

## **ACT FIRES JANUARY 2003**

### **SUBMISSIONS ON BEHALF OF TONY GRAHAM**

#### **1. INTRODUCTION**

The submissions made on behalf of the CFA in the Linton bushfire inquiry opened with the following passage. The Court will no doubt be aware that Mr Roche was the primary witness of the CFA in that inquiry; Mr Woodward was his junior counsel.

In all investigations, including coronial inquiries, it is standard practice to acknowledge that those conducting the investigation should avoid relying on the wisdom of hindsight. Equally, time and again courts and enquiries, having articulated this principle, then lose sight of it when they embark on an investigation as to what has happened. In the Linton inquest it is critical that those assessing the conduct and systems in operation at Linton should not be overcome by the wisdom of hindsight. It is all too easy to judge conduct, decisions and judgments by the result. Such an approach is not only unfair. It is also deceptive and produces an inaccurate picture of what actually occurred. If we rely too much on the wisdom of hindsight, we create a false picture of why things did or did not occur, and incorrect remedies can be prescribed for real problems.

“An unfair judgment produced by the ‘wisdom’ of hindsight”: it would be hard to arrive at a more accurate description of the submissions of counsel assisting in the present inquest. Despite the fine sentiments in the passage above, it would seem that experience has not, after all, been the great teacher.

#### **2. SUBMISSIONS OF THE AUSTRALIAN CAPITAL TERRITORY ADOPTED**

We adopt the submissions filed on behalf of the A.C.T. Given the thorough nature of those submissions, we have only few additional matters to address.

We pause to add that, in many respects, the analysis of Counsel Assisting in their submissions, and the evidence of the experts retained to assist the Court, in particular, Mr Roche, have been thoroughly and convincingly undermined by the submissions of a number of the parties in the inquest. It is unnecessary to add our voice to that chorus of critical analysis, save to express our agreement with those submissions.

### **3. SHOULD MR GRAHAM HAVE BEEN REPLACED AS ESB INCIDENT CONTROLLER?**

Counsel Assisting suggest that Mr Graham should not have been permitted to act in the role of the Incident Controller at ESB during the January 2003 fires. That role, it is suggested, should have gone to someone of greater fire-fighting experience (Submissions of Counsel Assisting, paragraphs 1120-1121).

### **4. WHY AND WHEN SHOULD MR GRAHAM HAVE BEEN REPLACED?**

By all accounts, prior to January 2003, Mr Graham had performed his role with skill and dedication. As a member of a team, he brought organisational and management ability to his role, relying, as members of a team do, on others for their respective strengths. The manner in which the ESB was designed to function, and did in fact function, was for the ESB as a whole to act synergistically, each member bringing to the team his own particular skills.

During the January 2003 bushfires, Mr Graham acted tirelessly. His few absences from Curtin to get sleep were brief. He made tens of thousands of decisions over the duration of the fires, all of which, save a handful, are without criticism. It has not been suggested that he was anything less than a very competent, committed, and dedicated officer who performed his task well, exhibiting grace under pressure, and serving the ACT in a most commendable fashion.

All of this, however, is beside the point – Counsel Assisting say that he should not have been there at all from 8 January 2003 onwards, that when Mr Bartlett offered his services that afternoon, he (or someone similarly-skilled in fire fighting) should have replaced Mr Graham. What is the basis of that suggestion?

It cannot be, and is not said to be, something which happened before 8 January 2003. It cannot be, and is not said to be, something which happened after the opportunity to appoint Mr Bartlett in Mr Graham's stead went by.

For the suggestion to make any sense at all, it must be based on some recognition which, it is said, Mr Lucas-Smith and (possibly) Mr Graham should have had in the minutes after the lightning strikes in the afternoon of 8 January 2003 which ignited the fires.

That is patently absurd. When analysed logically, the suggestion as to Mr Graham's replacement is nonsense.

The approach of Counsel Assisting is summarised in paragraph 1121 of their submissions as follows:

“We would not dispute that [Mr Graham] was an effective *controller of resources*, as he was described by Mr Lucas-Smith, and a competent and dedicated administrator in his day to day role at ESB. But the role he was

fulfilling on the evening of 8 January went significantly beyond Mr Graham's day to day role. It required at least a strong working knowledge of fire behaviour and fire fighting suppression and tactics, the stronger the better."

Where is the evidence for this assertion? It flies in the face of the evidence (and common-sense). At a fire, an experienced firefighter is appointed as Incident Controller ("IC"); the larger and more hazardous the fire, the greater the experience the IC should possess. It is that person who is the eyes and ears of ESB at the fire ground, and that person's judgment upon which ESB must rely. An Operations Officer's experience as a fire fighter, while most desirable, only approaches the quality of essential in circumstances where a judgment made by an IC on the fire ground needs to be overruled.

What is essential is that the Operations Officer possesses significant management skill and judgment. Those are the characteristics Mr Graham demonstrated in the innumerable decisions made by him in January 2003.

Counsel Assisting have a problem: they want to criticise Mr Graham's failure to overrule Ms Arman's decision, but have to accept that it would be wrong for an officer who has less fire fighting experience than the IC, and is not on the fire ground, to overrule a decision, based on safety issues, made by that IC. In those circumstances, the only way they can achieve their desire to criticize, where possible, is to suggest that Mr Graham should not have been the ESB Incident Controller in the first place.

That suggestion is irretrievably tainted, however, by hindsight. In the final analysis, the submission of Counsel Assisting is that the one decision of any causative relevance was that to withdraw from Bendora on 8 January 2003. Mr Graham should, it is said, have interacted with Ms Arman in such a way so as to reverse her decision to withdraw.

In our submission, this fact is the only real reason why it has been suggested that Mr Graham should have been replaced. Does Counsel Assisting suggest that Mr Lucas-Smith should have predicted this situation, and Mr Graham's failure to act in the way they suggest he should have acted? If not, what is said to be the trigger for replacing Mr Graham?

## **5. RESOURCES ON 9 JANUARY 2003 AT BENDORA**

The resources organised for Bendora by Mr Graham have been subjected to criticism by Counsel Assisting (paragraph 1162 ff.). It could be that their approach is calculated to avoid a very real issue, namely, why Mr Roche was misled by the selective collation of information by Counsel Assisting and their team into believing that the resources organised by Mr Graham were fewer than they, in fact, were. Although the recording of the conversation between Mr Graham and Mr Hayes which took place on the evening of 8 January 2003 ([ESB.DPP.0014.0079]) was available to Counsel Assisting and their team, that conversation was one of very few which were not transcribed and not made part of the coroner's brief. It was only brought to light through other counsel's endeavours.

In fact, as that conversation reveals, the resources available to Mr Hayes on 9 January 2003 were considerably greater than that which was suggested by the material selected for inclusion in the coroner's brief. Mr Roche was forced to concede that it would have been most helpful had he been provided with that information. No explanation has been offered as to why that crucial conversation was not transcribed and not made part of the coroner's brief.

It would appear that not all of the resources organised by Mr Graham on the evening of 8 January 2003, in fact, arrived on the following day. Mr Graham cannot be criticised for that, as that was never communicated to him. It was that under-resourcing of Bendora, however, ignorant of what had, in fact, been intended by way of resources on that day, regarding which Messrs Cheney and Roche were critical.

**S.W.GIBB S.C.**

**EDSON PIKE**

Counsel for Tony Graham

**30 June 2006**