommendations but for matters which should be considered.

40 The first area where Mr Bartlett comments on is the impact, and this is the basis upon which I put to your Honour that there was a significant problem arising from the fuel that was out there. Counsel assisting analyses the suppressed operations at Bendora on 10 till 12 January, but in
45 some respects does not mention some of the problems that the evidence discloses, things caused by overgrown fire trails. Your Honour will recall

that Bendora break of course was grown over and Flat Rock Spur Track.

5 These on the material before your Honour delayed the implementation of
back burning, contributing in some measure to the spread of the fire and
the cause of the fire. There's limited discussion by counsel assisting about
the impact of the heavy fuel loads which were about, in some respects,
25 tonnes per hectare and this of course contributed significantly to
10 problems encountered on 11 January in the evidence, and the difficulty in
containing the fire on Moonlight Hollow Creek on 12 January. Now,
these factors had had an impact on the ability to suppress the Bendora fire
which of course played a significant role in what happened later on
18 January.

15 Now, it's been said elsewhere and it's quite apparent that the community
needs to recognise that the kind of fires that came through can occur
again, and this community will be impacted by fires. It's a city within the
bushland and there's bushland out there. In that situated, with a repeat of
the conditions that occurred, there's a potential always for further
catastrophic fires. And it needs to be recognised, in my submission on
20 behalf of Mr Bartlett, that such fires if they come through have a
catastrophic effect upon the ecosystem.

25 What happened on 18 January of course devastated huge areas of the
bushland which has disastrous consequences for water catchments, the
community and everywhere else. In that context, Mr Bartlett suggests that
it should be unthinkable to exclude from fuel reduction burning off
national parks or water catchment areas, the kind of thinking that occurred
should not be repeated.

30 Mr Bartlett suggests at page 5 of his submissions that it's critical that
public land managers be involved in implementing fire management
programs. There needs to be a recognition within those agencies of the
importance of fire management. Senior managers within the public land
agencies must have appropriate experience in fire management and have
35 adequate resources and be accountable for the effective implementation of
fire management programs. This is placing the responsibility on those
who have responsibility for the land to ensure that things are done to
reduce the risk of further fires.

40 Page 8 of the submissions Mr Bartlett wishes to make comment about the
suppression of remote forest fires. He suggests that it's important to
recognise that different techniques are needed for remote forest fires,
compared to fires around the Canberra suburbs. This needs particular
skills and particular training. For remote forest fires the standard
45 operating procedures of deploying tankers and light units may not, in his

submission, be the most appropriate suppression strategy, unless the fire's located close to an existing track. So what's needed, in my submission, is a raft of resources to be deployed quickly and promptly to the areas of fire, and of course this should be done promptly on each occasion.

5

Indirect fire fighting strategies can be problematic, as was demonstrated by the problem at McIntyre's Hut fire with the huge area attempting to be contained, and it's quite apparent from all the material before your Honour that that can be quite problematic and it's important that before fires develop there be arrangements put in place, so that you can avoid having to have huge containment areas. This can be done appropriate fire trails and tracks within the bushland so that you don't suddenly try and put in a track when the fire breaks out, but there's a pre-existing set of tracks and trails in place which will enable quick and speedy access to where the fire is, to give access to bulldozers and so on.

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And it's important that the ACT recognise that appropriate skills are needed, different to skills of fighting fires in the urban area. Different skills are needed and people need to be trained up in these skills so that they can appropriately implement indirect suppression strategies. The ACT in my submission needs appropriate operational capacity to deal with that situation.

20

It became quite clear during the evidence that the way the AIIMS system was implemented was at variance with what might be suggested as the way it should be, and it's acknowledged of course that there had been some changes made since the times of the bushfires, but in my submission it's critical that not only do you have a theoretical base of an appropriate AIIMS-Incident Control System in place, but that personnel are appropriately trained in the implementation of that, and that incident controllers must have a full incident management team to manage the fire suppression operations.

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Mr Bartlett of course talks about the fact that you can't have the service management team or the team back in Curtin trying to run things, you need a special team running the particular fire under an incident controller. And it's important in my submission that where there is a wild which is uncontrolled, incident management teams operate 24 hours a day, and not leave the fire unattended for any period of time.

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Your Honour, at page 15 of his submissions he talks about the difficulties encountered in co-ordination with New South Wales in the period leading up to the fires, and he urges that there be put in place a proper cross border management arrangement or agreement which allow the dealing with fires in a seamless way, where they might impact upon both jurisdictions.

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5 There seemed to be some suggestion early in the piece of these fires that it was not appropriate for the ACT to play any particular role in what happened in New South Wales. Mr Bartlett suggests that there may be occasions when it's quite appropriate for the ACT to go and deal with these fires themselves, and that needs to be the subject of an appropriate agreement. It may be appropriate for ACT fire fighters to initiate the first attack.

10 Radio communications with New South Wales, it's important that of course it be acknowledged that there must be clear radio communication between the two, so that there's not a breakdown in communication. The other aspect of dealing with New South Wales of course is that the ACT has a vital interest in fuel management that occurs across the border, and they should have a significant say in what happens with fuel management
15 over the border, because that vitally affects the ACT.

20 Finally, at page 17 of his submissions, he deals with the question of the urban interface and recognising that whilst there was a significant setback between Weston Creek and the houses that were destroyed, and he deals with appropriate distances in the submissions, it wasn't enough to stop destruction of the houses of course, which were on all the evidence, generally ignited by ember attack, rather than there was no direct flame attack, and it appears that an analysis of the average buffer widths and the number of houses destroyed suggested the width of the buffer made little
25 difference to kind of house that was destroyed.

30 Now, that points out of course that it was the embers coming in that destroyed the houses, so the setback distance is somewhat problematical to know what distance should be placed, because there doesn't appear on the material any evidence to suggest what would have been an appropriate setback to prevent these houses catching fire. So what has to be attended to, in my submission, is a shared approach to fire prevent and the urban interface, shared between government and the residents, vegetation and fuel management standards need to be developed for that area to prevent
35 things like, of course residents simply planting.

40 We had examples in the evidence of a residence, probably with the best intention in the world, planting out areas between their houses and the pines. Those things need to be strictly controlled, what's in nature strips and gardens in that urban interface area needs to be the subject of some guidance and perhaps regulation.

45 Your Honour, Mr Bartlett's wish in making these submissions is of course to provide hopefully some positive contribution towards dealing with your Honour's report, and hopefully will provide your Honour with some

assistance in making recommendations that might reduce the problems in the future. Your Honour, that's on behalf of Mr Bartlett.

5 HER HONOUR: Thank you, Mr Watts. Thank you, and I thank Mr Bartlett for those submissions.

MR WATTS: Mr Bartlett's in court, your Honour.

10 And finally, your Honour, turning to another subject. These submissions are on behalf of Superintendent Peter Newham, who is still a superintendent of ACT Fire Brigade and Ian Bennett who at that stage was the Commissioner of the Fire Brigade. Your Honour, Mr Roche in his report made significant comments about the functions of the ACT Fire
15 Brigade, many which were quite critical or could be perceived to be quite critical, and I say that because what I'll be putting to your Honour is that the way that these things were expressed by Mr Roche was in such a way as to provide your Honour with no real assistance in coming to any conclusion about what was done or not done.

20 There were many, many comes, some of which were throw away lines by Mr Roche in his report about aspects of the Fire Brigade performance, but I think wisely counsel assisting have chosen not to take up most of those, or any of those except one matter. And I'm dealing in my written submissions with what counsel assisting has to say at paragraph 1,265 and
25 following of their submissions.

In that paragraph five lines from the bottom counsel assisting urges that Mr Roche's criticism of the IAP summarised in our narrative are valid and justified. Now, I pause there because in order to understand what
30 criticism is being made you have to turn to chapters 3.5.2.10 and 3.6.1.8 where it seems the factual narrative upon which this comment is based are to be found. The problem with this line in counsel assisting's submission and in my dealing with it is that when you look at what's in the narrative it's hard to understand really what the criticism is.

35 And in my submission that flows from the fact that Mr Roche's comments are difficult to understand, they are in very general terms and so unspecific as to be of no assistance to your Honour. It's very unclear what it is being suggested wasn't done or should have been done, and why
40 these so-called criticisms of the IAP are valid and justified. In fact, it's not clear to me whether what's being criticised is simply the IAP or planning in general by the Fire Brigade.

45 In one sense of course this matter can be put to one side by your Honour because at the bottom of paragraph 1,265 counsel assisting concede that

nothing done would have produced a different outcome. So in one real sense none of this was anything to do with the cause of the fire because nothing done or not done has any effect, or could be said to be a cause of the fire in any respect.

5

Mr Roche's report has been dealt with in some detail in other submissions, by particularly the ACT and by New South Wales, and I don't want to go over all of those, but it is my submission that the report in the way it was put together, the way it was presented and in the evidence that followed was of no utility to your Honour. In my written submissions I draw your Honour's attention of *Makita v Sprowles* which of course has a very, very helpful set of guidelines to do with experts. Mr Hastings in his submissions point out the fact that nowhere with this report get anywhere near being acceptable under the New South Wales new guidelines.

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There are really three principles which emerge from *Makita v Sprowles* to which I urge your Honour to look at. The first is that any opinion expressed must be based upon proved facts, the second is that the experts should be completely impartial, and the third requires the reasoning process of the expert to be transparent, so that when you read what is being put you can understand how the expert comes to his conclusion. And I'll add a fourth, and this is particularly pertinent to Mr Roche's report, it must be put in such a way, the opinion must be expressed in such a way as to be quantifiable.

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Your Honour, when Mr Roche gave evidence it became quite apparent that his methodology was seriously flawed and that what he had done was not to draw conclusions from facts which he knew to be true, but if he didn't know a fact to be true or not true, he assumed that something hadn't been done. And he was picked up on a number of occasions which I refer to in my submissions and which are referred to elsewhere, where he had to concede that he hadn't made an appropriate investigation before he'd drawn conclusion. He simply had to say, "Well, I hadn't seen any of that, therefore I concluded it hadn't been done". Well, with great respect to Mr Roche, that's not the way you go about doing an expert's report.

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35

At page 5 of my submissions at the top he was being questioned by Mr McCarthy and this appears in the transcript:

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"So you take the view in writing your report that you were given this material and if you can't find anything in there to demonstrate something was done or not done, then you conclude to the contrary, is that right?---That's the only option I have. And on a number of occasions I have prefaced my comments with 'On the evidence that is available to me'. I may not have in this case,

45

but in many other cases I have.”

Well, that’s a fundamental flaw, in my submission, in his reasoning process and the way he’s coming to his conclusions.

5

Others have made comments about his so-called advocacy for a cause and I don’t want to say any more about that. What I do want to make a comment about, your Honour, though is a thing I’ve adverted to and that’s the really general nature of the way he makes his comments. And the same applies when you read material that’s relied upon by counsel assisting in relation to the Fire Brigade.

10

But I just want to take but one example of the kind of thing I’m talking about in his report. At page 52 of his report where he’s talking about fire behaviour at about point 5 of that page he says this:

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“However, in my opinion, the evidence also reveals that a lack of understanding wild fire behaviour, particularly under extreme conditions, that the number of key personnel to make decisions and judgements that underestimated the potential of these fires. In most if not all instance where this occurred, nationally and internationally recognised learning should have enabled the personnel concerned to adequately predict and respond to the level of fire behaviour they were experiencing.”

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25

Now, with great respect, your Honour, that is meaningless. Your Honour can’t make any - it’s not footnoted in any way, he doesn’t give any particular examples and the report in the way it’s put is done in such general terms, with the use of adjectives describing things, that it doesn’t provide any assistance to your Honour in coming to firm conclusions about precisely what wasn’t done and what should have been done, and the basis for that reasoning.

30

Turning to the specific matters of the Fire Brigade and this apparent criticism of the IAP, your Honour, in my submission it’s completely unjustified on the material, in any event. After the meeting of 16 January, as your Honour will recall, the Fire Brigade set up their own planning unit, with Mr Collins being specifically in charge of that unit. At that stage of course they had no real idea of what was coming.

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40

Mr Hastings has talked about how people underestimated these fires. Mr Roche criticises. He asserts that Fire Brigade underestimated the potential of these fires. Well, so did everybody else. Everybody underestimated the potential of these fires. Mr Cheney, as has been point out, underestimated the potential of these fires. And Mr Collins says

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when he gave evidence at 5,395/5,396 that when they set up the planning unit he said:

5 “We had no idea what shape or size or nature of the severity of the fire was.”

So when their planning was being undertaken and when they produced that document that’s been referred to as an IAP they really didn’t know precisely what was coming.

10

Mr Prince who is now the head of the Fire Brigade, of course, at that stage I think was still a district officer, said in his statement which is AUS-AFP00700004:

15 “That incident management team did not have control of any fire at that time because there was no urban fire on 16 January.”

So what they were doing was putting in planning for the future, not knowing exactly what they might have to deal with. And it can’t be said that what’s in that IAP was in any sense any kind of summary of the kind of planning that was being done, because when you read the report of the planning section prepared by Mr Collins subsequently it shows a great deal of detail of action being undertaken by the Fire Brigade to prepare for an urban impact.

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25 Just on one issue, unfortunately counsel assisting quotes Mr Newham’s comment about business as usual. Now, with respect, Mr Newham has never said he didn’t say that, but what’s been done is that has been taken completely out of context in my submission throughout this Inquiry, both by Mr Roche in his report when he refers to it, and by counsel assisting. It’s quite apparent Mr Newham did not mean by that “We’re sitting back doing nothing else, we’ll just ignore what’s going on out there” because that was not what was happening.

30

35 You’ll recall that the planning section was in full swing and was doing a lot to try and prepare for what might come, but of course not knowing exactly what might come, and perhaps underestimating what might come, but that’s not, on all the evidence, at all surprising. Everybody, with great respect, did. Senior Fire Fighter Buckley said in question 6 in his statement, “Nobody in their wildest dreams could have predicted this”. And your Honour, the ACT at pages 30 to 47 of their submissions set out comments by a number of individuals, of senior people who recognised that this was by far and away more than they could have possibly expected. So on all the information the Fire Brigade had at the time on the 16th and leading up to the fires, in my respectful submission their

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planning and preparation was quite appropriate.

5 Finally, two things, the criticism by Mr Roche as he does criticise the Fire
Brigade for having its own incident management team is quite unfair. The
Fire Brigade of course was and still is a separate entity to the Rural Fire
Service and it had its own statutory responsibility, which was and still is
carefully defined. It had its own responsibility to set up its own incident
management team which it did. But of course that doesn't mean they
weren't right across what was going on. Mr Prince was attending, and
10 Mr Bennett as I recall was attending the planning meetings and there was
cross-fertilisation.

15 But of course those instructing me recognise that the difference in
structure between having two fire services can be, and one wonders in a
jurisdiction the size of the ACT whether it is appropriate for there to be
two separate fire services. However, as I've said earlier, in my respectful
submission your Honour wouldn't even get to these issues because it's
quite apparent that nothing done or not done by the Fire Brigade, which is
referred to, was in any sense causative of the fires.

20 Finally, I've made some submissions concerning counsel assisting's
submission on the Supreme Court applications and I note that what's been
urged upon your Honour has been withdrawn. It's in my submission quite
appropriate that that has been withdrawn, and that concludes what I have
25 to say, your Honour.

HER HONOUR: Thank you, Mr Watts. Thank you.

30 Yes, I think that brings these proceedings to a close.

MR LASRY: It does, your Honour, the next stage in the submission
process will be, as I follow it, next Monday, which will involve
Mr Archer, Mr Gibb and I think also Mr Stitt.

35 HER HONOUR: Yes.

40 MR LASRY: It's not clear, but it's likely that we could conclude that
process within the day. I've suggested to my learned friends that it might
be useful if I can, for me to make a reply to all the submissions which
have been made up to that point, if not on Monday then on Tuesday
morning, because the next step after that is the New South Wales
submissions on the following Friday week.

45 And if it suits my learned friends presently at the Bar table to basically
complete their role in the proceedings by the end of Tuesday, then I can

do that and we can treat New South Wales, in a sense, as a separate debate which is unlikely I think to impinge on the interests of my learned friends presently here, and to the extent that it does, well of course they can keep an eye on the proceedings by watching the transcript.

5

If that's convenient to your Honour, that's what I'd proposed to do.

HER HONOUR: That would be useful if you're in a position to do that, Mr Lasry either on Monday or on Tuesday after the submissions.

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MR LASRY: Probably Tuesday, I suspect.

HER HONOUR: I would think probably, given that we have a number of counsel making submissions on Monday.

15

MR LASRY: Yes, as your Honour pleases.

HER HONOUR: All right, thank you.

20

I just want to raise one issue as well with the counsel here. It was always and has always been my view that the submissions should be published and made available, and now that all the evidence has been completed and the submissions have been lodged and oral argument has started. So I'm simply asking counsel here today whether there's any objection to the submissions being made public. I intend to post them on the web site, but I won't do that until I check with counsel next week and give them the opportunity also to voice any objection that they have, to make the submissions available.

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30

MR LASRY: Your Honour, certainly we would have no objection. I just add one thing so that it's clear and on the record, that in the case of our submissions the electronic version of the submissions contains hyperlinks which then enable the reader of the submission to look at the documents that we refer to. We have no problem with that, and I assume - - -

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HER HONOUR: Yes, which virtually leads to the brief.

MR LASRY: Which leads to the brief, yes.

40

HER HONOUR: To the brief and the transcript of the proceedings.

MR LASRY: That's correct.

45

HER HONOUR: And again I see no objection to that information being made public.

5 MR LAKATOS: Yes, your Honour, we have no objection, subject to one minor point, of course. We've made some corrections on the run and I don't know in the scheme of things in this Inquiry whether those particular small problems are going to cause any concern for those in the public reading. They are such comparatively minute matters, but subject to that we have no objection whatsoever.

HER HONOUR: Thank you. Thank you, Mr Lakatos.

10 All right, thank you, so we'll adjourn.

MR HASTINGS: Your Honour, I can indicate too, on behalf of Mr Lucas-Smith and Mr Castle that there's no objection to the course that you propose.

