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AFTER THE FIRES DIE DOWN AND THE LAWYERS DEPART

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The Hon. Michael Kirby AC CMG

**AUSTRALASIAN FIRE & EMERGENCY SERVICE AUTHORITIES
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AUSTRALIA**

THURSDAY 9 SEPTEMBER 2010

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DEPART**

Plenary Conference Address

The Hon. Michael Kirby AC CMG*

THE SPELL OF FIRE

It is a timely reminder of the vital importance of the Australian Fire and Emergency Services Authorities Council that we meet here in Darwin in a week in which New Zealand has suffered the worst earthquake in 80 years. And when the State of Victoria, still reeling from the most devastating bushfires in its recorded history, has had to face the worst floods in 17 years. Those floods have left havoc in their wake and they threaten as we meet hundreds of homes, business and properties¹.

Once again, the powerful forces of nature have been manifested to us. Australasia is undoubtedly in a lucky position of the earth's surface – blessed with many natural and institutional strengths. But it is at times like this week that we are reminded of the fragility of human existence –

* Former Justice of the High Court of Australia (1996-2009), inaugural Chairman of the Australian Law Reform Commission (1975-84).

¹ *The Australian*, 6 September 2010, pp1, 7, 17.

even in lucky countries. And of the high dependence of us all on our emergency services when peril and danger strike.

As Euan Ferguson, now the Immediate Past President of AFAC, observed in 2009, “The last year has been a testing time for agencies”, across the continent “with many AFAC members managing the effects of fires, floods and storms that have fallen into the worst categories”². He went on:

“The effects of these events and in particular those of Black Saturday [7 February 2009 in Victoria] will mean that all agencies across Australia will be examining the way they do business and making changes to support the new climatic environment we find ourselves working in ... None of us needs to achieve this on our own, and the strength of collaboration that AFAC is based on has never been stronger than it has been shown over the last 12 months ... The fundamental bedrock of how we do business is being tested and we have been able to stand united and say we know where we need to improve and that we are capable of moving forward as one.”

Naomi Brown, AFAC’s CEO has remarked that, whilst every aspect of AFAC has been subjected to tests and scrutiny, it was the terrible fires that broke out in Victoria in February 2009, with the record consequential loss of 173 lives, and huge damages to property and infrastructure that truly placed the Australian system of fire and emergency services under exceptional pressure³:

“The announcement of a Royal Commission to examine the fires and specifically the ‘prepare, stay and defend or go early’ position, meant the very core of how AFAC members work with communities was under scrutiny.”

² Australasian Fire & Emergency Service Authorities Council (AFAC) 2009 *Annual Report*, p.5.

³ *Ibid*, p.4.

The central message that AFAC embraced in the face of these exceptional disasters was clearly right. It was the necessity to base all responses to catastrophe, submissions to the Royal Commission and statements to the media upon sound data. Not infotainment. Not demonisation of human actors who made human mistakes. Not the embrace of blame upon unknown pyromaniacs. But sound conclusions derived from good research and a thorough-going, professional understanding of the evidence. Lasting lessons can only be drawn, and strategic action derived, from accumulated, cruel experience. As Naomi Brown declared⁴:

“A significant piece of work undertaken in the last 12 months was the development of a new seven year research agenda for a proposed new co-operative research centre (CRC). While the bid for the new CRC ultimately proved to be unsuccessful, it is pleasing that the bushfire CRC has been funded to continue until 2013.”

This is the theme that should predominate throughout this conference. Recriminations, the blame game, easy solutions and denunciation of those who work to very tight deadlines, carrying very heavy workloads, may be the way the media and bloggers respond to natural disasters such as Black Saturday. Fortunately our society and bodies such as AFAC seek to build on sound evidence, to learn from mistakes and to accept the “systematic take-up of research from the bushfire CRC and other sources”.

