From:	Perry Maddocks Trollope
To:	Justine Stansen
Subject:	Hazelwood Mine Fire Inquiry II
Date:	Tuesday, 6 October 2015 3:09:16 PM
Attachments:	image001.png Ltr to Justine Stansen 061015.pdf

Dear Ms Stansen,

Please find attached our correspondence dated 6 October 2015 for your attention.

Kind regards,

Sent on behalf of Rob Perry - Partner

Leyanda Magodora Legal Administrative Assistant
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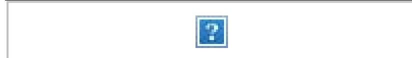

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PERRY MADDOCKS TROLLOPE

LAWYERS

Our Ref: RWP: 20150096

6 October 2015

BY EMAIL

Ms Justine Stansen
Principal Legal Advisor
Hazelwood Mine Fire Inquiry

Dear Ms Stansen,

Hazelwood Mine Fire Inquiry II
(Dr Rosemary Lester)

We refer to your letter of 30 September 2015.

Our client opposes the re-opening of Term of Reference 6. Associate Professor Barnett had ample opportunity prior to and during the course of the hearing to consider the daily death data and to give an opinion based on that data but he did not do so, nor was he asked to do so by Counsel Assisting. It is too late now for this to occur, prejudices the other represented parties and may undermine the evidence that has already been adduced concerning this term of reference.

When Assoc Prof Barnett's email of 11 September 2015 was received, he should have been informed that the Board would not accept further evidence or opinions from him because the evidence and final submissions for Term of Reference 6 had concluded. 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.

Assoc Prof Barnett has known since at least December 2014 that his analysis could have been improved if he had examined daily death data instead of monthly data (see p 9 of his December 2014 report). In cross-examination and in the course of the hearing, the limitations of his analyses were apparent again. For example in cross-examination, Assoc Prof Barnett agreed with Mr Neal QC's suggestion that the analysis would be improved by

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removing the deaths that happened before the fire (at T 562:20 – 20). Assoc Prof Barnett also agreed that monthly data is relatively crude compared to daily death data (T 562:30 – T 563:9). This observation was also made by Prof Gordon on day two of the hearings (T 497:28 – 31). Assoc Prof Barnett's email of 11 September 2015 to you also acknowledges these limitations.

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.

Although the Inquiry is not bound by the rules of evidence, we draw the Board's attention to the comments of J Forrest J in *Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 31)* [2013] VSC 575 at [252] to [255]. Re-opening Term of Reference 6 in the manner proposed will suffer from similar problems as those identified by J Forrest J including:

1. the planning and conduct of Term of Reference 6 has already taken place;
2. other experts including Dr Flander, Prof Gordon and Prof Armstrong had regard to Assoc Prof Barnett's analyses in formulating their own opinions, which influenced the manner in which they approached the joint expert session and report – their reports now need to be redrawn.

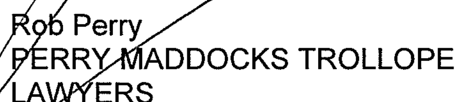
Further, in circumstances where Counsel Assisting has now called for adverse findings against Dr Lester, re-opening the evidence after final submissions results in a stark lack of procedural fairness to her, given the approach to Term of Reference 6 was conducted on the basis of the evidence that existed at the time of the hearing, and the final submissions which followed. The same problem arises for other counsel and represented parties. My client is also now overseas and will not return until 21 November 2015.

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)?

It is simplistic and unfair to suggest that a short hearing involving four of the experts followed by short further submissions can cure this prejudice. Further, every time a further statistical analysis takes place with slightly different parameters, this undermines the confidence in other analyses that have been put before the Board previously. Dr Flander acknowledged this problem in her evidence (T 499:8 – 25).

In those circumstances, we urge you to reconsider your decision to re-open Term of Reference 6 and suggest that you seek submissions from each represented party to Term of Reference 6 before finally deciding whether to do so.

Yours faithfully,



Rob Perry
PERRY MADDOCKS TROLLOPE
LAWYERS