

ACT FIRES
JANUARY 2003
SUBMISSIONS OF
PETER LUCAS-SMITH &
MIKE CASTLE

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

AND

INQUIRY INTO THE FIRES OF JANUARY 2003

30 June 2006

PART A – PRELIMINARY ISSUES RELATING TO THE INQUEST AS A WHOLE

ROLE OF THE INQUIRY AND JURISDICTION

1. The jurisdiction of the Coroner for the purpose of the four inquests and the fire inquiry is set out in sections 13 and 18 of the *Coroners Act 1997*. Relevant parts of those sections are as follows.

13 Coroner’s jurisdiction in relation to deaths

(1) A coroner shall hold an inquest into the manner and cause of death of a person who—

- (a) is killed; or*
- (b) dies, or is suspected to have died, a sudden death the cause of which is unknown; or*
- (c) dies under suspicious circumstances; or*
- (h) dies after an accident where the cause of death appears to be directly attributable to the accident; or*

(2) A coroner has jurisdiction to hold an inquest into the manner and cause of death, outside the Territory, of a person, if—

- (a) the person was ordinarily resident in the Territory; and*
- (b) the death occurred in any of the circumstances referred to in subsection (1).*

18 Coroner’s jurisdiction in relation to fires

(1) A coroner shall hold an inquiry into the cause and origin of a fire that has destroyed or damaged property, if—

- (a) requested to do so by the Attorney-General; or*
- (b) the coroner is of the opinion that an inquiry into the cause and origin of the fire should be held.*

2. It is not contested here that the deaths of Messrs Brooke and Fraser and Mesdames McGrath and Tener fall within one of the paragraphs of subsection 13(1).
3. Jurisdiction in relation to the Bendora, Stockyard Spur and Mt Gingera fires is also clear as they ignited inside the borders of the ACT.
4. It is submitted that, despite the fact that the point(s) of ignition of the McIntyre's Hut fire were in NSW, the fact that this fire damaged property which was located in the ACT is sufficient to found the Coroner's jurisdiction. The jurisdiction includes inquiring into the cause and origin of the McIntyre's Hut fire. The origin does not have to be in the ACT. There is no artificial distinction to be drawn such as would only permit the Coroner to look at the McIntyre's Hut fire after it crosses the border.
5. If this is the correct scope of the jurisdiction in relation to the McIntyre's Hut fire, there is no basis for limiting the Coroner's exercise of the full powers of inquiry even though this may involve some examination or comment on actions which occurred outside the ACT and even in relation to arms of the NSW Government including the NSW Rural Fire Service. Section 121 of the *Legislation Act 2001* provides:

121 Binding effect of Acts

(1) An Act binds everyone, including all governments.

government *includes the Territory, the Commonwealth, a State, another Territory or New Zealand.*

6. As a result of this section, the Crown in right of the states is bound by the *Coroners Act 1997*. The State of NSW is as bound by the *Coroners Act 1997* as much as the Territory is itself. As a result, the reach of the Act does not

stop at the border. It is not subject to artificial limits in relation to the NSW Government or the NSW Rural Fire Service.

7. There are however limits on what the Coroner has jurisdiction to do. An inquest into the manner and cause of death and an inquiry into the cause and origin of a fire does not confer an unlimited power to conduct inquiries, to make findings and to comment. This is so despite the breadth of the language in section 52 of the Act.
8. Section 52 of the Act is in the following terms.

52 *Coroner's findings*

- (1) *A coroner holding an inquest shall find, if possible—*
 - (a) *the identity of the deceased; and*
 - (b) *when and where the death occurred; and*
 - (c) *the manner and cause of death; and*
 - (d) *in the case of the suspected death of a person—that the person has died.*
- (2) *A coroner holding an inquiry shall find, if possible—*
 - (a) *the cause and origin of the fire or disaster; and*
 - (b) *the circumstances in which the fire or disaster occurred.*
- (3) *At the conclusion of an inquest or inquiry, the coroner shall record his or her findings in writing.*
- (4) *A coroner may comment on any matter connected with the death, fire or disaster including public health or safety or the administration of justice.*

9. The Full Court of the Supreme Court has provided some guidance on the limits of jurisdiction in *R v Doogan; ex parte Lucas-Smith*.¹ The Full Court's decision is binding on the Coroners Court. The following propositions can be distilled from that case.

¹ (2005) 158 ACTR 1; [2005] ACTSC 74

- Section 52 does not provide a separate grant or augmentation of jurisdiction to inquire into “circumstances”.² Circumstances are to be related to the cause and origin of the fire.
- It does not provide *“a general mechanism for an open ended inquiry into the merits of government policy, the performance of government agencies or private institutions or the conduct of individuals, even if apparently related in some way to the circumstances in which the death or fire occurred.”*³
- In relation to a fire which has developed over several days, “cause” extends beyond origins to those factors that had a causal effect *“on the development or continuation of the process.”*⁴
- The Coroner may consider all the factors that may reasonably be considered to be regarded as having been causative of the entire process of the fire which swept through parts of Canberra.⁵
- “Origins” of the fire would have been the locations of the lightning strikes that ignited each of the four fires that later converged into the overall conflagration.⁶
- Section 18 does not authorise the coroner to make a wide ranging inquiry akin to that of a Royal Commission, with a view to exploring any suggestion of a causal link.⁷

² Par. 14, 19 and esp. 37

³ Par. 15

⁴ Par. 20

⁵ Par. 22

⁶ Par. 23

⁷ Par. 28

- There is a line beyond which, even if relevant, factors which come to light will be considered too remote from the event to be regarded as causative.
- This limit is to be found by an application of a “common sense” test of causation as explained in *March v Stramare*.⁸ The application of this test depends upon the circumstances but it does not extend to resolution of collateral issues “*relating to compensation or the attribution of blame.*”⁹
- Section 18 excludes inquiries into general policy although it may permit an examination of the application of a policy in a particular instance. It will normally exclude a quest to apportion blame or a wide ranging investigation into antecedent policies or practices.¹⁰
- The conferral of the power to make comments does not enlarge the scope of the Coroner’s jurisdiction to conduct an inquiry.¹¹
- There is nothing in the *Coroners Act 1997* which would have authorised the Coroner to inquire into the balance struck between the public interest in fuel management and the public interest in maintaining wilderness area.¹²

10. From these principles, it would appear that the following matters do not fall within jurisdiction: compensation, the attribution of blame, the merits of government policy, the performance of government agencies or private

⁸ (1991) 171 CLR 506

⁹ Par. 29

¹⁰ Par. 31

¹¹ Par. 41

¹² Par. 122

institutions or the conduct of individuals, the investigations of general policies or practices and fuel management.

11. In the context of the present inquiry, this excludes the following issues:

- the financial, equipment and staffing resources devoted to the Emergency Services Bureau and the ACT Bushfire Service;
- pre-season preparations for the 2002/3 bushfire season;
- warnings in relation to the fire; and
- attributing blame to any individual;

as these do not relate to either the “cause” of the “origin” of the fire.

12. An obvious example of an impermissible attempt to attribute blame in Counsel Assisting’s submissions which would fall outside the jurisdiction of the Coroner is the invitations to make findings that Mr Lucas-Smith and Mr Graham “wanted” Odile Arman to withdraw from the Bendora fire; that Mr Lucas-Smith made an error of judgement in not replacing Mr Graham with Mr Bartlett and whether individual continued to “knowingly” withhold information to the people of the ACT.

13. If the Supreme Court’s ruling is that the jurisdiction did not contemplate inquiring for the purpose of attributing blame, there can be no place for Your Honour to make findings of a type which suggest *mens rea* or something approaching a consciousness of guilt. Your Honour’s task is to inquire as to the cause and origin of the fire. Your Honour may incidentally make findings about the prevailing circumstances in so far as they fall within this jurisdiction. There is neither the need nor the authority to make findings approaching *mens rea*. What happened is the issue.

14. In addition to the legal limitation on attributing blame to individuals, other limitations suggest that Your Honour should be reticent in attaching blame or criticism to individuals. The very fact that Your Honour is not conducting an open ended inquiry into all the circumstances attending the inquiry makes it unfair to do so. Some relevant circumstances which are exculpatory may not be the subject of inquiry. For example heavy fuel loads undoubtedly made the fire more intense and more difficult to fight. Your Honour cannot fully inquire into this issue. Accordingly, a key factor in the task faced by the Bushfire Service cannot be fully examined. Throughout the inquiry, there has been evidence and allegations about things which “*should*” have been done or resources which “should” have been available. This inevitably raises the question of resources. A number of examples will suffice.

15. It was at times suggested by Counsel Assisting¹³ that given the severity of the bushfire season, a bulldozer ought to have been available in the mountains on standby or that bulldozers should have been available at fires on the morning of 9 January. Counsel Assisting is also critical of individuals because these resources were not available.

16. Many of these criticisms of individuals cannot be separated from the overall question of what level of resources was available to those individuals. One cannot criticise a person for failing to do something or have something available if the person did not have the resources available to do so and if the financial capacity to acquire those resources was not within that person’s power.

17. While the level of resources will be the subject of more detailed comment later in these submissions, a few examples can be given here:

¹³ Eg [1126] Counsel Assisting Counsel Assisting submission

- .The lack of a dedicated Community Education officer where a budget submission for such a resource for ESB was rejected in 2002.
- The paucity of media trained personnel in ESB. Attempts to overcome this deficiency were made by briefing and having available the network of Public Relation people across the ACT Government Departments and the arrangements for Canberra Connect to be a source of information on ACT fires both by online and through the 132281 telephone number.
- Extra aircraft – a budget submission made by Mr Lucas-Smith for extra fire-fighting resources including provision of increased aerial fire fighting capacity for the 02-03 season was rejected.

18. The ACT Bushfire Service had only one planner at the beginning of these fires, namely Mr McRae and even he was not a permanent member of staff of the Bushfire Service. There were four permanent members of the operational staff of the ACT Bushfire Service: Mr Lucas-Smith; Mr Graham; Mr Ingram and Mr Plumb. However, none of these staff, including Mr Lucas-Smith, worked full time on bushfire management matters as they also managed the ACT's State Emergency Service and Mr Lucas-Smith was also Executive Officer to the ACT Emergency Management Committee. So they were multi-functional positions, which included operations if both Services were operational at the same time.

19. The difficulty for Your Honour is that the general question of the level of resources the government spent on emergency services clearly falls outside Your Honour's jurisdiction. On the other hand, the level of resources clearly can impact in many ways on what an individual can do.

20. Your Honour can therefore only examine a number of the integers which made up particular decisions. Your Honour must therefore be cautious not to visit unfair, critical comment upon individuals in relation to matters if that matter is potentially linked to a matter into which Your Honour cannot inquire.

21. As Your Honour cannot act like a Royal Commission and undertake a whole scale review of the ESB or the Bushfire Service, Your Honour can necessarily only deal with part of the whole picture. In dealing with part of the whole picture, Your Honour is at risk of criticising individuals unfairly. No doubt this inability to inquire into all facets of matters is why the Supreme Court said that it was not part of a coroner's function to apportion blame to individuals.

22. There is a further submission in relation to the approach Your Honour should take in relation to this matter. It is no doubt right and proper that Your Honour record the events that you find occurred in so far as they relate to the cause and origin of the fire. The recording of what happened and findings of the consequences of those events is often enough. Those charged with operational decisions in the future can examine what arose from particular decisions in relation to this fire. Nothing is added to this process by the attribution of blame.

23. When future field controllers are trained about the competing demands of safety on the fire ground and the need to combat the fire as soon and as hard as possible, Your Honour's findings as to what happened at Bendora on the night of 8 January and subsequently, will be all that is needed to point up the competing priorities and consequences of this decision. No doubt, assuming there is an inquest, the findings of the Coroner in Western Australia relating to the death of the firefighter from a falling tree branch will prove equally useful to put the other side of the issue.¹⁴ These facts can and will speak for themselves. The recording of them will be of public benefit. It is not necessary to pass judgement on this level of operational decision.

24. Counsel Assisting invite Your Honour to go much further. They invite Your Honour to make decisions whether particular operational decisions were

¹⁴ Counsel Assisting submissions par. 342

“right” or “wrong”. There could be no greater cause for unfairness than for two lawyers who have had years to peruse documents, confer with experts, check and re-check facts and who know the outcome of the decisions which were made, to invite Your Honour to second-guess the operational decisions of people who at the time, had no such advantages.

25. Counsel Assisting’s suggestion that on the first night, Mr Bartlett should have been taken away from work preparing the Uriarra Forest in the face of the 2,000,000 square metre McIntyre’s Hut fire to remain at ESB in Curtin to deal with three ACT fires, the largest of which was 500 square metres, is a *particularly trenchant* example of this vice. The attempt throughout the inquiry by Counsel Assisting to establish that Odile Arman’s decision was “wrong,”¹⁵ admitting of no room for a “judgement call” in the face of the clearly competing considerations of fighting the fire and firefighter safety, is another example.

26. The invitation to adopt such an approach by Counsel Assisting displays more interest in trying to attribute blame than to find the facts and record the events that occurred. No good purpose can be served by this type of finding. No person required to make operational decisions in emergencies in the future will be assisted by Your Honour second-guessing the rightness or wrongness of operational decisions made in relation to this fire. Such a person will always have to make operational decisions with limited time, limited information and by doing the best that he or she can at the time.

27. By contrast a very adverse consequence can arise. Few things could be more demoralising to people required to make such operational decisions, many of whom are volunteers, than the thought that when it is all over lawyers with a team of investigators will spend months if not years picking over each decision, after the event with the consequent possibility that they will be required to explain why they did not make a different decision. The equivalent

¹⁵ Par. 1168

of “defensive medicine” in the emergency services area would be likely, regrettably, to develop if such an approach were followed in this inquiry and others like it.

28. How does the approach submitted above result in a public benefit from the inquiry? Establishing the facts is a public benefit itself. When directing attention to comment, there is a significant public purpose that Your Honour can fulfil which would be of great future benefit. Where Your Honour identifies instances of either circumstances or of policy which impacted upon the course of events relating to the fires which are of a type which can be given proper consideration *in advance* of an emergency situation, it would be appropriate to record that impact. This may appear that it infringes the limitation on a Coroner commenting on the merits of policy and procedure decisions. It does not.
29. For example, Your Honour could make findings about the level of fuel load in various areas of the forest. Your Honour could no doubt comment that this level was high and that at times it reached equilibrium levels. Your Honour could comment that this led to a more intense level of fire and that this made fighting the fire more difficult. This does not amount, impermissibly to *“inquir[ing] into the balance struck between the public interest in fuel management and the public interest in maintaining wilderness area”*. It is simply recording a fact and its effect. If there were any doubt, Your Honour could say expressly that it was no offering a view on what is the correct balance on the public policy question.
30. The same approach could be made about the availability of particular resources, training or perhaps the adverse impact that the building had on easy communication. In none of these instances is it necessary to condemn anyone or pass judgement on the decisions which led to those circumstances, merely to record what the facts show and comment on the consequences.

31. With the benefit of Your Honour's findings of this type, those who are charged with making the public policy decisions would be better informed to make those decisions. This does have public benefit. These findings can be taken into account in advance and given proper consideration in a way that an emergency services worker making an operational decision can never do and they can be considered as a matter of public policy in a way which cannot be replicated in a court setting. Should Your Honour wish to particularly highlight something Your Honour considers warrants attention, Your Honour can recommend that attention be so given by the relevant area. The inquiry can be of considerable public benefit without descending to the level of vituperative fault finding and without second-guessing operational decisions, with all the potential unfairness and dangers which accompany it.

HINDSIGHT

Trevor Roche: "Hindsight is a wonderful thing."
Brett Walker SC: "The whole inquest is hindsight¹⁶."

32. A coroner is frequently required to examine the decisions individuals made and the actions they took during the course of some event, when those people had little opportunity for mature reflection or full information. Similarly, in many negligence suits, a court in determining whether a defendant acted "reasonably" will look closely at what he did or did not do and measure it against what it is alleged he could or should have done if he was acting reasonably.

33. In conducting such inquiries great care needs to be taken to ensure that the standard applied in the objective assessment of those decisions or actions is not one distorted by what has been described by Gleeson CJ as "*the prism of*

¹⁶ TR 17.10.05 p7879-17

hindsight'. It is not only easy to be wise after the event but also easy to be unfair.

34. The dangers associated with hindsight reasoning have been highlighted by Courts many times and in many contexts. In *Maloney v Commissioner for Railways (NSW)* (1978) 52 ALJR 292, Barwick CJ said:¹⁷

"It is easy to overlook the all important emphasis upon the word 'reasonable' in the statement of the duty. Perfection or the use of increased knowledge or experience embraced in hindsight after the event should form no part of the components of what is reasonable in all the circumstances. That matter must be judged in prospect and not in retrospect. The likelihood of the incapacitating occurrence, the likely extent of the injuries which the occurrence may cause, the nature and extent of the burden of providing a safeguard against the occurrence and the practicability of the specific safeguard which would do so are all indispensable considerations in determining what ought reasonably to be done. Of all these elements, evidence is essential except to the extent that they or some of them are within the common knowledge of the ordinary man. The fertile but unqualified imagination of counsel or the judge can never be a substitute for such evidence."

35. In *Rosenberg v Percival* (2001) 75 ALJR 735 Gleeson CJ analysed the dangers of hindsight as follows:¹⁸

*"In the way in which litigation proceeds, the conduct of the parties is seen through the prism of hindsight. A foreseeable risk has eventuated, and harm has resulted. The particular risk becomes the focus of attention. But at the time of the allegedly tortious conduct, there may have been no reason to single it out from a number of adverse contingencies, or to attach to it the significance it later assumed. Recent judgments in this Court have drawn attention to the danger of a failure, after the event, to take account of the context, before or at the time of the event, in which a contingency was to be evaluated: see, eg, *James v Bartlett* (2000) 75 ALJR 1 at 5 – 6 [19]; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164 at 167 [17], 183 – 184 [109]."*

¹⁷ at 292-293

¹⁸ at [16]

36. In *Capital Brake Service Pty Limited v Meagher & 8 Ors T/as Sparke Helmore* [2003] NSWCA 225, Justice Ipp stated:¹⁹

All these matters are matters of hindsight. There is a great danger, particularly in professional negligence matters, of applying an unrealistic hindsight judgment. Any fool can be wise after the event. That is not the test. The Court must be careful to judge the conduct of a defendant, where negligent failure to warn is asserted, by reference to what the defendant reasonably knew at the relevant time. Not after the loss has been suffered.

37. In the Coronial context a number of Coroners have referred to the dangers of hindsight reasoning, especially when considering adverse findings against individuals.

38. The State Coroner of Victoria, Mr L Byrne had the following to say in the report into the death of Norman Anderson²⁰:

“Ultimately, I conclude I could not properly make an adverse finding against Siltex because to do so would be to rely on that enlightening phenomenon – hindsight.”

39. Coroner S. Carey had this to say in a recent Inquest in Tasmania:²¹

“The purpose of this investigation is to determine the facts, not to apportion guilt or blame... One can only imagine the confusion and panic that accompanied the discovery of this fire and although it is easy to be wise in hind sight no-one can ever be sure how they would react in similar circumstances.”

40. The words of Northern Territory Coroner Cavanagh in his findings into the death of Sarah Rose Higgins are particularly apposite to this inquiry:²²

¹⁹ At paragraph 30. Justices Meagher and Beazley concurred.

²⁰ Number 3753/00 9 May 2002 at page 11

²¹ Death of Tayla Louise Braid TASCDC 124 2005

²² NTMC 065 2003

“it is always necessary to make allowance for the fact that the coronial process is conducted with the benefit of hindsight. It is not appropriate to judge those individuals whose actions are the subject of scrutiny during the course of that process in accordance with the counsel of perfection.

41. The “*danger of a failure, after the event, to take account of the context*” referred to by Gleeson CJ in *Rosenberg v Percival* has been manifest throughout this Inquest. Nearly every single witness who gave evidence made it clear that the ferocity, extent and speed of the fire that impacted on urban Canberra at about 3pm on Saturday 18 January 2003 was of an order of magnitude greater than anything they had anticipated or envisaged.
42. It is however, unfortunately apparent that Counsel Assisting have approached this Inquiry in a way that ignores the significant dangers and potential unfairness of hindsight reasoning.
43. For example during examination by Mr Lasry QC the following exchange took place with Mr Lucas-Smith:²³

Q. If we do not get on top of these fires very quickly”, and “we” of course includes New South Wales because they were conducting the response to McIntyre’s, “then if things go badly, Canberra is at risk”. That was surely within a possible chain of logic that was not unrealistic, even at 8 January; do you agree with that?

A. I think it is an easy thing to say in hindsight, but at the particular time -

Q. That does not make it invalid, though?

A. The thought did not cross my mind.

Q. It did not cross your mind?

²³ TR 16.2.04 p806-20

A It did not cross my mind that these fires at that stage on 8 January had the potential to impact on urban ACT.

44. At [1311] of their submission, Counsel Assisting state:

And if it had been the opinion of ESB that the community was well informed as to how to prepare, then what possible reason can there have been for the continuing lack of useful information and warnings coming from ESB until 2:40 pm on 18 January 2003? In our submission, ... ESB and its senior officers had at the time of the fires no basis on which to assume that residents of urban Canberra had any level of understanding of fire risk, let alone a sufficient level to comprehend and act on a warning received less than an 30 minutes before impact.

45. Counsel Assisting is here clearly relying on hindsight reasoning. It is only with the subsequent knowledge as to what occurred that it can be said that impact by the fires would be 30 minutes after the SEWS was broadcast. That fact was not known to anyone at that time

46. This is the type of hindsight reasoning which Your Honour must be careful to avoid and is the sort of hindsight reasoning that pervades the submission of Counsel Assisting.

47. The words of Hamilton J in *Grynberg v Muller; Estate Late M Bilfeld* [2002] NSWSC 350 could be equally applied to the submissions of Counsel Assisting²⁴:

“These submissions focus the bright light of hindsight. Hindsight sings a siren song of which Judges must be cautious.”

48. During the course of the evidence Counsel Assisting freely acknowledged that hindsight was significant to the examination of relevant issues:

²⁴ at 48

MR LASRY: There wouldn't have been any real reason now, looking back at it, and I accept with the benefit of hindsight that's what we are doing, saying, "Look, people ought to be aware there is an extremely high risk that the fire will hit the suburbs and they need to prepare for it"? Words of that nature could have justifiably been used in that conference, couldn't they?²⁵

MR LASRY: Certainly as it turns out, and it may be this really is with the benefit of hindsight, but as it turns out in this particular case all of the homes, even on the Warragamba Drive/Eucumbene Drive edge were safe places to be provided people were capable of resisting the consequences of the ember shower on those houses.²⁶

MR WOODWARD: If there is a breakaway from the north-east corner and a north-westerly wind, under the influence of a north-westerly wind that is going to push it down towards the A CT and Canberra?

A. Slightly .

Q. And into the Uriarra pines?

A. I'm not too sure of the exact - I'm not too sure of that.

Q. I know that this is with the benefit of hindsight, Mr Castle, but that's what happened, isn't it, initially?²⁷

MR WOODWARD: And certainly after the event you were very sensitive to the fact that he dramatically understated the threat?

A. They are your words. I don't know whether we "dramatically understated the threat" at that particular time.

Q. It certainly became apparent afterwards, and this time I am happy for you, with the

²⁵ TR 19.02.04 p1125-41

²⁶ TR 23.02.04 p1214-40

²⁷ TR 26.02.04 p1558-26

benefit of the hindsight, it certainly became apparent afterwards that he had dramatically understated the threat, hadn't he?

A. With hindsight.²⁸

MR WOODWARD: (to Mr Graham) Mr Cheney has expressed the opinion in his evidence - page 29 - that the Bendora fire was severely underresourced during the day, the day of the 9th of January. Is that a view, accepting with hindsight, that you agree with?²⁹

MR WOODWARD: I'm asking you, with the benefit of hindsight, would you now agree that that wasn't enough to have any real impact on the Bendora fire that day?³⁰

MR WOODWARD: Was part of the problem at least, and I invite you to use hindsight, that people apparently didn't properly understand the way in which the SMT structure was supposed to work?³¹

MR WOODWARD: I wanted to ascertain from Mr McRae, and I did it by reference to Mr Cheney's evidence - it is with hindsight because that is clearly how Mr Cheney approached it - whether with hindsight this witness in his expert opinion would agree that the decision to withdraw was the loss of a valuable opportunity.³²

MR LASRY (to Mr Keady) By midday on 18 January, was it your view, can you recall, that people on the western edge of the suburbs of Canberra were entitled to be told that there was a significant chance that they would be directly affected by this fire?

A. With the benefit of hindsight --

²⁸ TR 01.03.04 p1683-35

²⁹ TR 05.04.04 p2811-26

³⁰ TR 05.04.04 p2814-4. See also Mr Woodward at pp2814, 2818, 2819, 3017.

³¹ TR 07.04.04 p3078-13

³² TR 14.04.04 p3162-19. See also Mr Woodward at pp3200-2, 3460

Q. No, that's not what I asked you. I asked you whether you can recall holding that view at the time?

A. I can't recall holding that view at the time.

Q. I take it, with the benefit of hindsight, your view would be yes?

*A. Yes.*³³

49. These represent but a small sample of the occasions Counsel Assisting asked a witness about a matter 'with the benefit of hindsight'.

50. Yet when it comes to their submissions, in the course of 1329 paragraphs over 489 pages, Counsel Assisting refer to hindsight on but *one* occasion³⁴. It is not, as one might expect, a reference reminding Your Honour to take the care all the authorities urge when it comes to assessing behaviour with the wisdom of hindsight.

51. The only reference by Counsel Assisting in its entire submission to the concept of hindsight is in urging Your Honour to treat with doubt the evidence of the Chief Minister Mr Stanhope!

52. Your Honour is urged³⁵ to find that evidence of the Chief Minister that the threat of fire reaching the suburbs was not discussed as a real possibility during the Cabinet Briefing on the 16th of January, is "*difficult to accept*" because "*with the benefit of hindsight and in the knowledge that the public were not given the information available to ESB and the Government by 16 January 2003, it was no doubt tempting to reduce the impact of the discussion about the risk to Canberra in the Cabinet briefing.*"

³³ TR 19.04.04 pp3508-9

³⁴ The word 'hindsight' appears in the submission as part of a report of a witnesses evidence on 9 further occasions

³⁵ at paragraph 1237.

53. It is telling that in this inquest where such care must be taken by Your Honour not to slip into “judgement by hindsight” that those granted leave by Your Honour to assist you during the inquest make not one single reference to that danger in their submission to Your Honour. Indeed in our submission they rely on hindsight in order to make many of the extraordinary submissions they have. Paragraphs [1230], [1246], [1257], [1273] [1279], and [1311] in particular rely on hindsight reasoning.

54. As already noted above it cannot be seriously disputed that what occurred on the afternoon of Saturday 18 January was well beyond anybody’s expectation or wildest nightmare.

55. Mr Lasry QC quite properly accepted that this was the case during questioning of Mr Keady: *“Well, look, I don’t think that there is any issue, Mr Keady, that what happened on Saturday at about 3 or 4 o’clock in the afternoon far outstripped everybody’s expectations.”*³⁶

56. Yet for some inexplicable reason, and in the face of the overwhelming evidence to the contrary, Counsel Assisting now disavows this position. In their submission³⁷ Counsel Assisting goes as far as to urge Your Honour to ignore the effect of the tornado and accept that the fire that impacted Canberra was not only one that could have been predicted and anticipated but *should* have been:

“there is no evidence that the tornado contributed in any way to the speed or ferocity of the main run of the McIntyre’s Hut and Bendora fires. In our submission, Your Honour can also be satisfied that effect of Mr Cheney’s evidence is that both these fires travelled more or less as would be expected from a substantial wildfire burning through severely drought affected forested and grassland country

³⁶ TR 04.03.04 p2055-29

³⁷ at par 1277

*under extreme conditions. Further, while the extent of the ember shower that affected urban Canberra might not have been foreseeable, a substantial ember attack affecting homes in the area clearly was.*³⁸

57. This particular submission is so inconsistent with the body of evidence presented that Your Honour would be entitled to treat with significant caution anything Counsel Assisting has asserted.

58. The absurdity of this submission is demonstrated by the many witnesses who had an expectation of containing or slowing the fires in the eaten out grasslands.³⁹

59. We invite Your Honour to compare the submission quoted above with the evidence of but one witness here, Mr Neil Cooper (not referred to by Counsel Assisting). Mr Cooper said:

Q In any event, you set out there your thoughts and actions at that time. Given all of the things you experienced on that day [18 January] and taking into account your experience and your knowledge of what the weather was like that day, would it be fair to say that what you experienced was many factors beyond any worst case scenario that you could have imagined occurring that day?

*A. Yeah, I think that is a fair comment.*⁴⁰

60. Counsel Assisting's submission⁴¹ clearly demonstrates the dangers of "hindsight analysis"- we now know what happened and by looking back over every event and every decision with a microscope, we can now identify

³⁸ par 1277

³⁹ See these submissions par 350 at following

⁴⁰ TR 06.05.04 p4816-25

⁴¹ At paragraph 1277

different decisions that should have been made and different actions that should have been taken.

61. It is imperative that Your Honour be careful not to judge or damn actions taken or decisions made during the course of the fire event because subsequent analysis can demonstrate things may have been different if different decisions were made. Or indeed, to attribute to individuals knowledge or beliefs that they do not accept they had, merely because Counsel Assisting suggest (with the benefit of hindsight) that they must have had such knowledge or belief.

62. An apt example of this is Fire Commissioner Ian Bennett. His elderly parents lived 'on the front line' in Warragamba Avenue Duffy. He explained his expectations on the morning of 18 January as to the danger they might have been in:⁴²

Q. At the time that you went out to your parents' house that morning . . . what was your state of mind in relation to how prepared the people of Duffy actually were?

A. Based on what my thoughts at the time particularly in relation to Warragamba Avenue . . . , and the location of Warragamba Avenue from Stromlo pine forests in the experience that I had had was - I felt to be a safe distance. That people were doing the appropriate thing, of those that I saw.

Q So at that time was it your understanding that the people in Duffy had, so far as what was about to happen that afternoon or soon thereafter, not been told specifically to start preparing their houses?

A. I'm unsure. I can speak only - the only people I conversed with there were my parents. They were aware of the fires. They

⁴² TR 04.03.04 p2021-43 - p2023

were taking what they saw as precautionary methods. They certainly, as did I, did not envisage what was about to occur.

MR JOHNSON: Q. I am going to ask you, to as best as you can put the hindsight aside, as everyone must in this inquest, and focus upon your thought processes as they were on the morning of the 18th. . . You mention in paragraph 48 that it was about mid-morning when you travelled to your parents' home and you indicated it was about 10.15 or thereabouts. You say:

"I was concerned there was nobody to do this for my parents - that is filling gutters with water and clearing away general debris - so I did this task while at Duffy. However, I had no real sense that the fires were to hit Canberra later that day. I certainly would not have left my parents there had I realised this. In fact, I assured them that the fires were still some distance away and that I saw no real immediate risk to them." Does that accurately record both what your thoughts were at that time and what you said to your parents?

A. Yes, it does. Certainly if I had envisaged in any way the extent of the impact or even the extent of the embers, my parents do not qualify for someone that should stay and defend their property.

63. Mr Bennett also gave evidence as to how even with hindsight he might have fought the fire that impacted Duffy that afternoon.⁴³

Q: With the benefit of hindsight, what resources were needed to deal effectively with that fire as it came out of the forest at Duffy?

A. What fire resources, sir?

⁴³ TR 04.03.04 p2020-1

Q. What Fire Brigade resources were needed?

A. It's very difficult to quantify. Certainly I believe more than anything that was going to be available within the time frames and the movement of that fire.

Q. Assuming - let's take hindsight to its fullest extension. You knew what it was going to look like. If you had time to plan and get resources there and you had unlimited resources available to you, what would you have stationed up there?

A. It's a difficult question to answer, sir. Perhaps if I can indicate our standard operating procedures certainly for the ACT Fire Brigade and I believe most urban fire services is that we respond two urban pumper as to one house fire. That's obviously in routine situations. But, for example, if you were to use that as a fire ground calculation there wouldn't be I believe enough urban pumpers in Australia to deal with it under the circumstances that eventuated on the afternoon of the 18th.

Q. So it was a huge fire that blew across into Duffy, wasn't it?

A. It was, sir.

64. It is clear that hindsight has played a major role in this inquest. Most people's experiences, opinions and evidence were to some extent informed by hindsight. The word itself appears in the transcript almost 170 times. In the absence of any entreaty by Counsel Assisting to pay due regard to the dangers of hindsight reasoning, coupled with the fact that Counsel Assisting themselves clearly have relied on unfair hindsight reasoning as a basis for many of their assertions, Your Honour needs to be extremely cautious when assessing the submissions of Counsel Assisting.

A DELIBERATE DECISION TO WITHHOLD INFORMATION

65. Counsel assisting asserts⁴⁴ that a positive decision was made by Mr Lucas-Smith and Mr McRae to defer telling the people of Canberra the true position concerning the risk presented by the fires including the McIntyre's Hut fire and that Mr Castle "*participated in the deception*".

66. Without identifying or even speculating as to any possible motive or purpose these individuals may have had for such conduct, this submission in essence asserts that there was in effect a conspiracy to deprive the citizens of suburban Canberra with information that they knew should be disseminated. This proposition is not a finding Your Honour could properly make for at least three important reasons:

- There is no positive evidence whatsoever of any such conspiracy or deliberate decision to withhold information. Indeed there is considerable evidence that neither Mr Lucas-Smith, Mr McCrae nor Mr Castle had reached a state of mind where they truly believed that an impact with the urban interface of Canberra was more than a possibility until the 18th of January 2003. This matter will be dealt with at length in these submissions.
- The serious allegations directed to Mr Lucas-Smith and Mr Castle, include such comments as "*participated in the deception*", "*positive decision to defer identifying the risk in those terms*", "*continuing knowingly to withhold vital information from the people of the ACT*", "*derelection of the duty that ESB and its senior officers owed to the public*". Despite having the opportunity to do so, Counsel Assisting did not at any stage put these serious allegations to the either Messrs Lucas-Smith, Castle or McRae or indeed any other witness.

⁴⁴ At pars [1299], [1282], [1263] as but examples

- The jurisdiction conferred to the Court pursuant to the *Coroners Act 1997* does not permitted Your Honour to inquire for the purpose of apportioning blame or civil or criminal responsibility to individuals as is discussed above. More fundamentally however, it does not allow Your Honour to inquire into the area of warnings as these matters are neither relevant to the cause and origin of the fires nor the manner and cause of the deaths.

Jurisdiction To Inquire into Warnings

67. In our submission, on the basis of the Full Court's decision in *R v Doogan*, it is not competent for Your Honour in conducting an Inquiry into the cause and origin of the fires that hit Canberra on 18 January 2003 to examine the warnings that may or may not have been issued to the public in the lead up to the firestorm. Such matters can not sensibly be said to fall within the jurisdiction to inquire into the cause and origin of a fire.

68. In some circumstances it might be relevant for a Coroner to inquire into warnings where they could relate to the manner and cause of a death. In our submission Counsel Assisting, appreciating the jurisdictional vacuum with respect to warnings and cause and origin of a fire, has belatedly attempted to fit the entire warnings issue into a possible "*manner and cause*" of the death of Mrs Tener. For reasons which appear later in these submissions, there is no evidence upon which Your Honour could properly find that the warnings issue, (whether it be the wording of specific information or a general lack of warning) contributed to the death of Mrs Tener.

69. Our primary contention therefore is that Your Honour does not have a jurisdictional basis for making findings or comments relating to the warnings that were or were not delivered at various stages between 8-18 January 2003. Certainly an examination of information provided to the public up to 10 years

before January 2003 cannot be properly within the proper bounds of this inquiry either as relating to cause and origin of the fires or as a manner and cause of any of the deaths.

70. However, if Your Honour is against us on this point it is appropriate for these submissions to properly examine the issue notwithstanding our primary contention that the matter is *ultra vires*.

71. Even if Your Honour were of the view that it be within jurisdiction to consider whether the warnings issued were adequate or should be changed for future fires, or issued at an earlier stage, etc. this does not permit the Court to inquire into *why* adequate warnings were not given, (if that be the finding) for the purpose of apportioning blame or culpability to any individual.

