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The experience of the Victorian Ombudsman in dealing with disasters

John R Taylor, Deputy Ombudsman, Office of the Victorian Ombudsman

Level 9, 459 Collins Street, Melbourne VIC 3000
www.ombudsman.vic.gov.au

Abstract

I propose to address the Victorian Ombudsman's role in two disasters in Victoria in recent years:

- The "Black Saturday" bushfires in 2009
- The Cranbourne methane gas disaster in 2008.

Black Saturday

On 7 February 2009 bushfires swept through Victoria, leaving 173 people dead and 500 injured. In addition, more than 2000 homes were destroyed. Thousands of hectares of bush and farm lands were destroyed, with huge property losses.

Both the Commonwealth and Victorian governments' response was swift, with the Prime Minister immediately announcing emergency funding for the state and offering the services of the Army. Within two days following the incident, the Victorian government announced that there would be a Royal Commission into the fires and a review of the state's policies in relation to assistance and individual eligibility to stay and defend homes.

Following the bushfires, the Victorian Ombudsman received a large number of complaints relating to the fires, including issues surrounding hardship, loss of business, building and reconstruction advice and liability for damages. Most complaints were addressed by the mechanisms established by government to address the disaster. These included the Royal Commission, the Bushfire Appeal Fund Advisory Panel, the Victorian Bushfire Reconstruction and Recovery Authority and other relevant agencies.

Cranbourne Methane Gas Disaster

In September 2008 the Acting Premier asked the Ombudsman to investigate the leaking of dangerous levels of methane gas from the Cranbourne landfill into houses in the Brookland Greens Estate, a suburb of Melbourne.

The concerns for people's safety were such that many houses were evacuated and an emergency was declared. Given the seriousness of the matter and its widespread impact, the Victorian Ombudsman initiated an Own Motion investigation into the circumstances surrounding the presence of methane gas in the estate.

Our investigation identified significant failures by the authorities involved, including the local councils and the Environment Protection Authority.

While Ombudsmen are not first line responders to emergencies, they play an important part in ensuring that government agencies' responses during such times are both timely and appropriate.

I propose to address the Victorian Ombudsman's experiences in relation to two disasters in Victoria in recent years:

- The "Black Saturday" bushfires in 2009
- The Cranbourne methane gas disaster in 2008.

The first was a natural disaster (although some fires were started by arsonists) and the second was as a result of poor decisions by local government councils some twenty years ago. Both had a significant impact on people's lives.

The 'Black Saturday' bushfires

On 7 February 2009 two bushfires swept through Victoria, leaving 173 people dead and 500 injured. In addition, more than 2000 homes were destroyed. Thousands of hectares of bush and farm lands were destroyed, with huge property losses.

The two fires, known as the Kinglake Complex Blaze, stretched over 200,000 hectares of land. The blaze was made up of the East Kilmore fire which is believed to have started at 12.00pm that day and the Yea-Murrindindi fire which was first sighted at 3.00pm.

Conditions on 7 February 2009

Victoria endured one of its most severe and prolonged heatwaves during the final week of January 2009. The temperature in Melbourne was above 43 degrees Celsius for three consecutive days for the first time since records had been kept¹. On the 7 February 2009 temperatures of up to 46.4 degrees and gale force winds of up to 90 km/hr were experienced. There were 316 grass, scrub or forest fires that day.

The most serious consequence of the fires was the death of 173 people. Accompanying this loss of life was the damage to property, livestock and the environment which the subsequent Royal Commission estimated to amount to more than \$4 billion. More than 109 communities were devastated by the fires. The lives of many people were changed forever.

The Government response

Both the Commonwealth and Victorian governments' response was swift. The Prime Minister immediately announced emergency funding for the state and offered the services of the Army.

A \$10 million emergency relief fund was established. Ultimately the Commonwealth Government contributed more than \$465 million towards the recovery and reconstruction efforts.

Within two days following the incident, the Victorian Government announced that there would be a Royal Commission into the fires and a review would be conducted into the state's policies in relation to assistance and individual eligibility to stay and defend homes.

