

TONY GRAHAM

SECTION 55 STATEMENT

Introduction:

I refer to your Honour's letter addressed to me dated 11 October 2006. I will refer to it subsequently as "the Notice". This is my statement in response to the Notice.

This statement is to be read in the light of my counsels' letter to your Honour dated 19 October 2006. I stand by the contents of that letter – indeed, as shall become clear in this statement, the difficulties which were foreshadowed in that letter about my responding to the proposed comments in the Notice have been borne out in formulating this statement in response to it.

As in that letter, my statement refers to paragraph numbers, which, given the absence of numbered paragraphs in the Notice, have been allocated by me for the purposes of convenient reference to each paragraph of the Notice following the heading, "Proposed Comments" on the first page of the Attachment to the Notice. For the sake of clarity, I have also set out the text of each paragraph.

Necessity to deal with the submissions

A number of the comments that your Honour has foreshadowed making have already been the specific subject of submissions by counsel on my behalf, and by the ACT which were also adopted on my behalf. In many respects, Counsel Assisting failed to challenge those submissions. As will be seen below, I observe that, in a number of instances, Your Honour will need to address and deal with those submissions directly if the foreshadowed comments are ever to be properly made.

Whether your Honour has attempted to do so already in the body of your decision I do not know, because I have not been provided with a draft or extracts from your decision which set out factual findings you have made, or references to the evidence, if any, upon which any such findings, and the proposed comments, may be based .

Statement only addresses my position

This statement only addresses my position. However, I wish to make it clear that I am not critical of other members of the ESB, and none of the comments which appear here are

intended to be in any way a criticism of other members of the ESB. I believe that all of the individuals involved committed themselves selflessly and tirelessly to the truly monumental task of fighting what was probably the worst fire event that would ever occur in their lives, an event on a scale scarcely imaginable in the ACT.

Each member of the ESB brought to the team his own strengths and assumed his own responsibilities. Each should be judged with fairness, reason and balance, not simply in hindsight. No walk of life is free from decisions which are incapable of criticism with the benefit of hindsight, even those of judicial officers like your Honour – such errors only cease once life is extinct. Any fair and reasonable assessment of the events of January 2003 should conclude that the individuals, not only on the firegrounds, but also all those involved in the firefighting effort, acquitted themselves diligently, professionally, and honourably, even if, with the great benefit of hindsight, not always correctly.

Paragraph 1 – no additional preparations taken

Proposed comment:

“Yet, despite this knowledge and awareness, [OF THE PREVAILING EXTREME FIRE DANGER CONDITIONS] the evidence before this inquiry has revealed that senior ESB personnel lacked a proper appreciation of the gravity of the fire situation and the potential for escalation from the time the fires ignited on 8 January 2003. As well, despite being on notice from the fires some twelve months previously, apart from the preparations made by Mr Bartlett for ACT Forests, neither the ESB nor any of the ACT land management agencies made any additional preparations for the fire season over and above their routine preparations. Even though the necessity for a rapid and aggressive response was recognized, the response which was made to all the ACT fires lacked the sense of urgency which the situation demanded.”

This comment, when assessed from my standpoint, can be broken down into the following propositions:

Proposition 1: The evidence before the inquiry has revealed that I lacked a proper appreciation of the gravity of the fire situation and the potential for escalation from the time the fires ignited on 8 January 2003;

Proposition 2: I made no additional preparations for the fire season over and above routine preparations; and

Proposition 3: The response by me which was made to all the ACT fires lacked the sense of urgency which the situation demanded.

What is the evidence for each of these propositions? I would like to hope that your Honour is cognizant of the evidence you intend to rely upon to support such propositions. However, as a result of your decision not to provide me with the factual information underlying your proposed comments, I am not.

Proposition 1:

For this proposition to be made out, your Honour would need evidence to establish that following the outbreak of fires on 8 January 2003, I “lacked a proper appreciation of the gravity of the fire situation and the potential for escalation”.

Three points need to be made in relation to this proposition. Firstly, the proposed comment is not a statement of fact – it is a conclusion said to have been reached upon consideration and interpretation of certain unstated facts. I am unaware of the facts which you have found to base this conclusion, or the evidence said to support it.

Secondly, the comment fails to take into account the fact that prior to the Bendora fire the ESB had successfully managed 92 fires that fire season (Lucas-Smith T802). I was the Operations Officer of the Service Management Team with respect to each of those fires. I was well aware of the nature of the season the ESB and I were facing, aware that any fire could escalate, but also aware that many more fires could arise and the need to harbour resources. The error made by me, and frankly acknowledged by me, was that I did not discuss Ms Arman’s reasons for her decision with greater scrutiny. That one fact cannot, with respect, form the basis for a conclusion that I “lacked a proper appreciation of the gravity of the fire situation and the potential for escalation”.

Thirdly, alluded to above and elsewhere, is that without being apprised of the facts you have found as the basis for your proposed comment, I am deprived of the opportunity of further exploring and responding to the factual basis underlying the proposed comment, and the process of reasoning which led to the proposed comment being made.

Most importantly, I cannot address the use of the word “proper” (which I assume is meant to be understood in the sense of “adequate”) in the proposed comment, without being apprised of the matters referred to above.

I believe, as indicated in Counsels’ letter dated 19 October 2006, that the consequence of this will be that I will be denied procedural fairness if the proposed comment is made.

Proposition 2:

With respect, this proposition, again a paraphrase of a submission by Counsel Assisting, is incorrect. It is wrong, both in suggesting that no additional preparations were undertaken, and in suggesting that in practical terms the level of preparedness was unreasonable. In this regard, I refer to two matters: the fact that additional measures

were, in fact, undertaken, and the submissions of the ACT as to the evidence upon this issue.

Additional measures undertaken:

The following documents relate to additional measures undertaken prior to the 2002-2003 bushfire season:

- ESB.DPP.0018.0236 to ESB.DPP.0018.0286: these documents relate to the following activities: an excursion by the Bush Fire Council and others into Namadgi National Park (“NNP”) in 2002; correspondence between Environment ACT and ACTEW re NNP, water catchment, fuel issues; development of a NNP pre-suppression plan (marked with water holes, helicopter landing places, roads, etc.); the 2002 NNP Burn Scenario tabletop exercise designed specifically for remote bushfire issues, and the setting up of a group of experts for developing the NNP Fire Management Plan;
- ESB.DPP.0019.0170: letter from me outlining review of ICS training and implementation of a new training program, attaching the Sept/Oct 2002 training program (ESB.DPP.0019.0172);
- ESB.DPP.0019.0174-0177: documents regarding the new ICS training taking place;
- ESB.DPP.0019.0227: document regarding Remote Area Fire Training undertaken in December 2002;
- ESB.DPP.0019.0229-0254: documents regarding extra fire hazard reduction activities undertaken at the urban interface during 2002;
- ESB.DPP.0019.0255: Emergency Management Committee documents, indicating: issue of a new Road Closure SOP; traffic management planning provided to volunteer firefighters in mid-2002; Media Liaison review in August 2002; agreements between ACT and various support agencies put in place; Evacuation Management course in December 2002; Horsefarms ACT put in place evacuation and emergency plans; improvement of emergency management arrangements and emergency management catering improved; ACT Fire Brigade SOP’s reviewed in conjunction with the AFP; electricity supply management disaster exercise undertaken on 17.12.02; exercise regarding defence forces working with civilian organizations during emergencies undertaken);
- ESB.DPP.0019.0303: letter from Mr Lucas-Smith to emergency management managers in ACT re evacuation issues;

- ESB.DPP.0019.0307 and 0313: documents relating to the formulation of an SOP regarding access to lands managed by different Territory agencies;
- ESB.DPP.0019.0319-0323: documents relating to media opportunities being sought to inform the public of the problem season ahead and measures the public could take to protect themselves;
- ESB.DPP.0019.0335: email confirming readiness of Canberra Connect, which had been set up in 2002 for emergency communications;
- ESB.DPP.0019.0335: document confirming that by 20.12.02 the Canberra Connect website included Bushfire Safety Tips on its homepage.

Submissions of the ACT:

I draw your Honour's attention to the following passage in the submissions of the ACT:

“277. Counsel assisting assert, in paragraph 1116, that, with the exception of some measures taken by ACT Forests, *“ESB and ACT land management agencies made essentially no preparations for this particular fire season over and above any preparation made in any normal year”*. If this assertion is taken to mean that ESB did nothing in preparation for the 2002/3 fire season, then the ACT submits that the submission should be rejected. We refer to the “Operational Preparedness” and “Preplanning of Aircraft & Heavy Plant” sections above, and to the supplementary statement of Ingram referred to within those paragraphs.

278. If on the other hand, the criticism is directed at the omission to engage aircraft and heavy plant, any such criticism is unwarranted without a consideration of what financial and other constraints existed for ESB personnel to do so.”

The first passage in the submissions referred to above is that relating to operational preparedness. That passage, found at paragraphs 172-178, relates to what could reasonably have been expected of the ESB (and hence the ACT) in respect of additional pre-season preparations. The passage is as follows:

“172. Following the December 2001 fires, ESB gave consideration to areas of improvement in operational fire fighting. Evidence of this was given to Chief Coroner Cahill in January 2004 during the Inquiry into the December 2001 fires. Mr Lucas-Smith gave evidence in the present Inquiry on this point (T776-778).

173. A number of improvements had been made by January 2003. In general terms, the ACT authorities had a good record in fighting bushfires within their jurisdiction and in working cooperatively with NSW authorities.

174. At this point, it is pertinent to contrast the size of the NSW and ACT Bushfire Services. The NSW Rural Fire Service is comprised of the Commissioner, some 120 Fire Control Officers, some 2,200 Rural Fire Brigades and approximately 69,000 volunteer fire fighters (RFS.AFP.0093.0006). In January 2003, the ACT Bush Fire_Service comprised 4 full-time persons –Lucas-Smith, Graham, Ingram and McRae. There were only 3 departmental brigades and 9 volunteer brigades (ESB.AFP.0111.0236 at 0259). In effect, the ACT bush fire brigade was comparable to the bush fire personnel in a district or shire within NSW.

175. Counsel assisting have explored with a number of witnesses the question of increased operational preparedness leading into the 2002-2003 bushfire season. It is clear that there were finite resources in the form of appliances and facilities available to the ACT authorities. Likewise, there was a finite number of permanent and volunteer fire fighters available. It could not reasonably be suggested that a significant increase in numbers of experienced fire fighters could have been achieved in the 13 month period between December 2001 and January 2003.

176. Counsel assisting have referred to a document prepared by McRae in early 2002 entitled “*The Phoenix Imperative*”. In that document, McRae proposed fuel management and hazard reduction activities. In his evidence, McRae made clear that these were not actions which were capable of achievement within a matter of months. Rather, he was speaking of longer term actions which needed to be taken.

