

## Further Submissions of Counsel Assisting in Reply to the Submissions of the NSW Represented Parties (“NSW Submissions”)

### **Matters Already Addressed**

1. We have dealt in our oral submissions with the issues of jurisdiction, hindsight, the evidence of Mr Roche and procedural fairness. We do not propose to add to what we have said on those matters, save to point out a minor factual error in the NSW Submissions.
2. It is not correct to assert (as the NSW submissions do) that the ACT fires such as Bendora burnt within the borders of the ACT “at every moment of their existence” (see paragraph 39). Both the Bendora and Stockyard fire crossed the border into NSW and thereafter came under the joint management of the ACT and NSW authorities (described in the NSW documents as the “Bimberi complex of fires”).
3. This fact further illustrates the difficulties with the NSW submissions on jurisdiction as discussed in our oral submissions. The consequence of those submissions would be that if something happened in NSW that could be said to have contributed materially to the overall spread of those fires and their impact within the ACT (such as the implementation of backburn strategy that burned into the ACT as a separate fire), Your Honour could not make findings or comments about that matter.

### **Withdrawal of Submission on Cause**

4. Having considered carefully the NSW Submissions, it is no longer our view that there is sufficient evidence to support a finding as to the cause of the McIntyre’s Hut fire in the terms articulated in paragraph 1197 of our written submissions. In urging Your Honour that there is either insufficient evidence or no evidence to support many of the assertions we make in our written submissions, the NSW Submissions make frequent reference to the effect of particular decisions on the allocation of resources, competing demands for resources and the availability of resources generally.
5. At paragraph 498 to 501, the NSW Submissions state as follows (omitting footnotes):

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

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

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

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

6. The NSW Submissions correctly identify that we relied on this statement by Mr Walker in not directly confronting in our submissions the adequacy of the evidence relevant to the question whether the NSW had available sufficient resources to implement the alternative strategies discussed in our submissions. We appreciate, of course, that the statement was not evidence and we did not seek to treat it as such. Our recollection of the statement is that, while made in the course of responding to an answer by Mr Roche, it was directed towards Your Honour. We openly relied on the statement in the context of conceding that the evidence concerning the availability of sufficient resources was wanting in a number of respects (see paragraphs 427 and 428 of our written submissions). The suggestion that our reliance was “mischievous” is unwarranted, albeit not unusual in this Inquest. In making our written submissions, we assumed from the statement that the NSW parties would not seek to rely on arguments based on the availability of resources in answer to any submissions we might make.
7. However, it is clear in the light of the paragraphs from the NSW Submissions set out above that our assumption was misplaced. Further, while rejecting the description “flimsy material” (we did not suggest that it provided “evidential support”), we would not seek to argue that Your Honour can rely on the statement over the objection of the NSW represented parties.

8. In the circumstances (including the application of statement in *Briginshaw* discussed in paragraphs 152 and 157 of the NSW Submissions and paragraphs 1097ff of our written submissions):
- (a) we agree in substance with the submissions on behalf of the NSW parties (see, in particular, paragraphs 311, 318, 414, 438, 463, 490, 492, 496, 535, 599, 625 and 626 of the NSW Submissions) the effect of which is that Your Honour cannot be satisfied on the evidence as it stands that the NSW authorities had access to sufficient resources within the necessary timeframe, to implement the alternative strategies discussed in our submissions;
  - (b) the capacity of the NSW authorities to implement the alternative strategies in the manner and within the timeframes discussed in our submissions (including securing and deploying aerial incendiaries on 14 or 15 January) is central to any finding that the failure to implement those strategies was a cause of the McIntyre's Hut fire that burnt into Canberra on 18 January; and
  - (c) whatever view Your Honour takes of the other arguments made in the NSW Submissions concerning the evidence (chapter 3 and following), that alone appears to be sufficient to preclude a finding in the terms suggested in paragraph 1197 of our submissions.
9. We do not withdraw paragraph 265(a) of our written submissions, nor our oral submissions that Your Honour has the necessary jurisdiction to make the finding on cause and origin urged in that paragraph.

