ACT FIRES JANUARY 2003: INQUESTS & INQUIRY

FURTHER SUBMISSIONS ON BEHALF OF MR McRAE

1. Preliminary

1. When we made oral submissions on behalf of Mr McRae on 17 July 2006, we reserved our right to respond further[1] in the event that Counsel Assisting, contrary to our submission, was permitted to make a reply to our submissions. Further, we note that on 18 July 2006, Mr Whybrow sought and was granted the opportunity to put in a written response to Counsel Assisting's reply[2] on behalf of his clients. Accordingly, we now seek leave to exercise the same opportunity to make the following brief response to Counsel Assisting's reply.

2. Response

2. We make the following points by way of response:

(a) Having checked the letter mentioned by Counsel Assisting, we accept that we were in error in our belief that the document referred to in paragraph 106 of our written submissions was formally before you[3]. We now accept that it is not. However, we do not accept that it is for Counsel Assisting, in an inquiry such as this, to decide what material your Honour should

[1] Transcript T345/15.
[2] T391/18-392/7.
[3] T377/45-378/33.

receive as evidence, and they do not purport to do so. The material in that document is both relevant and qualifies as expert opinion to which your Honour may have regard. It became available well after the taking of oral evidence in the inquiry had been concluded. We submit that your Honour should formally receive it and give it such weight as it deserves. The significance which it bears, and what your Honour may make of it, has been addressed in paragraphs 105 to 108 of our written submissions, and in the Attachment itself. If your Honour will not receive it, then we ask that your Honour publish reasons for not doing so, including why the court should not have expert evidence before it which is capable of demonstrating either that weather predicting capabilities lacked the capacity to, or else, in any case, did not predict, a natural phenomenon which appears to have had a strong effect in intensifying fire behaviour on 18 January 2003.

(b) We dispute the correctness of Counsel Assisting's submissions with regard to *Mahon v Air New Zealand* [1984] AC 808, *Browne v Dunn* (1893) 6 R 67, and s 55 of the *Coroners Act 1997* (ACT)[4]. In proceedings of an inquisitorial nature, an overarching obligation of fairness applies. That obligation cannot properly be discharged merely because a coroner may, at some later time, become obliged to comply with s 55 if, indeed, it ever becomes relevant to do so.

(c) Counsel Assisting continue to misunderstand the real point about warnings. They say: *"what is the disadvantage of telling the public*

[4] T379/19-43.

that there is a possibility of an impact?"[5] This formulation assumes that there is some utility in telling members of the public something of which they already had some awareness, and that the furnishing of information of such generality would have enabled them to act so as to prevent or reduce the effects when and if such a possibility eventuated. There is no evidence that such a warning would demonstrably have had any such effect. Whether or not it be conceded that some broader general warning *could* have been given[6], there is no evidence that it would have made any difference to the outcome. And Counsel Assisting still will not address the fact that the giving of warnings, as distinct from the making of predictions of fire behaviour, were not part of Mr McRae's duties.

Chambers

24 July 2006

S W GIBB sc

G P CRADDOCK

Counsel for Mr McRae

[5] For example, T383/42-45 and T384/45-385/12.
[6] T386/11.