177. Counsel assisting have raised with witnesses the possible pre-deployment of bulldozers and other heavy equipment within national parks and in remote areas. Although this concept has a theoretical appeal, a critical issue is identification of the location where such heavy appliances would be placed. There would be a significant element of chance in placement of equipment – how would you determine where to place it? Whether it was close to or remote from a fire would depend upon the location of the fire. Practical and financial considerations also militate against such pre-deployment. As Crawford observed, “*we don’t pay to have dozers on standby ... if you pay to have a dozer on standby, I could have a dozer on standby in Queanbeyan, but the fire could be in Young or Crookwell Shire*” (T4434.33). Lucas-Smith said that he had access to ACT Forests heavy plant under a memorandum of understanding (T789).

178. Lucas-Smith was aware that the 2002-2003 fire season may be a bad one. The evidence indicates that he had been informing the ACT community of this concern. **Realistically, no further steps could have been taken to better**

prepare the ACT authorities to deal with the January 2003 fires.” (emphasis added)

The second passage in the submissions referred to above is that relating to preplanning of aircraft and heavy plant. That passage, found at paragraphs 179-201, is as follows:

“179. At Section 2.5.3 of their submissions, counsel assisting adopt the comments of Roche, and implicitly the latter’s criticisms regarding lack of pre-planning by the ESB in specified respects – see paragraph 247. Roche’s criticisms appear at pp.38-9 of his report and are prefaced with the comments that:

Despite this recognition of the expected severity of the 2002/3 fire season, the evidence suggests that little if anything, was done in the lead-up to the season by either ESB or the DUS over and above normal pre-season preparations.

180. Thereafter, Roche listed “*the actions that should have occurred*”, which list comprised 11 items.

181. Counsel assisting purport to summarise Roche’s evidence about these matters at paragraphs 211 to 216. The ACT submits that this evidence may be relevant to the making of recommendations for the future, but has marginal if any relevance to the cause and origin of the fires. The latter issue encompasses what did or did not occur from the point that the fires were ignited to their ultimate extinguishment; but does not include what might have happened if things had been done differently before the fires commenced.

182. It is significant to note that of the 11 actions which the Roche report asserted should have been done, only three matters were deserving of mention in the submissions of counsel assisting. No doubt this was so because Roche was extensively cross-examined about the manner in which he came to these conclusions; in particular the evidence upon which he relied to do so. It appears that that he assumed there had been inactivity by reason of the absence of evidence in the brief, rather than a reliance upon any evidence that things had not been done.

183. At T7573, Roche was asked whether he was asserting that none of the matters at p.39 of his report were attended to and he said:

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

184. This was an approach that Roche adopted in respect of other matters in his report. There are a number of examples in his evidence. At T7557/8, he was

questioned about criticisms he made at p.53 of his report asserting inadequate training, situational analysis and poor command, involving the burn over of Fire Brigade pumpers. He stated that it was not his place to have arranged for anybody in authority with intimate knowledge of the issue to be spoken to. Accordingly, his opinions were “*based on the evidence that was put before the Court*” or “*evidence that formed part of the brief*”.

185. In the context of pre-preparation for the impending fire season, Roche gave evidence that arrangements should have been made for an increased access to aircraft – however, until the receipt of Ingram’s second statement, he did not know “*the number and the specifics ...*” of available aircraft (T8014).

186. The weight of Roche’s opinion is reduced by reason of the fact that whilst he asserted the negative proposition, he would not be drawn on the specifics of what arrangements could and should have been made. So much is demonstrated at T8015, where 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.”

187. Similarly when Roche made the same criticism about the unavailability of heavy plant, he did not know whether the nine pieces of heavy equipment listed in Annexure DI3 of Ingram’s second statement were available or not (T8016-18).

188. Rather than concede that the reliability of his opinions might be affected by these omissions (as a truly objective expert witness would have done), Roche 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 (T8016).

189. Having regard to these matters, Roche’s reliability as an expert witness is called into question. Not only did he not qualify his report by stating that he was forming opinions on the assumption that what was contained in the brief represented the true facts, but he also did not take any steps to satisfy himself of the true position. Nevertheless Roche was prepared to proffer critical comments adverse to senior ESB personnel.

190. At paragraph 7 of the submissions, counsel assisting make the claim that chapters 2 and 3 “*contain an accurate summary of all the evidence*” which is relevant. The cross-examination of Roche is referred to in paragraphs 212 to 215 in chapter 2. Passing reference is made to Roche’s lack of knowledge of these facts; but no mention is made as to any impact this might have on Roche’s reliability as an expert witness yet counsel assisting did not show such reluctance in

commenting on the credibility of the evidence of other witnesses e.g. Keady's evidence at paragraph 556. Furthermore, nowhere in the submissions is there reference to the extensive attack on Roche's credibility or what effect that attack should have on the evidence given by him.

191. The ACT submits that this approach of counsel assisting lacks detachment and objectivity – it treats Roche as a favoured witness. The ACT submits that the Coroner should reject such an approach and consider Roche's evidence in the same way as other witnesses. The reliability of his evidence and the weight to be attached to it should be measured by the well accepted rules relating to the evidence of expert witnesses.

192. At paragraph 247, counsel assisting submit that nothing was done “*over and above ESB's usual pre-season preparations*” in the lead up to the subject fire season in relation to weight of response; pre-planning or pre-positioning of resources or arrangements in respect of aircraft.

193. It is accepted that nothing extra was done in relation to the specified matters. It might be thought that a significant degree of hindsight is implicit in the proposition – the line of thinking being that it should have been foreseen that any fire or fires which ignited would (without the preparations suggested) result in uncontrollable fires.

194. The ACT submits that in a jurisdiction of the size of the Territory, it is not unreasonable to deploy resources in accordance with a standard operating procedure which seeks to take into account the potential seriousness of the fire situation. Furthermore in the context of the ACT, it is not reasonable to expect that resources should be deployed in greater numbers than the weight of response requires, to remote fires which have not been assessed. Personnel and resources are not limitless; and deployment of resources can only be responsibly done by having regard to the ability to have sufficiently rested crews available in the event that the fire continues past a number of working shifts.

195. It is also incorrect to say that nothing was done at all. Ingram in his statement of 15 October 2005 (ESB.DPP.0013.0196) at paragraph 5, summarises the actions he took in preparation for the fire season as follows:

- i. the 2002 Pre-season Workshop was conducted. This included an exercise involving fires in Namadgi National Park and required complex fire management considerations;
- ii. the preparation and circulation of phone lists;
- iii. the preparation and circulation of Call Sign lists;
- iv. the development and distribution of Duty Coordinator and DCFCO and Group Officer Rosters for 2002/3;
- v. helicopter arrangements with regular contractor HeliAust were in

- place; but radio and buckets arrangements for the season were finalized and air observer kits were available and checked; as was the helicopter support trailer;
- vi. the fire tower contracts were in place and operative;
 - vii. the reviews of primary personal protective equipment and other stores were conducted in July and August 2002 and were regularly reviewed;
 - viii. a new initiative in COMCEN training which enhanced communication capabilities and protocols specifically for bush fire related duties was undertaken in 2002;
 - viii. liaison with Bureau of Meteorology regarding fire matters was completed in 2002:
 - ix. there was regular liaison between ACT Bushfire Service staff and Yarrolumla RFS staff; and
 - x. a review of stock of maps and ICS forms for the up-coming season, was conducted.

196. Ingram confirmed the steps he took in preparation for the 2002/3 fire season at T3522; he indicated they went through the normal checklist and it was no different to any other fire season (T3523). Further at T3523, Ingram referred to the Memorandum of Understanding between the ACT Bushfire Service and the land management agencies, which was signed of on 9 January 2003 (AUS.AFP.0036.0001, albeit the MOU was informally in place earlier in the season). Section 5 of the MOU made provision for the supply of heavy plant by ACT Forests to the Bushfire Service and associated matters.

197. Ingram confirmed that the ESB did not own or lease bulldozers; at the start of the season, suppliers were contacted to see what machinery was available; there was an MOU with ACT Forests that any machinery they had was available on request (T3527– T3528). Ingram confirmed that ESB had lists available to source additional aircraft apart from what was on contract to them (T3528).

At T789/790, Lucas-Smith referred to the MOU that ESB had with the land management agencies *“as we went up the readiness scales, ... heavy plant would become on standby and are available to us ... it moved the floats in close proximity to where the machines were working so they could be readily accessed and transported.”* He stated that such occurred on every orange and red readiness day in ACT.

198. Lucas-Smith was asked about preparedness of heavy equipment and said that he did not have the equipment available and to do so would involve a *“logistics exercise for four or five months ..., which is quite extensive and very expensive”* (T791). It is noteworthy that neither counsel assisting, nor Roche in his

report, pursued the issue of what practical and financial limitations existed if attempts were made to try and implement Roche's suggestions.

199. The allocation of funds was not a matter under the control of the ESB; nor is it an issue which is a legitimate area of concern for this Inquiry. If criticism is to be levelled at individuals for asserted failures in this area, it would be quite wrong to do so when a significant reason for such failure as might be inferred from Lucas-Smith's evidence, namely a lack of funds, was outside his control. It is one thing to say by recommendation that it is desirable in extreme fire seasons to have available aircraft and heavy plant – it is quite another to be critical of persons for not having that availability, when it may not have been in their capabilities.

200. In summary, the ACT submits that your Honour should reject Roche's criticisms in this regard. This is because Roche conceded that his opinions concerning some of the asserted omissions were based on an absence of evidence in the brief rather than information that things had not been done. Secondly, Roche gave no consideration to whether the things he suggested were achievable in the available time frame (August 2002 to January 2003); and finally he gave no consideration to issues such as how many aircraft or heavy appliances were required or the cost of them – see Roche T8015.

201. Having regard to these matters, any criticisms based on his views must be compromised and further any recommendations based upon them, are of limited utility if the Court is unable to conclude that they could have been achieved or afforded.”

The following further submission was made:

“532. Extensive material had been given to the Canberra community beforehand, particularly during 2002, about how to prepare for bushfires (ESB.GSO.0005.0812).”

Counsel Assisting did not deal with these submissions in their reply. The unavoidable inference is that they could not do so. Your Honour will have to address the matters raised in those submissions with specificity, and demonstrate that they can be overcome, before the proposed comment can properly be made.

Even if those submissions could be overcome, the proposed comment, with respect, is wrong in any event, because the suggestion that there were no additional measures undertaken simply cannot be made in light of the evidence referred to above.

Paragraph 2 - Suggestion that Tony Graham was not the appropriate person to be the Operations Officer

Proposed comment:

“The role [OF OPERATIONS OFFICER] should have been performed by the person second only to Mr Lucas-Smith in experience and someone with the most expertise in fighting and managing fires in remote wilderness areas. With all due respect to him, Mr Graham was not this person. Mr Graham was, by all accounts, a dedicated and competent administrator in his day-to-day role but the role required of him on 8 January was beyond his normal functions and responsibilities.”

