ACT FIRES JANUARY 2003: INQUESTS & INQUIRY

SUBMISSIONS ON BEHALF OF MR McRAE

1. Preliminary

1. Merely for ease of reference, these submissions adopt, where we have a submission to make about a relevant subject matter, the same chapter numbers and headings as those in the Submissions of Counsel Assisting dated 2 April 2006.
2. Your Honour should keep firmly in mind that, unlike a party to civil proceedings, Mr McRae was merely a witness, albeit one for whom, part the way through the proceedings, your Honour granted leave to counsel to appear, and, in consequence, only thereafter did counsel became entitled to question the remaining witnesses, who gave evidence before your Honour, and to make submissions.
3. The term *"parties"* has often been used by Counsel Assisting in the proceedings when referring to persons such as Mr McRae. There has been a tendency on the part of Counsel Assisting, by the use of that term, and in the guise of addressing a cause of the deaths and of the destruction or damage to property occasioned by the fires, to treat persons, including Mr McRae, as if they were parties to civil proceedings and, therefore, as persons to whom they should, if

possible, endeavour to attribute blame, rather than simply as witnesses before inquests into deaths and an inquiry into fires, helping your Honour to investigate those deaths and fires. That tendency has been accentuated by Counsel Assisting's apparent perception of their role, and of your Honour's duty, as being to find, if possible, that the actions or inactions of an agency or person was a cause of one of the deaths, or of the destruction or damage to property occasioned by the fires[1], rather than merely *"...identifying particular possibilities or tentative conclusions and testing the evidence with a view to determining whether it can be confirmed or discounted"*[2]. This heresy permeates and infects many of Counsel Assisting's submissions, as they relate to agencies and persons. One central theme of our submissions is that the former is no part of your Honour's duty, and that your Honour's acceptance of Counsel's Assisting's submission to the contrary, inevitably, will lead your Honour into jurisdictional error[3]. The other central theme of our submissions is that, on the evidence before your Honour, being evidence which your Honour could properly accept and act upon, no action or inaction on Mr McRae's part was a cause of any of the deaths, or of the destruction or damage to property occasioned by the fires.

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[1] Counsel Assisting's submission, paragraph 1095.
[2] *R v Coroner Doogan; ex parte Lucas-Smith* [2005] ACTSC 74 at [162].
[3] See *Craig v South Australia* (1995) 184 CLR 163 at 177-8.

4. Of course, in making these submissions, we do not assume any obligation to discharge a legal onus. Mr McRae bears none. Our submissions address matters which we perceive to be important, or which others, including your Honour, may or might perceive in the same light. However, if these submissions do not deal with a particular submission of Counsel Assisting, or with the evidence upon a particular issue, that will afford no warrant for your Honour to automatically adopt any submission or statement of the evidence from Counsel Assisting, either as representing a fair, or even an accurate, view of the law, or of the evidence, or as an appropriate finding of fact *en route* to your Honour's formal findings. Put another way, a Coroner cannot delegate to Counsel Assisting his or her responsibility to ascertain the law, weigh the evidence, and make appropriate findings, whether or not submissions on behalf of a represented witness address all or any of those matters.

5. In making that submission, it is not the intention of counsel for Mr McRae to impose an unwarranted burden upon your Honour. We acknowledge that the effect of this submission is that the burden cast upon your Honour may be much greater than it otherwise would have been, had we been able to urge your Honour simply to adopt the statement of evidence, or the submissions of Counsel Assisting, or certain parts of them, or to do so in the absence of

expressed opposition on our part. However, our stance largely reflects our serious concern that Counsel Assisting have not been guided by the overriding principle that their goal be the attainment of justice, but rather the achievement of a preconceived objective[4], to justify their efforts by seeking to *"claim some scalps"* of identified persons. However, our stance also reflects the limited role which counsel for a witness in Mr McRae's circumstances can realistically perform. Leaving to one side the jurisdictional issue, in practical terms, Mr McRae was not offered separate representation until well into the second phase of the proceedings, and no instructing solicitor or other day-to-day support staff has been provided to us as counsel, unlike those appearing for some other agencies and persons. This consideration has imposed limitations upon the preparation of these submissions. However, we have proceeded on the footing that, if your Honour considers that there is any issue which we have not addressed in these submissions, and upon which your Honour expects or wishes to hear from us, or more from us, then your Honour will make that known to us, before or during the time when we make our oral submissions, and we will use our best endeavours to assist the Court accordingly.

[4] *R v Coroner Doogan; ex parte Lucas-Smith*, at [162].

2. Conditions leading up to the fires

Fuel management and fuel loads

6. Whether or not it was in whole or part because of the observations made by the Supreme Court of the Australian Capital Territory[5], and leaving to one side for others to address in more detail the question as to the extent to which it is, in any event, a subject matter falling within your Honour's jurisdiction, the inquiry undertook some examination of *fuel management*, but the extent of that examination was, rightly or wrongly, superficial at best. Mr Cheney, seemingly put forward by Counsel Assisting as an expert upon every topic remotely connected with fire, was not, however, a fuel management expert. He expressed views upon that subject, even quite strong views, as revealed in his report[6], as well as his subsequent oral evidence, but the fact remains that he was not an expert upon that subject.

7. His job had included, for a very long time, the ignition of experimental fires for various purposes. That he had views upon the subject was inevitable, and some of them may have been of some relevance, at least as representing the views of some, among those with views on the subject, informed by some experience of

[5] Counsel Assisting's submission, paragraph 107.
[6] DPP.DPP.0008.0001.

fires. However, his views upon fuel management ought not to be elevated to the status of expert opinion, much less to the status of *independent* expert opinion.

8. That is not to say that your Honour was denied the benefit of some credible evidence as to the state of *fuel loads*. At least some of that other evidence was, to some degree, relevant, particularly including Mr McRae's observations in the *Phoenix Imperative* document[7].

9. What is significant about the evidence concerning that document, and your Honour may, and should, if your Honour concludes that it is permissible and open for your Honour to do so, find that in Mr McRae's opinion, the fuel loads were too high, and that he had set about in his document agitating for properly managed fuel reduction.

10. In that event, Your Honour may, and should, also find that Mr McRae undertook regular surveys of the state of fuels across the ACT, and combined those observations with detailed treatments of weather, actual and anticipated, in order to give the ESB regular predictions as to the likely conditions during the ensuing fire season. The tone of Mr McRae's writings abundantly justifies a finding that he was intent upon directing that serious attention be given to the messages conveyed therein. It is unmistakeable that

[7] ESB.DPP.0001.0074.

he was taking steps to ensure that it was accepted that there was a pressing need to be ready for an extremely dangerous fire season[8].

11. Mr McRae's abiding concern with readiness is also amply reflected in the views expressed during training sessions, no doubt resulting in the sobriquet *"Dr Doom"*[9]. Indeed, Mr McRae's views as to the capacity of a fire to impact houses beyond the immediate interface were, in fact, proved to be correct on 18 January 2003.

12. Your Honour may, and should, then make a further finding as to Mr McRae's track record in agitating for hazard reduction in the forests, at a time when, as Mr Cheney claimed, the ESB's focus may have been principally upon urban-edge hazard reduction[10], and as to Mr McRae's long-term predictions and warnings during training sessions.

13. One further finding should perhaps also be made with respect to *pre-fire preparation*. There is no acknowledgment in Counsel Assisting's submissions[11] that the methodology in Mr Roche's report[12] was fundamentally flawed. Mr Roche was plainly not an expert witness. That is not a personal criticism; these proceedings were highly unsuited to being the first proceedings for which Mr

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[8] See the material adverted to at paragraphs 191-203 of Counsel Assisting's submissions.
[9] See the material adverted to at paragraphs 193, 200, 203-206 thereof.
[10] DPP.DPP.0008.0001, 17-18.
[11] At paragraphs 211-216 thereof.
[12] DPP.DPP.0009.0001.

Roche (apparently) had to write an expert report[13]. His report failed dismally to comply with most, if not all, requirements for admissibility of an expert report in legal proceedings[14]. We expect that submissions on behalf of other agencies or persons represented, particularly those on behalf of the Australian Capital Territory and of the New South Wales represented parties, will detail these deficiencies far more exhaustively than we can, or need to, do so. So far as those submissions, if acceded to, detract from an acceptance of his evidence generally, and also upon particular subjects of more direct relevance to Mr McRae, or about which Mr McRae gave evidence, we gratefully adopt them, and support their making. Of particular relevance for Mr McRae, however, was Mr Roche's odd manner of reasoning with respect to *pre-fire preparation*. He asserted that a number of steps were not taken, simply because he did not personally sight documents demonstrating that such a step had been taken. The illogicality of that proposition is glaringly self-evident. As we have observed, Mr McRae is not in the position of a party to legal proceedings. Nor has he been assigned the resources that would permit an exhaustive search to be made of all the materials that may be of possible relevance in this regard, and which have been gathered

[13] DPP.DPP.0009.0001.
[14] See *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [59]-[103].

during these proceedings. Much less does he bear any onus that would dictate that he should have done so.

3. The fires: origin, path and response

14. Under this heading, we will not attempt to cover the breadth of subject matter dealt with in Counsel Assisting's submissions, even where there may have been some reference to Mr McRae. However, this should not be taken to amount to agreement with what appears in those submissions. For the reason already advanced above[15], your Honour will risk falling into legal error if your Honour simply accepts, and acts upon, submissions from Counsel Assisting to the effect that, in the absence of some challenge having been made to some statement of the evidence, or some submission of fact or law in their submissions, that statement should be accepted by your Honour[16].

The Lucas-Smith telephone conversation with Cheney

15. The subject of Mr Lucas-Smith's report of his telephone conversation with Mr Cheney, and its sequelae, we perceive, does

[15] See paragraph 4 above.
[16] See paragraph 479 for an example of this kind of erroneous reasoning.

require our attention[17]. What Counsel Assisting attempt to make out of this really is a *"beat up"*. It smacks of attempts to shore up Mr Cheney's already much depleted credit, rather than being a genuine examination of something of real importance that occurred in the course of fighting the fires. It is of no consequence at all whether Mr Cheney approached WIN TV or the reverse, which seems more likely to have been the case.

16. However, all that Mr Cheney was doing was telling Mr Lucas-Smith that he had an opinion, and he was giving Mr Lucas-Smith the courtesy of hearing it first and directly. Mr Cheney was entitled to his opinion, and it was appropriate for him to pass it on to Mr Lucas-Smith. It was no more than a sensible offering by someone with some experience in fire behaviour to another.

17. Much later on, however, along come Counsel Assisting, with their *"retrospectoscope"*, who read into the incident a significance it never really had. What better example could one find of the dangers of unbridled and undiscriminating hindsight analysis! Thirty seconds of history, dredged over for hours, apparently for the sake of divining some evidence that someone was at fault. Yet, what Mr Cheney was *not* doing was offering *tangible* information or assistance. He had not carried out any close analysis of the

[17] At paragraphs 554-570 of Counsel Assisting's submissions.

conditions, used modelling, or even consulted *"the stars"*. He thought that the fires might get to Canberra. He thought he should pass his opinion on to the fire suppression *supremo*, since a journalist had asked him to express an opinion *"on air"*. Nothing more and nothing less than that.

18. Had Mr Cheney carried out a scientific analysis, and whether or not he expected it to tally with what the ESB or the RFS thought about the subject, he would undoubtedly have gone directly to the ESB or the RFS and offered them the product of his labours. And if he had done so, there is no reason to believe that it would not have been accepted and considered on its merits.

