



“What does the ‘Prepare, Stay and Defend or Leave Early’ policy mean for me?”

Legal liabilities of emergency workers and emergency-service organisations
in Northern Territory

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“What does the ‘Prepare, Stay and Defend or Leave Early’ policy mean for me?” – Legal liabilities of emergency workers and emergency-service organisations in Northern Territory

By Elsie Loh¹

Centre for Risk & Community Safety, RMIT University

I. Introduction

The “Prepare, Stay and defend or Leave Early” policy (the Policy)² emphasises that in the case of bushfires, often the safest option for people caught in the path of a bushfire is to remain in their homes so that they are (i) protected from the radiant heat of the oncoming fire and (ii) able to take measures such as putting out invading embers to protect their homes from being destroyed by the fire. If homeowners feel they are unable to protect their homes whether it is due to physical impairment or lack of preparedness, then it would be safer for these people to leave early long before the danger of the fire presents itself. The policy is in recognition that the most dangerous option is to evacuate through the fire front and that most houses are lost due to ember attack which can greatly be controlled by able-bodied people in the building³.

This paper focuses on addressing the question of what the Policy would mean to individual emergency workers and emergency service organisations in Northern Territory (“NT”) specifically. It is not the intention of this paper to summarise the entire area of emergency law or cover the powers and liabilities of Emergency Services Organisations (ESOs) and their members over Crown land (eg. State forests, national parks, public land)⁴. The legal aspects relating to bushfire management may appear complicated due to the changing nature of the common law and the range of relevant fire and emergency service legislation of the respective State and Territory jurisdictions. The apparent complexity of our law often results in many feeling confused and fearful of what one can or cannot do as a rescuer or as an Emergency Services Organisation (ESO). Further, rescuers would often, in the heightened moment of an emergency, just revert to “common sense” in deciding what they will ultimately do. It is therefore important that rescuers and ESOs understand clearly what powers they have to support their actions and understand that often the acts they feel they “must” do to protect against injury or loss of life, such as forcibly evacuating people from their family home in the face of an approaching fire, are misguided. **This is important in light of the recognition that such last minute evacuations are often fatal and not supported in law.**

¹ Elsie Loh is a Research Officer at the Centre for Risk and Community Safety and qualified legal practitioner. This work was carried out under the funding of the Bushfire CRC and the Program C *Prepare, Stay and Defend or Leave Early* project. I also wish to thank Prof John Handmer for his comments and his time in reviewing the paper and Ms Rebecca Monson for her initial work on the Program C Legal project.

This publication does not constitute any form of legal advice and is not a policy document. The Bushfire CRC recommends seeking independent legal advice on the issues outlined in this publication. The Bushfire CRC will not be held accountable for any decisions made based upon the contents of this publication.

² See Australasian Fire Authorities Council (AFAC)’s *Position Paper on Bushfires and Community Safety* issued on 28 November 2005.

³ See John Handmer J and Amalie Tibbits, ‘Is staying at home the safest option during bushfires? Historical evidence for an Australian approach’ (2005) 6 *Environmental Hazards* 81-91 for more background on the policy.

⁴ The Chapter therefore does not look at the liabilities of Land Management Agencies, such as State/Territory Parks & Wildlife Agencies that may also have powers to manage fires.

This paper will consider the powers, liabilities and immunities that are relevant to emergency workers and ESOs. The paper aims to reassure emergency workers that in the context of the Policy (therefore, deciding whether to evacuate or not), there is little to worry about as long as they act within the scope of the policy. I note that it is not the intention of this paper to summarise the law in this area.

II. Powers

Legislation gives ESOs broad powers to do whatever is necessary to manage a fire and reduce injury or risk of injury to life and property. These powers include the power to *issue* an evacuation warning. More specific powers give some ESOs and their personnel, in some states, the power to *order* and undertake an evacuation, and even forcibly evacuate people.

The terms “pecuniary interest evacuation model” and “mandatory evacuation model” are often used to describe the different situations when evacuation is or is not allowed⁵. Historically, an order to evacuate could be lawfully refused on the basis of pecuniary interest.⁶ A pecuniary interest is a property right that can include goods and chattels. It is based on the principle, dating back to the Middle Ages, that a person who is not a felon or unlikely to act unlawfully can freely enjoy her or his property rights unencumbered by the state.⁷ In some states, however, the right to refuse an order to evacuate on the basis of pecuniary interest has been overridden.

