ELECTRO OPTIC SYSTEMS PTY LTD v THE STATE OF NEW SOUTH WALES

WAYNE WEST & ANOR v THE STATE OF NEW SOUTH WALES
[2012] ACTSC 184 (17 December 2012)

NEGLIGENCE – fire – multiple fires caused by lightning – spread of fire to neighbouring lands – damage to property and persons caused by fire – strategy adopted for fighting fires – liability for damage

NEGLIGENCE – choice of law – law of jurisdiction in which tort is committed is the law applicable to determination of liability – tort committed in jurisdiction where act causing damage occurred rather than where the injury is sustained

NEGLIGENCE – duty of care – crown – statutory duty – distinction between failure to exercise statutory duty and the negligent manner of its exercise – whether negligent exercise of statutory duty gives rise to a private cause of action – adequacy of resources provided to public authorities not a justiciable issue – duty to use reasonable care to avoid the spread of fire so as to avoid damage to property and persons – common law duty cannot operate to widen the duty imposed by statute

NEGLIGENCE – breach of duty of care – crown – whether acts or omissions were so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions

NEGLIGENCE – crown – statutory immunity from liability – statutory interpretation - whether otherwise negligent acts or omissions were done in "good faith" – meaning of "good faith"

NEGLIGENCE – duty of care – crown – statutory duty – occupiers duty to use reasonable care to avoid the spread of fire so as to avoid damage to property and persons – whether the crown had assumed a duty to warn citizens of approaching peril – need to particularise content of duty

NEGLIGENCE – breach of duty of care – crown – whether decision to withdraw from fire was unreasonable – whether a particular fire caused or contributed to damage to property and persons – whether acts or omissions with respect to public warnings were an unreasonable response by the responsible authorities

NEGLIGENCE – crown – statutory immunity from liability – statutory interpretation – whether legislature intended to widen the ambit of statutory immunity

Rural Fires Act 1997 (NSW), ss 25, 44, 63, 64, 73, 128
Civil Law (Wrongs) Act 2002 (ACT), s 8
Criminal Code Act 1983 (NT), s 155
Civil Liability Act 2002 (NSW), Pts 5, 5B, 5D, ss 42, 43, 43A
Bushfire Act 1936 (ACT)
National Parks and Wildlife Act 1974 (NSW), s 33
Crown Proceedings Act 1988 (NSW), s 5
Financial Management Act 1966 (ACT)
Bradley v Commonwealth (1973) 128 CLR 557

Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540
Breavington v Godleman (1988) 169 CLR 41
McIntosh v Southern Meats Pty Ltd (Unreported, Supreme Court of the Australian Capital Territory, Higgins J, 26 February 1997)
McKain v R W Miller & Company (SA) Pty Ltd (1992) 174 CLR 1
Commonwealth v Mewett (1997) 191 CLR 471;
Stevens v Head (1993) 176 CLR 433
John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503
Dow Jones & Co Inc v Gutnick (2002) 210 CLR 575
Koop v Bebb (1951) 84 CLR 629
Agar v Hyde (2000) 201 CLR 552
Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540
Pyrenees Shire Council v Day (1998) 192 CLR 330
Lowns v Woods (1996) Aust Torts Reports 81-376
T & H Fatouros Pty Ltd v Randwick City Council (2006) 147 LGERA 319
Wang v NSW [2009] NSWCA 340
Capital & Counties plc v Hampshire County Council [1997] 3 WLR 331
NSW v Tyszyk [2008] NSWCA 107
Sutherland Shire Council v Heyman (1985) 157 CLR 424
Bankstown City Council v Alamdo Holdings Pty Ltd (2005) 223 CLR 660
Board of Fire Commissioners (NSW) v Ardouin (1961) 109 CLR 105
Hargrave v Goldman (1963) 110 CLR 40
Tabet v Gett (2010) 240 CLR 537
Kent v Griffiths [2001] QB 36
Crowley v Commonwealth of Australia & Ors [2011] ACTSC 89
Stuart v Kirkland-Veenstra (2009) 237 CLR 215
Hill v Chief Constable of West Yorkshire [1989] AC 53
Hargrave v Goldman (1963) 110 CLR 40
State of New South Wales v Mikhael [2012] NSWCA 338
Warragamba Winery Pty Ltd v State of New South Wales (No 9) [2012] NSWSC 701
State of New South Wales v West & Anor [2008] ACTCA 14; (2008) 165 ACTR 47
Mid Density Developments Pty Ltd v Rockdale Municipal Council (1993) 44 FCR 290
Puntoriero v Water Administration Ministerial Corporation (1999) 199 CLR 575
Allianz Australia Insurance Ltd v Roads and Traffic Authority of NSW
Kelly v Roads and Traffic Authority of NSW [2010] NSWCA 328

Fleming J, *The Law of Torts* (8th ed, The Law Book Co Ltd, 1992)
Gray N and Edelman J, "Developing the Law of Omissions: A Common Law Duty to Rescue?" (1998) 6 *Torts Law Journal* 240

No. SC 103 of 2009
No. SC 10 of 2006

Judge: Higgins CJ
Supreme Court of the ACT
Date: 17 December 2012

IN THE SUPREME COURT OF THE)
) No. SC 103 of 2009
AUSTRALIAN CAPITAL TERRITORY)

BETWEEN: **ELECTRO OPTIC SYSTEMS PTY LTD**

Plaintiff

AND: **STATE OF NEW SOUTH WALES**

Defendant

IN THE SUPREME COURT OF THE)
) No. SC 10 of 2006
AUSTRALIAN CAPITAL TERRITORY)

BETWEEN: **WAYNE WEST and LESLEY WEST**

Plaintiff

AND: **STATE OF NEW SOUTH WALES**

Defendant

O R D E R

Judge: Higgins CJ

Date: 17 December 2012

Place: Canberra

THE COURT ORDERS THAT:

1. Judgment be entered in favour of the defendant.

2. The parties be heard as to costs.

BACKGROUND

1. On the afternoon of 8 January 2003, a major electrical storm occurred across north-eastern Victoria, southern New South Wales ('NSW') and the Australian Capital Territory ('ACT'). The accompanying lightning strikes ignited fires throughout the Brindabella Ranges, in both NSW and the ACT.

2. Relevantly, a fire commenced at a place known as McIntyres Hut ('the McIntyres Hut fire') in NSW; and at places known as Bendora ('the Bendora fire'), Stockyard Spur ('the Stockyard Spur fire'), and Gingera ('the Mount Gingera fire') in the Namadgi National Park (collectively 'the Namadgi fires') in the ACT. The fires rapidly increased in intensity, and on 18 January 2003, burnt into the south-western suburbs of Canberra ('the Canberra Bushfires'). The resulting damage included:

   - the death of four people;
   - injury to 435 people;
   - the destruction of 487 homes and 23 commercial and government premises;
   - damage to 215 homes, commercial premises, government premises and outbuildings;
   - the destruction of Mount Stromlo observatory, an institution of international renown;
   - the death of an inestimatable number of animals; and
   - almost 70 per cent of the ACT (157,170 hectares) being burnt.

THE ACTIONS

Electro Optic Systems Pty Ltd & ors v NSW

3. Those plaintiffs insured by QBE Insurance (Australia) Limited ('the QBE plaintiffs') are seeking damages from NSW ('the defendant') in respect of injury, loss and damage suffered as a result of the Canberra Bushfires, pursuant to the *Crown*

Proceedings Act 1988 (NSW). The defendant is said to be liable as the owner and occupier of the Brindabella National Park ('the Park') and for the negligence of members of the NSW Rural Fire Service ('RFS') and the NSW National Parks and Wildlife Service ('NPWS').

Wayne Karl West & anor v NSW

4. Wayne Karl West and Lesley Anne West ('the West plaintiffs') are also seeking damages from the defendant in respect of property loss sustained as a result of the burning out of Wyora Station in the Shire of Yarrowlumla on or about 18 January 2003, pursuant to the *Crown Proceedings Act 1988* (NSW). The defendant is said to be liable for breach of a statutory duty by the NPWS pursuant to s 63(1)(a) of the *Rural Fires Act 1997* (NSW) ('*Rural Fires Act*'), as owner and occupier of the Park pursuant to s 63(2) of the *Rural Fires Act* and for the negligent acts and omissions of officers of the RFS and NPWS.

THE PROCEEDINGS

5. This matter was heard from 1 March 2010 to 27 May 2010, 4 April 2011 to 21 June 2011 and from 14 November 2011 to 25 November 2011. Before the hearing began, it had been agreed between the parties that the questions of liability and quantum of damages would be separated. The only issue addressed in these proceeding, then, is whether the defendant is liable to any, or both groups of plaintiffs, in negligence or breach of statutory duty. In that respect, whether a defence is available under the *Rural Fires Act* and the *Civil Law (Wrongs) Act 2002* (ACT) ('*Civil Law (Wrongs) Act*') is, of course, a central question.

THE INCIDENT

The McIntyres Hut fire

6. On the afternoon of 8 January 2003, multiple lightning strikes were recorded in the McIntyres Hut area within the Park, at a place known as Webbs Ridge. At about 4.06pm, Mt Coree fire tower reported smoke in the area of the Park, which appeared to be coming from the McIntyres Hut area. Sometime after 5.10 pm, the McIntyres Hut fire was observed during an aerial reconnaissance as being approximately 200 hectares in size.

7. During that afternoon, Ms Julie Crawford, Area Manager of NPWS at Queanbeyan, assumed the role of Incident Controller ('IC') in accordance with the *Rural Fires Act* and the Yarrowlumla/Queanbeyan Districts Bushfire Management Committee Plan of Operations in respect of the McIntyres Hut fire. She remained IC until 1 pm on 9 January 2003 when, pursuant to s 44 of the *Rural Fires Act*, responsibility for that fire was transferred to the RFS and Mr Bruce Arthur became IC.

8. At or about 6.06 pm, Ms Crawford heard a radio call from Mt Coree Tower reporting smoke, which, when plotted, indicated fire in the vicinity of the Baldy Range. At or about this time, Mr Robert Hunt, the NPWS ranger overseeing the Park and the Bimberi Nature Reserve, reported to Ms Crawford that he could see smoke on Baldy Range. Noting that there were a 'number of fires in the area', Ms Crawford declined to dispatch crews to the Baldy Range fire on 8 January 2003. I will return below to the ramifications of that decision.

The 8 January 2003 meeting

9. At or about this time, people began arriving for an interagency meeting at the National Parks Office in Queanbeyan. The meeting was attended by NPSW officers Mr Hunt, Ms Crawford, Mr Tony Fleming and Mr Scott Seymour; RFS officers Mr Arthur and Mr Jim Lomas; ACT Forest Officers Mr Neil Cooper and Mr Tony Bartlett; and ACT ESB Officers Mr Peter Lucas-Smith and Mr Rick McRae.

10. The meeting first split into two groups. Mr Arthur, Mr Fleming, Ms Crawford and Mr Lucas-Smith met in Ms Crawford's office. Having decided that Ms Crawford was to perform the role of IC, the group discussed the question of a declaration under s 44 of the *Rural Fires Act.* The decision was made to apply for such a declaration. The rest of the officers who attended the meeting gathered separately and discussed their observations of the fire and strategies for fighting the fire, suggesting appropriate control lines for the fire.

The plan

11. The two groups then gathered for an official meeting in the conference room at Queanbeyan, chaired by Ms Crawford. It was agreed at that meeting that the fire was beyond direct attack, and that the strategy for fighting the fire would be indirect attack. That involved, essentially, establishing "containment lines" some distance away from the fire edge, before burning out the fuel between the containment line and the fire, thereby halting the progression of the fire. It is this decision that each of the plaintiffs seek to impugn as a decision no reasonable fire control authority would have

agreed to. Rather, in their submissions, direct attack on parts of the fires, combined with a tighter containment area, should have been preferred.

12. At the meeting, Ms Crawford was informed that the fire at the Baldy Range had crossed the Baldy trail and that, consequently, the Baldy trail was lost as a containment line for the eastern side of the fire. Those at the meeting unanimously agreed to use Doctors Flat, Webbs Ridge and the Folly trails as the northern containment line, the 07 Powerline trail as the southern containment line, the Firebreak trail as the eastern containment line and the Goodradigbee River as the western control line. It appears that no attempt was made at that meeting to estimate how long the indirect plan would take to complete. Nevertheless, Mr Seymour, the NPWS Service Ranger for Tablelands, prepared a "situation report", which stated that the "strategy" was to complete control lines on the day shift of 9 January 2003, and back burn from them in the evening of 9 January 2003. The back burning was then to be consolidated with aerial incendiaries on 10 January 2003.

The implementation of the plan

13. At 6 am on 9 January 2003, the Incident Management Team ('IMT') held a meeting at the NPWS Queanbeyan Depot, which had been nominated as the Control Centre. Members at the meeting discussed the proposed containment lines and the need to cut trails to complete the containment lines. Ms Crawford identified the south-east containment lines as a priority. The prevailing wind was from the north-west, and, when those winds returned, the area at risk would be the south-east ACT pine forests and rural assets, particularly neighbours to the east or south east of the Park. The first priority was brushing up the trails in the south-east corner.

14. Mr Arthur organised two RFS Group Officers, Mr Mark Ryan and Mr Chris Powell, to attend the Baldy Range fire to investigate whether the fire could be attacked directly, thereby enabling the Baldy trail to be used as the eastern containment line. Later that day, Mr Arthur again spoke to the two officers, who reported that it was worth attempting a control line on the eastern side of the Baldy Range trail. Arrangements were made for a number of crew and vehicles to be diverted to the Baldy Range fire. Whether any attacks on the Baldy Range fire were actually undertaken is a matter of dispute. In any event, a reconnaissance flight over the fires reported that the Baldy Range fire to the east of the trail was far bigger than could be seen from the ground and the Baldy Range fire was confirmed as lost *qua* a possible eastern containment line. That information does not appear to have been factually accurate, at least as assessed early on 9 January 2003.

15. At 3 pm, at a later IMT meeting, a suggestion was made for the immediate ignition of the south-east part of the containment line. However, the IMT decided that all containment lines should be completed before back burning began. By 6 pm that evening, the McIntyres Hut Fire was recorded as covering 500 hectares.

16. The strategy developed on 8 January 2003 had not changed by the morning of 10 January 2003. At 3 pm on 10 January 2003, the IMT was advised that the planned southern containment line was not completed, and that a one km track still required construction at the western end of this line, between the end of the Powerline access track and the Goodradigbee River. A medium bulldozer tasked to do this work was unable to finish, owing to the extremely steep and loose terrain, and a larger machine was requested for the task. This machine had to be brought in from outside the area, resulting in further delay in completing the containment line. Consequently, back

burning could not commence on 10 January 2003. By 6 pm on 10 January 2003, the McIntyres Hut fire was 1,100 hectares in area.

17. Back burning first commenced at 11 pm on 11 January 2003 in the Powerline division. At 8 pm on 15 January 2003, the RFS completed the containment lines. On or about 17 January 2003, the RFS dropped aerial incendiaries on the area within the containment lines. The work involved in the plan was not completed by 2 pm on 17 January 2003, when aerial incendiary dropping ceased due to high winds.

18. On the afternoon of 17 January 2003, the fire broke the containment lines in the south east, burnt down to the eastern bank of the Goodradigbee River adjacent to Tommys Flat, burnt across the river and out of the western bank of the river. It had also burnt down to the eastern bank of the river at Limestone and crossed to the western bank of the river.

19. On 18 January 2003, the fire burnt through containment lines spreading into the ACT and the suburbs of Canberra.

The Bendora fire

20. The Bendora fire was started by a lightning strike at approximately grid reference 644 785 at or about 3.11 pm on 8 January 2003. The ignition site of the fire was just to the north of Wombat Road and to the south of the "Bendora Break", the route of an old logging trail running off Wombat Road. While Wombat Road was accessible to fire crews, Bendora Break was overgrown with dense vegetation.

21. Mr David Ingram made his first report on the fire from the helicopter FireBird 7 at 4.02 pm, at which time he did not provide an estimate of the size of the fire. At 4.55 pm, he described the fire as being about 100 m^2, with a flame height of about 1 to 2 m, and burning very slowly uphill. At 5.13 pm, the Communication Centre at the

ESB ('ComCen') contacted Mr Ingram on behalf of Mr Tony Graham, the rostered duty coordinator for bushfire and emergency services, asking for a full situation report on the Bendora fire. Mr Ingram replied that the fire was about 100 m by 50 m, that fire in the understorey had not burnt up to the trees, and the flame height was 1 to 1.5 m.