15 HER HONOUR: Thank you, Mr Hastings.

Thank you, gentlemen, so we'll adjourn until Monday at 10 o'clock.

20

ADJOURNED TO 17 JULY 2006 AT 10.00 AM [12.35 pm]

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TRANSCRIPT OF PROCEEDINGS

CORONER'S 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

**10.04 AM, MONDAY, 17 JULY 2006
(Continued from 12/7/2006)**

HER HONOUR: Yes, gentlemen. Mr Gibb, thank you.

5 MR GIBB: Yes, may it please your Honour. Your Honour, may I formally seek leave to appear with my learned friend Mr Pike for Mr Graham, but only for the purpose of indicating to your Honour that we do not wish to make any further oral submission on his behalf. That is to say, in addition to the written submissions that - - -

10 HER HONOUR: To the written submissions that have been made.

MR GIBB: - - - were provided on 30 June.

HER HONOUR: Thank you.

15 MR GIBB: Then your Honour, I appear again with my learned friend Mr Craddock on behalf of Mr McRae. I can indicate to your Honour for the benefit of others that I would think that my oral submission would not last longer than an hour, and probably less than that.

20 HER HONOUR: Thank you.

MR GIBB: Your Honour, by way of introduction can I just make these observations, in preparing oral submissions on Mr McRae's behalf, and having already furnished a fortnight ago detailed written submissions on his behalf and in answer to counsel assisting's written submissions, both of which your Honour is well able to read yourself, we have reasonable grounds to believe that the task ahead of us today would be, and indeed would for your Honour most usefully be, not merely to provide an overview or simply a rehash, or an oral repetition of parts of our written submissions, as counsel assisting presented in respect of theirs last Monday, but primarily to address the reply which counsel assisting could have been expected to have made to our detailed written submissions in answer to theirs, and perhaps incidentally only, for us to elaborate where it might have been necessary upon our own written submissions.

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45 However, it's important to observe at the outset that in counsel assisting's oral submissions last Monday my learned friend Mr Lasry renounced any attempt to reply in detail to the submissions furnished on behalf of others, and saw fit only to provide a level of overview that's recorded in the transcript at page 139 at line 40, in the first instance. And secondly, 137 of outline 44 and also 138 of outline 9, submit your Honour that that is an extraordinary position to adopt, given that those submissions have now been the subject of the most fundamental challenge at almost every turn in detailed written submissions, both as to matters of law and matters of fact, particularly we would say in those that have been presented on behalf of

the ACT and the former ESB officers, Messrs Lucas-Smith, Castle and on behalf of our own client, Mr McRae.

5 For counsel assisting to make, as they did in their written submissions, very serious allegations against named persons, and when challenged to reply to the answers furnished to those allegations make no attempt to reply, or indeed to say with insouciance, as was said last Monday, that “our submission stands as our position on all the issues”, is a further example of, and a grave reflection of the extent to which we say counsel
10 assisting have failed, and continue to fail to pursue the attainment of justice, and instead have pushed a preconceived objective then to attribute blame to named persons, if necessary, irrespective of the law or the evidence.

15 We submit, your Honour, that the time for counsel assisting to defend their position orally was last Monday, not via the making of some further oral reply pursuant to some liberty to do so, which they might seek in their favour towards the end of the proceedings, or some part of them, as counsel assisting in passing sought to leave open in the transcript at page
20 140 about lines 15 and following. Presumably that was done for tactical reasons after counsel for others had long since made their oral submissions and, indeed, been excused from further attendance.

25 HER HONOUR: There was a period of delay, Mr Gibb, of 2 weeks. And are you suggesting that counsel assisting should have read hundreds of pages of submissions - - -

MR GIBB: Indeed, I am, your Honour.

30 HER HONOUR: - - - in the space of a week?

MR GIBB: Yes, I am.

35 HER HONOUR: And made a reply. That was never what was intended originally.

40 MR GIBB: Well, it might not have been intended by counsel assisting, your Honour, but I sat down and read them. I was able to read them in about 2½ days. Now, I don't see why counsel assisting, with all the resources that they have - - -

HER HONOUR: Well, what are these resources that everybody keeps talking about that counsel assisting has?

45 MR GIBB: Well, they have a team of people assisting them.

HER HONOUR: Who is this team? Do you know exactly who is part of this team?

MR GIBB: I don't know them in - - -

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HER HONOUR: Mr Lasry was here alone last week, Mr Gibb.

MR GIBB: Well, that's a matter for him. But what I'm saying is simply this, if your Honour is to - - -

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HER HONOUR: I'm simply pointing out to you that there is no mythical team assisting counsel assisting, probably no more so than is assisting you, Mr Gibb.

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MR GIBB: Well, I don't have a team. I don't have a team. But the point I'm making is simply this, if your Honour is to be assisted by a debate on these things, it's not really very helpful for counsel assisting to come along and say this is our position, and not engage in debate. And not engage in debate when we're here, and then to come along and say, "Well, we'd like to make a reply after everyone's gone". What's the point of that? How is that going to assist you?

20

HER HONOUR: Well, I understand that Mr Lasry intends to make a reply tomorrow, Mr Gibb.

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MR GIBB: Well, he says he does. Anyway, I don't want to delay on this point.

HER HONOUR: No, thank you.

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MR GIBB: But I simply want to make this point, your Honour, that the suggestion that they should have this liberty, with a right for other counsel to have a further reply to the further reply is an absurd notion.

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HER HONOUR: That's not going to happen, Mr Gibb.

MR GIBB: And indeed, it shouldn't happen, your Honour. When and where is the process of replying to stop, if that was to be the position? Indeed, our fear is that counsel assisting envisage making submissions which would not, in truth, be in reply but new and entirely different submissions of the kind we've already been subjected to in the notice that was given on 23 May. So your Honour, we would submit if there's to be any attempt to do that again your Honour should disallow it.

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Further than that, we say if counsel assisting hadn't read or been ready to

5 respond to our written submissions prior to last Monday, then for our part we submit that they should be taken to have abandoned their opportunity to do so. That is to say, to have abandoned their opportunity to reply to the answers that we made on Mr McRae's behalf in our written submissions. Your Honour has the competing contentions and is well able to deal with them, and should do so without hearing further from counsel assisting.

10 We shouldn't be put to the bother of having to contemplate making, or having to make yet a further reply to counsel assisting's further submissions on these matters. And so for that reason, your Honour, we would oppose the granting to counsel assisting of any liberty to make any further written submissions or any further oral submissions in reply to ours, whether it be tomorrow or at any other time. If your Honour is 15 against us on that, then we reserve our right to respond further, as we may see fit.

20 Your Honour, in default then of a detailed reply from counsel assisting, to which we can now address ourselves in these oral submissions, and in the interests of economy of time spent and avoiding further self-repetition, we will confine our oral submissions to brief responses to counsel assisting's oral submissions, on the assumption that where there was in them some reference to Mr McRae, counsel assisting perceived those submissions to be in a general sense to his, that is to say Mr McRae's, discredit and 25 therefore worthy of criticism of some kind or another. In doing that, we will also make some further brief remarks about other select issues of fact and law, but not hopefully in an unduly repetitive fashion.

30 Can I come then to the oral submissions that my learned friend made on 10 July. The first of those submissions, which is at about page 158 about line 44, was what was described in counsel assisting's written submissions, paragraph 1,199, as Mr McRae's "convoluted approach to the issue of warnings". Your Honour, in this regard counsel assisting has put nothing to your Honour in response to the detailed analysis of the 35 evidence that was contained in our written submissions, particularly at paragraph 86, and referring back to paragraphs 22 to 52.

40 In this regard, we say that those submissions demonstrate that Mr McRae well understood, but counsel assisting who questioned him clearly did not, the difference between, on the one hand, general advice about pre-fire preparation, such as removing rubbish, clearing gutters, et cetera, and on the other hand, targeted warnings to specific suburbs in identifiable risk from fire confronting them.

45 That is to say, to assist people there to make sure that they were safe,

5 either by staying and protecting their property, including by such things as blocking and filling gutters with water, sheltering inside, filling the bath with water, et cetera, or else evacuating. We say there was nothing convoluted about Mr McRae's approach manifested in his evidence extracted in our written submissions, specifically at paragraphs 30 and 32 of those written submissions, to which I will shortly refer.

10 The second such submission which was at about page 159 of the transcript, line 7 and following, was said to be based primarily upon Mr Cheney's opinion expressed to Mr Lucas-Smith over the telephone, to the effect that by 13 January at the latest it was apparent that there was a realistic risk that the fires in some form might affect the urban area of Canberra.

15 Your Honour, the submission made touches Mr McRae only tangentially, in that in their written submissions at paragraph 568 counsel assisting suggested that Mr McRae should have pursued Mr Cheney. Now, in our written submissions at paragraphs 15 to 21 we directly addressed that subject matter and made a number of submissions about the over-inflated
20 significance which counsel assisting seek to attribute to the evidence concerning that conversation and its sequelae, and as to the limited real worth which that evidence is properly capable of bearing. And we say - and I won't repeat this submission again, it's a matter of record that those submissions stand unanswered.

25 The third such submission made by my learned friend in his oral presentation is at transcript page 160, about lines 14 and following, which is allied with the one I just mentioned and which was to the effect that there was submitted to have been unwillingness on the part of Mr McRae
30 to admit of any view of potential fire spread "that didn't fit with his own somewhat rigid attitude".

35 Now, your Honour, the evidence to which we've referred in our written submissions at paragraph 20, and we also give you a reference to what we said at paragraph 90 of those submissions, with regard to the engagement by Mr McRae of a number of outsiders there identified, brought in to provide an independent view gives the lie to counsel assisting's submission.

40 As we put it in our written submissions at paragraph 21, and as Mr McRae explained in his evidence, part of which is included in counsel assisting's summary set out in italics in paragraphs 564-7 and 569 of their written submissions, Mr Cheney had nothing concrete to offer a fire suppression agency, and did not offer the ESB any such thing, other than an opinion
45 which was not evidence based, and provided no firm warrant for specific

action on the part of the ESB or its officers.

5 Your Honour, the fourth submission touching Mr McRae that my learned
friend made is at transcript page 161, about line 16 and following, and that
was to the effect that although by late afternoon or evening on 15 January
and thereafter Mr Lucas-Smith, Mr Castle and Mr McRae recognised and
acknowledged that the fires presented a serious threat to the Canberra
10 urban area and rural settings west of Canberra, no warning consistent with
that state of mind was given, so it was said, identifying the risk until prior
to 2.40 pm on 18 January. And that in that case, or that in the case of
Mr McRae, he considered that an impact on Canberra was likely to occur
by the Monday, the 20th.

15 Now your Honour, as we've pointed out in our written submissions, and
we refer you specifically to paragraphs 28 to 39 which relate to 15 and
16 January, paragraphs 40 to 52 which relate to 17 and 18 January, and we
also refer you to further material in paragraphs 91, 93 and 101, this
submission fails to distinguish the different roles of the senior officers
involved. More particularly, that it was no part of Mr McRae's duties to
20 issue community information or warnings, and it overstates the effect of
Mr McRae's evidence which was expressed with far more precision and
care than counsel assisting's submissions.

25 We refer your Honour specifically to the extract of his evidence which
appears, firstly, in paragraph 30 of our written submissions, and I'll just
go to that briefly, only to highlight parts of the extract of his evidence.
Mr McRae's evidence extracted there was to the effect that he said "My
projections didn't go" and he was speaking in the context of an urban
impact:

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35 "My expectation, and I would expect others would have had a
similar expectation, was that at some point in the sequence of
forecast bad weather one or more of the fires in the area would
break containment, and breaking containment that weather would
lead to fires making runs. Now, those runs would run across the
landscape. They would cause some damage."

And the passage concludes:

40 "I could not have expected a run when it was first made to reach
anywhere near the city."

45 Similarly, in paragraph 32 of our written submissions Mr McRae's
evidence was similar. We refer in the second line at page 20 in that
paragraph to Mr McRae's opinion that there wasn't a need to alert the

entire urban community, and specifically to where he said:

5 “My expectation was at some stage during the phase of forecast
dire weather, or nasty weather or bad weather, there would be
break-outs and analysis of those would provide the starting point
for the final run that, should it eventuate, would take the fire
toward the city, and that that would allow us to pin down the
sub-set of the urban community that needed to be alerted.”

10 Your Honour, the next submission made orally that’s related to Mr McRae
is found at transcript reference page 163, it starts about line 37 and goes
across to 164 about line 5, and is based apparently on paragraph 1,250 of
counsel assisting’s written submission. And it was to the effect that by
not telling those who might suffer the impact of fire on the following
15 Monday, Mr Lucas-Smith and Mr McRae came to a decision, now
apparently said by counsel assisting not to be understood in a
conspiratorial sense, but its effect was to deprive the people of Canberra
of the chance to prepare for the risk that both Mr Lucas-Smith and
Mr McRae saw as serious, and even perhaps likely.

20 Your Honour, presumably the absurdity of that submission in the form
that it took in counsel assisting’s written submissions has eventually
dawned upon them after it was quite rightly pilloried by a number of
counsel for those affected by its making. The status of that submission is
25 now somewhat unclear. Apparently what we described as a conspiracy
theory in our written submissions at paragraph 100 is now abandoned, but
the problem remains that there’s simply no evidence as to the making of
any such decision by anybody.

30 As we point out in our written submissions, particularly at paragraphs 100
to 117, it misconstrued Mr McRae’s evidence about targeted warnings, it
ignores the fact that it was no part of Mr McRae’s job to write or to issue
warnings. The critical fire spread prediction was not even made by
Mr McRae, but by Messrs Gellie, Taylor and Lhuede. The relevant fire
35 behaviour which was on the Saturday, that’s the 18th, not the Monday the
20th, was according to the reports of the fire fighters unprecedented, and
on the overwhelming balance of credible expert evidence unpredictable.

40 Even more recent expert meteorological opinion referred to in the
attachment to our written submissions, and also forming part of the brief,
suggests that there were natural forces at work which dramatically
affected fire behaviour that Saturday, and which may possibly have been
capable of being forecast, but which were not forecast by the Bureau of
Meteorology beforehand. And it approaches the matter in a way which
45 sets aside science based predictions in favour of an uncritical acceptance

of Mr Cheney's claimed approach, with the benefit of hindsight, in circumstances where neither Mr Cheney nor anybody else, for that matter, predicted what was to happen later on the Saturday, and not even Mr Bartlett who of course over-flew the fires that morning.

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The fifth such submission made by counsel assisting is to be found at transcript page 166 at lines 26 through to about 35, which was to the effect that Mr McRae should be criticised for having ensured that the ACT Fire Brigade and the ACT Ambulance Service were prepared to respond to urban impact of the fires but not having engaged the people within the urban community.

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That's a submission, your Honour, that has also been dealt with in our written submissions, particularly at paragraphs 99 and 117. In short, there were obvious reasons for giving direct advice to those instrumentalities because of the importance of their functions and their responsibilities in a fire emergency. In addition to that, however, general warnings about preparedness had already gone out to the community. Counsel assisting's criticisms again also continue to ignore the fact that no one contemporaneously and scientifically predicted what would happen on 18 January, not even Mr Cheney and nor Mr Bartlett.

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Your Honour, the sixth such submission to which we respond is at transcript 166 of outlines 36 over to about 45, and that was that Mr McRae should be criticised for the content of the midday media release that day, in that it didn't contain warning that fires could affect the urban area from Weston Creek to Greenway. Again we've dealt with that submission in our written submissions at paragraph 118. Mr McRae did not call for a target warning to name suburbs at the morning planning meeting because there was no sufficient warrant for doing so at that time.

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The information imparted at that meeting was, however, available to be used and could readily have been relied upon by those who did not include Mr McRae, who had responsibility for community engagement to engender, if they thought fit, a heightened sense of resident awareness of the general situation, to complete specific or specified tasks or to attend to further announcements, or whatever. Whether or not they should have done so, and whether or not if they had done so it may have had some beneficial effect on the level of community awareness generally, the fact remains that Mr McRae can't be blamed for the fact that they did not do so.

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Your Honour, the seventh such submission made relating to Mr McRae is at transcript reference page 167 about lines 21 and following, and that was that ESB officers apparently, still including Mr McRae, knowingly

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withheld information and were in dereliction of their duty to the public. That's a submission, your Honour, that has been universally and quite properly criticised for its lack of balance and its inconsistency with the evidence.

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We submit that that submission is simply indefensible. The criticisms of it in submissions on behalf of others, both written and oral, are telling. They also stand, lest we repeat it again, completely unanswered by counsel assisting. If there was a conspiracy, apparently now it seems, to some degree at least, disavowed by counsel assisting, it must have been a conspiracy, your Honour, of silence.

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It's difficult to imagine how such a conspiracy could have been furthered in the crowded room where planning meetings took place. If there was a conspiracy, even one only between Mr Lucas-Smith and Mr Castle, a necessary step in it would presumably have been to keep Mr McRae silent, since he knew as well as them the risk, the community awareness of which it is suggested they may have conspired to suppress. Yet Mr McRae was speaking openly at planning meetings which were attended by many, many people who were not ESB officers, and as early as 14 and 15 January he said what he said about "the worst fire weather of your careers". He invited those present "to do the maths, and get all the containments locked down before the expected change on the 17th" and so on. He said those things in the presence of the media, public servants, Mr McRae, police, the Fire Brigade. If Mr Cheney was ever trying to suppress community awareness of the risk at any point in time, up to and including 18 January, your Honour, he did a pretty appalling job of doing so.

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Your Honour, we addressed counsel assisting's submission directly on this matter in our written submissions at paragraphs 120 to 122. The root misconception which underlies it is counsel assisting's incapacity to grasp the difference between general advice as to the need to be prepared for the possibility of fire, and targeted warnings to a particular section of the community that a fire may be approaching, their assumption that the people of Canberra were entirely ignorant of the fact that there were large fires in the forests to the west and the north-west of the ACT, and their persistent misrepresentation of the evidence as to Mr McRae's duties, that is that it was up to him to tell the community that the fires might spread and that they should undertake some basic preparedness.