72. If Your Honour simply examined the “why” for the purpose of say, determining whether reasons such as avoiding panic or waiting until specific information can be provided should in future be permitted to outweigh competing interests such the desirability of early warnings being issued, then that might perhaps properly form a basis of comment by a Coroner.⁴⁵

73. However, Counsel Assisting goes significantly beyond any such purpose in proposing the findings it asks Your Honour to make. Counsel Assisting asks Your Honour to inquire into and make findings as to the mental state (*mens rea*) of Messrs Lucas-Smith, McRae and Castle, urging Your Honour to find that they deliberately and knowingly deceived the people of Canberra. Such a finding is well beyond Your Honour’s jurisdiction.

⁴⁵ If the issue were otherwise a matter falling within the “cause and origin of a fire” or “manner and cause of death”

74. As Counsel Assisting themselves set out: “*It has often been said (and re-affirmed in R v Doogan) that the role of a Coroner is not to lay moral blame or apportion criminal or civil responsibility*”.⁴⁶

75. The submissions by Counsel Assisting as to asserted motivations for an alleged failure to give adequate warnings are no more than exhortations to Your Honour to apportion moral blame or to apportion criminal or civil liability. That is not permitted.

Unfairness - Propositions Not Put To Relevant People

76. In *Mahon v Air New Zealand* [1984] AC 808 the Royal Commissioner appointed to investigate the cause and circumstances of the Mt Erebus air disaster found that there had been a “*predetermined plan of deception on the part of officials of the airline*”. The Privy Council found that it was incumbent upon the Royal Commissioner:

*“[to listen] fairly to any relevant evidence conflicting with the finding and any rational argument against the finding whose interests may be adversely affected by it”, but more importantly that “any person represented at the Inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding be made and thus deprived of any opportunity to adduce additional material of probity value which, had it been placed before the decision maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result”.*⁴⁷

77. Not only were Mr Lucas-Smith and Mr Castle unrepresented at the time they gave their evidence, at no stage were they placed on notice that it was to be

⁴⁶ at [1095]

⁴⁷ at 821B

asserted that they had arguably caused the death of an individual or had deliberately and knowingly deceived the residents of Canberra by withholding information they knew to be true. It was never suggested to them either directly or in terms during the many days they were examined by Counsel Assisting that they did indeed have such a state of mind.

78. At no stage during the cross-examination of Mr Castle or Mr Lucas-Smith was it put to them that they deliberately withheld true information or knowingly took part in a deception of the Canberra community. It was never put to them that they had any motive for such behaviour, that they had anything to gain from such behaviour or indeed, as is asserted,⁴⁸ that they were withholding information and that this was a dereliction of their duty. In particular Mr Castle gave the following evidence specifically directed to this point:

I believe it is truthfully trying to indicate that in terms of what we were trying to do is give the information that I, we, thought was possible, and all I was pointing out there was the aspects of what we were talking about and, I believe, that we were talking about the fires in our area predominantly.

Q. That may be the case when you analyse the transcript, Mr Castle, but at the moment what I am analysing is your statement. Where at paragraphs 107 and 108 what you are effectively saying to the reader is, I suggest to you, is "look, the reason we didn't talk more about the threat from McIntyre's is because we had an agreement or protocol in place with New South Wales which effectively meant we were not able to". That is what you are trying to say there, isn't it?

A. No, I don't think I'm saying that. I'm saying if we were asked we truthfully gave what our impression was, but I think in most

⁴⁸ at [1300] of Counsel Assisting's submission

*of those it was indicated, "but you should check with New South Wales for the detail, they can actually talk knowledgeable". All I am trying to portray is that truthfully what I believe we were saying at that particular time.*⁴⁹

79. If it was to be asserted against Mr Castle that he was not truthfully providing information on the basis of his belief then this was a perfect opportunity for responsible counsel to squarely put such a proposition. At no stage was this proposition ever put to Mr Castle.

80. Any finding of the type asserted by Counsel Assisting would amount to a denial of natural justice and liable to be set aside in our submission.

81. Mr Lucas-Smith acknowledged that the message that was put out to the community may have been deficient but denied any suggestion that he deliberately tried to withhold information from the Canberra community⁵⁰. This issue first occurred in response to a question from Mr Johnson SC.

MR JOHNSON Q. I think you readily acknowledged in your evidence last week that not enough was done in relation to informing the Canberra community?

A. Yes, I think the information was there. I think what was lacking was the emphasis, which would have added the criticality to the event. There is nothing more I can say about that other than the fact that I recognise now that that needed to be done and wasn't.

Q. To the extent that there were any deficiencies in the information given by you to the community about a position with the fires, were you ever intentionally seeking to withhold information from the public of Canberra?

⁴⁹ TR 01.03.04 p1684-27 -p1685

⁵⁰ Noting that the denial was not in response to any positive assertion or question of Counsel Assisting

A. Certainly not. In fact, I have always been very frank and upfront with any media interviews that I have done in the past. I was certainly not in any way, shape or form trying to withhold or mislead anybody in the ACT.⁵¹

82. If Counsel Assisting proposed to suggest that there were a number of specific events which demonstrated that this answer was false and that those events demonstrated that there was a deliberate attempt to withhold information, those events and that assertion should have been put to Mr Lucas-Smith, if not then and there, before he left the witness box. The issue was not taken up by Mr Lasry QC in re-examination at all.

PART B – CHRONOLOGY OF THE FIRES

WEDNESDAY 8 JANUARY 2003

Ignition

83. It is not possible to make a fair and reasonable assessment of the events that occurred on 8 January 2003 without appreciating how people assessed the relative risks of the fires as information became available during the afternoon of that day. It needs hardly to be said that the information was initially rudimentary and on the key issue of the size of the ACT fires, actually wrong.

84. There is no dispute with the submissions of Counsel Assisting that lightning caused the four fires.

⁵¹ TR 23.2.04 p1207-11

85. Mr Lucas-Smith became aware of the fires at around 1600 on 8 January 2003.⁵² The first response was to undertake a verification of the fires with the fire towers repeating the bearings and distances.⁵³ Mr Lucas-Smith then said that it was necessary to look very closely at the impacts that those fires could have on the ACT. He said:

*A. There was certainly a risk for the ACT and the pine plantations, and that was very obvious, and we responded accordingly.*⁵⁴

86. Mr Lucas-Smith did not at this stage think that there was a threat to the urban area of Canberra.

87. There is also no dispute that Firebird 7 was dispatched to make aerial observations of the fire.

The Fire Size Calls

88. What is crucial to a fair and reasonable assessment, from Mr Lucas-Smith's position is to recognise that from the very outset, the McIntyre's Hut fire was identified as the largest fire; the greatest threat to ACT assets and the fire which would require the largest number of resources to contain and suppress.

89. When Firebird 7 was dispatched to conduct aerial observations of the reported fires, the observer was Mr Dave Ingram. Mr Ingram was formally qualified as an aerial observer.⁵⁵

90. The Bendora fire was reported as follows.

⁵² PLS statement par. 14

⁵³ TR 16.2.04 p793-21

⁵⁴ TR 16.2.04 p794-3

⁵⁵ TR 20.4.04 p3674-5

- *18.53 VHF2 - SC1 to P1 - Southcare 1 we estimate the fire's stayed over the last hour and a half we estimate it's between 500 metres and 750 metres.*
VHF2 - P1 to SC1 – That's 500 by 350
VHF2 - SC1 to P1 – Southcare 1 negative 500 metres square to 750 metres square.
- *119.27 VHF2 – COMCEN to FB7 – Firebird 7 this is Comms can you estimate the size of that fire?*
...
19.31 FB7 to COMCEN – Yeah estimate at this stage about 500 square metres over.

91. Firebird 7 reported the Stockyard Spur fire as follows.⁵⁶

- *15.57 VHF1 – FB7 to COMCEN Yes Comcen grid reference for that first fire near Corin Dam is 633651 copy*
...
FB7 to COMCEN further to that the area burned probably is about 50 square metres at this stage right on the crest of the hill there over
- *16.46 VHF4 – FB7 to COMCEN – The sit rep of the first fire on grid referene 633651 [Stockyard Spur] is that the fire is increased to about 70 square metres with a flame height between one and one and a half metres the fire is actually burning in a small hollow and is only moving very slowly up hill over.*

92. Firebird 7 reported the Gingera fire as follows.

- *18.01VHF2 FB7 to COMCEN – 617606 [Mt Gingera] mike area burnt about 20 square metres appear lightning strike flame height about one to*

⁵⁶ In quoting radio transcripts etc we follow the practice of omitting the “ums” and the “ahs” etc

one and a half metres burning in understorey no easy access in to this one rocky outcrop.

93. By contrast the McIntyre's Hut fire was recognised as vastly larger and more dangerous from the outset. Coree Tower on channel 46 at 1636hrs said "*McIntyre's is fairly burning hard at the moment.*" The Section 44 report of the NSWRF⁵⁷ states that "*McIntyre's Hut main fire was estimated to be in excess of 200 ha at approximately 1700 hours.*" The channel 49 log of 8 January 2003 at 1703 hrs records one part of McIntyre's Hut fire as approximately "*2.5km long by 200 metres wide, flame 2-2.5 metres high.*"
94. The effect of the reported sizes of the fires and the relative assessment of the McIntyre's Hut fire was apparently active in Mr Graham's mind. This can be seen in his telephone conversation with Mr Prince.⁵⁸

DP I've only just left, and I've obviously come out on the parkway and gone "oh shit that's not a bad job you've got going out in the Brindys"

TO It's - in fact it's not ours, mate

DP It's NSW is it?

TG It is, it's about 6, it's a— do you know McIntyre's Hut?

DP yeah

TO Yeah, it's around that area. Urn, we'll — we might end up with it, but at the moment it's not our - we've got two little ones, urn and when I say little, like 70 square metres and 100 square metres or thereabouts, ah in the Brindy's but they're, you know, but they're not

⁵⁷ MLI.DPP.0005.0191 at 0196

⁵⁸ Transcript of Ch 53 (6207 8397) 8 January 2003 17:46:19. Conversation between Tony Graham and David Prince (omitting introductory pleasantries)

causing us any grief. And then, but ah, the other one, which is the NSW one may well cause us grief tomorrow or the next day.

DP Ok, yeah, just looking at it I would think if the breeze, and the wind, just keeps coming this way it will certainly push it to us.

DP Urn, so I'll be ah, it'll be interesting to see what does occur with that one.

TO Yeah

DP What's their country like? Pretty inaccessible or what?

TO Uh, well it's accessible with good fire trail, but um, off the fire trail, it's very rugged, extremely rugged, yeah.

DP Not a problem, I hope you have a quiet one.⁵⁹

95. Counsel Assisting has contended that if a person with Mr Bartlett's experience had been in the position occupied by Mr Graham, he would have identified the discrepancies about fire measurements coming in from Firebird 7 and Southcare 1. This is totally unfounded speculation. There is simply no evidence for it. The submission is nothing more than a device employed as a means of trying to attribute blame to Mr Lucas-Smith wherever possible, if necessary in spite of the evidence. Speculation as a means of ultimately being able to attribute blame is at odds with the decision of the Supreme Court in *R v Doogan* but in any event, the submission fails because there is no evidence to support it. Mr Bartlett makes no such claim himself.

McIntyre's Hut Assumes Priority

96. McIntyre's Hut fire was initially reported to be about 200 hectares or 2,000,000 square metres. Simple observation of the smoke plumes from the McIntyre's Hut fire also indicated that it was by far the most active fire. The McIntyre's Hut fire ignition point was about 12 kilometres from the ACT but it rapidly spread to within about 10 kilometres within the first few hours bringing

⁵⁹ DPP.DPP.0006.0101

it to within 10 kilometres of the ACT border and the Uriarra Pine forests. The pine forests were an ACT asset worth many millions of dollars in wood production and in water catchment protection.

97. As Mr Lucas-Smith stated in his statement, on the evening of 8 January:

“...it was not clear at this stage what resources may be requested to assist with the McIntyre’s Hut fire, which was clearly the greatest threat to ACT assets at that time, even though it was fully within NSW’s jurisdiction.”⁶⁰

98. This had an impact on the priorities accorded to all four fires, including the McIntyre’s Hut fire. Mr Lucas-Smith said:

The data that we received back from the field on the evening of 8 January indicated that the fires in the ACT were small. What information we had on the McIntyre’s fire was indicating that that fire was large, and had the potential to be much larger and also had the potential to impact on ACT assets. As a result of that, it was a higher priority, in my view, than the Bendora and Stockyard fires.”⁶¹

Role of Mr Bartlett and Mr Graham

99. It is correct to say that Mr Bartlett was not given an immediate role at COMCEN – he was not the rostered DCFCO at the time. However the submissions of Counsel Assisting wrongly imply that his skills were not being utilised. Mr Bartlett was the Director of ACT Forests. He had management responsibilities for the forests under threat. It is not reasonable to suggest that he should have been taken away from that responsibility when the Uriarra

⁶⁰ Lucas-Smith statement par. 27

⁶¹ TR 16.2.04 p804-35

Forest was under threat by a 2,000,000 sq metre fire to deal with fires, the largest of which was then reported to be 500 square metres. As Mr Lucas-Smith said:

Q. Was Mr Bartlett involved early in the process that we are describing when these fires were first discovered? Was he immediately involved in whatever needed to be done and whatever decisions needed to be made?

A. Not as far as Bendora and Stockyard Spur fires are concerned, but he certainly had an interest in McIntyre Hut Fire because it had the potential to impact on the Uriarra pine plantation, and that was our area of highest priority as far as we were concerned.⁶²

100. Mr Bartlett returned to ACT Forests, held back Forests staff and set in train action to protect ACT Forests from the threat posed to them by the McIntyre's Hut fire. Given the value of the forest asset; the proximity of the McIntyre's Hut fire and Mr Bartlett's position as head of that agency, it cannot be suggested that this was an inappropriate role for him, particularly in view of the relative reported size of the McIntyre's Hut fire and the immediacy of the threat posed to the Uriarra Pine Forest.

101. The logical response to Counsel Assisting's submission is: who could rationally suggest that Mr Lucas-Smith should have taken Mr Bartlett away from performing useful work to protect the major forest asset under threat from a 2 million square metre fire, to sit in an office away from the immediate fire event, in order to deal with three other fires, the largest of which was to their knowledge at the time only 500 square metres and did not immediately threaten such an asset? To do so can only be the result of hindsight. It can only be done with the knowledge of what became of the ACT fires and not how they were viewed on 8 January.

⁶² TR 16.2.04 p795.34

102. Whether the work Mr Bartlett did was by chance or by design, Your Honour should conclude that Mr Bartlett was employed doing important work in relation to the protection of the most valuable assets under threat for the highest priority fire at the time and that he was best employed doing just that.

103. To blandly suggest that Mr Bartlett was given no role is also to overlook the fact that Mr Bartlett, Mr McRae and Mr Neil Cooper accompanied Mr Lucas-Smith to Queanbeyan to confer with NSW authorities about the response to the McIntyre's Hut fire. It is clear that this was giving Mr Bartlett and Mr Neil Cooper a role in relation to the major fire at the time and in relation to the assets for which they had direct responsibility and greatest knowledge. It would also ensure in the most direct way that they were briefed about the McIntyre's Hut fire and the NSWRFSS response. It should be noted that Mr Neil Cooper was the first liaison officer ACTBFS appointed to NSWRFSS.

The Availability of Heavy Equipment and the Allocation of Resources

104. Much is made in the submissions of Counsel Assisting that there should have been a range of heavy equipment ready for use on the three ACT fires. Counsel Assisting have suggested that:

- There should have been a bulldozer ready to open up Bendora Break by the morning of 9 January 2003⁶³
- There should have been a bulldozer dispatched to open up the trail to the Stockyard Spur fire⁶⁴

⁶³ [1137] and [1164] Counsel Assisting submission

⁶⁴ [1171] Counsel Assisting submission

- There should have been a bulldozer sent in response to Mr Callan's request at the Mt Gingera fire⁶⁵

105. Mr Lucas-Smith has indicated in his statement that it was necessary for the ACT to locate heavy plant from as far away as Orange and Bathurst.⁶⁶ It is unrealistic to assume that the ACT will as an ordinary measure have either bulldozers in the mountains sitting idle waiting for a fire or that it will be able to produce the quantity of bulldozers suggested by Counsel Assisting in the time suggested. It is even more unrealistic to assume that this could be done when lightning strike had caused 72 fires across NSW⁶⁷ and further fires in Victoria with the consequent demand for that type of equipment which those fires created.

106. However, even if the quantity of bulldozers were available to the ACT, it is by no means clear that in the proper allocation of resources to priorities, those machines would not have been used to assist with the McIntyre's Hut fire or for the further protection of the ACT's Uriarra Pine Forests. Mr Lucas-Smith made this point:

Q. I am talking about heavy plant particularly?

A. If the plant is not available to you, it is not available to you. We had arrangements with New South Wales soil conservation service - that is not what they are called, that is not what their department name is - but we had arrangements with them in relation to access to their two bulldozers. But they were immediately deployed onto the McIntyre fire, and that option went away from us, as were a lot of the other resources immediately. And as far as I was concerned in that first 36-hour period, the McIntyre fire was still a priority fire anyway, and I would

⁶⁵ [1175] Counsel Assisting submission

⁶⁶ PLS Statement par. 47

⁶⁷ Koperberg statement

not have got in their way to sending those resources to that fire.⁶⁸

107. Mr McNamara made the same point in his TROC.

Q. But do you think it would've been possible given if there was plant equipment - suitable plant equipment on hire by one of the ACT land managers that it would've been able to be walked in the night before on the evening of the eighth and perhaps used during the night - for fire fighting operations. Particularly somewhere like Stockyard or Gingera which were quite inaccessible and I believe you talk about trying to reopen the Stockyard fire trail?

A Yep, yeah. Look it certainly would have been possible, yes. Without a doubt, if machinery was available.

Q. And again that's hindsight so - - -

A And it's hindsight so, um, yeah, look it's - if it was available to then to undertake the task yes, it would've made our life a little bit easier on the following morning. But, ah, the only other comment I'd make there is that - I mean I was aware of the fact that, ah, obviously the McIntyres Hut fire, ah, posed, at that point in time, a much more direct, ah, ah, significant threat to, to Canberra. Ah, in terms of the pine plantation which was obviously a valuable economic resource - so at the end of the day I guess, um, somebody within ESB had to make some sort of judgement decisions based on asset protection of a pine plantation versus a, ah, at that stage a relatively small fire in the Brindabellas. That's Stockyard I should say. But hindsight's an amazing thing.⁶⁹

⁶⁸ TR 16.2.04 p791-23

⁶⁹ DPP.DPP.0004.0030

108. This relative assessment of risk was not only appropriate but it was plainly correct. It had an impact upon the way resources were allocated and the way they would have been allocated even if there had been more resources available. It is plain that McIntyre's Hut was viewed as the pre-eminent risk for some time. When questioned about 10 January, Mr Lucas-Smith again emphasised this consideration.

Q. What problem are you describing in paragraph 47 of your statement?

A. The problem I am describing is we had multiple fires. We really had to make a decision very early in the piece as to where that priority lied. The McIntyre fire was the fire that was reported in the first instance and is growing rapidly and had the potential to impact upon the Uriarra pine plantation if it continued to spread eastward in the direction it was going. So we deployed our heavy plant to construction of fire breaks around the Uriarra pine plantation.⁷⁰

109. Thus even if there had been bulldozers available, it is by no means clear that it was appropriate to despatch them to Bendora or Stockyard Spur.

Planned Direct Attack

110. The ACT decided that it would combat the ACT fires by direct attack. Given their size as *initially reported*, it is submitted that this was an appropriate decision.

111. Counsel Assisting, based upon the evidence of Messrs Cheney and Roche, has submitted that had there been a vigorous attack on the fires on the first night, they may well have been put out. Plainly it was not possible to have bulldozers on those fires on the first night, so that submission cannot be predicated upon the presence of bulldozers. Realistically they could not have

⁷⁰ TR 16.2.04 p790-4

been transported there even if they were available. It is also not suggested that back-burning operations could have been conducted to suppress the fires, all on the first night, so suppression cannot be predicated upon the use of that technique. Accordingly, it must be that Counsel Assisting does not dispute the appropriateness of this on the first night and it must be their submission that direct attack was enough to suppress the fires without bulldozers at that time.

112. The comments that Bendora was under-resourced by Mr Cheney and even Mr Lucas-Smith's acceptance of this proposition have to be considered against this background. Mr Cheney gives little attention to the effect that the under-calling of the size of Bendora had on the assessment of what were the appropriate resources to devote to the fire. Mr Lucas-Smith was still obviously more concerned about the McIntyre's Hut fire. No doubt this is why, in the first few days of the fire, he went repeatedly to Queanbeyan. He was asked for resources by NSWRFSS and expected to be asked for them. He had Mr McRae replace him on the observation helicopter flight on the morning of 9 January so that he could again confer about McIntyre's Hut.

The Decision to Withdraw from the Bendora Fire

113. At approximately 1930, Mr Lucas-Smith left with Mr Bartlett, Mr McRae and Mr Neil Cooper to travel to Queanbeyan to confer with the NSW Rural Fire Service about their response to the McIntyre's Hut fire. While in Queanbeyan he received a telephone call from Mr Graham, at 1942:

Lucas-Smith:

Hello

Graham:

Yeah giddy Peter, Tony

Lucas-Smith: *Yeah*

Graham: *That Bendora fire*
Lucas-Smith: *Yep*
Graham: *Approximately 500 square metres, burning very slowly*

Lucas-Smith: *OK, is Odile on it?*

Graham: *Don't know. We can't, we've just spoken to Parks Forest 15 and they're goin' to go and grab Odile. She's in the scrub at the moment. That's the message we got.*

Lucas-Smith : *OK so what they are they going to be able to do anything tonight do you think?*

Graham: *I would be very doubtful that they could I'd...*

Lucas-Smith: *So we'd be looking at crews back tomorrow?*

Graham: *Yep.*

Lucas-Smith: *OK I wonder if you could organise that.*

Graham: *OK*

Lucas-Smith: *That with Odile. Need to make sure we are, that we don't commit ourselves beyond what we might end up needing to commit to the McIntyre fire.*

Graham: *Yep, sure.*

Lucas-Smith: *But I think we need to if we can get them out of the way the better.*

Graham: *Yep.*

- Lucas-Smith:* *But McIntyre's will most likely be tankers with back burning operations any way so*
- Graham:* *Yep OK*
- Lucas-Smith:* *So we might use other resources for that.*
- Graham:* *Sure. Not a worry. I'll work on that and let you know when you come back.*
- Lucas-Smith:* *Thanks mate.*
- Graham:* *Righto.*
- Lucas-Smith:* *See ya.⁷¹*

114. The important points to note about this conversation are:-

- Mr Lucas-Smith was informed that the Bendora fire was 500 square metres and burning very slowly.
- Mr Graham did not know whether Odile was “on” the fire at that time. It was in fact not clear at this time that she had even found the fire, she is only reported as being “in the bush”.
- Mr Lucas-Smith’s concern was primarily with the McIntyre’s Hut fire and he was careful to ensure that he had resources available to assist with that fire in the event that they were required.
- Mr Lucas-Smith did indicate in relation to the ACT fires (the plural was used) that “we need to”, “if we can”, “get them out of the way the better”.

⁷¹ 498

- Mr Bartlett, Mr Cooper and Mr McRae were in the car at the time and there is no evidence that either of them raised any query or objection to this conversation at the time. Given that the conversation indicated that the greatest priority was being given to the fire which was the greatest threat and to the forests for which they were responsible, it is not surprising.

115. Mr Lucas-Smith was not part of the decision whether Mrs Arman should withdraw from the fire-ground or whether she should stay. He has said he would not make his view known without hearing what the incident controller was saying from the field.⁷² It would have been the height of irresponsibility towards his firefighters for him to have done otherwise.

116. There has been much criticism of the impediment created by the border during this inquiry. The immediate recognition by Mr Lucas-Smith that McIntyre's Hut was the greatest danger to the ACT and his preparedness to make resources available to combat it, if requested by NSW, is commendable precisely because it does not ignore the risk posed by McIntyre's Hut because it was the other side of the border.

117. Contrary to the submission made by Counsel Assisting⁷³ this is not failing to "*fight the fire that is burning*". It is in fact doing just that. McIntyre's Hut was burning. The only difference was that Mr Lucas-Smith had to speak to NSW to see if it wanted ACT assistance.

118. Despite Mr Lasry QC saying during questioning that he was "*certainly not criticising* [Mr Lucas-Smith] *for being at Queanbeyan*"⁷⁴ and stating that he

⁷² TR 16.2.04 p829-10

⁷³ at par. 1126(a)

⁷⁴ TR 16.2.04 p835-16

recognised that Mr Lucas-Smith was “*under some pressure of time*”⁷⁵, Counsel Assisting now invite Your Honour to criticise Mr Lucas-Smith about this conversation. They go so far as to suggest that Mr Lucas-Smith displayed a “*casual approach*” to the decision to withdraw, that he failed to participate in the decision commensurate with his role and that his conduct was consistent with him and Mr Graham “*wanting*” Odile Arman to withdraw from Bendora.⁷⁶

119. No rational reason is ever advanced in the submissions as to why Mr Lucas-Smith would “want” Mrs Arman to withdraw from the fire and such a suggestion was never put to Mr Lucas-Smith. It appears to be contradicted by other parts of Counsel Assisting’s submission that refer to Mr Lucas-Smith disagreeing with the decision to withdraw. It is in fact quite contrary to the evidence. Mr Lucas-Smith stated that after its reconnaissance operations, Firebird 7 and Southcare 1 were detailed to conduct water-bombing operations on the Bendora and Stockyard Spur fires. “The intention was to limit the spread of the fire until units arrived on site although sunset was a limiting factor”⁷⁷. (It is submitted that sunset being a limiting factor refers here to the inability to fly helicopters in the mountains at night.)

120. Mr Lucas-Smith did not have any other conversation by telephone with Mr Graham after the conversation reported above.⁷⁸ He was not involved in discussions about whether Mrs Arman would withdraw from Bendora until he returned to Curtin. According to Mr McRae, the meeting at Queanbeyan finished at around 2100 and that they left ESB at around 2200⁷⁹.

121. During the meeting in Queanbeyan, Mr Lucas-Smith agreed with a recommendation that there be a section 44 declaration for Yarrlowlumla Shire

⁷⁵ TR 16.2.04 p835-26

⁷⁶ Par. 5.2.5

⁷⁷ PLS statement par. 21

⁷⁸ TR 16.2.04 p833-14

⁷⁹ McRae statement par. 31 ESB.AFP.0110.0487

for the McIntyre's Hut fire.⁸⁰ It was during this meeting that Mr Lucas-Smith was informed that as a result of the NSW decision to use existing roads wherever possible, the initial NSW effort would be on reconnaissance before using heavy plant. This gave some initial reprieve from tasking ACT resources to McIntyre's Hut although NSW made it clear to Mr Lucas-Smith that there may be a need for ACT resources when back-burning commenced.⁸¹

122. Mr Lucas-Smith stated that when he returned to ESB there was a discussion with Mr Graham. It was then that he was informed that the crew sent to Stockyard Spur were unable to find the fire and that the Bendora crew had withdrawn from the fire. From this briefing he concluded:

I think that the decisions in relation to whether we were resourcing overnight were probably confirmed a little bit in my mind as to the resources that were requested for the next day. We gave, I suppose, in a sense, a confirmation that the fires were still small, the resources requested for the next day's operations only consisted of two RAFT teams, which are remote firefighting teams, and one tank.

Q. For which fires?

A. For the Bendora fire, which once again is confirming in my mind anyway at that time that these fires were still small.⁸²

123. Strictly speaking Mr Lucas-Smith did not have any direct role in the decision to withdraw from the Bendora fire. However, it is appropriate to comment to a limited degree about the criticisms which have been made about this decision.

⁸⁰ PLS statement par. 25

⁸¹ PLS statement par. 25

⁸² TR 16.2.04 p841-27

124. In relation to the decision to withdraw from Bendora, it is also misleading to put, as Counsel Assisting has, that Mr Lucas-Smith says that he would have done things differently and leave it at that. Mr Lucas-Smith actually said:

Q. So you did not necessarily agree with the withdrawal?

A. If I had have been on the fire ground, I may have done things differently. But I dare say the people there were working on the best judgement --⁸³

125. He said the same thing again.

If I had been sitting in Odile Arman's position, I think I would have made a different decision, but I was not.⁸⁴

126. Mr Cheney was considerably more accepting of the rationale for the competing demands of crew safety and fighting the fire as quickly as possible when he first gave evidence. On 14 October 2003 he acknowledged the following.⁸⁵ He acknowledged the following:

- There has been more formal concern and documentation of what is required under occupational health and safety legislation and more formal accounting of it.
- A fireground is capable of being understood as a workplace for the purpose of occupational health and safety legislation.

⁸³ TR 16.2.04 p825-20

⁸⁴ TR 16.2.04 p835-12

⁸⁵ at TR 14.10.03 at p485-488

- That occupational health and safety has added “*a note of caution*” to the mix of factors which an incident controller must take into account.
- It was a “*major concern*” that firefighters be aware of safety issues.
- Relevant incident controllers had to make a “judgement call” as to what to do in the circumstances.
- There were risks of branches falling but this is a risk at any time.
- On making a decision whether to stay or go, some incident controllers would be more conservative than others.
- When asked whether that indicated that one decision is not necessarily right and the other wrong, he said that it was a matter of experience in making a judgement call.

127. Mr Roche said:

MR CRADDOCK Q. You would agree that the difficulty presented by the possibility of falling trees or limbs may, depending on the circumstances of the fire ground, be accentuated at night?

A. Not necessarily.

Q. Does that mean yes it may be accentuated but it may not be, or something else?

A. I think, as Mr Cheney explained, at night in a majority of circumstances - in my experience, anyway, and I have done a fair amount - always seem to win the night shift for some reason. In more circumstances than not the limbs that are likely to fall or the trees that are likely to fall are clearly

visible because of the burning - the glow and the flame.

Just as equally during the day that might not be so visible, particularly where the fire has been burning within a very dry tree or limb for some period of time and is not emitting a significant quantity of smoke that can't be discerned from the general smoke in the area.

So the risk of falling limbs and falling trees is equally a risk at night or during the day and is something that the incident controller must consider in making a decision of a particular strategy or tactics.

Q. Trees may fall night or day; limbs may fall night or day; is that right?

A. That's correct.

Q. Do you say that the reduced visibility of the night adds no further element of any importance to the question of whether firefighting in any particular location, any particular fire ground, ought to be carried out at night?

A. This is one other factor that needs to be considered amongst a whole range of factors.

Q. Can I ask you to go down the page to paragraph 6.4.5 "fatigue". That paragraph provides:

"The firefighters exposed to hard work and hazards on the fire line for long periods are very prone to accumulating fatigue which will greatly reduce their efficiency. Supervisory staff are similarly affected by fatigue. Field controllers should: Take into account fatigue when setting fire control target items; anticipate a requirement for replacement of tired firefighters; ensure that they themselves are also getting sufficient effective rest."

May I take it that you agree with those observations?

A. Yes, I do.

Q. They are matters that an incident controller ought to consider in making a decision whether to undertake direct attack whether by day or by night?

A. Whether to undertake any activity, day or night.

Q. The fire ground is in fact a workplace, is it not?

A. It is under the Victorian legislation. I'm not quite sure for the purposes - if you are talking from the purpose of occupational health and safety. I know it is in Victoria. I am not quite sure whether that legislation is equally applicable in this jurisdiction. If it is, yes, it is.

Q. Do I take from your last answer that you didn't, in your deliberations and preparation of your report, examine the occupational health and safety legislation of this Territory?

A. No, I didn't believe it was necessary.⁸⁶

128. The *Rural Fire Control Manual*⁸⁷ provides:

- *“Safety is the prime responsibility of every person at an incident not just the incident controller”*
- *“The Field Controller bears the responsibility for the welfare and safety of each person assigned to his/her fire ground workforce.”*
- *“Hazards of the fire control situation which may be encountered in the daily work situation [include]:*

⁸⁶ TR 7.10.04 p7532-46 and onwards

⁸⁷ DPP.DPP.0008.0201 made under section 5KA(7) of the *Careless Use of Fire Act 1936* renamed the *Bushfire Act 1936* Gazette S177 15.10.92

- *falling objects*
- *fatigue”*
- *“FALLING OBJECTS burning trees can drop limbs without any warning noise. In some mature, and long unburnt eucalypt forests, trees may start falling within 30 minutes of a fire and continue to drop for several days after the fire....On steep slopes all firefighters are to avoid dislodging rocks and logs and to watch for rocks falling from above.”*
- *“Field Controllers should take into account fatigue when setting target items.”*

129. Exhibit 49 *“Firefighting at Night”*⁸⁸ lists the following additional safety requirements for firefighting at night.

- *It involves no diminution in safety for firefighting personnel*
- *Personnel are adequately rested.*
- *Personnel are adequately briefed.*
- *Site specific hazards have been identified and marked if possible.*

130. It is relevant to considering the above points, that at the time Odile Arman made the call to COMCEN about withdrawing at 2001 that *“it was going to be dark soon”*.⁸⁹ Sunset in Canberra on 8 January 2003 occurred at 2022. At this time, clearly there had not been full deployment around the fireground. Odile Arman had just finished the only circumnavigation of the fireground that had occurred. It is not possible to say that requirements such as people being *“adequately briefed”* and hazards had been identified as night fell.

⁸⁸ ESB.DPP.0001.0204

⁸⁹ Arman statement par. 49

131. It was also the case that the fire was moving slowly. While it is not suggested that Bendora would burn itself out or that there was any reliance on this occurring, in an effort to gauge how slowly fires can burn in the cool mountain air at night, it should be recalled that by the morning of 9 January, 90% of the perimeter of the Mount Morgan fire had self-extinguished.

132. Mr Hayes made a similar safety call. He said that it was too dangerous to put crews on the Bendora fireground overnight on 9 January 2003. He said:

Mr Hayes. I will ask you: what was the reason for your decision at that time to reverse your earlier suggestion about overnight crews?

A. Conditions from probably 1600 on were not pretty in there. It was horrendous. There were numerous trees falling. The fire condition had upped the ante. It had crossed Wombat Road. Fire in there was atrocious. I would not put crews in there overnight.⁹⁰

133. No doubt the conditions were different on 9 January 2003 after the weather had worsened. However, Mr Hayes spoke about not putting crews onto Bendora after 1600 when it was clearly still daytime and with the benefit of crews having already been on the ground with the capacity to brief oncoming crews. We draw attention to this, not to criticise or second-guess Mr Hayes but to indicate that such decisions are always a matter of judgement. Mr Neil Cooper said:

MR LAKATOS: Would it be fair to say that, in applying those dot points, reasonable experienced minds might differ as to the weight you would give to, for example, safety considerations, site considerations and the like?

⁹⁰ TR 22.4.04 p3902-12

*A. That's a fair comment.*⁹¹

134. Mr Lucas-Smith's point on this is no different to that expressed by Mr Cooper. Reasonable minds might differ. One has to rely upon the judgement of the person on the fireground when a decision is made whether to undertake firefighting operations at night. This submission does not go to whether Mrs Arman was "wrong" or "right" as Counsel Assisting invites Your Honour to find. The submission is that reasonable minds might differ when weighing the competing safety and firefighting considerations. It was open for reasonable minds to differ on this occasion. It is simply not fair for people who have had months to consider the issues involved in this decision to second-guess such an operational decision made in the field on the first night of the fire.

Stockyard Spur

135. Mr Gray was unable to reach the Stockyard Spur fire on 8 January. He withdrew his crews. There appears to be no evidence at all to support the finding suggested in Counsel Assisting's submissions that if the response to the Stockyard Spur fire had been in accordance with the weight of response, and if the crews had been RAFT crews they would have been able to walk into the fire. Mr Gray did say that fitness was "one" of the factors he took into account as was equipment. He maintained the correctness of the decision to withdraw which he said he "initiated".⁹² Even Mr Roche said of this decision:

*"Given the lack of information available to the field IC, the difficult access and his inability to actually locate the fire, in my opinion the decision to withdraw cannot be criticised."*⁹³

Suggestion that Mr Lucas-Smith suggested withdrawal.

⁹¹ TR 6.5.04 p4797-11

⁹² TR 20.4.04 p3698-9

⁹³ Roche report p. 75

136. Counsel Assisting's submission about crews being able to walk to the fire is speculation. Counsel Assisting then builds further on this speculation and says that had the suggestions listed in their submission been followed it is "likely" that the fire would have been contained within 24-36 hours and controlled and probably suppressed in subsequent days.⁹⁴ This is speculation upon speculation. It no doubt slimly finds its origins in Mr Roche's comment:

"Had access been more readily gained and resources dispatched in accordance with SPO 7 there was in my judgement an excellent chance that this fire could have been contained overnight."⁹⁵

137. The fact is, access was not readily gained. No doubt, had the fire been in an open paddock or in the middle of Commonwealth Park, the chances would have been better as well.

