ACT FIRES
JANUARY 2003

SUBMISSIONS OF
THE NEW SOUTH WALES
REPRESENTED PARTIES

INQUESTS INTO THE DEATH OF DOROTHY MCGRATH, ALISON MARY TENER, PETER BRABAZON BROOKE,
AND DOUGLAS JOHN FRASER

AND

INQUIRY INTO THE FIRES OF JANUARY 2003

20 JUNE 2006

CHAPTER 1

1 INTRODUCTION

1. This document constitutes a submission by the New South Wales (NSW) represented parties to the ACT Coroner's Inquiry into the January 2003 bushfires, which impacted on the Australian Capital Territory (ACT). Where the context permits, the reference to "NSW" will also be a reference to the NSW represented parties.

2. On 8 January 2003, numerous fires started in the Brindabella National Park and the Kosciusko National Park complex in NSW, and in the ACT. These included fires which started at McIntyre's Hut in the Brindabella National Park and at Broken Cart and Mount Morgan in the Kosciusko National Park ("the NSW fires").

3. Also on 8 January 2003, numerous fires commenced on the western side of the ACT/NSW border. The principal of these were referred to as the Stockyard, Bendora and Gingera fires ("the ACT fires").

4. Operations in relation to the McIntyre's Hut fire (and three smaller but significant fires adjacent to the Baldy Range trail to the east and Mountain Creek to the north) were conducted jointly by the Yarrowlumla Rural Fire Service ("RFS") and the National Parks and Wildlife Service ("NPWS") initially from the NPWS Queanbeyan depot.

5. At 13.00 on 9 January 2003, a sec 44 declaration was made in relation to the McIntyre's Hut fire pursuant to sec 44 of the *Rural Fires Act 1997* (RFS Act) ("the Yarrowlumla sec 44 declaration"). After the making of the Yarrowlumla section 44 declaration, the Fire Control

Officer of the Yarrowlumla RFS was appointed Incident Controller, and the NPWS Area Manager Deputy Incident Controller.

6. On late afternoon and night of 17 January and on 18 January 2003, extreme fire weather conditions saw all fires in NSW and the ACT break their containment lines. In the course of 17-18 January, the fires in NSW merged with each other and with the fires in the ACT.

7. On 18 January 2003, there were substantial losses in the ACT. On 7 February 2003, the Yarrowlumla sec 44 declaration was revoked.

8. The NSW Deputy State Coroner Mr Carl Milovanovich has conducted an inquiry, under the provisions of the *Coroners Act 1980* (NSW) into the circumstances of the fire(s) that started in NSW/ACT border which burnt during January 8-28, 2003. At the hearing conducted at Queanbeyan from 25 to 28 August, Mr Milovanovich indicated that he would be investigating "*the circumstances, cause and origin of the fire at McIntyre's Hut*". We understand that Mr Milovanovich has made available to Your Honour all the information that had been provided to him.

9. Mr Milovanovich handed down his findings on 18 September 2003. Relevantly, Mr Milovanovich stated:

> *"The decision to fight the [McIntyre's Hut] fire by indirect attack was made after consideration of the available intelligence and was made late in the afternoon of the 8th January. To attack the fire directly at that stage would have required the deployment of personnel into rugged terrain at night with little knowledge of the fires likely behaviour or its intensity on the ground. The remoteness of the area was also a consideration and the primary responsibility of the fire fighting agencies must be preservation of life….I am of the view that to have sent firefighters into the Brindabella Ranges on the afternoon of the*

8th January, 2003, would be contrary to all the basic fire fighting knowledge and would have placed professional and volunteer firefighters in potentially grave danger. The decisions that were made on the afternoon of the 8th January, 2003, must be examined in light of what was known then and not what is now known as having taken place on the 18th January.

We are all the wiser with the benefit of hindsight, but that is not the test. The decision to contain the McIntyre's Hut fire was in my view, having regard to all the circumstances the correct decision at that time. The fact that the fire was contained for the best part of 10 days would suggest that the strategy was working." (at page 15 of the Coroner's Findings)

10. The former National Parks and Wildlife Service which is now part of the NSW Department of Environment and Conservation (DEC) and the NSW Rural Fire Service made a joint submission to the NSW Coronial Inquiry into the December 2002 to March 2003 bushfires, which burnt across south eastern Australia ("the Joint Submission").[1]

11. NSW adopts for the purposes of this Inquiry the Joint Submission. The Joint Submission gives a detailed account of the functions of the NPWS and the RFS and their roles in fire management activities. It then establishes the climatic context provided by the extensive drought of 2002/03 and the role this played in setting the conditions for the development of the fires. The events of 8 January 2003, when a storm event ignited over 160 fires across south-eastern Australia, are discussed in detail, particularly in relation to the ignitions at McIntyre's Hut, in the Brindabella National Park. The rapid initial progression of this fire in its first couple of hours is outlined, along with the subsequent containment strategy. The progression of the fire in the subsequent days is detailed, including the breaking of

[1] RFS.AFP.0093.0002.

containment lines on 17 and 18 January as weather conditions deteriorated sharply.

12. The final part of the Joint Submission focuses on one of the key points that was raised in submissions to the NSW Coroner, Mr Milovanovich by other parties. That is the response to the outbreak of the fires on 8 January and the management of the McIntyre's Hut Fire over the following few days. The Joint Submission establishes that the RFS and NPWS responded to all the fires in the region as soon as they were reported on the afternoon of 8 January, and that significant resources were applied to an indirect fire fighting strategy once the scale of the fire and number of ignitions were known.

13. In this submission, we propose to examine the following:

- Your Honour's jurisdiction to make findings, comments and recommendations in respect of the NSW fires which impacted on Canberra in January 2003;
- The standard of proof and procedural fairness requirements in relation to the evidence;
- The evidence provided by Roche; and
- The submissions by Counsel Assisting, to the extent those submissions refer to the NSW fires.

14. In this submission surnames only are used. No discourtesy is intended. It is merely to assist in the reading of the document.

CHAPTER 2

2 JURISDICTION

15. Your Honour sits as an ACT coroner, exercising jurisdiction under an ACT enactment. As part of your inquest, you are inquiring into a fire that for most of its existence burnt in NSW and was fought by NSW government agencies.

16. This inevitably raises a serious question of the extent of Your Honour's jurisdiction. The question was raised at an early stage of the inquest. There was debate at a directions hearing on 15 December 2003. The evidence in Phase 2 proceeded on the basis that the issue of jurisdiction in relation to the McIntyre's Hut fire would be dealt with at the end of the evidence.

17. That time has now arrived. However, the submissions of Counsel Assisting touch on the issue only slightly[2]. In particular they do not discuss ss.120 and 122(b) of the Legislation Act 2001, and the limitations in the Self Government Act on extra territorial jurisdiction.

18. Counsel Assisting appear to try to sidestep the question of jurisdiction by clothing their submissions in the language of causation.[3] However, this does not avoid the issue at all.

19. "*Causation*" is not a term at large. It exists in a statute. It defines Your Honour's jurisdiction.

[2] In general, 4.2.4.3; in particular paras.1112 and 1114
[3] Para 1112 in particular

20. One must recall that Your Honour's jurisdiction is found in s.18 of the Coroners Act. That gives Your Honour jurisdiction to inquire into the "*cause and origin*" of a fire. Unlike s.13(2), there is no express extra-territorial scope for the jurisdiction to inquire into fires.

21. As a term in a statute, the word "*cause*" in s.18 must be interpreted consistently with standard principles of statutory construction, including presumptions against extra territoriality. It must be interpreted in a way that does not exceed the power of the Legislative Assembly to make such a law. If the statutory provision does exceed that power, then it is ultra vires and of no lawful effect.

22. The High Court has recently stated that the scope and objects of a statute are "*critically important*" in considering questions of causation arising under the statute: *Travel Compensation Fund v Tambree* [2005] HCA 69 at [28]-[30], and [45], in particular. The opening remarks of Callinan J in that case are helpful (at [79]):

> *"The Court of Appeal approached the question of causation as if it were deciding a case at common law rather than a cause of action conferred by statute. As the Chief Justice has pointed out, in a case of the latter kind, the scope and objects of the relevant enactment are critically important, and bear closely upon any question of the meaning to be given to any language relating conduct to a consequence, that is, language directed to the question of causation…"*

23. The statutory setting includes the fundamental question of the legislature's power to pass the statute. Therefore it is simply not possible for Counsel Assisting to attempt to sidestep the jurisdiction issue by using the language of causation to avoid the problem. The language of causation still raises the question of jurisdiction, and with respect to Counsel Assisting, it has to be debated properly. If it is not, there is real risk that Your Honour will be asked to make findings that

exceed Your Honour's jurisdiction, and thus encourage Your Honour to fall into legal error.

2.1.1 THE LEGISLATION ACT – SECTION 120 AND 122(b)

24. Counsel Assisting have not referred to either of these sections in discussing Your Honour's jurisdiction. This is, with respect, an astonishing oversight when dealing with the McIntyre's Hut fire which began in NSW and burnt exclusively in that state for the first 9 days of its existence. Nobody can hope to understand Your Honour's jurisdiction under s.18 without understanding the effect of the important presumptions of statutory interpretation in ss.120 and 122.

25. These provisions significantly modify the text of s.18(1) in the context of a fire outside the ACT. Hence they significantly modify Your Honour's jurisdiction to inquire into the cause and origin of the 2003 fires.

26. The relevant parts of s.120 are:

> ***Act to be interpreted not to exceed legislative powers of Assembly***
>
> *(1) An Act is to be interpreted as operating to the full extent of, but not to exceed, the legislative power of the Legislative Assembly.*
>
> *(2) Without limiting subsection (1), if a provision of an Act would, apart from this section, be interpreted as exceeding the legislative power of the Legislative Assembly—*
>
> *(a) the provision is valid to the extent to which it does not exceed power; and*
>
> *(b) the remainder of the Act is not affected.*

27. This provision is similar to s.15A Acts Interpretation Act 1901 (Cth).

28. The effect of s.120 is that the statute conferring jurisdiction on Your Honour must be interpreted to confine the jurisdiction to matters about which the Legislative Assembly has power to confer that jurisdiction.

29. The Legislative Assembly is itself a creature of statute: *Australian Capital Territory (Self Government) Act 1988 (Cth).* With some exceptions not relevant to this inquest, the Commonwealth has conferred full power on the Assembly to make laws for the "*peace, order and good government*" of the ACT (s.22)[4].

30. That wording is, in turn, derived from s.122 of the Constitution. The reason is obvious. The Commonwealth's power to pass the Self Government Act derives from s.122 of the Constitution[5]. In relation to the Self Government Act, the stream cannot rise higher than the source. The ACT Legislative Assembly cannot be given power to make laws that the Commonwealth itself could not make for the ACT.

31. The power to make laws for the peace, order and good government of the ACT is sometimes described as plenary. This can be misleading. It is not an unlimited power. It is not a power to make laws about any subject, whether or not connected with the ACT. There must be a nexus, both as to the subject matter (the good government of the ACT) and the territory of the ACT. This submission is explained in more detail below.

32. Thus the effect of s.120 of the Legislation Act is to require s.18(1) of the Coroners Act to be interpreted consistently with, ultimately, the Commonwealth's power to make laws for the ACT under s.122 of the Constitution. The next part of these submissions will address that issue.

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[4] Although it has not been tested, it seems clear that this would include the power to make laws having extra territorial effect. Those laws, however, would still have to be within the grant of power from the Commonwealth. That is, they would still have to have a proper nexus with the ACT.

[5] There is also the power to make laws for the seat of government in s.52, but this power does not relevantly add anything to the grant of power in s.122 for the purposes of this inquest.

33. Section 122(b) is equally relevant to the question of Your Honour's jurisdiction to inquire into a fire that burnt in NSW. The relevant parts of that section read:

> ***Application to Territory***
> *In an Act or statutory instrument—*
> *…*
> *(b) a reference to a place, jurisdiction or anything else by name or description is a reference to the place, jurisdiction or thing of that name or description in or for the Territory.*

34. This section is similar to s.21 of the Acts Interpretation Act 1901 (Cth).

35. This section has the effect of adding three highly significant words to Your Honour's jurisdiction under s.18. Those words are added after the word "fire", so that the sub-section now reads:

> "*A coroner shall hold an inquiry into the cause and origin of a fire* ***in the ACT***…."

36. At one level it is trite that everyone, Your Honour included, has been well aware that Your Honour has been inquiring into a fire in the ACT. Your Honour said precisely this at T751.12, to cite but one example.

37. But at another level the addition of these words to s.18 makes a profound difference to the jurisdiction that Your Honour has to inquire into a fire in NSW.

38. Your Honour is not given jurisdiction by statute to inquire into a fire outside the ACT. The first point at which Your Honour acquired jurisdiction to inquire into the McIntyre's Hut fire was when that fire crossed the NSW border into the ACT during the day on 18 January 2003. It was only at *that* time that it became a fire *in the ACT*.

39. This is significantly different from Your Honour's jurisdiction in relation to the ACT fires such as Bendora. At every moment of their existence, those fires began and burnt within the borders of the ACT[6].

40. But the question posed for Your Honour in relation to the McIntyre's Hut fire is quite different.

41. The question is not: what is the cause and origin of the McIntyre's Hut fire? That is a question for the NSW coroner alone.

42. The question is: what is the cause and origin of the fire that first ignited *in the ACT* on the NSW border during the day on 18 January 2003?

43. Once the question is posed correctly, the jurisdictional issue becomes quite obvious. At its highest, the only relevance of any inquiry by Your Honour into the course of the fire in NSW can be as to the spread of that fire into the ACT.

44. This is, with respect, a crucial point. Your Honour is not entitled to make a finding at large about any matter to do with the efforts to fight the McIntyre's fire. At its highest, the only finding Your Honour may make is that a particular matter to do with the efforts to fight the McIntyre's Hut fire *was directly causally connected with the fire that burnt into the ACT*.

45. To anticipate the later part of these submissions, the evidence does not support any of the supposed causal connections proposed by Counsel Assisting between the way the McIntyre's Hut fire was

[6] The concept of a fire as a process rather than a single event was set out in more detail in *R v Doogan* at [20]-[22]. It should be noted that no NSW party challenged Your Honour's continuing to sit as coroner in that case, and no NSW party took part in the case in any capacity whatsoever. Thus the issue of territoriality and jurisdiction raised in these submissions was never an issue before the Supreme Court. The Supreme Court in discussing the concept of a "fire" in s.18 did not have to consider any questions arising from the fact that the McIntyre's Hut fire originated in NSW. While the fire as a fire did not respect the ACT/NSW border, the fire as a legal concept must still do so, and the discussion in *R v Doogan* does not impact upon this issue.

fought, and the spread of the fire into the ACT. If Your Honour accepts that submission, then Your Honour's jurisdiction with respect to the NSW aspect of the inquest is largely spent. Your Honour is not entitled to make findings – let alone comment or criticism – if the matter upon which Your Honour makes findings has no causal connection with the fire within the ACT.

46. Given the limitation on Your Honour's jurisdiction, then, what does Counsel Assisting propose by way of formal findings?

47. It is little short of incredible that Counsel Assisting should propose formal findings at par.265 that ignore Your Honour's jurisdiction entirely and invite you to become a NSW Coroner. In that paragraph they propose a formal finding as to the cause and origin of the McIntyre's Hut fire.

48. ***Your Honour has no such jurisdiction***. That entire paragraph is to invite Your Honour to fall into fundamental legal error.

49. Worse, there is no proposed finding as to the fires Your Honour does have jurisdiction to consider, namely the fire that came across the border from NSW on 18 January. No formal finding is proposed in respect of that fire, even though that is the only fire relevantly that Your Honour can make formal findings about.

50. If Your Honour were to adopt the formal findings at par.265 (a), therefore, Your Honour would regrettably fall into fundamental legal error. An ACT coroner has no jurisdiction to find the cause and origin of a NSW fire. An ACT coroner should make findings about the cause and origin of a fire in the ACT, yet Counsel Assisting propose no such finding in par.265 (a) in respect of the fires that Your Honour *does* have jurisdiction to deal with.

2.1.2 SECTION 22 OF THE SELF GOVERNMENT ACT AND SECTION 122 OF THE CONSTITUTION

51. The statutory presumption in s.122 (b) of the Legislation Act is only part of the issue of jurisdiction. That presumption inserts words into s.18 that confine Your Honour's jurisdiction to an inquiry into the cause and origin of only that part of the McIntyre's Hut fire which entered the ACT on 18 January 2003.

52. However, that does not completely resolve the issue that arises from s.120 of the Legislation Act, and in turn from s.22 of the Self Government Act and s.122 of the Constitution.

53. That issue is: what is the scope of Your Honour's jurisdiction to inquire into the McIntyre's Hut fire given that there are limits on the power of the Legislative Assembly to make a law giving Your Honour jurisdiction to inquire into a fire that burnt in NSW?

54. As already noted, s.22 of the Self Government Act and s.122 of the Constitution are relevantly the same. The extent of the power under s.122 has been considered by the High Court on a number of occasions.

55. Section 122 confers upon the Commonwealth Parliament a power to make laws "*for the government of*" the ACT and other territories. In other words, a law said to be supported by s.122 must display the necessary nexus or relationship with the subject matter of the power, namely "*the government of any territory*". In *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 Mason J said at 526 that a law is authorised by sec 122 if it has "*a sufficient connexion or nexus with the good government of the Territory*". According to Murphy J at 531, "*a rational connexion with the government of the Territories*" is required. See also *Berwick Ltd v*

Gray (1976) 133 CLR 603 at 607; *Spratt v Hermes* (1965) 114 CLR 226 at 242; *Capital Duplicators Limited v Australian Capital Territory* (1992) 177 CLR 248 at 271; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 41 per Brennan CJ, 54-55 per Dawson J.

56. In *Newcrest Mining (WA) Limited v The Commonwealth* (1997) 190 CLR 513 Gummow J said at 604-605:

> "*Section 122 empowers the Parliament to make laws "for the government of any territory". The term "for", to adapt the words of Wilson J in Attorney-General (Vict); Ex rel Black v The Commonwealth in construing sec 116 of the Constitution, speaks of the purpose of the law in terms of the end to be achieved, namely the government of the territory in question. This identifies a legislative "purpose" within the meaning of par (xxxi). Such a conclusion is consistent with the following observations of Dixon CJ in Lamshed v Lake:*
>
> *'To my mind s 122 is a power given to the national Parliament of Australia as such to make laws 'for', that is to say 'with respect to', the government of the Territory. The words 'the government of any territory' of course describe the subject matter of the power.'*"

57. The power under sec 122 – and hence the Legislative Assembly's power under s.22 - is thus limited as to purpose or subject matter – "*government*" - and as to locality or geography – "*of [the] territory*".

58. Examples of the scope of the power are set out in this footnote.[7] It is also clear that a law relying on s.122 can have extra-territorial effect.[8]

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[7] In *Kruger v The Commonwealth* (1997) 190 CLR 1 the impugned laws were expressed to operate in the Northern Territory and to be applied to persons within that Territory. According to Brennan CJ: "*They were laws which fell clearly within the prima facie scope of s 122. The ground of alleged invalidity … is without substance*."

59. But *Cotter v Workman* (1972) 20 FLR 318 illustrates an important point. Just because a law has some connection with the ACT does not give it a sufficient nexus with the territory. In that case an ACT law authorised service of process against a NSW defendant. The process related to a car accident which occurred in NSW. The only connection to the ACT was the fact that the plaintiff lived in the ACT. Fox J said (at 327):

> "*Such a law would impinge upon much of the judicial power of the States, but the fundamental objection would be that it was not a law 'for the government of' the Territory. The law would not be relevant, or incidental, to the government of the Territory. The plaintiff's residence in the ACT was in the context neither relevant nor appropriate*."

60. Counsel Assisting have assumed, without argument, that any causal nexus between the McIntyre's Hut fire and the fires burning into the ACT is sufficient to give Your Honour jurisdiction to inquire into that matter. The proposed formal finding at par.265 (a) is the clearest example of this fallacious assumption. Without in any way exploring the nexus with the ACT, they propose a formal finding as to the cause and origin of a fire that began and burnt in NSW. They propose no formal finding in respect of the fires that actually came across the

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In *Newcrest Mining*, Gummow J gave the example of a law providing for the recruitment in the Northern Territory of personnel for the defence forces not being a law for the government of the Territory. This would be a law for the defence of the Commonwealth and, as an Act of the Commonwealth Parliament, be supported by sec 51(vi).

A further illustration of the limits upon the laws authorised by sec 122 is provided by *Davis v The Commonwealth* (1988) 166 CLR 79. That case concerned the Australian Bicentennial Authority, a company incorporated in the ACT with the primary object of planning and implementing celebrations to commemorate the 1988 Bicentenary. Section 22 of the *Australian Bicentennial Authority Act 1980* (Cth) made it an offence for a person without the consent of the Authority to use certain expressions. Section 23 provided for the forfeiture to the Commonwealth of articles or goods by means of which or in relation to which there had been committed an offence against sec 22. Mason CJ, Deane and Gaudron JJ said of sec 122:

"That head of legislative power would extend to the incorporation of a corporation in the Australian Capital Territory and to the protection of its corporate name and symbols. But the Territories power on its own cannot sustain the regime which ss 22 and 23 attempt to create."
(166 CLR at 97; see also at 117 per Brennan J, 117 per Toohey J.)

[8] *Lamshed v Lake* (1958) 99 CLR 132 at 141 in particular.

border into the ACT on 18 January, presumably because they believe that Your Honour may investigate without limitation the fire that burnt in NSW.

61. Clearly, however, *Cotter v Workman* amongst other cases shows that this assumption is wrong. The question of Your Honour's jurisdiction must be considered much more carefully.

62. The words "*cause and origin of a fire in the ACT*" do not by themselves provide sufficient nexus with the ACT. On their face they are words of broad meaning, as has been commented on many times.[9] Without further refining, they would purport to authorise an inquiry whose nexus with the good government of the ACT would be insufficient to make that law valid.

63. Section 120 of the Legislation Act, therefore, requires us to interpret the words "*cause and origin of a fire in the ACT*" in such a way that the relevant cause and origin inquired into are rationally connected with the territory and government of the ACT.

64. The first part – the geographic nexus – reinforces the operation of s.122 of the Legislation Act discussed earlier. It underscores the need for a direct causal connection between the matters Your Honour inquires into at the McIntyre's Hut fire, and a fire that burnt in the ACT.

65. The second part – the governmental nexus – is also important. As *Cotter v Workman* illustrates, a geographic nexus on its own is not always sufficient.

66. 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,

[9] See the discussion by Counsel Assisting at pars.1082 - 1095

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 future.[10] This is often popularly expressed – and for once, reasonably accurately – as the lessons to be learned from a particular event.[11]

67. But the lessons to be learned are lessons for the good government of the ACT, not NSW. 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 NSW.

68. So in finding the "*cause and origin*" of an ACT fire that originated in NSW, that cause and origin must have a proper nexus with the good government of the ACT. Those words have to be read down to those which the ACT Legislative Assembly could lawfully authorise Your Honour to investigate.

69. The issue can be highlighted by returning to part of the question posed by s.18 as refined by s.122 (b): what is the origin of a fire that began on the ACT/NSW border during 18 January 2003?

70. A simplistic answer, relying on the discussion in *R v Doogan* at [20] in particular, would be to look at the lightning strike at McIntyre's Hut. However, demanding such a precise answer runs into problems in identifying any proper nexus with the good government of the ACT to identify the origin with such precision.

71. Of what relevance to the good government of the ACT is it to know that a fire which came across the border began at a particular point of origin in NSW – or, indeed, anywhere else for that matter? Suppose, for example, that the fire originated in Victoria, swept through NSW

[10] See the passage from *Perre v Chivel* quoted by Counsel Assisting at 1095

[11] This purpose is, of course, qualified by the comments discussed later that an inquest is not a Royal Commission and its jurisdiction and powers are not at large.

and then crossed into the ACT? Is there any relevant connection with the government of the ACT to inquire into its ignition point in Victoria?

72. The purpose of the inquest is focussed on the fire as it burnt in the ACT. It may be quite important to know the ignition point of a fire that began in the ACT (for example, to eliminate arson as a possible cause, or to improve lightning detection facilities in the ACT), The same is not true for a fire that began somewhere else. The function of good government of the ACT does not extend to matters such as arson or lightning strikes in another State.

73. Thus the answer to the question posed by s.18 in the case of a fire that comes across the border is: the origin of the fire is NSW. The good government of the ACT is not connected in any way with any further inquiry as to the ignition point in another State. It is not relevant to the good government of the ACT to know the origin of an interstate fire that crossed the ACT border any more precisely than that.

74. Similarly, the question of the cause of a fire that comes across the border must be confined to a cause that is directly connected with a relevant matter for the good government of the ACT. That may extend, for example, to matters of liaison by ACT authorities with fire fighting agencies in a State. Or perhaps precautions may have to be taken in the ACT at particular locations on the border because some feature of the terrain or vegetation may increase the risk of a fire crossing the border into the ACT at those points.

75. To go much further beyond such issues, however, is to beg the question: what is the connection with the good government of the ACT to know more about that fire? What is the aspect of good government in the ACT that would be enhanced by knowing more?

76. Whatever be the extent of causation as an abstract principle (which is discussed further on in these submissions), a cause that arises in another State cannot be part of Your Honour's jurisdiction in s.18 unless that cause is properly connected with the ACT. A cause that relates to the functioning of the NSW government, for example, cannot be a cause that has any rational connection with the government of the ACT. Hence it cannot be a cause that Your Honour may lawfully investigate, because the scope of the word "cause" in s.18 must be read down to those causes which have the proper territorial and government nexus with the ACT.

77. To take an extreme (and completely hypothetical) example, suppose that Victorian fire fighting authorities did not fight a fire within Victoria diligently, with the result that it broke away, crossed the border into NSW and eventually burnt into the ACT.

78. Of what relevance to the good government of the ACT is it to know that Victorian authorities did or did not fight the fire diligently? The answer to this question affects nothing in the government of the ACT itself. It has already been accepted by Counsel Assisting that Your Honour has no power to make recommendations about the functions and operations of interstate agencies.[12] It is trite to say that ACT government agencies have no power on their own to fight fires in Victoria (or NSW for that matter). The most that could be said is that in this hypothetical example the ACT might have improved its liaison with Victoria to make sure that Victorian agencies understood the concerns of the ACT and the risks to the Territory.

79. But that falls far short of authorising an exhaustive analysis of how the hypothetical Victorian fire was fought. Such an analysis may reveal that better fire fighting might have prevented the fire from crossing the border. But that fire fighting would have occurred entirely in Victoria,

[12] T756; para 1112

involved Victorian agencies operating under Victorian law and utilising Victorian resources. Nothing involved in the good government of the ACT could affect that fire fighting effort except to the limited extent already discussed.

80. To put this succinctly in the context of the present inquest, the cause and origin of the McIntyre's Hut fire as it burnt in NSW is for the NSW coroner to investigate. For the ACT coroner investigating that fire insofar as it crossed the border in the ACT, the cause and origin of that fire is confined to matters directly connected with the territory and government of the ACT.

81. Thus the answer to the origin of the fire in the ACT is simple: it originated in NSW. Any further inquiry is beyond the jurisdiction of an ACT coroner because it has insufficient nexus with the government of the ACT.

82. The answer to the cause of the fire in the ACT is similarly constrained: it burnt in NSW for 9 days in the area of the Brindabella National Park and was driven across the border by prevailing weather conditions and terrain from the evening of 17 January 2003.

83. Counsel Assisting have proposed a finding at par.1197 that a cause of the fire that burnt into Canberra on 18 January 2003 was a strategy agreed at a meeting of NSW agencies (with ACT liaison) at Queanbeyan on 8 January. Apart from the fact that the evidence does not support that finding, Your Honour has, with respect, no jurisdiction under s.18 to make such a finding.

84. This can be tested by asking the question: what is the nexus between that proposed cause and the good government of the ACT? For it is not enough that it be a cause. It must be a cause that has sufficient nexus with the ACT. Otherwise it would exceed the power of the

Legislative Assembly to make a law to allow Your Honour to investigate that cause.

85. It needs to be recalled that the fighting of the McIntyre's Hut fire was undertaken by the NSW government agencies because it was a NSW fire, not because it was a fire that threatened the ACT. They had no obligation to fight the fire merely because it might spread into the ACT.

86. Of course the threat to the ACT gave ACT authorities a real interest in liaising with their NSW counterparts and urging them to fight the fire more strenuously because of the threat to the ACT. But NSW had no legal obligation arising from an ACT law to take this into account in their fire fighting efforts, or to alter their strategies because of it. Nor could the ACT pass such a law in the future. It was NSW law, administration and policy *alone* which governed the actions of NSW government agencies in fighting the McIntyre's Hut fire. ACT government, law and policy was irrelevant to the strategies decided by NSW agencies in fighting the fire.

