

Counsel Assisting Opening Victorian Bushfires Royal Commission 20 April 2009

One can lose count of the number of major inquiries and reports, of one form or another into bushfires in Australia in recent years.

Victoria has produced an inquiry and report into the 2003 bushfires, a report concerning the 2006 bushfires. The Auditor-General reported on the 2003 bushfires, there has been an inquiry into the impact of public land management practices on bushfires in Victoria.

There has been a Commonwealth Parliamentary Inquiry into fire, a COAG report on fire, NSW, South Australia, Western Australia have produced significant reports on fire, the list of inquiries, reports is long, the recommendations many.

Yet despite the reports and inquiries and recommendations in such a relatively short period of time on 7 February 2009 this State suffered a fire catastrophe – for the nation it's greatest peacetime disaster. 173 people dead, thousands of homes destroyed, public buildings and communities devastated.

The countryside bears the stigmata of the fires but already charred paddocks are turning green, infrastructure has been replaced, building has started, yet the human cost, the permanent scarring of individuals, the loss to families and communities is something that can never be replaced or rebuilt. The loss, that human cost is enormous. I know this to be a fundamental concern for you, the Commissioners, that this aspect is fully represented in the course of evidence before the Royal Commission.

And the response of the Victorian Government, – another inquiry – a Royal Commission – at great expense to the community – that will run over a lengthy period of time. You Mr Chairman have indicated in your opening

remarks that the concentration and priority for the Commissioners will be to issues that save lives.

If you, the Royal Commissioners, can examine what will be an enormous body of evidence and as a consequence of that examination cause to be brought into existence practical recommendations and procedures the implementation of which will assist in the saving of lives, avoiding the catastrophe of Black Saturday, then this further inquiry and expense will be justified.

To achieve findings and make recommendations that will save lives the Royal Commission will need to rigorously examine the events and circumstances of 7 February 2009. The warnings, the policy behind the warnings, the management of the fires on the day, the communications.

From the point of view of Counsel Assisting the word "rigorously" is used deliberately; unless we have complete understanding of what went well and what did not go well, unless the policies that are the foundation for the bushfire response are examined rigorously and tested then the object of this Royal Commission, to save lives in the future, will be defeated.

Let me at the outset refer to the role of Counsel Assisting the Royal Commission. Our basic function is to place before the Royal Commission the evidence that permits you, the Commissioners, to make findings and recommendations concerning the terms of reference that govern the hearings of the Royal Commission. Of necessity that role will require the testing, the cross examination and presentation of evidence of numerous witnesses.

For those that are to come before the Royal Commission it needs to be said this approach is not for the purpose of attributing blame or fault; Counsel Assisting undertake the task recognising that all those involved from the highest management to the fire fighter on the fire ground were motivated by the common cause of saving life, and lives were saved.

Yet the actions and activities of all need to be examined. Where there was failure or mismanagement it must be identified. Witnesses will be questioned

and tested for the purpose of ensuring that in this open inquiry all relevant matters and issues are before you – for the preservation of lives.

In one way Victoria could not have been better warned of an impending bushfire disaster.

Evidence will demonstrate a decade of drought. In January of 2009 much of Victoria experienced it's lowest January rainfall on record. By way of example Melbourne received 0.8mm against a long term average of 47.6mm. The dry continued into the first week of February.

In late January the evidence will record Victoria suffered a heatwave, an exceptional heatwave impacted on South Eastern Australia. Days where temperatures in excess of 40 degrees were a feature of this heatwave. On 7 February 2009 the State sweltered with localities across the State recording the highest recorded temperatures since records began in 1859. Temperatures in the mid to high 40s and wind speeds in excess of 100 kilometres per hour created a lethal bushfire mix.

“The rich plains denied their beneficent rains lay bare and baking; and the forests, from the foothills to the alpine heights were tinder. The soft carpet of the forest floor was gone; the bone dry litter cracked underfoot; dry heat and hot dry winds worked upon a land already dry, to suck from it the last, least drop of moisture.”

This description of the State in January 1939, graphically described by Justice Stretton also exemplifies the conditions of the State 70 years later, the precursor to “the worst day [of fire conditions] in the history of the State”.

