

Australia's Royal Commission into National Natural Disaster Arrangements: *Insights, Experience, Lessons to be Learned*

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Balancing impact and expectations

I. Royal Commissions: expectations and impact

Balancing impact and expectations

Royal Commissions in Australia: expectations & impact

Royal Commissions an entrenched feature of Australian public life

- *Expectations loom large*: qualities of independence, neutrality, and transparency, as well as delivery of a reasoned report, make them attractive tools to government
- *Potential for considerable impact*: can extend far beyond specific investigations & remit, with changes to public policy & government administration
- *In the balance*: cost, efficiency, timeliness, commitment, capacity for recommendations to be implemented

Reasons why Government may establish a Royal Commission

- *Urgency*: Government confronted with an issue or problem where *immediate* action is 'necessary'
- *Fills a gap*: Government agencies lack expertise, coercive powers, or public confidence, to handle an issue or investigation
- *Big & tricky*: want to explore a very complex matter in manner beyond scope of administrative resources
- *Messy & ugly*: want to investigate allegations of impropriety where government, or individual working in government, involved

Instrument of Executive power – type of "public executive inquiry"

- *Historic*: Traces back to the *Domesday Book* in England
- *Ad hoc* and temporary
- *Unique*: Non-judicial and non-administrative governmental investigation
- *Exercise of the prerogative*: established by Letters Patent issued by the Governor-General acting with advice of Executive Council with possible complementary Letters Patent by State Governors
- *Compulsory powers*: depend on legislation

Balancing expectations and impact: lessons for Government

1. Establishing a Royal Commission is a 'brave' choice for government
2. Broad ranging coercive powers + broad terms of reference = 'be careful what you wish for'
3. Constitutional limitations can be restrictive (or helpful)
4. Not everyone wants to be (nor should be) your Commissioner(s)
5. Government's selection of Commissioner(s) may be challenged - the spectre of allegations of bias
6. A need to hasten slowly - procedural fairness must be afforded
7. With public sector scrutiny comes complex legal resource and personnel management
8. Amongst claims for privilege, parliamentary privilege must be maintained
9. No report is sacrosanct - the potential for judicial review abounds
10. No need to implement recommendations (nor account for non-implementation)

See my paper '[Lessons for Government from Recent Royal Commissions and Inquiries](#)',
Paper delivered to NSW Law Society Government Solicitors Conference, September 2019



Expectations and impact: can depend on format of Royal Commission

INQUISITORIAL:

Focus of inquiry

- Determine what happened (disaster/corruption)
- Make findings of attribution and responsibility
- May consider policy and systemic issues that are relevant to the investigated incident or problem

Potential Outcomes

- Referrals of wrongdoers for prosecution or regulatory action
- Allow stakeholders to learn from what happened
- Provide catharsis or reconciliation
- Provide assurance and rebuild public confidence

POLICY ADVISORY:

Focus of inquiry

- Adopt analytical problem-solving approach for issues with systems or processes
- Draw on experts and wide-range of stakeholders for advice and input
- May concentrate on the wrong or malfunction of the system and, as part of this, identify individuals who contributed to such wrongdoing

Potential Outcomes

- Advise government on policy development in areas that are novel or particularly complex
- May recommend law or administrative reform
- May recommend institutional or structural reform

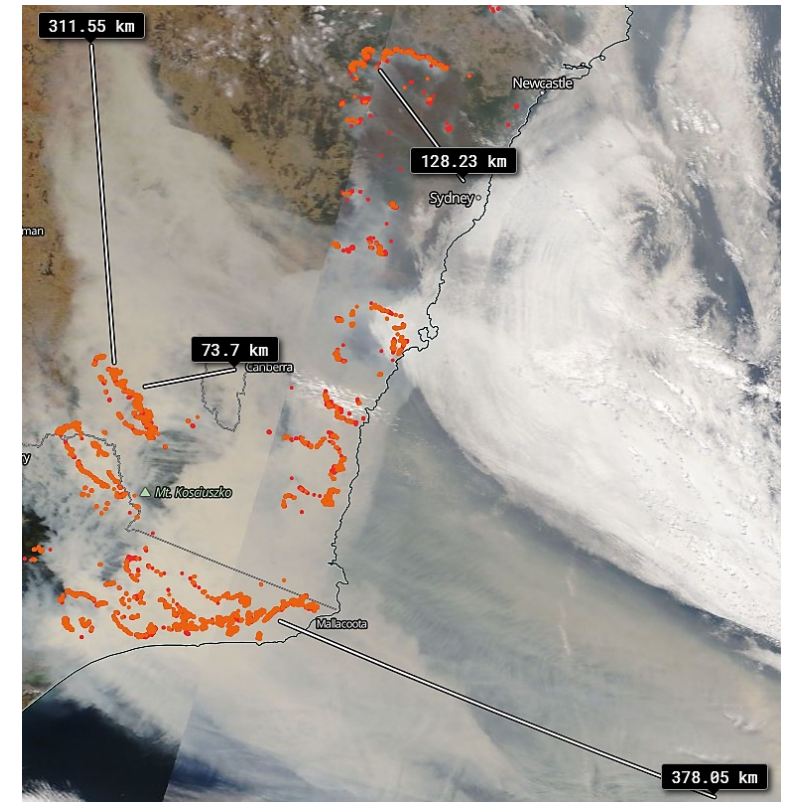
RCNDA recap: fast-tracked joint inquiry, with national policy focus

