# Its all about climate change[[1]](#footnote-1)

Persisting with our Tinpot theme: and so, it came to pass. Again.[[2]](#endnote-1)

The climate change brigade, shouting ‘fire’, have achieved the expected result.[[3]](#endnote-2)

A Royal Commission. In their view, into climate change. Even climate change and bushfires.[[4]](#endnote-3)

A National Royal Commission no less. Set up by the Prime Minister they so assiduously Badgered. All the way from Honolulu to Cronulla Point.

A National Royal Commission which, like the Prime Minister, acknowledges climate change. As follows (emphasis added):

*‘****The inquiry acknowledges climate change’.***

Brigade members: salute! Acknowledgement made, hearts gladdened, we move on.

To consequence. Of shouting ‘fire’.

The Commission’s purpose is to help ‘us’ deal with the climate-changed future of almighty infernos. And other natural disasters. There is quite some urgency. It is to conclude by end August 2020. For necessary action before the next bushfire season

The dealing with climate etc. includes a Prime Ministerial hope.

For him to be able to declare a national state of emergency enabling him to send in the military. Presumably to restore the natural order.

I exaggerate. He actually said the Government – which *a* Prime Minister leads hence applying equally to his successors – to be able to declare a national state of emergency enabling it to send in the military. Presumably to restore the natural order. In his words:

*‘In particular, we need to consider the need to establish new powers for the Federal Government to declare a national state of emergency to trigger direct Federal Government responses to national disasters, including the direct deployment of the Australian Defence Force.’*

Which, besides being a sloppy formulation, at present can’t legally be done because of the Australian Constitution.[[5]](#endnote-4)

The Constitution being a bit different to reputed practices in certain south/central American and African countries. And different to a former practice in Europe, for a while, the result of constitutional/legislative reactions to a fire emergency that took place on this day, 1933.[[6]](#endnote-5)

Constitutional change before the next bushfire season? Parliamentary consideration of the report, legislation, referendum and – if successful - new legislation between end August and end September? Hardly.

Rather, the plan – perhaps subject to what the Commission says – is likely to be to seek a transfer of powers from the States. Which avoids asking your opinion via referendum.[[7]](#endnote-6)

But it does require some groundwork – of showing State failures so their parliaments are sufficiently cowed to hand-over relevant powers to the Federal Government. Between end-August and end-September.

And while one might expect a Commonwealth Royal Commission set up to consider, inter alia, very serious new Commonwealth powers to be led by a senior ex-judge from Australia’s highest court, the court that determines Constitutional issues – the High Court – not so here. The Commission is to be led by a former Air Chief Marshall and head of the Australian Defence Force. He is to be joined by a former judge from the Commonwealth’s Federal Court – which does not decide Australian Constitutional questions. And a Professor from the Australian National University specialising in environmental law.

All good and all about an emergency - so we are relentlessly told by the brigade and now by the Commonwealth Government.

And as we are now on a perhaps slippery slope, despite what undoubtedly will be great efforts of distinguished Commissioners, some lessons from history on this day:

* be careful what you ask for;
* and about people shouting ‘fire’;
* or ‘emergency’.

J Austen

27 February 2020

1. And a little bit about ‘the republic’ – in note (iv). [↑](#footnote-ref-1)
2. <https://www.thejadebeagle.com/tinpot.html> and some new quotes to start off:

*‘In the State of Victoria, the month of January … came towards the end of a long drought which had been aggravated by a severe hot, dry summer season. For more than twenty years the State of Victoria had not seen its countryside and forests in such travail. Creeks and springs ceased to run. Water storages were depleted. Provincial towns were facing the probability of cessation of water supply. In Melbourne…..inhabitants were subjected to restrictions upon the use of water. Throughout the countryside, the farmers were carting water, if such was available, for their stock and themselves. The rich plains, denied their beneficient 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 crackled underfoot ; dry heat and hot dry winds worked upon a land already dry, to suck from it the last, least drop of moisture. Men who had lived their lives in the bush went their ways in the shadow of dread expectancy. But though they felt the imminence of danger they could not tell that it was to be far greater than they could imagine. They had not lived long enough. The experience of the past could not guide them to an understanding of what might, and did, happen. And so it was that, when millions of acres of the forest were invaded by bushfires which were almost State-wide, there happened, because of great loss of life and property -, the most disastrous forest calamity the State of Victoria has known….*

*There had been no fires to equal these in destructiveness or intensity in the history of settlement in this State, except perhaps the fires of 1851, which, too, came at summer culmination of a long drought. Some impression, then, of the unusual antecedents of the fires and of their extreme and unexpected severity may be gained. It will, it is hoped, be apparent that the experience of men in Victoria was such as to leave them unprepared for disaster on such a scale. It is with such facts in mind and with the belief that the facile wisdom which comes after an event is not wisdom, but foolishness……*

*The truth was hard to find. Accordingly, your Commissioner sometimes sought it (as he was entitled to do) in places other than the witness box. Much of the evidence was coloured by self interest. Much of it was quite false. Little of it was wholly truthful. The timberworkers were afraid that if they gave evidence they would not be given future employment in the mills. It is difficult to imagine a sufficient reason for the absence of representation of these men before the Commission of Inquiry. Some of them, disregarding advice, gave evidence which was clearly truthful. The Forest Officers were, in the main, youngish men of very good character. Mostly, they were afraid that if they were too outspoken their future advancement in the Forests Commission's employ would be endangered. Some of them had become too friendly with the millers whose activities they were set to direct and check. It was regrettable that some of the saw-millers and some of the Forestry Officers were loud in praise of one another, when, to the knowledge of both, each had neglected many obligations in the Matter of fire prevention and suppression……*