All this was known – Mr Russell Rees, Chief Fire Officer of the CFA was quoted in The Herald Sun on 6 February 2009 as follows:

“When we compare the weather that is forecast for this Saturday as against some of the classic fire days of this State’s history ... (it) is in fact worse”.

- all the media of the day, television and radio told of the potential risks of the day ahead.

The evidence to be put before the Royal Commission will demonstrate that the cornerstone of bushfire warning policy for the Victorian Community, and indeed across jurisdictions in Australia, is the so-called "Stay or Go" policy.

An examination of warnings and the Stay or Go policy associated with those warnings will be the focus of the first block of hearings of the Royal Commission commencing on 11 May 2009.

The evidence to be led in the week commencing 11 May 2009 will be a basic overview of the fires. The fires will be identified, the timings related to the fires, the intensity of the fires, the effect of wind and the south westerly change on the fires will be identified. Counsel Assisting anticipate this evidence will be detailed and non-controversial giving the Royal Commission a foundation of evidence as to the progress of individual fires.

After this initial evidence an examination will be conducted of warnings. Warnings given to the community in the lead up to and on 7 February 2009. The information contained in those warnings will be scrutinized. The warnings will also be evaluated in the context of the Stay or Go policy. The effectiveness of warnings, the way in which individuals in the community understood the warnings given will be led in evidence.

An example of the issues under this heading to be examined is the potential for confusion and misunderstanding of this bedrock policy.

The evidence will disclose that warnings in relation to Stay or Go were issued with the declaration of Saturday, 7 February 2009 being a day of total fire ban. The Bureau of Meteorology warned of "strong winds and extreme low relative humidity and extreme fire weather". Advice as to preparation of "bushfire plan" was given.

Thus the decision required of an individual was whether to leave early or stay and defend his or her home implementing an individual's "bushfire survival plan".

But what does leave early mean? On one view it means leaving before 10am on the day of a total fire ban. That has been put forward in some of the material provided by various authorities.

The CFA Bushfire Plan Workbook for 2008 describes it thus:

"CFA recommends that if you plan to leave your home you must do so before a fire threatens and road travel becomes hazardous. If a fire is burning nearby, or is likely to threaten roads you have to travel on, then leaving late is a deadly option."

In deciding to leave before "fire threatens" the individual on one view needs information about the fire or fires. At 10 o'clock, even midday, in the morning on 7 February 2009 there was little fire activity in Victoria. There was no reported fire in Kilmore East, Horsham, Kinglake, Marysville, Strathewen, Calignee, Bendigo, Coleraine.

The Australian Fire Authorities Council in propounding the Stay or Go policy has stated that:

"Access to accurate and timely information during periods of high fire danger and fire events is crucial to enable people to make appropriate decisions concerning their safety."

Another researcher who will be called to give evidence before the Royal Commission has suggested communication of triggers for people to leave early but "that it is critical residents are able to identify appropriate times of when to leave, which includes knowing when it is too late and therefore dangerous to leave their property".

There will be evidence to suggest that accurate and timely information was not available during 7 February 2009. Why would a resident of any of the fire

affected regions implement the "Go" part of the policy if they were not aware of any fire threat? Evidence will demonstrate people remained in their homes unaware of approaching fires until it was too late. On the other hand persons who chose to stay and defend property did so entirely unaware of the severity, the extremity, the intensity of the fires they would face.

This situation existed despite the rating given to 7 February 2009 on what is called the McArthur Forest Fire Danger Index. This is an index designed to measure the degree of fire danger. A rating of 12 to 25 on the index is considered high. A day having a danger rating over 50 is considered extreme. The index on 7 February 2009 reached previously unrecorded levels ranging from 120 to 180. These readings are higher than the Black Friday January 13, 1939 index reading of 100, higher than the Ash Wednesday Fires (Baverstock & Gill at 176).

Evidence will be called before the Royal Commission that a fire danger rating at these levels means where fire occurs it is likely to be of such intensity that the defending of a well protected home becomes a marginal proposition at least.

