Australian bushfire cases

A table of reported and unreported cases dealing with issues of liability for causing, or failing to control, bushfires.

(Please read these notes on how to understand and use this material)

				Who won		
Year of fire	**Case**	**Facts**	**Held**	**Plaintiff**	**Defendant**	**Unable to determine**
1867	*Macdonald v Dickson* (1868) 2 SALR 32 (South Australia – Supreme Court).	The defendant's employee lit a fire to clear vegetation around the defendant's sheep run. The lighting of the fire was illegal under the *Bush Fires Act 1864*. The fire spread to the neighbouring property causing £2000 damages. The defendant sought a new trial on the basis that the plaintiff had not proved negligence and that the defendant could not be liable for the doing of an illegal act unless he had given the overseer express authority to light the fire.	On the issue of negligence, Gwynne J held that the common law had imposed liability for damage caused by fire spreading from one property to another. Statute law had removed liability for fires accidentally started, but where a fire was deliberately lit out of doors, and spread to another property, liability was established without the need to demonstrate negligence. As this was a fire deliberately lit, the plaintiff was entitled to win. Hanson CJ held that lighting the fire was not an act that was 'altogether outside the servant's authority'. He was 'inclined to think that there were many instances in which it might be prudent for a person to light a fire within the prohibited hours to escape danger' and there was a general discretion vested in both the employer and the overseer. Because the overseer had general authority to light fires on the property, the fact that this fire was started at a time when it was illegal to do so, did not excuse the defendant from liability. The defendant was liable.	X		
	Rylands v Fletcher (1868) LR 3 HL 330 (United Kingdom – House of Lords)	This is neither an Australian, nor a fire case. However the decision in *Rylands v Fletcher* established an important rule that was cited in many Australian cases until the High Court ruled, in *Burnie Port Authority v General Jones* that the rule had become so confused and subject to so many exceptions, that it was better to hold that it was no longer part of Australian law. In *Rylands v Fletcher*, Rylands engaged a 'competent engineer and contractor' to build a reservoir on his land. No one knew that under the reservoir were disused mine shafts that connected to the current mine operated by the plaintiff (Fletcher). When the reservoir was filled the water flooded Fletcher's mine, via the old shafts. There was no negligence by the engineer and Rylands had not actually done the work, but was Rylands liable for the losses suffered by Fletcher?	In the Court of Exchequer Chamber, Blackburn J said: > "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the Plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God... and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischevious if it gets on his neighbours, should be oblidged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth or stenches." The defendant appealed to the House of Lords. Cairns LC and Lord Cranworth held that Blackburn J had correctly explained the law. The statement by Blackburn J became known as 'the rule in *Rylands v Fletcher*'. The gist of it is that if the defendant had brought something dangerous onto his land, be it water, or dangerous animals and they escaped and caused damage then the defendant was liable. The injured party did not need to prove there was any want of care or negligence on the part of the defendant. In the Australian fire cases, the rule is			

			extended to apply to fire – see *Batchelor v Smith* and *Havelberg v Brown* where it was critical that the landowner did not start or otherwise 'adopt' the fire, so that it was not something he brought to the land (but see *Goldman v Hargrave*). In *Sheean v Park*, *Cottrell v Allan*, *Mitchellmore v Salmon* and *Craig v Parker* the defendants did light the fires so were liable, regardless of any care that they may have taken to control or extinguish the fires.			
1879	*Batchelor v Smith* (1879) 5 VLR 176 * (Victoria - Supreme Court)	A fire started on the defendant's land. The defendant did not start the fire but took no steps to control it and it spread from the defendants land. The plaintiff sued relying on an early English case that said "The ancient law, or rather custom, of England appears to have been" that a person was liable for fire that spread from his property to another. The Defendant sought a ruling to the effect that he could not be liable as he was in no way connected with the start of the fire and was under no duty to extinguish it.	"It is the duty of anyone who brings anything dangerous on his land to contain it, but there is no authority for the proposition that a person who did not bring the dangerous thing is under a duty to remove it". The English authority, relied on by the plaintiff, was limited to England – "There has been no such custom in Victoria". Fire should be considered as other dangerous material and there was no duty on the defendant provided he remained passive. 'Had he interfered in any way, he might possibly have rendered himself liable'.			X
1881	*Sheean v Park* (1882) 8 VLR 25	The defendant lit a fire but took steps to control it by ploughing around the fire. The defendant argued that he took all reasonable care to contain it.	A person who brings fire onto his own land does so at his own risk, and even if he takes care to prevent it spreading he is liable for the damage it may cause. The question of his diligence does not need to be considered.	X		
1882	*Cottrell v Allan* (1882) 16 SALR 122 (South Australia – Supreme Court).	The defendant lit a fire which escaped to the plaintiff's property. The plaintiff sued seeking £350 damages. The jury found that there had been no negligence and so judgment was entered for the defendant. Had the defendant been found liable, the jury would have awarded £15. The plaintiff appealed.	Way CJ – the rule in *Rylands v Fletcher* was the applicable rule. Where a person choses to bring or store anything dangerous on his land he is liable if it escapes without the need to prove negligence. That was the case here where the defendant deliberately lit the fire and did not take sufficient precautions to contain it. Andrews J – there was no need to prove negligence in the way the fire was managed as the lighting of the fire, contrary to the *Bush Fires Act* was itself negligent. By consent a verdict for the plaintiff; damages of £15.	X		
1884	*Quinn v Commissioner for Railways* (1885) 2 WN(NSW) 43 (New South Wales - Supreme Court).	The plaintiff sued the defendant for a fire caused by sparks emitted from the defendant's engine. The defendant showed that they were using the best known spark arresters. The jury found in favour of the plaintiff and awarded damages of £50.	A new trial was ordered on the basis that the jury's verdict was contrary to the judge's direction on the law and contrary to the evidence.		X	
1884	*Cook v Commissioner for Railways* (1886) 2 WN(NSW) 57 (New South Wales - Supreme Court).	The plaintiff sued the defendant for a fire caused by sparks from the defendant's engine. The plaintiff argued that recently invented spark arrestors should have been invented by the defendant at an earlier time.	The trial judge should have directed the jury that the defendant would not be liable if he had used 'all reasonable and necessary precautions and appliances known to science'. The judges direction that the jury could find for the plaintiff if they believed that recently invented devices, but not known at the time of the fire, could have prevented the sparks escaping 'went too far, and misdirected the jury'.			X
1884	*Taylor v Ramsay* (1884) 18 SALR 47 * (South Australia – Supreme Court).	A staff member on a train observed a fire to start near the railway line as the train passed. He took no steps to raise an alarm or extinguish the fire that spread to the plaintiff's property. The Commissioner had a practice of clearing vegetation beside the train line, but this had been done 'imperfectly' at the area where the fire started.	There was evidence that the fire was started by the defendant's engine but this was not, of itself, sufficient to establish negligence. The Act allowed the defendant to operate a railway 'and modern science has not yet furnished us with the apparatus which will absolutely prevent the emission of sparks'. If the defendant were liable for all fires there would be unlimited liability. Accordingly the Courts in England have held that if reasonable precautions are taken there is no liability, even if a fire occurs. It was however the duty of every person who had fire on their property to take precautions to prevent it spreading. No action was taken by the Commissioner's staff to control the fire that they had observed. Further, the evidence that the Commissioner had not adequately cleared the vegetation along the line, leaving 'what practically amounted to a tinder-box' along the line was further evidence of failure to take reasonable precautions to prevent the spread of fire.			X
1884	*McKinnon v Commissioner for Railways* (1885) 2 WN(NSW) 11	The plaintiff sued to recover damages for a fire caused by sparks from a steam engine. The engine was pulling a heavy goods train up a steep incline through the plaintiffs land. When partly up the incline the wheels lost traction and the train could not proceed. Three attempts were made to get up the incline. The fire on the plaintiff's land was first	The verdict was against the evidence. There was no negligence.		X	

		seen near where the engine stopped. It was proved that the latest appliances for arresting sparks were fitted on the engine, and that a heavier load had on former occasions been dragged up the incline by the same engine. A verdict was given for the plaintiff.				
1887	*Roberts v Webb* (1887) 21 SALR 96 * (South Australia – Supreme Court).	The defendant lit a fire in circumstances, and with all the precautions, required by the *Bush Fires Act 1865*. The fire spread to a neighbour's property causing £40 damages. The defendant argued that the *Bush Fires Act* gave him a right to light a fire provided the provisions of the Act were complied with. In this way the case was like *Vaughan v Taff Vale Railway Co* (1860) 29 L.J. Exch. 247 (see also *Taylor v Ramsay*) to the effect that where there was statutory permission to do something (in those cases, run a railway, in this case, light a fire) there could be no liability for doing what the statute allowed.	Section 5 of the Act did allow for the lighting of fires in the prescribed circumstances and, on its own, that the decision in *Vaughan v The Taff Vale Railway Company* would apply however the Act went onto say that it did not 'affect any right of action, or other remedy [for] … any loss or damage occasioned by any fire'. The purpose of the Act was to restrict the power to light fires. In the absence of the Act a person could light a fire when and how he chose, but in Australia, with its high bushfire risk, the legislature required further precautions and made it a criminal offence to light a fire except as provided for in the Act. The effect of complying with the Act was simply to ensure that the defendant was not criminally liable for the offences set out in the Act, but it did not exclude civil liability for damage done by the fire.	X		
1892	*Edwards v Melbourne and Metropolitan Board of Works* (1893) 19 VLR 432 (Victoria - Supreme Court).	The defendant set a fire on their land, and the fire spread to land owned by Mr Frederick Edwards. In fighting the fire, Mrs Martha Edwards was injured when she became blinded by the smoke and then came into contact with a piece of iron. Mr and Mrs Edwards both sued the defendant for their losses due to Mrs Edwards' injuries. The defendants argued that the damages to Mrs Edwards were too remote. The way her injuries were caused was not a 'natural and probable' result of the fire. Further as she was under no duty to assist in fighting the fire, she was a 'mere volunteer' and so voluntarily accepted the risk of being injured.	It was debatable whether or not Mrs Edwards had a duty or obligation to fight the fire, but it was not important to decide that issue; she had sufficient interest to protect her husband's property, that was also her home, and so 'she cannot be considered a mere volunteer or bare licensee'. The damage to Mrs Edwards was a natural consequence of the defendant's negligence. The fire spread to the plaintiff's land, Mrs Edwards was lawfully on the land, and having an interest in preserving the property she attempted to fight the fire and without any fault on her part, was injured. This was a natural consequence of the plaintiff's negligence.			X
1902	*Dennis v Victorian Railways Commissioner* (1903) 28 VLR 576 (Victoria - Supreme Court).	A fire was caused by sparks from the defendant's properly constructed, operated and maintained railway engine.	Evidence of a failure to clear grass and vegetation naturally growing near the track may be evidence of negligence.	X		
1904	*Havelberg v Brown* [1905] SALR 1 (South Australia- Supreme Court).	A fire started on the defendant's land and spread to land owned by the plaintiff. There was no evidence as to how the fire started or evidence that the defendant was negligent in his attempts to extinguish the fire. The Magistrate had directed the jury that the plaintiff was entitled to win if they found that even though he did not light the fire, the defendant had failed to do all that it was possible to do to prevent the fire spreading. The jury found for the plaintiff and the defendant appealed.	The English Common law (going back to the reign of Henry IV) provided that 'the occupier of a house was primarily responsible for fires lighted in his house by himself, his family, his servants, or his guests' and it was presumed that a fire was started by someone's neglect. A statute in 1707 modified the rule so that a person was not liable for a fire started by accident; after that time a plaintiff had to prove that the fire was caused by negligence. The court applied the rule from *Batchelor v Smith*, namely a person who did not start a fire was under no duty to take steps to control it, but he may be liable if he interfered in any way. If there is no duty to extinguish the fire there could be no liability for failing to do so. 'If a person undertakes to perform a voluntary act he is liable if he perform it improperly, but not if he neglects to perform it.' Gordon J said 'In my opinion the defendant was under no obligation either to put the fire out or to prevent it spreading.' Here the defendant did take steps to control the fire – he and his employee cleared the area around the fire, removed light fuel and built earth banks around the burning log. They observed it for at least half an hour. The obligation upon them was to do what a reasonably prudent person would do, not all that could be done. Way CJ was of the view that the evidence established that the defendant's themselves were prudent, experienced men and they believed that the steps that they had taken were		X	

			prudent. Their commitment was shown by the fact that the defendant's own property was at risk and he was satisfied he had done what he needed to do to protect his own interests. Homburg J was of the view that if the defendant had done something to increase the size of the fire or the risk of spreading there could be liability: > But every act done by the defendant was consistent with the action of a prudent man, who wanted to confine or circumscribe a fire which he discovered on his land. There was no evidence of negligence so the plaintiff's claim was dismissed.			
1904	*Sermon v Commissioner for Railways (WA)* (1907) 5 CLR 239 (High Court of Australia)	The defendant Commissioner was authorised by an act of Parliament to operate railways using any kind of fuel. The plaintiff sued over a fire caused by the defendant's engine alleging that the coal used was of a type more likely to cause sparks than another type of coal available to the Commissioner and alleging that the Commissioner was negligent in the choice to use that fuel.	The use of the words 'any type of fuel' in the act was not intended to limit the choice to a choice of running engines on coal, wood or oil. It extended to the choice of coal types and there could be no action for doing that which the Act authorised. The discretion vested in the Commissioner was an unqualified discretion so his choice of fuel could not lead to liability provided reasonable care was taken in the actual use of the fuel, so if an engine needed modifications to run on a particular fuel, it may be negligent not to make those modifications, but the choice of fuel was not actionable.		X	
1905	*Mitchellmore v Salmon* (1905) 1 Tas LR 109 (Tasmania – Local Court)	A farmer lit a fire that escaped damaging a neighbouring property. It was established that lighting the fire was a normal and accepted farming practice and it was appropriate to light it in January (though some witnesses said March or November would have been better).	The rule in *Rylands v Fletcher* applies to the effect that a man who lit a fire on his land was responsible for the damage caused regardless of the care he took to control the fire.	X		
1906	*Craig v Parker* (1906) 8 WALR 161 * (Western Australia – Supreme Court).	A farmer lit a fire that escaped damaging a neighbouring property.	The Court again applied the rule in *Rylands v Fletcher*. The defendant was liable regardless of the care he took to control the fire.	X		
1907	*Street v Phillips River Roads Board* (1908) 10 WALR 102 (Western Australia – Supreme Court).	The plaintiff sued the defendant for the loss of his home caused when a fire spread from the defendant's work site. Four witnesses gave evidence that the fire moved from the direction of a stump that the defendant's workers had left burning, but one witness gave evidence that the fire had come from another source. The issue for the court was whether or not, in the absence of direct evidence of the fire spreading to his land, an inference could be drawn as to the source of the fire.	The only inference open on the evidence was that the fire was caused by the defendant's work and the plaintiff was entitled to succeed even without direct evidence of the cause of the fire.	X		
1907	*Victorian Railways Commissioner v Campbell* (1907) 4 CLR 1446 * (High Court of Australia)	The plaintiff's land was damaged by sparks from the defendant's railway setting fire to grass that lay on the defendant's land, between the railway line and the fence. The negligence alleged was a failure to burn or otherwise clear the grass and vegetation along the railway line.	The court cited *Dennis v Victorian Railways Commissioner* and approved the effect of that decision. The defendant was liable even though they claimed to have leased the land. The Act allowed for the Commissioner, with the approval of the Governor, to lease surplus land, but the Governor's approval had not been obtained. Further, the agreement provided that the tenant would 'take every precaution to prevent the spreading of fire' but the Commissioner retained the right to enter the land to 'burn off the grass should they consider it necessary.' In the circumstances the Commissioner retained absolute control over the land along with the obligation to reduce the hazard of fire by clearing the vegetation along the railway line. Higgins J said 'I think the Commissioners cannot keep control of the land and at the same time escape the consequences of having that control.' As they remained in control of the land they were liable for the fire caused by their negligent failure to clear the grass growing along the track.	X		
1911	*Anderson v Commissioner of Railways* (WA) (1911) 13 WALR 10 (Western Australia – Supreme Court)	The defendant typically used Newcastle coal to operate trains. When the supply of Newcastle coal was consumed they were forced to change to a lower grade 'Collie' coal. This coal produce more, and finer, sparks. To deal with the sparks an employee had to spend one day for each locomotive installing new, finer meshed spark arrestors. The fire was started by a train that had not been fitted with the new arrestors. The evidence from the defendant was that the arrestor could not have been fitted without disrupting traffic. The Magistrate found that there was	Although the defendant was authorised to use any kind of fuel (see also *Sermon v Commissioner for Railways (WA)*) the defendant acknowledged that the use of alternate spark arresters was reasonable. The defendant was also aware that the supply of Newcastle coal was being diminished and had 'ample' time to install the new arresters before they began using Collie coal. The defendant was negligent for not taking steps to install spark arresters when they become aware of the supply issue and, according to Parker CJ, would have been negligent even if they did not have	X		