THURSDAY 9 JANUARY 2003

138. On Thursday 9 January Mr Lucas-Smith commenced work at ESB at 0630. Once again he was informed of the status of the fires.⁹⁶

- Bendora was about 750 square metres with flame height less than a metre;
- Stockyard Spur was about 500 square metres; and
- Mt Gingera was about 300 square metres.

⁹⁴ Counsel Assisting submission [1172]

⁹⁵ Roche report p. 76

⁹⁶ PLS statement par. 29

139. Mr Lucas-Smith attended the NSWRFSS at Queanbeyan again on the morning of 9 January. He was requested to provide NSW with 8 tankers and 15 light units. He said that he would consider that request and reply in due course.⁹⁷
140. He did not agree to provide this level of resources to NSW. He informed Mr Arthur that the ACT could only provide four tankers, four light units and two command units. At this stage Mr Lucas-Smith considered that McIntyre's Hut was a threat to the ACT although not to the urban area.⁹⁸ He still regarded the McIntyre's Hut fire as the greatest risk of all the fires.
141. Mr Neil Cooper was appointed as the ACT's liaison officer to NSWRFSS. Mr Lucas-Smith emphasized to Mr Neil Cooper that the southern and eastern boundaries of the McIntyre's Hut fire were crucial as far as the ACT was concerned and that was where he wanted the priorities to go.⁹⁹
142. Mr Lucas-Smith's comments in his oral evidence about not considering himself under-resourced on the morning of 9 January 2003 must be considered against that background.¹⁰⁰ When Mr Lucas-Smith ultimately received the correct news about the size of the ACT fires, he re-evaluated the priority to be given to the ACT and the NSW fires.
143. It was at 1030 after Mr McRae went and observed the fires from Firebird 7 that Mr Lucas-Smith was informed that Bendora was 20 hectares, Stockyard Spur was 8 hectares and Gingera was 2 hectares. Ninety percent of the Mt Morgan fire had self-extinguished overnight. McIntyre's Hut main fire was 300 hectares, Dingi Dingi Ridge spot fire was 20 hectares, Mountain Creek was 15 hectares and the Baldy Range spot fire was 20 hectares. McIntyre's Hut

⁹⁷ PLS statement par. 32

⁹⁸ TR 1.2.04 pp853-40, 854-39 and PLS statement par. 40

⁹⁹ TR 16.2.04 p848-13

¹⁰⁰ TR 16.2.04 p853-22

was said to constitute a threat to the ACT, especially to pines, private property and power lines.¹⁰¹

144. It was not until Mr Lucas-Smith received this information that he had a real appreciation of the size of the fires.¹⁰²

145. This also led to a re-weighting of priorities. Mr Lucas-Smith said:

Q. It was meaning that resources which you would like to have committed to McIntyre's, because you saw the threat of McIntyre's for the ACT, you now had to split between what you could offer New South Wales and what you needed to apply to the ACT fires, which were now becoming a major problem?

A. That's correct. Up until that time, up until that morning my focus had been on the McIntyre's as being the areas of greatest threat to ACT assets, and I was responding accordingly. That now started to shift as more reliable data started to come forward in relation to Bendora and Stockyard fires.¹⁰³

146. At Stockyard Spur, Mr McNamara says at 0859 that it was right to report that they were “gonna get around it with our equipment”.¹⁰⁴ There was no reason to believe that this was incorrect. This fire increased in size with worsening weather during the afternoon. He was not able to contain the fire. At the end of 9 January crews were withdrawn from the fire. Mr Lucas-Smith did not have the resources available to subdue a fire which by that time had grown to 80 hectares.

147. With the worsening weather on 9 January and now with a correct appreciation of the size of the fires as well as the realisation that direct attack

¹⁰¹ PLS statement par. 33

¹⁰² TR 16.2.04 p863-35

¹⁰³ TR 16.2.04 p869-29

¹⁰⁴ VHF 4 Channel 49

on the fires was not going to be successful, the Service began to organise heavy plant. A strategy of direct attack was continued to hold the fire while indirect attack was planned.¹⁰⁵ Mr Lucas-Smith said that on the night of 9 January he did not feel he was short of firefighters and firefighting equipment but that he was short of aircraft and heavy plant. He said however that this was also a problem for NSW and Victoria.¹⁰⁶

148. Mr Lucas-Smith also attended the NSWRFSS planning meeting for McIntyre's Hut at 1600 on 9 January. At this meeting he advised Mr Arthur that the ACT could only provide four tankers and four light units with two command units to assist at McIntyre's Hut.¹⁰⁷ This was significantly less than NSW requested and was no doubt due to the re-evaluation of the ACT fires.

10 JANUARY 2003

149. At 0730 on 10 January, Mr Lucas-Smith attended NSWRFSS for a briefing on the McIntyre's Hut fire. He advised that he would continue to be able to provide ACT resources to NSW as agreed but that the could not provide more as the ACT fires were building momentum and constituting a threat to Mt Franklin Road.¹⁰⁸

150. Around midday on 10 January 2003, the Bendora fire crossed Wombat Road, moving to the southeast. This had the potential to threaten Mt Franklin Road if the fire then ran uphill to the west. Mt Franklin Road was the only escape route for crews working on the Stockyard Spur fire. The decision was taken not to deploy further crews to Stockyard Spur until Mt Franklin Road was considered safe.¹⁰⁹ This difficulty received no treatment in the submissions by Counsel Assisting. It is factors such as these which must be taken into account by any person in the position of Mr Lucas-Smith and which

¹⁰⁵ TR 16.2.04 p881-28

¹⁰⁶ TR 16.2.04 p880-15

¹⁰⁷ PLS statement par. 40

¹⁰⁸ PLS statement par. 43

¹⁰⁹ PLS statement par. 49

undoubtedly have an impact on the overall ability to control the Stockyard Spur fire. In the light of such factors, Mr Roche's predictions that if certain things were done, Stockyard Spur would have been contained within 24-36 hours and "probably suppressed in subsequent days" are clearly baseless, predictions formed after the event. That Counsel Assisting embraces this contention¹¹⁰ without canvassing the effect of the safety concern about Mt Franklin Road simply indicates how unwise it would be for Your Honour to rely on their submissions as a fair summation of the evidence.

151. The ACT was able to obtain heavy plant from Orange and Bathurst on this day.

SUNDAY 12 JANUARY 2003

152. The ACT obtained an additional helicopter on this day from HeliAust Pty Ltd which commenced work at 0830.

153. Mr Ingram was unable to find additional aircraft although instructed to inquire in ACT, NSW and Victoria as they were already in use.¹¹¹ Mr Lucas-Smith attempted to obtain additional aerial resources from Commissioner Koperberg but he was unable to speak to him. He spoke to Mr Allan Brinkworth who was unable to provide aerial assistance at that time.

154. During the afternoon, the Bendora and Stockyard Spur fires crossed the Mt Franklin Road compromising escape from the Gingera fire.

155. Mr Castle applied for Commonwealth assistance by the provision of four helicopters and four bulldozers.

MONDAY 13 JANUARY 2003

¹¹⁰ CA submissions par. 1172

¹¹¹ PLS statement 62

156. Mr Lucas-Smith said that by 1030 on 13 January 2003, it had occurred to him that the McIntyre's Hut fire could constitute a risk to urban Canberra but that he did not consider that it constituted a realistic prospect at that time. He had confidence in the firefighting effort to intervene at that time.¹¹²
157. From this day, ACT resources were no longer devoted to the McIntyre's Hut fire.
158. Mr Lucas-Smith fulfilled a media engagement at 1030 and departed in Firebird 7 with the Chief Minister. On this day, a helicopter crashed into Bendora Dam. The Chief Minister and Mr Lucas-Smith were involved in the rescue of the pilot. This placed Mr Lucas-Smith out of radio contact for four hours and he did not get back to ESB until 1700. Debrief activities in relation to the helicopter crash took him up to 2200.
159. In effect Mr Lucas-Smith was substantially out of action as far as fighting the ACT fires went, during this day.

TUESDAY 14 JANUARY 2003

Telephone Conversation with Mr Cheney

160. On this day, Mr Lucas-Smith spoke to Mr Cheney by telephone. Counsel Assisting has dwelt at length upon the discrepancy between whether Mr Cheney said to Mr Lucas-Smith that under the influence of north-westerly winds, the fire could be brought into Canberra or whether he said that it could be swept "*towards urban areas*".
161. It is recorded in the minutes that strong westerly gusts of wind could turn the fires "*towards urban areas*". There are notes by Miss Ferry and Miss Keane that west winds will bring fires into Canberra city. Although this

¹¹² TR 17.2.04 pp983-4; 990-8

occupied much time in both oral evidence and in Counsel Assisting's submissions endeavouring as a matter of forensics to determine what precisely was said, far less time is spent on explaining exactly what the passing of this information by Mr Cheney to Mr Lucas-Smith is intended to demonstrate.

162. As to the forensic issue, it is plain that in Mr Lucas-Smith's evidence he refers to the minutes as the source of his evidence that winds may blow the fires "*towards urban areas*". That is what is written in those minutes.¹¹³ Mr Lucas-Smith had earlier frankly said that, "*there is no way in the world I could repeat verbatim what he [Mr Cheney] said.*"¹¹⁴ When he was provided with the notes, of the planning meeting, he acknowledges that he may have referred to the fire possibly burning into Canberra.¹¹⁵ Plainly, Mr Lucas-Smith referred to the fires being turned "*towards urban areas*" in his statement because that is what the minutes said.

163. The discussion with Mr Cheney could only be material information if Mr Cheney had told Mr Lucas-Smith something he did not already know. Mr Cheney did not. It is nowhere suggested that Mr Lucas-Smith did not know that it was possible that the fires could come into Canberra under the influence of westerly or north-westerly winds.

164. Mr Lucas-Smith did not say that this information was something with which he disagreed or that it was a revelation to him. Quite the reverse. As mentioned above, he acknowledged that, on 13 January, it occurred to him that McIntyre's Hut could be a risk to Canberra. He said:

Q. You didn't accept it?

¹¹³ TR 17.2.04 p987-8

¹¹⁴ TR 17.2.04 p985-21

¹¹⁵ TR 17.2.04 p989-40

*A. -- that there was a realistic risk. As I said before, I had agreed and acknowledged that that potential in my mind had existed, but I didn't believe at that time that it was realistic. I certainly took the information in relation to my conversation with Phil Cheney to the planning meeting and advised the planning meeting of our discussions that we had, and of what Phil was proposing. At that stage I had no idea that WINTV had chosen not to interview him. But I advised our planning meeting of my discussion with Phil Cheney and what took place as far as I was aware.*¹¹⁶

165. Mr Lucas-Smith took Mr Cheney's comments to the planning meeting and discussed them with those assembled. It cannot even be suggested that this information was a revelation to those at the planning meeting. Mr Lucas-Smith said that "this potential had already been recognised at the meeting."¹¹⁷

166. Nothing can be drawn from the fact that the minutes say the fire would move "towards urban areas." There were obviously a number of people at the meeting. Whose expression this was is not clear. No-one suggests that the minutes are an exact transcript. It should not be assumed that, in addition to all the other things Mr Lucas-Smith had to do, he should have spent time converting the minutes into some form of exact transcript.

167. The long term weather forecast at the planning meeting was:

Planning Meeting 14 January 2003 at 1600

*Long term weather outlook details the temperature for Saturday at 35 °, with temperatures for Sunday, Monday and Tuesday being hot with stronger north-westerly winds.*¹¹⁸

¹¹⁶ TR 17.2.04 p986-32

¹¹⁷ PLS statement par. 72

¹¹⁸ ESB.AFP.0110.0775 at 776

168. The long term forecast suggests “stronger” north-westerly winds for Sunday – 5 days away. Mr Cheney’s prediction required “strong gusts” according to the Ferry and Keaney notes. Finally, under the same heading of “Weather” Mr McRae had proposed that the Bureau of Metrology provide a briefing on the following day. This in fact occurred.

169. Firefighting action was to take place in the meantime. Mr Lucas-Smith said that by later in the afternoon the Service was “pretty close to having containment lines established around the Bendora fire.” When this was completed all the heavy plant could be moved to the Stockyard Spur fire and some had already been moved there. The threat to Mt Franklin Road had been reduced, increasing the ability to move resources to Stockyard Spur. This fire now had two escape routes established.¹¹⁹ The fires were still well on the other side of the Murrumbidgee River. Mr Lucas-Smith’s view and Mr Lasry QC’s comment then were:

Q. But you rejected his view, didn't you?

A. I looked at it from a realistic point of view at that particular time and, of course, I had confidence in our people to actually undertake the job of intervention.

Q. Of course you did. I understand.¹²⁰

170. There is an implication in Counsel Assisting’s submission¹²¹ that some adverse inference should be drawn from the fact that Mr Cheney’s conversation is recorded in the minutes under a heading of “Media”. As discussed above, Mr Cheney did not tell Mr Lucas-Smith anything he did not already know and as he said in his oral evidence, the containment action being undertaken by the Service was aimed at making sure that fires burning to Canberra did not happen. Mr Cheney was going to speak to WIN TV. No-

¹¹⁹ PLS statement pars. 75 and 76

¹²⁰ TR 17.2.04 p990-8

¹²¹ at paragraph 1209

one knew at the time of the meeting that this had not and would not occur. In the event that it did, it would clearly give rise to media interest. Mr Lucas-Smith said:

A. I have no doubt that Mr Cheney's comments, if they had gone to air, would have sparked a lot more media interest in those aspects, and I think they were formulating a response.¹²²

171. Quite simply, Mr Cheney's comments were likely to require a media response.

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172. The Stockyard Spur and Gingera fires merged overnight.

173. Low cloud limited aerial direct attack for most of the day.

174. The morning planning meeting received a weather forecast briefing from Mr Mason of the Bureau of Meteorology. It indicated that Saturday was going to be a bad fire day and that Monday was likely to be worse.

175. At this time, the operational deadline was Friday night. Mr Lucas-Smith stated this in his oral evidence and indicated how progress was occurring against that deadline. He said:

MR LASRY Q. In the minutes of the 15th at 9.30 the phrase we started with is "the weather briefing indicate that Monday is the operational deadline to secure operational strategies." My question is why wasn't the operational deadline Friday, in view of what you were told by Mr Mason?

A. I am sorry, I am not really clearly understanding your question because as I

¹²² TR 18.2.04 p1029-28

understand it Mr McRae had indicated Friday evening from the days before, and that is what we were working to.

On the 14th we had our eastern and southern containment lines put in place for Bendora. We were also getting advice that the southern containment lines for McIntyre's was already in place, and we were moving our resources to Stockyard to start work on those containment lines and that down there. We were concentrating our efforts on to the eastern and southern boundaries of all of those fires.

I think that we were working towards Friday, and what I think Mr Mason indicated to us that there is a shift in the weather, we were going to move into the north-westerly and westerly influences in the next few days. And from my point of view operationally we really needed to make sure that we had our, particularly our eastern and southern flanks as well contained as we could possibly get them.¹²³

The Meeting with Commissioner Koperberg

176. Once again Counsel Assisting makes much of the forensic question about whether Commissioner Koperberg and perhaps others at the meeting at the NSWRFs in Queanbeyan stated that the fires were or could have an impact on Canberra. There are a number of points to be made in relation to this conversation.

177. Mr Koperberg had not planned to visit the ACT ESB and it does not appear that he planned to speak to Mr Lucas-Smith.¹²⁴ He was to go to Jindabyne and then back to Bankstown airport.¹²⁵

¹²³ TR 18.2.04 p1027-32

¹²⁴ TR 16.3.04 pp2085 and 2087

¹²⁵ TR 16.3.04 p2146-33

178. As with the conversation with Mr Cheney, Mr Lucas-Smith was aware that the fires could potentially have an impact on Canberra. For the sake of these submissions, if one assumes the correctness of Mr Koperberg's allegation that Mr Lucas-Smith said that he did not need him [Mr Koperberg] to come from Sydney to tell him what the threat to Canberra was, that allegation cannot be read in isolation from the interpretation of those words which Mr Koperberg, himself, advanced. That was:

You may well interpret his statement as meaning that he was already aware of the potential without my having said so.¹²⁶

179. It is then necessary to turn to what Mr Koperberg initially records in his statement as what he said:

I expressed concern during this briefing about the potentially serious implications for the western suburbs of Canberra were the fires not to be contained before the onset of the predicted weather. I considered that were the forecast conditions to prevail, a significant threat existed to the ACT if the fires currently being worked on were not completely contained by the 18th January, and I subsequently expressed this concern both at the briefing and during the course of media interviews on the same afternoon.¹²⁷

180. It is difficult to see how Counsel Assisting can criticise Mr Lucas-Smith for having some confidence if a fire is "contained", when Mr Koperberg said that the fire would be a problem if they were "not completely contained by 18th January", on the preceding Wednesday. Plainly when Mr Koperberg used the word "contained" he meant it. Firstly, a man of his experience would not misuse such a term and secondly, because by contrast in the next paragraph of his statement he referred it being unlikely that the fires would be

¹²⁶ TR 17.3.04 p2196-8

¹²⁷ Koperberg statement par. 9; NRF.DPP.0001.0014

“suppressed”. Mr Lucas-Smith said in oral evidence that he would have agreed with Mr Koperberg’s concern if the fires were not “contained.”¹²⁸

181. Mr Kopeberg agreed that the meeting expressed confidence about the containment of McIntyre’s Hut “because it was contained.”¹²⁹ Mr Lucas-Smith knew that McIntyre’s Hut was contained on the south and south-eastern boundaries. Those were the areas of concern to him.¹³⁰ No doubt further work was to occur between this day, Wednesday and “Saturday 18th January” which was the date to which Mr Koperberg referred.

182. Mr Lucas-Smith said that he felt that he did not need resources to combat an escape from McIntyre’s Hut.¹³¹

183. Mr Lasry QC asked Mr Lucas-Smith whether Mr Koperberg expressed concern for the western suburbs of the Canberra if the fires were not “controlled”. Mr Lucas-Smith said that he did not remember that.¹³² Mr Koperberg does say that he referred to fires being “controlled” in his statement.

184. With each retelling of Mr Koperberg’s story of the conversation at Queanbeyan, it appeared to get bigger and better. The essential aspects of Mr Koperberg’s written statement have been identified above. Mr Koperberg’s comment in his oral evidence that the fire would only remain contained if the forecast weather did not prevail¹³³ stands in contrast to his suggestion that the impact on Canberra would occur “if” the fires were not contained. Mr Koperberg takes the matter further by suggesting that it was

¹²⁸ TR 18.2.04 p1036-7

¹²⁹ TR 16.3.04 p2088-35

¹³⁰ TR 18.2.04 p1032-27

¹³¹ TR 18.2.04 p1033-5

¹³² TR 18.2.04 p1033-9

¹³³ TR 16.3.04 p2089-32

considered “*inevitable*” that the fires would break their containment lines and would make a “*major run*” to Canberra.¹³⁴ He then goes further still and says:

*Our position nevertheless, based on our opinion, was that if the Bureau of Meteorology was correct in its predictions then no matter what was done between Wednesday the 15th and Saturday the 18th it was inevitable that containment lines would be breached and that the fires would end up in Canberra - and they did.*¹³⁵

185. Mr Koperberg’s written statement and his oral evidence do not fit together.

186. Mr Koperberg’s more dire warnings are not supported by the evidence of Julie Crawford. She said:

Q. Mr Koperberg has given evidence that during the course of that meeting some emotive colourful and emotive language was used - not by him and not by Mr Lucas-Smith but by others present. The language included somebody, he doesn't identify who it was, saying, "As a result of the fire we are going to be in deep shit." Do you remember that being said at that meeting?

A. No.

Q. Do you recall ever hearing at any stage in the discussion, while Mr Koperberg and Mr Lucas-Smith were present, Mr Koperberg expressing his view that there was a very real threat that the fires could affect the Canberra suburbs?

A. Not the Canberra suburbs. I do remember the threat if the fire left its containment lines of burning into the ACT, and I think Canberra is often used. But what I understood

¹³⁴ TR 16.3.04 p2104-35

¹³⁵ TR 16.3.04 p2160-24

*"Canberra" to be was the pine plantations and the rural assets.*¹³⁶

187. Julie Crawford did not remember hearing the word *"inevitable"* used although she did not say that it was not said.¹³⁷

188. Mr Arthur did not consider it inevitable that the fires would break their containment lines, only that it was possible.¹³⁸

189. When Mr Lucas-Smith heard Mr Koperberg's more dire predictions on the television later in the day, this surprised him.¹³⁹ Your Honour should conclude that this is because when Mr Lucas-Smith was with Mr Koperberg the conversation occurred in the more toned down fashion set out in Mr Koperberg's statement. This is consistent with Mr Lucas-Smith's evidence.

190. Your Honour can have some confidence that Mr Koperberg referred to *"containment"* of the fire, that he made this reference in the terms of which written statement and not in the more dire terms discussed above. Mr Koperberg had not even planned contact with the ACT. Mr Koperberg did not alert any NSW authority to a possible requirement for their services in Canberra on Saturday 18 January as perhaps he might have if the more calamitous predictions he gave evidence about had been made and if he had truly expected that there would be an urgent need for assistance.¹⁴⁰

Q. I will make my question a little bit more specific. Are we to understand that the first effort that you made to alert other New South Wales government agencies and emergency relief agencies, I take it, that there might be a need for their services concerning Canberra occurred on Saturday morning?

¹³⁶ TR 3.5.04 p4491-28

¹³⁷ TR 3.5.04 p4493-4

¹³⁸ TR 4.5.04 p4592-3

¹³⁹ TR 18.2.04 p1037-33

¹⁴⁰ TR 16.3.04 p2153-2

A. I believe that to be the case. That is not to say that I didn't have discussion with my counterparts. Indeed, as I have already testified, Brian Gilligan, the Director General of National Parks and Wildlife Service and thus the controller of a major New South Wales resource, was present with me at the meeting on the 15th. So he was very much in tune with what the potential was.¹⁴¹

191. That a mood of confidence was prevalent at the meeting is consistent with what NSWRFSS subsequently did.¹⁴² As put in the cross-examination of Mr Koperberg and as is apparent in the minutes of the NSWRFSS, it did not “*push the panic button*”, so to speak even up to and including Saturday morning. To take another example, the NSWRFSS media officer, Mr Wade, left Queanbeyan on the morning of Saturday 18 January 2003 to go to Jindabyne. This is discussed later. These points are not intended to be a criticism of NSWRFSS and particularly not of those RFS members at Queanbeyan. They are merely to indicate that the NSWRFSS actions were in fact more consistent with the actions of Mr Lucas-Smith than the subsequent and greater degree of alarm expressed by Mr Koperberg in the ABC interview he later gave, and some of his oral evidence.

192. Mr Koperberg accepts that he may not have specifically mentioned the suburbs of Canberra at the meeting. It appears that Counsel Assisting concedes that this aspect of his evidence is unclear.¹⁴³ There is therefore no reason to doubt Mr Lucas-Smith when he says that he did not recall any mention of the suburbs by Mr Koperberg.¹⁴⁴

193. Mr Koperberg also accepts that he may have used ‘Canberra’ and ‘the ACT’ interchangeably.

¹⁴¹ TR 16.3.04 p2153-44

¹⁴² From TR 17.3.04 p2177

¹⁴³ CA submission par. 595

¹⁴⁴ TR 18.2.04 p1039-40

*Q. I think your words were that:
 "The Brindabella complex of fires are certainly potential threats and ... with valuable assets, not the least being some mature pine forests on the border of Canberra and indeed the ACT itself."
 Just dealing with those words for the moment, I suggest that you are really using the two quite interchangeably.*

A. Perhaps.

Q. And that in fact you may have done so on the day, on 15 January, when you were talking to Mr Lucas-Smith?

A. I suspect not.¹⁴⁵

194. Plainly Mr Koperberg does sometimes use 'Canberra' and 'the ACT' interchangeably. The very quote from his statement shows that they were used the wrong way around.

195. Mr Koperberg also referred to someone saying that Canberra was going to be "hammered". The later evidence Mr Corrigan¹⁴⁶ suggests that this conversation occurred outside the NSWRFSS office and that it did not involve Mr Lucas-Smith. This again suggests that Mr Lucas-Smith was correct in saying he effectively denied that any such reference was made.¹⁴⁷

196. The points which Your Honour should glean from Mr Koperberg's evidence are:

- Mr Koperberg's warning about a possible impact upon Canberra was not news to Mr Lucas-Smith. He knew of this possibility already.

¹⁴⁵ TR 16.3.04 p2150-26

¹⁴⁶ TR 4.5.04 p4687

¹⁴⁷ TR 18.2.04 p1042-25

- Mr Koperberg's warning during the meeting Mr Lucas-Smith attended was most likely to have been confined to a warning that there would be an impact on Canberra if the fires were not "contained by 18 January".
- Mr Koperberg is not sure whether the suburbs of Canberra were mentioned and it is clear that he uses 'the ACT' and 'Canberra' interchangeably on occasions.
- Mr Koperberg's more grave televised warnings were a surprise to Mr Lucas-Smith and did not appear to have caused any particular response in the NSWRFs.

197. Although submitting that the points listed above can be drawn from the evidence of the discussion with Mr Koperberg, fundamentally this submission does not back away from the opening point. Counsel Assisting has attempted, again, to draw an adverse inference from a conversation when there is no real basis for it. It can be repeated. Mr Lucas-Smith knew before he spoke to Mr Koperberg that the fires had the potential to impact upon the Canberra urban area. It was not a revelation to him. However, at the time, for reasons which will be discussed, he considered that there would be a successful intervention. Looking at Mr Koperberg's written statement, he contemplated that intervention could have an effect as well.

Request for resources

198. Mr Koperberg offered Mr Lucas-Smith NSW resources to assist in fighting the fires. Mr Lucas-Smith requested four task forces of five category one tankers, that is, 20 tankers in all and about 210 people. He also asked for Incident Management Team resources and RFS Field Command Units.¹⁴⁸

¹⁴⁸ PLS statement par. 83 and T18.2.04 p1032

199. This is not a criticism of NSW as it had many of its own fires to fight as well as those in the ACT; however it is a fact that NSW was only able to provide about 138 people and a number of lighter category 7 tankers instead of category 1 tankers.¹⁴⁹ The criticism which appeared to permeate Counsel Assisting's questioning was that Mr Lucas-Smith should have asked for more resources from Mr Koperberg. Given that NSWRFSS was not able to supply what was requested, Your Honour cannot conclude that there would have been a different outcome if Mr Lucas-Smith had requested more resources.

200. In any event, the resources which Mr Lucas-Smith requested were not to be brought to Canberra to sit around in the city waiting in case a fire eventuated. They were always to be put to work fighting the fires actually burning – not those which might later be burning. They were in fact devoted to the Stockyard fire.

201. Only a limited number of people can be applied to this form of work at any one time. Mr Koperberg made this comment in relation to the McIntyre's Hut fire:

Q. Had any steps been taken to increase the level of resources that New South Wales was to devote to the McIntyre's Hut fire on and in the days following 15 January?

A. Given that the strategy for dealing with the McIntyre's Hut fire was one of containment rather than direct attack, the amount of resource that could be applied to it was limited in as much as the task comprised construction of containment line, which would normally constitute a track or a clearing from which back-burning could be done and then, upon completion of the task, to actually back-burn from the trails into the main fire. So there is a limit to

¹⁴⁹ Exhibit 69 : NRF.DPP.0001.0042 at 0166

how much resource you can use for that particular task.¹⁵⁰

202. Mr Koperberg made the same point again in relation to the ACT fires and the number of crews which may have been useful at the Stockyard fire.

Q...there is only a certain number of resources you can devote to a fire behind containment lines; is that right?

A. If one has chosen containment as a strategy, then the tasking is in fact finite and is staged and evolves; so the answer is yes.

...

...at least insofar as Bendora was subject to indirect attack, it is perfectly reasonable for Mr Lucas-Smith to approach the question of resources in exactly the same way you have described McIntyre's Hut; there are only a certain number of useful resources that can be applied to it?

A. In the implementation of that strategy, yes.

Q. What might well be thought to be a lay idea - that if you can double the resources on a fire at any time you necessarily perhaps double the capacity of putting it out - that is just not really the case in these circumstances, is it?

A. In those circumstances, no, that is not the case.

Stockyard was uncontained, so the logical place to devote the resources which were available would be to send them to that area, would it not?

A. If that was considered appropriate, yes.

¹⁵⁰ TR 16.3.04 p2131-25

Q. You are not here to criticise the decision of that kind, are you?

A. No, I am not.

...

Q. Faced with extremely inhospitable terrain and some limitations in getting resources there, there is, I presume, at some point a natural limitation to the amount of resources that can be sent to a fire of that kind; is that right?

A. Absolutely correct.

Q. You would, I take it, in relation to a fire located where Stockyard was in the ACT defer to the judgment by Mr Lucas-Smith and his officers just as you might one of your own officers in similar circumstances; is that right?

A. Yes, it is.

Q. Insofar as resources were committed to actual direct or indirect firefighting, you are not really criticising Mr Lucas-Smith; is that right?

A. In relation to the deployment of resources on the 16th and the 17th, no. It was entirely within his purview to deploy resources we had provided as he saw most appropriate.¹⁵¹

Progress with the Fires to 15 January

203. Mr Lucas-Smith's statement¹⁵² and Mr Graham's situation report for 1600hrs record that another kilometre of containment line at Bendora had been completed and that there is very little distance left to go to complete the Bendora containment lines. The depth of the south and eastern flanks was 30-50 metres.

¹⁵¹ TR 16.3.04 from p2158-34

¹⁵² PLS statement par. 85

204. Approximately 48 hours more work was required on the Stockyard fire before back-burning would be completed. It was agreed that the NSWRFs crews would be assigned to work on the Stockyard fire.
205. Further resources were requested from the Commonwealth. These comprised a 30,000 litre water tanker and an extension to the time the Commonwealth had already made available resources being used, namely helicopters, bulldozers and an aircraft refuelling truck.
206. Mr Lucas-Smith considered that the Service still had the capacity for intervention if it received the resources that it requested.¹⁵³

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207. With the containment lines to the east of Mt Franklin Road complete, the task was to deepen the backburns from those lines to a depth of about 100 metres.
208. Heavy plant was moved from Bendora to the Stockyard fire.

Cabinet Briefing Paper

209. On the morning of 16 January 2003 Mr Castle and Mr Lucas-Smith briefed the ACT Cabinet about the fire situation at that time. The Briefing Paper¹⁵⁴ prepared by Mr Castle has been referred to at length by counsel assisting. With the benefit of hindsight, Counsel Assisting makes much of the fact that “*urban edge*” was mentioned under the heading “*Assets Under Potential Threat.*” The “*urban edge*” was the final asset listed under this heading.

¹⁵³ TR 18.2.04 p1046-34

¹⁵⁴ DPP.DPP.003.008

210. It is not in issue that as of 16 January the urban edge was a *possible* asset under threat. Under the prevailing drought conditions the South Coast could accurately have been described as possibly being under threat¹⁵⁵. What Counsel Assisting consistently fail to acknowledge or appreciate (or simply ignore as being antithesis to their case theory) is that there is a significant difference between the potentiality of something happening and the actual likelihood of it happening. Undoubtedly, with the benefit of hindsight somebody might have seen this potential risk as a more likely possibility at that stage than was then appreciated. That is a valid point but it falls a long way short of being evidence that person actually knew or honestly believed that the urban edge was going to be hit. The failure to ascribe the level of concern that hindsight (and Counsel Assisting) now demands, especially in the absence of evidence of a general appreciation by a number of witnesses that the risk was so high, hardly bespeaks '*dereliction of duty*' or a '*deliberate decision to withhold information as to the true situation.*'
211. As Mr Lucas-Smith stated when giving evidence about the Cabinet Briefing Paper, if he thought the level of risk to the urban edge was at all significant at that time he "*would have made it far more prominent than make it the second last dot point.*"
212. The fact is that nobody present at that Cabinet meeting who gave evidence before the Inquest attested to being of the view that there was then a realistic risk of the fires impacting on the suburbs of Canberra. This is significant.
213. When asked why no warnings were issued on 16 January despite the briefing paper mentioning "*potential serious impact to ACT forest pines and subsequently the urban area*" Mr Keady indicated that "*there is no reason why not...at that stage the level of risk didn't appear sufficiently high enough*"¹⁵⁶.

¹⁵⁵ See p2 Counsel Assisting submission

¹⁵⁶ Mr Keady T3510

214. Mr Stanhope in his supplementary statement at paragraph 15 stated “*The possibility of the fires reaching urban Canberra was not discussed in a manner that conveyed to Cabinet any understanding that the fires were a direct threat or that it was envisaged or anticipated that houses within the urban area were then at risk.*¹⁵⁷”

215. Mr Castle and Mr Lucas-Smith both gave evidence to this same effect (on a number of occasions).

Possibility of State of Emergency NOT due to possible fire Impact

216. At paragraph 678 Counsel Assisting of their submission state:

“Mr Keady was asked about Mr Castle’s evidence that Mr Castle was equating the declaration of a state of emergency with an impact by the fires on the suburban area.”

217. Whilst it is true that Mr Lasry QC did ask such a question of Mr Keady, it is totally incorrect to suggest (as is done) that Mr Castle at any stage in his evidence equated the possibility of a declaration of a state of emergency with an impact by fire on the suburban area

218. At the time of giving evidence on this issue Mr Castle was, for very good reason, concerned about revealing in open court what he considered to be highly sensitive information regarding the McGregor Power Station. Mr Castle was being asked questions by Mr Woodward about “major infrastructure loss” and “impact on the urban area.”

¹⁵⁷ Mr Stanhope supplementary statement [GSO.GSO.0004.0103].

At the time of the cabinet briefing on the 16th at which I think you have agreed there was discussion with cabinet about the declaration of a state of emergency; in your mind what circumstances would have given rise to the need to have a state of emergency?

A. Widespread impact, widespread disruption on a very large scale.

Q. I think you said the sort of situation that in your mind might give rise to a need for a declaration of emergency was if there was widespread impact. I think you said that would be predominantly urban impact. If I can ask the question in reverse. At the time could you have envisaged a circumstance in which a declaration of emergency might be necessary if there had not been impact on the urban area?

A. No. No I don't think so.

Q. So we can take it as a general proposition then you, at least in your mind, were equating declaration of emergency with impact on the urban area?

A. Predominantly, yes.¹⁵⁸

219. It seems Mr Woodward at that stage interpreted these answers as equating impact on the urban area with impact *by fire* on the urban area although he was not specifically asked about impact by fire. The issue of the Power Station then specifically arose as Mr Castle was taken through the “*Kwaitkowski*” notes:

Q. The next one is a little hard to read. Something "lower load but can't go to zero". That would seem to be a reference to electricity supply?

¹⁵⁸ TR 02.03.04 p1846-39 – p1847

A. *That's loads as in supply.*¹⁵⁹

Q. *Underneath that, "principal threat for major infrastructure and, urban is McIntyre"; do you agree that's what that says?*

A. *It appears to, yes.*

Q. *It certainly confirms, doesn't it, Mr Castle, at least to this point, that the issue or possibility of an effect or impact on the urban areas was part of the discussion; it was more than just something that appeared in the briefing paper?*

A. *Yes.*¹⁶⁰

220. Again neither the question or answer refers to impact *by fire* on the urban area. The questioning then moved onto that part of the notes dealing with a possible declaration of a State of Emergency.

Q *"Mike C overview of Emergency Management Act. Minister for Police and Emergency Services request that keep cabinet ministers advised". then the final line above the drawn ruled line says: "S of E" - that would be state of emergency - "would be called when getting major infrastructure loss". That would be consistent with the question I asked you initially, that is, major infrastructure loss perhaps - I don't want to be unfair to anyone - but that is a euphemism, isn't it, for effect on the urban area?*

A. *Sorry?*

Q. *Major infrastructure loss is another way of saying, to use your words earlier, an effect on the urban area, isn't it?*

¹⁵⁹ TR 02.03.04 p1850-37

¹⁶⁰ TR 02.03.04 p1851-19 -p1852

A. It could be. But it could also be a reference to the infrastructure that had been discussed earlier.[ie the power station]¹⁶¹

221. In fairness to Mr Woodward it is apparent that he did not appreciate at that time the importance of the McGregor Power Station to Canberra.

Q. But you wouldn't need a declaration of emergency if there was a problem with the Macgregor substation or the Tidbinbilla tracking station, would you?

A. Not the Tidbinbilla tracking station but the MacGregor power station, yes.

Q. You might actually declare a state of emergency if there is an effect on the power station; is that what you are saying?

THE WITNESS: Your Worship, could I seek some guidance?

