

ACT FIRES

JANUARY 2003

SUBMISSIONS ON BEHALF OF THE
AUSTRALIAN FEDERAL POLICE

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

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POLICE

1. PRELIMINARY MATTERS

1.1 Course of the Inquest

1.1.1 Before the taking of evidence on 7 October 2003 Your Honour gave leave to the Commissioner of the Australian Federal Police to be represented during the hearing.

1.1.2 During the Inquest only 4 officers of the Australian Federal Police were called by Counsel Assisting to give evidence before the Inquest. Those witnesses were:

- a) Mr. John Murray then Chief Police Officer for the Australian Capital Territory and Deputy Commissioner of Police, Australian Federal Police;
- b) Ms Mandy Newton, then Commander Operations Australian Capital Territory Policing, Australian Federal Police;
- c) Stephen Shaderick Kirby, then Sergeant of Police, Australian Capital Territory Policing, Australian Federal Police; and
- d) Jason Byrnes then Sergeant of Police, Acting Officer in Charge of the Tuggeranong Patrol, Australian Capital Territory Policing, Australian Federal Police.

1.1.3 A large number of statements were taken from members of the Australian Federal Police who were involved in the events of 18 January 2003 and the days leading up to the impact of the fires on Canberra. Those statements form part of the Inquest casebook upon which Your Honour will ultimately base your findings.

1.1.4 The Course of the Inquest is otherwise relevantly set out in the submissions of Counsel Assisting in Chapter 1 of the Submissions of Counsel Assisting and will not be repeated here. However, the range of issues that were of relevance to the Australian Federal Police during the Inquest was narrow. The findings of fact urged upon the Coroner by Counsel Assisting do not involve significant reflection upon the role of the Australian Federal Police during the 2003 Bushfires. Where Counsel Assisting in submission has addressed the role played by members of the Australian Federal Police during those fires, the findings of fact that are urged on the Coroner are, with only limited exceptions, supported by the Australian Federal Police.

1.2 Adverse Findings and Recommendations

1.2.1 As to the adverse findings urged upon Your Honour by Counsel Assisting in respect of the firefighting and warnings issued the Australian Federal Police makes no submissions.

- 1.2.2 As to the recommendations for administrative changes to emergency service structures have been urged upon the Coroner by Counsel Assisting the Australian Federal Police does not make any submissions. The Australian Federal Police will continue to work constructively with the ACT Government to implement any further changes to fire response arrangements that are considered necessary in light of any recommendations made by Her Honour.
- 1.2.3 Mr. Peter Dunn then ACT Emergency Services Authority Commissioner has written to the Coroner at considerable length outlining the considerable changes that have so far been implemented by the ACT Government and the Emergency Services Authority in the wake of the McLeod Report delivered in August 2003. It is noted that Counsel Assisting has submitted that “On the whole, the reforms seem ... to be a welcome and appropriate response to the issues identified during the course of the Inquest and the subject of our 2 April Submissions”.¹

1.3 Role of Australian Federal Police in the Coronial Investigation

- 1.3.1 Pursuant to a request made by the Coroner under section 63 of the Coroners Act 1997 the Australian Federal Police assisted in the investigation of matters relevant to the Inquest and Inquiry. The AFP investigators were tasked by the Coroner, Counsel Assisting and experts engaged by the Coroner to undertake relevant investigation. No direction was given by the command of the AFP as to how the investigation was to be conducted or what witnesses were to be approached.
- 1.3.2 Statements were provided by members of the AFP when requested by the AFP investigators forming part of the coronial investigation team.

1.4 Applications made to the Supreme Court

- 1.4.1 The Australian Federal Police was not a party to either the application made to Whitlam J in August 2004 or the application made to the Court of Appeal of the ACT Supreme Court in October 2004.
- 1.4.2 The Australian Federal Police acknowledges that the latter application significantly delayed the completion of the Inquest. However, no submission is made in respect of the suggestion made by Counsel Assisting that Your Honour recommend to the Attorney- General that the Coroners Act 1997 be amended in the terms set out at paragraph 104 of Counsel Assisting’s Submissions.

¹ Counsel Assisting Submissions 4 May 2006, para 3.

2. ROLE OF THE AUSTRALIAN FEDERAL POLICE DURING BUSHFIRE EMERGENCIES

- 2.1.1 Mr. Murray in his submission to the Coroner² outlined at length the role of ACT Policing in the management of large scale events and emergencies. That role was recognized in the Purchase Agreement then in place. Training and responding to actual events meant that many AFP members had by the time of the fires, gained substantial experience and skill in incident control. Command structures within ACT Policing reflected the importance of this role.
- 2.1.2 Over the last decade officers from ACT Policing have actively participated on Territory emergency management committees. At the time of the Fires the Chief Police Officer was the chair of the Emergency Management Committee which met every six weeks. Its primary function was to provide liaison between relevant agencies, organisations and persons in relation to emergency management.
- 2.1.3 In July 2001 the Chief Police Officer established an ACT Emergency Services Forum involving the Chief Executives of each emergency service and the Executive Director of the Emergency Services Bureau (ESB). The forum was designed to foster co-operation on policy, communications and training issues. The AFP was represented on sub-committees of the forum and chaired the policy and practices sub-committee. General training in emergency management had been encouraged within the ACT Policing. ACT members had attended training programs run by Emergency management Australia (EMA) and not long before the 2003 fires had participated with other ACT bodies in a disaster simulation exercise coordinated by EMA.
- 2.1.4 The AFP contributed to the development of the Emergency Plan³. Whilst the Emergency Plan did not contain a specific bushfire component, fires as a form of emergency event were given some prominence in that document. Otherwise, the principles of emergency management contained within the document were deliberately designed to be readily applicable to different types of emergency⁴.
- 2.1.5 By training, command structure and established protocol the AFP was well prepared to respond to the fire emergency that occurred in January 2003.