		negligence. The plaintiff appealed.	notice, but for choosing to run the trains rather than stopping them for a day or two to install the new arresters.			
1911	*Whinfield v Lands Purchase and Management Board (Vic)* (1914) 18 CLR 606 (High Court of Australia)	The defendant board owned land where men, employed by the State Rivers and Water Supply Commission were camped. The camp site was close to where the men were working but was not supplied by the Water Supply Commission. The men supplied their own bedding and food and lit fires for cooking. The Board and the Commission knew that fires were being lit there. A fire was lit outside working hours and through then negligence of the men, spread to the plaintiff's land. The plaintiff sued the Board and the Commission for the damage caused to their land. The plaintiff succeeded against the Commission, but not the Board; the full court of the Supreme Court of Victoria set aside that decision finding for the defendants. The plaintiff appealed to the High Court.	Griffith CJ - The Commission did not occupy the camp ground even though they had located it and invited the men to set up camp there. The Commission did not provide lodging; it had merely located a place where camping as permitted but the men themselves occupied the space. The Commission was not liable for the negligence of its staff – an employer who locates lodging for its staff is not liable for any wrong they may then do. Equally the Board, by granting permission to camp on its land did not become responsible for the conduct of the men there camped. Issacs J – the plaintiff contended that the rule in *Rylands v Fletcher* governed the matter, that the owner of the land was liable for the spread of a deliberately lit fire without the need to show negligence. Developments in English law had however made the law more reasonable: > … there is always a condition precedent to the application of the doctrine of *Rylands v Fletcher* - namely, that the user of the land for the purpose for which these dangerous elements mere introduced was not the natural use of the land… It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community. A fire lit for the purpose of cooking or warmth is not an increased danger beyond that arising from the normal use of the land so unless negligence is proved, liability is not established. The spread of cooking fires is a 'common risk, which members of society mutually accept'. The defendant Board and Commission were not liability for the negligence of the man who lit the fire so there was no liability. (NOTE – the discussion about what was or was not a 'natural use of the land' occupied many later cases about the application of rule in *Rylands v Fletcher*. The confusion arising from, and the difficulty of applying this concept was one reason given when the High Court held that the rule in *Rylands v Fletcher* is no longer part of the common law of Australia. See *Burnie Port Authority v General Jones*).		X	
1912	*Young v Tilley* [1913] SALR 87 (South Australia – Supreme Court)	A fire was deliberately lit but then spread, without negligence, to the grass. The defendant took reasonable steps to control the fire but ultimately, and without negligence, it spread to the plaintiff's land. A statute of 1707 had removed liability for fires 'accidentally begun'. Was the fire that spread to the plaintiffs land still the fire that the defendant's employee started or was it a new fire, accidentally started? (NOTE – The issue of whether or not a fire that ultimately damages property is the same fire that started some time before or a different fire, was an issue arising during the inquest into the 2003 Canberra fires – was the fire that burned into Canberra on 18 January 2003 the fire that was started by lightning on 8 January, or a different fire? See *The Queen v Coroner Maria Doogan; ex parte Peter Lucas-Smith & ors* [2005] ACTSC 74; see also the discussion on this point by the Privy Council in *Goldman v Hargrave*).	The words 'accidentally begun' had to be given their natural meaning and a fire deliberately lit was not 'accidentally begun' even if it spread to another part of the land by accident. The question of whether the fire on the ground was a new fire, or an escape of a fire from the fire place must depend on the circumstances of the case. It might be a different fire if the spread was caused by an 'act of God' but that would require 'the action of some elemental force of nature of an extraordinary character, and such as could not reasonably have been foreseen'. In this case there was nothing extraordinary; a spark flying from the fire to the ground was 'one of the most ordinary ways by which fire spreads'. As this fire was not 'accidentally begun' the defendant was liable regardless of any due care that was taken.	X		
1917	*Bugge v Brown* (1919) 26 CLR 110 (High Court of Australia)	The defendant supplied his employee with cooked meat for his midday meal, but on this day gave him raw meat and instructions to light a fire in a house on the property in order to cook it. Despite these instructions the employee lit a fire near where he was working. The fire spread damaging the neighbour's property. Was the defendant liable for the negligence of his employee who failed to follow the instructions he had been given? The Supreme Court of Victoria found for the	Issacs J: The fire was caused by the servant's negligence. The employer was liable as the act of lighting the fire was within the scope of employment even if he had been directed to light the fire elsewhere. That direction really related to the need to obtain cooking utensils rather than a concern for safety and the worker fashioned what he needed from material to hand. Lighting the fire where he did (in the fire place of an old and partially demolished hut) did not take his act so far beyond what he was authorised to do as to make him a stranger vis-à-vis his employer. As there had been negligence and the employer was liable for that there was no need to consider	X		

		defendant; the plaintiff appealed to the High Court of Australia.	whether there was strict liability for the spread of the fire. Higgins J: > If an employer is not to be liable for the negligence of his employee unless his instructions are strictly followed, as to time, place and method, then it will be easy for employers to frame forms of authority for their employees, and so absolve themselves from responsibility as to the consequences to their neighbours of the employees' negligence. I cannot think that we are forced to any such conclusion. It was B, not A, who chose Winter as an employee; it was B, not A, who could superintend and control him.			
1919	*Turner v Whitfeld* (1919) 19 SR(NSW) 345 (New South Wales – Supreme Court)	The defendant was the occupier of land in which a number of men were working. In February, an employee (a 'ganger'), was in charge, the engineer and foreman having travelled to Sydney. The work the men were engaged in was very varied and their exact tasks undefined. It was up to the ganger, in the absence of the foreman or engineer, to assign the tasks of the employees (whether fence building, building the dam, clearing land, building offices etc). The ganger's evidence was that, in the absence of the engineer and foreman, he ordered other workers to set fires to create fire breaks between 'scrub' and the rest of the property. He claimed to have seen smoke and signs of fire in that direction but the jury found in fact that there was no fire burning on the land at that time. The defendant gave evidence that only the engineer was authorised to direct that the land be cleared by fire.	Sly J: The employee's acts were done for the benefit of the employer; he was in charge and if the engineer had been there he could have ordered the fire to be lit so there was no absolute prohibition on the use of fire. He was acting in the course of his employment and so the employer was liable. Ferguson J: The other employees were clearly acting in the course of their employment when they complied with the ganger's orders; so if there was negligence the defendant employer was liable. Ralston J: If the land had been threatened by fire, the employee would have been authorised to light a fire to reduce fuel loads. Being so authorised he must have been authorised to clear the land in anticipation of a fire.	X		
1919	*Whitfeld v Turner* (1920) 28 CLR 97 (High Court of Australia)	An appeal to the High Court from the decisions in *Turner v Whitfeld*.	The decision of the Full Court in *Turner v Whitfeld* was correct. Knox CJ: > The fact that Spinney's authority to light a fire was only given to him in case of a certain emergency happening is nothing to the point. Lighting a fire was an act of a class which he had authority to do under certain circumstances. Whether the circumstances did or did not exist might be very relevant as between Spinney and his employer, but is not relevant as between his employer and the plaintiff.	X		
1919	*Watego v Byron Shire* (1920) 5 LGR 82 (New South Wales – District Court)	Council employees were clearing a road using fire to burn off dead trees and rubbish. The fire spread to land owned by Walsh and then to the plaintiff's land. The plaintiff relied on the rule in *Rylands v Fletcher*; he also alleged there was negligence and that the employees had failed to comply with *Careless Use of Fires Act 1912* (NSW) though this claim was no pursued at trial. The plaintiff had warned the defendant's staff of the danger of using fire in the way they were.	The defendant relied on the judgment in *Whinfield v Lands Purchase and Management Board* (Vic) and argued that the use of fire to clear the land for road building was a natural use of the land and so the rule in *Rylands v Fletcher* did not apply. > Roads have to be formed in young countries: to make these roads tress have to be felled and the stumps and undergrowth cleared, and a natural and usual means of doing that is by burning. Whether the rule applied did not matter as the judge found that there had been negligence by the council staff.	X		
1922	*Prout v Stacey* (1922) 25 WALR 20 * (Western Australia – Supreme Court)	The fire was caused by a contractor doing clearing work for the defendant.	Once it is proved that the fire escaped from the defendant's land, there was no need to consider the question of negligence as the rule in *Rylands v Fletcher* applies.	X		
1924	*Baker v Durack* (1924) 27 WALR 32 (Western Australia – Supreme Court)	The fire was caused by an employee doing clearing work for the defendant.	The rule in *Rylands v Fletcher* applied; there was nothing to suggest the spread of fire was due to an 'act of God', there was a wind but 'it was a wind of a kind with which we are familiar and was not of very exceptional character'. Although the defendant had 'been guilty of no misconduct' and 'It is his misfortune [that] he has to pay anything at all' still he was liable.	X		

1925	*McInnes v Wardle* (1931) 45 CLR 548 (High Court of Australia)	McLeay was engaged by McInnes to fumigate rabbits. The normal practice was to clear the bracken fern by burning which drove the rabbits into their exposed burrows. It was contrary to the *Bush Fires Act 1913* (SA) to set fires between 15 October and 1 February but McLeay was engaged in November and lit the fire in December.	Starke J: '…an occupier of land is liable for damage by fire lighted in dangerous circumstances by an authorized person, whether servant or contractor, notwithstanding that the conditions of authority have not all been complied with or have been abused.' Given that 'that burning ferns and undergrowth was a usual and ordinary method used in the fumigation and destruction of rabbits' the liability of McInnes was clear. Dixon J: 'the appellant knew, or ought to have known, that in the course of operations conducted for his benefit upon land in his occupation, fire would be employed if, as was likely, its use was found necessary or expedient in the opinion of the person whom he had authorized to be there for the execution of the work… Such a finding involves the appellant in responsibility for the introduction of fire upon the premises he occupied. In my opinion his liability was established.' Evatt J: 'a person who authorizes the use of fire in order to clear or burn off on land occupied by him is under a duty to neighbouring landholders to see that reasonable care is exercised to prevent the fire from spreading.	X		
1927	*Genders v South Australian Railways Commissioner* [1928] SASR 272 (South Australia – Supreme Court)	The defendant negligently started a fire on uncleared land that spread to the plaintiff's property. The defendant admitted that they were liable to the plaintiff, the legal question was how the value of damages should be assessed.	Damages should be assessed on the basis of the value of the property before and after the fire, but must also take into account any advantage caused by the fire, such as increased productivity of the land or the sale of the partially burned timber and the restoration of land value by natural growth in the period before any likely use of the land for farming purposes.	X		
1929	*Mattinson v Coote* (1930) 33 WALR 18	The defendant's, with the plaintiff's permission, were collecting stone from the plaintiff's land for use in road works. The plaintiff's had warned the defendant of the dangers of smoking and driving across the field of stubble. The defendant instructed his staff not to smoke and serviced the exhaust on the truck. The truck was driven across the stubble and loaded and then driven away. A fire was observed where the truck had been. There was no direct evidence as the cause of the fire. The trial judge found that the fire was started when a piece of stubble came in contact with the hot exhaust and fell off when the truck drove off. He found however that there was no negligence. The plaintiff appealed.	The plaintiff had required the defendant to ensure its staff did not smoke and an efficient silencer was attached to the truck. This was done. The cause of the fire was due to the hot exhaust coming into contact with the stubble which was a risk known to all parties, but not a risk that a reasonable person would have taken further steps to avoid; and it was noted that the plaintiff had not given any directions to avoid that risk. 'The use of motor trucks in farming operations is in these days an ordinary method of farming, and the risk of fire could not be avoided if the stone was to be removed in reasonable time'.		X	
1933	*Hazelwood v Webber* (1934) 52 CLR 268 (High Court of Australia)	The defendant lit a fire to burn off stubble, the fire spread to the plaintiff's land. The matter was tried before a jury that found there had been no negligence and a verdict was entered for the defendant. The plaintiff appealed to the Supreme Court that upheld the appeal and found that the defendant was liable, even if there was no negligence. The defendant appealed to the High Court. Although the common law imposed strict liability for damage caused by a fire that a defendant lit on their property, and which spread to another, that rule had been tempered by exceptions and excuses. In this case it was argued that: 'The fire, which travelled from the defendant's land to the plaintiff's, was lit by the defendant for the purpose of burning off stubble, a thing beneficial to the land which many farmers do. The use of fire for such a purpose is said by the defendant to be a recognized incident of the proper enjoyment of the land which, he claims, falls outside the application of the prima facie rule of absolute liability.' The defendant argued that *Careless Use of Fires Act 1912* (NSW) and the *Bush Fires Act 1930* (NSW) had abolished the common law rule and required proof of negligence. Those Acts did not have the effect	Gavan Duffy C.J., Rich, Dixon and McTiernan JJ: Apart from statute the **common law imposed** upon the occupier of land, who used fire upon it, a **prima facie liability which was independent of negligence** for the harm suffered by his neighbour as a natural consequence of the escape of the fire. This prima facie liability might be answered by more than one ground of excuse or exception … on behalf of the defendant, **it is contended that** in fact **statute has abrogated or modified the common law rule** in New South Wales. **We do not think that this contention is correct.** Sec. 86 of the *Fires Prevention (Metropolis) Act 1774* (14 Geo. III. c. 78) was, we think, part of the law which, under 9 Geo. IV. c. 83, was originally in force in New South Wales … It soon ceased, however, to be the formal expression of the law in New South Wales. Its provisions were transcribed in sec. 74 of the local statute of 8 William IV. No. 6, called the *Sydney Buildings Act 1837*. This section should, in our opinion, also be construed as of general application. The repetition of the section by the colonial legislation operated as an implied repeal of the British enactment so far as it applied to New South Wales. But, in its turn, the statute of 1837 was repealed. The repeal was effected by the *City of Sydney Improvement Act 1879* (42 Vict. No. 25) … It appears to be correct that the repeal would not revive the Imperial provision which the repealed statute had, in its application to New South Wales, previously repealed... The Act of 1774 may, therefore, be regarded as not in force in New South Wales.	X		