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Your Honour, we also remain critical of the continued imprecision surrounding counsel assisting's submission, that is to say, what information did Mr McRae knowingly withhold, and when did he withhold it? What was the specific information that counsel assisting now

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5 contends should have been provided? When and how? Where is the evidence to support counsel assisting's contention, which is paragraph 1,299(a), that many residents would have had time to save property from the effects of the fires, but for the withholding of that specific information? And where is the evidence that residents would have been - and I use counsel assisting's terms - somehow better equipped to protect their homes?

10 Your Honour, the repetition of formulaic answers to such enquiries I resort to generalised expressions such as, "straightforward and timely information about the risks they were facing" are totally unsatisfactory responses, when such serious allegations as these are still persisted in by counsel assisting. Your Honour, we've illustrated the difficulties inherent in them in our written submissions, particularly by reference to the terms
15 of the standard of urgency warning and residents' views about its efficacy, and we refer your Honour to what we've said in paragraph 123 of our written submissions in that regard. We would submit that your Honour could, in terms of the standard of proof required, have no sense of comfortable satisfaction that counsel assisting's submissions on this
20 matter has any substance whatsoever.

Your Honour, penultimately in this connection, we come to counsel assisting's concluding oral submission on the subject of warnings and forming part of their submissions as to your Honour's findings, and that's
25 a transcript reference 167 at line 40, and that goes over 168 at about line 30. Again we dealt with that matter in our written submissions at paragraphs 124 to 127.

30 For the reasons advanced by us on 19 May during the argument that transpired on the admissibility of the further evidence, we submitted that the findings urged by counsel assisting concerning Mr McRae on the subject of warnings are beyond the parameters and permissible scope of an Inquest or an Inquiry as formal findings, and for the reasons advanced in those submissions - and I'm not going to go through that material again
35 - we simply say that blame attribution is not part of the Coronial function. But in any event, we also say that such findings are not open or, alternatively, not fairly open for your Honour to make as findings even en route to your formal findings.

40 And lest we leave anything undone, we further submit that properly viewed, they could not be the foundation for any comment or comments adverse to Mr McRae. Why? He had no personal responsibility to warn anybody outside the ESB about anything. He had the capacity to recommend to others in the ESB the issue of targeted warnings when fire
45 behaviour predictions justified the adoption of that course, and that is

what he did.

5 Now, in retrospect, your Honour, one may or might disagree with the fire spread predictions for 18 January, which I again repeat were in fact made by the trio and not by him, but which Mr McRae took to the evening planning meeting, but that would be a disagreement from a position of overwhelming advantage over those charged with the responsibility of making those decisions, when those decisions were actually made.

10 Now your Honour, counsel assisting in oral submissions lauded Mr Roche's evidence on the subject of warnings, that's at transcript page 169 at about lines 26 to 30. Again, we've specifically addressed that in our written submissions at paragraph 126. Mr Roche's personal opinion as to the 3-stage process that he claimed would have constituted an effective emergency warning system was no more than that; a personal opinion. He was not expert in the establishment or maintenance of effective emergency warnings systems, he had made no investigation or study of the efficacy of emergency warning systems generally or elsewhere.

20 Factual assumptions upon which his 3-stage process was built were never spelt out because his personal opinion was not grounded upon any facts which could be identified and scrutinised. Indeed, he showed no interest, even in the resident survey, which was the only piece of evidence before your Honour which might have been, if it could have been demonstrated to have been statistically representative, at the least of some, albeit limited, relevance to the efficacy of the emergency warning system which was in place at the time.

30 Moreover, even if the ACT had had in place what Mr Roche after the event, and without evidence to support his opinion, claims would have been an effective emergency system, there is not the slightest evidence that it would have saved one life or one home from destruction or damage on 18 January, or that those who lost something in the fires would not or could not have still, in some cases perhaps quite validly, asserted that they were not warned or didn't understand any warnings which may have been given, or would have acted differently if they had been warned, or warned in a particular way at a particular time.

40 Your Honour, we come then finally to what, on any reasonable view, must be the most speculative of counsel assisting's submissions, and that's to be found at transcript page 169 at line 32 over to 170 about line 19, and that is that it's open for your Honour, on the evidence upon which your Honour could properly act, to conclude that because of the fact that the ESB had not implemented a community warning system of the kind

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5 suggested by Mr Roche, because of the fact that it had not issued a
warning on 17 or even 18 January, describing a risk to the area of Duffy in
terms similar to that issued by the ESB on 20 January, the Monday,
Mrs Tener didn't temporarily relocate before the issue of the standard
10 emergency warning at approximately 2.40 pm, and instead remained in
her house. And further because of the fact that the issue of the warning
was late and urged residents to return to their homes, and because of the
fact that the advice as to precautions to take if threatened by fire were
incomplete - and we assume the submission there is because it didn't
15 expressly explain the purpose of filling the bath and didn't suggest
temporary relocation - each of those factors, it is said, was a cause of her
death.

15 Your Honour, we've dealt with counsel assisting's submissions on this
subject in our written submissions at paragraphs 128 to 130, as we have
submitted, there is unequivocal - unequivocal - support among all experts,
and for the reasons we've already expressed, we don't include Mr Roche
in that, certainly on the subject of the efficacy of emergency warning
20 systems, is simply with the AFAC position, as a preference for
able-bodied persons to stay with their homes where possible, to stay and
defend their homes rather than evacuate, and certainly nobody ever
seriously contemplated evacuating Duffy on 17 January because there was
simply no warrant for doing so at that time.

25 And while it may be open to conclude that Mrs Tener had taken some
steps on the morning of 18 January with a view to evacuating at some
later point in time if were no longer possible to stay and defend her home,
there is certainly no sufficient evidence to conclude that she had any
immediate intention to do so, at any identifiable time on that day. Indeed,
30 if anything, the evidence as to where her body was found is the contrary,
we would submit.

35 Further there's no reliable foundation for a finding that she would have
evacuated, even if a warning of the kind given on 20 January, that is to say
the Monday, had been given, particularly since that warning, if your
Honour looks at it carefully, advised residents that they should stay with
their homes or temporarily relocate until weather conditions eased,
without expressing a preference for the one or the other. Plainly, not even
40 that warning constituted unequivocal advice to relocate.

45 And certainly there is no evidentiary foundation at all for a finding that
Mrs Tener heard the standard emergency warning for the first time on the
afternoon of 18 January as she was preparing to evacuate, if indeed she
was, but stayed with her home because the warning urged residents to
return to their houses, or evidence for a finding that she was inadequately

equipped to understand that warning, if indeed she heard it.

5 Where Mr McRae can properly be said to fit into this elaborate theory
with all its “ifs” is not made clear in the submission, unless it’s being
submitted that because he was a senior officer of the ESB he must bear
some responsibility, irrespective of the fact that (a) the giving of
community warnings was not part of his job, and (b) he had no role
whatever in the issues of standard emergency warning, nor as to its
contents with whatever deficiencies, if any, that document might
10 subsequently be perceived to exhibit.

Your Honour, we make no apology for the strong language that we
employed in paragraph 129 of our written submissions in condemning
counsel assisting’s approach on this issue. Circumstances in which they
15 have now come to make the revised submission as to the cause of
Mrs Tener’s death, that is to say, to establish some act or omission of
somebody who they’re no longer apparently even prepared to identify by
name, was a cause of Mrs Tener’s death, and particularly when the
substance of it was never put to any such person in the witness box, we
20 would respectfully submit ought to cause your Honour to reflect very
carefully indeed, before going down the path that counsel assisting
suggests.

Your Honour, there are two further subject areas which I wish to address
some remarks, the first one relates to the question of opinion evidence.
Your Honour, in drawing to a conclusion one matter we revisit is the issue
of how your Honour should treat the opinion evidence that’s been adduced
before you. We submit that you should rely only upon probative
evidence, that is to say reliable evidence, and you should be slow to make
30 findings which have serious potential impacts on professional reputations,
particularly where as here you are invited to do that, on the strength of
opinions expressed by witnesses, such as Mr Roche and Mr Cheney, who
had very limited, if any, capacity to speak with real authority outside their
limited fields of specialised knowledge, study or experience, and in the
35 case of Mr Roche, who failed to demonstrate the qualities of independence
and impartiality, properly expected of such witnesses.

Reference has been made to the fact that there are now commonly
embodied in codes of conduct for expert witnesses giving evidence in civil
40 cases a number of requirements, but those requirements are little more
than a reflection of what is now well developed jurisprudence, some of
which has been cited to your Honour in the written submissions, about the
circumstances in which that kind of opinion evidence may be received or,
indeed, acted upon. And we’ve referred in our written submissions, your
45 Honour, to the relevant principles with regard to the admission of opinion

evidence. And while your Honour, we acknowledge, is not bound to apply those principles, we submit that it is quite impermissible for your Honour to base findings on personal opinions which can't be relied upon as expert, because such evidence is not reliable evidence.

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Your Honour, finally then may I make these remarks which my learned friend suggests ought to be described this way, the big picture of a little city with a big fuel load nearby. Prior to the January 2003 fires the fuel load in the forests of both the ACT and New South Wales was very high. For your Honour to say fine would not be beyond jurisdiction. To purport to note a finding about the complexity of matters that led to that state of affairs would be beyond jurisdiction.

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However, your Honour can, and we submit should, make a finding that the very high fuel loads were of considerable significance, not only in the ignition of the fires themselves, but also in the difficulties experienced in their containment and suppression. More particularly, it would be to ignore part of the reality not to acknowledge the effect of high fuel loads on the capacity of the fire suppression agencies in what was, and still is, a relatively small city to contain and suppress wild fires of the dimensions that were involved.

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Even Mr Cheney, at least, quite properly recognised this reality when in the first phase of the Inquiry he acknowledged that remote fires starting in that level of fuel would always have been particularly difficult to stop. And when one factors into that reality the unpredictable confluence of fires and weather which occurred on 18 January, it's not so much the high fuel loads that one can find drove the fires into the suburbs or Canberra, as in significant measure the high fuel loads that generated fires of the size that were being acted upon by those drivers on the day.

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In that sense, the fuel loads were a cause of the fires that impacted upon the suburbs. What has been put, from our standpoint, is that those fuel loads had been the subject of study by Mr McRae, ultimately resulting in his Phoenix Imperative document, to which frequent reference has been made. Obviously that document wasn't created overnight, it was the product of study investigation over a lengthy period of time. When it was released to the policy and decision-makers it represented an analysis of the state of the fuels, and it also contained a proposal for urgent action to be taken to address that state of affairs.

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Now, we submit that it was not possible and, indeed, would not have been in any other policy to do or to have done that which the Phoenix Imperative document urged should be done, at least within the year between its release and the January 2003 fires. And there were of course

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the belligerent views on fuel management and many persons with interests, either direct in the case of landholders or less direct in the case of environmental lobbyists, who had a stake in the outcome of those recommendations.

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However, we submit that your Honour can and should make a finding that Mr McRae foresaw the problem and did what was reasonable that he should have done, to urge an appropriate response to it. Your Honour would do well, we submit, to think about making a recommendation to the

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ACT government to give serious consideration to adopting the recommendations contained in the Phoenix Imperative document.

During 2002, as revealed by the so-called Dr Doom emails, Mr McRae continued his study of and reported upon those fuel loads. He fully discharged what truly was a responsibility of his to study and to report. Both the content and the tone of his emails provide compelling evidence, we submit, that he did far more than just give occasional perfunctory advice about future fire conditions. The state of the fuels was one of the subjects to which he continually returned in his advice to the ESB.

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When one stands back to survey what we say is the larger canvas, the enormity of the contribution of fuel loads soon becomes apparent, and the effect is, and should be, to throw in sharp relief the relative insignificance, we say, of many of the alleged errors or omissions of individuals seen with the benefit of hindsight, which have been the primary focus, indeed, dare we say, the obsession of counsel assisting, can properly be regarded as bearing in the scheme of things.

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Your Honour, unless we can further assist your Honour upon any other aspect, those are our oral submissions.

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HER HONOUR: Thank you, Mr Gibb. That's fine, thank you.

Mr Craddock.

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MR CRADDOCK: Just so that it is on record, I think it's understood by my learned friends, but as a matter of record, I don't propose to make any further oral submissions on behalf of Ms Arman. There are written submissions we - - -

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HER HONOUR: Yes, there are.

MR CRADDOCK: - - - understand that you will take into account.

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HER HONOUR: Yes, and thank you, Mr Craddock. Thank you.

MR CRADDOCK: Thank you, your Honour.

5 MR GIBB: Your Honour, could I just say one other thing. In the light of what I put to your Honour, it is our submission that we would seek to be excused from further attendance.

HER HONOUR: You don't want to stay for anything further? Then you're excused. Thank you, Mr Gibb.

10 MR GIBB: Thank you, your Honour.

HER HONOUR: Thank you. And you too, Mr Craddock, you're excused.

15 MR CRADDOCK: Thank you, your Honour.

HER HONOUR: Yes, Mr Archer, thank you.

20 MR ARCHER: Your Honour, this will be brief, consistent with the approach that the AFP has taken during this Inquest. There are only a limited range of matters that we would want to address the court upon on final submission.

25 Submissions of great length have been filed by the AFP and they are available to those who would care to read them, and in relation to those larger submissions, the range of issues that are covered in those are quite narrow as well, and they cover a range of issues that perhaps in the wash-up aren't going to be of central concern to the Inquiry, but which were matters that were raised during evidence, and which are of concern to my
30 client. In particular, I refer to the issue of the evacuations that were conducted on 18 January. I don't in my submissions this morning intend to canvas that issue at all.

35 I want to say, basically, two things during these brief submissions, to outline the role of the AFP in a general sense in relation to bushfire emergencies, and to touch upon submissions made by Mr Hastings on behalf of Mr Castle and Mr Lucas-Smith in respect of matters concerning the AFP in the days leading up to 18 January 2003. And I'll say this again, but in relation to those submissions that were made by Mr Hastings,
40 perhaps the area of divergences is not as wide as on first blush might be considered when reading his transcript and reading submissions made by Mr Castle and Mr Lucas-Smith in writing.

45 Before going to those two subjects, can I just make some obvious points in relation to contact which are necessary. One is that the AFP is a

Federal agency, obviously, and provides community policing functions, including responses to emergencies such as these, according to the terms of the purchase agreement recently resigned between the AFP and the territory government.

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But the fact that the AFP is a Federal agency is no obstacle and has not operated as any sort of obstacle to the efficient corroboration between the global emergency services agencies historically and to the present day, the AFP and those agencies enjoy a good and co-operative relationship. In respect of these proceedings, it should be recorded in submission that the AFP was not a party to either the applications that were made to the Supreme Court, either to Whitlam J or to the Full Court of the Supreme Court.

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In relation to suggestions for reform that might arise from your Honour's deliberations, we note what counsel assisting has said in relation to those. The AFP will continue to work constructively with the ACT government to implement any further changes to fire arrangements that are considered necessary in the light of any recommendations that you make. We note that Mr Peter Dunn, then the ACT Emergency Services Authority Commissioner, has written to you and outlined at considerable length the changes that have so far been implemented by the ACT government, and the Emergency Services Authority in the wake of the McLeod Report delivered in August 2003.

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And with respect, we note what counsel assisting has said, that on the whole the reforms seem to be a welcome and appropriate response to the issues identified during the course of the Inquest and the subject of our 2 April submissions. But I repeat that the AFP, if there are further matters of administrative reform that your Honour identifies, that the AFP will work with the relevant territory agencies to consider those recommendations and, where appropriate, to facilitate their implementation.

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As to the role of the AFP in a fire emergency, we address this matter at some length in part 2 of our submissions and those submissions are drawn in that part from the evidence of Mr Murray, substantially, both in the terms of his quite lengthy submission to your Honour, and in the evidence that he gave to this Inquest.

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In relation to the role of the AFP during such an emergency, it's not a role that's defined precisely in any written document, it is a role defined by convention, as much as anything else. In part 2 of our submissions we say this, that the exact division of responsibility amongst Emergency Services Agency in the event of a fire was determined by convention, rather than

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prescribed law. The lead fire combat agency will command the incident according to its own internal command control structures, with cross-agency collaboration occurring by way of specific request to other agencies.

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The role of the police was to maintain order at the scene which, under direction from the lead agency, might have included putting in place road blocks, restricting access to or evacuating people from areas exposed to heightened risk. If events required criminal investigation, that investigation would obviously be conducted by the AFP.

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What wasn't the AFP required to do? Well, it wasn't there to make predictions about the fire movements, obviously. Its role was not to act independently of ESB and develop its own public information campaign, based on its own assessment of risk. Rather, its role was to respond to requests from the fire fighting authority to undertake specific roles that would have as their purpose an end to enhance the effectiveness of the fire fighting effort.

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Now, that approach, your Honour, is well known, well adopted both here and elsewhere in Australia, and the arrangements that existed, and the co-operative arrangement that existed between the AFP and other Emergency Services Authorities had served the community well during the 2001 bushfires. The evaluation of the co-operation between the AFP and other agencies during that bushfire emergency has highlighted that there was a very effective co-operation between ESB in its larger form and the AFP.

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That said, the role of the police is an important one, particularly in relation to the protection of life, and the effectiveness of the police in discharging that role is very much dependent on the efficiency of the flow of information between the lead authority, I'll just call that ESB, and the AFP. And in our submissions, and in the submissions of counsel assisting, we have set out the history of briefing or information sharing between ESB and the AFP in the lead-up to 18 January.

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And we note in particular that the AFP was not invited to or was not involved in the cabinet briefing that occurred on the morning of 16 January, and we note that in relation to the briefing that was given to the AFP in the afternoon of the 16th, that both counsel assisting and the territory have described very ...(indistinct)... at greater length perhaps with counsel assisting, that that briefing given on the afternoon of the 16th was not adequate and did not paint the picture in the same way that the picture had been painted to the cabinet in the earlier part of the day during its briefing.

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Now, much of the time in these oral submissions last week and today have been taken up with the issue which has been described as a conspiracy theory put forward by counsel assisting. Now, that is a term that is terminology used by others, and it's not as I read counsel assisting's submissions terminology it uses. But we, the AFP, don't make direct submissions in relation to that particular issue, save for this, that the territory and other affected people have made the point fairly that this is a small jurisdiction with limited resources, and in relation to responding to a fire as big as this, inevitably the size of the agency involved was going to have some impact on the effectiveness of its response.