87. Put another way, the actions of NSW firefighters fighting a fire in NSW under the authority of a NSW law are not part of the good government of the ACT. Once that is recognised, Your Honour's jurisdiction to make the proposed finding is exposed as non-existent.

88. The meeting which is proposed by Counsel Assisting as a cause of the fire that burnt into the ACT was held in NSW. It was convened by NSW officials. It involved NSW agencies responsible by NSW law for fighting fires within NSW. The fires to which the meeting related (there were more than the fires looked at in Your Honour's inquest) were burning in the geographic boundaries of NSW. It had ACT officials present, but only in the capacity of liaison, to provide information, advice and suggestions. The decisions taken at that meeting were made pursuant to NSW law, involved NSW resources,

and were the responsibility solely of the NSW Government. Any ACT resources used to fight this fire did so under the command of NSW agencies. How can such a meeting lawfully (under ACT law) constitute a cause of a fire that burnt into the ACT 10 days later?

89. This submission should not be misunderstood or misinterpreted. Of course NSW government agencies would be aware of the threat to the ACT, and would be concerned to do what they reasonably could about it. But that awareness and concern arises from common humanity, not from any legal obligation imposed by the ACT as to which ACT authorities are accountable. In other words the decision to fight the fires arises from no part of the good government of the ACT. Nor is it any proper purpose for an ACT inquest to investigate such matters.

90. So the answer to the question begged by Counsel Assisting's proposed finding about the strategies adopted in Queanbeyan on 8 January is: there is no sufficient nexus to authorise Your Honour to make such a finding. The only possible nexus would be improved ACT liaison with NSW agencies and (potentially) the provision of ACT resources to help fight the fire if required. That is a very small aspect of the strategy. The proposed finding goes far beyond anything that Your Honour has jurisdiction to make.

91. Counsel Assisting have recognised that Your Honour's power to make *recommendations* does not extend to making recommendations to the NSW Government (see par.1112). However, as already noted, Counsel Assisting have sought to make criticism of the way in which NSW fought the McIntyre's Hut fire, under the guise of causation (see par.1112 and 1114).

92. It needs to be recalled that the fighting of the McIntyre's Hut fire was undertaken by two NSW government agencies established under NSW legislation – the Rural Fire Service and the National Parks and

Wildlife Service. Those agencies fought the fire exercising statutory power conferred by NSW legislation, notably the Rural Fires Act. They fought the fire utilising resources given to them, as a matter of policy and administration, by the NSW Government. And they fought the fire entirely within the geographical boundaries of the State of NSW.

93. Any comment or criticism about the way the McIntyre's Hut fire was fought must inevitably involve comment or criticism about the operation of NSW government agencies, their legislation, and the allocation of resources given to them. The ACT Legislative Assembly simply has no power to make a law that would authorise an ACT coroner to investigate such matters and to make any findings, comment or criticism about them.

2.1.3 CAUSATION

94. Quite apart from these specific legislative limitations on the scope of Your Honour's jurisdiction, there is also the proper interpretation of the word "cause" of the fire in the ACT.

95. As the Supreme Court pointed out in *R v Doogan* at [12], s.18 of the Coroners Act "*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 and the cause or non-mitigation of the fire".*

96. Similarly in *Harmsworth v State Coroner* [1989] VR 989 at 995, the Victorian Supreme Court said that the coroner's source of power of investigation "*arises from a particular death or fire. A Coroner does not have general powers of enquiry or detection….The enquiry must be relevant, in the legal sense, to the death or fire."*

97. The relevance "in the legal sense" must include, in this case, a relevance that is rationally connected to the territory and government of the ACT. So the "cause" of a fire that originates over the border must be a "cause" that has some rational connection with the territory and government of the ACT. There is no jurisdiction to investigate any cause as such, whether or not connected with the ACT. Hence all the previous submissions are also relevant to the concept of causation.

98. But causation as a more abstract and less territorial concept still involves limits on Your Honour's jurisdiction. Counsel Assisting have drawn attention to the discussion in *R v Doogan* of the test in *March v Stramare* and to the very recent High Court decision in *Travel Fund.*[13] These provide some general guidance to Your Honour.

99. More specific discussion has occurred in other cases to which Your Honour was not referred by Counsel Assisting.

100. Before a factor can be considered to be a cause of a fire under s.18(1), there must not only be a clear causal connection between that factor and the fire but it must also be "*closely and directly associated*" with the fire.[14] Accordingly, "*as a general proposition the greater the time lapse between the event enquired of is from the allegedly causative factor, the less relevant as an initiating cause that factor will be*".[15]

101. In Harmsworth the Victorian Supreme Court made a number of important comments about the lawful scope of an inquest.

102. A wide ranging inquiry into remote causes "*would never end, but worse it could never arrive at the coherent, let alone concise, findings*

[13] See paras1088-1092
[14] *R v HM Coroner for North Humberside and Scunthorpe ex parte Jamieson* [1994] 3 WLR 82 at 96, 97
[15] Ibid at 97

required by the Act, which are the causes of death, etc. Such an inquest could certainly provide material for comment. Such discursive investigations are not envisaged nor empowered by the Act. They are not within jurisdictional power. Enquiries must be directed to specific ends. That is the making of the finding as required and set out in [s.18(1)].”[16]

103. The existence of a causal connection between the fire and the death and damage caused by the fire is a question of fact to be determined after the fact; notions of foreseeability are irrelevant. Reasonable foreseeability is not in itself a test of causation for the purposes of s.52(2)(a) of the Act.[17]

104. Applying the concept of “*remoteness*”, the Supreme Court of Victoria has held that the power to make findings as to the cause of death in a coronial inquest concerning the deaths of five prisoners who had died in the course of a fire which one of them had lit in a cell block did not extend to:

- *the policy of permitting remand and convicted prisoners to be housed together*[18]*;*
- *the reasons for and functioning of the two prisons located within the Cobourg Complex*[19]*;*
- *the functioning of the Pentridge Security Unit*[20]*;*
- *the budgetary arrangements of both prisons at the Cobourg Complex*[21]*;*
- *the input by prison tactical responses into prison design*[22].

[16] *Harmsworth* at page 995. See also *R v Doogan* at [11].
[17] *Chapman v Hear*se (1961) 106 CLR 112 at 122; *Commissioner of Police v Hallenstein* [1996] 2 VR 1 at 18.
[18] *Harmsworth v. State Coroner* [1989] VR 989 at 997.
[19] Ibid at 997.
[20] Ibid at 997-998.
[21] Ibid at 998.
[22] Ibid at 998.

105. So too, the Supreme Court of Victoria has held that the power to make findings as to the cause of death that in a coronial inquest concerning the death of a person who was shot by a police officer while participating in an armed robbery in which a hostage was taken, did not extend to general matters of police strategy and tactics in coping with discovered criminal activity[23].

106. In *Queensland Fire and Rescue Service v Hall* [1997] QSC 221 the Queensland Supreme Court considered the jurisdiction of the coroner to admit evidence relating to, amongst other things, the training and experience of rural firefighters conducting a backburning operation. Lee J, in an unreported decision without paragraph numbers, said in the penultimate paragraph of his reasons:

> *"The inquiry [by the coroner] seems to be limited to who or what caused the relevant fire in the first place. If it was caused (and thus originated) by some act of the Rural Fire Brigade, then it may be said that the prevailing circumstances at the time it was started by them, as well as their training and experience, are potentially relevant to the cause of the fire, e.g., if the relevant fire was started in dangerous and windy and dry conditions, without adequate equipment or manpower, and by persons of inadequate training and experience such that more experienced persons would not have started the fire in those conditions, those factors may be capable of being relevant to the cause of the fire in the first place. Otherwise it is difficult to see how their training and experience or what they used in their efforts to control the fire could be said to be a "cause" (and origin) of it, within the meaning of s.8. As indicated, both concepts relate to the time when the relevant fire actually started."*

[23] *Commissioner of Police v. Hallenstein* [1996] 2 VR 1.

107. The ACT Supreme Court has stated that the scope of the inquiry does not extend to the resolution of collateral issues relating to compensation or the attribution of blame. Furthermore, the application of the "*common sense*" test of causation, "*will normally exclude a quest to apportion blame or a wide ranging investigation into antecedent policies and practices.*"[24]

108. Ultimately Your Honour must make a judgment, case by case, as to whether a proposed finding is actually a cause of the fire within the limits set by s.18. It is not possible to set out any clear or precise verbal formula.

109. But that does not mean that the task is free from legal principle or precedent. The discussion referred to above shows that many of the matters on which Your Honour has heard evidence will fall outside the proper scope of s.18.

110. In particular the proposed finding at par.1197 lies far outside the legal concept in s.18 of the cause of the fire that burnt into Canberra on 18 January 2003:

- It is remote in distance: the meeting occurred outside the ACT;
- It is remote in time: the meeting occurred 10 days before the fire that Your Honour has jurisdiction to investigate (that is, the fire that came across the border on 18 January);
- It involved strategic decisions made by officials of the NSW government, applying NSW law and resources and complying with obligations and responsibilities imposed by NSW laws, none of which lies within the scope of Your Honour's inquest;
- It involved analysis of conditions of weather and firefighting progress which developed and changed over time, and which modified the implementation of the strategies adopted;

[24] *R v Doogan* at [12]

- Subsequent to that meeting there would be have to be an analysis of the actual operations and techniques used by firefighters (see *Qld Fire and Rescue Service* in particular);
- And, as the evidence shows (and which is set out in more detail in the submissions that follow), there is actually no evidence of a causal link (except in the most speculative and tenuous way) between the strategies adopted and the ultimate spread of the fire into the ACT.

111. Hence the proposed finding is one that lies comprehensively outside Your Honour's jurisdiction to make, even if the evidence supported the conclusion drawn by Counsel Assisting (which it does not). It is so remote in time, distance, intervening factors and involvement of NSW government administration that lies outside Your Honour's jurisdiction, that it could not possibly be said to be a "cause" of the fire that burnt into the ACT on 18 January, as that word is meant in s.18. If it is not a cause (and it is certainly not the origin), then Your Honour has no jurisdiction to make that finding.

2.1.4 THE POWERS AND FUNCTIONS OF THE CORONER

112. Counsel Assisting have discussed Your Honour's powers and functions in a limited way in Chapter 4.1 of their submissions. It is necessary to make some additional observations about Your Honour's powers and functions because the submissions of Counsel Assisting are quite inadequate on this matter.

113. As is noted many times in the present submissions, Your Honour's jurisdiction for the purposes of these submissions is set out in s.18 (1) of the Coroner's Act, to inquire into the cause and origin of the fire that burnt across the NSW border into the ACT during the day on 18 January 2003.

114. Counsel Assisting have noted[25] that Your Honour may also make findings about the "*circumstances*" of a fire (s.52(2)(b)) and may comment on "*any matter connected with the…fire*" (s.52(4)). They have not added the critical rider that these powers do not actually extend Your Honour's *jurisdiction*[26].

115. As the Supreme Court explained, the findings and comment must be based on evidence obtained in the course of inquiring into the cause and origin of the fire. Your Honour does not have jurisdiction, for example, to inquire into circumstances, nor to pursue matters purely for the purpose of making comment.

116. This point was also made in the passage from *Harmsworth* quoted earlier in these submissions in the context of causation. A wide ranging inquiry unrestrained by limits on the nature of causation would extend into many and varied areas.

> *"Such an inquest could certainly provide material for comment. Such discursive investigations are not envisaged nor empowered by the Act. They are not within jurisdictional power. Enquiries must be directed to specific ends. That is the making of the finding as required and set out in [s.18(1)].*[27]

117. It is important to note, therefore, that Your Honour's power to make comment, and to make findings about the circumstances of the fire, *relates only to evidence that is otherwise relevant to the cause and origin of the fire*. The power to make comment and findings about circumstances is not a stand-alone power, and it does not give Your Honour any additional jurisdiction.

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[25] Par.1080
[26] *R v Doogan* at [36]-[43]
[27] *Harmsworth* at page 995. See also *R v Doogan* at [11].

118. Thus Your Honour is not entitled to comment, or make findings as to circumstances, in relation to evidence of matters that do not relate to the cause and origin of the fire. If Your Honour concludes that the evidence you have heard about a particular matter is not related to an issue of cause or origin, then Your Honour has no further power to discuss that evidence in any way, and especially not within Your Honour's powers in s.52.

119. Within the concept of comment and circumstances, there are further limitations. Counsel Assisting have alluded to the fact that it is not Your Honour's function to lay moral blame.[28] They have gone on to suggest that this does not prevent Your Honour from making formal finding or comment, which may necessarily involve making adverse comment about a person.

120. We submit that the dichotomy between blame and adverse comment is bound up with the limitations on causation. Your Honour's task is to find the cause of the fires. It may be that a person's conduct was a contributing cause to one of the fires. That finding by Your Honour involves an adverse comment. But it is within Your Honour's jurisdiction for the sole reason that the person's conduct was a cause. The power to make comment or findings as to circumstances does not entitle Your Honour to go the extra step of directly blaming that person for a particular consequence. Nor does it entitle Your Honour to embark on an inquiry that seeks to find the person to blame for the fires or deaths.

121. It is common ground between Counsel Assisting and Counsel for the NSW parties that Your Honour does not have power to make any recommendations to the NSW Attorney General under s.57. Nor does Your Honour have power to make recommendations to the ACT Attorney General about the functions and operations of NSW

[28] See par.1095; see also *R v Doogan* at [12]

government agencies.[29] Consequently, for the purposes of Your Honour's additional powers under s.57, Your Honour has no power to make recommendations in respect of any issue on which NSW parties would make submissions. This point was confirmed at pp.74 and 79 of the transcript of the directions hearing on 7 April 2006.

122. Earlier Lasry QC dealt with the narrative in the submissions of Counsel Assisting. At p.49 of that transcript, he said:

> *"…our submissions have been compiled on the basis that they contain a factual narrative without argument…which [is] intended to be the platform or the basis on which your Honour might proceed further with the Inquest".*

123. This statement by itself is ambiguous, with respect. If it is intended to suggest that Your Honour should simply adopt the narrative in the submissions of Counsel Assisting, then that would involve the abdication of Your Honour's responsibility to make findings for yourself.

124. This does not seem to have been Lasry's intention in making that comment. At p.50 Lasry QC made an important qualification when he acknowledged that (although unlikely) there might be a possibility that substantial portions of the evidence might have been left out of the narrative and in those circumstances the narrative might have to be revised.

125. This point was specifically addressed by the Supreme Court at [164]-[166] of *R v Doogan*. Their Honours declared that "*a coroner cannot delegate his or her responsibility to weigh the evidence and make appropriate findings..".*

[29] See par.1112

126. A coroner can, however, receive summaries of evidence and argument to assist in the task of weighing the evidence and making findings. Provided that is what is intended by the narrative in the submissions of Counsel Assisting, nobody could possibly object to the aim.

127. This question is not merely theoretical. Despite the good intentions of Counsel Assisting to provide a "*very detailed and carefully referenced*" narrative that would not need any supplementation by the represented parties, it is clear that the narrative contains some important factual mistakes, omits some important material, and misrepresents some important evidence. These errors carry over in turn to the submissions on findings, where they are amplified by further errors of the same kind.

128. In the submissions which follow, we identify those errors. They are neither minor nor inconsequential to the findings Your Honour may make. On the contrary, they go to the heart of many of the proposed findings discussed by Counsel Assisting in Chapter 5. It will be an important matter for Your Honour to consider those errors before embracing the narrative of Counsel Assisting in Chapter 3.

2.1.5 THE EVIDENCE LED IN THE INQUEST

129. The question could be asked: if Your Honour's jurisdiction in relation to the McIntyre's Hut fire is so confined, why was all the evidence led about it?

130. Of necessity Your Honour was entitled to inquire into what can be loosely called the narrative of the fighting of the McIntyre's Hut fire. This arises from at least three independent legal bases.

131. First, Your Honour needs to know the story of the fire in order to put other evidence in context. This is similar to the well known principle in evidence law of the res gestae.

132. Second, some matters of chronology and narrative clearly have relevance to the cause and origin of the fire within the ACT. This has already been discussed in general terms in these submissions.

133. Third, Your Honour's jurisdiction is that of a coroner. A coroner does not hear a case presented by parties, but must inquire independently into the facts. In the investigation phase that will involve, of necessity, following evidence to see where it might lead.

134. Thus it was appropriate for Your Honour to hear from those NSW witnesses who gave evidence, and to have regard to the NSW documents forming part of the coroner's brief, in order to see where that evidence led in terms of cause and origin of the ACT fire. This was the result reached in the debate at the directions hearing on 18 December 2003 when the issue of jurisdiction was first raised. The approach taken by Your Honour, by Counsel Assisting and by counsel for the NSW parties, was not only proper at the time but was consistently followed in Phase 2 of the inquest.

135. The last point (the nature of an inquest) requires elaboration, because it leads to an important consequence for Your Honour at the point in the inquest that has now been reached.

136. An inquest is different from a civil or criminal suit. It is not only a judicial proceeding but an inquisitorial proceeding as well. In the words of Ipp JA in *Musumeci v Attorney-General of NSW* (2003) 57 NSWLR 193 at 199:

> "*I think it is sufficient to note, firstly, that it is a hybrid process containing both adversarial and inquisitorial elements.*

Secondly, coroners exercise judicial power, notwithstanding the executive nature of their functions. Thirdly, the proceedings in the Coroners Court involve the administration of justice…. The nature of an inquest differs from that of a fundamentally investigatory process such as a Royal Commission."

137. The ACT Supreme Court referred to this passage in *R v Doogan* at [45] and continued;

"Whilst these observations are generally true, it is important to bear in mind that the coroner's duties will almost always involve some initial investigation and that, in the case of bushfires that have covered large areas and caused substantial damage, may involve a substantial investigatory phase in which little, if any, scope for the exercise of judicial power may arise."

138. Because of the hybrid nature of an inquest, it is not always straightforward to identify the evidence that will ultimately be relevant. At the start of the process there is a clean slate, in which every likely lead needs to be investigated, even if it ultimately leads to a place that is not relevant to the coroner's jurisdiction.

139. It is only at the end of the evidence that it becomes clear what is relevant and what is not.

140. This last point was taken up at some length by the Supreme Court in *R v Doogan*. At [34] Their Honours said;

"Indeed, a liberal approach to the potential relevance of evidence may sometimes be appropriate, particularly in the early stages of an inquiry when the coroner is still seeking to identify what issues are likely to arise".

141. Later on at [45] Their Honours noted that an inquest has an inquisitorial and a judicial phase and the initial investigation of a bushfire *"may involve a substantial investigatory phase in which little, if any, scope for the exercise of judicial power may arise".*

142. At [46] Their Honours noted that it may take time, for example, "*before the coroner can make sensible judgments as to who should be granted leave to be represented at the subsequent inquiry*".

143. At [48] Their Honours said:

> *"Even when the inquiry has been formally convened and evidence is being adduced, the coroner may still be engaged in a n investigation of potential issues, the scope of which will not have been defined by pleadings. Issues may continue to arise and be progressively clarified and refined."*

144. These observations were a significant foundation for the ultimate decision of the Court that the suggestion of apprehended bias was premature in many cases because Your Honour had not yet determined which issues were relevant to your inquiry and which were not.

145. Your Honour has only just reached that point in the inquest where the evidence is largely complete. It is therefore only at this time that Your Honour can make a final judgment as to what matters are relevant and what are not.

146. It is now – not back in December 2003 – that Your Honour must decide what findings (if any) the evidence entitles you to make about the McIntyre's Hut fire, bearing in mind the significant limitations on Your Honour's jurisdiction to make such findings.

147. Hence there is no inconsistency in the position taken by NSW and by NSW witnesses in this inquest. It was accepted that Your Honour had

a lawful power to inquire into the McIntyre's Hut fire, provided that there was some possible rational connection with Your Honour's jurisdiction that might emerge from wherever the evidence led.

148. Now that the evidence has been led, however, it becomes an essential part of Your Honour's task to ensure that any findings that you make in relation to that evidence are properly connected with your jurisdiction.

149. If Your Honour has heard evidence that ultimately turns out to be irrelevant to anything within your jurisdiction, it must be discarded and not form part of the formal findings of the inquest.[30] Nor can it form part of the findings as to circumstances, nor to comment, nor to recommendations. It is, simply, irrelevant, and as such plays no further part in Your Honour's task. As a judicial officer Your Honour must make a judgment about its relevance – but if it is irrelevant, Your Honour's judgment that it is irrelevant is the last use that Your Honour may make of it.

[30] Of course Your Honour would also be entitled to refer briefly to the discarded evidence in the narrative of the inquest itself, in order to set out the extent of Your Honour's inquiries as coroner. But a reference in general terms to evidence that ultimately was found to be irrelevant is a very different thing from a formal finding on a matter that is beyond Your Honour's jurisdiction to make.

CHAPTER 3

3 EVIDENCE

150. The Coroner's Court is a hybrid of inquisitorial and judicial functions. However, these functions are not permanently intertwined. The Supreme Court's reasons in *R v Doogan* at [44]-[48] indicate that at the outset an inquest is almost purely inquisitorial. As it progresses the judicial function becomes more significant and the inquisitorial functions become less significant. At the point of making findings, the coroner is exercising an exclusively judicial function.

151. That point has been reached in this inquest. Your Honour has ceased to inquire, and has begun to make findings. That task is a judicial function, and must be undertaken according to proper judicial standards.

152. In relation to the standard of proof, Counsel Assisting have properly drawn attention to the extended and well known statement in *Briginshaw:* see par.1097. They have also properly drawn attention to the clarification or refinement of that statement in *Neat Holdings:* see par.1099 and 1100.

153. It is appropriate to set out why the common law applies. Section 47(1) of the Coroners Act says that the coroner is not bound by the rules of evidence. However, s.4 of the Evidence Act applies its provisions to all ACT courts. This term is defined to mean "*the Supreme Court of the Australian Capital Territory or any other court of the Australian Capital Territory*". Since the Evidence Act is a Commonwealth Act it takes precedence over any inconsistent ACT enactment. It would normally not be possible for s.47 of the Coroners Act to stand alongside s.4 of the Evidence Act: the two provisions are mutually exclusive.

154. However, s.8(4) of the Evidence Act allows any ACT enactment to continue to operate notwithstanding the Evidence Act. This means that s.47(1) of the Coroners Act is effective to exclude the operation of the Evidence Act from the Coroner Court.

155. In any event the common law and the Evidence Act probably reach the same result. Section 140 applies to all civil proceedings. That term is defined to mean any proceeding which is not criminal. The definition of a criminal proceeding clearly does not include an inquest (except on the rare occasion where a coroner might decide to commit a person for trial). Thus an inquest would be a civil proceeding, and s.140 would therefore apply.

156. That section says that the standard of proof in civil proceedings is satisfaction on the balance of probabilities. Among the matters to be taken into account in deciding satisfaction is the gravity of the matters alleged (s.140(2)(c)). This is probably the same result as reached by Counsel Assisting applying the common law (and see *ATN v Marsden* [2002] NSWCA 419 at [60]-[61]).

157. However, an even more fundamental point emerges from the passage from Briginshaw quoted at par.1097. The High Court said that "*'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect references*".

158. In relation to the submissions made about NSW, Counsel Assisting have consistently disregarded the fact that the conclusions they wish to draw about the causal connection between the strategies for fighting the McIntyre's Hut fire and the breakout of that fire into the ACT are not supported by any direct evidence whatsoever except for one tenuous reference in a passing exchange between Lasry QC and Roche[31]. It was particularly notable throughout the evidence in the

[31] The exchange at T7346-7

inquest that in their extensive written reports, neither of Your Honour's experts (Roche and Cheney) made any causal connection between their criticisms of NSW strategies and the spread of the fire into the ACT. At the end of the inquest, not one piece of substantial direct evidence, therefore, supported any inference that any strategy adopted by NSW had any causal connection with the fires in the ACT that Your Honour is investigating.

159. This submission will be expanded below. However, at the outset two fundamental issues arise.

160. First, in the context of the Briginshaw test, the finding proposed by Counsel Assisting at par.1197 is a very serious one. One does not lightly assume that competent and experienced firefighting managers such as Arthur, Crawford, Neil Cooper and Bartlett, made decisions and adopted strategies that ultimately caused fires to burn into Canberra.

161. Thus Your Honour would have to be satisfied to a high level indeed of the facts that supported such a proposed finding. Surmise, supposition, inference (not supported by any expert in an area that demands expertise) and innuendo is no substitute for actual evidence. Yet the submissions of Counsel Assisting can point to only one direct piece of expert evidence to support their proposed findings, and even that is tenuous. The rest of the evidence that purportedly supports the findings is supposition and conjecture, frequently by non-expert witnesses (and frequently by Counsel Assisting themselves) in an area that demands expertise.

162. Second, procedural fairness applies to Your Honour's process (as set out in par.1096 of Counsel Assisting's submissions).

163. The NSW parties paid close attention to the way in which the evidence emerged during the inquest, and the lines pursued by Counsel Assisting in cross examination of witnesses relevant to NSW.

164. At no point did the evidence suggest that any failings in the strategies adopted by NSW had any causal connection with the spread of the fires into the ACT. At no point did Counsel Assisting put that question to any witness, with the *solitary* exception of a question put to Roche by Counsel Assisting which was answered at T7346-7.

165. If this really was Roche's evidence, it is frankly incredible that such a fundamental point was not included in his written report. If, in proofing Roche, Counsel Assisting realised that he was going to make that causal connection in his oral evidence, it was a matter of such importance that it demanded to be done on notice in writing, with a full opportunity for NSW to consider its implications.

166. Instead, it was left to a single exchange in the course of Lasry's examination of Roche. Roche was the last witness called by Counsel Assisting. His written report, circulated well in advance, contained no such assertion of a causal connection.

167. This issue is a fundamental one, assuming that it lies within Your Honour's jurisdiction. It is, with great respect, completely inappropriate for Counsel Assisting to make the submissions that they do in relation to causation without having flagged it as an issue at an earlier stage in the proceedings, ensured that it was included in the written reports of the experts who would be called to support that proposition, and with a reasonable opportunity being given to NSW to seek to call evidence to respond to it.

168. It is submitted that Your Honour has no evidence on which you could make the proposed findings. However, were Your Honour minded to go down that path, it is submitted with respect that Your Honour would

be obliged by the rules of procedural fairness to have that issue properly explored in evidence, including the recall of Roche and Cheney and any other witness relevant to the question, as well as the opportunity for NSW to seek additional evidence (including expert evidence) in response. The evidence in this inquest is in no proper shape to allow the proposed findings of Counsel Assisting to be pursued. Either those proposed findings are rejected by Your Honour as being without evidential support, or the inquest is re-opened to allow what would probably be a considerable amount of further evidence to be led.

3.1.1 THE WISDOM OF HINDSIGHT

169. Everybody accepts that Your Honour's task cannot involve the wisdom of hindsight. It is a cliché. But what does it actually mean?

170. Hindsight means making judgments about past events in the light of knowledge that came to light only after those events had happened.

171. When it comes to assessing the decisions made by fire managers, Your Honour must therefore put out of the picture the information that was not known to them. The only exception to this is where those managers should have known that information.

172. "*Should have known*" is another phrase beloved of lawyers, that requires further consideration.

173. If someone should have known something, it means two things about that person and that information. First, the information was available if the person had looked for it. Second, even though the person did not look for it, they had some obligation to look.

174. It is worth recalling once again the jurisdiction given to Your Honour. It is to inquire into the cause and origin of the fires. The "cause" of something is what actually happened. Asking what should have happened is generally remote from asking what actually happened. The discussion by the Supreme Court in *R v Doogan* at [24]-[34] makes it abundantly plain that the further one gets from proximate causes, the less likely it is that the inquiry is authorised by s.18. Further, Your Honour does not have a jurisdiction to inquire into potential comment, nor even into circumstances. Those matters can only be the subject of Your Honour's findings if they arise fairly out of the evidence as to the actual cause of the fires.

175. Thus it is submitted that judgments by hindsight should form no part of Your Honour's inquiry, especially in asking what should have occurred or what should have been done. Your Honour's task is to find what *was* done, insofar as that was a cause of the fires burning into the ACT.

176. One piece of evidence demonstrates very clearly the dangers of judgment by hindsight and the way in which Your Honour is being invited by Counsel Assisting to make findings as to what should have happened that lie far outside Your Honour's jurisdiction.

177. This inquest has been bedevilled by one piece of information that has, with respect, obsessed the experts and in turn Counsel Assisting. On the night of 8 January, Gould from the CSIRO happened upon the Baldy Range spot fire. He took a poor quality video of the fire, and made some observations.

178. He candidly admits that he did not pass that information on to anybody. He did not contact the fire managers at Queanbeyan that night, either at the time or when he came into range of mobile phones at around midnight. Apparently he did not pass it on the following

morning. The first that any fire manager was aware of it was when it surfaced in this inquest.