A comprehensive 'recovery assistance package' was established to ensure that the individuals who were affected by the fires received the support they needed. The package also provided support for the economic, infrastructural, and environmental impacts caused by the fires. The package included individual assistance ranging from disaster recovery payments, funeral/memorial related costs, and mental health support. It also included the establishment of community assistance with provision for social housing, educational institutions and welfare support.

1. 2009 Victorian Bushfires Royal Commission, 2010.

On 10 February 2009 the Victorian Bushfire Reconstruction and Recovery Authority (VBRRA) was established to oversee and coordinate the recovery and rebuilding program within the fire affected areas.

Bushfires Appeal Fund

Also, immediately after the bushfires the Victorian Government, in partnership with the Australian Red Cross and the Commonwealth Government, established the Red Cross Victorian Bushfire Appeal 2009. When the Appeal officially closed in April 2011, \$379 million had been raised.

All the administration costs of the fund are paid by the Victorian Government and to date 27,000 payments have been paid to individuals and families affected by the bushfires. These payments covered three broad categories: Initial Emergency Payments, Rebuilding and Recovery Payments, and Support Payments. Nearly \$306 million of the donated money has been paid out to date, representing more than three quarters of the total fund.

Role of the Victorian Ombudsman

Following the bushfires, the Victorian Ombudsman received a number of complaints relating to the fires, including issues involving:

- financial hardship
- loss of business
- council rates
- building and reconstruction advice
- poor emergency accommodation
- compensation.

Most complaints were addressed by referring complainants to the mechanisms established by government to address the disaster. These included the Royal Commission, the Bushfire Appeal Fund Advisory Panel, the VBRRA and other relevant agencies.

In dealing with the complaints, our officers liaised with the relevant authorities with the aim of resolving issues, particularly those relating to compensation, as quickly as possible. Most complaints were resolved promptly and informally, without the need to take further action.

CASE STUDY

Shortly after the main fires occurred, a lady phoned the Ombudsman's office and complained that the Sheriff's Office had wheel clamped her vehicle due to outstanding fines. The complainant said that she was in a fire threatened region and she needed to evacuate her family from their home. The car was required for this purpose. The complainant also said that she had a serious health condition and needed the car to move around.

Given the extreme circumstances, we approached the Sheriff's Office and asked if consideration could be given to unclamping the vehicle and making other arrangements to recover the unpaid fines. Initially the Sheriff's Office did not recognise the urgency of the matter. After further discussions a

Sheriff's officer was despatched to release the vehicle. Other arrangements were made in relation to the outstanding fines.

Despite some of the adverse publicity that came out of the Royal Commission, particularly in relation to emergency management, in my view the Victorian Government response to the disaster was both timely and appropriate.

Royal Commission Findings

Many lessons have been learnt from the Bushfires Royal Commission. As the Commission noted²:

The response to the fires on 7 February was characterised by many people trying their best in extraordinary difficult circumstances. There were many examples of people who met the challenge admirably. Nevertheless, some poor decisions were made by people in positions of responsibility and by individuals seeking to protect their own safety³.

The Commission stated that even with the right policies and systems in operation, strong and effective leadership is essential. Some key figures were found wanting in this regard. For example, the Chief Officer of the Country Fire Authority and the Chief Fire Officer of the Department of Sustainability and Environment ought to have done more in relation to warnings, supporting incident management teams and statewide planning.

The Commission also considered that the then Chief Commissioner of Police's approach to emergency coordination was inadequate. The Chief Commissioner herself acknowledged that leaving the Integrated Emergency Coordination Centre and going home at about 6.00pm on 7 February was an error of judgement. The Commission shared that view.

Although the Commission concluded that the Minister for Police and Emergency Services acted properly before and during the bushfires it considered that he should have raised the option of declaring a state of disaster with the Premier. The Commission found that the circumstances clearly met the criteria for such consideration.

At a local level, the Commission identified that the experience of the day demonstrated how important effective preparation is to good performance. It found that it was invariably the local fire brigades that were well prepared, staffed by people with appropriate training and experience, and well practiced that managed difficult fires well.

