

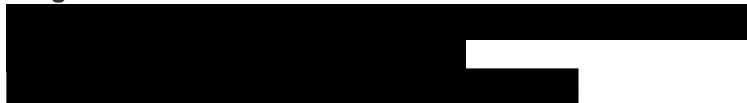
From: [Stearman, Winifred \(AU\)](#)
To: [Justine Stansen](#)
Cc: [Fox, Chris \(AU\)](#); [Heffernan, Emily \(AU\)](#)
Subject: Hazelwood Mine Fire Inquiry – Term of Reference 6
Date: Tuesday, 13 October 2015 3:10:17 PM
Attachments: [Letter to J Stansen.pdf](#)

Dear Justine

Please see attached correspondence.

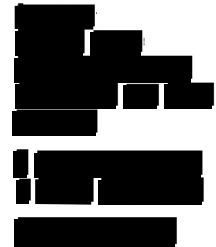
Yours faithfully

Winifred Stearman | Legal Secretary
King & Wood Mallesons



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13 October 2015

Ms Justine Stansen
Principal Legal Advisor
Hazelwood Mine Fire Inquiry

Chris Fox
Partner

Emily Heffernan
Senior Associate

By email

Dear Justine

Hazelwood Mine Fire Inquiry – Term of Reference 6

Thank you for your letter dated 8 October 2015 concerning the further reports of Associate Professor Barnett dated 17 and 25 September 2015, which were provided to us for the first time under cover of your letter dated 30 September 2015. Your letter was in response to our letter dated 6 October 2015.

We also refer to your email dated 12 October 2015 (and received at about 3.46pm), which is addressed not only to us but also to the other parties.

Our client does not agree or accept that the Board's proposed course of admitting the further reports of Associate Professor Barnett and conducting a hastily convened hearing into this "evidence" on 15 October 2015 is appropriate or accords procedural fairness to the other parties to the Inquiry, including our client.

As you know, the requirement to accord procedural fairness is expressly incorporated in the Terms of Reference, and in any event is a requirement of the *Inquiries Act 2014* (Vic).

The failure to accord procedural fairness is for a number of reasons.

1. The hearings in relation to TOR6 have concluded

Associate Professor Barnett, who is associated with Voices of the Valley, in his third and fourth reports dated 15 and 25 September 2015 has sought to respond, at least in part, to significant short-comings identified in his previous reports after the hearings in relation to TOR6 were conducted on 1-3 September 2015, and concluded with Submissions on 9 September 2015. As we noted in our letter dated 6 October 2015, it was expressly stated by the Chairman at the conclusion of the hearing on 9 September 2015 that there were to be no further hearings in relation to this matter.

The fact that Associate Professor Barnett subsequently advised that for his own reasons he wishes to go public with further attempts at developing his statistical hypothesis is not a good reason to admit further reports by him and to convene a further hearing within an unreasonably short time frame in relation to them.

This is especially so given the piecemeal and unsatisfactory way in which information relating to the further reports has been provided (see further below), and the fact that the reports themselves appear still to be evolving.

The inappropriateness of the course that the Board proposes to follow is also exposed by the fact that as shortcomings are identified with Associate Professor Barnett's third and fourth reports, and his subsequent explanatory analysis (as circulated by the Board on 10 October 2015), it is to be expected that yet more reports will materialise from Associate Professor Barnett. Therefore there can be no confidence that the circumstance which you state in your letter dated 8 October 2015 that the Board wishes to avoid by admitting this new material will not eventuate anyway.

2. The involvement of the other invited experts

In our letter dated 6 October 2015, we highlighted the unfairness of the process specified by the Board whereby it was proposed to question the other three invited experts about the additional Barnett reports at the hearing on 15 October 2015 in circumstances where our client had no indication as to the evidence that they might give until the hearing itself, particularly in relation to Professor Gordon and Dr Flander.

In your letter dated 8 October 2015, you stated that the Board "*acknowledges [our] concerns*" and therefore had "*determined that it will only hear from Associate Professor Barnett and Professor Armstrong at the hearing*" on 15 October 2015, on the basis that a supplementary report was being sought from Professor Armstrong which would be provided to us as soon as you received it.

Irrespective of whether this course would have adequately dealt with the unfairness we identified (which we do not accept would have been the case), it is clear from your email that the Board has now reversed its determination, and has reverted to its previous position of seeking further evidence from all four invited experts on 15 October 2015, notwithstanding the previously acknowledged concerns.

No explanation for this about face is provided, and nor is there any reference in your email to your letter dated 8 October 2015. There is also no reason offered as to why the concerns which were acknowledged in your letter dated 8 October 2015 are now to be ignored.

Your email states that Dr Flander and Professor Gordon have each been requested to provide a "short" report by this afternoon, and that Professor Armstrong has been requested to provide further comments on the most recent analysis by Associate Professor Barnett within the same time frame. It is also stated that Counsel Assisting intends to tender each of these documents, even though the documents themselves have not as yet been produced.