In NT, it is generally said that a “mandatory evacuation model” applies. Under this model, emergency services are allowed to evacuate and, if necessary, forcibly evacuate anyone from any area to another area. The term “mandatory”, however, can be quite misleading in the context of the Policy as it is termed from the perspective of the evacuee and not the emergency worker. This may give an impression to some people that emergency workers must evacuate people in the face of a bushfire. This in fact is not the case. It is “mandatory” in the sense that the evacuee must evacuate should an emergency service order them to do so (also giving an emergency worker the power to forcibly evacuate a person who refuses to evacuate), but there is no legal requirement that such an order to evacuate or a forced evacuation be made in the first place. The decision of the emergency worker to evacuate is in actual fact discretionary. The term “discretionary evacuation model” is therefore more appropriate than “mandatory evacuation model” in the context of the discussion here and this paper will henceforth use the term “pecuniary interest evacuation model” and “discretionary evacuation model” accordingly.

Further, although most states and territories have some legislation regarding evacuation, none provide a definition of its meaning. In the future this may become legally problematic, as the courts may be faced with the question of what an evacuation actually is. This paper defines evacuation as the planned relocation of persons, by an emergency services organization or their members, from a dangerous or potentially dangerous area to a safer area, and the eventual return of those persons to

⁵ Nicholas Karanev, ‘Assessing the legal liabilities of emergencies’ (2001) Autumn, *Australian Journal of Emergency Management* 21.

⁶ *Balfour v Balfour* [1919] 2 KB 571. ‘Each house is a domain into which the King’s writ does not seek to run, and to which his officers do not seek to be admitted’: at 579.

⁷ *Ibid* 571.

their initial location.⁸ This is the definition as adopted by the Emergency Management Australia (EMA). It is noted that “evacuation” is not defined by AFAC.

The following is a summary of the powers of the members of the NT Fire and Rescue Service, Bushfire Brigade, police force, the Incident Controllers, fire control officers, fire wardens and authorised emergency services officers when a state of emergency or a disaster area has been declared:

During fire and emergency

The incident commander is given broad powers under section 20(1) of the *Fire and Emergency Act 1996* and also specific powers to order a person to vacate land which is on fire or in the vicinity of fire as allowed by section 20(2) of the *Fire and Emergency Act 1996*:

20. Powers of incident commander

- (1) The incident commander at a fire or other emergency shall –
- (a) try, by such practicable means as he or she thinks fit, to control and extinguish the fire or deal with the emergency and to protect and save life and property; and
 - (b) control and direct those members who are at the fire or other emergency and any person who voluntarily places his or her services at the incident commander's disposal.
- (2) Without limiting the generality of subsection (1), the incident commander, at or immediately after a fire or other emergency, may –
- ...
 - (f) order a person to vacate land, a building, vehicle or vessel on fire or in the vicinity of the fire or other emergency;

Members of the NT Fire and Rescue Service (“RFS”) and any person voluntarily under the incident commander may be directed or authorised by the incident commander to exercise the abovementioned power to order a person to vacate land⁹.

Section 20(3) and (4) also provides for a member of the NT RFS and a police officer is able to exercise this power to order a person to vacate land but only if it is ‘for the purpose of protecting life or property or controlling or extinguishing the fire or dealing with the emergency’ and it is not practicable to obtain authority from the incident commander to do so:

- (3) Subject to subsection (4), where at or immediately after a fire or other emergency, a member or a police officer is of the opinion that, for the purpose of protecting life or property or controlling or extinguishing the fire or dealing with the emergency, it is necessary or desirable to do an act or thing which the incident commander is empowered to do under subsection (2), not being an act or thing specified in paragraph (h) or (p) of that subsection, the member or police officer may, without the authority of the incident commander, do that act or thing.

⁸ Department of Premier and Cabinet, *Report of the Inquiry into the 2002-2003 Victorian Bushfires - “Glossary”* (2003) 7-28; Australian Emergency Management, *Australian Emergency Manuals Series - Part 1: the Fundamentals - Manual 3: “Glossary”* (1998) 43.