The entirety of your Honour’s foreshadowed comment is a paraphrase of the submissions of Counsel Assisting as to this issue at paragraphs 1120-1121 of their submissions:

“1120. ... In our submission, as we discuss further below, it should have been evident at least to Mr Lucas-Smith, and probably also to Mr Graham himself, that:

- a. the person fulfilling that role and supervising the initial response under the conditions then prevailing, needed to be the next available officer after Mr Lucas-Smith with the most expertise and experience in fighting and managing fires remote area wildfires; and
- b. that person was not Mr Graham.

1121. Mr Graham had very little experience in managing remote area wildfires and no relevant experience in fighting them. We would not dispute that he was an effective *controller of resources*, as he was described by Mr Lucas-Smith, and a competent and dedicated administrator in his day to day role at ESB. But the role he was fulfilling on the evening of 8 January went significantly beyond Mr Graham’s day to day role. It required at least a strong working knowledge of fire behaviour and firefighting suppression and tactics, the stronger the better. Mr Graham had neither of these things, as he effectively conceded in evidence.”

The ACT and my counsel responded to the submissions of Counsel Assisting as to this issue by way of written submissions on 30 June 2006. The submissions of the ACT as to this issue were as follows:

“293. At paragraph 1120, counsel assisting state that the choice of officer responsible for decisions about strategies and resource deployment at initial response is most -important and submit that it should have been evident to Lucas-Smith and Graham that:

- the person with that role should be the next available officer to Lucas-Smith with expertise in fighting and managing remote area wildfires and
- that person was not Graham.

294. The premise upon which this submission is made is that the person entrusted with the task should have foreseen the potential of the fires to escape and ultimately become campaign fires – in other words a hindsight view of what occurred. It may be true that a more cautious or pessimistic person may have acted differently; however the ACT submits that what was required in that task of operations officer, was a competent and experienced officer and that Graham was such an officer. He had been performing the role of Operations Officer for many years and in response to 92 previous fires that bushfire season without mishap.

295. It was always likely that the operations officer at ESB would rely upon the incident controller in the field to provide accurate information about the location and circumstances of the fire and connected safety issues. Furthermore, the incident controller would have been singularly well placed to give an opinion about the matters as to which professional judgment might be required e.g. the size, spread and intensity of the fire; the terrain; the fuel loads; the experience and fitness of the crew; an assessment of what might be achieved if the crews remained and issues connected with safety of the crews.

296. Accordingly, of equal significance was the expertise of the incident controller at the site of the fires, because the responsibility lay with that person to assess the fire and determine what could be done and whether it could be done within the constraints of Occupational Health and Safety requirements.

297. At paragraphs 1121-1125, a comparison is made between the more limited experience of Graham in managing and fighting remote area wildfires and that of Bartlett, Cooper and Sayer. Graham accepted that he did not recognise the same level of concern as the others but did not accept that he was not sufficiently experienced. It is submitted that it is one thing to say that a more experienced officer may have acted differently; it is quite another to assert that the less experienced officer failed to act reasonably. There is no basis for the latter submission.

298. Graham acted as Operations Officer throughout the rest of this event and did so in a manner that receives no criticism. He was constantly making operational decisions concerning these same fires over that period. The fact that someone else may have made the initial decision differently to Graham is insufficient cause to say that he was not a suitable person for the Duty Officer role. He had performed the role with success for 5 ^{1/2} years. It is unreasonable to say that a person who has successfully filled the role for that period ought to have recognised at the time this event began that it was a particular event in which he ought not play his regular role.”

In order to remind your Honour of the submissions made on my behalf as to this matter, I repeat what my counsel put to you:

“3. SHOULD MR GRAHAM HAVE BEEN REPLACED AS ESB INCIDENT CONTROLLER?”

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

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

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

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

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

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

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

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

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

“We would not dispute that [Mr Graham] was an effective *controller of resources*, as he was described by Mr Lucas-Smith, and a competent and dedicated administrator in his day to day role at ESB. But the role he was fulfilling on the evening of 8 January went significantly beyond Mr Graham’s day to day role. It required at least a strong working knowledge of fire behaviour and fire fighting suppression and tactics, the stronger the better.”

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

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

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

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

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

Counsel Assisting did not make further submissions to your Honour as to this matter. There is a very good reason why this is so – the above submissions, with respect, dealt conclusively with the issue. Counsel Assisting could have said nothing in response – the submissions were and remain unanswerable. For that same reason, your Honour would be falling into error of a judicially reviewable nature were you to make the comment that you have proposed.

Before your Honour can make the comment that you have foreshadowed, these submissions must be overcome. If Your Honour simply fails to deal with them in your Honour's decision, the unavoidable inference will be that your Honour could not identify any basis to reject those submissions.

Paragraph 3 - Mr Graham did not possess sufficient experience and training

Proposed comment:

“While Mr Graham may have believed that he had sufficient training in the concepts and practices of incident management he did not, in my view, possess the required level of experience and knowledge of fire behaviour and firefighting suppression tactics and strategies which were needed to effectively fulfill the position of Operations Officer from the start of the fires. Mr Graham did not accept this but it is a fact, nevertheless. Mr Graham took up the position of Manager Operations with the ESB in mid 1997. Prior to that time he worked in the ACT Department of Urban Services involved with management systems and the Department of Defence in staff development. Before that Mr Graham has a career which was predominantly in the Royal Australian Navy for twenty one years most of which was spent in the field of catering. During his career in the RAN his firefighting experience was limited to an occasional grass fire near a Naval shore establishment. Mr Graham had some limited experience as a volunteer firefighter, a little bushfire training and had acted as an incident controller on two or three occasions. He has never actually fought a fire by holding a hose or using a rake hoe and has no training in fire behaviour. All of these factors combined to make him unqualified, inexperienced and unsuitable for the position he held as Operations Officer of the SMT from 8 January 2003 onwards.”

I repeat my comments above relating to my suitability to hold the position of Operations Officer. I have a number of additional comments to make in relation to this proposed comment.

Firstly, it is incorrect to state that I had no training in fire behaviour – my evidence (T 2597) was I received such training as part of the ACT Bushfire Service Firefighting Modules which I completed in 1989 (see curriculum vitae attached to my statement, ESB.AFP.0001.1307).

Secondly, the proposed comment is simply wrong in asserting as a fact that I lacked sufficient knowledge and experience.

Thirdly, the real vice, however, in the proposed comment is the conclusion that “All of these factors combined to make him unqualified, inexperienced and unsuitable for the position he held as Operations Officer of the SMT from 8 January 2003 onwards.” What is the evidence to support this conclusion? Where are the examples of my decision-making so unreasonably wrong that such a conclusion may be reached?

Only this, it seems in the absence of anything else: that I failed to overrule the decision of Ms Arman on the night of 8 January 2003.

It cannot be said that the failure to deploy bulldozers at Bendora on 8 or 9 January was an error made by me: there were no bulldozers available at those times (see the statement of Beutel (ESB.AFP.0108.1215)).

It cannot be said that the failure to comply with the SOP in terms of weight of response at Bendora on the evening of 8 January was an error made by me: while the configuration of vehicles sent to the fire was not exactly in accordance with the SOP, the number of crew and vehicles was as required by the SOP.

It cannot be said that I did not appreciate the need for an aggressive attack at the first opportunity – if that were so, then what explanation could there possibly be for my having sent fully equipped crews out to the firegrounds on the evening of 8 January in the first place? The only conclusion reasonably open is that they were sent out to fight the fire, and firefighting would have occurred but for the decision of Ms Arman to withdraw on safety grounds.

Without being apprised precisely as to what decisions of mine, if any, are being criticized in your Honour’s proposed comment, I have no other way of addressing the comment. Once again, I am at risk of being denied procedural fairness in that respect if the proposed comment is made based upon something else.

It need not be so. The approach that ought, with respect, be adopted by your Honour is exemplified in the following passage from the submissions of the ACT (adopted, as I remind your Honour, by counsel on my behalf), which I commend to your Honour in this respect:

“426. It is accepted that a more careful examination of the decision to withdraw from the fire at Bendora should have occurred. Counsel Assisting have urged upon your Honour numerous conclusions and findings which relate to the experience and state of mind of specified individuals antecedent to the decisions made. Putting aside the utility of such an exercise, it ignores the reality that decisions are

often made in circumstances of competing priorities and at times on incomplete information. It is one thing to conclude that a better decision might have been made or the decision-making process might have been better carried out. It is quite another to blame those who took the decisions at the time they did. Such a course is unwarranted and counter productive. A very real consequence of dissecting the decision or process in the kind of detail that the submissions of counsel assisting do, and urging findings of an adverse nature about the persons involved, might be to discourage persons from taking up positions which require such decisions to be made or to discourage effective and timely decision-making.”

Not only would you be denying me procedural fairness if the proposed comment were made upon some other basis – even if that not be the case, the proposed comment is not reasonably open on the evidence.

Paragraph 4 - Mr Graham did not recognize the urgency of the situation or the significance of the typical summer weather pattern

Proposed comment:

“This approach [EVIDENCE OF MR BARTLETT AS TO HIS RESPONSE TO FIRES] is very different to that adopted by Mr Graham who did not appear to recognize the urgency of the situation and the need for a maximum and sustained response which involved the use of appropriate personnel and heavy machinery. He did not understand the significance of the typical 5 to 7 day summer weather pattern referred to by many other witnesses and he was wrong to assert in his statement that night-time operations are usually conducted once strategies changed from direct to indirect attack.”

This comment, when analyzed, can be broken down into the following propositions:

Proposition 1: I did not appear to recognize the urgency of the situation and the need for a maximum and sustained response which involved the use of appropriate personnel and heavy machinery.

Your Honour has chosen to use the word “maximum”: there is no evidence to support the conclusion that the circumstances on the night of 8 January 2003 called for “need for a maximum ... response”. This, with respect, is incorrect: the highest the evidence reached was that the situation that night required a *greater* response, not the *greatest possible* response. Indeed, such a response would be the very height of folly: to exhaust all of one’s firefighting resources at the start of what was expected to be a horror fire season would be completely contrary to accepted firefighting principles and to common-sense.

What the evidence does support is the conclusion, which I frankly conceded, that Mr Bartlett recognised a degree of urgency of the situation that I did not, and he did so because of the additional experience Mr Bartlett possessed over mine.

Proposition 2: I did not understand the significance of the typical 5 to 7 day summer weather pattern referred to by many other witnesses.

This, with respect, is not the evidence. The proposition implies that I was *aware of, but did not understand (and did not seek guidance to enable me to understand)* the typical 5 to 7 day summer weather pattern. That is not the case - the evidence is that I was *not aware* of that pattern (T 2665.15).

Whether, as part of my training and education for my position, I should have been thus aware is a different point. The “many other witnesses” referred to by Your Honour are all, without exception, extremely experienced firefighters. This again harks back to the issue: while it is possible to argue that I was insufficiently experienced to have been left in the position of SMT Operations Officer when the fires struck on 8 January (a conclusion I say is irretrievably tainted by hindsight), responsibility for that decision can hardly be laid at my door. As the ACT observed in its submissions, “The ACT experience had involved, for two decades, relatively small fires which were capable of being controlled and extinguished, usually by early and direct attack” – in light of that context, I again ask: at what point was it supposed to have been recognized that I was not the right man for the job?