		suggested, they authorised the use of fire in some circumstances but did not alter the common law liability for the spread of the fire even if it was lit in accordance with the Act. In any event the defendants' fire was not authorised by these Acts. The court then had to consider if the use of fire to burn off the stubble was a natural use of the land (see *Whinfield v Lands Purchase and Management Board* (Vic)) then the rule in *Rylands v Fletcher* would not apply and the plaintiff would have to show that the defendant was negligent, and given the jury's verdict that there was no negligence, there would be no liability.	(Emphasis added) It follows that common law strict liability applies unless one of the exceptions to the common law ruled applied. The strict liability rules only applied if the use of the land was non-natural or exceptional. If strict liability applied to the introduction of some hazardous material (such as fire) where the use of that hazard is considered a necessary and normal practice, that would inhibit the defendant's ability to enjoy and use their land in the normal way. But, > In Australia and New Zealand, burning vegetation in the open in midsummer has never been held a natural use of land" and so liability was established regardless of negligence. Starke J: "The evidence established that burning off stubble is an ordinary farming operation, and was a method used by sixty or seventy per cent of the farmers in the district in which the appellant and the respondent had their lands. But it must be observed that February is a summer month, and the grass is then, usually, very dry and inflammable." As for the ordinary use of the land: > A man is entitled to the reasonable enjoyment of his land; he may build upon it, and in modern times it is but a reasonable enjoyment of his rights in respect of his land that his buildings should be equipped with fireplaces or apparatus for heating his premises, and with a water and gas supply and a sewerage system; such a user of land would be but a reasonable enjoyment of his rights in respect of his land. So, he may farm his lands, and conduct his farming operations in the ordinary manner. He may fertilize his land, and may make reasonable provision for watering his stock by means of dams, &c. The law relating to the legitimate enjoyment of lands must necessarily develop as conditions alter and methods improve. What may be regarded as a dangerous and extraordinary use of lands in one generation may well, in another, become but an ordinary and legitimate enjoyment of those lands … But burning off stubble, when it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger. And I cannot agree that such an operation is an ordinary or natural or reasonable use or enjoyment of land, even if sixty or seventy per cent—or all—of the farmers in the district in which the land is situate take the risk … The facts in the case were not in dispute, and on those facts … the appellant burnt off his stubble at his peril, and that his liability was independent of any negligence on his part. The defendant was therefore liable regardless of the jury's view that there had been no negligence.			
1933	*Wainwright v Stacy* (1933) 35 WALR 102 (Western Australia – Supreme Court)	The plaintiff's land was damaged as a result of fire started by the defendant on the defendants land. The property was subject to a mortgage so the damage was damage to the 'reversion' that is the value of the land that would revert to the plaintiff when the mortgage was paid out. The mortgagee (ie the bank) gave consent to the plaintiff suing the defendant for the loss of value of the reversion. The defendant argued that the consent was not effective and the bank should have been joined as a plaintiff. The plaintiff moved a bull into a paddock out of the way of harm by the fire. Also in the paddock was a horse that was gored by the bull. The plaintiff sought compensation for injury to the horse. In the Local Court the Magistrate held that the bank should have been joined or named as a plaintiff, and that the defendant could recover	The mortgagee's consent was effective. The damages to the horse were too remote – it was not a natural consequence of the defendant's act in lighting the fire.		X	

		damages for the injuries to his horse. All parties appealed.				
1933	*Thompson v Gosney* [1933] St R Qd 190 (Queensland – Supreme Court)	A fire started in the rubbish on a farm in tropical Queensland and spread to a watercourse where it was largely extinguished. The defendant said to the plaintiff 'I think it's pretty safe now' although some twigs, horse manure and small branches were still smouldering. A short time later the fire resumed and burned onto the plaintiff's land. There was no direct evidence as to the start of the fire. A magistrate found the defendant liable for 'permitting the fire to remain on his farm…and also in allowing it to escape after once getting it under control'. The defendant appealed to the Circuit Court and then to the Supreme Court.	Webb J: There was no evidence of negligence and the rule in *Rylands v Fletcher* had no application. (It is not clear why Webb J thought the rule did not apply; the magistrate found that the fire was deliberately lit and 'in the absence of evidence to the contrary I assume that these burning operations were under the control of the owner of the farm' and Webb J held that these findings were supported by the evidence. Webb J must have concluded that the use of the fire to burn trash was a natural use of the land). Brennan J: 'I think there was a unnatural user of this land, inasmuch as the defendant, being a cane farmer who was burning trash and knew there was long grass about, should have taken he precaution to get the fire well in hand. The dry grass was more than likely to catch fire if the fire spread. The fire did spread. It was under control that night. The next day it burst out again, showing that it had not been subdued sufficiently to justify the defendant relaxing efforts to check it, and his conduct in that regard amounts to negligence.' [Note this judgement is confused – if was an unnatural user of the land, negligence is not an issue. The findings about the defendant's state of knowledge and his conduct amounting to negligence is irrelevant unless Brennan J intended to say a negligent use of the land is an unnatural use of the land, in which case the rule in *Rylands v Fletcher* ceases to have any meaning – see *Burnie Port Authority v General Jones*). Henchman J: The magistrate found that the defendant was negligent in '(a) permitting a fire to remain on his farm … [and] (b) in allowing it to escape after once getting it under control' but not for lighting the fire. The magistrate made no finding as to who lit the fire. In Henchman's view the Magistrate *could* have found the defendant negligently lit the fire but he did not do so and was not *bound* to do so, in other words it was a conclusion open on the evidence but not the only possible conclusion and so the appeal court was not in a position to substitute that finding for the findings actually made. The findings that the defendant was negligent in permitting the fire to remain, or in his efforts to control the fire, were not supported by the evidence so the defendant was not liable. (Henchman J did not discuss the rule in *Rylands v Fletcher* and why, therefore, the defendant was not liable even without negligence. We can infer, in the absence of a finding as to who lit the fire, the rule did not apply as the defendant did not bring the fire onto his land – see *Batchelor v Smith* and *Havelberg v Brown*.)		X	
1942	*Tolmer v Darling* [1943] SASR 81 (South Australia – Supreme Court)	Due to a fuel shortage during World War II vehicles were fitted with a 'gas producer'. The defendant was driving a vehicle with a gas producer when he went into a deep drain at about 10mph. Unknown to the defendant, there was damage to the gas producer which allowed some charcoal to escape and start a fire that spread to the plaintiff's land.	The use of a car with a gas producer was an ordinary and natural use of the public road. On the evidence however the degree of force used to damage the bolt and hopper door should have alerted the driver to the possibility of damage such that he was negligent for not stopping the vehicle and inspecting it before driving on.	X		
1944	*Wise Bros Ltd v Commissioner for Railways (NSW)* (1947) 75 CLR 59 (High Court of Australia)	The defendant operated a flour mill. On 13 October a fire started at the mill and spread to the defendants siding destroying a large amount of rolling stock. The plaintiff sued the defendant alleging liability in negligence and further that the accumulation of flour, lead to the accumulation of a large amount of flammable fumes and waste with inadequate fire protection, was a non-natural use of the land and that the defendant was therefore liable for the damage done when the dust ignited.	Latham CJ: Adopted the reasoning in *Hazelwood v Webber* – the common law applied and there was strict liability unless one of the common law exceptions applied, including cases 'when the use of the element or thing which the law regards as a potential source of mischief is an accepted incident of some ordinary purpose to which the land is reasonably applied by the occupier.' Although the operation of a flour mill may lead to the accumulation of explosive dust, it is impossible to conclude that this is a non-natural use of the land, and so the plaintiff must establish negligence. Further the cases on strict liability related to liability for the escape of fire used or brought onto the land, there was no evidence that this was a fire brought onto the land by the defendant so again it is beyond the rule of strict liability. As the plaintiff had to prove negligence it should have been permitted to call expert evidence as to the standard of fire protection equipment that was no the defendant's premises at the time. Williams J: 'Whatever room there may previous have been for differences of opinion, I			X

			think that it is now clear … that under the modern law of tort an occupier of land is not liable for damage caused by the escape for fire used on his land on to that of his neighbour, unless it was not a natural use of the land.' The use of the land was not 'an unnatural use of the land under modern conditions'.			
1945	*Collins v The Commonwealth* (1945) 62 WN (NSW) 245 * (New South Wales – Supreme Court)	The plaintiff sued for damage caused by a fire that spread from the defendant's property. The plaintiff did not allege negligence but argued that the defendant was absolutely liable. The defendant filed a defence arguing that the fire was a small cooking fire lit with all reasonable precaution. The plaintiff sought to have the defence 'struck out' on the basis that even if established, it was no defence.	"It is established by the modern authorities, of which, for Australia, *Hazelwood v Webber* is the most important, that the introduction by a person of fire onto his premises is a particular case of the rule in *Rylands v Fletcher*. If it is introduced in abnormally large quantities or in abnormally unsafe conditions, he incurs quasi-absolute liability if it escapes and causes damage or injury to others. But if it is lit for a normal purpose, for example, in a grate for the purpose of warming a room or domestic cooking, he incurs no liability for any damage which may be caused by its escape unless this was due to some negligence on his part."		X	
1948	*SA Railways Commissioner v Riggs* (1951) 84 CLR 586 (High Court of Australia)	This was an action for damages for a fire caused by a fire that escaped from engine S 50 as it travelled from Gawler to Adelaide. There was evidence that the spark arrester on the train was of appropriate design and well maintained. There was no finding of negligence by the train staff. The judge would have accepted that but for the fact that engine S 50 was responsible for three earlier fires before it arrived at Gawler. His honour found that there was negligence as the controller's should have determined that this engine was prone to cause fire and so there was some issued that needed to be rectified even if the plaintiff could not identify what that was.	The defendant had statutory authority to run engines even though it was known that train engines could start fire. There could be no liability for doing what was authorised by statute even if it caused harm to others, but there was a duty to do that which was authorised 'reasonably' so there could be liability if the plaintiff could prove negligence. McTiernan J: '… a railway company authorized by the legislature to use locomotive engines is not responsible for damage from fire occasioned by sparks emitted from an engine travelling on their railway line provided they have taken every precaution in their power and adopted every means which science can suggest to prevent injury from fire and are not guilty of negligence in the management of the engine. It was the duty of the commissioner to observe this standard of care, in the case of locomotive engine, S 50.' As for the allegation that the engine had already started three fires and therefore should not be allowed to continue, McTiernan said 'It is not the law that where a locomotive engine is used under statutory authority without negligence, there is a limit imposed by the general law on the amount of nuisance it may commit.' Further 'it was not unlawful to use the locomotive engine, S 50, because the condition of the vegetation, the weather, the wind and the atmosphere, matters beyond the control of the commissioner, would contribute to the risk that sparks emitted from the locomotive engine, as a necessary consequence of using it, would cause fires. Further, if he took all reasonable precautions within his power, consistent with the use of the locomotive engine, he was not precluded from using it, because sparks emitted from the funnel had caused three fires.' Kitto J: 'The statutory authority which the defendant had for using a locomotive engine at the time and place in question absolves him from liability under the rule in *Rylands v Fletcher*, for the escape of fire from his engine. But the Act must be construed as authorizing the use of such engines in a proper manner only, and the plaintiffs are therefore entitled to succeed if the injury suffered was caused by a failure on the part of the defendant or his agents "to use reasonable care to do no unnecessary damage" by the use of the engine . If the injury to the deceased's property was caused, not by negligence, but by the ordinary and normal use of the railway, the defendant is under no liability. The onus of proving negligence rests upon the plaintiffs.'		X	
1948	*Casalegno v Pioneer Sugar Mills* [1951] St R Qd 141	The defendant was running trams along a public street for the purposes of moving sugar cane to the sugar mills. A fire was caused by one of the defendant's locomotives damaging the plaintiff's sugar crop.	Philp J (with whom Mansfield SPJ agreed): *Prima facie* a person who uses on a highway a vehicle from which sparks may be emitted is absolutely liable for damage occasioned by them. In his own editions of his work on Torts Sir John Salmon treated this liability as a special case of nuisance not within the rule in *Rylands v Fletcher*.' In this case the legislature had imposed an obligation upon the defendant to operate the train line and there could be no strict liability for doing that which the statute required. 'Where the law imposes a duty to do a dangerous act, *Rylands v Fletcher* does not apply.' The *Regulation of Sugar Cane Prices Act 1915* (Qld) gave the necessary, albeit implied,			X

			authority to operate the steam locomotives. It followed that the plaintiff not only had to prove that the fire was started by a spark from the defendant's locomotive but also that there was negligence. Stanley J dissented on the question of the authority granted by the legislation but ordered a new trial on other grounds related to the judges direction to the jury and the assessment of damages.			
1950	*How v Jones* [1953] SASR 82	The plaintiff alleged the defendant lit, and then failed to contain a fire that spread from his land to the land owned by the plaintiff. The magistrate hearing the matter found that the fire had started on the defendant's land and that the defendant had done nothing to stop it but he could not be satisfied that the defendant lit the fire and so dismissed the case. It was established that the plaintiff saw the fire on his land 2 days before it flared up but he, too, did nothing to extinguish it. The plaintiff appealed.	Napier CJ (with whom Mayo and Reed JJ agreed) cited the Magistrate's assessment of the law with approval. The Magistrate said: 'The effect of the statute [providing no liability for a fire that was caused by accident] was to cast on the injured party the onus of showing that the fire which caused the damage did not 'acidentally begin.' What, then, had a plaintiff to prove in order to establish a prima-facie case? According to *Filliter v Phippard*, he had to show that the fire was lighted either wilfully or negligently by the defendant or some person for whose acts or defaults the defendant was responsbible. That case was followed here in *MacDonald v Dickson*, *Cottrell v Allen* and *Young v Tilley*. If negligncе were established the defendant was, of course, liable, but if a wilful lighting of the fire were proved the defendant could still avoid liablity by showing that the fire was 'lawfully lighted for domestic or other ordinary purposes of occupation of land, and accidentaly spread without negligence' *(Whinfield v Lands Purchase Management Board (Vic))*. From what is stated above it will be seen that the liablity must be brought home to the occupier of the land. The fire must be shown to be *his* fire or the fire of some person for whose acts or defaults he is responsible." However the appeal court was of the view that the Magistrate had gone further than he needed in his desire to be 'fair' and it was open, on the evidence, for him to be satisfied to the required standard that the defendant had lit the fire. As for the defendant's failure to extinguish the fire, 'The same question was raised in *Wardle v McInnes* and answered as follows: "The defendant was not entitled to impose on the plaintiff the burden of putting out the fire … unless, upon the balance of risk and convenience, it was such an obvious and reasonable thing to do that, in neglecting to do it, the plaintiff was so careless of his own interests as to be guilty of contributory negligence." That case was taken to the High Court (*McInnes v Wardle*), but the judgment of the Supreme Court was affirmed without any challenge or criticism of this view. Judgment was entered for the plaintiff without any finding of contributory negligence (which in 1950 may have been a total bar to the plaintiff's claim.)	X		
1951	*Williamson v Commissioner for Railways* (1959) 60 SR(NSW) 252	The plaintiff's property was damaged due to a fire caused by the defendant burning off vegetation in the vicinity of the defendant's railway line. The jury awarded £3,337 damages.	The finding that the fire was caused by the defendant's negligence was not challenged on appeal. The appeal was limited to issues related to the calculation of damages, not on the question of liability.	X		
1957	*Edwards v Blue Mountains City Council* (1961) 78 WN(NSW) 864	The council was burning off at its rubbish tip. The fire escaped and destroyed the plaintiff's home.	Walsh J tried the matter without a jury. The plaintiff alleged the defendant was liable for breach of statutory duty for failing to do that which was required by the *Bushfires Act 1949* (NSW). Held that s 12 did not apply to councils. Section 54 said: > It shall the be duty of the council of any area or any public authority to take all practicable steps to prevent the occurrence of fires on and to minimise the danger of the spread of fires on and to minimise the danger of the spread of fires on or from (a) any land vested in or under its control or management; or (b) any highway, road, street, lane or thoroughfare, the maintenance of which is charged upon such authority or council. Section 54 applied to the councils rubbish tip but it was a public duty that is it was not intended that a breach of the duty would give rise to a private right or remedy in damages. The section even if it was intended to give a remedy to landowners imposes no more obligation than the common law. That supported the notion that the provision was 'intended as a measure directed to the public welfare, rather than as			X