### **Effect on the Coronial Report**

10. If Your Honour accepts that it is not open to you to find that the actions and decisions of the Queanbeyan IMT were a cause of the McIntyre's Hut fire that burnt into the ACT and Canberra on 18 January 2003, the question then arises as to what matters concerning the McIntyre's Hut fire can be legitimately canvassed in Your Honour's report. At paragraphs 147 to 149, the NSW Submissions state as follows:

*"Hence there is no inconsistency in the position taken by NSW and by NSW witnesses in this inquest. It was accepted that Your Honour had a lawful power to inquire into the McIntyre's Hut fire, provided that there was some possible rational connection with Your Honour's jurisdiction that might emerge from wherever the evidence led.*

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

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

11. The footnote at the conclusion of the first sentence of the final paragraph extracted above is as follows:

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

12. It is not clear to us whether these paragraphs are intended to be no more than an affirmation of the concession made in our written submissions that it is beyond Your Honour's jurisdiction for you to make recommendations about the functions and operations of NSW government agencies. We would extend that concession to apply to comments, where the comment relates exclusively to the functions and operations of NSW government agencies and their officers, and could not be said to inform or impact upon a comment or recommendation that is within Your Honour's jurisdiction (such as a comment or recommendation that concerns co-operation between NSW and the ACT). We note, in this regard, Mr Walker's comment at page 2235 of the transcript as follows:

*"May I make it crystal clear we have no jurisdictional objection to your Worship making comments about the state of territorial cooperation and the like. It is only the criticism that I rise to object to"*

13. However, if what is being submitted in these paragraphs is that, once Your Honour reaches the conclusion that certain acts and events are not a cause of the fire, Your Honour is then precluded from commenting on those acts and events, we disagree. As discussed in paragraph 1086 of our written submissions, the Full Court made clear in *R v Doogan* that the power to comment in s52(4) of the Act, does not enlarge the scope of Your Honour's jurisdiction to conduct an inquiry. However, the Full

Court also made clear that comments “*may obviously extend beyond the scope of findings*”.

14. In our submission, once Your Honour has validly inquired into matters that are within Your Honour’s jurisdiction as relevant to the cause and origin and circumstances of a fire, the fact that Your Honour may ultimately *not* find that certain of those matters are a cause of the fire, does not preclude Your Honour from making comment about those matters (including critical comment), providing they are “*connected with the fire*” (*Coroners Act* s54(4)). There is room for debate about the limits of the power to comment once an inquiry is held (see *Commissioner of Police v Hallenstein* [1996] 2 VR 1 Hedigan J at 7 (line 27)). For example, in *Hallenstein*, Hedigan J was satisfied that the Coroner was free to make comment concerning the differences between policy and culture between the Victoria Police Force and the New York City Police Force, which on no view were relevant to the findings of cause of death in that case (at 20). Thus, in our submission, if there were some aspect of the conduct of an officer of an NSW agency that Your Honour considered warranted critical comment, with a view to then making further comment or recommendation about co-operation between ACT and NSW agencies in the interests of public safety in the ACT, Your Honour would be free to do so.
15. However, in this case, such a debate appears to be largely academic. Putting aside the broader question about Your Honour’s jurisdiction to make findings and comments concerning the cause, origin and circumstances of a fire that started in NSW, the difference (if any) between us and the NSW represented parties on this issue seems to be more one of degree than substance. Although Your Honour arguably has the power to do so, we do not submit that Your Honour should make comment concerning the circumstances of the management of the McIntyre’s Hut fire by the NSW agencies and their officers that is critical of such agencies or officers, such as would give rise to the need to give a notice under s55 of the *Coroners Act*. We accept that, in the absence of evidence on the availability of resources, as discussed above, such comments would not be open.
16. On the other hand, in our submission, having regard to the scale of the devastation caused by the McIntyre’s Hut fire in the ACT, and Canberra in particular, on 18 January 2003, the public of Canberra are entitled to much more than a “*brief*” narrative of the evidence given about the fire and the management of it in the course

of the inquest. In our submission, Your Honour's narrative can and should include reference to all of the matters referred to in chapters 2 and 3 of our submissions, supplemented or amended as Your Honour considers appropriate by reference to the matters raised in the NSW Submissions.

17. Further, in our submission, Your Honour's discussion of that evidence can and should include comments to the effect that views and approaches differ about some of the decisions made by the IMT at Queanbeyan as discussed in our submissions. Such comments will be particularly appropriate, indeed necessary, if Your Honour is proposing to make recommendations concerning co-operation between ACT and NSW agencies, which are to some extent informed by the fact that these differences in views and approaches can arise.

### **Other Criticisms in the NSW Submissions**

18. The NSW Submissions are critical of a number of other matters in our submissions that are not related directly to evidence concerning the availability of resources. Because of our acceptance above that this issue alone is sufficient to preclude a finding in the terms suggested in paragraph 1197 of our submissions, we do not propose to further burden Your Honour by responding to those criticisms in detail. We reiterate that our silence should not be taken as acceding to the criticisms. However, having regard to our submission that Your Honour can and should incorporate in your report a reasonably detailed discussion of the evidence before Your Honour concerning the McIntyre's Hut fire and its management, we will briefly respond to those criticisms that may be relevant to that discussion of the evidence:

- (a) **Reliance on evidence of Gould** (paragraphs 187 and following and 297ff (among others))

The NSW Submissions criticise the evidence of Roche and Cheney (and our related submissions) to the effect that there was scope later in the evening on 8 January 2003 for closer reconnaissance of the fires under the management of the Queanbeyan IMT. The criticism is based primarily on the assertion that the evidence relies on what was observed by Gould and is therefore entirely informed by hindsight.