179. Thus it is classic hindsight information. It was completely unknown to anyone who had to make decisions on the night of 8 January. There was no way that any of them could have found out Gould's observations, as he did not have a radio in the vehicle and he was out of mobile phone range. And that assumes that any fire manager was even aware that Gould was out in the Brindabella National Park that evening.

180. So there can be no criticism of any fire manager for not knowing of Gould's observations at the time.

181. More than that, the Queanbeyan meeting *did* have direct information about the Baldy Range spot fire. It did not come from Gould, but from 2 ACT forestry workers who had been sent to reconnoitre the area. They were there only shortly before Gould. In a classic example of the distortions that come about by hearsay information, it was not passed on accurately to the meeting. But Counsel Assisting have accepted that the meeting had an unwittingly inaccurate version of the information, and that no criticism can be made of the meeting for having accepted it.[32]

182. At this point, then, one would have thought the issue was dead. No criticism could be made of the decision, the efforts to obtain information, or the reliance on the information obtained.

183. But Cheney and Roche have doggedly tried to pursue the point that the fire managers should have tried to find out by other means that by 9pm or so, the Baldy Range spot fire was relatively quiet.

[32] See para.1182

184. The entire body of information available to the meeting in Queanbeyan on the night of 8 January was put to Cheney. He was taken in particular to the report from Brian Blundell that the fire on Baldy Range trail at 8pm had winds of 30 to 40kmh.[33] When asked whether he would agree that these were "fairly strong winds" his answer was remarkable:

> *"I don't know where that record was from. That was not the wind speed that other people who went to the site recorded on site, which is the point of my comment".*[34]

185. It was a simple question to answer: was the reported wind fairly strong? His answer was to query the report of the wind speed *in the light of the wind speed recorded by others*. The "*other people*" obviously included Gould, whose information was never passed on to Queanbeyan. There can be no doubt that in this answer Cheney was using the judgment of hindsight to query information that the Queanbeyan meeting had no reason *at the time* to query.

186. At T6960 the judgment of hindsight emerged again. In relation to the information from the 2 ACT forestry workers passed on to the meeting, Cheney's response was;

> *"I don't even know whether Bretherton actually got to the fire".*

187. Your Honour will recall that, of course, the forestry workers reported that they were at the Baldy Range spot fire, it was across the trail, and they were pulling out. Cheney's answer went to elaborate lengths to try to downplay the importance of this information, because it was inconsistent with Gould's information obtained only shortly afterwards.

[33] T 6954 at 20-25
[34] T 6955 at 43-46

188. His answer went on to say that the decision not to use the Baldy Range trail that night was wrong because:

> *"I believe they should have known that they were going into a falling fire danger, that the fire behaviour would decrease in that country at night and that they needed to get a proper assessment of what it was doing and where it was on the ground".*

189. Here Your Honour will see the words "*should have known*" appear. Cheney's answer amounts to this: the meeting should have disregarded all the information it had, even information obtained in the course of the meeting itself, and gone out to make "*a proper assessment*" of the fire ground.

190. Your Honour is entitled to ask: Why should the meeting have disregarded all the information obtained, from a number of different sources, including information obtained as recently as the meeting itself from an observer actually at the Baldy Range spot fireground?

191. The only answer can be: because it was inconsistent with Gould's.

192. And that is unequivocally a judgment of hindsight. Therefore Your Honour would have no difficulty in rejecting that assertion from Cheney.

193. Roche's answers to this point were even more remarkable. He persisted beyond any reason with the suggestion that the Queanbeyan meeting should have sought "*corroboration*" of the report of the people who had witnessed the Baldy Range fire.

194. It is hardly surprising that Counsel Assisting have explicitly rejected this suggestion. Corroboration of information would never end on Roche's approach, and one would never end up making a decision

because all information would have to be corroborated – even the corroborations themselves. Roche himself recognised the ridiculous situation he had got himself into during cross examination by Walker SC.

195. So neither of Cheney's or Roche's evidence on this issue is reasonable. If experts of their calibre make such comments, it suggests very strongly that they are trying to judge the events of 8 January with the benefit of hindsight. They now know that Gould made those observations. They know that the only information at the time was contrary to Gould's. So they propose indefensible suggestions as to why the Queanbeyan meeting should have been able to find out the same information Gould had.

196. What this submission demonstrates is that judgment by hindsight rarely comes with a large sign attached to it saying *"Warning! judgment by hindsight is being used".* Instead, judgment by hindsight comes clothed in words such as "*should have*" – someone "*should have*" looked for the information, or someone "*should have*" known the opposite of what they actually knew, or expressions of that kind.

197. "*Should have*", however, does not alter the fact that it is still the judgment of hindsight. At any point where Counsel Assisting assert in their submissions that a person "*should have*" done something, we respectfully ask Your Honour to look on that submission with great caution. On what basis should the person have done it? If it was information they should have known, how should they have known it – from where, and why? If it was an action they should have taken, rather than the action they did take, why should they have taken it?

198. It is all too easy to say with wisdom obtained from 90 days of evidence that something should have been done differently. Your Honour's task, with great respect, is not to inquire into what should have been done. Your Honour's task is to inquire into what *was* done.

Only incidentally will that inquiry involve asking how things might have been done differently. And it is only with great caution that anybody judging events long after they occurred will suggest that the persons making decisions at the time should – not might – have done something in a different way.

199. All the more is this true when one is inquiring into an emergency on a vast scale. The meeting at Queanbeyan was confronted by a very large emergency. 8 fires were burning in the immediate area, including the 4 that Your Honour is inquiring into. More than 160 lightning strikes had occurred that afternoon across the region, and major bushfires were alight in northern Victoria, the Snowy Mountains and westwards to Tumut.

200. The meeting was convened at great speed, and it is remarkable that so many highly experienced people from both sides of the border were able to attend. The meeting had a commendable amount of information from many different sources on which to make a decision, but it had to make a decision swiftly so that plans could be put in place to start fighting the fires. Everybody has agreed that there was little luxury of delay and time for detailed analysis. The fire fighting effort had to start quickly.

201. It is far too easy for those of us in the inquest perusing the 90 days of transcript of this inquest to submit that decisions should have been made differently. Your Honour should, with respect, treat such submissions with great caution. They generally lie outside the scope of an inquest into the cause of a fire. They involve significant judgments with the benefit of hindsight. They ignore the imperative of beginning the fire fighting effort as quickly as possible.

202. And they involve criticism of those who had the unenviable task of making tough and swift decisions that would risk the lives of many volunteer firefighters and commit resources worth millions of dollars

into the very dangerous environment of a bushfire. Those who made these decisions were experienced trained people. One would not lightly assume that they had come to the wrong decision in the circumstances. Your Honour would need a very high degree of satisfaction in order to be persuaded of such a serious criticism. As will be apparent from the submissions to come, the evidence falls well short of such satisfaction.

CHAPTER 4

4 ROCHE

203. Before turning to the evidence in detail, it is necessary to look closely at the evidence of Roche in isolation.

204. Your Honour appointed Roche as an expert in firefighting operations. He was to assist the inquest, including the preparation of an expert report that looked at the large body of evidence on operational issues. As the only operational expert witness, his evidence would be of great assistance to Your Honour in looking at matters that required expert evidence to understand.

205. Your Honour would be dismayed and concerned at the evidence he has actually given. He has revealed a degree of partisan advocacy that irretrievably disqualifies him as an expert – there can be no serious argument on this point. His evidence on one key issue – corroboration of the information about the Baldy Range spot fire – was so discredited that Counsel Assisting were obliged to submit that Your Honour should disregard that point. His evidence on another key issue – the resources needed to carry out his proposed strategy – was equally discredited.

206. This is such a serious submission that it needs careful elaboration.

4.1.1 ROCHE'S APPROACH TO HIS ROLE AS AN EXPERT

207. In cross examination by Philip Walker at T7675. Roche was taken to comments in his report about an evacuation policy and to a minute he had written to Counsel Assisting. It was put to him:

> *"That, Mr Roche, is a circumstance in which you have endeavoured to persuade people to gather a particular type of evidence to bring about a particular consequence in this inquiry; is it not?"*

To which he replied:

> *"Absolutely".*

208. At T7676 Roche was taken to another instance of this. It was put to him:

> *"That is another example where you have endeavoured to make sure that evidence brought before the inquiry supports a particular predetermined view of your own, isn't it?"*

To which he gave a long answer agreeing that this was so and concluding, rather defiantly;

> *"I make no apology for that at all."*

209. At T7694 Roche was taken to another document of his by Counsel Assisting, in which he said of some evidence by Castles about "*being on top of*" the planning issues: "*This needs to be dispelled!!"*

210. At T7695 he was asked:

"You were going to make sure your report dispelled it; is that right?"

To which he said:

"I wanted to make sure that my report indicated that the planning was not 'on top of the situation.""

211. At T7944 Whybrow took up the issue, and recalled some of the exchanges extracted above.

"On the basis of your report, it would be extremely difficult for her Honour and those representing parties here to work out which of your opinions are strongly held beliefs where you have been endeavouring to bring about a particular consequence and ones which are not; you would agree it would be difficult from your report?"

To which Roche gave an unhelpful response:
"It may be if my report was taken in isolation, yes".

212. What the last answer means is unknown. It is not obvious what other material Your Honour is supposed to look at to clarify which parts of Roche's report are tainted by his advocacy of particular positions to the point of influencing the evidence to be led. Roche, however, did agree that this would be extremely difficult to work out from the text of his report.

213. At T7514 in the cross examination by Craddock, Roche was taken to an email from him to Barnicoat about the statement of Andrew Winter. The email concludes with the words "*he could be a good ally for us!*" This was sent as early as 23 November 2003, when Phase 2 of the inquest had not even commenced.

214. At T7517 Roche embarked on a tortuous explanation of this email, suggesting that "*us*" meant himself, and that he was asking for information as to whether his own views were correct. It was, he said, "*a poor choice of words".*

215. When pressed on every detail of this email, he returned to his rambling answer. Your Honour would have thought the answers he gave were pitiful. Every word of importance in his email was, apparently, "*a poor choice of words*" which was actually supposed to mean something totally different from what he actually said.

216. Your Honour will have little difficulty in rejecting his explanation of the email. It could not have meant what he said it meant in oral evidence. The very use of the word "*ally*" suggested that he was taking sides, and the use of the word "*us*" (which could not possible have meant "*me*") indicated that he thought he was part of a particular team on one side in the inquest. Overall there is no doubt that he saw his task as being to present a case to this Inquiry, not simply give expert evidence.

217. These matters make it clear beyond argument that Roche was an advocate for his own preconceived beliefs about the management of the fires. He went so far as to influence, directly, the calling of evidence before Your Honour so that his opinions would be able to be supported. He referred to at least one witness as "*a useful ally for us*". His report was written in such a way that Your Honour would find it extremely difficult to disentangle those parts where he had influenced the calling of evidence and advocated his own preconceived beliefs.

218. This evidence gives Your Honour little option, as a matter of law, but to disregard his evidence in its entirety. At no point can Your Honour be confident that his opinion as expressed is truly that of an independent expert, and not that of a partisan advocate who has even

gone so far as to influence the calling of evidence. Your Honour would commit, with the greatest of respect, a fundamental error of law to rely upon Roche's evidence at all.

4.1.2 ROCHE'S EVIDENCE ON CORROBORATION

219. This, by itself, is enough to dispose of his evidence. But in relation to the NSW evidence, Counsel Assisting have themselves submitted that Roche's evidence about corroboration of the Baldy Range spot fire information on 8 January should be rejected.

220. This is a remarkable situation. An expert, commissioned by Your Honour to provide independent advice, is even regarded by Counsel Assisting as having given evidence on a very important issue that should be rejected.

221. How did this come about?

222. At T7856 Walker SC was cross examining Roche about the meeting of 8 January in Queanbeyan. He was, in particular, taking Roche to the information from the ACT forestry workers who had been at the Baldy Range spot fire and relayed their observations to the meeting.

223. In a tone of disbelief that comes through the bare words of the transcript, Walker SC put it to Roche at line 9 that he could not possibly be suggesting that the meeting needed corroboration of this information. Roche's answer, astonishingly, was:

> "*Depending on the circumstances, yes*."

224. Walker SC explored this proposition in more detail. By T7857 line 26 he had put to Roche that the meeting should not "*actually start doing*

anything one way or the other" until the information had been corroborated, to which Roche replied:

"*Yes, that's correct*".

225. By T7858 line 19 Roche had got to the point of saying that no commitment of resources should have occurred for the McIntyre's Hut fire until there was corroboration of the Baldy Range situation. Some unspecified "*planning*" could have occurred, and the meeting could have continued, but no action should have been taken.

226. By T7859 line 1 Roche was prepared to apply this principle to all fires being looked at by the meeting *"where there was a lack of clear and definitive evidence of what the situation was*".

227. At T7859 line 9 he agreed that this applied to all the fires.

228. At T7859 line 16, the very next question, he denied that this was so. Within one question and answer he had contradicted himself.

229. At T7859 line 24, the very next question, he reversed himself again: in relation to all the fires considered at the meeting, there was no "*clear information*".

230. Not surprisingly Walker SC suggested to Roche that he had got himself "*in a tangle*" (line 36). Roche reaffirmed that what he was suggesting was "*a standard approach*" – in other words, to the strategic direction of any fire.

231. The tangle becomes thicker on T7860. At line 28 Walker SC suggested that this standard approach could not have applied to the other fires under consideration that night:

"*That would be absurd, wouldn't it?"*

To which Roche replied:

> *"Absolutely".*

232. This was, of course, a contradiction of his answer at T7859 line 24, for example.

233. At T7861 line 3 Roche declared that in relation to the point of origin of the McIntyre's Hut fire there was clear information about it and there would be no need to get corroboration.

234. At T7861 line 9, the next question, Walker SC pointed out the obvious: this was a direct contradiction of the answer given earlier about the other fires under consideration at the meeting.

235. At line 15 Walker SC offered Roche the opportunity to change his earlier evidence. The answer only confused the issue still further:

> *"I said they lacked clear information. That doesn't mean to say there wasn't any information".*

236. At line 24 Walker SC put to Roche, once again, the general principle Roche had earlier declared, that in the absence of clear information, corroboration was required. Roche, recognising the mess he had made of this evidence, surrendered (at least for now):

> *"If I've said that, that's not correct."*

237. Walker SC then asked whether Your Honour was being asked to treat his previous evidence as "*wrong or misconceived*" on this point, to which Roche said, in words that leave Your Honour with no assistance whatsoever:

> "I ask her to make up her own mind."

238. Walker SC pursued the matter. From T7861 to T7876 Roche attempted to explain how and why further corroboration would be obtained. His point was, apparently, that no strategy should have been implemented until this corroboration had been received. See T7864 line 26:

> *"…no actual firefighting [should] start until you have checked the information or got more; is that right or not?"*
> A: *"Yes".*

239. At T7868 line 35 he repeated this point: *"Certainly the firm strategy should not have been implemented, that is correct".*

240. At T7865 he began to suggest that those responsible for fighting the McIntyre's Hut fire had "*sat on their hands*" overnight on 8 January and done nothing. It is not surprising that Walker SC described this suggestion as *"unworthy of you as an expert and a person with experience in the field".*

241. As the cross examination progressed it turned out that Roche actually had no idea what information the meeting had about the Baldy Range fire. At T7871 line 9, for example, he said, "*They didn't have any. All they had was Mr Cooper's information [from the forestry workers at the fire]"*.

242. Yet just 3 pages further on Roche said that *"they had other information"* (line 13) and that prior to Cooper's information *"they had other information"* (line 20).

243. The focus then turned to how long it would take to get this corroborating information. It would have taken *"three or four hours or even less than that if they used communication…".*[35] At T7876 line 32

[35] T7875 line 43

he noted that, in fact, further information was obtained *"the following morning".*

244. So out of all this evidence about corroboration, it turned out that getting overnight corroboration would have saved, at most, a couple of hours in the middle of the night. This was put to Roche, whose answer was Delphic:

> *"Well the time issue was not necessarily mine. I can't confirm that one way or the other"*[36]

245. Later on at T7888 line 47 he described this period of a couple of hours in the middle of the night as a *"lost opportunity"*.

246. In summary, then, on the issue of corroboration, Roche's evidence was contradictory, confusing, in places incoherent, and ultimately absurd: at most a couple of hours would be saved, overnight, on 8/9 January compared with what was actually done.

247. It is no wonder that out of this shambles, Counsel Assisting had no choice but to submit that Your Honour should not accept the proposition that the meeting should have sought corroborating evidence of the state of the Baldy Range spot fire that night.

4.1.3 RESOURCES AND COMPARING ALTERNATIVES

248. Unfortunately this was not the only area where Roche's evidence got into serious difficulties.

249. Throughout his report Roche made comments that particular resources were inadequate, or that particular actions took too long, or that more resources should have been allocated. Comments of this

[36] Roche T7876 line 39

kind can only be made when the following logical analysis has been done:

In relation to timeframes:
What action was done?
How long did it take?
What alternative action was possible?
How long would it have taken?

In relation to existing resources:
What action was taken?
How many resources were allocated to it?
How many resources were actually available?
How might they have been better deployed?

In relation to necessary resources:
What action was taken?
How many resources were allocated to it?
What action should have been taken?
How many resources were necessary to take that action?

250. The proposition seems so obvious when it is set out like this. Each of these comments involves a comparison: a comparison between timeframes actual and hypothetical, or a comparison between resources actual and hypothetical.

251. No expert can criticise timeframes or resources as inadequate without doing the comparisons that are required. For example, an expert cannot criticise a timeframe as being "*too long*" if the expert has not analysed how long any reasonable alternative time frame might have taken. An expert cannot criticise a "*lack of resources*" to do a task without analysing where those resources might have come from. An expert cannot criticise the acquisition of "*necessary resources*"

without analysing how many resources there actually were and how many were actually needed.

252. Yet, incredible though it may seem, this is precisely what Roche did.

253. The evidence of Roche's lack of proper basis to make these comments emerged slowly from the cross examination. At T7611 Philip Walker cross examined Roche about his suggestion that there should have been a shadow IMT of ACT personnel alongside the NSW IMT in Queanbeyan. At T7612 line 13 he was asked:

> *"So had that option been followed in these fires, what measure of staffing would the ACT have been required to devote…."*
>
> A*: "I've not done that analysis."*

254. At T7662 line 35 he was asked whether, in the course of his private discussions with Commissioner Koperberg, he had asked:

> "*why, if he had up to 100 tankers and crews available that he could dispatch to Canberra, he didn't dispatch those additional resources to McIntyre's Hut or part of them?*"
>
> A*: "No, I did not."*

255. He gave a similar answer at T7666 line 14, though adding the gratuitous comment that his discussions with Commissioner Koperberg related to the period after 15 January: in relation to the period prior to 15 January *"I have already indicated that in my view the response by NSW was inadequate".* (We can anticipate the later submissions here and say that at no point did Roche ever analyse what resources NSW actually had available to it prior to 15 January.)

256. At T7958 line 36 Roche was being asked by Watts about the response of the urban fire brigade to the fire crisis at Duffy.

> *"In terms of quantities, how many pumpers do you think they should have put out there?"*
>
> *A: "I haven't done that measurement, sir."*

257. At T7968 Watts took him to pre-season preparations, and asked him at line 23:

> *"Have you prepared for us or do you have somewhere a list of what you say were normal pre-season preparations?"*
>
> A*: "Have I prepared a list of normal – no I haven't."*

258. McCarthy took up the issue of comparisons at T8014. He noted that Roche had criticised the ACT for not having enough access to aircraft. Clearly enough, this criticism demanded that Roche know how many aircraft the ACT had access to, and how many they should have had access to.

259. Between T8014 and T8016 it became clear that Roche actually had no idea how many aircraft the ACT could access. Nor did he have any idea how many it needed. At T8016 line 33 McCarthy summarised the situation:

> *"I am putting to you the proposition that it is quite impossible for you to criticise the Territory and say they should have increased the access to aircraft when you didn't even know what we had. Would you accept that?"*
> A: *"No."*

260. A similar story emerged in the next 2 pages about access to heavy plant and equipment. After some discussion of what the ACT actually had and what it needed, McCarthy asked Roche at T8018 line 23:

> *"You don't know either way, do you?"*
> A*: "No I don't"*

261. So it would come as no surprise that in relation to his criticism of the NSW firefighting efforts in relation to the Baldy Range fire, Roche had not done any such comparison either.

262. At the bottom of T7877 Walker SC opened up the question of the comparison between the resources actually allocated to fighting the Baldy Range spot fire, and the resources Roche said should have been allocated. He was asked several times whether he had done such a comparison. At the bottom of T7877 and over to T7878 he proffered several pages of his report, but then conceded that in fact they did not contain any such comparison.

263. In the middle of T7878 at line 25 he suggested p.65 of his report contained the analysis.

> *"I have said in there I considered there was a failure to deploy sufficient resources."*
>
> Q*: "I know. Where do you set out the comparison?"*
> A*: "I don't."*
>
> Q*: "You have not done that exercise, have you."*
> A*: "Not directly, no."*
>
> Q*: "Not at all, have you?"*
> A*: "No."*

264. At T7883 line 30 Roche was asked:

> Q:*"You haven't done an exercise of resources of how they should have been deployed in relation to firefighting vehicles on the evening of 8 January, have you? I'm not suggesting you should have?"*
> A*: "For the NSW fire, no."*

265. At T7889 Walker SC returned to this point:

> Q*: "Did you take any steps to obtain the information about the resources available in light of competing claims on the NSW authorities at that time?"*
> A*: "From NSW, no."*
>
> Q*: "It would be unfair for you to criticise the NSW authorities without having made inquiries about the available resources?"*
> A: *"If you took - -"*
>
> Q*: "Wouldn't it?*
> A*: "Not necessarily."*

266. The line of questions on this issue continued. At T7893, for example, Roche made it plain that in criticising NSW for not devoting "*adequate resources*" to fight the Baldy Range spot fire, he had done no comparison with what should have been allocated, let alone with what was available.

267. At T7894 this exchange took place, starting at line 17:

> *"You have already said that you work out how much is needed?"*
> A*: "No, I didn't work out how much is needed."*

Q*: "I will start again. You have already said in order to understand your use of adequate resources you are talking about somebody working out what is needed?"*
A*: "That is correct."*

Q*: "Are you telling her Honour that you haven't done that yourself?"*
A*: "That's correct."*

Q: *"What I want to suggest to you, it is a baseless and unfair criticism for you to make if you haven't done the exercise yourself; what do you say to that?"*
A*: "I don't agree."*

Q: *"How can you criticise someone for not working out what is needed and therefore having deployed not enough if you yourself have not worked out what would have been enough?"*
A: ***"The outcome speaks for itself**."* *(emphasis added).*

268. At T7903 Walker SC turned to the question of estimating the length of time taken to complete the firefighting strategies adopted on 8 January. In the course of his evidence on that page and over the next few pages, it became clear that Roche had done only the most cursory estimate of how long the strategy would have taken. Further, he had done this estimate in his head and had written it down nowhere, let alone in his report. For example, at 7905 he agreed he had only used the rule of thumb and had not made any allowance for the adjustments necessary to deal with the actual conditions (see line 34).

269. There then followed a strange exchange of question and answer. Roche admitted he had not set out in his report anywhere how long it would have taken to complete these strategies (see, for example,

7906 line 12). Rather curiously he said in the same answer that "*it is before the Court*", though not in his report. At line 37 appears this:

> *"Where do we find your version of the time estimating exercise you criticise [NSW firefighters] for not undertaking at the time?"*
> A*: "It's not in my report."*
>
> Q*: "In fact it's never been done in anything like the detail that you suggest should have been performed at the time by them, has it, by you?"*
> A*: "By me?"*
>
> Q: *"Yes."*
> A*: "Yes, it has been done. Not in writing."*
>
> Q*: "It hasn't been prepared in detail has it."*
> A*: "Didn't need to."*

270. At T7909 Walker SC completed his cross examination with this question:

> *"So, her Honour is left without your expert assistance as to the practical feasibility of any alternative containment strategy by reference to the critical question of the available time and resources to complete it, isn't that right?"*
> A*: "Perhaps."*

271. At T8137-8 Lasry QC picked up these questions and answers in re-examination. For completeness Your Honour would need to read those 2 pages, but they do not take the matter any further in terms of whether Roche did the comparison calculations.

272. The effect of all this is that Your Honour has before her a report and oral evidence of Roche in which he has criticised many people for

taking too long to do things, or for not deploying enough resources to do things. His criticisms, as a matter of logic, require a comparison to be made between what was done and what should have been done. The logical necessity for the comparison is inescapable.

273. Yet at no point did Roche do these comparisons. In the specific case of his criticisms of NSW in fighting the McIntyre's Hut fire and the Baldy Range spot fire in particular, he did not calculate either the resources required, or the time to be taken, to complete the strategies adopted.

274. Yet despite having not done any of these logically essential steps, it did not stop him making many criticisms in his report. Nor, apparently, did he understand at any time in the course of the evidence what the problem with his criticisms was. He was happy to acknowledge that he hadn't done the comparison calculations; but whenever it was suggested to him that this made his criticisms logically indefensible, he did not understand what the difficulty was.

4.1.4 SUMMARY

275. It is a serious matter to submit that Your Honour should disregard the whole of the evidence of one of the major experts in this inquest. The submission is not made lightly. NSW recognises that in the absence of evidence from Roche on many issues, Your Honour is left with no expert operational evidence at all.

276. But as a matter of law, the conclusion is inescapable that Roche has to be rejected as an expert. His approach to the giving of evidence was inappropriate for an expert. Instead of impartially reviewing the evidence actually given, he regarded himself (by his own admission) as an advocate for a particular position and unapologetically admitted

that he had sought to tailor the evidence actually led in the inquest to suit his pre-formed opinions.

277. He then compounded this by putting forward frankly indefensible comments about corroboration that were contradictory, confusing and absurd. This is to say nothing of the fact that those comments also appeared nowhere in his written report, but had obviously been jumped to in the witness box.

278. Finally, he failed utterly in the necessary logical analysis as an expert before making criticisms based on what should have happened. He did not do the necessary calculations across a wide range of issues to work out what was done and compare it with what he thought should have been done.

279. Your Honour will have noted that it is not just NSW which submits that Your Honour should disregard Roche's evidence about corroboration: it is also the submission of Counsel Assisting. On this particular issue the submissions are unanimous. Counsel Assisting have not explained exactly why they submit that Your Honour should reject Roche, but the reason is obvious and clear: his evidence about corroboration is just too absurd and contradictory to be accepted.

280. Despite the seriousness of the submission that Roche should be disregarded in his entirety, Your Honour will be keenly aware of the seriousness of the alternative. Relying upon Roche as an expert would be, with respect, an error of law. Your Honour's task is important in the public interest, but that public interest does not override either Your Honour's jurisdiction nor the requirement that Your Honour make findings only according to law. Significant though the consequences might be, Your Honour has, with respect, no choice but to reject Roche as an expert upon whom you can rely.

4.1.5 CONSEQUENCE OF REJECTING ROCHE

281. For the purposes of the submission relating to NSW, the rejection of Roche makes a considerable impact upon the submissions of Counsel Assisting.

282. The narrative section of those submissions has references to a number of factual findings that depend on the acceptance of Roche as an expert. See the following paragraphs:

431
439
440
441
502

283. The more detailed submissions about the McIntyre's Hut fire from par.1177 to 1197 clearly rely heavily on Roche although his evidence is not footnoted anywhere in these paragraphs. His opinions flavour most of the proposed criticisms and findings on causation in these paragraphs. Your Honour would have to consider each of the paragraphs in this part of the submissions of Counsel Assisting with considerable care to make sure that the proposed criticism or finding was not founded exclusively upon an opinion expressed by Roche.

CHAPTER 5

5 RESPONSE TO SUBMISSIONS BY COUNSEL ASSISTING

5.1 INTRODUCTION

284. In this Chapter we respond to the specific submissions made by Counsel Assisting and the conclusions and findings which Your Honour is asked to make on the basis of those submissions in paragraphs 1177 to 1197 of their submissions.

285. Your Honour should note that in our submissions which follow, we only discuss those parts of the narrative in the submissions by Counsel Assisting that appear to form the basis of their submissions in paragraphs 1177 to 1197. The fact that we do not discuss other parts of the narrative relevant to NSW should not be taken by Your Honour as acceptance by us of the correctness or completeness of that narrative.

286. The major criticism by Counsel Assisting of the NSW response to the McIntyre's Hut fire is that the initial strategy was wrong and doomed to fail.

287. Counsel Assisting have failed to deal with three key questions:

288. What was the information that led to the strategy being adopted?

289. Why should it have been questioned or reconsidered?

290. What was the better alternative?

5.1.1 WHAT WAS THE INFORMATION

291. As to the first, it has been a consistent complaint that those criticising NSW have never really grappled with the information actually available on the evening of 8 January. It is brought together in the Joint Submissions to the NSW Coronial, and has been conveniently available in this form to Your Honour's inquest. There is no excuse for the experts and Counsel Assisting consistently ignoring or downplaying the extent of the information available that led to the strategy being adopted.