19. Counsel Assisting's submissions blithely ignore the complete absence, in Mr Cheney's opinion, of anything that could actually have been used by the ESB or the RFS. They suggest[18] that Mr McRae should have pursued Mr Cheney. But for what purpose? The suggestion also ignores the obvious; if Mr Cheney had something to say that could really have assisted the deliberations of a planning meeting in some identifiable and tangible way at that time, Mr Cheney would hardly have waited for an invitation to proffer it!

[18] Paragraph 568.

20. It is not even as if it could properly be said that the ESB, Mr McRae, or the planning unit were, in some way, averse to outside influence. On the contrary, your Honour may, and should, find that Mr McRae had actually sought to bring in outsiders for the different perspective they might be able to bring to the planning effort. As detailed in his statement, Mr McRae had initiated consultations with Mr Gill, a fire scientist with the Bushfire Council, and Mr Carey, a fire scientist at the ANU, and had acted on their opinions[19]. He had brought in Ms Bell from the private sector as a GIS officer[20]. He had wanted a fire analyst, and contacted Mr Gill, Mr Carey and others, and at about that time, Mr Gellie had offered his services[21]. Mr Gellie confirmed in evidence[22] that his role was to provide an independent view. He was one of the trio, which did not include Mr McRae, who developed the fire spread prediction on 17 January 2003 for the following day.

21. Finally, in this regard, and most importantly, Mr Cheney himself confirmed that he had nothing concrete to offer a fire suppression agency when the media interview request was made. He was not doing any fire spread prediction work between 8 and 18 January, 2003. Indeed, not even Mr Cheney had used the 2003 fires as an

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[19] See ESB.AFP.0110.0493, paragraphs 63-65.
[20] *Ibid*, paragraphs 83 – 84.
[21] *Ibid*, paragraphs 85 – 86.
[22] T5018 and 5044.

opportunity to test, *"in the field"* so to speak, the Vesta experimental results in south-eastern forest conditions. His observations were concerned merely with fire behaviour[23]. Mr Cheney could, and might, as Mr Gellie had, have offered his services, but Mr Cheney had his own important work to do. So, we submit, your Honour may, and should, find that if Mr Cheney had indeed thought that the suburbs of Canberra really were in serious peril, and that the suppression effort was quite misguided, he would have made such an offer.

The McRae Trigger

22. An analysis of Counsel Assisting's submissions on this subject[24] reveals that Counsel Assisting simply misunderstand the relevant evidence. Mr McRae's evidence is criticized by Counsel Assisting as unclear and using other epithets. However, the criticism itself reveals the failure of minds to meet. Their pejorative references diminish the advocacy, but not the evidence. The task of comprehending Mr McRae's approach begins with the *Phoenix Imperative* and the "*Dr Doom"* emails. Mr McRae was endeavouring to bring a science-based approach to providing predictions upon which his colleagues could legitimately base

[23] T7128.
[24] Paragraphs 715-25.

decisions about undertaking works, committing resources, manpower and so forth. His natural inclination was to present the worst case that the science permitted by way of prediction, in order to induce a committed response. Complacency and *"head in the sand"* optimism that no fire disasters could, or would, befall anyone in the ACT seem the very antithesis of what he was about at any relevant point in time, as well as being entirely out of character for him.

23. Moving to the period of the fires, Mr McRae was stating at planning meetings, as early as Tuesday, 14 January 2003, that a change in conditions was expected *"sometime after Friday morning"*, such that strategies would be harder to complete and hold after Friday, with Monday, 20 January 2003 looking like being even more extreme[25]. This was a science-based approach. It was not based upon a *"gut"* reaction of the kind that Mr Koperberg expressed[26].

24. Of course, Mr Koperberg could have a *"gut"* reaction to the course of the fires. Mr Cheney could too, as he undoubtedly did before he was contacted by the media. But, they had no operational

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[25] See summaries at Counsel's Assisting's submissions, paragraphs 573-76. Given the trenchant criticism of practically everything that Mr McRae did or said, it is quite significant to note that, in his letter of warning to Tharwa residents, apparently regarded as an exemplar of good practice by Counsel Assisting, Mr Jeffrey said of the anticipated conflagration that: "At this stage it is looking like this could happen about Monday or Tuesday." See Counsel's Assisting's submissions at paragraph 636. Yet, it does not seem that Mr Jeffrey ever issued any further letter to the effect of: *"forget that, it'll now be tomorrow."* Counsel Assisting are strangely silent about that.

[26] See Counsel's submission at paragraph 608.

responsibilities for fire management in the ACT. It was not open to Mr McRae, or to Mr Good at Queanbeyan, to have the luxury of a *"gut reaction"* to the course of the fires, much less to base any concrete advice upon such an essentially subjective, rather than objective, notion. The ESB was paying Mr McRae to gather data and apply to it a recognised scientific analysis. A correct view of the evidence entitles your Honour to, and your Honour should, find that once Mr McRae had performed that undertaking and furnished the outcome to the operational managers or community relations people, it was then up to them to use the information he provided as they saw fit. Mr Graham acknowledged that fact[27].

25. What McRae was paid to do was to use the best scientific tools available to give advice about the conditions, and about what the fires *might* do in those conditions. In performing that function, as Counsel Assisting acknowledge, he advised on Tuesday, 14 January 2003 that by Friday, 17 January 2003, with a predicted weather change, positions would be harder to achieve and hold[28]. On that Tuesday, he also had the additional prediction from BoM, absent the previous day, of very low humidity from the Friday afternoon.

[27] Counsel Assisting's submissions, paragraph 172.
[28] Paragraphs 573 and 575.

26. Mr McRae repeatedly denied any personal expertise or role in community education or warnings[29]. There is simply no evidence to the contrary. Your Honour should so find. Others had that responsibility; there were media people hired for the event, and they worked for Messrs Castle and Lucas-Smith.

27. The advice that Mr McRae gave was received by those to whom it was directed. Mr Graham acknowledged taking on board what Mr McRae had said about the possible changes in fire behaviour[30].The letter seeking Commonwealth assistance referred to the effect of the inversion layer reducing visibility and impacting on the ACT's ability to implement successful control strategies, similar to advice Mr McRae had given to the planning meeting[31].

28. As further data came to hand, it was analysed by the planning unit, and presented, usually by Mr McRae, to the planning meeting. For example, at the afternoon planning meeting on Wednesday, 15 January 2003, Mr McRae gave a detailed analysis of conditions then prevailing and for the expected future, at least so far as prediction could be soundly based upon the information then available. His presentation was not relaxed, or comfortable, or lacking in urgency. For example, he warned of the impending "…*worst fire situation you will see in your careers. And you have just heard a forecast for*

[29] Paragraph 228.
[30] Counsel Assisting's submissions, paragraph 577.
[31] Paragraph 616.

the worst fire weather you will experience in your careers. Do the maths."[32]

29. Upon that advice, it was a matter for those in the responsible positions to project beyond the reach of science-based predictions, and to intensify the message that the community had already been given that preparations should be made, fuel reduced around houses and so forth. There was simply no known means, based upon any possible scientific analysis, which would have permitted, at that time, any person to say that the fires would impact upon any part of urban Canberra. Short of having a capacity to foresee the future, there was simply no recognisable or justifiable basis for Mr McRae to suggest that that might happen. It was, however, open to someone in Mr Lucas-Smith's position, applying his professional judgment to the range of information available, including predicted fire conditions and the state of operations, availability of manpower and machines and so forth, to say, if he thought fit, that some risk to the suburbs was then discernible, and that that risk should be the subject of some kind of warning. We do not submit that Mr Lucas-Smith should have so said, or if he should have, what kind of warning could, or should, have been given, merely that if he wished to do so, or should have, then he

[32] Paragraphs 620-24.

could have done so. We merely draw attention to the quite different roles of the senior officers involved, distinctions often completely ignored, or glossed over, by Counsel Assisting, hell bent upon attributing blame to someone, anybody in the ESB.

30. The key to Mr McRae's thinking is probably best encapsulated in the evidence Mr McRae gave to this effect[33]:

> *"My projections didn't go* [as far as urban impact] *my expectation, and I would expect others would have similar expectations, was that at some point in the sequence of forecast "bad weather" that we had in front of us that one or more of the fires in the area would break containment. And breaking containment, that weather would lead to fires making runs. Now those runs would run across the landscape. They would cause some damage. The day would end. You would have milder conditions overnight and then that would be the starting point for assessing where problems would arise the next day. In an unstable dynamic situation like that, you really can't predict what your starting point will be beyond the first day that you are analysing for because it literally is too dynamic. I would not have expected a run when it was first made to reach anywhere near the city."*

31. Ultimately, Mr McRae's expectation with regard to fire behaviour, informed as it was by the evidence which had been available to him

[33] Extracted in Counsel Assisting's submissions, paragraph 625.

at the time, and upon which he had made his projections, and not underestimating the seriousness of the situation, proved to be far more calamitous than even he and others expected. As he conceded, fire behaviour on Saturday, 18 January was not as he predicted. However, it is quite a different matter altogether to state that he should have predicted that behaviour. Why, when nobody else did? Not even the BoM gets weather forecasting right every time. There are some weather events that occur which simply cannot be predicted accurately. What Mr McRae was saying was that his business was to use the tools available to him to make predictions based upon recognised methods of analysis of known variables. What is "known" in such a context may not include all the variables; some may be *"unknowable"*, particularly, the course which the weather may take. Mr McRae was not entitled to assume what the weather might be like, certainly not beyond the point in time for which the BoM had issued a forecast.

32. Mr McRae's evidence about *"our unit"* being responsible for a trigger was in context of the likelihood *"that the fire would impact on the Canberra urban community on Monday [20 January 2003]."*[34] Mr McRae did not think, by Thursday, 16 January 2003, that is to say, the day about which Counsel Assisting was cross-examining him,

[34] T3351.

the point had been reached where that warning needed to be given. In Mr McRae's opinion, there *"wasn't a need to alert the entire urban community"*. He continued[35]:

> *"As I said before, my expectation was at some stage during the phase of forecast dire weather or nasty weather or bad weather – whatever you want to call it – there would be break-outs, and analysis of those would provide the starting point for the final run that, should it eventuate, would take the fire toward the city and that would allow us to pin down the subset of the urban community that needed to be alerted".*

33. Mr McRae was dealing with the need for a targeted warning: "*The specific stuff should be used when we knew exactly which parts of the community to target*"[36].

34. At that point, Counsel Assisting endeavoured to tax Mr McRae with the failure to issue press releases providing a warning to the whole of the Canberra community. Mr McRae reminded Counsel, correctly and, as we have submitted, your Honour should so find, that that was not his responsibility[37]. After being cross-examined, pointlessly, as to the motivations of others for not issuing a warning of the kind Counsel had in mind, Mr McRae explained once more that he

[35] T3352.
[36] T3353.
[37] T3353.

simply was not expert in, nor involved with, dealing directly with the community[38].

35. Mr McRae confirmed in evidence the following day that his task was to base such advice as he was able to give upon *"what was currently going on and what was forecast"*[39].The manner of delivery of the advice as to the fire situation, based upon reports from the field and BoM reports, was delivered via the planning meetings[40]. The advice was available to be used as seen fit by the many attendees at those meetings, including the senior ESB officers, the media people, fire brigade representatives, police representatives and so on.

36. Mr McRae was speaking of targeted advice, which was rather more specific and potentially more helpful than the subject of Counsel Assisting's more general questioning. Mr McRae explained the kind of advice that he was speaking about by analogy with BoM warnings of severe weather. There are levels of warnings, from the general to those that might be given when the BoM is actually able to predict those particular areas at risk, at which time a warning is issued that refers directly to those areas[41]. Plainly, Mr McRae was revealing his thinking about the process to be followed before a

[38] T3355.
[39] T3359.
[40] T3359.
[41] T3360.

specific warning could be issued to named suburbs, indicating to them that they may come under threat by fire. He confirmed that, by stating that the rural community was going through that process before the urban interface came into the picture at all[42]. The trigger he was speaking of was the emergence of observations, married with science based predictions, which would have permitted the ESB to target specific suburbs, for the ESB to take action with a view to assisting people there to *"make sure they are safe*"[43].