2.2 Police Responsibilities during a Fire Emergency

- 2.2.1 The exact division of responsibility amongst emergency services agencies in the event of fire was determined by convention rather than prescribed rule. The lead fire combat agency would command the incident according to its own internal

² AFP.AFP.0110.0001

³ ESB.AFP.0110.0602

⁴ ESB.AFP.0110.0602 at page 2,4

command and control structures with cross agency collaboration occurring by way of specific request to other agencies. The role of the police was to maintain order at the scene which, under direction from the lead agency, might have included putting in place road blocks, restricting access to or evacuating people from areas exposed to heightened risk⁵. If events required criminal investigation then that investigation would be conducted by the AFP⁶.

2.3 The 2001 Bush Fires

2.3.1 The extent of the 2001 bushfires has been canvassed in the submissions of Counsel Assisting and is not repeated here⁷. The fires had, in a less dramatic form, many of the features of the fires of 2003. The fires burned to the urban fringe and the AFP played a role amongst other things in controlling traffic and undertaking evacuations. A senior Police officer was stationed at ESB Headquarters at Curtin during the fire and performed an important liaison role.

2.3.2 After the fire the Emergency Management Committee undertook a review of the combined emergency services response. A Report was prepared by Mr. Lucas-Smith for the Chief Coroner Mr. Cahill. Both the review and the report to the Chief Coroner were positive in respect of the co-operation between agencies during the 2001 fires⁸.

2.4 Role of the AFP in Evacuations

2.4.1 In April 2001 the Australasian Fire Authorities Council published a position paper on *Community Safety and Evacuation during Bushfires*. The Senior Officers Group of the Australasian Police Ministers Council endorsed that strategy in the same year. ACT Policing does, and at the time of the 2003 fires did, support the objectives outlined in that document. Chief Police Officer Murray put the matter this way in his report to the Coroner:

In my opinion, the report outlines key issues for effective management of evacuations during bushfires including the development of:

- a national framework where the community takes responsibility for its own safety and property protection;
- local arrangements which:
 - provide adequate information that allows residents to understand the risks and consequences of staying or evacuating from their homes in a fire event;
 - help those who wish to leave;
 - encourage people to make an early decision to stay or leave in order to avoid panic stricken attempts to leave;
 - develop and implement strategies to manage people fleeing at the last minute;

⁵ Ibid page 9. See too M. Castle T 1801.

⁶ This outline of AFP responsibilities was agreed as accurate by Mr. Lucas-Smith T 1140.

⁷ Submissions of Counsel Assisting para 127 -129

⁸ M Castle T 1802.

- provide suitable support and welfare services during all phases of relocation;
- develop and foster an effective and reliable information flow between the emergency authorities and develop and implement strategies that support the safe return of able-bodied (sic) residents to their homes as soon as possible after the main fire had passed.

The Report suggested fire authorities would not advocate large scale evacuations as last minute evacuations were dangerous, and communities at risk should be allowed and encouraged to take responsibility for their safety, in cases where:

- adequate fire measures have been taken (including having defensible space and householder planning);
- people were able-bodied; and
- there was adequate warning time for people such as the very young, old, the infirm and those who feel they could not cope with the trauma of a fire, or those who have not taken sufficient measures to protect their homes, to safely leave.

While early return is listed as highly desirable as this reduces ember attack and subsequent loss of property, the strategy specified it must be safe for people to travel and to return to the fire-affected area. Fire authorities were to be the lead combat agency and should call evacuations with people only forced to leave their homes or areas when they were in imminent danger of death or serious injury. Although the report emphasised residents should choose the evacuation options that suited them, they should also have ready access to accurate information to assist and inform their decision making, with fire authorities providing advice to residents and determining the level of bushfire threat. It was, however, essential for the fire or incident controller to provide timely advice and to consult closely with police, the emergency coordinator and other support agencies⁹.

2.4.2 The AFAC position paper on evacuations was applied according to its terms during the 2003 bushfires. The key issues for the police in applying the policy was the lack of timely advice supplied by fire authorities to the AFP leading up to 18 January 2003 and the inadequacy of warnings to the Canberra public on the 18th of January 2003. These issues (so far as they relate to the role played by the AFP) are addressed in the submissions below.

⁹ AFP.AFP.0110.0015-16

3. ROLE OF THE AUSTRALIAN FEDERAL POLICE DURING THE 2003 BUSHFIRE EMERGENCY

- 3.1.1 The effectiveness of the AFP in responding to any emergency in which it was not the lead agency depended significantly on the quality of the information made available to it. Counsel Assisting has detailed at considerable length the process by which agencies and the general public were warned or briefed in relation to the dangers presented by the fires from the day they started to and including the 18th of January 2003. It is not intended to canvass that material in the same detail.
- 3.1.2 With only minor exceptions the AFP adopts the factual analysis of the warnings and briefing issues propounded by Counsel Assisting. In respect of the Cabinet Briefing of 16 January 2003 the AFP expressly adopts the analysis of Counsel Assisting in respect of the failure of Mr. Castle and Mr. Lucas-Smith not to involve the AFP in the Cabinet briefing and to inadequately convey to Mr. Murray and Commander Newton the content of the briefing to Cabinet during a separate briefing on the afternoon of the 16 January 2003:

6.7.4 AFP Not Informed

1. Similarly, while that risk could be spoken about at the Cabinet table and with the ACT Fire Brigade and ACT Ambulance Service on condition of confidentiality, it could not be revealed to anyone else who would have insisted that the public be informed. Thus, in a briefing later on 16 January for the AFP, commenced (sic) by Mr Castle but in which Mr Lucas-Smith later took the lead role, the evidence reveals that any risk to the urban area was not discussed. The Cabinet briefing paper used that morning (sic) discussion was not provided to the police members present. It may be that the fact of the Cabinet briefing was not even mentioned to the AFP, and while there was a discussion about the threat to rural property there was no discussion to suggest that ESB regarded the fires as an emergency. As has been outlined in the narrative, Mr Murray considered that information suggesting there was a risk to the urban area and high risk to Uriarra Pine Plantation of the order of 70% was *critical information* and Your Honour can be satisfied that if the AFP members present had been given that information they would have recorded it and remembered it.