22. Upon hearing Mr Ingram's first report of the fire at 4.02 pm, Mr Graham immediately directed units to the fire. Mr Cliff Stevens ('Forests 7') arrived at the Bendora area at around 4.40 pm, accompanied by the Forests 15 tanker. Leaving the tanker to follow, he drove ahead to look for the fire, reaching the fire ground at around 5.50 pm. He then set about marking the track into the fire ground.

23. Ms Odile Arman (radio call-sign 'Parks 1') was the IC assigned to the Bendora fire. Ms Arman knew the area and the surrounding fireground well, having been employed there previously for two years as a park ranger. She also had 20 years of experience as a firefighter, though much of it was acquired in small urban-interfaced grassland, woodland and open-forest fires.

24. At 5.58 pm, Ms Arman contacted the Southcare 1 helicopter that was water bombing the fire and asked about the size of the fire. Southcare 1 responded:

> At present the ... fire front is ... approximately on a 750 metre front.

25. Ms Arman and her crew arrived at the fire ground between 6.30 pm and 6.50 pm on 8 January 2003. The crew consisted of two tankers ('Parks 12' and 'Forests 15'), three light units ('Gunghalin 20', 'Parks 22' and 'Forests 25') and a command vehicle, with a total of 12 personnel. Upon her arrival, Ms Arman instructed Mr Stevens to undertake a vehicle reconnaissance of the area in order to locate water points and other possible access trails.

26. At 6.53 pm, Southcare 1 advised Ms Arman that the fire had:

> stayed fairly contained over the last hour, hour and a half. We estimate it's between ... 500 metres ... and 750 metres square.

27. Ms Arman responded:

> That's 500 by 350

28. To which Southcare 1 replied:

> Negative, 500 metres square to 750 metres square.

29. Having acknowledged that estimate, Ms Arman then advised Southcare 1 that her crews were about to run canvas hoses up to the fire. The southern edge of the fire was approximately 100 m from Wombat Road

Ms Arman's reconnaissance

30. Ms Arman began a reconnaissance of the fire at or about 7 pm. She was accompanied by a Forests crew member, Mr John Kane, for safety reasons. The two of them walked in a clockwise direction, beginning from the south-western corner. The slope was moderate but their progress was slowed due to a considerable build of "bracken-type" debris. Adding to that was the quantities of fallen trees and boulders on the ground, which were still evident at the time of the judicial view on 10 March 2010.

31. Ms Arman returned from her reconnaissance at 8.01 pm. She was not called as a witness in these proceedings and the Court therefore has no evidence before it regarding what she observed, nor the role that particular observations played in her subsequent decision making. Nevertheless, following her reconnaissance, Ms Arman did come to a conclusion as to the appropriate course of action to be taken by her

crew in relation to the Bendora fire on the night of 8 January 2003. I will come to that decision in due course.

Mr Graham's telephone conversation

32. Indeed, others besides Ms Arman were also discussing the possibility of withdrawing from the Bendora fire. At 7.03 pm, Mr Graham had a conversation with Mr Arthur from the RFS about the status of the fires in the region. Towards the end of that conversation, Mr Arthur said to Mr Graham:

> So I don't, you guys don't envisage doing much tonight, I guess?

33. Mr Graham replied:

> I don't think so, no.

34. Mr Arthur then said:

> Hopefully – I mean, until we know what this thing's doing, you can't put people in that country today.

35. At about 7.31 pm, ComCen contacted Mr Ingram in Firebird 7, and requested that he provide an estimate of the size of the Bendora fire. Mr Ingram estimated that the fire was "about 500 m²". That estimate was at some variance with his earlier report that the fire measured some 50 m by 100 m, which would have been 5,000 m². While Mr Ingram was not called to give evidence, it appears that his 7.31 pm estimate was a mistake, and that the fire he could see at that time was in fact 5,000 m² in area.

36. About 12 minutes after Mr Graham's conversation with Mr Arthur, and before Ms Arman's situation report, Mr Graham telephoned Mr Lucas-Smith and the following conversation took place:

> Lucas-Smith: Hello

Graham: That Bendora fire.

Lucas-Smith: Yep.

Graham: Approximately 500 square metres, burning very slowly.

Lucas-Smith: OK, is Odile on it?

Graham: Don't know. We can't, we've just spoken to Parks –ah– Forest 15 and they're goin' to go and grab Odile. She's in the scrub at the moment. That's the message we got.

Lucas-Smith: OK. So what, they are going to be able to do anything tonight do you think?

Graham: I would be doubtful that they could. I'd ...

Lucas-Smith: So we'd be looking at crews back tomorrow?

Graham: Yep.

Lucas-Smith: OK. I wonder if you could organise that ...

Graham: OK.

Lucas-Smith: ... with Odile. Need to make sure we are, that we don't commit ourselves beyond what we might end up needing to commit to the McIntyres Hut fire.

Graham: Yep, sure.

Lucas-Smith: But I think we need to, if we can get them out of the way the better.

Graham: Yep.

Lucas-Smith: But McIntyres will most likely be tankers with back-burning operations any way so...

Graham: Yep. OK.

Lucas-Smith: So we might use other resources for that.

Graham: Sure. Not a worry. I'll work on that and let you know when you come back.

Lucas-Smith: Thanks, mate.

Graham: Righto.

Lucas-Smith: See ya.

37. Mr Lucas-Smith was not called to give evidence concerning his conversation with Mr Graham. Certainly, as Chief Fire Control Officer ('CFCO') he was entitled to have a say in strategy and in the end, he had to take responsibility for the subsequent decision to withdraw crews from the Bendora fire that night.

38. In any event, the transcript of the telephone conversation between Mr Graham and Mr Lucas-Smith reveals that Mr Lucas-Smith was misled as to the size of the fire. It appears that he had gained the impression that the fire was in fact a "small fire" of 500 m² and that it was "burning very slowly", as had been reported to ComCen by Mr Ingram. In fact, the size estimates of both Southcare 1 and Ms Arman suggest that

the fire was at least 10 times larger than was reported to Mr Lucas-Smith by Mr Graham in their 7.42pm conversation.

Ms Arman's situation report

39. On completing her reconnaissance, Ms Arman gave a sitrep (situation report) to ComCen at 8.01 pm in which she said:

> OK, this fire's doing about 100 metres from the Warks Road uphill. It's drawing into itself. It's not moving very fast. We can access the eastern side of it from Warks Road with tankers and light units but we will need rake-hoe lines around the top section.

40. ComCen then confirmed this report:

> Fire 100 metres from the road moving uphill slowly. Eastern access is possible but will require rake-hoe lines on top side with water bombing assistance. Is that correct?

41. Ms Arman responded:

> That's affirmative on the western side, which is the uphill side

42. Ms Arman then received a message from the Southcare 1 helicopter:

> Parks 1, Southcare 1. We're inbound to your position at this time. ETA 10 minutes with a bucket of water and copied your last on the high side, the western side of the fire.

43. Ms Arman responded:

> That would be great, thanks. Parks 1 out to you.

44. A few moments later, ComCen and Ms Arman had a further exchange:

> Yeah received your sitrep. Any further information for me, Parks 1?

45. Ms Arman replied:

> No, could you ask the Duty Coordinator what he'd like us to do given that it's going to be dark soon? Not really sure whether we should be sending a rake hoe team in.

46. ComCen responded:

> Parks 1, I understand that teams will be removed from location this evening and returned tomorrow, but I will check with the Duty Coordinator to confirm that.

47. At 8.06 pm, ComCen requested that Ms Arman clarify her intentions with respect to the fire:

> Yeah, Parks 1. Compliments of the Duty Coordinator. Do you intend remaining or leaving crews on location overnight? If not, crews will be going in first thing in the morning and could you give us an estimate on how many crews would be required for that.

48. After requesting a "few minutes" in which to further assess the situation, Ms Arman radioed ComCen and said:

> An update on what's required for tomorrow. There's not too much that we can do this evening. We'll need at least two rake-hoe teams first thing in the morning to work the southern and northern sides of the fire, and, if it's possible, to have some water bombing done on the western side ... we also require at least one heavy tanker.

49. At about 8.16 pm, ComCen responded:

> Parks 1, compliments of the Duty Coordinator. Thanks for your attendance at this incident. You may return to your area and crews will be returning in the morning.

50. Subsequently, Ms Arman and her crew did indeed withdraw from the fire ground.

51. This account is not now relevant to any liability in ACT, rather it is relevant to the conclusion that the NSW fire alone caused the damage the remaining plaintiffs complain of.

QBE PLAINTIFFS

The indirect strategy for controlling the McIntyres Hut fires

52. It was accepted on all sides that the fires ignited shortly after 4 pm on the afternoon of 8 January 2003. The fire commenced by lightning strike for which, of course, no agency or public authority was responsible. It was also clear that the fire took hold quickly and rapidly spread in a south easterly direction.

53. Later that day, at the RFS headquarters in Queanbeyan to which representatives of the ACT emergency services were invited, a strategy for containment of that fire was agreed to without dissent.

54. The agreement involved surrounding the fire area with containment lines and back burning from those lines to form a barrier to further spread of fire from inside those lines. The area to be enclosed and burnt was, it was agreed, approximately 10,000 hectares.

55. It was acknowledged by the then IC, Ms Julie Crawford, that, even without detailed calculation, it was apparent that this was an ambitious strategy. As it happened, though only one week or slightly less was anticipated as the next bad weather day, that day in fact, did not emerge until 17 January 2003.

56. Even with that additional time, sufficient back burning both to the west and the east of the main fire activity had not been achieved by the afternoon of 17 January 2003, so as to prevent the escape of fire from those fronts.

57. Mr Philip Koperberg expressed the concern succinctly in his evidence

> ... it is always a concern in my mind, and the practitioners' minds, that that work may not be able to be completed or, if it is, will it have sufficient depth to withstand the impact of the oncoming fire.

58. That view was supported by experts called by the plaintiffs, Mr Trevor Roche, Mr Phillip Cheney, Mr Roger Fenwick and Professor Domingos Viegas.

59. There could be no doubt, nor was there, that, if the McIntyres Hut fire escaped under adverse conditions, fires would approach Canberra.

60. There was, however, a difference of opinion as to whether fire would be likely to progress beyond the Stromlo area.

61. Ms Crawford considered that a base camp for fire fighters and equipment at the Stromlo forest was "the safest place it could be". In so far as she contemplated the fire spreading beyond that point, the clear paddocks between the Stromlo forest and the urban edge, given its absence of fuel due to prolonged drought, would, she believed, provide an effective barrier given firefighters would be in attendance.

62. Mr Hunt and Mr Arthur, both experienced officers, had a similar view at 8 January 2003.

63. As is now apparent, those expectations were not realised. The fires escaping from the McIntyres Hut area burnt into Canberra causing much devastation both material and, worse, personal injury and death, as I have noted.

64. Although the risk of fire spreading to Canberra was not considered great, it was not regarded as zero by witnesses such as Mr Cheney, Mr Koperberg, Mr Roche and even Mr Hunt.

65. Mr Peter Cathles regarded the fire in the location it was on 8 January 2003 as "a real threat to Canberra".

66. Mr Peter Stanford, I accept, had, on 8 or 9 January 2003, warned Ms Crawford that the fire to the east of the Goodradigbee River posed a threat to properties to the west of the river. That included his own property and, of course, that of the West plaintiffs.

67. The fire, left unchecked, could well have been and, should have been, foreseen as a threat to life and property up to and including the western perimeter of Canberra. I did not need the opinion of Messrs Fenwick and Hunt to assent to that proposition.

68. It was undisputed. It is not inconsistent, however, with the more optimistic view that, with counter measures, the fire would, on the worst case scenario, burn into the pine forests between the Park and the western suburbs of Canberra but be contained in the eaten out and drought ravaged open paddocks between the forests and any urban habitation. Of course, that scenario would have acknowledged a threat to the forestry settlements at Uriarra.

69. Another issue raised was the failure to directly attack, on the evening of 8 January 2003 or early 9 January 2003, the Baldy spot fire which had preceded the main fire front from the Webbs Ridge to which that fire had spread from its point of origin.

70. There was, it was accepted, a lack of clear communication to establish that Fairlight and Mullion RFS Brigades were able and willing to combat that outbreak directly. That failure is relied upon by the QBE plaintiffs as a particular of actionable negligence.

71. In the west, there was clearly no urgent attention given to further containing the fire spreading slowly westward towards the river. The method suggested by the QBE plaintiffs to contain it, was to construct a containment line across the kink, a bend in the Lowells trail, linked to McIntyres Hut trail, to further isolate the fire from the river, albeit by a few hundred metres.

THE QBE PLAINTIFF'S CONTENTIONS

72. The QBE plaintiffs advanced the following propositions. I will indicate whether they are accepted, stating them in summary form.

73. The first proposition was that the containment area of 10,000 hectares was to be burnt out before the "next bad weather day. That was characterised as a "difficult strategy". I agree entirely. It was not, however, impossible as it transpired.

74. I appreciate that the authorities had more time than was anticipated. With 24 to 48 hours more the strategy adopted was achievable. There were some unexpected delays as well. All that being acknowledged, it does not detract from the factual conclusion that, depending on the ferocity of the next bad weather day, the strategy adopted on the evening of 8 January 2003 and then continued up to 17 January 2003 was, as the QBE plaintiffs submit, "difficult" to execute successfully.

75. The second proposition was that a "bad weather" day was anticipated within seven days.

76. Such a day plainly could include extreme weather. It did, in fact, include catastrophic weather conditions the like of which was up to then unprecedented. Though rare, such an event would be accepted as possible, though unlikely. The plaintiffs cite Ms Crawford, Mr Hunt and Mr Koperberg in support of that conclusion and I accept it as reasonable.

77. The third proposition related to the need to assess the time and, of course, the resources needed to execute the agreed strategy.

78. In this context, Ms Crawford agreed that the strategy she and her team adopted had not been assessed in accordance with usual and competent practice. As a result the incident team had no accurate forecast of the time to be taken to complete the planned work.

79. More of this anon. However, I note that Ms Crawford and, indeed all of the planning team, agreed that there was no reasonable alternative. That such was their conclusion

was not challenged. However, that it was a reasonable conclusion was challenged, particularly by Mr Fenwick.

80. The fourth proposition was a consequential one. That is, that if the work was not completed by the next bad weather day the fire would, probably, escape the confines of the Park. I accept that all relevant parties were aware of the risk.

81. The fifth proposition is that if the fire did escape containment lines it "could burn to Canberra".

82. Whilst all persons who turned their minds to that consequence considered damage to persons and property within the urban interface of Canberra to be unlikely it could not be dismissed as a fanciful outcome.

83. The evidence of Mr Hunt, Mr Arthur and Mr Koperberg supports such a contention and I also accept that proposition. It suffices to conclude that unless successfully contained it was foreseeable, though not expected, that the fire would burn up to the urban interface.

84. The sixth proposition was that it was the duty of those responsible for the indirect strategy to comply with the recommended practices and protocols of the RFS and NPWS for ICs.

85. The evidence is not contested that the relevant instrument was the Bushfire Management Plan (exhibit QBE 24) which mandated the appointment of an IC. When the indirect strategy was first agreed upon that IC was Ms Crawford. Following the s 44 (*Rural Fires Act*) declaration on 9 January 2003 at 1 pm, the RFS Commissioner, Mr Koperberg, had control of the fire and appointed Mr Arthur to be IC. Mr Arthur had, however, been involved in and agreed with the strategy devised on 8 January 2003.

86. The procedures and protocols were designed to ensure that ICs had regard to all relevant considerations and were competent to deal with whatever emergencies might occur including events which might be classified as catastrophic.

87. It should be borne in mind that no protocols or procedures could guarantee success. They were designed to give the RFS and/or NPWS the best chance of avoiding damage to personal property and injury to persons, including, of course, fire-fighters themselves.

88. Those protocols and procedures included the obligation to consider the risks and prospects of success of any strategy to combat the fires, including strategies to deal with any failure of that strategy. Again, that consideration might not avoid disastrous consequences from ensuing. It is a process for ensuring that no obvious precaution was overlooked.

89. The seventh proposition is that the sixth proposition entailed the consideration of five questions. I accept that this is, or was at the time, a mandated procedure. Those were accurately, I think, summarised as follows:

    (a) What time was reasonably available within which to complete the work involved in the strategy?

    (b) How long would it take to implement the strategy?

    (c) What are the prospects of the strategy succeeding?

    (d) What are the likely consequences of failure of the strategy?

    (e) The degree of risk involved in the strategy, whether that is acceptable and, if not, what other strategies are available?

90. I note that Mr Koperberg, Ms Crawford, as well as Mr Roche agreed that those questions should have been addressed before adoption of the indirect strategy was agreed upon.

91. Ms Crawford agreed that she did not expressly address those questions. Her reason for not doing so was that, given the information she and her team then had, there was no other strategy reasonably open.