			one designed for the benefit and protection of individual citizens.' The plaintiff also relied on common law principles. Held that the fact that there is statutory authority for the doing of an act, such as burning rubbish, precludes the operation of rule in *Rylands v Fletcher*. Use of the land for purposes authorised by statute could not be considered a 'non-natural' or 'special' use of the land, even if it did expose the neighbours to increased danger. The use of the fire (rather than the use of the land as a tip) could not lead to strict liability as that was the very thing authorised by statute (in particular the *Local Government Act 1919* (NSW) ss 282 and 283 and Ordinance 51). 'A railway authority cannot run locomotive steam engines without having a fire. A council cannot burn rubbish without having a fire. In either case, the presence of fire is the essential condition of the exercise of the statutory power.' That however only excuses the non-negligent performance of the task. Here the risk of fire in circumstances 'so fraught with risk' that it was both a nuisance and negligent. Where the action is framed in nuisance, it is up to the defendant to show that the nuisance (the spread of the fire) could not be prevented in the performance of its authorised tasks. In any event the council was negligent for burning off on an extreme fire day, when a total fire ban was in place (even if that ban did not extend to the council tip) and for failing to take reasonable precautions against the spread of the fire, in particular a failure to provide fire fighting hoses and water at the tip, and a failure to have someone in attendance when the rubbish was being burned.			
1959	*McWhirter v Emerson-Elliot* [No 2] [1962] WAR 162	The plaintiffs and the defendant were neighbours. Their land was separated by a dry creek that was filled with flammable vegetation. The defendant set fire to a pile of rotting timber in order to destroy it. There were no fire breaks on the plaintiff's land. The fire spread to the creek bed and then onto the dry weeds under the plaintiff's orchard.	The plaintiffs were entitled to succeed on the basis of the rule in *Rylands v Fletcher*; earlier decisions (*Craig v Parker*, *Prout v Stacey*, *Baker v Durack* and *Hazelwood v Webber*) had determined that the rule applied to the spread of fire in the circumstances in particular: • Boring a pile of discarded building timber was not a natural user of the land: 'I do not know that this conclusion can be supported by reasoning, and I can only say that to me the answer is self-evident'. • The light wind that arose could not be described as 'natural forces so unexpected that the defendant could not reasonably have expected them.' The defendant claimed the fire would not have spread but for the extreme sensitivity of the plaintiffs' land due to the dry weeds in the plaintiffs' orchard. 'In truth this plea appears to amount to no more than the plaintiffs' land would not have burnt if it had not been inflammable, and this cannot be a good defence to an action for having set fire to it.' There should have been a fire break on the plaintiffs' land but if there had been it would have made no difference so the claim of contributory negligence did not succeed. It was not negligent for the plaintiffs 'to leave untouched in his orchard weeds which nature has grown there'. Apart from strict liability, the defendant's conducted in lighting the fire in the circumstances in which he did was gross negligence.	X		
1961	*Hargrave v Goldman* (1963) 110 CLR 40 (High Court of Australia)	Prior to the decision in *Burnie Port Authority v General Jones*, this was the most significant case on liability for the spread of bushfire. Between 5 and 6pm on Saturday the 25th February 1961 lighting struck a tree on the defendant's property, near his home. It was a tall tree and it was observed that there was a fire burning in a fork 80 feet above ground level. The fire could not be extinguished from the ground. The next day the fire control officer was contacted. The defendant cleared the area of flammable material and wetted it down. About midday a tree feller attended and the tree was well alight. The fire near the base was damped down and the tree was felled. There was no question that	Taylor and Owen JJ agreed with the trial judge that 'there was abundant evidence' that had the respondent taken more care on Monday he could have extinguished the fire but he did not attempt to do so, nor did he take any steps to prevent the fire from spreading. The principles of *Batchelor v Smith* and *Havelberg v Brown*, relied upon by the trial judge, were inconsistent with the modern law of negligence [the history of which is normally traced back to *Donoghue v Stevenson* [1932] AC 562, a case decided after *Batchelor v Smith* and *Havelberg v Brown* but before this case.] Their Honours thought the textbook, Salmon's *Law of Torts* (5th ed, 1920) correctly	X		

		up until this time the defendant's conduct was completely reasonable or 'not open to question'. The defendant claimed that on the Monday he doused the fire with water and rolled the logs in order to inspect them which he did on Monday, Tuesday and Wednesday morning. He claimed to have spent two hours firefighting on Monday when two visitors left his property but the visitors gave evidence that the defendant left the property when they did. The judge accepted therefore that the defendant in fact left the property on Monday morning and was away for an unknown length of time but he was away 'for a substantial part' of the Tuesday. On Wednesday he was working about a quarter of a mile from the fallen tree. About 12.30pm his attention was drawn to smoke in the area. He returned to the tree and found that fire had burned out the paddock and spread some 2 and a half miles. Over the day it continued to spread onto the neighbour's property. The fire risk on the day was 'said to be severe and at sometimes dangerous'. Both the temperature and wind velocity increased on the Wednesday. The trial judge had dismissed the plaintiff's claim 'because the fire had been caused by lightning and the respondent could not be said to have thereafter "adopted" or "continued" it… Further, he was of the opinion, that the occurrence of the fire, caused, as it was, by lightning, did not impose upon the respondent any duty of care with respect to his neighbours.' (In reaching this conclusion, the trial judge relied on the precedents of *Batchelor v Smith* and *Havelberg v Brown*). The plaintiff's also alleged that the failure to deal with the fire was a breach of the obligation imposed by the *Bush Fires Act 1954* (WA) s 28. That section is still part of the law of Western Australia. This fire was investigated as part of the Rodger's '*Royal Commission appointed to enquire into and report upon the bush fires of December 1960 and January, February and March 1961*'.	stated the position: > "When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement" Although this defendant didn't light the fire, he was aware of its existence and did not take 'reasonably prompt and efficient means' to deal with it and therefore should be liable for the plaintiff's losses. This was so even though the defendant did, initially, take reasonable steps to extinguish the fire in the tree, but once the tree was down, 'a hazard of a different character was created' and he was under a duty to take reasonable care to prevent is spreading to cause damage to his neighbours and the countryside generally. As for the claim for breach of statutory duty, 'It seems to us that it is impossible to regard a breach of s. 28 as giving rise to a cause of action for damages.' Windeyer J agreed with Taylor and Owen JJ but added some further comments. The common law (which he traced back to 1401) imposed rigorous, if not strict, liability for the spread of fire but was modified by statute to remove liability for fires accidentally begun. Those early statutes had become part of the law of WA but did not apply where the fire (as here) was accidentally begun but negligently allowed to spread. The old rules had, however, been absorbed by the rule in *Rylands v Fletcher* 'but *Rylands v Fletcher* is excluded simply because the respondent did not bring the fire upon his land, nor did he keep it there for any purpose of his own. It came there from the skies. And he did nothing to make its presence there more dangerous to his neighbours.' For the same reasons the defendant could not be liable for the tort of nuisance. The plaintiff's argued that by failing to extinguish the fire, the defendant had 'adopted' it or 'suffered' it to remain and should still be liable. Windeyer said: > But it seems artificial in the case of a man who takes steps, although in the result ineffectual, to eliminate the danger [to say that he somehow adopted it]. Trying to get rid of a thing can hardly be evidence of approval of it. Instead of imputing to the respondent an intention contrary to his real intent Accordingly there was no liability in the tort of nuisance. The 'essential question' was whether the defendant was negligent. The trial judge had found that the defendant had not taken reasonable care to control the fire so negligence would be established if he was under a legal duty to take steps to stop the spread of the fire, even though he had not started or otherwise adopted it. Was there such a duty? A duty could be found where a person was undertaken work and it was argued that by taking some steps to extinguish the fire, a duty was established, but > … here what the respondent did in relation to the fire was not done pursuant to any undertaking to the appellants, nor was it done specifically for their benefit. It did not increase the danger of the fire spreading. Probably it diminished it. It seems to me impossible to say that, because the respondent did something to control the fire, he incurred a liability that he would not have incurred had he done nothing. If that were the law, a man might be reluctant to try to stop a bush fire lest, if he failed in his endeavours, he should incur a liability that he would not incur if he remained passive. Windeyer did not think that could be the law and that the mere fact that he had felled the tree did not give rise to a duty. TO determine the question he went back to earlier cases on negligence, not related to fire, to conclude that: > In my opinion a man has a duty to exercise reasonable care when there is a fire upon his land (although not started or continued by him or for him), of which he knows or ought to know, if by the exercise of reasonable care it can be rendered harmless or its danger to his neighbours diminished. Of course, if			

			the fire were brought by him upon his land - in the sense of being started or intentionally kept alight there by him or anyone for whose acts he was responsible - his duty would not be merely to take reasonable care: it would be the strict duty of *Rylands v Fletcher*. Windeyer J agreed that the *Bush Fires Act 1954* (WA) s 28, although imposing an obligation upon a landowner to take steps to control a fire on his or her property did not create a civil right to allow a person who suffers a loss to claim damages. The High Court ordered that the matter be returned to the Supreme Court of Western Australia for a new trial. It is important to stress that in Windeyer's view, the legal duty imposed on the defendant landowner *did not* arise because he took some steps to control the fire; it is not the case that if he had done nothing there would be no liability but by felling the tree a duty arose (see *Batchelor v Smith*). That may be a different view to that taken by Owen and Taylor JJ who said that by felling the tree 'a hazard of a different character was created' and the landowner thereby came under a duty to control the spread of the fire. If Owen and Taylor's view prevailed, a landowner may be better off doing nothing than trying, albeit unsuccessfully, to extinguish a fire that he did not start.			
1961	*Goldman v Hargrave* (1966) 115 CLR 458 (Privy Council - UK)	Prior to the passage of the *Australia Act 1986* (Cth) s 11, it was possible to appeal on issues of state law from the High Court to 'Her Majesty in Council' that is to the Privy Council in the United Kingdom. The landowner in *Hargrave v Goldman*, having lost in the High Court, appealed to the Privy Council. (The *Australian Constitution*, s 74, still allows for appeals to the Privy Council if the matter is certified by the High Court of Australia, but that will never happen, see *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461).	Their Lordships accepted that the defendant had not, by his actions, in any way adopted the fire or made it his own so as to attract the rule in *Rylands v Fletcher*. This conclusion has an important bearing upon the nature of the legal issue which has to be decided, It makes clear that the case is not one where a person has brought a source of danger on to his land, nor one where an occupier has so used his property as to cause a danger to his neighbour. It is one where an occupier, faced with a hazard accidentally arising on his land, fails to act with reasonable prudence so as to remove the hazard. The issue is therefore whether in such a case the occupier is guilty of legal negligence, which involves the issue whether he is under a duty of care, and if so, what is the scope of that duty. … it is only in comparatively recent times that the law has recognised an occupier's duty as [more than a duty to] … abstain from creating, or adding to, a source of danger or annoyance. It was for long satisfied with the conception of separate or autonomous proprietors, each of which was entitled to exploit his territory in a "natural" manner and none of whom was obliged to restrain or direct the operations of nature in the interest of avoiding harm to his neighbours.' Their Lordships traced the developments in the law in relation to the duty of occupiers to protect neighbours from a variety of risks including fire and weeds. The appellant (the defendant landowner) argued that the law should see a difference between a hazard 'brought about by human agency such as the act of trespasser, and one arising from natural causes, or act of God. In relation to hazards of this kind it was submitted that an occupier is under no duty to remove or to diminish it, and that his liability only commences if and when by interference with it he negligently increases the risk or danger to his neighbour's property.' Their Lordships rejected the distinction in part because of the difficulty in establishing, in particular when action was required, whether an event is the product of human agency or natural causes – how could a land owner know when discovering a fire, whether it has been deliberately lit or not? In any event when considering a duty to protect a neighbour the cause of the hazard is irrelevant. On principle therefore, their Lordships find … a general duty upon occupiers in relation to hazards occurring on their land, whether natural or man-made… One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking	X		

