

## **SUBMISSIONS TO CORONER MARIA DOOGAN**

### **ON BEHALF OF SUPERINTENDENT PETER NEWHAM OF THE ACT FIRE BRIGADE (FB).**

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

AND

INQUIRY INTO THE FIRES OF JANUARY 2003.

1. Supt Newham provided two TROC's dated the 18 March 2003 and 16 October 2003, a statement dated the 11 June 2003 and gave evidence on the 11 May 2004.
2. Mr Trevor Roche provided a report to the inquiry which was dated the 13 July 2004 (the report). Mr Roche gave evidence on the 5, 6, 7, and 8 October 2004 and 17, 18 and 24 October 2005.
3. On the 18 January and the days leading up to that day, Supt Newham was the FB officer in charge of operations.
4. In his report Mr Roche made a number of comments, which were critical of some operational aspects of the FB performance. Counsel assisting have made comprehensive submissions dated the 2 April 2006. At paragraph 6 counsel assisting detail the nature, purpose and structure of their submissions. It is said that chapters 2 and 3 are a summary of the evidence and that chapters 5 and 6 are their submissions as to what your Honour should find, based upon the evidence so summarised.
5. I do note that chapter 1 also makes some significant submissions

6. In making these submissions I have assumed that your Honour would not make any findings beyond those submitted by counsel assisting. On that basis my submissions on behalf of Supt Newham are for the most part only directed to the submissions contained in chapters 5 and 6 and I therefore do not intend to address in any detail the numerous other criticisms contained in the Roche report. If you Honour does at any stage consider making comments or findings concerning Supt Newham or the ACT Fire Brigade beyond what is contained in the submissions of counsel assisting then I would seek an opportunity to address those issues.

7. The only submissions of counsel assisting which are in any way critical of the performance of the ACT Fire Brigade, and therefore potentially of Supt Newham are to be found in chapter 6.8.6/para1265 of their submissions. The evidentiary basis of these submissions seems to be found in chapters 3.5.2.10 and 3.6.1.8. My submissions are therefore largely confined to these matters, although my submissions will shortly be directed to some comments of counsel assisting contained in chapter 1 of their submissions.

## **ROCHE EVIDENCE**

8. It is my submission that the report and his oral evidence lacks complete utility and should not be relied upon or followed in any way.

9. When the report was tendered I objected to a number of parts of it, basing my objections upon the principles set out in Makita v Sprowles (2001) 52 NSWLR 705. The report was admitted over those objections. In mentioning this matter I am not intending to canvass your Honour's ruling, however the principles mentioned in that case are of relevance when considering the weight which ought to be attached to the report and his evidence.

10. In Makita v Sprowles the following appears in the judgment of Heydon J:

*"The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state*

*explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are "sufficiently like" the matters established "to render the opinion of the expert of any value", even though they may not correspond "with complete precision", the opinion will be admissible and material: see generally Paric v John Holland Constructions Pty Ltd [1984] 2 NSWLR 505 at 509-510; Paric v John Holland Constructions Pty Ltd (1985) 59 ALJR 844 at 846. One of the reasons why the facts proved must correlate to some degree with those assumed is that the expert's conclusion must have some rational relationship with the facts proved."*

11. Three important principles emerge from *Makita v Sprowles*. The first is that the experts opinion must be based upon proved facts. The second requires complete impartiality of the expert and the third requires the reasoning process of the expert to be transparent. In my submission the importance of applying these e principles is in no way lessened simply because a coroner is not bound by the strict rules of evidence. (S47 Coroners Act). The Roche report and his oral evidence offends almost all of the principles enunciated in *Makita v Sprowles*.

#### THE FACTUAL BASIS OF MR ROCHE'S OPINIONS.

12. Where there is reliance upon an experts opinion then your Honour should only accept that opinion where you are comfortably satisfied of the facts underlying that opinion. The standard to be applied is the civil standard modified by the principles set out in authorities such as *Briginshaw v Briginshaw* (1938) 60 CLR 336. It should be borne in mind that findings about any deficiencies in the performance of any official in the carrying out of his/her duties is likely to have an impact upon that person's reputation. This is also true even where the finding is couched in terms relating to the general performance of an organization. Such a finding can still significantly affect the reputation of individuals.