92. It was put to her that she still needed to address the first and second questions. She agreed with that proposition. However, I have to observe that, if the strategy adopted did appear to be the only one available then any other inquiry would be pointless. The team could only proceed to implement the agreed strategy as quickly as it could.

93. Of course, as the plaintiffs submit, the risk was significant that weather challenging the viability of the strategy would occur before the contained area could be completely, or substantially completely, burnt out.

94. As events unfolded, the strategy was not and, indeed, could not be, completed within seven days after 8 January 2003. In fact, the seriously adverse weather did not occur until 17 January 2003. That was the date upon which the final element of the strategy, namely, aerial incendiary bombardment was put in place, though it had been planned for the previous day but delayed due to late delivery of the incendiary devices. That delay was not due to any negligence on the part of the incident team or, indeed, any other person or persons for whom NSW was responsible.

95. It follows that, although it did not succeed, I am satisfied that the indirect strategy would, in all probability, have succeeded had the catastrophic weather been later, say the following Monday, as some forecasts thought likely.

In saying that, I assume that the completion of the strategy would have included burning out from the Goodradigbee River, part of which had been done by 18 January 2003.

96. The eighth proposition was that the strategy proposed as the indirect strategy was agreed to by all present on 8 January without question in the belief that it was the only strategy reasonably open. That proposition is not denied by NSW.

97. There was evidence of a statement by Mr Arthur that the work had to be done within seven days. Otherwise there was no express discussion as to the time needed to complete each element of the strategy or as to whether it was reasonably likely that the target of seven days was achievable.

98. The ninth proposition asserts that if the IC, initially Ms Crawford and then Mr Arthur, had addressed the relevant questions, they would have concluded that there was a high risk of failure.

99. Certainly, Ms Crawford acknowledged that she did not know if the required work could have been completed in seven days. She was also well aware that if the areas to be burnt out were not adequately burnt out by the next bad weather day there was a significant risk that there would be spotting of fire which would then burn out of control. If bad enough, to the western suburbs of Canberra and, of course, properties in between, including the West plaintiffs' property.

100. There was no discussion at the meeting of any alternative strategy. The issue this raises is, first, whether there was any other more effective strategy reasonably open and, even if so, whether the ICs that were appointed were negligent in not recognising it.

101. It is not to the point to say that no alternatives were in fact considered unless there was an alternative reasonably available that no reasonable IC would have failed to consider the implementation of which would, as a matter of probability, have avoided the damage which followed.

102. The tenth proposition was that there was indeed an alternative strategy involving two significant differences. One was directly to attack the fire on the Baldy trail and secondly, establish a control line closer to the point of origin of the McIntyres Hut fire across the kink, thus joining Lowells Flat trail to the McIntyres Hut trail.

103. The effect of those two measures, particularly the first, would have been, if successful, to reduce the contained area significantly. There were resources available to attack the Baldy fire. The Mullion RFS brigade was ready willing and able to be deployed to that task.

104. That proposal was not accepted by Ms Crawford. It seems that she had safety concerns about it. The correctness of her opinion was challenged by Mr Fenwick and Mr Roche as well as a number of local RFS volunteers. They included Messrs. Peter Cathles, William Parker and Francis Kaveney.

105. The criticisms of the strategy adopted were, first, that the Goodradigbee River was not an effective containment line. The river was low due to drought and there was an infestation of blackberry bushes on the eastern bank. The crowns of trees met, or nearly met, above it.

106. That criticism was proved valid, though part of the expectation in choosing that line was that there would be burning back from the eastern banks of the river. That happened partially but not sufficiently by 18 January 2003.

107. Part of the strategy was to also patrol the western bank and use aerial water bombing to control any spotovers.

108. The ferocity of the adverse weather conditions commencing on 17 January 2003 rendered that part of the strategy impossible to implement.

109. The second criticism, levelled by the QBE plaintiffs, is that the fire should not have been allowed to burn down to the river. That is really a consequence of, or a restatement of, the first criticism.

110. The further criticisms related to the size of the containment area and failure to attack the Baldy fire, either late on 8 January 2003, or first thing on the morning of 9 January 2003. I accept those criticisms were honestly made by those who made them, that is, Messrs Timothy Cathles, P Cathles, Stanford, Peter Smith, Parker, Fenwick and Roche.

111. It is, however, fair to point out that these criticisms were not articulated until after 19 January 2003. They did not even occur to Mr Koperberg who reviewed the strategy adopted, and its progress, as at 16 January 2003.

112. That by no means invalidates those opinions, but it renders it impossible to suggest that all those involved, including Mr Koperberg, were so lacking in skill and experience as to have overlooked the obvious solutions perceived by Mr Fenwick in particular.

113. It is submitted that the failure to perceive the alternative solution embraced by Mr Fenwick was due to the failure of Ms Crawford to have undertaken the analysis that was recommended for ICs.

114. I do not agree that that was the cause of the failure to adopt what I will call the Fenwick strategy, rather it was that no-one at the meeting of 8 January 2003, then or later, considered, in their judgment, that any reasonable alternative existed.

115. I accept that the Fenwick strategy was, at least potentially, a better course.

116. One matter that militated against a direct attack, at Baldy at least, was the information conveyed to the meeting by Mr Simon Bretherton which indicated that the fire had already crossed the Baldy trail. In fact, there was an opportunity for direct attack to

hold the fire back to the Baldy trail as at 8 am on 9 January 2003, although Mr Arthur was, apparently, only given that information from aerial surveillance which indicated that more resources might be required than were then available. In any event, caution prevailed and no attempt was made to secure Baldy as a containment line.

117. The eleventh proposition was that, but for the failure to adopt the more aggressive option, the fire would probably have been contained.

That rests on four factors:

> First, if the Baldy trial had been the eastern containment line, the area to be burnt out would have been reduced by 15% at least.
> That proposition ineluctably follows.
>
> Second, it would take less time to have burnt out the area to the west of Baldy trail. It was Mr Fenwick's opinion that this could have been achieved by 14 January 2003.
>
> Third, the western containment line would have been the Lowells trail and a rake-hoe line to McIntyres Hut trail.
>
> Fourth, the fire would have been contained at the western edge to the east of the valley, in which the Goodradigbee River flowed so that the turbulence which fanned the flames on 17 and 18 January 2003 would not have spread the fire down to, and hence across, the river.

118. Thus the fire would not, to the west, have burnt the West plaintiffs' property and then turned east at Flea Creek towards Canberra.

119. In this context, I note the dispute as to whether the Bendora fire had any role to play in the destruction of homes in Chapman and Kambah. Mr Kelly Close thinks not, though Mr Cheney and Professor Viegas believed that the Bendora fire assisted in the destruction of houses at Chapman and Kambah, though not Duffy.

120. In my view, it is not shown that the Bendora fire was, on the balance of probabilities, responsible for, or had contributed, to any of those losses, though, given the

settlement between the ACT and all other parties that is no longer of any direct relevance.

121. It is, however, to my mind, beyond doubt that the McIntryres Hut fire escaping to the east and west caused the destruction complained of, though there is some doubt whether the escape to the west actually reached properties beyond the NSW border in the suburbs of Canberra.

122. The twelfth proposition asserts that the ICs, Ms Crawford and Mr Arthur, were "grossly" negligent in adopting the indirect strategy, rather than perceiving and adopting the Fenwick strategy.

123. That proposition rests on the failure to perceive and adopt the Fenwick strategy or, at least, the essential features of it. That failure, it is submitted, would have been avoided had the ICs followed the mandated analytical practices prescribed by RFS and NPWS for such eventualities.

124. The further point made by the QBE plaintiffs is that, even if there was no other strategy that the ICs could think of they should have warned those likely to be affected of the risk that existed of Canberra suburbs burning.

125. Lack of warning was, of course, not an issue in relation to the West Plaintiffs. Mr West was intimately aware at all times of the danger posed by the western flank of the McIntyres Hut fire.

THE ISSUES TO BE ADDRESSED

126. There are nine issues summarised as follows:

(a) The first is the applicable law. That is not an issue in the West plaintiffs' case. It can only be the law of NSW. It is an issue in respect of damage by fire negligently permitted to escape from NSW into the ACT.

(b) Second is whether the conditions imposing liability on NSW have been established (see paras 26, 31C and 31Z of the Amended Statement of Claim).

(c) Third is whether NSW owed those duties, or any of them, to the plaintiffs.

(d) & (e) Fourth and fifth is whether the plaintiffs have proved the breach of those duties by NSW through its officers.

(f) Sixth is whether that breach of duty is capable of constituting a cause of loss suffered by persons such as the QBE plaintiffs, though actual causation is not currently to be determined.

(g) & (h) Seventh and eighth is whether the law of NSW, assuming a tort otherwise to have been committed through the agency of officers of NSW, renders such persons "protected persons" within the meaning of s 128(1) of the *Rural Fires Act*, that is:

> (1) A matter or thing done or omitted to be done by a protected person or body does not, if the matter or thing was done in good faith for the purpose of executing any provision (other than section 33) of this or any other Act, subject such person personally, or the Crown, to any action, liability, claim or demand.

127. There is an issue as to whether NSW is protected from liability for the negligence of the ICs Ms Crawford and Mr Arthur, assuming that negligence, but also whether, that protection extends to damage suffered in the ACT by persons in the ACT.

128. In that respect it is conceded, and, in any event, indisputable, that s 128 of the *Rural Fires Act* would be available as a defence to proceedings within NSW. It provides:

> **Protection from liability**
>
> (1) A matter or thing done or omitted to be done by a protected person or body does not, if the matter or thing was done in good faith for the purpose of executing any provision (other than section 33) of this or any other Act, subject such person personally, or the Crown, to any action, liability, claim or demand.
>
> In this section: "protected person or body" means the following:

> (a) the Minister,
>
> (b) the Commissioner and any person acting under the authority of the Commissioner,
>
> (c) any member of the Service,
>
> (d) a member of the Advisory Council or Bush Fire Co-ordinating Committee,
>
> (d1) a member of a Bush Fire Management Committee,
>
> (e) the Commissioner of NSW Fire Brigades, the commissioner constituting the Forestry Commission, the Director-General of the Department of Environment, Climate Change and Water and any person acting under the authority of those persons,
>
> (f) an interstate fire brigade acting in pursuance of section 43.

129. As at January 2003 the Director General of NPWS was included within the definition "protected person or body".

130. The *Rural Fires Act* clearly expresses the object of protecting persons and property from injury or damage from bushfires. It may well be, as the QBE plaintiffs submit, that a person with sufficient standing might enforce a duty to exercise some or all of the powers granted to the RFS under the statute, in accordance with the decision of the High Court in *Bradley v Commonwealth* (1973) 128 CLR 557. That case did not, however, concern a right to compensation by the applicant. It did concern the right of the applicant to have access to postal and telecommunication services. In other words, to enforce action, rather than to seek compensation for loss arising from the failure to perform a statutory duty.

131. Next, is the role of the NPWS. The McIntyres Hut fire started within the Park. That is within the area of the statutory responsibility of the NPWS. Although NSW denies that it was at the relevant time the "occupier" of the Park, it was the manager of the Park. The *National Parks and Wildlife Act 1974* (NSW) confirms this status and responsibility (see s 33 *National Parks and Wildlife Act*). Whether that statutory responsibility translates into civil liability is the pertinent question.

132. Relevantly, fire management was addressed by the Draft Brindabella National Park Fire Management Plan ('the Plan') of September 1999. The Park itself was largely undeveloped. It was accessible by roads, but only for four wheel drive vehicles. The roads were fire trails. There were some camping and picnic areas.

133. There was a significant fire history for the Park area including fire spread into the ACT over areas then scrub or forest, but now urban.

134. It may be accepted that there were some areas of the Park which had high fuel loads. This is not to be considered to be an act of negligence on the part of NPWS, but rather a circumstance highlighting the need both for vigilance and an effective fire fighting response.

135. This history is set out in the Plan. It suffices to observe that NSW, through its relevant officers, including Ms Crawford and Mr Hunt, were all well aware of this history.

136. A more proximate historical factor was the weather conditions prior to the fires. As set forth in the NSW Coroner's Report, and cited by RFS and NPWS:

> (a) following an unusually wet February, a prolonged and persistent rainfall deficit existed across south-eastern Australia for the remainder of 2002 and into 2003;
>
> (b) the period April 2002 to January 2003 was the third driest on record across Australia;
>
> (c) a combination of well below average rainfall, higher temperatures, drier air, stronger winds and increased sunshine hours through mid and late 2002 and into 2003 led to the gradual drying out of the forests and woodlands, including the surface fuels and the soils. As a result, more fuels were made available should a fire start;
>
> (d) the prevailing drought combined with periods of high temperature, strong winds and low humidity to produce a period of high Forest Fire Danger Indices, with particular extremes during January 2003.

137. It may be concluded that the assessment of fire risk and expected weather patterns were such that the risk of a fire, of the kind which occurred, was both real and known to the RFS and NPWS. Indeed, no contention otherwise has been advanced.

138. The most pertinent feature of anticipated fire behaviour was that of spotting.

139. That is, the phenomenon of burning brands or embers of material being propelled by air currents, both from the fire itself and the prevailing winds, a considerable distance ahead of the fire front. That distance might vary from 0.5 to 5 or more km. Indeed, there was a report on 8 January 2003 at Fairlight and Brookvale of burning embers, apparently from the McIntyres Hut fire, from a distance of about 15 km to the east of the point of origin.

140. It is fair to note that on 18 January 2003 the fire danger index, conventionally measured (McArthur Fire Danger Rating System), where 100 is, practically speaking, the worst possible, was 100.5. The record was 100.6 measured on 25 November 1982.

141. Thus on 17 and 18 January 2003 the weather conditions were escalating towards almost unprecedented levels of fire danger. That level of damage could not be regarded as reasonably foreseeable, though significant fire danger approaching the extreme would have been.

142. There was no dispute concerning the methodology of bush fire fighting. The techniques available were:

- Fire line (or containment line) construction, using hand tools;
- Direct attack with water;
- Use of bulldozers to construct bare earth trails or use of such trails already constructed and cleared;
- Aerial attack with water or fire retardant;
- Back-burning; and
- Burning out.

143. Much of that is common sense. Those attack methods are not fool proof nor do they suffice alone or without monitoring and attack by fire crews. The same is true of fire trails, whether existing or established for the purposes of the instant fire. Back-

burning or burning out carries the risk of further fire spread. Above all, is the need to protect fire crews from entrapment or other hazards, such as falling trees or limbs of trees leading to injury and death.

144. Against the risk of injury to fire crews from direct attack, was the difficulty of completing the indirect strategy in time for it to be effective.

145. The QBE plaintiffs submit that the conclusion reached by Ms Crawford, Mr Arthur and Mr Cooper that, even if the fire escaped into the ACT, it would become controllable in the grasslands between the Murrumbidgee River and the suburban edge of Canberra, was flawed. Mr Cooper of the ACT Forests was of a like mind, although he acknowledged that catastrophic weather conditions could result in the impact of fire on the western suburbs of Canberra. As it happens the prediction was wrong though that does not establish that the expectation was unreasonable.

146. A 200 person base camp was established at the ACT Forests facility near Mt Stromlo. It was overrun by fire on 18 January 2003. This fact is relied upon by both parties. The QBE plaintiffs use it to highlight the erroneous judgments made by the incident control team whilst the defendant points to the fact that experienced fire fighters with full knowledge of the fire hazard in the Park considered the location to be a safe one.

147. As the QBE plaintiffs submit, it was the duty of the IC to prepare and keep under review the Incident Action Plan.

148. It is common ground that neither Ms Crawford nor Mr Hunt formally prepared any such plan.

THE EVENTS OF 8 JANUARY 2003

149. Topic 10 of the QBE plaintiffs' submissions sets out the events of 8 January 2003 following the fire ignition at 3.41 pm 1 km north-east of McIntyres Hut, and 100 m

west of McIntryres trail. It was first reported from an aircraft flown by Mr Seymour. He estimated its size, even by then, at 200 ha. Smoke was reported by Mr Blundell at about 5 pm. He was instructed by Ms Crawford to continue observations.

150. At 6.06 pm Mr Hunt at Mt Coree Tower reported both that the main fire appeared to have crossed over Webbs Ridge and that there was smoke on the Baldy Range. This was the Baldy spot fire. Winds were strong at 30 to 40 km/h.

151. A little later, between 6.29 pm and 6.44 pm, a helicopter observed the Baldy spot fire and another fire in the Mountain Creek area.

152. At about 7 pm Ms Crawford was asked if Fairlight Brigade should respond to the fires. She told Mr Brian Blundell "not yet".

153. At about 8 pm Mr James Gould and other CSIRO officers saw three spot fires near Dingi Dingi Range trail. Weather conditions were relatively benign (temperature 15˚C, relative humidity 62%, winds light and variable). At about 9.30 pm they videotaped the Baldy spot fire.