⁹ Section 20(2)(p) of the *Fire and Emergency Act 1996* states that the Incident Controller may ‘direct or authorise the doing by a member or by a person who voluntarily places his or her services at the disposal of the incident commander, of an act or thing which the incident commander is, under this section, empowered to do’.

(4) A member or a police officer may only do an act or thing referred to in subsection (3) without the authority of the incident commander where it is not practicable for the authority for the doing of that act or thing to be obtained from the incident commander.

The Incident Controller may also remove or order a member to remove a person who is interfering with the work of the members or creates a danger. Section 20(2)(g) *Fire and Emergency Act 1996* provides,

(g) remove, or order a member to remove, a person, vehicle, vessel or thing the presence of whom or which at or near the fire or other emergency might, in the incident commander's opinion, interfere with the work of the members, or create a danger;

A person who obstructs or interferes with a member's work is guilty of an offence under section 35(1)(c) and section 52 of the *Fire and Emergency Act 1996*. These provisions are as outlined below:

35. General offences

(1) A person who –

...

(c) obstructs or interferes with a member acting in the performance of a duty or the exercise of a power under this Act;

52. General penalty

A person who contravenes or fails to comply with a provision of this Act for which no penalty is provided other than by this section, is guilty of an offence. Penalty: In the case of an individual – 100 penalty units or imprisonment for 2 years. In the case of a corporation – 500 penalty units.

As outlined above, a member of the RFS and police officer may also exercise this power without authorisation from the Incident Controller if they believe it is necessary to do so to protect life and property or for the control and extinguishment of the fire and where it is not practicable to obtain authority.

During a bush fire

A fire control officer and a fire warden in the NT have broad powers to perform their functions under section 50 of the *Bushfires Act 1980*, which provides,

50. Powers of fire control officer and fire warden

(1) Subject to this section, a fire control officer and fire warden may do any act (whether or not it involves the use of fire) necessary for or incidental to –

(a) controlling a bushfire; or

(b) protecting property or the life of any person from existing or imminent danger arising out of a bushfire.

It is unclear whether this may include the removal of persons from premises that are threatened by fire.

During an Emergency

Broad powers are given to the Territory Controller and to the NT Emergency Service in carrying out their functions. The functions of the Territory Controller and the NT Emergency Service are outlined in section 12 and section 18 of the *Disasters Act 1982* as follows:

12. Functions of Territory Controller

The functions of the Territory Controller are –

- (a) to exercise control and direction of counter disaster operations; and
- (b) to carry out such other functions as directed by the Council.

18. Functions of Northern Territory Emergency Service

The functions of the Northern Territory Emergency Service are to –

- (a) educate and train employees of government departments and other bodies, members of the public, voluntary members and volunteer groups, for counter disaster purposes;
- (b) raise, train and equip such Northern Territory Emergency Service Volunteer Units as the Director considers necessary;
- (c) develop and install communications and operational facilities that may be required for counter disaster purposes;
- (d) select, deploy and co-ordinate resources during counter disaster operations;
- (e) collate and produce Territory, regional and local counter disaster plans; and
- (f) provide counter disaster equipment to Regional Controllers and Local Controllers.

Section 13 and section 19 of the *Disasters Act* 1982 gives the Territory Controller and NT Emergency Services ‘such powers as are necessary to carry out [his/its] functions.’ It is not clear whether this includes powers to forcibly evacuate people should that be necessary to carry out the functions assigned by legislation.

State of Disaster or Emergency is declared

The Administrator may declare a state of disaster should he or she believes that the government does not have sufficient resources to deal with the severity of a disaster or that special powers is required to deal with the disaster. Section 35(1) of the *Disasters Act* 1982 provides as follows,

35. Declaration of state of disaster

- (1) Subject to subsection (2), where at any time it appears to the Administrator that the extent or severity of a disaster or impending disaster is, or is likely to be, so great that –
- (a) it is beyond the resources of normal government services or privately owned services available in the Territory at the time; or
 - (b) special powers are required, to provide appropriate counter disaster measures, he may declare that a state of disaster exists in respect of so much of the Territory as, in his opinion, is affected by the disaster or is likely to be affected by the impending disaster.