This conference meets in the aftermath of Black Saturday and the painstaking report written by the Victorian Royal Commission chaired by the former Justice Bernard Teague⁵. Much of the impact of the Royal

⁴ *Loc cit.*

⁵ Victoria, Royal Commission into the Bushfires of 7 February 2009 (published 1 August 2010).

Commission's report, and a great deal of the power of its recommendations, derive from the meticulous accumulation of detail about what went wrong in the circumstances preceding, during and after the fires. A society that learns from catastrophes, that changes its laws, strengthens its infrastructure and repairs its mistakes is a society that deserves the respect of its people. To ignore the lessons of history is to condemn us all to repeat its mistakes.

FIRE AND HUMAN CIVILISATION

From the earliest days of recorded civilisation, human beings have enjoyed a love-hate relationship with fire. In traditional societies, fire was seen as the essential prerogative of the Gods. In Greek mythology, it was Prometheus who stole fire from Zeus and gave it to mortals. There are similar traditional stories involving the theft of divine fire in other communities, so that humans could use its benefits and tame its dangers. It is curious to observe this commonality of the fire-stealing tradition amongst indigenous peoples on completely different continents including our own. The stories show the long-standing fascination that human beings have felt for fire and the belief they derive from control over fire, as a god-like power, essential for the advancement of human civilisation.

Like it or not, we have to accept that fire has played a crucial role in human evolution. Indeed, the early capacity of humans to make, keep and utilise fire is now widely credited with advancing human civilisation in a particular but indirect way. The predecessors of our human ancestors, the Australopithecines discovered that the flesh of animals was improved greatly by subjecting it to fire. Cooking meat and other edibles, over fire, became a way of promoting two developments that

were vital for the historic ascent of man. The first was the capacity for humans to digest animal flesh and thereby to secure the rapid transference into the human organism of protein derived from flesh eating. These proteins, secured from cooked meat, are widely believed to have provided the human species with the vital nutrition that contributed to the rapid evolutionary expansion of the human brain. It produced the dominance of human beings over all other animal species, including over the vegetarian large apes that never made the leap to become carnivores because they never mastered the god-like control of fire for cooking.

Secondly, fire also contributed to human evolution by affording a safe and social environment in which this developing human species could evolve the societal interactions necessary for communal life around the joint business of cooking. Thus control of fire in the human species was not only the medium of large-scale transference of brain-building proteins. It was also the medium of encouraging social interaction, communal life, the building of homes, villages and towns, and the development of agricultural and, later, manufacturing communities⁶.

So quite apart from the peculiar importance of fire on the Australian continent, for the traditional lives of the Aboriginal people, fire has everywhere been a crucial element in the lives of human beings. Its importance depends upon staying in charge. Controlling and containing fire, utilising it but avoiding its perils, have been the challenges for humanity since the earliest days of civilisation. Every now and again, it is necessary for us to stop and consider such forces in our lives. To

⁶ R. Rangan, "Once You Had Communal Fires and Cooking and a High Calorie Diet the Social World of our Ancestors Changed", *New York Times*, 21 April 2009, p.D2. See Foreword to Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters 2010), vii at viii.

remember how crucial they have been to our evolution. And to appreciate that fire itself is not an enemy of humanity. It is uncontrolled fire that presents the dangers that we must address and tame if we, the humans, are to remain safe from fire's perils.

Anyone who has grown up in Australia knows how bushfires are a recurring feature of the hot spring and summer months. Most of us come to appreciate how fire serves a function as part of life of the unique flora and fauna across the Australian nation. The Aboriginal people used fire in grasslands for hunting purposes and for clearing tracks for human movement. In the records of Australian bushfires from the middle of the nineteenth century, there have been nearly a thousand fatalities, 10,000 injuries, and more than 30,000 Australians rendered homeless. Of the recorded fatalities, the numbers have definitely been creeping up from peaks of 12 deaths in Victoria in 1851 and 1898, to 60, 51 and 20 in the 1920s and 1940s, through to 75 deaths on Ash Wednesday in 1983, and 173 on Black Saturday in 2009.