Proposition 3: I was wrong to assert in my statement that night-time operations are usually conducted once strategies changed from direct to indirect attack.

I assume that what your Honour means by this proposition is that my assertion in my statement that night-time operations are usually conducted once strategies changed from direct to indirect attack was wrong, in the sense of being in error. If that is so, then I agree with the proposition.

However, if your Honour meant to convey the notion that I did something wrong in making that assertion in my statement, I disagree, as that formulation of the comment carries with it the implication that in making the assertion, I knew that I was doing something that was wrong.

Paragraph 5: I failed to respect the rule of fighting the fire on the first night

Proposed comment:

“The evidence was that the best opportunity generally to control a fire is on the first night because that is when it is at its most benign and the control almost invariably involves direct attack. Mr Graham, on his evidence and by his actions

appeared not to have respected this principle which is probably one of the most fundamental in bushfire fighting. It was not a question of being short of resources. It was a question of not appreciating the need to deploy those resources in the first twenty-four to forty-eight hours and the consequences of not controlling the fires quickly, given the extreme drought conditions and the dire weather forecasts.”

The central proposition here is that I appeared not to have respected the principle that the best opportunity generally to control a fire is on the first night, because that is when it is at its most benign and the control almost invariably involves direct attack.

The criticism is unfounded. There is no evidence to suggest that I lacked respect for this principle. Rather, the evidence is directly to the contrary effect:

Mr Graham: “I hold the view that, if possible, overnight firefighting is a good thing to be doing if the conditions allow that to happen.” (T 2666)

Rather, the evidence shows that Ms Arman, a more experienced firefighter than myself, made a decision on safety grounds, and that my approach did not have the effect of the important principle of fighting the fire on the first night outweighing the important principle of ensuring firefighter safety.

What the proposed comment embodies is an underlying proposition (as suggested by Mr Roche) that “respect” for the goal of operational success must result in an obligation to dismiss the paramount duty of ensuring the safety of those fighting the fires. Mr Roche is a completely discredited witness. His argument on this issue represented the type of “safety-averse” attitude he adopted during his tenure at the Country Fire Association in Victoria. His argument takes no account of, and displays a deliberate rejection of, occupational health and safety obligations (see T 7537).

That proposition, inherent in the comment, and hence the comment itself, is fundamentally wrong, and is not reasonably open on the evidence.

Paragraph 6: Mr Graham’s lack of experience contributed to poor decisions

Proposed comment:

“I am satisfied on the evidence before this inquiry that Mr Graham’s lack of experience in fire behaviour and fire suppression was a significant contribution to the poor decisions which were made on the first night of the fires and the following morning.”

Response: What “poor decisions” are here being referred to? From the context of your Honour’s other comments, I understand that one such decision was the fact that I did not

overrule Ms Arman's decision to withdraw from the Bendora fireground on the evening of 8 January, and I have dealt with that. What other decisions are being categorized as "poor"?

If I have to guess what decisions are being referred to (and with respect I should not be placed in this position), I would repeat, as above:

- Is it suggested that the failure to deploy bulldozers at Bendora on 8 or 9 January was an error made by me? That cannot be: there were no bulldozers available at those times.
- Is it suggested that that the failure to comply with the SOP in terms of weight of response at Bendora was an error made by me? That cannot be: while the configuration of vehicles sent to the fire was not exactly in accordance with the SOP, the number of crew and vehicles was as required by the SOP.
- Is it suggested that the failure to allocate more resources to Bendora for the morning of 9 January was an error made by me? That cannot be: those resources were allocated based on the information provided to me as to the size of the fire, which proved to be incorrect.

I cannot address the proposed comment without being apprised of the factual findings behind, or their basis in evidence for, this comment. Accordingly, I am of the view, as my counsel indicated in their letter dated 19 October 2006, that the consequence of this is that I will be denied procedural fairness if the proposed comment is made on some different basis to the above. Otherwise, the proposed comment, as I have understood it, is not reasonably open on the evidence.

Paragraph 7: Mr Lucas-Smith's error of judgment in not recognizing Mr Graham's inexperience

Proposed comment:

"The failure by Mr Lucas-Smith to recognise Mr Graham's limitations in terms of his experience was a serious error of judgment on his part – especially when he had two very experienced officers available, namely Mr Bartlett and Mr Sayer. This error of judgment resulted in an inadequate initial response in the first few days and was a factor in all the ACT fires expanding and ultimately becoming beyond control and thereby causing the devastation which occurred on 18 January 2000."

Response: This proposed comment clearly has its origin in the following passage from the submissions of Counsel Assisting:

“1128. In our submission, Your Honour should find in the circumstances, that the failure to identify the importance of the role that Mr Graham would be fulfilling that night in the absence of Mr Lucas-Smith and to replace him with an officer with the necessary experience, was a serious error of judgment that was a cause of all the ACT fires in the sense in which that concept was defined in the judgment of the Court of Appeal. That error of judgment was made, in the first instance, by Mr Lucas-Smith, who was in the best position at the time, with his experience and expertise, to understand the seriousness of the situation under the prevailing drought conditions and the consequent importance of Mr Graham’s role. His error was compounded by the fact that Mr Bartlett attended at the ESB in the afternoon of 8 January 2003 and spoke to both Mr Lucas-Smith and Mr Graham offering his assistance, but Mr Lucas-Smith declined the offer. Mr Lucas-Smith can be taken to have known that Mr Bartlett was an officer with vastly greater relevant expertise and experience than Mr Graham.”

The submissions of the ACT as to this issue were as follows:

“309. At paragraph 1128, counsel assisting submit that the Coroner should find *“that the failure to identify the importance of the role that Mr Graham would be fulfilling that night in the absence of Mr Lucas-Smith and to replace him with an officer with the necessary experience was a serious error of judgment that was a cause of all the ACT fires ...”*. The error was made (so it is said) in the first instance by Lucas-Smith who was in the best position to understand the seriousness of the situation and the importance of Graham’s role. His error was compounded by his declining Bartlett’s offer of assistance.

310. The ACT submits that the Coroner should not make this finding for the following reasons.

311. First, the serious assertion that Lucas-Smith was guilty of a serious error of judgment in this regard was not put to him – and as a matter of procedural fairness, it ought to have been.

312. Secondly, the ACT repeats the submission that the link between the asserted failure by Lucas-Smith and the fires on 18 January is so remote and tenuous that it would be outside the Coroner’s jurisdiction to make such a finding. The proposition may be demonstrated by outlining some of the steps in the proposed chain of causation: firstly that Graham lacked experience in such circumstances; next that Lucas-Smith should have but failed to realise this fact; thirdly, that had he done so, he would have replaced Graham; fourthly, that the replacement would have been a person of greater experience than Graham; fifthly, that the person would have had available to him crews and heavy equipment; sixthly, that the crews and heavy equipment would have been deployed that night to all the fires; and finally that those crews and equipment, assuming they had

even reached the fires, would have achieved containment. We submit that the finding is fundamentally speculative.

313. In any event, there is no evidence that Lucas-Smith had proper grounds or even the power to replace Graham. It may be inferred that Graham went through a routine employment process i.e. that he submitted an application, underwent a selection process and was selected based on his suitability for the job. Furthermore, Graham had successfully discharged his job since July 1997 and there was no cause to think that Graham was lacking in competence and would fail to discharge his duties competently.

314. As already noted, the proposed finding involves a number of steps as to how the alleged error of judgment occurred. The term “*error of judgment*” implies an exercise of judgment being a conscious choice between a number of options. There is no evidence of Lucas-Smith thinking on 8 January in regard to whether the Incident Controllers at Bendora and Stockyard Spur may have lacked sufficient experience to determine whether fire fighting should have continued at night; or whether Graham also lacked that experience. Indeed, his knowledge of what was occurring and who had been deployed, but not taking any steps to challenge or counter that course, suggests quite the opposite.

315. Counsel assisting submit at paragraph 1129 that Graham made an error of judgment in declining Bartlett’s offer and that his lack of perception about his inexperience was part of his overall error, but secondary to the error of Lucas-Smith.

316. According to Bartlett, he attended at ESB “*to inquire as to what I could do*”. The offer by Bartlett was made very early in the piece at a time when Lucas-Smith and Graham “*were still trying to confirm the number of fires and their specific locations*”(ESB.AFP.0001.1140 at paragraph 29). In the light of these matters, it is submitted that it was not unreasonable for Lucas-Smith and Graham to attempt to assess the dimensions of the tasks before taking up Bartlett’s offer of assistance and that neither Graham nor Lucas-Smith made any error of judgment. They had in place, both at headquarters in Curtin and on their way to the known ACT fires, competent and reasonably experienced personnel.”

Response: Again, before your Honour can make the comment that you have foreshadowed, the ACT’s submissions must be dealt with head on and overcome. If this is not done, the unavoidable inference will be that your Honour could not identify any reasonable basis to reject the submissions in this respect. Again, the proposed comment is not reasonably open on the evidence

Paragraph 8: Mr Graham’s error of judgment in not recognizing his own inexperience

Proposed comment:

“Mr Graham displayed a lack of judgment by failing to recognise the limitation of his level of skills and experience to deal with major fire events, and as a consequence of this he failed to call on and deploy all of the resources which were available to him. Nor did he seek appropriate advice.”

Response: This proposed comment clearly has its origin in the following passage from the submissions of Counsel Assisting:

“1129. Mr Graham also made an error of judgment in declining Mr Bartlett’s offer, although his position is more problematic. His expertise and experience was such that, despite his denials on this subject, he may not have fully understood what was likely to be required of him under the conditions and in the circumstances confronted that night. Further, we would accept that, for a person who is clearly conscientious and dedicated, it is difficult to admit in the heat of the moment, that you are not up to the job you are given. This difficulty was demonstrated during Mr Graham’s evidence, when he essentially agreed that a certain level of understanding of fire behaviour was required in his role that he did not have and that Messrs Bartlett, Sayer and Cooper were immediately recognising issues on the night that had not occurred to him, but would not go the next step and accept that he was not adequately equipped for the role he was given. However, Mr Graham could have at least identified the gaps in his expertise and experience sufficiently to consult others with more relevant experience about important decisions affecting tactics and resources. Thus, in our submission, his lack of perception about his own position was a part of the overall error on this issue that night, but secondary to that of Mr Lucas-Smith.”

Your Honour seems to have accepted holus-bolus the criticism urged upon you in the above passage, again without dealing, so far as I can tell, and as you must, with the submission made on my behalf upon this issue and those of the ACT reproduced above.