13. In my submission it would be dangerous to rely upon any part of the report and in particular the parts to which I objected.

14. It became quite apparent during Mr Roche's cross-examination that, with respect to a number of parts of the report, his reasoning process was seriously flawed, and his conclusions and opinions unreliable. In his report he made some positive

assertions that a certain thing had not been done. These assertions were, it seems, not based upon any firm evidence that the thing had not in fact been done. What he was really meaning to say was that there he had seen no evidence before the inquiry that the thing had been done. His conclusions were not based upon any detailed inquiry as to whether the thing had or had not been done.

15. A good example of the above relates to the question of the training of FB personnel in bushfire fighting techniques. At page 52 of his report Mr Roche said as follows:

*“Among the more extreme examples, personnel attached to the ACT FB appear not to have been exposed to any training relating to wildfire behaviour and suppression.”*

16. Subsequent material which I caused to be placed before the inquiry, being a statement of Supt Cartwright, indicated Mr Roche’s statement to be incorrect. At 7868 L1 Mr Roche conceded that with respect to basic training he was incorrect.

17. At page 38 of his report he says as follows:

*“the evidence suggests that little if anything was done in the lead up to the season by either ESB or DUS over and above normal pre season preparations.”*

18. Mr Roche’s statement appears to have been based solely upon his review of material then before the inquiry. When confronted with further material from Mr Bartlett he conceded that his statement could not be sustained. (See 7969 at L44)

19. In response to questions from Mr McCarthy it became quite apparent that Mr Roche’s methodology was to assume something had not been done unless there was existing material before the inquiry to indicate that the thing had been done.

20. At 8010 L 19 Mr Roche is being questioned by Mr McCarthy and the following appears:

*“Q. So you take the view in writing your report that you were given this material and if you can't find anything in there to demonstrate something was done or not done then you conclude to the contrary; is that right?”*

*A. That's the only option I have. And on a number of occasions I have premised my comments with "on the evidence that is available to me". I may not have in this case but in many other cases I have.”*

21. At T7573/4, I asked Mr Roche the following questions concerning parts of page 39 of his report relating to pre-season preparations:

*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.*

## BIAS/ADVOCACY FOR A CAUSE

22. Not only can it be said that Mr Roche expressed many opinions which had no factual basis it is also clear that he made no attempt at impartiality. This is illustrated by Mr Roche's answer to the following question by Mr Whybrow at 7944 :

*“Q. On the basis of your report, it would be extremely difficult for her Honour and those representing the parties here to work out which of your opinions are strongly held beliefs where you have been endeavoring to bring about a particular*

*consequence and ones which are not; you would agree it would be difficult from your report?”*

*“A. It may be if my report was taken in isolation, yes.”*

23. Nothing said by Mr Roche in his oral evidence and no other material before your Honour assists to determine the issue posed by Mr Whybrow’s question. It is not possible to know where Mr Roche is being an advocate hoping to achieve a certain outcome on the one hand, and where his opinion is a genuine and independent view untainted by any desire for a particular outcome.

## REASONING PROCESS

24. In numerous parts of his report Mr Roche makes assertions without any attempt to lay the foundations upon which those assertions are based. Inconsistent with the principles of *Makita v Sprowles* he does not make his reasoning process clear and it is thus impossible for a reader to understand the basis for his opinion. His opinions are further tainted by his use of vague and unquantifiable adjectives. I will give an example of this below. This problem makes it impossible to objectively test his opinions and in many cases to know what he really means in any concrete sense.

25. For the sake of economy I do not want to repeat all of the matters mentioned in chapter 4 of the submissions by New South Wales, however I respectfully adopt them as my own and submit that no reliance whatsoever should be place upon Mr Roche’s evidence.