37. Counsel then immediately referred to some actions, such as *"clearing garden areas, cleaning gutters"* and so forth. So, Mr McRae, correctly, we would submit, pointed out that such responses were the stuff of pre-season readiness[44]. Mr McRae was not talking about the trigger for a warning to people to tidy up, clear gardens and so forth, but to decide to leave, or else stay and fight the fire, the house already having earlier been made ready on account of the general advice or warnings or community education, call it what you will, that sensible people would have already acted upon. Mr McRae went on later, when Counsel persisted in dealing with the matter as if Mr McRae had been speaking of general advice, to tell Counsel that there were a number of triggers, and

[42] T3360.
[43] T3361.
[44] T3361.

that he had not seen the need for the final trigger to be activated[45]. That was because:

> *"I had no expectation that what happened on Saturday the 18th of January would happen. It was totally unexpected that the fires would all evolve into plume-driven fires and be driven by totally different drivers to those we anticipated. My expectation was that we would have to deal with a number of runs by fires, separate independent runs, and that these would make approaches towards the urban interface at different times and different places, and that the response crews would have perhaps varying levels of success in stopping them."*

38. Counsel Assisting persisted in ignoring Mr McRae's attention to the giving of targeted advice, by asking, again: *"why wasn't it thought appropriate to provide a general warning to those who might suffer that kind of impact..."*[46]. Mr McRae repeated that he thought that there had been adequate general warnings. Whatever one's view of the adequacy of general advice or warnings or community information, it is abundantly clear that Counsel Assisting and Mr McRae were at cross purposes. Mr McRae was addressing what he perceived to be a line of inquiry about the need for a targeted

[45] T3363.
[46] T3366.

warning to people who were directly under threat from a fire moving towards them, not a general warning about hazard reduction.

39. Mr McRae's trigger for giving targeted warnings was not activated because: "*We were overrun by circumstances*"[47]. The trigger for rural residents had, however, been "activated" at the afternoon planning meeting on Friday, 17 January 2003[48]. The advice given to that meeting by the planning unit was to the effect that rural residents were directly under threat. As Mr McRae had earlier indicated, he was not responsible for, nor skilled in the process of engaging with, the residents.

40. If one is to go to the next stage, and ask whether the events of the Saturday, 18 January 2003 ought to have been predicted, both as to the fact of the extraordinary fire behaviour, and the points of impact, one needs to start with the manner in which the ESB arrived at the fire spread prediction for the that day.

41. As noted above, Mr McRae sought to gather together a range of fire behaviour skills within the planning unit. On the afternoon of Friday, 17 January 2003, he had tasked Messrs Lhuede, Gellie and Taylor with producing a map of predicted fire spread for the following day upon an unattended, *worst case* assumption. The

[47] T3367.
[48] T3403.

trio were given free reign to use all such tools and techniques as they had available. They acted accordingly. They had as a starting point the McArthur meters, and the BoM's detailed fire weather forecast. Each, recognising the limitations of McArthurs, used local knowledge of fuel, slope etc to provide a reality check[49]. Mr Lhuede seems to have been, perhaps slightly, the junior member of the team.

42. This joint effort was then presented to the planning meeting. The furthest extension of the assessment at that time was that the fires *might* reach Narrabundah Hill at 8pm on the Saturday. That is to say, if the weather was as bad as the predicted maxima on all measures, and there was no abatement, and the fires were allowed to run, they *might*, by 8pm, reach Narrabundah Hill.

43. At the afternoon planning meeting on Friday, 17 January 2003, Mr McRae described the results of the analysis by Messrs Taylor, Gellie and Lhuede. Mr Lucas-Smith, as the CFCO, knew the effect of the advice that was being proffered. He had within his control the decision as to one variable that was included as one of the assumptions that the trio had made, which was whether the fire would, in truth, be allowed to run. However, there may well have been a significantly different answer to the predicted fire spread

[49] The fundamentals of the approach are summarised in Counsel Assisting's submissions, paragraphs 823-26.

had the fires behaved in accordance with the fire conditions, as they were *predicted* to be, rather than as they *turned out* to be.

44. As things happened, the fires behaved in unpredicted ways, and surprised all, including the trio responsible for the prediction, as Mr Gellie acknowledged.

45. There is some evidence that after the morning planning meeting on 18 January 2003, Mr Taylor decided to have a re-think at about 11am. At that time, he decided that the fires might reach the urban interface by 3pm. He was entitled to his view. That he arrived at a different view to that which he had expressed the evening before is no basis for thinking that the 17 January 2003 prediction was not soundly based; it was a very dynamic situation.

46. Mr Taylor took his new prediction to Mr Graham. It is not of the slightest consequence now, and probably was not then, that he did not take it to Mr McRae; it got to the appropriate destination, which was the operations people. It was to be considered, and acted upon, if thought fit, by those concerned with operations, and, also those with community relations.

47. There was no decision-making rule in place that said that the giving of any kind of community warning was in the gift of Mr McRae. As he endeavoured to explain, his task was merely to deliver information as to the predicted path of the fires. It was for others

to perceive the effect of that information, and to act upon it, including by way of determining that a warning should be given. The actual source of the information was also irrelevant, so long as it came from someone whose role it was either to analyse, or distribute, that information. When Mr Taylor decided that there might be urban impact at 3pm, and when he took the step of disseminating that information, it became a matter for the judgment of those responsible whether there was a present need to issue a warning.

48. It is not without significance in this context that others lauded by Counsel Assisting *might have*, *but did not*, predict the course of events on 18 January 2003. Mr Cheney was, naturally, very interested in the course of the fires. He reached views about the likely course of the fires early on, and gave Mr Lucas-Smith the benefit of those views. However, he *never* predicted what came to pass on 18 January 2003. Had he done so, he would, no doubt, not have chosen the southern area of the ACT as his observation point on that afternoon.

49. Mr Bartlett was, in the assessment of Counsel Assisting, a fire suppression officer of unmatched experience in the ACT. He was appointed Incident Controller of the fires generally for Saturday, 18 January 2003. He was given the task by Mr Graham of overflying

the fires that morning. Mr McRae arranged for his helicopter to have transferred to it the equipment that permitted a real-time digital view of the fire front[50]. As it happened, the technology failed.[51] That technical failure, nobody's fault, just the sort of bad luck that seemed to dog that day, produced its own setbacks for fire suppression that day, as Mr Gellie's evidence revealed.

50. Mr Bartlett knew that fires could move 15 km in one day under strong north-westerly winds[52]. He was able to see precisely the state and location of the fires on the morning of 18 January 2003 from the helicopter[53]. He reported his observations to the planning meeting. After the meeting, Mr Taylor, who was one of the predicting trio from the previous afternoon, told him that, in his opinion, the fires would be at Mt Stromlo by 5pm[54]. That was an advance on the previous evening's prediction. What is significant is that Mr Bartlett, as Incident Controller, did *not* direct that a warning be issued to suburbs adjacent to Mr Stromlo, nor did he tell anybody else that such a warning should be issued.

51. Mr Bartlett's view was that the fires were relatively under control before midday, but then spotting commenced in the early

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[50] In spite of Mr Bartlett's claim to have been unable to find Mr McRae that morning.
[51] See Mr McRae statement, ESB.AFP.0110.
[52] T5959.
[53] T6039.
[54] T6009.

afternoon[55]. He envisaged three separate fires impacting on parts of Canberra[56]. He saw the rural assets as under immediate threat[57]. It would have been between 2.30pm and 2.39pm that it became obvious to Mr Bartlett that the fire would burn up Mt Stromlo, and he wanted to be sure that there were no tourists on the road[58]. At 2.40pm the fire was still on the western side of the summit of Mr Stromlo, and, at that point, Mr Bartlett detected a spot fire. It developed rapidly and headed towards the ACT Forests office, which, soon after, it destroyed, and along with it, Mr Bartlett's car, which he can hardly have perceived to be under threat when he left it there!

52. As Incident Controller, making the observations that he did, being provided with the information that Mr Taylor and others gave him, it was within his remit to issue a warning had he been of a mind that one was necessary. That is, targeted advice of the kind of which Mr McRae spoke in his evidence, not general pre-season advice to reduce hazards and so forth. Mr Bartlett did *not* issue a targeted warning, because he, like the others to whom we have referred, was unable to predict the unpredictable.

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[55] T6009.
[56] T6024.
[57] T6054.
[58] T6065.

Fire Spread Predictions

53. Counsel Assisting seriously misrepresent Mr McRae's evidence on this subject[59]. Indeed, any finding based upon that submission would be manifestly erroneous. It is submitted that Mr McRae was not prepared to *"factor into his fire spread predictions that the McArthur meter might underestimate rates of spread at high wind speeds."*

54. Mr McRae was questioned with respect to the McArthur meter, and the Vesta *" findings"*[60]. In summary, his evidence was that he was aware of the preliminary results reported by the Vesta team. He distributed the preliminary findings and took part in discussions concerning these results. He was already well aware, as was Mr Lucas-Smith, of faults in the McArthur instruments. Mr McRae's practice was to apply a commonsense or reality check factor to McArthur readings. His approach with new tools was to run the new and old together in the field for a year, and then compare results. However, despite the preliminary results, there had been no new model produced which could be substituted for the McArthur meter. The relevant staff were trained with the McArthur meter, and the assessment of competency of officers was by

[59] Paragraph 1273.
[60] T3094ff and T3398ff.

examination in the use of the meter. Accordingly, it remained the primary tool, subject to studying the local conditions and keeping an eye on whether the meter was failing in the circumstances being dealt with.

55. That was, plainly enough, a perfectly reasonable approach. Indeed, it would quite unreasonable for a planner simply to uncritically adopt a preliminary finding of an incomplete study, carried out in different, as well as artificial, conditions.

56. The fire-spread prediction undertaken on the afternoon of Friday, 17 January 2003 was done by Messrs Gellie, Lhuede and Taylor. All were experienced. All knew about the doubts concerning the McArthur meter. With the possible exception of Mr Lhuede, all applied precisely the sorts of reality checks spoken of by Mr McRae. None applied the *"Project Vesta correction of three times."*[61] After referring to use of the meter, Mr Taylor said:

> *"That was also corrected by some local knowledge about fuel types, slopes and likely or forecast weather changes during the period. So it is an approximation based on Nick Lhuede, Hilton Taylor and Nic Gellie's experience, combined with the McArthur meter."*

[61] Gellie T5028-34; Lhuede T4944, 4946, 4957-9; Taylor T4994-6.

47. Counsel Assisting do not criticise *any* of these persons mentioned except, of course, Mr McRae. It would have been very difficult to do so with any semblance of justification, even for Counsel Assisting. This observation is as true for Mr McRae as it is for the other named persons. The prediction was a good one, albeit that the unprecedented fire behaviour the following day meant that it could not, as prediction, be thoroughly tested in retrospect. Mr Gellie had estimated a rate of fire spread of 4-6kph in the pines[62]. Mr Bartlett had actually measured the rate in the pines at 6kph[63].

48. Mr Taylor reviewed the prediction on the Saturday morning with the new information available from, inter alia, Mr Bartlett's reconnaissance. He arrived at a 3pm estimate, which was lauded by Counsel Assisting as prescient. Yet it was derived *without* recourse to the Vesta correction.