			or removing it, and the ability to abate it … the standard ought to be to require of the occupiers what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more.' The defendant sought to rely on the statute that said that there is no liability for a fire that is accidentally started. The fire in the tree was an accident but was it the same fire as the fire that damaged the surrounding property (see also the discussion on the decision in *Young v Tilley and in The Queen v Coroner Maria Doogan; ex parte Peter Lucas-Smith & ors* [2005] ACTSC 74). Their Lordships said A fire is an elusive entity; it is not a substance, but a changing state. The words "any fire" may refer to the whole continuous process of combustion from birth to death, in an Olympic sense, or reference may be to a particular stage in that process - when it passes from controlled combustion to uncontrolled conflagration. Fortunately, the Act has been considered judicially … in *Musgrove v. Pandelis* where a fire started accidentally in the carburettor of a car, but spread because the chauffeur negligently failed to turn off the petrol tap… The fire which caused the damage was … not the spark which caused the initial ignition, but the raging fire which arose from the act of negligence. Their Lordships accept this interpretation: it makes sense of the statute, it accords with its antecedents, and it makes possible a reasonable application of it to the facts of the present case, that is to say that the fire which damaged the respondents' property was that which arose on 1st March as the result of the negligence of the appellant. And not the fire that was started by lighting on the 26th of February.			
1965	*E.F. Smart v Shire of Mingenew* [1966] WAR 192	The council operated a tip. Trenches were dug which were filled with rubbish. When the trench was full a new one was dug and the earth used to cover the rubbish in the old trench. There was inflammable material dumped in the trenches and the area was covered with inflammable scrub. There were no fire breaks. In the previous year at least two fires had occurred and escaped from the tip. This fire also originated in the tip and spread to the plaintiff's property. The cause of the fire could not be established.	There was a clear duty on the defendant to take reasonable precautions both to stop a fire starting and to stop it spreading once it did start. It may have been difficutl to prevent ignition of papers, boxes and other inflammable material; but this only serves to reinforce the duty to prevent the escape of fire. The council was aware of the risk of fire and had resolved to put in fire breaks, but had not actually done so. The failure to put in fire breaks was negligence.	X		
1965	*Francis v Commissioner for Railways* (1967) 70 SR(NSW) 138	Employees of the defendant lit a fire on a grazing property which they negligently allowed to escape onto a neighbouring property.	This case dealt with the interpretation of the *Government Railways Act 1912* (NSW) s 145 which limited the Government's liability in any action for damage caused by fire. That Act is no longer part of the law and there were no principles of general application regarding liability for fire.	X		
1967	*Smith v Badenoch* [1970] SASR 9	A farmer lit a fire to clear scrub. The fire was inspected at midnight but the farmer failed to observe that it was spreading onto his neighbour's land. The neighbour had observed the fire but failed to call the fire brigade until the next morning by which time the fire was burning on his property.	Zelling J: The decision of the High Court in *Wise Bros Ltd v Commissioner for Railways (NSW)* established that there is not strict liability for the spread of fire, irrespective of the rule in *Rylands v Fletcher;* decisions such as *Young v Tilley* can no longer be considered good law. There is no liability if the case comes within one of the exceptions to spread of fire, irrespective of the rule in *Rylands v Fletcher*. The defendant argued that his use of fire was an ordinary or natural use of the land. His Honour was concerned that earlier cases had determined what was or was not a natural use was affected by the degree of hazard It would no doubt have been logically much more consistent if a natural user of land had been held to continue to be a natural user at any time of the year	X		

			notwithstanding changes in the circumstances and in the greater likelihood of danger ensuing from the use, and if user at a time when the condition were fraught with danger to others had been classified as a natural but negligent user, but the development of the case law has been otherwise and I must accept that to be so. The degree of hazard involved in the sue of the fire, the extensiveness of the damage it is likely to do and the difficulty of controlling it depending on climate, the character of the country and the natural donations do, on the case law as it now stands, decide what is natural and what is non-natural user… At the time of this fire there had been extensive rain such that lighting the fire so not 'so fraught with risk' such that the use of the fire in those conditions to clear scrub, could be described as a non-natural use of the land. As such the argument based on the rule in *Rylands v Fletcher* failed. The defendant was however liable for negligence in that 'his check of the area at midnight was too cursory… It may be said that this requires a high degree of vigilance form a defendant in these circumstances. So it should.' Had he looked longer and more thoroughly he would have observed the fire spreading and could have taken steps to contain it. The plaintiff contributed to his own losses by failing to call the fire brigade when he observed the fire at 11.45pm. Given his medical history there was no contributory negligence in not attempting himself to control or extinguish the fire. The plaintiff's damages were reduced by 15% to reflect his contributory negligence.			
1969	*Triplett Pastoral and Development Co v Cleaver* [1973] WAR 173	The plaintiff obtained a permit to clear bush by fire. The permit directed his attention to *Bush Fires Act 1954* (WA) s 18 which required him to ensure that there were at least three men present at the fire, to give notice of the burn and not to burn during days of 'dangerous' fire hazard. The fire was lit and spread to the plaintiff's land. The defendant's denied any negligence, notwithstanding they did not give the prescribed four days' notice and had only two men in attendance.	Wallace J agreed with the law as stated by Zelling J in *Smith v Badenoch*. To establish liability under *Rylands v Fletcher* the plaintiff has to show that the defendant brought the fire onto the land in circumstances that constituted a 'non-natural' use of the land and in circumstances that could be classified as 'dangerous'. The current practice in the area was to chain or roll over the area and then use fire to clear it, which necessarily required some wind and weather that would allow the fire to burn and spread. There was a fire break twice as wide as required and the weather was amenable to burning. The use of the fire in those circumstances was not a 'non-natural' use of the land and so the claim based on *Rylands v Fletcher* failed and there was no evidence of negligence in setting the fire. As for breach of statutory duty (with respect to the number of men in attendance and the notice) but compliance with either obligation would not have affected the outcome. The plaintiff's claim was dismissed.		X	

1976	*Lobsey v Care* (1983) 1 M.V.R. 1	Private landowners were conducting a hazard reduction along the roadside, clearing vegetation that was on land owned by council but that was between the road and their private land. A driver came around a corner and drove into the flames from the burn off. The driver ran into a car travelling in the opposite direction killing the other driver and injuring himself and his wife. One of the defendants, Ingall, was a local brigade captain. He relied on ss 22 and 48 of the *Bushfires Act 1949* (NSW). These sections granted various powers to brigade captain to take action to protect life and property against 'any existing or imminent bushfire danger' and provided legal immunity for brigade captains for actions taken bona fide in the execution of the Act.	The phrase 'existing or imminent' qualified the term 'bushfire' rather than 'danger'; that is it had to be the bushfire that was existing or imminent, not the danger. Moffit P held that 'imminent danger' made no sense as a danger was a risk that was always present and therefore imminent and further, the wide powers granted had to be narrowly interpreted and brigade captains couldn't exercise powers to enter and build fire breaks or destroy property because of a real danger that a fire may occur; there had to be a risk from a fire actually occurring. Section 22 was limited to case of extreme emergency 'where the bushfire brigades will have to make decisions in the agony of an immediate peril to people and homes, so that bona fides is the sole restraining force in decisions which may result in the destruction of the property of others without compensation or other redress." Hazard reduction burns, were outside the terms of both s 22 and s 48. Priestly JA with whom Samuels JA agreed, referred to the evidence of Ingall to the effect there was no urgency or imminent danger at the time they chose to light the fire that is they could have had their pick of days in which to burn. They were taking action against a possible future, not imminent, threat. Further he held there was no evidence that they were seeking to execute or act for the purpose of the Act rather they were seeking to act for their own purposes and interest	X		
1977	*Wollington v State Electricity Commission* [1979] VR 115	This was litigation arising from Victoria's 1977 extensive grass fires. These fires were the subject of the 'Report of the Board of Inquiry into the occurrence of bush and grass fires in Victoria' by E. Barber. The plaintiff lost his house, garage, workshop and all their contents. The defendant's admitted liability. The plaintiff received payments of $3680 from the Emergency Relief Committee that had been established after the fires. $1000 came from voluntary relief donations, $2680 came from funds provided by government from consolidated revenue for disaster relief. The question for determination was 'what was the impact of the $2680 on his right to damages from the defendant?'. If the payments were compensation for loss then that would require the applicant not to gain double compensation so he would have to repay the Committee or the defendant would be able to deduct the value of the payments from the damages.	The true purpose was the immediate relief of distress. Payments were made on the basis of items lost (eg a bed) but were not based on the value of the thing lost, rather where there was a loss an amount sufficient to replace it with a basic item, regardless of the value of the thing actually lost, was paid. These were voluntary gifts from the government to relieve hardship and not provided to compensate for actual losses.	X		
1977	*Wollington v State Electricity Commission* [1980] VR 91	Defendant's appeal from the earlier decision that the applicant was not required to account for emergency relief funds provided by the Emergency Relief Committee from consolidated revenue.	Appeal dismissed.	X		
1978	*Haileybury College v Emanuelli* [1983] 1 VR 323	Liability of the driver of a motor vehicle for a bushfire caused when the wheel fell off his defective trailer. The driver was aware of the defective condition of the trailer, having observed that the wheel was defective in	The defendant knew the significance of wheel bearings but having detected a fault in this trailer he was content to patch up the problem in the hope it would not recur, rather than taking the vehicle to a mechanic for professional servicing.	X		

		November 1977.	… the defendant knew, or ought to have known, that the bearing was faulty and that it had no washer in the assembly, and that if the bearing collapsed as was likely, there was nothing to prevent the wheel coming off. From time to time thereafter, the defendant tested the hub of the relevant wheel on the trailer to see if it was overheating. This is not, I find, the ordinary conduct of a reasonable man towing a trailer in good order. For example, in this case, the defendant said in his evidence that he did not check the hub on the wheels of his car at any stage. His conduct in this case was rather the conduct of a man who knows that he is towing a trailer with an inherent weakness in the wheel bearing which he hopes against hope will not remanifest itself. In my opinion, the reasonable man, in the circumstances of the defendant, after becoming aware of the slackness in the wheel bearing causing wheel wobble at Yellingbo and after being told of the absence of a washer in the bearing assembly at Yellingbo, would have considered the risks inherent in continuing to operate the trailer in this defective condition, as against the small cost and inconvenience to which he would be put to eliminate that risk, by having new bearings installed. A reasonable man in the circumstances would also appreciate the risk of fire on a hot summer's day and that a fire may be caused by the wheel falling off and the axle being dragged along the road in the period that it took to come to a stop. The defendant was liable for the $89000 damages The defendant's insurer sought to rely on a clause in their policy that would allow them to avoid liability if the defendant drove his vehicle in a defective condition. That clause did not apply because the clause did not include the trailer – see also *AMP Fire and General Insurance Co Ltd v Emanuelli* [1984] VR 607.			
1979	*R Field (Yass) Pty Ltd v SRA* (1985) 2 NSWLR 231	On the 13th February 1979 the Commission carried out maintenance work on a railway bridge over Derringullen Creek near Yass. The work involved the use of oxy-cutting equipment, power grinders and power drills. The railway ran over the bridge, under the bridge was dry undergrowth. 'The day was one of high fire danger, the weather being hot and windy.' Sparks from the work ignited the undergrowth and spread to the plaintiff's land. The Commission wanted to rely on the *Government Railways Act 1912* (NSW) s 145 which limited the Government's liability in any action for damage caused by fire. The issue was whether or not maintenance work was work 'in the operation of the railways or railway services'.	This case dealt with the interpretation of the *Government Railways Act 1912* (NSW) s 145 which limited the Government's liability in any action for damage caused by fire (see also *Francis v Commissioner for Railways*). That Act is no longer part of the law and there were no principles of general application regarding liability for fire. Smart J said '… in my opinion the ordinary English meaning of the phrase "in the operation of the railways or railway services" would embrace maintenance of a railway bridge. The maintenance of a safe track, and any bridge on which the track sits, is an integral part of the working or operation of the railways.' The Act applied so the defendant's liability was capped at $4000 per claim.	X		
1979	***Burnie Port Authority v General Jones Pty Ltd*** **[1994] HCA 13** (High Court of Australia)	This case involved a structure fire at a cold store owned by the Port Authority. The plaintiff, General Jones Pty Ltd had a large quantity of frozen vegetables stored in the defendant's cold store. The defendant was extending the cold store and engaged independent contractors to install new refrigeration. This required them to undertake welding and to install 'Isolite', an insulating material. Isoloate had a fire retardant in it, but it could still be ignited after prolonged exposure to flame and when it did burn it did so with great intensity. The defendant had stored 30 boxes of Isolite in roof void near where the welders were working. Sparks from the welding ignited the cardboard boxes which, in turn, ignited the Isolite and destroyed the building and the plaintiff's stock. The plaintiff sued both the Authority and the welders. Both were found liable. The trial judge said the defendant was liable under the ignis suus	Mason CJ, Deane, Dawson, Toohey and Gaudron JJ: The ignis suus rule can be traced back to 1401 but it had been modified by statute providing no liability for fires that were accidentally started. Regardless of the status of the rule now, the Australian case law shows that the rule has been replaced by the rule in *Rylands v Fletcher*. As for *Rylands v Fletcher* the cases had become involved in deciding what was or was not a no-natural use of the land (see *Smith v Badenoch*). Increasingly, *Rylands v Fletcher* liability has come to depend on all the circumstances surrounding the introduction, production, retention or accumulation of the relevant substance. That being so, the presence of reasonable care or the absence of negligence in the manner of dealing with a substance or carrying out an activity may intrude as a relevant factor in determining whether the use of land is a "special" and "not ordinary" one.			

		rule, the rule dating back to the 1400s imposing strict liability for fire. On appeal the Full Court of the Supreme Court of Tasmania found the defendant liable but found that the ignis suus rule had been replaced by the rule in *Rylands v Fletcher*. The defendant appealed to the High Court of Australia.	After tracing the development of the law of negligence their Honours said > … the rule in *Rylands v Fletcher*, with all its difficulties, uncertainties, qualifications and exceptions, should now be seen, for the purposes of the common law of this country, as absorbed by the principles of ordinary negligence. Under those principles, a person who takes advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things, owes a duty of reasonable care to avoid a reasonably foreseeable risk of injury or damage to the person or property of another. What constitutes 'reasonable care' varies with the circumstances: It has been emphasised in many cases that the degree of care under that standard necessarily varies with the risk involved and that the risk involved includes both the magnitude of the risk of an accident happening and the seriousness of the potential damage if an accident should occur. Even where a dangerous substance or a dangerous activity of a kind which might attract the rule in *Rylands v Fletcher* is involved, the standard of care remains "that which is reasonable in the circumstances, that which a reasonably prudent man would exercise in the circumstances". In the case of such substances or activities, however, a reasonably prudent person would exercise a higher degree of care. Indeed, depending upon the magnitude of the danger, the standard of "reasonable care" may involve "a degree of diligence so stringent as to amount practically to a guarantee of safety". Because of this finding the Court did not have to decide whether welding in the roof void was, or was not, an unnatural use of the land. The storage of the isolite in the roof void near the welding was negligent so liability was established. Brennan J agreed that the ignis suus rule had been absorbed by the rule in *Rylands v Fletcher*. His Honour did not determine whether or not the rule in *Rylands v Fletcher* had been subsumed into the law of negligence as he found there was no liability, under either head, as the Authority had not authorized the welder's to undertake the dangerous task of welding near the isolite. McHugh J agreed that 'the "ignis suus" principle is not part of the common law of Australia. In this country, liability for fire is not the subject of a special common law rule. It is covered by the rule in *Rylands v Fletcher*.' He disagreed however, with the proposition that this rule had been overtaken or subsumed by the law of negligence. With great respect to those who are of the contrary opinion, I do not see how, consistently with the settled doctrine of this Court, the liability of an occupier of land under the rule in *Rylands v Fletcher* can be understood as assimilated to, or could be incorporated into, an occupier's liability in negligence. He agreed with Brennan J that liability both under the rule in *Rylands v Fletcher* and in negligence had not been established. The effect of the 5:2 majority decision is that the rule in *Rylands v Fletcher* should no longer be considered part of Australian common law. Liability for the spread of fire is to be determined by the application of the normal rules of negligence. This case did not specifically deal with a situation where a fire is started by lightning and the property owner in no way adopts the fire as his or her own. In that situation			