A serious misstatement of the evidence by Counsel Assisting

It is necessary at this point to draw attention to a passage from the submissions of Counsel Assisting referred to above, namely the suggestion that I:

“essentially agreed that a certain level of understanding of fire behaviour was required in his role that he did not have”

This submission was wrong. There was no evidence that I agreed with that proposition, and my evidence cannot be construed to infer such an agreement.

This is a serious misstatement of the evidence and warrants careful analysis. Paragraph 1129 of the submissions appears in that portion of Section 5.1 of Counsel Assisting's submissions (entitled "Initial Response to the ACT Fires Generally") dealing with the findings urged upon your Honour, and purports to accurately summarise the evidence upon this issue. The passage from paragraph 1129 referred to above purports to be based on paragraph 1121 of the submissions, which relevantly reads as follows:

"Mr Graham had very little experience in managing remote area wildfires and no relevant experience in fighting them. We would not dispute that he was an effective *controller of resources*, as he was described by Mr Lucas-Smith, and a competent and dedicated administrator in his day to day role at ESB. But the role he was fulfilling on the evening of 8 January went significantly beyond Mr Graham's day to day role. It required at least a strong working knowledge of fire behaviour and firefighting suppression and tactics, the stronger the better. Mr Graham had neither of these things, as he effectively conceded in evidence."

The footnote reference at the conclusion of the above passage is to section 3.2.2.9 of Counsel Assisting's submissions, described as "Mr Graham's Role in the Decision" (being the decision to withdraw from Bendora on 8 January).

Section 3.2.2.9 of Counsel Assisting's submissions is, in turn, their summary of my evidence as to this topic, specifically the evidence I gave between T 2664 and T 2729. A careful reading of that evidence demonstrates that I never agreed that I lacked a necessary attribute for my job – rather, I denied that. What I admitted was that others had considerably more experience in bushfire fighting than I did (T 2726), not that I lacked sufficient understanding of fire behaviour to perform my job.

The submission was wrong, and seriously so.

It is pertinent at this point to remind your Honour of your very own words, uttered when Mr Lakatos (now of Senior Counsel) rose to object to a question put in cross-examination of me by Mr Woodward, at T 2724:

"I am here to protect the interests of Mr Graham."

I would like to believe, although this proposed comment, with respect, suggests otherwise, that Your Honour remains anxious to protect me from misstatements of the evidence by Counsel Assisting.

Paragraph 9: ESB's incident management system was not in accordance with AIIMS

Proposed comment:

“The fact that the ESB adopted a system of incident management for the fires which was not in accordance with the recognised AIIMS ICS model did serve to cause confusion among incident controllers in the field and inhibited the flow of important information to incident controllers.”

Response: As my counsel observed in their letter to your Honour dated 19 October 2006, the proposed comment is a comment which, on its face, does not make, either directly or, as far as can be ascertained from the terms of the Notice, inferentially, any adverse comment directed towards me. If your Honour intends the proposed comment to convey or suggest some inference or conclusion adverse to me, it is incumbent upon you to make clear what the inference or conclusion is, and the basis for making it. You have not done so.

Paragraphs 10-12: the decision to withdraw from Bendora was seriously wrong

Proposed comment:

“The decision to withdraw crews from the fire was a seriously wrong decision because it resulted in the Bendora fire growing. The way the decision to withdraw from the fires was made was flawed. Ms Arman relied on Mr Graham and took his words to the effect of ‘we were hoping you would do that [i.e. withdraw]’ as meaning the decision was supported by the SMT. The decision to withdraw should have been subjected to greater scrutiny by Mr Graham in the first instance and, by the time Mr Lucas-Smith knew of the decision it was too late to reverse it.

Ms Arman was looking for guidance from headquarters but received none.

Mr Graham failed to make proper enquiry of Ms Arman before acceding to her suggestion that she withdraw her crews overnight.”

Your Honour’s proposed comment, as it relates to me, can be broken down as follows:

Proposition 1: The decision to withdraw crews from the fire was a seriously wrong decision because it resulted in the Bendora fire growing;

Response: The fact is that Ms Arman’s decision to withdraw was based on her perception of risk to her crews. Her decision, based on the reason of safety, successfully achieved her goal of ensuring that her crews were safe. The logical consequence of your Honour’s proposed comment is that fighting the fire then and there that night should have been put ahead of the safety of firefighters. Mr Lucas-Smith, whose views Counsel Assisting have wrongly attempted to use to demonstrate error in Ms Arman’s decision, was rightfully

most concerned about this issue. As he said (in a passage at T 814, interestingly not referred to by Counsel Assisting:

“I certainly had some concerns in relation to the night-time firefighting exercise there. The potential existed, I suppose, for a number of safety issues to arise. However, it is the advice of the people in the field that make that determination, not us sitting in our bunker in Curtin, so to speak.”

The decision to stay at Bendora on the night of 8 January 2003 was always one of balancing risks. Ms Arman’s decision not to stay cannot fairly or reasonably be criticized. As Mr Lucas-Smith’s evidence makes clear, assessment of safety issues could only be properly made on the fireground. The conclusion that the decision was wrong (let alone “seriously wrong”) cannot be reached simply because one of the risks weighed up in making the decision came to pass. How much more wrong would the decision have been if the crews had stayed and a firefighter had been killed?

Proposition 2: The way the decision to withdraw from the fires was made by Ms Arman was flawed.

Response: In relation to Propositions 1 and 2, it is clear from the evidence and from the terms of the remainder of the proposed comment (and is conceded to be so by Counsel Assisting: para. 327) that the decision to withdraw was that of Ms Arman, as the Incident Controller (see Arman TROC q236 [DPP.DPP.0004.0021]; Lucas-Smith T 835) – the issue for me was merely whether I should override her decision.

I have commented elsewhere on the foolishness of the suggestion that decisions based on safety considerations should be overruled by persons of lesser firefighting experience not present on the fireground. Counsel Assisting were completely wrong to assert that fighting the fire on the first night was “an absolute necessity” (para. 1159). That submission, and the evidence of Mr Cheney in this respect, to the effect that safety for the public must in this situation prevail over the safety of firefighters (T 7069) – must be firmly rejected by the Court. Quite apart from common-sense considerations, it is not a conclusion which is reasonably open, given that the law imposes obligations with respect to occupational health and safety. As I emphasised in my evidence, the safety of firefighters is paramount (T 3019). Not merely “important” – paramount (or, as Roche was forced to concede, “pre-eminent”: T 7538). The Court must not forget that fact.

Proposition 3: Ms Arman relied on Mr Graham and took his words to the effect of ‘we were hoping you would do that [i.e. withdraw]’ as meaning the decision was supported by the SMT;

Response: That is correct – I considered that it was important to support the decision of the Incident Controller. While I did not interrogate her further, the unchallenged

evidence establishes that had I done so, in the interests of firefighter safety, I would have acted no differently.

Proposition 4: Ms Arman's decision to withdraw should have been subjected to greater scrutiny by Mr Graham in the first instance;

Response: This is a proposition with which I agreed – however, the evidence is that had I pressed Ms Arman further in this regard, and had Ms Arman, in response, communicated all of the reasons for her decision, I would not have acted in a manner other than I did (T 3018).

Proposition 5: By the time Mr Lucas-Smith knew of the decision it was too late to reverse it.

Response: This proposition is correct, although in my telephone conversation with Mr Lucas-Smith at 1942 I adverted to the likelihood that suppression activity might not take place that night, a suggestion with which he expressed no disagreement. This is the reason I was of the view, as I indicated in my evidence (T 2683-2684) that Mr Lucas-Smith would not have been opposed to having crews withdraw if that was the view of the Incident Controller.

Proposition 6: Ms Arman was looking for guidance from headquarters but received none;

Response: This comment – derived from the (incorrect) interpretation placed on the evidence by Mr Roche in his report at p.71 - is incorrect. Ms Arman did receive guidance – the guidance she received was support for her decision to withdraw. That may not be the guidance Mr Roche considers she should have been given, but it was guidance nonetheless. Mr Roche's conclusion, based as it is on his evident disrespect for obligations arising under the law relating to occupational health and safety, is incorrect.

Proposition 7: Ms Arman made a suggestion that she withdraw her crews overnight;

Response: This proposition is correct.

Proposition 8: Mr Graham acceded to Ms Arman's suggestion.

Response: This proposition is correct.

Conclusion re paragraph 12:

For the reasons advanced above, I consider that the proposed comment is wrong, and not reasonably open on the evidence.

Paragraphs 13-14: Mr Graham's evidence concerning his conversation with Mr Byrnes rejected

Proposed comment:

“Constable Jason Byrnes of the AFP telephoned the ESB and spoke with Mr Graham at about 5.30 pm about whether the police needed to be involved in traffic operations because of a back-burn which was planned on the Brindabella Road. In that conversation Mr Byrnes said to Mr Graham: “Obviously our bosses are a little bit concerned now. They’re sort of worried that Canberra is gonna burn”. Mr Graham replied: “Yeah, well it’s not beyond possibility on Saturday or Monday”.

When questioned about his remarks Mr Graham said he was not referring to the fires burning in the city but the areas towards and up to the city. This does not make any sense. If Mr Graham did think of Canberra in terms of the wider area outside the city, then, it was already burning and had been for the past eight days.” He was present at the planning meeting which had probably just concluded and heard Mr McRae’s predictions. He heard Mr Mason report earlier in the day on the weather forecast up until Monday 20 January which included high temperatures and north and north-west winds. He may well have thought, as he said, and hoped that the fires would be contained in the grasslands but I do not accept that Mr Graham was not referring to the urban area in his conversation with Mr Byrnes.”

What your Honour must remember is that the conversation in question was initiated by Mr Byrnes, in order to raise the issue of whether *the area around Canberra* (not the urban area of Canberra), might come under threat. There can be no doubt that this is what Mr Byrnes was talking about – that is his sworn testimony, and was completely unchallenged, both at the time and subsequently in the course of submissions.

For your Honour to contemplate making the comment you propose, it must, by necessary implication, follow that you believe a fundamental misunderstanding has occurred between Mr Byrnes on the one hand, and myself on the other. There is not a skerrick of evidence to support such a conclusion.

Your Honour needs to be reminded of the tenor of the cross-examination of myself upon this issue by Counsel Assisting. Mr Woodward was attempting to discredit my assertion that I did not understand the discussion with Mr Byrnes to be about possible impact upon Canberra City. Such was his zeal in this endeavour that he

mis-stated the evidence, and had to be corrected by my counsel (T 2889.37-43). Mr Woodward's insistence in pushing me to admit that I was referring to Canberra City was unsuccessful. Given that Mr Byrnes' account simply reinforced my evidence, Counsel Assisting made no submission to you which urged upon you the suggestion that I thought the conversation with Mr Byrnes was about the urban area of Canberra burning.

Counsel Assisting's submission upon this issue, which, on this occasion, accurately summarises the evidence on the point (if not the manner in which the evidence came to be before you), is illuminating. Your Honour's proposed comment, so far as I can tell, does not deal in any way with the passages that are in bold below:

“3.5.1.9 Telephone Call Graham to Byrnes.

