

ROCHE AS AN EXPERT WITNESS

427. The common law principles concerning the admissibility of expert evidence have been adverted to in a number of recent cases. A convenient starting point is the judgment of Heydon JA in Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705. At paragraph [79], His Honour stated:

In National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer") [1993] 2 Lloyd's Rep 68 at 81-82 Cresswell J set out a list of duties and responsibilities of expert witnesses in civil cases as follows:

- "1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ...*
- 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise ... An expert witness in the High Court should never assume the role of an advocate.*
- 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion*
- 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
- 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one ...*
In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report ...
- 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.*
- 7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports ..."*

While some of these matters have an ethical dimension, taken together they point to the need for the trier of fact to be fully informed of the reasoning process deployed in arriving at the expert's opinions.

... This implies that not only must the appropriate information be supplied, but that the expert must reveal the whole of the manner in which it was dealt with in arriving at the formation of the expert's conclusions.

428. The importance of the qualities of objectivity and lack of bias in an expert were emphasized by Pagone J in Fagenblat v Feingold Partners Pty Ltd [2001] VSC 454. At paragraph [7] and following, His Honour said:

[7]... An expert witness has a special and important role in judicial proceedings to assist the Court by providing objective and unbiased opinions about matters that bear upon the determination which the Court is called upon to make. ... The possibility of a witness having a bias in favour of a party (directly or indirectly) is undoubtedly a matter to take into account by a court when deciding what weight to give to the expert's evidence, but it is not a ground for the Court rejecting evidence that may be of assistance to the Court in reaching the correct result. ... The bias, actual, potential or perceived, of any witness is undoubtedly a factor which the Court must take into account when deciding the issues between the parties, but the hearing of evidence from such a witness does not mean that the Court will not be doing justice to the parties impartially. ...

[8]... The possibility that a witness of fact or expert opinion may be biased does not infect the impartiality of the Court. The situation might be otherwise where the expert is appointed by the Court or where the role or function of the expert is more than that of a giver of evidence (whether that evidence be in the form of an opinion, as librarian of a body of knowledge, or otherwise). In such a case the role or function of the expert may perhaps come to be incorporated into that of the decision maker. ...

[9] Experts do have duties to the Court to be independent. Those duties have some similarity to those owed by counsel conducting a case. ... The product of the expert should itself be "the independent product of the expert, uninfluenced as to form or content by the exigencies of the litigation". The reason for these duties, however, stem from the need to ensure that the evidence which is before the Court is useful in the sense of being probative and reliable. The fact of partiality goes to those issues rather than to admissibility. ... It is for the Court to assess the value of the evidence. It is easy to conceive of instances of expert evidence where partiality could have no conceivable impact upon the reliability of the expert evidence tendered. [emphasis added]

429. In R v Doogan the Full Court recognised the undesirability of an expert being adversarial, stating at paragraph [117]:

... Even in the absence of any interference by counsel in the preparation of reports, little weight may be attached to the evidence of an expert who has adopted an adversarial stance, if it is admitted at all: see Hardy v Your Tabs Pty Ltd (in liq) [2000] NSWCA 150 at [133] and Fox v Percy (2003) 214 CLR 118 at 167-168.

430. In Hardy v Your Tabs Pty Ltd (in liq) [2000] NSWCA 150 Heydon JA stated at paragraphs [133] and [134]:

133 ... The trial judge rejected it (the expert evidence), after detailed argument and in quite extensive reasons for judgment, because it was "in substance, an advocate's final address based on materials which had been put before him." The statement "is simply being used to argue the defendants' case on causation" ... He applied Clark v Ryan (1960) 103 CLR 486.

134 ... But ... (the expert's) statement was not admissible under that Act (Evidence Act 1995 (NSW)). The trial judge's characterisation of it was correct: it was not really expert opinion evidence, but advocacy.

431. In Fox v Percy (2003) 214 CLR 118 at 167-168, Callinan J stated:

... the adversarial stance taken by Mr Tindall ... is very much to be regretted. It also might have been basis enough for the rejection of his evidence. What was said in the tenth edition of Phipson on Evidence and earlier editions before enactment of the Civil Evidence Act 1972 (UK), and notwithstanding the enactment of the Evidence Act 1995 (NSW) remains relevant [166]:

"Value of Expert Evidence. The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of pre-conceived theories; moreover, support or opposition to given hypotheses can generally be multiplied at will [167]"

432. In Footy v Horewood (No.2) [2004] VSC 222, Hansen J at paragraphs [16] and [18] made the following observations -

[16] ... It may not be unduly cynical to observe that the evidence of the experts followed the pattern, so often experienced, of favouring the party on behalf of whom the expert was engaged. ...

[18] ... (The expert's) evidence suffered from a tendency to be argumentative, not content to simply and responsively answer the question and say no more, but to argue the matter, and at times to provide commentary. ... but ... (the expert) clearly saw his role as being to argue a case for Footy. In my view he took every point he considered possible in order to achieve the best result for Footy. ...

433. Finally, in the criminal context, the Courts have counselled against experts speculating about alternative factual possibilities where the evidence gives no basis

for preferring one possibility over another – see Jacobs J in *Straker v The Queen* (1977) 15 ALR 103 at 114; and Gleeson CJ in *HG v The Queen* (1999) 197 CLR 414 at 429 at paragraphs [41] and [42].

434. As Heydon JA stated in *Makita*, the common law rules have been influential in causing rules of court concerning expert evidence to be promulgated. In NSW, the *Uniform Civil Procedure Rules (NSW)*. Pt 31 r.17, 18 and 23 require as a condition of admissibility of their reports, that experts be provided with a copy of the Code of Conduct in Schedule 7 and require them to acknowledge to be bound by the Code.

435. Under the rubric “*General Duty to the Court*”, r.2 of the Code relevantly provides:

(1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert’s area of expertise.

(2) An expert witness’s paramount duty is to the court and not to the person retaining the expert.

(3) An expert witness is not an advocate for a party.

436. Rule 3 which relates to the form of expert reports, imposes duties on experts to specify any qualification, the absence of which they believe may lead the report to be incomplete or inaccurate – r.3(2); and to state that an opinion is not a concluded opinion by reason of insufficient research or insufficient data or for any other reasons – r.3(3).

437. Section 47(1) of the Act provides that a coroner is not bound to observe the rules of procedure and evidence applicable to proceedings before a court of law. The common law rules are rules of evidence. However, those rules represent the distilled wisdom and experience of courts and provide a valuable tool by which to assess the reliability of expert evidence in all proceedings. Accordingly the ACI submits that in the proper exercise of the fact finding function in coronial proceedings, a coroner will be guided by a reference to those rules.

438. When measured by these principles, the ACT submits that Roche's evidence was not "... *the independent product of the expert uninfluenced as to form or content by the exigencies of litigation*". Likewise, "*it was not really expert opinion evidence, but advocacy*"; and parts of it were based on inaccurate information.

439. At pp.171 and following of his report, Roche proffers expert opinion on the issue of community awareness, the warnings given to the Canberra community and their adequacy. He concluded at p.174 that the steps taken were "*superficial and largely inadequate*". That conclusion in large measure appears to be based upon Roche's views on the perception of the community to warnings at p.175.

440. Roche's experience and qualifications are set out at pp.6-12 of the report. Save for unspecified "*media management and public communication*" courses, that Curriculum Vitae does not reveal any skill, training or expertise in psychology or any area of learning associated with the effectiveness of communications and warnings to members of a community. Absent such skill, training or expertise, Roche's opinions on this subject matter cannot have expert status. Accordingly, the ACT submits that the Coroner should not make any findings relating to the adequacy of community education and warnings based on Roche's evidence.

441. There is reasonable cause to have severe reservations about Roche's evidence in its entirety. Far from taking the position of a detached and objective expert, he:

- showed himself to be partisan;
- arrived at opinions adverse to certain parties without any evidentiary foundation; and
- proffered criticisms of alleged omissions without indicating what precisely could have been done and in some cases, he erred in the evidence which was given.

442. At T7515/6, Roche was asked about an email of 23 November 2003 sent by him to the police. The subject was *"Suggested interview questions for Andrew Winter"*. It reads as follows:

Good morning, Therese. Please find attached some suggestions for the interview planned with Andrew Winter. In reading his statement, I am of the view that he probably knew what should have been done and how to do it with some semblance of order and structure, but obviously the culture of 'ESB runs the show' prevailed. ...

However, in the future and in the witness box, he could be a good ally for us!

Roche conceded that he *"was preparing lists of questions that the interviewing police might consider putting to witnesses."* He did so on the basis that he had formed a view by that time that *"there were deficiencies in the command and control arrangements during those fires and I had shared that view with officers of the police"*(T7517).

443. The effect of this evidence is that having formed a preliminary view of certain deficiencies, Roche prepared questions that he expected would be put to a witness to elicit evidence supportive of that view. This represents a complete abdication of the objective standards expected of expert witnesses.

444. Roche was asked to explain the *"good ally"* comment in his e-mail. The only explanation he offered was that it was *"probably a poor choice of words"* but he meant to say that he *"wanted this interview conducted on the basis of information that could be obtained which would assist me in determining whether my line of understanding of deficient command and control was in fact correct"*.

445. At T7518, Roche was pressed about his use of the word *"ally"* suggesting it connoted *"the forming of opposing sides"*, and he responded:

"Oh, look, I'm not a dictionary. I'm not prepared to debate the application of words. I have indicated to you it was probably a poor choice of words. ... My explanation ... is that I believed Mr Winter in his statement, and the questions which I was asking the police to assist me with, were that Mr Winter's information may have assisted me in arriving or firming in my conclusion that there were problems with command and control within ESB ..."

446. Furthermore at T7519, it was put to Roche that he was

“taking sides. ... (he) the police on one side and the ESB on the other”.

a proposition he denied. Roche offered no meaningful explanation for his use of the words in question, preferring instead to avoid the issue by not wishing to “*debate the application of words*”. Notwithstanding his denial, the words in the e-mail are clear and their meaning free of ambiguity he was clearly taking sides and more importantly, he was seeking to obtain evidence of a certain kind to support the viewpoint of his ‘side’.

447. The Winter incident was not an isolated one. At T7672/3, Roche stated that he was appointed to assist the Coroner in August 2003. Before the end of September 2003, he had received some statements including the Cheney report. He wrote a minute to Woodward on 18 September 2003 regarding the Bureau of Meteorology submission (exhibit 105). Based on these materials, Roche formed the view that fires could have been held after an aggressive and concentrated fire attack immediately following ignition. This was an opinion formed before any evidence had been given and indicated a propensity of Roche to arrive at pre-emptive conclusions on incomplete and scant information and to then pursue evidence to support those conclusions.

448. As for the last mentioned matter, Roche was asked:

Q: Did you at any time ... attempt to secure evidence to bring about a particular outcome in this inquest?

A: No

(T7674/5)

449. His attention was then drawn to his minute to Woodward dated 15 September 2003 (Exhibit 109), recommending

... the submission of appropriate evidence from a limited number of residents that could subsequently support a recommendation ...

consistent with the AFAC evacuation policy and the following question was put:

Q: That is a circumstance ... in which you endeavoured to persuade people to gather a particular type of evidence to bring about a particular consequence in this inquiry ...?

A: Absolutely

450. Roche was questioned about his suggestion that evidence supporting appropriate legislation, to make land managers responsible for limiting the occurrence and spread of fires in built-up areas, should be submitted to the Coroner. It was put to Roche that this was another example where he sought to ensure evidence was brought to the Inquiry which “*supports a particular predetermined view of your own*” and he said:

I make no apology at all for proposing the adoption by the coroner ... (of such legislation and practices) ... (T7676/77)

451. Roche’s views relating to the appropriate means to acquire information from witnesses is demonstrated by the evidence he gave at T8071-3:

Q By September, October and November 2003, you had held firm views about what had occurred with respect to those fires, didn't you?

A. I held views, yes. Not set in concrete.

Q. When you set about assisting the AFP with their inquiries - didn't you?

A. Yes. At the request of the AFP.

A. I didn't set about doing that at all. I was asked by the AFP - I was forwarded statements and I was asked by the AFP to prepare questions, which I did.

Q And you provided them with large numbers of very detailed questions to put to those witnesses to elicit evidence, didn't you?

A. I put to them a number of questions. I wouldn't say that they were, in all cases, a large number. But certainly there were a number of questions that I put - that I asked for them to be put, in the knowledge that it was up to them, ... as to whether they put them or not. It was entirely for them to determine. In a number of cases they didn't use them.

Q. And those questions went into considerable detail in order to obtain the kind of information you wanted to obtain, didn't they?

A. To obtain information, yes.

Q. Not just obtain information, obtain the information that you wanted to obtain?

A. In some cases that's correct.

Q. In many cases?

A. That's correct.

452. This evidence indicates that Roche had firm views – even if not immutable – and he assisted in the formulation of questions to be put to witnesses to obtain information that he wanted to obtain to support the view. It is of concern that Roche conceded that in many cases, the questions were directed to obtaining information that he wanted to obtain.

453. The following evidence was given by him:

Q. Let me give you some examples of the questions you put to Mr Hayes:

"Was he surprised that there were no resources on the fire overnight?"

Would you agree, ... that that question evinces a view that you think that there were inadequate resources on that fire overnight?

A. You might look at it that way.

Q. Your next question:

"In his opinion, if the fire had been resourced at night would this have contributed to early containment of the fire?"

That plainly evinces your view that that should have occurred and that you wanted to obtain information to support that view that you held; would you agree?

A. I don't agree. Quite a straightforward question to say if you did something, what would be the outcome at that particular time? Quite a straightforward question, I would have thought. ...I could have equally asked if you didn't put anything on it, what do you think the outcome would have been?

Q. You didn't, did you?

A. I didn't.

Q. You asked the question to elicit the answer you wanted to get.

A. I don't believe that. I don't think that's the case.

(18073/4)

454. Both questions, the subject of this evidence were leading questions, the characteristic of which was to suggest an answer by the questioner, rather than being open questions. It is a forensic technique used by cross-examiners in an attempt to exact concessions from reluctant witnesses. More importantly, it indicates to the person who is asked the questions, what the view of the questioner is and what the expected or desired answer is. The vice therefore is twofold: firstly that an expert is complicit in obtaining evidence of a given kind and secondly, that the actual questioning technique is calculated to produce desired answers. Neither of these vices

is consistent with the objective discharge of the duties of an expert witness and is indicative of a partisan position.

455. Similar observations apply to the following evidence given by Roche at T8075/6 where the suggestion to the police officers asking the questions, was not even in the form of a question but in the form of putting a proposition:

Q. Let me read the next question you asked to be put:

"Put it to him that if: 'if the fire escaped the containment lines overnight it was possible, if not highly probable, that a fallback position would have to be adopted the next day adding to the size of the fire and length of containment line unnecessarily.'"

A. Straightforward question.

Q. So you think it is appropriate to direct the AFP or to request the AFP to put it to him that, open quotes, and then put that to him, do you think that is the appropriate course to take, is it?

A. If they chose to take that course, yes. That's the information I wanted, was if that occurred, what would occur?

Q. I put it to you, Mr Roche, that you were asking the police to put to Mr Hayes that very question, weren't you?

A. Yes.

Q. The question itself was designed to establish that fact, wasn't it?

A. Designed to establish the information on what would have occurred had that action have occurred or not occurred.

Q. That is not seeking his information; that is seeking his adoption that that was true.

A. I don't agree.

Q. Your next question:

"Put it to him isn't a key function of a planning unit to obtain intelligence from field commanders (himself) during a shift to enable them to develop a plan and appropriate resourcing for the next shift, ie in this case a night shift."

A. Yes.

Q. That is designed to ask him to acknowledge that that is true, isn't it?

A. To confirm that, yes.

Q. That's the view you held?

A. Well, it's a fact.

456. Roche was further pressed about whether he held that view concerning the function of the planning unit – an issue which was relevant and uncontroversial. Instead of a straight forward reply, he declined to answer the question and became argumentative:

Q. ... I am asking whether or not that is your view of the role, the function of the planning unit?

A. I agree that the role of the planning – that that is the role of the planning unit, as set out in the Australasian Fire Authorities Council training material.

Q. Why cavil with the question?

A. Because I don't like your line of questioning, that's why.

Q. I'm sorry if you don't like the line of questioning. I am simply asking you, if you hold a view that that represents a key function of the planning unit, why do you choose to deny it?

A. I guess I am mistrustful of some people, Mr McCarthy.

(T8077)

457. The effect of Roche's evidence at T8079/80 was that it was a matter for his judgment as to when leading questions should be asked to elicit information from witnesses:

Q. I am simply suggesting to you that if you want to find out Mr Hayes' view ... the preferable course, from an expert's point of view, is to ask him what he thinks, not to put a proposition to him and hope that he agrees with it.

A. That's one option.

...

Q. Do you agree it is the preferable course?

A. Not necessarily, no, I don't.

Q. In what situation would it not be the preferable course?

A. I don't know. You are being hypothetical and I can't answer that.

Q. ... My question is in what circumstances do you think it is appropriate to put a question that suggests the answer?

A. Circumstances where you want an answer, where you believe there is an answer. I mean, there are different ways of questioning different people.

...

Q. You tell me in what situation is it preferable to put a question that is designed to elicit the answer?

A. In the circumstances where I put it.

458. Roche agreed that the questions he formulated for the witness Blinksell were also of a leading type:

Q: ... the questions that followed were designed to obtain evidence that you thought would be valuable?

A: That could be correct

(T8082)

459. It is submitted that if fresh facts arise relating to an issue on which an expert has formed an opinion, his or her role is to give proper consideration to those facts and if they are reliable, make any necessary changes to the earlier opinion. Roche

took a different view - at T 7856-7, his attention was drawn to an analysis of a survey of Canberra residents whose houses had been burnt, relating to the issue of community awareness. Roche was unaware that 86% of those surveyed knew of the preparations to take and they took some preparations.

460. Roche gave no real consideration to how those facts affected the opinion in his report. His response was twofold - to question the reliability of the results based on "*what questions were asked*" even though he had no knowledge of what those questions were and secondly to adopt the fallacious process of reasoning that lack of community awareness should be inferred from the extent of the houses lost. Roche disagreed that it was a good indication of community awareness and:

Proof is in the pudding

The outcome was that 500 houses were lost

(T7858)

Opinions based on absence of evidence

461. At T8014, Roche was critical of the lack of pre-2002/3 fire season preparation in relation to aircraft, the substance of his complaint being that there should have been an increased access to aircraft by the ESB. He formed that view even though he was unaware of "*the number and the specifics,*" of available aircraft and without any knowledge of the information in Ingram's second statement. At T8016, he rejected the proposition that it was impossible to criticise the ACT and to suggest they should have had increased access to aircraft when he did not know what they had.

462. Roche made the same criticism about the unavailability of heavy plant, in circumstances where he did not know whether the nine pieces of heavy equipment listed in Annexure D13 of Ingram's statement, were available for deployment in January 2003 or not (T8016-18).

463. At T7557/8, Roche was questioned about the adverse views he had formed of the senior officers in the ACT Fire Brigade, based on the assumption that they had

prior knowledge of faults in fire brigade pumpers which led them to being burnt over on 18 January. Those assumptions were not based on evidence from the senior officers but *“on the evidence that formed part of the brief”*. Roche disagreed with the suggestion that it was not his place to speak directly to persons who might know. He took this position even though he *“raised a number of questions on a small number of witnesses that should be asked where I was asked to provide that information”*, e.g the Winter information.

464. Not only did he not include in his report, the qualification that there was no evidence from the senior officers on the subject but Roche declined to pursue information which might have explained a shortcoming. This is to be contrasted with his apparent enthusiasm to pursue inculpatory information which sought to attribute blame for deficiencies in command and control.

465. At T7573/4, Roche was referred to at p.39 of his report, where he made criticisms of what should have been done in preparation for the fire season. The following exchange took place:

Q ... You are asserting there that these are things that should have been done in the lead-up to the January 18 fires?

A. That's my view - sorry, leading up to, in some cases, the summer season.

Q Are you also asserting that none of these matters were attended to?