The intensity – the radiant heat of this fire was extreme. Fire intensity can be expressed in kilowatts per metre of fire perimeter. Maximum fire intensity in a worst condition scenario can reach in excess of 100,000 kilowatts per metre. Such a figure likely described the intensity of the fires on 7 February. Researchers indicate the maximum intensity for control of forest fires, by comparison, is about 4,000 kilowatts per metre.

The McArthur Forest Fire Danger Index predicted that not only would 7 February 2009 have the potential to be the worst day on record for bushfires but that the intensity of the potential fires would be such that it could not be imagined by our generation. Not only the intensity of the fire, the heat of the fire, but it's speed was phenomenal. Fire spotted kilometres ahead, fireballs seemingly of atomic force came before the fire. The fire did not discriminate between buildings of brick, timber or other construction; such fires create their own weather and are beyond the most sophisticated attempts to control them.

The evidence will demonstrate people made decisions in relation to Stay or Go with an unrealistic optimism having regard to the nature of these fires.

There was foreboding, even dread, as to what 7 February 2009 may hold, how did that potential fear translate into preparations for the day?

These issues raise for consideration preparedness, the performance of 000 emergency in handling calls on the day. The Royal Commission will be required to examine the performance of the 000 emergency system in the light of previous performances and previous recommendations.

Other issues relating to communication of warnings to be considered in evidence include the websites of major fire fighting organisations and the information they contained during the course of the day, the tracking of fires and the subsequent warnings based on that tracking, the ability to track fires at all, the communications between the integrated emergency co-operation centre in Melbourne and rural incident controllers and the communications between these controllers and local crews. The coverage of radio/television and mobile phones to enable the provision of information for some communities is a critical consideration.

As stated individuals need to act in the sense of go early, but that action is to be based on information they have to hand. Again the evidence will demonstrate the crucial need for accurate time and relevant warnings. Underpinning such warnings is the ability for agencies to rapidly analyse on the ground intelligence, to monitor risks as they emerge and develop, predict future impacts and point to the best course of action.

As stated for many people the only warning was the general warning of a day of total fire ban and extreme fire risk – such a warning can be a regular part of a hot summer and for many people the evidence will indicate such general terms of warning is not a trigger for “go early”.

The evidence will demonstrate, the less informed people are, the less likely they are to believe a threat and see the significance of any danger.

Evidence to be placed before the Royal Commission will indicate that the system of communication of warnings did not cope on 7 February 2009; that warnings fell behind the advancing fires and the impact on those fires of the south westerly wind change later in the day.

Warnings and information to the community will be a particular focus of the first batch of evidence.

The evidence to be called by Counsel Assisting will demonstrate that whilst people knew Saturday, 7 February would be a day of extreme risk they did not have an understanding that the risk, as the McArthur Forest Fire Danger Index indicated, carried with it the potential of a fire that could not be fought. The declaration of a day of "total fire ban" – a day of severe fire risk it may be thought did not adequately convey the real potential of the risk of Saturday, 7 February.

It is unclear who has responsibility for warnings in Victoria. The CFA has a statutory responsibility to issue notification of days of total fire ban but not warnings generally.

Further evidence will be led that terminology and phraseology of warnings is important. There is no nationally consistent standard message construction for warnings in relation to bushfires yet that consistency, the evidence will reveal, is important when it comes to appreciating and understanding the nature of a warning.

In 2004 a report into bushfires undertaken by COAG recommended that all fire ban advice and subsequent "bushfire threat warnings" relating to specific fires be conveyed consistently in all states and initiatives including the use of standard emergency warning signal or "SEWS" when lives or property are threatened. This signal alerts by public address, radio and television to those listening or viewing the emergency announcement. The impact of the signal is preserved by ensuring that it is used only for emergencies of real major community significance.

The recommendation appears to have been lost in a myriad of reviews and committees between State and Federal Government. It was not utilised in February 2009.

Another technique under discussion for a number of years prior to February 2009 between Federal and State Governments is the common alerting protocol or "CAP". This is a protocol providing a template for effective warning messages based on best practices identified by academic research and practical experience. Using a standard message format, an authorised warning message can simultaneously be issued in a community using multiple means – the reach and reliability of the warning dissemination is increased, people can corroborate the message through multiple warnings increasing the likelihood that the message will be acted upon.