THE CORONER: In what regard?

MR WOODWARD: I think Mr Castle is indicating he might like to take some legal advice.

THE WITNESS: If I could explain to my counsel then that might clarify. I am happy to explain to you, your Worship.¹⁶²

MR JOHNSON: Perhaps it is best if counsel assisting and I, or indeed counsel assisting directly, if there is a concern, talk to Mr Castle. It may be his concern is about being asked questions publicly about a matter that may touch upon some issue of security.

THE WITNESS: That's correct.

¹⁶¹ TR 02.03.04 p1854-6

¹⁶² TR 02.03.04 p1854-25

*MR JOHNSON: If that is the case, clearly it is in the public interest that it be done in a way that avoids that, as I am sure counsel assisting would agree.*¹⁶³

222. During the short adjournment Mr Castle briefed Mr Woodward and Counsel for the ACT about his real security concerns in mentioning the significance of the Macgregor Power Station in open court. Mr Castle explained that the Macgregor station provided approximately 80% of ACT power and a loss of power at this station would evoke a Declaration of Emergency due to the widespread impact of the power loss on the urban area. Mr Woodward was told this power supply came from the Snowy Hydro grid and into Canberra via transmission lines that run through the McIntyres Hut area and onto the McGregor Power Station and that this loss of power might occur without any fire at the urban edge.

223. It is significant that a number of major power lines feeding the Macgregor sub-station either ran through, adjacent to, or in the path of a fire driven by North-westerly winds from the McIntyre's Hut fire. In addition, the major feeder high voltage lines from the Snowy grid passed not only adjacent to McIntyres Hut but also through the major fires burning at that time in Kosciusko National Park. The ACT had already been experiencing some power fluctuations due to smoke and fire in these feeder lines from the NSW grid. Therefore a potential loss of power was a significant matter that would cause a State of Emergency Declaration regardless of where the fire affected the power lines.

224. Following this briefing Counsel Assisting *must* be taken to have thereafter been aware of the significance of that power supply to Canberra (the urban area) and could have been left in no doubt what Mr Castle meant when he

¹⁶³ TR 02.03.04 p1855-30

earlier equated a declaration of a state of emergency with major infrastructure loss. Mr Woodward went so far as to seek suppression of the relevant page of the Kwaitkowski notes.¹⁶⁴

225. However, rather than clarifying the ambiguous effect of Mr Castle's earlier evidence Mr Woodward asked but one further question:

Q. Mr Castle, in your evidence I asked you, after going through some issues about the state of emergency, I said:

Q. So we can take it as a general proposition that you, at least in your mind, were equating the declaration of emergency with impact on the urban area?

A. Predominantly, yes.

Q. Is that still your evidence?

A. Yes.

*MR WOODWARD: I have nothing further.*¹⁶⁵

226. Mr Woodward's final question only entrenched the ambiguity of that earlier evidence. One can not envisage any purpose other than to prevent Mr Castle being able to clear up the ambiguity and specifically deny that during that Cabinet Briefing he had equated the declaration of a state of emergency with an impact by fire on the urban are. At the time Mr Castle gave this evidence (as Mr Lasry QC himself made abundantly clear) "*there [was] no-one at the Bar table who [was] Mr Castle's counsel.*"¹⁶⁶

227. To put this security issue in context, on 17 October 2005 Counsel for Mr Castle tendered a number of documents in particular, Annex C of the ACT

¹⁶⁴ Mr Woodward TR 02.03.04 1863- 45 - p1864-24

¹⁶⁵ TR 02.03.04 p1864-27

¹⁶⁶ Mr Lasry at TR 02.03.04 p1855-21

Emergency Plan which sets out the consequences and contingencies for a loss of electrical power in the ACT. Although not formally marked as an exhibit this material nevertheless forms part of the "brief".¹⁶⁷

228. A loss of power is probably the most significant infrastructure impact that can occur in the ACT. It was not the likelihood of an impact of the fire on the urban edge as at 16 January 2003 that may have led to a State of Emergency but the possibility the fire causing adverse impact to the specifically mentioned '*major infrastructure*' being the many feeder lines into the Macgregor power station or an impact on the substation itself (which is some distance from the urban edge).

229. Several witnesses attested that their recollection of discussions at the Cabinet meeting about a state of emergency and possibilities that one may need to be declared related to the possible impact of a loss of power to the Canberra urban area.¹⁶⁸

230. Mr Keady stated:

Q. In the context of the discussion of the possibility of a need for a declaration of a state of emergency, are you able to say what part that subject took in those discussions?

A. Well, it was general context or background. There was just a discussion about the fire effects. At that time one of the concerns was for the transmission lines into Canberra. The transmission lines had an area that was cleared which intended to prevent direct fire attack on them. There was a technical discussion about the problem of thick smoke and what that can do to cause power arcs, and this kind of phenomenon and I think that was speculated about as something

¹⁶⁷ See Mr Woodward at TR 25.10.05 p8281

¹⁶⁸ See Mr Keady TR 19.04.04 p3513-37 and also pp3497, 3480,3495

which might cause interruption or cessation of power supply, and of course there was the MacGregor power station itself. That was part of the infrastructure issues that was raised in the course of the meeting.

231. The Chief Minister Mr Stanhope stated:

The context of a discussion around a state of emergency, as I recall it, was the possibility of the ACT losing all of its power. And the prospects of the ACT being without power is a circumstance in which one would give serious consideration to the need for a state of emergency to deal with the fact that the territory was powerless.

232. This potential disruption to power was a significant factor at that time and one which Counsel Assisting has underplayed. Mr Lasry QC may not have appreciated the context of Mr Castle's earlier evidence when he (quite incorrectly) put it to Mr Keady that Mr Castle had equated the declaration of a state of emergency with an impact by fire on the urban area. However, it should have been apparent when the carefully prepared submission was being drafted that paragraph [678] was grossly unfair given it was based on inaccurate material.

233. Finally in relation to this issue, it should be noted that the significance of the power infrastructure was known to the members of the ACT Emergency Committee (which included Chief Police Officer Murray and Commander Newton) as it was the topic of discussions at a special extraordinary meeting of the EMC (Chaired by the Chief Police Officer) on 23 October 2002 convened due to potential terrorist concerns. The distribution of the Minutes of this extraordinary EMC meeting and further discussions about power critical infrastructure were included in the normal EMC meeting on 30 October 2002 where Commander Newton attended and even spoke about

meeting with ActewAGL concerning security of the infrastructure. These minutes were part of the material tendered by Counsel for Mr Castle which became part of the material in the brief.

The Midday Press Conference

234. Counsel Assisting has made much of the statement by Mr Lucas-Smith at the midday press conference on 16 January that “*at the moment, I don’t think that there is any threat to the urban areas.*”¹⁶⁹ Counsel Assisting has put the worst possible construction on this, omitting any evidence or discussion of a more benign explanation for it.

235. The first point to note about the transcription of that general media conference is that a number of the questions are listed as “indecipherable”, including *the question immediately before this answer*.

236. Secondly, in context, this answer was clearly intended to convey Mr Lucas-Smith’s assessment of an element of risk if not immediately, in the very near future. Mr Lucas-Smith made the following points in the interview:

- Friday and Saturday were going to be difficult fire management days and Monday and Tuesday could be worse.
- “Whether” containment lines could be held would be “an interesting thing to watch”.
- It would be necessary to speak to NSWRFs about evacuations in the Brindabella Valley.

¹⁶⁹ DPP.DPP.0003.0468

- In view of the deteriorating weather conditions it was “*critical*” to get the NSW firefighters in and that they were at “*crunch point*” and the resources were “*desperately need[ed]*”.
- In response to an indecipherable question he commented:

There is still a long way, over 20 kilometers away if you talk about Canberra it's the urban development areas, there over 20 kilometers away from the urban areas. At the moment I don't think that there's any threat to the urban areas, certainly see a lot more smoke than what they've seen in the last few days and even the smoke haze that we've had for the last 2 days, they'll see a lot more thicker smoke over the next few days but the fires got a long way before it starts to threatening the ACT community.¹⁷⁰

- His statement is correctly interpreted as meaning that while there was potential, (otherwise why “*a long way to go*” and “*at the moment*”) he did not believe that there was a “*threat*”, “*at the moment*”. He then noted that the “*fire has a long way to go before it starts threatening the ACT community.*”
- Mr Lucas-Smith later discussed whether there were houses “*under threat*” and said that the closest were in the Brindabella Valley.
- Later again he said that the next five days would be critical.
- He concluded by saying that in 1928 and 1952 there had been fires which had come across to where Woden Township was now. He noted that the Gudgenby fire did not threaten any community.
- This is consistent with Mr Lucas-Smith's view, mentioned before, that there was a potential risk to the urban area but that at that time,

¹⁷⁰ DPP.DPP.0003.0468 at p. 471

Mr Lucas-Smith believed that there would be successful intervention no doubt fortified by the progress on the Bendora fire containment and backburning and by the additional NSW resources to be devoted to the Stockyard fire. It should be recalled that the Cabinet briefing paper listed the urban edge as the last in a progressive series of assets heading east from the fires and under the heading "*Assets under potential threat*".

237. Although Counsel Assisting's submissions allege that Mr Lucas-Smith is not being truthful by comparing what he said in the press interview with the Cabinet briefing, a very different approach was taken when he was actually questioned about the Cabinet briefing. That approach apparently recognised that a series of things had to occur before there was a threat to the urban area and that this series constituted a worst case scenario.

Q. So I take it by the 16th at 9.30am, or indeed when this briefing was finalised, it was now recognized that there was a potential serious impact to the urban area of the ACT?

A. Well, yes, I suppose that is the simple answer to your question. But it needs to be also put in the context.

Q. Can I put to you it is the usual context, which is assuming certain things?

A. Yes.

Q. I am not suggesting that you are of the view that at this stage -

A. I am painting a worst case scenario to the best of my ability.

Q. -- it was all over red rover, as it were, but simply that there was now a potential serious impact for the urban area if things went wrong, both in the weather, in a containment line and a

resource set of circumstances?

*A. Yes. That potential existed.*¹⁷¹

238. The submission by Counsel Assisting should be rejected. The difference between the Cabinet briefing and the media briefing is not even established given the absence of the question Mr Lucas-Smith was asked and in any event, the two appear to be explicable on the basis of a concentration on different time frames.

The 2pm Briefing

239. In the commentary section of Counsel Assisting's submissions, they have addressed the conclusions which they say should arise on whether Mr Lucas-Smith asked that the content of the meeting should be kept confidential. They have however completely omitted addressing Your Honour about the conclusions it should draw on a matter far more relevant to Your Honour's jurisdiction. That is whether the meeting achieved its object of acquainting the ACTFB and ACT Ambulance Service of the risk of fire and what might be required of them. We maintain that this misdirection of the submission arises for Counsel Assisting being more concerned with establishing a grand conspiracy and fixing on persons to blame, in the teeth of the Supreme Court's decision, rather than with the proper discharge of Your Honour's function of inquiring into the cause and origin of the fire.

The Briefing Achieved its Purpose

240. Your Honour should find that the participants at the meeting were alerted to the fact that there was a risk of fire to the urban area and that the Brigade and the Ambulance Service set about making preparations to deal with this risk.

¹⁷¹ TR 18.2.04 p1061-26

241. The extent to which the risk of an impact on the urban area was conveyed was consistent with Mr Lucas-Smith's understanding of the risk at the same time.

242. At the conclusion of the meeting, the Fire Brigade held its own meeting. The Fire Commissioner was to be the incident controller for the Brigade, Acting Superintendent Newham would be the operations officer, Acting District Officer Canham would be the logistics officer and Acting District Officer Collins would be the planning officer.

243. After the meeting of senior brigade officers, Mr Collins met with Acting Superintendent Prince, who was responsible for executive command support, planning, media and interagency liaison, and five safety officers in the Brigade, to commence dealing with planning issues.¹⁷² These were set out in his Planning Section Report.¹⁷³

Resulting from the planning meeting, planning issues were discussed and resourced as follows:

- *ACTFB Planning Liaison officer in the ACT BF&ES IMT Planning Section - SQF I. Moore (See Section 14.7)*
- *Media Liaison - A/g Superintendent D. Prince & SO K. Hannon*
- *Contingency Planning - Team effort & No officer assigned*
- *Weather and Bureau of Meteorology liaison - SO J. Whittle*
- *AFP Liaison (ie. Road access & closures) SO J. Whittle*
- *Risk assessments of vulnerable areas on the western urban/rural interface - SOQ K. Nester & SFQ F. Prichard*

¹⁷² Collins TROC 28.3.03 Q80; ESB.AFP.0049.0274

¹⁷³ January 2003 Bushfires ACT Fire Brigade Incident Management Team Planning Section Report February 2003 pages 3-4; AFB.AFP.0001.0001

- *Legislation & Government Solicitor's Office liaison - A/g District Officer M. Collins*
- *Fire safety systems and regular business - SO R. Biggs*
- *Water Supply (rural & urban) and ACTEW liaison - SO R. Biggs*
- *Interstate brigade liaison - A/g District Officer M. Collins*
- *Procurement of Canberra Nature Park maps - SO K. Hannon*
- *ACTFB IMT Logistics section liaison - SO K. Hannon*
- *Activity logging and vehicle deployment - SO K. Hannon*
- *Rural community liaison (ie. Uriarra, Pierces Ck and Stromlo Forestry settlements) - SO R. Biggs*

244. ACTFB checked hydrants south of the Cotter Road. Mr Prince attributed this action to the information provided to ACTFB by Mr Lucas-Smith at the meeting on 16 January.¹⁷⁴

245. Mr Dutton and Mr Biciansen from the ACT Ambulance Service were also invited to join the meeting held by the ACTFB after the briefing. Shortly after doing so, Mr Dutton left because there was a similar meeting for ACT Ambulance Service so that it could be prepared. This included ensuring that there were enough maps available, ensuring that their staff were called in (some from leave) and briefing to staff.¹⁷⁵

246. Mr Cartwright left the meeting and spoke to the Kambah, Greenway and Phillip stations, asking them inter alia to check hydrants/refill points on the urban and rural fringe and access points at the ends of streets. They were to ensure that keys fitted locks and that access points were marked on street directories. They were to do general reconnaissance.¹⁷⁶

¹⁷⁴ TR 4.6.06 p6451-11-31

¹⁷⁵ Ambulance Service Strategy Meeting 16.1.06 ESB.AFP.0016.0441 and ESB.AFP.0016.0443

¹⁷⁶ Cartwright diary ESB.AFP.0026.0195

Mr Lucas-Smith conveyed the risk as he believed it to be

247. Much care must be applied when considering evidence about a risk to the “interface” or “urban/rural interface”. This should not be equated to the edge of the built up urban area such as Eucumbene Drive, as at times it has. The need not to make this assumption is particularly important when dealing with evidence from the ACT Fire Brigade because it has responsibility for all structures in the Territory, not just those in the built up areas.¹⁷⁷ Thus evidence of the ACTFB reacting to a risk that the fire would reach the “urban interface” could very well mean the area between the mountains and the built-up urban area. Given the extent of the ACTFB responsibility by comparison to the ACTBFS responsibility, even the term “urban area” can carry an extended meaning. When Mr Lasry QC cross-examined Mr Newham about an extract in an Incident Action Plan dated 17 January which stated “predominant north-west winds are likely to initially cause grass fires within 5 kilometres of Canberra's western boundary, and later to structures and bushland areas within the Canberra urban area”¹⁷⁸, Mr Newham was at pains to explain this terminology in the ACTFB context.

Mr Lasry Q. So that is dealing with what might occur within the urban area?

A. Well, again, sir, the urban area to us with that extended interface is out to the remote and those other properties. So they are for us classified as structures. Still assuming that to be structures in that extended interface area that we had taken responsibility for.

Q. You say the words set out in that paragraph do not refer to anything east of, for example, Eucumbene Drive or Warragamba Avenue?

¹⁷⁷ TR 11.5.04 p5086-7 Newham

¹⁷⁸ TR 11.5.04 p5075-30

A. I don't specifically say that. That's what they are making mention to. I am assessing that as being any of those properties from that interface area outward.¹⁷⁹

248. This is not to say that this terminology is always used in such an extended sense but it is necessary to determine exactly in what way it is being used.

249. According to Mr Newham 's TROC, Mr Lucas-Smith said that the urban interface from Belconnen could be impacted but that there was no suggestion that it was "*it was going to happen categorically*".¹⁸⁰ He later described looking at those areas as a hypothetical and commented that the ACTFB always look at hypotheticals. He went on to say that his thoughts were that they may have to look at a scenario that the fire could burn "*all the way through*" but that he believed that the final containment line would be along the Murrumbidgee corridor. He believed that there was a defensible space between the river and the city. If there was going to be a direct attack it would be in that corridor.

250. In summary, Mr Newham's view of whether the fire would affect the urban area was that he knew that "*they had a potential but a particular outcome, no.*"¹⁸¹

251. Mr Collins said in his TROC that Mr Lucas-Smith had spoken of the "*possibility*" that the fires could impact on the urban infrastructure but that was low.¹⁸² The day of greatest concern was the coming Monday. Mr Lucas-Smith was balancing trying not to alarm the two services with providing them with information so that they could make some decisions.¹⁸³

¹⁷⁹ TR 11.5.04 p5075-41

¹⁸⁰ Newham TROC 18.3.03 Q32; ESB.AFP.0049.0270

¹⁸¹ TR 11.5.04 p5070-35

¹⁸² Collins TROC 28.3.03 Q49; ESB.AFP.0049.0274; T17.5.04 p5417-8f

¹⁸³ Collins TROC 28.3.03 Q57; ESB.AFP.0049.0274

252. Mr Collins' stated in his Planning Section report that, based upon the information from Mr Lucas-Smith, there was a possibility that the fire would reach the urban/rural interface and it was likely that the fire would reach the suburbs on Monday 20th January.¹⁸⁴

253. Mr Dutton also said that he *"thought that it would be unfair to say that directly after the meeting on the sixteenth it was predicted that the fire would impact upon Canberra."*¹⁸⁵ He said that he was left with the impression that the fire could *"get close to or impact on the urban fringe of Canberra."*¹⁸⁶

254. Mr John O'Connor of the ACTFB also stated that he believed that what was conveyed at the meeting was that while it was possible the fires could impact on the urban environment, the Service was still confident of the containment lines that they had in place.¹⁸⁷

255. Mr Canham stated in his TROC:

Q. Was there any indication made of the likelihood of the fires impacting upon the urban environment?

*A. No and I - I can't recall any specific mention that the fire was going to, um race out of the mountains and impact on - on the city of Canberra itself. As I stated before he did say that - that they may not be able to contain the - contain the fire in it's current - in it's current area and it could come out of the mountains, but there was no mention that it was, um, that it was going to come through the ACT the way it did on the Saturday the eighteenth.*¹⁸⁸

¹⁸⁴ AFP.AFP.0001.0001 at 0003

¹⁸⁵ Dutton TROC 14.4.03 Q43; ESB.AFP.0048.0204

¹⁸⁶ Dutton TROC 14.4.03 Q39; ESB.AFP.0048.0204

¹⁸⁷ O'Connor TROC 25.3.03 Q42; ESB.AFP.0048.0223

¹⁸⁸ Canham TROC 24.3.03 Q45; ESB.AFP.0046.0273

256. Mr Prince made similar comments in his statement.

*Mr Lucas Smith told us that on Saturday 18th January and Monday 20th January, the weather would present an extreme fire danger. Monday was seen as the major problem day at that time. At that time Mr Lucas Smith stated that the local bushfires were within containment lines. He was hopeful containment measures would control the fires.*¹⁸⁹

257. Mr Cartwright, the witness upon whom Counsel Assisting urges greatest reliance, has spoken of Mr Lucas-Smith referring to the “*possibility*” that the fires could do the same as earlier fires and the “*possibility*” of risk to the suburbs, “*a possible threat*”, “*a chance, a likelihood*” (*sic*) that fires could break containment lines and “possibly threaten the urban rural interface”. When Mr Cartwright spoke to ACTFB station officers he spoke of a “*possible event*”.¹⁹⁰

258. Mr Bennett spoke of the ACTFB making contingency planning to respond to not just the urban area but also outside the interface area into the rural area.¹⁹¹

There was no attempt to keep the information conveyed by Mr Lucas-Smith secret

259. Mr Newham was asked in his TROC whether there was any mention of the information being portrayed in the media. He said:

¹⁸⁹ Prine statement par. 6; AUS.AFP.0070.0002

¹⁹⁰ Cartwright TROC Q38, 48 and 66; ESB.AFP.0046.0262

¹⁹¹ TR 3.3.04 p1929-24

Peter LUCAS-SMITH may have said, um, this is for information of those people this meeting. I don't recall him actually saying, "And no one else shall ever know." I think it was more by, "Look this is what I'm telling you - you're - I'm briefing you and the information is pretty much for the people in this room." But on the same hand I don't - I don't recall any suggestions or anything saying, "And no one else must know." I think it was more less, um, "I'm briefing the ACT Fire Brigade staff and I'm giving you what I believe is a - a current and accurate briefing as - so that you can do some amount of your own plan."¹⁹²

260. In his oral evidence, Mr Newham was asked whether he could “*recall*” Mr Lucas-Smith saying that he did not want to alarm the public and the media. He said that he could not.¹⁹³ He felt under no constraint about using the information which had just been passed on to him by Mr Lucas-Smith. He said:

Q. Let me ask you this question: did you feel when you left that meeting that you weren't at liberty to use the information you received in the briefing as you saw fit?

A. I would have used any information that was said at that meeting. I wouldn't have withheld information on any account.

Q. Did you feel under any constraint?

*A. No.*¹⁹⁴

261. Mr Collins said that Mr Lucas-Smith was “*proactive*” in providing the brief and that he was careful not to be alarmist but careful in passing the situation on to the two services. He had the impression that the information that he conveyed should not be passed to the media but he saw this as part of the

¹⁹² Newham TROC 18.3.03 Q39; ESB.AFP.0049.0270

¹⁹³ TR 11.05.06 p5062-44

¹⁹⁴ TR 11.5.04 p5089-15

balance Mr Lucas-Smith struck between not causing undue alarm, and informing the appropriate people of developments.¹⁹⁵

262. Mr Dutton said that he could recall, *“no specific comment that the information was restricted or was not to be discussed with other persons attributed to Mr Lucas-Smith or anyone else.”*¹⁹⁶

263. Mr Prince described Mr Lucas-Smith as being more concerned that he managed the information which went to the media. He said:

Q. What did he actually say about not alarming the media or the public?

*A. I think something along the lines that he wanted to make sure that the information stayed within the room and that he managed it - I can't remember the exact words.*¹⁹⁷

264. He later said that it was in accordance with protocol that a person who has operational control has the right to advise how to deal with information. He said that he felt under no operational impediment about how he used the information. He agreed that there should be some uniformity in the dispersal of the information, that usually one channel is selected, and that if everybody was at liberty to say anything, it could be detrimental. Mr Prince said:

Q. You provided some evidence about the way you say Mr Lucas-Smith said the information was to be dealt with, the information he passed to you. Firstly, did you feel under any operational constraint as to the way you could use the information that was passed to you?

A. I think with any protocol if an individual has responsibility, it is their right to

¹⁹⁵ Collins TROC 28.3.03 Q73, 93-6; ESB.AFP.0049.0274

¹⁹⁶ Dutton TROC 14.4.03 Q47; ESB.AFP.0048.0204

¹⁹⁷ TR 4.6.04 p6470-26

advise you how to deal with it. We are often given confidential information; we are often given information during our everyday life where we are required to hold that until we are given the go ahead to inform people.

THE CORONER: I would like you to repeat the question, Mr Walker.

Q. I don't think you answered the question, Mr Prince. Did you feel under any constraint to deal with the information in any way that you saw fit?

A. No, I did not.

...

Q. Let me ask the same thing in another way: did you not feel impeded in the discharge of your duties in any way?

A. I did not, no.

Q. Could I just ask you a hypothetical question: assume you were in the same sort of situation as Mr Lucas-Smith and it was necessary for you to brief some emergency service personnel about an incident, which I think you will agree with me at that stage was regarded as a potential?

A. Yes, certainly a potential.

Q. What, if anything, would you say to those people assembled about how the information should be dealt with?

A. I would be open and honest and say we would have to deal with the information sensitively at any time because we have to have a position amongst us all on how we are going to deliver it. Normally you try to deliver that sort of information through one channel.

Q. If it were the case that information relating to a potential emergency was open for anybody to say anything to anyone about

it, does that have the capacity to be detrimental?

A. It could be detrimental. It could cause confusion.

265. Mr Canham was an acting District Officer in the ACTFB. He made a similar point about the distribution of information to Mr Prince. He was asked:

Q. Was there anything during the course of the meeting where it was - where there was any inference made on the sensitivity of the confidentiality of the information conveyed in that meeting?

A. Um, nothing specific that I can recall. But we usually treat most matters in relation to those meetings as being sort of sensitive to the media, I mean we had a - I know the Fire Commissioner has a policy that you know we don't go out and speak to the media off your own bat, um, you, ah, you run things past the normally through the chain of command, you just don't go out and talk to the media off your own bat in relation to the things that are discussed for operational purposes. No I can't recall anything, can't recall a specific mention of you know this sensitive or don't - don't tell the world about it sort of thing.¹⁹⁸

266. No mention is made of Mr Canham's evidence in the submissions by Counsel Assisting. There is no discussion by Counsel Assisting of the point made by Mr Prince and Mr Canham that there should be some uniformity in the information conveyed to the public. This is a point which, it is submitted, Your Honour would have no trouble accepting as correct.

¹⁹⁸ Canham TROC 24.3.04 Q50; ESB.AFP.0046.0273

267. Mr Dutton from the ACT Ambulance Service said that he did not feel under any constraint in the way that he used the information Mr Lucas-Smith imparted to him at the meeting:

Q. Concerning the same meeting, Mr Dutton, at 1400 on the 16th: when you left that meeting did you feel yourself under any constraint as to the use you could make of the information that had been passed to you in that meeting?

A. No, not at all, by virtue of the meeting being called and the information being provided, I left with no understanding or impression of limitations or restrictions attached to that information.¹⁹⁹

268. Counsel Assisting rely heavily upon the evidence of Mr Cartwright. They refer to the fact that he made a “*contemporaneous handwritten note*”²⁰⁰ There are serious reservations about the accuracy of Mr Cartwright’s note which are only partially mentioned in the discussion of that note by Counsel Assisting.

269. According to Mr Cartwright, there were about 12-14 people at the meeting.²⁰¹

270. The extract from Mr Cartwright’s diary was a transcription of notes which he “*jotted down on a note pad*” and which he “*believes*” he transcribed in the evening of the same day.²⁰² The notes were a “*summary*” of what was stated.²⁰³ When Mr Cartwright was asked whether Mr Lucas-Smith referred to a 50:50 chance of the fire breaking containment lines, Mr Cartwright said that he “*believed*” that the note reflected what Mr Lucas-Smith had said.²⁰⁴

¹⁹⁹ TR 29.04.04 pp4281-47ff

²⁰⁰ CA submission par. 1243

²⁰¹ TR 14.5.04 p533-43

²⁰² TR 14.5.04 p5318-25

²⁰³ TR 14.5.04 p5348-24

²⁰⁴ TR 14.5.04 p5320-35

Even the allegation that Mr Lucas-Smith said that the information was not to leave the room and that he would deny it was something which Mr Cartwright put in terms of "*I believe he said word to the effect.*"²⁰⁵

271. When referring to the amendments to the 1952 date and the underlining of the 1985 date, Mr Cartwright suggested that he may have either written the notes in haste or just transcribed them as they were and filled in the 52 and 85. He does not recall when he made the alteration to "52". He later added the reference to Mr O'Connor. The reference to Mick Collins and Phil Canham were added later again. The reference to Conrad Barr and Tony Ross were in a different pen again. Mr Cartwright was not sure whether he wrote the reference to Jeff Dau at the same time. It would appear that the reason for the repeated embellishments of the note is that Mr Bennett spoke to Mr Cartwright on Sunday 19 January and asked him to make sure that he had good notes.²⁰⁶

272. Your Honour may conclude that these issues so far do not raise matters going to the substance of the meeting at 2pm on 16 January. To this point, what they do reveal is that the original notes taken by Mr Cartwright were not intended to constitute a full and proper formal record. They were jotted down on a notepad which cannot now be found. Later, after the transcription of these notes, further additions were made as Mr Cartwright recognised the need for something approximating a full set of notes. This is not intended to be a criticism or any allegation of impropriety against Mr Cartwright. At the time that he took his notes, he had no idea of the importance that they would later have and no doubt like any other person he did not attempt to record events to the level he might have done if he had known the importance that they would later assume.

²⁰⁵ TR 14.5.04 p5321-37

²⁰⁶ TR 14.5.04 p5336-31-p.5341

273. There are however two errors which go to the very heart of what Mr Cartwright recorded Mr Lucas-Smith as saying. He says that there were predictions of winds from the north and north-west.²⁰⁷ Despite this, Mr Cartwright records in his notes:

“Suburbs at possible risk from Namadgi fires were most suburbs of Tuggeranong and Western Creek.”²⁰⁸

274. This plainly makes no sense certainly as far as Western Creek is concerned, as Mr Cartwright ultimately and reluctantly conceded. It raises doubt about the notes merely by virtue of the fact that it was written down without realising that it made no sense. However during the course of questioning, Mr Cartwright said the following things about his notes.

Q. It doesn't make any sense, does it, Mr Cartwright?

A. You are saying the Namadgi fires having an effect on Weston Creek. But we are referring to short notes taken from a 40-minute briefing in which Mr Lucas-Smith had drawn on a map the effects of the fires in 1939, 1952 and 1985 and their impact on the Canberra area. He showed lines on a map with the impact of those fires.²⁰⁹

Now if I have failed to record Brindabella and all the other areas, it is a summary, as I said, of what was stated.

275. Mr Cartwright went on for a while to maintain that his note was correct. He then decided to interpolate the words “including Namadgi” which were not included in the note. Finally he agreed that Mr Lucas-Smith did not say Namadgi would “directly affect” *Western Creek*.²¹⁰

²⁰⁷ TR 14.5.04 p5346-9

²⁰⁸ ESB.AFP.0026.0195

²⁰⁹ TR 14.5.04 p5348-6

²¹⁰ TR 14.5.04 p5350-2

276. Mr Cartwright did not make any record of a discussion about fires at McIntyre's Hut, even by way of addition and even after he had been asked by Mr Bennett to make sure that he had good notes. He initially explained this by saying that Mr Lucas-Smith focussed his attention on the ACT fires. He acknowledged that there:

*"...was references definitely made to the McIntyre's Hut fire that I have not recorded in my notes."*²¹¹

277. Mr Cartwright stated that he was concerned about McIntyre's Hut and that Mr Lucas-Smith had stated that there was a threat from that fire.²¹² He acknowledged that McIntyre's Hut had the potential to impact on where the ACTFB placed its personnel. It was therefore important to him. When asked by Mr Bennett to ensure that he had good notes, he only recorded people's names. This was after McIntyre's Hut had made the run to Duffy.

278. It is submitted that given the manner in which Mr Cartwright's diary note came into being and the important errors and omissions contained in it, Your Honour should be reluctant to base firm conclusions upon it. Even if what was recorded by Mr Cartwright is, contrary to these submissions, taken to be an accurate record of the words used by Mr Lucas-Smith, those words cannot have been intended to be interpreted literally. No-one, Mr Carwright included, has given any evidence to the effect that he complied with the request that the information not leave the room. Mr Cartwright said:

Q. When you spoke to people in Kambah, Greenway and Phillip and you told them to check hydrants and so forth, did you say

²¹¹ TR 14.5.04 p5355-20

²¹² TR 14.5.04 p5357-6

"This is just some form of preparation in case there is a problem with fires"?

A. No. I think I referred to the fact that we had been briefed that afternoon and there was a chance of fires, or possibility or probability that the fires may impact the urban/rural interface and that we needed to do something to try and prepare. I asked them to check access points because we have access point - it is written in my notes what -

Q. Logically, that is exactly what you would expect people to do as a result of that meeting?

A. Correct.²¹³

...

Q. Sir, wait until the question is asked, please.

You would not have been able to do your job as you saw the need to do it if you had complied with that literally?

A. You are quite correct.²¹⁴

279. In conclusion Mr Cartwright agreed with the opinions expressed by other people, that there should be a co-ordinated approach to the comment to the media and that there was nothing "*sinister*" for an organisation to say that comment should not be made by anyone and everyone. He said:

Q. Would it normally be the case that other people perhaps of lower rank would make comment to the media about a particular incident?

A. No, not without the district officer's approval.

²¹³ TR 14.5.04 p5361-45

²¹⁴ TR 14.5.04 p5363-20

Q. I take it that the reason for that is so that there is a coordinated approach to what is put into the media?

A. Yes, that is correct.

Q. And that, if it were otherwise, different stories may go out and misleading information or at least conflicting information could be put about?

A. That's correct, so it goes through a coordinator and through generally senior officers.

Q. That could cause some public confusion?

A. If there was information coming from a whole range of people, if that is what the question means, yes, I would agree.

Q. So there is nothing either wrong or sinister for an organisation to say that comment to the media should not be made by anybody and everyone?

*A. Correct.*²¹⁵

280. Mr Bennett took the reference to the information not leaving the room to be a "*bit of a tension breaker*". He did not think about it again until it was raised as part of the inquiry. He did not take it as a threat or anything else.²¹⁶

Peter Lucas-Smith's Evidence

281. Mr Lucas-Smith said that the purpose for calling the meeting at 2 o'clock on 16 January with the Ambulance Service and the Fire Brigade was to keep the Fire Brigade up to date, to "*engage the Fire Brigade*". There was potential for an impact on rural ACT and if rural property was threatened it was a Fire Brigade responsibility.²¹⁷ Mr Lucas-Smith acknowledged that there would be pressure on containment lines although he thought it was unlikely that he said

²¹⁵ TR 14.5.04 p5365-19

²¹⁶ TR 3.3.04 p1921

²¹⁷ TR 18.2.04 p1051-30

that there was a 50:50 chance they would be breached.²¹⁸ Mr Lucas-Smith denied the suggestion that he said that the suburbs of Weston Creek and Tuggeranong would be at risk. He said that there was no potential for Bendora to impact upon Weston Creek unless the wind came from a south-westerly direction. He acknowledged that the bottom end of the Tuggeranong area was at risk.²¹⁹ It is submitted that Your Honour should find that this evidence by Mr Lucas-Smith is not only logical but correct and it should be preferred to the evidence originally provided by Mr Cartwright. It is important to note that in the course of being cross-examined on this subject Mr Lucas-Smith tended to use terminology such as “*I certainly don't recall*” when he was actually disputing what was put to him.²²⁰

282. Mr Lucas-Smith suggested that there may have been some friendly discussion or banter about not alarming the public. He said:

Q. Did you say any words to the effect that you didn't want to alarm the public or the media?

A. I certainly don't recall saying that, and that does not sound like the sort of thing I would say.

I might have said we were having a co-ordinated media response and that we needed everybody to be co-ordinated through the same media response arrangements. But that does not sound like me.²²¹

283. Mr Lucas-Smith thought it unlikely that he said the information he was imparting was not to leave the room. He also thought it was “*very unlikely*” that he said that he would deny if it got into the media.²²² Mr Lucas-Smith denied that there was a conscious distinction between what he said in the

²¹⁸ TR 18.2.04 p1053-3

²¹⁹ TR 18.2.04 p1054-10

²²⁰ TR 18.2.04 p1055-1

²²¹ TR 18.2.04 p1056-34

²²² TR 18.2.04 p1057-40

media and the risk to the urban area of Canberra that he really believed existed.²²³

284. Mr Lucas-Smith did acknowledge in the course of his evidence that there was the potential or possibility that property would be affected by the fire. Mr Lucas-Smith acknowledged that if the fire got into the Stromlo pine plantations and the Narrabundah Hill the potential impact on Duffy would be quite high. He said he had been making this point for a decade or more.²²⁴

285. When the proposition was put to Mr Lucas-Smith that he did not want the information to leave the room he said:

Having heard all those bits and pieces read to you, do you accept that you said something to that effect, that the information you were giving needed to stay in that room?