Royal Commission Recommendations

The Commission made 67 recommendations including that the State of Victoria:

2. 2009 Victorian Bushfires Royal Commission 2010, page 4.

3. Ibid.

- Revise its bushfire safety policy, particularly enhancing the role of warnings and awareness of conditions.
- Revise the approach to community bushfire safety education.
- Introduce a comprehensive approach to shelter options.
- The Country Fire Authority and the Department of Sustainability and Environment amend their procedures in relation to incident management teams.
- Consider amending the Emergency Management Act in light of the Commission's findings.
- Victoria Police pursue a coordinated statewide approach to arson prevention.
- Amend the Victorian Planning Provisions relating to bushfire to ensure that the provisions give priority to the protection of human life and adopt a clear objective of substantially restricting development in the areas of highest bushfire risk.

The Government undertook to implement all of the Commission's recommendations.

Cranbourne methane gas disaster

Background

In September 2008, residents of part of the Brookland Greens Estate (the Estate) in Melbourne had to evacuate their homes after dangerous levels of methane gas were detected in houses.

The Estate, a new housing development on the south eastern outskirts of Melbourne, was built next to a closed landfill. Methane, a component of landfill gas which becomes highly explosive in certain quantities, was reported to be leaking underground from the site of the landfill into the Estate and up into houses. The state's environmental regulator, the Environment Protection Authority (EPA) concluded that there was an imminent danger owing to the risk of explosion and/or asphyxiation. Emergency management arrangements were implemented and the Country Fire Authority advised affected residents to consider evacuating.

The Victorian Government gave the EPA \$3 million to assist the local council responsible for the landfill to reduce the risk associated with the leaking gas. It also assisted affected residents with emergency grants.

It was over seven weeks before the Country Fire Authority was able to advise residents that it was acceptable for them to return to or remain in their homes.

The role of the Victorian Ombudsman

The Ombudsman dealt with a number of complaints from residents and other interested persons in the aftermath of the emergency.

The Ombudsman's role in this case also went further. On 15 September 2008 the Acting Premier of Victoria asked the Victorian Ombudsman to investigate the leaking of dangerous levels of methane gas from the landfill into houses in the Estate. Given the seriousness of the matter and its

widespread impact on the community, the Ombudsman initiated an own motion investigation.

The investigation sought to provide the community with answers about how the leaks occurred, and to make recommendations to reduce the risk of the type of incident happening again.

Using the Ombudsman's statutory powers, the investigation interviewed over 70 individuals and obtained access to extensive information and records from government departments, statutory authorities, local councils and private individuals and entities.

Using this evidence, the investigation was able to trace the source of the emergency back over two decades to:

- The regulatory approval process that allowed the landfill to be constructed in the first place
- The management of the landfill during its operational life by the two local councils that owned the landfill
- The enforcement action taken by the EPA in relation to the landfill
- The process that allowed the Estate to be built directly adjacent to the landfill.

It was also able to consider the circumstances surrounding the safety of residents in the Estate and the declaration and management of the emergency.

The investigation concluded that the emergency was brought about by a series of missed opportunities by agencies including the EPA, which was responsible for enforcing environmental standards for landfills, and the local councils that owned the landfill site.

The Ombudsman's investigation

1. Approval for the landfill

The EPA issued a works approval for the construction of a landfill at the site, a former sand quarry, in 1992. Our investigation was critical of the EPA's actions in this regard.

The investigation revealed that the EPA ignored a condition of state environment policy that prohibited landfilling below the level of the water table without the EPA's written permission. This landfill was not only below the level of the water table, but interrupted a nearby aquifer.

It also revealed that the EPA initially intended the landfill to be lined with compacted clay if it was to accept putrescible waste (waste which is biodegradable and produces landfill gas, such as household rubbish). A landfill liner assists in the control of leachate⁴, which in turn affects the control of landfill gas. This did not happen. One of the local councils that owned the site argued that a landfill liner would be expensive. Following a series of meetings, the EPA agreed to allow an unlined landfill. The estimated cost of lining the landfill at the time was \$500,000.