There will be evidence that Australian bushfire policy is unique.

"Rather than attempting to evacuate all those who may be in the path of a bushfire, fire authorities in all States allow the public to make a choice: either get out of the area early, or prepare to stay and defend homes and property from the fire. In other countries with a high bushfire risk, such as the USA and parts of Europe, evacuation is still seen as the safest emergency management approach."

There will be evidence of policy adopted in Californian bushfires. In major fires that destroyed 3,069 homes in October 2007 close to one million California residents, 350,000 homes, were evacuated. 10 people were killed as a consequence of these fires, three whilst evacuating and four from fire siege events.

Is an evacuation policy suitable in Victoria for specific bushfire days? Should specific areas be identified as areas requiring evacuation on specific bushfire days? Do specific bushfire days require a different approach – a different policy to the current Stay or Go alternative?

Some particular areas of this State as a consequence of habitat and topography, the evidence will demonstrate, are indefensible from a fire fighting

point of view thus the issue of evacuation will be one directly raised for consideration for the Royal Commission.

The issue of fire refuges (refuges being generally speaking buildings, large open spaces, beaches) is also a matter for consideration upon the evidence that will be led before the Royal Commission. Refuges were recommended in the Ash Wednesday Fire Report. During the 1980s fire refuges were maintained by local councils but over time they have generally been decommissioned. Questions as to uniform standards, the legal liability of local councils who maintained them and the risk people may drive to refuges in dangerous circumstances have been raised as reasons for decommissioning.

There remains a level of uncertainty in the community as to the existence of fire refuges in municipal districts. At this stage of investigations Counsel Assisting have not been able to identify any municipality with a fire refuge that is CFA compliant.

The issue of whether fire refuges in the overall scheme of emergency response to fires have a place will be one for consideration by you on the evidence that will be put before you.

The evidence that will be led in the first block of hearings Counsel Assisting expect will enable a basis for submissions to you for the preparation of an interim report; the evidence may permit the Royal Commission to make findings and recommendations concerning the communication of warnings generally, the better defining of the Stay or Go policy so as to achieve greater clarity as to the options it provides, particularly in relation to the "Go" option. It is hoped the Royal Commission will be in a position to make findings and recommendations as to the use of the fire indices particularly as they relate to extreme fire weather conditions. Further it is hoped the Royal Commission will be in a position to make findings and recommendations as to SEWS/CAP.

Whilst the issue as to the overall utility of retaining the Stay or Go policy against evacuation or other fire emergency response will be referred to in this first block of hearings Counsel Assisting perceive the restraints of time and evidence will mean that an overall assessment of the scheme and whether it

should be replaced by some other scheme will not be a matter that can be the subject of findings and recommendation in the interim report nor in time for implementation in the 2009/10 bushfire season.

Just what has been outlined thus far underscores the enormity of the task of the Royal Commission. The Terms of Reference raise other issues of great importance to life that must be addressed by the evidence.

The issue of prescribed burning is one that will be addressed in evidence before you. Submissions received thus far by the Royal Commission demonstrate a range of strongly held views in relation to this contentious subject.

Counsel Assisting will call evidence as to the nature and extent of prescribed burning carried out over recent years in Victoria and whether targets have been met.

The purpose of prescribed burning is not to prevent fires from occurring but to reduce intensity of fire, rate of spread, difficulty of suppression and potential damage incurred as a consequence of fire. It has been said "once a fire has started, fire intensity and the speed in which fire spreads are affected by fuel loads. Of three factors influencing fire behaviour, the quality and arrangement of fuel is the only factor that can be altered by man before an unplanned fire starts."

DSE has a legislative responsibility in Victoria for fire prevention and suppression on public land including State Forests and State Parks and National Parks and wilderness areas. The duty is described in S61 of the *Forests Act*:

"... to carry out proper and sufficient work for the prevention and suppression of fire in every State Forest and National Park and on protected land ..."

An examination will be undertaken as to how that obligation has been met over recent years in the lead up to February 2009.

