



THE AUSTRALIAN NATIONAL UNIVERSITY

Bushfire litigation – an Australian view

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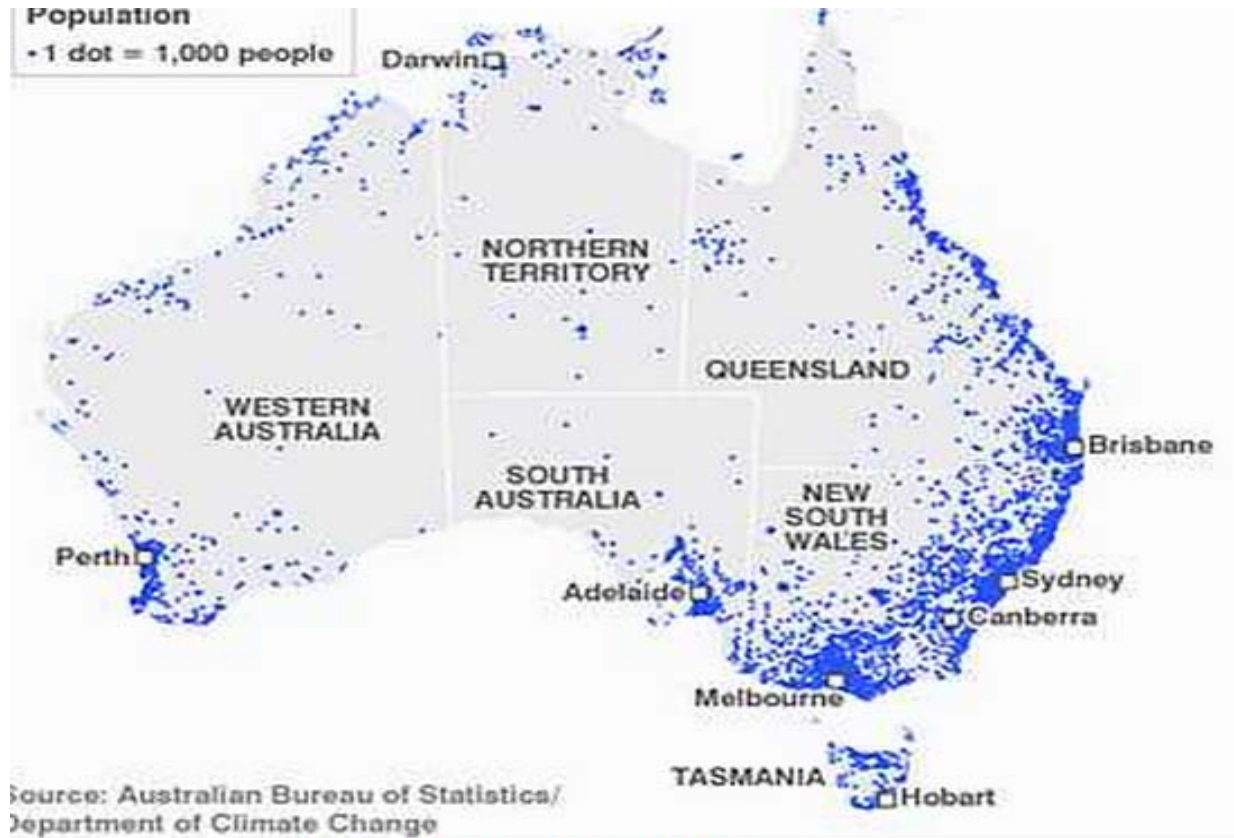
- Background.
- The Australian experience.
- Factors that may explain the extent of wildfire litigation.
- Conclusions.

Background

Australia...