But that said, there's an obligation on those best charged by the community with responding to fires and emergencies such as this, to make the best use of resources that is available. And we say that in respect of information flow that was less than perfect in the days leading up to and including 18 January, that the resources that were opposed in the AFP by way of manpower on the ground, and by way of media expertise, was not drawn upon to the extent that would have benefited the community most.

Although the efforts of the AFP on the 18th and the days following the 18th involved a very large number of its personnel and the AFP was able to draw down on the Federal aspect of its operation to respond to the ACT fire, way over and above its commitments under any purchase agreement, that the resources that the AFP did have were not used to their full potential in the days leading up to the 18th, and in the morning of the 18th.

Now, that we say was a direct result of that failure in appropriate information flow and a failure in implementing the very simple tenets of risk management that are known to all emergency services authorities without having to go to documents such as the Emergency Plan, where one can see that in this case, given the state of information that was available to ESB as the lead fire fighting agency in the days leading up to the 18th, given that information there was a need to disseminate that information, to the extent that was appropriate to the public, and that did not happen.

In relation to the submissions of Mr Castle and Mr Lucas-Smith, Mr Hastings in his submissions on 11 July repeated, without too much elaboration, the written submissions that were made on behalf of those two people in respect of matters concerning AFP. Now, in his oral submissions Mr Hastings used the expression in relation to the characterisation by counsel assisting of what the approach to the AFP was. He described counsel assisting's view of that as hiving off the AFP. Now, it's not our submission that the AFP was hived off, but we say that in

relation to the flow of information coming from ESB towards the AFP in the days before the 18th and the 18th, that the flow of information was not adequate and could have been handled better.

5 Now, a thesis that was then put forward in written and oral submission that had - I'll put it this way - counsel assisting's submissions were characterised as putting forward a submission that had the AFP have been fully briefed then they would have acted differently in the days leading up to and including 18 January 2003. And in answer to that submission made
10 by counsel assisting the argument was put along these lines, that if one looked at the response of the AFP when briefed on the 16th and when told of the possibility of impact on the evening of the 17th, that the approach taken was not significantly different than the approach that the AFP took anyway.

15 Now, we are not here to characterise counsel assisting's submissions in any way, nor to defend them from unfair characterisations by others. But in relation to this argument that was developed on behalf of Mr Castle and Mr Lucas-Smith, we simply say the following. That the AFP responded
20 according to the risk that was identified by ESB. I hearken back to my opening submission in relation to what the role of the AFP was. It was not to develop its own risk assessment, it was not there to develop its own media strategy, but it was simply there to respond to specific direction from the lead fire fighting authority in respect of matters that could be
25 taken to assist that fire fighting effort, or to remove people from harm's way.

Now, the emphasis of the briefing from ESB, various players from ESB, both Mr Castle and Mr Lucas-Smith during the briefing of the 16th and at
30 the planning meetings of that day and of the 17th, and even 17 January, was that the predominant threat in relation to these fires lay in the rural areas. And the AFP's response on that assessment of the given risk was to target its attention on the rural areas.

35 So for example, on the 17th action was taken by Mr Kirby, Sergeant Kirby, to put in place a number of teams from SRS within the AFP, equip them with 4-wheel drives so that they could move into the rural areas to do what was necessary there to ensure evacuations if necessary, and to warn rural leaseholders of the threat posed by the fire.

40 Now, it is clear that given the information that was available at that planning meeting of the 17th and Mr Lakatos in his submission, I think fairly put this, that it would have been prudent at that stage to give some sort of warning to the public in relation to the risk, whatever it was at that
45 stage, in relation to the possible impact of the fire on the western fringe of

Canberra.

5 Similarly, on the following morning after the planning meeting of that day, it would have been similarly prudent for adequate warnings to have been given to the public, and it was a matter for the ESB to determine what the content of those warnings, but given the risk that was escalating at that time, there was, in our submission, some need to highlight the possible impact of the fire on the western fringe and to communicate to the community, as that information became available, what the nature of that impact may have been.

10
15 Now, on the morning of the 18th the AFP were given information that the fires were moving quicker than otherwise advised, and during the morning of the 18th were given information by the ACT Fire Brigade in relation to what those fires might look like when they came out of the forests on the western fringe of Canberra. And your Honour will no doubt recall the effect of the evidence of Superintendent Prince in respect of the briefing that he gave to senior members of the AFP at Winchester Centre at about 20 to 12 on that day, when he described what those fires might look like when they came from the forests on that day, as it was likely to be the case.

20
25 Now, if one is wanting to assess what the AFP might have done at an earlier time, had it been given particular information, then I'd invite your Honour to consider what the AFP did when actually given the information in relation to the actual threat to the western suburbs of Canberra. I'd invite you as the coroner to assess the role of the AFP, the efficiency of its reaction and the decisions that it took, particularly in relation to evacuation, based on the fact that that information was known to it only 30 on the 18th, and the information probably was available to the AFP in a starker form perhaps, than was available to the Emergency Services Bureau.

35 The communication systems that the AFP had available to it were probably working better for it on the morning of the 18th than they were for those at ESB Headquarters who, to be fair, were battling with inadequate communication systems in that facility, and in an environment that did not assist in accurately and efficiently dealing with the information that was coming in.

40
45 So perhaps in relation to the submissions that Mr Hastings made on behalf of his clients, there are points of divergence, but perhaps those points of divergence aren't that great. We would agree with what he says in relation to the capacity of the AFP to go off on its own in relation to developing an independent media strategy. But that said, the AFP had

considerable expertise and resources in that area which were not put to effective use in the lead-up to the 18th or on the 18th itself.

5 In relation to its reaction otherwise, that the manpower that was stood up on the 17th was appropriate to the risk assessment that had been given to it on the 17th. And given the size of the impact that occurred on the 18th, those resources were obviously going to be inadequate to do the job that needed to be done, but one can only act in the circumstances and on the advice that's actually given.

10 Now, could I conclude by saying this, that there was nothing in the history of the relationship between those emergency services areas and the AFP that suggested that there was any obstacle to an effective and co-operative response to the fires that impacted upon Canberra on 18 January. In the
15 lead up to the 18th the exchange of information between the ESB and the AFP, that is the flow of information from the ESB to the AFP, was not complete. Did that have the potential to compromise the AFP response? Yes, it did.

20 If matters of the nature that were briefed to the cabinet on 16 January 2003, and if the type of risk that was identified in that meeting was known to the AFP, then its responses, as Commander Newton and Mr Murray gave evidence of, may well have been different. And the fact that a more
25 real focused analysis of the risk came out in latter days and influenced the way the AFP prepared for responding to the potential risk only in my submission highlights the fact that the AFP could only go so far as the risk analysis of another agency allowed.

30 In our submissions, your Honour, there are some matters concerning, as I've said earlier, the decision to evacuate and the conversations that occurred between Commander Newton and Mr Castle on the morning of the 18th. In relation to the latter, those conversations and the context in which they occurred are set out at some length in our submissions.

35 Probably they don't have great significance for your Honour, and in a causative sense didn't have great significance for the day. However, the urgency with which Commander Newton approached her task and her
40 urgency in trying to contact Mr Castle highlighted that, so far as the AFP was concerned, there was a divergence and a significant and dangerous divergence between the state of public preparedness, the state of the public warnings and the risks that were actually faced by the Canberra community on the morning and the early afternoon of the 18th.

45 And in relation to those risks, the AFP did what Mr Roche described as an instinctive thing, is to remove those in the path of harm from that harm,

but did so in the context of directions given by those on the ground, by Mr Prince, by Mr Thornthwaite, that it was appropriate for the members of the public to be taken out of harm's way, and that's what the AFP did.

5 Your Honour, they are my submissions unless I can assist further, I won't trouble you any more.

HER HONOUR: That's fine, thank you, Mr Archer. Thank you.

10 Yes, I think that's it, Mr Lasry.

MR LASRY: Your Honour, the next step in the process I think is the submissions to be made on behalf of ACTEW by Mr Stitt.

15 HER HONOUR: Yes.

MR LASRY: We've arranged with him to be here, I think, at 10 o'clock tomorrow morning.

20 HER HONOUR: Tomorrow morning.

MR LASRY: And following that, then I'll raise some matters by way of reply, subject of course to the criticisms that have been levelled at us so far.

25 HER HONOUR: Thank you. I didn't have an opportunity to ask Mr Gibb and Mr Craddock before they left whether or not they had any objection to my posting the submissions on the web site, and I made that comment last week, Mr Archer, and you weren't here I think on the Wednesday, as to
30 whether or not - do you have any objection to that?

MR ARCHER: No, your Honour.

35 HER HONOUR: To all the submissions which, of themselves, will mean that virtually the whole brief and the transcript of evidence will become available, it'll be published. You don't have any objection to that?

MR ARCHER: No.

40 HER HONOUR: All right.

MR LASRY: Your Honour, Mr Gibb, clearly had - and Mr Craddock, no doubt, have read the transcript and presumably if they had an objection they would have raised it.

45

HER HONOUR: Yes, that's so, they would have raised it. Thank you, for that. Thank you.

5 MR WHYBROW: Your Honour.

HER HONOUR: Yes, Mr Whybrow.

10 MR WHYBROW: Just in the correspondence that went on previously with myself, Mr Walker and Mr Hastings and counsel assisting, it may not have come to your Honour's attention, and lest there be any concern of any discourtesy, Mr Hastings and Mr Walker are not here today because they were never able to be here this week, I thought I should put formally on the record - - -

15 HER HONOUR: I understood that, Mr Whybrow, but thank you for putting it on the record. All right. So we'll adjourn until tomorrow morning at 10 o'clock, and thank you.

20 **ADJOURNED TO 18 JULY 2006 AT 10.00 AM [11.25 am]**

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TRANSCRIPT OF PROCEEDINGS

CORONER'S 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

**10.03 AM, TUESDAY, 18 JULY 2006
(Continued from 17/07/2006)**

THE CORONER: Yes, thank you, Mr Stitt, are you ready?

MR STITT: Thank you, your Honour.

5 THE CORONER: Thank you.

MR STITT: Your Honour, a great deal has been written and spoken about the nature and extent of your powers to conduct this Coronial Inquiry, as well as the findings which you should make. Today I do not propose to
10 add to your Honour's burden by making further submissions on those topics, and we have made out position clear in the written submissions which we've put forward.

However, we do submit that a relevant part of the statutory duty which
15 your Honour is exercising is that in addition to making enquiries and findings into the cause of the fire and the cause and manner of death of the deceased is to answer the following questions: (1) What lessons are to be learned from these events? (2) After the relevant findings of fact are established, what recommendations can be made to improve things for the
20 future? And (3) Are there steps which can be taken in the future, both before and after the onset of the fire and the destruction, which will either better prepare for such a disaster, or ameliorate its subsequent effects?

Those questions are the matters to which I wish to direct some brief
25 submissions to your Honour this morning, because in our submission the answers to those questions go a considerable distance to satisfying the public interest element, which is a part of your Honour's statutory jurisdiction. My submissions this morning are directed to answering those questions, only from the perspective of ActewAGL, my client, it's the
30 partnership and the associated entities. And so far as my clients are concerned, these submissions are directed to the ways in which the bushfires in January 2003 impacted upon the infrastructure and the operation for each of gas, water, sewerage and electricity.

35 Now, your Honour, what the evidence in this Inquiry disclosed was that ActewAGL, in its various divisions, was able to, and did in fact, respond to the emergency conditions which prevailed in those days in January, both before and after the onset of the fires and their impact into the urban areas of Canberra.

40 So that the answer to the first question, namely, what lessons are to be learned from these events, in our submission is clear and unequivocal, so far as ActewAGL is concerned, namely that if provided sufficient warning and information by the relevant Emergency Services Authority,
45 ActewAGL has the capacity to respond in an appropriate way to requests

or directions which involve each of gas, water, sewerage and electricity. What the evidence also disclosed, in our submission, was that within the wider community and perhaps also within some sectors of the emergency services divisions there was a degree of uncertainty as to how requests and directions for appropriate responses by ActewAGL should be communicated and dealt with.

Now, your Honour, it goes without saying that it's intolerable and likely to lead to chaos and perhaps disaster if conflicting, different or contradictory instructions and directions are given to ActewAGL to perform any particular function under emergency conditions. And I want to stress, and I'll come back to this later, that these submissions to which I refer are directed only to emergency conditions, and when a state of emergency is prevalent.

Your Honour, it's essential and crucial to the efficient administration of emergency response to a situation such as a catastrophic bushfire that there be a clear, well defined channel of communication between the responsible authority and ActewAGL. It comes readily to mind that there could be many examples of the inefficiency and chaotic conditions which could or would be created if that well defined channel of communication is not established. If, for example, ActewAGL is expected to respond to a response from a captain of a Fire Brigade or a police officer, no matter how senior, or an emergency service employee if they issued directions to ActewAGL about matters such as electricity, gas, water or sewerage under emergency conditions and expected my client to respond in an *ad hoc* way.

The first question which we pose in these submissions therefore lends itself to the proposition that when directions or instructions are to be issued to the utility provider, those instructions should be clear, unambiguous and speaking with one voice. Now, your Honour, that applies with particular relevance to the supply and distribution of gas. If, for example, there are instructions or requests to shut off the gas supply to a particular house or to a particular street or to a particular area, then because of the complex nature of the procedures involved, this is not a matter which can be undertaken lightly or instantaneously because of the inherent risks involved.

Now, we have spelled out those inherent risks in our written submission and I don't need to take you to it in any detail, other than to remind your Honour that those matters are set out on page 11, 12, 13 and 14 which deal with the nature of the problem where you have natural gas, the flammable mixture which is created when it mixes with air in a proportion between 5%, which is the lower explosive limit, and 15% which is the upper

explosive limit, and a source of ignition.

5 Now, your Honour, so far as gas is concern, it's not simply a matter of
shutting the gas down because it's a matter that involves the shutdown of
the network and we deal with that on page 12, paragraph 59, shutting
10 down the gas supply distribution system is never without risk, particularly
where there is known or suspected damage to the distribution network,
and so on. And paragraph 61 on page 13 we deal with those steps which
are necessary to be taken, in order to prevent the uncontrolled escape from
the distribution system, that when there is an isolation of part of that
15 system it can be achieved, but the process is complex and it needs to be
understood, and we there set out what is involved in the process involving
the network and the isolation of various parts of it.

15 And as we say on paragraph 63, that it's capable of being shut down by
accessing and turning off valves located underground at the regulators, but
there are extensive and inter-connective nature of the network in the ACT,
so that isolation may require a multiple number of regulators being shut
20 down, and it's not simply a question of turning the gas off, but rather the
system has to be purged and, depending upon the size of that part of the
distribution network sought to be shut down, this may take some time.

25 Now, your Honour, the answer to the second question, so far as gas is
concerned, are there steps which can be taken in the future, both before
and after a fire, which would either better prepare for such a disaster or
ameliorate its subsequent effects, and the answer, so far as my client is
concerned, is in the affirmative in respect of each of the utilities. We
30 have, as a part of our written submission, proffered some protocols which
are in our submission manifestly efficient in leading to clear and
unambiguous channels of communication and I want to take you to those
in due course and make some further submissions about it.

35 Your Honour, in respect of water, the education program and information
booklets and brochures which the ACT government and the ESB
distribute to citizens, in our submission, should emphasise the fact that
under extreme bushfire conditions when both fire fighting equipment and
citizens are using all of their domestic hoses, there may be a reduction in,
or a loss of, water pressure.

40 Now, this does not represent a failure on the part of ActewAGL or of the
water supply system, and it's simply a function due to the high demand
which is imposed in the water network, and that was dealt with in the
evidence of Mr Leonard which we set out, your Honour, page 4,
45 paragraph 16 where he simply encapsulated, in our submission quite
accurately and correctly, the reason why during high demand there may be

5 a loss in, or reduction of water pressure. So that in our submission, any education program in the future which is undertaken, particularly when advising citizens as to whether or not they should remain with their home to fight the fire, should emphasise the fact that such an event may occur, that there may be a reduction or a loss of water pressure.

10 Now, your Honour, in those circumstances it's often easy for people to assume that there's some defect in the water supply system or in the adequacy of the water available for fire fighting purposes, and to create in the minds of citizens uncertainty, or even panic, if they think that there is no adequate water available. In our submission, your Honour should recommend that the education program, or any future education program, should make plain, in unambiguous terms, that it may be appropriate for residents and citizens to have auxiliary water pumps or booster pumps, if they have the intention to remain with their property and houses, and if they have the intention to remain and fight the fires. It should be made clear that it is highly likely, or indeed inevitable, that there may well be a drop in or loss of water pressure under those circumstances.

20 Now, your Honour, in our submission you would find as a finding that there was no evidence that any drop in or loss of water pressure caused or contributed to the destruction of any house or property during the fire. Now, we've made reference to this, your Honour, in our written submissions in paragraphs 18 to 21 and I don't need to weary your Honour by reading them, but I just draw your Honour's attention to them.

30 More importantly, and again we would ask your Honour to make a finding or reference to this fact, more importantly there was no evidence from any fire fighters or any Fire Brigade officers that hydrants failed to deliver suitable pressure to them during the emergency. Now, your Honour will recall that the evidence was that prior to the onset of these fires, a days or so before, the reservoirs were filled and that ActewAGL inspected all the relevant hydrants along the urban boundaries of the suburbs likely to be affected, to make sure that all hydrants were operating, that they were efficiently in service, and that that again is an indication of the sort of thing that can be done by my client, if adequate direction and instruction is given in a timely fashion.

40 Now, your Honour, there was, as we say, no evidence that the hydrants in any way failed to deliver suitable pressure, and the evidence seems to establish that the fire engines and fire units which were engaged in fighting the fires in the urban area had sufficient water and water pressure, which was probably due to the fact that the fire engines and units have their own pumping booster system, so that the water which was available from the hydrants was available to fight the fires. And that is again

further illustration of the efficiency which can be achieved if citizens themselves with to remain to fight the fires have appropriate auxiliary pumps or booster pumps.

5 Your Honour, in our submission, would also make a note or finding that there was no evidence from any person in authority, or any of the relevant authorities, criticising or making any adverse comment about the water distribution system or ActewAGL's management of it, and in our submission, your Honour would note that in your report as a part of your findings.

