

FIRE UPDATE

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2009 VICTORIAN BUSHFIRES ROYAL COMMISSION



SUMMARY

Royal commissions are the most powerful form of public enquiry in our system. They have broad coercive powers of investigation, including the power to compel witnesses to give evidence and produce documents. Though not a judicial inquiry, royal commissions often adopt the external "trappings" of a court process. For example, it is common for witnesses to be cross-examined when appearing before royal commissions. Parties wishing to be actively involved in the Commission (such as by appearing before the Commission) may therefore find it extremely beneficial to obtain independent legal advice and assistance.

INTRODUCTION

The 2009 Victorian Bushfires Royal Commission (Commission) was established on 16 February 2009 in response to the bushfires that swept through parts of Victoria in January and February 2009. The combination of high temperatures, low humidity, high wind

speeds and years of drought resulted in bushfires that caused unprecedented loss of life and extreme property damage. On 16 February 2009, the State of Victoria appointed the Commission to inquire and report on the causes and responses to the January/February 2009 bushfires.

ROLE AND POWERS OF A ROYAL COMMISSION

Royal commissions are special investigatory bodies found in Westminster democracies. They are established to investigate specific issues or problems and are, therefore, temporary in nature. Royal commissions are established by *letters patent* issued by the Governor or Governor-General on the advice of the government.

Royal commissions are characterised by their open processes of investigation, the public release of their reports and collected evidence, public hearings and coercive investigative powers. They are also not bound by the rules of evidence as in a court, as royal commissions are not determining issues between parties

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but conducting a thorough investigation into a subject matter. However, the evidence gathered must be relevant to the terms of reference.

Royal commissions have a more prestigious status than other types of public inquiries and are generally only established in respect of issues of significant importance. They have been described as the 'most powerful and independent instrument of review'. Royal commissions have a 'special' status because they:

- have coercive powers of investigation conferred by legislation;

- are appointed by the Crown rather than elected officials;
- have a greater sense of independence, as members of royal commissions are drawn from outside of government;
- have often senior judicial and legal professional memberships; and
- have open processes.

The Commission can be generally described as an inquisitorial commission. The primary task of an inquisitorial commission is to assemble and verify facts, hear and cross-examine witnesses and make recommendations arising out of the inquiry. Royal commissions also sometimes allocate responsibility for a particular act or incident. Though the present Commission is not mandated this specific task (of allocating responsibility), it is also not prevented from doing so under the broad terms of reference set out in the letters patent (see below for a brief description of the Commission's terms of reference).

Each Australian jurisdiction has legislation which confers on royal commissions coercive powers. In Victoria, Part 1, Division 5 of the *Evidence Act 1958 (Vic)* (**Evidence Act**) confers on Victorian royal commissions a range of powers to collect and procure information and to make witnesses attend hearings and give evidence. The power conferred by the Evidence Act is also not limited by the letters patent, which grants the Commission 'full power and authority' to:

- call before it witnesses who the Commission considers are likely to afford it with any information related to the 'subject' of the Commission; and
- inquire into the matters (or 'premises') specified in the terms of reference 'by all other lawful ways and means whatsoever'.

Though the powers granted by the letters patent are broad and largely undefined, the 'lawful' powers that can be exercised by royal commissions according to the Evidence Act include the power:

- to summons any person to attend



the Commission at a time and place, and to give evidence and/or produce any document in that person's custody possession or control. However, the person cannot be compelled to answer any question and/or to produce any document that he would not be compelled to answer and/or produce at the trial of an action in the Supreme Court (s.17);

- to administer an oath and to examine upon oath any person so summoned

or who happens to be present before the Commission. A person who happens to be present before the Commission may also be called upon to give evidence and/or to produce documents (s.18);

- if the Commission reasonably considers it necessary, to (with the assistance it thinks fit) (s.19E):
 - enter and inspect any place and any document or thing in that place;

- make copy of any document the Commission considers is relevant; and
- take possession of any document or thing which the Commission considers relevant and may keep it until the Commission has completed its inquiry and report.

A person who fails to attend or produce any documents without reasonable excuse when summoned or called upon (upon happening to be present before the commission) is guilty of an offence and may be fined no more than 15 penalty units (currently \$1,701) or imprisoned for a term of not more than 3 months (ss.19 and 20).

The powers of the Royal Commission are generally confined to Victoria. Whether it is able to compel witnesses from outside Victoria to give evidence is a vexed question and is likely to depend upon the specific circumstances of the potential witness.

A person is not excused from giving evidence and/or the requirement to produce documents on the ground that:

- the evidence or document may tend to incriminate him or her. However, such evidence cannot be used against him or her in Court or form the basis of any prosecution or suit against him or her. (s.19C);
- the answer to the question or the document contains matters in respect of which the person could claim legal professional privilege (which is a legal rule that protects the confidentiality of communications between a client and his or her lawyer). The Commission may however exclude the



public, or specified persons, from a hearing if this issue arises (s.19D).

Unlike other types of inquiries, witnesses appearing before royal commissions can be publicly cross-examined by the royal commissioners (or counsel assisting) and counsel representing other interested parties. This adversarial approach is considered to reinforce the open, independent and investigatory nature of royal commissions. However, others are of the view that public cross-examination exposes innocent people to unsubstantiated and iniquitous allegations and scrutiny by over-zealous lawyers, necessitating the need for legal counsel to be engaged by all sides.