292. Cheney does not refer to it in his report. When Cheney was cross examined by counsel for NSW, it was painfully obvious that he had not previously read the Joint Submission in any detail. His offhand dismissal of the information from some sources in the cross examination bespoke a man who did not want to deal with information that conflicted with his preconceived opinions based on Gould.

293. Roche was no better. When cross examined by Walker SC, he asked for a moment to "*read*" the material. When Walker SC gently suggested "*re-read*", Roche merely responded, "*I heard you*".

294. Counsel Assisting refer briefly to this information at pars.395 – 403 of their submissions. They do so under the dismissive heading "Initial assessment". Having set out the information, they never again refer to it. In particular, when discussing the meeting at Queanbeyan on the night of 8 January (at paras 404-5) they do not include any discussion of the fact that the information summarised in the Joint Submissions (which continued to come in during the meeting) was taken into account.

295. The ignoring of this comprehensive body of information by both experts and Counsel Assisting is inexcusable. It actually informed the

decisions taken that night. It came from many sources, over a number of hours. It presented a consistent and coherent picture of what was happening. When coupled with the garbled transmission to the meeting of the information from the ACT Forestry workers at Baldy Range, it is perfectly obvious why the meeting made the decision it did.

296. More importantly, it is perfectly obvious that the decision taken was not only reasonable, but the only one reasonably open at the time.

5.1.2 WHY SHOULD THE INFORMATION HAVE BEEN IGNORED OR RE-ASSESSED?

297. Had it not been for Gould, it is likely that this question would never have been asked in this inquest.

298. By sheer coincidence Gould and his team happened to be in the general area at the time the meeting at Queanbeyan was considering its strategy. They made observations at the Dingi Dingi trail at 7.50pm, and at the Baldy Range trail at around 9pm.

299. *Those observations were never relayed to Queanbeyan*.

300. And by never, we mean never ever: the first that anybody at that meeting knew of them was when Gould provided a statement to this inquest.

301. By itself that should be enough to dispose of this issue. Gould did not pass on the information. Nobody at Queanbeyan knew he was there, or collecting information. Because he had no radio and was out of mobile phone range, nobody could have contacted him even if they had known he was there.

302. On what possible basis, then, can it be seriously suggested that the meeting at Queanbeyan should have simply discarded the large body of information already obtained and gone out hunting for something new?

303. Put another way, if the meeting had done that, it would have been roundly criticised by everybody for having ignored what it already knew.

304. Roche and Cheney have attempted to argue, clearly with the wisdom of hindsight and with the benefit of the information from Gould, that the meeting should have made a reconnaissance of the area before deciding on a strategy.

305. As these submissions will show below, Cheney in particular consistently misstated or misunderstood the information from Gould anyway. The Baldy Range fire was not as benign as he thought.

306. Roche tied himself in knots trying to argue for a reconnaissance, to the point that even Counsel Assisting were obliged to submit to Your Honour that you should not accept his evidence on this issue.

307. But all this begs the fundamental question that neither the experts nor Counsel Assisting have answered: *why should the existing information have been discarded?*

308. In truth they do not grapple with this question because they have no answer to it. Any answer that they give is made with the wisdom of hindsight. As these submissions will go on to show, there is no reasonable basis for suggesting that the meeting should have simply ignored the existing information and gone out to get some more.

5.1.3 THE ALTERNATIVE STRATEGY

309. Fundamental to the reports of Roche and Cheney and to the submissions of Counsel Assisting is that there was a reasonable alternative strategy.

310. That alternative was to use the Lowell and McIntyre's trail in the west, and the Baldy Range trail in the east, thus reducing the area to be burnt out.

311. 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.

312. *No such analysis has been done.*

313. As a matter of logic, then, the submission of Counsel Assisting on this point simply has to be discarded. It is bordering on irrational to propose an alternative strategy that has not been analysed even to see if it could be carried out. It invites Your Honour into legal error to propose an alternative where there is literally no evidence that it could have been any more successful than the strategy adopted.

314. As these submissions will go on to show, however, a cursory analysis of the proposed alternative shows three things.

315. The control lines for the proposed strategy were actually 3km *longer* than the ones actually adopted. This by itself raises serious questions of resources and logistics to carry out the plan.

316. All the problems with the southern line (the Powerline trail) would have remained unaffected. This is because the proposed strategy adopted *exactly the same line*. Since this was the major cause of the

delay in carrying out the burning out operation, that delay would have occurred under the proposed strategy as well.

317. Substantial resources would have been needed to adopt the proposed strategy. These included upgrading the existing trails, putting in a rake hoe line around the McIntyre's Hut ignition point, trying (by whatever appropriate means) to contain the Baldy Range spot fire, and maintaining patrols along the McIntyre's and Lowell's trails. While efforts were made to contain the Baldy Range spot fire, it seems implicit in the expert evidence that these efforts were inadequate. Hence much more needed to be done, apparently.

318. None of those additional resources has been quantified by the experts, nor by Counsel Assisting. Until that is done, nobody can possibly argue that it was a more reasonable alternative given existing resources, or that it would be any more likely to succeed than the strategy actually adopted.

319. That ought to be enough to dispose of this contention. However, Counsel Assisting have persisted with the alternative strategy to the point that these submissions have no choice but to expand in considerable detail on the information actually available to the meeting in Queanbeyan, the strategy actually adopted (not the distortion of the strategy set out in the submissions of Counsel Assisting), and the alternative strategy proposed by Counsel Assisting.

5.1.4 CONTEXT OF DECISION MAKING

320. On 8th January 2003 a major storm event occurred across north-eastern Victoria, southern NSW and the ACT associated with the passage of a weather change. As a result of the storm 87 fires were ignited in Victoria, at least three in the ACT and 72 in NSW.

Accordingly, the fires that are the subject of this Inquiry were not the only fires the NSW fire authorities were dealing with at the same time.[37] Fires were ignited in Brindabella, Yanununbeyan and Tallaganda National Parks, which are all managed by the Queanbeyan Area office of the NPWS.[38] The consequence of the multiple fires, was that resources, both man and machinery, had to be shared by those responsible for undertaking fire suppression activities in various areas.[39]

321. There is ample evidence before the Inquiry that drought conditions prevailed in the relevant area at the time McIntyre's Hut fire ignited.[40] On 8th January 2003, weather conditions in the area were favourable for fire development. "*Temperatures were warm, humidity low and there was a strong wind* (on Mt Coree average wind speed was 41 km/h gusting to 60km/h at 1700 hours) *from the WNW".*[41] At 1500 hours the weather conditions at Canberra Airport were maximum temperature 34 degrees Celsius, relative humidity 20%, mean wind speed 43 km/h and the Forest Fire Danger Index (FFDI) was 54, which is extreme.[42]

322. Lightning strike data indicates that lightning struck a tree in the vicinity of McIntyre's Hut in the Brindabella National Park at approximately 1541 hours on 8th January 2003. *"The ignition point is part way up the slope rising from the Goodradigbee River east to Webbs Ridge, about one km north-east of McIntyre's Hut and 100 metres west of the McIntyre's Trial, at an altitude of approximately 640m."* [43]

[37] Cheney T323 at line 35
[38] Joint Submission p16, RFS.AFP.0093.0021
[39] Crawford; DPP.DPP.0001.0435; NSW Coronial Transcript
[40] Joint Submission pp 13 & 14; RFS.AFP.0093.0018 & 19; Bureau of Meteorology Submission, pp14-17; BOM.AFP.0092.0001
[41] Joint Submission, p17, RFS.AFP.0093.0022
[42] Cheney Report, p11; DPP.DPP.0008.0051
[43] Joint Submission, p17, RFS.AFP.0093.0022; see also NSW RFS Wildfire Investigation Report, AFP.AFP.0001.0572

323. After ignition, the fire was *"burning in dry eucalypt forests carrying a moderate fuel load and a sparse scrubby understory."*[44] The Mt. Corey fire tower first reported the McIntyre's Hut fire at 1606 hours. By 1630 hours the Mt Coree fire tower had reported a further three distinct fires, two of which were in the upper reaches of Mountain Creek.[45]

5.1.5 INFORMATION AVAILABLE TO THE MEETING

324. At approximately 2030 hours an interagency meeting between NPWS, RFS and the ACT ESB was held at the Queanbeyan office of NPWS. Those in attendance at the meeting were NPWS Officers Julie Crawford, Tony Fleming, Scott Seymour, and Rob Hunt, RFS Officers Bruce Arthur and Jim Lomas and ACT ESB officers Peter Lucas-Smith, Neil Cooper, Tony Bartlett and Rick McRae.[46]

325. Julie Crawford, the NPWS Queanbeyan Area Manager, was the Incident Controller for the fires in her management area from 8th January 2003 until declaration under s.44 of the Rural Fires Act was made on 9 January at 1300 hours. After the s.44 declaration was made, Bruce Arthur was appointed as the Incident Controller. Crawford's initial response to the fire reports was to:

a. Dispatch Rob Hunt and a fire crew in a Category 9 fire unit to the McIntyre's Hut area soon after the initial fire report, to assess the fire;
b. Contact the NSW Department of Land and Water Conservation to check availability of dozers and arrange for their transport to Brindabella National Park at approximately 1640 hours;
c. Arrange for a charter of an aircraft to undertake a fire detection flight which commenced at approximately 1715 hours;

[44] Cheney Report, p11; DPP.DPP.0008.0051
[45] Joint Submission, p21, RFS.AFP.0093.0022
[46] Joint Submission, p24, RFS.AFP.0093.0029

d. Dispatch crew and divisional commander to Yanunubeyan National Park fire at 1730 hours;
e. Dispatch crew to Tallaganda National Park fire at approximately 1930 hours; and
f. Convene the interagency meeting to discuss the strategy to contain the McIntyre's Hut and other fires.

326. At the time of the interagency meeting, the following information was available to it;[47]

a. At 1526 hours Coree Fire Tower reported 2 columns of smoke, one in the ACT and one 40-50 km away in NSW. There followed further reports of lightning strikes and fires in the ACT. (COMCEN log 8/1/03).

b. At approximately 1606 hours Coree Fire Tower reported smoke bearing 317 degrees at 12 to 15 km. The bearing and distance, if correct, placed the fire in the vicinity of Brindabella National Park. At 1620 Coree Fire Tower reported smoke at bearing 311, distance approximately 10 km and advised it may be in the McIntyre's Hut area. (COMCEN log 8/1/03)

c. COMCEN (the ACT ESB communications centre) began to relay smoke sightings from other ACT Fire Towers. (COMCEN log 8/1/03)

d. At 1630 hours Coree Tower reported smoke sightings at (bearing) 195, and reconfirmed sightings previously reported at 223, 180 and 317. (COMCEN log 8/1/03)

e. At 1637 hours Coree Tower reported *"McIntyre's is fairly burning hard at the moment, large column of smoke".* (COMCEN log 8/1/03)

[47] Joint Submission, pp 21 – 24, RFS.AFP.0093.0026 - 29

f. At 1645 hours Fairlight Fire Brigade Captain advised Yarrowlumla RFS he could smell smoke and would investigate. (Yarrowlumla FCC log book 2, p123)

g. At 1654 hours Coree Fire Tower reported the smoke from the McIntyre's Hut fire was turning to yellow columns and was very thick. (COMCEN log 8/1/03)

h. At 1700 hours **a** large plume of smoke from McIntyre's Hut fire was visible from some distance.

i. At 1708 the Fairlight Brigade Captain reported fire on the western side of Baldy Range (Yarrowlumla FCC log book 2, p123)

j. At 1715 Coree Fire Tower reported wind gusts of 70-80 km an hour. The tower continued to report lightning strikes and further smoke columns. (COMCEN log 8/1/03)

k. Brian Blundell Deputy Captain Fairlight Brigade RFS and a landholder (at Brookvale property), telephoned NPWS Queanbeyan at 1718 hours and advised there was fire on the west side of Baldy Range, due west of Brookvale, there were gale force winds and the fire was *"going well*". (NPWS Queanbeyan log 8/1/03 pB1/6)

l. Coree Tower commented again on the column of thick smoke at McIntyre's Hut at 1724. (COMCEN log 8/1/03)

m. By 17:30 RFS reports to NPWS a fire at Yanununbeyan National Park. An NPWS crew and a divisional commander were responded to that fire. RFS also despatched crews to the fire. (NPWS Queanbeyan log pB1/6, Yarrowlumla FCC log book 2, p125)

n. 1730 large plume of smoke from McIntyre's Hut fire was visible in Canberra and Queanbeyan.

o. The 1730 weather report from Coree Tower noted winds from the WNW, wind speed average 41 gusts to 60 km per hour. (COMCEN log 8/1/03)

p. RFS units responded to a fire at Rocky Peak. (Yarrowluma FCC log book 2, p125)

q. At approximately 17:40 the air observer on the fire detection run noted the McIntyre's Hut fire was approximately 200 ha in size. The fire was east of the Goodradigbee River. Determining the eastern flank of the fire and any view of the ground to the east of the fire was obscured by smoke for up to 5 km immediately down wind. The fire had a convection column to 6000 ft. (Seymour, pers comm)

r. NPWS officers dispatched to McIntyre's Hut fire met on the Brindabella Road near Blundell's Flat at approximately 1740. They observed intense smoke. The officers proceeded to Two Sticks Road from where they would have a better vantage point en route to the fire. From the intersection of Two Sticks Road and Curries Road the divisional commander (R Hunt) contacted the Area Manager in Queanbeyan and reported their observations. The intense smoke indicated the fire was clearly not behaving as a normal lightning strike fire and was beyond direct control by the officers. Options to better observe the fire were discussed – Dingi Dingi Ridge Fire trail was considered unsuitable as it could have endangered the officers by placing them in front of the fire. There were numerous reports of smoke and it was agreed the officers would proceed to Mt Coree to assess the situation. (Crawford and Hunt, pers comm)

s. Brian Blundell telephoned Queanbeyan NPWS at 1752 and reported there were leaves and embers flying over Fairlight and that he was on standby with unit. (NPWS Queanbeyan log pB1/7)

t. At 1806 Coree Tower reported a new fire at bearing 009 distance 10kms (this new fire became known as the Baldy Range fire). (COMCEN log 8/1/03)

u. A short time later NPWS officers were dispatched to McIntyre's Hut fire arrived at Mt Coree. Fire Tower operator advised he had reported further smoke sighting (Baldy fire). The divisional commander contacted the Area manager in Queanbeyan and reported his observations. The main fire appeared to have crossed Webb's Ridge. Smoke could also be seen on the Baldy Range. It was agreed the fire was beyond direct control by the officers. The crew returned to Queanbeyan to assist with the formulation of suppression strategies. (s44 report and Crawford and Hunt pers comm)

v. The fire detection flight ended at about 1930 and from the airfield the air observer reported 8 fires relevant to the NPWS Queanbeyan area. The fires were -

1 McIntyre's Hut

2 A small fire of approximately 1 ha in area located at Cromwell Hill about 10 km south west of the McIntyre's Hut fire. (the Mt Vale fire)

3,4,5 three fires in the ACT along the Brindabella range. These became known as the Bendora, Stockyard and Gingerra fires. There was another ignition also seen at this time within Namadgi National Park.

6 Mt Morgan (in Kosciusko NP, south of the Brindabella Range)

7 Wild Cattle Creek, in the Tallaganda National Park.

8 Mt Foxlow in Yanunbeyan National Park, approximately 1-2 ha in area. (Seymour, pers comm.)

w. At 2000 Brian Blundell again phoned Queanbeyan NPWS office and reported fire at approximately 630 998 on Baldy Range – wind change 30-40 km, south, fire heading towards Dingo Dell. (NPWS Queanbeyan log 8/1/03 pB1/8)

x. Shortly after, Neil Cooper (ACT ESB) advised Julie Crawford that he had a vehicle checking the area and the Baldy Range fire was over the Baldy Range Fire trail. (Crawford, pers comm)

y. Fairlight Brigade advised Fire Control at 2114 that there was substantial fire on the side of Baldy Range. (Yarrowluma FCC log book 2, p129)

327. In our submission, in considering the appropriateness of the decisions made by those attending the interagency meeting on the evening of 8th January, Your Honour must only have regard to the above.

5.1.6 THE STRATEGY ADOPTED

328. We note that Counsel Assisting have stated that the McIntyre's Hut fire as a whole was not amenable to direct attack on 8th January or at any time thereafter.[48] In their submission the only method by which the fire could be controlled was by a *"combination of long distance indirect attack and direct attack. Direct attack would be limited to locations where the fire had crossed existing roads and tracks that might otherwise serve as containment lines."*[49] There can be no doubt that indirect fire fighting is a legitimate fire fighting tactic.[50]

[48] Para 1177
[49] Para 1177
[50] Cheney, T351

329. Roche in his evidence agreed that in determining containment lines, one has to have regard to a number of factors. Those factors include the existence of other fires in the area, the topography, the nature of the fuels, the weather, short-term weather forecasts, availability of resources, the safety of those working within the vicinity of the fire, the speed with, and the direction in which the fire is travelling.[51]

330. Crawford has stated that in deciding whether or not to send fire fighters to McIntyre's Hut fire on 8th January, she took into consideration the possible existence of other fires which were not apparent at that time. She was concerned that other fires may have commenced as a result of the burning embers flying from the McIntyre's Hut fire and also that other fires may have been ignited by lightning strikes.[52] It is well known that lightning strikes can leave *"sleepers"* and fire fighters may not know that the fires exist until sometime after the lightning strike.[53] This was obviously also a consideration for all those attending the interagency meeting on 8th January.

331. Those at the meeting were aware that a number of fires were already burning and that the eastern most of those fires was the spot fire at the Baldy Range trail (see "Information Available to Meeting" above). Crawford understood from the information given to her that the fire had crossed the Baldy Range trail and that the trail was not available for use as the eastern containment line.[54] They were aware that there were no containment lines available between the Baldy Range trail and the houses to the east of the Baldy Range spot fire.[55] There is no dispute that on the evening of 8th January, the fires were burning in both an easterly and south easterly direction and therefore those houses were in the direct path of the fire. The next available

[51] Roche T7897–7899
[52] Crawford T4425, line 5–15
[53] Cheney T325 – 326
[54] Crawford T4430
[55] Crawford T4426–4427

containment line to the east of the Baldy Range trail was the Fire Break trail and that is why it was chosen.

332. In deciding on the strategy not to undertake a direct attack on the McIntyre's Hut fire, the very steep nature of the terrain and accessibility to the area were also a consideration.[56] The choice of containment lines was limited to the existing trails and roads, which were located "*only where they can be because of the steep terrain."*[57]

333. In respect of the McIntyre's Hut fire, those present at the meeting were aware that by 1740 hours that fire was some 200ha in size. Cheney in his evidence has stated that once a fire reaches "*a size of more than 10 to 15 hectares, then the possibility of direct attack was removed and they had to go back to indirect attack."*[58] Accordingly, on Cheney's own expert evidence the decision made at the meeting in respect of the McIntyre's Hut fire, was the only decision that could have been made.

334. Arthur in his evidence stated that in determining which available lines to use as containment lines: "*My recollection is that we looked at all of the north-south lines because, as you have already pointed out, the aim was to try to contain the area as small as possible. We looked at the east-west lines and the north-south lines to try and bring the area down."*[59] Hunt and Crawford have also given evidence that keeping the area within the containment lines as small as possible was a major consideration.[60]

335. It is clear from the foregoing that those responsible for choosing the indirect strategy to combat all the fires on the night of 8th January, had regard to all the factors that Roche stated ought to be taken into

[56] Crawford T424; N Cooper, ESB.DPP.0001.0214 at para 24
[57] Crawford T4433
[58] Cheney T6211; line 33
[59] Arthur T4559
[60] Hunt T4642 –4643; Crawford T4469

account, including the need to minimise the area within the containment lines. In our submission, the containment lines chosen on 8th January, on the basis of the information available to the meeting, were the only practical containment lines that could have been chosen.

5.2 TIME FRAMES

336. A criticism of the NSW Incident Management Team (IMT) in the submissions by Counsel Assisting, is that when the strategies for containment of the McIntyre's Hut fire and the Baldy Range fire were adopted on 8th January, no time frames were set in which to achieve those strategies. Counsel Assisting submit, if time frames had been calculated it *"would have been tolerably clear*" that the area to burn out and the works to be undertaken could not be achieved before the weather changed, which in turn would have resulted in the IMT reviewing its strategies on the night of 8th January. Such a review, Counsel Assisting submit, would have prompted the need for *"further urgent on ground reconnaissance of the fire area and the viability of potential alternative containment lines."* [61]

337. Counsel Assisting submit that the time frame should have been estimated "*on the afternoon and evening of 8th January*."[62] The evidence before Your Honour is that the strategy adopted by the IMT was subsequent to the meeting held at Queanbeyan at approximately 8:30pm. Clearly, no estimate of time for achieving the strategy could have been made in the afternoon, as no strategy had been devised at that time. Indeed, the fires did not ignite until after 3pm, and the major run of the McIntyre's Hut fire was still going strongly after 6pm.

338. The strategy adopted by the IMT was on the basis of all the information, which the IMT had at the interagency meeting on 8th

[61] Para 1180
[62] Para 1180

January. Accordingly, as at that time the IMT understood that to be the only strategy available to contain all the fires burning in Brindabella National Park. In our submission, it is an inherent aspect of adopting any strategy, that the strategy can be implemented within the time constraints present.

339. While Crawford and Arthur have stated that no time frames were set for the achieving of each aspect of the over all strategy that was adopted by the IMT, they have both stated that they were aware of the need to complete their strategy as quickly as possible because of the likely change in the weather and the direction that the fire was travelling.[63] Roche in his evidence agreed that the "*fundamental time frame*" is the time the weather will change to extremely adverse conditions.[64] It is apparent from the evidence of Crawford and Arthur that all those at the IMT meeting on 8th January at Queanbeyan believed, when they adopted the containment strategy, that they would be able to achieve the strategy within the "*fundamental time frame*".

340. Evidence is before Your Honour that a number of factors delayed the carrying out of the set objectives and therefore, resulted in the completion of the overall strategy being delayed. For example, the need to get a larger dozer to create the line down to the Goodradigbee River in Charlie Sector, the inability of the IMT, despite their best efforts, to obtain sufficient resources, especially aerial support to undertake the back burning along the Powerline trail, the slowness of implementing the back burn due to the extremely dry fuels and resultant spotting behaviour of the fire[65] and the failure to obtain the incendiary devices at an earlier time.[66]

[63] Crawford T4446, T4447, T4448; Arthur T 4564 - 4565; Hunt T4644 - 4645
[64] Roche T7372
[65] Crawford T111
[66] Arthur T4564; Crawford T4456

341. In our submission even if time frames had been set for each task to be undertaken, it could not have included the sort of delays experienced in achieving the planned strategies. As Crawford stated: *"You can't calculate that time frame. The D6 driver went down to do it and he said no way he wasn't going to do it. It was pointless putting hours on those sorts of things."*[67] Counsel Assisting do not suggest how these delaying factors, which only became apparent on 9th January and the days following, could have been factored into the time estimate, which they submit should have been made by the IMT on the evening of 8th January.

342. It is noteworthy that neither Cheney, Roche nor Counsel Assisting have suggested how the calculation should have been done, nor have they done the calculation as at 8th January, to show that it was clearly an impossible timeframe. Furthermore, no calculations have been provided by Counsel Assisting in respect of the strategy which they submit should have been adopted to show that that strategy would have been completed before the anticipated change in weather conditions. Roche has stated that the timeframe should have been calculated by reference to the *"typical 4-5 day weather cycle*".[68] In other words, the alternative strategy proposed by Counsel Assisting would have to have been capable of completion by 12th or 13th January. No evidence has been put before Your Honour by Counsel Assisting to show that the alternative strategy would have been completed in that time.

343. Counsel Assisting, based on the evidence of Cheney and Roche, submit that the containment lines that were chosen by the IMT at the meeting on 8th January 2003 were wrong because those containment lines encompassed an area of approximately 10,000 hectares, which was too large an area to burn out before the arrival of bad weather.

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[67] T4527
[68] Para 417

344. Counsel Assisting submit that the IMT should have chosen the Baldy Range trail on the east rather than the Fire Break trail and the Lowell's Flat and McIntyre's Hut trails to the west rather than Goodradigbee River. The essence of this submission is that a smaller area would have had to be burnt and that it could have been done much more quickly. We note that there is no criticism by Cheney or Roche and therefore, by Counsel Assisting, as to the northern and southern containment lines chosen by the IMT.

345. While it is agreed that the containment lines which were ultimately used by the IMT enclosed a large area, the question is what were the alternatives? Crawford's evidence is that the containment lines were more remote from the fire than they would have preferred but the terrain dictates where they are.[69]

346. If the alternate containment lines suggested by Counsel Assisting had been adopted, it would have encompassed an area of approximately 7,000 hectares.[70] This was still a very large area, which had to be burnt out before the change in weather conditions.

347. Furthermore, this area was still bounded on the south by the Powerline trail. All the problems involved in preparing that trail would have remained unaffected. Recalling that it was this problem that dictated much of the time spent before burning out could commence, it is difficult to see how the alternative area would have made the slightest difference to the time necessary to complete the task of burning out.

348. It is also notable that while Counsel Assisting have made much of the size of the area to be burnt out within the containment lines adopted by the IMT, no calculation has been provided as to the length of the adopted and suggested containment lines, which would have had to

[69] Crawford T4531
[70] Cheney Report, p14; DPP.DPP.0008.0051

been used to burn from and patrol. In our submission, if such a calculation had been done, it would have been apparent that the difference in the effective length of the containment lines that were adopted by the IMT, and those suggested by Counsel Assisting was minimal.

349. By our calculations the total length of the adopted containment lines, including the Goodradigbee River, is 56.17km. The part of the Goodradigbee River which was used as the containment line is approximately 10.64km in length. At least in the early stages of the fire the river was not patrolled by ground crews.

350. So the effective length of the containment lines actually adopted was 45.53km.

351. On the other hand the effective length of the suggested containment lines is 48.85km. Far from being shorter, the proposed containment lines were actually *more than three kilometres longer*!

352. Furthermore, if the Lowell's trail had been adopted as the western containment line, much more resources would have been required to prepare that containment line, to burn from it and patrol it.[71]

353. In our submission, the length of containment line and the consequent resources required to establish and maintain it is more important than simply area. The effect of the additional area to be burnt out is negligible because of the similarity in length of back burning required.

354. In our submission, the failure to burn out the area within the adopted containment lines was due not to the size of the area, but to factors which delayed the undertaking of the burn out process. We note that most of the delays that were actually encountered, other than the

[71] Crawford T4537

availability of incendiaries, relate to the southern containment line. Counsel Assisting have not criticised the adoption of the southern containment line and therefore, those delays would have still impacted on the implementation of the strategy proposed by Counsel Assisting.

355. In our submission it is only with the benefit of hindsight, that is, by having regard to all the unforeseen delays that actually occurred, which resulted in the delay in completing the adopted containment strategy, that Counsel Assisting can now submit that *"it would have been tolerably clear"* on 8th January that the prospects of completing the strategy was poor. Notwithstanding the delays, we note that by 8:00 pm on 15th January, the IMT had fully implemented its adopted strategy along the southern, eastern, and northern containment lines and continued to deepen the burn.[72]

356. If Your Honour accepts, for the reasons given above, that it was not "*tolerably clear*" on the evening of the 8th January that the adopted strategy could not have been completed before the onset of bad weather conditions, then Your Honour must reject the submission by Counsel Assisting that there should have been further on ground reconnaissance of the fire area on 8th January. There are also other reasons for rejecting that submission.

5.2.1 GOULD

357. Counsel Assisting submit that further reconnaissance of the Baldy Range and the McIntyre's Hut fires on the night of 8th January would have shown that the Baldy Range fire, and the western edge of the McIntyre's Hut fire, were both amenable to direct attack. It is on that basis that Your Honour is invited to come to the conclusions stated in subparagraphs "a" and "b" of paragraph of 1180. That submission is

[72] Crawford T4498

based on an acceptance of Cheney's evidence as to the intensity of the fires after 8:00pm.[73]

358. It would appear that Counsel Assisting rely on the following quote from Cheney's amended report;[74] "The fire behaviour had subsided as the weather conditions became milder with lower wind speeds and increased relative humidity on the western slopes of the Goodradigbee River. The fire had burnt out the entire catchment of the Creek up to Webb's Ridge and the flank fires were burning quietly. On the eastern side of Webb's Ridge the fire behaviour was very mild and there were several small spot fires close to the Dingi Dingi trail that were burning quietly. At 21:30 hours the spot fire in the Baldy Range appeared to be burning quietly on the southern aspects of a knoll on both sides of the track with very low flame heights mostly less than 0.3m."[75]

359. The first point to note is that the above quote is inserted in the narrative at paragraph 402 of the submissions by Counsel Assisting as though this was information known to Cheney on the evening of 8th January and therefore, should have been known to those attending the meeting at Queanbeyan.