Model and purpose:

- Joint Commonwealth & States' complementary Letters Patent
- 3 Commissioners, with mix of expertise
- First Royal Commission to review all 3 levels of government across the nation
- TOR called for broad examination of issues at a national level
- Reporting date before next disaster season
- Not a 'blame game'
- Policy and forward focussed
- Constructive, not adversarial

Methodology:

- 10 weeks of hearings
- 301 witness appearances
- 3,079 exhibits tendered
- 1,772 public submissions
- 16 community fora
- 6 expert consultation fora
- 5 Background Papers
- 4 Issues Papers & responses
- Notices to produce documents & statements of information
- Interim Observations of Commissioners
- Draft propositions developed by Counsel Assisting & responses
- Final submissions



II. Experience of being part of the Royal Commission

Balancing impact and expectations

RCNDA recap: Counsel Assisting's primary functions and obligations

'Servants of all, yet of none'
'Represent the public interest'

Hearing preparation:

- 'Bring alive' the terms of reference (TOR)
- Direct enquiries along particular lines a/c to TOR
- Superintend re evidence:
 - Collection
 - Analysis
 - Collation
- Presentation of evidence:
 - Hearing themes
 - Selection of witnesses
 - Documents for tender

Witness examination:

- Impartiality
- Procedural fairness
 - 'Notice rule'
 - 'Hearing rule'
- Proper basis for allegations of fact or law, challenge to credit

Other work:

- Opening statement
 - use caution & restraint
- Closing statement
 - evidence & recommendations
- Assist in report preparation



Examining NSW's Emergency Leaders



Examining Australia's Chief Scientist

RCNNDA recap: getting informed (Counsel Assisting 'on the road')



Namadji National Park, ACT, April 2020



NSW/Victorian Border



Mogo Town Centre, regional NSW, May 2020



RCNNDA recap: behind the scenes (national inquiry v national emergency)

Logistical Challenges:

- Early declarations of States of Disaster/Public Health Emergencies due to COVID-19 pandemic created significant logistical challenges
- Commissioners, Counsel Assisting team, Solicitors and Staff co-located in Canberra or WFH to manage border closures
- Capacity and participation by State and Territory governments & their emergency/health agencies seriously affected, with delays in document production and difficulties in witness availability, and approaches to certain topics (eg health)

Recalibrated Witness Examinations:

- Hearings not held in person but 'virtual', livestreamed
- 301 witness appearances (some more than once) by video-link, often using panel format
- Community witnesses also pre-recorded to reduce risk of trauma, and logistics
- 38 witness appearances from Australian Government
- 107 witness appearances from state and territory governments
- 22 witness appearances from local governments
- 134 witness appearances from broader community and experts



