

The logo for the University of New England (UNE) features the lowercase letters 'une' in a stylized, green, sans-serif font.

University of
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New South Wales Rural Fire Service, Region South Staff Conference, Wagga Wagga Tuesday 1 June 2010

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Courts before the fire brigades Fire brigades before the courts



Russell Rees, Chief Officer CFA
2009 Victorian Bushfires Royal Commission

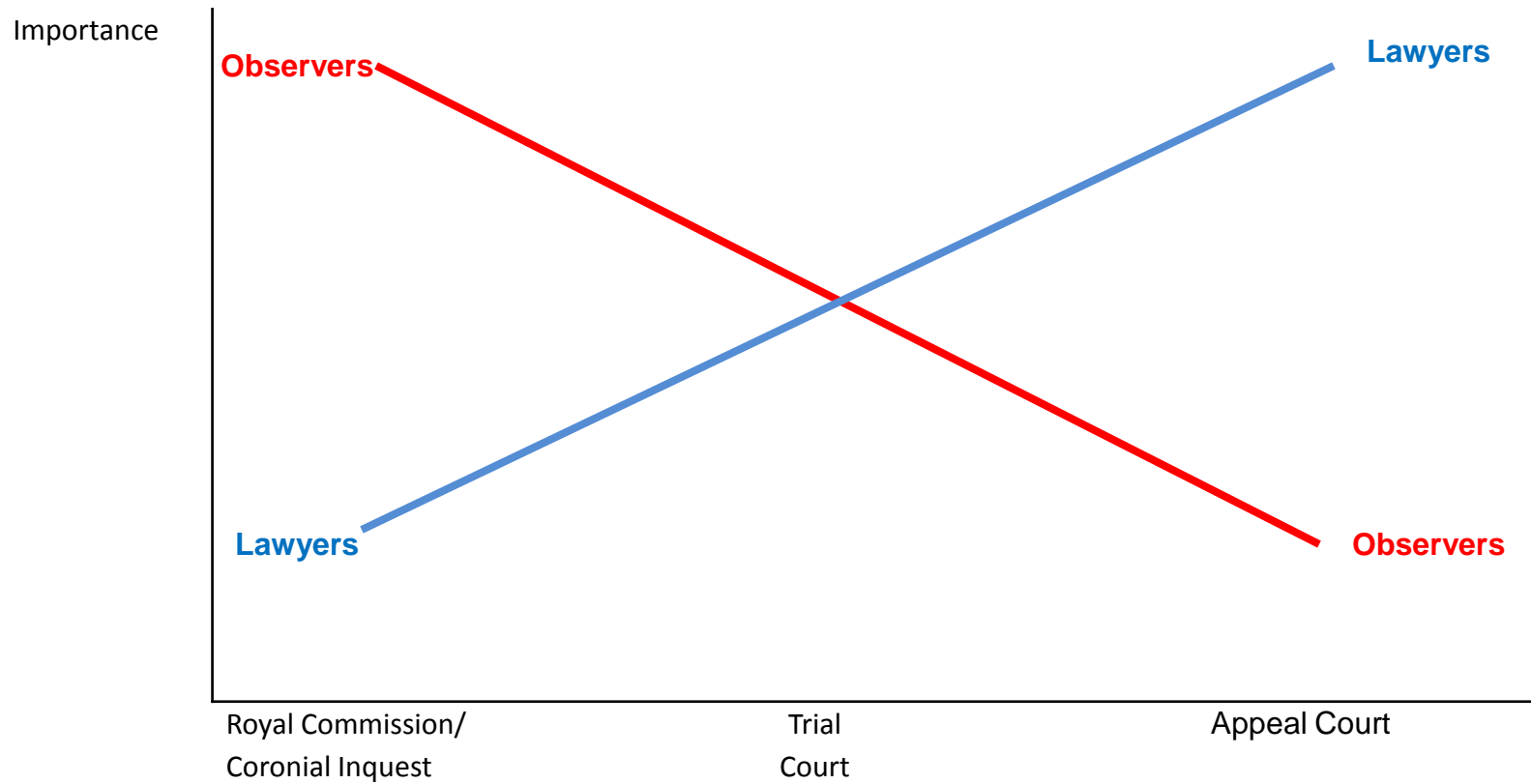
Allendale County Courthouse, South Carolina, USA,
May 18, 1998.