4. Leachate is liquid that has passed through solid waste and may have become contaminated with metallic, organic and inorganic compounds and toxins.

Our investigation identified that the EPA allowed external factors to influence its standards on environmental protection. It was under pressure to provide good service to the council following a series of earlier inefficiencies. It was also concerned about the possibility of legal action by the council, having lost an earlier case about works approval for a landfill.

2. Management of the landfill

The landfill opened in June 1996 and closed in June 2005, with approximately 1.1 million tonnes of waste deposited at the site. It was managed and operated by private companies on behalf of the two local councils that owned the site.

Our investigation identified that there were significant issues with the landfill during its operation, with largely uncontrolled and overabundant leachate and poorly controlled gas.

Despite these issues being raised by environmental audits and the EPA, the councils failed to take action. The contracts were badly written and failed to delineate the roles of the parties or match the EPA's regulatory requirements. The councils gave their contractors free reign to manage and operate as they saw fit. There were no checks or balances other than financial audits. They lacked the technical expertise needed to properly oversee their contractors. They also failed to ensure a central repository of information about the landfill for future reference.

3. EPA enforcement in relation to the landfill

The EPA also knew of problems at the landfill site. There were numerous complaints about odours from the site. An environmental audit identified continued high levels of leachate and monitoring at the site showed that methane gas was migrating laterally out of the landfill into the Estate.

The EPA has extensive powers to enforce environmental regulation. Our investigation revealed that, in this case, it failed to take adequate action over a number of years.

The EPA issues warnings, Penalty Infringement Notices, a Pollution Abatement Notice to the council and two formal Notices of Contravention, one to the landfill operator in 2001 and another to the council which was primarily responsible for the site in 2007. However, it failed to prosecute despite ongoing breaches. It did not seriously consider taking prosecution action against the council until August 2008, the month before the emergency.

Our investigation identified that the EPA's enforcement process was overly complex and time consuming and hampered by poor record keeping. However, the lack of action in this case was largely due to the EPA's former Regional Manager in the area. The evidence supported the view that he ignored serious compliance issues and was unwilling to support his staff in taking action.

4. Planning decisions affecting the Estate

It was particularly concerning that, despite the known problems at the site, homes were able to be built only two to three metres from where waste had been deposited.

State environment protection policy at the time required a minimum 200 metre buffer between landfills and residential properties. The private developer who built the Estate entered into an agreement with the council that no homes were to be built within 200 metres of the landfill site.

However, in 2002 the developer applied for a planning permit to subdivide land adjacent to the landfill site. It argued that, as a result of landfill activities, the land was no longer within the 200 metre buffer and residential development could proceed.

The private developer took the council to Victoria's planning tribunal, the Victorian Civil and Administrative Tribunal. The tribunal decision allowed the development to proceed.

The Victorian Ombudsman has no jurisdiction to investigate the actions of the tribunal. However, our investigation did establish that the council and the EPA failed to combine effectively to present the best possible case to the tribunal. The EPA did not seek to become a party to the proceedings, despite knowing of the problems at the landfill and that the 200 metre buffer was under challenge. The council decided not to appeal the tribunal's decision on the basis of legal advice that we later identified was incorrect.

5. The safety of residents

Perhaps the most concerning part of our investigation was identifying that the council and the EPA had been warned about methane gas leaking from the landfill as early as 2006, while the Estate was still being built. Workers building the drainage system for new homes reported that puddles of stormwater were 'bubbling'. Some had been able to light the puddles with a cigarette lighter.

At that time a junior EPA officer reported that significant levels of landfill gas had been found migrating from the landfill into the Estate, resulting in environmental and possible public health risks. No action was taken by the EPA's Regional Manager. In fact the Regional Manager stopped the officer's briefing note reaching the EPA Chairman, to whom it had been addressed.

Our investigation also found evidence that the same Regional Manager had stopped another briefing note on a serious matter from progressing to the EPA Chairman. He had since left the EPA.