The largest fires in recorded Australian history were in 1851 when a quarter of Victoria (5 million hectares) fell under fire; through to 7.3 million hectares in Queensland in 1974-5; 15.5 million hectares in Western Australia in 2003; 16 million hectares in South Australia in 1974-4 and four occasions in the Northern Territory since the 1960s where bushfires have burnt no fewer than 40 million hectares. However, whilst other parts of Australia have experienced a broader front, it is the intensity of the periodic fire storms in Victoria, propelled by the hilly nature of the terrain and the abundant vegetation and undergrowth, that together make Victoria the recurring chief target of bushfires imposing the largest impact on life, limb and property.

With emerging climate change, each season in recent years has brought similar reports of bushfires in the large vegetated areas of California and Russia. Still, it is the intensity and concentration of the bushfire experience in Eastern Victoria that has presented the major challenge that demands the taking of some tough decisions. Many of the decisions have to be made by those who work with emergency services. And by those who share the political and administrative responsibilities for such services.

THE LAW AND FIRE

Just as every religious and spiritual tradition has sought to explain fire as a danger, but also a divine gift, so every developed legal tradition brings forth principles that are designed to afford redress to those who suffer as a result of the wrongful spread of fire.

Under Roman law, where wrongful damage was done to property by burning, the offender was required to pay the value of the thing reckoned at its highest value at the moment of injury⁷. As Roman society, protected by Roman law, encouraged the growth of villages and towns, the dangers of escaping fire became increasingly a subject upon which law was expected to speak. So it also proved in the common law of England, from which the Australian common law is derived.

A special common law rule developed in England, relating to the liability of an occupier for any damage caused by the escape of fire from his

⁷ R.W. Leage (2nd Ed Ch. Zeigler) *Roman Private Law (Founded on the Institutes of Gaius and Justinian)*, Macmillan, London, 1948, 371. See also R.W. Lee, *The Elements of Roman Law with a Translation of the Institutes of Justinian* (4th Ed, 1956), Sweet & Maxwell, London, at p400 [§623.13], *Lex Aquilia* (Action for Damnum Injuria).

premises. This can be traced to a very early court decision in 1401 in the English Year Book record of *Beaulieu v Finglam*⁸. The judges there observed that the rule had its basis in “the ancient custom of England”⁹. The rule did not extend to fire caused by a so-called “act of God”. Nor did it apply to a fire caused on another’s land by a stranger to that land. Liability only applied to the occupier’s responsibility for his own fire (“*ignis suus*”). If it could truly be said that the fire that spread to someone else’s property was a fire to be attributed to the neighbouring occupier, he or she was responsible in law to prevent the spread of the “fire” and liable to neighbours who were damaged as a result.

In the increasingly close confines of the English medieval townships, or in the great metropolis of London, the imposition of such legal liability for escaping fire was felt by the landowners to be too heavy a burden. At least, it so appeared to the landowners who were entitled to vote for the House of Commons. Accordingly, by the reign of Queen Anne, legislation was enacted in 1707 and 1711 designed to limit the liability of the occupier on whose property a fire had begun¹⁰. By a statute of the realm, liability was excluded in the case of “any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall ... *accidentally* begin”. The potential of fire to cause ruinous liability in the narrow laneways between wooden buildings was so great that an exemption was felt necessary from Parliament where the cause of the fire was “accidental”.

⁸ (1401) YB 2 Henry IV f8 pl6, translated Fifoot, *History and Sources of the Common Law, Tort and Contract* (1949, London), 166-7. Cited *Burnie Port Authority v General Jones Pty Ltd* (1994) CLR at ; 68 ALJR 334.

⁹ See also *Turberville v Stampe* (1697) Ld Raym 264 [91 ER 1072]. See also *Filliter v Phippard* (1847) 11 QB 347 at 354; [116 ER 506 at 509].