2. The evidence of the AFP members, particularly Commander Newton, was that if they had been aware of a genuine risk to the urban area they would (sic) taken quite different action including the activation of the Police Operations Centre much earlier and more planning and consultation with the ESB. Inevitably the issue of informing the public of the risk would have come to the fore. Your Honour would be entitled to conclude based on this evidence and on the evidence of the actions in fact taken by the AFP on the morning of 18 January when the extent of the risk became clear that, if the AFP members had been given

the same information as that provided earlier that afternoon to the ACT Fire Brigade and ACT Ambulance Service:

- a. the AFP would have activated the Police Operations Centre either late on 16 January or on 17 January;
- b. as a result, plans would have been developed by the AFP, in consultation with the ESB, over the course of 17 January on community information and warnings;
- c. inevitably, in the course of that planning, the ESB and AFP would have discussed and resolved well in advance of the crisis, questions over the AFAC stay or go early policy and briefed AFP members accordingly;
- d. timely resolution of questions over the AFAC policy would have ensured that a more ordered process would have been in place in the afternoon on 18 January, giving greater opportunity for residents to stay and protect their homes or gain access to their homes through roadblocks to fight spot fires and flare-ups sooner after the worst of the fires had passed; and
- e. it is likely that, with the AFP fully engaged in the process of community information a day in advance, opportunities for AFP members to be involved in door-knocks and other similar information dissemination processes would have been identified and implemented, as occurred at the time of the December 2001 fires.¹⁰

3.2 Chronology of AFP Briefing in Respect of the Fires

3.2.1 In days immediately following the lightning strikes in the Brindabella Ranges the response of the AFP was simply one of a watching brief and to respond as directed by ESB. Between 8 January 2003 and 13 January 2003 there was email correspondence from Mr. Castle the Executive Director of ESB and Ms Kate Keane the Emergency Management Support officer at ESB on the one hand and members of the AFP command on the other. None of that correspondence¹¹ indicated that those at ESB considered the fires represented a risk to the urban fringe. For example, the email sent by Ms Kate Keane of 13 January 2003 to a collection of people associated with the Emergency Management Committee (including Chief Police Officer Murray and Commander Newton) gave details of three uncontained fires in the ACT and indicated that “a large uncontained fire in NSW close to the northwest of the border that has the potential to pose a serious

¹⁰ Submissions of Counsel Assisting pg 454-455.

¹¹ See ESB.DPP.0001.0071, DPP.DPP.0003.0229

- threat to the ACT”. Ms Keane flagged that “we may require a Liaison Officer from some agencies to assist with the response to and recovery from the fires and the aircraft accident”.¹² If ESB had concerns about the potential for the fires to impact upon the urban fringe there was nothing in this email to indicate such a concern.
- 3.2.2 However, in the days immediately following there were less benign assessments made of the potential threat of the fires that were not communicated to the AFP. The Planning Meeting at ESB on 14 January 2003 was not attended by the AFP. During that meeting Mr. Cheney’s assessment of the potential of the fire to burn into Canberra was discussed¹³. No advice was given to the AFP as to such a threat. On 15 January 2003 Peter Lucas- Smith and others met with Mr. Koperberg at Queanbeyan. During that meeting the possibility of the fires impacting on the suburbs of Canberra was raised¹⁴. The import of that meeting was not communicated to the AFP. On the same day Mr. Castle sent correspondence to Emergency Management of Australia in which he referred to fires “causing concern for the ACT urban environment”¹⁵. This concern was not communicated to the AFP.
- 3.2.3 On 15 January 2003 there was a conversation between Jason Byrnes the acting officer in charge of the Tuggeranong Police Station and Mr. Tony Graham the Operations Manager with the ACT Bushfire and Emergency Services section of the ESB. The context of that conversation was the possible police involvement in providing roadblocks for a back burn happening near the Brindabella Road. Mr. Byrnes said to Mr. Graham “Obviously our bosses are a little bit concerned now. They’re sort of worried that Canberra is gonna burn. Mr. Graham responded: Yeah, well it’s not beyond possibility on Saturday or Sunday”¹⁶. Both Mr. Graham and Mr. Byrne denied that the conversation referred to the possibility of Canberra City burning. On the basis of this evidence Counsel Assisting has invited the Coroner to find that by “late afternoon of 15 January 2003 Mr. Graham had recognised a serious risk to the urban area of Canberra”¹⁷ Whilst Mr. Graham may have arrived at such a recognition it is submitted that he did not communicate that realisation to Mr. Byrnes. Mr. Byrnes was clear in his evidence that had he taken the reference to Canberra in the conversation to mean Canberra City he would have briefed up the line immediately¹⁸.
- 3.2.3 On 16 January 2003 Mr. Castle and Mr. Lucas- Smith briefed cabinet¹⁹. The briefing included references to dangers presented to the urban edge. Particular

¹² DPP.DPP.0003.0229

¹³ ESB.AFP.0110.0775

¹⁴ NRF.DPP.0001.0014

¹⁵ ESB.AFP.0110.0115

¹⁶ Transcript of telephone call:DPP.DPP.0006.0099

¹⁷ Submissions of Counsel Assisting para 1228 at page 448.

¹⁸ T4412

¹⁹ ESB.AFP.0019.0111, DPP.DPP.003.0269, DPP.DPP.0003.0267, DPP.DPP.0003.0084, ESB.DPP.0001.0104.

suburbs were referred to. The possibility of a Declaration of a State of Emergency was discussed. The AFP was not present nor informed of the fact that such a briefing was to be conducted notwithstanding Mr. Murray would become the Territory Controller if a State of Emergency was declared.