360. That was not of course the case. The above quote from Cheney's Report appears to be a compilation of information which Cheney gathered from a number of sources, including his inspection of the area subsequent to the fires, the video provided by Gould and his assumptions based on general theory as to how fires burn at night. Although it is only the video of Gould which is referenced in the Report.

[73] Para 1181
[74] Origin and Development of the Bushfires that spread into the ACT, 8 – 18 January 2003
[75] Cheney Report p12; DPP.DPP.0008.0051

361. Gould's evidence is that he attended the three spot fires on the Dingi Dingi trail at approximately 8:00pm and he noted the flame heights at between 1-1.5 metres. He then travelled along the Baldy Range trail and saw a spot fire, which was burning on both sides of the trail, with flame heights of between 1-1.5 metres. He continued along the Baldy Range trail and came to another spot fire at approximately 9:30pm, which had flame heights of less than a metre high.[76]

362. Having regard to Gould's evidence we are uncertain on what evidence Cheney concluded that the flame heights "*were mostly less than 0.3m*."at the Baldy Range spot fire. Furthermore, Gould did not at any stage inspect the main McIntyre's Hut fire.[77] Cheney has admitted that Gould did not see the main McIntyre's Hut fire and that when he refers to the "flank fire" of McIntyre's he actually means something different, a spot fire somewhat ahead of the main McIntyre's Hut fire front.[78]

363. The Baldy Range spot fire was some 6 to 7 kilometres away from the main McIntyre's Hut fire, and in different terrain. Accordingly, Cheney cannot say that the weather conditions and fire behaviour seen by Gould would have been the same at the main fire. The wind speed and relative humidity recorded by Gould was at the Dingy Range trail spot fires, and not at the Baldy Range trail spot fire, in respect of which Gould stated; "*Being higher up on the ridge, we noticed that the wind was a little bit stronger than when we were at the spot fires on the Dingy Trail earlier."* [79]

364. The fact that different areas within a short distance can have a significant difference in weather conditions is evidenced by the difference in Gould's recordings at the Dingy Trail spot fires at 8:10pm and those recorded at 7:50pm on the same evening at the Mt Coree

[76] Gould statement DPP.DPP.006.0289
[77] Gould Statement, para 3, p3; DPP.DPP.0006.0289
[78] T6948, line 35
[79] Gould Statement, para 3, p4; DPP.DPP.006.0289

fire tower. Gould recorded a relative humidity of 62% and noted the winds as *"light, variable winds."* [80] The Mt Coree record shows relative humidity of 38%, with winds of 22km gusting to 35km per hour. At 8:00pm on 8th January Blundell the Deputy Captain of the Fairlight Brigade telephoned the NPWS Queanbeyan office to report a fire at Baldy Range "*wind change 30-40 km, south, fire heading towards Dingo Dell."*[81] Cheney accepted that the report from Blundell was either from Fairlight or his property which is located at Brookvale.[82]

365. As Gould's information only related to the spot fires on the Dingi Dingi and Baldy Range trails, it is patently implausible to then suggest the McIntyre's Hut fire, burning some 6 to 7 kilometres away was also burning in a similar fashion. As Your Honour is aware, there is no evidence as to the intensity of the McIntyre's Hut fire on its western side on the night of 8th January. Cheney's evidence on that point is based on theory and what he learnt from his inspection of that area many months after the fire.

366. As has previously been submitted, the entire body of information available to the meeting in Queanbeyan on the night of 8 January was put to Cheney. He was taken in particular to the report from Brian Blundell that the fire on Baldy Range at 8pm had winds of 30 to 40kmh.[83] When asked whether he would agree that these were "*fairly strong winds*" his answer was:

> *"I don't know where that record was from. That was not the wind speed that other people who went to the site recorded on site, which is the point of my comment".*[84]

[80] Gould Statement, para 2, p3; DPP.DPP.006.0289
[81] Joint Submission p24 RFS.AFP.0093.0029
[82] Cheney T6954
[83] T 6954 at 20-25
[84] T 6955 at 43-46

367. It was a simple question to answer: was the reported wind fairly strong? His answer was to query the report of the wind speed *in the light of the wind speed recorded by others*. The "*other people*" obviously included Gould, whose information was never passed on to Queanbeyan. There can be no doubt that in this answer Cheney was using the judgment of hindsight to query information that the Queanbeyan meeting had no reason *at the time* to query.

368. At T6960 the judgment of hindsight emerged again. In relation to the information from the 2 ACT forestry workers passed on to the meeting, Cheney's response was;

> *"I don't even know whether Bretherton actually got to the fire".*

369. Your Honour will recall that, of course, the forestry workers reported that they were at the Baldy Range fire, it was across the trail, and they were pulling out. Cheney's answer tried to downplay the importance of this information, because it was inconsistent with Gould's information obtained only shortly afterwards.

370. His answer went on to say that the decision not to use the Baldy Range trail that night was wrong because:

> *"I believe they should have known that they were going into a falling fire danger, that the fire behaviour would decrease in that country at night and that they needed to get a proper assessment of what it was doing and where it was on the ground".*

371. There is little doubt that Cheney relied on hindsight to give the evidence he did about what should have happened on the night of 8 January. In particular there is little doubt that he is relying on the subsequent evidence of Gould, not known at the time, as to the state of the fires and the weather.

372. As a result, Counsel Assisting in relying upon Cheney's evidence as to fire behaviour after 8:00pm on 8th January, are also relying on hindsight. Furthermore, it is only with the benefit of hindsight that Counsel Assisting are inviting Your Honour to come to the conclusions stated in subparagraphs a, b and c of paragraph 1180.

373. It is significant that Crawford, the IMT and representatives from the ACT did not know at the time they were making crucial decisions regarding fire suppression strategies, what Gould had seen. Gould had not informed the IMT of his observations even after he had arrived back in Canberra.

374. Furthermore, the meeting *did have* reasonably up to date information about the weather and fire conditions. In particular they had the weather and fire information from Blundell's at 8pm, which appeared to be confirmed by the observation information from Fairlight at 9.14pm. On what basis should the meeting have thought that this information was wrong, needed corroboration, or should have been further confirmed?

375. In this respect it should also be noted that Counsel Assisting have expressly disavowed Roche's suggestion that the meeting should have sought further corroboration prior to deciding on their strategy. See paragraph 1182.

5.2.2 FURTHER RECONNAISSANCE

376. It is not in dispute that it was sometime after 8:30pm on 8th January that the strategies were adopted at the meeting in Queanbeyan. It is at some stage after that time, that Counsel Assisting submit that the IMT should have calculated how long it was going to take to achieve their strategy.

377. In order to do the calculation the IMT would have had to know, amongst other things, what resources, both men and machinery, were available. In order to know that, inquiries would have had to been made. Clearly some time would have been taken up in making those inquiries. Accordingly, it is unlikely that the IMT could have sent crews out to inspect "*all the fires,*" as suggested by Counsel Assisting,[85] until sometime late on that night.

378. Evidence is before Your Honour that travel in the area in which the McIntyre's Hut and Baldy Range fires were burning is difficult and therefore slow.[86] Indeed, Counsel Assisting do not suggest how access could have been gained to the fires burning in the Mountain Creek area so as to inspect them.

379. Irrespective of where the crews where sent from, we estimate that it would have taken them at least one to two hours to reach the spot fires observed by Gould on the Dingi Dingi and Baldy Range trails[87] and the western edge of the McIntyre's Hut fire. There would have been a further time delay while the fires were properly inspected and the report made back to the IMT.

5.2.3 AN ATTACK ON THE BALDY RANGE FIRE

380. Assuming that on the basis of the reports received, the IMT did decide to undertake a direct attack on the Baldy Range fire and the western edge of the McIntyre's Hut fire, it would have taken a considerable time, first, for the crews and machinery to be organised and secondly, for them then to drive to the fires.

381. It is not an answer for any one to suggest that the IMT should have been gathering the resources in anticipation of a favourable report

[85] Para 1181
[86] Arthur T4548 & T4552
[87] Gould Statement DPP.DPP.006.0289

from those undertaking the inspections on the fire ground. How could the IMT know how much resource was required until the reports from the fires had been received? As noted above, the fire had crossed the Baldy Range fire trail and was posing a threat to homes. Fire fighters and a dozer had already been sent to protect those homes.[88]

382. In our submission, even with the most conservative estimates of time taken to undertake the tasks discussed above, it is unlikely that any direct attack could have been made on the relevant fires until the morning of 9th January.

383. Counsel Assisting have accepted that at the time the containment strategy was agreed upon on 8th January, Crawford had understood from the information provided to her that the Baldy Range trail was lost as an eastern containment line.[89]

384. If therefore a calculation had been done that the proposed strategy could not be achieved before the onset of adverse weather, why would the IMT then require a reassessment of the Baldy Range trail, when they already believed that it was lost as a containment line? In our submission, Counsel Assisting can only make the submission that the Baldy Range trail should have been reassessed on the night of the 8th of January, because they have the benefit of now knowing what Cooper says Bretherton had in fact told him, and also on the basis of Gould's evidence. The IMT did not have that knowledge when the decisions were being made on the night of 8th of January.

385. There has been no suggestion by Counsel Assisting, or anyone else, that a containment line other than the Fire Break trail could have been selected if the Baldy Range trail could not be so used. The choice was clear; it was either to be the Baldy Range trail or the Fire Break trail. We submit that once it was accepted by the IMT that the Baldy

[88] Crawford T4427
[89] Para 1182

Range trail had been lost, there was in fact no other choice the IMT could make.

5.2.4 CHENEY ON GOULD AND THE BALDY RANGE FIRE

386. At paragraph 414 of their submissions, Counsel Assisting have quoted a lengthy extract from Cheney's Report. That extract appears, in part, to form the basis of Cheney's conclusion that there should have been an inspection done of all the fires on the evening of 8th January and that direct attack could have been made on the fires.

387. Cheney is critical in that extract that no action was undertaken to directly attack the Baldy Range spot fire although "*Mr Cooper reported that Simon Bretherton had inspected the Baldy Range spot fire and that it was on both sides of the trail and containable by ground crews*..".[90]

388. What Cheney does not include in his report, is the evidence of Crawford that Cooper did not relay to the meeting that the spot fire was "*containable*", only that it was on both sides of the trail and that Bretherton and his companion were getting out of there. Cooper, in his evidence states that that was not what he had intended to convey to Crawford.[91] However, he concedes that "*Julie's interpretation may have been we had lost that."*[92] There is no evidence from Cooper that once he was aware that Baldy Range trail was not to be used as the eastern containment line, that he made any attempt to inform Crawford, or any one else at the interagency meeting, of what he subsequently says Bretherton had in fact said to him about that trail. Hunt in his evidence states that his understanding of Cooper saying

[90] Para 414
[91] Cooper, T4722, line 18
[92] Cooper; T4722, line 18

that Bretherton had said to him that "*we are getting out"* was that there was a safety consideration for leaving the area.[93]

389. This is another example of Cheney relying on hindsight to criticise those making decisions on the evening of 8th January.

390. It is also noteworthy that having referred to the information provided by Bretherton to Cooper to criticise the failure to make a direct attack on the Baldy Range spot fire, Cheney states in his evidence: *"I don't even know whether Mr Bretherton actually got to the fire. He didn't have a firefighting vehicle and he didn't do a thorough assessment of the spot fire at the time he was there".*[94] This statement was made to support his opinion that the IMT "*needed more information*".[95] Clearly the two statements by Cheney in respect of Bretherton are contradictory.

391. Cheney also refutes in the extract referred to earlier, Crawford's evidence that it would have been unsafe to send fire fighters to the fires, as gale force winds could have brought down trees and blocked roads. Cheney states: "*However, by 20:30 hours the area was under the influence of light variable winds and the research team going to the fire did not feel under any threat and were not obstructed by fallen timber on the way along Two Sticks Road and Dingi Dingi trail."*[96] The reference to the "*research team*" is of course a reference to Gould. As already noted, the meeting convened by Crawford on the 8th January did not know what Gould had seen, and therefore cannot be criticised for not taking that information into account.

392. However, what Cheney has omitted to mention in his report is that Gould when referring to the "*light and variable*" winds in his statement, was referring to the spot fires on Dingi Dingi trail. In respect of the

[93] Hunt T4639
[94] Para 416
[95] Para 416
[96] Para 414

Baldy Range spot fire he said: "*We noticed that the wind was a little bit stronger than when we were at the spot fires on the Dingi Trail earlier".*[97] Gould then stated: *"We walked up the trail (Baldy Range Trail) and into the fire approximately 100 metres and considered that the trail was not drivable and there were fallen trees across the trail".*[98]

393. Hutchings, who accompanied Gould on the evening of 8th January, says in his notes of the trip in respect of the fires on the Dingi Dingi trail: "*We did not proceed any further past these fires because trees along the edge were well alight and posed a hazard."* In respect of the Baldy Range trail, he noted: *"I walked approximately 100 metres up the trail with burnt forest either side to try and gauge its extent, but it continued on further up the ridge and was considered not drivable because of poor visibility and trees falling across the trail at this time."*[99] Bretherton in his statement states: "*It was a bit dangerous to drive anywhere around the fire we drove as close as we calculated was safe…. I didn't walk around the perimeter and could not estimate its size because of the rough ground and danger from falling trees.*"[100]

394. Cheney's selective and contradictory use of the available evidence to support his views, that it was safe to undertake inspections of the fires and to undertake a direct attack on the Baldy Range spot fire on 8th January, must place doubt as the credibility of his opinion on those two crucial points. Equally, the validity of any submissions that Counsel Assisting make on those points, to the extent they are based on Cheney's opinion, must also be questioned.

[97] Gould; DPP.DPP.0006.0289
[98] Gould; DPP.DPP.0006.0289
[99] DPP.DPP.0010.0270
[100] Bretherton Statement p 3 ESB.AFP.0108.0206

5.2.5 THE WESTERN CONTAINMENT LINE

395. Counsel Assisting submit that if timeframes had been calculated, it would have also necessitated a review of adopting Goodradigbee River as the western containment line. Again the argument is that the area to be burnt out would have been reduced if Lowell's and McIntyre's trails had been used as the western containment line and the containment strategy would have been achieved more quickly.

396. There are a number of assumptions made by Counsel Assisting, including that that there was safe access to the western edge of the McIntyre's Hut fire.

397. Cheney has stated that there was access to the western edge of the McIntyre's Hut fire on 8th January to access that fire,

> "*On the McIntyre's fire there is access to the western edge of the fire where the fire started, that is steep access and probably available to light units. I believe they could have made access up to the back of that fire. They would have reached the flank where it crossed the road, and that's where they would make their assessment. Because the wind was westerly, the likely change was southerly and it was blowing rapidly uphill, then probably the only option to them was to control the back of the fire. But even that action would have been a useful action on the first night, as I explained, that that made that fire trail accessible for later control. On the top of the fire, the video showed the staff that went in there were in no danger from the fire at that point."* [101]

398. Cheney's reference to the "video" must be to the video taken by Gould. As noted previously Gould never saw or went to the

[101] T541

McIntyre's Hut fire. The video relates only to parts of the spot fires on the Baldy Range and Dingi Dingi trails.

399. Accordingly, Cheney cannot assume what the state of the fire and trail was on the western edge of the McIntyre's Hut fire. In any event, Gould's and Hutching's evidence is that there was poor visibility and fallen trees.[102] Could there not have been fallen trees on trails that fire crews would have had to travel along to get to Lowell's trail?

400. Cheney does not explain how Lowell's trail was to be accessed and how long it would have taken to arrive at the western edge of the fire.

401. Smith's notes indicate that on 11th January he rang Wayne West to get best directions and to ask him to ensure that all the gates were open on his property so that access could be made to the western edge of the McIntyre's Hut fire.[103] It is also evident from Smith's notes that easy access to the fire ground was not possible as he had to discuss with "locals" about access to McIntyre's Hut.

402. No evidence was adduced by Counsel Assisting as to whether access across the river was possible on the 8th if the crews had come through West's property.

403. On 9th January a "*NPWS crew leader and a RFS Deputy Captain drove down the western side of the Goodradigbee River and observed fire burning slowly down the hill towards McIntyre's Hut. It was burning hot north of the Hut to the north east. They determined that tankers could not get across the river.*"[104]

404. Due to the steep terrain, travel time would have been substantial. Smith in his video stated he did not use the private access when

[102] Gould DPP.DPP.0006.0289 & DPP.DPP.0010.0270
[103] DPP.DPP. 0006.0348
[104] Joint Submission p 26; RFS.AFP.0093.0031

taking the police in because of locked gates on the private land. He went via a forestry track further north which he had not previously been on during daylight and states on the video that he was surprised how long it took them.[105] Smith estimates that it would take a Category 7 or 9 tanker about 45 minutes to get to Lowell's Flat from the Brindabella fire station.[106]

405. The fact that Smith and the Police did access the McIntyre's Hut fire as shown on the video is not evidence that access was possible on the night of 8th January. No evidence was adduced by Counsel Assisting to show what, if any, works had been done on the trails after the fires in January 2003. Accordingly, Your Honour cannot assume that access to Lowell's and McIntyre's trails was possible and safe on the night of 8th January.

406. Who does Counsel Assisting suggest was available to undertake the assessment on the night of 8th January?

407. If someone had been sent from Queanbeyan it is unlikely that the assessment could have been made for at least two hours after the decision was made to reinspect the fires.

408. Smith in his evidence suggests that the Brindabella crew was available to respond to the McIntyre's Hut Fire.

409. However, the issue that is being addressed here is the assertion by Counsel Assisting that fire crews should have been sent to the fires to reassess them sometime after 8:30pm on 8th January. That being when at the very earliest the IMT would have determined, according to Counsel Assisting, that there was a need to reinspect the fires.

[105] Smith video DPP.DPP.0006.0168
[106] Smith T6608

410. The radio logs indicate that Smith informed the Queanbeyan fire control at 7:25pm that Brindabella station was standing down.[107] Accordingly, by the time the IMT would have determined that a reinspection was required, Smith and other members of the Brindabella brigade were not available to undertake the inspection.

411. The Fairlight brigade was at Dingo Dell/Dingo Flats for property protection at that time and therefore not available to undertake the inspection.[108]

412. Perhaps the most crucial question to be asked is; how could an assessment of the western edge of the fire assist the IMT in determining its strategies in respect of the fire front heading in an easterly direction?

413. The Goodradigbee River was chosen as the western containment line because it required the least amount of resources, the fire on the western edge was a slow burning fire due to the fact that it was burning against the wind and downhill to the river, and there were no properties under immediate threat by that edge of the fire.[109] The rationale for concentrating their efforts and resources on the east edge of the fire as opposed to the western edge is best expressed by Crawford: *"We were concentrating on life and property, which is our priority, and life and property where the Baldy fire."*[110] A little later she again states: *"Our priority was life and property. Resources were at the properties, and that's where the dozer was as well. We were concentrating on where it was going."*[111]

414. In our submission, a fundamental difficulty with Counsel Assisting's assertion is that if Lowell's and McIntyre's trails had been adopted as

[107] DPP.DPP.0006.0325
[108] Joint Submission p 26; RFS.AFP.0093.0031
[109] Crawford T4426, T4443
[110] Crawford T4427
[111] Crawford T 4452-4453

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 and to ensure that the trails were safe for use to burn from, but also to undertake those tasks before the burning could commence. This would have clearly delayed the implementation of the containment strategy and therefore, had the opposite effect to what is being asserted by Counsel Assisting. The use of the river clearly required no such time delay.

415. Furthermore, as the western edge of the McIntyre's Hut fire was a backing fire burning downhill, it was slowly burning out the area between the river and Lowell's and McIntyre's trails without any need for resources being allocated.

5.2.6 REVIEW OF STRATEGIES

416. Notwithstanding that no time frames may have been set, other than in the broadest terms that the strategy had to be completed before the change in weather conditions, we submit that there is evidence before Your Honour which clearly shows that the IMT did review its strategies on 9th and 10th January.

417. The following exchange took place between Counsel Assisting and Hunt:

> *"Q. As Mr Arthur has described, difficulties arose that you can't foresee?*
> *A: Yes*
>
> *Q. As those difficulties arose, was there any reconsideration of the containment planning? Did anyone say, "This is taking too long, what else can we do?"*

A: Absolutely. We had a discussion I think it was the following day with Roger Good, the planner; Jim Lomas, who was the other operations officer; myself; and I think Neil Cooper was privy to that. Again, we had a look at: is there an opportunity to go back into direct attack? We were doing that continually. Before we set the back-burn: is there another opportunity, can we go in?

The problem again was the size of McIntyre's fire. And also those ignitions down at Mountain Creek, they were continually between us and the Baldy fire. There was nowhere we could cut them off. They were so remote and so large that the answer kept coming back, 'No, we can't go back into that direct attack.' We were doing that because we knew it was going to take us a little while to establish those larger containment lines. So here is an opportunity to really get back in and have another good look, because that is our last option – direct attack. Once we light up, that's it."[112]

418. The following exchange took place between Counsel Assisting and Arthur:

"Q. I understand that you can't timetable these activities for the reasons you have given. But surely experienced people such as yourself and others would be interested to discuss, at least by way of estimate, how long all this was going to take because the consensus might in the end be that it was going to take too long and there was no way the weather would hold for the time this project would take?

A: We certainly did discuss it, sir. And by recollection we had hoped to be well into the burning on Friday. For a number of

[112] T4645

reasons beyond our control that got setback. If I may go back, there was a large delay caused by the difficulty of getting a line down to the Goodradigbee River on the far west. We had to make some changes to our plan of the power line easement because we discovered the easement wasn't continuous, although we had information to the opposite. When the actual fire boss went out to reconnoitre the ground, he found there were re-entrance through it which would carry the fire back up the hills behind them. That forced us back on the 07Powerline, which cost us more time and preparation. Sorry, back on the 07 Powerline access trail." [113]

419. In the Joint Submission the following is stated:

"The Incident Management Team met throughout the day - at 1030 hours, 1515 hours and 1800 hours. During the course of the day the IMT again discussed the proposed containment lines. Alternative containment lines were considered but rejected. Direct attack was also discussed but not considered appropriate given the size of the perimeter, the terrain and the presence of the Mountain Creek spot fires and the Baldy Range fire." [114]

420. At the NSW Coroner's Inquiry into the McIntyre's Hut fire when it was suggested to Crawford that at no stage was the strategy of indirect attack reviewed in the week before 18 January, she replied:

"No, it was reviewed, and I thought I explained that earlier that while we were working on putting our containment lines in, 9th and 10th, we did review the strategy and to look at could we do direct attack, and even if we could do direct attack on one fire, we still had three other fires, and if we looked at the Baldy

[113] T4565
[114] Joint Submission p 27; RFS.AFP.0093.0031

Range spot fire, the eastern side, we didn't want to contain the whole fire, we just wanted to contain the eastern side of that fire to the Baldy Range fire trail. We could not even hold that with numerous aircraft and ground crews which got a rake hoe line right around the trail – around the edge of the fire, it still kept breaking out, and because we didn't hold that, that was just pointed out, that it was not efficient use of your resources for direct attack, so we stuck to indirect."[115]

421. In response to questions from Counsel Assisting about the situation report dated 9th January 2003 at 8:30 in the morning and in particular whether it referred to the Baldy Range spot fire, Crawford made the following response:

> *" I would assume so because that's the only fire that we considered direct attack on – that we actually considered it and said that we would do it. With the others we looked at – you set your strategies and then you review them. We reviewed all our strategies right up to Saturday morning. Once you light the back-burn, you can't turn back after that."* [116]

422. As noted by Crawford and Hunt above, once the back burn was commenced on 11th January, that strategy had to be completed.

423. We note that the strategy of direct attack on the Baldy Range spot fire continued until 13th January. It was only after it became clear that it was not possible to contain that fire, that a decision was made to drop back to the Fire Break trail as the eastern containment line. In our submission the decision on the 9th to directly attack that fire, and the decision on the 13th to abandon that strategy, are further examples of the constant review by the IMT of the strategies that were being adopted.

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[115] DPP.DPP.0001.0435
[116] T4458

424. In our submission three things are patently obvious from the evidence. First, that the IMT only had limited options for strategies to contain all the fires. Secondly, that the only relevant time frame to which the IMT worked was the need to get the proposed strategies completed before the anticipated weather change. Thirdly, that the IMT did constantly review its strategies until 11th January in respect of the McIntyre's Hut fire and the 13th in respect of the Baldy Range spot fire.

5.3 EASTERN CONTAINMENT LINE

425. The following is in response to submissions by Counsel Assisting at paragraphs 1182 to 1186.

426. In relation to the eastern containment line, as already noted, the decision made on the night of 8th January to adopt the Fire Break trail rather than the Baldy Range trail was based on the information then available to the interagency meeting, and the understanding by then Incident Controller that the Baldy Range trail was lost as a containment line due to the spot fires burning on either side of that trail.[117] Counsel Assisting accept that was her understanding[118] of the information conveyed to her by Cooper, who had received information from Bretherton who was at the fire ground. The decision to adopt the Fire Break trail as the eastern containment line was agreed to by all those present at the interagency meeting.[119]

427. Your Honour must, with respect, make findings on the basis of the information as it was known to Crawford and others at the meeting on the evening of 8th January, not on information that has come to light during the course of the Inquiry. We also refer Your Honour to our earlier submission, that even if another inspection had been made on

[117] Crawford T4430
[118] Para 1182
[119] Cooper, T4714; Cooper Statement ESB.DPP.0001.0214; McRae Statement, ESB.AFP.0110.0487; Lucas-Smith T816; Bartlett Statement, ESB.AFP.0001.1148; Arthur T4560

the 8th, it would have been done at a very late hour and with little prospect of any containment work being done until the morning of 9th January.

428. In any event, the evidence of Crawford and Arthur is that the Baldy Range trail was their preferred eastern containment line.[120] Cheney also believed this to be their tactic.[121] This is supported by the fact that a reinspection of the Baldy Range spot fire was undertaken on the morning of 9th January to determine whether it was possible to contain that fire and thereby make the Baldy Range trail available as the eastern containment line. Indeed, as a result of that reinspection a decision was made to try and contain the Baldy Range spot fire on the 9th January by direct attack, and secure the Baldy Range trail as a containment line. Only if that failed would they then fall back to the Fire Break trail as the eastern containment line.[122]

429. Counsel Assisting state that there was no evidence that arrangements were made on the night of 8th January for an inspection of the Baldy Range trail to be undertaken either that night or the next morning.[123] In our submission, the mere fact that there is no evidence that arrangements were not made that evening for a reinspection of the Baldy Range trail fire does not mean that it was not done. Evidence is before Your Honour that an inspection was in fact undertaken early on 9th January and it is that fact which Your Honour must have regard to.

430. On the morning of 9th January, fire-fighters were sent to the Baldy Range fire and commenced work on that fire. They were only withdrawn when as a result of an aerial inspection the Group Officer in charge of the fire fighters was advised directly by Lomas from the air that the fire was much larger than could be seen from the

[120] Arthur T4563; Crawford T4469
[121] T357
[122] Joint Submission, p18, RFS.AFP.0093.0023
[123] Para 413

ground.[124] Two aircraft water-bucketed the fire throughout that afternoon.[125] Fire fighters were again sent on the 10th when they put in a wet line and rake hoe lines around the eastern side of the Baldy Range fire trail.[126] Indeed every effort was made to contain the Baldy Range fire, so as to be able to use the Baldy Range fire trail as the eastern containment line until 13th January, when due to continual spot overs it was determined to fall back to the Fire Break trail.[127] A comprehensive list of the main actions taken in respect of both the McIntyre's Hut fire and the Baldy Range fire on 9th and 10th January 2003 is to be found at pages 25 to 28 of the Joint Submission.

431. Counsel Assisting submit that the delays being experienced with the southern containment line on 9th January, should have resulted in a reassessment of the strategies and greater emphasis being placed on bringing the fire on the east of the Baldy Range trail under control.[128] Again this is a submission made with the benefit of hindsight. The IMT could not have foreseen on the 9th the additional difficulty with creating the track on the western end of the Powerline trail with the dozer that was allocated to the task. The evidence is that that dozer could not do the task and therefore a larger dozer had to be sourced and then taken to the site to complete the work. That was done by the morning of the 11th.[129] That is also the date on which appropriate aircraft support was made available to the IMT to ensure the safety of fire crews.[130]

432. Counsel Assisting submit that once the Group officers inspected the Baldy Range fire on the morning of 9th January and reported that the fire could be controlled, "*adequate crews, ideally with bulldozer support should have been responded, not just three light units that*

[124] Hunt T4642; Crawford T4441
[125] Joint Submission, p26, RFS.AFP.0093.0031
[126] Crawford T4442
[127] Arthur T4587
[128] Para 1185
[129] Crawford T4460
[130] Arthur T4599

happened to be not required elsewhere on the fire ground."[131] There are a number of difficulties with this submission by Counsel Assisting. It assumes that the officers who had inspected the fire were able to inspect the whole of the fire, that the units sent were to be the only units responded and that a bulldozer could be used in the area. Furthermore, it does not explain what is meant by "*adequate crews*".