Section 35(2) of the *Disasters Act* 1982 enables two Ministers to make such a declaration of a state of disaster should the Administrator be absent:

- (2) Where during a vacancy in the office of Administrator, or the Administrator is absent from duty or from the Territory or is, for any reason, unable to exercise the powers or perform the functions of his office, a declaration under subsection (1) or an extension under subsection (4) may be made by 2 Ministers acting jointly.

When a state of disaster has been declared, special powers under section 37 of the *Disasters Act* 1982 may be exercised. Specifically, section 37(1)(d) the relevant emergency workers to direct the evacuation and exclusion of persons from the disaster area and may remove any persons who do not comply with directions to evacuate. The provisions provides,

37. Special powers during state of disaster

(1) During a state of disaster, the Territory Controller, the Director, a Regional Controller, a Local Controller, a member of the Police Force or authorized persons may, for the purposes of carrying out counter disaster operations or for the safety of the public generally –

...

(d) subject to subsection (2), direct the evacuation and exclusion of any person from any place and, in the exercise of that power, may remove or cause to be removed a person who does not comply with a direction to evacuate, or may remove or cause to be removed a person who enters or is found in a place in respect of which a direction for the exclusion of persons has been given¹⁰

‘Authorized persons’ as referred to in subsection 37(1) of the *Disasters Act* 1982 is defined in subsection 37(4) to mean ‘any person authorized to carry out counter disaster functions by the Council, the Territory Controller, the Director, a Regional Controller or a Local Controller’.

Similarly, a state of emergency may be declared by the Minister under section 39(1) of the *Disasters Act* 1982 which states as follows,

39. Declaration of state of emergency

(1) Where the Minister, having regard to the magnitude or threatened magnitude of an emergency and to the facilities that appear to him to be available to deal with the emergency, is satisfied that extraordinary measures are necessary or advisable for the protection of life and property, he may declare that a state of emergency exists in respect of so much of the Territory as, in his opinion, is likely to be affected by the emergency.

The same special powers may be exercised as during a state of disaster (as outlined above) as described in section 37 of the *Disasters Act* 1982.

40. Duties upon declaration of state of emergency

(2) For the purposes of subsection (1), the special powers and obligations, and the liabilities, referred to in sections 37 and 38 may be exercised as and enforced as if the references in those sections to a state of disaster were references to a state of emergency.

Further, powers may be delegated by relevant persons in accordance with section 41 of the *Disasters Act* 1982:

41. Power of delegation

(1) A person upon whom a power is conferred, or upon whom any function is imposed by or under this Act may, by writing under his hand, delegate all or any of his powers or functions to another person, except this power of delegation.

(2) A power or function delegated under this section may be exercised or performed by the delegate in accordance with the instrument of delegation.

(3) A delegation under this section is revocable at will and does not prevent the exercise of a power or the performance of a function by the person delegating that power or function.

Section 45 of the *Disasters Act* 1982 also makes it an offence with a penalty of \$5,000.00 to fail to comply with an order or direction lawfully given by an authorised emergency worker:

45. Offence and penalty

¹⁰ Subsection 37(2) of the *Disasters Act* 1982 prohibits a person from being evacuated from or denied entry to an area (municipality, town, specific area or Aboriginal land) unless the Administrator has declared that that area should be evacuated or entry denied.

A person who contravenes or fails to comply with this Act, the Regulations, or an order or direction lawfully given, or a requisition lawfully made under this Act or the Regulations, is guilty of an offence against this Act. Penalty: \$5,000.

Summary

The *Fire and Emergency Act 1996* goes as far as giving powers to the incident commander and members of the FRS and police officer (if authorised to do so, or authority cannot be practicably obtained) to order a person to vacate land. The legislation however has not given any enforcement power to this order, i.e. it does not appear that legislation gives power to the relevant emergency worker to use force to remove a person who fails to comply with order. The *Fire and Emergency Act 1996* only makes it clear that a person can be *removed* if the person’s presence interferes with the fire-fighting operations. The *Fire and Emergency Act 1996* also makes it an offence to interfere and obstruct fire-fighting operations.