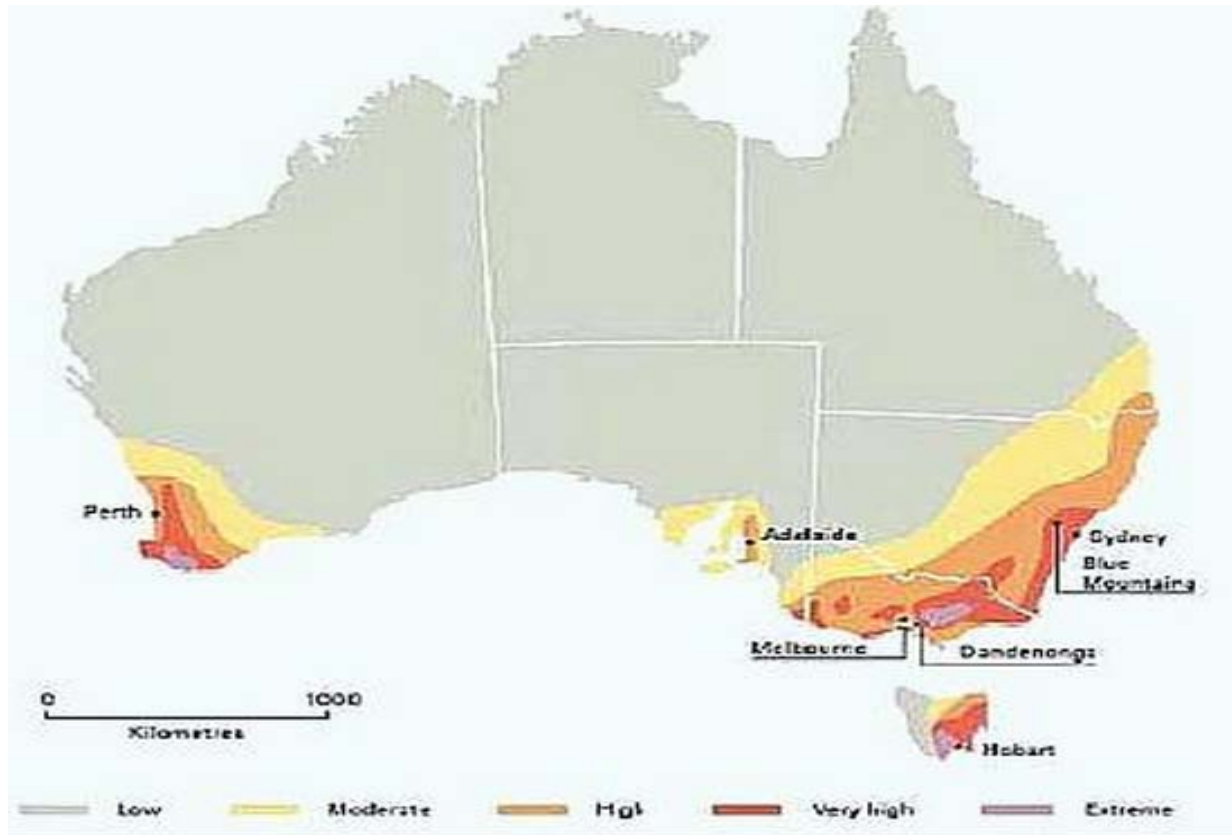


Population distribution



Population distribution map.

Bushfire Risk



Bushfire Risk Map

Image courtesy: Blong.R.J, Sinai.D and Packham c2000, (16)

The fire experience

Years	Number of reported landscape (bush and grass) fire incidents
2002-03	62 582
2003-04	48 877
2004-05	55 536
2005-06	46 848
2006-07	54 555
Average per year	53 680

If that were repeated every year, it would mean 4.9 million fires between 1931 and 2010.