49. In oral evidence, Mr Cheney agreed that the Vesta project was an empirical study. Fire spread is not the subject of some established theory; it remains an elusive concept, not well understood by scientists, or anyone else for that matter! That being so, an empirical study was necessary to formulate a process whereby fire spread could, so far as possible, be predicted. The predictive power of such a process is derived from the repetition of the

[62] Counsel's Assisting's submissions, paragraph 827.
[63] T6066.

experiment under like conditions, thus permitting study of the contribution of variables under relatively controlled conditions[64].

60. When he gave his evidence on 20 September 2004, there was not in existence a *"report [of Vesta] prepared by [Mr Cheney] that [he] would be happy to submit for publication."*[65] As at 30 June 2006, there is no evidence that the position is any different.

61. Mr Cheney was referred to statements made by Mr Gould, his Vesta second-in-charge. Not surprisingly, he agreed with them. However, a number of aspects of the project then remained outstanding. Included amongst those aspects was *"validation in south-east fuel types"*[66]. The Vesta experiments had all been carried out in Western Australia, in different fuel types to those found in the ACT.

62. Significantly, not even Mr Cheney used a Vesta 3x correction during the 2003 fire event[67].

63. None of this restrains Counsel Assisting from urging your Honour to criticize one only of several officers, for failing to blindly apply the preliminary finding of an incomplete and unpublished study undertaken under experimental conditions in different fuel types. The criticism is little short of preposterous!

Mr Roche

[64] T7118 -9.
[65] T7120.
[66] T7122.
[67] T7127.

64. Mr Roche's evidence cannot, and should not, be relied upon by your Honour in these proceedings as a basis for the making of any serious finding. Regrettably, his report and evidence were irremediably infected by the manner in which he approached his task. We do not seek to criticise him personally. No doubt, he did his earnest best, but the task proved beyond him, and at critical points, he was led into error by Counsel Assisting, rather than given assistance to furnish reliable evidence.

65. He should not have been placed in the role of an investigator, as well as put forward as an independent expert witness, expressing opinions upon evidence elicited, in part, by reason of the very investigation in which he was involved, including in framing issues for the conduct of the inquests and the inquiry. Of course, there is nothing untoward in having an expert provide assistance to a coroner in the investigative phase. There is nothing untoward in having an expert provide lists of questions that might be asked by other investigators, such as police. But, we submit, it is entirely inappropriate for such an expert to be thereafter put forward as an *independent expert witness*, purporting to express opinions as such a witness upon the outcome of that investigation.

56. At times in his evidence, Mr Roche even denied that he was an investigator. That merely illustrates the degree of confusion in his mind about the true nature of his role.

57. We respectfully submit that there is simply no basis for *any* legitimate criticism of Mr McRae's conduct, whether based in whole or part upon the evidence of Mr Roche, or otherwise.

58. Mr Roche's partiality, and his lack of comprehension of his role, was evident from very early in the piece. For example, his email to Ms Barnicoat of 23 October 2003, concerning the alleged *"culture of the ESB"* and his belief about a certain witness, with views he perceived antipathetic to the ESB or its officers, clearly demonstrated partiality of a kind that completely disqualified the views he expressed from acceptance as independent expert opinions upon which your Honour could comfortably act[68]. Further, his attempts to *"rewrite"* this email in the witness box only served to confirm his partiality, and his persistent unwillingness to recognise the constraints upon expert witnesses that have often been the subject of judicial comment[69].

69. The position of partiality he adopted was revealed on many occasions in his evidence. No doubt, other submissions will make the same point. To offer a relevant example, his attempts at

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[68] T7516.

[69] See *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [78].

dealing with the proposition that remote forest fire fighting might be attended with additional difficulties bordered on the bizarre[70].The position he seemed to reach was that it is actually easier to conduct remote forest fire fighting at night. Yet it is beyond argument that the exercise is more difficult at night. That this is so does not necessarily mean that the best possible decision was made on 8 January, 2003 at Bendora, but, plainly, Mr Roche saw his role as defending a position with respect to the issue of fire fighting at night, regardless of obvious additional challenges that must inevitably be involved when working in darkness and poor visibility.

70. It is not to their credit that Counsel Assisting have chosen simply to ignore all these critical deficiencies as if they simply did not exist. That, of itself, is a good reason for your Honour to reject as foolhardy in the extreme the invitation of Counsel Assisting to your Honour to adopt their narrative as a platform from which your Honour should make findings, comments and recommendations[71]. This submission of theirs is a recipe for legal error.

71. Mr Roche's methodology was not that of an expert. In a matter such as this, with vast quantities of material gathered in disparate ways, it can have been no easy task. However, basic flaws could

[70] T7528*ff*.
[71] Paragraph 4.

and should have been dealt with. Mr Roche set out to gather information from many sources. They are listed at page 13 of his report[72]. Commonsense suggests that some record of these inquiries should have been kept. The list of correspondents or interviewees is impressive, and was no doubt reproduced to convey the impression of a thoroughly researched report. However, this appearance is purely illusory, as was revealed when Mr Roche was questioned about it. He either had no notes of what these people said to him upon various topics, or had destroyed them, or had written something cryptic on an envelope[73].

71. Mr Roche delegated to Counsel Assisting the task of finding support for some of the opinions in his report. He sought to suggest in evidence that all that Counsel Assisting did was to add the electronic brief references. That evidence was simply not correct as an examination of the underlined portions in the drafts referred to in oral evidence demonstrates[74].

72. In other respects, once simply cannot discern the basis of opinions expressed. Mr Roche expressed an opinion in a draft report that the fuel load at Bendora was 40 tonnes per hectare. In his report, it is said to be 35 tonnes per hectare. It was pointed out to him that

[72] DPP.DPP.0009.0013.
[73] T7843*ff*.
[74] T7453.

this represented a significant 12.5% difference. He did not have the faintest idea what led him to change the figure[75].

73. These matters call to mind another of the principles concerning expert evidence: the expert must identify the criteria enabling the Court to evaluate the validity of the opinion[76]. This is no less important in coronial proceedings as it is in civil proceedings, because it identifies the means by which the Court is able to determine the probative value of the evidence, and, as your Honour has already rightly recognised in your reasons for rejecting the tender of further evidence delivered on 19 May 2006[77], a coroner must only act upon material that is probative.

74. Experts should not simply be assumed to know the rules by which courts admit and evaluate expert evidence. In many jurisdictions, experts are to be provided with a code of conduct to bring these sorts of matters to attention. It is plain nothing of that sort was done here.

75. In his report, Mr Roche asserted that many things that ought to have been done in the approach to the 2002-3 fire season were not done. His sole basis for saying so was, as he asserted, an absence of evidence upon his reading of the brief showing they had been done. A number of counsel took Mr Roche to task for the obviously

[75] T7471-2.
[76] See *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [59]-[103].
[77] T131-2.

flawed approach revealed by these opinions. The illogicality of the proposition is obvious. At least, it is to anyone with even basic legal training. It was not obvious to Mr Roche, and when material was placed before him he was prepared, in some instances only, sometimes a little reluctantly, to modify his views.

76. This flawed approach should have been obvious to Counsel Assisting. In some instances, for example, it was not merely that no inquiry had been made as to whether a particular step had been taken, there was actually material in the brief to show otherwise. The *"Dr Doom"* emails provide an example, and there are others[78]. Counsel Assisting had the benefit of drafts by Mr Roche, including this section of his report, but made no attempt to address the matter. It would have been not only professional to have done so, but, more importantly, in the interests of the administration of justice to have done so. Experts who are qualified by counsel to express opinions to courts are entitled to expect assistance from counsel in the execution of their task, but none here was forthcoming.

[78] See also T7998.

Mr Jeffrey

77. This witness was permitted to place before this Court documents making gross accusations of serious criminal offences against persons without the slightest basis. Indeed, that course was facilitated by Counsel Assisting upon the basis that they would not base submissions upon that material. The evidence of this witness, save for contemporaneous operational documents[79], should be put to one side, and no reliance placed upon it whatsoever.

Jurisdiction of the Coroner

78. Before your Honour on 19 May 2006, we advanced detailed submissions, including the citation of a number of relevant authorities, as to the parameters and permissible scope of an inquest and an inquiry, particularly in relation to the issue of causation[80]. We rely upon those submissions generally, and do not intend to repeat them here. The submissions on behalf of the Australian Capital Territory also deal with various matters related to your Honour's jurisdiction, and so far as they are consistent with those we have already advanced, and are of relevance to Mr

[79] We can only think of his letter to residents, but we do not assert there are no others.
[80] T99-108.

McRae, generally, we gratefully adopt them, and support their making. We will not re-canvass those issues here.

Warnings

79. Counsel Assisting draw attention to Mr Lucas-Smith's general warning, publicised on 29 November 2002[81], about precautions which could be taken, and about the ensuing fire season. Such a warning was hardly one that would normally be associated with complacency or secretiveness.

80. The submission then goes on to deal with Mr Roche's alleged expert evidence upon community awareness. However, he gave no expert evidence upon community awareness, having demonstrated no expertise in that area. That he worked as a fire fighter and an executive of a fire fighting instrumentality for some years no more qualified him as an expert in community awareness than Mr Lucas-Smith's experience qualified him. It may well be that there is a recognised field in which persons with relevant study and experience have a capacity to assess the degree to which a community might, or would, absorb some public message upon a topic of concern, and how it should be framed in particular circumstances. But Mr Roche's report and examination revealed no

[81] Paragraph 232.

qualification for the expression of opinion upon that subject matter, such that your Honour would be entitled to accept his evidence as that of an expert in the field.

81. The point may readily be tested by an examination of his expressions of opinion. He offered no foundation for his opinions beyond the opinions themselves. The only study that he made reference to in evidence, and only under cross examination, was the resident survey, and then only to acknowledge that he had not troubled himself to study it. That is to say, there was only one piece of empirical evidence, and he chose to ignore it[82].

82. Mr Roche might have been able to give evidence of what he, as a fire authority manager, would have done, in particular, identifiable circumstances, by way of the issue of warnings. However, he was in no better position than anybody in the general community to express an opinion upon the content or effectiveness of any particular message, and his evidence should not be elevated to a status to which it can make no legitimate claim.

83. Mr Roche's opinions upon warnings[83] were completely lacking in independent support. When taken to evidence that there was an attempt to engage the community, Mr Roche simply dismissed it,

[82] See the reference in Counsel's submission at par 238.
[83] DPP.DPP.0009.0186.

suggesting that it was not directed enough to personalise the risk[84], whatever that meant. It would be an error for your Honour to elevate that suggestion to the status of an expert opinion. Significantly, it does not seem that Mr Roche, himself, ever made a claim to be an expert in the field. Rather, Counsel Assisting, having nobody who was such an expert, simply opted to confer that status upon him, and Mr Roche readily accommodated them by accepting that status.

84. It was suggested that there had been research aimed at determining how best to deliver pre-event exhortations to planning, but none was ever produced to the enquiry by Counsel Assisting[85].

85. Mr Roche's incapacity to give expert opinion upon this issue was demonstrated when he was asked to place himself, hypothetically, in the position of the overall Incident Controller for the fires on 18 January 2003 at 11.00am, and to describe the community warning he would have given in the circumstances then obtaining as he knew them to be. He conceded he could give no meaningful answer[86].

86. Counsel Assisting's submission upon the issue[87] gets off to a poor start, because their perception of Mr McRae's evidence as

[84] T7996.
[85] T7429.
[86] T7549 -50.
[87] Paragraph 1199.