A. From the evidence available to me there was no indication that they were.

Q This is a fairly significant criticism you were making in making this list, isn't it, if you are suggesting none of this was done?

A. That's correct.

Q Did you make any specific inquiries of anybody in authority who might know whether these things were done?

A. No, I did not, for the reasons I have previously indicated.

The effect of this evidence is that once again Roche formed views critical of various persons on the assumption that things had not been done, based on the absence of evidence and he failed to have inquiries made from those who would have known the true position.

466. The fact that Roche in his role as an expert thought it appropriate to conduct himself in this way is disturbing enough, but evidence he gave is more troubling, suggesting as it does that he did so despite the fact he knew it was misleading:

Q. What I want to say to you by way of a proposition to see if you agree or disagree is this: The only option, and a responsible independent expert has, in such a circumstance, is to fairly and clearly state, "I have seen no evidence to show that this is so", because to state something is not so, on the basis of a lack of evidence, and then failing to disclose in the report that the basis of saying that is because you have seen no evidence to suggest it, is misleading; do you agree with that?

A. Yes, sir.

(T8124)

467. It is submitted that somewhat like the role of a court, where an expert proposes to make adverse judgments about the conduct of persons, there is an obligation to ensure that the facts upon which such judgment is based, are correct. Unfortunately, the evidence demonstrated that Roche was prepared to make highly critical comments based upon a misconstruction of the evidence before the Inquiry. At T8033/4, Roche was directed to p.53 of his report, where he asserted that the burn over of personnel (he later identified as Cooper, McNamara and others) was indicative of inadequate training, situation analysis and poor command and tantamount to negligence. In order to make good this claim, it was necessary to show that each of these persons was on duty at the time of the burn-over – because if it were not so, issues of training, command and situation analysis were irrelevant.

468. In relation to the experience of McNamara being burnt over on 18 January, Roche conceded that he was attempting to save his house on his own initiative:

Q. Mr McNamara went to his house in an endeavour, with a number of people to help him, to save his house; agreed?

A. As I recall it, yes.

Q. He certainly was doing that on his own initiative, wasn't he?

A. Oh, well, I don't know. I can only assume that, yes.

469. At T 8034/5, Roche was compelled to withdraw the example of McNamara as indicative of the suggested failings:

Q. As a result, his situation did not arise from command, poor or otherwise?

A. Yes.

...
Q. So where you say you give him as an example of a burn over that occurred by reason of inadequate training, that's not right, is it?

A. No.

Q. Nor is it an example of a failure to make a good situational analysis, because he analysed exactly the right thing to do?

A. Correct.

Q. So Mr McNamara is not an example of that at all, is he?

A. Correct.

470. At T8037, similar propositions were put to Roche in relation to the events involving Neil Cooper on 18 January. Notwithstanding Cooper's evidence that he was attempting to save a person's property of his own volition, Roche did not agree stating:

...someone must have told him to go to work and someone must have told him to report and do something. He didn't just get out of bed in the morning ... and say I'll go fight a fire today, did he? ...

471. At T8039, Roche ultimately accepted that by reason of a breakdown in communications, Cooper was not under command and control; at least "*not directly ...*" so (T8040).

472. In the light of these concessions, an objective expert might well have reconsidered the adverse opinion he had originally formed and perhaps varied it. It appears that Roche gave the matter no such reconsideration and the regrettable conclusion is that far from being detached and objective, he was in inextricably wedded to the conclusion in his report.

473. At T7836/7, Roche gave evidence to the effect that he understood that the Baldy Range fire was controllable on 8 January. He appeared to arrive at that conclusion in reliance on the evidence and statement of Crawford, on the basis that:

I seem to remember that there was nothing that indicated that it wasn't controllable.

In other words, the conclusion was based on what was not said rather than what in fact was stated. This approach indicates such a lack of rigour, that opinions based on it, are unreliable.

Criticisms without suggesting what was achievable or feasible

474. On a number of occasions, Roche was critical of things omitted to be done by the ESB and others and when pressed, would not be drawn on what he suggested should have happened. Such a proposition was put to him in relation to the NSW effort:

Q: How can you criticise someone for not working out what was needed and therefore having deployed not enough if you yourself have not worked out what was enough?

A: The outcome speaks for itself.

(T7877)

Roche's response or lack thereof, does not engender confidence that his views are well considered.

475. As the courts have recognised, the evidence of experts is in a special category, it being of a kind to which the judges of fact generally accord great weight. It is for this reason, in part, that rules have developed to allow a proper and rigorous testing of such expert opinions. Such testing invariably focuses upon the facts upon which the opinion is based and upon an assessment of how such opinion is arrived at. The ACI submits that where as in this case, an expert merely provides negative views, without deigning to offer concrete views as to how omissions could have been remedied, any such negative views should be treated with considerable caution.

476. Roche was equally non-committal about the asserted failure to secure aircraft when he said:

... in my view, arrangements should have been made to secure or to ascertain ... the availability of additional aircraft. Now what number to me is irrelevant at the time. (T8015)

Any assessment as to what different result might have ensued had what Roche suggested been done, is left unanswered and accordingly, it appears to be criticism merely for the sake of it, rather than for any constructive purpose.

477. Roche was critical of the warnings given by the ESB during the period up to 18 January 2003. At T7549/50, Roche was asked to say what warning he would have given if he was the Incident Controller at 11am on 18 January but stated he was unable to do so. The reason he gave was because he would have given the warning earlier and “*there were too many other variables*”.

478. Much has been made by counsel assisting and Roche about how loss and damage could have been avoided by proper warnings. It is difficult to attribute any weight to the criticisms of an expert when he is unable or unwilling to offer an opinion on a critical matter in the Inquiry, some two years after the event and having had the benefit of the extensive evidence given in this Inquiry.

479. Even when Roche offered suggestions about what might have been done, he did so without regard to what was practically achievable or within the budgetary capacity of the ESB. Without these constraints factored in, any recommendations are of academic value only and any criticisms are of no weight at all. By way of example at T7584-5, Roche was questioned about the suggestion in his report that the Stockyard Spur fire could have been fought by firefighters, rappelling from helicopters to the fire ground. He agreed that training and equipment “*can be expensive*” and conceded that he had no idea of what the training budget of the ACT Bushfire Service was.

480. Furthermore, when Roche identified shortcomings, he made no attempt to ascertain whether steps had been taken to address such shortcomings. At T7615/6, Roche stated that he was unaware that Lucas-Smith had attempted to get increased funding in 2002 for the purpose of acquiring aircraft operations and a community education officer. Even though Roche stated that he would reconsider his criticisms of Lucas-Smith on those matters – the fact that he originally made them without checking the surrounding facts is of concern.

481. It appears many of the adverse findings urged by counsel assisting are based in large measure on the evidence and opinions of Roche. Those opinions were given in relation to the asserted inadequacy of the initial response to the fires; the issue of night-time firefighting; the likelihood that the fires could have been extinguished on

the first night; the timeliness and adequacy of the warnings and the asserted deficiencies in various ESB personnel and others in connection with the initial response and warnings.

482. The ACT accepts that in the context of this Inquiry the evidence of Roche plays a central role and that the rejection of his evidence, or attributing little weight to it, would not be lightly done. The above analysis indicates however that such a result must follow: it shows that Roche was partisan; that he sought to collect evidence by the formulation of leading questions to support his pre-conceived ideas; that he formed opinions based on incorrect evidence and on the absence from the brief of evidence without ensuring that this information was correct; that he failed to add suitable qualifications to his report which showed that this was his approach; and that he made criticisms relating to the inadequacy of what was done without specifying, what should have been done and whether it was achievable.

483. For these reasons, the ACT submits that the evidence of Roche should be given little or no weight and that such evidence forms no sound basis for the serious criticisms which counsel assisting urge the Coroner to make.

WARNINGS

484. During his evidence on 18 February 2004, Lucas-Smith volunteered that “*our media arrangements and our advice to the community was sadly lacking*” (T1048.9). He said “*we didn’t emphasise the warnings adequately enough. ... I thought we had more time to do it*” (T1202.25). As Koperberg stated, communities learn from “*bitter experience*” with respect to bushfires. The introduction in May 2004 of the Emergencies Bill 2004, and the application of lessons learned from the January 2003 fires in future emergencies, will see the ACT community better protected.

485. It is appropriate that the Court examine the question of why more effective warnings were not given to the ACT community in January 2003. It is clear from the evidence of Lucas-Smith, Castle and others that warnings were given to rural communities in the ACT on the evening of 17 January and the morning of 18 January 2003 (T1776, 1845).

486. The ACT accepts that warnings should have been given to the communities on the western edge of Canberra earlier than occurred on 18 January 2003. However, a key factor explaining the absence of earlier warnings was the extraordinary and unexpected nature of the event, including the speed and intensity of the fire that struck Duffy on the afternoon of 18 January 2003. Crawford acknowledged that there is an element of judgment in determining when warnings must be given (T4521.39). Arthur said that it was “*a very fine balance*” as to when you warn people to leave their homes (T4622.24).

487. The ACT submits that it is critical to the coronial process that the events of 18 January 2003 be assessed objectively. The tragedy that overtook many persons, including the firefighters, is incontrovertible. An emotional response to the events, and the recounting of them, would be understandable. However, the community will be best served by a measured and objective examination of what occurred. That task,

undertaken by a judicial officer in a constructive and non-punitive manner, lies at the heart of the coronial function.

488. In moving to examine relevant events on a daily basis from 8 January 2003, it must be kept firmly in mind that any judgments must be made in the light of knowledge then possessed by, or available to, relevant decision makers.

489. The ACT submits that in making any judgments about whether the lack of warnings of serious risk of an impact on the suburbs of Canberra was a serious and deliberate omission by ESB officers, it is proper to have regard to two important matters. The first is what motive, if any, did the senior ESB officials have for such omissions? The second is whether other actions of such officials are consistent with the proposition that the omissions to warn were deliberate. The ACT submits that in order to fairly assess whether these serious allegations are sustainable, these two matters must remain in the forefront of one's thinking. The ACT submits that if these two matters are taken into account, as expanded below, the conclusions urged by counsel assisting cannot be sustained.

490. In relation to the issue of motive, counsel assisting do not suggest any reason why ESB officers might decide to knowingly withhold information and, it is submitted, no motive is suggested by the circumstances. There was no personal or other interest of the ESB officers in question in withholding appropriate warnings.

491. A suggestion was advanced was in some areas that the warnings were withheld so as not to alarm the public. The position urged by counsel assisting in the present case is that from at least 15 January 2003, if certain weather conditions prevailed, and the fires had not been contained, there was a real risk or even an inevitability, that the fires would impact urban Canberra. Further, they assert that the senior ESB officials knew of this eventuality and knew that little could be done in the way of effective suppression steps.

492. There would seem to be no possible benefit or advantage to the ESB officials in withholding warnings in these circumstances. The event will occur; panic is more likely to ensue; presumably loss and damage may result, and the lack of judgment of

the officers making that conscious decision will be readily exposed. It is extremely unlikely that the officers in question would not have realised the inevitability of this result. The alternative explanation that ESB officers did not appreciate the seriousness of the risk is substantially more logical. Accordingly, the proposition that the ESB officials omitted to warn so as to avoid panic in the Canberra community is untenable.

493. In any event, the suggestion that the avoidance of panic was the motivating factor is denied by the ESB officers. On this analysis, there is simply no evidence of what motivated the ESB officers to make a decision to deliberately withhold warnings from the Canberra community.

494. It would be a remarkable and serious finding to make that, absent any motive, these ESB officers knowingly withheld information relating to the impact of the fires. The ACT accepts that the Court will conduct its considerations applying common sense and will bring to the process its knowledge of human affairs and experience. The Court must be satisfied to a high degree in order find that a serious allegation such as this is made out cf. Briginshaw. The ACT submits that there is no occasion at all for the making of such serious findings. This is especially so when the proposition was not expressly put to any of the affected witnesses.

495. The process by which counsel assisting draw inferences of intentional withholding of information is also flawed. The suggestion is that despite their denials, the ESB officers must have known of the potential impact of the fires. Counsel assisting point to the knowledge of the officers of past disastrous fires, of the volatile state of the fuels, severe fire weather, and the indications of various persons before and during the fires, of a potential for the fires to impact the Canberra urban edge.

496. One inference is that, having regard to these matters, the ESB officers must have known and did know of the potential of these fires despite the fact that they were undoubtedly aware of the matters mentioned above, it is doubtful that all these matters were in the forefront of their thinking when the issue of warnings came to be considered. It is unsurprising that their immediate focus was on the problems involved in dealing with the fires. It is therefore unlikely that, when decisions were made in the course of their duties throughout the relevant time, that they had regard to

all of the information and broader background considerations. It might have been different if there was an occasion for standing back and giving the matters calmer consideration.

497. The more likely inference is that whilst the matters referred to above, put the officers on notice of a potential for a serious fire event to eventuate, they did not appreciate this potential as realistic and immediate prospect. That this may have occurred is understandable, having regard to their limited level of experience in large fire events and their previous successful record in suppressing fires in the ACT. Whatever comments may be made about their experience and performance during this event, the ACT submits that this is a reasonable inference, indeed the most likely one, and contradicts any suggestion that omissions to issue warnings were deliberate in the sense that counsel assisting submit.

498. The second and connected reason for rejecting the submissions that the ESB officers were wilfully withheld warnings involves an examination of other actions of such officials, to determine if those actions are consistent with the proposition that the omissions to warn were wilful.

499. If the premise is that such omissions to warn the Canberra urban community were intentional, there appears to be no logical reason why they would prejudice one section of the ACT community to warn (namely the rural residents) and deny warnings to another. There is no doubt that extensive efforts were made to warn rural residents thought to be at risk on 17 January and that Lucas-Smith authorised those efforts. The evidence in relation to that process is summarised below.

500. At the afternoon Planning Meeting on 17 January 2003, senior ESB officers and others discussed the need to advise rural residents of the imminent impact of the fire. The Minutes of that meeting (ESB.AFP.0110.0865) record that discussion as follows:

There is a need to determine the current occupancy of properties around the Corin area and whether residents intend to evacuate or stay.

501. The handwritten notes of that planning meeting (ESB.AFP.0110.0934) also confirm that discussion:

Corin get public ready, msg to rural community

...

PLS ... determine occ properties evac or stay?(at 0938)

502. The evidence of a number of witnesses who were tasked with the duty of warning the rural residents confirms that their directions to do so came from the senior officers of the ESB.

503. In Marika Harvey's statement (ESB.AFP.0111.0206), she states:

29. It was apparent at the 6 pm meeting that things were going to be bad for the rural areas around the ACT. It was apparent in the meeting that we needed to focus quickly on what needed to be done for people in the rural areas. It was serious enough to start looking at things like Recovery Centres ...

30. At the meeting, the need to contact people in rural areas to appraise them of the threat was discussed, to provide them with the right advice and protective measures to adopt. This became the number one priority for Friday evening and all of our resources were focused on working as hard as we could on this priority.

Harvey confirmed this in her evidence at T2400.

504. David Prince, in his statement (AUS.AFP.0070.0005) said:

15. About 1800 on Friday, 17th January 2003, I attended the second bushfire briefing for the day. ... The risk of that fire reaching the urban interface was now increased.

16. I was directed by the Chief Executive Officer of Justice and Community Safety Mr Tim Keady and the Fire Commissioner and tasked to work with Ms Marika Harvey of the Chief Ministers Public relations Unit to develop a process for the Media, Canberra Connect and to inform rural lessees. ... A number of rural lessees were contacted and given appropriate warnings of danger. This work went through to about midnight. Copies of that information were handed to Police on the 18th March 2003.

505. In his statement (ESB.AFP.0110.0481) McRae said:

112.... I expressed the view that the Stockyard fire would quickly head east toward Smokers Gap; that the Bendora fire would also head east towards the Cotter River and probably cross that river; and that the McIntyres Hut fire was likely to break containment and run towards the Uriarra pine plantation. I expressed these opinions at a meeting of the SMT involving Peter Lucas-Smith, Tony Graham, Dave Ingram and myself prior to the larger planning meeting that afternoon. I repeated these views during the planning meeting. There was general consensus that this was the likely situation.

113 The immediate planning task, therefore, was to identify assets at risk. We identified immediate assets at risk to be rural residences, the pine plantations, Corin Dam Ski Resort and the Tidbinbilla National Park. It was apparent that other services including ACT Ambulance and the ACT Fire Brigade should be briefed on the developments. ...I provided them with a copy of the ACT Rural Residences Directory which is a directory that I had prepared approximately 12 months previously that identifies all rural residences and their locations. I provided about 20 copies of that directory, and others arranged for many more to be made. I understand that the Logistics Unit provided topographical maps.

115. During that afternoon, I worked with various people from Canberra Connect which constituted the media unit at ESB for the purpose of communicating the fire risks to residences in rural ACT west of the Murrumbidgee river. We decided to do this on a district-by-district basis and to cover all districts west of the Murrumbidgee River. I provided Canberra Connect with a list of the districts west of the river and they then took responsibility for preparing the media release.

McRae gave similar evidence to the Inquiry (T3402).

506. This evidence indicates that when Lucas-Smith and other senior officers in the SMT recognised an imminent risk to rural residents of Canberra from the fires, they directed that immediate and timely steps be taken to convey warnings of that risk to those residents. There is nothing in the evidence to suggest that senior officers were constrained by any considerations other than the perfectly proper desire to issue timely warnings.

507. The ACT submits that there is no conceivable reason why those senior officers would take this approach in the interests of the rural residents, and take a diametrically opposed approach to the residents of the urban edge of Canberra.

508. Counsel assisting have not suggested any reason for this distinction. As a matter of common sense, the only reasonable inference is that in the case of the rural residents, the actions by the senior officers were prompted by their recognition of the imminent risk. In the case of the urban residents that awareness had not yet eventuated.

509. A review of the evidence leading up to the impact of the fires on 18 January clearly shows that senior ESB officers and others did not recognise the imminent potential serious consequences of the impact of those fires.

510. A major focus of this Inquiry was the investigation of why that was so. Counsel assisting urge findings of serious and deliberate omissions in many respects. The ACT submits that there is an obvious explanation for such omissions. There is clear evidence that the senior ESB officers in question worked long hours for up to 10 days in the critical period leading to the 18 January 2003. It cannot be doubted that in the course of this event, they operated in stressful conditions, dealing with a multiplicity of decisions both simple and complicated, and making judgment calls about matters having serious consequences. Ordinary human experience indicates that under those pressures a physical toll is taken on even the most robust individuals.

511. It is in these very circumstances that individuals are likely to be distracted from important issues and may make judgments which on closer analysis are not the best judgments which could be made. To recognise this is simply to recognise a facet of the ordinary human condition. The ACT submits that all its officers worked hard and with the best intentions in the course of these events. The ACT submits that when consideration is given to making findings adverse to such persons there should be a recognition of the constraints and pressures under which they were operating. Any findings made about their conduct, in order to be fair and reasonable, should reflect this.

6.2 Submission in summary

512. In Chapter 6 of their submissions, counsel assisting address the issue of warnings and suggest there are three critical issues: when did it become apparent to

senior personnel at ESB that there was “*a realistic risk of the fires, probably in combination, having an impact*” on nominated parts of Canberra; whether information about the risk was conveyed in a timely and appropriate manner; and if not, why not (paragraph 1198).

513. In order that there can be meaningful responses to these issues, there needs to be a recognition of the scope, magnitude and timing of the fires which were expected by senior ESB officials. Otherwise, this approach is unfair. The question presupposes an understanding of “*what might be coming*”, as though the fires that struck Canberra on 18 January 2003 were within the range of what was expected during the lead-up to that day. If it were correct to assume that the senior ESB officials did or should have foreseen the events of 18 January, then the answers to the three questions posed by counsel assisting can only result in a critical assessment of the efforts of the ESB. The evidence does not support this assumption.

514. The ACT submits that the first and most important question is: when did senior personnel at ESB recognise the possibility that fires such as those which eventuated on 18 January 2003 may occur? Only in the context of that question should the issues raised by counsel assisting be addressed.