*Except that the summer …. was unusually dry and that it followed what already had been a period of drought, the causes of the … bushfires were no different from those of any other summer. There were, as there always have been, immediate and' remote causes. Upon examination, which is not now undertaken, it will appear that no one cause may properly be said to have been the sole cause. The major, over-riding cause, which comprises all others, is the indifference with which forest fires, as a menace to the interests of us all, have been regarded…….*

Acute Danger Period*.—The period contemplated occurs in cycles at intervals of from six to ten years. It is preceded by a long period of dry weather and is more immediately caused by hot winds and low humidity. Its duration is for about a week or ten days. The condition of the forests and of the weather combine to make almost certain the outbreak of bush fires. The month of January, 1939, was preceded by such a period.’*

<https://digitised-collections.unimelb.edu.au/bitstream/handle/11343/21344/112962_1939_Bushfires_Royal_Commission_Report.pdf?sequence=1&isAllowed=y> [↑](#endnote-ref-1)
3. It is commonly believed shouting ‘fire’ in a crowd is a crime. Perhaps it is somewhere, however, the term refers to exceptions to rights of free speech. From wiki:

*‘the phrase "shouting fire in a crowded theater" has since come to be known as synonymous with an action that the speaker believes goes beyond the rights guaranteed by free speech, reckless or malicious speech, or an action whose outcomes are obvious.’*

Wiki has famous US jurist justice Oliver Wendell Holmes originating the idea (Schenck v. United States):

***‘****The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic. [...] The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.’*

Perhaps better phrased for our purposes as: speech should be curtailed when the circumstances in which the words used create – and are intended to create – a clear and present danger of a substantial problem that a Parliament has a right to oppose.

<https://en.wikipedia.org/wiki/Shouting_fire_in_a_crowded_theater> [↑](#endnote-ref-2)
4. <https://www.pm.gov.au/media/national-royal-commission-black-summer-bushfires-established> [↑](#endnote-ref-3)
5. The formulation is a bit sloppy because, under the Constitution, it is the Executive Government that gets to do stuff like call in the troops. The Executive Government is the Governor General in Council – the Governor General (Head of State) advised by/acting on the advice of the Ministers of the Government (being the Government who holds the confidence of the majority of members of the House of Representatives). First among these is the Prime Minister. This can be seen in articles like <https://www.smh.com.au/politics/federal/pm-calls-up-reservists-for-firefighting-effort-20200104-p53os7.html> which have the Governor General ‘signing off’ orders or notes about the ‘practice’ of troop deployments: <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/ParliamentaryInvolvement>. At present the Governor General is a former senior military man.

Does this matter? Who knows? However, it does suggest there should be more than passing interest in any proposals to alter the Governor General’s position.

One such proposal is for an Australian republic – to change the Head of State from Governor General to a President.

A variant of this went to and was defeated at a referendum in 1999. <https://www.thejadebeagle.com/referendums.html>.

The defeated variant is of particular interest in the context of this article. It was portrayed as being merely ‘symbolic’ - the powers of the President would be the same as the Governor General. The proposal was said to have a two thirds majority of the Parliament appointing the President instead of the Queen appointing the Governor General.

But there was a (very largely) hidden catch. The proposal apparently also had a majority of the House of Representatives able to dismiss the President. That majority is in reality the Government. Apart from the obvious problem of a deadlock – what happens if a President persistently appointed by Parliament is persistently dismissed by Government? – the effect would have been to combine some Head of State and Prime Ministerial functions. Like calling in the troops?

In practice it would allow the Prime Minister to act on his/her own without an independent Head of State who has a right to be consulted, to encourage or to warn.

<https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter1/Powers_and_Functions_of_the_Governor-General>

 [↑](#endnote-ref-4)
6. <https://www.britannica.com/event/Reichstag-fire>;

<http://ghdi.ghi-dc.org/sub_document.cfm?document_id=1496>: Law to Remove the Distress of the People and the State (1933). The law transferred legislative power to the government. To secure its passage through the legislature, it was claimed the law was not tantamount to abolition of that body since the government would use its new legislative power only in emergencies and only for a limited time.

 [↑](#endnote-ref-5)
7. It may also avoid potential trouble arising from ‘immunities’ set out in a recent article on Royal Commissions:

*‘Earlier this year, in Spence v Queensland [2019] HCA 15, Kiefel CJ, Bell, Gageler and Keane JJ (at [309]) also observed that the doctrine of inter-governmental immunities expounded in the Melbourne Corporation Case is a structural implication captured in the proposition articulated by Starke J in that case that “neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or 'obviously interfere with one another's operations”. His Honour had explained that “[i]t is a practical question, whether legislation or executive action thereunder on the part of a Commonwealth or of a State destroys, curtails or interferes with the operations of the other”*

Dominique Hogan-Doran SC NSW Bar, LESSONS FOR GOVERNMENT FROM RECENT ROYAL COMMISSIONS AND PUBLIC INQUIRIES, Paper presented to the Law Society of New South Wales Government Solicitors’ Conference 2019 3 September 2019. [↑](#endnote-ref-6)