On a higher level there will be evidence put before the Royal Commission directed at investigating the effectiveness of fuel reduction in fire management. It is a complex issue. The issue is additionally complicated by the urban bush mix of many of the high risk bushfire areas. Other matters to be addressed in relation to this issue include questions of adequate resources, adequate experience. The issue is, of course, of great importance to those that the Victorian community calls upon to fight its fires.

The planning regime in Victoria will be considered in evidence. Victorian planning provisions are regulated by the Department of Planning and Community Development and by DSE and local government.

The evidence will demonstrate these provisions allow removal (without permit) of native vegetation for purposes of fire threat to a distance of 10 metres from a building used for accommodation. Native vegetation does not include a tree. A permit is not necessary to lop a branch off a tree overhanging the roof of a building providing the building is used for accommodation and the branch is removed for the purposes of fire protection. A permit, apparently, is necessary if one wants to remove part of an overhanging tree for a building that is not used for accommodation.

Within 10-30 metres of the building used for accommodation a permit is not necessary for the removal of native vegetation other than a tree provided 50% of native shrubs are kept and native grasses are kept to at least a height of 100mm.

Beyond 30 metres significant plans and explanation must be provided in relation to clearing around homes and building structures.

There is potentially another layer of regulation that must be complied with depending upon the municipality in which one lives. Many municipalities in high risk bushfire areas have a Land Management Overlay, an Environmental Significance Overlay, a Vegetation Protection Overlay, a Wildfire Management Overlay. On their face the planning provisions appear complex and bureaucratic.

A number of submissions have been received from organisations and individuals in relation to these matters. They will be examined by Counsel Assisting for the purpose of calling evidence. Others also will be approached to give evidence on this topic.

Intertwined with planning is the topic of building and fireproofing of housing and buildings. In excess of 2000 homes were destroyed in these fires, 3500 building structures of different types were also destroyed.

The evidence will disclose that a national standard in relation to the construction of buildings in bushfire prone areas has been under review for a number of years despite the recommendation of the House of Representatives Select Committee Report on Fires in 2003 that it be completed as a priority. The National Standard was adopted less than a month after 7 February 2009, on 5 March 2009. The Standard formed the basis of the recent State Government Building Regulation Amendments.

However the National Standard does not cover what may be thought to be important issues in relation to building in bushfire prone areas. Issues that are not covered include matters such as building maintenance, egress both before and after the fire, bunkers, power and water supply. Thus questions as to the adequacies of the standard and the issues not covered by the standard will arise for consideration of the Royal Commission.

As stated some evidence will reveal that it appears the fire did not discriminate between structures. The Royal Commission will have evidence indicating homes recently built to the highest standards in relation to fire protection burned to the ground.

Extensive analysis is being undertaken for presentation to the Royal Commission by way of evidence in relation to the impact of these fires on homes and buildings, on a street by street basis to assist the Royal Commission to make findings and recommendations in relation to building codes.

The Terms of Reference require an examination of the causes of bushfires which burned across Victoria. Evidence will be led in relation to this important aspect later in the hearings of the Royal Commission. Some of the fires are still being investigated in relation to cause by police.

Another topic standing on its own is the overall response to the fires by various agencies and instrumentalities. Road blocks and infrastructure replacement.

I have attempted in this opening to identify some of the major issues to be considered over the course of the Royal Commission. I do not pretend each issue is dealt with in this opening. Yet it is apparent just on this brief summary the enormity of the task that lies ahead.

As you have stated constantly since your appointment Mr Chairman the Commissioners have a strong desire that those most affected by these fires have the opportunity of ensuring their experiences and concerns are put before the Royal Commission.

On a practical level the implementation of that desire is perhaps demonstrated by the fact that the Commissioners have undertaken, in the relatively short time since appointment, 26 community consultations, seen over 1000 people in an effort to identify the concerns and issues of many hundreds of people affected by fire. The summaries of those consultations are now posted to the website of the Royal Commission. This information provides a focus for Counsel Assisting in its continuing investigations and obtaining of evidence.

Evidence of individuals, from those most closely affected by fires as I hope has become apparent from this opening will be of great importance not only in providing you the Commissioners with an understanding of the impact on individuals but also a practical base of evidence for findings and recommendations.