154. It was, clearly, Ms Crawford's view that there should be no direct attack on any of the fires, particularly the Baldy spot fire, that evening. It seems to me that it is most likely that Ms Crawford, then IC, so instructed officers and brigades, particularly Fairlight. That is confirmed by an 8.25 pm Firecom broadcast. It asserted that a taskforce had been arranged for the following day.

155. That, effectively, postponed any action by the Fairlight or Mullion brigades. They were, I accept, available to have attended if so directed. So also was a bulldozer under the control of Mr O'Connor at Dingo Dell.

156. The bulldozer was taken to Dingo Flats and did property protection albeit that the property in question (Mr Schunke's house) was not threatened.

157. Thus, it must be concluded that it was, at least objectively, possible for the Baldy spot fire to have been subjected to direct attack on the evening of 8 January 2003.

158. There was a meeting of all relevant agencies on the evening of 8 January 2003.

159. As noted in the preamble, the information that was available to the meeting concerning the Baldy fire was:

> (a) The fire was a backing fire exhibiting low flame height;
> (b) It had crossed the Baldy trail;
> (c) The track was blocked with fire, the depth of flames was uncertain;
> (d) It appeared to be containable with ground crews though the country was steep and the fire perimeter could not be ascertained.

160. Mr Bretherton, whose report it was, told Mr Cooper that the fire was "not too bad. You could attack this fire directly if we had an appliance with us".

161. Mr Cooper's report of this conversation did not convey the lack of alarm about that fire.

162. Ms Crawford's recollection was that Mr Cooper said words to the effect of:

> It is across the trail and they are getting out of there.

She had asked:

> Isn't there something they can do?

The reply was:

> No, they are not even in a fire unit.

163. It seems that Ms Crawford interpreted this information as indicating that the Baldy trail was lost, though it seems the truth was otherwise. Even so, it seemed unlikely that the conditions were likely to significantly worsen overnight. Nevertheless, it was concluded Baldy trail was lost as a containment line. That was the impression Mr Hunt had.

164. It seems to me that that conclusion, though genuinely entertained, was not an accurate reflection of the situation as Mr Cooper believed he was expressing it.

165. Objectively, the Baldy spot fire was, in my view, containable on the evening of 8 January 2003. It remained containable as at the morning of 9 January 2003.

166. Based on that misunderstanding, the meeting concluded that the only available control lines were:

- West: Goodradigbee river;
- South: Powerline fire trail;
- East: Fire Break trail; and
- North: Doctors Flat and Webbs Ridge trails.

167. The choice of Fire Break trail assumed that Baldy trail was lost. Those lines were subject to re-evaluation on 9 January 2003.

168. It does appear that, immediately after the meeting of 8 January 2003, Mr Seymour prepared a situation report and action plan. The plan proposed completing control lines on 9 January 2003 followed by back burning with aerial incendiaries on 10 January 2003. The plan addressed resources to be made available to implement the strategy, but did not refer to addressing the Baldy spot fire. This no doubt reflected the decisions made at the meeting of 8 January 2003 to set control lines, particularly the eastern line, beyond the Baldy trail.

169. The QBE plaintiffs make the point that, contrary to the assumption made by Ms Crawford, an assumption not challenged by any other attendee, the Baldy spot fire was not so far gone over the Baldy trail to be irretrievable. If it had been held, the containment area would have been substantially reduced.

170. There are two aspects to this. The first is what the fact was. The second is what the meeting concluded about it and whether that was or not a reasonable conclusion.

171. I accept that the meeting received information in terms noted by Mr Cooper, that is to say, that the fire was 20 to 30 m east of the trail, moving slowly.

172. There is a difference in recollection of the oral communication by Mr Cooper to Ms Crawford. She asked him to confirm with Mr Bretherton if the fire had crossed the trail. Mr Cooper, she said, responded, "No. It is across the trail and they're getting out of there". Mr Cooper was "strongly sure" he had not been told that by Mr Bretherton.

173. The crew in attendance had no fire fighting equipment. The two statements were factually accurate. The fire was across the trail and they were leaving the area.

174. I, therefore, do not find it surprising that Ms Crawford drew that conclusion from what she was told. It is notoriously difficult to separate an understanding from a recollection of actual words used.

175. I also infer that it was not likely that Ms Crawford would have risked sending crews out at night even if they had been willing to go.

176. I am reasonably sure that had a contrary decision been made, crews could, in fact, have secured the Baldy trail though there was a theoretical risk of fire flaring up from the east of the Baldy trail.

177. The Fairlight crew could have been directed or permitted, with or without the bulldozer, to proceed to Baldy trail. It is clear that permission to do so was denied. That denial could only have emanated from Ms Crawford either directly or as a consequence of the decision taken to implement a plan which did not include holding the Baldy trail.

178. I accept that, in fact, had crews been despatched on the night of 8 January 2003, the fire to the east of Baldy probably could have been suppressed for the reasons, and on the materials referred to by the QBE plaintiffs.

179. As against that Firebird 555, overflying the fire had a different view of it from the RFS Group Captains who had inspected the fire. Firebird 555 reported that crews on

the ground would not be able to get around the fire. If true, that would have been a serious safety concern. The crew at Powerline trail was accordingly withdrawn.

180. Mr Hunt gave evidence that, despite this, he observed a crew with hand tools and hoses when overflying the fire at Baldy in Firebird 755 on 9 January 2003. That does not sit well with Mr Arthur's evidence that there was no direct attack on Baldy on 9 January 2003. Indeed Mr Lomas reported, from the same flight, that it would be a waste of time to do so as there was flame that crews could not access.

181. I agree with QBE plaintiffs' submission that the crews Mr Hunt saw were unlikely to have been directly attacking the Baldy fire.

182. In any event it appears that, on the information available, both late on 8 January 2003 and early on 9 January 2003 that there was no reasonable prospect of containing the Baldy fire to the west of the Baldy trail. The objective truth may have been otherwise but the Incident Team could only be expected to make a judgment on information given to them.

183. It would, as Ms Crawford conceded, have been more prudent for her, even on the mid-morning of 9 January 2003, to have directed the Mullion and Fairlight RFS Brigades to have attacked the Baldy spot fire. It appears that by then the fire, though across the Baldy trail, was not burning fiercely and had, at least when observed at about 11.15 am, and again at 2 pm on 9 January 2003, been suppressible.

184. Mr Arthur agreed that he was advised at about 11.30 am on 9 January 2003, after reconnoitre by group captains, that the Baldy spot fire could be held.

185. Inexplicably, no crews were despatched to attempt to contain the fire. Ms Crawford conceded that, as a competent IC, she should have done so.

186. There was thereafter, on 10 January 2003, an attack on the Baldy spot fire. The spot fire appears to have been held until 13 January 2003, but it is not clear why it then escaped. It is likely that the delay in earlier attack upon it was a contributory factor.

187. I am driven to conclude that the failure to attack the Baldy spot fire, at least by the end of the morning of 9 January 2003, led to the IC team failing to secure the Baldy trail as the eastern control line.

188. This, of course, led to the eastern control line as had been proposed at the meeting on 8 January 2003 being adopted as the only strategy for the eastern front of the fire.

THE GOODRADIGBEE RIVER

189. This topic relates to the decision to use the Goodradigbee River as the western containment line. It appears that by 5 pm on 8 January 2003 the McIntyres Hut fire, at its western edge, was about 600 m from the eastern bank of the river.

190. No ground inspection of that area was arranged on 8 January 2003. It does appear to me that this was because the main movement of the fire was to the east. It also seems that Ms Crawford expected that brigades in Yass control area, Wee Jasper, Brindabella and Cavan brigades, would "self-respond" to the western flank.

191. There is no doubt in my mind that the river itself, if placed under pressure, would not hold as a containment line without back-burning. It is clear that, if it breached that containment line, the fire would, under adverse wind conditions, run up the slopes to the west of the river. Hence it would, inter alia, place properties, such as the West plaintiffs' property, at risk of devastation.

192. Certainly, no consideration was given to the joinder of Lowells trail and McIntyres trail across the kink as the western control line.

193. Of course, that containment line would also have required surveillance and back-burning. It would have, to some degree, further limited the containment area.

194. It is not clear to me that there was any other advantage to selecting the eastward alternative to the river.

195. In either case, an escape of fire under the weather conditions prevailing on 17 and 18 January 2003 would have seen a fierce fire crossing the river and endangering property as it did. The time delay would have been minimal between the proposed rake hoe line being crossed and the river being crossed. In each case, the effective step to be taken was back-burning and patrols by ground crew. That was managed in relation to part of the river frontage and, significantly, that part of the containment line was not crossed.

196. Mr Koperberg made the assumption that there would be back burning from the river. I do not accept that it was not reasonably open to do that. Unfortunately, it was not done. It was open to have called on local RFS crews (Wee Jasper, Brindabella and Cavan) to ensure that back-burning was carried out without exacerbating the situation or diverting resources from more urgent tasks.

197. That back-burning along the entire river front was essential is supported by the presence of vegetation along the eastern banks of the river. The water levels in the river itself were low due to the sustained drought, many of the trees had crowns virtually touching above the river, and there were blackberry bushes infesting particularly the eastern bank. In support of that back-burning, a bulldozer could have been used.

198. In my view, so far as the western perimeter of the fire was concerned, whilst the selection of the Goodradigbee River as the containment line was defensible, it could

only have been so, as with the suggested alternative, if back-burning and clearance was undertaken.

199. Merely monitoring the river was reasonable enough in the short term, but clearance by bulldozer cut and back-burning were obvious measures that could, and should have been, taken. Regrettably, they were not.

200. In my view, it was certainly a serious strategic error, perhaps occasioned by the more obvious risk to the south east, not to secure the western containment line by effective back-burning. As I have noted, the areas where burning back had been undertaken along the river front did contain the fire.

201. It was apparent, as Ms Crawford agreed, that if the fire crossed the river under the anticipated adverse weather conditions, there was a substantial risk of damage to life and property on the western side of the river and then south toward the ACT and Canberra.

202. That is, I agree, a failure to comply with the statutory obligation imposed by s 63 of the *Rural Fires Act.* Whether s 64 also was breached it is unnecessary to determine.

> **63 Duties of public authorities and owners and occupiers of land to prevent bush fires**
>
> (1) It is the duty of a public authority to take the notified steps (if any) and any other practicable steps to prevent the occurrence of bush fires on, and to minimise the danger of the spread of a bush fire on or from:
>
> (a) any land vested in or under its control or management, or
>
> (b) any highway, road, street, land or thoroughfare, the maintenance of which is charged on the authority.
>
> (2) It is the duty of the owner or occupier of land to take the notified steps (if any) and any other practicable steps to prevent the occurrence of bush fires on, and to minimise the danger of the spread of bush fires on or from, that land.
>
> (3) A public authority or owner or occupier is liable for the costs incurred by it in performing the duty imposed by this section.
>
> (4) The Bush Fire Co-ordinating Committee may advise a person on whom a duty is imposed by this section of any steps (whether or

not included in a bush fire risk management plan) that are necessary for the proper performance of the duty.

(5) In this section:

"notified steps" means:

(a) any steps that the Bush Fire Co-ordinating Committee advises a person to take under subsection (4), or

(b) any steps that are included in a bush fire risk management plan applying to the land.

64 Occupiers to extinguish fires or notify fire fighting authorities

(1) If a fire (not being a fire or part of a fire lit under the authority of this Act or any other Act) is burning on any land at any time during a bush fire danger period applicable to the land the occupier of the land must:

(a) immediately on becoming aware of the fire and whether the occupier has lit or caused the fire to be lit or not, take all possible steps to extinguish the fire, and

(b) if the occupier is unable without assistance to extinguish the fire and any practicable means of communication are available, inform or cause to be informed an appropriate officer of the existence and locality of the fire if it is practicable to do so without leaving the fire unattended.

(2) In this section, "appropriate officer" means:

(a) if the fire is burning within any fire district constituted under the *Fire Brigades Act 1989* -the nearest available officer or fire fighter of the fire brigades in the fire district, or

(b) if the fire is burning outside any such fire district-the nearest available:

(i) officer or member of a rural fire brigade, or

(ii) fire control officer or deputy fire control officer, or

(iii) member of staff of the Department of Industry and Investment, or

(iv) member of staff of the Department of Environment, Climate Change and Water.

Maximum penalty: 20 penalty units or imprisonment for 6 months, or both.

203. In my view, from the text of the provisions, s 64 is intended to apply to private land owners rather than public authorities, but s 63 clearly does apply to public authorities.

204. Had the measures I have noted as feasible been taken, with or without the further steps recommended by Mr Fenwick, the fire would, in my view, have been unlikely to have crossed to the west of the Goodradigbee River on 17 and 18 January 2003.

205. There was no evidence from NSW to suggest that the alternative measures were not feasible. I will refer to their submissions in due course.

206. I accept that it was reasonable for NSW officers to be concerned about crew safety but the areas of difference with Mr Fenwick's evidence raised by Mr Hunt do not address what I consider to be the essential issue. Thus, whether or not cutting across the kink was safe, the western containment line was not competently or effectively managed. It was obvious that adverse weather conditions would make aerial suppression impossible. The essential part of a successful strategy was clearing and back-burning.

207. It was attested by Mr West, whom I accept as both truthful and accurate, that from 8 January 2003 to 11 January 2003 the western flank of the fire was "backing, slow and meandering" as the plaintiffs submit. I accept that there was, therefore, no apparent risk until 17 January 2003 in carrying out the strategy of clearing and back-burning from the river.

208. As a matter of fact the fire crossed the river on 17 January 2003 at the confluence of Limestone Creek and the river and at Tommys Flat near McIntyres Hut.

209. It is true that Professor Viegas formed the opinion that the breach of that line occurred on 18 January at about 2.30 pm. That opinion was flawed as he himself acknowledged. In a fundamental respect that mattered little. The fire still escaped to the west and might not have done so but for the failures I have noted. In any event, Mr Cheney's analysis of fire spread, as revised, is, in my view, to be preferred. The factual errors admitted and corrected by him render that aspect of Professor Viegas' report untenable.

210. I find that the fire crossed the river about 4 pm on 17 January 2003. That fire therefore burnt to the west and the south devastating the West plaintiffs' property then turned east travelling towards Canberra as the McIntyres Hut South fire.

211. There was no issue taken with the proposition that the QBE plaintiffs suffered damage from the McIntyres Hut fire. There was an issue as to whether some of the damage was also caused by the Bendora fire.

212. The expert evidence attempting to model fire spread from Mr Close and Dr Jonathon Marsden-Smedley was interesting but, to my mind, inconclusive. The evidence of eye witnesses, such as Mr Robert Burdick is much more reliable as to when and where they saw fire. However, that evidence is necessarily limited as to the origin of the fire so observed. The actual fire spread maps, as corrected, seem to provide more useful information on fire spread.

213. Mr Cheney's observations do support a view, which I accept, that the rate and ferocity of the fire spread on 18 January 2003 was unprecedented and could not have been foreseen.

214. Nevertheless, although none of the experienced officers from NSW or ACT thought of it, I accept that, in general terms a less indirect strategy would have been preferable.

215. It was practicable, in my view, to have, on 9 January 2003, confined the eastward spread of the fire to the west of the Baldy trail.

216. It was also practicable to have confined the western edge of the fire to the east of the kink.

217. That would, as the plaintiffs submit, have created a western containment line of Lowells/kink/McIntyres Hut trails. The southern containment line could have been a bulldozer line between that trail and Webbs Ridge trail to Dingi trail.

218. The Baldy trail would have been the eastern containment line. That would have reduced the area to be burnt out quite considerably.

219. It should be noted that I do not consider that a competent IC would necessarily have thought of, or embraced, every aspect of Mr Fenwick's alternative strategy. There is an element of hindsight in his approach but, even discounting that, I was greatly impressed by the level of experience and ability of Mr Fenwick such that I am of the view that the fact that no IC thought of every strategy he would have, does not lead to the conclusion that that IC was incompetent or, more relevantly, negligent.

CAUSATION

220. It is not in issue as to whether the McIntyres Hut fires caused the damage complained of. Rather, it is an issue as to whether the negligence of the defendant caused that damage.

221. I adopt the standard accepted by the High Court in *Tabet v Gett* (2010) 240 CLR 537 in assessing the causative relationship between any proven failure to take reasonable care in containing the McIntyres Hut fires and the damage sustained by the escape of those fires.

222. In this respect, the evidence of Mr Close and Dr Martin-Smedley which utilises more proximate and relevant data than Professor Viegas, is to be preferred. It is consistent, I think, with Mr Cheney's revised evidence.