¹⁰ 6 Anne c 31 (1707); 10 Anne c 14 (1714). Ultimately see *Fire Prevention (Metropolis) Act 1774* (UK) (14 Geo IIIc 78)

These rules of law coincided with the alarm occasioned by the Great Fire of London and the way in which this disastrous event had propelled British society into developing organised fire brigades so as to share, within the community of landowners, the costs of bringing a rapid response to the enormous danger of fire in tinderbox, vulnerable towns and cities.

When the Australian colonies were established, they inherited so much of the common and statute law of England as was suitable for their rather differing climatic and geographical conditions. Questions arose in the early days of the High Court of Australia as to whether the peculiar rules developed by the 'custom of England' had found their way to Australia so as to render persons here liable for the escape of fire from land that they occupied, or to exempt them on the basis that the escape of fire was, in the circumstances, purely "accidental".

In a 1914 case, 11 years after the establishment of the High Court, the question was presented as to whether the liability for damage caused by the escape fire was to be decided by reference to the special English rule of liability relating to fire as distinct from the more general principle then defining occupier liability for the escape of *any* dangerous substance (whether water, fire or otherwise). The first Chief Justice of Australia, Sir Samuel Griffith, pointed to the need to look at this issue with fresh eyes because of the very different circumstances in which fires (and for that matter, floods) presented themselves to Australian courts when compared with fires and floods in England. In *Whinfield's Case*¹¹, Chief Justice Griffith declared:

¹¹ *Whinfield v Lands Purchase & Management Board of Victoria* (1914) 15 CLR 603 at 614-5.

“It would be a shocking thing to lay down as a rule of law that a country like Australia, where probably hundreds, if not thousands, of men travelling on foot in sparsely settled districts ask every day for permission to camp for the night on private property, the owner by granting such poor hospitality becomes responsible for the lighting of a fire by the wayfarer to boil his ‘billy’ or keep himself warm.”

But a future Chief Justice, Sir Isaac Isaacs, in the same case, went on to hold¹²:

“Fire being always dangerous and less confined, a person who introduces it upon his own land is, apart from the effect of inevitable accident or the wrongful interposition of a third person, liable for all damages caused to another by its escape.”

In nineteenth century England, another general principle of law had been established to render the occupier of land liable if he “brings or uses a thing of a dangerous nature on his own land” because “he must keep it in at his own peril; and is liable for the consequences if it escapes and does injury to his neighbour”¹³.

This rule likewise imposed very heavy responsibilities on all occupiers of land. In the Australian circumstances, the English rule was often criticised as being unrealistic in the burdens that it imposed on landholders. Ultimately, in 1994, in *Burnie Port Authority v General Jones Pty Ltd*¹⁴, the old rule of absolute liability was declared by the High Court of Australia not to be part of the Australian law. Instead, by majority, the Court held that all such special English rules had become absorbed into the general principles of ordinary negligence. In this way, it a stroke, the obscurities of old English legal categories; the

¹² *Ibid* at 617.

¹³ *Rylands v Fletcher* (1866) LR Ex 265.

¹⁴ (1994) 179 CLR 520; 68 ALJR 33.

uncertainties of the universal application of English statutes; and the vagueness of exceptions and qualifications to the old rule were cast aside¹⁵. Thenceforth, the only basis upon which a neighbour could be held liable in Australian for the escape of fire (or any other dangerous substance) was if the person thereby damaged could prove that such escape occurred by reason of the negligence of the neighbour or of any person for whose negligence the neighbour was liable in law¹⁶.

The case in which this principle was established was not without interest. General Jones Pty Ltd suffered damage when a large quantity of frozen vegetables was ruined by a fire that destroyed a large repository owned by the Burnie Port Authority in Burnie, Tasmania. The vegetables were stored in three cold rooms. Work was being carried out in order to extend the building. A contractor's employee was engaged in considerable welding work near the cold rooms. Sparks escaped from the welding equipment and ignited the cardboard in which the vegetables were stacked.