Courts and the law

Type of court or tribunal	Rulings on facts and law.
Royal Commissions and coronial inquest	Determine the facts; can make no binding legal decisions.
Trial courts, that is a magistrate, a single judge or judge and jury hearing a case for the first time	Hears the evidence, makes a ruling on what the facts are and makes a binding legal determination on what the consequences of the law, applied to the facts as determined by the court.
Appeal court – Court of Appeal, Court of Criminal Appeal or High Court of Australia. A panel of judges.	Reviews the decision of the trial judge on the law. Determines whether the trial judge accurately identified the law and applied the law to the facts as established by the trial court. They do not conduct a further investigation into the facts.

Case	Highest court	Approximate time to finalisation
<i>Nelligan v Mickan</i>	SA Court of Appeal	5 years
<i>Keller v MAS and Victoria</i>	Supreme Court of Victoria	8 years
<i>Gardner v NT</i>	High Court of Australia (Leave to appeal refused)	10 years
<i>Neal v NSW Ambulance</i>	NSW Court of appeal	7 years
<i>NSW v Tyszyk</i>	High Court of Australia (Leave to appeal refused)	5 years
<i>Stuart v Kirkland-Veenstra</i>	High Court of Australia	10 years
<i>West v NSW</i>	High Court of Australia (Leave to appeal refused); trial continues in ACT Supreme Court.	7 years <i>and still a long way to go</i>

Importance





2009 Victorian Bushfires Royal Commission

Opening question

“What can be done to ensure that so many lives are not lost, that so much devastation is not caused, in such bushfires in the future?”

Bernard Teague, *Chairman Opening Remarks – 20 April 2009.*

Burnside QC (Counsel for Mr Rees)

“... what I think has not been done is to ask, "How many lives were saved?" The fact is that on a catastrophic day of fires almost all the fires were managed. A couple escaped, the consequences were disastrous, but to point to the number who died is to look at only half the equation and to judge the performance of Mr Rees or anyone else by reference to the number who died is to ignore the larger part of the picture.”

Three recommendations from the interim report

- The duty to issue warnings;
- Neighbourhood Safer Places;
- Individual advice on the whether property can be defended.

Neighbourhood Safer Places

- *Country Fire Authority Act 1958* (Vic) ss 50E to 50L.
- Does vulnerability and control lead to a 'duty of care'?

Individual assessments

“The Chief Officer may provide advice to the community or to any person on ways to improve the defendability of a home or other building in the event of a bushfire.”

Country Fire Authority Act 1958 (Vic) s 50P.

Stay or go...

Is a matter for the occupier. The assessment is complex because of:

[a] range of factors... These include house design, construction and maintenance, vegetation management, fire intensity. These factors are very complex and may vary significantly through the fire season or even on any given day...

2009 Victorian Bushfires Royal Commission: Interim Report, [7.81].

Our pre-purchase report

- 29 pages long.
- Warnings and disclaimers on 18 of those 29 pages (62%).
- Will pre-fire assessments look the same?

The Royal Commission

- Looked at the causes and circumstances of 13 fires.
- Sat for 155 days of hearings.
- Took part in 26 community consultation sessions.
- Heard from 434 witnesses.
- Received nearly 1700 submissions and over 990 exhibits; and
- Produced over 20,000 pages of transcript.

Counsel's final submissions

- Dealt with
 - The fate of Stay or Go;
 - Organisational structure and
 - Leadership.

Stay or go

- It's not a simple choice. Fire agencies have to plan for those that will do neither.
- Fire agencies can't focus on 'fighting the fire' and leaving decisions to people in harms way. Evacuation, refuges and safer places must form part of their tool box.

Organisational structure

- A single board, with the CFA and MFB reporting to it, along with DSE.
- But not amalgamation, recognising the value and cultures of the organisations and, in particular, the volunteer culture of the CFA.

Leadership

- The most controversial. Rush QC recommended various adverse findings be made against:
 - Police Chief Commissioner Christine Nixon;
 - CFA Chief Officer Russell Rees;
 - DSE Chief Fire Officer Ewan Waller;
 - Senior CFA and DSE Staff;
 - The Minister; and
 - The Emergency Services Commissioner, Bruce Esplin.

Burnside QC

“... this Commission should try ... to reach findings that are constructive, not destructive. ... It is more important for this Commission to identify ways in which the improvement of the fire services can continue rather than to identify individuals whose individual performance on the day in extraordinary and unprecedented circumstances fell short of the standard which counsel assisting in the tranquillity of this room would urge was necessary.”

“The criticism of Mr Rees which is urged by counsel assisting will do ... a good deal of harm to the organisation and likely retard the improvement of its systems because it will very likely dissuade senior appropriate people from taking senior positions in the CFA or the DSE for fear of being subjected to similar criticisms after the event when the next unprecedented catastrophe occurs.”