A. No, I don't recall saying that. But there was a fair bit of - as I said, this was discussion amongst firefighters, there was a fair bit of free discussion, and there was a fair bit of humour, I suppose, added into the discussions towards the end. There is a whole range of different things that may have been said. But I find it extraordinary and I am having great difficulty understanding the logic of me making such a statement when the whole reason for that meeting was to engage the fire brigade into the firefighting process and to alert them to the potential for impact on rural properties.²²⁵

286. Mr Lucas-Smith expressly denied the proposition that he did not want the public to be aware of the risk because they would panic. He said that that had not entered his mind "at any time".²²⁶

²²³ TR 18.2.04 p1069-10

²²⁴ TR 18.2.04 p1074-1

²²⁵ TR 18.2.04 p1074-35

²²⁶ TR 18.2.04 p1075-10

287. The final destruction of Counsel Assisting's submission occurs when it is realised that the substance of the information provided by Mr Lucas-Smith was provided to and published by the Canberra Times on 17 January. We deal with this in more detail under the heading "Information published to the Community in the lead up to 18 January.

Conclusions Your Honour can Draw

288. As stated at the outset of this submission, Your Honour must always maintain your primary focus on the cause and origin of the fire. Mr Lucas-Smith stated that he intended to brief the Fire Brigade and also the Ambulance on the state of the fires. He not only achieved this, it is clear from the evidence above that both services took action as a consequence of the briefing he gave them. The fundamental purpose of the meeting which is relevant to the "cause and origin" of the fire is that the services took the steps that they considered necessary in the light of the risk of fire conveyed to them.

289. Even the evidence of Mr Cartwright, at its highest, makes clear that Mr Lucas-Smith conveyed the risk of fire on property as a "*chance*" or a "*possibility*" or similar language. That is consistent with the view that he expressed in his own evidence and is consistent with all witnesses' reports of what he said about the fire. No doubt they phrased it differently. The essential meaning however is the same. Mr Lucas-Smith did not present the impact of the fire as a certainty but as a possibility, and that was the impression taken away by those at the meeting. He did so because this was his actual view at the time.

290. Whatever the language was which was used, no-one left that meeting seized of the information conveyed to him by Mr Lucas-Smith but feeling himself incapable of making use of it. There was no attempt to suppress information in the sense suggested by Counsel Assisting. It is submitted that

any such suggestion of suppression would be rejected. The more logical interpretation to be placed upon Mr Lucas-Smith's words, and that given by the most senior officers in attendance (Mr Bennett, Mr Newham, Mr Prince and Mr Dutton) was that information of the type conveyed by Mr Lucas-Smith should be revealed to the media through a single channel so that a single message is conveyed. Even Mr Cartwright acknowledged that it could be counter-productive if everybody were at liberty to go and speak to the media in whatever different terms that person may have interpreted what was said at the meeting. The different interpretations of the meeting which have been revealed by the witnesses who have given evidence speak volumes as to the danger of multiple messages being put about.

291. Your Honour would conclude that insofar as there was any discussion about the sensitivity of the information it was done for the purpose of ensuring that a single, clear message was conveyed.

292. Finally, Your Honour should conclude that the substance of the information conveyed at the meeting was passed to and published in the Canberra Times on 17 January.

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293. We have submitted that Counsel Assisting has either selectively referred to evidence or presented a one sided view of the conclusions which could be drawn from the evidence. Section 6.7.4 of Counsel Assisting's submissions border on the irrational. It is actually contended that there was some form of conspiracy to separate the briefing of the Fire Brigade and the ACT Ambulance Service from the briefing of the Australian Federal Police. The rationale for this conspiracy is substantially unexplained no doubt because it is unexplainable. Counsel Assisting does not attempt to go beyond suggesting that the Australian Federal Police would have insisted upon the

public being informed of the risk to Canberra whereas, apparently, Messrs Lucas-Smith and Castle could rely on the Fire Brigade and the ACT Ambulance not insisting that this occurred. There is no attempt to explain why there was a need for such alleged secrecy. It was not put to members of the ACT Fire Brigade who attended the briefing at 2pm on 16 January that they could be relied upon to keep “the big secret” close to their chest. It was also not put to Mr Dutton. There is no attempt to explain why if Messrs Lucas-Smith and Castle desired to keep matters secret, they informed the Fire Brigade or Ambulance Service at all. There is no attempt to explain why some 12 to 14 people attended the meeting at 1400 hours. It is surely not customary in “top secret” discussions to invite such a large number. Even less so when it is anticipated that those present at the meeting will immediately go and inform other members of their organisations of the tasks which they are required to undertake.

294. Assuming that this absurd contention was in fact what motivated Messrs Lucas-Smith and Castle at 2pm hours on 16 January, it must be viewed as one of the most spectacular failures of all time. There is not one person who has come before the Inquiry who said that he left that meeting feeling that he could not reveal the contents of it to anyone - so much for a grand conspiracy, the “big secret”.

295. The matter becomes even more absurd when it is realised that Mr Bennett, the Fire Commissioner, attended the briefing with the Chief Police Officer Mr Murray and Commander Newton. Had the question been asked of Mr Bennet, “Did Mrs Lucas-Smith or Mr Castle say to you, Mr Bennett, make sure you don’t tell Mr Murray or Commander Newton about the risk to Canberra?” - it would surely have been laughed out of court. As this was never suggested to Mr Bennett it cannot now properly be asserted to Your Honour to be the case.

296. The next step in this supposed grand conspiracy was to *ensure* that Sergeant Kirby, attended ESB planning meetings as the AFP Liaison Officer. Given that these planning meetings were attended by a large number of people (including from time to time persons outside of ESB – eg Mr Cheney) it could hardly leave Messrs Lucas-Smith and Castle with much confidence that their “big secret” would be kept from the AFP for very long. The next planning meeting on 16 January was to take place at 1600 hours.

297. Mr Murray said that it was possible that he was told that Cabinet had been briefed that morning.²²⁷ Mr Murray emphatically denies that he was told that there was any possibility of an impact from the fire on Canberra’s urban areas. Mr Lucas-Smith does not deny that he may not have made mention of the urban area in his briefing with the AFP. He said he was emphasising the rural properties at this time.²²⁸ This is consistent with what Mr Lucas-Smith and other witnesses have said was his emphasis during the briefing with the ACT Ambulance and the ACT Fire Brigade. Mr Lucas-Smith’s main concern at that time was ACT rural properties.

298. When Mr Murray was asked what difference that knowledge would have made²²⁹, he said it would have been “critical”. Despite this, when Mr Lasry QC asked him what the police response would have been to having that information he said:

Q. If you had that information on 16 January - I say you now speaking pretty much in a corporate sense rather than individually - what would have been the police response to that?

A. It would have been no different in the sense that I would have still conducted an appreciation through a person with that expertise. That would have still been Steve Kirby.

²²⁷ TR 30.4.04 p4300-1

²²⁸ TR 18.2.04 p1082-40 - p.1083-4

²²⁹ Ie with the benefit of hindsight

Q. Sorry, I missed that.

A. It still would have been Steve Kirby.

Q. You say it would have been useful information. The question I am asking as a consequence of that is: would it have made any difference to the urgency with which you prepared from the 16th onward?

A. It was more than useful; it would have been critical information; it would have meant my liaison with Mike Castle would have been more constant and more regular. I still would have relied on Steve Kirby for an appreciation and contingency plan.²³⁰

299. Mr Murray indicated little more than what actually happened. He understood that State Emergency Service was engaged by his officers.²³¹

300. Mr Kirby was appointed on the 16th of January as the liaison officer by Commander Newton although he had been fulfilling that role since the implosion inquiry.²³² He attended the planning meeting as ESB at 1600 hours on the day.²³³ It was part of his job to attend the twice daily planning meetings as required.

301. Sergeant Kirby corrected the description of the fire spread predictions given at the planning meeting at 1800 hours on 17 January 2003. He had said in his statement that these were “*predictions*”. He described this as a wrong choice of words and substituted that it was a “*possibility*”.²³⁴

²³⁰ TR 30.4.04 p4301-1

²³¹ TR 30.4.04 p4302-27

²³² TR 30.4.04 p4342-15

²³³ TR 30.4.04 p4342-33

²³⁴ TR 30.4.04 p4350-1

302. After this meeting Sergeant Kirby advised Commander Newton that there was a realisation of a potential for the fire impacting on the urban fringes. He said:

Q. Following the meeting you advised Commander Newton, Superintendent Lines and Sergeant Wynn from SRS of the changed status of the fires. Can you recall exactly what you advised Commander Newton and the other police about what you had just heard?

A. That for the first time there was a realisation of a potential for the fire impacting on the urban fringes and that obviously the contingency plan that I had drawn up was in relation to rural response not urban response. I think I even mentioned for the first time that there may be a necessity to activate the POC - not that night but the next day. But I said that the current contingency plan that I had in place and the time delay we had or the time that we had before the possibility of it impacting on the urban fringe was plenty of time to increase policing resources if required.

Q. So are you aware of whether or not any additional resource planning was done overnight as a result of the information that you gave to Commander Newton and Superintendent Lines?

A. No, based on the information I had from the possibility of the fire reaching the urban fringe, I was satisfied that the plan I had put in place was adequate for that time.

Q. The plan you had put in place?

A. The plan that I had already put in place and the amount of people I had on-call was satisfactory.

Q. How many people did you have on-call through the SRS?

A. I had approximately 30 people. And then with the time delay that we had, I knew we had another 60 to 80 people that could be utilised

from the day shift working on and the afternoon shift coming in early if required - being the changeover at 3 o'clock - and again the possibility for fires impacting on the urban fringe being 8 o'clock at night.

Q. It was envisaged that if the worse case scenario happened, you would keep the dayshift back and have a double shift working in the afternoon?

*A. Exactly, yes.*²³⁵

303. Some important points should be noted from this evidence. Firstly, Commander Newton was informed of the potential impact on urban fringes on the evening of 17 January 2003. Secondly, despite this information the assessment appears to have been that it was not necessary to commence planning at that time as there was "*plenty of time to include policing resources if required*". It also appeared that the police had an adequate number of people in hand.

304. Again in a conversation with Superintendent Prince at 23.11 on 17 January 2003 Sergeant Kirby elected not to call out the AFP's SRS Group in response to worsening fires at Tidbinbilla. He decided (and no criticism was made of this) that he wanted them on the day shift.²³⁶

305. It may be that the AFP had notice prior to 16 and 17 January. On 15 January 2003 Sergeant Byrnes was informed by NSW Police that a series of bush fires to the west of the ACT pose a threat to the ACT in coming days. He informed Detective Superintendent Quade and Sergeant Kirby.²³⁷ Sergeant Byrnes said in his oral evidence that he believed that what he wrote in his statement was what occurred on that day. He acknowledges it may have occurred on another day because he did speak to Sergeant Kirby on a

²³⁵ TR 30.4.04 p4350-33-4351-35

²³⁶ TR 30.4.04 p4353-25

²³⁷ Byrnes Statement p.1; AFP.0110.0345. Sergeant Byrnes corrected the date of 16 January which appears in his statement to 15 January at TR 30.4.04 p.4384/34

couple of occasions before 18 January.²³⁸ Sergeant Byrnes had a conversation with Tony Graham of ESB on 15 January concerning his conversation with the NSW Police. In this conversation there was a reference to Canberra “going to burn”²³⁹ Mr Graham said this was “a possibility”. It is difficult to imagine that if Sergeant Byrnes spoke to Mr Graham at 17.34 on 15 January about the conversation which he had with the NSW Police officer he did not attempt to speak to Sergeant Kirby on the same day or shortly thereafter. It is also difficult to imagine that as he expressly raised the question of “Canberra burning” with Mr Graham he did not raise the same matter with Sergeant Kirby. Commander Newton said that she did not realise there was a risk to the suburbs of Canberra until Saturday. This stands in contrast to the advice provided to her by Sergeant Kirby which is quoted above.²⁴⁰

306. The opportunity was provided to Commander Newton to state what the AFP would have done differently had it been provided with the same information on 16 January as was provided to Cabinet. Commander Newton said as follows:

Q. Can I just go back a step: you said if you had the information that was made available to the cabinet on the morning of the 16th of January, you would have done a number of things. You itemized what they were, which included activating the Police Operations Centre. If you had had the information on the 16th of January that the cabinet had, would the police separately from ESB have involved themselves in any process of warnings to residents about the potential effect on the suburbs?

A. We would have worked completely with Emergency Services Bureau in regard to that. Our arrangements and working relationship with them

²³⁸ TR 30.4.04 p4390-23

²³⁹ DPP.0006.0099

²⁴⁰ TR 13.5.04 p5266-20 cf T30.4.04 p4350-33

*meant that we would stay in contact with them. They were the lead agency under these circumstances and had the majority of the information around what was happening in regard to the fires. Therefore we would have taken their advice, and I would have consulted closely, as well as the Chief Police Officer, with Mr Mike Castle and the staff of Emergency Services Bureau in any action that we would take.*²⁴¹

307. Apart from in broad terms “*working more closely*” Commander Newton did not state with any particularity that anything would have been done differently to that which had already occurred. The suggestion that the Federal Police would have acted in some substantially different way to the way they did act, also appears to contrast with the evidence of Sergeant Kirby about not feeling that additional steps needed to be taken on Friday night and that there was adequate time to do so. This has been mentioned earlier.

308. The other contention in Counsel Assisting’s submission is that the Australian Federal Police would have insisted upon some additional media publicity to members of the public. This is not supported in the evidence of Commander Newton. Commander Newton said:

Q. Do the police have the capacity independently of anything that ESB might do, albeit that this was a bushfire situation, to themselves begin to develop a process by which people in affected areas can be warned that there is now a genuine risk and that they should either make preparations to leave or at least prepare for the risk in some way?

A. Our process would have our media liaison officers or media staff working with the Emergency Services Bureau staff to ensure that we provide consistent messages across the community, particularly when we didn't have the full level of information that Emergency

²⁴¹ TR 13.5.04 p5267-43 - 5268-19

Services Bureau had at hand to advise the community of where the fires were moving. We do have an independent capability to advise the community, and in particular our role rests around road closures and general safety issues and messages that we will give to the community.

Q. Is there any role - and again I would have to say I am guessing about this because I don't claim to understand the procedures - for the deployment of police in local areas such as in the Weston Creek area to begin patrolling in the neighbourhood and letting people know either ad hoc or in some more systematic way that the fire has now reached a point where there is some risk to the area and they should begin to make preparations?

A. If I had suitable information that that was the case and it was correct information, then we would be in a position - and I would always once again liaise with Emergency Services Bureau on that because it is fire related - to attend in the suburbs and assist Emergency Services Bureau with fires in the community and provide additional staff to be able to do that.²⁴²

309. This clearly suggests that Commander Newton would have liaised with Emergency Services Bureau about publicity and this is no criticism of Commander Newton. It is consistent with submissions made earlier in this document about the evidence from other emergency service workers. That is, that there should be one voice communicating with the public in emergency services situations. It would be unthinkable that the Emergency Services Bureau should say one thing and the Australian Federal Police something different.

310. Commander Newton's evidence is consistent with this position and it destroys the submission by Counsel Assisting that the Federal Police would in some way have ensured that the public was informed of "something". If there is any doubt about it, this position is confirmed at a later stage in

²⁴² TR 13.5.04 p5271-19 - 5272-10

Commander Newton's evidence. She specifically stated that she said that in her view the public were not aware of the information which was coming in. This seems to be precisely the proposition advanced by Counsel Assisting. However, she had in mind anything but that which Counsel Assisting suggests would be the AFP response. She was asked the following questions:

Q. What I was particularly wanting to ask you about was your increasing concern about the community's understanding of the likely danger. I understand all the other matters. Why were you becoming increasingly concerned about the community's understanding? Was it because you had a view that they did not have a proper understanding of the risk?

A. I think as my understanding of the situation developed, which specifically related to the 10.20 call, [Saturday morning]the other calls I was receiving and information coming in, the public also in my view weren't aware of that information. So we needed to develop a strategy further as to how we would advise the community, because I was concerned about community response and preparedness.

Q. What was the strategy that you had in mind to inform them of the risk?

A. I had my media liaison officer or my media staff. I spoke to them to make sure that they were in contact with the Emergency Services Bureau. I wanted those people to ensure they gave full assistance to the Emergency Services Bureau in preparation of any documentation for dissemination to the community.²⁴³

311. Plainly Commander Newton would not have attempted in some way to “overrule” the media from the Emergency Services Bureau.

²⁴³ TR 13.5.04 p5273-40 - 5274-19

312. Your Honour should draw the following conclusions in relation to the meeting with the Australian Federal Police. Your Honour should –

- Reject the contention that there was some conspiracy between Mr Lucas-Smith and Mr Castle to ensure that the AFP was not briefed at the same time as the ACT Fire Brigade and the ACT Ambulance Service.
- Reject the submission that this was done because, to quote Counsel Assisting “it could not be revealed to anyone else who would have insisted that the public be informed.”
- Conclude that Sergeant Byrnes appears to have made Sergeant Kirby aware, at least informally, and possibly by 15 January, that an officer in the NSW Police had raised the possibility of Canberra being affected by fires.
- Conclude that, on the evening of Friday 17 January, Sergeant Kirby was aware of the deteriorating situation concerning the fires, that he passed this information on to Commander Newton, and that he did not at that time consider it was necessary to bring in additional AFP resources.
- Conclude that there is no clear evidence of precisely what the AFP would have done, had they been provided with an assessment of greater risk to the suburbs of Canberra, in addition to what they already did.
- Form the view that, if the AFP had been informed that there was a greater risk to the suburbs of Canberra than its members might already

have known, it would still have regarded the ESB as the lead agency and in control of media output.

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313. In their submissions²⁴⁴ Counsel assisting assert in relation to the planning meeting of 17 January:

“As the evidence concerning the planning meeting makes clear, by the time that meeting was held there was no question that there was a significant risk that the urban area would affected.[sic] This was directly acknowledged by Mr Lucas-Smith, although he spoke in evidence about options for intervention.”

314. Counsel Assisting in this same section, then ask Your Honour to *ignore* the tornado²⁴⁵ stating that *“there is no evidence that the tornado contributed in any way to the speed or ferocity of the main run of the McIntyre’s Hut and Bendora fires.”*

315. This submission is informed by hindsight but more than that it unfairly and inaccurately implies that the speed and ferocity of the fire run from McIntyre’s Hut could and should have been predicted. There is no evidence to support that proposition.

Cheney and the Planning Meeting 0930

316. Counsel Assisting submit²⁴⁶ that on 14 January ESB were “*upset*” and “*defensive*” about Mr Cheney possibly speaking to WIN TV. They go so far as to suggest:

²⁴⁴ [1271] Counsel Assisting submission

²⁴⁵ at [1277] Counsel Assisting submission

²⁴⁶ at [1211-1212] Counsel Assisting submission

“Someone considered that the ESB (and Your Honour should infer, to the exclusion of Mr Cheney) should be the source of reasonable advice to of threats to the public” and that “such risk as there was should not be discussed publicly, and certainly not without the imprimatur of the ESB. Further, if confronted with a position by someone in a position to speak with authority on the subject, the risk should be down-played.”

317. If this truly were the position of ESB and its senior officers it would be remarkable that Mr Cheney was permitted to be present at the planning meeting of 17 January.²⁴⁷ Nothing was stopping Mr Cheney immediately “spilling the beans” to WIN TV or any other media organisation following that meeting. It is, in our submission ludicrous to suggest that ESB was orchestrating a cover-up.

318. Mr Cheney stated that he felt “*ESB was well aware of the imminent risk to Canberra but just hadn’t issued warnings at this stage*”²⁴⁸ That would be all the more reason for Mr Cheney to be out there making his views known – knowing they were not inconsistent with what he surely expected was going to be stated! However, in our submission this ‘*feeling*’ of Mr Cheney’s is simply not borne out by the evidence (including his own). Nothing in the notes²⁴⁹ or other evidence given relating to this meeting suggests anybody discussed an “imminent risk to Canberra” or that anybody expressed such concerns.

319. Mr Cheney agreed that the main focus at the meeting was the need for the ACT to deal with the fires that threatened the southern area of the Territory rather than the McIntyres Hut fire and that they seemed not to appreciate (as he allegedly then did) “*that Canberra was going to burn down the next day from the McIntyre’s Hut fire.*”²⁵⁰

²⁴⁷ Cheney TR 20.09.04 pp7168- 7169

²⁴⁸ Cheney TR 20.09.04 p7169-9

²⁴⁹ ESB.AFP.0110.0868, AFP.GSO.0008.0161, AFP.GO.0008.0156

²⁵⁰ Cheney TR 20.09.04 p7169

320. Despite this Mr Cheney did nothing to raise it with anybody either within or outside of that meeting. Your Honour would be entitled to treat with some scepticism Mr Cheney's claims to have appreciated at that time (or even on 18 January itself) what was going to happen that afternoon. In our submission these claims at best are informed by hindsight and at worst are grandstanding.

321. Not only did Mr Cheney fail to bring his views to the attention of anyone at ESB on 17 January he further:

- sent his son and Mr Hutchins up to Mt Stromlo without telling them it was going to be burnt over that afternoon,²⁵¹
- spent the most significant fire activity day of his lifetime down the southern end of the Territory in anticipation of fire crossing the Monaro Highway,
- did not even commence to travel back towards Canberra until 4pm on 18 January,²⁵²
- took no steps whatsoever to tell CSIRO management that they were in danger although CSIRO facilities at Black Mountain were significantly threatened on his views,²⁵³ and
- conceded that the extreme fire spread in the grasslands from 2pm was, without hindsight unable to be predicted in the following terms:

*Q. On your expectations, moving through
grassland with a fire danger index of 60*

²⁵¹ Cheney TR 20.09.04 pp7157-8, 7173,

²⁵² Cheney TR 20.09.04 p7155

²⁵³ Cheney TR 20.09.04 pp7172-3

would be on the latest information available, in terms of predictive devices, would be a rate of approximately 3.5 kilometres per hour?

A. That's correct.

Q. As it turned out from your work, the fire travelled about three times of that between 2 and 2.30 through the eaten-out grasslands to the west of Canberra?

A. That's correct.

...

Q. In terms of, say, 6 o'clock Saturday morning and making predictions that if the fire gets into the grasslands, the best prediction that you would make at that time, not using hindsight, would have been, using the available meters, 3.5 kilometres per hour?

A. That's correct.²⁵⁴

322. In our submission Your Honour should exercise restraint before accepting Mr Cheney's claims that he predicted the fire event well in advance of 18 January. In any event, even if Your Honour were to accept that Mr Cheney had the foresight he claims, it does not lead to a conclusion that anyone deliberately withheld information.

Planning Meeting 1800

323. This planning meeting is perhaps the most significant event Your Honour needs to examine when considering many of Counsel Assisting's assertions. By the time of this planning meeting Counsel Assisting positively assert that:

- Mr Lucas-Smith knew it was likely that fire would collide with the urban area over the next few days,²⁵⁵

²⁵⁴ TR 20.9.04 p7148-39 – p7149-34

- A conspiracy to withhold information from the public had been formed by he and Mr McRae and Mr Castle was participating in this deception,²⁵⁶
- A decision had already been made that the “*true position*” could not be revealed to anyone else who would have insisted that the public be informed – such as the AFP,²⁵⁷ and
- Mr Lucas-Smith had falsely and deliberately given the public the impression that there was “*some kind of barrier that he considered had a realistic prospect of holding the passage of the fires*”.²⁵⁸

324. What occurred at this planning meeting, when examined objectively, shows that all these propositions are without foundation.

325. The briefing started late at about 1830 hours and was attended by so many people that they were standing outside the door:

*It was in their conference room and it was packed, you know, people standing up, people pretty much packed in I think, and I guess in my most vivid recollection is whoever spoke from planning.*²⁵⁹

326. Those present at this meeting included Sgt Kirby. Mr Cheney had been at the meeting that morning. These facts alone would tend to contradict the proposition that Mr Lucas-Smith was trying to ‘*hide something*’. Between them Mr Cheney and the police liaison officer Sgt Kirby heard everything that had been discussed within the ESB planning meetings that day. Hardly consistent with a conspiracy of silence.

²⁵⁵ [1256]

²⁵⁶ [1263]

²⁵⁷ [1245]

²⁵⁸ [1257]

²⁵⁹ Amy Lowe at TR 22.03.04 p2494

327. Notes were taken of this meeting by Ms Ferry and Ms Keane. In addition another ‘outsider’ – Ms Janelle Wheatley (from the Education Department) attended and took her own notes. Ms Wheatley gave evidence²⁶⁰ as to what occurred in relation to fire prediction maps for the following day: It was during the course of this meeting that the “onion rings” fire spread prediction map²⁶¹ was produced and discussed.

A. Yes. My recollection was that the maps that had been developed, based on the information that was available on the current fire conditions, was that with the expected wind conditions, temperatures et cetera there was a potential for the fire by 12 noon on the 18th of January to reach Uriarra. Reference to the school building obviously because there was a school building there. I work with the department of education so that was of interest to me. And then onwards from Uriarra to then reach the Cotter. By 6pm could potentially reach Mt Stromlo and by 2000 hours Narrabundah Hill.²⁶²

328. The planning meeting minutes themselves²⁶³ indicate:

“Rick provided an overview of unattended fire behaviour for various periods until tomorrow afternoon. There is the potential for fire to reach Uriarra by midday tomorrow, the Cotter Pub and Reserve at 1600, and Mt Stromlo and potentially Narrabundah Hill by 2000 hours. Planning is to provide a map of predicted unattended rate of spread.”

329. Nothing in that evidence (nor in the evidence of any other attendee) suggests the meeting was told the fire would reach the suburbs. The predictions discussed were based on ‘unattended’ spread and were clearly

²⁶⁰ TR 28.04.04 p4183

²⁶¹ [ESB.AFP.0110.1035]

²⁶² Wheatley TR 28.4.04 p4182-40

²⁶³ [ESB.AFP.0110.0865] at .0866

expressed as ‘worst case’. As we now know with the benefit of hindsight, these worst case predictions came nowhere near the actual event. That does not mean they were not made in good faith or did not then truly represent people’s understanding of what the worst case might be. In particular, Counsel Assisting does not point to any evidence that Mr Lucas-Smith or Mr Castle knew these predictions to be significantly (or at all) understated.

The fires were never envisaged to be ‘unattended’

330. Much was made about the fact that Mr Lucas-Smith quite sensibly indicated that he would not risk firefighters in the forests. This fact however does not equate to leaving the fire unattended.

331. In fact the evidence clearly indicates that NSW resources were there in numbers and intending to continue to fight the McIntyre’s Hut fire even if it broke containment lines. Therefore it cannot be suggested that ESB officers knew at any stage that the McIntyre’s Hut fire would make an unattended run the following day. At the noon press conference that day NSWFS media spokesperson Cameron Wade had stated:

Extra resources have been brought in from all round NSW to those fires. For example, between the ACT and the Hut fire there are at least 200 fire fighters from NSW, other areas of NSW as well as those local crews from Yarralumla.

So we have staged resources on the border, we certainly are looking at what we can do as a secondary containment should it break the containment there. There is a real threat to that pine forest but at this stage everything is holding at the moment.²⁶⁴”

332. One of the base camps for NSW firefighters was that evening set up directly between the McIntyres Hut fires and the projected worst case unattended spread for the next day. There was also a NSW base camp set up at the Stromlo settlement (within the ‘worst case’ spread for the following

²⁶⁴ 17 Jan noon media conference [DPP.DPP.0003.0476 at 0487-9]

day) that was not evacuated until very shortly before the fire front hit. The fire came so quickly that NSWRFs lost over \$1m in equipment due to fire damage on 18 January 2003.

333. Mr Koperberg expected his firefighters would follow any containment break, even if it were to cross into the ACT:

Q. The McIntyre's Hut fire at some stage on the evening of Friday the 17th and into Saturday the 18th broke containment lines and spotted into the ACT. I understand, and somebody will correct me if I am wrong, that New South Wales firefighters quite properly pursued that fire and attempted to conduct firefighting operations within the borders of the ACT?

A. And I expect that would have been done with the knowledge of the ACT. Surely it is not going to be suggested that once the fire reaches the border firefighters say, "That is it."

Q. You are not suggesting that; are you?

A. No, I am not. Of course not.

Q. Indeed, as I understand it, a number of New South Wales firefighting operations for the fires, both McIntyre's Hut and other fires, were based with base camps in areas within the Australian Capital Territory?

A. Yes.

Q....you are not suggesting, are you, that the border has significance to those on the ground who need to follow the course of a fire perhaps on a minute-to-minute basis?

A. No, indeed the cross-border arrangements, understandings, protocols which have long since been established and that I referred to

yesterday would provide for that normal close proximity operation to go unimpeded.²⁶⁵

334. Once the McIntyre's Hut fire did make a run into the ACT, the NSW firefighters stayed with it. Julie Crawford stated in evidence:

*When it crossed the border, we stayed with it. We were doing property protection. Once the fire front would go over - it didn't go over in one wall. It came across in fingers. So they would then stay and protect the property from the embers that were left after the fire front. Some other crews followed it down. There was nothing they could do with it. It just moved so quickly. I don't think anyone expected the fire to get to the urban area in such a short time.*²⁶⁶

Was it the intention of New South Wales, if the fire came over the border, to provide some fire fighting capability in the ACT?

*We did, sir.*²⁶⁷

335. Tony Bartlett was in a helicopter on 18 January 2003 - he estimated that there were about 10 different helicopters working the fire.²⁶⁸ The NSW RFS air base was, until the morning of 18 January 2003 set up very near to Uriarra Settlement – again in the path of the predicted ‘worst case’ fire spread on 17 January.

The Fire Prediction Map – what was predicted and what was understood

336. The fire prediction map was prepared by Nic Gellie, Hilton Taylor and Nic Lhuede.²⁶⁹

²⁶⁵ Mr Koperberg at TR 17.3.04 p2209-10

²⁶⁶ TR 3.5.04 p4515-11

²⁶⁷ Bruce Arthur at T04.05.04 p4621-34

²⁶⁸ TR 01.06.04 p6067

²⁶⁹ Mr Gellie at TR 11.05.04 p5032

337. The map²⁷⁰ indicates fire spread predictions for McIntyre's Hut fire were to be in the vicinity of Mt Stromlo by 2000 hrs. The concentric lines do not touch the suburbs in Weston Creek.

338. Mr Lhuede indicated that the reference to Narrabundah Hill was to the Narrabundah Hill pines and explains why that was not a specific reference to the suburbs – because they did not predict the fire getting so far (even assuming unattended spread on a worst case scenario):

Q. So if I could take you back to [ESB.AFP.0110.0974]. You have got the estimated fire spread to Narrabundah Hill pines at 2000 on the 18th and Stromlo treatment at 1800 on the 18th. You don't actually say in your message form anything about the urban edge of Canberra, do you? Was there any reason for that?

A. No. Just wasn't specifically identified reaching the urban edge. We just identified the Narrabundah Hill pines, I suppose, as the last easternmost component of the rural land to be affected. [T4946]

339. Your Honour needs to keep in mind that it is not Mr Lucas-Smith or Mr Castle conducting this aspect of the meeting and that to the extent Mr McRae was, planners who had prepared the map were present and able to clarify any misconception or mistakes.

340. Sergeant Kirby who was at the planning meeting indicated in evidence that although he heard the predictions about Stromlo by 2000²⁷¹ he thought that these were only “possibilities” and that it “might occur”:

"A. The word "prediction" in that case simply means as a worst case scenario or a

²⁷⁰ ESB.AFP.0110.1035

²⁷¹ TR 30.04.04 p4349

possibility that this could happen. It wasn't a definitive statement saying, "The prediction is this is how it is going to happen" - probably a wrong choice of word in my statement. It was a possibility. It was a consideration that might occur, but it was something that was predicted so, again, it is a wrong choice of word in my statement.

341. There was no reference by any of the planners or Sgt Kirby in their evidence to "Duffy" being under possible threat during the course of that meeting.
342. As outlined above, the predictions were *not* of fire spread hitting the suburbs. Sgt Kirby never suggested this. Commander Newton never suggested she was told so by Sgt Kirby.

A. On the Friday night I was advised that it may hit the Uriarra area by midday on Saturday, the Cotter by 4pm and Stromlo by 8pm. In the advice I was given by Sergeant Kirby, the indication was that it would still be within the pine forest area and there was no indication that it would hit the suburban area and that that was a worst case scenario.

Q. This is on the Friday night?

A. Yes.²⁷²

343. Even on the worst case scenario, there was no positive suggestion that the suburbs would be impacted by fire the following day. The assertion by Counsel Assisting²⁷³ that there could be 'no question that there was a significant risk the urban area *would* be effected is not the evidence.

²⁷² TR 13.05.04 pp5268-39 - p5269

²⁷³ at 1271

The conspiracy to withhold vital information and the 17 January Meeting

344. As already noted, Counsel Assisting do not (as they cannot) suggest any possible motive why persons such as Mr Lucas-Smith, Mr Castle or Mr McRae would deliberately withhold information or attempt to deceive the community. In a criminal trial, the prosecutor would be duty bound to at least note 'good character' as a factor to be considered before asking a jury to decide, contrary to that prior faultless behaviour, that significant malfeasance was being perpetrated. Such has not been the way for Counsel Assisting in these proceedings and the long and distinguished careers of Mr Lucas Smith in bush fire-fighting and Mr Castle in Emergency Management barely rate a mention in Counsel Assisting's submissions. They certainly are not mentioned in the context of why discussing whether Your Honour should find they were part of such a conspiracy as that alleged.

345. In addition to the absence of any motive for acting as Counsel Assisting submit, both the circumstances and evidence relating to the planning meeting of 17 January are inconsistent with the suggestions that information was deliberately withheld.

346. Counsel Assisting failed to put to either Mr Lucas-Smith or Mr Castle that they deliberately downplayed, understated the risk or deliberately withheld information. To the extent Mr Castle was asked about such matters at all he denied them, explaining the lateness of the warnings was "purely because of the speed of the fire":

Q. You have been asked questions by both Mr Woodward and Mr Archer at considerable length about the warnings not given in forms that have been suggested to you to the people on the urban edge. Are you able to explain why warnings were not given to people on the

urban edge in the manner that has been suggested to you, as you understand it?

A. As I understand it, purely because the speed of the fire left very little time for us to actually provide a more detailed warning.

Q. You have been asked questions over a number of days as to what was said to the public concerning the level of threat, whether it is in media releases, press conferences or indeed in any other form by persons from the ESB. You have indicated that more information should have been provided?

A. Yes.

Q. Did you at any stage deliberately understate the risk to the Canberra urban community?

A. No.

Q. Was there any advantage to you in taking the course of deliberately understating to the Canberra urban community the level of threat? A. No. None whatsoever. ²⁷⁴

347. Mr Kevin Cooper, a man who was no supporter of ESB, was also present at this meeting. In relation to his perception of the preparations and intentions relating to community information he stated²⁷⁵:

A. There was a group of people at the other end of the table. I mean, given that I had only been in this building six hours, there were media people, senior management people talking about what information would be provided to the community and in particular through Canberra Connect. I don't recall the exact details of what was mentioned there. But it was certainly in a positive sense of

²⁷⁴ TR 02.03.04 p1845-6

²⁷⁵ TR 02.06.04 p6140-17

what information would be given to the community. It wasn't what we won't give to the community; it was matter of what will be provided to the community.

348. Mr Lasry QC then asked:

Q. Was there an acceptance at this meeting that there was a risk, significant risk, a realistic risk - however you might like to describe it - that the suburbs would be affected by some or all of these fires burning to the west of Canberra?

A. There was no specific discussion about the fires reaching the urban edge - the western urban edge, the interface of Canberra. In terms of fire activity, the discussion was focused on more if the fire reached the pine plantations what wouldn't happen. So basically we wouldn't work in the pine plantations. There was very brief discussion about if the fire reached the grasslands.

But the take-home message for me was that we were to focus our efforts in the rural areas, particularly around Tidbinbilla, Tharwa and Naas.

349. This evidence from an ESB outsider totally destroys Counsel Assisting's case as to the 'conspiracy'. They are central to any objective examination of this issue yet these aspects of Mr Cooper's evidence were never referred to by Counsel Assisting. The submissions of Counsel Assisting demonstrate an incomplete and one-sided view of the evidence and cannot be relied upon by Your Honour.

Fire was never expected to move as it did – by anyone

350. Counsel Assisting fails to properly differentiate between what actually happened and what people reasonably expected to happen. They submit:²⁷⁶

²⁷⁶ at [1311]

“ despite Mr Castle’s unwillingness to adopt the proposition, the ESB and its senior officers had at the time of the fires no basis on which to assume that residents of urban Canberra had any level of understanding of fire risk, let alone a sufficient level to comprehend and act on a warning received less than an 30 minutes before impact.”

351. Even at 2:40pm (and steps were commenced at least an hour before then to issue warnings) *nobody* “*at the time*” knew that warnings issued at that time would only give 30 minutes notice. Your honour is reminded Mr Cheney himself was completely caught out at this time (and way down south).
352. The SEWS was being prepared between 1330 to 1400. At this time the McIntyre’s Hut fire was still west of the Murrumbidgee River. According to Mr Cheney’s to scale Whole Firespread Map²⁷⁷ it was at 1330 over 12km from the interface. Pursuant to direct observation by Mr Bartlett, the fire did not spot over the Murrumbidgee River until 1420.