The Authority had taken no steps to avoid the risk of conflagration. It broke out quickly and immediately engulfed the entire complex. The question was whether the Authority was liable, or only the contractor and its welding employees. The High Court concluded that the facts showed that the contractor's work was inherently dangerous with a real and foreseeable risk of conflagration unless special precautions were taken. Accordingly, the Authority was found liable based on the then ordinary principles of negligence law. The legal importance of the case is that it

¹⁵ R.P. Balkin and J.L.R. Davis, *Law of Torts*, Butterworths, Sydney, 1991, 496-8; Francis Trindale and Peter Cane, *The Law of Torts in Australia*, OUP, Melbourne (2nd ed., 1993), pp.639-40.

¹⁶ Danuta Mendelson, *The New Law of Torts*, OUP, Melbourne, 2007, 669-70; Paul Vout (Ed.) *The Laws of Australia – Torts*, Thomson Lawbook Co., Sydney, 2007, p370 [§33.6.160].

swept aside the old and special English laws on particular liability for the escape of fire. After 1994, those special rules were found to have no application in the differing environmental conditions of Australia. Instead, the sole criterion for liability in this country was declared to be the ordinary principles of negligence law.

In the Australian bushfire season, cases can arise where, by negligent burning, ostensibly designed to reduce the risk of expanding bushfires, neighbours suffer because high winds and other dangerous conditions spread the sparks over considerable distances, igniting the eucalyptus sap that often becomes the vector for the spread of bushfires in Australian conditions. Depending upon the evidence (necessarily much of it expert testimony about the precautions proper to the circumstances and the dangers inherent in the conditions), liability can be brought home by one occupier to a neighbour or even by a neighbour to a public authority which carelessly goes about the task of back-burning.

Still, in most bushfire conditions in Australia, such is the speed, broad front and circumstance of the spread of fire that such nice questions rarely fall to be determined. When bushfires sweep in Australia, they do so with a mighty force and often on a very wide boundary. The issue is not generally a quiet contemplation of individual legal liability by one occupier to another for negligent conduct permitting a fire to escape. The issue then is usually the desperately urgent one of saving the lives and limbs of human beings, of farm and domestic animals, of essential possessions and, if possible, precious homes with all their vital contents, goods and beloved memories.

It was danger, rather than nice questions of legal liability between adjoining properties, that was the focus of the Victorian Royal Commission report. It is to that report that I now turn.

THE ROYAL COMMISSION RECOMMENDATIONS

If you were following the media reportage of the Victorian Royal Commission hearings, and the coverage of the Commission's report and recommendations, you could be forgiven for believing that, amongst the most serious causative features in the terrible loss of life and property on Black Saturday 2009 was:

- * The decision of the then Chief Commissioner of Victoria Police (Ms. Christine Nixon) to go to dinner on the evening of that fateful day;
- * The decision of the Emergency Minister (Mr. Bob Cameron) to spend Black Saturday at his Bendigo farm, although he had asked fire authorities for assurances that they could cope and although at 8pm, he travelled to Melbourne; and
- * The failure of the Victorian Fire Authority Chief Officer (Mr. Russell Rees) to act in a particular way after a deadly south-westerly wind change occurred.

After horrifying, and exceptional, loss of life, limb and property, it is natural and understandable that everyone will be extremely upset. Many will be angry and rightly emotional. There is a predictable tendency in such circumstances to look for individuals upon whom blame can be heaped. Further, it is the nature of modern confrontational media to encourage sharp feelings and resentment. We see this daily in our national politics: we are all the victims of such media reportage today. We can witness it in the recordings of *Question Time* in parliament which

we are assured, miraculously, is about to change. Confrontation, blame, denigration and judgmentalism are increasingly the way public life is played out in Australia. The media are in part responsible; but we, the citizens, are also responsible because we are told that the media response to what we need and demand.