Only broad powers are given to the fire control officer or fire warden under the *Bushfires Act 1980* to do ‘any act’ necessary for or incidental to protecting property and life. It is unclear whether forced evacuation (which is effectively assault) can be implied by this provision. It is only clear during a state of emergency or disaster that emergency workers have the power to evacuate and the remove people from the declared area. This however can only be done if the Administrator has declared that evacuation should occur over that particular area. At all other times, it is not clear if emergency workers may forcibly evacuate people from their homes during a bushfire.

Nevertheless, the most important point that must be made is that the decision by an emergency responder to order persons be evacuated is a **choice** and must be considered carefully as it is often an onerous, costly and dangerous task. Further, as such forced evacuations involve a degree of deprivation of civil liberties, the power should be only used in situations of great urgency. In such situations, it is extremely difficult to provide the public with the information – such as why an evacuation is necessary and where they are being evacuated to – which is necessary to obtain informed consent. The context in which forced evacuations are likely to occur therefore has the potential to expose ESOs and their personnel to actions for trespass to the person. There is also the potential for legal and political fallout regarding the use of ‘reasonable force’ to force an evacuation if a person refuses to leave his or her home. Kanarev notes that “it would not be politically acceptable to evacuate a person from their home at gunpoint.”¹¹ Finally, every stage of an evacuation – including withdrawal, shelter and return – the ESO personnel who are involved in the process are likely to assume a duty of care. Directing or transporting people away from a danger area, providing welfare for evacuees and ensuring their safe return to their homes involves a responsibility towards the public. Thus any stage of the evacuation process may create a claim for negligence.

Further, as the decision to stay and defend or leave early is to be exercised by the people themselves in accordance with the Policy, the focus of ESOs should not so much be on whether to initiate forced evacuations but to provide timely and accurate information about the fire to residents to enable them to make an informed decision as to whether they should stay and defend or leave early. The central issue in the Policy (which is well-accepted by ESOs as best practice) is well-informed decision-making by the residents themselves and as such, prudence in advising residents is of utmost importance¹².

¹¹ Kanarev, above n 4, 22.

¹² See Elsie Loh, ‘Don’t get burnt by the law: the Legal Implications of the Prepare, Stay and Defend or Leave Early Policy’ in John Handmer and Kat Haynes (Eds.) *Community bushfire safety*. CSIRO publishing (forthcoming).

Finally, it is clear that members and ESOs acting in accordance with the Policy (where last minute evacuations should generally not take place) would be acting within the law. Where evacuations are necessary and the rescuer decides in their expert opinion to evacuate, then what is required of the emergency responder is that the rescue be done in a reasonable and competent manner and to ensure that they do not by their actions make the situation worse.

Table 1 summarises the various powers related to evacuation in your relevant state/territory.

Table 1: Powers of emergency workers to evacuate

Who has power/authority to act?	Action which is permitted by legislation	Conditions required for exercise of power	Enforcement of power	Comments
<p>Incident commander Members of the NT Fire and Rescue Service and any person voluntarily under the incident commander (s20(2)(p) <i>Fire and Emergency Act 1996</i> (“<i>F&E Act</i>”))</p> <p>A member of Fire and Rescue Service or police officer without authorisation from Incident Controller (where not practicable)</p>	<p>Order a person to vacate land (s20(2)(f) <i>F&E Act</i>)</p>	<p>Person is in the vicinity of a fire</p>		<p>A member of FRS and police officer may only exercise power without authority for the purpose of protecting life or property or controlling or extinguishing the fire or dealing with the emergency (s20(3) and (4) <i>F&E Act</i>).</p>
<p>Incident commander Members of the NT Fire and Rescue Service and any person voluntarily under the incident commander (s20(2)(p) <i>Fire and Emergency Act 1996</i> (“<i>F&E Act</i>”))</p> <p>A member of Fire and Rescue Service or police officer without authorisation from Incident Controller (where not practicable)</p>	<p>Remove, or order a member to remove, a person (s20(2)(g) <i>F&E Act</i>)</p>	<p>Person’s presence might interfere with the firefighters’ work or create a danger</p>	<p>A person who obstructs or interferes with a member’s work is guilty of an offence (s35(1)(c) and s52 <i>F&E Act</i>).</p>	<p>A member of FRS and police officer may only exercise power without authority for the purpose of protecting life or property or controlling or extinguishing the fire or dealing with the emergency (s20(3) and (4) <i>F&E Act</i>).</p>