"convoluted", or criticized using other epithets, springs from the failure to recognize that he and his interrogator were at cross-purposes for much of the time when dealing with warnings. As we have submitted above, Mr McRae was concerned with conditions which could trigger targeted advice for those particular suburbs of Canberra to which a direct threat was apparent from fire spread towards those suburbs. Counsel Assisting put no evidence-based argument to support their contention that *"the opposite of what was known was said publicly about the risk of an impact on the suburban area"*. There is, in fact, no evidence to support such a contention; it is merely a flight of fancy on their part, another manifestation of Counsel Assisting's obsession with attempting to identify someone to blame, regardless of the true state of the evidence.

87. Counsel Assisting refer to Mr McRae's *"call to arms"*[88], being his prescient emails, and to the *"extraordinary accuracy"* of his pre-event warnings as to the nature of a fire that *might* occur. Their submissions are internally inconsistent. On the one hand, they refer to such advice or warnings or predictions when it suits them to do this, and then pretend they were never given when it suits them to do that. Their only perceptible reason for so doing is to

[88] Paragraph 1201.

push your Honour into expressing some criticism of Mr McRae. There is *no* basis here for any criticism of Mr McRae. Instead, your Honour should find what the evidence establishes, that Mr McRae feared a wildfire impacting upon urban Canberra, and did all he could reasonably be expected to have done to bring that fear, which was based upon scientific analysis, to the attention of those whose job it was to do something about it, if, indeed, they could do some such thing. What possible motive could he have had, when the feared wildfire eventuated, for denying that fear, feigning optimism, or pretending to the community that the risk was minimal? These illogical and offensive submissions, now made, Counsel Assisting never once put to Mr McRae to give him the opportunity, in fairness to himself, to rebut them in his own words.

88. Your Honour can, and should, find that Mr McRae did his best to place before all relevant persons, both before and during the fire event, his views as to the dreadful risk of an adverse outcome. It is certainly open to Your Honour to find that the prediction, made on Friday, 17 January 2003, as to what the fires, in combination, would do on the following day, was not realized. But it should not be forgotten that whilst he endorsed that prediction, the work, and we assert good work, that brought it about was done by others at his request. Counsel Assisting grudgingly concede that it was

arrived at by Messrs Gellie, Taylor and Lhuede. However, they do not concede the truth that no-one predicted what would happen on 18 January. Counsel have not pointed to any prediction of the fire spread reaching the urban edge earlier than the Gellie/Taylor/Lhuede prediction save for that of Mr Taylor's re-think on the Saturday with the benefit of up to date weather and real-time fire spread reports. Even Mr Jeffrey, in his letter to residents, warned of the worst befalling them on the Monday or the Tuesday. Nor did the NSW planners see the worst coming on the Saturday. Counsel Assisting appear intent upon pushing your Honour into personal criticism of Mr McRae, yet your Honour must consider their submission against, and must rationally analyze the evidence; such an analysis can lead to one conclusion only: Counsel Assisting's submission on this account must be firmly rejected.

89. We bypass in this context Mr Cheney's conversation with Mr Lucas-Smith, having dealt with it above, save to note that the Machiavellian accusation that Mr McRae *"contrived a basis for dismissing Mr Cheney's assessment"* was another of Counsel Assisting's flights of fancy, not grounded in any evidence. Counsel Assisting should not presume to put such a submission when they never bothered to afford Mr McRae an opportunity to deal with it.

Your Honour should, without hesitation, completely reject Counsel Assisting's submission on this issue.

90. Counsel Assisting's submission concerning the ESB approach to community information and their criticism of Mr McRae in that regard[89] is just nonsense. How can their submission be sustained, that Mr McRae demonstrated *"an unwillingness"* to admit of other views of potential fire spread when, on 17 January 2003, he tasked Lhuede, Taylor and Gellie to arrive at a prediction for potential fire spread for the following day, and then presented their joint view to all who attended the afternoon planning meeting? As we earlier observed, Mr Taylor worked for ACT Forests, and Mr Gellie was a private contractor. Counsel Assisting's omission to face up to this evidence appears calculated; it does not fit into their preconceived objective.

91. Despite Counsel Assisting's submissions[90], it is no part of your Honour's jurisdiction to inquire into why administrative arrangements were such that the head of the planning unit, Mr McRae, was not obliged to determine the content of media releases. Curiously, Counsel Assisting submit that Mr McRae was somehow *"effectively absolved from [that] responsibility"*, despite the fact that there is no evidence whatsoever that it was *ever* part

[89] Paragraph 1216b.
[90] Paragraph 1217.

of his responsibility, and there is no evidence that he had *any* expertise in such matters. However, even if this could be a proper matter for comment, there is no demonstrable reason why a scientist whose job it was to apply scientific tools to the prediction of potential fire spread should also be assuming the burden of determining when, how and with what information the community should be furnished. Counsel Assisting submit[91] that ultimate responsibility for the dissemination of such information rested with Messrs Castle and Lucas-Smith. If it be any business of your Honour to pass comment upon this matter, Counsel Assisting ought to demonstrate precisely how and why that was in any way inappropriate.

92. Shorn of criticisms which are no more than labels, but are not backed up with references to the evidence that justify the criticisms, at least one part of Counsel Assisting's submissions accurately summarizes Mr McRae's position[92]. He expected, an expectation which was not realized as it transpired, that when fires made their runs towards the city, he would obtain the data by reference to which it might be predicted who should be warned that a fire was actually approaching them; that this would serve as the trigger for a specifically targeted warning upon the Bureau of

[91] Paragraph 1218.
[92] Paragraph 1226a-d.

Meteorology analogy. He did not accurately predict what came to pass on 18 January 2003. If the events of that day had been open to prediction based upon some recognized scientific analysis that Mr McRae ought to have followed to that end, but had not done so, then his performance, or lack of it, might legitimately be the subject of comment. He accepted that the prediction made was unrealized. He did not accept that anyone in his position, applying the then available tools, would necessarily, or even more probably than not, have got it right. Messrs Lhuede, Taylor and Gellie, applying a range of tools and factoring in local conditions, and conscientious in their efforts to arrive at a prediction which was as accurate as could reasonably be expected, came up with a prediction which was not realized. Counsel Assisting's submissions show no signs of ever coming to grips with this fundamental reality, but your Honour will have to do so.

93. Further, it should not be thought for one moment that Mr McRae tried to lock anyone into his thinking. Not only did he ask an independent trio to predict potential fire spread, he gave the *"do the maths"* warning, as Counsel characterize it, to anyone who was willing to listen, to make of it what they would, and to act on it as they saw fit.

94. In much of their submissions on this subject[93], Counsel Assisting stubbornly refuse to acknowledge a critical fact; the fire spread prediction relied on by the ESB was not prepared by Mr McRae personally. This is another telling omission. They do refer to Mr Jeffery's evidence, but do not see fit to acknowledge that Mr Jeffrey's prediction was also for the fires to impact *in his rural area on Monday or Tuesday*. Presumably, Mr Jeffrey was also relying upon the BoM's fire weather forecast. Mr McRae relied upon, as he was obliged to do, along with every other planner, including the NSW planners. Your Honour should not be slow to find that firespread prediction must inevitably be very much at the mercy of weather prediction, which, itself, is hardly an exact science. The weather prediction for 18 January 2003 had not changed. If Counsel Assisting are now suggesting that planners should conduct their work on other than a science-based or evidence-based footing, which would seem to be a necessary implication of any criticism of the planning that was done, including by Messrs Lhuede, Taylor and Gellie, and by the NSW planners, then any such submission would itself need to undergo an evidence-based appraisal, and none has been identified here.

[93] Including down to paragraph 1230.

95. Counsel Assisting's submission[94], in so far as it concerns Mr McRae, that he made a decision to defer giving a warning to the public is just plain wrong. We will not repeat in detail the reasons why, because we have already stated them previously more than once. In succinct terms, the point had not been reached at which, in Mr McRae's view, a targeted warning to some identified section of the public under threat from the approach of fire needed to be given. There was no question of deferring anything. The kind of information required before a targeted warning could be given, specific and relevant information about fire spread behaviour, runs etc in particular directions, was not previously to hand such as would have warranted the giving of a targeted warning. Mr McRae's conduct up to the early afternoon of 18 January 2003 was not explicable *only* upon the basis, as Counsel Assisting now submit, that Mr McRae had decided to defer a warning to the public. Quite apart from that, it would also constitute a serious error of law to accede to such a submission, given that its appearance in Counsel Assisting's submissions is its first outing; it was never put to him, as it clearly should have been, if Counsel Assisting had been attempting to attain justice, rather than seeking to achieve a preconceived objective.

[94] Paragraphs 1231-2.

96. In striving for a basis upon which to accuse Mr McRae, for the first time, of making a decision to defer a warning, Counsel submit[95] that he decided "*it was not necessary or appropriate on 15 or 16 January to be activating the trigger for a clear warning to the Canberra urban community*..." of an impact on the following Monday. There is simply no evidence of that. In any event, the impact occurred on the Saturday. Their submission is merely their *"spin"* on part only of the evidence, that those responsible, who did not include Mr McRae, did not, in fact, issue the so-called *"general warning"* upon which Counsel Assisting have become fixated, to the exclusion of targeted advice, with which Mr McRae was concerned. Counsel Assisting also do not state what they mean by the so-called "clear warning". A warning to do what, when and how, and what difference would its making have made then anyway? If Counsel Assisting are still not prepared to specify these details so that their efficacy can be properly evaluated, your Honour can, and should, find that there is no substance in this submission. Counsel's failure to provide the template against which to urge criticism of McRae may spring from the incapacity of their own "expert" upon warnings, Mr Roche, who was unable even in retrospect to fashion the warning he would have issued. As to the

[95] Paragraph 1232.

evidence, Mr McRae's was that, at that time, it could not be predicted where the fires would approach, and there was, as he saw it, information of a general nature going out to the community at the behest of those whose responsibility it was to deliver it. That there was concern generally for the state of the fires is obvious, and no-one in Canberra at the time can have been in any doubt about it. There had been warnings about the need to prepare in the ways that one can before there is actually a specific threat of the kind that with which Mr McRae was concerned. That is to say, assuming people to act reasonably, they had been told in no uncertain terms that it was to be a severe fire season, and that precautions of the kind encompassed in Counsel Assisting's *"general warning"* should have been taken. Fires had started and a massive and obvious effort was being made to contain them. The community was engaged in a real sense. The fires were *"the talk of the town"*. However, some element of commonsense, proportionate response and personal responsibility must be acknowledged at some point of time in all of this.

97. The flaw in Counsel Assisting's submissions in this regard becomes apparent when one comes across the only attempt by Counsel Assisting to formulate the sort of warning that they say could, and should, have been issued prior to 18 January 2003. We will not set

it out verbatim, but it appears in italics in paragraph 1235 and again at paragraph 1312 of their submissions. We have already trenchantly criticized the latter during our oral submissions on 19 April 2006[96]. We will not repeat those submissions here. As to the former, plainly, on its face, it is vague. Apart from the references to *"Dunlop and Weston Creek"* areas, it lacks any specificity. Of course, the references to Dunlop and Weston Creek areas can be, and have been, incorporated with the clarity of vision afforded by hindsight, an *ex-post facto "fudging"* to achieve the preconceived objective. Had that warning been issued, and had Mr Cheney's feared but unpredicted westerlies occurred, and Belconnen been hit, Counsel would now be criticizing those who were in any way associated with the issue of the warning for the omission of Belconnen. At the considerable risk of self-repetition, we submit that it must constantly be kept in mind that *nobody* predicted what happened, not even Mr Cheney, who went elsewhere to observe.