Despite the often adversarial approach of royal commissions, they are not 'judicial inquiries'. However, as they are often chaired by current or past judges or other senior legal professionals (as is the case here), royal commissions

often end up operating much (at least in appearance) like a court. In the present Commission, the Commissioners have also engaged the assistance of four barristers. This measure suggests that the present Commission, like others before it, will likely adopt an adversarial and legalistic approach to their investigative process, necessitating the need for independent legal representation for parties wishing to be actively involved in the royal commission process. Royal commissions are often expensive and take a considerable time. Once a royal commission is established, little action can be taken in respect of the area being investigated, until a report is released. This is most likely why the Commission has been commissioned to produce an interim report by 17 August 2009 that focuses on immediate actions that can be taken prior to the 2009-2010 fire season.

THE ROYAL COMMISSION'S TERMS OF REFERENCE

The Commission is established by letters patent dated 16 February 2009. The letters patent appoints the **Honourable Mr Bernard Teague**, a recently retired judge of the Supreme Court, **Ron McLeod**, who headed the ACT government inquiry into the operational response to the 2003 ACT bushfires, and **Susan Pascoe**, a Commissioner with the Victorian State Services Authority, as the Commissioners of the Commission. Hon

Teague is appointed as the Chairperson of the Commission.

The terms of reference as set out in the letters patent are broad. The Commission has been mandated to inquire into and report on:

1. "The causes and circumstances of the bushfires which burned in various parts of Victoria in late January and in February 2009 ("2009 Bushfires").

2. The preparation and planning by governments, emergency services, other entities and community and households for bushfires in Victoria, including current laws, policies, practices, resources and strategies for the prevention, identification, evaluation, management and communication of bushfire threats and risks.
3. All aspects of the responses to the

2009 bushfires, particularly measures taken to control the spread of the fires and to protect life and property, including but not limited to:

- (a) immediate management, response and recovery;
 - (b) resourcing, overall coordination and deployment; and
 - (c) equipment and communication systems.
4. The measures taken to prevent or minimise disruption to the supply of essential services such as power and water during the 2009 Bushfires.
5. Any other matters that [the Commission] deem appropriate in relation to the 2009 Bushfires”.

“The letters patent directs the Commission to conduct its inquiry as ‘expeditiously as possible’ and to provide to the State an interim report by 17 August 2009.”

The Commission has also been directed to make ‘such recommendations’ as it considers appropriate, including recommendations for governments, emergency services, other entities and the community on:

6. “The preparation and planning for future bushfire threats and risks, particularly the prevention of loss of life.
7. Land use planning and management, including urban and regional planning.
8. The fireproofing of housing and other buildings, including the materials used in construction.
9. The emergency responses to bushfires.
10. Public communication and community advice systems and strategies.

11. Training, infrastructure and overall resourcing needs.”

The letters patent directs the Commission to conduct its inquiry as ‘expeditiously as possible’ and to provide to the State an interim report by **17 August 2009**, focusing on immediate actions that can be taken prior to the next bushfire season, and a final report by **31 July 2010**. The date by which the final report must be produced may be extended according to the letters patent.

THINGS TO KEEP IN MIND

As inquisitorial inquiries are highly dependent on the evidence collected first hand from witnesses and, also in the present case, written submissions received, it is important that fire and emergency service organisations (ESO) and other interested entities become actively involved in the process in order that their views are heard and taken into account of.

It is therefore in ESO’s interest to be proactive in submitting written submissions to the Commission, seek leave to appear before the Royal Commission at the formal hearings and, if appropriate (therefore, if the ESO’s representative has lived and/or worked in fire-affected communities), attend community consultation sessions to become involved in identifying (and refining) the key issues for further research and investigation by the Commission (especially in the context where the terms of reference set out in the letters patent are extremely broad).

As the Commission has coercive powers to compel witnesses to attend a public hearing and to give evidence and to produce documents, ESO and other relevant entities may nevertheless be called upon to give evidence at formal hearings and/or produce documents, even if they do not take proactive steps to become involved in the inquiry.

• *This Fire Update does not constitute legal advice. If any ESO or other interested entities wish to become involved in the Commission process or are summoned by the Commission to give oral evidence and/or produce documents at the formal hearings, it is recommended that independent legal advice and/or assistance be sought.*

IMPORTANT DATES FOR GETTING INVOLVED IN THE ROYAL COMMISSION

- Written submissions to the Commission must be submitted by 4.00 pm on 18 May 2009 (see <http://www.royalcommission.vic.gov.au/Have-Your-Say> for further information).
- Applications to seek leave to appear before the Royal Commission at the formal hearings must be lodged by **4.00 pm on 9 April 2009** (see <http://www.royalcommission.vic.gov.au/Leave-to-Appear> for further information).
- Community consultations are being held at 12 different locations in fire-affected areas. Details of the consultations sessions can be found at <http://www.royalcommission.vic.gov.au/Community-Consultations>.

OTHER IMPORTANT DATES

- The Commission is to produce an interim report focusing on immediate actions that can be taken prior to the 2009-2010 fire season by **17 August 2009**.
- The Commission is to produce a final report by **31 July 2010**. However, this date may be extended according to the letters patent.

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