433. In our submission, the moving of fire crews who were not required to construct the western end of the Powerline trail to commence containment activities on the Baldy Range fire, was a most effective and timely use of limited resources that the IMT had at that time. Those units were in the area and equipped to commence fire fighting activities on their arrival. We also note that there is no evidence of the Group officer informing the IMT that he required more resources. In any event, it is part of the normal fire fighting processes that in large fire events, the IMT plans its strategies and allocates its resources once a full reconnaissance has been undertaken of all the fires under its control. In the present case, such a reconnaissance could only be done by air.

434. The evidence is that Lomas and Hunt observed the Baldy Range fire at 11:45am, the aircraft not being available for the reconnaissance flight until 11:20am.[132] Lomas and Hunt observed that the fire was much larger than what could have been seen from the ground[133] and that the fire was quite active below the fire crews.[134] The significance of this is that as the fire was burning below the fire crews there was a real danger that the fire might burn back up the hill and endanger their lives.

435. We note that no evidence has been obtained from Lomas by Counsel Assisting. We would have thought that if the withdrawing of fire

[131] Para 1185
[132] Joint Submission p26, RFS.AFP.0093.0031
[133] Joint Submission p26, RFS.AFP.0093.0031
[134] Hunt T4642

fighters from the Baldy Range fire was such an important issue, then Lomas, as the person who instructed the fire fighters to withdraw on the 9th, should have been interviewed and called to give evidence.

436. In any event, having made the observations he did, Lomas as an Operations officer had a duty to instruct the fire crews to withdraw from the fire. No criticism can be made of the IMT in accepting the observations made by Lomas and Hunt. The IMT can only rely on the information provided to it in determining strategies and providing resources. Obviously, once Lomas had instructed the fire crews to withdraw from the Baldy Range fire, the IMT would not have sent additional resources to the Baldy Range fire until discussions had been held with Lomas and others.

437. On return to Queanbeyan, further discussions were held between Arthur, Lomas, Hunt and the Group Officers who were at the Baldy Range fire. The Group officers were of the view that with more resources they may be able to hold the fire. As a result of those discussions, a decision was made by Arthur to send 30 fire fighters with tankers to the Baldy Range fire.[135] It is notable that a direct attack was made, notwithstanding that according to Cheney the Baldy Range fire was approximately 18.5 hectares in size by 3:00pm on 9th January.[136] Cheney's evidence is that once a fire reaches more 10 to 15 hectares in size, it would normally be subject to an indirect attack.[137]

438. As Your Honour is well aware, it takes time to gather resources. RFS brigades are comprised of volunteers who are simply not sitting at their fire sheds in case they may be required. Therefore, it would have taken some time to gather the resources required.

[135] Joint Submission p26, RFS.AFP.0093.0031; Crawford T4442
[136] Cheney Report DPP.DPP.0008.0051; p15
[137] Cheney T6211

439. We note that this issue was not raised with any of the NSW witnesses by Counsel Assisting when they gave evidence. The only issue raised, was why the fire crews had not been sent to the fire ground on the night of 9th January. Arthur could not recall why it was not done[138] and Hunt believed it may have been for safety reasons as it *"was quite steep country*."[139] Having regard to the time involved in gathering the resources and the nature of the terrain, in our submission, it was an acceptable strategy not to send the fire crews to the fire ground in the dark but rather to wait until first thing on the morning of 10th January.

440. It was also an acceptable and proper strategy for the IMT to use two aircraft to water bomb the Baldy Range fire during the afternoon of 9th January in order to slow down its progress. Crawford stated: "*It was certainly to our advantage to wet in front of where the fire was going so you restrict the spread of the fire. It was to dampen the area in front of the fire, stop the easterly spread until we could get crews onto that. It would just assist so that there was much less area the next day to round up."*[140] Counsel Assisting's statement that the water bombing *"was likely to have little or no effect without support from ground crews,"*[141] is made without any basis whatsoever. No evidence was adduced by Counsel Assisting as to what in fact was the result of the water bombing. That, Your Honour, is the crucial test; not a bland assumption by Counsel Assisting.

441. Cheney, when he gave evidence as to the spread of the fire on 9th January, was never asked by Counsel Assisting about the impact of the water bombing on the spread of the fire. Furthermore, the statement by Counsel Assisting referred to in the preceding paragraph, ignores the evidence of Crawford as to the purpose of the water bombing that was undertaken. Cheney's evidence as to the

[138] Arthur T4572
[139] Hunt T4643
[140] T4466
[141] Para 1186

rate of spread between the morning of 9th January and morning of 10th January is that it would have spread "*about half a metre a minute overnight".*[142] Cheney further stated that the "*fire was backing slowly downhill against firstly the southerly and then the easterly terrain which was steeper and more broken and more difficult to do hand tool work."*[143] Cheney's opinion is that the fire was approximately "*700 by 500m (18.5 hectares)*" in size by 1500 hours on 9th January. He then states that the Baldy Range spot fire "*continued to spread slowly burning a maximum distance of around 400m in 24 hours. It is assumed that there were 10 hours when the weather conditions were suitable for active fire spread, this would give an average rate of spread of less than 0.7 m per minute which is about the rate of spread of a backing fire."*[144]

442. In our submission, having regard to the slow rate of spread of the fire between 9th and 10th January, Your Honour can draw an inference that the water bombing may have had an impact on the spread of the fire. In any event, in the absence of any evidence to show that the water bombing did not achieve the purpose for which it was used, Your Honour must, with respect, reject Counsel Assisting's statement as to the "*likely*" effect of the water bombing. As to the impact of water bombing on the fires, it is noteworthy that in the Incident Action Plan for 12th January the following is stated: *"Helicopter bombing undertaken on 11/03/03 has contained this fire."* [145]

443. Counsel Assisting submit that with "*adequate*" fire crews and "*ideally with bulldozer support,"* the Baldy Range fire could have been contained on the morning of 9th January.[146] Counsel Assisting do not anywhere suggest what they mean by "*adequate,*" nor have they provided any evidence as to what would have been adequate.

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[142] Cheney T6852
[143] Cheney T6852-6853
[144] Cheney Report pp 14 & 15; DPP.DPP.0008.0051
[145] ESB.AFP.0007.0050
[146] Para 1185

Counsel Assisting appear to have simply accepted the evidence of Roche referred at page 65 of his report. Roche in his evidence admitted that he did not do any calculations as to what would have been adequate resources.[147] In the absence of such evidence we can only assume that Counsel Assisting are submitting that because the fire could not be controlled, the resources were inadequate. Counsel Assisting are in fact *"committing the simplistic fallacy*" that even Roche in his evidence refuted.[148]

444. As regards the use of a dozer, the reference by Counsel Assisting to "*ideally*" and earlier in the same paragraph "*if one could be found*", is an acknowledgement by them that there were only a limited number of dozers available to the IMT. However, even assuming that a dozer was available to be used at the Baldy Range fire on the 9th, could it in fact have been used? Cheney's evidence is that the fire was in steep terrain.[149] However, what was the state of the ground itself? Was it safe to use a dozer in that area? The Incident Action Plans in respect of the Baldy Range fire state: *"Steep and loose footing on Baldy Range fire."*[150] "*Steep terrain and loose footing on scree slopes."*[151] This issue was not explored by Counsel Assisting and therefore, they cannot now make a submission on the basis of an untested assumption.

445. In our submission, the fact that there is no evidence of a dozer having been used at the Baldy Range fire strongly suggests that the IMT and those advising it from the fire ground were of the view that dozers could not be safely used in that area. Having regard to the evidence of Crawford and Arthur, as to the importance placed by them on trying to keep the Baldy Range trail as the eastern containment line, one

[147] Roche T7894
[148] Roche T7894-7895
[149] Cheney T355
[150] ESB.AFP. 0007.0050
[151] ESB.AFP.0110.0205

can only assume that a dozer was not used because it could not be safely used to assist in containing the Baldy Range fire.

446. By reference to Cheney's evidence that by the 10th, because of its size and the terrain in which it was located the crews were "*presented with a difficult task to hold that fire* "; Counsel Assisting states: "*This belated attempt to control the fire was ultimately unsuccessful and all further attempts were abandoned during the afternoon of 13 January.*"[152] Apart from the prejudicial use of the word "*belated*", this statement does not reflect the facts.

5.3.1 WAS THE BALDY RANGE FIRE CONTAINED?

447. As noted above the attempt to contain the Baldy Range fire commenced on the morning of 9th January, both by using fire crews and water bombing. The Baldy Range fire to the east of the trail was in fact contained from 10th until the afternoon of the 13th.[153]

448. Cheney's fire spread maps, also shows no change in the size of the fire during that time.[154]

449. The Incident Action Plan for 12th January states: *"Helicopter water bombing undertaken on 11/01/03 has contained this fire. Ground crews and air attack tasked black out the fire edge to 20m."*[155] This is clear evidence that the fire crews had managed to get around that fire and had contained it for three days.

450. That being so, there must have been some other factor or factors, other than the size of the fire and the terrain which resulted in the abandonment of the direct attack on that fire.

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[152] Para 1186
[153] Cheney T361-362; T6855-6856
[154] AFP.AFP.0099.0007 pp50, 51 & 52
[155] ESB.AFP.0007.0050

451. Yet this point was not canvassed with any relevant witness by Counsel Assisting. Counsel Assisting have completely ignored the influence of drought conditions on the fuels, and therefore the capacity to contain and suppress fires.

452. In relation to the fuels generally, Crawford stated: "*This fire season was very different – extreme drought, very dry fuels and very dry live fuels. So even your live trees and shrubs, the fuel moisture in them is very dry. You can easily lose the fire.*"[156] Later she stated: "*Even when we were putting the back-burn in, there was continual spotting. The fuels were so dry they were spotting over…We were trying to keep it within the containment lines, but it was continually breaking those containment lines by spotting.*"[157]

453. In the Joint Submission the following is stated in respect of the Baldy Range fire on the 10th: "*Although sections of the perimeter were completed, there continued to be spot overs and reignitions of areas blacked out*".[158]

454. The Situation Report Form for 13th January at 1600 hours states: "*Water bombing on eastern edge of Baldy Range fire continued, however unable to black out.*." [159]

455. Even areas which had apparently been blacked out for days began to reignite. Crawford gave the following evidence: "*On the night of the 17th, the crews going into Charlie sector were driving past a lot of other sectors to get in. They had been driving past for days and those areas had been burnt out for days. As far as we were concerned, they were what we call blacked out; they were out. When they drove out on the night of the 17th, areas that had been blacked out for days*

[156] Crawford T4523
[157] Crawford T4481
[158] Joint Submission page 28; RFS.AFP.0093.0033
[159] NRF.AFP.0001.0071

were all starting to put smoke up and pop up. They were still sitting there simmering."[160]

456. In our submission, Your Honour ought to have regard to the state of the fuel as a result of the severe drought, as being a major factor why the Baldy Range fire could not be contained within its initial containment lines.

[160] Crawford T4531

5.4 WESTERN CONTAINMENT LINE

457. Counsel Assisting submit that the choice of Goodradigbee River as the western containment line was a poor one, that Lowell's and McIntyre's trails were viable options, that the choice of those trails would have reduced the area to be burnt and that resources were available to undertake fire suppression along those trails on the evening of 8th January.[161]

458. At the outset there are several things to say about this submission.

459. First, and fundamentally, there is no evidence whatsoever that the fire that spread down the Goodradigbee River on 17/18 January and ultimately swept into Canberra (as the tornado fire) originated on the *west* bank of the river. It is purely conjecture on Cheney's part, which he readily concedes. It could as easily have been a breakaway on the *eastern* side of the river. Thus the use of the river as a containment line in all likelihood made no difference to the source of the fire that ultimately burnt into Canberra.

460. Second, there is no evidence that the use of the river as a containment line made any difference whatsoever to the ability to control the overall fire area. Virtually no resources were devoted to maintaining that control line, because virtually none were needed.

461. Third, there is no evidence that the use of the river slowed down the burning out of the controlled area. Cheney's fire spread maps show that the east bank of the river burnt out slowly between 8 and 17 January, as one would expect of a fire burning downhill in steep country. By 17 January it was largely burnt out, with minimal effort required to burn or control the area. Thus the additional area to be

[161] Paras 1187 - 1189

controlled did not contribute to the length of time taken to burn out the area.

462. Fourth, there is ample evidence that attempting to put a rake hoe line around the ignition source on 8/9 January was dangerous, on the information then available. It is ironic that Counsel Assisting a coroner whose inquiry should help public safety, would be submitting that Your Honour should criticise public officials who put safety of firefighters at the top of their concerns.

463. Fifth, by comparison, there is ample evidence that using the trail as the western line would have involved considerable additional resources. They would have been needed to upgrade the trail to make it accessible, construct the rakehoe line around the ignition point, and then maintain a constant patrol of the trail itself. Counsel Assisting have pointed to no evidence as to where these 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, fundamentally, how they would have made the slightest difference to the breakout of the fires on 17/18 January.

5.4.1 THE FIRE ALONG THE GOODRADIGBEE RIVER

464. Based on the evidence of Cheney and Roche, Counsel Assisting submit that it was critical to have controlled the western edge of the fire on the night of 8th January so that Lowell's and McIntyre's trails could be used as a containment line. But to what purpose and what difference would it have made to the eventual impact of fires on the suburbs of Canberra? These are questions that have not been addressed by Counsel Assisting.

465. Cheney's evidence as to the progress of the fire in the Goodradigbee River area was that it broke across the river on the night of 17th

January, and on the 18th travelled in a southerly direction, which was at right angles to the prevailing winds, most likely as a result of the funnelling effects of the mountains and valleys. "*When the southern edge of the fire reached the unburnt country on the south western corner of the Powerline containment line, it commenced a rapid and intense run to the southeast under the influence of the prevailing winds"*.[162]

466. Cheney has acknowledged that his evidence of the fire spread, including his maps, was based on his interpretation of the information he obtained from aerial photographs, video recordings, eye witness reports and line scan data. Line scan data being the most important.[163] The only line scan data he had for 18th January started at 2:40 pm and finished at either 3:10 or 3:30 pm.[164]

467. Importantly, Cheney has acknowledged that he had no direct evidence of where exactly the fire began which spread down the Goodradigbee and became the "tongue" of fire which was drawn between the Bendora and McIntyre's Hut fires, ultimately merging with those fires.

468. Cheney stated: "*My interpretation is certainly based on the assumption that there was no break-away on the southern part of the McIntyre fire."*[165] After being advised by Counsel for NSW that there had been reports by fire crews[166] of areas that had been blacked out for days smouldering back into life on 17th January along the Powerline trail, Cheney was asked whether it was a possibility that the southern containment line could have spotted over. He replied: "*Yes. I guess I would not have been surprised if there had been a break-*

[162] Cheney T386, Cheney Report p120 DPP.DPP.0008.0051
[163] Cheney T6942
[164] Cheney T6943
[165] Cheney T6945
[166] Crawford T4531

away on any part of the southern line between the Goodradigbee and Dingo Dell."[167]

469. In our submission, having regard to Cheney's evidence, Your Honour cannot as a matter of fact find that the "tongue" of fire was caused by the fire travelling down the *western* side of the Goodradigbee River. It is equally likely that it was a breakaway from the Powerline Trail containment line on the *eastern* side of the river. There is simply no evidence either way: it is a matter of conjecture only.

470. It follows therefore, that Your Honour cannot ascribe any importance to the choice of the river as a containment line as leading to the creation of the "tongue" of fire. This by itself disposes of any suggestion of the use of the Goodradigbee being in some way a "cause" of the fire that ultimately burnt into Canberra on 18 January.

5.4.2 CONTROLLING THE WESTERN SIDE OF THE MCINTYRE'S FIRE

471. In determining the appropriateness or otherwise of choosing Goodradigbee River as opposed to Lowell's and McIntyre's trails, Your Honour must, with respect, have regard to all the circumstances existing on the night of 8th January. Those circumstances include the fact that the McIntyre's Hut fire front was heading in an easterly and south-easterly direction, that the Baldy Range fire was burning towards properties, that there were no properties in the vicinity of the western edge of the McIntyre's Hut fire[168], and that the western edge of the fire was a backing fire burning down slope and against the prevailing winds. Another crucial circumstance is that the McIntyre's Hut fire was only one of many fires being dealt with by NSW agencies on 8th January in south-east NSW.[169]

[167] Cheney T6946
[168] Crawford T4426
[169] Joint Submission p16 RFS.AFP.0093.0002

472. In our submission, the single most important fact that Your Honour must have regard to is that the Goodradigbee River contained the fire until 18th January. A spot fire, which occurred across the river on 12th January, was contained by water bombing and ground crews.[170] Fire crews also contained a spot fire across the river on 17th January.[171] These are obvious examples of the strategy adopted by the IMT working.

473. The fact that the western containment line was breached on the evening of 17th January and on 18th January is not, in our submission, proof that the use of the river was wrong. Cheney's evidence is that given the severe weather conditions it was virtually impossible to do any useful control action on the fires by the morning of 18th January.[172] In his opinion "*the breakaways across the river were inevitable as soon as the fire danger reached the very high classification."*[173] Roche in discussing the use of the incendiaries on 17th January stated that "*a breach of the containment lines was more than likely in any event."*[174] Arthur gave the following evidence: *"I would also like to point out that on the evening of the 17th and the day of the 18th, my understanding is over 28 fires broke containment lines. There were no fires in the southern part of New South Wales and I might add the northern part of Victoria which maintained inside their containment lines over that night and the following day."*[175]

474. The evidence is overwhelming that irrespective of which containment lines were chosen on the night of 8th January, in all probability those containment lines would have been breached on the night of 17th and during 18th January given the sever weather conditions. No evidence has been provided by anyone to suggest that Lowell's and McIntyre's

[170] Smith statement DPP.DPP.0006.0316
[171] Cheney Report DPP.DPP.0008.0051 p 23
[172] Cheney T332 & T514
[173] Cheney Report DPP.DPP.0008.0051 p 24
[174] Roche Report p118 DPP.DPP.0009.0001
[175] Arthur T4610

trails, if adopted as the western containment line would not have been breached on those days.

475. Furthermore, there is an assumption by Cheney and Roche that if Lowell's and McIntyre's trails had been used as the containment line, then any spot overs from the western edge would have only fallen on the eastern side of the river. Evidence is before Your Honour that under adverse conditions spot overs from the McIntyre's Hut fire travelled up to six kilometres away and ignited the fires on Baldy Range. Could not the spot overs from the western edge of the fire travel a much shorter distance across the river? Would those spot overs not have to be dealt with in the same way as proposed by the IMT, that is by water bombing and ground crews of which Counsel Assisting are so critical?

5.4.3 SAFETY OF FIREFIGHTERS

476. In submitting that Lowell's and McIntyre's trails were a viable option on the night of 8th January, Counsel Assisting assume that safe access could have been made to those trails on the night of 8th January. This point is discussed in more detail below. As already noted, Cheney's statement that it was safe to access the western edge of the McIntyre's Hut fire was based on the conditions depicted in Gould's video. That video, as Your Honour is aware from cross examination of Cheney, is of the Baldy Range trail and Dingi Dingi trail spot fires. There is no evidence of the fire conditions on the western edge of the McIntyre's Hut fire on the night of 8th January.

477. Cheney's assumptions as to fire behaviour is based on how fires would behave under normal conditions. There is abundant evidence, including from Cheney that the conditions prevailing in that area were far from normal due to the severe drought. Crawford gave evidence that the "*last two years experience has shown that your fuels and your*

fire behaviour have been very different to a normal season."[176] As regards fire activity at night she stated: *"It will reduce. But I know from my experience being on the fire line in November/December 2002, I was night shift on the fire line and I was really surprised with the activity of the fire at night. So it may reduce, but it can still be quite severe."* [177] We reiterate our previous submission that the IMT could not have known and did not know that safe access was available on the night of 8th January. It is also noted that by 1740 hours, the fire was already over 200 hectares in size.

478. Smith's evidence that the fires could have been attacked safely on the evening of 8th January "*because of the low flame height, high humidity, cooler temperatures and calm wind conditions"*[178] lacks credibility. Where did he make these observations from and when? The evidence is that Smith did not go either to McIntyre's Hut fire or the Baldy Range fire on that night, so how can he know what the conditions were there. To suggest that he could make an accurate assessment of the conditions from his property, which is many kilometres away from the fires and obstructed by mountain ranges is frankly absurd. It is more likely that his evidence as to the fire and weather conditions has been derived from his conversations with Cheney and material that he became aware of after the fires.

479. As Your Honour knows, Cheney's evidence as to fire behaviour at McIntyre's Hut is based on theory and the evidence of Gould, which only relates to the Baldy Range trail and Dingi Dingi trail fires. Accordingly, we submit that Your Honour cannot, with respect, place any importance on Smith's evidence as to how safe it was to fight the fires directly on the night of 8th January.

[176] Crawford T4530
[177] Crawford T4425
[178] Smith statement pp4-5 DPP.DPP.0006.0311

480. Crawford, in her evidence to the NSW Coroner's Inquiry stated that she instructed Hunt not to proceed to the McIntyre's Hut fire because of the information that Hunt was relaying to her and other information of which she was aware. She stated:

> *"On a number of occasions they talked about the smoke and they had numerous other smokes in the area as well, but this one had their particular attention, they were saying it is big, its like last years fires, its thick its yellow smoke, whereas the other fires we'd get…. Small columns of smoke… Coree was talking about gale force winds, we had a land holder who was to the east of the fire call in with gale force winds and ash coming over his property. I put all that together, my crews were at the top of Coree, this was what they were saying, myself as incidence controller have to guarantee if I send crews into a fire to direct attack, I have to guarantee that they have safe refuge areas and they have an escape route. I could not guarantee that. The fire at this stage by the column of smoke was far bigger that that you would send crews into to do direct attack under those weather conditions at that time."* [179]

481. Even on Cheney's own evidence, it would have been highly irresponsible for fire fighters to have been sent to the McIntyre's Hut fire in the dark. Cheney has given evidence that in the early stages the McIntyre's Hut fire was very intense, *"…even if someone had been on that road at the time that the fire started with the fire unit, they would not have been able to contain it on that road. It developed very rapidly. This area here is a dry string bark country, and the stringy barks are particularly prone to produce fire brands and throwing spot fires ahead and so really when you are in a very high fire danger, you have little hope of stopping a fire in forest country, if it is on a slope which is aligned with the direction of a prevailing wind"* [180]

[179] DPP.DPP.0001.0249
[180] T340 – 341

482. In her evidence to this Inquiry as to why she did not send fire crews to the McIntyre's Hut fire, Crawford stated; *"I also had a phone call of a lightning strike at Yananumbeyan National Park which is to the east of ACT. So I had another fire there. I had all this information. If I sent them in, I knew at least one of the fires was huge. I didn't know how many other fires there were. There was gale force winds. There are lots of big trees up there. Under gale force winds, you could send people in on tracks but you can't drive around big trees because the terrain is too steep. If they had driven in, they could be trapped. I couldn't guarantee them a safe refuge area, I couldn't guarantee them an escape route. I am the incident controller; I am responsible for the welfare of the crews that I send in; under those conditions I just didn't send them in; I told them to come back. You have to weigh up, even if you do get in, what are you going to do? It's a huge run up steep slope. It is mountain goat country. You just can't have people working on those edges. Night is coming."*[181]

483. There is evidence of fallen trees on the tracks at the Baldy Range fire[182], and the difficulty that Smith had in accessing Lowell's trail across the Goodradigbee River on 11th January during daylight.[183] In our submission, the decision by Crawford not to send any person to the McIntyre's Hut fire front on the night of 8th January, in all the circumstances was the only decision that could have been made. There can be no doubt that the safety of fire fighters must be a primary consideration for any incident controller.

[181] Crawford T4425
[182] Gould; DPP.DPP.0006.0289**,** Hutchings DPP.DPP.0010.0027& Bretherton Statement p 3 ESB.AFP. 0108.0206
[183] Smith notes DPP.DPP.0006.0348

5.4.4 ACCESSIBILITY OF THE LOWELL'S AND MCINTYRE'S TRAILS

484. Cheney's assertion that the "*general accessibility of the trail*"[184] was the same at the time of the fire as when he went there with Smith is unsustainable. Cheney and Smith accessed the area in May 2004, more then twelve months after the fire event. They went there in daylight and in clear weather conditions. They accessed the river crossing along a track that Smith had not used before and therefore we do not know what the state of the trail was that would have been used on 8th January.[185] Smith's assertion that he could have reached the ignition point in a Category 7 or 9 tanker on the night of 8th January is no more than an assertion. Similarly, Roche's evidence that "*there wasn't a problem with getting access to that part of the fire at Lowell's fire trail,"*[186] is made with the benefit of hindsight. He simply does not know what the access conditions were on the night of 8th January.

485. No evidence was adduced by Counsel Assisting as to the state of the relevant trails prior to or at the time of the fire. Furthermore, no evidence was adduced by Counsel Assisting as to what works had been done on Lowell's and McIntyre's trails and access to Lowell's trail and the river crossing during and subsequent to the fire.

486. Having regard to Crawford's description of the weather conditions in the area of the McIntyre's Hut fire, and the fact of fallen trees at the Baldy Range fire, Your Honour can draw a strong inference that access to and along Lowell's trail may have been obstructed by fallen trees and was unsafe. Certainly, Your Honour cannot, we submit, draw any conclusions as to how safe and how accessible that area was on the basis of Roche's evidence, or on the basis of Cheney's

[184] Para 427
[185] Smith video DPP.DPP.0006.0168
[186] Roche T7344

and Smith's evidence that they had no difficulty when they went there over twelve months later.

487. In response to Cheney's suggestion about creating a rake hoe line around the western edge of the McIntyre's Hut fire Crawford gave the following evidence: *"By doing what Cheney suggested, that added more area that we had to patrol by vehicle. As soon as you put in a hand line or even with dozer lines, you then have people walking it. It's not as safe, and also it is just so much harder to keep an eye on it and it can break away. Also it then created- we were being pushed then to light off that containment line. We could easily compromise the northern containment line, depending on when we lit off from it. So it just would have added a lot more complications."*[187]

488. The significance of Crawford's evidence is that it clearly shows that the trails have to be in a condition which enables fire crews and tankers to use those trails and to ensure their safety. Which in turn shows the need for substantial resources to use Lowell's and McIntyre's trails as containment lines. Hunt gave evidence to a similar affect.[188]

489. On a map prepared for fire fighting by NPWS, just north of the area where Cheney has suggested a hand tool could have been established, there is a notation on that map *"no tankers*". Arthur's evidence is that "*you would not be able to put heavy or medium tankers up there. You may be able to get a light unit*."[189] Significantly, in response to the suggestion that heavy and medium tankers are necessary to maintain a control line across the possibility of break–out; Arthur responded: "*I believe so, from the simple point of safety for fire fighters.*"[190] In response to the suggestion that the kink in McIntyre's trail could have been ironed out for access to tankers to

[187] Crawford T4537
[188] Hunt T4641
[189] Arthur T4628
[190] Arthur T4628

enable the use of that trail as the western containment line, Crawford responded: "*I just think it is impractical. You can do it but it would just be really hard to maintain it because you are restricted to light units down there. So sort of low water accessing units. It would be very difficult to hold. The river worked much better and it is just so steep.*"[191] Therefore, to the extent that the trail was not trafficable to heavy and medium tankers, not only was the integrity of that trail as a containment line put in jeopardy but it also compromised the safety of fire crews working along that trail.

490. It was suggested by Counsel Assisting to Arthur that "*no tankers*" did not mean that the trail could not be modified in order to use as a containment line.[192] Arthur responded: "*Not necessarily, sir, because it would depend. "No tankers" may mean several things – the track may not be wide enough or it may be just too steep for heavy tankers*."[193] Arthur agreed with Counsel Assisting that it was not unusual to have to modify a trail to use it as a containment line and that if Lowell's and McIntyre's trails had been chosen as containment lines then "*there would have been nothing unusual about the fact that personnel would then have to go to that track and modify it, perhaps widen it, perhaps clear it, or otherwise affect it so that heavier traffic could move on that track*."[194] We note that no evidence was adduced by Counsel Assisting as to whether there were any dozers available to undertake the works that may have been necessary to modify Lowell's and McIntyre's trails prior to their use on the night of 8th January. The evidence is that the only dozer available that night was sent to protect property to the east of the fire front.[195]

491. Hunt was asked why the "*no tankers*" notation was made on the map and about the possibility of upgrading the trail in time to use it as a

[191] Crawford T4543
[192] Arthur T4629
[193] Arthur T4629.
[194] Arthur T4629
[195] Crawford T4429

control line. He responded: "*It is a very steep trail and, because it heads from Waterfall Trail, comes down off Webbs Ridge, there is a lot of side cuts. So it is very steep in its side cuts.*"[196] Hunt explained that a side cut was where the bull dozer had to cut out the side of the hill, "*so that is the space you have to drive*." He also explained that it would take many weeks and hundreds of thousands of dollars to modify the trail for access by all vehicles and therefore it made it impractical for use as a control line for a fire that was already burning.[197]

5.4.5 RESOURCES AND DELAY

492. It is apparent from the foregoing that not only certain parts of McIntyre's trail could not have been accessed by large tankers but also that substantial work would have been required to those parts and perhaps others, to make it accessible and safe for use by fire fighters. This in turn would have required a substantial time delay before that trail could be used to back burn from safely and the allocation of substantial resources. Counsel Assisting have stressed in their submissions, that time was of the essence in implementing strategies to contain the fires. In our submission, if Lowell's and McIntyre's trails had been adopted as containment lines the reallocation of 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; the two areas which posed the most immediate risk to property and possibly life.