98. To reiterate, reflecting Mr McRae's thinking at the time, he certainly expressed his concerns. He was undoubtedly telling all comers in the packed planning meetings all that the science would permit him to say, and dressing it up in terms designed to capture attention to the threat. However, general warnings to prepare were not his

[96] T105-108.

responsibility. He was not, as Counsel Assisting now seem to lament, "*absolved*" of responsibility; it just was not, and never had been, part of his job. If the content, timing, manner of delivery, emphasis and so forth of any warning called for by the material which he laid out in such stark terms to planning meetings is now to be judged, with the benefit of hindsight, and with all its dangers, as inadequate, and we make no submission one way or the other on that subject, then that cannot be sheeted home to Mr McRae.

99. Counsel Assisting's submission, that your Honour should criticize the Mr McRae's evidence that it was *most important* to provide the ACT Fire Brigade and the ACT Ambulance Service with the opportunity to plan for damage to homes and injuries to residents, is without foundation. There are quite obvious reasons for giving *direct* advice to those instrumentalities, specifically because of the importance of their functions and responsibilities in a fire emergency. In addition, general warnings about preparedness had already gone to the community. The preparation which might have been required of these instrumentalities was of an entirely different kind. It might have included such things as the need to cancel leave, perhaps have officers return from leave, arrange rosters, ensure the availability of equipment and so forth. Indeed, Mr Prince, whom

Counsel Assisting laud[97], spoke in terms quite complimentary of the advice that he received from Mr McRae.

100. In their headlong rush to criticize persons, Counsel Assisting then seek to raise to the status of a formal decision an issue that, in Mr McRae's mind, was merely a subject which had not yet arisen for consideration, but now submitted by Counsel Assisting to have *"had the effect of depriving the people of Canberra of a reasonable opportunity to prepare for a risk that* [Mr McRae] *saw as serious, even likely."* [98] Here, one finds a pretty fanciful attempt to suggest that Mr McRae was a party to a conspiracy to bring harm upon his fellow citizens. The suggestion would be laughable if it were not advanced in all seriousness. Your Honour should dismiss it out of hand. Counsel should have read the evidence, rather than getting too carried away with conspiracy theories. Once again, they ignore or misconstrue Mr McRae's evidence. As we have earlier noted, Counsel persisted in questioning Mr McRae about the giving of a general warning, which is perhaps better described as general advice[99], and, for his part, Mr McRae was giving evidence about a targeted warning, which he did not see as justified, at least in the absence of some rational basis for selecting who needed to be

[97] Counsel Assisting's submissions, paragraph 1243.
[98] Paragraph 1250.
[99] T3366.

specifically targeted and when[100]. If, as a matter of emergency management, the ultimate answer were to be that, in particular circumstances and at a particular time, the appropriate course would have been for residents in the whole of the western interface to have been warned that they might be directly impacted by a fire front, then we submit that the subject of when to have given such a warning, as well as the content of it, has not been the subject of sufficiently reliable, thorough or balanced evidence before your Honour, unaffected by the many benefits which hindsight inevitably confers, upon which your Honour could properly rely. For that reason, your Honour should resist Counsel Assisting's invitation to venture on this issue what would necessarily be ill-informed comment, as well as being, in all likelihood, beyond the bounds of coronial jurisdiction in the ACT.

101. In purporting to summarize the position at the end of 16 January 2003[101], Counsel once again ignore the fact that it was not part of Mr McRae's job to write or to issue warnings.

102. What needs to be observed about the morning planning meeting on 17 January 2003[102] was that Mr McRae gave an appraisal of the effect of the BoM forecast upon fire behaviour, and that it contained all the detail that those present needed in order to get

[100] T3360.
[101] Counsel Assisting's submissions, paragraph 1252.
[102] Paragraph 1254.

on with their respective jobs, whether that was fire suppression or community engagement.

103. Immediately before Counsel Assisting's submissions on fire spread predictions[103], they finally concede that the critical 17 January 2003 fire spread prediction was made by Messrs Gellie, Taylor and Lhuede, not by Mr McRae. We have referred to this matter previously in these submissions. But it is just plain wrong to suggest, as Counsel Assisting do[104], that Mr Taylor's prediction on 18 January 2003 followed Mr Cheney's methodology, or involved any Vesta factor.

104. Counsel Assisting purport to make submissions upon the relevance of the tornado to fire behaviour[105]. They concede that the *"extent of the ember shower that affected urban Canberra might not have been foreseeable"*, but nonetheless submit that *"a substantial ember attack affecting homes in the area clearly was."* But if the former is correct, and we do not submit otherwise, it is not apparent why the latter must necessarily be correct, and it is not based upon any credible evidence.

105. Fire behaviour on 18 January 2003 was unprecedented, and unpredictable. Nobody predicted it, not even Mr Cheney. Moreover, it was the unprecedented and unpredictable fire spread

[103] Paragraph 1271.
[104] Paragraphs 1275-6.
[105] Paragraph 1277.

that placed the fire at the doorsteps of the suburbs, and that prevented any realistic suppression action. A major deficiency of Counsel Assisting's approach to the inquiry has been that they have adopted a blinkered view of the relevance of scientific knowledge to the investigation of fire behaviour and its relevance to what occurred in January 2003.

106. To illustrate that point, we refer your Honour briefly to some aspects of that science, which would have been relevant to the inquiry, but which have not been explored during the proceedings, principally because of the poor quality of expert advice relied upon by Counsel Assisting, and their own approach to that subject. The material to which we refer is referred to in an attachment to these submissions.

107. Counsel Assisting's approach to the science appears tactical. The approach appears to be to argue that there was nothing really new in what occurred on 18 January 2003; that being so, it can then be argued that what occurred ought to have been foreseen and prevented, or, at least, ameliorated in its effects. That is, by adopting a blinkered approach to the role of scientific knowledge, the door is opened to attribute blame to agencies and persons, because they failed to predict that which ought to have been predicted.

108. We submit that your Honour cannot comfortably make findings or comments based upon such an approach. It has been demonstrated to Counsel Assisting that the state of scientific knowledge is rapidly changing. Their approach to Dr Mills groundbreaking work, referred to in the attachment mentioned in paragraph 106 of these submissions, was to dismiss it in an email to the ACT which put it forward, with the blasé response that it would be placed with the papers, but that they found it a little difficult to read. Of course, they found it difficult to read; they are not scientists. However, that was a simplistic response at best. In the discharge of your Honour's function to ensure that the facts are fully, fairly and fearlessly investigated, your Honour's inquiry could have benefited from an analysis of what appears to be an advance in scientific knowledge upon a relevant issue. At the least, Dr Mills could easily have been invited to produce a plain English version of the paper, or to come along and explain it. We record our strongly held concerns that, consistent with the approach taken by the Counsel Assisting, and apparently also by your Honour, at least if your Honour's previous observations about delay are at all indicative[106], that finishing the job may be perceived to rank in

[106] We refer to your Honour's observations, recorded in the transcript for 16 June 2006 and elsewhere, on the subject of delay, upon which subject we note and support the submissions on behalf of the Australian Capital Territory.

importance above ensuring that advantage is taken of the best that science may have to offer the inquiry.

109. Counsel Assisting have recognized[107] that Mr Castle acknowledged that the failure on the Friday night to warn the Canberra urban community of the then state of the predicted fire spread was based upon his optimism as to suppression possibilities. Your Honour has evidence of the fire spread prediction made by Messrs Gellie, Taylor and Lhuede. That prediction was, in fact, made upon a *worst case* basis[108]. It was also based upon the worst case ends of the ranges of predictions made by the BoM. It would not have been proper for the planners, upon whose work others would make a range of resource, personnel and tasking decisions, to have ignored the expertise of BoM and dreamt up their own predictions, or taken the predictions, assumed something even worse, and then done a rough calculation based upon the sort of guesstimate thinking which Mr Cheney claimed *after* the event that he would have used *during* the event. The results of Mr Cheney's approach were not subject to any rigorous examination by Counsel Assisting. Their uncritical approach was to assume that Mr Cheney's claimed approach, and with the benefit of hindsight, would have informed the ESB on 17 January 2003 that a very large urban impact would

[107] Counsel Assisting's submissions, paragraph 1279.
[108] Contrary to those submissions, paragraph 1280.

occur the following day, and, therefore, that was the approach that ought to have been taken.

110. Of course, putting forward Mr Cheney's approach as the *only* proper approach requires acceptance of the proposition that fire behaviour on 18 January 2003 was not really out of the ordinary, that it was, in fact, within the bounds of what one would have expected. However, the correctness of that proposition is thrown into grave doubt by, and illustrates the problem which arises when one ignores scientific developments such as, Dr Mills' work.

111. If that science is right, and there was an extraordinary event on 18 January 2003, then the approach which Mr Cheney claimed, *ex post facto*, that he would have used, is cast in a very different light. However, if, on 17 January 2003, based upon Mr Cheney's approach, a targeted warning of the kind Mr McRae's had in contemplation (that is to say, one to the effect that *"a fire is approaching your suburb"* etc) had been given to the majority of the suburbs on the western edge of Canberra, but the *worst case* prediction of Messrs Gellie,Taylor and Lhuede had not eventuated, the giving of that targeted warning, with the benefit of hindsight, might now be judged as having been alarmist and unnecessary, maybe even counter-productive to the maintenance of a credible warning system. We do not submit that that would necessarily

have been the judgment, but it is a distinct possibility. Of course, to deal properly with this issue, one would need to have obtained evidence from someone who was truly expert in community behaviour in emergency situations, but your Honour has not been furnished with that kind of evidence, merely with inexpert views of Mr Cheney.

112. With respect to fire spread prediction, there was the prediction by Messrs Gellie, Taylor and Lhuede delivered to the evening planning meeting on 17 January 2003 by Mr McRae. As Counsel Assisting observe[109], there was no plan to place fire fighters near the fire front, though contrary to their contention, as the operational people would no doubt explain, that does not mean, literally, a complete absence of suppression efforts, as Counsel Assisting seem to have assumed. The advice of Mr McRae as to fire weather, fire behaviour and so forth was stark. But it really was a matter at that stage for those responsible to take that material and make the judgment that was called for in relation to community engagement. Mr Castle, to his very considerable credit, and in a hostile atmosphere of attempted blame attribution, conceded that, with hindsight, he erred in applying an unjustified measure of optimism that affected his decision-making with respect to community

[109] Paragraph 1279.

engagement. However, no amount of blame attribution can visit that upon Mr McRae. It was not Mr McRae's fault that that may have occurred.

113. Counsel Assisting submit that only Mr Prince *"accurately interpreted the fire spread predictions and other signs as pointing to a serious impact from the fires on the urban area"*, but fail to acknowledge that, at least in part, that interpretation was, itself, based upon Mr McRae's advice to Mr Prince[110]. This omission is explicable upon Counsel's *"black and white"* approach to the matter; persons who, in their submissions, should be criticized, have apparently irretrievably failed in *all* ways.

114. In dealing with 18 January 2003, a further example of the simplistic *"us and them"*, *"black and white"* thinking of Counsel Assisting, which your Honour should decline to accept, is found in their submissions concerning Mr Bartlett[111]. What is strikingly absent is a single word of criticism of Mr Bartlett, this most experienced fire fighter, who was actually appointed as the Incident Controller for the fires generally that day. He had all the responsibilities of an Incident Controller under the AIIMS system, no more, no less. The fact is that, despite flying the fires and having the benefit, not available to others at ESB, of first-hand observation of the fires, he

[110] DPP.DPP.0004.0040; Prince transcript record of conversation q132;T6460-1.
[111] Counsel Assisting's submissions, paragraph 1292.

did *not* predict the urban impact that day. Nor did he call for a targeted warning to be issued. We do not submit that Mr Bartlett, any more than anyone else, should be criticized for failing to predict the unpredictable. Nor do we criticize Mr Cheney if, indeed, he really did believe, on 13 January 2003, that the fires would impact urban Canberra and, and noticing that there had been no warning given to the Canberra community for 18 January 2003, he, nonetheless, failed to take the matter up with those whom he must, in those circumstances, have believed had seriously miscalculated the true position.