223. The question is, assuming, as Ms Crawford conceded, her judgment on strategy was so flawed as to fall below the standard to be expected of a competent IC and, hence, the judgment of those who were aiding and, in the case of Mr Hunt, assuming those

duties, was similarly flawed, did that amount to negligence and, if so, did that negligence cause the break-out of fire which happened?

224. I accept that the strategy particularly to the south east and the south west was so flawed.

225. The western side strategy was flawed in that no adequate fire suppression was directed towards supporting the river as a containment line. Whether or not the Lowells/kink/McIntyres line was adopted, any containment line required ground support not just aerial patrols or the vague hope that local brigades might self-respond, particularly in the absence of clear, or indeed any, direction to that effect.

226. I also accept that, if, on the morning of 9 January 2003, the available brigades and bulldozer had been despatched to Baldy they would have concluded the fire could have been contained to the west of the trail and, in all probability, would have done so.

227. That would have allowed back-burning closer to the point of origin, greatly reducing the area to be burnt out. It would also have freed up some resources more quickly to secure the then perimeters, even allowing for the Powerline trail difficulties.

228. It therefore seems to me, as a matter of fact that the failure to have taken those steps was both negligent and causative of the escape from those fire fronts to the east and the west. The fire which crossed the Goodradigbee River has been referred to as the McIntyres Hut South fire and the fire which escaped over the Fire Break trail was referred to as the McIntyres Hut North fire.

229. Critical to the escape of the McIntyres Hut North fire was the existence of large tracts of unburnt vegetation to the west of the Fire Break trail which, the aerial incendiary strategy having failed, enabled long distance spotting under the extreme conditions of 17 and 18 January 2003.

Which fire caused the damage?

230. There was considerable dispute between the various experts on this issue. Mr Cheney, on his analysis on the original line scan data concluded that all three fires had joined together west of Duffy and burnt into the western suburbs of Duffy, Chapman and Kambah. However, as Mr Cheney conceded, later and further information, coming to light after the coronial inquest, disproved those assumptions.

231. In one respect, so far as NSW is concerned, save for the West plaintiffs' case, whichever fire burnt properties in Canberra does not matter. The McIntyres Hut North fire clearly caused or contributed to all relevant ACT damage. The only issue was whether the Bendora fire contributed to the damage.

232. It seems to me that this would be an issue for NSW only if the defendant sought contribution from the ACT. It does not. However, I think it unlikely from the fire spread maps that the ACT fire burnt into any urban area though it certainly burnt up to the boundary at Greenway.

233. I accept that the fire spread of the McIntyres Hut fire was extraordinarily rapid. Dr Marsden-Smedley thought such rapid spread was "unlikely" but Mr Burdick's evidence persuades me that, though Dr Marsden-Smedley's opinion is sound, it was the unlikely which actually occurred. The wind speeds Mr Burdick noted at Pierces Creek were vastly in excess of what Dr Marsden-Smedley, quite reasonably, could have or did assume.

234. I have to say that I prefer the evidence of Mr Close and Dr Marsden-Smedley. Their evidence exonerates the Bendora fire though that makes no difference to the liability of NSW. Professor Viegas' experiments, though interesting, were unpersuasive.

235. I note that no evidence was called by NSW, particularly from Messrs Lomas, Carey, McRoy, Seymour, Fleming, Powell and Webb. I draw no particular inference from this save, of course, that that left much of the evidence as to factual matters uncontested.

236. I turn to note NSW's submissions. First, as to facts. I note that I do not find Ms Crawford to have acted unreasonably in not directing a direct attack on the fire on 8 January 2003. To select the Goodradigbee River as a containment line was not itself unreasonable, though the alternative of the Lowells/kink/McIntyres line would have been preferable.

237. For reasons I have noted, I am not persuaded that the overall strategy was reasonable. The fact that no one, at the time, voiced criticism at the command level, to my mind, reflects either a lack of relevant information, as in the case of Mr Koperberg, or, more likely, the fact that by 10 January 2003 there were no other real alternatives. It was too late to effectively shrink the containment area, save perhaps on the western flank and there was no pressing need to do so.

238. In so finding, it is important to note a number of factors. First, the weather conditions were and had been disastrously adverse. There was severe drought and, perhaps partly for that reason, there had been little, if any, hazard reduction burning since 1995. That is not something for which NSW can be held accountable though it is reasonable to expect that the relevant officers of NPWS and RFS would be well aware of these matters. In any event, no case is proposed that NSW was negligent by reason of failure to manage fuel loads and maintain fire trails. I need not consider in any event, whether, such a cause of action would be justifiable.

239. Certainly, the very dry conditions were relevant to the deliberations of any IC. They also created a greater hazard than usual for fire-fighters by reason both of tinder dry

material suddenly flaring up, and of falling branches and trees, whether then ablaze or not.

240. I also accept that other fires in both the Tumut and Queanbeyan areas diverted resources to those areas either on deployment or on standby. That, however, does not undermine the conclusion that on 8 and 9 January 2003 there were sufficient effective local brigades, with sufficient resources at least to confine the Baldy spot fire to the west of Baldy.

241. There is no evidence of any lack of resources hampering the fire fight effort, save in respect of the earlier availability of aerial incendiaries, which, in any event, could not have been deployed until control lines had been established, including sufficient back-burning.

242. I agree with NSW that the decision not to send crews in to Baldy and to pull crews back on the evening of 8 January 2003 was not unreasonable. It is the decision, or lack of it, to deploy the three local brigades after first light on the 9 January 2003 to Baldy that seems unreasonable to me.

243. It was not unreasonable to fear, as appeared to the meeting of 8 January 2003, that "we lost Baldy" but that was not the fact and the position should have been explored early on 9 January 2003. If it had been, and the brigades available deployed, I am satisfied Baldy would not have been lost.

244. The plan otherwise, if not optimal, was, to my mind a reasonable one. As NSW correctly submits, none of the well qualified officers at the meeting raised any objection to it.

245. A criticism of the officers, particularly Ms Crawford, was that no precise calculation of the time to complete the various tasks was undertaken. That is a valid criticism but I do not consider it causally relevant. In truth, there was, so far as the officers at the

meeting were then aware, no viable alternative. The only possible difference could have been to conclude the objective of containing the fire was hopeless. That was far from being the situation.

246. It may be noted that Mr Cooper, whilst agreeing with the proposed containment lines, also considered the Baldy fire could have been contained on the next day. That would have enabled the Baldy trail to have been used as the eastern containment line.

247. In summary, whilst the reports on the evening of the 8 January 2003 led to a conclusion that "Baldy was lost", it should have been checked next morning and crews despatched to contain it and once it was found, as it appears to me it would have been, that the fire was able to be suppressed east of Baldy trail and then confined west of that trail. That conclusion is reinforced by the CSIRO observations made the previous evening. In other words, even if the fire was suppressible late on 8 January 2003, given the less than consistent reports of observations, it was prudent not to proceed with direct attack on 8 January 2003 but not early on 9 January 2003.

248. So far as the western containment line is concerned, I have rejected the QBE plaintiffs' contention that the choice of the river was inappropriate per se. It may be that had the IC had all the information Mr Fenwick later had, the kink solution might have been embraced. I am satisfied that had back-burning been undertaken from the river, it would have been an adequate containment line even if the alternative was better.

249. Nevertheless, though it is apparent that the river was not an ideal containment line, it was no worse than the Lowells/McIntyres trails. The latter was a better option by reason of the extra distance of it from the river. However, the disadvantage of using the river would have been overcome by back-burning. There was less urgency in that task, given the western edge was a slow burning backing fire moving downhill.

Nevertheless, there were resources available to ensure back-burning along the whole river front not just the part of it which was so treated and it could and should have been done by 16 January 2003.

250. I note that Mr Arthur had that in mind as an objective, as he recorded in the action plan of 9 January 2003 after he became IC. No containment line, rake-hoe, bulldozer cut, or trail will hold a fire propelled towards it by strong winds without assistance by back-burning, mopping up spot fires over it, and suppression measures such as water bombing and burning out. Aerial measures are impossible in strong winds, with turbulence and strong swirling smoke.

251. NSW submits that on 9 January 2003 it was reasonable not to attack the Baldy fire directly so as to attempt to confine it to the west of the Baldy trail. It was not unreasonable to secure and clear trails along containment lines before back-burning. Indeed, the only criticism I consider valid is the failure to undertake back-burning from the river before 16 January 2003.

252. The defendant refers in detail to the steps taken to support the strategy agreed on 8 January 2003.

253. I note that on 11 January 2003 back-burning and containment of spot fires was successfully undertaken north of Wyora Station along the river front. Indeed, part of the containment strategy involved taking water (with Mr West's permission) from Wyora Station to dump on the fire that had crossed the containment line from Powerline trail. That had the effect, as it happened, that Wyora had no reserves of water when fire struck on 18 January 2003. Given the ferocity of the fire attack, I do not think that would have made a difference.

254. That activity continued on 12 January 2003. There were numerous spot fires in various parts of the containment areas. That did underline the need for caution.

255. On 15 January 2003 Mr Koperberg attended a meeting at Yarrowlumla Fire Control Centre. Those meeting with him, in hindsight optimistically, advised that McIntyres Hut fire appeared contained. However, in light of weather forecasts for 18 January 2003, Mr Koperberg considered that, if those forecasts proved correct, containment lines would not hold and an impact on Canberra was inevitable.

256. Mr Lucas-Smith, ACT CFCO, received an offer from Mr Koperberg to provide whatever assistance was necessary. Four task forces were requested and approved.

257. Mr Koperberg, in an ABC interview that day, clearly worried, said:

> This is probably the worst threat to this part of the State in many, many decades. The Brindabella complex of fires is certainly a potential threat to some very valuable assets, not the least being some mature pine forest on the border of Canberra, and indeed, the ACT itself.
>
> Given the fact that the weather is going to deteriorate at the weekend, and possibly quite severely, the job is still ahead of them.

258. On 16 January 2003, Ms Katja Mikhailovich, land owner of property near that of the West plaintiffs saw fire on the eastern edge of the river burning into blackberry bushes flaring up into the canopy of trees. By about 9 pm, it had jumped the river. No fire crews were in attendance but by 1 am on 17 January 2003, she and others (staff of Timberlands) crossed the river and managed to control that fire.

259. That demonstrates that deploying resources to the eastern side of the river would have been likely to have prevented the cross-over that occurred on 17 and 18 January 2003.

260. One such cross-over was observed to have occurred about 8.30 pm on 17 January 2003. Mr West saw a fire on Tommys Flat moving rapidly up a steep slope on the west side of the river. It was in the canopy of trees.

261. There was another cross-over at Limestone. The containment line there held until about midday on 18 January 2003. It appears there was no cross-over north of the

buoywalls to the west of the river. The cross-over which devastated the West plaintiffs' property was to the south of that, as marked by Mr West on exhibit 3.

262. On the morning of 18 January 2003 the property of Ms Mikhailovich was threatened by fire. No fire crews were in evidence. Her property was near that of the West plaintiffs. Crews from RFS did arrive about midday. They assessed the situation as dangerous and directed evacuation. They cut a firebreak around her house and all personnel left with Ms Mikhailovich and a male person named Gary. As it happened her house was not damaged.

Available Time Frame

263. The defendant points out that Mr Arthur had believed, on 8 January 2003, that there were seven to ten days to complete the indirect strategy. The weather reports at the time indicated about eight days. It was the unsuitability of the Powerline easement which led to the more convoluted Powerline trail being chosen as the northern containment line. Back-burning from there was therefore delayed until 11 January.

264. Ms Crawford also considered the strategy achievable. In essence she felt that there was no reasonable alternative. Subject to the observation I have made about Baldy trail, I consider that judgment not to have been unreasonable.

265. The implementation of the strategy was delayed by the need to switch from the Powerline easement to Powerline trail. The trail needed extensive work to be safe for heavy tankers.

266. The rake-hoe line from the Powerline down to the Goodradigbee River proved impracticable. There was delay in sourcing a suitable bulldozer to cut a line by those means.

267. Probably the most serious deficiency was the non-availability and non-deployment of aerial incendiaries until 17 January 2003, by which time the weather had turned.

There is no clear explanation as to why AIs were not available earlier. Certainly, if a sufficient burn-out had been achieved by 16 January 2003 the chances of a break-out could have been significantly reduced.

268. Qualifying that conclusion was the evidence of Ms Crawford and Mr Arthur. They pointed out that even if the areas to be burnt out had been so burnt, re-ignition was likely under the extreme conditions on 17 and 18 January 2003.

269. That risk was conceded by Mr Cheney and acknowledged by Mr Koperberg. Mr Fenwick also conceded re-ignition to be a real hazard.

270. Having rejected the proposal to attack Baldy on 8 January 2003 the next question is whether direct attack should have been persisted in on 9 January 2003. This does qualify the conclusions Mr Fenwick offered. If on 9 January 2003 crews had been sent early the hazard would have been much less. It is asserted by NSW that "direct attack was attempted but failed" on 9 January 2003. There is no evidence other than a report of an observation by Messrs Hunt and Lomas from an aircraft. That evidence was not tested by the calling of Messrs Hunt and Lomas to give evidence about it. I do not believe that their observations were accurate insofar as the report suggested that fire crews were attempting to contain or suppress the Baldy spot fire east of the trail. I do accept that, by the time they flew over the fire, it would then have been hazardous to send crews in. Of course, it cannot be regarded as a certainty that the crews, if sent in at first light, would have succeeded in securing the Baldy trail but I think it likely that they would have done so.

271. I do not believe that there was an attack that was aborted.

272. I agree, however, with NSW's submission that a line across the kink was not "obvious". It did not occur to anyone at the meeting of the 8 January 2003. It clearly was a solution that was, with hindsight, preferable. It seems to me, however, that the

resources needed to secure such a line could have been more usefully deployed to secure the eastern bank of the river. Indeed, whether the fire was relevantly still to the east of the kink is far from certain.

273. I do not accept the practicality of another element of Mr Fenwick's plan, namely attacking the north-east and south-east heads of fire by end of 9 January 2003. It was simply impracticable but, in any event, does not affect the ultimate result. Mr Cheney's map at 8 pm on 8 January 2003 showed fire spread across Waterfall trail by about 1 km.

274. The major issue with Mr Fenwick's report was his plan to contain the eastern head of the fire. It is apparent that a confused understanding of relevant intelligence did result in a more pessimistic report than was warranted. I accept NSW's contention that Mr Fenwick's proposal for a line from Dingi trail to attempt to separately contain the Mountain Creek spot fire was not practicable.

275. In general whilst, with the benefit of hindsight, some elements of Mr Fenwick's proposal had merit, the only portion of it which was practicable was the proposal to take action early on 9 January 2003 to confine the Baldy spot fire to the west of the Baldy trail. I do not further consider the strategy proposed by Mr Fenwick.

276. I have indicated the extent to which I accept it and the extent to which it seems to me to have been based on hindsight.

277. I accept that there was no decision on Ms Crawford's part to expressly refuse permission for Mullion and Fairlight brigades and the bulldozer to go to Baldy early on 9 January 2003 but if, as appears, Mr Carey refused permission for them to go then that would be a serious error on the part of the management team.

278. It appears Ms Crawford did not turn her mind to sending those brigades in on 9 January 2003 though she accepted, when it was put to her, that it was an "obvious answer" so to do.

279. Insofar as there was an erroneous decision relevant to the eastern front of the fire; that is it. Even as at 11.42 am on 9 January 2003 the inspection of Baldy reported that the fire had crossed the Baldy trail by about 50 m and a direct attack was possible. However, it was not followed up. In all probability had the Fairlight and Mullion brigades been given the task they were prepared to undertake and attend the Baldy trail, that fire could have been confined to the west of that trail. By 10 January 2003 I believe it was too late to win back that situation.

280. So far as the western containment line is concerned, I have concluded that it was not unreasonable to adopt the river as the containment line.

281. However, that line did require, not only patrols by land and air, but also back-burning as was done at the southern and northern extremes. Perhaps the latter assists to explain why the northern and southern containment lines held throughout the adverse conditions on 17 and 18 January 2003.

282. It was not suggested by NSW that there were no sufficient resources to secure and back-burn from all containment lines, particularly the western line (the river).

283. I note that Mr T Cathles, Captain of Wee Jasper Brigade was available to attend the western edge of the fire each day from 8 to 12 January 2003. Even on 12 January 2003 the fire was slow moving with low flame heights about 300 m from the river. It could, he believed, have been contained there and back-burned. The Wee Jasper, Cavan, and Mullion Brigades, and a bulldozer were all available. Mr West confirmed that Mr Scanes' Bulldozer was available on 12 January 2003.

284. I should conclude this aspect of the matter by acknowledging that I accept Mr Cheney's revised fire spread maps which indicate that the river was breached at two places on 17 January 2003, and again on 18 January 2003. I accept that Professor Viegas' opinion to the contrary was based on mistaken data.