			the property owner does not take 'advantage of his or her control of premises to introduce a dangerous substance, to carry on a dangerous activity, or to allow another to do one of those things.' Such a case was also not decided on the basis of *Rylands v Fletcher* as the defendant did not bring the dangerous thing onto the land (see *Batchelor v Smith*). The relevant statement of the modern law can still be found in explained in *Hargrave v Goldman*.			
From this point the use of electronic databases, such as LEXIS (a commercial database) or AustLII (a free public access database) means many more judgments are available. Prior to this point only reported decisions, important cases dealing with areas of law, can be located. After this many procedural decisions (such as *Woodend Water v Bell)* or decisions by trial judges that do not resolve issues of law can be located. The procedural cases help to identify when bushfires have led to litigation even if the cases ultimately settle. This data helps to give a more complete picture of the extent of post bushfire litigation, even if the cases themselves do not determine issues of law or liability.						
1980	*Evans v Delaney* (1985) 58 LGRA 405	The defendant Council had previously operated a rubbish tip. They 'outsourced' the operation of the tip allowing a private operator to operate the facility subject to some conditions including that rate payers could use the tip for free and that the tip was subject to inspection by council staff. A council employee, who was also a fire supervisor under the *Country Fires Act* (SA) was appointed to supervise operations at the tip. On 5 February 1980 a fire started at the tip but was not fully extinguished. The days of 18-20 February were days of 'acute' fire danger. The tip operators had no fire fighting facilities at the tip and no employees on duty. A fire broke out and damaged the plaintiff's property 5kms away. This fire was part of a fire complex that affected the Adelaide Hills and was known as the Ash Wednesday fires of 1980. Further fires, that impacted South Australia and Victoria in 1983, are also known as the Ash Wednesday fires.	The real issue in this case was whether the council, that had licensed the company to run the tip, was still liable for the negligent management of the tip. The plaintiff's claim relied on *Rylands v Fletcher*. Although this fire started in 1980 and the fire at the Burnie Port Authority cold stores was in 1979, the decision of the High Court in *Burnie Port Authority v General Jones* was not handed down until 1994, some 9 years *after* this decision. The argument was rejected, in any event, because the council was not the occupier of the land. The Council was alleged to have been negligent in the exercise of its powers under the *Local Government Act.* King CJ drew a distinction between 'those functions of council which relate to policy and discretion and those which are operational in nature'. Issues of policy are not examinable in courts – so for example the policy decision to stop running the tip but instead licence someone else to do so, could not be challenged in court. (The distinction between policy and operations has played a large role in deciding when governments are liable to private citizens and when they are not in the United States, but less so in Australia). In this case, regardless of the contractual provision, it remained the council tip. The contract required the licensee to allow rate payers to dump rubbish for free and the council retained significant authority over the conduct of the tip. On 12 February the council fire officer inspected the tip and even though he knew of the earlier fire did not thoroughly inspect the site to make sure it was extinguished or give directions as the fire fighting equipment that should be on hand given pending high fire danger weather. > I think that the council, having undertaken the responsibility of inspecting and giving directions to ensure that the dump was not a fire hazard was under a duty, in the circumstances outlined, to those who might foreseeable be damaged by an outbreak of fire, to exercise reasonable care to make the inspection and directions effective to prevent the outbreak of fire. Cox J referred to this fire as one of the fires of 'Ash Wednesday 1980' which should be distinguished from the 1983 fires, also referred to as 'Ash Wednesday fires' that affected both Victoria and South Australia. Cox J took the view that the corporation's failure to take steps to fully extinguish the fire on the 5th, and its failure to have fire fighting equipment on hand or any person on duty on subsequent extreme fire danger days, given their experience with fire on the tip, was negligent. Their liability was clear. Council retained the power to inspect the tip and to give directions to the operators on matters including fire prevention. > The council had failed to exercise its powers of inspection and supervision effectively… It neglected to use its coercive powers to ensure that there was adequate fire fighting gear and water on the site. These failures on days of extreme fire danger when the council was undertaking	X		

			extensive inspections but not actually giving directions to protect from a risk they were well aware of, was negligent and the council was also liable. Per Olsson J: the tip was substantially operated by Evans as agent or servant of council so council was also liable on the basis of the rule in *Rylands v Fletcher*.			
1983	*Woodend Water v Bell* 1988 VIC LEXIS 840 (Victoria Supreme Court)	This was litigation arising out of fires on 1 February 1983 at Woodend but not the Ash Wednesday fires that occurred on 18 February. These fires were caused by the use of a saw on the property of Woodend Water causing sparks to start a fire.	This case was a preliminary matter dealing with interrogatories and what questions the plaintiff was required to answer.			X
1983	*Woodend Water v Hyan* 1990 VIC LEXIS 1106 (Victoria Supreme Court Full Court)	This also arises from 1 February 1983 fires and actions by some 85 plaintiffs. The Board's insurer payed $3 million to the Board's solicitor to hold on trust to indemnify the members of the Board of Woodend Water for claims arising from the fires.	Money paid to the Board by their insurer was held on trust for the benefit of the plaintiffs who had commenced legal action before the expiration of the limitation period.	X		
1983	*Ballantyne v ETSA* [1993] SASC 4275 (South Australia Supreme Court)	Following the 1983 Ash Wednesday fires there was a commercial arbitration where ETSA agreed to pay damages for the losses caused by the Narraweena fire. During the proceedings it was alleged that some damage was caused by the Baker's fire, a fire that ETSA was not responsible for. The applicants were put to the expense of investigating the Baker's fire but those costs were thrown away when that defence was not perused. The arbitrator did not allow those costs. There was a time limit of 14 days to lodge an appeal that the appellants missed. They were allowed further time to lodge their appeal. ESTA applied to set aside the extension of time.	Appeal dismissed, so the appeal was allowed to proceed even though the Court took the view that the court hearing the appeal from the Arbiter may well take the view the appeal lacked merit.	X		
1983	*May v ETSA* [1993] SASC 4149 (South Australia Supreme Court)	This was an appeal from the decision of the master to extend the limitation period to allow the plaintiff to commence proceedings for damages due to the Ash Wednesday fires, when his wife was killed and his home was destroyed. To extend the limitation period, the plaintiff has to show that they have discovered new material, that they could not have discovered during the limitation period that shows they have a legitimate cause of action. The fires were 1983 and proceedings were commenced in 1991.The relevant fact that had been brought to his attention was that ETSA powerlines had caused the fire.	Appeal dismissed.			X
1983	*Seas Sapfor Forests v ETSA* [1993] SASC 4004 (South Australia Supreme Court)	Another action arising from the Ash Wednesday fires. An application to extend the time to commence proceedings.	The decision was that the Master (a lower order judicial officer) had misapplied the law relating to the extension of the time. The Judge, finding that there had been an error, invited Counsel to address on the orders to be made but the reported decision does not actually record whether or not time was extended.			X
1983	*Seas Sapfor v ETSA* [1996] SASC 5718 (South Australia Supreme Court)	The plaintiff's forests were burned in the Ash Wednesday fires. Litigation was commenced by them and their joint venture related companies that arranged finance and that harvested and milled the timber. After the fire subsequent companies were brought into existence and arrangements for harvesting and milling were changed. Two new parties, including one that had not existed at the time of the fire, sought to be joined as plaintiffs. The Master struck out the application to add the new plaintiffs. The plaintiff's appealed.	Doyle CJ and Nyland J found there could be no duty of care to parties that relied on the assets of others to earn a living so the milk carrier could not sue if a dairy farm was destroyed. Even though all the plaintiffs were interrelated rather than arms-length there was no duty. Bollen J dissented, holding that it was a matter for trial rather than striking out.			X
1983	*SA Electricity v Union Insurance* (Unreported, Supreme Court of South Australia, Perry J 9 July 1997)	This case was about the adequacy of pleadings and whether the defence should be struck out or the application for strike out adjourned until after discovery at which time the defendant could be expected to give further and better particulars.	The actual issue is not important but it shows there was a dispute after Ash Wednesday between ETSA and their insurer.			X
1991	*Telfer v Flinders Council; ETSA 3rd party* (1)	Where a plaintiff sues a defendant, the defendant may join another party (a 3rd party) arguing that responsibility actually lies with the 3rd	The court refused to strike out the notice. The 3rd party was really arguing that there			X

	[1999] SASC 42 (South Australia Supreme Court)	party. This was an application by ETSA to strike out part of the defendant's 3rd party notice. The defendant alleged the 3rd party's negligence was the cause of the fire. The fire, on 25 November 1991, was caused by a failure of the 3rd party's SWER line.	was no evidence to support the claim but that went to the whole action, not just parts of the written claim. It was a 'no case submission' but the 3rd party was only entitled to make that argument after the defendant had presented its evidence and if the 3rd party decided not to call any evidence in its own case. This application was an attempt to avoid those consequences (that is by having a chance to test the defendant's case without having first to chose whether or not to call evidence). The Court would not be part of a process designed to avoid other court rules.			
1991	*Telfer v Flinders Council; ETSA 3rd party* (2) [1999] SASC 117 (South Australia Supreme Court)	The plaintiff and defendant reached an agreement on liability where the defendant accepted 80%. They sought a contribution from ESTA. This is the judgement in the 3rd party proceedings to determines ETSA's liability for the failure of its SWER line.	The Council generated and supplied electricity to people within its area. In theory the council was an independent supplier but the evidence showed that in fact ETSA exercised a lot of control, setting standards, approving annual budgets and supplying technical support often at no charge. The court found that there was negligence by ETSA as they failed to keep the manuals up to date so council employees were not made aware of problems with various insulators nor instructed to apply solutions. The defendant's right to a contribution was established. The matter was the adjourned to determine issues of quantum.	X		
1991	*Telfer v Flinders Council; ETSA 3rd party* (3) [1999] SASC 142 (South Australia Supreme Court)	This is the judgment on proportionate liability.	The Council was found liable for 40%, ESTA for 60%.	X		
1995	*Wright v AAMI* (Unreported, District Court of South Australia, Master Burley, 23 April 1997)	Fire started by illegal, negligent use of a petrol pump in bushfire season. Is that sufficient to allow the insurer to refuse to indemnify the insured? The policy, if applicable, would require AAMI to cover their insured's losses and damage caused to others. The pump was used to pump water from the plaintiff's dam to the house. He took fire precautions by having a cleared space for the pump and pouring water around the pump. On the day in question he used a borrowed pump as a crack in the exhaust of his pump presented an ignition hazard; but the different pump outlets meant it couldn't sit in the normal spot but in an area with some tall grass. The insurer alleged there was a failure to take reasonable care of the insured property (as required by the policy) as he left the pump unattended and further, the use of the pump without clearing the land and having a person in attendance was a breach of the *Country Fire Authority Act 1989* (SA).	An obligation to take 'reasonable care' cannot allow an insurer to avoid a policy because of the insured's negligence, as that would defeat the commercial purposes of the contract. To allow the insurer to void the policy the acts have to be intentional or reckless i.e. with actual foresight of the risk.	X		
1995	*Gardner v NT* [2003] NTSC 113 (Northern Territory Supreme Court)	This is the first reported case against a fire service, in this case NT Fire and Rescue. The plaintiff sued the Conservation Land Commission as owner, and the Parks and Wildlife Commission as manager of a block of Crown land from which a fire spread to his own block, destroying his home. He also joined the fire service for not adequately monitoring the fire to determine that his home was at risk. Allegations of negligence included failure to maintain fire trails/fire breaks and failure to monitor and fight the fire. The Northern Territory government accepted it was responsible for all the defendant agencies and their staff. Accordingly the action proceeded against the Territory rather than the agencies.	The Northern Territory admitted it owed the plaintiff a duty of care (this became important in *West v NSW*, see below), but denied there was a breach of duty or 'negligence'. The Court found there was no negligence. For details, see below.		X	
1995	*Gardner v NT* [2004] NTCA 14 (Northern Territory Court of Appeal)	This was an appeal to the Court of Appeal following the decision by the first judge to dismiss the plaintiff's claim based on his finding that none of the agencies had been negligent.	Appeal dismissed; there was no negligence. Failure to establish fire breaks at the boundary between the Crown land and Mr Gardner's property was not negligent. Had they been built they would not have stopped the fire so whether there was a duty to build fire breaks or not, the failure to build them did not cause the plaintiff's damage. Failure to reduce the fuel load on the Crown land was not negligent as the plaintiff had not reduced the fuel on his own land. Even if the authorities had burned off fuel, once the fire got onto the property (and the evidence showed that in the case of this fire no		X	

			fuel reduction program would have actually stopped the fire spreading) it would have had sufficient fuel to burn out his property and destroy his home. With respect to the observation of the fire, the Fire Brigade was under a duty to make sure the plaintiff was aware of the fire. They fulfilled that duty when the Captain attended and discussed the fire. Further there was no negligence in their monitoring of the fire. The plaintiff was told to call 000 if the situation changed. He attended to other matters on his property without noticing the fire had spread to his land and burned out his home. The court was required to apply the standard of what was reasonable taking into account all the circumstances including the realities of life in the remote Northern Territory. The decision to monitor the fire by leaving it to the landowner with instructions to call 000 if the situation changed was reasonable. For more detailed discussion see Eburn, M., 'A case study of tort liability for fire damage' (2007) 22(1) *Australian Journal of Emergency Management* 44-48.			
1997	*Brechin v Shire of Brookton* [2002] WASC 228 (Western Australia Supreme Court)	Fire at council's tip escaped causing damage. A council employee observed smoke in a pile of grain but still left the tip. When a fire was reported no-one was dispatched to investigate for about 50 minutes. When they did go they found a burning fire which was duly controlled but in the interim, spotting caused a new fire on the plaintiff's property which escaped damaging neighbouring properties and infrastructure.	Council was liable. See below.	X		
1997	*Brookton Shire v Brechin* [2003] WASCA 240 (Western Australia Supreme Court of Appeal)	Appeal from finding of negligence with respect to fire started in council tip.	Appeal dismissed. McLure J (with whom Anderson and Steytler JJ agreed) "In my view, the Shire had a duty to take reasonable care to prevent damage to the respondents' property as a result of a fire at the tip site. This formulation is intended to cover the prevention of fires at, as well as controlling the escape of fire from, the tip site."	X		
1997	*Smith v CALM* [1999] WASC 240 (Western Australia Supreme Court)	This was an application to extend the limitation period, required as P did not serve a required notice as soon as practical and in any event within 1 year. The fire was started by lightning but the alleged negligence was failure to maintain a fire buffer (it was scheduled for a hazard reduction burn in late 1997 but the fire occurred on 2 January 1997) and negligence in the response that involved keeping crews out as night fell & then a delay in getting a bulldozer in the next day due to mechanical failure.	The court noted the plaintiff's difficulties but the case was not 'unarguable' so in the interest of justice the period was extended.			X
2001	*Atkinson v NSW* (1) [2005] NSWSC 400 (New South Wales Supreme Court)	33 plaintiffs are suing the state for alleged negligence by NPWS over fires in Goobang National Park that escaped. The gist of the allegation was a failure to conduct hazard reduction burns so that the fuel levels in 2000 increased the risk that fires could not be controlled and could, and did, escape from the park.	This was an application to review an order of the registrar allowing further discovery. The order was upheld.			X
2001	*Atkinson v NSW* (2) [2006] NSWSC 152 (New South Wales Supreme Court)	This was an application b to have the issues of quantum, ie the value of the damages, determined after issues of liability (that is, rather than have a long trial where everything has to be considered, have a hearing to determine if the defendant is liable. If they are not liable that would be the end of the matter. If liability is established, only then have a hearing for the various plaintiffs to prove their damages).	Order separating the issues for trial granted.			X
2001	*Atkinson v NSW* (3) [2006] NSWSC 1083 (New South Wales Supreme Court)	This is an appeal against the order allowing for separate trials on issues of liability and quantum.	Appeal dismissed.			X
2001	*Evans v NSW* (1) [2007] NSWSC 955 (New South Wales Supreme Court)	This case relates to the Mt Hall (Warragamba dam) fire. Bell J described the proceedings: "The plaintiff, Father John Evans, sues the State of New South Wales as first defendant pursuant to the Crown Proceedings Act 1988 in respect of the acts and omissions of the National Parks and Wildlife Service	This was a matter to determine whether or not the plaintiffs' had sufficiently answered the defendant's request for further and better particulars. The judge went through the various issues in dispute ruling in some cases that the plaintiffs' claims had been sufficiently particularised and in others that they were required to answer the defendants' questions with more detail.			X