515. The evidence makes clear that no one involved in the suppression of the fires had any appreciation that the events of 18 January 2003, or events of that kind, were about to unfold until late morning on 18 January 2003. After that time, the speed and enormity of the disaster overwhelmed everybody. The ACT submits that had ESB officials appreciated what was about to occur, the warnings to the community would have been very different. Contrary to their evidence, counsel assisting pose the three issues and make their submissions on the basis that ESB had that appreciation.

516. The ACT accepts the broad proposition that the warnings of what was later to occur were inadequate.

517. The ACT accepts that from at least 13 January 2003, most senior officers and many others working in or for ESB had either been informed or independently recognised the possibility that “*any strong westerly gusts of wind could turn the fire*

towards the urban areas” of Canberra (Lucas-Smith T1017, ESB.AFP.0110.0551 at paragraph 72). However, it was not their expectation that this was imminent, and even when the time came, that they expected the fires to reach the urban edge, what occurred was vastly different to what was expected.

518. It is also submitted that had events unfolded as expected by ESB officials, and any warnings were not given until more specific information became available, the questions now posed by counsel assisting would have barely arisen. The Inquiry into the 2001 fires illustrate why your Honour should draw that conclusion.

519. During the 2001 fires, the predictive process undertaken by ESB personnel, who were similarly qualified to those who undertook the task in 2003, was materially the same as what occurred in 2003. This was despite what was viewed in 2001, based on the experience and training of those involved, as a relatively quickly developing fire. Those warnings on that occasion were accepted as proper and adequate (*Report on the 2001 Bushfire Event*, Brian Parry, 16 October 2003 at p.10; *ACT Bushfire Service Report on 2001 Bushfires*, ESB.AFP.0057.0001 at p. 20).

520. Preparation and warnings, by definition, can only occur in the context of what is reasonably expected, as opposed to what is possible if certain variable factors eventuate. The events of 18 January were wholly unexpected and it is unfair and ultimately unhelpful to appraise conduct devoid of its context.

521. The passage in Gleeson CJ’s judgment in Rosenberg v Percival which we have earlier quoted bears repetition in this context:

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. This danger may be of particular significance where the alleged breach of duty of care is a failure to

warn about the possible risks associated with a course of action, where there were, at the time, strong reasons in favour of pursuing the course of action.

An analysis of the facts makes it clear that the submissions of counsel assisting succumb to this danger.

6.3 The risk recognised and understood

522. Paragraphs 1200-1202 of the submissions of counsel assisting illustrate the error identified in Rosenberg v Percival. ESB was aware of the 1939 and 1952 wildfires. Articles about the 1939 fires were on the wall outside the executive area of ESB for all to read during the 2003 fires, and officers did so (McNamara T3782 - 3784). Lucas-Smith spoke about the 1952 fires on several occasions. He briefed Cabinet about those fires and later briefed members of the ACT Fire Brigade about them on the afternoon of 16 January 2003 (Lucas-Smith T1053-1054). Lucas Smith spoke about the 1928, 1939 and 1952 fires in the article published in *The Canberra Times* on 17 January 2003 entitled “*Next Five Days Critical*”, even to the point of informing the public that those fires burnt into the area now occupied by the Woden town centre (ESB.AFP.0110.0973).

523. ESB was also aware, as a matter of broad proposition, of the potential for such fires to occur again. It is one thing to be aware of catastrophic fires in the past; it is another to be aware of the precise impacts of such fires and especially so when the physical environment in the path of the fires has changed greatly. Further, they were aware that in January 2003 the fuel in the Brindabella ranges was extremely flammable. Internal and external communications to that effect had been occurring for some time during the 2002-2003 bushfire season, and continued to be sent after 8 January 2003 when bushfire had become actual rather than potential. In other words, the potential for catastrophic fires was recognised as a possibility, both before and after the fires in question began.

524. It is quite wrong, however, to characterise this knowledge as equating to knowledge that the fires that began on 8 January 2003 might reasonably become fire of the kind that struck Canberra on 18 January 2003. It is submitted that no one

involved in the suppression of the fires had the knowledge or appreciation that the fires would impact as they did.

525. The fact that by 8 January 2003 the ESB had successfully attacked and extinguished, without major incident, some 92 other fires during the 2003/03 fire season belies the surety of the hindsight evidence about the severity of apparent dangers as at 8 January 2003 (Lucas-Smith T802).

526. The December 2001 fires involved six separate fires burning in various locations but all proximate to or within Canberra. Fires began at around 1330 hours on Christmas Eve at Huntley and Coppins Crossing, followed by two more ignitions at 1600 hours on Bruce Ridge and in Red Hill. On Christmas Day, fires began at Oaks Estate and soon after, at Wanniasa Hills. On that occasion, the weather conditions were severe and flammability of the forest fuels was high. It was perceived that the fires would impact on the urban edge of Canberra and this later occurred. The fires began burning in locations more proximate to Canberra than in 2003, yet each of them was ultimately controlled and extinguished without loss of built property (except fencing and some paddock sheds). By contrast, the 2003 fires initially involved four not six fires; they were all a considerable distance from Canberra; and one was not even within the ACT.

527. It is one thing to have a theoretical appreciation of what can occur. It is quite another to have an actual expectation that something will occur or might reasonably occur. Regarding the events of 18 January 2003, ESB had the theoretical appreciation but not the actual expectation.

528. The ACT accepts that the warnings to the Canberra community were “*sadly lacking*”. The ESB officers acted in good faith. The ACT submits that omissions to warn were a product of their limited experience in large fire events of this kind, and of an optimism that the fires could be suppressed borne of their previous successes in suppressing fires in that more limited context. The ACT submits that if this is the correct conclusion there is no warrant for the making of further findings about the personal responsibility of individual officers, which can have no other purpose than the attribution of blame.

529. First, the existence of the fires was known to the Canberra community during the period in question. ESB added to that public knowledge by giving information about the location of the fires, the fire fighting efforts that were occurring, and its views about future fire behaviour.

530. Secondly, it is submitted that ESB officers spoke in terms of legitimately held expectations about the fire suppression efforts, but never said that the fires were under control, and indeed to the contrary continued to inform the Canberra community that despite their efforts the fires were not under control.

531. Thirdly, ESB officers provided information consistent with how they perceived the risk. In particular, during the fire event, Castle and Lucas-Smith acknowledged during media interviews that an impact on Canberra was possible, as addressed further in these submissions.

532. Extensive material had been given to the Canberra community beforehand, particularly during 2002, about how to prepare for bushfires (ESB.GSO.0005.0812). The ACT submits that the Canberra community were reasonably well educated by ESB and other Territory agencies concerning the risk of wildfire and that there was a reasonable level of knowledge within the community about fire readiness, as evidenced by the analysis of community surveys (Watson statement ESB.DPP.0013.0234). However, the information provided during the 2003 event was of a general nature and not specific as to what might later occur. No one at ESB recognised until mid-morning on 18 January 2003 that a serious impact on the Canberra community was a real or probable outcome. Even by mid morning on 18 January 2003 the expectations about the event were significantly less serious than the event that occurred.

533. When judging the adequacy or otherwise of the warnings which were given by the ESB in January 2003, it is instructive to have regard to the evidence of Lucas-Smith relating to the considerations he had in mind when this issue was raised with him. At T983/4, Lucas-Smith stated that as at 13 January, although he had considered it, he did not think that "*it was a realistic prospect*" that the western edge of Canberra

would be affected. In relation to information that he should have conveyed to the AFP on 16 January 2003 concerning the potential impact on the urban edge, Lucas-Smith stated that *“it (the potential impact on the urban edge) was not something that was prominent in our thinking at that particular time, but it was there. The potential existed”* and had he thought that *“the most serious potential for impact (was) on urban edge ...”* he would have made that issue far more prominent (T1083).

534. At T1126, Lucas-Smith expressed the view that the *“fire was certainly going to approach the urban edge. What the impact that fire was going to be and where that was going to occur I hadn't formulated a plan.”* Similarly Lucas-Smith stated that a factor which inhibited his ability to issue warnings on 18 January 2003, was: that he *“...didn't have the information of when and where”* the fires might impact (T1127). In giving evidence about the warnings on 18 January 2003, Lucas-Smith stated *“... I think we didn't emphasise the warnings adequately enough. I thought we had more time to do that.”*(T1202)

535. The ACT submits that Lucas-Smith's evidence in this regard should be accepted as the true state of his thinking at those times. This evidence indicates it was his belief that the urban edge was not at immediate risk and that there was time before the fires might impact for the warnings to be given. Furthermore, it was his belief that the magnitude of the fires which would threaten Canberra was nowhere near *“that sort of ferocity”* which occurred (T1205).

536. The ACT accepts that there is no reason why a broad precautionary message, linked to the fires then burning, concerning preparation of homes and property in the rural farming areas, rural villages and western urban interface could not have been undertaken on 16 and 17 January 2003 for the period from Saturday to Monday 18 to 20 January 2003. However, given the theoretical nature of the possibility, and the nature of what was thought possible (ground fires on fronts that could be attacked by bushfire service crews once they left the forest, or embers that could be dealt with by residents and Fire Brigade), it is understandable why warnings were deferred and if given would necessarily have been very broad.

537. The ESB should not be judged against the warnings given after 18 January 2003. Those warnings were prepared immediately following one of the worst fires in Australian history. Further, given that the community had never experienced an event of the nature of the 2003 fire, what they would have done if given any reasonable precautionary message cannot be predicted and cannot be assessed by reference to what occurred after 18 January as was suggested at T3361. It is notoriously difficult to achieve broad education and compliance with preparatory and precautionary measures. Following a reasonable warning to undertake precautionary measures, it is reasonable to expect that some members of the community would have followed the advice to clean up their yards and gutters, but as to a determination of how many people would have followed the advice and the extent of their preparations, any conclusions will be speculative. The nature of the reasonable warning would have been an AFAC like warning - preparations for staying to defend your home. Such a warning would reasonably have contained the same type of information provided to the public during 2001, but be mentioned in connection with the fires burning to the west of Canberra in January 2003.

538. The severity of the fire event, as revealed by the factual narrative provided earlier in these submissions (see “Extraordinary Events of 18 January 2003”) was such that it would be in the realms of speculation and inappropriate in the context of this Coronial Inquiry to conclude that a substantially different outcome would have been achieved even if such precautionary advice had been given. The issues concerning warnings to evacuate, as opposed to warnings to make household preparations, are separate and are dealt with below.

539. As has been stated, such warnings as were given by ESB officers were consistent with their understanding of what might occur, and where and when. It is accepted that the warnings later proved to be inadequate and had the effect of not conveying an accurate picture of what occurred.

6.4 Risk Apparent on 13 January 2003

540. The ACI does not accept the submission of counsel assisting at paragraph 1203 that by 13 January 2003 “*it was apparent that there was a realistic risk that the*

fires might in some form... impact on the urban area of Canberra.” No issue can be taken if that is a hindsight observation, but the evidence of Lucas-Smith at T983/4 is to the contrary. Even if the risk was perceived as something that “*might in some form*” occur, that does not advance matters since the content and timing of any warnings would be dictated by the form and timing of any prospective impact. Furthermore, the risk which was known by ESB officers was communicated to the Canberra community in a manner which dealt with the perceived risk but it is conceded, not in a way which proved adequate.

541. For example, at paragraph 1204 counsel assisting refer to an interview with Castle conducted on ABC radio on 13 January 2003(DPP.DPP.0004.0003). Castle was asked about a threat to Canberra and, quite properly, acknowledged that risk. He said:

“... our most prevailing winds is from the north-northwesterly and that gives us 180°, and would bring the fires back into us and back on to us in a much wider front. So that’s the concern we actually have.” (emphasis added)

542. When asked whether the fires could threaten Canberra, Castle acknowledged that risk but tried to give it context, commensurate with his understanding. He said:

“I wouldn’t want to be that dramatic. ... they don’t look particularly large from down in the urban area, but they could present quite a – quite a significant impact, but there’s a lot between where they currently are and the urban edge (emphasis added).”

543. The ACT accepts that the risk was not explained in positive terms which would have suggested some action was required on the part of the public, but nor was the magnitude of the risk or its imminence understood by ESB officers. Secondly, as the risk was not thought to be “*a realistic prospect*”, there was no knowledge of the “*where, when, or what*” of the impact of the fires so that a warning about the risk could only have been given in the broadest terms, as was done.

544. At paragraph 1203, counsel assisting submit that your Honour should reject Lucas-Smith’s evidence that on 13 January 2003 he saw the prospect of the fires impacting on Canberra as a possibility, but not a “*realistic prospect*”. The term

“realistic prospect” is one of variable content – with reasonable and differing views as to the certainty of the suggested result. That Lucas-Smith was aware of a possible outcome of impact on the urban edge cannot be denied – but it was at that time one of number of possibilities. Until there was some recognition that one outcome was more likely than another, the proposition that it was a realistic prospect is harder to sustain.

545. The transcript reveals that Lucas-Smith expressed that opinion in the context of acknowledging the inherent uncertainty of fire behaviour. He foresaw a much larger fire event and was considering fallback options to the east. He also recognised the potential for the fire to go a long way if unchecked, but had not formed concluded views due to variables such as the possibility of intervention and the weather patterns (Lucas-Smith T983 – 984). It was not put to Lucas-Smith in cross-examination that his evidence of the prospects of the fires reaching urban Canberra was incorrect or should not be believed. The ACT submits that there is no basis for your Honour to reject Lucas-Smith’s evidence about his perception of the risk.

546. Counsel assisting rely upon two matters in support of their contention in this regard: the terms of Castle’s request for Commonwealth assistance; and the fact that Cheney told Lucas-Smith that the westerly winds would bring the fires into Canberra City.

547. There are two reasons why the request for Commonwealth assistance by Castle on 12 January 2003 cannot be used as a basis for rejecting Lucas-Smith’s evidence. In the first place, the evidence indicates that Castle was the author of the document. Lucas-Smith neither contributed to or approved the text of that document. At T993 he gave the following evidence:

Q. Were you part of the formulation of this request for Commonwealth assistance?

A. No, I was not.

Q. Did you advise on the information that should go into it?

A. No, I didn't.

548. The novel suggestion by counsel assisting seems to be that the Court should make a finding adverse to a person based upon a statement made by another person, which statement he neither contributed to nor approved. That proposition should be rejected.

549. The second reason why the terms of the request give no basis to reject Lucas-Smith's evidence is that even if knowledge of the words could be imputed to him, there is no explicit statement from which it could be inferred that any identified threat was to the Canberra urban area. The references to areas threatened related to "*the ACT water catchment areas*" and "*the ACT*". Having regard to the size and particularly the location of the fires, the references in the Commonwealth assistance document can only be sensibly read as perceived threats to ACT assets which were then proximate to the fires.

550. Counsel assisting also rely upon Cheney's communication with Lucas-Smith on 13 January 2003. The ACT submits that, having regard to the evidence of the participants to this exchange and the circumstances in which the exchange occurred, there was scope for misunderstanding as to the gravity of the risk. Indeed, it appears that Lucas-Smith did in fact misunderstand what was conveyed as to the risk. In his evidence, Cheney gave a number of formulations as to what he conveyed to Lucas-Smith on that occasion:

Q. You said you had a view as of, I think, 14 January as to what might happen.

A. Well, in general terms, simply that if we got extreme weather, the positioning of these fires and the behaviour of fires under extreme weather would push them into Canberra. It was just that, if we did get an extreme day, the wind direction would be somewhere between north-west and west and it would have the capacity to burn into Canberra. (emphasis added)
(T433)

551. At T434 he gave the following evidence:

Q. Did you have occasion to speak with anyone - any authority within the Emergency Services

Bureau about that opinion that you held?

A. I was contacted by our press liaison officer on the Monday, who was handling inquiries from the media, and had lined up that I talk to Win Television, and I rang Mr Lucas-Smith on Monday afternoon, towards the evening, and advised him that I was going to be asked questions from Win Television and I expressed my opinion to Peter that, if they asked me, I would have to tell them that in my opinion it was a very dangerous situation and that these fires were likely to burn into Canberra, and the Win Television decided not to interview me.

552. At T528 he said:

Q. And so when you were speaking to Mr Lucas-Smith on the 13th, your view is we will get a westerly and when that happens we have a dangerous situation, is that right?

A. Yes, and depending on the strength of that wind it would determine the degree of danger and how far the fires would spread. But, in any case, I felt that it was unlikely that we would get them in under control before that change would come through and, even if that frontal system didn't push it into Canberra, then - we'd normally expect two or three of these systems coming through during the summer months.

553. At T529-530 Cheney gave the following evidence:

Q. Was it the case that you had an actual view then that the fires were likely to burn into Canberra, or was it the case that you had a qualified view that under certain circumstances they couldn't burn into Canberra?

A. The latter would be more accurate because it depended on the strength of the wind associated with the change.

Q. It was the case you didn't express it that way to Mr Lucas-Smith?

A. I expressed it as an unqualified statement that if we got strong westerly winds we would

get the fire into Canberra.

Q. I don't want to quarrel with you but you've just qualified it, the qualification being "if we got strong westerly winds".

A. The "if" was always there.

Q. And Mr Lucas-Smith was aware of the "if", as you understood it?

A. As I understood it.

554. It may be observed that in recounting this evidence Cheney gave slightly different formulations of his views on or about 13 January 2003 as to the potential impacts of the fires – he used the terms “*would push into Canberra*”; “*would have the capacity to burn into Canberra*”; “*were likely to burn into Canberra*”; and “*the fires could burn into Canberra*”. Having regard to the fact that Cheney made no notes of that conversation and was relying upon his memory of what occurred approximately nine months before (T495), the fact that he used different formulations is not remarkable. Cheney’s frank assessment of the conversation he had given in evidence was “*I think that was pretty close*” (T529).

555. Whilst on one view the differences are not substantial, when what is in question is a matter of degree, the differences are significant. Accordingly, it is not surprising that Lucas-Smith interpreted Cheney’s comments as indicating a possible outcome, without the degree of certainty which Cheney may have wished to convey and which is pressed by counsel assisting.

556. Lucas-Smith gave evidence concerning this conversation at T984 to 986. The effect of that evidence was that whilst he could recall that Cheney expressed the view that “*the situation was dangerous and the potential for the fire spread was significant*”, he did not agree that any statement was made to the effect that the fires were likely to burn into Canberra. The shorthand notes of the afternoon planning meeting suggest that Lucas-Smith’s memory in respect of the mention of fire burning into Canberra may not be reliable. Of course, the notes do not specify whether such event could, would, or was likely to occur and any appreciation of the degree of imminent risk depends upon which of these terms is applicable.

557. In the light of these various formulations, on any reasonable view of what occurred, there was a genuine scope for a misunderstanding as to the level of risk which was conveyed by Cheney. Indeed, the manner in which the issue was dealt with at the planning meeting gives support to the proposition that the level of risk considered by the meeting was not the same as that which Cheney intended to convey.

558. If it were otherwise, and the suggestion is seriously made that the planning meeting was told of Cheney's view, and determined not to act upon that indication, counsel assisting put forward no conceivable motive as to why those at the meeting would do so. Even if some motive might be conceived of for the members of the SMT, it is not realistically conceivable that everyone who attended the meeting would dismiss Cheney's serious view of the imminent risk to urban Canberra.

559. At paragraphs 1208 - 1212, counsel assisting refer to the Planning Meeting on 14 January 2003 at which Cheney's view was discussed and submit that the discussion begs the question why "*were not the public informed of the risk*" (paragraph 1209). Counsel assisting's reference to "*the evidence ... (about the Cheney conversation) was entirely unsatisfactory and many of the witnesses failed to grapple with the issue*" is entirely a product of hindsight. Rather than being indicative of an unwillingness to remember, this alleged "*failure to grapple with the issue*" is more reasonably construed as an appreciation by those witnesses of a level of risk significantly less immediate than Cheney's view. There appear to be two alternatives open – firstly, a conspiracy of silence amongst all those who attended that meeting or alternatively, a different view of the potential of the fires. Common sense and experience would tend to support the latter as being the more likely. The evidence of the witnesses and their later course of conduct support this conclusion.