10
15 And as I say, I want to come to the protocols which we've proffered in due course, but the protocol which we have propounded in respect of the water infrastructure is predicated on the proposition that in order for the infrastructure not to be put at risk, particularly by fires, it's necessary for ActewAGL to be given early and timely warning of impending danger, and if that is given, my client has demonstrated that it's able to provide appropriate protective and defensive measure to ensure, so far as it is able, the safety of those structures.

20
25 Your Honour, in relation to sewerage, there was not very much evidence given about the sewerage and the effect of the sewerage, but in our submission what happened with the sewerage was a very good example of the way in which my client, and indeed the citizens of the ACT, were able to respond to a serious potential risk, that is a risk of the pollution of the Molonglo or Murrumbidgee Rivers from sewerage.

30 Now, your Honour, it is submitted that your Honour would make reference in your report, or make findings of the fact that the Molonglo Water Quality Control Centre was damaged by fire and it was put out of action, and in those circumstances it was critical to ensure that the sewerage which could not be routinely treated at the centre was appropriately held and stored because there was the potential risk, public health risk of pollution of the Molonglo and/or the Murrumbidgee Rivers.

35
40 Now, what the evidence did establish, your Honour, was this, that firstly the sewerage division of ActewAGL that was able to hold untreated and partially treated sewerage in the holding dam, so as to prevent it flowing into the river system and creating the obvious public health risk. Now, part of the reason why the holding dam was able to be efficiently utilised in this way, your Honour, was because of the public reaction to the public request to refrain from excessive discharge of water into the sewerage system. And we would ask your Honour to note and perhaps make as a part of your findings that the Canberra residents responded magnificently to this request, which contributed in no small part to the fact that the

holding dam was able to perform its function and to prevent the creation of a potential public health risk.

5 Now, as a result of the response by the Canberra residents, or the ACT
residents, fortunately the period of shutdown was comparatively short in
time, and the request for limitation on use of the sewerage system was
able to be lifted the following day. Now, your Honour, we would submit
with respect that this was a very rapid response by my client's sewerage
10 division to a potentially major problem which could have had quite
serious consequences and repercussions, and it demonstrated that
ActewAGL could and did respond appropriately to an emergency of this
kind, and we would ask your Honour to note this in your report as a part
of your findings.

15 Now, your Honour, in relation to electricity, we've dealt with that again in
our written submissions at page 9 and it goes through to the top of page
11. Briefly, your Honour, in relation to electricity the same comment
applies in respect of water. Your Honour will recall the evidence that
before the fire reached the trans grid station at Holt, which is vital to the
20 city's electricity supply, steps were taken by ActewAGL with assistance
from others to protect that station and no fire eventually damaged that
station, and electricity was available to the Canberra network from that
trans grid station. However, your Honour will recall that the Woden to
Wanniassa, 132,000 volt sub transmission line was damaged by fire and
25 did become unserviceable, and after the fire on Saturday, 18 January, your
Honour, there were 37,500 customers without electricity supply because
of the damage to that sub transmission line.

30 Now, your Honour, again we would ask your Honour to note the
following facts as a part of your report, that by midnight on Saturday,
18 January electricity was restored to 7,500 of those customers, and by
midnight on Sunday, 19 January only 6,500 customers remained without
electricity supply. This we submit is a fine example of the ability to
35 restore, under difficult conditions, electricity which was so vital to the
ACT and to Canberra. And your Honour would note, as a part of your
findings, that on 24 January the Woden to Wanniassa 132,000 volt
transmission line was restored to service. And by 28 January electricity
was restored to all customers in Canberra who had been affected. And
again, we would ask your Honour to note those facts as a part of your
40 finding and to comment upon it.

Your Honour, I want to just briefly return to the question of gas, because
that is more potentially emotive and potentially dangerous. Your Honour
in our submission would recall the evidence which establishes that there
45 are 3,520 kilometres - 3,520 kilometres of gas mains in the ACT which

supply approximately 90,000 customer connections, and as I said earlier in my submissions, this is a complex distribution system. The product is natural gas, which is lighter than air, and it has volatile properties which carry with it the obvious risk of flammation and possible explosion if it's mixed with air in an explosive mixture and in relevant proportions.

Now, your Honour, the handling of gas in that complex distribution system is a matter which requires skill and expertise, particularly if any part of the distribution system is sought to be shut down or closed off. Now, your Honour would recalled the evidence that ActewAGL is able to prevent the uncontrolled escape from the distribution system of gas by isolating parts of the system, but that isolation process is complex and it takes time, depending on the nature and extent of the area which is sought to be isolated.

Now, your Honour, it's for this reason that protocol which we have annexed to our submissions are tendered to the court and we submit to your Honour that a recommendation should be made that these protocols be adopted. Your Honour, further, it is unrealistic and unattainable to expect that all component parts of the gas distribution network will at all times be capable of withstanding the extreme temperatures and ambient conditions, such as those generated by the bushfires of January 2003.

And your Honour will recall the evidence of Mr Cheney where he said that the temperatures created by these bushfires was something of the order of 1,300 centigrade. So that it's inevitable that there would, in those conditions, be some evidence that meters and meter sets at houses were burnt or damaged, which caused escaping gas to burn, and there was evidence about that, as you will recall. However, there is no evidence - and we would ask your Honour to find this - there is no evidence that such burning gas in those circumstances played any direct causative role in the destruction or damage to property, and we would ask your Honour to make such a finding.

Your Honour, the gas distribution network, of which I have been speaking, and the infrastructure system complies with all relevant and applicable Australian Standards. There are in excess of 150 Standards issued under the Australian Standards regime, all of which are complied with by the ACT gas distribution network. Your Honour the submission of my learned friend, Mr Lasry, counsel assisting, refers to Mr Leonard's recommendation that your Honour recommend the implementation of Australian Standard AS3959. Now, your Honour, ActewAGL has no submission to make to contradict such a recommendation, other than to submit that if such a Standard is to be implemented then it should be implemented in the usual way, namely, that it operates prospectively.

5 Your Honour, could I now come briefly to the protocols which we have spent a considerable amount of time and effort in preparing, which deal each with water and sewerage, electricity and gas. Your Honour, I must say at the outset that it was disappointing and unhelpful that these protocols were dismissed by my learned friend, Mr Lakatos, in three lines of submission on page 267, where he simply said that it was inappropriate, even if it was within your jurisdiction, to make such a recommendation.

10 Your Honour, I can only assume that those instructing my learned friend, Mr Lakatos, have either not read the protocols or didn't understand them, and I want to take you to them very briefly. Because your Honour will see that these are put forward inviting your Honour to make a recommendation that they be adopted, and there are several things to be
15 noticed about them, your Honour, which, with great respect to those instructing Mr Lakatos, have simply missed the point.

The first is this, these are protocols which are designed to operate only in an emergency. As your Honour will see in the opening part of it, it says
20 "Purpose", and it's only intended that there is to be a provided a procedure when an emergency exists. These protocols are not designed to interfere with the usual or ordinary dealings between ActewAGL and the government, or other entities, as there are in fact in position, in place, some protocols or some procedures which have been put in place that
25 operate to control the interaction between them under non-emergency conditions. But the first point is that this is only in respect of emergency.

The second point to be noticed is this, that the protocols impose an obligation only upon ActewAGL. It is my client which is putting them
30 forward, saying we are prepared to assume these obligations if you give us the relevant information in a timely fashion. The next point to be noticed is that they do not impose obligations on the Emergency Services Authority, other than to provide information in an accurate and timely fashion. All the obligations and duties which thereafter are to be
35 exercised are those which ActewAGL is prepared to accept and to abide by. So that these are discreet separate protocols which apply and come into operation only in the event of an emergency, such as a bushfire.

The next thing to be noticed is that these protocols do not impose onerous
40 or oppressive obligations on the part of the Emergency Services Authority. All they establish is, firstly, a clear channel of communication, a clear, unambiguous channel of communication, and all that the emergency authority has to do is to identify the relevant officer who will give the instruction to ActewAGL. And then as your Honour will see, if
45 you look at the protocols, that the information which is required to be

given to my client is set out. Again, it doesn't require any obligation or onerous duty on the ESA.

5 These protocols were dismissed, as I say, by Mr Lakatos in three lines and saying that they might be prepared to look at them. In our submission, it's not a matter about which consultation needs to be engaged in, for the reasons that I have just given, that all of the obligations fall on my client. My client is prepared to accept those obligations and to be bound by them. And it's clearly within your Honour's power to make such a
10 recommendation and we would urge you to do so.

15 Finally, on this aspect there are no reasons at all advanced in support of the submission that it's not within your Honour's statutory jurisdiction to make such a recommendation. It plainly is, in our submission. And in our submission, what your Honour would do as a part of your report and findings is to recommend that these protocols be adopted, because they achieve a purpose of answering one of the important questions which your Honour has to answer, which is: Are there steps which can be taken in the future, both before and after a bushfire such as this, which will either
20 better prepare for such a disaster or ameliorate its subsequent effects? And these protocols deal precisely with that matter.

Those are the submissions, if your Honour pleases.

25 THE CORONER: Thank you, Mr Stitt. Thank you. Mr Stitt, last week I asked counsel who were present last week whether there was any objection to submissions of all counsel being posted on the web site.

30 MR STITT: I have no such objection.

THE CORONER: There's no objection?

MR STITT: No. No, thank you, your Honour.

35 THE CORONER: Thank you.

Yes, Mr Lasry, do you wish to - - -

40 MR LASRY: Your Honour, we commence our reply by repeating that which I said at the outset of this exercise, or this session of submissions, that our submissions are, to state the obvious, our submissions and they should continue to be read as expressing the views that we put forward by way of submission as to the conclusions that your Honour should draw, and they were always designed to assist and to inform the represented
45 parties of our position in relation to matters of contention.

5 Theoretically, at least, and in other Inquiries it might have been the case
that your Honour took the view that the appropriate way to deal with
submissions was, in fact, simply for everybody to put submissions in
writing with your Honour would consider, and then your Honour would
then proceed to the next step in the process. As I understood the purpose
of this exercise, it was to enable the public to at least see what the
overview was of the particular positions taken by us and by the
represented parties in the course of the submissions, and rather than be a
10 process by which the submissions were being made in excessive detail, as
in inter-parties litigation, where the process of submission, reply,
rejoinder, and all the rest of it was a crucial part of the process.

15 We haven't approached it on the basis that it was, and we understand that
the process that's been applied here is a process which enables everyone
to put forward their submission and dealt with each other's submission, to
the extent that it's necessary to do so. So with great respect to Mr Gibb,
in our submission his complaints yesterday were, we would say,
misplaced and I do propose to say some things about his submissions,
20 although I don't propose to reply in great detail. And I start by saying that
our position on the matters in contention remains that which is set out in
our submissions.

25 A concern that we have, your Honour, is that understandably a great deal
of emphasis has been placed by the represented parties on chapters 5 and 6
of our submissions. That's understandable because it's in those chapters
that, in a sense, the argument or the submissions as to conclusions were
formulated. But I made the point in starting this process last week that
that's all of our submissions, and of course chapters 2 and 3 set out in
30 detail what we would submit is an appropriate description of the narrative
of events.

35 I'll come back to this perhaps in the course of submissions, but to the
extent that we're criticised, as we have been, for a lack of thoroughness in
relation to material not being included in our submission, regard needs to
be paid to chapters 2 and 3 as well as chapters 5 and 6. And I haven't
understood that there are substantial criticisms of the narrative in chapters
2 and 3, and indeed there are a couple of examples where matters that we
are said to have ignored are in fact included in chapters 2 and 3.

40 And in the end, what we would urge your Honour to do, to the extent that
you're considering the criticism of our submission as being in some way
having shortcomings by lack of thoroughness which, I must say, surprised
me that it was such a regularly repeated criticism, is of course to have
45 regard to chapters 2 and 3. 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. And of course, in the end, what conclusion you come to, your Honour, is entirely a matter for you.

5 Can I just say something briefly, and I'll just deal briefly with a number of points, if I might, your Honour. The first of them is in the submissions of the ACT. At paragraph 16 and following in their submissions they refer to our submissions at paragraph 208, and in paragraph 208 of our submissions we deal with what I've described as the five factors that
10 played a part in the cause and origin of the fires.

The ACT's submissions were, in our submission, in this area and of course in others, we would say, with respect, helpful and we note that we would agree with the thrust of paragraph 21 of the ACT's submission in
15 relation to what actually is, or what can constitute the cause of the fires. And what was meant in our submissions was that the factors that we referred to in our original paragraph 208, referred to as part of the relevant background, and assists in understand the key causes identified in our submissions, the key causes we would submit, and have submitted, causes
20 linked to the question of initial response, and also the issue of warnings.

In relation to recommendations, later in their submissions the ACT is critical of our discussion of recommendations for reform in relation to land management issues, paragraph 166. As we made clear in our
25 submissions on recommendations for the convenience of the parties, and in particular for the ACT, we structured our submissions based on the letter from Mr Dunn of November 2002 which, in turn, outlined for the assistance of your Honour the reforms implemented based on the McLeod recommendations.

30 Our understanding had been that the whole purpose of the letter was to give your Honour the opportunity to consider and reflect upon the pre-existing reform process, and rather than, as it were, re-invent the wheel and go through the process again. So we're surprised that we are
35 criticised for making the submissions on that very process which, on the whole, our submissions support and endorse.

We make the point, in any event, your Honour, that the evidence before you was taken without objection and is sufficiently comprehensive and
40 sufficiently connected with the Inquest for you to include it as part of the exercise of your jurisdiction under section 57 to make recommendations on land management issues of the kind suggested in our submissions. Mr Lowe, of course, has similarly touched on matters relating to that.

45 Another preliminary matter which, in fact, this one relates to the

5 submissions on behalf of Mr McRae, arises from the submissions both in writing and made orally yesterday by our learned friend Mr Gibb. In the course of those submissions at paragraph 106 an attachment is referred to, which is a scientific article which is the basis of the submissions on behalf of Mr McRae, I think commencing at around paragraph 106 and following. It was submitted orally yesterday by Mr Gibb, I think, that the document referred to in paragraph 106 is part of the brief. In our submission that's not the position and of course wasn't the subject of any evidence during the course of the Inquest.

10 The article, your Honour, was brought to our attention by the ACT Government Solicitor on 19 May with a request that the article be included in the brief. We responded by letter objecting to the material being so included, unless an application was made to your Honour on that basis, and the letter which we forwarded concluding by saying, "Pending any such application, the parties should proceed on the basis that Mr Mills' article is not part of the evidence before her Honour".

20 The submissions suggest, that is the submission on behalf of Mr McRae suggest in paragraph 108 that we agreed that the article would be, as it were, "placed with the papers". That's simply not the case. The article's either part of the material before your Honour or it isn't, and no application of the kind that we indicated that would require to be made has been made for the material to be included, presumably for the purpose of founding the arguments put in Mr McRae's submissions.

30 Indeed, it would have been open yesterday, of course, to my learned friend Mr Gibb to make the application in a formal way and to expand on the basis on which that material should be included, but beyond criticising us, no such application was made. So we proceed, your Honour, in our submissions on the basis that the material is not before you as evidence, and that has, we would submit, a consequent effect for the submissions which are based upon that material.

35 Can I turn generally to the question of the evidence of Mr Roche. So far as Mr Roche is concerned, he has been heavily criticised by a number of the represented parties for a variety of reasons, and we make absolutely no complaint about the fact that those criticisms are made. That's an appropriate part of the process. We have referred to parts of the evidence where he made concessions in relation to his own opinions. See, for example, paragraph 211 of our submissions.

45 At paragraph 1,182 of our submissions we specifically rejected, by way of submission, the suggestion by Mr Roche that Julie Crawford should have sought corroborative information for the information she was given by

Mr Bretherton on the night of 8 January at Queanbeyan. We have no complaint with the submissions which were made that you, your Honour, should be careful about the evidence that you act upon, and you should be careful about the expert evidence that you act upon.

5

In the end, it's completely a matter for you and we would simply make this observation, that whatever criticisms are made of his evidence and the way he conducted himself, and it's his conduct as a witness that's been criticised, in part at least, he is nonetheless a very experienced fire fighter and a former chief officers of the Country Fire Authority in Victoria. Like any other witness, particularly in a proceeding such as this where *prima facie* the Rules do not apply, you can accept those parts of his evidence that assist you, and you can reject other parts of the evidence that do not. In our submission, we have followed that process and refer to evidence given by him which we think will assist, particularly where that evidence is supported by other evidence, and we would invite your Honour to effectively do the same thing.

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From time to time, during the course of the submissions it has been submitted that as a matter of, in effect, unfairness criticisms made by us of individuals were not put to them when they gave evidence. The submissions, to the extent that that criticism has been made, the submissions at least imply that some form of *Browne v. Dunn* rule should apply, that there was some obligation on us to put to, for example, Mr Lucas-Smith and Mr Castle and Mr McRae, the concluded submissions that we have put to your Honour.

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In the course of that submission, reference has been made to the judgment of the Privy Council in *Mahon* in New Zealand which is reported, among other places, in 1984 3-Weekly Law Reports at page 884. Our submission is that that case is not a case which carries with it that obligation. The case, among other cases, as I understand it is effectively the common law basis for what is now section 55 of the Coroner's Act. In our submission, it is not a judgment which requires, as has been suggested, that we should have put to witnesses, such as those that I've mentioned, the concluded criticism that we urge your Honour to make by way of comment.

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In the event that your Honour forms the view that a finding or, particularly, a comment relating to an individual is to be made, then of course your Honour has obligations under section 55, and as I follow section 55 of the Coroner's Act is precisely the process which develops from judgments such as *Mahon's case*, it's exactly that procedure that wasn't followed by the Royal Commission in that case.

45

Much has been said, your Honour, during the course of the submissions

5 about the wisdom of hindsight, and of course the caution about the wisdom of hindsight has its place in an Inquest like this, although it does not carry of course the authority of *Holley writ*, and it's my answer in itself to anything. If the evidence demonstrates, as we submit that it does, that particular people knew particular things at a relevant time and failed to act on their own knowledge then there is no role for complaining about the wisdom of hindsight, but rather the complaint is that there was a failure to have appropriate foresight.