26. I also respectfully adopt the submissions of the ACT relating to Mr Roche and his evidence.

27. I would ask you Honour to make a specific finding that you are unable to place any reliance upon any of the evidence of Mr Roche.

## **ACTFIRE BRIGADE PLANNING**

28. If your Honour rejects my submission that no reliance at all be placed upon Mr Roche then I further submit that his criticisms of the Fire Brigade IAP as mentioned at chapter 6.8.6 are completely unjustified.

29. At para 766 counsel assisting unfortunately repeats the quote of Mr Newham where he is alleged to have used the words "*business as usual.*" This phrase has been completely taken out of context by both Mr Roche and counsel assisting. It is quite obvious that what Mr Newham was suggesting was that the ACT Fire Brigade had all its usual statutory functions to attend to. It was not part of the Fire Brigade's statutory function to fight fires out in the bush. That is patently correct when one looks at the statutory division of responsibilities between the Bushfire Service on the one hand and the Fire Brigade on the other. As Ian Bennett said at T1979 L42 "The lead combat service on the 18<sup>th</sup> was the ACT Bushfire Service. At that point of time (meaning before the fires arrived) there was no fire incident within the jurisdiction of the ACT Fire Brigade." Your Honour should reject any suggestion that Mr Newham was intending to say that there needed to be no planning or preparation for the possibility of the fires reaching the urban area. The evidence shows that the Fire Brigade was taking significant steps to prepare for that likelihood. The report of the Fire Brigade Incident Management Team dated February 2003. This team was set up after the briefing of the 16<sup>th</sup> January sets out in some detail what was being done. The report is AFB.AFP.0001.0001.

30. Mr Collins, in charge of the Fire Brigade Planning Section said at 5395-5396 "*we had no idea what shape or size or nature of the severity of the fire was.*"

31. Mr Roche asserts that the FB underestimated the potential of the fires in making decisions and judgments. In simple terms that statement must be accepted as largely correct. It is now easy, with the benefit of hindsight, to understand that FB officers did not, before the fire arrived, appreciate the full power of what was to arrive at the corner of Eucumbene Dve and Warragamba Ave at 3pm on the 18<sup>th</sup>.

32. The words of Mr Roche quoted by counsel assisting at para 817 are largely meaningless words full of qualitative adjectives which would be of no assistance to your Honour. When he was asked by me in cross examination to provide quantitative detail he was found to be wanting. At 7958 I asked him as follows;

*" Q In terms of quantities, how many pumpers do you think they should have put out there?"*

*“A. I haven’t done that measurement sir.”*

33. It would in my submission be inappropriate to make any criticism or adverse finding based upon such generalized and vague waffle. Your Honour would need detailed and quantified analysis, based upon proven material before making any critical finding. Such quantifiable analysis is absent from his report.

34. To criticize the Fire Brigade planning is to fall into the trap of judgment by hindsight. It cannot be said that before the fire arrived at Duffy the Fire Brigade could have had a proper appreciation of the intensity and magnitude of what was to hit.

35. Mr Kopeberg’s evidence at T2191 and 2192 should be borne in mind when he said as follows:

*“Hindsight would dictate that there would have been dozers, if not hundreds, of things that might have been done by many, many people, but they were not. Based on the information that was available to a whole range of people, I should say that the magnitude of what occurred in the western suburbs of Canberra could not have been foreseen by anybody. The fact that impact was likely or inevitable, I believe, could have been foreseen. The magnitude, the intensity could not have been foreseen by anyone.*

*Hindsight of course could say, “Well, you should have seen foreseen that and you should have done this and you should have done that,” but these assertions are invariably made with the benefit of little more than hindsight.*

36. Fire spread expert Mr Cheney was himself surprised about the behaviour and intensity of the fires. At 510 and 6999 7000 he told your Honour that a number of things about these fire surprised him. The rate of spread and the intensity of these fire could not have been forecast by the Fire Brigade. Interestingly Mr Cheney went to Tharwa on the 18<sup>th</sup> January because he thought that was the area most likely to be badly hit.