560. Counsel assisting are implicitly critical of the fact that none of the witnesses identified as being at the meeting had any recollection of this discussion. Indeed they appear to be critical of Graham even though there was a possibility that he was not present when this was discussed. Consistently with the evidence of these identified witnesses, the note takers – Ferry and Keane – also lacked specific memory of this discussion (Keane T2520-2523 and Ferry T2567-2570). It is hardly likely that the Cheney prediction, having regard to its serious nature, would be easily forgotten and

yet it appears to have been. It cannot be suggested that the note takers were part of any conspiracy of silence. This again supports the conclusion that the level of threat recognised by those at the meeting was not the same as that of Cheney.

561. As has been mentioned, the notes of Ferry and Keane do not specify the level of certainty attaching to the winds bringing the fire into the city. There was room for a reasonable alternative view that the risk adverted to did not have the same level of immediacy as Cheney's view – see Lucas Smith's evidence earlier.

562. Cheney's views were not 'kept under wraps', downplayed, ignored or kept confidential. To the contrary, those views were raised at the meeting and openly discussed for all to hear, as evidenced by the Planning Meeting notes. Numerous people were present, with diverse areas of expertise and with different interests to consider. Neither the evidence of the witnesses nor the documentary records indicate that there was any dispute about the credibility of Cheney's views. Rather, the notes record a discussion as to the prospects of the weather patterns realising the threat adverted to – this was a discussion quite clearly directed to a reasonable assessment of the imminence of the risk. It might be thought that such a discussion was appropriate in the circumstances. In the event, the assessment of the meeting as to the prospects of control of the fires, proved to be wrong. However, it is submitted that at the time it was not unreasonable.

563. Castle had acknowledged the possibility of a significant impact when asked about fire in the urban area during a media interview (13 January 2003). Lucas-Smith acknowledged in his evidence that he considered the potential for the fire to get very large. McRae reported to the planning meeting that "*strategies will be harder to complete and hold after Friday evening*". These senior F&SB officials understood there were risks and did not hide those views. The ACT submits that the correct conclusion to be drawn is that the meeting determined, having regard to the expected weather change, that the point was not yet reached that a public warning was appropriate. Fire and weather are inherently uncertain phenomena. Reasonable rules of thumb may be available as to weather cycles, but uncertainty may attach to the actual timing and attendant outcomes. Cheney was expressing a view about potentials, but was not saying anything, except in broad terms, about "*where, when or*

what". Also, the expectation about "*where, when or what*" was more akin to what ACT had experienced during the previous 50 years.

564. At paragraph 1212, counsel assisting submit that the manner in which the planning meeting dealt with the Cheney view indicated "*an unwillingness on the part of ESB personnel to confront or even acknowledge the issue of the risk*" and "*rather that such risk as there was should not be discussed publicly*" and "*the risk should be down-played*". The ACT submits that the preferable and more likely position was that the same level of risk was not agreed (see above), and that to ensure an orderly dissemination of warnings relating to the likely threats, the proper body to issue those warnings was the ESB. It is further submitted that there is nothing in the evidence - oral or documentary - which supports the contention that relevant matters should be withheld from the public. If one accepts, as counsel assisting do at paragraph 1210, that the most reliable source of what occurred was the handwritten notes, the absence of any reference to the risk not being discussed publicly or the risk being downplayed strongly indicates that no such discussions were had.

565. This conclusion is not affected by the reference in one of the notes to "*upset*" since that reference is not attributed in the notes to any person, and indeed the evidence of the participants was not able to clarify to whom that description was directed.

566. The ACT accepts that with hindsight, better information should have been provided to provide advice to the Canberra community about preparations that could be made when some level of risk existed that property to the east of the fire could be affected by it. The ACT submits that the omission by senior ESB officers to provide such advice resulted from their perception of the risk. Regrettably their expectations regarding fire control, and the time which might be available to give such advice closer to the event, were not realised. For those officers, this was the kind of watershed event referred to by Koperberg as being the basis of experience, which might have led to a different result. Further, the ACT submits that there is no basis to conclude that this omission was in any way wilful or a conscious attempt to withhold such information (Lucas-Smith T1207, Castle T1693). The difficulty in providing warnings to the community when the risk of the fire impact is imminent was

demonstrated by the evidence of Lucas-Smith when he referred to the inability to issue warnings specific as to when and where the impact might occur. These difficulties were recognised by the NSW RFS personnel who gave evidence (Crawford and Arthur). A second issue relating to the effectiveness of warnings given more proximate to the time the fires might impact was adverted to by Cheney. At T557-558, he gave evidence that *“its very difficult to convey that information in highly meaningful terms to residents in urban areas because having no experience with fire.... for most of the people, they have a great deal of difficulty understanding what’s being said other than that fire is going to burn into the area and concepts of different intensity that some areas are more dangerous than others is very difficult for people to understand who haven’t had any experience with fire”*. Cheney also stated that in his view *“advice about what to do would almost have to be handed out on a personal basis around the perimeter by fire authorities if they were available”*.

567. This is not say that no warnings should have been given; the submission, however, is that no reliable conclusions can be drawn as to what members of the community would have done if warnings had been disseminated through the media. Further, no reliable conclusion can be drawn as to the extent that loss and damage could have been prevented, save perhaps for personal possessions that those who decided to leave could have taken with them.

568. In relation to paragraphs 1247 – 1250, counsel assisting refer to and comment upon the way in which McRae viewed the process of activating warnings to the public. Great emphasis is placed upon his use of the terms *“we made decisions”* about the fire activity and the triggers needed to activate warnings. The assertion seems to be that this evidences a conscious decision or agreement to decline to warn the Canberra public. McRae’s evidence read fairly does not support that conclusion. At T3353, McRae stated that he was not involved directly or indirectly with the media. Further, he stated that his communications with Castle and Lucas-Smith about the issue of warnings were:

Not a direct discussion. Briefing during the planning meetings and on other occasions,

569. The reference to “*decisions*” is at T3358/9. The reference to “*we*” in the response at the top of T3359 is directed to the activities of those in the planning section about fire predictions. The further reference at T3359 to “*discussions ... (in) the planning meetings*” must refer to his conveying to that meeting the decisions of the planning unit about predictions and forecasts of the fires.

570. The ACT submits that the proper and reasonable construction of the evidence is that the predictions were discussed at the Planning Meeting and based on the perceived lack of immediate threat (as they believed on 15 January), the occasion for warnings had not arisen (that occasion being nominated by McRae at T3361). There is no evidence from either of them that Lucas-Smith participated in any decision with McRae to the asserted effect, let alone that their course of conduct was intended to deprive Canberra residents of information that they believed should have been conveyed.

571. At paragraphs 1216(a) and 1315, counsel assisting criticise the ESB’s decision making about warnings on the grounds that the ESB treated warnings as a public relations exercise, rather than part of its operational response to the fires. The evidentiary basis for this criticism is apparently three matters, although this is not entirely clear.

572. The first matter is the reference in the handwritten notes of the morning Planning Meeting of 14 January 2003 to the discussion of the comments of Cheney. The ACT submits that nothing in those notes gives rise to any inference other than that the Cheney comment was a potential media issue – as it clearly was - and that the source of warnings should be the ESB. Any further inference that community information and warnings were treated as a public relations exercise is not open.

573. The second apparent basis for the claim is the evidence of Gellie to the effect that “*a lot of stress was placed on public relations via media*” (ESB.AFP.0111.0308 at paragraph 7). Gellie did not expand further on that issue in his evidence. The apparent context of his comments however does not support the inference sought to be drawn here. It appears that the comment was given in response to a question concerning the effectiveness of operational communications with, inter alia, the

public. His point was not that such efforts were a public relations exercise but that creating a string of local networks was a more effective means of conveying information to the public.

574. The third apparent basis is the entry in the morning Planning Meeting Minutes of 15 January relating to the fact that certain positive aspects should be made public. As Castle made clear at T1541, (and counsel assisting apparently agreed that “*no doubt that it is appropriate*”) the legitimate purpose behind such publicity was:

... There was value in people being recognised for the efforts they have actually done in a positive sense.

The weakness in this assertion is emphasised by the fact that there is only one instance in the 10 days under consideration when matters of this kind arose. A cursory analysis of the media releases and media reports makes plain that these successes were put forward as an exception to a general pattern of bad news, namely that day after day ESB was unable to contain the fires, and was saying so. (DPP.DPP.0004.0004 Castle interview)

575. ESB also knew the forecasts were for worsening weather and thus the prospects of it bringing the fires under control were bad, and Castle was saying so (DDP.DDP.0004.0003 Castle interview). On 13, 15 and 17 January 2003, Castle made formal requests for Commonwealth assistance and broadcast the fact that ESB had made those requests on the media (DPP.DPP.0003.0468, AFP.GSO.0005.0373).

576. The ACT submits that this evidence represents no basis at all on which to conclude that the dissemination of information in the entire 10 days was treated merely as a public relations exercise.

577. Such a characterisation is unfair and fails to acknowledge that personnel at ESB worked extraordinarily long hours during the fires in an ultimately unsuccessful effort to keep on top of the innumerable tasks that had to be done as events unfolded with increasing speed, diversity and complexity. Lucas-Smith and Castle, in particular, had substantial and numerous tasks to perform, including attending media

conferences speaking with journalists and causing media releases to be issued in order to keep the public informed. To suggest these efforts were no more than a “*public relations exercise*” devalues that effort and is not warranted.

578. Lucas-Smith and Castle were acutely aware of the need to keep the public informed. It was not done well, as both men acknowledged (Lucas-Smith T1046-1048, Castle T1572-1573, 1845-1846), but they did so to the best of their ability based upon the knowledge and expectations that they held at the time.

579. At paragraph 1218, counsel assisting are critical of Lowe and Harvey for being “*not adequately equipped for*” the role of drafting and formatting messages to the community. Lowe was employed by ESB to undertake a variety of tasks including media related activities (Q26 TROC DPP.DPP.0003.0408). There is no suggestion that she failed to discharge those duties other than competently. Harvey was co-opted from the Chief Minister’s Department to assist at the ESB on 10/11 January 2003 (ESB.AFP.0111.0196 at paragraph 16 and 17). Like the great majority of those involved in the fires of 2003, neither of those persons had significant experience in handling the media requirements in a large fire event. It is indicative of the limitations of a jurisdiction like the ACT, that the assistance of a variety of persons, is required in these circumstances.

580. It was clear from their evidence that Lowe and Harvey were to carry out their tasks in 2003 under the supervision of primarily Castle and sometimes Lucas-Smith. It was expected that such material as they produced would be checked by those supervisors. In the light of these matters, it is unduly harsh to be critical of their efforts. An effect of doing so is to discourage those who may in the future consider giving assistance, not to do so.

6.5 Koperberg discussion – 15 January 2003

581. Counsel assisting rely upon the evidence surrounding a discussion between Koperberg and Lucas-Smith on 15 January 2003 to found their assertion that the fires,

at that time, represented a genuine threat to urban Canberra and that this knowledge ought to have founded a warning to the Canberra community.

582. Counsel assisting, in their review of the evidence concerning the meeting, make much of the different formulations of the content of the conversation on the part of Lucas-Smith (counsel assisting submissions paragraphs 581-586). Koperberg similarly provided a number of different formulations concerning what was said at the meeting (counsel assisting submissions paragraphs 592-601, NRF.DPP.0001.0014 and Koperberg T2088-2095 and T2103-2109).

583. What is plain from the summary of the evidence in the submissions by counsel assisting is that at the time of giving their evidence each of them gave different versions of the conversation, particularly in relation to:

- Whether Koperberg mentioned his view that the western suburbs of Canberra were at risk (Lucas Smith says not at T1037 and Koperberg, though his statement says otherwise, admitted in his evidence that it was likely he did not at T2092-2093. Crawford says he did not at T4491);
- Whether florid terms such as “*hammered*” were used in connection with Canberra during that conversation (Lucas Smith says not at T1042, and Koperberg made no such comment until much later and could not attribute it to any person: T2106/2108. Crawford could not remember when or where that comment had been made at T4495/96).
- The terms of the request for assistance and the purpose for which they were requested (Lucas-Smith states he required the NSW resources to assist in keeping the ACT fires contained to the west of the Cotter at T1039; Koperberg said he was asked for help because “*the ACT's resources would be insufficient in the event of the fire impacting upon Canberra and its suburbs*” (NRF.DPP.0001.0014 at paragraph 11)
- Whether Koperberg said it was his view that the containment lines would more than likely be breached at T2091-2092 (as to this see below).

584. Quite clearly both Lucas-Smith and Koperberg, in what may be categorised as an honest attempt to recall the words of their conversation in excess of a year before,

have recounted what they said against the background of what they were thinking at that time. At times it was unclear whether the evidence given by the witnesses was a reflection of their thought processes or content of the conversation.

585. As it transpired the significant difference between the positions of Lucas-Smith and Koperberg appears not to be what was said about there being a risk to urban Canberra, but the likelihood and immediacy of that risk eventuating based upon the question of the anticipated level of success of the containment measures by NSW RFS.

586. Lucas-Smith said in his statement "*I then asked him [Koperberg] what his level of confidence was in relation the McIntyre's Hut fire, and he, Mr Gilligan and Mr Arthur expressed great confidence they had the fire contained and that it was not going to be an issue for the ACT*". (FSB.AFP.0100.0551 at paragraph 82)

587. At T1032 Lucas Smith gave the following evidence:

Q. So the significant feature in the conversation that you had with Mr Koperberg was that Mr Koperberg was telling you McIntyre's Hut fire was contained and it would not be an issue to the ACT?

A. McIntyre's Hut fire was contained on the southern and eastern boundaries. The south-east corner was the area that was of concern to us for the ACT.

588. In evidence at T1049 Lucas-Smith gave the following evidence:

Q I presume what you intended to convey in paragraph 82 of your statement was that what you were being told was, as far as the ACT was concerned, it needn't be concerned about the effect on the ACT from McIntyre's Hut. Is that a fair summary of your impression from Mr Koperberg's --

A. Yes.

Q. And that that was his opinion or that was the opinion of people in his team?

A. Yes.

589. As to this issue Corrigan, at T4680 gave the following evidence:

Q. Do you recall anything being said more generally about the prospect of containing or keeping - holding the fire, I suppose would be the term, within the containment lines?

A. I think the IMT was quite confident of maintaining the fire within the containment lines, especially if they could get some depth to burnings before the bad weather which was forecast on the weekend.

590. Arthur, at T4592/92 gave the following evidence:

Q. Mr Lucas-Smith's account of being told that the McIntyre's fire was contained and that it wouldn't be an issue for the ACT; do you recall that being said to him?

A. I can't agree with that, sir. We didn't achieve containment until somewhere near 2000 hours that evening. We anticipated it was going to be contained. Our expectation then was we would maintain it there. (emphasis added)

591. It is not possible to determine precisely the words used at the meeting on 15 January 2003. However, Koperberg is an experienced person who expressed certain views concerning the immediacy of the risks which might eventuate if the McIntyre's Hut fire was not contained. The ACT submits that he did not express those views to Lucas-Smith, but later in a public statement to the press. In any event, Lucas-Smith agreed, in principle, with the view that uncontained, the McIntyre's Hut fire could reach Canberra (T1035-1036).

592. Koperberg was not, however, closely involved in the operations at the McIntyre's Hut fire. He arrived in Queanbeyan on 15 January 2003 and had just received a briefing from his senior operational fire personnel. The person who provided that briefing, Arthur, confirmed during his evidence that optimism was expressed concerning the establishment of containment lines (T4592). This was also confirmed by Corrigan (T4680). Lucas-Smith had available to him the opinion of

members of NSW RFS expressed during the meeting at Qucanbeyan. The views of the operational personnel involved in McIntyre's Hut fire accorded with his own that there were reasonable expectations concerning containment.

593. The NSW RFS situation report prepared for the McIntyre's Hut fire after the meeting and discussions which took place on 15 January 2003 (1600 on 15 January 2003) states the risk in a manner which is not inconsistent with Lucas-Smith's understanding:

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.

594. The ACT submits that any differences between the evidence of Koperberg and Lucas-Smith as to the conversation are not significant. It is clear from the summary above that whether or not Koperberg effectively conveyed the level of his concerns for Canberra, Lucas-Smith had his own view of this matter – a view not dissimilar to the NSW personnel involved in the suppression efforts at the McIntyre's Hut fire.

6.6 Other developments on the afternoon of 15 January

595. At paragraphs 1224 – 1230, counsel assisting rely upon: Castle's second and third requests for Commonwealth assistance, Castle's Cabinet briefing document, McRae's "*do the maths*" comments during the afternoon planning meeting and Graham's telephone discussion with Byrnes on 15 January 2003- among other things that occurred on the afternoon of 15 January 2003- as grounds for submitting that by the late afternoon or evening of 15 January 2003, Lucas-Smith, Castle, McRae and seemingly Graham recognised that the fires represented a risk to the Canberra urban area.

596. Castle gave evidence about the form of words used in the Second and Third Requests for Commonwealth Assistance and in particular that the forecast weather was “*causing concern for the ACT urban environment*” (T1543ff). He accepted that his degree of concern was no longer small, having regard to the potential for a wind change but that the documents do not take into account “*what’s the success before then*”(T1543). His view was therefore not dissimilar to that of Lucas-Smith who felt that “*we still had potential for intervention if we got the resources that we needed*”(T1046).

597. It was put to Lucas-Smith that the risk to the Canberra urban area was “*a distinct possibility if certain things happened*”(T1046) and he accepted that with westerly winds the fire “*certainly had the potential to impact*” southern Canberra and the rural properties (T1046/7). Lucas-Smith accepted that the responsibility for lack of warnings at that time was his (T1047).

598. It appears that Lucas-Smith and Castle held the view that the prospects of “*certain things*” happening were greater than they ultimately proved to be. The ACT submits that those officers recognised the potential for the fire to impact but did not consider that the risk was as imminent as the events proved.

599. The fact is that a serious risk to Canberra was not apparent to any of the ESB’s senior personnel until mid-morning on 18 January 2003. The potential for the fires to reach the urban edge had been recognised well before 15 January 2003, as discussed above. The events of 15 January 2003 relied on by counsel assisting confirm that knowledge. However, that does not translate into a “*failure*” to warn people of that risk, as submitted by counsel assisting. Firstly, it was recognised as a potential occurrence, and had been for some time, but dependent upon various contingencies being realised. Secondly, the potential was understood in terms of a fire event wholly different to what occurred. Your Honour should so find.

600. A number of disparate events make it apparent that no one on the afternoon of 15 or on 16 January 2003 perceived the risk of the fires reaching Canberra as “*serious*”, or the likely impact – if the fires did reach Canberra – as “*serious*”.

601. Several examples can be given, including the three circumstances on which counsel assisting rely.

602. The Cabinet briefing did not prompt any of those present to consider the fires reaching Canberra as a real possibility (see Stanhope T3631, Tonkin T4242-4243). It is untenable to suggest otherwise. The point of the briefing was to inform the various members of Cabinet about what was happening and what could be expected in the short and in the longer term. It seems reasonably clear that the focus of the briefing was upon the valuable assets of the ACT then considered to be at risk. The fact that no issue about warnings to the Canberra urban residents was raised at or as a consequence of that briefing can only be explained by the absence of any recognition of the real or imminent need to do so.

603. The Fire Brigade was briefed for operational purposes and to permit them time to make contingency plans in the event that their intervention was required. Although these briefings indicate that there was a raised level of concern, it should not be concluded that ESB officials believed that the impact to the urban edge would occur by 18 January. The briefing was to forewarn them that they might later have a role in what had hitherto been a rural bushfire for which it bore no operational responsibility. (Bennett T1910-1911). Collins recalled Lucas-Smith *"warning that there was a possibility that these fires could impact upon the urban infrastructure"*. He did so, not in the context of warning them that a fire event of the magnitude which ensued might occur, but to forewarn the Fire Brigade of a possible operational responsibility (TROC Q49-52, ESB.AFP.0049.0274).

604. The Fire Commissioner, Bennett, attended the Planning Meetings on 10 to 12 January and 14 to 18 January (Bennett statement AFP.AFP.0110.0330 at paragraphs 24, 25, 30, 32, 37, 39 and 45). He was a party to the briefing by Lucas-Smith to the Fire Brigade on 16 January (AFP.AFP.0110.0330 at paragraph 34). His statement makes plain that he was present at the meeting on 18 January. No one was better placed to recognise the potential of the fires, as explained at the various meetings, than a person such as Bennett.