640. At 17:34 hours on 15 January 2003, Mr Graham received a telephone call from Mr Jason Byrnes of the AFP¹¹⁰. The purpose of the telephone call appears to have been for Mr Byrnes to ascertain whether the ESB needed the AFP to be involved in any traffic operations because of a back-burn being planned on the Brindabella Road. Late in the discussion, Mr Byrnes said to Mr Graham: *Obviously our bosses are a little bit concerned now. They're sort of worried that Canberra is gonna burn.* Mr Graham responded: *Yeah, well it's not beyond possibility on Saturday or Monday.*

641. Mr Graham was asked in evidence whether, in his answer to Mr Byrnes, he was referring to the possibility of Canberra City burning. His response was: *No, I don't believe I was... I think I was referring to the fact that the fire is expected to have a run towards Canberra City and that areas up to Canberra City may well be under some threat. But as I described earlier, my feeling at that time was once the fires had reached the river and had crossed into the grasslands that they would contain it all.* It was again put to Mr Graham [**“again”, because when it was first put the question mis-stated the evidence and could not be pressed**] that he understood Mr Byrnes to be referring to Canberra City. He said: *No, I don't believe so. I believe, as I earlier described, that I was talking to the east certainly of where the fires were, but not Canberra City. Mr Byrnes, he didn't question me any further on it. He just let the issue go. So I don't think that he took it either to be a reference to Canberra City.*

642. It was pointed out to Mr Graham there were two substantial fires burning in the ACT and that the fire he had earlier been talking about with Mr Byrnes was the Bendora fire, which was burning in the ACT. It was suggested to Mr Graham that he could not have been referring to the ACT in responding to Mr Byrnes' reference to *Canberra*, because the ACT was

already burning. He repeated that he was not identifying or recognising the possibility of Canberra City burning on the following Saturday or Monday. Mr Graham was asked: *What do you say you are responding to by the reference to “Canberra”*. He responded: *That the fires will change their course and that they will start burning towards Canberra city.*¹¹¹¹

643. Later in his evidence, Mr Graham indicated that if Mr Byrne’s view had been that the Canberra suburbs were under threat as at 15 January, he would have expected that there would have been an immediate AFP presence at Curtin for the ensuing days until they got over that threat and the Emergency Management Committee would have been called together to do some planning on that potential impact¹¹¹². Later still, Mr Graham gave evidence that, had he had in his mind as his understanding of that conversation the possibility of Canberra City burning, he would have immediately raised that to the attention of the other members of the SMT, in particular Mr Lucas-Smith and Mr McRae and brought to the attention the views of the AFP. Mr Graham didn’t believe that Mr Byrnes was talking about Canberra City burning¹¹¹³.

644. Mr Byrnes gave evidence that the telephone conversation he had with Mr Graham was preceded by a discussion he had with a New South Wales Inspector of Police from Tumut or Cooma to the effect that a series of bushfires to the west of the ACT may pose a threat in coming days. At the time, Mr Byrnes was the acting officer in charge of Tuggeranong patrol. The officer seemed to indicate to Mr Byrnes that the fires were serious fires and there was a strong potential they would impact in the ACT. As a result of that information, Mr Byrnes briefed Detective Superintendent Quade who instructed him to *continue to run with it and... then get back to me*. He then contacted the NSW Rural Fire Service at Queanbeyan and then Mr Graham from ESB. The person he spoke to at the NSW Rural Fire Service was somebody who played a relatively senior coordinating role. He sought some advice about the fires and was told that he should contact the ACT Bushfire Brigade and they were large and serious fires. He then contacted Mr Graham.¹¹¹⁴

645. Taken to the transcript of his telephone conversation with Mr Graham, Mr Byrnes gave evidence that when referring to *our bosses*, he was referring to the Woden officer in charge who was Sergeant Budworth. He explained that the concerns arose from the telephone conversation he had received from the New South Wales police officer. Mr Byrnes accepted that he referred to a possibility that *Canberra was going to burn on Saturday or Monday and obviously I considered that as an issue. Again, I can only say I came away from that and the other conversation*

*satisfied that the situation was in hand and that if it was going to be a critical incident the fire brigade would come back to the AFP and seek – formally advise and then seek our involvement.*¹¹¹⁵

646. Later in his evidence Mr Byrnes was asked what he meant by the expression *Canberra is going to burn*. He responded: *Your Worship, as I stated, that’s one of the statements I don’t recall exactly saying but obviously I did say it. All I can say is that if I thought it was going to mean the actual City of Canberra in the statement, I would have stated so and continued to push on that issue. The difference is Canberra means the areas around Canberra City as well. According to Mr Byrnes, if it had been his intention to convey that the urban area was under threat and that was his operating assumption as at that time on 15 January, he would have briefed straight up the line through his chain of command up to Winchester Centre.*”

Although it is not apparent from the submissions of Counsel Assisting, the very important qualification made by Mr Byrnes that “if I thought it was going to mean the actual City of Canberra in the statement, I would have stated so and continued to push on that issue. The difference is Canberra means the areas around Canberra City as well” was not elicited by Counsel Assisting.

With respect, what seems to me to be apparent is an intention to sheet home to individuals in the ESB a belief at an early stage that the fires were going to impact upon the urban area of Canberra. My apprehension is that such an approach is to be adopted by your Honour in order, impermissibly, to attach blame to those individuals for having failed to warn the people of Canberra of the risk of the fires.

The telephone conversation between Mr Byrnes and myself cannot, by any stretch of the evidence, be construed in the manner your Honour has indicated in the foreshadowed comment. My evidence was that at no time on 15 January did I consider the Canberra urban area to be at risk, and at the time I was not privy to any information or opinion suggestive of such a risk. On what basis could I, a man your Honour has categorised as a person inexperienced and lacking in knowledge of fire behaviour, have formed a view that the urban area of Canberra might be under threat? Why, had that been my view, would I not have “**immediately raised that to the attention of the other members of the SMT, in particular Mr Lucas-Smith and Mr McRae and brought to the attention the views of the AFP**”? What other substantial reason, based on the evidence, could be advanced as the basis for your proposed comment? The Notice does not inform me.

For you to make such a critical comment as you have proposed requires you to deal with these questions. I believe that these questions cannot reasonably be answered adversely to me, and that, accordingly, the proposed comment is wrong, and not reasonably open on the evidence.

Paragraph 15: on 15 January Mr Graham recognised that the fires were a serious risk to the urban edge

Proposed comment:

“By late afternoon of 15 January 2003 senior personnel of the ESB were in receipt of information which either confirmed or was the basis upon which they formed certain views about the risks of the fires. By late afternoon of 15 January 2003 Mr Castle, Mr Lucas-Smith, Mr McRae and Mr Graham each recognised that the fires, including the McIntyre’s Hut fire, presented a serious risk to the Canberra urban area and rural settlements west of the urban area.”

This comment, when assessed from my position, can be broken down into the following propositions:

Proposition 1: By late afternoon of 15 January 2003 I was in receipt of information which either confirmed or was the basis upon which I formed certain views about the risks of the fires.

Response: This proposition is correct.

Proposition 2: By late afternoon of 15 January 2003 I recognized that the fires, including the McIntyre’s Hut fire, presented a serious risk to the Canberra urban area and rural settlements west of the urban area.

Response: The highest the evidence reached in relation to this issue was that, on the afternoon of 15 January, there was a discussion between Mr Koperberg and Mr Lucas-Smith in which, if Mr Koperberg’s evidence is preferred over that of Mr Lucas-Smith, Mr Koperberg made reference to a risk he perceived to Canberra. Four points need be made in this regard:

- Mr Koperberg considered that it was a *“possibility that ought not to have been precluded”* (T 2092-2093), evidence which does not tend to lend support for the proposition that it was a “serious risk”;
- I was not at that meeting;
- My evidence was that at no time did I consider the Canberra urban area to be at risk – in this regard I was extensively cross-examined (T 2906-2920), and the evidence demonstrates that, on 15 January, I was not privy to any information or opinion suggestive of such a risk; and

- My unchallenged evidence was that my understanding on 15 January was that the threat from the fires had moved away from the ACT somewhat (T 2913).

Conclusion re paragraph 15: the proposed comment, to the extent to which it is directed against me, is wrong, and not reasonably open on the evidence.

Paragraphs 16-19: by 17 January Mr Graham, believing that the fires were likely to impact on the urban area the following day, failed to warn the public

Proposed comment:

“By the evening of 17 January 2003 the senior personnel of the ESB (Messrs Castle, Lucas-Smith, McRae and Graham) were in possession of information which confirmed what they had already believed namely that the fires were a serious risk to the urban edge of Canberra and that the impact was likely within the following twenty-four hours.

The same senior personnel of the ESB did not consider that it was necessary to issue warnings to those people in the urban area who were in the direct path of the fires and consequently, none were issued.

No contact was made and no warnings were given on 17 January 2003 to the people living in the forestry settlements of Stromlo, Uriarra and Pierce’s Creek.

By the evening of 17 January 2003 the ESB had no plans and no strategies for dealing with the fires the following day when it was predicted they would enter the pine plantation and advance towards the urban edge.”

I repeat the observation in my counsels’ letter to your Honour dated 19 October 2006, that the proposed comment is one:

“which, having been directed at members of the Emergency Services Bureau generally, makes it impossible for Mr Graham to gain any understanding as to the extent to which the comment is directed towards him.”

I cannot discern, from the material in the Notice or elsewhere, any basis to suggest that this proposed comment is fairly or reasonably directed at me, given my position within the ESB.

However, to address the proposed comment from my position requires that the comment be broken down into propositions referable to me, which I have done as follows:

Proposition 1: By the evening of 17 January 2003 I believed that the fires were a serious risk to the urban edge of Canberra;

Response: The use of the words “serious risk” is debatable in terms of my thinking at the time. The evidence was rather that I first identified that there was a *possibility* that there may be a threat to the urban edge of Canberra on the night of 17 January (T 2892).

Proposition 2: By the evening of 17 January 2003 I believed that the impact of the fires on the urban edge of Canberra was likely within the following twenty-four hours;

Response: This is incorrect: while the projections available on the evening of 17 January suggested that the worst case scenario was that the fire, if unattended, might impact near the urban edge on the following day, as indicated above, my (unchallenged) evidence was that I identified a *possibility* of a threat to the urban edge of Canberra on the night of 17 January, as opposed to such an impact being “likely” (T 2892).

Proposition 3: By the evening of 17 January 2003 I was in possession of information which confirmed that belief;

Response: This is incorrect: I did not hold such a “belief”, and did not possess information which would have confirmed any such belief had I had one. The evidence does not establish the contrary.

Proposition 4: I did not consider that it was necessary to issue warnings to those people in the urban area who were in the direct path of the fires;

Response: This is incorrect: I specifically stated in my evidence that, in my view, it would have been appropriate for the public to have been warned: (T 2955);

Proposition 5: By the evening of 17 January 2003 I had no plans and no strategies for dealing with the fires the following day when it was predicted they would enter the pine plantation and advance towards the urban edge.