*A. That’s correct. We were flying in the general area so we had a pretty good view. As soon as that spot fire occurred on the eastern side, we saw it. So I would have taken - you know, as you have seen - a few moments to plot it on the map and then I would have called COMCEN as soon as the air radio frequencies were free. So it would have been at roughly 1420 that the fire occurred on the eastern side of the Murrumbidgee River.*²⁷⁸

353. At 1430 Mr Cheney’s map has the fire front over 5km from Duffy. At 1400 when the SEWS was being finalised the fires were still over 8km from Duffy, a distance approximately *4 times further away* from the urban edge than when the SEWS was issued in 2001.²⁷⁹ The speed in which the fire moved from

²⁷⁷ Exhibit 81 – DPP.DPP.0010.0269

²⁷⁸ TR 01.06.04 p6063-25

²⁷⁹ See Mr Bartlett T01.06.04 pp6060-6062

1300 to 1500 is something that *must* be properly acknowledged by Your Honour when considering findings. Even Mr Bartlett, in a helicopter over the fires, seems not to have appreciated the speed with which the fire front was moving towards the interface – he does not foresee danger to his own Depot until the fire is a few hundred metres away and first mentions a concern for the urban interface at 1358.²⁸⁰

354. Perhaps the most significant statement comes from Mr Hilton Taylor, one of the planners who actually prepared the fire prediction map that had as a worst case scenario the fire possibly reaching Mt Stromlo and the adjoining suburbs by 2000. At paragraph 41 of his amended statement²⁸¹ he states:

I don't think anybody comprehended, or could have comprehended the rate at which the McIntyre's Hut fire jumped the Murrumbidgee River and came across the open ground between the Murrumbidgee Corridor and Stromlo Forest. This happened during the early afternoon. The fire just seemed to burn across bare ground defying all the models.

355. It is a significant flaw in the submissions of Counsel Assisting that such comments, by persons whose views and opinions are otherwise heavily relied on by Counsel Assisting, do not rate mention when their evidence contradicts the submissions of Counsel Assisting.

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Realistic Confidence that fire runs could be managed

356. By 17 January Counsel Assisting positively assert Mr Lucas-Smith had falsely and deliberately given the public the impression that there was “*some kind of barrier that he considered had a realistic prospect of holding the passage of the fires*”.²⁸² The evidence is clear that Mr Lucas Smith did

²⁸⁰ Mr Bartlett T 08.06.04 p6518-6519

²⁸¹ [ESB.DPP.0001.0236]

²⁸² [1257]

honestly have such a belief and that that belief was almost universally shared by both ESB and NSWRF officers.

357. Undoubtedly there was a level of confidence within ESB as to its capacity to deal with the fires if they should make runs towards Canberra. This confidence was in part based on the experience of 2001 where the fires were successfully fought on the interface, in part on the “Utopian” set backs at many places on the interface.²⁸³ The fact there was a significant buffer zone of eaten out grasslands between much of the interface and the forests also contributed to this confidence.

358. There was also a historical basis for such confidence. At page 2 of Counsel Assisting’s submissions they set out a lengthy extract from the Rural Fire Control Manual²⁸⁴ (including in the second last paragraph) the statement that:

“In 1939 fires burning west of the Brindabella Ranges in the Mountain Creek and Flea Creek catchments rained firebrands on Capital Hill, now the site of Parliament House.”

359. The next sentence must have been accidentally omitted. The Manual went on to state *“Due to the eaten out nature of the grasslands the firebrands did not start significant spot fires as there was little grass fuel available to burn.”*

We will stop it in the Grasslands

360. The evidence and experiences of a wide cross-section of witnesses clearly demonstrate that there was a widely held expectation that once the fires came out of the forests they would be able to be contained in the eaten out grasslands. It is significant that none of these parts of the evidence, or indeed

²⁸³ See eg Nicholson at TR 24.10.05 p8156 and Koperberg at TR 17.03.04 p2206.

²⁸⁴ [ESB.AFP.0028.0112 at .0133]

this expectation, is at all referred to by Counsel Assisting. One might expect that *all* relevant explanations for a failure to warn might objectively be examined and at least discussed and dismissed before such a serious assertion as that made would be made.

361. On the evening of 17 January the Bendora and Stockyard fires made significant runs in the Naas Valley. The consistent report of fire-fighters was that the fire behaviour dropped markedly once the fires moved into the grasslands. Ms Vivien Raffaele, an experienced and decorated bush fire fighter²⁸⁵ stated in relation to her observations only the day before:

"The thing that stunned me was when it hit the property boundary where the tree line virtually stopped and you got into the drought affected paddocks, the fire just virtually stopped, it just stopped at that point. When I went home that day I thought we would still have a reasonable chance if anything did crop up further. That we would be able to contain it out in those grasslands cause it just stopped. It just stopped dead in its tracks".²⁸⁶

362. Mr Graham, in answering a question about the prediction of an unattended fire run possibly reaching Narrabundah Hill by 2000 on 18 January said: *"My view at that point was still that, when the fires left the forested areas containment may have been possible in the grasslands."²⁸⁷*

363. On a number of occasions Mr Graham asserted his confidence (seemingly shared by many others) about ESB being able to contain any fire runs in the grasslands:

²⁸⁵ Ms Raffaele was awarded the Australian Fire Service Medal in the 2004 Australia Day Honours – TR 22.04.04 p3936-7

²⁸⁶ Ms Raffaele at TR 22.04.04 p3934-4

²⁸⁷ Mr Graham TR 2951

*Certainly the fire making a run towards Canberra was a view that I had before then. But I think that my expectation was that, once it hit the river and hit even our grasslands, that the containment was possible and never envisaged it doing the impact that it did maybe until the morning of the 18th.*²⁸⁸

364. In his TROC²⁸⁹ Mr Neil Cooper, a very experienced fire fighter whose testimony and opinions have been relied on greatly by Counsel Assisting, described how he attended the RFS Control centre in Queanbeyan on the evening of 17 January. It is clear from his answers that nobody there apparently considered an impact on suburban Canberra anything more than a possibility, if they considered it at all, and that *“there was a general expectation that as soon as it hit the grazing land it would be containable”*.²⁹⁰

365. Mr Cooper described his thought processes on 17th of January as *“I thought it would stop as soon as it came out of the plantation”*²⁹¹. *“I never perceived that it - with all my experience that it was going to burn the depots and the houses”*²⁹² He went on to say during his evidence that even as of today *“I still have those thought processes I still thought it would stop”...I expected that, once it came out onto the open grazing country which was just bare dirt, we would be able to undertake successful suppression efforts”*²⁹³.

366. None of these aspects of Mr Coopers’ evidence are referred to by Counsel Assisting. They are certainly inconsistent with the submission that Mr Lucas-Smith and/or Mr Castle by this stage knew urban Canberra would be impacted upon.

²⁸⁸ Mr Graham TR 05.04.05 p2885-14, see also TR 05.04.04 p2917

²⁸⁹ Neil Cooper TROC at DPP.DPP.0004.0019

²⁹⁰ Neil Cooper TROC Q 76

²⁹¹ Neil Cooper statement at paragraph 57 and TROC Q 88

²⁹² Neil Cooper TROC Q 100

²⁹³ TR 06.05.04 p4800-20

367. Mr Cooper even reiterated his views during re-examination by Mr Lasry QC: *"I assumed that once it came into that open country, we would be in a better position to be able to undertake a successful suppression operation"*²⁹⁴. Notwithstanding that this evidence was in response to questioning by Counsel Assisting, it was yet again not referred to in their submissions.

368. In relation to the fires burning into the urban areas Mr Cooper was asked: *"[U]ntil 9.30 on the morning at least of 18 January the prospects of the fires coming into the urban interface was not one that you were seriously considering at that time"*. His answer was *"No it's not."*²⁹⁵ The assertion directed at Mr Lucas-Smith and Mr Castle that they must have known well before this time that the fire would impact on the urban interface must be judged not only against evidence such as this from a senior experienced and operational firefighter but also against the consistent failure of Counsel Assisting to address such material, which is diametrically opposed to the submission they ultimately were to make.

369. Mr Cheney's evidence specifically suggests that it would not be unreasonable to have an expectation about fire spread once the fires left the forests. He stated: *"[T]he grasslands in early January were largely eaten out around much of the ACT and NSW and that did have a considerable impact on slowing down the fire spread when it came out of the forest ... Elsewhere in NSW, the fires largely came out of the forest and stopped on the eaten out grasslands and it is a fairly common event that when we have a bad forest fire season we usually have an easier grass fire season because the grasslands have been eaten out."*²⁹⁶ Although much of what Mr Cheney had to say on all ranges of subjects is referred to and relied on by Counsel Assisting, this aspect of his evidence does not rate a mention in Counsel Assisting's submission.

²⁹⁴ TR 06.05.04 p4823-7

²⁹⁵ TR 06.05.04 p4800-40

²⁹⁶ TR 10.10.03 p322-12

370. Ms Julie Crawford said in relation to the fire spread on 18 January 2003 of the McIntyre's Hut fire²⁹⁷:

"If you just look at it, there is the Murrumbidgee River to cross there is a huge amount of rural paddocks which were in the middle of drought there were no fuels in them. A lot of them were just dust bowls ... the advice I got back through my Divisional Commander was 'there is nothing you can do once it is in the timber. Once it gets out in the cleared country, that's when you hit it'. That's what you would expect when it came out in the cleared country is when you would attack the fire and when you would be able to get it. At least the rate of spread would drop.

What happened when it came out into the cleared country from my discussions I had with people who were there at the time, they couldn't believe it, it hit the cleared country and just took off. It was a wall of flame across paddocks that had nothing in them. The rate of spread was far more excessive than what people expected ... what are you going to tell the people of Canberra? That it is coming and, yes, you will get it in the cleared paddock which is what everyone was hoping would happen. ...

371. When asked what warnings in her opinion could have been given early on 18 January 2003 she stated:

It would be a really difficult decision because you have got big roads, you have got rivers, you have got open paddocks. I don't think anyone expected the fire to get to the urban area in such a short time. When it did get there, I think we all had the same confidence that we have had for a long time,

²⁹⁷ at TR 03.05.04 p4514-24

which is the ACT Fire Services have such a fantastic ability to hold it on the edge".²⁹⁸

372. Mr Bruce Arthur also felt that the buffer zone of eaten out grasslands provided some basis for confidence in dealing with any breakout from McIntyre's Hut:

Our consideration at that time was that, if it hit the grasslands, given the degree of overgrazing and the bareness of the paddocks, we had a very good chance of dealing with it once it came down off the hills²⁹⁹.

373. At the planning meeting at 9:30am on 18 January Ms Ferry took shorthand notes that she indicated meant somebody (possibly Mr McRae) had stated "*grasslands today may put fire out.*"³⁰⁰

374.

375. Mr David Prince expressed what he thought was the general expectation when he stated:

*Obviously with the expanse of grasslands between the pine forests and the urban interface, a lot of people thought there was an opportunity there or a chance that firefighters would be able to deal with those fires in those areas... I think a number of firefighters would have thought that if fires had come out of the pine forests in the grasslands that firefighters would have been able to deal with it.*³⁰¹

376. These beliefs were also held and expressed in evidence by Mr Lucas Smith in terms that categorically answer the assertion of Counsel Assisting.

²⁹⁸ TR 03.05.04 p4515-21

²⁹⁹ Mr Arthur TR 04.05.04 p4575-8

³⁰⁰ Notes[ESB.AFP.0010.0278] and Ms Ferry TR 23.03.04 p2578

³⁰¹ Mr Prince TR 04.06.04 p6450

Q. In view of the circumstances as they prevailed at 6 o'clock on the night of the 17th, people in the path described in Mr McRae's assessment, including people on the western side of the suburban area of Canberra, were now entitled to be warned - weren't they? - that they were at risk?

A. I think it also points out this is a fire spread without intervention. This is unattended fire growth. There were a number of things in the way there. Certainly from our point of view we had in our minds the strategy of the extensive clear area or open area of the grasslands to the east of the Murrumbidgee River which gave us very strong, certainly in my view, gave us very strong control line opportunities to prevent that.³⁰²

I had to say I had a fair bit of confidence that we could do something. As I said, I think a little while ago just this morning, in the 16 years that I have been Chief Fire Control Officer in the ACT, the ACT Bushfire Service has responded to over 3,000 fires in the ACT, many of those on the interface. And of those only - well over 3,000 - I don't know the exact number - well over 3,000 fires, only six have been significant fires in that 16-year period.

Interesting enough, the December 2001 fire, the Stromlo fire of December 2001, which burnt about 1200 hectares, was - in fact, I think it might have been close to 1400 hectares, I am not too sure exactly of the size - was really the largest fire we had in the ACT in the full 16 years I have been Chief Fire Control Officer. That threatened the interface, but we did not lose any structures or had any injury associated with that fire. So I had some, I believe, reasonable expectation that some suppression effort would be successful, and there would be some amelioration of the impact on the

³⁰² Mr Lucas Smith TR 18.02.04 p1102-7

ACT. We still needed to evaluate exactly what that was going to be.

I think events overtook us quite significantly as things started to accelerate at around 1 o'clock. That was when we started to issue the standard emergency warning signals to the community that there needed to be additional actions taken by the community to support our fire suppression office, and we started telling people what they should do. I can't remember an exact time but I am sure it will come up in the evidence to come, but I think it was somewhere around 2 o'clock that we started issuing those warnings.

At 1400 hours, as Mr Cheney has quite rightly pointed out in his evidence, the fire at that time was still to the west, or just on the western slopes of Mt MacDonald, which is about 13 kilometres or more from the urban edge of the ACT and still a number of kilometres west of the Murrumbidgee River. It was really the Murrumbidgee River and the open between the Murrumbidgee River and the western side of Stromlo and the western side of the urban areas which gave us our best opportunity for fire suppression of this fire as we moved out of the forest environment into a grass environment and into a grass environment that in fact had very little grass on it because of drought conditions that the ACT was currently in. I think that then the speed and spread of that fire in fact went across the Murrumbidgee River and impacted into Duffy in the first instance was an hour or hour and 10 minutes at the very most from that time out. So to be able to travel 10 or 11 kilometres in that short period of time I think took everybody by surprise.³⁰³

377. Whilst Counsel Assisting briefly refers to some parts of this passage of Mr Lucas-Smith's evidence,³⁰⁴ the reasons Mr Lucas Smith outlines for why

³⁰³ Mr Lucas Smith TR 23.02.04 p1200-13 - p1201

³⁰⁴ at [925]-[926]

he had a degree of confidence in suppressing the fires before the urban edge (including the eaten out grasslands., are largely passed over and ignored

378. Given that Mr Castle was not and never had been operational in terms of fire fighting or fire spread prediction he could only express his views and beliefs based on the information he was receiving. On this issue Mike Castle variously stated:

"I think there was always the understanding that between the pines - between the Murrumbidgee and the urban edge there is grasslands.³⁰⁵"

"as I think I said, my expectation, my understanding was that there was likely to be success when it comes out into the grasslands and there were grasslands in between there. "³⁰⁶

379. Whether unduly optimistic, misguided or, with the benefit of hindsight, plain wrong, there was undoubtedly a belief genuinely held by many experienced people - not only Mr Lucas-Smith- that the McIntyres Hut fire could be successfully contained in the eaten out grasslands if it breached containment lines and made a run towards urban Canberra. Such a widely held belief is entirely inconsistent with the notion of some conspiracy to mislead and withhold information in the manner asserted by Counsel Assisting. It is also contrary to the assertion by Counsel Assisting that Mr Lucas Smith falsely and deliberately gave the public the impression that there was *"some kind of barrier that he considered had a realistic prospect of holding the passage of the fires."*

³⁰⁵ Mike Castle TR 01.03.04 p1718-20

³⁰⁶ Mike Castle TR 01.03.04 p1760-20

18 JANUARY 2003

380. Your Honour's task of accurately summarising and drawing conclusions from the evidence as to events in the 24 hours leading up to the fire impact on 18 January 2003 has in our submission been made very difficult, given Counsel Assisting's approach of trying to sheet home some sort of "*personal responsibility*" and malfeasance on the part of senior ESB officers.

381. In pursuing this end, Counsel Assisting have failed in many crucial respects to accurately or fairly summarise the evidence.

382. Submissions such as:

- "*dereliction of duty;*"
- "*directly contributed to the extent of the property loss;*",
- "*continuing knowingly to withhold vital information from the people*",
and
- "*actions were a cause of death.*"

involve such serious allegations of misconduct they should only be made after a thorough and objective examination of all the evidence. Only if such a balanced examination clearly suggests (noting the *Briginshaw* principles) that the comments are warranted could Counsel Assisting or indeed Your Honour properly make such findings.

383. No such thorough examination of the material has occurred here. It no doubt is frustrating and the source of much irritation to Your Honour to have Counsel Assisting criticised in such a way. However, the sad reality is that in many respects Your Honour has been seriously let down by the lack of

accurate or objective analysis in Counsel Assisting's submissions. It is of significance that it is not just within this document that Your Honour will find serious criticisms of the approach of Counsel Assisting.

384. The approach taken by Counsel Assisting in summarising and analysing the events of the final days before 3pm on 18 January and the conclusions drawn are infected by "*hindsight*" reasoning and significant failures to consider evidence contrary to the thesis put forward.

Lucas-Smith Expectations For 18 January 2003

385. Following cross-examination by Mr Lasry QC, Mr Johnson SC asked Mr Lucas-Smith to explain in his own words what his position was on the morning of 18 January and what his expectations were throughout the day. This question probably provides the best summary of Mr Lucas-Smith's thinking about the events on that day.³⁰⁷

386. The following points can be gathered from the response Mr Lucas-Smith provided:

- On the afternoon of 17 January ACTBS were not engaged in fighting the fire front but in property protection. Some properties were lost but many were saved.
- On the morning of 18 January the Bendora and Stockyard fires were spreading through Namadgi National Park. They had burned into Tidbinbilla Nature Reserve and into Paddy's River Road. They had reached the Mt Tennant and the Naas areas.
- The Service continued property protection on 18 January in these areas in the south. This continued with the commitment of all ACT

³⁰⁷ at TR 23.03.04 p1196 and following

resources. Some people had worked 24 hours straight. It also involved the assistance of around 150 people provided by Commissioner Koperberg.

- When Mr Bartlett reported that the McIntyre's Hut fire had entered the ACT, Mr Lucas-Smith described himself as being between "a rock and a hard place". He could pull people out of the south in the expectation that property might be under threat in the north. He chose to leave those people in the south where property was under immediate threat. He said he would do the same again today.
- McIntyre's Hut fire had only just come into the ACT. There was a long distance between it and the urban area. Weather conditions were conducive to rapid fire spread across the landscape, however Mr Lucas-Smith was still working on the predictions that he had been given from the planning meeting on the evening of 17 January. He said:

[A]ll of our resources were committed to that, and I really needed to get a very good handle on what was going to happen in the northern part of the ACT before I would sacrifice rural properties in the south, to send those resources north.³⁰⁸

- As the day progressed the McIntyre's Hut fire remained a considerable distance from the ACT urban area and to the west of the Murrumbidgee River, giving Mr Lucas-Smith some confidence that there was a little bit more time to understand what the growth of the fire was going to be and to finalise property protection in the south.

³⁰⁸ TR 23.2.04 p1199-15

- The information Mr Lucas-Smith conveyed at the media conference at noon on 18 January was imparted in the belief that he still had at least until 2000 before the fire was likely if at all to come close to the urban area.
- Mr Lucas-Smith said that he had “reasonable expectations” that some suppression effort would be successful. In the 16 years that Mr Lucas-Smith has been CFCO, he has responded to between 3000-3500 fires, many on the interface. Only six have been significant fires. In 2001 some 1400 hectares were burned making it the largest fire in the ACT since Mr Lucas-Smith was CFCO. That fire threatened the interface. No properties were lost in that fire.
- Events overtook the Service when the fire started to accelerate around 1 o'clock. At 1400 the fire was still 13 kilometres to the west of the urban edge and west of the Murrumbidgee River.
- The river and the open grasslands between the river and the urban area constituted the best opportunity for suppression, particularly as there was little grass in this area.
- The fire then spread from the other side of the Murrumbidgee River to Duffy, 10 or 11 kilometres, in about one hour and 10 minutes. To move a tanker from the south where it was needed to Duffy was a 50 minute drive.
- The houses in Duffy were not damaged by convection heat but by the burning embers carried ahead of the fire by convection.
- The models used grossly underestimated the rate of spread of the fire.

- Mr Lucas-Smith had never experienced anything like this fire in 30 years of bushfire fighting. He did not expect an impact of the ferocity which occurred.
- The distance measuring around all the “nooks and crannies” from Warragamba Avenue to the bottom of Gordon is 72 kilometres.
- Mr Lucas-Smith acknowledged that the media campaign lacked the emphasis necessary to properly inform the community. While he thought that it would be necessary to be able to inform the media of where and when the fire would reach the urban area, he acknowledged that the community could have been informed that the fire would reach the urban area although ESB did not know where and when.
- Mr Lucas-Smith expressly denied trying to withhold or mislead anybody in the ACT. It was not put to him in re-examination by Counsel Assisting that he was deliberately doing so.³⁰⁹

NSWRFS Expectations and Predictions

387. Although never dealt with to any significant degree in the course of evidence, there is a great deal of material in “the brief” that makes it clear that the NSW authorities themselves had little to no expectation or appreciation that this fire was going to burn into suburban Canberra until late on the morning of 18 January 2003.

388. This of course is not a criticism of NSWRFSS. On the contrary, the point is that before Your Honour can proceed to make criticisms of ACT authorities for failures to predict or appreciate what the McIntyres Hut fire was going to do, it is imperative to compare their behaviour with that of those people who were

³⁰⁹ TR 23.2.04 p1207-26

directly responsible for fighting this fire. We say both services were understandably taken by surprise by an extraordinary event.

389. There is no doubt NSW *did* appreciate residents within the ACT might be affected by fires in some respect (not necessarily directly). Mr Winter stated³¹⁰:

National Parks and Wildlife Services officers had established a public information cell, in part, resulting from the existing fires in the southern part of Kosciuszko National Park. As appreciation grew regarding the sheer number of new fires in the Northern part of Kosciuszko National Park, this team began working to promote additional information about the progress of fires within that Park. One of their key communications targets was Canberra media. I was kept constantly apprised of their activities in promoting the bushfire situation to residents in that area and directed my staff to ensure that their updates were posted on our web page. Comprehensive written daily updates were provided to all southern NSW media by this group in relation to fires within the Kosciuszko National Park.

390. The Situation Report Form³¹¹ prepared by NSW RFS planning people at 1600 hours on Thursday 16 January for the McIntyres Hut fire indicates the following:

THREAT ANALYSIS

Current Threat: Fire no threat to life and property at present time while in containment lines. The fire still poses a threat to the ACT, if it escaped from the current containment lines.

Potential Threat: Major Pine plantations in the ACT and to the ACT water catchments. Private property to the North and East, and Pine plantations to the south and state forest to the west.

391. Although not a document released publicly the phrase “no threat to life and property *at the present time* is consistent with the language used by Mr Lucas-Smith and Cameron Wade at the press conference the following

³¹⁰ MR Winter statement NRF.DPP.0002.0006 at para 14

³¹¹ Sitrep No 17 – NRF.AFP.0001.0132

day. Your Honour should also note the reference to “*the ACT*” is particularised as relating to pine plantations and water catchments.

392. When Cameron Wade arrived at ESB Curtin on 16 January 2003 he was made aware of the fact that neither Ms Lowe nor Ms Harvey “*had any emergency media information dissemination experience*”³¹² He indicated that he “*was there to report on the RFS activities*” and “*did not go into too much detail with Amy and M[arika] on their plans or strategies.*” He offered his help to them though they did not accept.

393. According to Mr John Winter, the Director of Corporate Communications for the NSWRFSS, when Mr Wade was forward deployed to the Yarralumla/Queanbeyan area he “*was thoroughly conversant with the current fire situation and our expectations for the coming days*”³¹³

394. As Mr Wade was a significant player in relation to issuing information to the public, yet he was never called to give evidence, it is pertinent to set out at length parts of his statement:

8.The next morning (17 Jan) I called into the Yarrawlumla Fire Control Centre in Queanbeyan. There I was given a brief rundown on the McIntyres Hut fire and it was explained to me by the Operations Officer the potential threat to the pine plantations on the outskirts of Canberra. It was also explained to me that the current strategy was to do some incendiary drops to the North East of the fire in an attempt to contain that edge. This was described to me as a potentially risky strategy and had the potential to be changed due to the forecast weather conditions. I am unaware whether or not the incendiary drops took place.

³¹² Statement Cameron Wade – NRF.AFP.0002.0001 at par 5

³¹³ Statement Mr Winter NRF.AFP.0002.0001 at par 18

395. The NSWRFSS (Mr Winter) issued a press release on 16 January 2003³¹⁴ dealing with amongst other things the McIntyres Hut fire. That media release contained the statements:

- *“Firefighters are concerned that wind changes predicted Saturday will increase pressure on lines and force fires back towards the ACT”* and
- *“West northwest winds expected Saturday and Sunday will pressure lines to the east and southeast and force the fire to the ACT border.”*

396. This media release also noted in relation to the McIntyres Hut fire:

- *Containment strategies are progressing well;*
- *Control lines are complete on this fire, which*
- *is being fought by about 120 NSW firefighters*
- *Containment was achieved with the completion of backburning yesterday and aggressive mop up and patrol of these lines today.*

397. At 1100 on 17 January 2003, NSWRFSS planning finalised Sitrep No 18 for the McIntyres Hut fire.³¹⁵ The language used in the section “Threat Analysis” is identical to that in Sitrep No. 17, namely:

THREAT ANALYSIS

Current Threat: Fire no threat to life and property at present time while in containment lines. The fire still poses a threat to the ACT, if it escaped from the current containment lines.

Potential Threat: Major Pine plantations in the ACT and to the ACT water catchments. Private property to the North and East, and Pine plantations to the south and state forest to the west.

398. Reference is also made to the commencement of aerial incendiary operations, but this did not seemingly require any change at that time to the threat analysis.

³¹⁴ NSP.AFP.0047.0407

³¹⁵ NRF.AFP.0001.0155

399. At 1200 on 17 January Mr Wade participated in the press conference at ESB Curtin and answered questions about the McIntyres Hut fire. In his statement Mr Wade indicates:

9. I returned to the ESB Control Centre and participated in a press conference. I commented on our involvement in operations within the ACT and the current threat, which existed, based on forecast weather and the briefing I had at Queanbeyan. I was constantly reporting any information I had back to John Winter.

400. During the press conference Mr Wade made the following comments about the McIntyres Hut fire:³¹⁶

Media

Q: So with the change of wind is it changing threat?

Cameron Wade

It certainly has as similar to the ACT situation, the threat was on the western side with the easterly and south easterly, that has totally turned around, the threat is now to the southern and eastern sides and of course that means it's more heading back toward the ACT.

Media

Q: In that region do you know how intense these fires are?

Cameron Wade

The fire activity is being described to me as fairly intense and fuel loads that their experiencing there also the wind conditions picking up as we speak are making the situation more desperate as the day goes on. We are expecting this to continue for the next few days. Extra resources have been brought in from all round NSW to those fires. For example, between the ACT and the Hut fire there are at least 200 fire fighters from NSW, other areas of NSW as well as those local crews from Yarralumla. We also have the National Parks and Wildlife Service crews working in the area and the same can also be said for the Kosciusko fires and the fires burning to the south of Tumut. A lot of resources have been brought into those areas.

Media

³¹⁶ See DPP.DPP.0003.0476

Q: What's the level of threat to the pine plantation that you refer to from which the fires (undecipherable)?

Cameron Wade

Speaking with the incident controllers there is a certain concern for it. It's 2 kilometers or so. We have seen spotting activity up to a kilometer, kilometer and a half with these fires. So we have staged resources on the border, we certainly are looking at what we can do as a secondary containment should it break the containment there. There is a real threat to that pine forest but at this stage everything is holding at the moment.

401. At 1200 on 17 January 2003 Mr Winter issued what was to be the last Media Release³¹⁷ from the NSWRFs that dealt with the McIntyre's Hut fire. It contained the following statements concerning McIntyres Hut fire:

- *“Containment lines are complete in this fire, however they will be tested today”*
- *There is currently no immediate threat to any property. Firefighters are concerned that strong wind gusts could cause spot overs which could impact major pine plantations in the ACT*
- *Close communication between ACT and NSW fire authorities is occurring through liaison officers and daily joint planning meetings.*

402. Obviously the McIntyres Hut was perceived as a threat to the ACT, especially to the pine plantation, however the words used by Mr Wade at the press conference and Mr Winter in the media release are not significantly different to the language used by Mr Lucas-Smith. There is certainly no direct indication by NSWRFs that suburban Canberra was at risk the following day. In our submissions these statements simply confirm the reality that, without the benefit of hindsight, the NSWRFs was not at that time of the view that suburban Canberra was at any appreciable risk of impact from the McIntyre's Hut fire.

³¹⁷ NSP.AFP.0047.0409

403. Counsel Assisting does not point to any evidence from NSWRFs officers fighting the McIntyre's Hut fire where it is clearly communicated to ESB that McIntyre's Hut in their view is going to impact on suburban Canberra. Again, this is not a criticism of NSWRFs but only to reflect the reality that what occurred after noon on 18 January 2003 was not within the contemplation of any fire authority before late on the morning of 18 January 2003.
404. At 1600 on 17 January 2003 NSWRFs Sitrep No 19³¹⁸ again contains no change to the wording of the Threat Analysis for the McIntyres Hut fire.
405. At about 1930 on 17 January 2003, the Fire Commissioner Mr Koperberg relocated Mr Wade to Jindabyne.³¹⁹ Whilst there was undoubtedly proper concern for the situation in the Kosciuszko National Park, this relocation was inconsistent with an expectation that Canberra City was going to "get hammered" the following day. Indeed at 3:30pm on 18 January, despite deteriorating conditions in the Snowy Mountains, Mr Wade was deployed back to Canberra, which suggests that when it was *known* that there was an impact on Canberra it warranted the presence of a NSW media officer.³²⁰
406. The significant efforts made to contact and warn the rural lessees on the evening of 17 January by ESB are entirely consistent with the views then genuinely held that the fires would threaten such properties the following day. Such concerted efforts to warn those residents render incongruous the assertion that such information was deliberately being withheld from the suburban residents.
407. The behaviour of NSW crews late on the 17th also suggests that the fire behaved in a manner the following day that was to them totally unexpected.

³¹⁸ NRF.DPP.0001.0159

³¹⁹ See Statement Mr Wade NRF.AFP.0002.0001 at par 13 and Mr Winter NRF.AFP.0002.0006 at par 29

³²⁰ Statement Mr Wade NRF.AFP.0002.0001 at par 15

One hardly imagines that NSW authorities would have set up overflow accommodation and other changeover facilities in the direct path of a fire and lose much of it they had *any* expectation it was going to overrun those places within a few hours.

408. In his statement DFCO Inspector GA Goode indicated that he set up the base camp at Greenhills [near the Cotter scout camp] on the evening of the 17th and received and fed crews during the night. He handed over to another shift (Brett Hagan) at 0830 on the 18th.³²¹

409. Greenhills is directly south east from the spot over of the McIntyres Hut containment line on the evening of the 17th and just slightly west of the direct line to Duffy. Inspector Goode stated:³²²

“At 1330 I was awoken by Brett Hagan and informed that the fire situation had intensified and we were to prepare the crew in Greenhills for property protection as evacuation was not possible.”

410. These comments are in no way intended to be critical of NSW authorities. The fact that notice given to NSW RFS' own crews about the likelihood of fire moving to the suburbs through their area was very short is entirely consistent with the fact that what happened that day was totally unpredicted – by anybody.

411. The crew at Greenhills went into self protection mode in a concrete bunker building and survived but the other wooden buildings at the camp were lost.³²³

412. There are also many references in the statement of Stromlo Settlement security officer Roberto Montagnino³²⁴ to the NSW RFS Stromlo base camp

³²¹ [NRF.DPP.0087.0001]

³²² at 0002

³²³ It is worth noting that Mr Roche makes no mention of this “burn over” of firefighters in his report as he does of Mr McIntyre and Mr Sayer.

and how little notice crews there seemed to have of the approaching fire front. Until about 1300 it appears the night crews there were still sleeping until woken up for possible evacuation.

413. At 1100 on 18 January 2003 NSWRFs planners completed Sitrep Report No. 20. By this stage the Threat Analysis had changed, although an impact on the suburbs of Canberra had not yet been identified, only a potential threat to rural holdings between the pines and the urban areas.

THREAT ANALYSIS

Current Threat: There is an immediate threat to private property and major pine plantations in the ACT and to the ACT water catchments. Specifically in Uriarra Pine Plantations in the ACT and a small commercial pine plantation in NSW in the area of Two Sticks Rd.

Potential Threat: Rural Holdings in the ACT between the pine plantations and Canberra urban areas.

414. This description of the "Potential Threat" at 1100 by NSWRFs planners is eerily similar to that made by ESB planners the previous evening. Mr Lhuede described the extent of the "worst case scenario" fire prediction in the message form he signed off on the night of 17 January as "*wasn't specifically identified reaching the urban edge. We just identified the Narrabundah Hill pines, I suppose, as the last easternmost component of the rural land to be affected.*"³²⁵

415. When seen together, the predictions of potential fire spread by ESB on the evening of 17 January and the potential threat identified by NSWRFs planners as at 1100 on 18 January, are powerful evidence of the extent to which people were genuinely taken by surprise by the fire behaviour from noon on 18 January.

³²⁴ [DMC.AFP.0095.0123]

³²⁵ TR 10.05.04 p4946-25

416. In assessing what to draw from the language used in describing the threat in Sitrep 20 it is helpful to look at the language used in Sitrep 21 issued at 1800 on 18 January where it is stated:

THREAT ANALYSIS

Current Threat: Continuing spotting and spreading in the ACT suburbs, particularly in the Western creek/ Woden Valley area. Also private property to the west of ACT.

Potential Threat: The northern flank of the fire to spread and spot into north western suburbs of Belconnen and Gungahlin.

417. Finally there is of course the evidence of such experienced firefighters as Julie Crawford and Bruce Arthur who consistently indicated they had no belief that the Canberra suburbs were in any appreciable danger until late on Saturday morning.

418. According to the NSW RFS Yarrowlumla Section 44 report³²⁶ it was at 1:50pm that the ACT liaison officer advised the IMT that fires were now in the pine plantations at Uriarra and moving rapidly to the east into grasslands to the west of the suburbs of Canberra which were now to be considered under direct threat.

419. This timing is consistent with the fact that it was not until the dramatic fire spread began after noon that it was considered the suburbs of Canberra were under direct threat. Notwithstanding this, warnings to residents on the Western edge of the City were being promulgated up to 2 hours before ACT liaison officer advised the IMT that fires were in the Uriarra pine.

³²⁶ MLI.DPP.0005.0190

Warnings on 18 January

Counsel Assisting's Assertion: No Warning Until 2:40pm

420. As noted elsewhere, there can be little dispute that earlier and better warnings could and should have been issued by the authorities.

421. It is the firm position of Counsel Assisting that *no* warnings were issued by ESB until after 1430 on 18 January 2003. As will be made clear below, this claim (oft repeated) is totally false. As this assertion is central to many of the more extraordinary findings Your Honour is asked to consider making (including the cause of death of Ms McGrath and Mrs Tener) it needs to be examined in some detail.

422. Counsel Assisting submits to Your Honour that *"the realistic risk of an impact on the urban area of Canberra was appreciated as early as 13 January..., it is clear that the existence of that risk was not conveyed to the public of Canberra prior to about 2:40 pm on 18 January 2003."*³²⁷

423. Counsel Assisting state *"As discussed below, no warning was given clearly identifying that risk before 2:40 pm on 18 January 2003. That risk being *"the fires, including the McIntyre's Hut fire, presented a serious risk to the Canberra urban area and rural settlements west of urban Canberra"*.*³²⁸

424. It is then asserted in the pejorative that *"Finally, at 2:05 pm the Standard Emergency Warning Signal was signed and began to be broadcast on radio 20 to 40 minutes later"*.³²⁹

³²⁷ at [1199]

³²⁸ 1228 or 1229???