In our submission, while Gould's evidence assists in confirming (admittedly with hindsight) what the fire behaviour in the area of the McIntyre's Hut fire was like later that evening, it does not colour the view expressed by Mr Cheney and referred to at paragraph 188 of the NSW Submissions. In summary, that view was that the Queanbeyan IMT should have known that by later in the evening, they were going into falling fire danger and that the fire behaviour would decrease in that country at night. There is ample evidence before the Inquiry that it is well known (including to the members of the Queanbeyan IMT that gave evidence in the Inquiry) that fire danger and fire behaviour decreases as night falls thus (subject to taking appropriate safety precautions) providing an opportunity to undertake a closer assessment of the fire and, if appropriate, commence suppression efforts.

**(b) Information available to the Queanbeyan IMT should have been discarded**  
(paragraphs 189ff and 295ff (among others))

The NSW Submissions suggest that the effect of the evidence of Cheney and Roche and our submissions was that the Queanbeyan IMT should have "discarded" or "ignored" the information obtained by the Queanbeyan IMT in the late afternoon and evening of 8 January 2003 and headed out to get new information. It is nowhere suggested in the evidence of Roche and Cheney or in our submissions that that information should have been discarded. We accept that it was important and useful information to be taken into account in devising strategies for the suppression of the fires under the management of the Queanbeyan IMT.

However, it is universally recognised that a fire is a dynamic event and conditions change. Knowing that fire behaviour decreases as night falls, it was open to the Queanbeyan IMT to update the information obtained earlier in the afternoon and in the early evening and adjust suppression strategies accordingly. We agree (as submitted in paragraph 377 of the NSW Submissions) that some time would have been taken up in making enquiries and it is unlikely that the Queanbeyan IMT could have sent crews out to inspect all the fires until some time late on that night, with the possible result that direct attack could not have been made on the

relevant fires until the morning of 9 January 2003 (see also paragraph 382 of NSW Submissions).

In our submission, these are options that were open to the Queanbeyan IMT on the night of 8 January and first thing in the morning on 9 January (assuming resources were available) which options were taken up (at least in part) later in the morning of 9 January and on 10 January. This does not involve discarding or ignoring information, merely updating that information and adjusting strategies as appropriate, but doing so at the earliest available opportunity.

Incidentally, we do not understand the suggestion in paragraph 294 of the NSW Submissions that our heading “Initial Assessment” is “dismissive”. It is not pejorative and accurately describes what was going on in the gathering of information in these early stages of the firefight. Similarly, while it is true that we have not set out verbatim every piece of information referred to in the Joint Submission, a review of our narrative concerning the McIntyre’s Hut fire (particularly the footnotes) will show that we have included extensive references to that submission including, much of the information set out at paragraph 326 of the NSW Submissions. We reject the suggestion that we have consistently ignored or downplayed the extent of the information available as disclosed in the Joint Submission that led to the strategy being adopted.

(c) **Timeframes** (paragraph 336ff)

In response to our submissions concerning the need to set timeframes, the NSW Submissions assert that: *“It is an inherent aspect of adopting any strategy, that the strategy can be implemented within the time constraints present.”* In our view, this is misconceived and inconsistent with the evidence. As we have discussed in our written submissions (paragraph 432ff), it is vitally important when devising a fire suppression strategy that some attempt is made to calculate how long it is likely to take to complete the strategy.

It should go without saying that any such estimate would need to be regularly reviewed as the fire suppression efforts continue, and adjusted to take account of unexpected delays, changes in the weather forecast and the like. It is only by setting timeframes and updating those timeframes as work progresses, that a

realistic assessment can be made of the prospects of success of a strategy. Setting a timeframe is also relevant to planning for the use of resources and determining when particular resources are likely to be freed up for use in other tasks. In our submission, Your Honour would be concerned at the suggestion implicit in the NSW Submissions that setting a timeframe to complete a strategy is unnecessary.

**(d) Inspection by the Brindabella Brigade and evidence of Mr Smith** (paragraph 410ff)

It is not clear to us why the standing down of the Brindabella Brigade at 7.25pm apparently precluded members of the Brigade being later recalled to undertake inspection. More generally, in our submission, the NSW Submissions give insufficient weight to the evidence of Mr Smith as to what could have been achieved by the Brindabella Brigade on the evening of 8 January in the area of the point of origin of the McIntyre's Hut fire.