- 3.2.4 In the afternoon of the 16th the AFP were briefed by Mr. Castle and Mr. Lucas-Smith. The extent of the evidence in this context is set out at length by Counsel Assisting in their submissions²⁰ and need not be repeated. It is submitted that the version of events given by Commander Newton and Mr. Murray should be preferred. Although the Cabinet briefing document was in the room at the time of the briefing the full import of the contents of that document was not divulged to Mr. Murray and Commander Newton. The information in that document was of critical significance to the AFP. Had such information been relayed both senior officers would have noted the information and acted upon it. The absence of such a note and the lack of urgency in their response suggests, as Mr. Murray testified,²¹ the effect of the briefing was that the fires presented a threat to rural areas only. The consequences of this failure to brief fully of the dangers presented by the fire are set out in the passage quoted from the Submissions of Counsel Assisting above. Commander Newton put the matter this way when questioned by Mr. Lasry QC²²:

Q. I should say I was reading there from [DPP.DPP.0003.00078]. Had anyone informed you on 16 January that there was a potential serious impact to the urban area of Canberra, would that 15 have made any difference to the way you and those under your command would have reacted from the 16th of January onwards?

A. I was not told that. I would have taken a completely different course of action had I have been told.

Q. What would you have done?

A. I would have escalated our activities from a policing perspective far higher than we did at the time. We would have activated the Police Operations Centre much earlier. We would have had a planning team preparing plans in consultation with Emergency Services Bureau personnel. I would have undertaken a far greater activity in relation to the interaction between Emergency Services Bureau and ourselves in having people working together on that planning process. I

²⁰ Submissions of Counsel Assisting para 754-762.

²¹ T 4331

²² T 5265

would have also taken other action in regard to discussion from both our media personnel in the AFP as well as the Emergency Services Bureau.

Q. Does it follow from your answer so far that it was simply not something in your mind on the 16th 40 of January that there was any risk at all to the suburbs of Canberra from any of these fires?

A. No, it was not.

- 3.2.5 The AFP were in attendance at the morning and afternoon planning meetings on 17 January 2003. The threat was interpreted by the AFP liaison officer to be still predominantly rural .The AFP was requested to close Brindabella Road at its intersection with Uriarra Road. Specialist Response and Security (SRS) members were allocated this task²³. Sergeant Kirby drew up a contingency plan for ACT Policing should the fires encroach into the rural areas of the ACT. At this stage there had been no information given to the AFP that there was any chance of the fire reaching the suburbs of Canberra over the weekend. However, by emails at 13.07²⁴ and 18.39pm²⁵ members of the Emergency Management Committee were advised that contingencies would be put in place for an evacuations working group to be convened in the following week.
- 3.2.6 SRS members were placed on standby to respond to demand in the rural areas of the ACT with four wheel drive vehicles allocated to each of the teams²⁶. Command requirements were identified. Sergeant Kirby co-ordinated with the Department of Urban Services in respect of the availability of barricades and road signs should further road closures be required. Commander Newton was advised of what contingencies had been put in place.
- 3.2.7 At the evening planning meeting (postponed until 1800 hours) Sergeant Kirby was informed that the fire situation had deteriorated considerably and that there was potential for the fires to encroach upon the urban fringes of Canberra on Saturday. The prediction at that stage was that the fires could reach Uriarra by 1200 hours, the Cotter at 1600 hours and Stromlo by 2000 hours.²⁷ Mr. Lucas-Smith advised that if the fires reached the Stromlo Forest it would travel unchecked as it would be too dangerous to fight. Sergeant Kirby briefed Commander Newton and other senior officers. SRS members were placed on call. Through the late evening Sergeant Kirby received further briefings from Superintendent Prince indicating a further worsening of weather and fire conditions. The effect of these conversations was relayed to Superintendent Lines and through him to Commander Newton.

²³ S Kirby Statement pg 2 DPP.DPP.0003.0219

²⁴ Ms Kate Keane email ESB.AFP.0014.0317

²⁵ Ms Frayne Pritchard email ESB.AFP.0110.0882

²⁶ S Kirby Statement pg 2 DPP.DPP.0003.0219

²⁷ S Kirby Statement pg 3 DPP.DPP.0003.0219

3.2.8 At 740 hours on 18 January 2003 Sergeant Kirby attended a meeting at ESB. Superintendent Prince briefed Sergeant Kirby as to a further deterioration in respect of the fires. He advised that the fires were now predicted to arrive at Duffy at 1800 hours. This information was relayed to Commander Newton who authorised the activation of the Police Operations Centre. Arrangements were made for Sergeant Byrnes to act as the AFP's liaison officer at ESB headquarters. Mr. Murray was briefed at 9.31am. The Commissioner, Mr. Keelty, was briefed at 10.08 am.

3.3 Conversations between Mr. Castle and Commander Newton

3.3.1 Some time was spent during the Inquest determining the extent and conversations that occurred between Commander Newton and Mr. Castle in the morning and early afternoon of 18 January 2003. Your Honour is unlikely to find that the content of those conversations had any real significance so far as the events of that day were concerned. Submissions are made, only as a matter of record, that at 9.29 am on 18 January 2003 Commander Newton attempted to contact Mr. Castle. Her evidence on this point was that the call was put through to a pager service and her return details were left²⁸. Her reasons for wanting to talk to Mr. Castle were articulated in her statement:

I wanted to ensure appropriate liaison was taking place and to offer assistance to him wherever he required it. I wanted to discuss the seriousness of the situation, in particular my intention to start developing evacuation plans as part of our contingency planning process considering there were concerns that the fires may reach the suburban area. It was also necessary at this time to make sure we were developing and were prepared to implement a coordinated media strategy.

3.3.2 None of these activities could happen without direction from the lead fire authority. It was simply not open for the AFP to commence a public information program on its own²⁹ or to commence a program of evacuations absent a direction from the lead fire fighting authority.

3.3.3 Commander Newton made one other attempt to contact Mr. Castle at 11.28 am. She also asked her staff officer and liaison officer at Curtin (at 11.52 am) to get a message to Mr. Castle.³⁰ Commander Newton was able to speak to Mr. Castle at 12.20 pm. It was not suggested by her that he was avoiding her call³¹. He was understandably very busy.