The plain fact is that (as the Royal Commission report in its detail demonstrated) the fundamental problems occasioning the terrible losses of Black Saturday 2009 were a combination of natural events and forces of nature that could not be predicted with accuracy nor fully met or deflected in the very limited time available for the relevant responses to be made. A lot of the blame game in which some media outlets indulged, was served up with a great deal of armchair retrospective wisdom. This was infused with a desire to personalise the blame and to demonise individuals rather than to accept the much more difficult task of logically tracing in the evidence the systemic causes of what went wrong.

Undoubtedly, as the Royal Commission report explains, the leadership of Victoria's emergency services on 7 February 2009 was not well coordinated for such a large and sudden challenge. Management reportedly "faltered because of confusion about responsibilities and accountabilities and some important deficiencies of leadership". However, it is by addressing those deficiencies, not by looking for scapegoats and ready targets of animosity, that a real and lasting contribution will be made to actually improving emergency responses in Australia in the future. Rather than just making us all feel more upset and angry. This is why Victorian Country Fire Chief, Mick Bourke, referring to the Royal Commission report, said that he believed:

“Everyone did what the could ... For us at this point, it’s beyond people. It’s beyond the leaders at the time ... This report is a catalyst for far-reaching change and that’s what we have to embrace”.

I agree with that approach, and also with the statement of Premier John Brumby¹⁷:

“There were system failures on the day and it is evident from the Commission’s report and what occurred that I think all of us were involved. We are obviously sorry those systems failed. I personally feel the weight of the responsibility to get the arrangements and the systems right in the future so we never again see the result of those circumstances.”

The way forward, as the Royal Commission itself indicated, is not to delay needlessly over flagellating individual public officers. It is to look at the systems that are in place and to base suggested improvements on well thought out systemic improvements. It is to free the necessary changes from the comforting but illogical thought that if only the Chief Police Commissioner had not gone to dinner, somehow, miraculously, the winds would have turned; the decisions of experienced fire fighters on the ground would have been changed or countermanded; the pace of the conflagration would have been slowed; and the lives of the victims would have been miraculously saved.

In many cases of alleged negligence that I have sat on in the courts, the complaining party can show that this or that was done imperfectly and might have been done better, armed with hindsight. But many such cases fail in law and logic because, had a perfect course of human conduct been observed, it would not have made a relevant difference. It would not have prevented the loss of life, limb or property. Fallibilities in

¹⁷ Quotes from *The Australian*, 2 August 2010, p.2.

human conduct can all too easily be shown in all of us. However, a question always remains for judges, Royal Commissioners and our society. Are they truly the *cause* of what went wrong? Or is this just superficial breast-beating because demonising a public official is so much easier than getting one's mind around the really hard decisions that are needed to prevent, or reduce, such risks and dangers in the future.

To its great credit, the Victorian Royal Commission did address the really serious and systemic changes that are needed if repeated disasters of the Black Saturday kind are to be avoided in Australia in the future. The Royal Commission report contains 67 recommendations. They address the generic topics of:

- * Victoria's bushfire safety policy;
- * Emergency and incident management in bushfires;
- * Fire ground responses;
- * Electricity caused fires;
- * Deliberately lit fires;
- * Planning and building modifications;
- * Land and fuel management policies;
- * Improving organisational structure; and
- * Instituting research and evaluation and monitoring the implementation of proposals.

Arguably, one recommendation (No.63) is specifically addressed to the much publicised subject of individual decisions by public offices on that fateful day. Correctly and desirably, the Royal Commission accepts that the uncertainties that existed in the statutory chain of command for

decision-making, whether by the Minister or by a new official, had to be reconsidered. The report recommends the appointment of a Fire Commissioner as “an independent statutory officer responsible to the Minister for Police and Emergency Services and as the senior operational fire fighter in Victoria”. It specifies a number of responsibilities that should devolve on this office holder. In short, a systemic solution to a systemic problem, going far beyond individual demonisation. This recommendation has been followed and the appointment made.