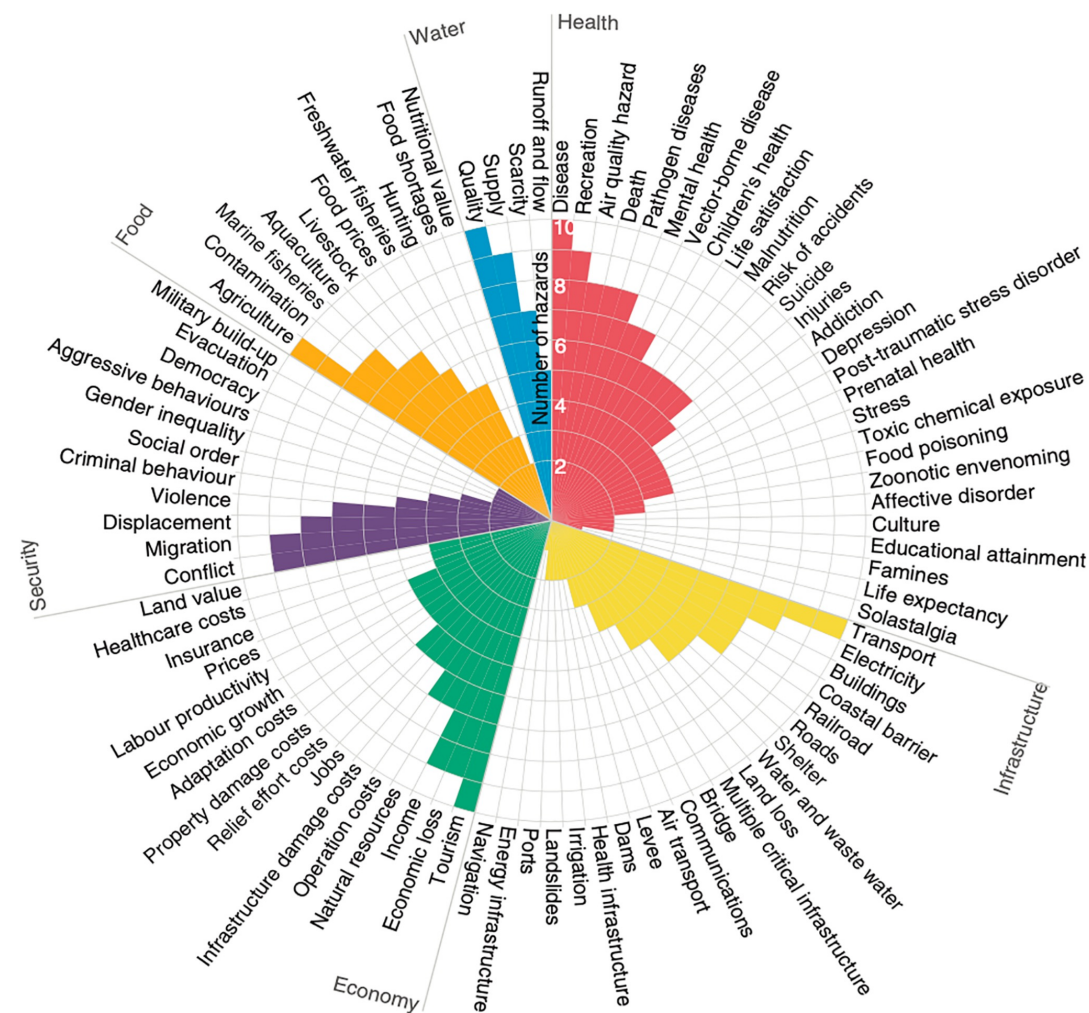
RCNNDA: Behind the scenes

Photo © D Hogan-Doran 2020

RCNDA recap: multi-level governance challenges emerged

Submissions indicated governance & data challenges:

- Complex set of governance arrangements in place to guide resilience, disaster policy and security policy.
- Responsibilities for disaster risk management & climate adaptation mainly rest with emergency management organisations at Commonwealth and state level, as well as local government level.
- Outcomes at local level often influenced & driven by investment & operational decisions made by, eg, asset owners & service providers at other government levels & within private companies.
- Local decision makers may not have the right tools or data to make informed decisions.
- Strategic, whole-of-system perspective not defined and embedded through national, state and territory and local levels.



RCNNDA Recap: Counsel Assisting's hearings program

Ceremonial Hearing

- Formal commencement of proceedings; reading of Letters Patent; Chair's opening address; Counsel Assisting's opening address.

Hearing Block 1 – Setting the scene (2 weeks)

- The changing global climate and natural disaster risks; the impact of the 2019-20 bushfires; and the responsibilities of the Australian Government in relation to natural disaster arrangements.

Hearing Block 2 – Investigating natural disaster management in Australia (6 weeks)

- Hazard reduction: the division of responsibilities between Australian, state and territory governments; bushfire fuel load management; and Indigenous land management practices.
- Local government responsibilities for, and experiences of, natural disaster risk mitigation, preparedness, response and recovery.
- Interconnection and communication: Community messaging and information; cross border commissioners; delivery of essential services; firefighting volunteers and sharing of resources.