²⁸ T 5290

²⁹ Mr. Lucas-Smith T 1140

³⁰ T 5291

³¹ T 5292

- 3.3.4 To understand the full context of the conversation between Commander Newton and Mr. Castle several other developments of that morning must be noted. Concerned about the increasing seriousness of the situation Commander Newton had consulted the ACT Emergency Plan and refreshed her memory as to the requirements for the declaration of a state of emergency and the powers of the Territory Controller. She had assessed the need for a coordinated agency response³² and was increasingly concerned about the state of the community's understanding of the likely danger and their preparedness to deal with the situation³³. At 10.20 am she had been briefed by Sergeant Byrnes as to the potential for a major fire impact along the whole western side of Canberra. That impact raised the possibility that major pieces infrastructure including the electricity supply point at West Belconnen, the waste water plant at Lower Molonglo and the Stromlo water treatment plant amongst others, could be threatened.
- 3.3.5 Finally, at 11.40 am Superintendent Prince, from the ACT Fire Brigade, briefed senior AFP officers as to the movement of the fire and what could be expected when it impacted on the urban fringe. He described the briefing in these terms³⁴:

"I attended the Winchester Centre about 1130. I attended a meeting attended by police and public service officers. There were about ten people present. I gave these people a brief overview of where the fires were. I also gave information about the likelihood of fire travel under conditions that were present. On the information I had at that time the fire was expected to reach Duffy at about 1800 that evening. That calculation was made by Nic Gellie - who had significant knowledge on rural fire behaviour. He is an ecological consultant who had volunteered his services to the Emergency Services Bureau. I did advise this meeting that in my opinion once the fire reached Stromlo forest it would take about five to ten minutes to reach the top of Mount Stromlo and about another thirty minutes to an hour to reach Eucumbene Drive. I recall that Superintendent Lines asked me what fire fighters, police and residents could expect when the fire arrived. I answered that the height of the flame would be double the height of the material that was burning. Because thirty foot pine trees were

³² M Newton Statement page 13 AFP.AFP.0110.0398

³³ M Newton Statement page 15 AFP.AFP.0110.0398

³⁴ AUS.AFP.0070.0002 at para 27

in that area, then sixty foot flames could be expected . Chris Lines then asked me if the residents of Duffy should be evacuated. I recall that I told the meeting the normal response to fire, if residents are prepared, is to stay with their houses and fight the fire. I then told the group that in this case the residents were not all prepared and that evacuation should be considered. I do not recall Chris Lines response. The meeting then ended."

3.3.6 Given the communications systems that were available to the AFP, the information available to it as to the advance of the fire was probably more up to date (and therefore more concerning) than that available to the ESB³⁵ and Mr. Castle. Indeed immediately prior to the conversation with Mr. Castle Commander Newton had received information from a patrol at the Cotter pub that people there did not want to evacuate³⁶.

3.3.7 It was against this background that Commander Newton spoke to Mr. Castle. She made notes of the conversation at the time or later that afternoon. Her evidence in respect of this conversation when examined by Mr. Lasry QC was as follows:

Q. In the paragraph where you describe the conversation with Sergeant Byrnes and then you describe him putting you on to Mr. Castle, you say: "During this conversation I clearly articulated my view that a state of emergency needed to be declared and my reasons for wanting him to support a state of emergency."

A. That's correct.

Q. In your notes - do you have your notes in front of you? Please refer to them if you wish to. It is document [AFP.AFP.0001.0902] at 0904. Am I right in saying that about two-thirds of the way down the page, your note of that conversation appears.

A. That's correct.

Q. What appears in the note is Mr. Castle's inquiry about what powers the declaration provides. You don't seem to have noted the part of the conversation, whereas in your statement you say:

"I clearly articulated my view that a state

³⁵ Newton T 5306-7

³⁶ *ibid*

of emergency needed to be declared and my reasons for wanting him to support a state of emergency".

Q. Is that because you can recall it or you didn't make a note of it?

A. At the time of talking to him, I had in front of me the Emergency Management Plan and the Emergency Management Act. Section 10 in the plan is the outline of the requirements or what meets a state of emergency, and I went through those points with Mr. Castle. As well as having the Act in front of me, I think section 24 and section 27 within that Act talks about the declaration as well as the powers.

Q. That is the legal criteria for doing it. You say in your statement that you provided him with your reasons for wanting him to support it. Can you remember the reasons that you provided?

A. Yes. May I refer to the legislation?

Q. Yes.

A. I indicate to Mr. Castle that, in my view, the event had a potential to overwhelm all existing personnel, facilities, equipment and capability in the ACT with the breadth of where I understood the fires were at the time.

Q. Just pause there for a moment. That is as a result of the information you were receiving from Sergeant Byrnes that was being relayed to you from ESB?

A. That's correct, as well as in particular information I received from Superintendent Prince.

Q. Did he respond - that is, Mr. Castle - to that expression of opinion by you?

A. I went through my view against all of the criteria first, and then he responded to me that he didn't feel that there was a need to have a state of emergency and we just --

Q. Perhaps I interrupted. If you want to describe the rest of what you put to him.

A. I told him that was my view, that the event required a significant and coordinated response. But at the time I didn't feel that we necessarily

had the level of interaction between the Emergency Services Bureau and ACT policing that I believed was required as well as any other services or assistance needed.

Already there were a range of agencies that were involved. I had a number of those at the Police Operations Centre that we were working with along with the Emergency Services Bureau; and that it may require additional resources - certainly when I became aware through talking to Superintendent Prince that it may enter the suburban area - and that potentially it could disrupt the whole functioning of community, in particular if we lost electricity and waste water and water treatment plants were completely affected.

Q. Your recollection of that is based on your memory that you went through the criteria in section 24 of the Emergency Management Act and dealt with each one that you thought was relevant to the situation; is that right?