605. Bennett's evidence as to what he did that morning is as follows:

Although the increased fire danger was recognised, there was no specific indication that the fires would impact on the suburbs of Canberra that day (although the potential of fire runs from McIntryes and Tidbinhilla was discussed during the morning briefing). About mid-morning, I travelled to my parents' home at Warragamba Avenue, Duffy, to check on how they were. My parents at that stage were aged in their mid-70s and I had not seen them for a couple of days. At this time, many people in the street were filling their gutters with water and clearing away general debris. I was concerned that there was nobody to do this for my parents 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. ... (AFP.AFP.0110.0330 at paragraph 48)

606. The ACT submits that Bennett's evidence as to what he did on 18 January, is the most reliable basis from which to infer the state of his knowledge of the immediacy of the threat of impact i.e. that he "*had no real sense that the fires were to hit Canberra later that day.*" It therefore follows that the immediacy of the threat could not have been conveyed to him in earlier meetings. Otherwise, his actions on 18 January 2003 defy logic.

607. At the afternoon planning meeting on 15 January 2003, McRae made his "*do the maths*" predictions in front of approximately 40 persons (Lucas-Smith T1148) including all the members of the SMT and other persons such Bennett and Keady. He said to various people that he thought an impact on the urban area by Monday was "*likely*" (McRae T3344-3345). However, that did not prompt any suggestion from anyone that the public should be informed about any serious risk of an impact upon urban Canberra. That circumstance can only be explained by no one appreciating an imminent risk requiring warnings then and there.

608. Lastly, Graham described an impact upon Canberra as "*not beyond possibility*" but that did not prompt Byrnes to act differently regarding the interests of the AFP.

609. These observations are not to criticise Byrnes, McRae, Bennett, or anyone else. Rather, they illustrate a lack of appreciation by those persons and, by inference,

others who were privy to the knowledge held by ESB officers that events might unfold as they did or to warn the public about that possibility.

610. At paragraph 1230, counsel assisting assert that had a warning of the kind issued by Jeffrey on 15 January been given, *“much of the injury and property loss and damage resulting from the fires, would have been avoided”*. The ACT submits that such a finding cannot be made. Jeffrey’s warning was directed to rural residents some of whom had properties in areas adjacent to the forests from which the fires would come; the situation of the residents of urban Canberra was that their properties were more distant from the fires and somewhat less exposed. Secondly, Jeffrey warned of *“the very real possibility that these fires would break out of the mountains ... this could happen on Monday or Tuesday”*. If that time frame had been conveyed, considerable doubt exists as to what urban residents would have done by 18 January 2003 and the extent that injury and damage would have been avoided.

611. It should also be borne in mind that it was common knowledge that the fire had been burning for 10 days and 86% of persons surveyed said that as a result of pre-season information provided by ESB, they knew what to do in the event of a bushfire (see statement of Watson ESB.DPP.0013.0234).

612. Even those residents who informed and well-prepared, such as the residents of Chauvel Circuit, Chapman, were unable to prevent the severe impacts of wind and fire on their residences.

6.7 The decision to defer a warning to the public

613. At paragraph 1231 – 1238, counsel assisting submit the Cabinet was briefed about a potential serious risk of impact on Canberra’s urban edge, but that Lucas-Smith – probably with the concurrence of Castle – had *“determined”* that *“the public would not be told that there was a serious risk”* of an impact on the Canberra suburbs.

614. The ACT submits that such a serious finding cannot and should not be made based on the weak evidence said to support it. A proposition in those terms was not

put to either witness and therefore it should be rejected on that ground alone. Secondly, it appears to be conceded that there are no or only “*obscure reasons*” for such an agreement or concurrence – it is remarkable that such serious allegation is made in the face of evidence by those witnesses that they did not appreciate the risk, in the absence of any motive to do such a serious thing. Finally, the submission is made on the basis that their knowledge of the claimed “*serious risk of impact*” has been conceded or established. In fact the contrary is true. That evidence is referred to above in the context of the Requests for Commonwealth Assistance.

6.7.1 Cabinet briefing

615. In relation to the claims made in this section of the submissions, the ACT submits that there is simply no evidence capable of supporting the serious allegations made against the Chief Minister and others. The Chief Minister and members of Cabinet are sworn to act in the best interests of the ACT and its community. Consistent with that undertaking, they would have as their primary concern in an event such as this, the welfare of the community. The premise on which the unsustainable allegations are made, that Cabinet might or would withhold information from the Canberra community, defies logic. This is so because it assumes that Cabinet would act contrary to its duties to the ACT. There is no conceivable motive and no evidence is advanced for this extraordinary proposition.

616. At paragraph 1233 and 1234, reference is made to the Cabinet briefing document (DPP.DPP.0003.0078) and its reference to the potential for impacts on the urban area. The first reference in the document has only been partly quoted by counsel assisting and is therefore misleading. The full reference is as follows:

McIntyre's Fire to the northwest has secure containment lines to the south and east following back burning operations. However, with stronger winds from the north-west there is always the potential for spotting over the containment lines which has potential serious impact to ACT Forest pines and subsequently the urban area.

617. The ACT submits that the omitted reference to secure containment lines, whilst providing no absolute guarantee that that fire may not cause problems, is centrally relevant to the degree of risk to any ACT assets. It would have provided any Cabinet member who read the document considerable confidence that the fire could be controlled. Secondly, a plain reading of the words indicates that the “*potential serious impact*” refers to the risk to the pines. This is clearly so having regard to the proximity of the omitted words to the pines; it is also the only reasonable inference having regard to the fact that at that time, the fire was close to the pines and a considerable distance from the urban area. Finally, the position of the reference to the “*urban edge*” later on in the document confirms this construction.

618. The second reference to the urban edge in the document is as follows:

Assets under potential threat

These include:

- *Cotter catchment area.*
- *ACT pine forest plantations.*
- *Isolated communications infrastructure.*
- *Tidbinbilla Nature Reserve.*
- *Tidbinbilla Tracking Station.*
- *Rural Leases.*
- *Urban edge.*
- *Saved*

This appears to list assets at risk in descending order of the risk. A reader would be most likely to infer that, of the assets listed, the urban edge - whilst under potential threat - was the least threatened asset. It is submitted that the references in the notes to the suburbs at risk should be understood in this context.

619. The ACT therefore submits that Cabinet were not told, as is asserted by counsel assisting, that there was a serious risk the fires would impact upon the suburbs of Canberra (counsel assisting submissions paragraph 1237). So much is clear from the analysis of the document above.

620. Lucas-Smith in his evidence considered that:

“I would have thought that if I was making a statement to Cabinet, and I thought that the most serious potential for impact on urban edge existed, I would have made it far more prominent than make it the second last dot point.” (T1083)

621. Castle gave evidence that the urban edge referred to was a reference to the Macgregor Power substation. This evidence was consistent with that given by the Chief Minister (Stanhope T3606). The evidence concerning the need to declare a State of Emergency was with reference to the same power infrastructure.

622. At the time of the Cabinet briefing the threat was variously described by those present as not “*a probability*” and a “*potential serious possibility*” (Keady T3510 and T3491), as something that may occur “*eventually, if intervention failed*” and “*the potential existed*” (Lucas-Smith at T1062 and 1066), and as a “*theoretical possibility that the fire would advance to the urban edge*” (Stanhope T3611). None of these formulations equate to a serious risk of an impact on the suburbs of Canberra, as put forward by counsel assisting (counsel assisting submissions paragraph 1231). Tonkin said that to the best of his recollection the prospect of a risk to the suburbs was not discussed (T4243-4)

623. Contrary to the submissions of counsel assisting, the Cabinet briefing document and the contemporaneous notes taken at the briefing (DPP.DPP.0003.0269, DPP.DPP.0003.0266, DPP.DPP.0001.0104) are consistent with the evidence given by the Chief Minister and also by the other attendees at the Cabinet briefing who gave evidence.

624. At paragraph 1237, counsel assisting criticise the evidence given by the Chief Minister as being “*difficult to accept*”. If this should be understood as a contention that the evidence of the Chief Minister ought not be accepted, that assertion should be rejected.

625. No attempt is made by counsel assisting to identify with any precision what part of the Chief Minister’s evidence, incompletely summarised by counsel assisting in paragraph 1236, is either difficult to accept or ought not be accepted. Once again it is regrettable that such serious claims are made in such a general fashion.

626. The proposition is put at paragraph 1237 that “*it was no doubt tempting to reduce the impact of the discussion about risk to Canberra*” having regard to what later occurred. It does counsel assisting no credit to advance such a proposition in this vague manner. If it is an attack on the credibility of anyone involved, it should be rejected as there is no evidence to support it, nor is any evidence referred to.

627. Further if it is suggested that this somehow evidences a decision by Cabinet to withhold information, that proposition should be rejected. In any event, the attached Cabinet Minute, which notes that a public information system had been put in place and would be activated as required, gives lie to the notion that Cabinet or the officers briefing Cabinet were determined to withhold information from the public.

628. The ACT submits that it is surprising and regrettable that an extraordinary allegation that the evidence of the Chief Minister of the Australian Capital Territory ought not be accepted is made on this tenuous basis. It is especially so when there is no competing evidence to that of the Chief Minister and that the contention was never put to him in the witness box. It should also be rejected on the substantive basis that there is no sufficient proof to establish such a serious allegation (cf Briginshaw v Briginshaw).

629. There is no objective reason for the actual and implied criticisms of the Chief Minister by counsel assisting in the submissions. The evidence of the Chief Minister is consistent with the evidence given by other witnesses. The criticisms made by counsel assisting are unfair, without foundation and without support.

630. At paragraph 1235, counsel assisting refer to Keady in his evidence as “*protesting a continuing lack of recollection on important issues*”. If this is to be understood as an attack on Keady’s credibility, then it is highly regrettable and improper that counsel assisting only make such an allegation indirectly, without permitting the witness to respond to that assertion. This appears to be a further example of counsel assisting making indirect critical comments about a witness being unable to recall matters which, upon their analysis, have assumed importance in this Inquiry.

6.7.2 Midday Press Conference

631. Your Honour should reject the submission at paragraph 1239 that Lucas-Smith “*was not telling the truth*” when he stated at the midday press conference on 16 January 2003 that “*At the moment I don’t think there’s any threat to the urban areas.*” Counsel assisting concede at paragraph 710 that he was not questioned about those comments because the transcript was not available, but state that he was asked about them in the context of a Canberra Times article on 17 January 2003. At F1090, Lucas-Smith was asked whether that was his genuine state of mind and he agreed. It was never put to him that he was not telling the truth and it is submitted that there is a significant unfairness in making that submission in these circumstances.

632. In any event, the comment was consistent with- not “*in stark contrast*” to- the briefing he gave to Cabinet earlier that day. The threat to Canberra was contingent upon several occurrences. “*At the moment*” when Lucas-Smith spoke at the press conference, none of those contingencies had materialised. The same day, NSW RFS issued a media release stating that “*the control lines are complete*” (NSF.AFP.0047.0407). The phrasing is open to different interpretations, but that arises from different constructions of the word “*threat*”. Lucas-Smith’s evidence about his understanding of the immediacy of the threats should be accepted.

633. It must also be noted that Koperberg and Wade from the NSW RFS used similar language on 17 January 2003 when describing the fire threat, and no assertion was made against them that they were “*not telling the truth*”.

634. Mr Wade said:

“At this stage, there is no threat to any property in the area, it is more those pine plantations we’re keeping a close eye on.” (DPP.DPP.0003.0476 at 0486)

635. Lucas-Smith’s opinion about the threat at that time was genuinely held, and he should not now be taken to task for potential ambiguity in wording used ‘on the run’ in the course of a media interview.

636. At paragraph 1240 counsel assisting assert that “*it is inconceivable that*” Lucas-Smith would expect to be understood in the midday press conference as referring only to threats from the ACT fires. The ACT submits that a fair reading of the transcript of that press conference strongly supports Lucas-Smith’s position in this regard. The press conference commenced with Lucas-Smith giving a report on the Bendora and Stockyard fires, after which he took a number of questions. The first question related to the possible evacuation of residences in the Brindabella Valley region and Lucas-Smith responded by stating “*you need to ask NSW that*”.

637. The next subject matter of the questions was the extent to which the Bendora fire had progressed. The third subject matter was a similar question in relation to the Stockyard Spur fire. It was in connection with that latter question that Lucas-Smith made the comment about his views on the threat to the urban areas.

638. The next question which was posed to Lucas-Smith concerned the McIntyre’s Hut fire.

639. This sequence of questions clearly evidences the proposition that Lucas-Smith was responding to questions aimed at specific fires and the relevant response upon which counsel assisting now rely related to the Stockyard Spur fire.

640. Comment may be made about Lucas-Smith’s lack of media skills in not seizing the opportunity to give an update about the McIntyre’s Hut fire, assuming that he knew the position in regard to that fire. In the light of this analysis, it is disingenuous of counsel assisting to assert the proposition that Lucas-Smith was not only referring to the ACT fires.

6.7.3 Briefing to the ACT Fire Brigade

641. At paragraphs 1241-1244, counsel assisting makes submissions about the briefing to ACT Fire Brigade and ACT Ambulance and the perceived confidential nature of the briefing.

642. It was appropriate for Lucas-Smith to be direct with operational personnel about his perception of the risk that the fires would breach their containment lines and run towards Canberra. It is also commonplace for such briefings to be comprehensive and to address contingencies that might never arise. The briefing was made to professional emergency workers to enable them to prepare, operationally, for those possibilities. It is not uncommon for such briefings to be more detailed than briefings given to the public, especially where the briefings involve issues and occurrences expressed as possibilities that might never arise (Collins TROC, qns 48 – 52, ESB AFP.0049.0274).

643. In making the submission at paragraph 1244 that your Honour should conclude that Lucas-Smith was “*serious*” when he stated that he did not want to alarm the public and that the information provided to the briefing should not be revealed, counsel assisting rely upon a selection of witnesses. For example, Cartwright, McLeary and Barr are relied upon to support the proposition; other witnesses such as Bennett, Dutton and Collins do not give the same level of support to these propositions.

644. Lucas-Smith stated in evidence that this was a discussion amongst firefighters, involving “*a fair bit of free discussion*” and humour. However, he also stated that he could not understand the logic of his making such statements to a large group of firefighters in the expectation that such material was to remain confidential (T1074).

645. The ACTI submits that in light of these competing versions, the scope for a genuine misunderstanding was very real and the more likely situation is that the difference in the evidence arises from such a misunderstanding. A reasonable construction of what occurred was that Lucas-Smith conveyed to those firefighters his desire that any information disseminated to the public should be by the ESB, as was discussed in relation to the Cheney comments on 14 January 2003. As was earlier submitted in relation to the latter event, no sinister connotations should be drawn from this understandable objective.

646. At paragraphs 1245-1246, counsel assisting makes submissions about an insufficient briefing to the AFP. The Territory does not dispute that those briefings were inadequate, however counsel assisting's consequent submissions at paragraphs 1246(b)-(c) about what the AFP "*would have*" done are entirely speculative. Excepting, perhaps, an earlier activation of the Police Operations Centre, the course that the AFP "*would have*" taken is unknown and should not be judged by reference to best practice responses assessed after the event, and in the context of what later occurred.

6.7.6 The Situation at the end of 16 January

647. At paragraph 1251 counsel assisting are critical of Lucas-Smith in that "*he apparently chose not to*" inform the Canberra community of the threat posed by the McIntyre's Hut fire. The transcript of that interview commences with a question to Lucas-Smith regarding the situation of the Namadgi Bushfires. It is tolerably clear that Lucas-Smith was responding to questions about the ACT fires. The criticism that he chose not to go further in those circumstances is entirely unwarranted, especially as Lucas-Smith himself conceded that he was not a skilled media performer (Lucas-Smith T1128).

648. Had the latest NSW RFS press release been available to him, the information in it was that lines would be pressured and the fire forced to the ACT border. The ACT submits that even that formulation of words would not be such as to bring home to the Canberra community a real and imminent risk of impact on the urban edge.

649. At paragraph 1252, counsel assisting make the submission that Lucas-Smith (as well as Castle and McRae) seriously and deliberately omitted to impart to the Canberra public their knowledge of the risk of fire impact. That submission is partly based on Lucas-Smith's interview at 5pm on 16 January 2003. The ACT submits that such a proposition should be rejected in light of the fact that Lucas-Smith was doing his best to provide responses for the questions being asked. Furthermore, when cross-examined about this matter at T1088-1089 no such proposition was put to Lucas-Smith to allow him an opportunity to answer it.

650. If the submissions of counsel assisting at paragraph 1253 are intended to downplay the effectiveness of the dissemination of warnings by media, that submission should be rejected. The local media in Canberra has proven to be a valuable means of dissemination of such warnings in the past (2001 fires). In a jurisdiction the size of the ACT, use of the media is a sensible resource-efficient means for conveying the information. The article in the *Canberra Times* headed “*Next five days critical*” fairly considered, did convey that the situation confronting the ACT was serious.

651. The article quotes the opinions of Lucas-Smith, Bartlett and Cooper about the fire danger. The article read as a whole (ESB.AFP.0110.0973) puts the public on notice about the seriousness of the fires;

- i. It opens by noting that, “*the weather conditions now facing fire fighters in the ACT and surrounding NSW were worst than those that preceded the 1983 Ash Wednesday disaster*”.
- ii. It notes that in 1983 “*the Ash Wednesday fires killed 75 people, destroyed 2500 buildings and burnt out close to 400,000 ha*”.
- iii. It notes that the conditions ACT was facing on 17 January 2003 were “*drier than they were at this time in 1983*”.
- iv. It notes that in 1928, 1939 and 1952 fires “*burned as far as Woden*”.
- v. It quotes Lucas-Smith stating, “*the reality is there will always be that level that you can’t manage for and that’s what we’re facing*”.

652. The comments of Lucas-Smith in this article are almost identical to the words he used in the midday media conference the preceding day. As was noted earlier in the submission, the comment “*At the moment I don’t think there is any threat to the urban edge of Canberra*” was a response to questions about the Stockyard Spur fire. It is not uncommon in press reports that the entire context of given statements are

included. As was suggested earlier, it is wrong to be critical of Lucas-Smith in relation to a comment which was taken out of its proper context and which in its true context was a correct statement.

653. If the assertion is made that Lucas-Smith knowingly withheld relevant information from the Canberra community, such a proposition simply cannot stand, especially having regard to the last two points in the summary of the article referred to above. It defies common sense that a person with such intent would refer to past catastrophes and then state that *“that’s what we’re facing”*.

6.8.2 Morning Planning Meeting

654. At paragraphs 1254 – 1255, counsel assisting make submissions about the 17 January 2003 morning planning meeting. The submissions do not portray the events in any realistic manner. At this point, Lucas-Smith and senior ESB personnel had been engaged, working long hours, for some 10 days in fire suppression efforts. It would be surprising if they were anything other than fatigued and under pressure and that their judgment was not impaired by these matters. It seems tolerably clear that the focus of those persons was on what measures could be taken to suppress the fires, and they failed to have sufficient regard to the very important consideration of issuing appropriate warnings (Lucas-Smith T1202). No doubt, if there had been an occasion to stand back and carefully review what was being considered, the issue of warnings would have been better addressed.

655. The evidence is that a number of ESB officials and experienced firefighters maintained optimism that the fires could be controlled or mitigated when they reached the open grasslands and upon reaching the set-backs at the urban edge (Lucas-Smith T1200):

“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 ACT”

See also T998 and T1102 and T1184.

656. Cheney himself conceded that the setbacks at the urban edge *“provided Canberra with the safest interface of any city within the equivalent or higher rainfall zone anywhere in Australia. Other fire experts agree”* (Cheney Report at page 18).

657. Neil Cooper is amongst the most experienced fire fighters within ESB, and even he, with 21 years of fire fighting experience including fighting this particular fire throughout the fire event, held the firm view through until the morning of 18 January 2003 that:

“I still strongly believe that, once it came out of the plantations or out of the timber, we would be able to contain it on the grassland”.

