

# LITIGATION AND AUSTRALIAN BUSHFIRES

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## Context

Bushfire CRC research has reviewed post wildfire litigation in Australia as well as claims for compensation made against the New South Wales Rural Fire Service to determine the extent of compensation claims made against the fire agencies over hazard reduction and response activities. Although the data is incomplete and likely to underestimate the actual claims history, analysis of the available data does show that the number of claims for compensation is small given the very large number of fires and hazard reduction burns across Australia. The evidence may, however, suggest that litigation will be a more common response to future fires.

## Methodology

The data for this review is drawn from reported and unreported judicial decisions as well as a review of the insurance claims made against the New South Wales Rural Fire Service. The cases were identified by using the search term <bushfire or 'bush fire'> across three legal databases Austlii, Lexis/Nexis and WestLaw, in each case limited to Australian case law.

This method of data collection has necessary and significant limitations. Generally speaking, for cases heard before 1995, only cases that were the subject of an appeal on a point of law and that were reported in the law reports that are available.

Since the development of the internet and online resources, and in particular the Australian Legal Information Institute (AustLII) in 1995, many more judgments are available including judgments delivered in the lower courts and interlocutory judgments. Locating these judgments can show that litigation took place, even if it was ultimately settled rather than resolved by judicial determination. The delivery of this material is not consistent across Australia and many decisions, particularly in the lower courts, remain unavailable. There is no doubt that there will be many cases where no judgment can be located and equally many claims made and settled without ever coming before a court.

To identify trends in claims that are made but resolved without final judicial determination, the NSW Rural Fire Service ('the RFS') and the NSW Treasury Managed Fund ('the TMF') allowed access to their files relating to claims made against the RFS, and its predecessor, NSW Bushfire Services, in the period 1989 to 2010. The research was undertaken under ethics and privacy protocols.

## Litigation

Only 41 judgments in the period 1931 to 2011, were identified as dealing with the legal issue of liability for causing or allowing bushfires to spread. Analysis of those judgements reveals that fires in only 14 years have led to litigation where there has been some publically available judicial determination. This is the case notwithstanding the fact, that there may have been in excess of 4 million fires in that period. The identification of the defendants in these claims, and the year of the relevant fires, is shown in the table, below:

**Table 1 – cases by year and defendant type**

Defendant		
Landowner	Electrical agency	Fire or Land Management
1925		
1933		
1961		
1968		
	1977	
1978		
1983	1983	
	1991	
1995		1995
1997		1997
		2001
	2002	
	2003	2003
	2009	2009

The fire and land management agencies were first sued after fires in 1995. With the exception of one case in the Northern Territory, none of these cases have been finalised by a court judgment, they either 'settled' or are ongoing. Fundamental legal issues, such as whether or not the fire agencies owe a duty of care to individual property owners, remain unsettled.

## RFS claims for compensation

263 claims for compensation were made against the RFS in the period 1989-2010. (These do not include claims for personal injuries by employees, volunteer firefighters or for motor vehicle accidents on public streets). There were:

- 66 claims arising from hazard reduction burns;
- 80 arising from the response to or management of unplanned fires; and
- 50 where the nature of the fire could not be accurately classified.
- Only 28 (or 10.6%) of claims led to court action.

In the same period the RFS:

- responded to 184,888 fires and
- burned over 7.28 million hectares of land in hazard reduction activities.

Only 0.04-0.07% of RFS fire responses led to some form of compensation claim and there was, at most, only one court claim filed for every 10,000 responses. There was one claim for compensation for every 62 000 to 110 000 hectares of land subjected to hazard reduction burning.

## Conclusion

Day to day or routine fires continue to be dealt with without frequent litigation. There is a constant 'trickle' of claims for compensation for small scale damage caused by the actions of the fire authorities. On the other hand, significant fire events such as the Black Saturday fires now trigger litigation almost before the fires are extinguished.

This topic is the subject on ongoing research.