A. I didn't go through in detail the powers --

Q. No, no - of the criteria?

A. Of the criteria, yes.

Q. You certainly took him through the criteria for a declaration?

A. Yes.

Q. And referred to the ones that you thought were particularly relevant?

A. I also indicated that I was concerned about the community's understanding.

Q. We will come to that in a moment. You then had a discussion about what the consequences of a state of emergency were. But did Mr. Castle offer any response as to whether, for example, your opinion about the prospect of resources being overwhelmed was misplaced or based on some misunderstanding of the situation or anything like that? Was there any correction offered by him to the factual basis of the opinion you expressed?

A. I didn't receive a correction. I received a view from Mr. Castle that he didn't see that it was necessary at that time.

Q. Can I put the question another way: was there

any suggestion from him, for example, that the magnitude of the problem was being overstated by you in that conversation?

A. Not that I recall.

Q. So what he then wanted to know was, as your note says "what does the declaration give?" It would appear from your note said "powers to evacuate if needed". Then, as your statement says, Mr. Castle said, "I don't see a need to evacuate." You then said according to your statement.

"You can answer to the coroner if people die."

He said , "if people die I will answer to the coroner".

Now the note actually says:

"Didn't see a need to evacuate. Said 'could answer coroner if people died'."

Q. Are you confident that the way you have set out the conversation is the way that it actually occurred?

A. That was a shorthand and that's why in my statement I indicated that it was words to the effect of "if people die you can answer to the coroner". I quite clearly recall indicating to him that he could answer to the coroner if people died.

Q. Have you had Mr. Castle's evidence about this drawn to your attention for the purpose of giving evidence in this inquest?

A. I was advised he did give evidence in regard 15 to this, yes. I haven't read the transcript.

Q. At page 1782 the portion of the conversation that has been referred to was put to Mr. Castle by Mr. Woodward. Then he was asked:

"Q. Do you agree it is a reasonably accurate summary of the conversation?

"A. I was shocked at the last - when I read that. That is not my recollection of the words. I believe that what I answered was that I would stand by the evacuation guidelines."

3.3.8 It is submitted that if the terms of this conversation are found to be relevant Your Honour's findings in the Inquest, Commander Newton's recollection of the events

based as they were on contemporaneous notes, should be preferred. Although the terms of Mr. Castle's final reply were not recorded in Commander Newton's notes she insisted that this was the reply made in the terms recorded in her statement. Mr. Castle appears to have indicated to Commander Newton at a later time (her evidence varied as to when this conversation occurred) that he had no recollection of the phone call having even been made³⁷. The first time he turned his mind to the exact terms of the conversation was during preparation for the Inquest³⁸. However, in making that submission Your Honour must have regard to Mr. Castle's knowledge at the time of the conversation as to the movement of the fire and to the possible appearance and ferocity of that fire once it reached the suburban edge. If he had known what Commander Newton knew the conversation may well have been different, both in its terms and tone³⁹.

3.4 The Decision to Evacuate

3.4.1 Acting on the advice of Superintendent Prince, given during his briefing that evacuation should be considered, Superintendent Lines was tasked by Commander Newton to prepare an evacuation plan for Duffy. That decision was supported by Superintendent Prince⁴⁰. As those plans were being developed Sergeant Kirby was directed by Commander Newton to seek advice from ESB regarding the possible evacuation of Duffy. At a meeting attended by Mr. Lucas-Smith, ACT Fire Commissioner Ian Bennett, Mike Castle and Tim Keady, the Chief Executive of the Department of Justice and Community Safety, Sergeant Kirby was advised that the decision to evacuate should be left with the residents. From that point officers on the ground advised people to stay with their houses if they were prepared and capable of protecting their property. If not they were advised to leave⁴¹. This remained the position even after the State of Emergency was declared⁴².

3.4.2 Planning of a possible evacuation of Duffy had been interrupted by news that the fire was likely to impact mid afternoon. The steps then taken by the AFP were described by Mr. Murray in his statement:

At about 2.57pm Commander Newton rang Superintendent Lines to inform him that a state of emergency had been declared.

At 2.59pm Police Communications advised all members that a state of emergency had been declared.

At about 3.00pm Superintendent Lines and Sergeant Fittler spoke with the fire officers and described the evacuation plan. The fire officers said that the fire may now arrive as early as 4.00pm.

³⁷ T5282

³⁸ T 1822

³⁹ Castle T 1826

⁴⁰ M Newton Statement page 18 AFP.AFP.0110.0398

⁴¹ J Murray Statement AFP.AFP.0110.001

⁴² J Murray Statement page 19 AFP.AFP.0110.001

At about the same time Senior Constable Brace Harris was at the intersection of Cotter Road and Eucumbene Drive. He had just come from Mount Stromlo Observatory. He saw the fire was moving much quicker than the fire reports were indicating and it was his opinion the fire was not just a grass fire but a fire wall that could 'wipe out' Duffy. The fire was unchecked by any fire units in the area. Senior Constable Harris spoke with a rural fire officer. The fire officer advised Senior Constable Harris that the flames on the far side of Mt Stromlo were 80 metres high. The fire officer recommended police consider moving people out of the Duffy area. Shortly after, a fire service Field Commander advised Sergeant Spence at the corner of Cotter Road and Namatjira Drive that the fire would be at that location in approximately 7 minutes and suggested that Weston be evacuated. The information provided to Senior Constable Harris and Sergeant Spence was passed onto Police Communications by police radio.

At about 3.13pm Sergeant Fittler rang Sergeant Young at the POC. Sergeant Fittler advised of the revised timing of the fire and its anticipated size. He asked permission for police to commence evacuations. The request was denied because the ESB had not authorised it. Sergeant Fittler then rang and spoke to Commander Newton. Commander Newton told him that if there were no fire officers available, or if the fire officers were not willing to make a decision, then he should assess the situation and evacuate people if he was of the opinion that the public's safety was in direct jeopardy from the fire and that peoples lives were in imminent danger.

At about 3.15pm flames could be seen on the top of Mount Stromlo and the roar of the fire could be heard in Duffy. Within five minutes the fire was moving quickly down the south eastern side of Mount Stromlo burning through the trees in the plantation.

