

# The legal powers and potential cultural impact of the 2009 Bushfire Royal Commission in Victoria

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Royal Commissions have had an important role in the Australian federation and over 1000 (Borchardt 1990) have been conducted in Australia up to 1990.

Royal Commissions also have the emotional role of catharsis of some anger for some individuals. The grief and loss experienced and the stories told in Royal Commissions can become part of the cultural identity of a nation and hence have a cultural role. All Royal Commissions are investigative bodies whose power to report is capable of damaging or prejudicing the rights, interests or legitimate expectations of many people. (*Firman v Lasry 2000 VSC 240* page 9). However, the investigative powers are generally administered formally and there are limitations on these powers.

Royal Commissions have been conducted by State governments alone, State and federal governments together and by the Commonwealth alone. They are often controversial as in *Firman v Lasry 2000 VSC 240* addressing fraud and illegality as in the Victorian Royal Commission on the Metropolitan Ambulance service. There have been many Royal Commissions on fraud and illegality of business and individuals. Royal Commissions or Inquiries have also often been called after bushfires, notably in 1939 in Victoria and several other times in all Australian States. Such Royal Commissions then have had a key role in shaping our democracy and telling stories about relations of people to nature in the case of natural disasters and between people and institutions for the investigations of fraud.

The Australian Law Reform Commission considers that Royal Commissions exist when there are controversial matters that cannot be handled by a Court or by the political process. Often, as with the Bushfires 2009 Commission, there is a need to answer a series of questions and a formal process is required to gather evidence to answer such questions. The answers can lead to law reform and policy changes.

For example, the 1939 Bushfire Royal Commission, under the fearless Leonard Stretton, led to the widespread use of systematic fuel reduction and a new organisation—the Country Fire Association (CFA) which was formed in 1945. (Australian Dictionary of Biography online edition).

## Questions and powers to make recommendations

In the case of the 2009 bushfires the questions asked of the three Commissioners are broad and detailed. The Governor acknowledges the role of existing organisations but asks these questions:

1. What were the causes and circumstances of the bushfires that burned various parts of Victoria?
2. What were the preparations and planning by Governments, emergency services organisations, other entities, the community and households for bushfires in Victoria, including current laws, policies, practices, resources and strategies for prevention, identification, evaluation, management and communication of bushfire threats and risks.
3. What were the aspects of the response to the 2009 bushfires, particularly measures taken to control the spread of fires and measures taken to protect life and private property and public property, including but not limited to:
  - (a) immediate management response and recovery;
  - (b) resourcing, overall co ordination and deployment; and
  - (c) equipment and communications systems?
4. What were the measures taken to prevent or minimise disruption to the supply of essential services such as power and water during the 2009 bushfires?
5. What are any other matters deemed appropriate in relation to the 2009 bushfires?

Furthermore, the 2009 Bushfire Royal Commission is obliged to make recommendations in relation to a broad set of long term issues. These are:

1. The preparation and planning for future bushfire threats and risks, particularly the prevention of the loss of life.
2. Land-use planning and management, including urban and regional planning.
3. The fireproofing of housing and other buildings, including the materials used in construction.
4. The emergency response to bushfires.
5. Public communication and community advice systems and strategies; and
6. Training, infrastructure and overall resourcing needs.

The Royal Commission is directed to take into account and consult the Coroner, the Victorian police, the Director of Public Prosecutions and the Victorian Bushfire Reconstruction Authority. The Commissioners have full power and authority to call before it any persons that they judge shall be able to afford any information on the 2009 Bushfire.

Royal Commissions in Victoria are empowered under section 88B of the *Constitution Act 1975* and all Royal Commissions are placed under the supervisory jurisdiction of the Supreme Court to ensure procedural fairness. There is also a separate law designed to deal with evidence given to Commissions in Victoria the *Evidence (Commissions) Act 1982* and the ambit of this will be tested.

So what lessons are there from past practices in running Royal Commissions in Victoria and in NSW and at the national level Australia under the *Royal Commissions Act 1902 (Commonwealth)* which is up for review as of January 2009?

The issues have been:

1. The scope of the reference.
2. The powers to compel the provision of information.
3. The power to report instances of behaviour which can prejudice a person in many ways, i.e. to criminal investigation bodies.
4. The public nature of the evidence taken especially if recording is to be allowed.
5. Whether contempt of the Royal Commission can occur through publication of certain statements; and
6. If the rules of evidence are to apply.

Because of the difficult nature of the questions and reference it has become normal practice in Victoria to have legal practitioners assist the Commission and to cross examine witnesses *Bretherton v. Kay & Winneke [1971] VR. 111*. This process tends to push the processes toward formal rules of evidence.

## The outlook for the 2009 Bushfires Royal Commission

The scope is extremely broad and the powers to compel information are also broad. The words suggest that a steep change in the organisations maybe possible.

It is also a certainty that the Royal Commission will be an emotional time for the victims and their families and the broader community as the eye witness accounts of the events and the grief over lost family members, animals' livelihoods and cultural artefacts including homes becomes known. The question of why and how did this happen will resonate with grief and blame.

The delicate task will be to elicit many stories and then weave all these threads into one overarching story that has policy, legal and institutional ramifications. This story will change culture and lead to yet another iteration of laws, policies and management operations better able to address these events. The predictions of climate change scenarios suggest that these firestorm events will become more common and hence we need an adaptive cultural understanding of these events. This Royal Commission has great short and long term roles in modern Australia.

## References

Australian Dictionary of Biography online edition

Borchardt, D.H. (1990), *Supplement to Checklist of Royal Commissions, select committees of parliament and boards of inquiry, 1856-1980*, La Trobe University Library, Bundoora.

### About the author

**Jennifer McKay** is Professor of Business Law at the University of South Australia and was co editor of the *Economics and Bushfires the South Australian experience*, Oxford University Press on 1985. She has also written about newspaper reporting of bushfires on several occasions for academic journals. She now works on sustainable development law.