Response: This proposition, while correct on a strictly literal interpretation (in the sense that I did not myself have any such plans and strategies), is incorrect in the sense that the unspoken premise is that I, myself, should have had such plans and strategies. The role of formulating plans and strategies was a task for the ESB and, as in all teams, the particular role rested with some members of the team and not others. Formulating plans and strategies was not my job.

Conclusion re paragraphs 16-19: the proposed comments, to the extent to which they are directed against me, are wrong, and not reasonably open on the evidence.

Paragraphs 20-21: by the afternoon of 17 January Mr Graham knew that the fires would impact on the urban area

Proposed comment:

“It is clear from the evidence that the senior personnel at ESB, being Mr Castle, Mr Lucas-Smith, Mr McRae and Mr Graham knew - and many others who were working at the ESB headquarters in Curtin as well as the senior bureaucrats who attended the planning meetings knew - that a very real risk existed. [BEFORE 18 JANUARY 2003]

If any of these people were to claim that they had doubts before 17 January about the realistic potential of the fires reaching the suburbs – and it is difficult to envisage how they could legitimately claim this – then there can be no doubt that any such uncertainties would have been dispelled by the information provided at the afternoon planning meeting on 17 January. They all knew the fires would burn into Canberra. They may not have been exactly sure of the precise place or the precise time or even envisaged the precise nature of the fire. But they all knew that impact was inevitable. Those people who said in their evidence that they still hoped the fires could be stopped were living with false hope, not reality, choosing to consciously ignore the information and the evidence presented to them. It is totally inexplicable why there was no reaction to Mr Taylor’s revised prediction that morning that the fire had the potential to impact upon the urban interface at 3.00 pm. Mr Graham saw the message but appears to have simply ignored it.”

Your Honour’s proposed comment, as it relates to me, can be broken down as follows:

Proposition 1: I knew that a very real risk existed before 18 January 2003;

Response: Similarly to my observation above concerning the phrase “serious risk”, the use of the words “very real risk” is debatable. The evidence is that I first identified that there was a *possibility* that there may be a threat to the urban edge of Canberra on the night of 17 January (T 2892).

Proposition 2: Any doubts I could have had about the realistic potential of the fires reaching the suburbs would have been dispelled by the information provided at the afternoon planning meeting on 17 January;

Response: I make the same comment in relation to the phrase “the realistic potential” as I made with regard to Proposition 1 above. It is correct to say that I identified a threat to the urban edge of Canberra as a *possibility* on the night of 17 January.

With respect to the reference to there being an “afternoon planning meeting”, I note that the meeting, in fact, took place at 1800 hours.

Proposition 3: I knew, by the afternoon planning meeting on 17 January, that the fires would burn into the urban areas of Canberra;

Response: This is incorrect: I had no such state of knowledge. I repeat: my (unchallenged) evidence was that I identified a *possibility* of a threat to the urban edge of Canberra on the night of 17 January, not that such an impact *would* occur (T 2892, 2951).

Proposition 4: I chose to consciously ignore the information and the evidence presented to me in continuing to hope that the fires could be stopped;

Response: This is a very serious allegation indeed to make in a comment. To suggest that I made a conscious and deliberate choice to ignore the inevitability of the fires impacting upon Canberra is completely without basis in fact. It is not reasonably open on the evidence.

Proposition 5: There was no reaction to Mr Taylor’s revised prediction that morning that the fire had the potential to impact upon the urban interface at 3.00 pm;

Proposition 6: The fact of there being no reaction to Mr Taylor’s revised prediction is a fact incapable of being explained (definition of “inexplicable”, Macquarie Dictionary (second revised edition));

Proposition 7: I saw the message from Mr Taylor but it appears that I simply ignored it.

Response to Propositions 5-7: As an introductory comment, what your Honour needs to remember in this context is that the document Mr Taylor handed to me stated "This fire [i.e., the fire in the Uriarra Two Sticks area] needs to be resourced as a priority." Mr Taylor gave the document to me, the Operations Officer, as it was *information for the operations section* (T 5000).

This is most important, as had Mr Taylor considered that it was information for the media unit, or for those responsible for issuing public warnings, he would have said so, and would have provided the information to those persons accordingly. His evidence was not that he expected me to pass that information on to the Media Unit or to any other party. Rather, his evidence was that his document contained information (i.e., that the fire in the Uriarra Two Sticks area needed to be resourced as a priority) which I needed to know, as the Operations Officer. He was entirely correct.

In answer to Proposition 5, it is wrong to say that there was no reaction to Mr Taylor's revised prediction. Not only did no-one give such evidence or submit that – it is contrary to the evidence.

The evidence as to what my reaction was to Mr Taylor's message is that as Mr Taylor had told me that the fire in the Uriarra Two Sticks area needed to be resourced as a priority, I dispatched a volunteer officer and two units (T 5001). Proposition 5 is false, and not reasonably open on the evidence.

What is not known (because there is a lack of evidence about it) is what was happening at around this time, save that it was very busy (Taylor: T 5000). There is an absence of evidence as to what was happening at the time the document containing the prediction was passed to me, what Mr Taylor said to me, who I might have discussed it with, and so on. This is hardly surprising in all the circumstances at that time.

So, it is entirely possible that:

- Mr Taylor expressed to me the belief that he held at the time, that “the fire progress would be checked in the grasslands” (T 5003); and/or that
- I told Mr McRae about the Taylor prediction, and that Mr McRae told me that he disagreed with Mr Taylor (Mr McRae's evidence was that he did disagree with the Taylor prediction: T 3413); and/or that
- I discussed it with Mr Bartlett, the Incident Controller of the fires that day; and/or that
- Mr Taylor, who had a discussion with Mr Bartlett following the morning planning meeting (T 5006), told me that he had already discussed his predictions with Mr Bartlett.

Given these possibilities (and leaving aside the suggestion of my having made no response as being simply wrong), the suggestion that the lack of response is incapable of being explained is also wrong. Proposition 6 is false, and not reasonably open on the evidence.

Apart from sending the resources referred to above, I do not know what other reaction the Taylor prediction received, and there is no other evidence about it. That does not however mean that there was no other response. It also begs the question, what other response is it suggested should have occurred? The experts have not suggested that any particular response to the Taylor revised prediction should have occurred but did not. Nor has counsel assisting.

The proposed comment that “*Mr Graham saw the message but appears to have simply ignored it*” is, given the evidence of Mr Taylor as to the dispatch of the volunteer resources, simply incorrect. Even if were restricted to a suggestion that, save for the dispatch of those resources, I ignored the message, it would still lack an adequate foundation in the evidence. Before a conclusion can be reached as to what “appears” to have been the case, there must be evidence to establish that that appearance is correct. The more serious the adverse implications of the appearance, my counsel advise me, the greater, in law under the *Briginshaw* rule, the probative value required of the evidence said to give rise to the appearance.

“Ignore” is defined in the Macquarie Dictionary (second revised edition) as “*to refrain from noticing or recognizing*”. There is no evidence which suggests that I “ignored” the message. Rather, in light of the surrounding circumstances, the possibility alluded to above that I discussed it with Mr Bartlett or Mr McRae (or someone else) is clearly open, and, on its face, more likely than not, if not most likely. Other possibilities are also open, which do not involve an adverse conclusion that the message was “ignored”. There is no reason to prefer over these possibilities the suggestion that I “ignored” the message. Proposition 7 is false, and not reasonably open on the evidence.

What is clear is that there were numerous predictions as to possible outcomes for the fires being made, of which Mr Taylor’s was but one (and one with which the head of the planning unit differed). Only hindsight has established its accuracy.

The greatest defect of the proposed comment, however, is its inherent point that, given the Taylor prediction, the community should have been warned. As to that, I observe that the risk to the urban area was known at the time of, and discussed during, the morning planning meeting on 18 January, at which Mr Taylor, Mr Lucas-Smith and Mr McRae were all present. Mr McRae’s assessment was that the risk at that time was not such that the community ought to have been warned. Although he was not aware of it at the time, he did not share Mr Taylor’s view, which was a worst case scenario in any event (T 5006-5007).

Further, as stated above, the information was given to me because of its relevance to operations. Had Mr Taylor felt the information needed to go to those whose responsibilities including warning the public, he would have notified them accordingly.

Your Honour may, with the benefit of hindsight, disagree with Mr McRae’s assessment. However, as demonstrated above, you cannot fairly or reasonably sheet home to me responsibility for a failure to warn. Nor can you, without some probative evidence, conclude that I “ignored” anything.

Conclusion re paragraphs 20-21: the proposed comments, to the extent to which they are directed against me, are wrong, and not reasonably open on the evidence.

Paragraph 22: Mr Graham failed to warn the public

Proposed comment:

“Up until the issue of the first SEWS at 2.40 pm [ON 18 JANUARY 2003] the people in the suburbs of Canberra were not given any information which would serve as a warning to them that they and their property were at risk that day from the coming fire.”

Response: I again repeat the observation in my counsels’ letter to Your Honour dated 19 October 2006, that the proposed comment is one:

“which, having been directed at members of the Emergency Services Bureau generally, makes it impossible for Mr Graham to gain any understanding as to the extent to which the comment is directed towards him.”

I cannot understand, from the material in the Notice or elsewhere, that there is any basis to suggest that this proposed comment could fairly or reasonably be directed at me, given my position and responsibilities within the ESB. While I believed that it would have been appropriate for the public to have been warned (T 2955), giving that warning to the public was not my job (T 2953).

Paragraph 23: the ESB (including Mr Graham) recognised but failed to prepare for the worst case scenario

Proposed comment:

“The senior personnel of the ESB recognized the worst case scenario but did not prepare for it. They hoped for the best. They were influenced in their thinking and their planning and by their experiences with the fires in December 2001 and the success they had in controlling those fires. This was a mistake because it led to the perception, certainly on the parts of Messrs Lucas-Smith, Castle, McRae and Graham, that the fires could be controlled once they reached the grasslands on the urban fringe. This perception existed despite the views expressed publicly by Messrs Lucas-Smith and McRae, at least, and despite the expert opinions previously expressed by Commissioner Koperberg and CSIRO expert Mr Cheney – to say nothing of the dire opinions expressed by Mr McRae in his earlier emails which are on the public record.”

Your Honour’s proposed comment, as it relates to me, can be broken down as follows:

Proposition 1: I recognized the worst case scenario but did not prepare for it.

Response: There is no evidence to establish that there were things to be done within my area of responsibility, upon a worst case scenario, but which were not done.

Proposition 2: I hoped for the best. I was influenced in my thinking and my planning and by the experiences with the fires in December 2001 and the success the ESB had in controlling those fires.