(Cooper T4794, 4795)

At T4823 Cooper said:

“...once [the fires] came out onto the open grazing country which was just bare dirt, we would be able to undertake successful suppression efforts.”

658. Others experienced firefighters who held a similar view include: Murphy at T4007; Graham at T2885; Raffaele at T3936-37; and Taylor at T5003.

659. Senior ESB officials were not the only persons involved in the January 2003 fires who were taken by surprise by the size and magnitude of the actual impacts. For example, Cooper said, when referring to fire moving over a heavily grazed paddock:

“... the oncoming flames driven by heat and wind were up to two metres high. I remember they were as high as the aerial on my vehicle. The flames had a depth of greater than 100 metres which is a lot deeper than normal grass fires. I could not believe the height and depth of the approaching flame front given that it was burning across heavily grazed and bare ground. ... [I] ... “had never seen anything like that before”. (Cooper T4784, 4785)

660. A number of other examples are referred to above (see “The Extraordinary Events of 18 January 2003”).

661. Cheney said:

Q. ... Did that joiner [sic] of fires add to the intensity of the burn?

A. Yes.

Q. In what way?

A. In increasing the spread of the fire between the established patterns of Bendora and the McIntyre fire.

Q. Was that something that you thought would happen?

A. No.

Q. Did that take you by surprise?

A. It was surprising, yes.

And further he stated that although he expected the fires to merge:

A. I expected them to merge, but it's correct, not in the way in which they did.

Q. How did you expect them to merge?

A. I expected they would have drawn together the two - that the interaction of the two fires would have drawn them together.

Q. But when that occurred, did you understand that the intensity of the fire would then, thereby, be greatly increased?

A. Not to the extent that it was. You normally get some increase of intensity when fires draw together, but not the intensity of the fire that came through between the two fires.

(Cheney T510-511).

6.8.3 Midday Press Conference 17 January 2003

662. In light of the evidence reviewed above your Honour should reject the submission that at the midday press conference Lucas-Smith or Castle thought one thing about potential fire behaviour but informed the public of another, or said or condoned anything they “*knew to be false*” or “*knew to be unsupportable*” (counsel assisting’s submissions at paragraphs 1256-1259 and 1262-1263 respectively).

663. At paragraphs 1256 to 1259, counsel assisting made a number of criticisms against Lucas-Smith – firstly that he “*chose to compound the harm done by the morning’s newspaper*” by stating that the risk to the urban edge was “*pretty slim*”. Secondly, they appear to infer that Lucas-Smith was “*apparently careful not to go as far as describing the fires as contained or controlled*” and that he knowingly gave a false impression that there was a realistic prospect of holding the fires. They also assert that the evidence he gave that he was not thinking about the McIntyre’s Hut fire, when making his comments, was “*absurd*” and “*wholly contrived*”. Finally, counsel assisting state that Lucas-Smith consciously made fine distinctions “*likely to be lost on the media and the people present at the conference*” for the purpose of concealing information from the Canberra community.

664. The transcript of the media conference shows that it occurred in two parts. In the first part, Castle and Lucas-Smith made statements relating to the fires burning in Namadgi National Park. There is no mention at all of the McIntyre’s Hut fire by Lucas-Smith or Castle, nor is there any mention by those officers of the NSW fire.

665. The second part of that media conference was given by a NSW RFS liaison officer named Wade. He spoke about the NSW fires, including the McIntyre’s Hut fire. Whether this was done by agreement, arrangement or protocol is not clear. However, it evidences an understanding between the agencies which might be considered reasonable given the fact that the agency in charge of the fire is most likely to have the best information about it and measures of suppression being implemented. This two part form of media conference gives overwhelming support to what is asserted to be an absurd proposition namely that Lucas-Smith was only talking about the ACT fires.

666. So understood, Lucas-Smith’s statements about the prospects of the ACT fires reaching the urban edge being “*pretty slim*” are more understandable. Counsel assisting point to the references made in the morning Planning Meeting to winds turning westerly the following day. The forecast recorded in the planning meeting minutes for the morning of 17 January 2003 initially described north-west winds gusting between 45 and 60km, “*pulling back to a westerly direction ... an easterly*

change is expected after 2200 hours". The reference in the forecast to strong wind gusts appears to be linked to the north-west winds: there is no indication as to when the winds might pull back to a westerly direction and, more particularly, when in relation to the easterly change. In the light of these matters, Lucas-Smith's construction of the predominant direction of the winds, whilst not precise, reflected the substance of the weather forecast.

667. The truly Machiavellian claim by counsel assisting that Lucas-Smith consciously relied upon a distinction which was likely to be lost on the media, in the face of the above evidence, is unsustainable.

668. When making judgments about the accuracy or otherwise of the comments made by the PSB officials concerning the ACT fires, it is instructive to have regard to how their NSW counterparts dealt with the perceived threat emanating from the McIntyre's Hut fire. Wade said during the course of the media conference:

The McIntyre Hut fire burning to the direct west of Canberra in NSW, now burnt out some 8,000 hectares is also still burning within containment lines although the containment lines on the south eastern side are only very small really, their 500 meter's or so in depth and we are expecting those to be tested fairly extensively today. Already the wind conditions up in that area have strengthened from the north west, which means fire crews at the moment on the south eastern side of the McIntyres Hut fire are working very hard as we speak at the moment to try and contain those containment lines. The fire is about 2 kilometer's from pine plantations in the ACT. We do have resources on the edge of the border there and on the edge of the pine plantations. At this stage also some 13 aircraft are working in the area, keeping a very close eye out for spot fires and so forth. At this stage there is not threat to any property in the area, it is more those pine plantations we're keeping a close eye on. (emphasis added)

669. The ACTI notes that counsel assisting make no criticism of Wade for qualifying his opinion that "*there is not threat to any property*" with the words "*at this stage*". The ACTI does not assert that Wade was evasive or intending to withhold any information; as it does not assert that Lucas-Smith was evasive when using the words "*at the moment*" in previous media conferences.

670. Further, the statement by Wade that “*there is not threat to any property in the area*” has resonance with the impugned comments of Lucas-Smith and other ESB officials about their perception of the risk to the Canberra urban edge at various times. Even Wade’s comments about the perceived threat to the pines is not couched in terms such as a serious or immediate threat.

671. Similarly, the NSW RFS media release for 1200 on 17 January 2003 makes reference to:

Containment lines are complete on 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.
(NRF DPP.0001.0019)

672. The ACT accepts that it was no part of the responsibilities of the NSW RFS to be issuing warnings to the Canberra community. However, it is noteworthy, given that the release does refer to property, that no comment is made about threats to the urban area. Furthermore, the manner in which the level of risk to property and the pines is referred to does not convey any greater levels of risk than counterpart ESB pronouncements. That is, the use of the words “*currently no immediate threat to any property*” are very similar to the “*at the moment*” formulation used by Lucas-Smith.

673. Wade also said in the media conference:

“... the threat is now to the southern and eastern sides and of course that means it's more heading back toward the ACT.

...

There is a real threat to that pine forest but at this stage everything is holding at the moment.

Once again, the level of concern evident in the words “*a real threat*” to the pines (when the fire was approximately 2 km from the pines at that point) would, on the tests urged by counsel assisting for ESB warnings, be somewhat of an understatement.

674. At paragraphs 1260 - 1262, counsel assisting take Castle to task about the phrase “*the agreement and the protocols*” in paragraph 107 of his statement, referring

to an arrangement by which ESB spoke about ACT fires and NSW RFS spoke about NSW fires. The ACT accepts that the phrase overstated the formality of the arrangement, but the substance of paragraphs 107 and 108 remains true.

675. As a pattern, the various press releases from ESB and NSW RFS respectively, and the press conferences given by Lucas-Smith and Castle on one hand, and Koperberg and Wade, on the other, make clear that this was the arrangement. The fact that some press releases make observations about fires pertaining to another jurisdiction, for example an ESB media release observing that the smoke blanketing Canberra was coming from the McIntyre's Hut fire, does not contradict paragraph 107.

676. To suggest that Castle concocted a justification and made wilfully untrue statements is very serious and should be rejected.

677. The submissions of counsel assisting at paragraph 1263 say that what Lucas-Smith said at the midday press conference of 17 January 2003 evidences his decision *"to defer telling the people of the ACT ... the true position"* and that Castle *"participated in the deception, either by condoning the decision or not acting to correct an impression left by Mr Lucas-Smith ... which Mr Castle knew to be unsupportable"*.

678. The submission should be rejected, firstly because it was not specifically put to either witness – at T1069 a very general question was asked of Lucas-Smith about whether there was a conscious distinction between what he said in the media about the risk and what he really believed. He denied that proposition. No proposition was put that in consequence he lied to the Canberra community, let alone that he did so on any specific occasion. As a matter of propriety and fairness, if it was asserted as it now appears to be, that Lucas-Smith in effect lied to the Canberra public on specific occasions, the seriousness of those claims demanded that the specific asserted lies be put to him to allow him the opportunity to respond. What was done at T1069 was of such a general nature as not to give him a fair opportunity to respond.

679. Contrary to the submission by counsel assisting with respect to Castle, the evidence at F1691-92 discloses that no proposition remotely like the assertion that he was lying to the public or knew that Lucas-Smith was lying to the public in media conferences was put to him.

680. Secondly, no realistic motive is suggested for such a deception. Finally, even if there was some perceived motive about not inducing panic in the public, Lucas-Smith's reference in that media conference to those who *"live adjacent to Namadgi National Park in any way, you need to be making sure that you have taken precautions around the property ... or if you'll stay or if you'll evacuate ..."* belies any intention to prevent panic in a situation where there was a clear threat to a definable location evident to him. (DPP.DPP.0003.0476)

681. At paragraph 1265 counsel assisting adopt the criticism of Roche concerning the IAP. In light of the concession by counsel assisting that a more realistic assessment of resources could not be proved to have produced a different outcome, there appears to be no reason, apart from the attribution of blame, for counsel assisting to raise these matters. The ACT submits it is not unreasonable for the ACTFB to rely upon the expertise of the officers of the Bushfire Service in relation to the predicting of wildfires. As is already clear, the latter officers did not have an appreciation of the magnitude of the possible impact. Accordingly to expect the ACTFB to have independently arrived at such a conclusion and acted upon it is unreasonable.

6.8.7 3.45pm Media Release

682. At paragraphs 1266 - 1270, counsel assisting submit that the distinction in wording between the 3.45 media release of ESB and the 12 noon media release of the NSW RFS is further evidence of the *"implementation of the decision ... to conceal"* the true position from the ACT public. This criticism appears to be based on two propositions – the first is that, compared with the contemporaneous NSW RFS media release, certain pessimistic elements were omitted from the ESB document and

secondly that the wording has changed from residents being affected by “*flying embers*” to being affected by “*ash and burnt material*”.

683. There is no evidence as to what prompted the preparation and distribution of the ESB media release. Furthermore, there is no evidence as to how the ESB obtained the information contained in their media release - whether it was by formal or informal means. This may be relevant to how accurate the information that was obtained was, and may explain differences in emphasis as to how the perceived threat was expressed.

684. It cannot be denied that the NSW RFS media release made reference to “*completed containment lines*” but that those lines would “*be tested*”. By comparison, the ESB media release in question made reference to the fire being within the containment lines and advised that “*undue concern*” was not warranted. At T1695 Castle was asked why “*those slightly more pessimistic aspects*” of the NSW RFS document did not appear in the ESB media release and he stated that he presumed it was not communicated or not discussed. In fact, as a comparison of the documents shows, only one pessimistic element of the NSW RFS document was not included, namely the reference to the lines being tested. If that statement was included in the ESB release one might wonder how informative it would have been to the average member of the public in Canberra.

685. In any event, it was not only a pessimistic comment which was left out of the ESB document since the NSW RFS release also stated “*there is no immediate threat to any property*”. If the intent of the ESB officers composing their media release was to downplay the risks there is no reason why a similar reference was not included in their 3.45 pm media release.

686. In relation to the change from “*flying embers*” to “*ash and burnt material*”, it is debatable as to whether that change in words would have conveyed to the average Canberra resident a different level of risk or threat.

687. Counsel assisting rely upon the Fire Brigade’s preparations for a possible impact on the urban area as evidencing what it meant to be “*in the loop about the true*

state of knowledge ...”. This argument fails to have regard to the fact that the ACTFB IAP was prepared in order to deal with the possible impacts of the fires as they reached the urban edge (the 6pm planning meeting, the fire was predicted to be potentially near to the urban edge no earlier than 2000 hours the next day). The warning given in the ESB media release appears to be directed to events at any time from the issue of the release onward and related to a much less dramatic event (airborne material coming in from the fires some distance to the west of urban Canberra).

688. There is no good reason why downplaying the expected event from *“flying embers”* to *“ash and burnt material”* would be done in any event. If in fact embers were expected, those persons impacted would soon become aware. If it is thought that, by describing the material as ash rather than embers was to diffuse potential panic of the public, or to engender confidence that the fires were being contained or controlled. The arrival of airborne material from the fires could not be prevented, whatever the ESB chose to say and whether or not the fires were being successfully contained. It is submitted that the only feasible reason for adopting the words was for the purpose of more usefully communicating what was expected.

689. At T1691, Castle was asked what he was doing on the 17 January 2003 to disseminate information to the Canberra community about the threat posed by the fires. His said *“I suppose it goes back to we didn’t think there was an immediate threat. So, in that respect I don’t think I was focussed on a specific immediate threat”*. He was further pressed in relation to the absence of any warnings and he stated *“I don’t think there was any conscious reason and with hindsight I wish I had”* (T1692). It is clear from the media release that there was no reference made to the adverse predicted weather conditions and consequent spotting distances. There is also little doubt that ESB lost an opportunity on this occasion to disseminate relevant information to the public.

690. The ACT submits that the conclusion that Castle intentionally determined not to pass on the true state of affairs is not reasonably possible. This is especially confirmed by statements from him and Lucas-Smith in the course of radio interviews that afternoon.

691. At 1500hrs, Lucas-Smith (DPP.DPP.0004.0010)

Interviewer: *Extreme weather conditions The hot and gusty northwesterly winds have also arrived in Canberra, fanning two large fires in the Namadgi National Park. ACT Fire Chief, Peter Lucas-Smith says the fires are still within containment lines, though that could change very quickly.*

Lucas-Smith: *Under our current weather conditions, the chances of those fires approaching our containment lines in a rapid sort of a way which may cause some spotting and cross over is a concern to us, particularly as the wind conditions and the temperatures rise this afternoon, later today.*

692. At 1630hrs, Castle (DPP.DPP.0004.0008)

Interviewer: *Fire fighters in the Namadgi National Park are scrambling to contain the two major blazes, as weather conditions deteriorate, with low humidity and strong northwest winds. Mike Castle from Emergency Services says fierce conditions in the ACT probably won't improve this weekend.*

Castle: *Today will not be a good day fire-weather-wise, and the same probably, for tomorrow, we just ... if we can continue to pick up any spot fires that do come over, with the water-bombing aircraft, if they're close to our containment lines, and within hose length, then, we can put crews on it, but if not, then it's back to that sort of rugged country again, and water-bombing, and then pull back outside those containment lines to establish new containment lines.*

693. And in a news conference shortly thereafter at 5pm (DPP.DPP.0004.0009)
Castle adverted to spotting:

Interviewer: *Winds is causing concern for crews, who say the blazes could be pushed across lines and flying embers may start spot fires. Mike Castle, from Emergency Services says the Bendora fire front has been meeting with containment lines.*

Castle: *With the Bendora fire, our containment lines along that sort of easterly and southeasterly corner, the backburn had gone in and met the fire front, it's just a case of how far it is likely to spot, as opposed to a fire front, the fire front coming towards it, we had even cut some trees down and done that sort of preparation, but it is the spotting distance, fanned by the strong winds, that's sort of the most concern.*

694. It is clear that Castle had told the interviewer prior to the question asked in this extract of “*flying embers that may start spot fires*”. The fact that he did so and confirmed the matter in his answer contradicts the serious assertions made by counsel assisting concerning the decision to “*conceal ... the true position*” of the fires from the ACT community.

695. Evidence was adduced from Castle about the 5pm interview on 17 January 2003 at T1711. The ACT notes that in the “*accurate summary of all the evidence ... of what actually occurred from 8 to 18 January 2003*” (paragraph 7 of submissions by counsel assisting), there appears to be no reference made to any of the interviews above or to Castle’s evidence about the 5pm interview (see sections 3.6.1.7 to 3.6.1.17 which appears to cover the relevant matters which occurred between about 1400 and 2050 on 17 January 2003).

696. There must be some doubt attaching to counsel assisting’s claims that their summary of evidence is complete and accurate. Of concern is the fact that in what is undoubtedly a comprehensive coverage of the evidence by them, the matter which was in the brief and the subject of oral evidence (and what might be thought to be exculpatory of any adverse inference against Castle) has neither been referred to in the summary, nor is it referred to in the relevant section of the findings where serious criticisms are made of that individual.

6.8.8.1 Fire Predictions

697. Warnings can only be given in the context of predictions about future fire behaviour, whether that behaviour be possible, probable or likely. We understand counsel assisting to agree with that proposition. They have made submissions about fire predictions made on 17 and 18 January 2003 for that reason, among others (see paragraphs 1272 to 1277). We deal with each day in turn.

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698. At paragraphs 823-828, counsel assisting summarise the manner in which three members of the Planning Unit - Lhuede, Taylor and Gellie - carried out their predictions of fire behaviour for the next day, 18 January 2003. In particular, on the morning of 17 January 2003, Lucas-Smith asked them to prepare "*a map detailing potential spot distances today for all fires*" (our emphasis) (ESB.AFP.0110.0868). The task was to proceed by reference to unattended fire spread. In our submission, that amounted to Lucas-Smith seeking a view about the "*worst case scenario*", to the extent that a prediction could be made.

We agree that McRae was probably also involved in making that request.

699. Lhuede, Taylor and Gellie worked together on the task and produced a map identifying the potential for the fires to reach Narrabundah Hill by 2000 hours (8pm) "*as the last eastern most component of the rural land to be affected.*"(Lhuede T4946)

700. In making their predictions, and producing their map, the planning officers also took into account the "*likely or forecast weather changes during the period*" (Taylor T4995). The three officers worked together on the task. Each had considerable and varied planning experience which they applied in making their predictions and producing the map. Each was aware that in certain conditions the McArthur meter may understate fire spread. At least one of the planning officers (Taylor) allowed for the note of caution arising from Project Vesta. However, it is clear that the officers did not approach their task in any purely mathematical or artificial way. Rather, they applied their knowledge about "*fuel types, slopes and likely forecast weather changes*". They also calibrated the model to suit the particular field conditions. (See counsel assisting submissions at paragraphs 823 - 828)

701. In addition to the map, the officers also prepared a 'message form' on which Mr Lhuede set out their estimated times at which the fire would reach certain points as it progressed eastwards. That form, like the map, did not identify any threat to the urban edge (ESB.AFP.0110.0974).

702. The afternoon planning meeting on 17 January 2003 was delayed for two hours beyond the ordinary time of 4pm. One of the reasons for doing so was to give

the three planning officers time to finish their work so that their map and predictions could be presented to the whole planning meeting.

703. The map and the predictions, in terms of places where the fire was predicted to reach and when, were presented to the meeting. The predictions involved potential fire spread into the rural areas of the ACT, particularly in the Tidbinbilla Valley as a result of the Bendora and Stockyard fires. As a result of those predictions, ESB responded by taking various steps to warn persons living in rural areas about the potential fire danger. (counsel assisting submissions at paragraph 846f).

704. Several matters become evident as a result of the planning work done that day and later presented at the planning meeting.

705. Firstly, a major concern for Lucas-Smith, McRae and many others was to have an understanding of potential expansion towards Canberra of all the fires. The whole point of tasking Lhuede, Taylor and Gellie was to gain that understanding. Its importance is demonstrated by the fact that those three officers were, speaking generally, the three most experienced planners in the Planning Unit (in addition to McRae) and yet all three of them were put on the one job.