Similar detailed and painstaking approaches can be found throughout the recommendations. They include:

- * The provision of timely, specific and clearer warning system for residences at risk;
- * The provision of community refuges, bushfire shelters and evacuation procedures for endangered residents who need to leave positions of danger early;
- * The Commonwealth to lead a federal initiative, through the Ministerial Council for Policing and Emergency Management, so as to develop a national bushfire awareness campaign (Rec.7);
- * The state to clarify whether, during major fires, the Victoria Police should discharge its co-ordinating function from the State Emergency Response Co-ordinating Centre or from the State Control Centre (Rec.10);
- * The removal of the title of Co-ordinator in Chief of Emergency from the Minister for Police and Emergency Services; clarification of the function and powers of the Minister; and designation of the Chief Commissioner of Police as Co-ordinator in Chief with primary

responsibility for keeping the Minister informed during an emergency (Rec.11);

- * The Country Fire Authority (CFA) and relevant department to amend procedures to require that a suitably experienced, qualified and competent person is appointed as Incident Controller (Rec.18);
- * Provision to all CFA volunteers of an identity card to facilitate passage through road blocks (Rec.19);
- * The CFA and department to amend procedures for investigating incidents and near misses to ensure that all dangerous incidents, including back-burns, are fully investigated (Rec.24);
- * Progressive replacement of all single wire earth return power lines within Victoria with aerial bundled cable, underground cabling or other more fireproof technology (Rec.27);
- * Municipal councils to identify in advance hazard trees in high bushfire risk areas (Rec.31);
- * The State to implement a regional settlement policy taking account of the management of bushfire risk and including a process for responding to bushfire risk (Rec.38);
- * Victorian planning provisions to ensure priority to the protection of human life and to adopt a clear objective of substantially restricting development in areas of highest bushfire risk, giving due consideration to biodiversity conservation and clear guidance for decision-makers (Rec.39);
- * CFA to amend guidelines for assessing permit applications for dwellings, non-dwellings and subdivision of the bushfire prone overlay, substantially to restrict new developments in areas of highest risk (Rec.40);

- * Standards Australia to move expeditiously to develop a standard for bushfire sprinklers and sprayers in homes at risk (Rec.50);
- * The Victorian Building Commission to provide information about ways in which existing buildings in bushfire prone areas can be modified to incorporate improved safety measures (Rec.51);
- * A vendor statement in the sale of land henceforth to identify if the land is designated bushfire prone (Rec.53);
- * Introduction at tertiary level of a course on bushfire planning and design in Victoria (Rec.55);
- * A state fund and commitment to implement a long-term programme of prescribed burning based on annual rolling target of 5% minimum of public land (Rec.56).

The Royal Commission has recommended a “retreat and re-settlement strategy” for areas “of unacceptably high bushfire risk”. If this were to include the State buying property for home owners who want to leave, it would be very expensive, of course. However, as the Royal Commission points out, such expense must be weighed against the losses of life and the \$4.3 billion which the Royal Commission estimates that Black Saturday cost the people of Victoria and Australia¹⁸.

Even within the Royal Commission itself, there were certain revealed differences about whether, in the event of highest risk conditions, a personal decision would be made to leave a home or stay to defend and protect it. Of course, everything would depend upon the physical condition of the land, the topography and the fire risk; the age of the defenders; the availability of water and other protective resources; and

¹⁸ “No More Errors of Excuses. No More Murderous Fires”, *The Australian*, 2 August 2010, 14.

the demands imposed on fire fighters, including the brave volunteers who spring into action whenever these risks arise, as so often they do. As the final report of the Victorian Royal Commission observed:

“It should be recognised that some places are too dangerous for people to live ... and development should be strongly discouraged in those areas.”

This conclusion led the Royal Commission to express concern that the town of Marysville, in the epicentre of the bushfire path, where 34 people died, was being rebuilt “without reference to the mitigation of bushfire risk”. Likewise, Pine Ridge Road at Kingslake West, where 21 people died, is described as “an extraordinarily high risk” for human habitation.