- States' and territories' land-use planning, resource sharing, accountability mechanisms and recovery.
- Scenarios testing states' and territories' preparation and response management in relation to natural disasters; and emergency sector experiences of the 2019-2020 bushfire season.
- Non-governmental recovery support: Barriers to small business recovery; access to and coordination of recovery support; charities; wildlife recovery issues.

Hearing Block 3 – National coordination (1 week)

- Situational awareness, decision making and resource sharing at a national level; the COVID-19 response, including national coordination and decision-making arrangements.

Hearing Block 4 – Looking to the future (1 week)

- The potential role of national information systems and coordination; potential changes to national coordination arrangements in relation to natural disasters; responses received to Counsel Assisting draft propositions; Counsel Assisting's closing address; and Chair's closing address.

RCNNDA recap: improving national disaster risk law & governance

Evidence synthesised key themes:

- Recognition of *shared* responsibility for disaster risk.
- Need for *systemic* risk assessment (c.f. a single hazard approach; need to consider multiple hazard events, occurring *concurrently* or *consecutively*).
- Anticipating *complexity* (e.g. hazards and disasters do not respect borders) and *cascading* effects (each subsequent hazard increases *scale* of damage caused by previous hazard).
- *Collective* and *co-ordinated* decision making & action (e.g. 'National Cabinet', 'National Co-ordinating Mechanism').
- Informed by *better* data (e.g. improved climate change models, developing 'downscaled' climate projections).
- Need for *scenario* planning and *stress* testing.

See my presentation '[Disaster Law and Governance: The Challenge of Strategic Imagination](#)', Paper delivered to NSW Law Society Government Solicitors Conference, September 2021.

The checklist on law and disaster risk reduction
(pilot version – march 2015)





The Royal Commission into National
Natural Disaster Arrangements Report

Commissioned 20 February 2020

Published 30 October 2020

Commissioners' Overview:

A clear role for governments

- States and territories have primary responsibility

Disasters have changed

- Compounding disasters

We need to act on multiple fronts

We need a national approach

- ❖ Shared responsibility
- ❖ More cooperation and coordination
- ❖ Accountability and assurance mechanisms

'calls for strategic imagination'

A greater role for Australian government

- ❖ Declaration of national emergency

We need strategic leadership directed at resilience

- ❖ Senior ministerial leadership across the nation
- ❖ Standing national resilience & recovery entity
- ❖ Standing national emergency management entity

'big country thinking'

Sharing people and resources

- ❖ Technology that works together
- ❖ Training, accreditation, joint exercises
- ❖ Sharing firefighting aircraft

National picture needs national data Supporting individuals to make good decisions

- ❖ Community education
- ❖ Inconsistencies in warnings, danger ratings, and other information
- ❖ Unclear information about land management
- ❖ In the dark about risk exposure

Whole-of-nation effort required

RCNND: Commissioners' recommendations and the reactions

Conclusions informed and driven by the scientific evidence

- Australia's disaster outlook is *'alarming'* and requires a *'fundamental shift in strategic thinking about national natural disaster risk management'*.
- Clearly signals urgent need to improve disaster management capacity, resilience & adaptation in Australia as natural hazard events become more frequent & severe under climate change.

Recommendations

- 14 recommendations directly targeted to the Australian Government
- 23 recommendations specific to States and Territories
- 41 recommendations that are shared between the Commonwealth and States and Territories
- 2 recommendations specifically focussed on the Insurance Industry and the Australian Building Code Board

Expert reactions

- *"Overall, this seems a realistic report that incorporates a diverse and complex body of evidence"* - Professor Bowman, Professor of Pyrogeography & Fire Science, Uni of Tasmania
- *"It's an extraordinary read and, if you've got a couple of hours spare, I actually recommend people at least skim read their way through the report ... they go across an extraordinary breadth."* - Dr Annagretta Hunter, ANU Medical School

Implementation: 12 months on, still a 'work in progress'.