At about 3.20pm Superintendent Lines and Sergeant Fittler left the PFCP and were travelling north on Eucumbene Drive towards Warragamba Avenue. There was a wall of flames in the pine plantation on the western side of Eucumbene Drive. The fire was travelling quickly in a southerly direction through the trees at ground level and in the treetops. The fire engulfed their car but they were unhurt.

At about the same time the SRS members left the PFCP. Many small fires had started and some houses were on fire. Some cars were already leaving this area and police approached people who remained and asked them to leave. It was not long before many houses were on fire.

At about 3.23pm Superintendent Lines rang Commander Newton. He recommended Duffy be evacuated immediately. Commander Newton agreed but advised Superintendent Lines to get approval from the senior fire officer at the scene prior to commencing.

Shortly after, Superintendent Lines spoke with District Officer Thornthwaite. During their conversation District Officer Thornthwaite told Superintendent Lines that the fire was much bigger than anticipated and houses were on fire. He said it was well beyond the capacity of the Fire Brigade to bring the fire under control and that everyone should withdraw quickly to an area of safety. During this conversation a decision was made that Duffy should be evacuated immediately.⁴³

3.4.3 Officer Thornthwaite was the senior fire fighter at hand. His recollection of the discussion with Superintendent Lines was as follows:

And so it is a very, very tricky situation and it's almost like the same situation that I had with Chris LINES out at Duffy. Chris said to

⁴³ J Murray Statement AFP.AFP.0110.0041

me, “Do we evacuate?”, and I’ve turned around and thought, “Whoa, time is critical here.” We knew the fire was coming and we knew the fire was going to impact –

(Time signal)

- but to actually pull the population out onto the street at the time of impact was - was - that’s definitely wrong. I mean, we were going to lose more lives doing that than leaving them in their houses, and yet when I saw the impact it had on the - on the property destruction, I thought we’ve lost lots of lives here. I was convinced when I went home that we had lost literally hundreds of families, you know.

Q So what was the decision there, was the decision made to evacuate, or?

A I told Chris that we wouldn’t do it until the fire front moved through and we could reassess it. And then when the fire front hit us, eventually I went around and saw Chris and he said, “So what do we do now?”, and I knew the infrastructure was all starting to impact upon it, we had lost electricity, there was power cables down, there was so many houses burning in the suburb. I really didn’t have an appreciation at that time of exactly how deep it had penetrated and I said, “Chris, just evacuate anyone you can. Just clear Duffy if you can.” And that was more for, um, assessment from what had actually happened than it was as being sort of a cautious thing. I just think it was - and of course of these trips, and about the time we evacuated at that point and even then, the fire was still running. And it wasn’t until later in the night, even when it was impacting upon the police complex at Weston they were still trying to evacuate. You couldn’t - you would never expect a police officer in a car with no protective clothing to get in front of the head of that fire and try and evacuate people. The best you could do was wait for that fire head to go through and then try and evacuate anyone that is left standing up. That’s it.

DOYLE:

Q Do you think Chris - Mr. LINES was acknowledging those sorts of factors?

A At the time Chris and I were both hard pressed with our own activities to spend too much time discussing or drilling down into the finer points of it. Like I said in my statement, at one point there I went back to Chris’s Forward Command Post and said to him, “Chris, you know, get out of here, this is going to be an inferno.” And he realised what I was saying and he’s going, “Well, do I evacuate the rest of the suburb?”, and I said, “Yes, as soon as you can.” So with that, Chris had to make a few calls off his own - off his own back but it was absolutely essential that he moved his command post, otherwise he would have lost police officers.⁴⁴

3.4.4 As Mr. Lucas Smith attested, he relied on officers exercising good sense in making decisions such as the one Mr. Thornthwaite made⁴⁵, particularly when those at ESB had only a limited appreciation of the actual conditions that

⁴⁴ D Thornthwaite DPP.DPP.004.0041

⁴⁵ T 1156

prevailed at the fire front⁴⁶. Even Mr. Roche conceded that Superintendent Lines was entitled to rely on Mr. Thornthwaite's advice⁴⁷.

3.5 Evacuation and AFAC Position Paper

3.5.1 These passages are extracted at some length to highlight the fact that decisions made to evacuate people in the Duffy area were not made unilaterally by the AFP. Nor were decisions made that were inconsistent with the Position Paper on *Community Safety and Evacuation During Bushfires*. As articulated by Mr. Murray in the passages from his statement extracted above, the position paper

- exhorts relevant agencies to keep householders informed of fire risk;
- encourages householders to ensure that adequate fire protection measures are taken;
- demands that those who are not physically or mentally prepared to undertake fire fighting activities to move to a safe area well ahead of the fire's arrival.

3.5.2 Your Honour is likely to find that none of these measures had been undertaken or considered to any meaningful extent before the fire impacted on the western fringe of Canberra. The risks that are always attendant on staying with houses during fires were thereby heightened to an unacceptable level. The position paper makes clear that:

“Required or directed evacuation of people by an emergency service may be needed because of the imminent threat to those people. People who have not undertaken adequate preparations and who choose not to leave may put their life or other lives at risk by remaining. Where a person's life is immediately at risk by them remaining in a particular location they may be advised to evacuate. Should that advice be ignored, evacuation may be enforced.”⁴⁸

3.5.3 As to authority to order evacuations the position paper makes clear that the decision to evacuate people should be made “by the lead fire combat authority”⁴⁹. On 18 January 2003 that decision was made by the ACT Fire Brigade. Mr. Lucas-Smith had no criticism to make of the decision to evacuate people on 18 January 2003.⁵⁰