Instead of rebuilding such communities, the Royal Commission report urges the Victorian State government to adopt a “retreat and re-settlement” approach, in which the government offers to purchase the relevant property so as to encourage people to move to safer locations. This recommendation not only involves a public/private transfer of funds. It involves, at once, a suggested inhibition upon the freedom ordinarily enjoyed by Australians to live where they choose so long as they enjoy a relevant legal interest to do so. And the dream that most Australians have to own their own home in congenial circumstances which, for many, means either with a water view or an environment surrounded by Australia’s unique and beautiful bushland.

Putting inhibitions upon these freedoms does not come easily in a country such as Australia. Yet, as the Victorian Royal Commission report demonstrates, what is at stake in recurrent bushfires of the kind repeatedly witnessed in this nation are huge public as well as private costs. The public cost of implementing the strategies recommended by

the Royal Commission. The public costs of the police, fire fighting and emergency services deployed in such conditions. The public costs of the volunteers and other officers who put their lives on the line in time of crisis. The public costs of hospital and other emergency support that can never be fully recompensed. And above all, the private costs of loss and grief. Of memories destroyed. Of irreplaceable photographs consumed in the flames. Of the disruption, stress and anger occasioned to an entire society which then looks around for those whom it can blame and condemn so as to ease the collective sense of grief, pain and anger.

Objectively speaking, the greatest blame may lie on those who go back and stand and fight, rather than on a few officials who made a wrong call in unpredictable circumstances. Whatever that call should have been, ordinarily, it is unlikely in the big picture to have changed many of the devastating consequences of dramatic bushfire circumstances where nature is out of control and a mighty force is unleashed.

A TIME FOR REFLECTION

We must be grateful to the Victorian Royal Commission for its thorough, evidenced-based approach, and for maintaining throughout its work the correct perspective. For doing so when too many in the public media just wanted scapegoats amongst public officials or scapegoats in the form of those few disturbed individuals blamed for deliberately lighting fires. Alas, it was never going to be as easy as nailing a few scapegoats. The real source of our problem lies in the large freedoms that we ordinarily possess in Australia. In our desire to enjoy our beautiful and unique landscape. And in our wish to return, when the

fires are over and the lawyers have departed, to the charred lands, rebuilding the beloved homes “brick by brick”.

Interfering with these desires was never going to be easy. The great lesson of the examination of Black Saturday 2009 is that hard decisions have to be made. And those decisions must address systemic problems. They must limit individual freedoms where to pursue them will repeat the path of danger and expose the State and its personnel to unreasonable risk.

Until Australians face up to the necessary tough decisions, they will be condemned, on a regular cycle, to witness further Ash Wednesdays, Black Saturdays and flames, floods and tempests on every other day.

Australians all must be grateful that, in our country, we have an organisation like the Australasian Fire & Emergency Services Authorities Council:

- * Identifying necessary national objectives and strategies;
- * Promoting the effective management of our land and its environment;
- * Insisting on consistent and effective approaches to the provision of public services;
- * Encouraging a public and civic culture that nurtures and supports evidenced-based decision-making;
- * Securing fire and emergency services throughout this continental land which repeatedly display capability, capacity, courage and consistent professionalism¹⁹.

¹⁹ These are the five goals of AFAC as stated in its 2009 *Annual Report*. See pp.9-19.

These are the goals which AFAC accepts for itself in its 2009 *Annual Report*, after the embers of the Black Saturday disaster have died down. All Australian citizens must be grateful for the high standards that are observed and the marvellous service that is given by AFAC and its members. The further emergencies that have arisen this very week across Australasia remind us of the debt of gratitude we all owe and the high dependence we repeatedly impose on AFAC and its member agencies for our safety and our survival. So to you, as a citizen, I say a nation's grateful thanks.