³²⁹ at [1301]

425. Your Honour is asked to conclude that “there were no meaningful warnings until the issue of the first SEWS [about 1440] and the later declaration of a state of emergency”.³³⁰ One of the bases of this assertion is what is said to be “*the point of view of the public affected by the fires who had a strong impression that there had not been give any useful warnings.*”³³¹ In our submission the concept of making a factual finding about whether a warning was or was not given on the basis of what is asserted to be evidence of “*the public*” is quite an extraordinary proposition and one Your Honour cannot possibly adopt in a judicial proceeding.

426. This muddying of the actual facts [ie what objectively was said] with what is said to be the “*public’s strong impressions*’ [subjective perceptions of certain individuals] is particularly problematic as Counsel Assisting in this same paragraph go on to suggest that “*the lack of adequate warning*” was a cause of two of the deaths.

427. It seems Counsel Assisting’s submissions, particularly those asserting that ‘no warnings were given until 1430’ are improperly informed by some concept of ‘doing it for the victims’.

428. Counsel Assisting refer to the continuing lack of useful information and warnings coming from ESB until 2:40 pm on 18 January 2003?³³²

429. Counsel Assisting, in referring to a portion of Mr Nicholson’s report, comment “*his position is genuinely offensive to those who were adversely affected by the fires and who were never warned that the suburbs could be affected until 2:30 pm on 18 January 2003.*”³³³

³³⁰ At 1304

³³¹ [source??] What para?

³³² at [1311]

³³³ at [1322]

Actual Evidence of Warnings

430. In their discussion of Warnings,³³⁴ Counsel Assisting do not make a single reference to the warnings issued by Mr Lucas-Smith in the midday press conference or the multitude of warnings broadcast by the ABC from noon onwards. Given the warnings issue is perhaps the most important one in the Inquest this is quite extraordinary.

431. When the transcript of the ABC broadcast is examined as well as what Mr Lucas-Smith said at or about noon, it is clear that quite specific and quite clear warnings were being issued by ESB, well before 1440.

432. The position of the fires at these times is a very important consideration. So too is the indisputable fact that *nobody* appreciated how this fire was going to behave from 1200-1500. So too is the fact that everybody (including Cheney) considered that the grasslands would provide some benefit in slowing the approach the fires (see discussion at par 360 and following above).

433. It is also crucial to a reasoned and objective consideration of what occurred to consider these things *without* being guided by hindsight. Given nobody expected the speed or ferocity with which the fires moved that afternoon it would be totally unfair of Your Honour to examine the words and actions of people during these hours through "the prism of hindsight".

6am-Noon

434. The Canberra Times of 18 January contained the following statements:

- ***Headlines - Bushfires Break Through'***
- ***"Ill Wind Casts Pall over the Capital"***
- ***"Govt Information Line to Monitor Situation"***.
- ***"The flames were last night about 12 km from the outskirts of***

³³⁴ [1198] and following

Canberra."

- "Mike Castle said last night the situation was serious as efforts turned from trying to control the fires to protecting property."
- "Mr Wade said there was a concern for the Uriarra Pines. 'We have seen spotting activity up to a kilometre, a kilometre and a half with these fires so we have staged resources on the border, he said'"
- "The latest bushfire information is available through the Canberra Connect website and call centre. People can look at the web site at www.canberraconnect.gov.au or talk to an operator at the Canberra Connect call centre on 132281"
- The ACT Chief Minister Jon Stanhope said "The ACT Bushfire situation is of great concern to all Canberra residents and by increasing the availability of bush fire information via Canberra Connect all citizens can keep up to date with how the fire-fighting is progressing and how the fires may affect them"

435. Your Honour should also note Mr Nicholson's evidence³³⁵ as to the positive value of these types of articles to heightening awareness.

436. Counsel Assisting states³³⁶ that the Canberra Connect website probably did not have information on it about what to do in the event of an approaching bushfire. This is speculation³³⁷. The brief is silent on this issue and Your Honour should not be asked to speculate about matters such as this, especially if an asserted lack of relevant information is said to have been a cause of one or more of the deaths.

437. Mr Castle gave a number of interviews to the media that morning. At 0605 on 18 January 2003, for the purpose of providing information for early morning radio interviews, Mike Castle received a briefing on current operational matters when he called Tony Graham from his home. That phone call was played to the court. No mention was made in the briefing of the McIntyre's Hut fire by Mr Graham to Mr Castle.

³³⁵ at TR 24.10.05 pp8164 -8168

³³⁶ at 859

³³⁷ The references footnoted by Counsel Assisting simply have the witnesses saying they do not know one way or the other. Ms Harvey's recollection was the information was being worked on on Friday night.

438. Mr Castle passed on all the information he had received from Mr Graham when interviewed on 666 ABC at 0730.³³⁸ During the interview Mr Castle publicised the Canberra Connect website and 132 281 information number. He specifically stated "*We hope to provide them with regular updated information, but I warn people that the exact locations of the fires are particularly difficult to assess, and therefore my advice is for people to stay out of the Murrumbidgee River and stay out of the treed area*".

439. Counsel Assisting rely on evidence of Natalie Larkins as somehow strengthening the case theory of a deliberate withholding of information. The fact that this reporter became "*increasingly frustrated*" that she could not reach Mr Castle at times that morning was interpreted by her as a sign the situation was deteriorating.

440. Such subjective hindsight speculation by somebody whose home burnt down that day is entirely unhelpful to Your Honour. Counsel Assisting went so far as to lead reconstructed evidence from Ms Larkins in order to give these impressions: "*Is it an appropriate reconstruction from what you can recall...*", "*That certainly would have been the question... the indication would be that*".³³⁹

441. Ms Larkins evidence that Mr Castle never returned her call is not correct. As Mr Castle's phone records indicate, he made a call at 1136 to the ABC newsroom. Mr Castle then went on to give other radio interviews at 1136 and 1141 to local radio stations³⁴⁰.

442. Counsel Assisting reproduce the following from Ms Larkins statement:³⁴¹ "*I wasn't overly concerned at that stage because the feeling generated by the*

³³⁸ ABC Radio Transcript DPP.DPP.0006.0001 at 0008-0010

³³⁹ TR 18.03.04 p2301-22

³⁴⁰ Mr Castle's telephone CCR DPP.DPP.0003.0253 – Exhibit 28

³⁴¹ At 867

authorities, particularly on that Friday, was that the fires were 20km away and moving slowly. We were told that the fires were unlikely to affect Canberra."

Counsel Assisting fail to point out to Your Honour the fact that the underlined comments were in fact never made, nor that the Canberra Times that morning (based on information received on the Friday night) was reporting the flames were 12 km from the outskirts of Canberra.

443. Up to 1pm the McIntyre's Hut fire (and indeed all fires) were not behaving so as to suggest the worst case predictions of the previous evening would be met let alone exceeded so significantly. Of course the worst of the weather was still ahead, and this was known but on those predictions, the fires were still a long way behind where they were predicted to be on the worst case scenario. Mr Bartlett confirmed this was the case:

Q. You were aware that morning, both from you say your own concerns expressed to the meeting and what planning had been indicating, that the fires may make various runs indeed to the extent of putting Weston Creek to Greenway at some risk?

A. Yes.

Q. I think you have already agreed that, up until 1 o'clock, there was in effect good news in that the fires hadn't appeared to be behaving towards reaching those worst case predictions?

A. That's right³⁴².

Noon to 3pm

444. According to the Cheney Fire Spread Map,³⁴³ at midday the McIntyre's Hut fire was between 13-14km from the urban edge of Canberra with fire activity and fire danger rating increasing. At the midday press conference Mr Lucas-Smith said the following:

³⁴² TR 8.06.04 p6514

³⁴³ Exhibit 81 – DPP.DPP.0010.0269

There is no doubt whatsoever that people need to be taking precautions that may live adjacent to the grassland area on the western side of the suburbs of Canberra and they need to be making sure they have nothing combustible near their homes. They need to make sure that their gutters are clear, their hoses are connected and they can reach all corners of their houses and to be vigilant for any flying embers that might come as the day progresses... I think it is prudent under the current conditions that certainly anybody that lives on the western side of the ACT urban area needs to be taking these sort of precautions... certainly Weston Creek and they're south. Belconnen is a little out of the frame and bit too far north but I think it is prudent that anybody that lives on that sort of interface area should be taking precautions... make sure you clear around, make sure its clear, make sure your hoses can fit, make sure you're comfortable and you've got all the things you need to protect your property.

445. Despite these specific warnings to residents of western Canberra being made by Mr Lucas-Smith at the noon press conference, discussion of this press conference by Counsel Assisting merits only 4 lines of submission with no acknowledgement of the warnings then given.³⁴⁴

446. Counsel Assisting may have chosen to downplay or otherwise dismiss these statements, suggesting they were not in truth “warnings’ or not specific or detailed enough. Ironically, for much of the submission Mr Lucas-Smith and Mr Castle are criticized for placing too much emphasis on such concerns. The fact remains however that *the statements were made* and in discussing the warnings given Counsel Assisting makes no mention of them. This omission not only reflects poorly on the thoroughness and reliability of Counsel Assisting’s submissions, but suggests a positive lack of objectivity in the approach.

447. The 666 ABC transcript are similarly ignored by Counsel Assisting, which is even more surprising as the one o’clock news specifically reports that:

³⁴⁴ at 1297

“Residents on the western side of Canberra are being warned to prepare for the approaching fires, taking all precautions to protect their homes.”³⁴⁵

448. At 1300 Mr Cheney’s fire spread map has the fire 12.06 km away and if it travelled at the speed it had between 0800 and 1300 could be expected to travel a further 3.1km over the next 6 hours. Obviously with the rising temperatures and winds this figure significantly understates the likely behaviour over the next 6 hours. On the other hand, the fire was at this stage moving into the eaten out grasslands where there were genuinely held and soundly based expectations that its spread could be slowed or stopped.

449. Following this one o’clock bulletin – when McIntyre’s Hut fire was still over 12 km from the urban edge the ABC broadcast the following advice about what to do if fire approached your property:

“Now indoor if fire approaches your house, close all the doors and windows, fill the bath tub, any buckets etc, and soak towels to place in any crevices such as under the door. If you have time and can do it take down the curtains and push furniture away from the windows, this is because if a fire does come very close to you, flying debris can break the windows and then you have your curtains on fire and away we go. So if you are staying to defend your home and you are able to do that remember those basics.

And outdoors, if you have time and only if it is safe to do so, you can do the following, connect hoses that will reach all corners of your house. Store flammable liquids away from the house, close in open eaves and space under the house, block your down pipes, that is with rags, and fill your gutters with water. Use water to dampen all areas on the side of the house facing the fire.”³⁴⁶

450. Immediately following these statements Ms Larkins gave a live report stating:

³⁴⁵ ABC 666 Transcripts 1pm -2pm DPP.DPP.0006.0037

³⁴⁶ ABC 666 Transcript at DPP.DPP.0006.0039-40

“The Emergency Services Bureau is suggesting that people who live in the Weston Creek area and south of that area, certainly people who live on the western front of those suburbs that are facing the grasslands, they should certainly be starting to take precautions at this point in time.”

Julie Derritt announcer “They should be prepared?”

Natalie Larkins “They should be prepared, they should be following all the advice that you just read out then. Making sure they have hoses, making sure their gutters are clean and just being sure that they are ready just in case the fire does come any closer to Canberra.

Yes and also having an evacuation plan should that, should they need to pull back from any fire, which means organising your pets..., always a sad story of people who weren't able to get their pets out because they were frightened and disappeared. Pack them up into boxes ladies and gentlemen.

451. Sometime before 1400 the ABC broke into its Grandstand program and the announcer stated the following:

If in the meantime you would like to gather more information yourself, and you have access to the net, go to www.Canberraconnect.act.gov.au for a full update of bushfire information...

There was one other piece of information that we do need to give to Weston Creek listeners, and people in that part of the world, particularly if you have..., if your street abuts any of the open land around there, that the Weston Creek area is in some danger at the moment as fires move towards that area. It is some kilometres away at the moment we understand, but it is moving towards that area, and the Emergency Services Bureau has asked people in the Weston Creek area to be fire ready. That means have yourself organised, have your hoses organised, etc, etc. We will bring you more of that information after the news... I said at three, I meant at two o'clock.

452. During the course of this hour (1300-1400) the fire moved up to 4.5km, travelling further in that hour than it had in the preceding 12 hours. At that

time it had jumped from a rate of spread of 3.5km in 6 hours to 28km in 6 hours. During the course of this hour ESB were preparing the SEWS for issue. Mr Castle signed it at 1405 and due to problems with fax machines it was not broadcast until about 1440.

453. Between 1400 and 1500 the McIntyre's Hut fire travelled between 7 and 10km moving at a speed of over 15km/h at the point of impact.

454. This dramatic escalation of fire activity – to the scale observed on the afternoon was totally unforeseeable and Your Honour must so find. Any finding to the contrary could only be based on the suspect and inconsistent evidence in this respect of Mr Cheney. In the face of so much other evidence to the contrary it would be perilous in the extreme to make a finding about the predictability of the fire spread during the afternoon based only on the uncorroborated evidence of the Court appointed expert Mr Cheney.

455. When viewed in toto and without the relying on hindsight reasoning, it is in our submission impossible for Your Honour to positively or even possibly reach any of the conclusions urged on you by Counsel Assisting, summarised at par [323] above.

PART C –SPECIFIC ISSUES ARISING FROM THE EVIDENCE

SUBMISSION AT PARAGRAPH [1262]

456. At [1260-1262] Counsel Assisting makes the extremely serious allegation that Mr Castle in effect committed perjury by failing to disavow the accuracy of certain parts of his statement.

457. However, even a cursory examination of the evidence reveals this allegation is to be totally without foundation. The supposed summary and discussion of the issue in [1260-1261] fails properly to set out the evidence relevant to what Counsel Assisting ask Your Honour find.

458. As the allegation made against Mr Castle is so significant, it is necessary to review the evidence and discuss the issue at some length.

Paragraphs 107 and 108 of Mr Castle's statement

459. It is necessary to set out in full these paragraphs.

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

108. ESB press releases consistently only referred to the Bendora and Stockyard fires, and stated that information on McIntyre's Hut and Mount Morgan fires in NSW could be obtained from Rural Fire Service (RFS) media unit. It gave a phone number and the RFS website. So, right from the early days we agreed with NSW that they would talk about the fires they were managing and we would talk about the fires we were managing. Cameron Wade, media spokesperson for NSW RFS followed our mid-day press conference with his own press conference where he expressed optimism about containment of the McIntyre's fire. He briefed the media on the fires in NSW.

460. Counsel Assisting state³⁴⁷ “Both Mr Lucas-Smith and Mr Koperberg denied the existence of any such agreement or protocol.” That is entirely incorrect. Neither denied the existence of an understanding or arrangement – which is what Mr Castle indicated very early in his evidence he meant to convey by that phrase. The word ‘protocol’ has a wide range of possible interpretations. However, neither Mr Lucas-Smith nor Mr Koperberg denied the gist of this statement.

461. What Mr Lucas-Smith said was:³⁴⁸

Was there a protocol in existence which meant that you couldn't speak about New South Wales fires that were burning either adjacent or in the ACT?

A. I don't know if there was anything as formal as a protocol, nor as formal as couldn't. It was just we were fighting the Bendora and Stockyard Fire and New South Wales were fighting the McIntyre's fire, and it was appropriate for them to answer their own questions in relation to those fires.

Q. Although Mr Castle seems to think there was a protocol, you don't think it was as formal as that?

A. No. My response I think I was even asked that question more than once and my response

³⁴⁷ at [1260]

³⁴⁸ T1092

was you really need to address that question to New South Wales.

462. Mr Koperberg said (after paragraph 107 of Mr Castle's statement was read to him:

Do you agree with that? Was there a protocol and agreement in force as at 17 January under which ACT ESB would not talk about New South Wales fires and would only talk about the ACT fires?

A. It is an oversimplification. General convention has it that New South Wales does not talk about fires in Adelaide or Melbourne or Brisbane, and they don't talk about fires bearing down on Sydney. However, it is not at all uncommon for us to talk about a fire crossing the Queensland border and threatening properties in Glen Innes or Tenterfield or any of those places. So it is only a reflection of a general standard.

463. Neither of these statements amounts to a repudiation of what Mr Castle had set out in paragraph 107. The unfairness of the questioning of Mr Koperberg in particular is that Counsel Assisting only put the terms of paragraph 107 to the witness. By this time Mr Castle had given evidence clarifying what he meant when he used those words (as set out below). In any event, Mr Koperberg *does not* deny the existence of some agreement or protocol – he in fact goes on to explain a convention entirely consistent with what Mr Castle described in his evidence.

464. Counsel Assisting assert:

“Mr Castle agreed that he was present in court throughout Mr Lucas-Smith's evidence, but later denied that he heard Mr Lucas-Smith say he was unaware of the existence of anything as formal as a protocol.”

349

³⁴⁹ [1261] Counsel Assisting submissions

465. Counsel Assisting seek to draw something sinister from Mr Castle's failure to recall a particular question and answer in Mr Lucas-Smith's evidence. Your Honour may well recall that Mr Lucas-Smith gave evidence for 5 days, covering over 460 pages of transcript. This is a ludicrous and unfair notion.

466. Your Honour may also recall the many instances where Mr Roche was unable to recall certain matters one would expect he would have been able to.³⁵⁰ On at least one occasion Mr Roche was unable to recall a significant answer given by Mr Cheney,³⁵¹ and he was specifically in court in order to comment on the evidence given by other witnesses. No sinister conclusions are sought in relation to the failure of this witness, nor indeed many others, to recall every question and answer asked of another witness.

467. In any event the submission "*but later denied that he heard Mr Lucas-Smith say he was unaware of the existence of anything as formal as a protocol*" is unfair as what Mr Lucas-Smith said was not put to Mr Castle accurately. What Mr Woodward actually asked was.³⁵²

Q. You heard Mr Lucas-Smith in his evidence say that he was not aware of any agreement or protocols?

A. No.

468. Your Honour will see that the submission that Mr Castle later denied "*that he heard Mr Lucas-Smith say he was unaware of the existence of anything as formal as a protocol*" is simply not correct. He was never asked about the most

³⁵⁰ Eg T7453; T7475; T7479; T7482; T7488-9; T7490-98; T7505; T7515; T7551-7552; T7566-7; T7583 (couldn't recall instructions given to him by Counsel Assisting!); T7627; T7652.

³⁵¹T 7670: Q. Did you also hear him answer my question that it would not justify a multiplication by a factor of two?

A. I don't recall that. But if you say that's how he responded, yes, I wouldn't dispute that.

³⁵² T1638

significant qualification in Mr Lucas-Smith's answer "*anything as formal as a protocol.*"

469. In fact when *first* questioned by Counsel Assisting about these paragraphs Mr Castle's accepted that agreement was "*an overstatement. More an understanding was probably more the case.*"³⁵³

470. This was in fact *consistent* with Mr Lucas-Smith's evidence. It is apparent Counsel Assisting had a pre-conceived view in his cross-examination of Mr Castle on this issue. Within a few more questions³⁵⁴ Mr Johnson on behalf of the Territory raised objections to the helpfulness to Your Honour of this questioning and Mr Woodward insisted Mr Castle leave the Courtroom if such objection was to be taken. It is pertinent to note that at this stage Mr Castle was not represented.³⁵⁵

The Questioning of Mr Castle on this Issue

471. It is apparent Counsel Assisting had formed the view when questioning Mr Castle that Mr Lucas-Smith knew there was a significant threat to suburban Canberra by the 17 January press conference and that he could use the phraseology of paragraph 107 in order to prove this. The problem was Mr Castle conceded immediately the words he used 'overstated' the position. This should have been the end of the matter. It was not.

472. Mr Woodward proceeded:³⁵⁶

³⁵³ T1638

³⁵⁴ at T1639

³⁵⁵ Indeed shortly thereafter at [T1646] Counsel Assisting requests access to the personal papers Mr Castle had with him in the witness box. When Your Honour asked Mr Castle if he had a difficulty with this he stated "I think I would like to speak to Counsel before I answer that." Counsel Assisting then insisted the folders remain in Court.

³⁵⁶ at T640

MR WOODWARD: Q. Why would you have elevated it in your statement to something as formal as an agreement and protocols?

A. I don't think I intentionally elevated it. I think that was my words of a discussion and out of that agreement that "we will talk about this "and "you will talk about that".

Q. Yes. What I want to suggest to you is that in that paragraph what you are trying to do is to justify, by reference to an agreement and protocols, the fact that Mr Lucas-Smith has understated the threat to Canberra in that conference?

A. Oh, no. No.

473. Mr Castle then indicated his belief that ESB would focus on the ACT fires and that advice on the New South Wales fires should be sought from the NSWRF³⁵⁷. He was then questioned about the fact he had “*talked about*” McIntyre's Hut in earlier interviews. Mr Castle went on to try and explain (noting his answers were frequently cut off during this questioning) that what he was referring to was “*the specifics of the individual, what the fires are doing. I haven't enunciated that carefully and, as you have pointed out, that is not strictly correct*”³⁵⁸.

474. The terminology is very important if the answers are to found a submission such as that made.³⁵⁹ Mere reference to the fact of McIntyre's Hut fire (as in descriptions of its size and location) do amount to “*talking about*” that fire. A dissertation as to operational matters such as resourcing, future tactics and planning expectations also amounts to “*talking about*” McIntyre's Hut fire but in a *completely* different sense.

³⁵⁷ T1641

³⁵⁸ T1643

³⁵⁹ at [1262]

475. The ESB media releases frequently do “*talk about*” McIntyre's Hut fire in terms of location and description – *not* in terms discussing operational matters. Readers of the media releases were consistently referred (as was entirely appropriate) to NSWRFSS for more detailed information about that fire.

476. A third concept of “*talking about*” McIntyre's Hut fire is raised by Counsel Assisting during questioning of Mr Castle which is “*giving an assessment*” of that fire. At times during the questioning of Mr Castle, Counsel Assisting switches between the various “*talking about*” concepts without proper clarification as to which is meant.

477. Mr Castle stated after being asked about “earlier days” that:³⁶⁰

“we had people on McIntyre's to start with. It may have been when we no longer had a direct involvement in McIntyre's and it was liaison. That is when it was more the case we were relying on the advice coming from New South Wales Rural Fire Service, and therefore so as we could - because of the inter jurisdiction, we could not have the up-to-date information. We felt that the media and the information should come from the jurisdictions which were managing those particular fires.”

478. The third concept was specifically raised:³⁶¹

Q But there was nothing to prevent either yourself or Mr Lucas-Smith, if asked, or if it was appropriate to do so, at any time up to the 18th to give your assessment, as well you knew it, of the McIntyre's fire? There was nothing formal preventing you from doing that, was there?

³⁶⁰ at T1644

³⁶¹ at T1645

A. Nothing formal. I suppose a courtesy in that they are not under our jurisdiction, those firefighters, and the management of it was not under our jurisdiction. So it was more a courtesy.

479. It is pertinent to note that Mr Castle in this answer refers to “a courtesy”. Mr Castle repeats this description on many further occasions over the course of questioning on this issue. It is simply untrue and unfair of Counsel Assisting to state that “in the end the best Mr Castle could do was describe it as more of a courtesy.”

Guidelines for Inter-State Disaster Assistance

480. At this point it is useful to refer your Honour to the Guidelines for Inter-State Disaster Assistance, which were approved by the National Emergency Management Group on 17 August 1999 and were in application in January 2003. (A full copy of these guidelines was recently provided to Counsel Assisting for inclusion in the Brief). The guidelines are also published in the 2000 edition of "The Australian Emergency Manuals Series Part 1 The Fundamentals Manual 2 Australian Emergency Management Arrangements". at Annex A. Unfortunately the copy of this manual in the brief (at AFP.AFP.0091.0462) is the 1996 edition).

481. Guideline 13 dealing with Media states:

13. Media

13.1 During the provision of assistance, the Requesting State shall be responsible for provision of information to the media.

13.2 It is recognised that there will normally be significant interest by the media in activities of personnel from an Assisting State. Comments to the media by Assisting State personnel should be restricted to administrative matters as far as possible with questions on operational matters, in particular, being referred to the Requesting State unless there is prior agreement from the Requesting State to the contrary.

482. This guideline although never specifically mentioned in the Inquest seems to have been in the back of many people's minds. The evidence of Mr Castle at T1644 in particular is entirely consistent with this guideline. Evidence from Mr Winter and Mr Koperberg is also consistent with their knowledge and application of this guideline.

483. In his statement³⁶² John Winter NSW the Director of Communications for the NSW RFS stated "*I reiterated in several conversations with Cameron Wade the need for us to only comment on fires within our jurisdiction.*"

484. When asked about one of the press statements he gave Mr Koperberg stated³⁶³:

I referred to pine forests, I referred to border issues and I referred to Canberra. It was certainly not competent for me to start speculating on degrees of risk to the interface at that particular point - or for that matter at any other point - because I did not have the jurisdiction to do so.

The Questioning of Mr Castle on this Issue (continued)

485. When Counsel Assisting further pursued his questioning of Mr Castle about the wording of paragraphs 107 and 108, as the next lengthy (but important) extract from the transcript reveals, Mr Castle continued to reiterate his earlier evidence that there was not a formal agreement but a "courtesy" whereby each jurisdiction talked about its responsibilities. During this questioning Counsel Assisting made it clear he did *not* want to get "bogged down in terminology of agreement, protocol, courtesy, understanding etc."³⁶⁴

³⁶² NRF.AFP.0002.0006 para 45

³⁶³ at T2257-8

³⁶⁴ "*there was a protocol an agreement or an understanding- and I don't want to get caught on the terminology*" T 1683; "*Again we don't want to get too bogged down in the terminology*" T 1684

486. Yet Counsel Assisting now asks Your Honour to interpret strictly the references to “*agreements and protocols*”, ignore the repeated evidence of Mr Castle that these terms were not appropriate and what he meant was that there was “*an understanding*” or “*a courtesy*”.

Q. On what basis did you say in your statement, at paragraph 108:

"So right from the early days we agreed with New South Wales that they would talk about the fires they were managing and we would talk about the fires we were managing."

Putting aside the question of agreement or understanding, on what basis did you say in your statement that from the early days there was an agreement or understanding to that effect?

A. I think it was the courtesy of talking about the jurisdiction responsibilities.

Q. I see. You did refer to courtesy on Friday, and I suppose that was the part where I was unclear. Is what you are saying, in effect, Mr Castle, that the nature of the understanding was simply a position that you, as the ESB took, that you thought it was appropriate only to talk about things for which you were responsible; is that how it started?

A. I think even back in 2001 when we actually brought people in, what we tried to do was actually have the people who were supporting talk about their particular aspects. So I think in terms of the courtesy, I think it is based on jurisdiction.

Q. I understand that. But what I am trying to do is get a sense of whether there was - I suppose what the lawyers would call - a meeting of minds, a point between someone on behalf of ESB and someone on behalf of New South Wales where this understanding developed or from which either it was simply

something that the ESB unilaterally felt it was an appropriate way to conduct itself?

A. I suppose it was - I don't think it was a meeting - I don't think it was a meeting of the minds. You mean, did we actually discuss it and then agree?

Q. Yes.

A. Not that I can specifically recall, but I think the fact that the liaison was going on between the two agencies, I think there was a deferment by all that they would actually look after the details of the fires that were in their areas.

Q. All right. So you are saying that just developed in a practical way, but there was never, as far as you know, any point where people sat down and actually came to an understanding about it?

A. I don't think there was a formal understanding, or a point in time where I could definitely say that there was an understanding³⁶⁵

Q. You see, the difficulty, Mr Castle, is that on a reading of paragraphs 107 and 108 one is left with the clear impression that there was a protocol, an agreement or an understanding - and I don't want to get caught on the terminology - under which you and Mr Lucas-Smith were effectively precluded from discussing details or, more importantly, threats from the McIntyre's Hut fire; and that is just not the case, is it?

A. I don't think that is what I am trying to portray there. I think what we are trying to say is the detail and the specifics of what it is about the fires was being concentrated on in both jurisdictions.³⁶⁶

³⁶⁵ [T1677-78]

³⁶⁶ T 1683

487. In our submission this passage clearly sets out Mr Castle's position. He had already conceded (from the start) that the reference to "protocol or agreement" was overstated, and proceeded to explain what in fact he meant to convey.

488. Mr Prince used the word '*protocol*' in a sense other than denoting some formal written agreement or arrangement:

Q. You provided some evidence about the way you say Mr Lucas-Smith said the information was to be dealt with, the information he passed to you. Firstly, did you feel under any operational constraint as to the way you could use the information that was passed to you?

A. I think with any protocol if an individual has responsibility, it is their right to advise you how to deal with it

489. The focus by Counsel Assisting on the word '*protocol*' in Mr Castle's statement in light of the wide range of concepts that word could connote is in our submission neither helpful nor fair. Mr Castle explained what he meant by his use of that word and his understanding as to what arrangements he had in mind.

490. Mr Castle's understanding is mirrored in the actions taken by NSWRFs at various times. A television statement made by Mr Koperberg on Wednesday 15 January was read to Mr Castle³⁶⁷ and it was put to him that "*He seems to be only talking about NSW responsibilities doesn't he, Mr Castle?*" We would

³⁶⁷ at T1681

submit, this was consistent with the “convention” or “courtesy” Mr Castle refers to.

491. In the press conference conducted at midday on 16 January 2003 Mr Lucas-Smith spoke about the ACT fires with information about operational matters and his expectations. When asked about operational matters concerning the McIntyre's Hut fire he made it clear that information should be obtained from NSW³⁶⁸:

“Media: Q. Will there be a possible evacuation of residence in the Brindabella Valley region here?”

“Peter Lucas-Smith: I can't answer that question you need to ask NSW that, we do have jurisdiction line between the ACT and NSW, we're cooperating very very closely in our, all our efforts and we are operating to similar objectives and we are operating on a basis of coordination and resource deployment. The NSW, what happens in NSW as far as evacuations and those other things you need to be talking to the Queanbeyan Fire Management Centre.”

492. Similarly the press conference on 17 January emphasised the jurisdictional ‘courtesies.’ Mr Lucas-Smith spoke firstly about the ACT fires and Cameron Wade then spoke about the NSW fires.

Conclusion

493. Counsel Assisting has formed a view that Mr Castle amongst others deliberately downplayed the risk of the fires to the Canberra community and even go so far as to positively assert that there was a conspiracy to deliberately withhold accurate information and to propagate false and misleading information. For the reasons set out in other parts of this submission (and indeed the submissions of other parties) these claims are without merit or substance.

³⁶⁸ DPP.DPP.0003.0468

494. The allegations made against Mr Castle³⁶⁹ amount to nothing more than a boot-strapping exercise by Counsel Assisting to try and 'prove' the conspiracy they already assert existed. The whole premise³⁷⁰ relies on it being a proven fact that the comments of Mr Lucas-Smith on 17 January were to the knowledge of Mr Castle at the time, unsupportable based on what ESB *then* knew. This primary fact for reasons set out elsewhere is unsustainable. The circular reasoning thus proceeds:

- on 17 January Mr Castle knew it was coming;
- he (nor Mr Lucas-Smith) provided the information we say they knew about McIntyre's Hut on that day;
- when preparing his statement he knew we were on to him;
- he therefore had to concoct some reason for not saying anything about McIntyre's Hut on 17 January;
- Paragraphs 107 and 108 are the result;
- he now concedes that the terminology is overstated;
- there was no formal contractual agreement or protocol;
- notwithstanding all the other evidence (consistent with jurisdictions commenting about the operational matters relating of their own jurisdiction);
- Mr Castle must have deliberately lied in paragraphs 107 and 108 to conceal the truth; because
- on 17 January Mr Castle knew it was coming.

495. When one actually reads the transcript, it is clear that Mr Castle freely acknowledged he had overstated the position in 107 and 108 and what he had in mind in phrasing those sentences was something less formal – like an understanding or a courtesy, or as Mr Koperberg describes it, a convention.

³⁶⁹ in [1260 -1262]

³⁷⁰ cf [1262]

496. As it transpires there is indeed such an ‘understanding’ – the Guidelines for Inter-State Assistance that are remarkably consistent with what Mr Castle describes.

497. Counsel Assisting never suggested to Mr Castle that he “*set about attempting to concoct a justification for the prediction which he must have known would not stand up.*” To now put such a serious allegation without first giving him the opportunity to comment is unfair.

498. Further Your Honour has evidence that NSWRFSS itself appreciated and followed the type of jurisdictional convention or understanding Mr Castle was referring to. The submissions³⁷¹ are baseless. Your Honour should dismiss them as nothing more than an attempt by Counsel Assisting to bolster the credibility of their primary submissions that Mr Lucas-Smith, Mr Castle and Mr Mcrae knew well in advance of 18 January that fire was going to impact on the suburbs.

RESOURCES

499. In accordance with the decision of the Supreme Court in *R v Doogan* it is beyond the jurisdiction of an ACT Coroner to inquire into questions of resources when conducting an inquiry into a fire. This would clearly fall within those matters of government policy which are too remote from the question of the cause and origin of the fire.

500. As we have previously submitted, this limitation on Your Honour’s jurisdiction suggests that extreme caution should be exercised before

³⁷¹ at [1260-1262]

criticising individuals for either not doing a particular thing, not having it done by a particular time or in a particular way. People cannot be criticised for not doing things which they do not have the resources and capacity to do.

501. It is in this respect we are critical of the views expressed by Mr Roche. From the very start of the fire, he appeared to require of the ACT Emergency Service, things which were simply beyond its ability to provide. Rappelling was the most obvious example. Mr Roche's suggestion as an "option"³⁷² that the ACT send a shadow IMT of 10-12 people to the NSWRFs is another.³⁷³ His views appeared to be coloured by his own experiences in a much larger organisation than the ACT Bushfire Service.
502. There is a measure of infrastructure and resources available to the Victorian Country Fire Authority which will never be available to its ACT equivalent. It is not even valid to compare the ACT to a region or district in Victoria or for that matter in New South Wales for the totality of its accessible resources. The whole of those states do not catch alight at the one time. Resources in those larger jurisdictions which are obtained or available centrally and fire fighters and machinery in regions which are not experiencing fires can be concentrated into regions which are experiencing fires. Mr Roche said:

Q. In the event of a large fire breaking out in a particular area, are the areas able to call on resources or assistance from the head office of the CFA?

A. Yes.

Q. What sort of resources or assistance are they [the regions] able to call on from the head office?

A. The whole of the state's resources - notwithstanding of course the need to secure or remain secure in those areas that might be depleted, the CFA shifts resources all over Victoria.³⁷⁴

³⁷² TR 8.10.04 p. 7611/33

³⁷³ TR 8.10.04 p. 7612/18

³⁷⁴ TR 7.10.04 p. 7596/44-7597/9

...

Q. Indeed. But the whole area doesn't explode in flames all at once - usually at least. You can move resources from one area of the state to the particular point where the fire is whenever the occasion demands?

A. That's correct.

Q. And that's what you do?

*A. That's correct.*³⁷⁵

503. It would also be unfair to criticise Mr Castle or Mr Lucas-Smith in relation to what has been said to be a lack of community education and awareness about bushfires. ESB actually sought funding for a community education officer following the 2001 fires and it was rejected by the government. Given that the Bushfire Service has only four full-time staff, this rejection has to be regarded as significant. This is an excellent example of the point we have made before about the danger of laying blame at the feet of individuals when the inquiry cannot examine all factors which are relevant to a particular issue. Mr Lucas-Smith and Mr Castle can only identify a need and ask for the resources to address a problem. They cannot be held accountable if that request is rejected and they do not have the resources at their disposal.

504. Even Mr Roche appeared to acknowledge the validity of the argument we present above in relation to the inability to visit blame on individuals when they are constrained by resources limitations. When dealing with what he called systemic, organisational issues and training in particular, Mr Roche said:

Q. Again, I ask you the question: might your report not have been better and perhaps fairer had you had the opportunity to ask those at the head of the Emergency Services Bureau and, for that matter, the

³⁷⁵ TR 7.10.04 p. 7598/28

Bushfire Service why more training had not been undertaken?

A. Not necessarily, because the end result would have been the same.

Q. Well, it might have enabled you to be a little bit more specific in targeting where the fault lay, would it not?

A. I don't think I have targeted individuals. What I have said is that there is a lack of competency. It is not up to me to determine who individually is at fault. That's a systemic organisational issue.

Q. So on systemic issues, to take your word, of which training is one, if we read of a comment such as the one that I just read, your report should not be taken to be a criticism of individual officers in charge of the Emergency Services Bureau or of the Bushfire Service because you are not familiar with the extent of their responsibilities; is that fair?

A. My criticism is that there was a lack of experience in these matters. Now, I haven't gone - my evidence or my report, as I recall it, does not go to whose responsibility that is.