By July 2007, reports from an environmental auditor warning of an 'imminent environmental hazard' were being brought to the attention of EPA senior management. However, it was not until June 2008, and the discovery of methane within homes in the Estate, that senior management began to fully appreciate the gravity of the situation.

If action had been taken sooner, people's lives may not have been so disrupted.

6. The declaration and management of the emergency

Our investigators also met with affected residents to discuss the handling of the emergency. We conducted a letterbox survey to engage with as much of the community as possible and held a public meeting.

The CFA, the lead agency responsible for handling the emergency, does not have the power to require people to evacuate. As a result its approach was to provide residents with as much information as possible to assist them in making an informed decision.

Our investigation established that the CFA performed commendably in the circumstances. Community information sessions and public meetings were arranged immediately and a door-knock of residents was undertaken. In the Ombudsman's view, the Victorian Government's assistance to the EPA and affected residents was also timely and reasonable in the circumstances.

Nevertheless, there were concerns. This emergency was unlike other disasters such as bushfires where the threat can be seen and understood. Residents had to make 'snap decisions' based on highly technical information about methane gas and the likelihood of it causing an explosion or other health-related issues. Some said they were overwhelmed by the amount of information provided.

Our investigation also identified that, while authorities were quite rightly focused on the health and safety of residents, the social impact of declaring the emergency in terms of anxiety and well-being was not necessarily given sufficient attention. Several residents also complained that their house values dropped as a result of the emergency.

The Ombudsman's recommendations

The Victorian Ombudsman's report made 65 recommendations including that:

- The EPA review its policy for assessing works approvals.
- The two local councils that own the landfill site centrally manage all future contracts through an officer or team with contract management expertise.
- The EPA revise its compliance and enforcement procedures to ensure strong and decisive enforcement action in response to non-compliance.
- The EPA revise its policies to provide greater clarity and guidance in relation to how the buffer distance from a landfill is measured.
- The state's Office of the Emergency Services Commissioner conduct a detailed review of the emergency response to the methane gas risk at the Estate.
- The council and relevant government agencies continue to support residents in rebuilding their lives.

All of the recommendations were accepted, except one. That recommendation proposed that the council waive payment of rates to all residents in the Estate for 2009-10 as a measure of good faith and in response to the inconvenience experienced by the community. The council

stated that it had waived payment of rates to all residents in the Estate the previous year.

The outcomes

There have been a number of good outcomes since the Ombudsman's report was tabled in the Parliament of Victoria. There was also positive support from the affected residents.

In 2011, the Supreme Court of Victoria approved a settlement of \$23.5 million for more than 700 residents affected by the emergency. Our report had stated that affected residents should be compensated, while noting that the issue would be considered by the courts.

There has been extensive remediation work at the site and this is continuing. An \$11 million deep wall designed to contain the methane gas was built on the northern and western boundaries of the site. At the time of our report, the long term cost of remediating the site was estimated at \$100 million. This stands in stark contrast to the \$500,000 it would have cost to line the landfill when it was approved in 1992.

Agencies are also implementing the Ombudsman's recommendations to reduce the risk of a similar emergency arising in the future. The EPA assessed 260 other closed or licensed landfill sites in the state while the investigation was under way. It has since released a revised best practice publication on landfills with updated guidance on issues such as landfill gas management and buffer distances. It has also completed a major enforcement and compliance reform project incorporating the Ombudsman's recommendations.

Conclusion

In the case of the Cranbourne methane gas disaster, the Victorian Ombudsman used his statutory powers to investigate how the emergency occurred and to make recommendations to the responsible agencies. Affected residents have received significant compensation and steps are being taken to reduce the risk of similar events in the future. It is an example of a disaster where the office of the Ombudsman was able to achieve practical outcomes not just for affected individuals, but for the community as a whole.

REFERENCES

2009 Victorian Bushfires Royal Commission (2010) *Final Report - Summary*

Victorian Ombudsman (2009) *Brooklands Greens Estate - Investigation into methane gas leaks* (accessible at www.ombudsman.vic.gov.au)

ABBREVIATIONS

EPA Environment Protection Authority

VBRRA Victorian Bushfire Reconstruction and Recovery Authority