37. Very senior FB officers with many years of experience who were at Duffy expressed the view that this event was beyond anything that could have been anticipated. Senior Fire Fighter Buckley said in his statement at Q6 that “nobody in their wildest dreams would have predicted this.” There are other comments in like vein from other senior fire fighters.

38. Mr Roche himself agreed that the exact nature of this firestorm could not reasonably have been foreseen. This comment is noted at para 817 of counsel assisting’s submissions.

39. For the above reasons, the suggestion that the FB should have, before the fires arrived, appreciated that they would be rapidly overwhelmed or had *no real appreciation of the extent to which the urban interface could be impacted*” should be rejected.

40. The ability to foresee the nature and extent of an emergency with which you are dealing affects the way a task is approached. On the information which they had at the time the Fire Brigade planning and preparation was appropriate.

41. Mr Roche described the Fire Brigade IAP as “*fragile.*” Such a description is unfair because the document referred to was never intended to be a proper IAP. As David Prince pointed out in his statement (AUS.AFP.0070.0004) “*That Incident Management Team did not have control of any fire at that time because there was no urban fire on the 16 January 2003.*” It was never intended to be and could never have been a detailed IAP.

42. The IAP document itself should not be looked in isolation as something showing all that the FB were doing or planning for. The extent of the planning was appropriate on the basis of the information which the Fire Brigade had at the time.

43. The criticism by Mr Roche of the Fire Brigade having its own IMT is grossly unfair and completely unfounded. It ignores the fact that the ACT Fire Brigade was, and still is, a separate organization with its own statutory responsibilities. In any event like many of his comments Mr Roche does provide any facts or explanations as to why this was a problem or explain his reasoning process. Again what he says is a vague and meaningless generalization. If your Honour finds that having a separate IMT was a problem then you

should also find that it arose from the fact that the Fire Brigade and Bush Fire Service were legally distinct organizations. This issue is alluded to in chapter 8.2.1.1 of counsel assisting's further submissions dated 4 May 2006. It is difficult to see why in such a small jurisdiction the formal division between the BFS (now RFS) and the Fire Brigade is retained, but that is the way it was and still is.

44. I do note that counsel assisting concede at para 1265 that even if the alleged deficiencies (whatever they are said to be) had not been present then the outcome would have been no different.

### **SUPREME COURT APPLICATIONS**

45. At chapter 1.2.8 and 1.2.9 of their submissions counsel assisting have chosen to refer to the two sets of Supreme Court proceedings. The references are generally in critical vein. They then in paras 103 and 104 urge you Honour to make certain recommendations.

46. I do not wish to repeat all that has been said by the ACT Full Court in *R v Doogan* concerning the jurisdictional limits which constrain your Honour, but in my submission it is quite apparent that your Honour has no jurisdiction whatsoever to inquire into and to comment upon the rights and wrongs of those proceedings. Your Honour's jurisdiction is limited to looking at the "manner and cause" of the several deaths and at the "cause and origin" of the fires.

47. In any event it would be inappropriate for you Honour to criticize any of the parties for exercising their rights by taking the proceedings. It must of course be noted that those taking the proceedings heard by Whitlam J were successful. The proceedings were only necessary because counsel assisting refused to provide the material requested.

48. One further matter concerning the proposed recommendations at para 104 should be noted. Before the proceedings were able to be pursued it was necessary for the plaintiffs to obtain an order nisi based upon a prima facie entitlement to relief. There is accordingly already a filtering process in place to prevent the taking of proceedings which obviously and clearly have no merit. In both cases an order nisi was granted.

**DELAY**

49. I submit that your Honour should make no comment critical of any party in connection with the delay which has occurred in this inquiry/inquest. I adopt completely the submissions of the ACT on this question. There is no point in my repeating them here.

Dated the 28 June 2006

John Watts  
Counsel for Peter Newham