NSW's forensic decision to not call certain witnesses

285. The decision of NSW not to call certain witnesses, Messrs Lomas, Adrian Carey, Seymour, Tony Fleming or Tim Webb, for example, leads to the conclusion only that the evidence of the plaintiffs was not relevantly contradicted. Indeed, it was not fundamentally challenged. I therefore, accept it. It supports the conclusion to which I have come.

Legal principles

286. The place of the tort in the case of the West plaintiffs is not in doubt. It is NSW and the law of NSW applies.

287. In the case of the QBE plaintiffs, all suffered loss and damage only in the ACT. It was from a fire allowed by the negligence of NSW to escape into the ACT. The question is whether the *Rural Fires Act* and the *Civil Liability Act 2002* (NSW) ('the *Civil Liability Act'*) apply or whether the *Civil Law (Wrongs) Act* (ACT) applies to the determination of the liability, if any, of NSW assuming actionable negligence is established on the part of NSW.

288. NSW denies liability on a number of bases. As set out in par 15 of its submissions, they are:

> (a) the claims made by the plaintiffs, and each and every one of them, is not justifiable [sic];
>
> (b) none of the actions brought by the plaintiffs or any of them discloses a duty of care in negligence, or any other case of action known to the law

(c) if, which is denied, the court finds that a duty of care was owed to all or any of the plaintiffs, the scope for content of any such duty is not such as to support an action for damages on the part of any of plaintiffs

(d) if the scope for content of any such duty is such as to support an action for damages on the part of any plaintiff, the facts proved does not establish a breach of any such duty

(e) if any such breach of duty is established, no breach was a necessary condition of the occurrence of the particular harm suffered by each or any of the plaintiffs

(f) if any such breach was a necessary condition of the occurrence of particular harm, it is not appropriate for the scope of New South Wales liability to extend to the harm so caused

(g) as a matter of law, the harm complained of by each of the plaintiffs does not amount to damage recognised by the law; it rises no higher than the loss of the chance of a better outcome

(h) if any of the harm complained of any of the plaintiffs does constitute damage recognised by the law, that the damage is too remote.

289. The starting point is to confine the basis for liability to the deficiencies in the response to the fire threat than prior management of the Park (see *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540).

290. The fundamental principle at common law is that the law of the place of the tort is the law applicable to the determination of liability (*Breavington v Godleman* (1988) 169 CLR 41). The application of that decision to a tortious cause of action was noted in this Court in *McIntosh v Southern Meats Pty Ltd* (Unreported, Supreme Court of the Australian Capital Territory, Higgins J, 26 February 1997). That decision illustrates the point that, although the West plaintiffs sue in this court, the liability of NSW is governed entirely by the law of NSW, including the assessment of damages. That includes limitation periods (see *McKain v R W Miller & Company (SA) Pty Ltd* (1992) 174 CLR 1; *Commonwealth v Mewett* (1997) 191 CLR 471; *Stevens v Head* (1993) 176 CLR 433).

291. The issue in respect of the QBE plaintiffs is whether the tort they seek to recover damages for occurred in NSW or the ACT. A similar issue was addressed in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503. In that case, however, both the

negligent acts and the damage occurred in NSW. That case affirmed that the law of NSW, including laws restricting an award of damages, applied to the action litigated in the ACT.

292. That settles the question for the West plaintiffs. For the QBE plaintiffs, the negligent acts occurred in NSW, though it is arguable that any failure to warn, if actionable, occurred in the ACT. The damage was sustained in the ACT. For choice of law purposes there can be only one place of the tort.

293. In *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 606-607, it was observed (per Gleeson CJ, McHugh, Gummow and Hayne JJ) in the context of defamation:

> 42. Many of these territorial connections are irrelevant to the inquiry which the Australian common law choice of law rule requires by its reference to the law of the place of the tort. In that context, it is defamation's concern with reputation, and the significance to be given to damage (as being of the gist of the action) that require rejection of Dow Jones's contention that publication is necessarily a singular event located by reference only to the publisher's conduct. Australian common law choice of law rules do not require locating the place of publication of defamatory material as being necessarily, and only, the place of the publisher's conduct (in this case, being Dow Jones uploading the allegedly defamatory material onto its servers in New Jersey).
>
> 43. Reference to decisions such as *Jackson v Spittall, Distillers Co (Biochemicals) Ltd v Thompson* and *Voth v Manildra Flour Mills Pty Ltd* show that locating the place of commission of a tort is not always easy. Attempts to apply a single rule of location (such as a rule that intentional torts are committed where the tortfeasor acts, or that torts are committed in the place where the last event necessary to make the actor liable has taken place) have proved unsatisfactory if only because the rules pay insufficient regard to the different kinds of tortious claims that may be made. Especially is that so in cases of omission. In the end the question is "where in substance did this cause of action arise"? In cases, like trespass or negligence, where some quality of the defendant's conduct is critical, it will usually be very important to look to where the defendant acted, not to where the consequences of the conduct were felt.
>
> 43. In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher's conduct, lead to the conclusion that, ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the

> material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.
>
> (Footnotes omitted).

294. The emphasis in tort is upon where the act causing damage occurred rather than where the injury is sustained. *Koop v Bebb* (1951) 84 CLR 629 was a case where the plaintiff was injured in NSW but died in Victoria. NSW law was accepted as applicable rather than the law of Victoria. I do note the comment of Callinan J in *Agar v Hyde* (2000) 201 CLR 552 at 591 that an omission by way of a failure to warn is located where the failure took place. In so far as it might be a tort of negligent misstatement, his Honour's observations at 592 are apt:

> Assume a negligent statement be made on the telephone by a valuer in London to a Venezuelan investor whilst the latter is in Spain, with respect to the value of real property in Australia which the Venezuelan then purchases at an overvalue and sells for much less than the purchase price. I would find it difficult to accept that the tort of negligent misstatement was committed in Australia "where the relevant conduct has its natural and intended effects".

295. I therefore conclude that the law of NSW is the law applicable to the determination of liability of NSW for the acts and omissions of its officers. That is the place where the negligent acts or omissions occurred.

296. It is not disputed that, if NSW is vicariously liable for the acts and omissions of its officers, persons suffering loss thereby may sue NSW as if it was a subject of the Crown (*Crown Proceedings Act 1988* (NSW) s 5).

297. The *Rural Fires Act* governs the rights and duties of the officers of the RFS and others in a similar position, including officers of the NPWS. Section 44 of the *Rural Fires*

Act enabled the Commissioner, then Mr Koperberg, to exercise all of the powers under that Act.

298. That NSW had, through relevant officers, control of the fire suppression activities is manifest. The question that arises is whether those powers, if exercised negligently, enable a private cause of action.

299. Certainly, as the *Rural Fires Act* allows (ss 25, 73), authorised fire fighters may commandeer or destroy private property for the greater public good of starving or suppressing bush fires.

300. There is an express statutory duty imposed on the two authorities by s 63 of the *Rural Fires Act*:

> (1) It is the duty of a public authority to take the notified steps (if any) and any other practicable steps to prevent the occurrence of bush fires on, and to minimise the danger of the spread of a bush fire on or from:
>
> (a) any land vested in or under its control or management, or
>
> ...

301. NSW submits that the duty so imposed does not imply a cause of action for individuals suffering loss or damage.

302. That involves a consideration of *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540. As Gleeson CJ commented at 555, there is a distinction between the failure to exercise protective powers authorised by statute and negligence in the manner of their exercise. That does not address the further difficulty, if the latter is alleged, as is the case here, of establishing a causative connection between the negligent exercise of statutory power and the injury to the plaintiffs. If the statutory power was not exercised the loss might well still follow.

303. Nevertheless, in *Pyrenees Shire Council v Day* (1998) 192 CLR 330, a council was empowered to carry out works to prevent fire resulting from defective chimneys or fireplaces. It discovered a defect and issued a defect notice but it took no further steps

to avoid the risk of fire. The High Court found the council liable as it was under a statutory duty to exercise those statutory powers.

304. Brennan CJ found the basis for imposition of a public duty enforceable by private action for damages lay in the purposes for which the power is conferred. It was, in his Honour's opinion, analogous to a statutory duty imposed for the benefit of an identifiable class of persons. Toohey J referred to the particular vulnerability of the members of such a class. That is apt in the present case. The class is those persons who may suffer loss and damage from the spread of fire, in NSW or, in this case, the ACT. The persons affected were not trained and equipped fire fighters and hence were in need of protection by the relevant authority. Kirby J stated the principle in typically elegant and clear terms.

305. The fire hazard in the latter case was both dangerous and known to the Council. The liability of the Council did not, in his Honour's view, rest on any notion of "general reliance" by the affected residents on the protection of the Council. Rather, the concept of "proximity" being equally unsatisfactory, the question is whether any principled approach can be discerned.

306. His Honour concluded at [244] that the test to be posed was:

> 1. Was it reasonably foreseeable to the alleged wrong-doer that particular conduct or an omission on its part would be likely to cause harm to the person who has suffered damage or a person in the same position?
> 2. Does there exist between the alleged wrong-doer and such person a relationship characterised by the law as one of "proximity" or "neighbourhood"?
> 3. If so, is it fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrong-doer for the benefit of such person?
>
> (Footnotes omitted).

307. To apply that test to the current matter, stage 1 is virtually conceded. Mr Koperberg himself said as much. Those likely to suffer harm were those beyond the Park in the path of the fire. It is the third stage that poses the real question to be answered.

308. The RFS and like fire-fighting authorities are, undoubtedly, dedicated to the saving of life and property. They willingly engage in hazardous operations, sometimes at risk of life and limb. To suggest that they have no responsibility, save to their superior officers, for the discharge of their duties, would, I expect, be regarded as bizarre by those so involved as well as the general public.

309. For the fire fighting authorities to be held to have no accountability to the law for actions of neglect would offend the general sense of justice in the community. True, a coronial inquiry may expose neglect and culpable inaction but a denial of compensation to those thereby damaged would, in my view, be an outrageous result.

310. A contrasting situation is that considered in *Graham Barclay Oysters Pty Ltd v Ryan*, though finding no duty of care was imposed, McHugh J at 576-567 [82] said:

> The likelihood of the common law imposing an affirmative duty of care whose content may require the exercise of a statutory power increases where the power is invested to protect the community from a particular risk and the authority is aware of a specific risk to a specific individual. If the legislature has invested the power for the purpose of protecting the community, it obviously intends that the power should be exercised in appropriate circumstances. If the authority is aware of a situation that calls for the protection of an individual from a particular risk, the common law may impose a duty of care. In that situation, failure to exercise the power may constitute negligence. This seems the best explanation of *Pyrenees Shire Council v Day* where the majority of the Court held that a Council which knew of a fire risk owed a duty of care and breached it by not exercising its powers. Kirby J said:
>
> > "The statutory power in question is not simply another of the multitude of powers conferred upon local authorities such as the Shire. It is a power addressed to the special risk of fire which, of its nature, can imperil identifiable life and property. Therefore, the nature of the power enlivens particular attention to its exercise and to the proper performance of a decision whether to give effect to it or not."
>
> (Footnotes omitted).

311. Similarly, whilst it would not be just or reasonable to impose a general duty upon persons to rescue another in distress, a distinction may be observed in the role of those who, by profession, training or statutory role assume and hold out a preparedness to

respond to those in distress. For example, police, lifeguards, medical practitioners and, relevantly, fire fighters.

312. That genesis for a duty of care is illustrated by the case of *Lowns v Woods* (1996) Aust Torts Reports 81-376. A medical practitioner was approached to come to the aid of a child, not a patient of his, who was fitting. He refused to assist unless the child was brought to his surgery.

313. At 63 155, President Kirby (as he then was) affirmed that a medical practitioner, by reason of skill, training and professional obligation, had a duty to assist going beyond that imposed on an ordinary citizen.

314. In my view, the same would be the case in respect of trained rescuers who hold themselves out as skilled, willing and able to assist (see the discussion in N Gray and J Edelman, "Developing the Law of Omissions: A Common Law Duty to Rescue?" (1998) 6 *Torts Law Journal* 240).

315. Mahoney JA dissented in *Lowns v Woods*, but nevertheless made the valid point that the duty to respond is not absolute. It is necessarily subject to prudence and the preservation of the safety of those not already imperilled.

316. Some legislative immunity from liability has been enacted for the benefit of volunteers. That term embraces the fire fighters of the RFS. It does not cover full-time employees.

317. In the ACT provision for volunteers is made by s 8(1) of the *Civil Law (Wrongs) Act*:

> A volunteer does not incur personal civil liability for an act done or omission made honestly and without recklessness while carrying out community work for a community organisation on a voluntary basis.

318. The Northern Territory has gone further. Section 155 of the *Criminal Code Act 1983* (NT) creates criminal liability in respect of "any person who, being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person

urgently in need of it and whose life may be endangered if it is not provided, callously fails to do so".

319. Clearly, there is a balance to be struck between the duties imposed on public authorities purely for the benefit of the public generally, the political question for parliaments and governments of the allocation of resources and the interests of those imperilled by emergency events, such as bush fires.

320. For NSW, that balance is sought to be addressed by Pt 5 of the *Civil Liability Act 2002* (NSW). Relevantly, the applicable provisions are:

> **42 Principles concerning resources, responsibilities etc of public or other authorities**
>
> The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability to which this Part applies:
>
> (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,
>
> (b) the general allocation of those resources by the authority is not open to challenge,
>
> (c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),
>
> (d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.
>
> **43 Proceedings against public or other authorities based on breach of statutory duty**
>
> (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to exercise a function of the authority.
>
> (2) For the purposes of any such proceedings, an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

> (3) In the case of a function of a public or other authority to prohibit or regulate an activity, this section applies in addition to section 44.

321. The test provided for by s 43(2) requires a degree of negligence going beyond inadvertence (see, for example, *T & H Fatouros Pty Ltd v Randwick City Council* (2006) 147 LGERA 319). It is designed to limit liability that otherwise would arise (see *Wang v NSW* [2009] NSWCA 340).

322. It should be noted that no case has been made by NSW that insufficient resources were made available to the RFS to fight the fires effectively. The case against it is that it embraced an inadequate and defective strategy. I agree with that case. The question is, however, whether the adoption of that strategy, albeit negligent, was "so unreasonable that, no authority could properly consider the act or omission to be a reasonable exercise of its functions".

323. It is not a case, either, where the RFS decided not to exercise its powers or functions. It is, therefore, unnecessary to determine if it had a duty to do so. However, I would consider it would be regarded as astonishing if it did not have such an obligation owed, not merely to the public at large, but those liable to injury or death if such powers were not so exercised.

324. That said, it is clear that the RFS chose to exercise its powers to address the suppression of the McIntyres Hut fire.

325. It must be emphasised that the failures I have identified had to do with strategic planning. There is no criticism of front line fire fighters at any level.

326. There is no real issue either as to the vicarious responsibility of NSW for the negligent activities of the ICs and their team. The question is whether that gives rise to legal liability as opposed to moral or political responsibility.

327. An issue raised by NSW concerned the scope of any duty of care under the rubric of "indeterminate liability". I do not consider that arises in terms of the escape of fire where the claims arise from damage directly inflicted by that fire. It may well be that liability would not extend to more indirect effects. An example might be an economic downturn or loss of tourism as a result of the wild fire activity and its aftermath.

328. Nevertheless, it is not necessary for each potential plaintiff to be identified before NSW, through the RFS, owed them a duty of care to avoid causing them damage by the escape of the McIntyres Hut fire.

329. The content of the duty is also not difficult to specify. It is to use reasonable care to avoid the spread of the fire so as to avoid damage to persons or property.

330. That is not to say that choices might not have to be made. (See, for example, *Capital & Counties plc v Hampshire County Council* [1997] 3 WLR 331 at 350, where reference was made to a decision during the Great Fire of London to blow up houses, not threatened by fire, to create a fire break. That clearly is not a dilemma relevant to the present case).

331. The question of the scope of the duty segues into the question of the standard of care required.

332. A good illustration, in my view, is *NSW v Tyszyk* [2008] NSWCA 107. In that case, Campbell JA made two points relevant for present purposes. The first is that if a duty is imposed by statute, the common law duty of care which otherwise might be imposed cannot be imposed so as to widen the scope of the statutory duty. In other words, the statute prevails to the extent of any inconsistency. The second, less relevant for present purposes, is that there is a distinction between a duty to engage in positive action and a duty, if so acting, to act without negligence.

333. That leads to another submission by NSW. Namely, that the duty when acting pursuant to the statutory duty imposed by the *Rural Fires Act* is merely not to exacerbate the situation of peril. I have to say that this proposition is not consistent with the terms of the *Rural Fires Act*. It is true that if an authority, for example, by burning off, negligently creates, or fails to manage safely, a hazard that otherwise had not existed, it will be liable. That is not this case, the only faint suggestion of it was that the use of aerial incendiaries may have had that effect. That hypothesis was not, in any event, supported by the evidence. The effective cause of the escape of fire from the Park was a strategy of containment that was inadequate.