[196] Hunt T 4647
[197] Hunt T4647

493. Evidence is before Your Honour that because of the many fires burning on the night of 8th January, there was difficulty in obtaining sufficient resources quickly to undertake necessary tasks.[198]

494. We note that Counsel Assisting have adduced no evidence as to what resources would have been required, to not only undertake a direct attack on the western edge of the McIntyre's Hut fire but also to patrol and maintain it. Cheney's assertion that "*resources should have been gathered*"[199] to patrol McIntyre's and Lowell's trails ignores the reality that the McIntyre's Hut fire was not the only fire being dealt with on 8th January and on subsequent days and that the eastern side of the Baldy Range fire was of far greater significance, as it posed an immediate threat to property and possibly life.

495. We note that Counsel Assisting have submitted that the adoption of the Lowell's and McIntyre's trails would have reduced the overall area to be burnt. Crawford accepted that a reduction of the area to be burnt was desirable, but that it would have taken a lot more people and resources to look after it.[200]

496. In our submission Your Honour will have regard to the fact that at the time Crawford and others were making decisions on the night of 8th January, as to the best choice for a western containment line they had to balance not only the area that had to be burnt as a part of any containment strategy but also the availability of resources, the immediate threat to life and property and the fact that the western edge of the fire was a backing fire burning downhill. We note that the area between the river and Lowell's and McIntyre's trails completely burnt out by 15th January[201] with very little assistance from fire crews.

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[198] Crawford T4466; T4517
[199] Para 427
[200] Crawford T4537
[201] Cheney map p 58 AFP.AFP.0099.0007

497. Counsel Assisting have not adduced any evidence to show how the choice of the river as opposed to the two trails impacted on the overall containment of the fire. In particular, how the choice of the river delayed the completion of the strategy adopted by the IMT. As noted earlier, it is our submission the adoption of the two trails would have substantially delayed the implementation of the strategy, because it would have required utilisation of limited resources to ensure that it was safe for use by fire crews and then to patrol it. The reallocation of the resources may also have resulted in a delay in the implementation of the strategy along the other containment lines. The choice of Goodradigbee River resulted in no such delays.

498. Counsel Assisting have suggested by reference to a statement made by Senior Counsel for NSW when cross-examining Roche, that NSW did not have inadequate resources.[202] The inference being that sufficient resources could have been obtained on the night of 8th January to undertake direct attack along McIntyre's and Lowell's trails.

499. We refer Your Honour to the whole of the exchange between Roche and Senior Counsel so that you may see the context in which that statement was made.[203] It is obvious beyond argument that Mr Walker's comment was to clarify to Roche that he was being asked on what basis he had made various criticisms. Roche was not being asked about the adequacy or otherwise of NSW resources. That was the context of Senior Counsel's remark, and it is mischievous of Counsel Assisting to take it out of context and virtually build its entire argument on that one sentence.

500. Furthermore, of course, Walker SC prefaced his remark at T7892 by saying, correctly: *"I don't give evidence, nor do I make assertions*". His comment was not evidence, and could not be taken as evidence.

[202] Para 428 on p 154+
[203] Roche T7891-7892

501. The very fact that Counsel Assisting are forced to resort to such flimsy material to provide any evidential support for their submissions on this topic really only underscores the sheer lack of evidence that founds what they have to say.

502. In any event, it is our submission that the availability of resources in NSW is not a matter on which Your Honour can comment, as it would be beyond Your Honour's jurisdiction to do so.

5.4.6 RESPONDING ON THE NIGHT OF 8 JANUARY

503. The only evidence on which Counsel Assisting invite Your Honour to conclude that crews were available on the night of 8th January to undertake a direct attack along McIntyre's trail is that of Smith.[204] The assumption that has been made by Counsel Assisting is that Crawford, as the Incident Controller on that night knew that the Brindabella brigade was available. This assumption is based on a lack of understanding as to the operational protocols involved between the RFS and NPWS in responding to fires on NPWS estate.

504. The McIntyre's Hut fire was in Brindabella National Park. That is why Crawford was the IC before the s44 declaration on 9th January. The protocols allow for the nearest RFS brigades to respond to a fire in a national park, but it is expected that the NPWS office would be notified of that response. In the present instance, Smith asserts that he was the closest to the McIntyre's Hut fire, and yet he did not respond to that fire. This is despite the fact that he saw the smoke columns at approximately 3:30 pm. Indeed he appears not to have attended the Brindabella fire shed until 6:45 pm.[205]

[204] Para 1189 (b)
[205] Smith statement pp 3-4 DPP.DPP.0006.0311

505. In contrast the Fairlight RFS brigade did respond to the Baldy Range fire and contacted the NPWS office directly to advise of what they were observing. Crawford was then able to include this information in the planning and advise the Fairlight crew of what NPWS were doing. Crawford's evidence is that she would not call out RFS brigades herself; it would be done through the RFS at Yarrowlumla.[206]

506. The circumstances, which led Crawford to call the interagency meeting, are well known to Your Honour. Cheney has agreed that in the circumstances then known to Crawford, the calling of that strategy meeting was a very sensible step to take.[207] Smith's evidence is that all his communications were with the RFS Firecom and in the absence of any evidence that Crawford was advised that the Brindabella brigade was available, it cannot be assumed that she was aware of that information. In any event, as the strategy meeting was not completed until sometime after 8:30 pm, how could the Brindabella brigade be tasked to the McIntyre's Hut fire when Smith had stood down his brigade at 7:25 pm?[208]

507. Smith has stated that he was "*surprised the Brindabella Brigade was not responded to any fire on the afternoon of the 8th January 2003."*[209] That statement is of course incorrect as the Brindabella brigade was directed to attend to the Mt Vale fire but did not do so because Smith had received advice that there was no fire there. As it transpired there was in fact a fire there and his brigade had to attend to it the next day.[210] Arthur's evidence to the NSW Coroner's Inquiry is that the Brindabella Brigade was asked to respond to the Mt Vale fire at 6:02 pm on 8th January. Arthur stated that the Cat 1 tanker was not available as there was insufficient crew but that the Cat 7 was available.[211] In our submission there is strong evidence that the

[206] Crawford T4421
[207] Cheney T6955
[208] Smith statement DPP.DPP.0006.0325
[209] Smith statement p4 DPP.DPP.0006.0311
[210] Smith T6606
[211] Arthur DPP.DPP. 0001.0454

Brindabella brigade could not have been tasked to any fires on the afternoon of the 8th January, because no crews were available until sometime around 6:00 pm and then only a Cat 7 could be manned at that time.

508. As noted earlier, Crawford's evidence is that on the night of 8th January, their priority was life and property and that resources were allocated accordingly.[212] The most immediate threat to property was from the Baldy Range fire.[213] John Schunke's house was "*within a kilometre and a half of that Baldy Fire. It was heading towards Schunke's house*."[214] The IMT, in our submission, quite rightly chose to utilise the available resources where the greatest threat to property existed and that was on the eastern side of the spot fires on Baldy Range as those fires could impact on Dingo Dell.[215]

509. In our submission, Your Honour cannot, with respect, conclude that crews were available to under take direct attack on the western edge of the McIntyre's Hut fire on the basis of the evidence provided by Smith. Even if it is assumed that crews were available to be sent to that area, we submit that on the basis of the information that was available to the IMT on the night of 8th January, as to conditions then prevailing, it would have been highly imprudent, indeed reckless, of the IMT to have sent crews to that area in the dark.

510. Smith, Cheney and Roche have stated that in their opinion, a fire crew could have put a rake hoe line around the fire which was on the west of McIntyre's trail.[216] Their opinion is of course based purely on hindsight. Counsel Assisting acknowledge that Cheney's opinion is based on looking at the circumstances "*in retrospect*".[217] Their assertions are made on the basis of an inspection of the relevant area

[212] Crawford T4427, T4425 - 4453
[213] Crawford T4426
[214] Hunt T4638
[215] Crawford; T4426
[216] Paras 424,426, 427 & 431.
[217] Para 427

by them over twelve months after the fire, in daylight and in calm conditions. What Your Honour has to have regard to is the circumstances, which the fire crews were likely to have faced on the night of 8th January; darkness, wind gusts, possibly fallen trees, certainly large burning trees with the potential to fall, very steep terrain, and the potential for burning logs to roll down the hill below the fire fighters and thereby placing them at risk from a fire that would have run back up the hill towards the trail.

511. Smith's assertions as to what he and his crew were able to achieve elsewhere in terms of building a rake hoe line is of little relevance to Your Honour. Other than an assertion that it was done in steeper country, there is no evidence of the conditions in which it was done and therefore, we submit, that no useful comparison can be made with the task that would have confronted fire crews at the McIntyre's fire on the night of 8th January.

512. In summary, in our submission, Your Honour cannot come to the conclusions that are suggested by Counsel Assisting at paragraph 1189 of their submissions. That is because either there is no evidence, or the evidence relied upon is so tainted by hindsight, that it cannot and does not support the conclusions that Your Honour is asked to draw.

5.5 DELAY IN COMMENCING BURNING

513. Counsel Assisting have submitted that the delay in the burn-out operation meant that "*the burn-out area remained so large it was almost inevitable that the weather would work against the success of this strategy."* [218] Two paragraphs further on Counsel Assisting submit that the strategy "*was made all the less feasible by an absence of committed investigation of eastern and western containment lines and a significant delay in the commencement of the burning-out operation*".

514. The submissions of Counsel Assisting appear to be based on two fallacies.

515. First, they assume that the contained area was not substantially burnt out by 17 January. In fact it was. Cheney's fire spread maps demonstrate this.

516. Second, they assume that "*burning-out*" involves burning vegetation to the point that it cannot re-ignite. This fallacy is best illustrated in the middle sentence of par.1178, on which pars. 1190 – 1192 then build. In that sentence it is assumed that because the fires broke away late on 17 January, the contained area cannot have been burnt out "*to a sufficient depth to prevent breakouts*…". Hence the issue of delay becomes crucial in their submission. With more time or less area or both, burning out could have been completed "*to a sufficient depth*".

517. In fact, burnt out – even blacked out – areas could and did re-ignite in the awesome weather conditions of 17 and 18 January. It did not matter in what "*depth*" they had been burnt out, whatever that means.

[218] Para 1190, p 433

518. The fallacy is best exposed in the cross examination of Cheney. Counsel for NSW put to him that as crews were being withdrawn late on the afternoon of 17 January they saw areas that had actually been blacked out re-igniting in the extreme weather conditions. He replied: *"Yes. I guess I would not have been surprised if there had been a break-away on any part of the southern line between the Goodradigbee and Dingo Dell."*[219]

519. Your Honour has ample other evidence about breakaways occurring across the board on all containment lines. Roche in discussing the use of the incendiaries on 17th January stated that "*a breach of the containment lines was more than likely in any event*."[220] Arthur gave the following evidence: "*I would also like to point out that on the evening of the 17th and the day of the 18th, my understanding is over 28 fires broke containment lines. There were no fires in the southern part of New South Wales and I might add the northern part of Victoria which maintained inside their containment lines over that night and the following day*."[221]

520. In short, every fire burning in south-eastern Australia on 17 January 2003 broke away from its containment lines that night and the following day. **Every fire**: not just McIntyre's.

521. What this means is that reignitions, spotovers and breakaways were likely to occur on all parts of the containment lines, even in the areas that had been blacked out for nearly a week. Consequently it is utterly fallacious to assume that because there were breakaways on 17 January, the burning out must not have been completed properly. And consequently the issue of delay in commencing burning out, seen in context, was of little if any significance in ensuring that the

[219] Cheney T6946
[220] Roche Report p118 DPP.DPP.0009.0001
[221] Arthur T4610

McIntyre's fire did not break its containment lines on 17/18 January and burn into Canberra.

522. Counsel Assisting have not grappled with this evidence at all. They persist in seeing every fire in isolation, and assuming that it could be contained and extinguished. Perhaps they could in normal conditions. But the combination of extreme drought and extreme weather on 17/18 January meant that no fire, anywhere, stayed within its containment lines, no matter how it was being fought. Hence the question of delay in burning out the contained area is of far less significance than Counsel Assisting would like to believe.

5.5.1 WAS THERE DELAY IN FACT?

523. The very word "*delay*" is a coloured word. It connotes tardiness, lack of vigour (and rigour), procrastination and an unwillingness to fight the fires with any degree of urgency. NSW rejects such connotations about the people who fought the fires. They had a difficult task, which they carried out with great effort and professionalism. They had to weigh up difficult issues of safety for fire crews on the ground. As the evidence set out in these submissions will show, there was no delay in commencing the burning out.

524. Crawford's evidence is that once a decision was made as to the containment lines to be used to contain all the fires then burning in Brindabella National Park, it was understood by those making decisions that they had to ensure that the containment lines were ready and that the burning-out process had to commence as soon as possible. She stated "*I think the overall assumption was that we would get in there, get the containment line done and light up as*

quickly as possible. That might be lunch time the next day or the next day."[222]

525. A back burning operation is not simply a case of lighting up areas and allowing them to burn. It is a well recognised principle that before any areas are set on fire, you have to prepare the containment lines not only to enable easy and safe access and egress for vehicles, but to ensure the safety of the fire crews and also to ensure that the back burn itself does not escape across the containment lines.[223] It is also a well recognised principle that you must have sufficient resources to enable the back burn to be successfully undertaken. Clearly the preparation of the containment lines and the gathering of resources take time, especially during a period in which there was heavy demand on the resources due to the many fires burning in south eastern NSW.[224] A number of factors delayed the implementation of the agreed strategy.

526. In relation to the southern containment line, the evidence is that the fire crews sent on the morning of 9th January to create a trail from the end of the Powerline trail down to the Goodradigbee River determined that it was too difficult to do so by hand. Accordingly, a dozer was resourced and sent to the area. On arrival the dozer driver assessed that a larger dozer was required to do the work. It was not until 10th January that an appropriate sized dozer was available and the work was completed on 11th January.[225] Roche has agreed that the burning out of that section was not appropriate until the containment line created by the dozer was completed.[226]

527. The initial plan was to use the powerline easement to back burn from. However, an inspection of the easement on 10th January indicated

[222] Crawford T4448
[223] Crawford T4457
[224] Crawford T 4441; T4464-T4466
[225] Joint Submission;RFS.AFP.0093.0002, p27; Arthur T4597; Crawford T4527
[226] Roche T7374

that the easement was not continuously cleared and therefore, there was potential for a back burn to run up the uncleared gullies. This would have resulted in fire across the uncleared sections of the easement, hence outside the "*containment line*". Which in turn may have posed a risk to the safety of fire fighters undertaking the back burn. The inspection also revealed that there were windrows within the easement, which would burn with great intensity and likely cause a spot over. The easement was not trafficable along its full length and as such in some places the fire fighters would have had to leave their vehicles on the Powerline trail, which was a sufficient distance away from the powerline easement to cause safety concerns in the event that fire fighters had to leave the area quickly.[227]

528. The change to the use of the Powerline trail rather than using the easement meant that time had to be spent in preparation of that trail to back burn from. The preparation involved, amongst other things, dropping stags close to the trail, removing trees that may fall across the line, and constructing passing bays and refuge areas. Also, having regard to the serpentine nature of the trail meant that Arthur, as the Incident Controller, had to ensure the safety of the fire crews who were going to undertake the back burning. The serpentine nature of the trail meant that there would be fire both below and above the firefighters undertaking the back burn. That is why he waited until sufficient aerial support was available to protect the fire crews.[228] Aerial resources, in particular the sky crane, was not available until 11th January, at which time back burning operations along the southern containment line were commenced, notwithstanding that the northern containment lines had not been completed.[229]

[227] Joint Submission; RFS.AFP.0093.0002, p28; Arthur T4565
[228] Arthur T4573
[229] Crawford T4528

529. On 9th January a decision was made by the IMT to first consolidate the containment lines in the area where the back burns were to be done, to light small sections of the containment lines at a time and to contain that prior to further ignitions.[230] That decision was made by the IMT on the basis of experience at other fires in the previous two seasons which clearly showed that in the prevailing drought conditions lighting back burns on large scale and without proper containment lines was doomed to failure.[231]

530. In discussing the lighting of back burns along the Powerline trail, Cheney states that the "*rate of spread [of the fire] in these perimeters was really quite slow".*[232] A bit later he states: "*Because of the serpentine nature of this road- and they had to burn these little pockets – there was a chance with the easterly wind that parts of this would spot over, and I'm sure that happened in places as they were getting into this area if the conditions were hot".*[233] And again: "*At an east south-easterly wind, they're still getting some advantage by the wind sort of pushing out in this direction, but during the day the nature of this trail means it's almost inevitable that they will get spot fires coming across it and it's most likely that its breakaways from their burning out operation during the day slowed the progress in this section of the trail.."* [234] In our submission, Cheney's evidence supports the correctness of the strategy adopted by the IMT to burn-out small areas at a time rather than large scale burning from the containment line.

5.5.2 AN EARLIER START TO THE POWERLINE TRAIL?

531. Counsel Assisting invite Your Honour to rely on Bartlett's evidence to conclude that the back burning process could have commenced

[230] Joint Submission; p27
[231] Joint Submission, p.27; Crawford T4463, T4530
[232] Cheney T358
[233] Cheney T359
[234] Cheney T361

earlier than 11th January.[235] Bartlett's suggestion being that burning could have been started from the eastern end of the Powerline trail, which was straighter, while the western end of that trail was being completed.

532. As noted earlier it was not only a matter of completing the construction of the trail down to the river, but also the existing parts of the Powerline trail had to be prepared for safe use by fire crews and vehicles. Both those tasks obviously required the use of resources. If large scale burning had been commenced from the eastern end of the Powerline trail, having regard to the condition of the fuel and the potential change of the weather conditions, substantial resources would have been required to ensure that the back burning did not become uncontrollable, and thereby add to the wild fire.

533. Crawford in agreeing with Counsel Assisting that one of the important factors in a back burn of the size involved was getting the area burnt out before the bad weather arrived stated:

> *"But with the proviso that once you light it, you can hold it. There was no use rushing and putting it in because you had good weather. If you're going to lose it, you've lost it. So there was other issues to consider as well."*[236]

534. Other issues included resources and when asked by Counsel Assisting whether on 9th January she had "*everything you needed*", Crawford reported:

> *"No. The morning of the 9th, a number of us were ringing up trying to get other dozers. It was taking a long time to actually have people who had dozers to get them in. For the burn, we needed more aircraft than what we had. We were trying to get*

[235] Para 1191
[236] Crawford T4465

more aircraft. You need to have crews on the ground so that you can actually contain the burn. So it was trying to get enough crews to do it as well."[237]

535. No evidence has been adduced by Counsel Assisting to show what resources would have been required to undertake all the tasks simultaneously along the Powerline trail and that those resources were available. We again stress to Your Honour the fact that this was not the only fire that was being dealt with by NSW agencies. More particularly, the Powerline trail 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 10th January. In our submission, Your Honour must, with respect, have regard to the "*total picture*" and not only to sections of the McIntyre's Hut fire, when considering what should or could have been done to contain it.

536. In our submission the IMT was quite justified in using the resources it had to concentrate on the western half of the Powerline trail because that was the point closest to the fire front. Cheney's fire spread maps for 10th, 11th, and 12th January support this point.[238] It would have been of little use to anyone if the back burning process had been commenced on the eastern end of the Powerline trail, only to have the fire escape across the western end of that trail.

537. We note that Roche in his Report stated that the back burning did not commence until all the containment lines had been completed and that "*added significantly to the time needed to complete the strategy."*[239] That statement is of course incorrect, as Crawford's evidence is that back burning commenced along the southern

[237] Crawford T4466
[238] Cheney AFP.AFP.0099.0007, pp50, 51 & 52
[239] Para 439

containment line before the northern containment lines had been completed.[240]

5.5.3 THE RISK TO FIRE FIGHTERS

538. Counsel Assisting have submitted that Arthur's concerns "*overstated*" the risk to fire fighters of commencing burn-out operations along the Powerline trail.[241] Counsel Assisting rely on Bartlett's evidence to support that submission.

539. This is a remarkable submission to find in an inquest. It is usually submitted that those facing criticism did not pay *enough* attention to safety, as a result of which people died. Instead, we find the submission from Counsel Assisting, no less, that a senior and experienced fire fighter *overstated* the risk to fire fighters. That is, he overemphasised safety and the lives of those for whom he was responsible.

540. The evidence that Your Honour is asked to prefer is that of Bartlett. He is an experienced fire fighter, and nobody could question his experience or expertise. But so, too, is Arthur. His CV is in evidence before Your Honour. Nobody could question his experience or expertise either.

541. This is not a case where one witness clearly understands an issue and the other does not. Both understood the problem. They weighed the scales slightly differently – but that does not mean that Arthur got it wrong.

542. Matters of judgment arise all the time. Two people can legitimately disagree on that judgment, yet both judgments may fall within the

[240] Crawford T4528
[241] Para 1191

reasonable range of acceptable decisions. This concept is well known in the law, and we respectfully ask Your Honour not to fall into the trap of assuming with hindsight that Arthur must have got it wrong and Bartlett must therefore be preferred.

543. Bartlett's evidence is that he was concerned to protect the assets in the ACT, particularly the pine forests which would have been impacted by the fire if it crossed the Powerline trail. He was therefore concerned to commence the back burning operations along that trail as early as possible. Bartlett has stated that at the meeting on 10th January, his opinion as to when and where the back burning operation should commence was not the only opinion that Arthur, as the Incident Controller, had to consider in making his decisions. Bartlett gave evidence that others present at that meeting expressed differing views based on their experiences.[242] Bartlett also acknowledged that there were factors which needed to be considered in the final decision, including the need to ensure the safety of firefighters.[243] In response to the question that Arthur weighed up all the matters in issue, including Bartlett's point of view before making his decision, Bartlett stated: "*That's right. I fully accept that an incident controller at the end of the day is the person who has to make the decision taking into account all facts. They also then have to be prepared to stand by their decisions."* [244] Bartlett also conceded that Arthur's judgement was not an unreasonable one although different people may make different judgements.[245]

544. In our submission, having regard to Bartlett's evidence, it is quite clear that Arthur's decision as to when and where to commence the back burning was made after due consideration of all the information and points of view available to him. Arthur did not only have the responsibility for trying to contain the fire but also, and in our

[242] Bartlett T6033
[243] Bartlett T6035
[244] Bartlett T6037
[245] Bartlett T6038

submission most significantly, he had the sole responsibility for ensuring the safety of the fire crews who were to implement the containment strategy. In our submission the fact that no fire fighters were killed or seriously injured vindicates Arthur's decision to ensure not only that adequate resources were available but also the manner in which the back burning was implemented.

545. We further submit that Your Honour cannot, with respect, infer that because no fire fighters were killed or seriously injured that therefore Arthur's concerns regarding the safety of fire fighters was overstated. Such an inference would be based on hindsight and therefore, of no assistance to Your Honour in determining the appropriateness of Arthur's concerns.

546. In any event, in our submission the safety of fire fighters cannot be ever "*overstated*". In our submission the principles of work place safety apply equally to the fire ground as to any other place. As recognised by the Victorian State Coroner in his report into the deaths of five firefighters at Linton on 2 December 1998, one of the factors which can impact on safety is the firefighter focussing on "*getting the job done"*. It is clear from the evidence of Bartlett and Cooper that they were focussing on "*getting the job done*", knowing that they would bear no responsibility if a firefighter had been killed or injured if their views had been adopted because they were not in charge of running the fire. Indeed the fire was not even in their jurisdiction.

547. On the other hand, Arthur was in charge of running the fire and therefore, had a responsibility to ensure that any risk to the firefighters had to be reduced as much as possible. He therefore quite properly assessed the potential risks to the firefighters to be deployed and ensured that sufficient resources were available to protect those firefighters. As Arthur stated: "*Unless I had the resources to support and back those men, I was not prepared to start any burning*

whatsoever along the trail. That was my responsibility, sir, not Mr Cooper's."[246]

5.5.4 THE 10 JANUARY PHONE CALL

548. Counsel Assisting have referred in their submissions to the fact that on 10th January Arthur received a call from a senior RFS officer while he was in the meeting with Bartlett and others. He states that after Arthur came back to the meeting he agreed to commence the back burning operations almost immediately. Counsel Assisting infer that Arthur only agreed to commence the back burning operation after he had been instructed to do so by that senior RFS officer.[247] In our submission that inference is not only unfair but contrary to the evidence before Your Honour, including the narration of the evidence by Counsel Assisting.[248]

549. As noted above Arthur's evidence is that he was not prepared to commence the back burning until he had sufficient resources, especially aircraft to ensure the safety of the fire crews. He attended a meeting at Jindabyne on the morning of 10th January to discuss strategies for managing all the fires in southern NSW and to obtain the resources for the containment strategy at the McIntyre's Hut fire.[249] The person who telephoned him while he was in the meeting in Queanbeyan was Fitzsimmons, a senior RFS officer, who advised Arthur that the aircrafts, including the skycrane would be available the next day. Crawford's evidence is that the arrival of the sky crane on the morning of the 11th January was delayed until about 11:00am due to fog. However, once it arrived the back burning was commenced.[250]

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[246] Arthur T4573
[247] Para 1191
[248] Paras 511 & 512
[249] Arthur T4573
[250] Crawford T4476 - 4477

5.5.5 OTHER ISSUES

550. We note that no evidence has been adduced by Counsel Assisting as to what difference it would have made to the containment of the fire, having regard to the fact that all the containment lines were breached on the night of 17th January and 18th January, by commencing the burn-out from the eastern end of the Powerline before 11th January. We note that the IMT had fully implemented its adopted strategy along the southern, eastern and northern containment lines and continued to deepen the burn by 8:00 pm on 15th January.[251]

551. As regards the submission by Counsel Assisting that there was an *"absence of committed investigations of eastern and western containment lines"*[252] we refer Your Honour to our earlier submissions. Suffice it to say, that as regards the eastern containment line, there is ample evidence that a strenuous effort was made to contain the spot fires on Baldy Range trail so that it could be used as the eastern containment line. Assuming that the Baldy Range spot fire had been successfully dealt with by 13th January, the Baldy Range trail could not have been used as a containment line until that date. Accordingly, any back burning from that trail could not have been commenced until 13th January due to safety reasons and the availability of resources to undertake the back burn as opposed to trying to contain and extinguish that spot fire.

552. As regards the western containment line, the evidence is that the IMT gave priority to where the fire was heading and therefore posed the most immediate threat. Furthermore, the evidence is that the Goodradigbee River contained the fire for almost 10 days. No evidence has been adduced by Counsel Assisting to show that a choice of a different containment line on the western side of

[251] Crawford T4477
[252] Para 1192

McIntyre's Hut fire would have been anymore successful in containing that fire.

553. As noted earlier, no criticism was made by Counsel Assisting of the adoption of the Powerline trail as a containment line. Accordingly, in our submission, the factors which determined the speed at which the back burn could have been undertaken along the Powerline trail would still have been present even if the western and eastern containment lines suggested by Counsel Assisting had been adopted.

554. Putting this last point succinctly: the debate about the western and eastern containment lines is *completely irrelevant* to the question of how long it took to burn out the contained area. That was driven by the need to prepare the whole of the Powerline trail. Until that was done, no burning could start.

5.6 AERIAL INCENDIARIES

555. In three relatively short paragraphs under this heading, Counsel Assisting have managed to misstate the law, misstate the facts, and propose formal findings to Your Honour that not only have no factual basis but which are directly contrary to the evidence. NSW does not make this criticism lightly. But the errors are very serious in this part of the submissions of Counsel Assisting and, with the greatest of respect to them, the submissions have to be rejected in their entirety.

556. In making these egregious errors, Counsel Assisting have also managed to make the issue of aerial incendiaries into something far bigger than it deserves to be. The submissions in response should not be taken as agreeing that the use of aerial incendiaries was a major issue.

557. Plainly on the facts it was not, and it does not deserve either the extravagant language from Counsel Assisting in putting their submissions, nor the extensive response that is inevitably required in the present submissions. It was only a small part of the firefighting effort, and ultimately deserves to be treated as such by Your Honour.

