

**From:** [Mark Beech](#)  
**To:** [Justine Stansen](#)  
**Cc:** [Robert Perry](#)  
**Subject:** Hazelwood Mine Fire Inquiry II  
**Date:** Monday, 12 October 2015 11:05:10 AM  
**Attachments:** [image001.png](#)  
[Ltr to Justine Stansen 121015.pdf](#)

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Dear Ms Stansen,

Please find attached our correspondence dated 12 October 2015 for your attention.

Kind regards,

Sent on behalf of **Rob Perry** - Partner

**Mark Beech** | Lawyer

[Redacted]

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# PERRY MADDOCKS TROLLOPE

## LAWYERS

Our Ref: RWP: 20150096

12 October 2015

BY EMAIL: [REDACTED]

Ms Justine Stansen  
Principal Legal Advisor  
Hazelwood Mine Fire Inquiry  
[REDACTED]

Dear Ms Stansen,

### **Hazelwood Mine Fire Inquiry II (Dr Rosemary Lester)**

We refer to your letters of 30 September 2015 and 8 October 2015.

You have not responded to a number of matters we raised in our letter of 6 October 2015.

#### **Omissions in Your Letter**

In our letter of 6 October we commented that:

*None of the communications you have produced explains how or why Assoc Prof Barnett proceeded to produce his third analysis, or why it was accepted by the Inquiry without reference to any of the represented parties, particularly when he was a witness who was never held out as independent (as described by Counsel Assisting).*

*It is also unclear what communications took place between Assoc Prof Barnett and representatives of the Inquiry between 11 and 15 September 2015 when he emailed his third analysis to the Board. We would be assisted if those communications could be provided to us and to the other represented parties.*

Your letter of 8 October is silent on this issue. We again request that you explain how Assoc Prof Barnett came to produce his third analysis and ask that you provide all communications between Assoc Prof Barnett and representatives of the Inquiry between the close of his viva voce evidence and the provision of his final report.

In our letter of 6 October, we referred to evidence of Assoc Prof Barnett in cross-examination and other evidence and stated that:

*Properly seen, Assoc Prof Barnett's further analysis is nothing more than an ex post facto attempt to remedy the deficiencies of his opinion highlighted in cross examination.*

Your letter of 8 October also fails to comment on this observation. Merely reciting that Term of Reference 6 requires the Board to have regard to "any relevant evidence" ignores the fundamental problem that re-opening a hearing to adduce further evidence gives rise to a lack of procedural fairness to those represented parties who have conducted the hearing on the basis of the existing evidence.

Your reference to the inability of the first Hazelwood Mine Fire Inquiry to consider information provided by Voices of the Valley is presumably a reference to the fact the evidence had concluded and closing submissions had already taken place. In short, it was too late at that stage to reopen proceedings. An identical situation now arises.

The joint expert report of 31 August 2015 (Exhibit 30) records that Assoc Prof Barnett (and Prof Gordon) "have not yet had a chance to review the daily death data." One and a half days passed between that time and the commencement of Assoc Prof Barnett's evidence on 2 September 2015 during which he could have reviewed the daily death data. Please provide any communications with Assoc Prof Barnett on or around 31 August 2015 relating to the provision of the daily death data to him.

Your letter of 8 October fails to explain how it is fair or appropriate to proceed to re-open this term of reference in the absence of Dr Flander and Prof Gordon. It also contrasts with your 30 September letter that proposed that all four panel experts would be recalled. Both Dr Flander and Prof Gordon participated fully in the previous hearings including providing reports, participating in a private joint expert session, authoring a joint expert report, and submitting to lengthy examination and cross-examination as part of a joint expert panel (Dr Flander was also examined separately in advance of the panel being sworn in). Your proposal to recall only two of the panel experts is contrary to the requirements of procedural fairness. In our letter of 6 October we asked:

*Realistically, how is Dr Flander to approach the re-opening of Term of Reference 6 and participation in a joint expert sitting, when Counsel Assisting has already called for findings adverse to her personally, as well as Melbourne University? Does Dr Flander now require legal representation? Will Prof Gordon now be asked to complete a new report which also takes into account the daily death data (to date he has not done so)?*

Your letter does not explain how your proposal to call only two experts deals with the problems we have identified above. With respect, if you intend to proceed to re-open this term of reference, these issues cannot simply be ignored. They should be dealt with. Dr Flander should be advised to retain legal representation and Prof Gordon (and Dr Flander) should be asked to comment on Assoc Prof Barnett's most recent analyses. It is irrelevant that Prof Armstrong was the only expert who was retained by the Board and that he is aware of Assoc Prof Barnett's new reports. We do not understand how the Board can be satisfied that these new analyses carry any evidentiary weight if they are only tested in evidence against the opinions of one other expert. It would be a simple exercise to bring Assoc Prof Barnett's new reports to the attention to Dr Flander and Prof Gordon and we urge the Board to do so.