Myers QC (Counsel for Ms Nixon)

“... these recommendations are apt to undermine morale ... The persons who work in those organisations are apt to say, “We did our best and all we do is cop criticism in most extraordinary circumstances.”... [T]he criticisms give no adequate recognition to the extraordinary situation that existed on 7 February 2009. The individuals who were involved in dealing with the catastrophe of that day were subject to, necessarily, extraordinary pressures and it would be human to have overlooked things, to have made mistakes. We say please don't criticise them for it; that won't help.”

“... it is an attitude which is quite inconsistent with the way in which a modern and complex society works. If this is the response to problems that arise because of the presence of bushfires ... then no solutions will ever be found. You just blame someone and that's that. The true task is to develop policies and solutions and organisational structures that are continuously improved...”

Mr Clelland (Counsel for Victoria)

“... for the reasons that have already been put to the Commission ... there is no utility in making findings of that kind. Indeed, we submit with respect they would be counterproductive.”

Warnings

- The suggested criticisms were mostly about warnings, and the failure to warn.
- The proposed model of leadership was not clear; is the Chief Officer expected to take control over everything?
- But warnings *are* important...

One finding...

“With the climatic conditions prevailing ... and the intensity of the spread of the fire, loss of immovable property may have been unavoidable, but it likewise appears clear that, with adequate warning, lives could, and would, have been saved.

Many questions, of course, come to mind arising from the management and the attempts to control this fire. But, in the long run, they all revolve around the crucial question, that of lack of communication, and lack of warning to the residents.”

And later

“... there does not appear to be any logical reason or excuse why adequate warning was not given to the residents ... I note in this regard ... that a plan is currently being prepared to avoid similar situations in the future. All I can do, I feel, is encourage the responsible persons in their deliberations and sincerely hope that such a plan is in operation before any further disasters are likely to occur.”

Ellis, SM, *Inquest into 7 deaths at Mt Macedon in the 1983 Ash Wednesday Fires.*

Rush QC

“... there is a long history in relation to the importance of warnings. Inquiry reports, commentaries over the years have all indicated and emphasised that a key agency responsibility is to provide informative, timely warnings to communities potentially threatened by bushfire. ... What the history demonstrates is ... the imperative of warnings, ... the community expectation for warnings, the community reliance on the agencies giving timely and informative warnings.”

Warnings

“It is the duty of the Chief Officer to issue warnings and provide information to the community in relation to bushfires in Victoria for the purpose of protecting life and property.”

Country Fire Authority Act 1958 (Vic) s 50B.

What the commission can and can't do

- The Commission can make findings and recommendations. They may be adopted, they may not.
- If people don't have confidence in the Commission its report may sit on a shelf. Acceptance of the Commission's recommendations will depend on political will.
- Courts of law are different.

Burnside QC (again)

“In ordinary litigation ... the objective is to ascertain what happened, attribute blame and lead to consequential adjustment of rights.”

- A court makes a binding order; adjusts rights; sets the benchmark of what the law expects, not what the law should be.
- A Royal Commission can recommend changes to the law; a Court applies the law.
- The issues are before the Courts; and a critical issue will be warnings.

West v ACT & NSW

- Litigation from 2003 Canberra fires.
- 3000 plaintiffs, down to less than 200.
- Does the fire service owe individuals a duty of care?
 - Key issues are ‘vulnerability’ and ‘control’.

NSW v West

[2008] ACTCA 14, [26] and [27].

... a bushfire hazard is clearly a danger to persons and their property and only an organised, trained and equipped service such as the Rural Fire Service could have any prospect of averting danger from a serious bushfire.

The vulnerability of the prospective victim is self evident, particularly if they are or may be assumed to lack the resources to protect themselves.

Warnings

- The ESB was in control of the information, if not the fire.
- But, the citizen's of Duffy have to show that warnings would have made a difference.

Wayne West's case

- What are the implications?
 - Duty to the person that calls 000?
 - Duty *not* to take water?
- Vulnerability increased if the RFS took his water.
- Implications of future decisions if he wins.

Breach of duty

- Were the actions of the fire service 'reasonable'?

Will it end here?

- Appeals to:
 - the ACT Court of Appeal; then
 - The High Court of Australia.

Conclusions

- Royal Commission – increase burden/obligation on fire authorities.
- It is up to the Government, CFA and other fire authorities to take on board the Commission's recommendations.
- ACT Litigation – question of whether or not a duty of care exists.
- The decision of a court is binding and affects rights.