10 It is submitted by counsel for Mr McRae, for example, yesterday that there were, as he put it, natural forces at work on or about 18 January 2003, but the drivers for those natural forces had been discussed of course since 2002. Such foresight that we say should have been in the minds of particular individuals at the time can of course be general rather than
15 particular. It can be qualified, but as in this case, some people have, in our submission, a responsibility to be able to look forward at the worst that might happen and then warn people about it.

20 It is disappointing to see that Messrs Gibb and Pike in their submissions felt it necessary to, in effect, personally impugn Mr Woodward by an extract from the CFA submission and Linton Inquest. Concentration on the issues and perhaps less on the individual would have been more helpful to your Honour.

25 It has been suggested that in conducting the Inquest we have had some personal agenda, although the nature of that agenda has never been articulated, and like other criticisms about motives, no motive has ever been identified for us to have such an agenda. In a sense, those submissions perhaps demonstrate a preoccupation with counsel assisting,
30 as well as a preoccupation with the issues surrounding the wisdom of hindsight.

35 Can I deal with some matters, your Honour, in relation to initial response. It is true, as was put on behalf of the ACT government that during the evidence we did not criticise Mr Lucas-Smith for being at Queanbeyan on the night of 8 January. Indeed, as was submitted, given the magnitude of the McIntyre's Hut fire and its potential for the ACT, it was understandable that he was there. In our submission however that does not mean that Mr Lucas-Smith could not have taken a more active and
40 detailed role in the decision about the withdrawal from Bendora, particularly given what we understood was the understanding of ESB of the need for rapid initial response, an understanding which had been documented and discussed prior to the 2002-2003 fire season. And that's particularly so, of course, given - and we'd discussed this many times - the
45 antecedent weather and the potential fire spread in the event of adverse

weather.

5 Mr Hastings in his submission took umbrage, as he described it, at the
allegation that Mr Lucas-Smith acted flippantly in the Bendora
withdrawal. We've already submitted in detail in our submissions what
should have occurred. If Mr Lucas-Smith was not present at ESB on the
10 night of 8 January to personally supervise the decision, for good reason,
then it was still in our submission appropriate and important for him to
analyse the reasons for the proposed withdrawal from Bendora, and to
15 give directions, if necessary. He was after all the ACT Chief Fire Control
Officer. He had a long record of experience as a fire fighter, both in the
ACT and in New South Wales.

15 In relation to Odile Arman, it seems to us to be implicit in several of the
submissions that we are either sceptical about her assertion that she had
safety concerns and/or that we are critical of her in reaching her decision
to withdraw based on, among other things, those safety concerns. In their
20 submissions the ACT government at paragraph 370 suggest that the stated
position of Odile Arman that she was happy to stay if the service
management team had asked her to was academic. We agree, and we've
already made this submission, that Odile Arman's concerns were
genuinely held, and I make it clear we're not sceptical about that. Fire
25 fighting safety is obviously a vital concern and Ms Arman was right to
have regard to it.

25 The evidence that she gave however that she would have been happy to
act differently if her decision had been overruled is far from academic. It
may not be relevant to her exchange with Tony Graham because she
30 didn't raise it, but it shows contrary with the submissions of a number of
the parties and, indeed, contrary to the evidence of Mr Nicholson, that
Odile Arman herself believed that the safety concerns could have been
managed, she would hardly have been happy to stay if the position were
otherwise.

35 In the light of this evidence it is not possible to assert, as the ACT
government appears to do at paragraphs 376 to 383 that Arman's evidence
that safety concerns led to her decision to withdraw can be equated with
Odile Arman having the view that it was unsafe for her crews to remain
40 and fight the fire, because that's not the evidence that she gave.

40 And on that same topic, in the course of his submissions, our learned
friend, Mr Hastings, referred to the issue of Occupational Health & Safety,
referred to a case in which he had participated and referred in particular to
the statutory duty to ensure the safety of workers. The difficulty about
45 these submissions, your Honour, is that they look at 8 January 2003, in a

sense, in isolation and they do not refer to the fact that fire fighting at Bendora overnight was occurring from 10 January onwards.

5 On any view, on the evidence particularly of Mr Cheney, but as a matter
of deduction from what your Honour knows about the Bendora fire on the
night of 8 January, it was on that first night in it's most benign condition,
the most benign condition that it would be in for the whole period. And
even Mr Nicholson, who I had previously criticised in the way he gave his
evidence and the content of his evidence, agreed that there are times when
10 night time fire fighting is, as he accepted, an absolute necessity. And
we've made reference to that part of his evidence at page 359 of our
submissions.

15 And I come back, your Honour, to the issue of hindsight and warnings. It
was submitted by the ACT government that the first and most important
question is: When did senior personnel at ESB recognise the possibility
that fires such as those which eventuated on 18 January 2003 may occur?
In our submission, this is very much the wrong question to ask, and it
proceeds on the theme which is prevalent in those submissions that people
20 were taken by surprise.

The problem with the approach taken by the ACT government to the
effect that everyone was taken by surprise is that it would only make sense
if in the days prior to 18 January the planning section and planning in
25 relation to the fires was not showing the possibility of impact on the
suburbs under the predicted weather conditions, and if people were saying,
both privately and in public, things like "Some impact is possible but not
likely. Don't expect it to be severe" or "We're expecting something
similar to 2001, but we expect to hold it in the grasslands".

30 In our submission that's not what was happening. What was in fact
happening is that in documents circulating in government circles and in
discussions between senior officers the risk to urban assets had been
identified. That's got nothing to do with hindsight. And we accept that it
35 is appropriate, wherever possible, subject of course to the complication of
having the knowledge that all of us now have, that your Honour should try
to put yourself in the position as it was in that 10-day period.

40 Despite the circulation of the documents and despite the understanding
amongst senior officers that there was a realistic risk - and that's my
phrase, not theirs, but your Honour knows what I mean and your Honour
can look at the evidence in relation to what occurred on the 13th and what
occurred on 15 January, and what occurred at the cabinet briefing and the
Fire Brigade briefing on the 16th, and the various planning meeting
45 discussions towards the end of that week.

5 So your Honour is able to gauge, not with the benefit of hindsight but with the benefit of contemporaneous records, coupled with the evidence given, what the state of mind of particular individuals was. And our submission is that it remains the fact that in public statements until midday on Saturday, the public via the media was being told something different from what was understood within ESB.

10 And we do not suggest, for a moment, that the matters concerning the size and scale of the fires was something within the contemplation of these officers. We agree that the magnitude of the fires was significant, and dealing briefly with paragraph 73 and following of the submissions of the ACT government we are content for your Honour to include material about the magnitude and scale of the fires in the narrative. We don't suggest for a moment that material shouldn't be included in any narrative that your Honour compiles. That is of course a matter for you.

20 And we are not critical of the fact that no one predicted the size and scale of the conflagration that hit Canberra on 18 January, but we say now and what we have always said, and what we've always put to witnesses, is that what the evidence demonstrates is that an impact on the suburbs of some kind was predictable. Not that impact, not at that precise time, but an impact. Mr McRae predicted it in his email of 30 December 2002. It was being discussed, as your Honour knows, as early as 13 January and certainly on 16 January. And we've set out the detail, and I've already referred to it in the course of my earlier submissions.

30 We don't for a moment complain that Mr Lucas-Smith and/or Mr Castle and/or Mr McRae, and/or anyone else for that matter, hoped that they would win the battle. But they knew something was going to happen and they knew that something was going to happen which would involve the fires affecting and burning into the suburbs to some extent. And we would submit that the fact that they hoped that wouldn't happen, and even if your Honour is of the view that they held a belief that it would be able to be held in the grasslands, there is still not a reason to at least inform the public of the risk.

40 And I now only speak for myself, but I've never been able to understand, and I make this by way of submission, what the disadvantage was to anyone in giving the people of the western side of Canberra, and of course a medial warning is going to be heard by everybody in Canberra if they listen to the radio, but what on earth is the disadvantage of telling the public that there is the possibility of an impact, likely from burning embers? And in my submission that question asked rhetorically has really never been answered.

5 Even a general warning of the kind that was being put to witnesses, a
general warning that accepted a lack of understanding of the exact time,
place and size of the impact would have been useful for the people most
likely to be affected. They knew where the fires were, they knew
obviously which parts of the Canberra urban area were in the line
generally of the fires. We would submit and we have always put to
witnesses and we've submitted to your Honour, both orally and in our
written submissions, that the Canberra public were entitled to have that
10 information.

15 One of the themes that runs through the submissions of the ACT
government and of the submissions on behalf of Mr Lucas-Smith and
Mr Castle concerns the obligation and/or entitlement of ESB at the time to
issue public statements to the media about the fires. Putting aside the
particular passages in Mr Castle's statement and the debate about that, the
point being made is that the ESB had an understanding, at least, that they
would talk only about the ACT fires, and that's what was being referred
to, in particular, references to the fires by Mr Lucas-Smith at particular
20 media conferences.

25 The difficulty with that we would submit, your Honour, is this, that from
the outset the fire that was always the most threatening fire, from the point
of view of the Canberra urban area was the McIntyre's Hut fire. That's
why Mr Lucas-Smith went to Queanbeyan on the night of 8 January. It
also seems to us on the evidence that in the end, because that was a New
South Wales fire, it still meant that any warnings that were to be given to
the ACT public about the McIntyre's Hut fire were going to be the
responsibility of the ESB in the ACT to give.

30 As I follow it, the New South Wales position has been and would be in
any debate about this, that it wasn't their job to warn the Canberra public.
So ultimately there was a significant or realistic risk that the McIntyre's
Hut fire would cross the border and burn in Canberra, the responsibility to
warn people about that was the ESB.
35

40 So the question we would submit needs to be asked, rhetorically perhaps:
Is there any reason why Mr Lucas-Smith would not say at media meetings
on 16 and 17 January that there was not much risk from the ACT fires, but
there was some significant risk from the New South Wales fire? As we
understand it, and the evidence suggests, by 16 January he had a
consciousness that there was a risk to the urban area of Canberra and the
primary risk was going to come from that fire.

45 And your Honour, we would say would do well to ask why there was a

5 problem about making statements to that effect at that stage, so that
decisions could be made. And we've said this I think as early as in
opening, we've put it during the course of the evidence to witnesses, such
information would enable people to make decisions about whether to
10 remain in Canberra or go to the coast for the weekend, if that was their
plan. If they knew there was a risk from fires to take other precautionary
measures to enable them to deal with the impact, if and when it came. We
submit there can't be any disadvantage in such a process. And whatever is
15 said about targeted warnings and the need to be precise, no one has ever
really put to your Honour a disadvantage from the kind of general warning
which, for example, was being put to Mr McRae in the course of his
evidence.

15 It may well be, your Honour, that the reason why this wasn't done was
because ESB officers held an optimistic view about their prospects of
holding the fire, stopping it in the open lands, but nonetheless we would
submit the risk remained, and it remained as long as there was a risk to the
20 pines, which are reasonably close to the urban area. And it was known at
the time that a fire of that magnitude, those fires would involve spotting
distances of as far as 10 kilometres. And as long as there was that
prospect, then there was a clear and demonstrable risk to suburbs, and
there was no reason not to alert them to that risk, and I say that with
paragraph 390 of the Lucas-Smith/Castle submissions in mind.

25 In his what was described by our learned friend, Mr Gibb, as the seventh
area of submission covered on behalf of Mr McRae, Mr Gibb refers to the
submission that I made at page 167 of the transcript, about the entitlement
of the public in the line of fire to be warned of the risk. It is suggested
30 that we, that is my learned friend Mr Woodward and I universally
criticised for our lack of guts and our lack of consistency with the
evidence, and Mr Gibb went on to make the point that there was no
conspiracy of silence, and as Mr Archer observed yesterday, conspiracy
was not a word that we used in the course of our submissions.

35 That's of course an emotive word because inevitably phrases that include
"conspiracy" usually either imply or expressly allege criminal conduct, or
at least criminal agreement. Lest there be any doubt about, we don't for a
moment suggest anything of the sort. We are prepared to accept that there
40 was an optimism about holding the fire, and that that may have been the
reason why warnings of the kind that we have urged should have been
issued weren't issued. We still say it was the wrong thing to have done, it
was a wrong decision to have made, and we still submit in relation to the
essential finding that that lack of warning was a cause of the fire.

45 In the course of Mr Gibb's submissions, he refers to the circumstances at

5 ESB. Crowded rooms, planning meetings, Mr McRae speaking openly he said. He referred to the discussions on 14 and 15 January, “worst fire weather in your careers”. He makes the point that those things were said in the presence of media, police, public servants and suggests that if there was some attempt to conceal the truth, then they were doing an appalling job of it.

10 Ultimately it’s a matter of course for you, your Honour, but the ACT government in their submissions, paragraph 536, concede that a broad general warning could have been given. And they also appeared in their submissions to accept that the giving of such a warning was deferred. We think that categorisation of what happened is a fair description of what happened.

15 And no matter how transparent the process was, no matter how many police, public servants and other were in and out of planning meetings, ultimately the requirement that was on a person in authority at ESB to give the necessary direction via the media that the public needed to be given a particular kind of warning. And at least as between us and the
20 ACT government, that process appears to be agreed to have been sadly lacking.

25 In the course of Mr McRae’s submissions, or those filed on behalf of him, an important part or a central plank of those submissions was that it was no part of Mr McRae’s role to issue warnings. A related submission that he makes is that it was not part of his role to make decisions about what and how and when such warnings would be issued. This is not a surprising submission and we would agree that the evidence supports the view that others at ESB were primarily responsible for the formulation
30 and dissemination of warnings. The making of submissions generally about warnings generally, of course, we relied on Mr McRae’s own evidence about many of these matters.

35 To find consistently with the submissions made on Mr McRae’s behalf your Honour would first need to find that on his own, evidence about decisions that he and his planning unit ultimately made had no effect on what, when and how the warnings were issued, which goes perhaps to the submissions that we made, at least in part, concerning the way in which the service management team operated. The evidence generally in
40 relation to these matters is referred to in our narrative at paragraphs 718 to 723.

45 In Mr McRae’s submissions it also is suggested that when examining Mr McRae about what were described as general warnings, we were referring to people clearing gardens, et cetera, whereas, what Mr McRae

was discussing were triggers. He was referring to triggers, it's suggested, about warnings concerning whether to stay with the premises or not.

5 In our submission, a proper analysis of the evidence will show that in referring to general warnings in the examination of Mr McRae, Mr Woodward was dealing with something much simpler, namely that there was a risk that the fire would affect the urban area of Canberra by Monday, accepting Mr McRae's evidence about when that impact was likely. In our submission, we reject the suggestion that what
10 Mr Woodward was asking about in the course of his examination of Mr McRae were warnings to the effect that people should be clearing gutters, and things of this kind. In our submission it's a distraction, and the submissions on behalf of Mr McRae we would submit are replete with such references. See, for example, paragraphs 121 to 122 where our
15 misconception is said to have entirely corrupted our analysis of Mr McRae's thinking.

The evidence, your Honour, speaks for itself. It's set out in paragraph 718 of our submissions, and the entire focus of the questioning in relation to
20 Mr McRae was whether or not there should have been a warning to the residents of Canberra that there was a serious risk of the fires impacting on the urban area. And in that paragraph - and I don't have the transcript page number in front of me, your Honour - but in that paragraph the following questioning of Mr McRae is referred to:

25 "If you had identified by the 16th, the Thursday, that it was likely that the urban community would be impacted on the Monday why wasn't the urban community being told that, as soon as that was being identified?---We didn't know which part of the urban
30 community to work with.

Does it matter, Mr McRae? Why can't you just tell the whole urban community, 'Look, these fires will impact, or are likely to impact on urban Canberra on Monday'?---My view of the matter
35 was that we shouldn't be giving a specific alert to the whole community. The whole community should be getting general material at this point. The specific stuff should be used when we knew exactly which parts of the community to target."

40 Similar evidence is referred to in our submissions at paragraph 723 and the suggestion that we did not give a template against which to judge Mr McRae, we would submit is incorrect. There are a number of places in the course of our submissions where we discuss the kind of warning that could have been given, and indeed in the course of my original
45 submissions I think I formulated and read from the kind of warning that

could have been given, similar in terms to the kind of warning that was given in relation to events on 20 January.

5 During the course of the submissions a number of things have been said about the issue of blame. Contrary to what has been suggested in a number of the submissions, we did not and do not set out to blame someone for causing the fires or any of the deaths, in the sense in which that term “cause” is used in the Coroner’s Act. In our submission, we have identified and focused on two factors as being part of the cause, 10 namely, the inadequacies of the initial response and the issue of warnings, and our submissions make abundantly clear that these are the causes.

In particular, in paragraph 1,307 of our submission, the only finding we urge on your Honour on the question of cause is that the failure to give a 15 warning was a cause of the loss and damage to property, set out in subparagraph (g). The other findings that we have made submissions about are incidental to the finding of cause.

In our submission, if your Honour finds consistently with our submissions 20 that two factors were the cause of the fires, or in the case of warnings one of the deaths, your Honour is entitled to consider and comment on the factors that resulted in these inadequacies. Indeed, the people of the ACT are entitled to expect that your Honour would do so.

25 If one of those factors was, taking warnings as an example, a decision by one or more officers of the ESB that for the time being the public would not be told of their view that there was a serious risk of impact on the suburbs of Canberra, in our submission your Honour can and should make a comment to that effect. Such a comment would be an adverse comment 30 that is incidental to a finding as to cause about warnings, which is precisely the kind of comment envisaged by section 55 of the Coroners Act as the ACT submissions concede in paragraphs 39 and 43 of their submissions.

35 And I come back, your Honour, to the criticism of our submissions and their thoroughness and perhaps rather than be too pejorative about this, make one point on behalf of everybody, even those who criticise us so heavily, even Mr Gibb. Analysing this material has been, I’m sure for everybody including for us, a very significant job. Inevitably, material 40 will be either missed or errors will be made. Our learned friend Mr McIntosh was good enough to give us a list of corrections that had to be made to their submissions. Inevitably there will be mistakes made.