Counsel Assisting as a consequence of the consultations, the receipt of individual submissions to the Royal Commission and from other investigations being undertaken are in the process of identifying witnesses that will be called

to give evidence before the Royal Commission to ensure this evidence is thorough and comprehensive.

Written submissions from persons impacted by fire provide an ongoing mechanism by which those affected can bring to the attention of Counsel Assisting relevant evidence.

The approach taken by you, the Commissioners, to community consultations was legally novel. It was criticised in some legal circles because this type of approach had not been undertaken before; as you Mr Chairman have constantly been at pains to state, information received was not evidence. Yet the consultations in so many ways, in identifying individual issues and concerns relating to the Terms of Reference, has been invaluable.

Counsel Assisting will endeavour to identify other methods and channels that may be considered novel for the identification and provision of evidence during the Royal Commission that will not only ensure individual voices are heard before the Royal Commission but ensure as far as possible the efficient management evidence and utilisation of resources – a high consideration if this Royal Commission is to report on time.

I should also address the issue of “leave to appear” before the Royal Commission hopefully to clear up any misunderstanding there may be around what this legal term means.

In general terms leave to appear is granted to a person or entity whose conduct is under scrutiny by way of evidence before the Royal Commission particularly where there is potential for such person or entity to be criticised in evidence or by finding. In such circumstances the person, as a matter of procedural fairness, where possible, needs to be informed of such evidence and given the right to “appear” in the legal sense represented by Counsel to cross examine and to explain.

It needs to be understood that where “leave to appear” is not granted to an individual this does not mean such person will be denied the opportunity of giving evidence or as some have put it, shut out of the Royal Commission.

On the contrary, persons are being identified to ensure such evidence is presented to the Royal Commission. The engagement with the community commenced by the Commissioners will be carried through into evidence.

I referred briefly, earlier in this opening, to the role of Counsel Assisting. It has been said in a Royal Commission of this nature that in some ways Counsel Assisting, in presenting the evidence, in cross examining, in investigating represents the public interest; it is a role Counsel Assisting will fulfil in this Royal Commission.

A related topic concerns the independence of the Royal Commission. The Royal Commission operates entirely independently; particularly, it needs to be emphasised, it is independent of government. Indeed the conduct of government and government agencies will be the subject of scrutiny in this Royal Commission. There should be no misunderstanding that scrutiny and investigation will be thorough and objective. In relation to openness of the inquiry it should be stated that the Commissioners have taken steps to put in place arrangements previously not seen in this state to have proceedings streamed online. Transcripts of evidence will be posted to the website as soon as possible after daily proceedings.

In my concluding remarks I briefly look ahead. Counsel Assisting propose presenting the evidence to the Royal Commission in blocks. The first block of hearings to commence on 11 May will run for some eight weeks. As indicated this evidence will be primarily concerned with warnings. It is a tight schedule. If time permits evidence will be called in relation to building regulation.

In due course a plan in relation to other blocks of hearings will be identified and published. It is proposed for some topics the Royal Commission will issue discussion papers identifying issues relating to identified topics and those of particular interest to the Royal Commission. The discussion paper will call for written submissions in relation to those issues and it is hoped this process will assist in the identification of all relevant points of view for the purpose of distillation and presentation in evidence to the Royal Commission.

The presentation of the evidence over a long inquiry is difficult. The obligation falling on Counsel Assisting is great. We seek the co-operation of all, particularly those who may represent a particular interest or group to provide information, to inform Counsel Assisting of lines of inquiry that may be relevant to the Terms of Reference.

I conclude this opening where I started;

that the investigation and calling of evidence by Counsel Assisting is undertaken with a recognition that those responsible for fighting the fires and managing the response were motivated by the interests of the people of Victoria, often at risk of life; that this State's response to bushfire is dependent, largely, on a proud volunteer force, is recognised.

That said, to ensure the evidence permits you, the Commissioners, a full understanding of events, circumstances and policy and to enable you to be in a position to make findings and recommendations to avoid loss of life in the future Counsel Assisting will investigate and produce evidence with the thoroughness and rigour that would be expected in the circumstances of an inquiry, established as a consequence of the loss of 173 lives, – Australia's greatest peacetime tragedy.