III. Learning from Royal Commissions

Balancing impact and expectations

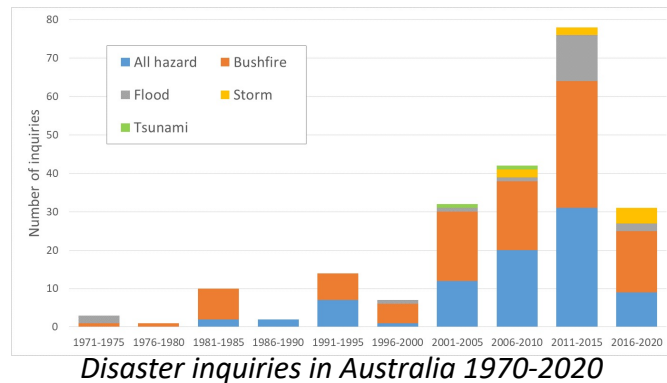
Culture & integrity: improving accountability & assurance mechanisms

RCNNDA recommended: embedding implementation, assurance and accountability framework, in face of > 240 disaster inquiries in recent decades, and informed by work of Vic / Qld IGEMs.

Implementation of recommendations:

- Important measure of the effectiveness of an inquiry.
- Evidence of a culture of learning lessons in the aftermath.
- Yet this and several RCNNDA recommendations not (yet) implemented.

- **Recommendation 24.1: accountability & assurance mechanisms at Australian Government level**
- **Recommendation 24.2: independent accountability & assurance mechanism for each state & territory**



'24.11 The existence of such a large number of reports may speak to the intractability of some of the problems, perhaps even a reluctance to implement recommended solutions in natural disaster arrangements.'

Comment:

- *Expectations:* should community expect to know 'if not, why not?'
- *Impact:* will weak or delayed implementation of recommendations mean history repeating itself, demonstrating a failure of accountability?
- *Risk:* might next time herald a 'blame game' 'in earnest'?
- *Balancing:* is there a need for better resourcing of policy development and change management within fire & emergency agencies & AFAC? Do settings properly reflect reality of extension/overlap of disaster seasons and heightened pace of change required to respond to extreme weather risk, climate change, and national security pressures?



Lessons learned: participating in Royal Commissions

Consider	Consider background & historical positions taken by Commissioners, interpretation of Letters Patent
Understand	Understand powers and protections of Royal Commission including to compel: (a) witnesses (b) documents (c) explanatory statements of information
Prepare	Witness and statement preparation is critical: how have the Commissioners and Counsel treated witnesses for other interested parties?
Monitor	Constantly monitor evidence: be alert to issues that might arise through the evidence of others that may need to be (re)addressed through evidence and/or submissions; re-evaluate strategy
Keep in Mind	Keep in mind Model Litigant Obligations (eg Note 1 Appendix B, <i>Legal Services Directions 2017</i>)
Reassess	Reassess from organisational, whole-of-government, industry perspective issues being examined



Lessons learned: anticipating the aftermath

Downstream	Anticipate implications of particular strategies or approaches adopted at the Royal Commission
Horizon Scan	Consider political climate & public policy landscape when Report and recommendations released
Bear in mind	Inquests, disciplinary actions, regulatory proceedings, class actions, litigation on foot and in future
Coordinate	Communicate and coordinate among parallel business operations to ensure connectedness, including use of formal protocols for interactions
Proactive	Be proactive – not reactive: highlight achievements, identify challenges, opportunities to change
Learn	Learn from Royal Commissions that may not involve your agency - but may apply by analogy / insight



The next Royal Commission? Themes from today's agenda

Understanding of & engagement with community, business, the vulnerable exposed to extreme events

Your connectedness and knowledge will shape your personal and agency's capacity to respond to criticism and influence & contribute meaningfully to future reform

Mental health, wellbeing and resilience

Your personal capacity to contribute meaningfully could be diminished, especially if balancing simultaneous operational leadership and policy development pressures, and under-supported/overcommitted

Social licence & trust

Learn from the experience of other sectors and industries. Your sector's capacity to advocate successfully (for resources, primacy, autonomy) will be a function of its commitment to accountability & transparency.

Postscript: Some resources

Royal Commission into National Natural Disaster Arrangements - [Final Report \(Vol 1\)](#) and [Appendices \(Vol 2\)](#)

D Hogan-Doran, *Disaster Law and Governance: the Challenge of Strategic Imagination*, NSW Law Society Government Solicitors' Conference (2021) [Link](#)

D Hogan-Doran, *Lessons for Government from Recent Royal Commissions and Public Inquiries*, NSW Law Society Government Solicitors' Conference (2019) [Paper](#), [Listen on SoundCloud](#)

D Hogan-Doran, *Responding to Crisis: Royal Commissions in Australia*, South Australian Bar Association (2018) [Slides](#), [Listen on SoundCloud](#)

S Prasser, *Royal Commissions and Public Inquiries in Australia* (2nd edn, Lexis Nexis) (2021)