⁴⁶ T 1154

⁴⁷ Roche T 7976

⁴⁸ AFP.AFP.0001.0606

⁴⁹ AFP.AFP.0001.0606

⁵⁰ Mr. Lucas-Smith T 1159, T 1164

4. EXPERT WITNESSES CALLED DURING THE INQUEST

- 4.1.1 The evidence of Mr. Cheney and Mr. Leonard has no relevance to the interests of the AFP and no submission is made in respect of it.
- 4.1.2 Mr. John Nicholson gave evidence at the instigation of Mr. Castle and Mr. Lucas-Smith. His evidence was received over the objection of the Australian Federal Police. He had read little of the material that was before the Inquest. This shortfall included some of the evidence of Mr. Lucas Smith and Mr. Castle. He may not have read Mr. McRae's evidence. He had not read the evidence of key AFP witnesses. So far as he reflected upon the evacuation issue in passing it is submitted that his evidence should be given little if any weight. The comments made by Counsel Assisting in respect of Mr. Nicholson's evidence are, with respect, adopted by the AFP.
- 4.1.3 Mr. Trevor Roche was one of the experts retained by the Coroner to assist in the investigation of the 2003 fires. It is anticipated that his evidence will be the subject of considerable comment by parties represented before the Inquest. The AFP makes no submission as to weight to be accorded to his evidence other than to say that it is open to Your Honour, as with all witnesses, to accept or reject his evidence in part or in whole. That assessment will inevitably involve a consideration of Mr. Roche's evidence in its totality rather than in the narrow context of his evidence as it related to the AFP.
- 4.1.4 His report and evidence, whilst directed principally at issues concerning warnings and the early fire suppression efforts, did reflect upon the role played by the AFP. Taken as a whole and so far as relevant to the role played by ACT Policing the AFP generally agrees with Mr. Roche's factual analysis. However, there are matters of disagreement. At page 135 of his report Mr. Roche states:

Following the declaration, the Chief Police Officer advised Commander Newton that the fire services would make the decision as to whether to evacuate as a result of the fires unless lives were in imminent danger. This instruction was passed to police officers in the field with the advice that they could not evacuate people and that the ESB were still recommending that people remain with their properties. The Commander later became increasingly concerned at the inability of police to undertake evacuations unless authorised by the fire service. She decided that if the police could not evacuate people under the provisions of the *Emergency Management Act*, they would evacuate only if a person's life was in imminent danger and the police believed people would die if they didn't move them

At approximately 1520 hours, Commander Newton was briefed by the Police Forward Commander who indicated that he considered that there was a need to evacuate people from the Eucumbene Drive area of Duffy. Following endorsement of the request by the Fire Brigade personnel

present, police commenced an evacuation. Throughout the afternoon and evening police continued to conduct a number of evacuations. I have not identified from the evidence any instances where a resident or other person with a pecuniary interest in threatened property, was forcibly removed⁵¹.

4.1.5 The AFP accepts this observation in part only. As outlined above, the AFP was invited to draw up evacuation plans by the ACT Fire Brigade. Mr. Thornthwaite as the most senior firefighter at the scene ordered the evacuation. Despite Mr. Roche's stubborn refusal to accept this proposition⁵² Mr. Thornthwaite clearly did not simply endorse the AFP request to evacuate.

4.1.6 Later in his report, dealing specifically with the role played by the AFP Mr. Roche wrote:

In general terms, in my opinion, the AFP conducted their primary obligations in a responsible and cooperative manner, having regard to the dearth of pre-impact information and warnings provided to both the police and the community.

In my experience, and in the absence of alternative arrangements, police services generally operate on the basis of either removing the risk to people and property or removing the people from the risk. Various laws enable these activities to occur. Whilst this arrangement holds well for a significant number of risk environments, as a general rule, it is not in the best interests of the community during a wildfire.

In any wildfire of significant size, no fire service has the capacity to offer a response at every property subjected to or likely to be impacted by the passage of a wildfire. In these circumstances, the actions of the community itself is fundamental to saving lives and property. Such a philosophy is espoused in the position paper of AFAC on "Community Safety and Evacuation During Bushfires".

The ACT Chief Police Officer Mr. Murray had supported the application of the AFAC position on evacuation at a meeting of the Senior Officers Group, Australian Police Ministers Council on 20 September 2001-8. However, the evidence suggested that this position was not widely known throughout the AFP at the time of the January 2003 fires. Hence it is understandable that the reaction of police in the affected suburbs remained one of seeking to remove people from the risk.

On the other hand, I remain unconvinced that the actions of the police on 18 January 2003 in carrying out evacuations saved lives.

.....
The evacuation of people during a wildfire is a contentious issue for police, the fire services and the community. The actions of the AFP in seeking to evacuate people was, as I understand the evidence, predicated on a lack of confidence concerning the level of knowledge existing within the community on the steps necessary to protect themselves and their property. The fact that an Officer of the ACT FB

⁵¹ T Roche Report to the Coroner DPP.DPP.0009.0001 at 0135.

⁵² T Roche T7976

endorsed the evacuation adds weight to the decision of the police. In these circumstances, despite the studies concerning the perils of late evacuation, it is difficult to criticise police for the actions that they took on 18 January.

- 4.1.7 Again Mr. Roche's views are accepted in part. Mr. Roche's assertion that the AFAC position was not widely known throughout the AFP was not referenced. Mr. Murray and Commander Newton knew about it. Superintendent Prince briefed senior AFP officers on the basic AFAC principles on the morning of the 18th of January 2003. Further the general approach to evacuation was not left to the discretion of those occupying positions of responsibility in the AFP Forward Command posts. Subject only to the exception identified by Commander Newton relating to immediate threat to life the guiding direction to police was *not* to evacuate unless directed to do so by the lead fire combat agency.
- 4.1.8 There can be no way of determining whether the decision to evacuate saved lives. It can only be observed that those who died stayed with their houses. It remains for Your Honour to determine whether those people who did die should have left prior to the arrival of the fire.

5. THE DEATHS

- 5.1.1 The Australian Federal Police makes no submission as to whether any of the deaths were causatively linked to the failing of any individual or body in the terms raised by Counsel Assisting. No submission is made in respect of the relevant law that Your Honour must apply in this context. Parties with a more relevant interest will by submission undoubtedly assist Your Honour.

Ken Archer

Ken Archer
Counsel for the Australian Federal Police

30 June 2006