334. Indeed, in my view, the case of *Capital & Counties plc v Hampshire County Council* and the general view that police and fire services owe no duty to respond to persons in danger where they are trained and able safely to respond is clearly inconsistent with public expectations and the intent shown by the legislative provisions imposing positive duties on such services to protect the public.

335. The limits upon the duty relate more to the restrictions upon public authorities generally. The provision of resources is a non-justiciable issue. The authorities must make do with the resources parliament and the executive provide. The deployment of those resources may be limited by the demand placed upon them. NSW rightly points to the widespread outbreak of fires throughout NSW in January 2003.

336. There are, as the High Court noted in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 and *Pyrenees Shire Council v Day* (1998) 192 CLR 330, conflicting interests which limit the scope of the duty of care imposed on public authorities.

337. Ultimately, the scope of duty imposed upon NSW could not exceed that enacted under s 43(2) of the *Civil Liability Act*. The test for breach of duty is, therefore, whether the acts or omissions were, "in the circumstances, so unreasonable that no authority

having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions".

338. That requires, as I have noted, a degree of negligence beyond that which the common law otherwise would have imposed.

339. The critical point, to my mind, is that whilst I accept that a strategy resembling the Fenwick solution, would, at least with hindsight, have been preferable and enjoyed a better prospect for success than the strategy in fact adopted, no person on 8 or 9 January 2003, despite the array of training and experience present, either criticised the chosen strategy or proposed any alternative. Once 9 January 2003 passed, the strategy was locked in.

340. Insofar as the more indirect strategy was adopted, it was clearly believed to be less likely to imperil fire fighters than any more direct engagement. That may have been a misjudgement, but it was erring on the side of caution. I cannot conclude that no reasonable authority could have so acted.

341. Further, it was, though a misjudgement, plainly the view of all the relevant decision makers that, even if the fire escaped, it would be contained before it reached suburban Canberra. That does not deny the plaintiffs' contention that such damage was reasonably foreseeable under extreme weather conditions which were, in themselves, reasonably foreseeable. I do accept that the extent of the extreme weather went beyond that which was considered to be likely. That is a factor which tends to support the view that it was not unreasonable, in the context of s 43 of the *Civil Liability Act*, for the authority to have reasonably believed that the indirect strategy adopted could succeed in avoiding the widespread destruction that occurred.

342. I should point out, as the parties should have, that s 43A of the *Civil Liability Act* had yet to be enacted as at January 2003. Nevertheless, s 43 prescribes the relevant standard.

343. It is unnecessary, therefore, to consider the provisions of s 5D of the *Civil Liability Act*. The failure to adopt a more effective strategy was clearly a relevant cause of the damage suffered by the plaintiffs.

344. The conclusion I have reached is that the negligence of the defendant does not reach the level limited by s 43. If, however, it does, it is necessary to consider the application of s 128 of the *Rural Fires Act*. That section addresses the assumption that liability might otherwise be found. It provides:

> **Protection from liability**
>
> (1) A matter or thing done or omitted to be done by a protected person or body does not, if the matter or thing was done in good faith for the purpose of executing any provision (other than section 33) of this or any other Act, subject such person personally, or the Crown, to any action, liability, claim or demand.
>
> (2) In this section:"protected person or body" means the following:
>
> (a) the Minister,
>
> (b) the Commissioner and any person acting under the authority of the Commissioner,
>
> (c) any member of the Service,
>
> (d) a member of the Advisory Council or Bush Fire Co-ordinating Committee,
>
> (d1) a member of a Bush Fire Management Committee,
>
> (e) the Commissioner of NSW Fire Brigades, the commissioner constituting the Forestry Commission, the Director-General of the Department of Environment, Climate Change and Water and any person acting under the authority of those persons,
>
> (f) an interstate fire brigade acting in pursuance of section 43.
>
> See section 731 of the *Local Government Act 1993* (NSW) in respect of protection from liability of councils, councillors and employees of councils.

345. There is no doubt that the section applied to Ms Crawford and Mr Hunt as successive ICs. The question was whether the acts or omissions, otherwise negligent, were done "in good faith" so as to excuse the Crown, in right of NSW, from liability.

346. That term was considered by the High Court in *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660. There must, as the High Court said, be more than negligence, otherwise the section has no work to do. Even assuming the onus is on the defendant to establish good faith, there is nothing in the evidence to suggest any basis for inferring any lack of "good faith" in coming to the conclusion that the indirect strategy adopted was the appropriate response to the fire hazard.

347. The strategy adopted by the ICs was clearly directed towards the containment of the fire. It was not, as in *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105, an activity incidental to the exercise of core powers. Rather, it was the very essence of the NPWS and RFS functions to devise a strategy utilising available resources to contain a bush fire so as to avoid or limit damage to persons or property.

348. I also note that, on 23 November 2012, NSW, by leave, relied on two additional submissions. The first I simply note. It is to challenge the construction adopted in a number of cases, culminating in *State of New South Wales v Mikhael* [2012] NSWCA 338. That relates to s 5B of the *Civil Liability Act 2002* (NSW), that is, that a risk unlikely to occur may, nevertheless, be regarded as foreseeable for the purposes of that Act. It postulates an objective enquiry. NSW concedes that to be the law as adopted by the highest authorities in NSW but submits, formally, that s 5B requires a subjective test relevant to the person or persons who did in fact have the duty to consider the likelihood of harm.

349. I am bound by that authority. In any event, I agree with it. Mr Maconachie QC acknowledged that the submission would be so dealt with but put it "formally".

350. His primary submission related to a recent decision of Walmsley AJ in *Warragamba Winery Pty Ltd v State of New South Wales (No 9)* [2012] NSWSC 701.

351. The action was not dissimilar from the present in that it involved damage by fire suffered by property owners near the national park in the vicinity of Warragamba Dam in New South Wales. It was alleged, as it was in this case, that fire authorities had failed to act early enough or effectively enough to avoid the damage in question. The fire preceded the 2003 fires and related to December 24, 2001.

352. NSW seeks to rely upon three matters. First, as in this case, that the fire was not started by fire authorities. They made it no worse but merely failed to abate it. He did not find that ss 63 and 64 of the *Rural Fires Act* cast on the fire authorities any duty to act.

353. It will be apparent that I do not accept that there was no duty to act with reasonable care, at least once the task was embarked upon, to avoid loss and damage to others. That may well in some cases, create a duty to warn those affected.

354. I do, however, come to a similar conclusion as to s 43A of the *Civil Liability Act* though that provision did not commence until 19 December 2003. That provision imposes a threshold for liability over and above that imposed by the common law. Section 43 imposes a similar test. Further, I agree that s 128 of the *Rural Fires Act* is engaged only when liability would otherwise attach either at common law or by statute and excuses those persons otherwise liable where they have done their "honest best".

355. As in the present matter, there was no direct evidence of the state of mind of every officer concerned with the relevant decision making.

356. Further, as I had said in *State of New South Wales v West & Anor* [2008] ACTCA 14; (2008) 165 ACTR 47 [65], the onus of establishing the defence must be carried by each defendant claiming the protection of the section.

357. In that case, Graham J noted that in the matter before him some of the relevant officials had conceded they might have done better, particularly as to more timely warnings of impending disaster. That, his Honour noted, did not "of itself" establish bad faith.

358. In Warragamba, as to the argument that to establish good faith each relevant officer would need to attest to their innocent state of mind, Walmsley AJ said at [751]:

> ... But there is a limit to how many witnesses must be called to establish good faith. There was no suggestion in the evidence [that] the alleged omission was malevolent or not in accordance with procedures. I do not accept the argument.

359. I do note the failures conceded by Ms Crawford in formulating the strategy adopted on 8 January 2003 subsequently confirmed by Mr Hunt but it should be emphasised that a failure to observe established procedures does not equate with a lack of good faith.

360. His Honour then adopted what I accept as an appropriate definition of "good faith" affirmed by the Full Court of the Federal Court in *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290. That was accurately summarised by his Honour as follows at [752]:

> (a) it is unlikely "good faith" will be established merely from evidence that the party relying on the defence acted honestly and without malice; and
>
> (b) for the defence to be made out there should be evidence that a real attempt was made to do properly the very thing for which immunity is sought: This may involve following an established system, or set of procedures.

361. I would note that the mere fact that established procedures are by-passed does not, conversely, establish per se that good faith cannot be found. It may be, as here, be the

judgment of the relevant officials that the established procedures were of no utility in the circumstances as they were reasonably seen to be.

362. The issue arises in the present case as to whether the actions of the relevant officials were done pursuant to the execution of functions under the *Rural Fires Act* - c.f. *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105, 117 per Kitto J, as cited by Walmsley AJ, noting that the immunity did not extend to acts or omissions merely incidental to "or done by the way or in the course of, the exercise of the power". That does not detract from the central purpose of the immunity, that is (per Owen, Manning and Else-Mitchell JJ in the Full Court of New South Wales decision in the matter at (1960) 60SR (NSW) 322, 326) it extends to protect officers acting negligently in pursuance of their statutory duty "provided they have acted bona fide in purported pursuance of the statute".

363. His Honour acknowledged also authorities, such as *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 which, for example, per McHugh J [33] – [34], noted that "provisions taking away a right of action of a citizen are to be construed 'strictly', even 'jealously'".

364. I also agree that an argument that otherwise actionable negligence, of itself, evidences bad faith is clearly untenable. Otherwise, s 128 would have no real work to do.

365. His Honour's assessment of the officials whose conduct was in question before him in fact mirrors the conclusion I have come to concerning the relevant officials in this case, particularly the ICs and their advisors. I set out his Honour's expression of opinion at [765]:

> I find that those who made the decisions and did the work or made the questioned omissions, did so honestly; none of them had anything to gain by not doing so; all of them were seasoned and dedicated fire fighters; they only stood to lose public esteem had they not acted properly; each of them made a real attempt to do what it was they were attempting to do ....

366. Thus, even had negligence been established, in his Honour's view, s 128 would confer immunity. In the present case, negligence is made out but s 128 does confer immunity.

367. For similar reasons, his Honour found that the test for liability imposed by s 43A of the *Civil Liability Act* had not been met. Section 43A was not enacted at the time of the 2003 bushfires, however, I note that the test for liability is the same. The only relevant difference is that s 43A applies to the exercise of "special statutory powers". It likewise imposes an additional requirement, beyond those of the common law, before liability can be established (see *Allianz Australia Insurance Ltd v Roads and Traffic Authority of NSW; Kelly v Roads and Traffic Authority of NSW* [2010] NSWCA 328 [60] per Giles JA, cited by Walmsley AJ at [776].

THE WARNING CASE

368. It is suggested that NSW had some duty to warn ACT residents, including the plaintiffs, of the risk of fire escaping from the Park.

369. I doubt that Mr Koperberg, the only relevant official of NSW so identified, could lawfully be fixed with any duty, directly or through his staff, to warn ACT citizens of the damage of fire from McIntyres Hut.

370. In any event, no such case is maintainable. The liaison with ACT, including that with Mr Lucas-Smith was such that there was no information known to NSW that was not immediately known to ACT. Indeed, Mr Koperberg went further, on 15 January 2003, both to Mr Lucas-Smith and to the ACT public, by stressing the danger from the NSW fires.

371. Further, I agree with NSW that he was entitled to assume that ACT authorities would communicate his views to the extent they were seen to be relevant and had not already been communicated.

372. Mr Lucas-Smith could be assumed to be well aware of what ACT residents were told or needed to know.

373. It follows that the case of ACT residents against NSW must fail on this ground.

THE WEST PLAINTIFFS' CASE

374. The West plaintiffs differ from the QBE plaintiffs only in the circumstance that their property adjoined the Park. The case of *Hargrave v Goldman* (1963) 110 CLR 40 has some similarity in that a fire hazard, coming to the landowner's attention was inadequately dealt with so that the fire later flared and spread. I agree that NSW, as the occupier of the Park, had a duty at common law to use reasonable care to avoid damage to the West plaintiffs' property. It is clear that no adequate steps were taken to prevent the fire burning down to the river and hence crossing it. With or without the "kink" solution, the efforts of NSW to deal with the western edge of the fire were inadequate and would have given rise to liability at common law.

375. It is, for the reasons already expressed, no answer to say that the defendant simply let nature take its course. It had a duty to intervene. It did so in fact, albeit inadequately. Nevertheless, those inadequacies, though sufficient to satisfy the common law, do not rise to the level mandated as the standard of actionable negligence by s 43 of the *Civil Liability Act*. In any event there is no evidence to support any inference that the incident control team or any other officials acted otherwise than in good faith. Indeed, accepting that it is for the defendant to satisfy the court that it, through its officials, acted in good faith, I have no doubt, on the evidence presented, particularly

that of Ms Crawford, that there was no lack of good faith in the adoption of the strategy which was unhappily flawed.

CAUSATION

376. NSW correctly points out that the adoption of the Fenwick strategy was by no means a certain recipe for avoiding the disaster which happened. It is also incumbent on the plaintiffs to establish on the balance of probabilities, not merely that a chance of avoiding damage had been lost, but that on the balance of probabilities such loss or damage would have been avoided. I take that to be the ratio of the case of *Tabet v Gett* (2010) 240 CLR 537.

377. That question can only be answered on the basis of the evidence given. In that respect I note that Mr Fenwick, for one, was confident that had his strategy been adopted, disaster would have been avoided.

378. I do not need to go so far. I note that in those areas where back burning had been carried out from the river and the sides, to the north and south of the fire, the lines held, despite the conditions on 17 and 18 January 2003. I consider the eastern lines would have held had burning out with incendiaries occurred earlier. That task would have been accomplished in sufficient time, in my view, had the Webbs Ridge trail been secured as it could and should have been on 9 January 2003. The strategy adopted was below the standard the common law would require of competent fire suppression authorities. It does not, however, fail, compared with the standard required by the *Civil Liability Act*, nor is there any lack of good faith so as to avoid the effect of s 128 *Rural Fires Act*.

CONCLUSION

379. The result I have reached is that the plaintiffs' claims must, as a matter of law, be denied. However, but for the express limitations on the liability which otherwise would attach at common law, those plaintiffs who suffered loss and damage would have been entitled to compensation for their losses. Effectively, they are deprived by statute of what would, under the general law, be regarded as just compensation. The legislature has, however, spoken so as to exempt NSW from such liability, and the courts must apply the law as Parliament has decreed it to be.

380. There will be judgment for NSW against the plaintiffs.

381. For reasons explained in relation to NSW, I am of the view that the Territory owed a duty of care at common law to take reasonable steps to protect persons and property in the Territory from loss or damage by fire. To that end it has established dedicated rural and metropolitan fire services. That, as I have explained, distinguishes emergency services from the usual rule that no person is obliged to go to the aid of another in distress unless they have caused or contributed to the situation of peril or has some special duty or relationship. In my view, the dedicated fire services and by analogy other services created to protect the public have a duty to act where they reasonably can, so far as that is consistent with any relevant statutory provision. There are, as I have noted, issues which are matters of legislative or executive policy that are not capable of judicial determination. An example would be conservation policy which might lead to dangerous fuel loads in bushland areas. As the ACT is no longer a party it is not necessary further to consider these matters.

382. *Kent v Griffiths* [2001] QB 36 and *Crowley v Commonwealth of Australia & Ors* [2011] ACTSC 89 provide examples of emergency responders owing a duty of care to

a person in distress. More than a statutory power to act must be shown, as *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 illustrates. There the fact was that the statutory power to intervene had not been enlivened, hence the police officers in question owed no greater duty of care than any other member of the public towards the person in distress who might have been in need of assistance.

383. As Gummow, Hayne and Heydon JJ noted at 248, the duty asserted in that case was to prevent self-harm, not, for example, to protect the deceased from attack by another. No such duty was imposed by common law or statute. Hence, there was no duty at common law to intervene, the statutory power to do so not having been enlivened.

384. Unlike the present case, the statute in *Stuart v Kirkland-Veenstra* empowered action but did not impose a duty to exercise the power. Further, the conditions enabling the exercise of the power, that is, that the deceased was suffering a relevant mental illness, had not been made out. Here the power was mandated to prevent harm from escape of fire. The fires had broken out to the knowledge of the relevant emergency services and they responded.

385. The situation of the NSW and ACT authorities is closely analogous to that of the council in *Pyrenees Shire Council v Day*.

386. The limiting factor over and above that is, of course, for NSW, the test imposed by s 43 which affects the question of breach rather than duty. The point is, in any event, well-made that the relevant authorities can plainly do no more than not incompetently to deploy available resources as required by their statutory duties.