The litigation experience

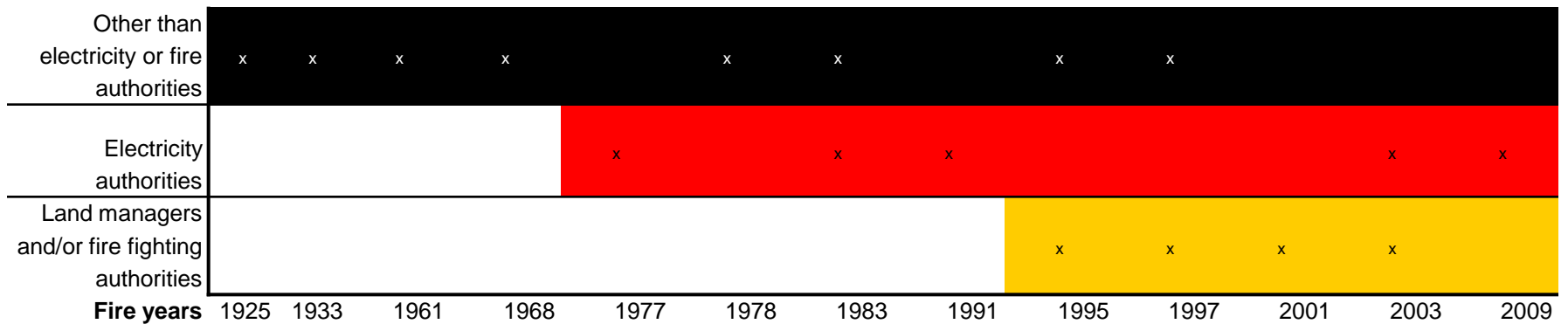
- Between 1931-2010 only:
 - 44 judgements on litigation arising from wildfire;
 - Arising from 24 separate fires.

Claims

Liability for hazard reduction burns	2
Fire fighter compensation	6
Negligently causing or allowing fire to spread - defendant other than electricity supplier	7
Negligently causing or allowing fire to spread - defendant electricity supplier	5
Negligence of land management and/or fire fighting authorities in prevention or response to a fire	4

Growing number of defendants

Defendant



What can we infer?

The amount of litigation is growing:

1925-1977 – one case every 10.4 years

1978-2009 – one case every 3.8 years

The nature of the claims and the type of defendant is changing:

1925 – other land owners;

1977 – *add* electricity authorities;

1995 – *add* land and fire management authorities.

Factors that may impact upon Australian wildfire litigation – historical and social

Growth of electricity supply.

Changing nature and increased professionalism of fire brigades.

High incidence of fire insurance.

Procedural

Contingency fees.

The loser has to pay the winner's costs.

Class actions.

Legal

Many critical legal issues are unresolved.

When does a government agency owe a duty of care to an individual?

Effect of 'good faith' defence clauses.

‘Salient features’

- (a) the foreseeability of harm;
- (b) the nature of the harm alleged;
- (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
- (d) the degree of vulnerability of the plaintiff to harm from the defendant’s conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
- (e) the degree of reliance by the plaintiff upon the defendant;
- (f) any assumption of responsibility by the defendant;
- (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
- (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
- (i) the nature of the activity undertaken by the defendant;
- (j) the nature or the degree of the hazard or danger liable to be caused by the defendant’s conduct or the activity or substance controlled by the defendant;
- (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
- (l) any potential indeterminacy of liability;
- (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
- (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one’s own interests;
- (o) the existence of conflicting duties arising from other principles of law or statute;
- (p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
- (q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.

Fire legislation

Provides that firefighters, the government, the Minister etc are not liable for acts done in the good faith performance of their duty.

West and ors v NSW

- Expect this to be the first case to deal with these issues.
- Round 1 to West – the ACT Supreme Court and Court of Appeal rejected a ‘strike out’ application.
- Round 2 – the trial – already taken a number of weeks. Now part heard and due to resume in April 2011.
- Will deal with many of these issues but it is likely that there will be:
 - Round 3: The Court of Appeal; and then
 - Round 4: The High Court of Australia.

'My Country'

(by Dorothea Mackellar)

*I love a sunburnt country,
A land of sweeping plains,
Of ragged mountain ranges,
Of droughts and flooding rains.*

...

*For flood and fire and famine,
She pays us back threefold-
Over the thirsty paddocks,
Watch, after many days,
The filmy veil of greenness
That thickens as we gaze.*

Famine (10 year drought, 2000-2010)



Fire (Black Saturday, 2009)



Flood (Queensland 2011)



*That thickens as we gaze
The filmy veil of
greenness*





'Kinglake throws support behind Qld flood victims'. *ABC News*, 11 January 2011, <<http://www.abc.net.au/news/stories/2011/01/11/3110585.htm>> accessed 15 February 2011.

Questions? Comments?

Thank you for your attention.

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