The position is that as at the time of this letter, we have received none of this material. For the reasons we have stated previously, to receive reports and material of this kind effectively one business day before the hearing on a matter as important as the present one, and to be expected to deal with this material on 15 October 2015, is unfair and a denial of procedural fairness.

Whilst on the topic of the experts, we note your comments in your 12 October 2015 email relation to the suggestion by the solicitors for Dr Lester that Professor Abramson be invited to participate in any expert panel in relation to Associate Professor Barnett's new reports, and the statement that the Board declines this suggestion. For our part, we do not understand why the Board would wish to deny itself material and potentially important evidence from someone well qualified to provide that evidence, particularly where the Board is required by the TOR to have regard to any relevant evidence. Now that the daily data for deaths in all eight postcodes for the 2009-2015 years as sought by the Board is available (as to which we further refer below), it can be reviewed by him. To deny that input is difficult to comprehend.

3. Hearing the matter on 15 October 2015

In your letter dated 8 October 2015, you state that 15 October 2015 is the latest date on which the hearing can be held in light of the Board's reporting deadline of 1 December 2015. The reasons for this are not explained.

Even so, to conduct a hearing on this date in relation to the further reports of Associate Professor Barnett circulated for the first time on 30 September 2015, and to hear evidence from the three other invited experts on the same day from whom foreshadowed further reports and material have not yet been provided, is inappropriate and unfair.

This is for a number of reasons.

- (a) First, insofar as the further reports of Associate Professor Barnett are concerned, you will appreciate that the 15 day period referred to in your letter in fact comprises only 9 business days. This is an insufficient period to accord procedural fairness, the more so given the reports themselves have been subjected to subsequent further enquiry from Professor Armstrong.
- (b) Second, the further information which was sought by our client in relation to the further reports of Associate Professor Barnett was only supplied on 8 October 2015, five business days prior to the hearing.
- (c) Third, the piecemeal and incomplete manner in which information is being provided for the purposes of the hearing on 15 October 2015 is most unsatisfactory and significantly impairs the ability of our client to understand and assess Associate Professor Barnett's further reports. This information provision involves the as yet incomplete to-ing and fro-ing between Associate Professor Barnett and Professor Armstrong, and the remaining reports and other material of the other invited experts which are yet to be provided.
- (d) Fourth, a feature of the way in which TOR6 has been dealt with has been the late provision of expert material and of data to which the experts have had regard, which has compromised the ability of our client to interrogate the material and respond to it. This was a matter raised in detail in our client's Submissions on 9 September 2015 in relation to the expert reports and other relevant materials (such as the monthly and daily death data in relation to certain postcodes) which were only provided to our client between 1 and 4 business days prior to the substantive hearings in relation to them on 1-3 September. The same situation applies in relation to the new reports of Associate Professor Barnett, his subsequent further analyses and explanatory material, and the foreshadowed further reports and associated material from the other experts.
- (e) Fifth, and irrespective of any other issues in relation to the new reports of Associate Professor Barnett, the reports are prepared on the basis of incomplete data. Much is made of the assertion that daily death data was only first available to Associate Professor Barnett on 31 August 2015. However, by email dated 8 October 2015, the Board circulated updated and complete death records received from the Victorian Registry of Births, Deaths and Marriages in relation to eight (not four) postcodes for the period 2004-2015. It is not stated in the email when these records were received by the Board. Be that as it may, the fact is that the further reports of Associate Professor Barnett which the Board proposes to admit and hear evidence about on 15 October 2015 are based on four postcodes only and exclude data which is plainly material. For the avoidance of doubt, in relation to your email dated 8 October 2015, our client is not concerned by the proposed non-provision of data in relation to the small number of pending deaths to the invited experts, however our client considers that the complete death records for all eight postcodes for 2009-2015 should be (and should have been) provided to the invited experts.

- (f) Finally in this regard, we note that in reply submissions at the hearing on 9 September 2015, Counsel Assisting suggested that if a party was embarrassed or put in a difficult position by the late provision of material, "then the way one responds to that is to ask for additional time". We must confess that we doubted that this was being put seriously by Counsel Assisting given the way that hearing dates have been prescribed for the purposes of this Inquiry (and the previous one), however it is plain from your letter dated 8 October 2015, your email dated 12 October 2015, and other related correspondence that there is little point in seeking additional time in relation to the hearing which the Board has stated is to take place on 15 October 2015.

For all of the foregoing reasons, our client maintains its objection to the Board admitting the further reports of Associate Professor Barnett and further reports, material and evidence of the other invited experts, and to the Board conducting a hearing in relation to the further reports on 15 October 2015.

Yours faithfully

A handwritten signature in black ink, consisting of a stylized 'K' followed by a series of connected loops and a long horizontal stroke.