		(NPWS); the NSW Fire Brigade (NSWFB) and the NSWFB Commissioner; and the New South Wales Rural Fire Service (RFS), together with the Sydney Catchment Authority (SCA), a statutory corporation, as second defendant. His claim is brought in negligence and breach of statutory duty and arises out of damage to his property said to have been occasioned by a bushfire on Christmas Day 2001. Father Evans' claim is one of 25 claims brought against the same defendants arising out of losses said to have been suffered as the result of the bushfire by persons who were residents of Warragamba, Silverdale and Mulgoa at the date of the fire … Particulars of negligence are pleaded against each of the authorities in paragraph 43, and comprise (i) the failure to monitor the fire and its progress towards the town; (ii) the failure to warn the residents of Warragamba of the approach of the fire; (iii) the failure to provide sufficient means for fighting the fire and preventing it from entering the town; (iv) the failure to provide sufficient means for preventing damage by spot fires occurring within the town, and (v) the failure to provide sufficient personnel or equipment to prevent the loss of the plaintiff's property."			
2001	*Evans v NSW (2)* [2007] NSWSC 1381 (New South Wales Supreme Court)		This deals with the issue of costs for the first proceedings.			X
2001	*Andrews v NSW* [2008] NSWSC 1034 (New South Wales Supreme Court)	This is also Mt Hall litigation and was an application to hear questions of liability separately to issues of quantum. The plaintiff stated the following questions for separate determination: "1. Did the Rural Fire Service ("RFS") and New South Wales Fire Brigade Commissioner ("NSWFB") owe the plaintiffs a duty of care to protect the plaintiffs against any loss, damage or injury from the Mt Hall fire? 2. Did the Sydney Catchment Authority ("SCA") and the National Parks and Wildlife Service ("NPWS") owe the plaintiffs a duty of care to protect the plaintiffs against any loss, damage or injury from fire in the Warragamba Special Area or the Park? 3. Did the NPWS owe to the plaintiffs a duty to: - (a) minimise the danger of the spread of the Mt Hall fire from the Park and the Area; (b) take all possible steps to extinguish the fire? 4. Did the SCA owe to the plaintiffs a duty to: - (a) minimise the danger of the spread of the Mt Hall fire from the Area; (b) take all possible steps to extinguish the fire? 5. If the answer to any of 1 to 4 above is "yes", did the RFS, NPWS and SCA breach the said duties or were they negligent by failing to extinguish or control the Mt Hall fire in the period from about 9.20am to about 3.00pm on Christmas Eve 2001? 6. If so, did any such breach cause the plaintiffs loss or damage? 7. Did the authorities breach the said duties or were they negligent in failing to warn the plaintiffs on 24 or 25 December 2001 of the approach of the fire? 8. When ought the warning, or warnings, to have been issued? How ought the warning(s) have been given and what ought to have been the terms of the warnings? 9. Are the defendants to be excused from liability pursuant to section 128 of the *Rural Fires Act*?"	The plaintiffs were granted leave to file amended statements of claim and other orders regarding the future conduct of the matter including an order that issues of liability would be heard separately from, and before, the amount of damages (if any) were determined.			X
2001	*Warragamba Winery v NSW (1)* [2010] NSWSC 66	The defendant was seeking to set aside the orders made in *Andrews v State of New South Wales*. "[20] The first of these several proceedings was commenced by a statement of claim filed originally in the District Court on 21 May 2002 on behalf of one of the plaintiffs. The	The order for separate trials of the various issues was revoked.			X

	(New South Wales Supreme Court)	proceedings were transferred to this Court on 21 June 2005 and between August 2005 and December 2005 the balance of the proceedings were filed. They all concern the events caused by and surrounding a large bush fire that destroyed property in the vicinity of the Warragamba Dam west of Sydney on 24 and 25 December 2001. These events have been the subject of a Coronial Inquiry in the meantime. "[21] There is no issue that the respective cases of all of the parties will be complicated and time consuming. They give rise to many difficult and significant issues including but not limited to the fact, timing and adequacy of warnings and communications, the adequacy, appropriateness and levels of deployment of fire-fighters, plant and equipment, the existence and appropriateness of fire fighting plans and strategies, and the implementation of them, as well as issues of causation, preventability and statutory defences. Estimates of the need for more than 100 days of this Court's hearing time have been proffered. Mediations have proved to be of only very limited success and would not appear to have any remaining chance of further reducing either the scope of the issues or the number of cases to be heard."				
2001	*Warragamba Winery v NSW (2)* [2010] NSWCA 174 (New South Wales Court of Appeal)	Application for leave to appeal from the decision in *Warragamba Winery v NSW (1)*.	Application dismissed.			X
2001	*Warragamba Winery v NSW (3)* [2010] NSWSC 1314 (New South Wales Supreme Court)	Application for costs due to failure by the defendant to serve evidence by prescribed dates and for other issues including failed mediation opportunity.	The first defendant to pay some costs, the rest to be determined after the final trial.			X
2001	Warragamba Winery Pty Ltd NSW (4) [2012] NSWSC 701 (New South Wales Supreme Court)	A fire was caused by lightning near Warragamba dam. At the time the NSW RFS were full engaged with fires across the state. A decision was made not to actively fight the fire as it was not thought to be an immediate risk to properties though the risk was realised. Some attempts were made to fight the fire but aerial appliances were not available. Earlier than expected, the fire crossed the dam and burned into towns nearby damaging a number of properties.	With respect to fighting the fire, he held that there was no legal obligation or duty owed to the plaintiffs. The RFS is established to provide firefighting services for the common good, not for individual benefit. The RFS had to provide firefighting across the state. If the RFS owed a duty to these plaintiffs then it owed similar duties to other homeowners across the state. The RFS had to make decisions about how to allocate scarce resources, how to manage and protect its own staff, and how to make decisions for the greatest good. All of these factors move against holding that they owe a duty to any identifiable individual that would, in turn allow a person to sue the RFS for failing to extinguish a fire. If there was a duty of care, His Honour would have found no negligence. The fire service was entitled to make decisions on how to allocate resources. The decision not to send in firefighters was reasonable given the risk to their safety and the failure to deploy helicopters for fire bombing was also reasonable given the resources available and the other fires burning in the state. Even if the service had allocated more resources to the fire, by the time they could have been brought to bear on the fire, it would have grown in intensity and been uncontrollable. The decision to let this fire run, and to focus on fires that were posing a more direct threat was reasonable in the circumstances. Even if there had been a duty and there had been negligence, the RFS would not have been liable because of the provisions in the RFS Act that protected officers and the Crown for actions done in good faith. The defendants could also rely on the *Civil Liability Act 2002* (NSW) s 43A which		X	

			provides that an agency exercising special statutory powers cannot be liable unless there action is so unreasonable that no other agency would believe that they were using their powers to achieve the statutory obligations. Even if the decisions were negligent they were not so unreasonable to meet that test. The judge also considered the plaintiffs' claims that had they received warnings they would have taken steps to protect their properties. His Honour rejected those claims going through their evidence in detail noting that none of the plaintiffs gave any explanation how they would have heard the warnings, that their claims of what they would have done was 'wise with hindsight' but unlikely to be true. Although he did not use the language of shared responsibility, his honour did look at the preparations that people had done prior to the fire and noted where properties had poor fire hygiene with bush and flammable material too close to the home thereby increasing the risk.			
2002	*Bonny Glen Pty Ltd & Anor v Country Energy* [2007] NSWDC 171 (New South Wales District Court)	The defendant, Country Energy, owned power lines that ran 'parallel to, and more or less on top of, pine trees on the' plaintiff's property. Country Energy had a right to enter private property to maintain its power lines. The plaintiff sued for damages for negligence and breach of contract after a row of pine trees, which operated as a windbreak, as well as some of the plaintiff's orchard trees, burned down as a result of a fire on 10 November 202, caused by contact between the trees and the wires. The damage was exacerbated as they could no longer spray their trees as the destroyed trees had allowed them to spray without risk of drift onto neighbouring properties. Previously Country Energy had attended the premises every few years for the purpose of trimming the trees; they had last inspected the trees about 18 months before the fire. The defendant inspected its power lines by helicopter on 21 October 2002 and it was noted that the trees needed urgent attention. Defendant's staff attended to lop the trees. There was a dispute about what happened, the defendant's staff say the plaintiff refused to allow them access. The plaintiff's evidence was that he simply asked them not to cut the trees below a certain level as that would kill them. The defendant's staff gave inconsistent and contrary evidence as to why they did not lop the trees so the judge preferred the plaintiff's version of what happened, and accepted that they didn't do the work as the senior manager realised it was only a temporary solution and the power line needed to be re-routed. The fire occurred three days later, before any action on the long term solution could be considered and the staff didn't appreciate the urgency of the issue.	'It is not in dispute, and should not be in dispute, that Country Energy owed a duty of care as the owner of power lines and a retail supplier of electricity pursuant to the *Electricity Supply Act 1995* (NSW). It has an obligation to remove dangers such as browning pine trees which are proximate to power lines... The obligation to minimise the possibility of fire included an obligation to trim pine trees in the manner that they had trimmed them over the 35 years that their officers had been entering Bonny Glen for this purpose. Country Energy in fact had a statutory right of entry, even if Bonny Glen's employees or owners refused to permit this. This is a clear case of 'general reliance' of the kind discussed by the High Court in *Pyrenees Shire Council v Day* (1998) 192 CLR 330.' The defendant knew 'there was an urgent problem with tree burning. They knew that there was not only a short term problem requiring a "bandaid" solution, but also a long term problem that the wires needed to be relocated.' The judge did not accept that the plaintiff had refused the defendant access to the property, but even if he had '... the defendant had a statutory right to enter Bonny Glen to maintain the power lines. In a country such as Australia, where bush fires are a grave danger, not simply to one property owner but to all those around them, that statutory right was available to be used and should have been used if in fact there had been a refusal.' The judge concluded 'I am satisfied that at all relevant times not only were the defendant's employees given access to the property, and that there were at least one and probably three methods of access to the pine trees, but that the only condition that was ever placed on a cutting of the pine trees was that they should not do so in such a way as to endanger the pine trees by causing them to suffer die back. Since this could have led to the same or a similar result to the trees burning down in a fire, this was not an unrealistic or unreasonable expectation on the part of the plaintiff.' The defendant was liable for negligence and for breach of an implied term in the contract for the supply of electricity to the effect that the supply would be provided in a way that did not damage the property being supplied.	X		
2003	*West v NSW* [2007] ACTSC 43 (Australian Capital Territory Supreme Court)	The application to dismiss the 2003 Canberra fire litigation on the basis that there was no reasonable cause of action. Application dismissed. Phil Koperbeg, Commissioner of the NSW Rural Fire Service was originally named as a defendant but the action against him was discontinued by consent when the State agreed that it would be liable for any negligence proved against the Commissioner.	The judge said 'I should not summarily dismiss a plaintiff's claim "except in the clearest of cases", and there should be a "high degree of certainty about the ultimate outcome of the proceeding" if it is to be summarily dismissed.' The claim raised a number of legal issues including the application of the provision of the*Rural Fires Act* that seeks to protect the service and individuals from liability for acts done in good faith as well as the common law which has not imposed a duty on fire brigades. However there is no binding Australian authority on the point. Accordingly 'It seems to me that the plaintiffs' asserted claim, that the New South Wales Rural Fire Service owed it a duty of care, is not a claim which can be said to be unreasonable or unarguable. There is no binding High Court authority either way, but that of itself			X

			clearly should not preclude the matter going to trial. Indeed, the common law can only develop by way of novel cases going to trial and eventual appellate determination.' Accordingly it was not 'the clearest of cases' and the case should be allowed to proceed to allow the plaintiff to call his evidence and for a properly constituted court to determine the legal issues after a full exploration of the facts and hearing submissions from all sides.			
2003	*NSW v West* [2008] ACTCA 14 (Australian Capital Territory Court of Appeal)	Appeal to the Court of Appeal; dismissed.	For further information and discussion see 'Canberra bushfires litigation' (2009) 28 *Fire Update* 1-4 (Bushfire CRC).			X
2003	*Cohen v Victoria* [2010] VSC 371 (Victoria Supreme Court)	Litigation from 2003 fires in Victoria. At [3] "… the claim bought by Mr Cohen on behalf of land owners affected by the fires, relates to the measures taken by the three defendants to prevent or restrict the spread of the fires from areas of Crown land under their control." The issue was whether Mr Cohen would be allowed to file his 4th Amended Statement of Claim and did it adequately disclose his cause of action. The judge noted both the 2003 Esplin Report and the 2008 Report on the effect of controlled burning on hazard reduction and the involvement of DSE and Parks Victoria to suggest that the defendants could not read the Statement of Claim in a vacuum, they well knew the issues that had been raised about the fire and their control practices. Whilst that did not excuse the plaintiff from the need to properly plead his case, "arguments relating to the adequacy of the details provided in V4 need to be viewed in the light of the information patently available to the defendants and their familiarity with the subject matter of the claim."	The amended statement of claim was allowed subject noting that further and better particulars would be required in due course.			X
2003	Electro Optic Systems Pty Ltd v The State of New South Wales; West & West v The State of New South Wales [2012] ACTSC 184 (Australian Capital Territory Supreme Court)	Lighting caused fires to burn in NSW and the ACT on 8 January 2003. A decision was made not to engage in direct attack until the next day. On that day a defensive line was chosen in the belief that the fire had already overrun a preferred defensive line. That belief was wrong. A choice was also made to rely on a river as a fire break but no preparations were made to reduce the fuel load along that river. The fire escaped the containment lines and burned into Canberra killing 4 people and destroying approximately 500 houses.	The NSW Rural Fire Service and the National Parks and wildlife service owed a duty of care to people affected by the fire. (It should be noted that this conclusion appeared inconsistent with other authorities including *Warragamba Winery Pty Ltd v State of New South Wales* [2012] NSWSC 701). There was negligence in the failure of the IC to ensure that the information relied upon was correct and to arrange for preparation work along the river's edge. The failure allowed the fire to spread and damaged the plaintiff's property; but the test for liability was not the common law test of 'reasonableness' but the statutory test of was the defendant's conduct so sub-standard that 'no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions'. The answer to that was 'no' and so there was no liability; and even if the issue had been one of common law negligence, the actions of the state's officials were made in good faith and so there would be no liability because of s 128 of the *Rural Fires Act 1997 (*NSW). This case is expected to be appealed by all parties.		X	
2004	*Southern Properties v DEC* [2006] WASC 40 (Western Australia Supreme Court)	This is the case involving damage to grapes caused by a prescribed hazard reduction burn. The first case was an application for an injunction (ie a court order) to stop another burn from going ahead.	DEC conducted a hazard reduction in April 2004 that damaged the plaintiff's grape crop. The plaintiff commenced litigation for damages arising from the burn. In January 2006 DEC wrote to the plaintiffs again advising them that they intended to conduct a further hazard reduction burn. The plaintiff sought an injunction to stop any further burns. Le Miere J: "After weighing all the relevant … I am not persuaded that an injunction should be granted. In the exercise of its discretion a court of equity should pay		X	