45 It is unfortunate, your Honour, that where a mistake or an omission is alleged in relation to our submissions an allegation is made, not that it’s a

5 mistake but that it represents a deliberate and selective step in furtherance of some agenda that Mr Woodward and I are said to have held. One needs to be careful about making those sorts of allegations because, for example, in the submissions of Mr Lucas-Smith and Mr Castle at paragraph 218 of their submissions, they assert that when Mr Castle was giving evidence about the need for a state of emergency because of the impact on the suburbs, he was not talking about an impact of the fire.

10 On page 80 of their submissions they quote transcript from page 1,846 of the transcript, and without inserting any marker indicating it is only a partial quotation they leave out two questions on that page in that transcript, which make it clear that in asking Mr Castle questions it was an impact by fire precisely that Mr Woodward was talking about. Now, if transcript is to be quoted selectively, then there is some responsibility of course to indicate that portions of the transcript have been left out. That's not what happened in that case.

20 Similarly, and regrettably, in paragraph 547 of their submissions it is suggested that because I or I and Mr Woodward did not attend at the particular view of the Emergency Services Bureau, that showed some disinterest, lack of interest, lack of willingness to understand the problems that were confronted by people working in that environment. I've been there twice. On the first day that I came here when this matter was first briefed to me, one of the first things I did was go to ESB and we were given a tour, as I recall, by Mr Lucas-Smith himself. We've been back again, I think for one of the briefings by Mr McRae. And it's unfortunate, your Honour, that the level of personal vilification or criticism has, from time to time, reached the level that it has.

30 In relation to that, we would accept that the layout of ESB caused difficulty in numerous aspects of the fire fighting. However, in our submission, in the way in which we've constructed the submission, after the first few days the detailed aspects of the factors inhibiting the fire fight, we would submit are essentially not relevant to the cause of the fires.

40 We limited our focus to whether the layout affected timely dissemination of information, because that was the only relevant issue. And in our submission, the evidence that we have referred to on that topic supports the proposition that the layout did not prevent timely dissemination of information to the public. There's no question the layout no doubt caused difficulties in command and control and communication, but that does not detract, in our submission, from the narrower submission made by us.

45 And also just finally, in relation to these sorts of matters, at paragraph 446

in the submissions of Messrs Lucas-Smith and Castle the following appears in relation to, your Honour, to the midday media conference on 18 January which is quoted on page 166. At paragraph 446 the following appears:

5

“Counsel assisting may have chosen to downplay or otherwise dismiss the statements suggesting they were not, in truth, warnings or not specific or detailed enough. Ironically, for much of the submission Mr Lucas-Smith and Mr Castle are criticised for placing too much emphasis on such concerns. The fact remains, however, that the statements were made and in discussing the warnings given counsel assisting makes no mention of them. This omission not only reflects poorly on the thoroughness and reliability of counsel assisting’s submissions, but suggests a positive lack of objectivity in the approach.”

10

15

Well, your Honour, the quotation which is set out at the top of page 166 in our submissions will be found at paragraph 922 of our submissions.

20

Your Honour, the last matter that I want to refer to briefly is with a view to the proceedings next Friday, concerning New South Wales. To the extent that the New South Wales submissions deal with Mr Roche, the benefits of hindsight and ...(indistinct)... we have dealt with those matters today in a general sense in these submissions and I dealt with the issues of jurisdiction during the course of my submissions last Monday.

25

To the extent that it’s necessary to do so, if there are any further substantive submissions by way of reply to the New South Wales represented parties, then we would provide those by, at the latest, next Monday, 24 July in writing. I appreciate, your Honour, and I should make sure it’s clear so that the criticism can be made if it’s appropriate to do so, about New South Wales represented parties were in fact on time with their submissions, they filed them on the date that they were asked to.

30

Any reply that we provided by next Monday would, in fact, be late. So we would need your Honour’s leave to do that and we may need to have a discussion about that next Friday, although I suspect that, to the extent that we need to say anything further about New South Wales, those submissions will not be a cause of difficulty, either for your Honour or for New South Wales.

40

THE CORONER: Mr Erskine indicated that he was rather keen to get some comments, Mr Lasry, from you.

45

MR LASRY: Yes.

THE CORONER: So if you're able to provide any comments before they make their submissions on the 28th then that would be useful.

5 MR LASRY: And your Honour, I'm conscious of the fact that we should have done that by now and we haven't but we will endeavour to do it as quickly as we can. If your Honour pleases, those are our submissions by way of reply.

10 THE CORONER: Thank you. Thank you, Mr Lasry.

All right, if there's nothing else, we'll adjourn until - - -

MR WHYBROW: Your Honour.

15

THE CORONER: Yes, Mr Whybrow.

20 MR WHYBROW: I think Mr Gibb reserved a right of any response to a response. As I noted yesterday, Mr Hastings is not here and whilst much of what was said in relation to the submissions filed on behalf of Mr Lucas-Smith and Mr Castle arose out of the oral submission parts of it did not, and on behalf of Mr Walker and Mr Hastings, I'd indicate that we would propose filing a short written, probably 3 or 4 pages, response to some of those matters, once they've had a chance to look at the transcript.
25 Obviously there's nobody here today representing Mr Lucas-Smith and I don't want that to be not said in case they do wish to respond to anything.

30 THE CORONER: I didn't respond to Mr Gibb's request yesterday because not long after he made the request he got up and left.

30

MR WHYBROW: No, I'm not defending him.

THE CORONER: I just presumed that he'd lost interest in the proceedings and I must admit I - - -

35

MR WHYBROW: I want to make it clear that Mr Lucas-Smith's representatives have not lost interest.

40 THE CORONER: I understand that. I saw you here yesterday and I see you here today, Mr Whybrow. But I must admit, not that it was my place to not grant Mr Gibb leave yesterday to leave, he'd finished and he'd left. But I must admit, and I'll put this on the record, that I was rather surprised that after making the submission that he simply got up and left, and didn't even give Mr Archer the courtesy of staying and listening to Mr Archer's
45 submissions.

All right. Well, I'm not going to prevent you from doing that if you want to put submissions. But it will have to be writing.

5 MR WHYBROW: Yes, your Honour.

THE CORONER: And circulated to everybody. And if there's nothing further we'll adjourn until 10 o'clock on Friday, the 28th. Thank you.

10

ADJOURNED TO 28 JULY 2006 AT 10.00 AM

[11.35 am]

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TRANSCRIPT OF PROCEEDINGS

CORONER'S 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

**10.05 AM, FRIDAY, 28 JULY 2006
(Continued from 18/07/2006)**

HIS HONOUR: Yes, thank you, Mr Walker.

5 MR WALKER: May it please your Honour. Your Honour, the way in which the issues that I want to address have arisen and evolved in this Inquiry before you can now be seen to be somewhat unusual, and has the happy effect for everybody here today that my address will be much shorter than might otherwise have been the case.

10 I refer of course to the fact that counsel assisting delivered, as we all know, very detailed submissions on a large number of issues. From within those large number of issues in relation to the McIntyre's Hut fire there was a thesis, or perhaps a collection of theses, which were advanced by counsel assisting in those written submissions that might, without going into detail, be summarised in this way; that things could have and should have been done differently by the New South Wales Fire
15 Authorities in their initial and immediately following response to the ignition at McIntyre's Hut by the lightning strike.

20 Now, your Honour will appreciate that bearing in mind that this is an Inquiry into deaths of ACT residents and damage to property by fire in the ACT, that in order for that thesis or those theses to have the relevant link it needed to be able to be shown by satisfactory evidence and cogent argument that if the alternative strategy, as I shall call it, had been followed by the New South Wales authorities there would likely have
25 been a difference in the eventual impact and outcome in the ACT.

As your Honour knows and has been published along with counsel assisting's written submissions on the net, New South Wales responded in detail to those parts of the submissions by counsel assisting in writing that
30 advanced this case about the alternative strategy. What has then happened is in our submission worthy of note and, if I may say so with the greatest of respect and without any condescension intended whatever, what has happened reflects great credit on those assisting you, because there has been a meeting intellectually of those assisting you and us in relation to
35 the matters the subject of the exchange in the written submissions.

And as you know there has now been prepared and served on us, but I fear perhaps not yet published or only just published and therefore not available to those who've understandably commented in public, a new
40 document, further submissions of counsel assisting in reply to the submissions of the New South Wales represented parties. Now, that's a document that has several parts and not all of which we need to address today. But there is an extremely important part and effect of that document that greatly shortens what we have to do and we hope, in turn,
45 will render your task that much more efficient in the decision-making you

have to make.

5 In order to draw those strings together and to advance, as is my duty, the
position of the New South Wales agencies, and particularly on behalf of
the New South Wales named officers whose conduct you've heard so
much about, what I intend to do now is, by the combination of those
exchanges, to put to you certain propositions which, in our submission,
you would be satisfied should be the subject of observation by way of
finding by you.

10 Before I do so, again because there has been public comment about it and
understandably not all of that as fully informed as may have been, had the
further submission been available to those commenting, I should mention
that I will come to the question of jurisdiction. One of the very useful
15 aspects of the supplementary submission that has been recently put on by
counsel assisting in relation to jurisdiction is of course to identify that
when it comes down to it, in practical terms in relation to these matters
and how you should be proceeding, there really isn't a great deal of
difference between our positions, and such differences as still exist are
20 really matters of degree, rather than bright line divisions.

I'll come back to the jurisdictional question later, but it is obvious in
relation to jurisdiction from what I've already said, from what was said in
writing, from how we've participated in the Inquiry and, in particular, how
25 we did everything we could to ensure that the New South Wales Coronial
material was available and supplemented by the material from our
agencies' work, it must be obvious that of course we take the attitude that
this Inquiry has very properly looked at, amongst other things, what has
become known as the McIntyre's Hut fire.

30 It is quite wrong for anyone to get the notion that we have sought to
prevent that from being done, and that we've not participated in it. As
your Honour knows, from time to time, by dint of certain objections I
have made, we have drawn a distinction between making an enquiry into
35 narrative facts and then what I'll call the governmental function of the
Coroner in relation to comments and criticisms, which is a different thing
and one upon which there is not a great deal of difference, if any, between
us and counsel assisting.

40 So the task I'm now very briefly going to carry out is one which goes to
the merits and the facts and the actual narrative in relation to the
McIntyre's Hut fire. There is a danger of seeing the McIntyre's Hut fire
as the fire which hit Canberra, as the same entity, if one can think of fires
as entities rather than a process which travels in time and space, as the
45 entity which hit Canberra, it simply, as it were, changed its name along

the way. That's not correct. What is correct is that the McIntyre's Hut fire was one of the conflagrations that contributed to the impact and by no means the least important.

5 There's another setting which, with respect, we're confident you're well aware of, in which one can put the McIntyre's Hut fire. It's not only not the only source of ignition and development of the fire which combined eventually to hit Canberra. It's not only one of several there, it is one of many more that were afflicting New South Wales at the time, and that of course is of highly significant matter for the availability of resources, to which so much reference has been made in writing.

15 Now, against that context these are the matters which we submit you would now be very confident of observing, as a proper approach to the heart of the exercise concerning the New South Wales response. First of all, in relation to the alternative strategy, in order that it be shown to constitute a reasonable alternative somebody has to show that it could have been adopted with the available resources, and that it would have been more likely to be successful. Now, that's paragraph 311 of our written submission. It's now just our submission, it is also, as you are aware, the first of the references in subparagraph 8(a) of the supplementary submission from counsel assisting where they agree, in substance, with it.

25 The next thing to say, that being the proper approach of method, that none of the additional resources which would have been necessary for the hypothesised alternative strategy has been quantified by the material before you, either by the experts assisting you or by the argument of counsel assisting. And until that is done, and that not having been done, nobody can possibly argue that it was a more reasonable alternative, that is the different containment lines, given the existing resources, or that it would have been any more likely to succeed than the strategy actually adopted.

35 Now, that's very important, as you appreciate, bearing in mind the way in which what might be called, sadly, battle lines had been drawn earlier. That again comes from our written submission, paragraph 318, and it's the second of the illustrations in subparagraph 8(a) of counsel assisting's supplement with which they agree in substance.

40 When I say illustrations, in their very important submission in paragraph 8 of the supplement, what is said, and we respectfully agree in this, that counsel assisting agree in substance, that is in effect join in the submission on behalf of the New South Wales parties, the effect of which I'll come to in general terms later. And then as your Honour knows, there are a

number of examples given by way of particular illustration.

5 I've taken you to 311, I've taken you to 318, and 318 is obviously extremely important. That puts paid to the notion that might otherwise have been abroad that had things been done differently in the way that some witnesses proposed by New South Wales the result would likely have been different. No, we submitted. No, counsel assisting agree in substance.

10 Now, the next one to come to is that there was a fundamental difficulty in the earlier submission from counsel assisting that if the Lowell's and McIntyre's Trails had been adopted instead of the river as the western containment line, it would have necessitated not only the gathering of resources to suppress the fire that was already burning across McIntyre's Trail to ensure that the trails were safe for use, but also to undertake those tasks before the burning could commence. That would have clearly delayed the implementation of the containment strategy. In other words, a new and extra task would have been required.

20 Tasks take time and resources, that would have delayed the implementation of the containment strategy, and therefore had the opposite effect to what was being asserted, namely a closer containment line, easier containment. And that the use of the river clearly required no such time delay, so it had pros and cons; some disadvantage in choosing the river, but the advantage that it didn't need the delay.

25 Now, those are paraphrases and adaptations from our paragraph 414 of our written submission and that's the third of the particular illustrations in 8(a) of the supplement from counsel assisting with which they agree in substance. That is, we can hardly overemphasise the importance of that material reflection on the state of the evidence and the propriety of the arguments.

35 The next proposition which places the matter, as we submit it ought to be, follows up in the same manner. There is ample evidence that using the trails proposed as the alternative western line would have involved considerable additional resources. Those resources would have been needed to upgrade the trail to make it accessible, to construct the rake hoe line around the ignition point, and then maintain a constant patrol of the trail itself.

40 There's been no identification of any evidence, counsel assisting have pointed to no evidence as to where those resources could have come from, how long it would have taken to put them in place, how long it would have taken to carry out the necessary construction work, and - here comes

5 the most important climactic point - and fundamentally how they would have made the slightest difference to the break-out of the fires on 17 and 18 January. Now, that's to quote from our paragraph 463, and paragraph 463 is the fifth of the particular illustrations of those submissions, agreed in substance by counsel assisting in paragraph 8(a) of their supplement.

10 The next one to which we come - I'm dealing only with part now - it's again a resources matter, critical in order to understand the alternative strategy point. That is, to recap, something else could have been done and had it been done the result would likely have been better. In particular, one can say of what is now clearly established to be vital for the alternative strategy in relation to the western containment line, that is don't choose the river, choose the combination of Lowell's and McIntyre's Trails. There is no evidence adduced whatever that there were
15 any dozers available to do the work that it's now been established would have been necessary. Now, they don't grow on trees.

20 There is evidence that the only dozer available that night was sent to protect property to the east of the fire front. It's a classic example of the danger that one would fall into by focusing on particular locations where in many locations the same authorities are dealing with emergencies. After the event there is always a danger of saying, "Well, your dozer was over here, but if it had been in a different place things would have been different at the different place".

25 That is either trivially true, that is it adds nothing because the dozer wasn't there and there's a good reason for it, if it was, or else it lacks evidence that there would have been a difference made. But the important point is what I've just noted in relation to the dozers, what there's no evidence of, and what there is evidence of comes from our paragraph 490 of our
30 written submission, and that is the sixth of the particular illustrations in 8(a) with which counsel assisting agree in substance.

35 The conclusion therefore in relation to the question of resources and possible delays that would have been caused by alternative strategies falls out as following. We accept that time was of the essence in implementing strategies to contain the fires. It's the nature of the beast with the weather cycle that you've heard about. If Lowell's and McIntyre's Trails had been adopted as containment lines instead of the river, the reallocation of
40 limited resources to modify those trails would have significantly impacted on the works that were undertaken to combat the Baldy Range fire, and to implement the containment strategy along the southern containment line.

45 It's trade-offs. Two areas, that is Baldy Range and the southern containment line which posed the most immediate risk to property and

possibly life. And in trade-offs prioritising in a principled way is something that we're confident that your Honour would approve. And prioritising to protect the most immediate risk to property and possibly life is unquestionably correct. Now, the substance of what I've just put, apart from the argument about priorities and trade-offs, is from our paragraph 492 which is the next of the particular illustrations in paragraph 8(a) with which counsel assisting agree in substance in the supplementary submission.

10 The decision-making therefore that was actually carried out by Julie Crawford and her colleagues on the night of 8 January as to the best choice for a western containment line was one which involved them balancing, not only the area that had to be burnt as part of any containment strategy, but also the availability of resources. The immediate threat to life and property and the fact that in the west - and your Honour has seen the location and has heard evidence, much evidence about this - the western edge of the fire, after all, was a backing fire burning downhill. In other words, not the most urgent front.

20 In fact, as history shows, the area between the river and Lowell's and McIntyre's Trails, now that's the area that would not have required, according to the alternative strategy, containment had the trails instead of the river been used. But history shows that in fact that area was completely burnt out by 15 January with very little assistance from fire crews. So that the extra containment area arising from the choice made of the river, rather than the previously proposed alternative strategy, turns out not to have been an area of burn-out but was an inappropriate strategic choice. Now, all that's taken from paragraph 496 which is the next one in subparagraph 8(a) of the supplement from counsel assisting with which they agree in substance. It is a very important matter in order to vindicate the decision-making on the spot at the time with imperfect information by hard working and very diligent officers from New South Wales.

35 Now, the power line trail is another part of the alternative strategy your Honour will recall evidence about. No evidence was adduced by counsel assisting to show what resources would have been required to undertake all the tasks simultaneously along the power line trail, let alone evidence that those resources were available. This was not the only fire being dealt with by New South Wales agencies, and your Honour will recall that there's more detail about that in the New South Wales submission to the New South Wales Coroner, which has been supplied to your Inquiry.