706. Secondly, the afternoon planning meeting was delayed in order to allow the situation officers to present their predictions to the entire meeting. That step was taken because Lucas-Smith, McRae and others appreciated that many people with different interests needed to be kept informed about potential fire spread. In particular, the information was not required only for operational purposes. Had that been so, the information could have been provided in that context, either before or after the planning meeting.

707. Thirdly, counsel assisting make no criticism of the work done by Lhuede, Taylor and Gellie, and properly so. As events turned out, their predictions were significantly wrong as to place, time and intensity (or where, when and what). However that arose because the fires behaved in a way that none of them anticipated. No one at the later planning meeting queried their predictions, and indeed everyone accepted them and acted accordingly.

708. Fourthly, there is no evidence to suggest that any of the large number of persons mentioned below who attended the planning meeting voiced concerns about whether warnings should be given to those living further on from where the fire was predicted to reach (i.e: whether urban edge residents ought be warned). Those who gave evidence supporting this include Castle T1725, Harvey T4202, Wheatley T4196 and Prince T6457.

709. Those present at the meeting included:

- i. Experienced firefighters including Lucas-Smith, Bartlett and Cooper among others.
- ii. A senior officer from the AFP.
- iii. A senior officer from NSWRFs, namely Kevin Cooper
- iv. Several medial liaison personnel including Harvey, Lowe and Wheatley.
- v. Senior government officers with “whole of government” interests to consider including the Chief Executive of the Department of Justice and Community Safety, Tim Keady, to whom Castle answered.
- vi. The Fire Commissioner, Ian Bennett, who had operational responsibility in the event that the fire reached the urban edge.

710. In the face of these facts, counsel assisting single out McRae from the group (despite him not even having made the predictions) and submit that it “*defies common sense*” for him not to have realised that the urban edge was at risk (counsel assisting submissions at paragraph 1274). In this context it is unfair that he alone should be criticised for such a lack of prescience when the predictions were a result of work by his team and were the subject of discussion and debate at the planning meeting.

711. There is great difficulty in counsel assisting’s submission that McRae lacked “*common sense*” in relation to his predictions of 17 January 2003 when those predictions were the subject of debate amongst the wide group of attendees at the meeting and those attendees apparently raised no concerns. It is one thing to say that an individual may have been distracted from the true position; if the position is that a large number of people laboured under the same misapprehension, the likely

construction is that in that context all thought the proposition was reasonable. In our submission, your Honour should reject that submission.

712. The submission is built entirely on hindsight. In our submission, the failure to appreciate the possible outcomes is explained by the fact that subsequent events were wholly outside the contemplation of experienced firefighters and ESB officials.

713. The Territory agrees that, with hindsight, it would have been prudent to inform residents on the urban edge about the risk identified during the evening planning meeting. However, it did not happen because no one expected the residents to be affected. This should be contrasted with the rural lessees, where a potential for them to be affected was recognised and consequent steps to warn them were taken.

714. At some time much later, and for the purposes of the Inquiry, Cheney says *“there is no point in being terribly fancy about it ... the Planning Unit should have assumed a fire danger index of 80 ... and that extreme weather would occur after 1000 hours ... and that it was possible for the fire to reach the suburban area of 18 January between 1300 and 1400 hours”*.(T6879-6880)

715. It is accepted that Cheney’s views in this matter should be given weight. However, it is clear that Cheney made a number of assumptions in giving his view. These related to the assumed fire danger index and the time that the extreme weather would commence to affect fire behaviour. These assumptions, of course, are matters of judgment upon which reasonable fire planners might differ, particularly because it would be unusual to base predictions on a fire danger rating different than the one predicted for the day in question.

716. That such assumptions can prove to be inaccurate is supported by Cheney’s concession at T7148/9 that as the fires moved through the eaten out grasslands at 2pm on 18 January 2003, they moved at a speed of three times that which could be expected. Cheney conceded that the fire spread through grasslands is unaffected by the Project Vesta adjustment.

717. Small variations in the underlying assumptions would no doubt affect the ultimate prediction. Cheney's concession about the fire spread through the grasslands is a matter which casts further doubt upon the submission of counsel assisting at paragraph 1277 that the main run of the McIntyre's Hut fire and the Bendora fire "*travelled more or less as would be expected*".

718. The ACT submits that the assumptions made by the fire planners at the ESB, whilst proved to be incorrect by subsequent events, were nevertheless reasonable ones upon which to base the predictions they made, particularly given that they had not experienced fire behaviour of that type before. It is difficult, even for the most objective observers, to avoid being affected by a degree of hindsight when looking at past events.

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719. At paragraphs 874-904, counsel assisting make submissions about the predictions made on 18 January for fire behaviour later that day.

720. Various meetings happened early on 18 January, particularly the 9.30am morning planning meeting. It is enough to say that by the time of the planning meeting, many people - particularly Gellie, McRae and Bartlett - were predicting that the fires would reach the urban edge at around 1800 hours (6pm) that day, and that numerous other people became aware of their view either before or during the 9.30am planning meeting. However, the prediction was very broad. Fire was expected to reach the urban edge somewhere between Dunlop in the north and Greenway in the south. Numerous suburbs were mentioned as being at risk along that entire western edge of Canberra. The threat also extended to the rural areas in Tidbinbilla Valley south of the suburbs of Tuggeranong. The predictions were made in the context of unattended fire spread as a worst case scenario and without the benefit of the thoughts later expressed to one person by Taylor. (Bennett T1986; Taylor Statement, paragraph 38)

721. Although those predictions were made, they were tempered by several matters. First the expectation was only for low level "*tongues*" of fire or spot fires burning

through scant grasslands and dirt areas. Secondly, the firefighters were confident that the fire behaviour would be ameliorated once it was out of the forests and onto the "eaten out" grasslands that extended over approximately 2kms between the forests and the urban edge (counsel assisting's submissions at paragraphs 879-880; Ferry T2579).

722. The ACT acknowledges that the ESB did not inform the public about these predictions for a further two hours or so after the planning meeting concluded. The ACT and many of its employees acknowledge that with hindsight, warnings should have been given more promptly, but the two hour delay must be understood in the context of the perceptions about the likely fire impact as discussed above.

723. On the morning of 18 January 2003 Taylor still held optimistic views as to measures which could be taken to ameliorate the fire-run and its effects. This remained so, even though he had made a new prediction that morning, which is further referred to below. He said at T5003:

Q You make the point in paragraph 41 and this has been subsequently amended:

"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."

As it turned out, Mr Taylor, your prediction in that message form was pretty accurate; wasn't it?

A. That was a prediction of unchecked fire behaviour.

Q Yes, I appreciate that. But in effect what you predicted is what actually occurred?

A. Yes

Q At the time that you wrote this, or for that matter on the previous evening, had you turned your mind to the possibilities for the western suburban edge of Canberra, particularly when you

wrote this message form you are predicting an impact on the urban interface from Hawker to Weston Creek. But were you considering what the effect of that impact might be?

A. No. In the context that I believed the fire progress could be checked on the grasslands.

724. This is particularly significant because the views he held appeared to be consistent with the views of senior ESB officers and other experienced firefighters concerning the likely speed of travel of the fire and the effect of the grasslands and eaten out paddocks on the fire behaviour.

725. At the media conference at midday on 18 January 2003, Lucas-Smith spoke in consistent terms about the threat to the urban edge when commenting on what the ESB expected. He reminded the public of the steps they should take to prepare for a bushfire impact (DPP.DPP.0003.0493). He referred in particular to everyone living on the western edge of Canberra.

726. At paragraph 1276, counsel assisting refer to Taylor's prediction on the morning of 18 January 2003 about the time at which the McIntyre's Hut fire would reach the suburbs, and note that it is consistent with the estimate Cheney "would have" made. We submit that submission must be tempered by the matters referred to above concerning the assumptions made by Cheney when he reported upon his likely prediction, and also the matter referred to hereunder.

727. Taylor made a different prediction, shared by others, the night before. The new prediction was arrived at after the morning planning meeting. There is no evidence regarding the passing of that prediction to anyone other than Graham (T5000-5001). The time when he handed the memo to Graham (after he had reviewed the predictions following the planning meeting) is not known.

6.8.8.2 Warnings to the Urban Community

728. The Territory accepts counsel assisting's submissions at paragraphs 1278 – 1280 that the ESB's approach on the night of 17 January 2003 proved to be unduly optimistic. Having regard to Castle's evidence at T1723 to 1726, however, the ACT submits that Castle had a genuine expectation that attempts could be made to inhibit the run of the fires.

729. In his evidence Castle pointed to the various matters that were apparently occupying his thinking at the time of these events – these included that he had “*an optimistic view of the ability to suppress*”; that he did not specifically know the extent and the area which might be affected; that his “*perspective and the focus might not have been on the urgency*” and that “*the focus was on the rural*”. On later reflection, many of these reasons do not withstand closer scrutiny. However, there is no cause to doubt the veracity of this evidence or the genuineness of his expectations at the time.

730. The ACT submits that it is appropriate to make findings to the effect that warnings should have been given at this time, but further findings about responsibility of individuals is not appropriate. Further there can be no findings that what occurred was in the course of a wilful decision to withhold important warnings from the Canberra community – the extensive efforts to warn the rural community simply do not bear that out.

6.8.9 20.50 Media Release

731. At paragraphs 1281 – 1283, counsel assisting criticise the inadequacy of the media release issued at 8:50pm on 17 January 2003. The ACT accepts that this media release did not forewarn the public about what was to occur, and with hindsight should have been more forthcoming about the prospect of embers and spot fires in urban Canberra. However consistently with the reasons expressed above, the ACT submits that no finding should be made to the effect that “*the only plausible explanation ... (for the failure to refer to the risk of embers and spot fires) is ... a positive decision to defer identifying the risk in those terms*”. The evidence suggests that the issue of warnings was not discussed at the planning meeting that evening, nor apparently did the issue arise amongst those responsible for preparing the media release, including Harvey and Lowe.

732. The evidence of Lowe to the effect that “*there was a certain sense of its not going to be that bad*” and a sense of lack of urgency at the meeting is more indicative that those present lacked an appreciation of the risk. With respect to the urban area, that impression is confirmed by the information in the media release about how the public could find out about sporting events relocated from North Curtin Oval as a result of fire fighting personnel relocating from Bulls Head, and about the expectation of significant smoke over the area.

733. On the other hand, the “*current threat to property in Tidbinbilla*” was described as “*serious*”. This directly contradicts the submitted “*positive decision to defer identifying*” significant risks.

734. Further, there can be no advantage for ESB officials to advise residents about smoke problems over the urban area if they had an actual expectation that the following day a significant fire impact was expected. The misleading advice would be exposed in a very short time.

735. It is certainly not indicative of the implementation of a decision not to warn, as contended for by counsel assisting. Had that been the case, one would have expected that one of the many persons present at the meeting or involved in the media release to have disclosed that fact in evidence or otherwise.

736. The ‘ring around’ to rural residents referred to in paragraph 1284 also detracts from the proposition that information was intentionally withheld. The ACF submits that it is churlish of counsel assisting to dismiss such efforts for not including some residents and as being too late to be of practical assistance. The targeting of those contacted and the timing of those contacts reflects the genuinely held views of the senior ESB officers about those who were thought to be at risk.

737. With hindsight, on the evening of the 17 January 2003, a more pessimistic approach should have been taken and communicated but such outcomes were not within the thinking of ESB officers at the time.

738. Your Honour should reject counsel assisting's submission at paragraph 1287 that had residents been given a warning about the substantial risk of being affected by fire on 18 January they are likely to have adopted the "*best practice*" responses set out in subparagraphs 1287(a)-(e).

739. These hypotheses are unhelpful and speculative. First, the submissions presuppose the content of a warning for events about which the ESB did not have a clear appreciation. It is illogical to speculate about a course of action based on a warning of events that were never contemplated.

740. Secondly, even if a warning had spoken about the possibility of grassfires reaching the urban edge, or embers falling within the suburbs, it is questionable, at least, that the public at large would have acted as suggested by counsel assisting. Some people might have taken some of the steps proposed; some may have taken none of those steps and some might have taken many of them; many might not have heard the warning. To speculate in that range is idle. At its highest, it could only be said that residents may have acted in varying ways depending on all the facts and circumstances pertaining to them and each of them. Cheney considered these difficulties at T557-558.

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741. The ACT accepts that events on 18 January were chaotic, and that in large part that arose from a lack of preparation for, and a lack of warning about, the size and magnitude of the fires which in fact impacted on the urban edge. It appears that many of those working at the ESB were overwhelmed by the situation. Your Honour should reject the submission at paragraphs 1288 and 1290 that this circumstance arose as a consequence of any deliberate decision by the ESB to defer warnings to the public about the nature of the risk they faced.

742. The ACT accepts that the ESB should have provided a clear indication about the possibility of the fire reaching the urban edge. The fact that this was not done

may be due to the various factors relating to stress and fatigue to which reference was made at the commencement of this submission concerning warnings.

743. The meeting had been informed that the McIntyre's Hut fire had broken its containment lines; nevertheless, experienced fire fighters retained some belief that the fire could be contained in the grasslands. One such person was Neil Cooper who:

"... still strongly believed that, once [the fire] came out of the plantations or out of the timber, we would be able to contain it on the grassland." (T4780)

That was so, despite the prediction made at the Planning Meeting by a planning officer, Mr Hilton Taylor (Cooper T4780), *"that the McIntyre's Hut would impact on Canberra by late that afternoon"*. (Cooper T1781, ESB.AFP.0110.0693)

744. As at 18 January, Lucas-Smith's view of what he expected to impact on the urban edge was described at T1205:

Q It is always difficult looking back to try and see what your state of mind may have been at a particular time. But to the extent that you had in your mind that the McIntyre Hut fire may reach the urban edge of Canberra, did the events depicted in Mr Thornthwaite's, or the video taken at the time of Mr Thornthwaite's ember shower, and matters of those sort, did those sorts of things enter into your thinking as possible events at that time on the 18th?

A No, certainly not to that extent or to that ferocity. I certainly did not expect an impact on the ACT interface areas of that sort of ferocity at all. I certainly expected that somewhere, either from the Bendora fire or Stockyard fire or the McIntyre fire, just for the sheer length of the interface there - and in fact if you measured around all the nooks and crannies and the full interface from that corner from Warragamba Avenue right down to the bottom of Gordon there is in fact 72 kilometres of potential interface of the ACT - and I didn't know where impacts were going to occur. I knew we would not be able to cover all of that with the resources we had. So the potential for the Bendora fire or the Stockyard fire to eventually creep through to

the interface, or the McIntyre's Hut to eventually each the interface, that potential really existed. But where I didn't know and when. All we had was the predictions we were able to make based on the best of our ability.

(Although that view appeared to have changed by about 12 noon when Lucas-Smith considered that the impact was likely to consist of a fire burning very fiercely through the pines.)

745. McRae stated at T3363 to 3364

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

Traditional damage to the urban interface in Canberra, as I said before, indicates the first row of houses and maybe another two rows of houses back. There was nothing at all on my radar screen, to use a figurative term, to indicate the impacts that did occur. In terms of the impacts that we expected to occur, my belief is that my decisions and the information given to me by people working for me led to appropriate levels of trigger setting for what we anticipated.

746. Bartlett, and members of NSW RFS, were well placed to recognise the potential of the fires. As Counsel assisting state, “*of all those participating [at the meeting] (with the possible exception of Mr Lucas-Smith) [Mr Bartlett] had the greatest expertise and most experience in the behaviour and suppression of large-scale wildfires.*” (paragraph 1292). Bartlett was at the morning planning meeting. He expressed his views “*about the potential for fires to burn towards the edge of Canberra during the day*”. He recalled there was no “*dissent from the views that [he was] then expressing*” and that, notwithstanding, there was “*not any discussion about*

the means by which the Canberra community should be warned of this potential”-
Bartlett T6550-6556)

747. Bartlett was in a helicopter most of the day on 18 January 2003 making observations about the fire behaviour. He described himself as *“the eyes of ESB”* (Bartlett T6510). He agreed that at 2.39pm the fire was *“within a couple of hundred metres of the urban interface.”* He gave the following evidence about events at that time:

Q. “This is the point where you indicate that the fire was developing rapidly and heading towards the ACT Forest office?”

A. Yes.

Q. Was this the first time you had concerns for your forestry office?

A. Yes

Q. Not long after that your depot was destroyed by fire?

A. That’s correct. ” (Bartlett T6066-6067)

He had also been working with this fire event for many days.

748. Bartlett gave evidence that he first *“had concerns”* for the headquarters of ACT Forests, of which he was the Director, approximately an hour before it was destroyed by the fire.

749. Cooper also had a similar experience at T4799:

“I mean, right up until the fire was actually in Stromlo Pines I still didn’t think there was any – I really lie awake about that, I find it quite embarrassing with the fire experience I’ve got. And I know Tony Bartlett, him and I have talked about this several times that we never even perceived it would burn our depot. I left my vehicle at the depot with my wallet and all the drivers licence and all the details”. (Cooper T4799)

750. Similarly, NSW RFS constructed its camp in the path of the McIntyre’s Hut fire, were it to run towards Canberra under the influence of north-westerly winds, and later lost its camp. Indeed the evidence of the NSW personnel was that on 14 January, *“...the location (of the Stromlo base camp) would not come under threat from the fire”* (Arthur T4630, Crawford at T4518-9). It can be reasonably presumed that NSW

RFS did not appreciate its camp was at risk until it was too late to move it or any item at the camp. The NSW contingent did not evacuate that camp until very shortly before the fire struck. Furthermore, it was only on the night of 17 January, that NSW fire fighters made contingency plans for the base camp having regard to the spread and movement of the fire (Arthur T4630)

751. In view of the fact that this cross-section of persons did not foresee the speed and ferocity of the fire, it is less surprising and more explicable that others at the ESB, including the senior officials (with admittedly less experience than these firefighters), also had a less serious view of the level of risk involved.

752. At least one explanation for the firefighters' lack of appreciation of the potential impact was the speed of the fire runs. The McIntyre's Hut fire crossed the border into the ACT at one location by about 7.30am. By 12 noon it was burning in the timber behind Uriarra Station (a distance of about 2 to 3 km). By 1pm the fire had made a run through Uriarra Settlement (about 1.5km from the Station). This is a total of approximately 4.5km in 5.5 hours. By 2pm the fire was burning in the pine plantations on Mt McDonald (a distance of about 4km from the Settlement). In the next hour it crossed the Murrumbidgee and burned through Stromlo Forest, reaching the urban edge, a distance of about 8 km. Therefore, between 1pm and 3pm the fire travelled a distance of 12km. As it transpired, even the fire spread in the morning of the 18 January 2003 was not a reliable indicator as to what would occur after 1pm.

753. At paragraph 1296, counsel assisting make submissions about the media release provided on 18 January 2003. The ACT accepts that the press release should have been released much earlier in the day, but this may be explained by the substantial increase in activity at ESB owing to operational demands.

754. At paragraph 1297, counsel assisting refer to Lucas-Smith's press conference on 18 January and submit that it *"took him until midday to actually say that there has always been a chance that the fire would reach the urban area."* Counsel assisting also submit that, still, he and Castle *"didn't emphasise adequately enough the potential risk."* It is not true to say that this was the first time Lucas-Smith and others had acknowledged the chance of the fire reaching the urban area. Although on 13

January 2003, Castle conveyed the notion that residents should not be concerned, he also acknowledged that the fires could present a significant impact in context of the urban edge. The effect of such comments was to recognize the chance of such an impact and that submission should be rejected.

755. The ACT agrees with Lucas-Smith's own assessment of what he conveyed at that media conference -- namely that it did not emphasise adequately enough the potential risk. However, it also contained indications about the relevant precautions that persons adjacent to the grasslands on the western side of Canberra should take. The ACT further submits that Lucas-Smith should be accepted when he stated that he was not intentionally seeking to withhold information from the Canberra community.

756. At paragraph 1299, counsel assisting submit that at midday on 18 January 2003, ESB personnel are still "*continuing knowingly to withhold vital information from the people of the ACT and Canberra*". That is quite wrong -- the McIntyre's Hut fire was still 13.5km away and had been moving at less than 1km per hour. Although some increase in fire spread might have been expected during the peak afternoon fire danger period, the actual speed was beyond expectations.