			particular regard for the public consequence of employing the extraordinary remedy of injunction. There is a weighty public interest in the burn proceeding. An injunction would prevent or at least seriously impede a state agency carrying out a public function." If the plaintiffs grapes were damaged, and if there was liability the plaintiff could be compensated by the payment of damages, but if the burn did not proceed DEC would not be able to fulfil its statutory function leaving the community exposed to higher risk, so the injunction would not be granted.			
2004	*Southern Properties v DEC* [2010] WASC 45 (Western Australia Supreme Court)	This case was the claim for damages arising from a hazard reduction burn in April 2004. The plaintiff's had asked the defendants not to conduct the burn during the period when the grape crop would be affected by smoke. The defendant determined that the conditions for a suitable burn arose during that period and the burn, which had been planned but 'rolled over' for 3 years had to go ahead. The damage to the plaintiff's grape crop was in excess of $600 000.	The defendant did not owe a duty to take reasonable care to prevent damage to the grape crop, and even if they did their actions were reasonable in the circumstances. The Department had an obligation, imposed by statute, to manage the forests which included an obligation to reduce the risk of fire. It was undoubted government policy, supported by expert opinion, that the most effective way to do this was hazard reduction burns. The imposition of a common law duty of care would be inconsistent with the statutory formulation of the duties of the defendant. Further where an authority is performing a duty required by statute and the harm (in this case the smoke) is inevitable, there can be no liability as that would impose an obligation not to perform the statutory task; 'the existence of such a common law duty of care would tend, at least, to distort, by skewing, the focus of the statutory decision-making process, and distort the performance of the Department's statutory functions.' The decision to burn was a 'policy' decision, that is one that involved weighing 'political or social factors or constraints'. As a result the *Civil Liability Act 2002* (WA) s 5X applied and there could be no liability unless the decision to proceed with the burn was 'so unreasonable that no reasonable public body or officer could have made it.' It was no so unreasonable so the s5X defence applied.		X	
2004	*Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation And Land Management* [2012] WASCA 79	This was an appeal to the Court of Appeal from the decision in *Southern Properties v DEC*.	**McLure P** accepted the wisdom of hazard reduction burns to reduce the risk to the broader community. In his view there was no duty of care so he did not discuss the issue of whether the respondent's conduct was or was not reasonable. He did find that the *Civil Liability Act 2002* (WA) s 5X further protected the respondent. Governments have to make a number of choices about how to achieve their objectives and only a plan that is so unreasonable that no other authority would accept that it was a reasonably way to meet the stated objective can constitute negligence. The decision to light this burn on this day did not pass that threshold test and so there could be no liability. **Pullin JA** dissented. He was of the view that the respondents had the power but not the duty to conduct hazard reduction burns, but in doing so they had to consider those that may be harmed by their conduct including harm by smoke that had been brought to their attention. In this context where the respondents were introducing a very great hazard, that is fire, and where not only damage, but the very damage that occurred was foreseeable, they must owe a duty of care. > It would seem remarkable that the respondents should owe no duty of care. If that were so, it would mean that the respondents could exercise the statutory power to light a fire in the forest careless about the damage it might do to neighbouring properties either from smoke or escape of the fire. Some very plain language would have to be used in the legislation to bring about that result. No such language was used. The next issue he had to consider was whether there was a breach of that duty, that is was the respondent's conduct reasonable? He thought it was not. His honour took the		X	

			view that the probability of harm was well established and there was no doubt that the known risk, ruining the entire grape crop was significant. These factors suggested the burn should not take place. He was of the view that there was little 'social utility' to be balanced against the foreseeable harm to the plaintiffs. Pullin JA clearly did not accept that hazard reduction burns achieved much in the way of 'social utility' holding that there was no scientific support for the claim that burns either promoted biodiversity or protected from wildfire. He asked: > … whether there is any scientific support for the view that prescribed burning provides protection from wildfires. Scientific information to support the claim that prescribed burning protection would have to be based upon observation of the outcome in control areas where no prescribed burning was carried out over many years and the outcome in comparable areas where prescribed burning is carried out. No reference is made in the reasons to any such scientific evidence. Scientific support for prescribed burning is not provided by post hoc ergo propter hoc reasoning that there have been no serious bushfires in recent years like those in the Dwellingup region in 1961 or in New South Wales, Canberra or Victoria because prescribed burning began some time ago. Notwithstanding the inquiries post the 2003 fires and those that have occurred after this particular burn, including the findings of the 2009 Victorian Bushfires Royal Commission, Pullin JA was clearly not satisfied that hazard reduction burns achieved any public benefit at all. He took the view that the social utility in conducting prescribed burns was so little that it in no way outweighed the risk of damage to the plaintiff's to justify conducting the burn when the risk to the plaintiff's crop was clearly known. The fact that there was no good reason to conduct the burn that could be balanced against the risk to the growers also meant that the decision was so unreasonable that no authority would think it was a legitimate way to achieve the objectives that the statute imposed on DEC, so *Civil Liability Act 2002* (WA) s 5X did not provide a defence. Buss JA agreed with McLure P. The appeal was lost 2:1.			
2007	Myer Stores Ltd v State Fire Commission [2012] TASSC 54 (Supreme Court of Tasmania)	This is not a case relating to bushfire but the decision is important and so recorded here. In this case the Tasmania Fire Service responded to a fire at the Hobart Myer Store. Because of a fear of electrocution, the sprinklers were turned off before the seat of the fire had been located. The fire spread and destroyed the building.	The Tasmania Fire Service and all its staff, including the Commissioner, were only liable for actions that were not taken in good faith in the performance of their duties. There was no absence of good faith here and so the legislative provisions ensured no liability. His Honour said that the financial risk of property loss by fire was a risk to be borne by the property owner or their insurer.		x	
2009	*Thomas v Powercor Australia* [2010] VSC 489 (Victoria Supreme Court)	This is the first case arising from the 2009 Black Saturday fires. This decision was to determine whether the plaintiffs' had to provide discovery of documents relevant to the quantum before issues of liability had been determined; issues of expert evidence and whether all three proceedings should be heard together. Powercor argued that it needed details of the claim given that they cannot answer the case otherwise. Note [78]: "The trial of Mr Thomas' proceeding is scheduled to commence on 5 September 2011 at Horsham, the Pomborneit proceeding will be held at Warrnambool commencing 10 February 2012 and the Coleraine proceeding at Hamilton commencing 16 April 2012." The next directions hearing is scheduled for 18 February 2011.	The judge said: > I must say that this suggestion is surprising given that Powercor is a major electricity supplier and participated in the Royal Commission hearings; it has had nearly two years to consider its potential liability to those affected by the fire which, it concedes, emanated from its infrastructure. Notwithstanding that observation, Mr Shute contends that a sequential exchange of expert information is necessary here." Ordered that 10 of the group; 5 with the largest claims and 5 with the smallest give the relevant discovery.			X

2009	*Matthews v SPI Electricity (No 1)* [2011] VSC 167 (Victoria Supreme Court)	This case arose from the 2009 Black Saturday fires. A law firm Slidders Lawyers advertised for people who had suffered losses in the fires to contact them with a view to joining a class action. On 16 February, some 9 days after Black Saturday and without instructions they commenced the class action in the name of one of the people who had contacted them. When the named plaintiff found out that he was named on behalf of the class he sought to be removed from the proceedings. The solicitors failed to do that for over a year and during that time the named plaintiff could have been subject to a order for costs over the way the proceedings were run. This was an application to 'regularise' the proceedings, to substitute a new plaintiff on behalf of the class and to put new lawyers in to run the case for the class. The defendants, SPI and the State of Victoria sought to have the entire case dismissed.	The court made the orders allowing the proceedings to continue with an appropriate plaintiff and new lawyers with the old lawyers to indemnify the first named plaintiff for any costs and various other orders as to procedure and interest.			X
2009	*Matthews v SPI Electricity (No 2)* [2011] VSC 168 (Victoria Supreme Court)	This was an application by the State of Victoria to dismiss claims made alleging breach of statutory duty and negligence by members of Victoria Police, DSE and the CFA.	Forrest J had to consider the application of the *Emergency Management Act 1986* (Vic). He held that the Act was designed to establish coordination and response arrangements across Victoria for all types of hazards. The Act, and DISPLAN, were intended to ensure that 'key players know who is in charge at particular levels and what their responsibilities are.' [73]. He said (at [76]): > Nothing in these provisions even vaguely implies that the legislature intended to impose an obligation upon particular persons or organisations identified in DISPLAN, (and particularly police officers) which would give rise to a private right – to the contrary, I think that purpose is to provide those bodies with the knowledge and understanding as to who is responsible for what particular activity in the event of an emergency. In passing the Act, the Parliament in no way intended to give individuals a private right to sue if they believed that a person, in this case a police officer, had failed to perform a task or duty set out in either the Act or DISPLAN. Accordingly the action based on breach of statutory duty was dismissed. With respect to the application to strike out the claim based on common law negligence, Forrest J had to decide whether or not the case had 'no real prospect of success' (*Civil Procedure Act 2010* (Vic) s 63). Proceedings such as these are based on the 'pleadings' that is the documents filed in court, and not on any evidence as to the facts. Proceedings should only be 'struck out' when it was clear that the case could not proceed, otherwise plaintiffs would be denied the right to have their case heard and determined on all the relevant facts. The matter was complicated by the fact it is a class action and dismissing the matter now would deny many hundreds, if not thousands of affected people, the right to show how the facts that applied to them on that day, would affect the ultimate finding of whether or not there was a duty of care and whether or not there had been a breach of the duty. The judge therefore found that it could not be said that there were no real prospects of success and so the matter should proceed to trial to allow the parties to bring evidence of the relevant facts and to allow the trial court to determine the matter based on applying the law to the facts. The case was allowed to continue but only on the basis that the plaintiff can allege common law negligence, but not that a failure (if any) to do something required by either the *Emergency Management Act 1986* (Vic) or DISPLAN gives rise to a right to damages.			X

2009	*Matthws v SPI Electricity (No. 3)* [2011] VSC 399	A step in civil litigation is 'discovery' where the parties have to exchange all relevant documents that they intend to rely on. In order to manage the discovery process, an Associate Justice was appointed. She would have to make decisions on whether or not various documents were relevant to the ultimate litigation. It was felt that it would make her job easier if she could review parts of the Royal Commission reports and the evidence before the Commission to better understand the issues that would ultimately come before the Court. The parties were also required to give discovery of the various documents that they had provided to the Royal Commission. The 'state parties' that is the Country Fire Authority, the Department of Sustainability and Environment and the State of Victoria resisted moves to allow the material to go before the Associate Justice. They argued that the Associate Justice should 'only have Chapters 1 and 2 of Volume 1 of the Final Report, and only four pages of the chapters dealing with the Kilmore East fire. The State also stipulated as follows: > The State parties consent to provision of this material on the basis it does not become evidence in the proceeding does not constitute an admission that the information is accurate, relevant or admissible in the proceeding; and the material provided does not extend to exhibits referred to therein.	Allowing the Associate Justice to access the Royal Commission material would assist her to manage the discovery process by understanding what is, or is not relevant. 'They will assist her Honour in understanding what the real issues are and what documents are truly relevant.' Further the Associate Justice was only managing the pre-trial process. She will not be the trial judge and so will not determine issues in dispute, so any concern the State parties had on whether the court would see the findings of the Commission as established facts was simply not relevant at this pre-trial stage.			X
2009	*Thomas v Powercor Australia Ltd* [2011] VSC 586	Forrest J had to decide whether or not the plaintiff, Thomas, was entitled to recover money damages for the cost of repairs when the repairs were done by himself and his neighbours (volunteers).	The Court held that he was entitled to recover the value of the replaced fencing at a commercial rate.	X		
2009	*Thomas v Powercor Australia Ltd* [2011] VSC 614	This was the class action over the Black Saturday bushfires at Horsham in western Victoria. The case settled by consent. Because it was a class or group action a judge needed to approve the terms of settlement.	The settlement was approved.	X		
2009	Powercor Australia Limited v Thomas [2012] VSCA 87 Supreme Court of Victoria – Court of Appeal	The plaintiff sued for losses caused by the 2009 Black Saturday fires. His claim included an amount for the cost of repairs when the repairs were done by himself and his neighbours (volunteers).	The plaintiff was entitled to compensation for the damage suffered directly to the fixtures at the time of the fire. At the time of the fire the way to calculate the loss was the cost of the repairs. When damages are paid there is no obligation to 'account' for how they are spent, so it would have been open to Thomas to take the money and go on a holiday rather than repair the fences. If that is correct then it can't make any difference that he did in fact repair the fences using his own, or volunteer labour. The damage was the value of the damage to the fences not the actual cost incurred in repairing them.	X		
2009	Mercieca & Anor v SPI Electricity Pty Ltd & Ors; SPI Electricity & Ors v Eagle Travel Tower Services Pty Ltd & Ors [2012] VSC 204 (Supreme Court of Victoria)	Settlement of $32 million for damages arising from the Churchill fire on Black Saturday, 7 February 2009. Apart from causing extensive property damage, this fire claimed two lives.	The case was a 'class action' where two representative plaintiff's brought the legal action on behalf of all people, other than those who 'opted out', who suffered damage in the fire. The original claim was against SPI Electricity for alleged negligence in failing to clear around their power lines so that when a tree was brought down during high winds, it impacted the power line and started the fire. SPI joined the Department of Sustainability and Environment (DSE) and Eagle Travel Tower Services Pty Ltd which was the contractor they employed to keep the vegetation clear of the power line. All of the defendants denied liability but have agreed to settle for $32million being about 45% of the total losses claimed ($73 million). There are advantages in settling, rather	x		

			than running a case such as this. There is no guarantee of winning as the legal and factual issues were contested so settling for 45% can be quite prudent. The judgement does not explain how the damages are 'split' between the defendants, that is whether they are being paid 100% by SPI's insurers or whether the insurers for DSE are also contributing to the settlement.			