387. It is unnecessary to apply any so-called immunity of emergency services said to arise from *Hill v Chief Constable of West Yorkshire* [1989] AC 53 or *Capital & Counties v Hampshire County Council plc*. To my mind, the true limiting factor is not absence

of duty, but the lack of breach of that duty. As Crennan and Keifel JJ explained in *Stuart v Kirkland-Veenstra* at 266:

> The question of whether there was a duty at common law in this case requires, as a minimum, a power given by the statute. This is because it is the existence of a power, to avert the risk of harm, which would set the police officers apart from persons generally and the common law rule that no action is required to protect others. It is the availability of such a power which may inform considerations as to the existence of a relationship and the ability to control the risk of harm which may be relevant to the existence of a duty. However, it is not the common law which determines whether the power is enlivened. It is the *Mental Health Act* which is the sole source of the power. That Act, by s 10, requires that a police officer hold an opinion that a person is mentally ill before the power of apprehension is available to the officer. In the present case neither officer held such an opinion. There was no issue raised as to the fact that such opinions were held. It is difficult to see what such an issue might be, on the facts of this case. The opinions held by the police officers were considered and reasoned. The statute requires no more.
>
> (Footnotes omitted).

388. In the present case the sources of power are the statutes imposing a duty to manage the relevant national park so as to suppress or control fire, plainly for the benefit of those who might otherwise be imperilled.

389. So far as the *Bushfire Act 1936* (ACT) is concerned, the Bushfire 'Council' established under s 5A of the Act is empowered to take protective measures to suppress fires (see s 5H). It exempts "a built-up area". In similar vein are the powers of the CFCO (s 5N). It seems to me that those powers do carry an obligation to exercise them. It is no answer to say that the functions performed by emergency services did not exacerbate the risk. The powers must be exercised reasonably so as to fulfil the object of those powers. I am satisfied that they were, in fact, exercised in accordance with those objectives, though it is unnecessary given the circumstances so to determine in respect of the ACT

390. The claim as to "warnings" is more vexed. For a warning to be a reasonable means to avoid harm does not imply negligence in the creation of the hazard on the part of the authority in question. Rather, it needs only an awareness of it and an identification of

those at risk in addition to the duty to act to protect. It is highly speculative whether more explicit warnings from Mr Lucas-Smith and others would have averted loss to any plaintiff. I accept that his warnings and those of the ACT ESB were less than full and frank. However, whether that was, even if required otherwise, pursuant to an enforceable duty, is far from clear. It is also not established that the warnings in fact given, including those of Mr Koperberg, were so deficient as to mislead anybody into believing that there was no risk of harm. In any event, it is no longer an issue.

391. For the foregoing reasons there will be a verdict for the defendant. No issue of causation or of quantification of damages arises.

392. I will hear the parties as to costs.

I certify that the preceding three hundred and ninety-two (392) numbered paragraphs are a true copy of the Reasons for Judgment herein of his Honour, Chief Justice Higgins.

Associate:
Date: 17 December 2012

Counsel for the QBE plaintiffs:	Mr R Smith SC with Ms J Gleeson SC
Solicitor for the QBE plaintiffs:	A R Conolly & Co
Counsel for the West plaintiffs:	Mr B Collaery
Solicitor for the West plaintiffs:	Collaery Lawyers
Counsel for the defendant:	Mr J Maconachie QC with Mr C Erskine SC and Mr D Mallon
Solicitor for the defendant:	Crown Solicitor's Office
Date of hearing:	1-4, 9-11, 15, 16, 24, 25, 29-31 March 2010; 1, 6-8, 12-15, 19-21, 27-29 April 2010; 3-6, 10-13, 17- 20, 24-27 May 2010; 4, 5, 7, 18-21, 27, 28 April 2011; 2-5, 16-19, 23-26 May 2011; 1, 2, 7-9, 14, 15, 20 June 2011; 14-17, 21-25 November 2011
Date of judgment:	17 December 2012

ANNEXURE

DRAMATIS PERSONAE

Ms Odile Arman:

At the time of giving her evidence, Ms Arman was attached to the ACT Chief Minister's office, as a liaison officer for Environment ACT. Her substantive position was District Conservation Officer. She had been a ranger at Namaji National Park from 1984 until 1995 and had attended remote fires as a crew member. Her first role in a command position was in about 1994. Most of Ms Arman's fire experience had been with small urban-interface grassland, woodland and open-forest fires. She was the IC at Bruce Ridge during the Christmas 2001 fires and was in command in the initial response to the Bendora fire on the night of 8 January 2003.

Mr Bruce Arthur:

Mr Arthur joined the army as a field engineer in 1965. In 1973 he retrained as an army firefighter, retiring in 2002. He subsequently joined the RFS. At the time of the January 2003 fires he was District Fire Control Officer for the Yarrowlumla and Queanbeyan rural fire district. Mr Arthur had previously attended a number of wildfire incidents and had been the IC for two or three campaign fires. Mr Arthur was the day shift IC for the McIntyres Hut fire from9 to 18 January 2003.

Mr Simon Bretherton:

Mr Bretherton has been employed by ACT Forests Brigade for 20 years. During his service with the Forests Brigade he has been involved with fire tower operations, fire reduction burning and remote area fire fighting. He has been a sector leader on fires and has been responsible for leading machinery into fires, including directing heavy plant into fire situations. Over the years he has responded to many grass fires and forest fires caused by lightning and arson. During the Christmas 2001 fires he was involved in the mop up phase of that fire. At the time of the January fires he was Deputy Captain with the ACT Forests Brigade, having filled that role for 3 or 4 years.

Mr Peter Cartwright:

At the time of the fires Mr Cartwright was a relieving district officer in the ACT Fire Brigade. On 16 January 2003 he attended a briefing by Mr Lucas-Smith for Fire Brigade officers at the ESB in Curtin.

Mr Peter Collingwood Cathles:

Mr Cathles' family own property in the Wee Jasper area, the southern boundary of the property is 7 kms from McIntyres Hut. Mr Cathles has attended major bush fires since 1956. He became a Deputy Fire captain in the 1960s, and advanced to group Captain of the Cavan Bushfire Brigade, Mullion Brigade and Wee Jasper Volunteer Fire Brigade. He was awarded Order of Australia Medal and National Medal for

services to NSWRFS. At the time of the January 2003 fires Mr Cathles was Senior Group Captain for the Yass Shire.

Mr Timothy Noel Collingwood Cathles:

Mr Cathles has lived in the Wee Jasper area all his life. Mr Cathles has been involved in almost every fire in the Wee Jasper and Yass areas since 1984. At the time of the January 2003 fires Mr Cathles was Captain of the Wee Jasper Volunteer Bushfire Brigade, having held that position since 2000.

Mr Philip Cheney:

At the time of giving evidence he was a senior principal research scientist with CSIRO, specialising in bushfire behaviour and management. He has a number of relevant tertiary qualifications, among them a Diploma of Forestry and a Bachelor of Science in Forestry degree. During the first half of the 1970s Mr Cheney lectured at the Australian National University on subjects associated with fires and fire suppression. He has since held various positions with the Forest Research Institute; his work includes developing guidelines for prescribed burning and the application of aerial prescribed burning for fuel reduction in mountains and forests. He has led research projects on the use of large air tankers, the behaviour of high-intensity fires, the effectiveness of retardants, understanding the spread of bushfires in the natural environment, and the development of models to predict fire behaviour. He has also been involved in more than 50 consultancies as a fire behaviour expert – including providing advice to the ESB and its predecessor – and has written or co-written a substantial number of related publications. Early in his career Mr Cheney had some experience as a firefighter in the field. He was subsequently involved in fire suppression and control on experimental fires, and he initiated and led the Project Vesta experiments on fire spread in Western Australia; these experiments began in 1996. Mr Cheney is one of Australia's pre-eminent experts on fire behaviour, suppression and management.

Mr Kelly Close:

At the time of the January 2003 fires Mr Close was a Fire Behaviour Analyst who reviewed the Viegas Report and provided a report entitled Report into the Fire Behaviour of the McIntyres Hut and Bendora Fires on 18 January 2003".

Mr Kevin Cooper:

At the time of the fires Mr Cooper had been a volunteer member of the RFS for nearly 20 years. He had extensive experience as the Coordinator of Emergency response with the NSW Department of Agriculture. He was Commander of the RFS task force that travelled to the ACT on 16 January 2003. His role was to liaise with ACT authorities and to ensure the wellbeing of members of the task force. He spent time at the ESB in Curtin and had discussions there with both Mr Graham and Mr McRae.

Mr Neil Cooper:

At the time of the fires Mr Cooper was employed by ACT Forests; since 2001 had had been manager of debris removal and fire control and responsible for ACT forest fire management. Previously, he had been responsible for plantation management. Mr Cooper has a Bachelor of Science degree from the Australian National University and has had a senior role as a fire controller for some 15 years. He undertook the AIIMS Incident Control System training in 1991 and in 2002 and is an accredited trainer. During the January 2003 fires Mr Cooper was the ACT liaison officer at Yarrowlumla for 9 and 10 January and IC for the Bendora fires on some night shifts.

Mr Tony Corrigan:

For two years Mr Corrigan was a wildlife ecologist with the ACT Parks and Conservation Service, and in 2000 he became the manager of that organisation. From December 2002 onwards he ceased to occupy the latter position, being an unattached officer at the time of the fires. In the 1980s and 1990s Mr Corrigan had considerable bushfire experience, usually as a team leader. That included a number of remote are fires. In December 2001 he was the planning officer for the Stromlo fire; this was the first type 3 incident where he had been involved in an IMT in the field. From 12 to 16 January 2003 he was the ACT liaison officer situated in Queanbeyan.

Ms Julie Crawford:

In January 2003 Ms Crawford was the Queanbeyan area manager for the NSW National Parkes and Wildlife service. Her fire experience began in 1979 and included being part of IMTs. She was the IC for the McIntyres Hut fire from the time of its ignition on 8 January 2003 until the following day; thereafter she fulfilled other operational roles in respect of that fire.

Mr Roger Fenwick:

Mr Fenwick, a Bushfire Consultant, is the author of three reports served on behalf of the plaintiffs in the proceedings.

Mr James Gould:

At the time of the fires he was a research officer with CSIRO, responsible for coordinating bushfire research programs and fire behaviour modelling, fuel management and suppression technology.

Mr Tony Graham:

At all relevant times Mr Graham was Operations Manager with the ACT Bushfire and Emergency Services section of the ESB and was thus involved in some crucial decision making in the connection with both firefighting strategies and resources. Mr Graham had held that position since July 1997 (then with the title Manager) and from that point on had had a role as one if the duty coordinators or duty officers at the ESB and was the designated Operations Manager in the service management team. Mr Graham's curriculum vitae and written statement showed he had spent 21 years in

the Royal Australian Navy. On discharge from the navy in 1993, Mr Graham was a Warrant Officer, having spent most of his naval career in catering. His firefighting experience was limited to two or three incidents and the occasional bush or grass fire near shore facilities. In the last few years of his naval service, Mr Graham joined ACT Emergency Services as a volunteer and received bushfire training. He was involved in training for the AIIMS Incident Control System and is accredited as an instructor. Before the 2003 fires he had some experience as an IC between 1998 and 2001. Mr Graham had never actually fought a fire by holding a hose or rake-hoe and has no training in fire behaviour.

Mr Robert Hunt:

At the time of the fires Mr Hunt was a ranger with the NSW NPWS, being responsible for the Park and Bimberi Nature Reserve. His fire involvement began in 1989 as a student at Charles Sturt University. He later joined up as a field officer in Kosciusko National park, then became a ranger at Narrabri. He was a ranger in the Queanbeyan area for almost 10 years. Mr Hunt was involved in initial assessment of the McIntyres Hut fire from 8 January 2003 and fulfilled other roles in respect of that fire during subsequent days.

Mr David Ingram:

At the time of the fires Mr Ingram was logistics coordinator with ACT Bushfire and Emergency Services: he has a Diploma of Education in Adult Education and has attended numerous courses in logistics management. He has assisted with logistics in major operations such as the Canberra Hospital implosion incident, the Thredbo landslide, and the 2001 fires in Canberra. He also assisted with logistics for the Canberra aspect of the 2000 Olympic Games. Having joined the ESB in 1995 as the operational support officer, Mr Ingram became the logistics coordinator for both the Bushfire Service and Emergency Services in 1997.

Commissioner Phil Koperberg:

Mr Koperberg is Commissioner of the RFS and his fire experience is extensive, both operationally and administratively. He began his firefighting activities in 1967, later becoming deputy captain and then captain of the brigade he joined. In 1970 he was appointed Fire Control Officer for the Blue Mountains, and in 1972 he became the first chairman of the Fire Control Officers Association. In 1985 he was appointed Executive Officer of the Bushfire Branch of the Office of the Minister for Police and Emergency Services in NSW. He was subsequently appointed to this present position. Mr Koperberg was in telephone contact with Mr Arthur on a number of occasions between 8 and 18 January 2003 and attended meetings at the Queanbeyan incident control centre on 15 January with Mr Lucas-Smith and members of the IMT responsible for the McIntyres Hut fire.

Mr Peter Lucas-Smith:

Mr Lucas-Smith was appointed Chief Fire Officer in the ACT in 1986 and held that position at the time of the fires. He had also held the position of Director of ACT Bushfire and Emergency Services since the organisation's formation in 1995.

Mr Lucas-Smith's professional career had been in firefighting. From 1971 until 1986 he was employed by the NSW NPWS in fire management roles. During that time he was the IC or part of the IMT for 10 major bushfires and for more than 4000 medium and minor bushfires and other emergency events. Mr Lucas-Smith was awarded the Australian Fire Service Medal for meritorious and distinguished service in bushfire management.

Mr Rick McRae:

At the time of the fires Mr McRae was Acting Manager of the Risk Management Unit at the ESB. By the time he gave his evidence he had been confirmed in that position. Mr McRae explained during the inquiry that his role was to provide risk-based services to agencies within the ESB. He is a trained ecologist, and during the early 1980s he worked for the Blue Mountains National Park. In that capacity he had some role in relation to bushfire suppression when acting as a firefighter and crew leader of remote area firefighting teams. He was involved in about six major fires. In the late 1980s he worked for the Victorian Department of Conservation, Forests and Lands on alpine management, but that did not involve any bushfire fighting. In July 1989 Mr McRae took up employment with the ACT Bushfire Service, initially as the fire management planning officer, which involved weather mapping and fire behaviour prediction. Once the Incident Control System came into use in the ACT, in the early 1990s, he became the planning officer.

Mr Trevor Roche:

Mr Roche joined the Victorian Country Fire Authority as a volunteer in 1963. He later became a staff member and attended numerous large bushfires as a firefighter and a commanding officer. He became an assistant regional officer in the authority in 1969 and regional officer in charge of the northern Victoria region in 1978. In 1990 Mr Roche was appointed Assistant Chief Officer, with responsibility for command and control and business management across three regions. In 1993 he was promoted to the position of Deputy Chief Officer, with responsibility for Country Fire Authority operations throughout the state. In 1995 he became Chief Officer, a position he held until his retirement on 26 June 2002. During his time with the Country Fire Authority, Mr Roche attended courses on many aspects of fire and other emergency management and activity. Since leaving the authority he has been involved with Emergency Management Australia, dealing with multi-jurisdiction emergency management and preparedness.

Dr Jonathon Marsden-Smedley:

At the time of the January 2003 fires Dr Marsden-Smedley was a Research Fellow at the School of Geography and Environmental Studies at the University of Tasmania, Hobart. He wrote a report entitled: "Report into Fire behaviour Predictions for the McIntyres Hut and Bendora Fires".

Mr Peter Smith:

At the time of the fires Mr Smith was captain of the Brindabella Brigade and had been with that brigade for 30 years. He had been captain since 1990 and had qualified to

group officer level. He was involved in the response to the McIntyres Hut fire and travelled to the point of ignition of that fire to help assess the area's accessibility for fire tankers.

Mr Peter Stanford:

Mr Stanford has been involved in fighting fires in the Brindabellas since 1957, including fighting fires in the Brindabellas at night and putting in rake hoe lines at night on many occasions. At the time of the January 2003 fire he was a member of the Wee Jasper Volunteer Fire Brigade and owner of Nottingham Station, near Limestone Creek.

Professor Domingos Viegas:

Professor at the University of Coimbra in Portugal. The professor's academic background is in mechanical engineering. Professor Viegas headed a multi-disciplinary team at the university which studied fires and fire behaviour. He lectured and trained on fire behaviour and fire safety.

Mr Wayne Karl West:

At the time of the fires Mr West owned the property known as Wyora Station at Sandy Flat, Brindabella.