115. Your Honour should exercise care to avoid being led into error by Counsel Assisting's persistent efforts to put a sinister *"spin"* on events where this may advance their preconceived objective. They criticize Mr McRae[112], apparently for being *"two-faced"* in telling Mr Prince, on the one hand, that he had to be prepared for possible impact from Weston Creek through to Greenaway, and, on the other hand, saying that he *"wasn't implying there would be an impact on [the urban interface] from Weston Creek to Greenaway that afternoon. I would stick with the notion of a forecast that puts the fire on Narrabundah Hill at – I believe it was 2000 hours I said.*" What Mr McRae was doing was giving the ACT Fire Brigade

[112] Paragraph 1293.

representative practical advice as to the breadth of the area for which the brigade would have to plan. That advice was sensible. He could not have predicted just where that impact might be, but he had to make a judgment as to the breadth of coverage for which the brigade should make preparations, lest they be caught short. He confirmed, at the same time, perfectly rationally, that he did not believe that the fires would impact upon the whole of that broad reach of the urban edge, and relied upon the for prediction that Messrs Gellie, Taylor and Lhuede had jointly made.

116. Viewed with the benefit of hindsight, Mr McRae failed to perceive that, if fire behaviour was substantially worse than could be scientifically predicted by factoring *worst case* BoM weather forecasts into the models, and adjusting for local knowledge of fuel, slope etc (the work Messrs Gellie, Taylor and Lhuede did), then the fires might, in fact, overreach the *worst case* Messrs Gellie, Taylor and Lhuede fire spread prediction, before any amelioration in weather and fire behaviour. Had he guessed that might happen, then that might be at least *some*, if only a flimsy, basis for contending that it may have been appropriate for him to indicate the need for a targeted warning. However, we use the word *"guessed"* advisedly. His job, and that undertaken by Messrs Gellie,Taylor and Lhuede, was to apply scientific methods to the

business of giving advice as to what fires might do. He was not at liberty to guess, and to do so would have been wrong. The suppression services and those charged with community engagement expected him and those in the planning unit to give advice which they could back up with relevant science. If Mr McRae had told a planning meeting that Messrs Gellie, Taylor and Lhuede had worked out a *worst case* unattended rate of fire spread which would have put fire at Narrabundah Hill by 8pm, or wherever by whatever, but that he, Mr McRae had a *"gut reaction"* that the fire might suddenly intensify exponentially, and reach the urban edge much earlier, those in command positions would have been well justified in being extremely sceptical about making resource allocations, staffing or strategy decisions based merely upon a *"gut reaction"*. If that kind of decision-making has a place in fire fighting, and we submit that it does not, then that kind of *"judgment call"* is best left to the ultimate decision-maker. Any such advice from a planner would constitute a serious usurpation of the ultimate decision-maker's role. It would effectively tie that officer's hand, on the basis merely of the planner's intuition, not science-based advice.

117. Counsel Assisting's purported summary of Mr McRae's thinking and approach by and during Saturday, 18 January 2003[113] persists in treating Mr McRae's evidence in an unfair and irrational manner, without proper regard to the evidence. They persistently refuse to address the question whether anyone else contemporaneously and scientifically predicted what would happen on 18 January 2003. Apparently, they persist in relying upon Mr Cheney's discredited evidence, including the views which he expressed on 13 January 2003 about fires burning into Canberra, and which Mr Cheney, in a telling practical sense, contradicted by his own actions on 18 January 2003. A further important matter that is completely left out of account in Counsel Assisting's summary is that even Mr Bartlett saw nothing untoward before midday. It was only *after* midday when Mr Bartlett, who was in the field, and thus had a major advantage over Mr McRae in a rapidly changing situation, began to observe fire behaviour that was demonstrably different from that which was expected. Counsel Assisting also simply ignore the communications difficulties which were experienced on 18 January 2003, so that they can then be critical of Mr McRae's evidence as to when he first realized there was unpredicted fire behaviour before 3.00pm that day. This style of selective advocacy

[113] Paragraph 1295.

for a preconceived outcome is one calculated to lead your Honour into error. It should be firmly rejected in favour of a fair-minded appraisal of the whole of the evidence.

118. Counsel Assisting attribute to Mr McRae sole responsibility for the midday media release on 18 January 2003 not containing a targeted warning to residents from Weston Creek to Greenaway, and then submit that he cannot accept sole responsibility for that[114]. If anything to do with Mr McRae or his evidence is, as Counsel Assisting submit, *"convoluted"* or *"nonsensical"*, this reasoning about him certainly qualifies. The evidence was that Mr McRae did not call for a targeted warning to named suburbs at the morning planning meeting, because there was no sufficient warrant for doing so at that time. However, the information that was imparted to the meeting was available to be used, and could readily have been relied upon by those (who did not include Mr McRae) bearing responsibility for community engagement, in order to engender, if they thought fit, a heightened sense of resident awareness of the general situation, of the advisability of completing general readiness tasks, or of the need to attend closely to further announcements.

[114] Paragraph 1296.

119. Counsel Assisting submit[115] that Mr McRae was not *"ready to give a frank account of the current predicament to the people of the ACT and Canberra in particular"*. This darkly suggests that Mr McRae was actually a party to a *"cover up"* of some kind. The suggestion is patently absurd. It could only be the product of Counsel Assisting's fevered imagination, driven relentlessly by their determination to seek to *"claim some scalps"*, regardless of the evidence. It studiously ignores the fact that it was not Mr McRae's role to give any account of the *"current predicament to the people of the ACT and Canberra in particular"*, whatever meaning that notion is intended by them to convey. It was his job to advise the ESB and others about fire behaviour and fire spread, and he did that. He gave his advice in planning meetings attended, usually, by the CEO, the CFCO, the deputy CFCOs, the head of operations, the logistics officer, departmental heads, the media people, the ACT Fire Brigade representative and the AFP representative. On the morning of 18 January 2003, he briefed the evacuation committee, and he gave briefings to Mr Prince from the brigade. The accounts that he gave to those meetings were frank; nothing known was held back. Counsel Assisting, when it once suited them, described a briefing given by Mr McRae as having included a *"dire warning"*. Mr

[115] Paragraph 1297.

McRae did not ever, in any way shape or form, seek to place any restriction upon the use to be made of the information he imparted at any of these meetings. It is true that he did not perceive what everyone may now perceive with the benefit of hindsight, that is, the potential utility of some kind of targeted warning, if possible, having being given on the morning of 18 January 2003 to residents in the suburbs to which the fires reached later that day, but it takes a particularly cynical mode of reasoning, as well as a gigantic leap from the evidence, to characterize a lack of perception of that kind, at the time and in the circumstances, as, in fact, constituting an unwillingness to impart frank information to the community.

120. Counsel Assisting's submission[116], that Mr McRae, inter alia, *"knowingly"* withheld *"vital information"* from the people (precisely what that was Counsel Assisting do not deign to formulate), manifests hyperbole beyond measure . It suffers from precisely the same defects and reveals a partisanship fundamentally inconsistent with the proper role of Counsel Assisting. Your Honour should have no hesitation in rejecting such unbalanced assertions as any basis for sound findings.

121. In their submissions with regard to the position after midday on Saturday, 18 January 2003, Counsel Assisting reveal a continued

[116] Paragraph 1299.

incapacity to grasp the difference between general advice as to the need to prepare for the possibility of fire, and targeted warnings to a particular section of the community that a fire may be approaching. This misconception entirely corrupts their analysis of Mr McRae's thinking at that time[117]. A consequence is that Counsel Assisting proceed as if the people of Canberra were entirely ignorant of the fact that there were large fires in the forests to the west and northwest of the ACT, and as if, somehow or another, it was up to Mr McRae to tell them that there were such fires, that fires may spread, and that it would be a good idea for them to undertake basic preparedness. If that is not what Counsel Assisting submit, your Honour is entitled to ask, and should get an intelligible answer from them, in precise terms, rather than in mere formulas, as what was the *"straight forward and timely information about the risks they were facing"* to which Counsel Assisting refer, as well as, in precise terms, what urban Canberra was supposed to do in response to that information (stay and fight, or evacuate, and if the one or the other, how, which and when), and which information would demonstrably have made some material difference to the outcome as regards destruction and damage to property in the

[117] Paragraph 1306.

affected areas. There is simply no evidence remotely bearing upon this difference.

122. Of course, people were aware of the fires, and not only of their presence, but of the general risk that they posed. If, in the pre-season community advice, and during the early days of the fires, people were advised, as they were, of the need to reduce fire hazards and, generally, to prepare their homes by cleaning gutters, removing inflammables and so forth, that is one thing. However, the question whether, on the evening of Friday, 17 January and the morning of Saturday, 18 January 2003 targeted warnings ought to have been given to residents in particular suburbs was another thing entirely. We submit that it is quite erroneous to treat general advice and targeted warnings, as Counsel Assisting do, as if, in essence, they were the same things. Any findings or comments which your Honour may make in reliance upon what Counsel Assisting submit, and which fail to recognize this important distinction, and the evidence which Mr McRae gave about it, will manifest the same error.

123. A simple illustration of that distinction may be found in the terms of the SEWS signed and broadcast that afternoon[118]. One may leave to one side for the moment the question whether the SEWS was

[118] Refer Counsel Assisting's submissions, paragraph 1301ff.

poorly drafted, by reason of the absence of a brief message as to the purpose of filling buckets and the bath. Consider the elements of the warning. It is not self-evident that the specific advice contained in the SEWS, or that it might have contained if more felicitously drafted, ought to have been given to the residents of the whole of the western edge of Canberra, either between 15 and 17 January 2003, or, indeed, even on the morning of the 18 January 2003. Such advice would have been the kind of targeted warning that Mr McRae did not think was then necessary, that is to say, whose issue would then have been premature. There is no credible expert opinion to the contrary. Indeed, the difficulty of formulating even a targeted warning, including basing it upon information about the particular situation prevailing at the time (assuming that it is available), and including the giving of unequivocal advice as to precisely what residents should do at that time, and particularly in what may be a rapidly changing situation, is well illustrated by the evidence of the residents referred to by Counsel Assisting in their submissions[119]. The giving of general advice in the preceding hours and days would be even less likely to have enabled the residents to decide whether to stay with their homes, or to evacuate, during the afternoon of 18 January 2003.

[119] Paragraph 1302.

124. Counsel Assisting urge upon your Honour a number of findings, including ones concerning Mr McRae and on the subject of warnings[120]. As to those, we submit that the only formal findings that this Court can make are those required or permitted by the Act; in the case of deaths, identity, place and time of death, and manner and cause of death (s52 (1) of the *Coroners Act 1997* (ACT)), or, in the case of fires, the cause and origin of the fire, and the circumstances in which the fire occurred (s52 (2)). For reasons advanced by us on 19 May 2006 and related to the parameters and permissible scope of an inquest (which are also applicable to an inquiry), we submit that the findings urged by Counsel Assisting concerning Mr McRae on the subject of warnings are beyond those parameters and that scope as formal findings. For the reasons we have advanced in these submissions, they are also not open, or, alternatively, not fairly open, to your Honour to make as findings *en route* to those formal findings.