Response: As to this point, I take it that your Honour does not advance the second sentence of Proposition 2 in a critical sense; I take it, in other words, that your Honour is not suggesting that I should **not** have taken our experience with the fires in December 2001 and the success in controlling those fires into account. I say this because I would be surprised if your Honour was suggesting that experience of this nature should be disregarded – rather, I take the entirety of the proposed comment to be indicating that, to the extent to which I may have been influenced by that experience and success, that influence was excessive, and led to the perception to which reference is made.

Proposition 3: I made a mistake in being influenced in my thinking and my planning by the experiences with the fires in December 2001 and the success the ESB had in controlling those fires, because it led to the perception that the fires could be controlled once they reached the grasslands on the urban fringe.

Response: There is no doubt that I was influenced by our experiences in the 2001 bushfires, and by all of the fire events I was involved in that followed them. I am still influenced by that experience. I am also profoundly influenced by our experience in the January 2003 bushfires. In my view, it would have been remiss of me not to have been influenced by that experience, and, accordingly, I reject the suggestion that being influenced by that was a mistake.

While it is correct to say that I was influenced by our experience in the 2001 bushfires, I readily acknowledged in my evidence that I was not as experienced in bushfire fighting and behaviour as a number of others. In terms of what the fires would do once they reached the grasslands, I was far more influenced by the expert opinions of others than I was by the 2001 experience. I do not understand how I can fairly or reasonably be criticized for not having sought advice from those with such expert knowledge on the one hand, and then criticized for having relied on advice from those same persons on the other hand. To my mind, this, with respect, is suggestive of a lack of impartiality.

Proposition 4: I should not have held the perception that the fires could be controlled once they reached the grasslands on the urban fringe in light of the views expressed publicly by Messrs Lucas-Smith and McRae, the expert opinions previously expressed by Commissioner Koperberg and Mr Cheney, and the dire opinions expressed by Mr McRae in his earlier emails which are on the public record.

Response: As I state above, I based my belief in large part on the expert opinions of others, whose judgment I trusted. I had no reasonable basis to do otherwise.

This proposed comment refers to my “perception”. As my evidence makes clear, my perception of the risk being presented by the fires was changing day by day. What I did not consider to be a risk on, say 15 January, I did by 18 January. By that date, with Mr Bartlett as the Incident Controller, I had an appreciation of that risk, but even as of that morning, I did not appreciate, and could not reasonably be expected to have appreciated, how the fire would behave later that day. Nor, I stress, did either Mr Koperberg or Mr Cheney for that matter.

While even on the morning of 18 January I did continue to have some hope that there would be a chance of containment, the phrase used by your Honour that “the fires **could** be controlled once they reached the grasslands” (emphasis added) suggests that I believed that to be a likelihood. It was a possibility – it did not stop us from continuing to plan for the prospect that it would not happen.

Conclusion re paragraph 23: the proposed comment, to the extent to which it is directed against me, is wrong, and not reasonably open on the evidence.

Paragraph 24: the suggestion that the ESB (including Mr Graham) lacked competence and professionalism, were disorganized, etc.

Proposed comment:

“I have been left with the overall impression that the ESB, at the senior levels, lacked competence and professionalism, was disorganized and was functioning in a chaotic uncoordinated fashion particularly in the most critical period of the fires. The impression I have is that the left hand did not know what the right hand was doing and neither hand was actually doing very much to deal with the crisis which was growing day by day and hour by hour.”

As my counsel observed in their letter to you dated 19 October 2006, by virtue of its generality in direction, this proposed comment could be taken as being directed towards all members of the ESB, of whom I was but one. In those circumstances, unless there is the clearest of indications that the comment is not directed towards me, I must assume that it is your Honour’s intention to refer to me in this way.

I have already clearly communicated to your Honour the fact that without being advised precisely of the factual basis for such an extraordinarily general comment, I cannot possibly defend myself against such an assertion. Had, for example, a question been put to me in cross-examination, that I lacked competence and professionalism, without making clear the basis of the suggestion, the question would quite properly have been disallowed.

More precise questions might well have been properly asked and answered. They were not.

Even the wording of the proposed finding is revealing – there is no place, in any inquiry (let alone one of this length and detail), for any finding (let alone one of a level of seriousness as this) to be based on something as flimsy as an “impression”. Such comments, if they are to be properly made, must be firmly based in the evidence, not on “impressions”.

I wish to make it abundantly clear to your Honour that this proposed comment, if made, will, on my advice, and along with a number of others, provide a strong basis for an approach to the Supreme Court to have the comment or comments quashed, as being not reasonably open on the evidence.

Your Honour’s proposed comment, as it relates to me, can be broken down as follows:

Proposition 1: I lacked competence and professionalism;

Proposition 2: I was disorganized, particularly in the most critical period of the fires;

Proposition 3: I was functioning in a chaotic uncoordinated fashion particularly in the most critical period of the fires;

Proposition 4: In my capacity within the ESB, I did not know what others in ESB were doing, and vice versa;

Proposition 5: I was not actually doing very much to deal with the crisis which was growing day by day and hour by hour.

I shall deal with the propositions sequentially.

Proposition 1: I lacked competence and professionalism

Response: All that I can do to defend myself against an extraordinary attack of this nature is to draw your Honour’s attention to the fact that no-one has said or inferred in evidence, and your Honour has received no submission indicating, that I lacked competence or professionalism. Counsel Assisting urged no such conclusion upon your Honour: indeed their words in relation to me were as follows:

“he was an effective *controller of resources*, as he was described by Mr Lucas-Smith, and a competent and dedicated administrator” (para. 1121)

Further, that he was

“clearly a conscientious and dedicated officer” (para 1125; see also para 1129).

I repeat what my counsel submitted concerning myself:

“During the January 2003 bushfires, Mr Graham acted tirelessly. His few absences from Curtin to get sleep were brief. He made tens of thousands of decisions over the duration of the fires, all of which, save a handful, are without criticism.”

Even the most cursory review of the evidence before your Honour demonstrates the truth of this proposition. In the face of this evidence, and in the absence of any evidence capable of furnishing an evidentiary foundation for your proposed comment, the task of justifying the comment is formidable, if not impossible.

With respect, the comment is not reasonably open on the evidence with respect to me. I should not be taken, by making that submission, to be indicating that the comment is open to be made against any other individuals in the ESB.

Proposition 2: I was disorganized, particularly in the most critical period of the fires;

Proposition 3: I was functioning in a chaotic uncoordinated fashion particularly in the most critical period of the fires;

Response: I reject absolutely these propositions. They are simply, and completely, wrong. There is no evidence capable of establishing either Proposition 2 or 3. Similarly, given their non-specificity, it is impossible for me to respond to them in any fashion other than to reject them on the basis of lack of any suggested evidentiary basis. They are not reasonably open on the evidence.

Proposition 4: In my capacity within the ESB I did not know what others in ESB were doing, and vice versa.

In order for this proposition to amount to an adverse comment, the intended meaning must be that, at some point or points in time (which are not revealed in the proposed comment), there were (non-particularised) things being done by (unspecified) others in ESB which I should have been aware of, but was not, and vice versa.

As with Propositions 2 and 3, there is no evidence capable of establishing this proposition, and none suggested. Similarly, given its non-specificity, it is impossible to respond to it, save to reject it on the basis of lack of an evidentiary basis. It is not reasonably open on the evidence.

Proposition 5: I was not actually doing very much to deal with the crisis which was growing day by day and hour by hour.

Response: With respect, so far as I can tell, only willful blindness to the evidence, or lack of impartiality, could explain the making of such a comment. The suggestion that I was “not doing very much” is staggeringly incorrect. As just one piece of evidence, I would simply invite your Honour to read, or to re-read, the radio transcripts – they demonstrate exactly the opposite conclusion; and there is much other evidence which proves that such a conclusion is not reasonably open. The proposed comment has absolutely no basis in fact. It receives no support from any of the evidence given by Mr Cheney or Mr Roche, nor even from the submissions of Counsel Assisting. It is a grossly insulting and offensive comment, without any foundation whatsoever, and contrary to the actual evidence. It cannot fairly or reasonably be made, and I reject it.

Conclusion re paragraph 24: The proposed comment, to the extent to which it is directed against me, is wrong, and not reasonably open on the evidence.

Paragraph 25:

Proposed comment:

“By the early morning of 18 January and before, senior personnel of the ESB being Messrs Castle, Lucas-Smith, McRae and Graham all recognised the serious potential for fires to impact upon the urban edge at some time during the afternoon or evening of Saturday 18 January and failed to take action within their respective areas of responsibility to ensure public warnings were widely broadcast and disseminated to the community.”

I again draw attention to my counsels’ concern, in their letter to you dated 19 October 2006, about the generality of proposed comment. Your Honour’s proposed comment, as it relates to me, comes down to this: that there was action open to me within my area of responsibility to ensure public warnings were given, which action I failed to take.

This comment is, once again, completely without basis. There is no evidence whatsoever to demonstrate that issuing warnings to the public was within my responsibility – indeed, my (unchallenged) evidence was to the contrary (T 2953). That responsibility, if it existed in the particular circumstances and at a particular time, as was acknowledged by those concerned, lay with others, not myself.

Paragraph 26: Mr Graham deliberately withheld information from the community

Proposed comment:

“The same senior ESB personnel lulled themselves into a false sense of security because they managed to prevent the December 2001 fires destroying any urban structures; and as a result of this self-delusion, they deliberately withheld information from the community in the belief that they would – as they had done in 2001 – stop the fires in the grasslands; and they did not wish to alarm the community.”

It is one thing to suggest, with the benefit of hindsight, that based upon previous experience, ESB personnel may have underestimated the risk posed by fires, and may have overestimated the efficacy of the response which could be made to them, and therefore got things wrong in those respects; it is quite another, however, to attribute this to “self-delusion”. Further, I repeat my earlier comments above, but add this: to accuse me of having *deliberately* withheld information from the community, when all the evidence indicates that providing warnings was in no way my responsibility, is just plain wrong, and also suggests a lack of impartiality. I reject the comment completely. It warrants no further or other response.

Paragraph 27: Mr Graham was completely out of his depth

Proposed comment:

“Messrs Castle, Lucas-Smith, McRae and Graham were completely out of their depth at the time of the conflagration and the days leading up to it.”

With respect, this statement amounts to nothing more than a gratuitous insult, having, as far as I can see, no basis in fact or the evidence. It is neither fair nor reasonable. On its face, it suggests that the entire firefighting effort, everything done, during the whole period of the fires, was completely lacking in competence. Such a jaundiced view of the evidence suggests a disturbing lack of objectivity and proportionality, and, once again, a lack of impartiality. While I have drawn your Honour’s attention before to the impossibility of addressing a comment such as this without being apprised of the factual findings or the evidence said to be the basis for the comment, this goes further: it is just plain wrong. With respect, had your Honour been as familiar with the evidence as you should be, it ought be overwhelmingly apparent to your Honour that this comment, whether taken literally or figuratively, is not reasonably open on the evidence.

Dated: 22 November 2006

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TONY GRAHAM