You also appear to be open to calling Prof McNeil as a witness via Skype, despite not being prepared to call Dr Flander or Prof Gordon. Time zone differences between Berlin and Melbourne will make it impracticable for Prof McNeil to participate in that way.

### **Prejudice to Dr Lester**

Your suggestion that our client's interests are unlikely to be affected by any evidence that may be given on 15 October 2015 is extremely concerning. At present our client is trekking in Brazil. Dr Lester was granted leave to be represented at Term of Reference 6 and special arrangements were made between staff of the Inquiry and her to ensure that she could be present for the duration of the hearings on 1 to 3 September 2015 (in between anticipated absences overseas). She attended those three days of hearing and actively instructed us throughout that process. She will be unable to actively participate in any re-opened Term of Reference 6, even if Skype was an option.

Your suggestion that the evidentiary basis for Counsel Assisting's submissions about adverse findings against Dr Lester is unlikely to be affected by the evidence adduced on 15 October 2015 is contrary to the written submissions of Counsel Assisting dated 8 September 2015. At pp 18 and 19 of those submissions, Counsel Assisting drew a very specific link between any finding that there was an increase in deaths as a result of the fire and the reputation of Dr Lester. One example (of many) at paragraph 92 will suffice where it is recorded:

*It is further submitted that Dr Lester's investigation gave rise to a conflict of interest. Had the result of such an investigation been an acceptance that there was in fact an increase in deaths, that finding would have reflected poorly upon Dr Lester personally in light of her role during the fire (and resulting criticism of it). This ought to have been plain both to Dr Lester and to those more senior to her within DHHS. She should not have been permitted to assume carriage of the matter in such circumstances.*

It is clear from the above that Counsel Assisting is of the view that our client does have a direct interest in the subject matter of any re-opened hearing. Her reputation is at risk. If Counsel Assisting wishes to persist with this and like submissions about our client, the only fair and appropriate course is to facilitate her participation in any re-opened hearing. Your comment that she will nonetheless be able to make submissions to the Board does not remedy the procedural unfairness we have outlined above.

### **Future Conduct**

In the event that, contrary to this request, the Board proceeds to re-open the hearing and adduce further evidence, we suggest that the following process be followed.

Assoc Prof Barnett's latest reports and the comments about them from Prof Armstrong should be served on each of the expert witnesses (Dr Flander, Prof Armstrong and Prof Gordon) and each of them be invited to provide a supplementary report to the Inquiry. This process should take place as soon as possible and well in advance of 15 October 2015. Our client, and the other represented parties, should be notified in advance of any joint expert conclave that is arranged to take place prior to the hearing.

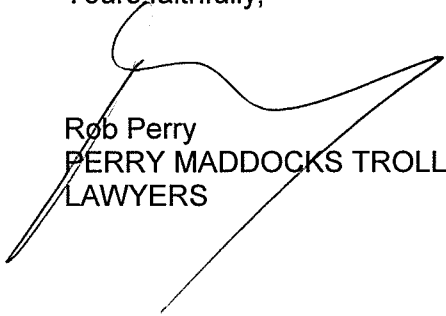
In relation to Dr Flander, the Board should inform her that she might wish to retain legal representation in relation to this term of reference.

Any supplementary reports of Prof McNeil should be also be tendered.

At the hearing itself, Assoc Prof Barnett, Prof Armstrong, Dr Flander and Prof Gordon should be called to give evidence in person, not via Skype. Prof Abramson from Monash University should also be invited to participate in any expert panel. Could you please confirm that this is how you intend to proceed?

Please circulate this letter, our letters of 6 and 8 October 2015 and your letter dated 8 October 2015 to the other represented parties for Term of Reference 6 if you have not yet done so. Please also circulate a copy of your recent letter of instruction to Prof Armstrong that you refer to on p 1 of your 8 October letter.

Yours faithfully,



Rob Perry  
PERRY MADDOCKS TROLLOPE  
LAWYERS