125. More particularly, we strongly dispute their contention that it was any part of Mr McRae's duties or responsibility to ensure that people in the Canberra urban area and rural settlements west of urban Canberra facing a fire risk were given any kind of warning of that risk. The responsibility referred to in the evidence of witnesses

[120] Paragraph 1307.

was that of the ESB. Mr McRae's job was limited. He did not bear any personal responsibility to warn anybody, outside of the ESB, about anything. Nor did he have the capacity to do so. What he *did* have the capacity to do was to recommend to others in the ESB the issue of targeted warnings when fire behaviour predictions justified the adoption of that course. His judgment at all relevant times was that the occasion for so doing had not then been reached. In retrospect, one may disagree with that judgment, but the making of adverse comment about such matters, driven by little more than the benefit of hindsight, is a poor foundation for the exercise of any of your Honour's powers. In their submissions on this subject, Counsel Assisting persist in referring to *"such a warning"* or *"that warning"* or *"the warning"* without ever identifying precisely what they have in contemplation. We made submissions about this fundamental deficiency on 19 May 2006, there, in the context of two of the inquests, but those submissions are also relevant to the inquiry generally[121]. That deficiency remains unremedied. It is probably incapable of remedy, despite Counsel Assisting's recent attempt, after failing to persuade your Honour to receive further evidence, to reformulate a case for attributing blame for the death of Mrs Tener, based upon evidence which, only a few weeks

[121] T105-8.

previously, Counsel Assisting conceded, rightly we submit, was incapable of sustaining such a finding. And we have already drawn attention to Mr Roche's confessed inability, despite the cloak of expertise in which Counsel Assisting tried to clothe him, to identify the kind of warning he would have given on the morning of 18 January 2003. Counsel Assisting's proposed findings on this subject, apart from constituting a reckless invitation to your Honour to make a jurisdictional error, remain wholly unacceptable, by reason of the continued failure of Counsel Assisting to face up to the question: a warning addressed to whom, how, when, and in what terms, and with what demonstrably beneficial effect? If they are unable even to set out the terms of the warning that should have been given, it is an impossible task, simply as a matter of logic, to demonstrate that its absence led to the destruction of, or damage to, any property. It is also abundantly clear that there is not the slightest evidence that any *particular* warning, that might have been given, would have saved a single item of property from destruction or damage. Finally, we note that not even the seriousness of their submission, that some failure on the part of the named persons to warn was a cause of two deaths (now, or else all along, even without the further evidence, had Counsel Assisting only realized it earlier, apparently, at least one death) does not

induce Counsel Assisting to revisit the nature of the warning which, they contend, if given, would have saved life and property. The evidence on this subject is, upon any measure, incapable of proving what Counsel Assisting submit.

126. Counsel Assisting's heading in their submissions: **6.10 EXPERT EVIDENCE ON THE WARNINGS ISSUE** is a bold heading indeed, because there was no such evidence. They submit that pre-season awareness was low. No doubt, if there had, in fact, been expert evidence called upon this subject, an expert could have indicated by what measure such awareness, whatever the expression may mean, could be, or was, assessed. Certainly, Counsel Assisting have not bothered themselves to identify any such measure. An essential feature of expert evidence is that the witness who gives it is a person who has studied, and/or practised, in a recognized field, so as to gain knowledge not found in the general community. An expert is able to demonstrate in expressing an opinion a path of reasoning or deduction from evidence, by reference to accepted precepts within that body of learning or experience, and thereby expose the opinion to rational testing by other experts in the field. Nothing of the sort occurred with respect to the evidence in this regard. Counsel Assisting offered some criteria for determining whether the urban community had pre-

season awareness of the fire risk[122], but they have not demonstrated any evidentiary basis upon which your Honour could find that those are the criteria by which to determine whether a community, a disparate collection of humans of varying ages, backgrounds, life experiences etc, has any awareness of the risks posed by bushfires. The submission made by Counsel Assisting is that your Honour cannot be satisfied on the evidence that the *"urban community"*, speaking generally of this completely undefined mass of souls, for example, had *"personalized the risk"*, whatever that may mean. Counsel Assisting invite your Honour to decide that the Canberra urban community had a *"low"* pre-season awareness, by reason of an alleged absence of evidence upon which it could be found that the *"urban community"* understood certain things. That process of reasoning is no better than the approach adopted by Mr Roche, which was: *"If I did not see evidence of it in the brief, it did not happen"*. With respect to the police survey of residents[123], it may well have been thought that more could and should be done. However, that provides a rather slim basis for inferring that the community did not understand the risk posed by bushfires. The plain fact is that Mr Roche was not an expert in community awareness. The fact that he did not examine

[122] Paragraph 1310.
[123] Paragraph 1311.

the resident survey, the only available empirical evidence, such as it was, only serves to underline that reality. Further, while it may not be politic to say so, there may be an understandable tendency on the part of those who lost something in the fires to assert that they were not warned, or did not understand any warnings which may have been given, or would have acted differently if they had been warned, or warned in a particular way at a particular time. In our oral submissions on 19 May 2006[124], we drew your Honour's attention to remarks in judgments of the High Court of Australia in a number of civil cases about the problems posed by evidence of that kind given by plaintiffs seeking damages and alleging a failure to warn. Those remarks are no less relevant to the assessment of this subject matter. What it suggests is that your Honour could not be comfortably satisfied that the evidence establishes that for which Counsel Assisting contend on this subject matter.

127. Counsel Assisting refer to Mr Koperberg's evidence[125] as to a two phase approach, which, itself, acknowledged the distinction between general advice and targeted warnings. The *"intensive and more specific process"* that Mr Koperberg spoke about is much more akin to the targeted warning that Mr McRae thought should await proper evidence upon which to determine to whom such a

[124] T116-7.
[125] Counsel Assisting's submissions, paragraph 1312.

warning should be addressed. Mr Koperberg's experience certainly suited him to give an opinion upon the timing and content of warnings. However, Mr Cheney's did not. He was not an expert in such matters. That he was invited to express personal opinions on this and many other subjects, and that he was an expert on fire behaviour, were no sound bases for elevating anything he said upon community warnings to the status of expert opinion. In their submissions[126], Counsel Assisting continue to ignore the important distinction between general advice and targeted warnings. It misrepresents the evidence to submit that Mr McRae's stance was that no warning should be given until the precise point of impact of the fire can be predicted. Targeted warnings of the kind to which he referred could be given, once such a point could be identified with reasonable certainty. Whether that stage has been reached then becomes a matter for professional judgment, having regard to all the relevant circumstances known at the time that judgment is required to be made. Counsel Assisting also refer on this subject to Mr Nicholson's evidence[127]. However, we submit that Mr Nicholson's evidence should simply be put to one side *en bloc*, as not being based upon a proper understanding of the evidence upon which he was asked to comment. It would ordinarily be a reasonable

[126] Paragraph 1314.
[127] Paragraph 1316.

assumption that his call to the witness box meant that he had been qualified as an expert, that is to say, that he had relevant qualifications, or else that he had made sufficient study of the relevant subject matter so as to enable him to offer expert opinion evidence. However, neither was the case. The best course in the circumstances is for your Honour simply to disregard his evidence.

128. Finally, we now address Counsel Assisting's submissions upon the subject of the cause of death. We do so now only with respect to cause of Mrs Tener's death. Counsel submit[128] that *"…the deceased persons had indicated a willingness to leave their houses in the event that they had been requested to do so by the authorities."* This is the first point at which any attempt to link the death of Mrs Tener to an alleged failure to give a warning collapses. There is unequivocal support amongst *all* experts that, consistently with the AFAC position, there was a preference for able-bodied persons, where possible, to stay and defend their homes, rather than evacuate. That is to say, no-one seriously advocated a need to evacuate Duffy. In those circumstances, there was never in contemplation any request, that Mrs Tener would have received, that she should leave her home. But, quite apart from that, she, in common with many in the suburb, were making

[128] Paragraph 1323.

preparations to go at some stage, if the need arose. The second problem for Counsel's submission is that there is no evidence, one way or the other, as to when, or in what circumstances, she intended to leave. Counsel Assisting then go on to submit[129] that:

> *Your Honour might conclude that Mrs Tener became aware of one or more of these warnings for the first time in the early afternoon of 18 January, as she was preparing to evacuate. Your Honour might also find that she was not adequately equipped to understand the warnings, but accepted the instruction to stay with her home, filled her bath and soaked towels and, ultimately, immersed herself in the bath hoping to find refuge there as her home burnt down around her.*

Contrary to Counsel's submission, however, the evidence is not capable of supporting an inference that Mrs Tener was preparing to evacuate when she heard the SEWS warning. Nor is it capable of supporting an inference that she was not adequately equipped to understand the warnings, whatever that means, or that she did not leave her home because of the SEWS warning. These considerations more than suffice to indicate that your Honour could not comfortably find that the absence of some kind of warning can

[129] Paragraph 1323.

now be identified as a cause of her death. If, however, there were to be evidence capable of establishing that Mrs Tener did not leave on account of the SEWS, it would not have been the giving of that warning, or its timing, that might have some causal relevance, only its specific content. If Mrs Tener placed herself in the bath *in response to* the advice contained in the SEWS, a not unreasonable inference may be that she took that step as the fire approached or was in close proximity to her home. Of significance for Mr McRae is that he had no role whatsoever in the issue of the SEWS, nor as to its content.

129. Counsel Assisting acknowledged in their submissions[130], as we have already submitted, quite properly, that the state of the evidence did not permit a finding that a lack of adequate warning was a cause of *any* death. This acknowledgement was what impelled them to seek to adduce further evidence: to permit our Honour, so it was submitted, to determine whether, *"upon the evidence, once tested, we are able to submit that you should make the findings that appear to be open"* upon that further evidence. But, no sooner had your Honour rejected the further evidence, Counsel Assisting were pressing your Honour to accept that, *"well, we were wrong about that all along, so forget about what we stated in our submissions,*

[130] Paragraph 1325.

here's another way to look at warnings that will enable you to stitch up somebody, or the same named persons" . We submit that your Honour is entitled to assume that Counsel Assisting's submissions dated 2 April 2006, months in the writing, years in the preparation, were the product of careful consideration, especially when they were contemplating putting to your Honour that you should take the very serious step of purporting to find that the action or inaction of a named person or persons at the ESB was a cause of death of somebody with whose life and property that body was charged with the protection and preservation. We objected to the further evidence as lacking probative value. Your Honour may also assume that Counsel Assisting carefully reviewed the further evidence in light of our outline of submissions in support of that objection. We put further detailed submissions to your Honour orally on that subject matter on 19 May 2006. At no relevant time before your Honour ruled upon that objection did Counsel Assisting claim that they had had *"a conversion on the road to Damascus"* so to speak, and that they had been wrong all along, that your Honour would not have needed to have received the further evidence anyway, because the absence of some kind of warning was demonstrably a cause of at least one of the deaths.

130. The basic framework of their new submission foreshadowed to us on 23 May 2006 on this subject is not materially different to that made in Counsel Assisting's submissions dated 2 April 2006. Counsel's Assisting's process of reasoning is somewhat more detailed, but that now reveals, as an essential step in the reasoning, an even more tenuous inference. Counsel Assisting now submit that had a warning, still in terms not identified, been issued on 17 January 2003, or early on 18 January 2003, Mrs Tener would have temporarily relocated, that is to say, left her home. However, that submission lacks *any* foundation whatsoever in the evidence. It is pure speculation, nothing more and nothing less. Counsel Assisting still cannot, or persistently and stubbornly will not, identify, with the particularity that they should, the warning for which they contend. Mr Roche, whose evidence they pray in aid, could not tell your Honour, after years of study of these events, the warning he would have issued on the morning of 18 January 2003. Counsel Assisting nonetheless now submit that your Honour could find that *any* warning issued on 18 January 2003 would have induced Mrs Tener to leave. The submission is nonsense. It has no foundation in any evidence that your Honour could accept as establishing it, whether directly, or by inference from established and reliable evidence. Your Honour should reject it out of hand.

Chambers

30 June 2006

S W Gibb SC
G P Craddock

Counsel for Mr McRae