757. There was nothing wilful in the failure by ESB officials to clearly state the risk; none of the witnesses asserted or conceded that their failure to warn was motivated by the wish to avoid panic as suggested in paragraph 1300. The most reasonable inference is that these officers failed to anticipate the immediacy of the impact.

758. The ACT submits that it is no part of the proper exercise of the Coronial function for the Coroner to entertain making findings in the intemperate terms contained in paragraph 1300.

759. In paragraphs 1301 and 1304 counsel assisting seem to suggest that the SEWS or any meaningful warnings were first commenced to be broadcast between 2.25pm and 2.45pm. The evidence suggests that the conclusion is not accurate - indeed it appears from document DPP.DPP.0006.0037 that the emergency fire precautions message was being broadcast shortly after 1pm. That earlier dissemination may have

been prompted by the release of information at the 12 noon press conference and through the 12 midday and 1 pm media releases.

760. At paragraph 1302, counsel assisting criticise the fact that, as part of the SEWS message, residents were advised to return to their homes – and in some cases those homes were already on fire. The ACT submits that in a dynamic situation of fires burning across a wide area, and the method of broadcasting is by radio broadcast, it is simply unavoidable that a single message is capable of having its correct and intended application in cases of this kind. This is simply a product of the fast changing and dynamic circumstances of such a disastrous event. No complaint can be made about the appropriateness of that advice in most cases as it complies with the AFAC guidelines in this regard. There was no reason to think that a warning other than one which complied with the AFAC guidelines would be appropriate until after the fires were well into the suburbs.

761. The ACT submits that there is no basis to make the findings against Lucas-Smith contained in paragraph 1305, even if the terms of the finding are considered to be comprehensible (what is “*a product of a completely misguided unwillingness ... to be frank with the people of Canberra?*”). There has been previous reference to the matters which influenced Lucas Smith’s thinking about warnings in the days leading up to 18 January 2003 and, as has been submitted, there is no reason to disbelieve that evidence. Furthermore, the ACT submits that it is unhelpful and improper to urge findings against Castle and McRae couched in the terms selected by counsel assisting.

762. Regarding the suggested findings at paragraph 1307, for the reasons expressed above, your Honour should not make the finding in sub-paragraph (a). It is simply contrary to the evidence given by each of these officers. Further, the ACT submits that the finding urged in sub-paragraph (c) is not in accord with the various demonstrated provisions of community information and warnings evidenced before this Inquiry.

763. The ACT submits that there is no evidence that Lucas-Smith and McRae made a decision together or independently that warnings would not be given. As has been submitted on earlier occasions, the proper characterisation is that these officers acted

upon their honest belief as to the level of risk which was then evident to them. Accordingly, to cast the finding as a considered decision not to issue warnings misrepresents the process – the proper construction being that the process is triggered by recognition of a particular level of risk.

764. The ACT makes the same submission in relation to Castle.

765. The ACT further submits that the findings proposed in sub-paragraphs (g) and (h), as to contribution to and causation of the specified events, cannot be made utilising the applicable legal tests relating to the issue of causation referred to above.

6.10 Expert evidence on warnings

766. At paragraph 1309 – 1311, counsel assisting submit that the evidence indicates that pre-season community awareness of what to do in preparation for a bushfire was low. Essentially, that view is based upon the evidence of a selected number of residents and the opinion of Roche concerning that evidence. Roche's evidence in this regard does not appear to be based upon any significant analysis of the surveys which were conducted. It also appears that he drew his conclusions based upon the proposition that, because so many houses were damaged or burnt, one could therefore infer a lack of awareness. As has been adverted to earlier, this does not follow as a matter of logic, it not taking into account the fact that this fire event was one of great extremes. Furthermore, both Roche and counsel assisting summarily dismiss the analysis of the survey conducted by Watson, the sample group being comprised entirely of persons who suffered loss or damage. 86% of those persons indicated a level of awareness as to what should be done in the event of a bushfire.

767. The ACT submits that community awareness activities undertaken by ESB in the period prior to the 2003 fires was reasonable given the size of the jurisdiction. Considerable efforts were made to raise the level of community awareness through various publications provided over the years, and particularly during 2002 (ESB.GSO.0005.0812). It is wrong of counsel assisting to submit that from 1994 there was “*no further targeted campaign for its distribution*” – which we take to refer to the

“*Will You Survive*” booklet. It was reprinted in 1997, and the ‘index’ table provided as part document ESB.GSO.0005.0812 shows a steady stream of publications about bushfire awareness, particularly during 2002.

6.11 Warnings and the deaths

768. At paragraphs 1323-1325, counsel assisting makes submissions about a possible causal link between the lack of warnings and the death of Mrs Tener and Ms McGrath. Counsel assisting reviewed the evidence with obvious care, in the light of the serious nature of the issue and concluded that the evidence, as led, would not permit a finding of that kind to be made.

769. In paragraph 1325, counsel assisting state in relation to the death of Alison Tener that:

A finding that the lack of adequate warning was a cause of these deaths is a serious finding ... and we do not consider that at this stage, the evidence would permit that finding to be made.”

The submissions were prepared over a considerable period of time having regard to the available evidence. The issue of causation was of central importance in the submissions, and to a number of the parties affected by the proposed finding. Presumably, counsel assisting proffered the opinion after careful consideration. The ACT accepts the correctness of this submission.

770. In their letter of 23 May 2006, counsel assisting now urge your Honour to find a number of propositions, some based upon evidence before the Inquest (albeit there was no evidence direct or indirect of what Mrs Tener intended to do on 18 January) and others on mere speculation as to Mrs Tener’s mental processes and intentions. The speculative element of the process is more marked when the ultimate submission is based not on what Mrs Tener’s intentions were but on what they would have been, if certain warnings had been given.

771. In the absence of some explanation for it, the reversal of the initial opinion calls into question the reliability of counsel assisting's submissions, and tends to suggest that the motive for the latest proposed finding is to justify a pre-determined conclusion in regard to causation. It gives every appearance of counsel assisting struggling to attribute blame to senior ESB personnel.

772. In regard to Mrs Tener's death, counsel assisting urge six specific findings.

773. In relation to the first proposed finding, the ACT submits that your Honour would fall into error in making such a finding for the following reasons. The finding is said to be based on the evidence of Amanda Taylor, and she gives no indication of what time she spoke to Mrs Tener. Accordingly there is no basis on this evidence, to make a finding concerning Mrs Tener's state of mind at all about the issue of evacuation, let alone what it was at about 2.00pm.

774. The only evidence given by Taylor of relevant times she had contact with Mrs Tener on 18 January was at Q.44 of TROC (AMT.AFP.0097.0149). She there stated that about 1.15pm-1.30pm - *"that would be a real approximation"* - she had a telephone conversation with her husband about the fires. Taylor did not indicate any time in Q.72, where she said that she was preparing to leave and saw Mrs Tener. The latter stated that she was *"a little frightened"*, but said nothing more about what she intended to do (Q.82). Taylor made the observation that Mrs Tener was not panicked (Q.83). It is to be noted that this evidence is silent on what Mrs Tener's thoughts were about whether to stay or go.

775. Two other elderly neighbours supplied statements about their contact with Mrs Tener that day. In his TROC (AMT.AFP.0097.0128), David Craven said that he asked his wife to check with Mrs Tener to see if she wanted help (Q.51-54), however, he was not sure about the time and he *"would say ... getting up towards 2 o'clock, quarter to 2 maybe"*. He stated that when his wife returned after 5 to 10 minutes, she said:

"Alison's OK ... she's not panicked or anything. She's concerned like everybody is. But she says she's OK and she's getting some things together,

photos and some other things ... just in case there's any need to take them out of the house ..." (Q57).

776. Helen Craven in her TROC (AMT.AFP.0097.0120) stated she last saw Mrs Tener in the "mid morning" "at home" - Q29 and 30. Further she stated at Q.57 that Mrs Tener "... started looking through a few photos ..."; "she was sorting through some of the photos". "She did not tell me why or anything ... Maybe she was getting ready to put them in an album" -- Q92. These witnesses gave inconsistent evidence about the time Ms Craven spoke to Mrs Tener (Mr Craven's evidence was itself an approximation) and about the content of the conversation in relation to the photographs. The only common feature being that Mrs Tener was looking at photographs.

777. It is submitted that there is no sure basis on which to draw conclusions as to when Mrs Tener placed the personal items in the boot of the car. It is the proximity between the time the fires impacted and the time the items were placed in her car that may suggest that Mrs Tener was considering evacuation. If the evidence does not permit a temporal connection between those events, and it is submitted it does not, then no reliable conclusions can be drawn about whether Mrs Tener considered evacuation or not at that time.

778. As to the second and third findings, apart from evidence that the SEWS was authorized at 14.05 and a reference in McLeod report that the ABC radio received notification of the SEWS at 2.31pm, there is no evidence as to when the SEWS commenced to be broadcast. Indeed, the person responsible for its dissemination - Marika Harvey - thought the first SEWS went out was between 1 and 2 pm - paragraph 45 of her statement. Accordingly there is no evidence of when Mrs Tener became aware of the SEWS, if she did at all, and of whether that was the source of her information concerning filling the bath tub with water. Consequently, the claims that Mrs Tener obeyed "*that advice*" and "*abandoned any plans to leave her home*" are unreliable and the ACT submits no findings in those terms can be made.

779. The fact that Mrs Tener was found in the bathtub is of itself not conclusive of the fact that she obtained information from the SEWS. The Fire Brigade officer who

found Mrs Tener body suggests that people under threat often seek refuge in the bathroom and this is a recognised phenomenon. Stevens stated:

“Due to previous experience being a rescue operator I ascertained that the most likely spot was the bathroom as that is where people seem to flee in these conditions.” (Q.9 TROC - AMT.AFP.0097.0097)

780. The ACT submits that the proposed finding that Mrs Tener “*would have temporarily relocated well before the issue of the SEWS at approximately 2.30pm*” is entirely speculative.

781. The advice in the SEWS concerning the filling of the bathtub is not as comprehensive as it might have been. However, the message was designed for broadcast to the public in times of emergency. As such it should convey important advice when a fire approaches. Accordingly, it needs to be succinct and capable of readily being understood, retained and applied. A more comprehensive message may not be so effectively retained by a reasonable listener of the broadcast. The message suggested the filling of receptacles – bathtubs, buckets etc – and the ACT submits that a reasonable member of the public would understand such direction to be directed to a means of collecting water to extinguish fires.

782. The evidence before the Inquiry indicates that the SEWS message was not broadcast in an identical manner by all media outlets. For example, in a SEWS broadcast on 666 radio after 2pm (DPP.DPP.0006.0025) the announcer gave the following relevant explanation of what should be done when a fire approaches the house:

*“**Indoor** if the fire approaches your house close all the doors and windows, fill the bathtub, any buckets etc, soak towels to place in creaves’ such as under the door, if you have time and can do it take down the curtains and push furniture away from the window. That means if your windows are shattered by debris your curtains will not catch on fire because there not there to do so, that’s why you need lots of water buckets it’s the little fires that burn down houses.”*

783. It may be observed that in this broadcast there was an explanation for the use to be made of the water being collected in receptacles, which would reasonably

include the bathtub. The construction of the radio announcer tends to indicate that the message was understood by that person in the manner that it was intended to be. If Mrs Tener heard one of the SEWS broadcasts, there is no basis on which to exclude the proposition that it was the abovementioned broadcast. Accordingly, no firm conclusions can be drawn as to the circumstances in which she came to be in the bathtub. If indeed, Mrs Tener heard the SEWS and acted upon it in the way suggested by counsel assisting, tragically she appears to have misunderstood its purpose.

784. There is no direct evidence of what Mrs Tener proposed to do, so far as evacuation is concerned. There was no evidence from her husband who last saw his wife on 4 or 5 January (Q85, TROC AMT.AFP.0097.0100) nor from her neighbours about her intentions. The evidence indicates that one other person (Taylor) did decide to evacuate and did so to Mrs Tener's knowledge - if Mrs Tener intended to evacuate, that was the time that she would have elected to go. The most likely inference was that at that time, she was prepared to stay. An inference is equally open that even if a warning of the kind which went out on 20 January was issued, Mrs Tener may well have stayed.

785. In summary then, there is no evidence in any conversation Mrs Tener had with any witness of her intentions about evacuation. It may be inferred that Mrs Tener placed the personal items placed in boot of the car, but when that occurred is not disclosed in the evidence. Accordingly there is no evidence about Mrs Tener's state of mind concerning the issue of evacuation.

786. There is also no evidence about when and if Mrs Tener became aware of SEWS and even if it is assumed that she did, that does not determine whether she intended to evacuate. It is equally open to infer that by her acts of filling the bath tub, she intended to stay. Therefore it is entirely speculative to conclude what Mrs Tener would have done if a different warning was given. It follows that the causative link between the absence of warnings and the late issue of the SEWS cannot be established.

SUBMISSION ON RECOMMENDATIONS

787. Counsel assisting has made some Submissions in Response to the statement of Mr Peter Dunn, the then Commissioner for ACT Emergency Services Authority, dated 18 November 2005. As that statement notes, at paragraph 2, the purpose was to assist your Honour in relation to recommendations you might wish to make and informing you of the changes that have occurred subsequent to the fire, regarding the delivery of emergency services in the ACT.

788. Counsel assisting consider the reforms a welcome and appropriate response “*on the whole*”.

789. In a number of areas, counsel assisting offer comments about the adequacy and viability of the further changes. At paragraph 7, reference is made to the evidence of Koperberg (who did not give evidence on this issue) and doubts are expressed about whether a small jurisdiction like the ACT, can sustain “four separately constituted emergency services”.

790. So far as we are aware there was no evidence expert or otherwise, about these matters. Any recommendation arrived at without a comprehensive consideration of the views of those affected and all the relevant factors including the costs of such arrangements, is likely to be of limited value. Such matters would of course be outside the scope of any legitimate inquiry of the Coroner. Nevertheless, the ACT will give the comment appropriate consideration.

791. At paragraph 8, counsel assisting point to the risk of inefficiencies in the use and allocation of resources through duplication and conflicts over jurisdiction between the fire services at the BAZ. Such concerns are theoretical, since it is highly unlikely that both services in attendance at a fire, would contest the issue of jurisdiction rather than fight the fire. The most likely scenario is that there would be significant liaison and co-operation (as indicated in the ESA Guidelines relating to

Response Arrangements in the BAZ, cl.4 and 5), reinforced by the retention of the services as part of an integrated single authority.

792. The anticipated problems referred to in paragraph 9 relating to unified control arrangements between ACT and NSW authorities in relation to a fire outside the BAZ, but which constitute a substantial threat to assets in the BAZ, are likely to occur only infrequently. The co-operative arrangements between NSW and ACT will remedy such problems in practice, as they did in the January 2003 fires, when the Bendora fire crossed the border into NSW on 12 January 2003.

793. The suggestion at paragraph 9, that the full merging of the two fire services is desirable is a statement of aspiration, but fails to take into account or understand the numerous jurisdictional and other impediments involved such a merger. Absent a proper consideration of those matters, any such recommendation should be resisted.

794. Regarding counsel assistings' suggestion in paragraph 10 that the Coroner should comment on the delay in the completion of SBMP Version 2, the ACT refers to paragraph 30 of Dunn's statement indicates the SBMP was prepared by representatives of the interested parties and finalised and approved in early 2005. The ACT agrees that it is desirable to introduce Version 2 but the format and timing for that step is a policy matter and dependent upon completion of various projects under the existing SBMP.

795. As the ACT has submitted elsewhere in this submission, significant decisions regarding the issue of fuel management (addressed at paragraphs 17 to 22 of counsel assisting's submissions) should not be made without the benefit of the full range of views as to what regime best suits the interests of all interested parties. The Coroner should not make the suggested recommendations because they rely entirely on those in favour of large scale hazard reduction across almost all land tenures.

796. Indeed, Cheney was questioned about other types of hazard reduction regimes apart from broad scale hazard reduction at T7054-6. He was referred to the Western Australian scheme of strategic plan prescribed burning and acknowledged that the various factors underpinning the WA scheme (see T7055) were sensible matters

which should be taken into account. It is not suggested that Cheney agreed with the approach; but the point is that his approach is not the only reasonable approach and there are other legitimate factors which must be considered to arrive at a balanced conclusion on which scheme is appropriate.

797. At paragraphs 23-26, counsel assisting urge findings that the responsibility for initial response to all fires on their land, should be with the relevant land management agency. This submission has been addressed earlier in the Land Management Issues Section. In summary, the ACT submits that in a jurisdiction of the size of the ACT, it is neither practical nor sensible to by-pass fire fighters located nearer to the fire in order that the land manager responds first. In any event, the present system (and that which obtained in January 2003) is that the land managers were responded at the outset and had command and control at the fire ground -- in substance the same result was achieved.

798. At paragraph 31 and 32, counsel assisting argue that the Coroner should make recommendations relating to the appointment of personnel to IMT roles in level 2 and level 3 wildfires. Under the *Emergencies Act 2004*, the ACT has put in place the Emergency Services Authority. The senior personnel of the Authority were selected for their skill, experience and capabilities. The ACT submits that there should be no such recommendations which impinge upon the ability of such senior officers to carry out their functions and impinge upon their judgment calls in dynamic situations.

799. At paragraphs 33 and 34, counsel assisting submit that recommendations should be made about the importance of funding community awareness programs and “*personalising the message*” to community members. The ACT has shown a clear commitment to carrying out the Melcod recommendations (including those relating to community education and warnings) and it intends to continue with that commitment. Further, it is submitted that the proposal by counsel assisting that the Coroner remind the ACT of “the responsibility of current and future governments of the ACT” about these matters is unnecessary, beyond jurisdiction and any recommendation in those terms should be rejected.

800. In relation to the Memorandum of Understanding between the ESA and the NSW Department of Environment and Conservation (paragraphs 35-38), the ACT submits that the analysis of counsel assisting as if the Memorandum were a statute rather than a working document designed to encompass a cooperative relationship, is unhelpful. The suggestion of the implementation of “*joint operational arrangements*” between NSW and ACT authorities where it is probable that a fire will affect the other jurisdiction, in practice may not involve a situation greatly different from that which occurred in 2003.

801. The ACT has fewer personnel than does NSW and accordingly, in a large fire event, those personnel will most likely be primarily involved in the fire suppression effort in the ACT. If ACT personnel were to be involved in joint arrangements, they would not be available for the ACT suppression efforts. This would not be a productive result. In circumstances where NSW authorities have undertaken the suppression activities in NSW, provided there are effective avenues for communication and liaison between the jurisdictions, the ACT submits that this would yield the best results in those circumstances.

802. The suggestion of joint arrangements is not the panacea that it might seem. For example, an interesting question would arise if there were disagreement as to what should be done between the authorities under such joint arrangements. It serves to underline that whatever the formal arrangements, absent the will to co-operate, no system will function properly.

803. A number of specific recommendations are urged in relation to various matters including the desirability of a single MOU between the ESA and NSW authorities (paragraph 38); the conduct of “*an annual qualitative risk analysis of conditions*” prior to each fire season (paragraph 40) and a “*wholesale review*” of the reforms in the Dunn statement (paragraph 43).

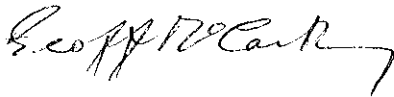
804. By establishing the ESA and staffing it with skilled and professional officers, the ACT intended to ensure that emergency services (and in this case, firefighting services) were provided efficiently and by skilled persons. It was recognised that the

provision of such services in varied conditions required the exercise of judgment by such persons.

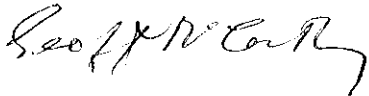
805. Whilst recommendations of a general nature can be helpful in identifying matters for improvement and suggesting solutions, generally, these more specific recommendations could have the effect of removing or impeding the necessary element of judgment and skill of the senior personnel.

806. The ACT submits that it is neither appropriate nor necessary for recommendations to be made which have the effect of micro-managing the skilled senior personnel in carrying out their many duties.

30 June 2006



P. ILAKATOS SC



G. C. MCCARTHY