45 More particularly, the power line trail that features in this former thesis about the alternative strategy was not the only containment line which was being dealt with by the IMT. Substantial resources were committed to try

and contain the spot fires on the Baldy Range Trail on 10 January. When you look at the total picture, as of course you would, and not only to the artificial focus on sections of the McIntyre's Hut fire, that will be the proper approach to considering what should and could have been done to contain it. Now, that comes from paragraph 535 of our written submission which is the next one in the list of particular matters of submission on our behalf, with which counsel assisting agree in substance in paragraph 8(a) of their supplement, and it is obviously an extremely important one.

10 In relation to aerial incendiaries and when they could have been deployed, I could do this in more summary. To have deployed the aerial incendiaries before there was a sufficiently deep burnt area between the containment lines and the area to be burnt by them would have been contrary to established procedure in undertaking such an operation. Common sense, as well as the expert evidence before your Honour would support that.

20 No evidence has been provided by counsel assisting to show either that if their alternative strategy had been adopted the back burns would have been completed by the 14th or the 15th, of that the aerial incendiaries could have been obtained on either of those two days. So in terms of opportunities to have taken up hypothesised alternative ways of dealing with things in relation to what aerial incendiaries, as to the aspects I've just mentioned paragraph 599 of our written submissions makes those points, and that's the next one which was agreed in, in substance, by counsel assisting. See 8(a) of their supplement.

30 Finally, and by way of summarising in a way that enables us here and now to terminate what we want to say about this aspect of the facts, into which you've been enquiring, the following can be put. All the alternative approaches which had been urged on you in the submissions in-chief by counsel assisting had clearly been made with the benefit of hindsight. No evidence was provided as to whether the suggested alternatives could be achieved in reality.

40 No analysis was undertaken by counsel assisting or by Mr Cheney or by Mr Roche as to what resources would have been required and whether those resources, including aerial incendiaries, would have been available to complete the alternative strategies. And while there has been argument addressed to the question of whether time frame had been set for my clients to have completed their containment strategies, you will have noted that there had not been time frames provided for the alternative strategies either. We go further. In the absence of a proper analysis of all those factors there is simply no evidence to support an assertion that it was

likely that the control lines would have been completed and burnt to sufficient depth to undertake any remaining burning by aerial admission on 14 or 15 January at the latest.

5 Now, when you put all of that together it is, in our submission, a
vindication of the position we had taken, both before the New South
Wales Coroner and in the factual material and our challenges by
cross-examination before you. And most particularly in our written
10 submissions because, after all, what I've just been putting is paragraphs
625 and 626 of our written submission, and those are the last two items in
the list of particular submissions agreed in, in substance, by counsel
assisting. See 8(a) of their supplement.

15 The difference between the position adopted in submission by counsel
assisting and by New South Wales through Mr Erskine and myself has
very largely been diffused by a method which, with respect, in turn
vindicates the approach your Honour has taken procedurally. The steps
you laid down and stipulated for not only the gathering and testing of
evidence, but the exchange of submissions in advance of the section 55
20 decision by you, has served its purpose in our submission in an exemplary
fashion, so far as concerns these issues of concern to New South Wales.

25 There were hypotheses put up by counsel assisting, there were answers
provided to the best of our ability to those hypotheses, and in the respects
you have noted in the supplement, by way of submission from counsel
assisting, there has been a meeting of the minds on a great deal of the
matter. And in our submission, you ought to be satisfied by the
thoroughness of that approach which has been undertaken under your
supervision that the position is, as we have submitted, that in critical areas
30 as agreed by counsel assisting there simply isn't the evidence or the
argument to support any observation about New South Wales and the
McIntyre's Hut fire which is adverse.

35 To put it another way, that alternative strategies different from what was
in fact done by the New South Wales authorities cannot possibly be the
subject of any observation by you that they would have been better, either
because they would have conformed more closely to accepted practice, or
that they would have led to a better outcome. In neither respect can any or
such alternative strategy be shown to have been a better one. Of course,
40 we have another and different argument about the alternative strategies
which have been already addressed sufficiently this morning which
counsel assisting accept, namely, before one troubles oneself about
whether it would have been better, first ask whether it was feasible or
whether it was possible.

45

Your Honour, that completes what I want to say about the factual case in relation to the New South Wales response to dealing with McIntyre's Hut. As you know, in paragraph 18 of the written supplement from counsel assisting there are some matters subsidiary in nature which have been, if I may say so, very usefully and succinctly addressed by counsel assisting in writing. But - I hope you won't take this amiss - we have taken the position, so far as today's occasion is concerned, that those are matters which are well dealt with in the exchanged written submissions and they are matters of detail.

They don't call for detailed address, perhaps one reference only which might be worth adding by way of a note, subparagraph 18(a) refers to some matters concerning the expectation that fire would die down somewhat at night, and all we would add is that while that is I think agreed on all hands to be the expectation by experienced persons, at least in normal conditions, your Honour has by now a plethora of material showing that there was nothing very normal about what was happening, and about the conditions that had both immediately preceded and accompanied these matters.

And in that regard could I simply give you two transcript references in Ms Crawford's evidence, one is 4,530 the other is 4,425 and at those passages she refers to previous experience she had that notwithstanding fire receding somewhat or dying down somewhat at night, it could in certain circumstances still, to use one of her words, be quite severe. I don't suggest that that is a matter of anything other than a very small detail, indeed.

The only other one of those that I wanted to draw to attention was 18(i) which is headed "Risk To Fire Fighters". It is, with respect, a very useful and proper submission that is put in supplement by counsel assisting here. It starts by saying, as you see, that we, that is New South Wales, the New South Wales lawyers, have misconstrued the submission by counsel assisting to suggest that counsel assisting was critical of Mr Arthur for having concerns for the safety of fire fighters under his command. We apologise for that misconception, your Honour, and we are of course very grateful, and on behalf of Mr Arthur, regard it as a vindication that the submission by counsel assisting ought not to be so understood. There is no criticism of him for having concerns for the safety of fire fighters under his command.

Then what is dealt with in that submission really only goes to the question of what inference you draw from the way in which Mr Arthur did deploy his resources about the stage at which he decided that it was safe for fire fighters to work at a particular part of that line. With great respect,

bearing in mind with what we've started our address with, the way in which the lawyers have managed to meld some submissions, it's most unlikely that your Honour will be concerned with detail at that level.

5 In the address by my learned friend, Mr Lasry, recorded at transcript for
10 July starting at page 156, I suppose, of outline 23 and going over to
page 157 about line 20 or so, and I should also highlight the passage at
154 line 39 to 155 line 35, my learned friend addressed the issue that
10 might conveniently be called that of jurisdiction. Now, I repeat, as I'm
sure your Honour is clear in your mind about the way in which we've
conducted ourselves before you, we have never taken the position that
there was an excess of authority involved in your Honour's Inquiry,
looking in all the detail it did look, at McIntyre's Hut fire and what the
New South Wales fire fighters were doing.

15 We have never done anything, such as ask the Supreme Court to declare
that a limit has been breached. We have taken the position that I trust
your Honour has found us co-operative, we've certainly supplied a deal of
material on the merits of those matters. However, jurisdiction or, to use
20 another word, power is distributed in this country by a method that
involves observance of the different levels of legislative power, the
different zones of executive power and, for good or ill - this is not a place
to consider whether federation is a good idea - for good or ill, that
involves political boundaries.

25 And I hope that your Honour has appreciated from the very beginning the
first submission I made to this effect, and from the rather briefer
excursions of this kind following the accommodation between counsel
assisting and us in that respect, I hope your Honour has appreciated that
30 we have simply sought to confine the governmental function that you
serve under the ACT Coroner's legislation to matters which have to do
with the government of the territory. Nothing that your Honour has ever
said has ever given us concern that you are intending to do anything else,
and I don't wish to labour the point. There seems to be some
35 misapprehension, at least according to public commentary, as to the
position we take.

40 Technically and legally it may be there is a difference between us and
counsel assisting, and perhaps also my learned friend Mr Phillip Walker,
but it is not a matter of any moment for you and does not affect,
practically speaking, anything that we say you can do, or that they say you
can do. It can be summarised as follows, it's a point that is not going to
matter. It's suggested, for example, that when one applies the
45 interpretation provisions which are of a familiar kind, that one should
rather apply that to the question of property damaged than to the fire.

Now, I've already made a comment this morning and presumably others have made comments and your Honour has often thought about how odd it is to think of a fire as a thing. But is it? That's how we have to speak.
5 If one takes the argument that has been put as if it were against us - it's not really - namely, concentrate on property being in ACT damaged by fire, at the risk of putting childlike argument, well it's obvious that in order for that property damaged by fire being located in the ACT, it follows so is the fire. That is, so is the fire at the point which gives you
10 jurisdiction.

Now, we have been used to talking about fires perhaps as if they're animals, perhaps as if they are events, maybe as if they are things, and we call them names for convenience. No one proposes, no one would dream
15 that you would have had jurisdiction for the McIntyre's Hut fire if two days after the lightning strike there had been a deluge from heaven and it had never gone any further, and no one would suggest you'd have jurisdiction. Of course not, how silly.

But because we are used to thinking about a fire as having some identity with the chemical reaction that occurred on its first ignition, and have been the same as the set of chemical reactions that are happening
20 somewhere else much later, there is this danger that serious legal questions will be blurred in the way they are answered. You have jurisdiction because of the most unfortunate deaths, and that doesn't affect
25 our argument, and you have jurisdiction because of the property damage, and it's a jurisdiction which entitles and obliges you to investigate cause and origin of the relevant fire.

Now, I don't want to repeat what we've said in writing about it. Issue has been well and truly joined in the written submissions between us and
30 counsel assisting on the question of ultimate findings. But as to jurisdiction we stress it is only because the fire reached the ACT that you have jurisdiction, and that is a fact which never ceases to be important in
35 ascertaining the limits and observing the limits of the power you have.

Now, I said before this doesn't much matter, that doesn't mean that we make concessions about the law of the matter, we don't. In our
40 submission the interpretation provisions properly understood require you to read words in the Coroner's Act as the interpretation provisions stipulate. As simple as that. No contrary intentions appear, and that's an end of it. That is not to be taken as suggesting that you can't or shouldn't make findings of fact or observations concerning how it was that the fire
45 reached the ACT. That's why we've been here, we hope, helping you.

5 But there is an important link between what I've already said this morning
about the facts of the case and New South Wales' responsibility, and this
jurisdictional matter. Once you find, as we respectfully submit you are
bound to find, once you find that the way in which the New South Wales
authorities dealt with McIntyre's Hut can't be shown to have been
materially worse than, or more likely to have produced impact on the
ACT, than any realistic alternative strategy. Once you find that, then in
our submission it is just narrative for your Honour to observe matters that
precede the fire arriving at the boundary.

10 There is one hugely important qualification to that, that is common ground
between us and counsel assisting, and has been a constant theme of our
submissions to you on jurisdiction from day one. Of course you may and
should venture as fully as your Honour feels inclined to do, on the
evidence before you, into the all important matter of co-operation and
liaison between the ACT authorities and all other relevant authorities, in
this case of course principally being the New South Wales authorities.
There is no question about that.

20 Now, as your Honour appreciates, it's not limited to New South Wales.
New South Wales obviously looms large because ours is the territory in
which the ACT is a carve out. The co-operation and liaison with Victoria,
for example, is also important. Indeed, from any of the other places of the
Commonwealth that sends resources, as they do in times of emergency.
25 We make it as clear as I possibly can by repetition and emphasis, we have
never put, and we have never taken any step to inhibit your Honour's full
and complete exploration of the liaison issue.

30 However, we observe recommendations such as you may be inclined to
make in the area are recommendations concerning conduct which, from
New South Wales' point of view, is well in hand and has of course
continued since the fire. We have no opposition whatever to your
Honour's voice being added to those that plead for detailed, scientifically
informed, administratively sensible methods of liaison and co-operation
35 between authorities to deal with emergencies.

40 Your Honour, the third part of what I want to say touches very briefly on
matters which were to the forefront of the way in which we
cross-examined, and as your Honour has seen occupied a deal of the paper
upon which our written submissions appear, namely the detailed and in
some ways full-frontal criticism that we have essayed of some of the
so-called expert evidence before you in development of the alternative
strategy thesis.

45 Your Honour will have gathered from how I started my address that I

5 don't need to elaborate on that because of what has happened, and I don't wish to elaborate on it. But there are matters in the narrative that counsel assisting, with respect, very sensibly suggest must be included in your report which derive from or closely reflect some of that expert material, mostly Mr Cheney but not confined to that.

10 It is of course a matter for your Honour as to how you deal with the way in which evidence was given and what happened upon the testing of that evidence, respectively by Mr Cheney and Mr Roche. I have no further submission to make about that, apart from what we've put in writing, and as to what we've put in writing your Honour will appreciate that it's our respectful submission that given the way counsel assisting have moved to meet much of that material, the burden is largely removed from you of needing to deal with that in much detail at all.

15 Your Honour can be satisfied that there was an extremely thorough process of the gathering of evidence and the testing of evidence, and the assembly of argument about it, but that is a process that is intended to remove matters of contest, as much as they are to expose them. And where the matters of contest have been removed by the very considerable and proper statements in the supplementary submissions from counsel assisting then you don't need to go further.

20 However, that narrative, as it presently stands in the written submissions from counsel assisting, while of undoubted great usefulness and reflective of great industry, does need some amendment. It's very detailed textural amendment only, in order to remove what in our submission are the vestiges of contributions by the witnesses whose alternative strategy thesis can now be put to bed. This is not the time and place to do such a textural exercise, it's almost in the nature of proof reading.

25 May we respectfully request this of your Honour, may we supply by way of, as it were, word processor adjustment of the test prepared by counsel assisting our suggestions as to what might need to be changed in order to reflect that movement in the issues concerning the alternative strategy. We can have that available as a document next week. Would that be in order, your Honour?

30 THE CORONER: Yes, thank you, that would be helpful.

35 MR WALKER: Thanks. Now, that leaves only the fourth and last part of what I want to say by way of address. That leaves only the differences which do remain between counsel assisting and us, concerning those matters of finding which are of concern to New South Wales. It's not useful for me to simply rehearse what's been exchanged in writing about

that. I don't intend to do that. We maintain what we have put in writing, but we wish just to emphasise some of the matters that fall out from the way in which arguments evolved.

5 The differences between us are still there and you will pick them up, your Honour, in paragraph 18(k), the last paragraph of the further submission of 24 July, the supplement to which I've been referring from counsel assisting. At the end of that useful summation of the continuing differences between us there is this statement:

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“While we would agree that your Honour might consider making a finding in the terms of the first paragraph under the heading ‘New South Wales’ Proposed Further Findings’ in New South Wales’ submissions, as part of your findings on the circumstances of the McIntyre’s Hut fire, in our submission the remaining findings suggested under that heading are neither necessary nor appropriate.”

15

I thought I might just take your Honour to the detail of that, it's to be found commencing on page 174, the last two pages of our written submission to you in paragraph 6.1.3. The first paragraph to which our learned friends make reference and which we would respectfully urge that you should consider finding is as follows:

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“Having heard evidence during this Inquest of the history of the McIntyre’s Hut fire in New South Wales between 8 and 18 January, it's clear that any fire still burning in that area by the night of 17 January would, in all probability, have broken its containment lines in the prevailing extreme weather conditions of 18 January. It's also clear that under the influence of the prevailing drought conditions and the strong north-westerly winds of 18 January that fire would, in all probability, burn towards the ACT and cross the ACT border in the way that it did.”

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Now, it's a very useful exchange that's occurred in relation to findings because that again rather neatly summarises what we have put at much greater length in our written submission about the defects in the alternative strategies argument, and the way in which that has been most creditably crystallised by removing contest in the supplement of counsel assisting.

40

That leaves only this last observation. Your Honour will have noted that in our proposed findings to you there is express reference to what happened before your New South Wales colleague. It is of the first importance to stress that these were emergencies, of course, that involved

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fires that were themselves the subject of Coronial Inquiry in New South Wales. And what we will call the McIntyre's Hut fire was, as a New South Wales fire, part of those which were considered by your New South Wales colleague.

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It's for those reasons that of course regardless of the important limits on power, ultimately territorial and related to the subject matter of governmental concern, that we've made argument about. But notwithstanding all of that, of course you can and should adopt so much as seems useful and appropriate to you of the narrative, or even findings, of your New South Wales colleague about the McIntyre's Hut fire. Now, that puts paid to the notion that we before you engaged in anything like an attempt to stop you from looking at the McIntyre's Hut fire. We are not. We have not. And most of our written submission, as you know, is devoted to the merits of what happened on that night and the following days after the lightning had struck.

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Unless there's anything else with which I can assist, your Honour, that completes what we wish to say by way of address, and I thank you for your understanding in providing today as an opportunity.

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

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Yes, is there anything you wish to add, Mr Lasry, at this stage?

MR LASRY: No, your Honour, as I think I indicated last time, our reply, although it came in advance of my learned friend's presentation this morning, stands as our reply and I don't wish to add to it.

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THE CORONER: There's just one matter. I received this morning a copy of a short letter from Mr Peter Smith. I think Mr Lasry you have been given a copy of that. I don't know whether you have - - -

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MR LASRY: I have, your Honour, yes.

THE CORONER: - - - Mr Walker. Has Mr Walker been given a copy of this?

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MR LASRY: I've shown it to Mr Walker.

MR WALKER: I have seen it. I wonder if we could have a copy, your Honour.

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THE CORONER: I just wanted to bring that to your attention and, indeed, to anybody else who wishes to have a copy of Mr Smith's letter.

MR WALKER: Does your Honour wish us to do anything about this?

5 THE CORONER: No, I don't.

MR WALKER: Thank you.

10 THE CORONER: I just want to bring that to your attention, that I have received a copy of that.

MR WALKER: I'm obliged. Thank you, your Honour.

15 MR LASRY: Your Honour, just so that the record is clear, what I think happened with Mr Smith when he was formulating the second last paragraph is that he made a note to himself to put in the numbers for the paragraph.

THE CORONER: Yes, for the paragraph.

20 MR LASRY: I'm just not sure as I stand here what paragraph it is that refers to the allegation that he's describing there, but subject to establishing that we agree as to what we're talking about. We have nothing further to say about it.

25 THE CORONER: Thank you. All right, thank you. Well, this Inquiry and Inquest is adjourned.

30 **ADJOURNED**

[11.00 am]