**(e) Resources available to begin work on the Baldy Range spot fire** (paragraph 438ff)

Although we accept that there is no evidence before Your Honour as to what resources were in fact available to the Queanbeyan IMT to commence work on the Baldy Range spot fire on the evening of 9 January 2003, we reject the assertion in paragraph 439 that the issue was not raised with any of the NSW witnesses by us when they gave evidence. The NSW Submissions go on to refer to the fact that both Mr Arthur and Mr Hunt were asked why crews had not been sent to the fire ground on the night of 9 January. In our submission, Your Honour is entitled to infer that, if the reason had been related to a lack of resources available at that time, both of those witnesses would have said so, and they did not.

Further, we did not suggest in our submissions that such crews as were available should have been sent to the Baldy Range spot fire "in the dark". The point made in our submission (paragraph 502) was that, if the resources were available, they could have been sent to the fire during the afternoon and stayed overnight.

(f) **Water bombing** (paragraph 440)

Our statement that water bombing was likely to have little or no effect without support from ground crews, was made on the basis that it was generally understood and accepted that water bombing alone can inhibit the spread of a fire edge for a only a short time. Even under moderate fire danger indices, the area dampened by water bombing will soon dry out start to burn. Mr Roche's evidence was that *"any aerial suppression strategy under these conditions must be supported by the presence of adequate tanker and/or hand crews on the ground to immediately consolidate the impact of aerial delivered water or foam"* (Roche report page 47).

(g) **Resources to patrol Lowells Trail** (paragraph 494)

It is not correct that we adduce no evidence as to what resources would have been required to patrol and maintain McIntyre's and Lowells Trail. At paragraph 427 of our submissions, we specifically acknowledge that Mr Cheney agreed that he did not know whether there were sufficient resources to patrol the Lowells Trail if that had been used as the western containment line. However, his evidence was that once the lower part had been contained, a light unit could work along there and keep pace with the fire and watch for any spots or rolling debris coming across the road.

(h) **Depth of burning out** (paragraph 517)

The suggestion in the NSW Submissions that there is some uncertainty about the meaning of the word "depth" in the context of a burning out or back burning operation, is unwarranted. The NSW Submissions themselves use the same expression in the same context (see paragraphs 571 and 599).

(i) **Risk to firefighters** (paragraph 539)

It misconstrues our Submission to suggest that we are critical of Mr Arthur for having concerns for the safety of firefighters under his command. Our focus in

this part of our Submission was on Mr Arthur's view that no burning out could commence on *any* part of the Powerlines Trail until *all* containment lines were complete. Mr Arthur was right to also be concerned that his firefighters have support from adequate resources, including aircraft. However, the fact remains that burning out operations commenced *before* control lines were complete. Accordingly, it is open to Your Honour to conclude that Mr Arthur's initial safety concerns in relation to this issue were able to be sufficiently ameliorated to provide a safe working environment.

(j) **Aerial incendiaries** (paragraph 555ff)

It is not clear to us why our Submissions on this topic were twice described in the NSW Submissions as "extravagant". We reject the description. However, on reflection in the light of the NSW Submissions, we accept that the passage in the section 44 report on which we rely (referred to at paragraphs 575 and 576 of the NSW Submissions) is ambiguous. In particular, we accept the criticism in paragraph 578 of the NSW Submissions and that, in the absence of evidence from Scott Seymour or Matt Dando, there is insufficient evidence for Your Honour to conclude that the flame heights and spotting referred to in the section 44 report were ignited by the aerial incendiary ignitions.

Having regard to our earlier concession concerning the availability of resources generally (including the availability of aerial incendiaries before 16 January) it is unnecessary to debate the implications of the need for evidence from Messrs Seymour or Dando on any findings Your Honour might otherwise have made.

We had not understood Mr Cheney to be suggesting in his report or his evidence that the aerial incendiaries be deployed at night. Although his use of the expression "late evening" raises some doubt, we approached his evidence and our submission on the basis that the deployment would be "*on the afternoon of 14, 15 or possibly even as late as 16 January*" (paragraph 1195), as the fire behaviour was decreasing, but while there was still sufficient daylight for the safe use of aircraft. His reference to "overnight" was to the fires linking up overnight, having been commenced by aerial ignition in the evening.

(k) **Proposed findings** (paragraph 637)

As discussed above, in our submission, it remains open to Your Honour to make the finding on cause and origin in paragraph 265(a) of our written submissions and, in the circumstances, Your Honour should not make the finding in substitution for that finding as suggested in paragraph 637 of the NSW Submissions. Similarly, while we would agree that Your Honour might consider making a finding in the terms of the first paragraph under the heading “*NSW Proposed Further Findings*” in the NSW Submissions as part of your findings on the circumstances of the McIntyre’s Hut fire, in our submission, the remaining findings suggested under that heading are neither necessary nor appropriate.

24 July 2007

**Lex Lasry QC & Ted Woodward**

**Counsel Assisting**