Q. I just want to make this clear because somebody could pick up your report and read something like the passage I have just read to you and say, "Well, if there is not enough experience in this area, then that must be the fault of that Peter Lucas-Smith, he is the Chief Fire Control Officer, or Mike Castle for that matter, he is the head of Emergency Services Bureau. He, therefore, must be held accountable". I understand your comment to be merely a reflection that in your view there was not enough planning and not intended to indicate that it was the responsibility of any particular individual in charge of either the Bushfire Service or the Emergency Services Bureau.

A. I am not in a position to assign responsibility, sir, in those matters.³⁷⁶

³⁷⁶ TR 7.10.04 p. 7590/24-7591/7

The ESB Budget³⁷⁷

505. The total ESB expenditure in 2000/01 was \$35.91m

- In the financial year 2001/02 ESB total expenditure was \$41.28m against a budget of \$36.84m. (This period included the December 2001 fires).
- Despite budget submissions for increased funding the ESB budget for 2002/03 was only \$36.19m with an actual expenditure of \$48.28m.
- Following the 2003 fires ESB budget for 2003/04 was increased by approximately 30% to \$46.78m.
- Despite an increased funding for specific purposes over the life of ESB there has been pressure on the other hand to contribute, sometimes a sizable proportion of funding, to general budget savings, eg \$100K in September 1998 and \$618K for 2002/03 budget.

The ESB Budget devoted to the ACT Bushfire Service³⁷⁸

- In 2000/01 Bushfire component expenditure was \$1.30m.
- In 2001/02 Bushfire expenditure was \$1.68m against a budget of \$1.3m.
- In 2002/03 Bushfire expenditure was \$1.62m against a budget of \$1.43m.
- Following the fires of January 2003 Bushfire budget was doubled to \$2.86m.

The ESB Budget devoted to Risk Management³⁷⁹

³⁷⁷ See data contained in "Selected ESB Budget and Expenditure Breakdown (2000/01 - 2003/04)" The information and explanation of the material tendered is contained in ESB.DPP.0014.0138.

³⁷⁸ See data contained in "Selected ESB Budget and Expenditure Breakdown (2000/01 - 2003/04)" The information and explanation of the material tendered is contained in ESB.DPP.0014.0138.

³⁷⁹ See data contained in "Selected ESB Budget and Expenditure Breakdown (2000/01 - 2003/04)" The information and explanation of the material tendered is contained in ESB.DPP.0014.0138.

- In 2000/01 Risk Management (including Community Education) expenditure was \$0.39m.
- In 2001/02 Risk Management expenditure was \$0.4m against a budget of \$0.34m.
- In 2002/03 Risk Management expenditure was \$0.6m against a budget of \$0.4m.
- Following the fires of January 2003 Risk Management budget was increased by 250% to \$1.4m.

Community Education³⁸⁰

504. Following the December 2001 fires ESB bid for increased resources in Emergency Management and for Bushfire. In particular a Community Education position was bid for but the funding was not approved.

ESB compared to Interstate Counterparts

505. Mr Roche said that the CFA has 20-30 operational people at its head office and about 100 administrative staff.³⁸¹ He also accepted that it had around 70,000 volunteers. Mr Kevin Cooper said that the NSWRFs had over 100 people at its head office in Rosehill and 64,000 volunteers. "Elvis" or an equivalent is contracted to be on standby.³⁸² He also spoke about 45-50 management people being able to be brought in from head office for a significant campaign fire.³⁸³

506. The full time staff for Bushfire and Emergency Services at the time of the 2003 fires was four. There were approximately 650 volunteers.

³⁸⁰ See ESB Budget Submissions May 2002; ESB.DPP.0013.0035

³⁸¹ TR 7.10.04 p. 7594/10

³⁸² TR 2/6/04 p. 6181-2

³⁸³ TR 2.6.04 p.6184/20

THE MANNER AND CAUSE OF DEATH OF ALISON TENER

Counsel Assisting's Submissions

507. Counsel Assisting stated at paragraph 1323 of their submissions that *“prima facie” the lack of warning may be able to be identified as a cause of death”*. The two deaths under consideration were Alison Tener and Dorothy McGrath. Counsel Assisting advances the hypothesis in relation to Alison Tener by referring to the fact that the evidence indicated that she had placed some personal items into her vehicle and was getting some things together. This indicated that she was willing to leave her house. She was found badly burnt in her bath.
508. Counsel Assisting then referred to the fact that the media update on 18 January contained instructions to fill the bathtub without any explanation why that was to be done. It is then suggested that Your Honour “might” conclude that Mrs Tener became aware of one or more of these warnings for the first time in the afternoon of 18 January as she was preparing to evacuate, she was not adequately equipped to understand the warnings but accepted the instructions to stay with her home, fill the bath and soaked towels and ultimately immersed herself in the bath hoping to find refuge there.
509. Counsel Assisting acknowledge at paragraph 1325 that finding that the lack of adequate warning was a cause of the death of these two people is a serious finding for Your Honour to make. Counsel Assisting did not submit at that stage that the evidence would permit such a finding to be made.
510. Counsel Assisting then proposed calling additional evidence. The application to call additional evidence was rejected by Your Honour on 19

May 2006 on the grounds that “the nature of the evidence that [the proposed witnesses] could give would, of necessity, be speculative.”³⁸⁴

511. Counsel Assisting having once formed the view that the state of the evidence would not permit a finding that a lack of adequate warning was a cause of the deaths of the two people concerned now, after having the evidence proposed rejected reverse their earlier position to submit that the absence of a warning at earlier times and the late issue of the SEWS together with its incomplete nature can be found to be the cause of the death of Alison Tener.
512. While it is true to say that the supplementary submission provided by Counsel Assisting dated 23 May 2006 does not identify any individual, the events mentioned therein are so closely connected with such a limited range of individuals that in a practical sense the finding advanced would reflect upon individuals who could be identified. If the additional evidence which Counsel Assisting advanced in order to be able to make the submission that they now make, was “speculative”, how much more speculative and without foundation is the existing body of evidence without that supplementation? If the thorough examination of the evidence which ought to have occurred at the first instance did not warrant such a submission how, applying commonsense, fairness and with due observance to the injunction that barristers should not make allegations of serious misconduct without a reasonable basis, are those submissions now made?
513. Before a submission is made either way on an issue as serious as whether a particular incident was a cause of a person’s death, any barrister would have to give the matter the fullest and most serious consideration. It is clearly a finding which in the *Briginshaw* test would demand the highest levels of satisfaction before any such conclusion could be reached. That level of satisfaction clearly is not met on the basis, as Counsel Assisting submit, that Your Honour “might” be able to make such findings.

³⁸⁴ TR 19 May 2006

Warnings Mentioning “Fill the Bath”

Letter to Householders³⁸⁵

514. There is no evidence such a letter went to householders in the Duffy area.

This particular document was apparently approved for release in January 2002. Mr Tener's statement of April 2006 indicates he does not recall *“receiving any information regarding bushfire preparedness.”* The contents of this document are irrelevant to a consideration of the manner and cause of death of Mrs Tener.

Canberra Connect

515. Although information about filling baths and buckets with water was published on the Canberra Connect website there is no evidence that Mrs Tener wither knew this or accessed that information. Likewise, what was published on that website is irrelevant to a consideration of the manner and cause of death of Mrs Tener.

ABC Broadcasts 18 January 2003

516. Shortly after 1pm the ABC broadcast the following information:

“Now If you have time and can do it take down the curtains and push furniture away from the windows, this is because if a fire does come very close to you, flying debris can break the windows and then you have your curtains on fire and away we go. So if you are staying to defend your home and you are able to do that remember those basics.”

There is again no evidence that Mrs Tener may have heard this broadcast. To the extent there is any information, Mr Tener's statement suggests Mrs Tener was not a listener of 666 ABC.

³⁸⁵ DUS.AFP.0001.0587

SEWS - Standard Emergency Warning Signal³⁸⁶

517. The standard emergency warning signal commenced with a list of suburbs that should be on alert (including Duffy) and urging residents of those suburbs to return to their homes. There followed bushfire preparation instructions identical to those broadcast on 666ABC at about 1pm including:

Indoor if fire approaches your house, close all the doors and windows, fill the bath tub, any buckets etc, and soak towels to place in any crevices such as under the door.

518. Again it can only be speculation that Mrs Tener heard the SEWS broadcast.

Information was in accordance with National Practice

519. The information provided by ESB on 18 January 2003 relating to filling the bath with water was in accordance with the practice of other bushfire services in Australia. Since the January 2003 bushfires the information provided by ESB (now ESA) has changed to explain the purpose of filling the bath. It is trite to say that the fact that information is changed following a death is no evidence at all that the previous information caused the death. The fact that a possibility for misunderstanding may have previously existed does not in any way assist the court in finding that in this particular case there was such a misunderstanding.

520. It is pertinent to note that whilst the information now provided in NSW, ACT and Victoria explains the purpose of filling baths, the information still being provided to residents of WA, Tasmania and Queensland remains consistent with what ESB was issuing in January 2003.

Western Australia

³⁸⁶ ESB.AFP.0110.0768

521. The Fire and Emergency Services Authority of Western Australia published "The Homeowner's Bush Fire Survival Manual" (4th edition) in January 2004. At page 30 under the heading "If You Decide to Stay" the home owner is advised in relation to "Protecting the House" to (amongst other things):

- Close all doors, window and shutters.
- Remove highly flammable curtains and furniture from window areas
- Fill basins, sinks and baths with water. Fill outside gutters. If time permits block up the mouth of downpipes to keep in the water
- Soak towels and rugs in water and lay along the doorways to keep sparks out.

Queensland

522. The Queensland Fire and Rescue Service currently advises the following in relation to this information in its "If I Stay" section (amongst other things):

- Close all doors and windows
- Take curtains down and push furniture away from windows
- Fill baths, sinks and other water containers and place them around the house
- Block spaces beneath doors with towels and blankets to keep smoke out

Tasmania

523. The Tasmania Fire Service advise (on its website) for when bushfire approaches contains the following advice:

- *Clear roof gutters of leaves, and sweep or rake leaves from decks and lawns near the house.*
- *Block your downpipes, (a sock full of soil will help) and fill your gutters with water.*
- *Move flammable outdoor furniture, doormats and hanging baskets away from the house.*
- *Close all doors and windows, remove curtains, and close shutters if you have them.*
- *Put tape across the inside of windows so they remain in place if broken.*
- *Fill the bath and any buckets and other containers with water. Put a ladder inside.*
- *Extinguish any sparks, embers and spot-fires burning on or close to the house. A hose or a wet mop is handy for this.*

NSW, Victoria an ACT

524. Since 2003 the advice on this topic is more explicit, no doubt to totally eliminate any possibility of misunderstandings.

525. The information available to ACT and NSW residents on the NSWRFWS website provides relevantly:

- *Fill all sinks, baths etc with water to use on spot fires in case mains water supply or domestic electric water pumps fail.*

526. Likewise the Courty Fire Authority website advises Victorian residents to:

- *Fill the bath and buckets with water to provide a water supply in the house for putting out any small fires that may start*

527. The above information does not form part of the brief before Your Honour. However, until the primary submissions of Counsel Assisting were provided, Mr Castle and Mr Lucas-Smith had not been provided any notice, directly or indirectly, that the wording of the SEWS might be said to have been a cause

of death of Mrs Tener. At that point those submissions stated that the current state of the evidence did not permit such a finding to be made.

528. If Counsel Assisting had been granted leave to introduce additional evidence on this point Messrs Lucas-Smith and Castle were ready to tender the above material. When the application to introduce additional evidence was refused, the tender was not pressed as in the belief that Counsel Assisting's position would revert to the one set out in their primary submission. We did not contemplate that it was going to change.

529. We respectfully ask Your Honour to admit this evidence.

Misled by the information ?

530. The contention that Mrs Tener was misled in some way by the SEWS cannot be accepted. The relevant part of the SEWS did not simply advise occupants of houses to fill their bath tubs. It advised them to "fill the bath tub, any buckets etc. and to soak towels to place in any crevices such as under the door." Counsel Assisting's submissions require Your Honour to accept that anybody hearing this message would hear the reference to "bath tub" and entirely ignore the reference to "buckets etc.". Plainly buckets and like objects are to be filled for the storage of water for the extinguishment of fires and perhaps also for personal use.

531. The message also advises to dampen towels to place them under crevices such as under the door. It is no way discussed in Counsel Assisting's submissions why, if Mrs Tener had taken this message into account, the dampened towels were found underneath her in her bath. If she was influenced by the warning the towels would not be underneath her in the bath. It may be that as a result of a fire it might be difficult to identify towels placed underneath the door but towels would not be where they were found.

532. The scenario revealed by witnesses who saw Mrs Tener taking goods from her house and loading them into her car and Mrs Taylor recording

Mrs Tener saying that she was “frightened”³⁸⁷ is consistent with Mrs Tener intending to leave her home. It is also equally if not more consistent with Mrs Tener being suddenly caught by the fire in her house and having little alternative but to endeavour to take refuge in her bathroom and ultimately the bath. Even if one were to go so far as to assume that the circumstances of Mrs Tener in her bath were the product of her own albeit mistaken intention, it does not answer why three towels were found underneath her. If she believed that the wet towels were to provide her with some protection, it could only be if they were above her.³⁸⁸

533. It is also difficult to reconcile Counsel Assisting’s contentions with the fact that a fire extinguisher was found outside the house near Mrs Tener’s car. If Mrs Tener had formed the view that she would shelter in her house while a bushfire passed, it is inconceivable that she would leave a fire extinguisher outside on the ground.

534. There is no record in the statement by Mrs Taylor that Mrs Tener said she either was listening to was going to listen to the radio. The statement does however indicate that Mrs Tener was conscious of the approaching fire and was also made aware that Mrs Taylor was going to leave.

535. The layout of Mrs Tener’s house is also consistent with the possibility that she was caught by surprise in the fire. The Senior Scientific Officer Petra Clissold determined that the fire swept through the house from a north westerly direction. This would expose the lounge room first. An examination of the plans of the house drawn by Mr Tener and professionally drawn³⁸⁹ reveal the bathroom was at somewhat of a dead-end of the house. There was a door exiting on the eastern end of the lounge room and from the laundry at the far eastern end of the house. The stairs from the first floor of

³⁸⁷ Taylor Troc Q.62-69; AMT.AFP.0097.149

³⁸⁸ Bird Statement ANT.AFP.097.0016

³⁸⁹ AMT.AFP.0097.0173

Mrs Tener's house descend to an area west of the internal entrance to the lounge room and near the bathroom.

536. The fire that blocked the entrance to the lounge room and therefore exit through the lounge room would also block the hallway and exit through the laundry. Page 6 of Constable Bird's statement³⁹⁰ records Vlasta Dahl saying that at about 2.30 pm on Saturday 18 January she saw Mrs Tener in the upstairs area of her house at the window closing curtains. She said the deceased appeared calm and not distressed. The bathroom was located on the south western side of her house on the ground floor.³⁹¹

537. It is not contended in these submissions that the scenario just outlined constitutes *the* explanation of why Mrs Tener was found in her bathtub. It is merely to indicate that there are more scenarios than those painted by Counsel Assisting to explain why it might have happened. Ultimately, no-one will ever really know. In the light of this doubt it is submitted that Your Honour should and could not properly make the findings urged upon you by Counsel Assisting. In order to do so you would have to be convinced of the following:

- Mrs Tener would have left her house.
- Mrs Tener changed her mind about leaving her house.
- The cause for Mrs Tener changing her mind about leaving her house was that she had heard the standard emergency warning signal.
- Mrs Tener misunderstood the standard emergency warning signal.
- As a result of this misunderstanding Mrs Tener elected to take shelter in her bathtub while her house burnt down around her.

³⁹⁰ AMT.AFP.0097.0016

³⁹¹ Clissold's Statement (Senior Scientific Officer); AMT.AFP.0097.0073

538. The evidence of these events is simply not there and in some respects (the towels) specifically contradicts these conclusions.

THE EXPERT WITNESSES

Mr Nicholson

539. Mr Nicholson particularly addressed the issue of the warnings to the community and was of the opinion that the warnings given to the people of Canberra were “quite graphic. Quite upfront” in relation to material that was appearing in the Canberra Times leading up to the 18th January at TR8164. He was further of the view that the warnings in the Canberra Times and information given was a “very effective means of getting the message through to the community in a broad sense” at TR 8164. He also spoke of the benefits of “ramping up” the warnings as they were given to the community. These warnings of course were in conjunction with other uses of the media through radio, particularly the ABC. These warnings were also following a large amount of material that had been provided to the community over some years by the ESB.

540. Further, Mr Nicholson, whose experience operationally was far greater than that of Mr Cheney, held the opinion that warnings should not be given too early as “to issue warnings too early can have people on the move doing things that, in hindsight, you might not have wanted them to do” at TR 8168 and further that the issuing of warnings when there has been no community preparedness is “fraught with hazards”.

541. At TR 8169 he explained that the warning needed to be linked to the expectation that certain events were going to occur. He agreed with a statement of Julie Crawford that you do not “want to cry wolf either and have people going too early”.

542. Mr Nicholson also accepted that it was important to be truthful with people and give them correct information when this proposition was put to him a number of times by Counsel Assisting. Despite Counsel Assisting hinting that the warnings given by ESB were inadequate, Mr Nicholson stated it was reasonable that “once the people on the ground were confident of where the fire might impact and then started to notify people that that was reasonable” at TR8173. It is important to realise that nobody on the ground knew, not even Mr Cheney (see below and in other parts of these submissions), precisely where and with what ferocity and speed the fire would impact. Importantly, Mr Nicholson was not critical of the actions of the ACT and ESB in fighting the fires that they faced, including the decision of Odile Arman on 8 January.

543. Mr Nicholson also thought it was reasonable for the ACT to act upon and rely upon NSW information, with particular regard to the comments made by NSW and Cameron Wade at the Press Conference on 17th June at noon before he departed to Jindabyne. His view as to the advice given by Mr Lucas-Smith in relation to the ACT fires and to either “stay or evacuate” was “certainly alerting the people in that area that they may be confronted with a fire situation” at TR 8261. When taken through all the information given by Mr Lucas-Smith and verifying it with Mr Cheney’s fire spread map, Mr Nicholson agreed that all the information being provided by Mr Lucas-Smith at the time to the media and thus the community at large was correct. It is difficult to see how Counsel Assisting’s submission that information provided by ESB to the public was untruthful can be made out with regard to the whole of the evidence before the enquiry and this is evident in the expert testimony of Mr Nicholson.

Mr Cheney

538. Mr Cheney has given much of his evidence with the benefit of hindsight, such hindsight the result of many months of perusing of statements, having

access to line scan data, and transcripts, as well as hearing and assisting Counsel Assisting with the evidence that was to be presented to Your Honour. One aspect of Mr Cheney's evidence is that *in hindsight* he is correct as to the spread and behaviour of the fires.

539. But the task of this Court is not about hindsight and what became apparent after the event. The task is about what was known at the time. Let Mr Cheney's actions at the time speak louder than his benefit of hindsight now. Mr Cheney's actions resulted in him going to an area that the path of the fire did not pass over, (despite his predictions prior to the 18th January), sending his son into the path of the fire without warning, not warning his colleagues, or anyone for that matter, in regard to the CSIRO and its "potential" or even "inevitable" property losses. These are but a few of the examples that have been referred to in other parts of these submissions.

540. There are serious problems in Mr Cheney's evidence in that his actions simply do not bear any close scrutiny with his evidence to Your Honour in what he knew at the time or furthermore what should have been done at the time by those in New South Wales or the ACT. It is hardly appropriate or fair for him to now criticise others in relation to decisions they made at the time, on knowledge they had at the time, when his own actions show that he was mistaken and he did not appreciate what was to occur and did occur on 18 January. His appreciation and knowledge come much later, with the benefit of hindsight and much assessment of information that was only later available to anyone connected with the fires. In many circumstances the evidence presented to Your Honour by him simply lacks any credibility when compared to what he did at the time.

541. Your Honour must also exercise some caution making findings based on Mr Cheney's evidence where it conflicts with other evidence in light of

comments about not only expert witnesses but this expert witness made in *R v Doogan* at pars 97-100.

542. The other issue with Mr Cheney is the reliability of many of his opinions and Your Honours' acceptance of these without a closer scrutiny of all the other available evidence. There are a number of "expert" witnesses who have appeared and given evidence in this enquiry, none of whom gave evidence that supports or corroborates the theory that Mr Cheney knew when and where the fire would impact . These witnesses are discussed further below. Notably the majority of these witnesses had far more experience than Mr Cheney in attending and taking part in the fighting of fires. Mr Cheney is after all a fire behaviour scientist and has had no experience in non research oriented fire fighting since the early 1970s.

Roche

538. We adopt much of what is said in the submissions for New South Wales in respect of this witness. It is clear from Mr Roche's evidence that this witness had an agenda in his deliberate and pronounced involvement in the tailoring of evidence for this enquiry. Mr Roche at various points in his evidence gave a clear indication that he endeavoured to gather a particular type of evidence, had a predetermined view, sought "good allies" and was willing to give opinions on analysis not carried out by him. These parts of the relevant transcript have been reproduced and footnoted in the New South Wales submissions and we do not repeat them again here for the sake of brevity.

539. Mr Roche was also willing to assume facts critical to people when he did not know one way or the other what those facts were. His assumptions that people had not undertaken certain tasks simply because he was not aware of them doing so were a constant in his evidence. Mr Roche failed to recognise the lack of any serious basis for criticisms made by him when he was unaware as to what was possible, particularly in regards to criticisms made by

him regarding adequacy of resources. He further failed in his report to make a single mention of the role of the New South Wales Rural Fire Service in the provision of information to Canberra, despite the major impact on the suburbs of Canberra coming from the McIntyre's Hut fire, however was critical of the ESB in giving timely warnings about the approaching bushfire on 17 and 18 January. Even with the benefit of hindsight and having many months to make an impartial assessment of what may or may not have been done, he failed to do so.

540. This becomes of a more troubling nature given his close relationship with the "team" of Counsel Assisting and his involvement from the beginning in advising members of the Australian Federal Police of the specific questions to be asked of many witnesses, some of whom were "allies" to borrow his expression and many of whom were not. Some of this partisan involvement has been the subject of comment in *R v Doogan* at pars 97-100.

541. In light of the above, nothing proffered by him as expert opinion can have any influence on Your Honour given the approach by Mr Roche to his role as an expert to assist the Court in its enquiries.

Other "expert witnesses"

538. Your Honour has had the benefit of hearing from many experienced firefighters, who one and all could not comprehend what was to occur and did occur on 18 January. Many of these experts are discussed in other parts of these submissions. A short list of extremely competent firefighters and operational people who did not predict and did not have any idea of the devastation that was to follow include , but are not limited to those in NSW such as Julie Crawford, Bruce Arthur, and even Phil Koperberg; and those in the ACT such as Neil Cooper, Peter Lucas-Smith , Rick McRae, the planning team at ESB, Brett McNamara, Tony Bartlett , and Ian Bennett (whose elderly parents lived on Warragamba Avenue) to name but a few.

539. Indeed Mr Cheney himself conceded he was taken by surprise at how the fire behaved and the speed at which it travelled on the “dirt bowl” (as described by Julie Crawford) of agisted paddocks that were a buffer between the fires and the urban edge of Canberra.

540. This is aside from the expectation held at the time by every witness of an experienced operational capacity in this enquiry, and familiar with the ACT and Canberra suburbs, of suppression efforts being successful. It is difficult, if not impossible, to accept Counsel Assisting’s “conspiracy theory” in the light of the overwhelming experience and opinions of those who were dealing daily with the fires and did not form the “inevitable” view that. Your Honour is asked to accept.

THE EFFECT OF ESB HEADQUARTERS ON COMMAND & CONTROL OPERATIONS

541. It cannot be seriously disputed that the Emergency Services Bureau Headquarters in Curtin was totally unsuitable for the purposes it was required to meet. The building was a converted primary school with a veritable rabbit warren of corridors. The evidence overwhelmingly speaks for itself as to how inadequate this building was as the central command and control centre. Set out below are the statements of numerous witnesses ranging from Chief Police Officer John Murray to ESB Planner Hilton Taylor which leave no doubt that the design of ESB HQ played a significant and detrimental role in the way the fire emergency was handled.

542. Before setting out this evidence it is pertinent to note the submission of Counsel Assisting on this point. It comprises less than half a page of the

entire submission. Counsel Assisting assert³⁹² that whilst it was universally accepted that “*the layout of ESB Headquarters hampered the efficient management of the fire emergency*”...“*no witness suggested this contributed in any material way to any deficiencies in the initial response, nor to the development and dissemination of timely information and warnings to the ACT.*”

543. Counsel Assisting then support this assertion by footnoting evidence given by Mr McRae, Mr Lucas-Smith, Mr Graham, Mr Bennett, Mr Newham and Mr Murray. If Your Honour were to actually go to those references it would be apparent that they do not in fact support this proposition in the slightest.

544. Moreover Counsel Assisting set out³⁹³ a passage of the evidence of Mr Hilton Taylor, This material totally contradicts their above quoted assertion. After setting out the terms of the memorandum Counsel Assisting go on to state:

“Mr Taylor did not have any discussions with Mr McRae about the view that he expressed the memorandum. He was taking counsel from Mr Bob Wilcox who was an experienced senior RFS planning officer. On that Saturday and in the time leading up to that, as things became very busy in the Emergency Services Bureau and with the nature of the building, it wasn’t always easy to locate Rick. I felt this was fairly urgent and wanted to get it out. I discussed it with Bob Wilcox and got him to sign it in the absence of being able to locate Rick at that time.”

545. Mr Lucas Smith’s evidence³⁹⁴ is specifically referenced³⁹⁵ by Counsel Assisting as supporting the proposition put to Your Honour. This is what he said, in response to questions from Mr Archer.³⁹⁶

³⁹² at paragraph 171

³⁹³ at [902]

³⁹⁴ at TR 19.02.04 p1147

³⁹⁵ at [171]

³⁹⁶ at TR 19.02.04 p1147 and following

Q. Isn't it a central premise of command and control in that sort of environment that the person making the strategic decisions, you be in one spot?

A. It is certainly desirable, yes.

Q. Otherwise people are chasing you all over the building, wherever you may be, trying to get information to you?

A. Yes.

Q. Isn't that what happened that day [18 January], that people were chasing you around the building?

A. Yes. I don't know there was any alternative.

Q. Is it possible that, as a result of that, the close relationship that you needed to have with your planning team, particularly that morning and as it moved into the afternoon, that that close relationship broke down?

A. I think a number of things broke down as a result of the layout - of the facility we had to work in.

Q. That was one of them?

A. Yes.

546. Even if one were to adopt Counsel Assisting's extraordinarily narrow focus as to the relevance of the building layout ("*contributed in any material way...to the development and dissemination of timely information*") these comments from Mr Lucas-Smith and Mr Taylor are in *direct* conflict with the submission and indicate that the layout of ESB HQ in fact had a significant impact on operations at those crucial times on 18 January.

547. Your Honour no doubt recalls that when the Court went on a view of the ESB Headquarters to inspect the layout for itself, neither Mr Woodward not

Mr Lasry QC attended. Perhaps their lack of interest in this issue explains the total ignorance of the evidence their submission³⁹⁷ displays. Whatever the reason for the submission it is nonetheless palpably erroneous to suggest that ESB HQ design had no relevant effect on activities from 8-18 January 2003.

548. Indeed, as the following excerpts from the evidence make clear, the layout of the building had a major impact on the response, coordination, communication and timeliness of actions:

549. Mr McRae³⁹⁸

A. The building is a converted primary school and it's totally unsuitable for the function we were trying to put it to. The layout of the rooms, the relationships of the rooms, the access requirements are all very unsuitable. In fact what stands out in my mind on the afternoon of the 18th, we lost power. I was trying to do my work with a head torch.

A. One of the outstanding issues with the way we used the building for the Service Management Team was we had to put operations in our communications centre, what we called COMCEN for short, because they were the link to the field incident management. That room is so small that, if there is more than one person doing planning work, we get kicked out and put into a room that at that stage was normally the ambulance training room. That's a separation of the order of 20 metres with a security door in the middle. It became obvious that making information flow from one room to the other was a top priority. So it was important to make planning reach out to where the information was as far as possible to facilitate moving the information. That

³⁹⁷ at [177]

³⁹⁸ At TR 16.04.04 p3438 (footnoted by Counsel Assisting at [171])

even meant going into the hallway adjacent to COMCEN and putting maps on the brick wall there above the photocopier almost to make sure the mapping was up to date with the information coming into operations.

549. Mr Lucas-Smith³⁹⁹ - Following the 17 January planning meeting where a potential for the fire to reach Narrabundah Hill the next day was identified:

Q. What were the arrangements outside of the planning meeting proper for you to consult with your planning team? Was it an ad hoc on a needs basis; is that the way it was working?

A. Yes, it was. Unfortunately the facility at Curtin is not very well laid out to facilitate a more centralised approach to command and control at that facility. The reality was that the only avenues that were really open to me was to make sure that I moved around to the different areas. And I would go in and out of planning and talk to the planning officer as to how things were developing, have a look at things for myself. I would spend a lot of time in logistics seeing how resources were coming around and spending time in operations. There was nowhere in real terms that we could set it up in a desirable way that would see things operate in reverse.

Q. In relation to that, wasn't the case that later in the day in fact you did establish such a space for yourself so that people came to you rather than you going to them?

A. No. In fact I did not. I know Mr Murray made that recommendation to me but I didn't set it up that way. Purely and simply, I knew it wouldn't work because I had tried it already at the start of it. That's how I would have preferred to start the whole of the campaign. But I had already attempted

³⁹⁹ At TR 19.02.04 p1146-14

that and it had failed. I felt we needed to continue doing what we were doing.

550. Mr Graham⁴⁰⁰

Q Do you have any comments about the layout of the building and any aspect that may have contributed there?

A. I think for the majority of the events that we have, the smaller events - I am just looking at it from the bushfire point of view now - it is adequate at best to operate out of there. But as soon as - for instance, as soon as we have a Service Management Team set up where people need to be working separately to each other, then that separation is by a long distance. If Mr McRae at a small event needs to do some planning then he can't do that planning from where the operation is being managed from. The technology isn't there to allow for that; the space isn't there to allow for that. He needs to be separated either to get back to his office where a lot of this technology resides or into one of our conference rooms where he can hook up his technology into our computer systems and the like.

There is always that separation. That contributes - when you want to run something by him immediately or alert something to him immediately where you then need to find somebody to pass a message on or ask him to come into the operations centre or indeed myself go and have a discussion with him. When I am doing that, I am out of the operations centre and missing the immediacy of the information coming in from the field.

551. Chief Police Officer Murray⁴⁰¹

⁴⁰⁰ TR 07.04.04 p3012-27

⁴⁰¹ TR 30.04.04 p4311-23

Q. You make the observation in your statement that you noted the layout of the building was not conducive to a good command and control process being established. What was the problem?

A. Well, it is hard to know where to start there because the building is a good operational centre. It is a good classroom setup. It was totally inappropriate, something which has been realised since. I felt quite sorry for Peter Lucas-Smith at the time because the conditions under which he was working were extremely testing. Notwithstanding, he was energetic and professional about his work.

I offered my assistance, and my early advice to him was that an intelligence process should be set up whereby we were acting on refined raw information rather than just raw information itself and that he receive regular briefings from an intelligence person. I say that for this reason: because of the layout of the rooms, we were hearing raw information over the telephone and were hearing - for example, on one occasion I heard "helicopter down" and that turned out not to be true. The role of the intelligence officer is to sift out things like that and present to the co-ordinator - or in this instance the controller - information which is known to be true or reasonably known to be true.

552. Ms Felicity Grant (planning officer)

Q. It sounds like you almost needed a guided tour to get from the planning room to his office?

A. If you hadn't been there before and didn't know where his office was, it's not easy to locate.

Q. And do you think that location contributed to your inability at times to get hold of Mr McRae and ask him questions or vice versa?

A. I do.⁴⁰²

553. Sergeant Jason Byrnes⁴⁰³

Q. You say: "It is a converted school with a layout that is not conducive to efficient command management practices. A series of corridors separated the essential command sections, often winding past courtyards. I found that throughout the day the layout of the building hampered me in the swift conduct of my duties.

A. Correct.

554. Sergeant Steve Kirby⁴⁰⁴

Q. could you just give us some indication of how the facilities available to the Australian Federal Police at the POC compare with the facilities and environment at ESB in Curtin?

A. I could say from the outset that the facilities at ESB are terrible. They are not conducive to command and control at all; they are very small; they are almost claustrophobic, to be quite truthful. It makes life very very difficult to work under that environment. The venue is not purpose built; the POC is purpose built. All the linkages of the building and the whole format of the building is designed around command and control.

555. These extracts are but examples of the myriad of comments made by witnesses on this issue. Whilst Counsel Assisting downplay the significance of these issues for the purposes of this inquest it should be remembered that

⁴⁰² TR 4.06.04 p 6122

⁴⁰³ TR 30.04.04 p4403-36

⁴⁰⁴ TR 30.04.04 p4379-5

it was not the case in another significant fire inquest (and indeed one in which Mr Woodward appeared!).

556. The Report into the Linton Inquiry highlighted the way in which poor accommodation can adversely affect a total response⁴⁰⁵:

Q. Indeed, in the lead-up to the Linton tragedy, the Country Fire Authority had been involved in four other major incidents which had led to coronial inquests occurring, being the Berringa-Enfield fire in 1995, the Creswick fires in January 1997 and also on that same day the Dandenong Range fires and the Mount Martha fires?

A. That's correct.

Q. The coroner in Linton identified that some of the problems that had arisen during those earlier incidents - there was an examination, briefly, of the circumstances of those earlier fires; do you recall that?

A Yes.

Q. For example, in relation to the Berringa-Enfield fire, in relation to that fire it was said in that report by the coroner: "Throughout the fire the Incident Control Centre had difficulty managing the fireground because of inadequate radio communications, remoteness to the fire front, lack of facilities for managing CFA resources, and the inappropriate layout of the office for incident management. These factors combined with poor mapping resulted in the failure to maintain a single incident status map, a particularly important requirement during dual agency operations."

557. In our submission the assertions of Counsel Assisting on this issue are factually inaccurate and should not be accepted by Your Honour. The gross inaccuracy of this submission means Your Honour *must* exercise extreme

⁴⁰⁵ at page 115, as set out at T17.10.05 p7919-5

caution before accepting this or indeed any submission put by Counsel Assisting without checking the primary evidence said to support it. This is of course an onerous task for Your Honour to undertake, one that you should not be obliged to discharge, and would not be required to discharge if you were truly being assisted in an even handed and objective manner. In this case however, simple reliance on assertions of Counsel Assisting could not only seriously undermine the integrity of Your Honour's ultimate findings but possibly the entire proceedings.

CONCLUDING REMARK

558. Finally it is submitted that Your Honour in examining in fine detail the actions and decisions taken by ESB officers and in particular Mr Lucas Smith and Mr Castle during 8-18 January 2003 and indeed until 30 January 2003 and beyond, should pay particular regard to the concluding remarks of the other person to have inquired into these fires, Mr McLeod where he noted:⁴⁰⁶

Experience is the basis of most of the progression of human knowledge, and there is much we can learn from our mistakes. It is inevitable therefore that inquiries of this kind concentrate on weaknesses, errors and shortcomings. They do not dwell to the same extent on those aspects where systems and people performed satisfactorily or in the way intended...

Finally, a word about the people involved. The individual government officials, employees and volunteers spared nothing in terms of their personal commitment during a long and difficult crisis, then as soon as the crisis had passed they had to cope with the demands and complexities of the recovery phase. After that, the investigators started to come along, forcing many of them to relive the experience, asking them to try to reconstruct events from their sometimes blurry recollection, and requiring them to respond to a myriad of hypothetical, and possibly at times irritating, propositions. The Inquiry is full of admiration for the way those people it dealt with who occupied positions of responsibility or authority during the fires continued to respond to the changing challenges of an event that is, in different ways, very much still the focus of their attention.

⁴⁰⁶ McLeod report p 243

Any criticism directed at individuals because of the role they were required to perform is in no way intended to question their integrity or their honesty in doing what they felt in the circumstances was the right thing to do at the time."

DISCLAIMER

Lest there be any doubt, we wish to make it clear that if we have failed to address a particular issue or particular criticism that appears in Counsel Assisting submissions, especially where it might be directly or indirectly referable to the conduct of either Mr Lucas Smith or Mr Castle, that omission should not be taken to be either acceptance of or acquiescence to that submission.

NOTE ON THE TEXT

To avoid unnecessary repetition it can be assumed unless otherwise stated that emphasis in quotes has been added by the authors

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30 June 2006