5.6.1 MISSTATING THE LAW

558. In paragraph 1194 Counsel Assisting propose that the aerial ignitions constitute "*ignitions of the fire independently of the main fire*" and hence are "*directly relevant to Your Honour's jurisdiction*". This is wrong as a matter of law.

559. It has already been submitted that Your Honour's task is to find the cause and origin of the fires *in the ACT*.

560. It is not Your Honour's task to find the origin of individual fires in NSW. The origin of the fire that entered the ACT on 18 January was NSW. Where it originated in NSW is irrelevant to Your Honour's jurisdiction.

561. Similarly, once it is established that the aerial incendiaries "*coalesced with the main fire*" (as Counsel Assisting specifically state at the end of 1194), the incendiaries cease to be a "*cause*" of the fire in any legal sense.

562. We can test these submissions very easily. Counsel Assisting has not suggested that every burning-out operation along the Powerline Trail is an independent source of the fire that ultimately burnt into Canberra. On their logic, however, each firefighter with a torch became a cause and origin of the fires that struck Canberra. Each of those fires was a separate ignition source of fire. The evidence is clear that spotovers occurred all along the containment lines, including the areas burnt out by these firefighters. Therefore, according to Counsel Assisting's logic, Your Honour should be treating each firefighter's torch over a period of about a week as a separate cause and origin of the fires that burnt into Canberra.

563. Such a proposition is clearly absurd. There was a fire burning in the McIntyre's Hut area. As part of the process of fighting it, fires were lit to burn out areas ahead of the fire to try to control it. None of these is a separate "*cause and origin*" of the fire that burnt into Canberra. They are part of a process, as described by the Supreme Court in *R v Doogan*, that resulted in the fires reaching Canberra on 18 January.

564. One can speculate, of course, that Counsel Assisting included this gratuitous and unique reference to Your Honour's jurisdiction because they recognised that most of what they had submitted was not legally relevant to Your Honour's jurisdiction at all. By trying to cloak the aerial incendiaries in the language of "*independent ignitions of fire*",

they were sliding around the problem that their submissions otherwise were not legally relevant to the cause or origin of fires in the ACT. We respectfully ask Your Honour not to fall into the legal error proposed by Counsel Assisting.

565. In our submission the use of aerial incendiaries as part of the containment strategy is of no greater significance than the other strategies used. We further submit that Counsel Assisting have expressed the submission at paragraph 1194 so as to give the use of aerial incendiaries a heightened importance in the Inquiry that it does not deserve and is not supported by the evidence before Your Honour.

5.6.2 THE EVIDENCE: THE CONTEXT OF THE DECISION

566. The IMT's decision must be seen in context of what they were trying to achieve. Crawford and Arthur have both stated that the plan was to deploy the aerial incendiaries along the ridge tops and to allow the fire to burn down the slopes. The consequence of this was to stop the upslope run of fires and thereby stop the potential for those fires to spot over the ridge tops.[253]

567. Counsel Assisting refer to Cheney's evidence that the aerial incendiaries should have been dropped in the late evening around the westerly aspects so those fires would link up overnight without creating too much convective interaction. Counsel Assisting then refer to Crawford's agreement with Cheney's proposal.[254]

568. Crawford's response in agreeing with Cheney's proposal must be seen in light of her earlier response to Counsel Assisting's suggestion

[253] Crawford T4499; Arthur T4605
[254] Para 800

that the aerial incendiaries should be dropped at the bottom of valleys so that even at night they will burn in an uphill run. Crawford stated:

> "*You wouldn't be dropping them at night. You wouldn't have the aircraft to do it in the dark. What you would do is try and burn them out in the late afternoon, which is what we were trying to do on the 16th. You drop them on the ridge tops. They burn out the ridge tops. You work out how quickly you want to burn it out. In your plan you put how long you want it to take to burn out; you want to do it in as quick a time as possible. You drop them along the ridge tops, they burn out the ridge tops and then they work their way downslope. So it is a backing fire downhill. Once that stops any run of fire uphill, the hills are already burnt out."*[255]

569. Cheney's evidence is that helicopters would probably be used as it would have been "*a bit risky in that area*" to use fixed wing aircraft to drop the aerial incendiaries.[256] No evidence was adduced by Counsel Assisting to show that helicopters could have been used to deploy the aerial incendiaries at night and therefore that Cheney's proposal was a feasible one. Crawford's evidence is that none of the aircraft available to the IMT could undertake aerial incendiary operations at night.

570. That being so, Cheney's proposal could not have been implemented. In our submission it is of little value to Your Honour to have Cheney proffer suggestions as to what should have been done, if they are no more than theories, which could not have been implemented.

[255] Crawford T4499
[256] Cheney T384

5.6.3 THE EVIDENCE: WHEN COULD IT START

571. Evidence by Crawford and Arthur is that the aerial incendiary operation could not have been undertaken until 16th January because the back burning from the containment lines had not been made deep enough until then.[257]

572. Furthermore, there is evidence that aerial incendiaries were simply not available at an earlier date. In response to Counsel Assisting's question as to whether there was an explanation as to why there was still a problem on 15th January about the availability of aerial incendiaries when they were aware on the 8th that they would be required, Arthur stated: "*That was just it, the availability of them. There was a high demand for these devices right throughout the bottom of the state. Everybody wanted to use them."* [258] A little later Arthur states: "*"the logistics - sir, may I point out that the logistics organisation was searching everywhere to obtain those items. There is only a limited stock of the things kept in this country."*[259]

573. Therefore, despite their best efforts, by the time the aerial incendiaries were available late on 16th January the weather was not suitable and it was too dark to deploy them.[260] Accordingly, the only opportunity that the IMT had to deploy the aerial incendiaries was on the morning of 17th January.

5.6.4 THE EVIDENCE: SPOT FIRES FROM AERIAL IGNITIONS

574. Counsel Assisting's submission that spot fires were caused by the fires ignited by the aerial incendiaries is made without any evidence of such spotting having occurred and ignores evidence to the contrary.

[257] Crawford T4483; Arthur T4605
[258] Arthur T4603
[259] Arthur T4604
[260] Arthur T4604

575. Counsel Assisting rely on the section 44 Report to support their submission, which is relevantly reproduced at paragraph 802 of Counsel Assisting's submissions.

576. We draw Your Honour's attention to the last sentence which states:

> "*On return, the AI navigator advised the IMT that he had observed considerable fire activity with rapid upslope runs high flame heights and spotting outside the AI area on the northern and middle areas of the eastern containment line where the back burns had been put in place*."

577. The first thing to note is that the AI navigator does **not** say that the fire behaviour, flame heights or spotting *refer to the fires ignited by the aerial incendiary ignitions*.

578. Counsel Assisting have misconstrued the words "*spotting outside the AI area*" as meaning that the spot fires originated from the aerial incendiary ignitions. Those words must be read in context of the whole sentence. What the navigator observed was spotting occurring from where the back burns had been started, which was outside the AI area. Furthermore, there is no reference that any spotting that was observed fell outside the containment area.

579. That Counsel Assisting's interpretation is wrong is supported by Crawford's evidence. When asked by Counsel Assisting what the effect of the incendiaries that were being dropped was to her knowledge, Crawford stated: "*They would have burnt out the ridge tops but the aerial incendiary program did not get completed. They did not do all the area. As the aerial incendiary report that was done said, by the time they had finished there had already been large smoke put up from areas that had not been treated and runs up*

towards the tops of ridges had already started in those areas that weren't treated."[261]

580. In our submission, the quote from the section 44 Report does not support Counsel Assisting's submission that spot fires were thrown from the fires ignited by the aerial incendiary drops. Furthermore, there is no reference in the quote that the fires started by the aerial incendiaries coalesced with the main fire, although one can assume that it is what in fact happened.

581. We further note that although Counsel Assisting have given great importance to the deployment of aerial incendiaries, no evidence was obtained either from Scott Seymour or Matt Dando, the bombardier and navigator respectively, who undertook the operation. Both officers were available to give evidence if required. It is frankly astonishing that Counsel Assisting would make such an extravagant submission about the aerial incendiaries without having called evidence from the two people who actually conducted the aerial drops and who witnessed first-hand where exactly they were dropped and the effect of the incendiaries.

582. Nor was evidence adduced by Counsel Assisting to show that spot fires did occur from the area affected by the aerial incendiary ignitions. Cheney's evidence is that "*while I don't know where these spot fires came from, I believe it was reported around 1400 hours that these were starting to get spot fires into the Dingo Dell area in that vicinity*."[262] Not only does Cheney not know where the spot fires came from, but also his knowledge that spot fires occurred in the Dingo Dell area is based on his "*belief*".

[261] Crawford T4502 - 4503
[262] Cheney T384

5.6.5 THE EVIDENCE: CHENEY'S REPORT

583. Counsel Assisting state at paragraph 947 of their submissions that the evidence concerning the fire behavior of the McIntyre's Hut fire on 17 and 18 January "*is largely uncontentious and is conveniently summarised in the report by Cheney as set out below*." With respect to Counsel Assisting, we do not accept that Cheney's evidence as to the impact of the aerial incendiary drops is "*uncontentious*."

584. In respect of the McIntyre's Hut fire on 17 January 2003, the following is quoted from Cheney's report:

> *"During the morning the fire perimeter in the northern block of unburnt fuel expanded down slope slowly… after 1345 hours severe fire behavior resulted from the aerial ignition with rapid upslope spread and crown fires on western aspects. This fire behavior most likely caused spotting to the east of the containment line in Dingo Dell flats and the subsequent breakaway along the eastern containment line."*

585. Cheney's report on this issue contains no factual basis for the assertion that there was *"rapid upslope spread"* resulting from the aerial ignitions.

586. The only evidence before Your Honour is Crawford's evidence of what was contained in the navigator's report. No mention was made by Crawford of the navigator reporting the aerial incendiary ignitions making "*rapid upslope spread*" as stated by Cheney. Crawford's evidence is that the navigator was referring to the fire behavior in areas "*that had not been treated."*[263]

[263] Crawford T4502

587. In response to Counsel Assisting's suggestion that the dropping of aerial incendiaries added to the intensity of the existing fire, Arthur responded:

> "*No not necessarily. When you do an incendiary run with the trained operators that we used, it was down to ridge tops. As I think I explained yesterday, the attempt is to burn off the ridge tops and then make the fire fall over the sides. We don't drop it on the downslopes so that they can come up. It adds fire into the area.*"[264]

588. And, of course, the submission already made about the failure to call evidence from the navigator and bombardier of the plane is also relevant here. Why were they not called to give evidence? If the incendiaries were causing spotfires, one might expect aerial observers at the time to be able to see that.

589. Furthermore, the evidence of both Crawford and Arthur is that the incendiaries were dropped along the ridge tops and only along a small part of the unburnt area. If the aerial incendiaries were dropped on the ridge tops, then how could the ignitions from those drops make "*rapid upslope spread*" as stated by Cheney? They simply could not have done so because they would have burnt downslope from the ridge tops.

590. Cheney can only have made his statement on the assumption that the incendiaries were dropped in the gullies or well below the ridges. That assumption is obviously based on his own theory that the incendiaries should be dropped "*towards the bottom of ridges*."[265]

591. In respect of the spotting activity Cheney states, "*this fire behavior most likely caused spotting to the east of the containment line*….".

[264] Arthur T4605-4606
[265] Cheney T383

Yet in his evidence Cheney states "*I don't know where these spot fires came from*."[266] Clearly on the basis of Cheney's own oral evidence the statement in his report is contradicted.

592. We submit that Cheney's oral evidence is to be preferred. Accordingly we submit that there is no evidence as to where the spot fires at Dingo Dell came from and how the breakout of the eastern containment line occurred. Furthermore, in the absence of any evidence of spotting having occurred from the areas in which aerial incendiaries were dropped, Cheney's opinion that the "*aerial ignition caused the fire to breakaway earlier than if it had not been done*"[267] is made without any fact to support it and therefore, Your Honour should disregard it.

593. In our submission, a more probable cause of the spot fires into the Dingo Dell area was the intensive fire activity on the middle and northern parts of the eastern containment line that was observed by Dando and Seymour at approximately 1345 hours.[268]

594. On the basis of all the available evidence, or lack there of, we submit that Your Honour cannot, with respect, conclude that any spot fires were caused by the aerial incendiary ignitions.

5.6.6 THE EVIDENCE: CAUSAL CONNECTION

595. At paragraph 1195 of their submissions, Counsel Assisting concede that there is insufficient evidence on which to conclude that had the aerial incendiaries not been deployed on 17th January, that the fire that reached Canberra on 18th January would have arrived any later or would have been any less fierce.

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[266] Cheney T384
[267] Para 804
[268] Crawford T4502

596. In our submission, there is not merely "*insufficient*" evidence but in fact there is no evidence, other than that of Crawford and Arthur, as to the impact of the fires ignited by the aerial incendiaries on the intensity and behaviour of the fire, which impacted on Canberra.

597. Counsel Assisting submit that it is open to Your Honour to conclude that if the aerial incendiary had been deployed on the afternoon of 14, 15 or as late as 16 January "*the fire would not have burned into Canberra on 18 January with the speed and intensity described by Mr Cheney or at all*."[269]

598. Arthur and Crawford have stated that the earliest that the aerial incendiaries could have been deployed was 16th January. That is when all relevant containment lines had been completed and sufficient deepening of the back burns had occurred.[270]

599. In our submission Counsel Assisting have provided no basis for their suggestion that the aerial incendiaries could have been deployed on 14th or 15th January. 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 the aerial incendiaries would have been contrary to established procedure in undertaking such an operation. No evidence has been provided by Counsel Assisting to show either that if their alternate containment strategies had been adopted that the back burns would have been completed by 14th or 15th January, or that the aerial incendiaries could have been obtained on either of those two days.

[269] Para 1195
[270] Arthur T4605, Crawford T4450, T4483 & T4485

5.6.7 THE EVIDENCE: THE "FIRE"

600. We note that Counsel Assisting refer to "*the fire*" impacting on Canberra. It is unclear to us what Counsel Assisting mean when they refer to "*the fire*".

601. The narrative in their submissions refers to the McIntyre's Hut fire. Cheney's evidence relates not only to the McIntyre's Hut fire but also the "*tongue*" of fire, which came through between the McIntyre's Hut fire and the Bendora fire to the south. Cheney's evidence is that those three fires merged at approximately 1445 hours on 18th January and then impacted on Canberra suburbs later that afternoon.[271]

602. The areas where the aerial incendiaries were to be deployed are the unburnt areas within the fire perimeter shown on Cheney's fire spread map for 0900 hours on 17th January.[272] The area where the incendiaries where deployed is in the north eastern part of the larger unburnt area shown on that map.

603. It is of course nonsensical to suggest that the deployment of aerial incendiaries would have had any impact on the speed and intensity of the Bendora fire.

604. In respect to the "*tongue*" of fire, which originated according to Cheney somewhere near the Goodradigbee River south of the Powerline trial, Cheney's evidence is that it was driven by extremely strong surface winds induced by the convective activity of the McIntyre's Hut fire to the north and the Bendora fire to the south.[273] Cheney has also stated that the joining of the fires added to the intensity of the burn by increasing the spread of the fire between the

[271] Para 3.7.1.3, p 345
[272] AFP.AFP.0009.0007, p 61
[273] Para 3. 7. 1. 3, p 345

established patterns of the Bendora and McIntyre's Hut fires, which surprised him.[274]

605. Cheney did not expect the intensity of the fires to increase when they joined to the extent that it did, particularly the intensity of the fire that travelled between the McIntyre's Hut fire and the Bendora fire.[275] In Cheney's opinion, the fire that travelled between the McIntyre's Hut and Bendora fires travelled three times faster than he previously thought possible.[276]

606. No evidence has been adduced by Counsel Assisting to show what impact deployment of aerial incendiaries in the relevant areas would have had on the behaviour and intensity of the "*tongue*" of fire.

607. If therefore, Counsel Assisting include in their reference to "*the fire*" at paragraph 1195 of their submissions the "*tongue*" of fire, then they are not entitled to make the submission that they do. There is simply no evidence to support such a submission and therefore, no evidence on which Your Honour can draw the conclusion, which Counsel Assisting would have you draw.

5.6.8 THE EVIDENCE: BREACH OF CONTAINMENT LINES

608. Cheney and Roche have both stated that irrespective of whether the aerial incendiaries had been used, the eastern containment line of the McIntyre's Hut fire would have been breached on 18th January because of the severe weather conditions.[277]

[274] Cheney T510
[275] Cheney T511
[276] Cheney T513
[277] Cheney Report DPP.DPP.0008.0051; p 23; Roche Report DPP.DPP.0009.0001, p 118

609. As noted earlier, Arthur's evidence is that containment lines at every fire in southeast NSW was lost on 18th January.[278]

610. Cheney's evidence is that as early as 800 hours on 18th January he was of the opinion that nothing useful could be done to fight the fires.[279]

611. Crawford's evidence is that the navigator who undertook the aerial incendiary operation reported severe fire behaviour in the areas where the back burns had been lit.[280] There is also evidence that areas that were thought to have been extinguished along the Powerline trail began to flare up on 17th January.[281]

612. Having regard to the foregoing evidence, in our submission, even if the relevant areas had been burnt out by use of aerial incendiaries, it is more likely than not that the eastern containment line of the McIntyre's Hut fire would have still been breached on 18th January.

613. Accordingly, Counsel Assisting's assertion that if those areas had been burnt out, the McIntyre's Hut fire would not have reached Canberra "*at all*" is without basis and contrary to the evidence referred to above. Most notably no evidence was adduced by Counsel Assisting to support the submission made by them.

5.6.9 THE EVIDENCE: WAS IT THE RIGHT DECISION?

614. Counsel Assisting submit that on the basis of evidence by Cheney and Roche the decision by the IMT to deploy the aerial incendiaries on 17 January was "*probably the wrong one".* [282]

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[278] Arthur T4610
[279] Cheney T514
[280] Crawford T4502
[281] Crawford T4531
[282] Para 1194

615. Crawford and Arthur have both given evidence that after discussing intently whether or not to use the aerial incendiaries on the morning of 17th January, they felt they had no option but to carry out the operation.[283] It was decision made by the IMT. *"I don't think we had any option but not to do it. We had to give it a try. It has going to make runs and jump if we didn't do it. So by doing it all we were doing was trying to stop that happening. We weren't going to be any worse off.*"[284] Cheney's evidence is that the IMT was "*between a rock and a hard place about what they could do."*[285] Roche has acknowledged that *"it was an extremely difficult decision"* to make.[286]

616. Roche has stated that after thinking "*long and hard about that decision*", he came to the conclusion that he would not have made the decision to use the aerial incendiaries.[287] Unlike Roche, the IMT did not have the benefit of unlimited time or the benefit of hindsight to consider what decision to make. The IMT had to make a decision in respect of which both Crawford and Arthur have stated they did not have any choice.[288] As Arthur stated: "*We really only had two alternatives left. One was to do nothing and hope that the thing wouldn't come out – I don't believe that was an alternative. To do nothing is not an alternative in this instance.*[289] A little later he stated: "*If we did nothing, we would be equally damned*."[290]

617. Cheney's evidence relates to what ought to have been done and how and when the aerial incendiaries should have been deployed. While acknowledging that the IMT had a difficult decision to make, Cheney does not state that it was the wrong decision. Indeed, Cheney's evidence is that it "*didn't really matter*" whether or not the aerial

[283] Crawford T4501; Arthur T4605
[284] Crawford T4501
[285] Cheney T385
[286] Roche T7385
[287] Roche T7385
[288] Arthur T4605
[289] Arthur T4605
[290] Arthur T4605

incendiaries had been deployed as to the likely behaviour of the fire in the relevant area during 17th January.[291]

618. Whether or not the decision by IMT was "*wrong*" is clearly a matter of opinion. In our submission Your Honour ought to prefer the evidence of Crawford and Arthur, as to why they made the decision to deploy the aerial incendiaries having regard to the time pressures and other circumstances they faced at the time they made their decision, rather than that of Roche and Cheney.

619. In our submission, having regard to all the circumstances, it is open to Your Honour to conclude that the deployment of the aerial incendiaries at the time it was done was not *"wrong*" but rather that it was the only option that was available to the IMT.

[291] Cheney T384 - 385

CHAPTER 6

6 PROPOSED FINDINGS

6.1.1 COUNSEL ASSISTING'S PROPOSED FINDING

620. In our submission, having regard to our preceding analysis of the various issues raised by Counsel Assisting, there is –

(a) no jurisdiction to make the proposed formal finding about the cause and origin of the McIntyre's Hut fire at par 265(a); and

(b) either no evidence or insufficient evidence to support the proposed findings that Your Honour is asked to make at paragraph 5.5.8 of the submissions by Counsel Assisting.

621. As to the formal findings, at the end of this part of the submissions we set out a formal finding which Your Honour patently does have jurisdiction to make, given Your Honour's task under s.18 of the Coroner's Act.

622. As to the other findings proposed by Counsel Assisting, they suffer from two vices.

623. First, they plainly lie outside Your Honour's jurisdiction as a matter of law. The "cause and origin" of a fire in the ACT could not, as a matter of law, extend to causes that relate to the activities of NSW government agencies, applying NSW law, fighting a fire within the territory of the State of NSW. Furthermore, even within the broader scope of the "cause" of a fire within the ACT, the proposed finding

about the strategy adopted at Queanbeyan on 8 January 2003 lies outside the concept of the "cause" of a fire that burnt into Canberra on 18 January 2003.

624. Second, as a matter of evidence, the proposed findings are simply not supported by the evidence, notwithstanding the submission of Counsel Assisting that they do.

625. Without repeating all the previous submissions, it is enough to note in summary that the alternative approaches to which they refer, are approaches, which have been clearly made with the benefit of hindsight. No evidence was provided as to whether the suggested alternatives could be achieved in reality. No analysis was undertaken either by Counsel Assisting, Cheney or 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. While Counsel Assisting have made much of the IMT not setting a timeframe for completing its containment strategies, it is notable that Counsel Assisting provided no timeframes for the alternative strategies.

626. In the absence of a proper analysis of all the factors having been undertaken by Counsel Assisting, in our submission, there is simply no evidence to support his assertion "*that it was likely that the control lines would have been completed and burnt to sufficient depth to undertake any remaining burning-out by aerial ignition on 14 January or 15 January at the latest*."[292] Furthermore, Counsel Assisting have adduced no evidence to show that aerial incendiaries could have been obtained by 14th or 15th January.

627. Counsel Assisting submit that if their alternative approaches had been adopted and completed by 14th or at the latest 15th January, then the

[292] Para 1196

events referred to in subparagraphs (a) to (d) inclusive of paragraph 1196 of their submissions would have occurred. In our submission, there is either insufficient evidence or no evidence to support the assertions made by Counsel Assisting in subparagraphs (a) to (d).

628. We do not propose to reiterate our previous arguments in respect of each assertion but draw Your Honour's attention to some salient facts. As to subparagraph (a), Crawford's evidence is that no planes were available to the IMT, which could undertake night operations. Therefore, the aerial ignitions could not have been undertaken in the evening as asserted by Counsel Assisting. The only evidence on which Counsel Assisting rely as to how the unburnt area could have been burnt out by using aerial incendiaries is that of Cheney. Cheney's evidence is that the incendiaries would be dropped on bottom of ridges on the westerly slopes and the ignitions would allow the fire to run upslope.[293]

629. While reference is made to the likely weather conditions in which these ignitions would have burnt, what is not referred to is the extreme drought conditions and the state of the fuels then prevailing. In our submission, having regard to the evidence of how the fires behaved in the drought conditions,[294] Your Honour cannot be certain that the aerial ignitions at the bottom of gullies would not have made strong upslope runs even in milder weather conditions, and thereby resulting in spotovers. Furthermore, it is only an assumption on the part of Counsel Assisting that all of the unburnt areas would have been burnt out before the onset of severe weather conditions.

630. As to subparagraph (b), as previously stated, there is no evidence before Your Honour that the aerial ignitions undertaken on the morning of 17th January either intensified the existing fire behaviour, or that any spotting occurred from the areas in which the aerial

[293] Cheney T383 – 384; Cheney Report DPP.DPP.0008.0051; p 22
[294] Crawford T4523 & T4481

incendiaries were deployed. Accordingly, Your Honour cannot, with respect, be satisfied to the requisite standard that any spotting did occur from areas in which aerial incendiaries were deployed.

631. As to subparagraph (c), the assumption is that spotovers only occurred from areas affected by aerial incendiaries. We have previously referred to evidence of severe fire behaviour in areas where back burns had been undertaken. It is also a fact that fire was burning along much of the south-eastern containment line, which could have easily resulted in spotovers.

632. Furthermore, there is simply no evidence to support the assertion that any breakouts that did occur "*are likely to have been less extensive and more amenable to attack*." In our submission, the evidence of how the fires did behave on the evening of the 17th January and on 18th January when they could not be controlled even in open fields with little or no pasture, is more relevant to Your Honour, than simple assertions by Counsel Assisting of what was "*likely*" to have happened.

633. As to subparagraph (d) if Your Honour accepts our submissions that there is no evidence that the spot fires, which did occur across the eastern containment line, came from the areas impacted by the aerial incendiaries, then Your Honour cannot accept this assertion by Counsel Assisting. Furthermore, there is no evidence to support the assertions either that the fire, which impacted on Canberra on 18th January, would have been on a "*significantly smaller scale*" or that its spread towards Canberra would have started "*significantly later*."[295] As to the latter assertion, Counsel Assisting is obviously relying on Cheney's comment that the "*aerial ignition caused the fire to break away earlier than if it had not been done….*".[296] However, that comment is based on an assumption by Cheney that spot fires were

[295] Para 1196(d)
[296] Cheney Report DPP.DPP.0008.0051; p23

caused by the aerial ignitions. As noted above, not only is there no evidence to support the assertion that the aerial ignitions caused spot fires but Cheney also acknowledged that he did not know where the spot fires came from.

634. We also note that the reference to "*the fire*" in subparagraph (d) can only be a reference to the eastern part of the McIntyre's Hut fire. Even if Your Honour were minded to accept the assertion by Counsel Assisting, in our submission Your Honour cannot, with respect, draw any conclusions as to the speed of spread or intensity of the "*tongue*" of the fire or the Bendora fire which also impacted on Canberra almost simultaneously with the McIntyre's Hut fire. There is simply no evidence to suggest that those fires would have been any less intense if the aerial incendiaries had been deployed on either 14th or 15th January.

635. In our submission, having regard to our analysis of the issues raised by Counsel Assisting, and the evidence before the Inquiry, Your Honour cannot, with respect, make the finding that Counsel Assisting invite you to make at paragraph 1197 of their submissions.

6.1.2 NSW PROPOSED FORMAL FINDING

636. It has already been submitted that Your Honour has no jurisdiction to inquire into the cause and origin of the McIntyre's Hut fire as such. Therefore the proposed finding at 265(a) is not only outside Your Honour's jurisdiction, but it does not address the finding that Your Honour is empowered to make.

637. We therefore propose the following formal finding in substitution of the finding proposed at par.265 (a):

The cause and origin of –

(a) the fire which ignited on the border with NSW in the vicinity of Uriarra at approximately 12 noon on 18 January 2003, and

(b) the fire which ignited on the border with NSW in the vicinity of the Flea Creek near Mt Coree at approximately 2.30pm on 18 January 2003 –

was a fire which originated in NSW.

While it lies outside the jurisdiction of an ACT Coroner to make formal findings as to the cause and origin of a fire burning in NSW, it is noted that –

(a) the fires referred to above were part of the fire which was investigated by the NSW Coroner in September 2003;

(b) he found that that fire had its cause and origin in a lightning strike to a tree near McIntyre's Hut on the Goodradigbee River on the afternoon of 8 January 2003; and

(c) the evidence led in this inquest supports that finding.

The fire referred to in (a) burnt in a south-easterly direction and reached the western edge of Duffy at approximately 3.45pm on 18 January.

The fire referred to in (b) burnt in an easterly direction, joining with both the fire referred to in (a) and the Bendora Fire, and reached the western edge of Chapman at approximately 4pm on 18 January.

6.1.3 NSW PROPOSED FURTHER FINDINGS

Having heard evidence during this inquest of the history of the McIntyre's Hut fire in NSW between 8 and 18 January, it is 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 is 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.

However, any further findings by an ACT Coroner into the manner in which that fire was fought by NSW government fire fighting agencies in accordance with NSW law and within the territory of the State of NSW, lie outside the lawful scope of an inquest into the cause and origin of a fire within the ACT conducted under the Coroner's Act of the ACT.

Accordingly, no further findings are made in relation to the way the McIntyre's Hut fire was fought within NSW between 8 and 18 January 2003.

Accordingly, there is no power to make findings as to the circumstances of the fire, nor to comment or make recommendations, in respect of any matter arising from the efforts to fight the McIntyre's Hut fire between 8 and 18 January 2003 in NSW.