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Who has power/authority to act?	Action which is permitted by legislation	Conditions required for exercise of power	Enforcement of power	Comments
Fire control officer or fire warden	Any act	Necessary for or incidental to protecting property or life from existing or imminent danger arising out of bushfire (s50(1) <i>Bushfires Act</i>)	It is an offence with penalty of \$5,000.00 or 2 year imprisonment for a person to hinder a fire control officer or fire warden in the exercise of their powers (s52 <i>Bushfires Act</i>).	
<ul style="list-style-type: none"> - Territory Controller; - Director of NT Emergency Service; - Regional Controller; - Local Controller; - Member of police force; or - Other authorised person 	Evacuate or deny entry to an area (s37 (1)(d) and s40(2) <i>Disasters Act</i> 1982)	<ul style="list-style-type: none"> - State of Disaster or Emergency is declared over an area - Administrator has declared that the area should be evacuated and/or entry to it should be denied 	<p>Remove a person who fails to comply with a direction</p> <p>It is an offence with a penalty of \$5,000 to fail to comply with orders given under the Act (s45 <i>Disasters Act</i> 1982).</p>	Statutory powers appear to privilege emergency response operations over the pecuniary interests of owners.

IV. Legal Actions

ESOs and their members may be subject to legal action by the public for their exercise or failure to exercise the powers described in Table 1. There are two main types of legal actions that are relevant – criminal and civil legal actions.

A tort is a civil wrong where one party (the plaintiff) alleges another party (the defendant) has done something that has caused harm to the plaintiff which he/she is entitled compensation for. In the context of bushfire emergencies, the torts of assault/battery, trespass and negligence are the most relevant.

Members of an ESO may also be subject to criminal prosecution for crimes including homicide, causing serious injury, or assault. However, in order to prove most criminal offences, it must be shown that the person charged had the intention to commit the crime and this will not usually be the case in an emergency response situation. Some crimes require that the defendant was only reckless in relation to the consequences of their actions. Nevertheless, prosecutors must prove to the court that the accused is guilty of the crime “beyond reasonable doubt” which is a higher threshold than in civil cases. In civil law, the plaintiff only has to show his or her case on the “balance of probabilities”¹³.

In an emergency, an ESO would usually be dedicated to saving lives and property. In such circumstances the defence of necessity may be used to defend a criminal prosecution. It will succeed where the defendant was faced with a choice between complying with the law and allowing great harm to occur, or minimising harm by breaking the law. The defendant must not have done any more than was reasonably necessary in the circumstances, and the harm done must not be disproportionate to the harm avoided. Therefore, though a criminal action brought by the State against an ESO or a member is possible, it would be unlikely.

The most common tort action that is brought in this area is **negligence**. Negligence is also the action that attracts the most media attention and the tort that most people in the emergency service area are most familiar with. Familiarity, however, does not always equate to understanding. It is, therefore, this cause of action that will be the focus of the next section.

The law of negligence in Australia is in a state of flux and is subject to scrutiny from the legislature, judiciary and the community. As a result, any attempt to comprehensively define the circumstances in which emergency services personnel are likely to be found liable in negligence is likely to be quickly outdated. Broadly speaking, a defendant may be found liable in *negligence* if:

1. they owed the plaintiff a duty of care in exercising their powers or performing their duties at an emergency;
2. they breached that duty by failing to exercise the required standard of care (i.e. to take “reasonable” care); and
3. the plaintiff suffered loss or damage as a result of the breach of duty.

Though it is open for the Court to decide that a rescuer is liable for the harm/damage suffered by an individual in that the rescuer owes a duty of care and has failed to take reasonable care, the Courts

¹³ Please refer to H Luntz and D Hambly *Torts: Cases and Commentary* (5th ed, 2002) and D Baker et al, *Torts Law in Principle* (4th ed, 2005) for a more in depth look at the area.

and the Australian public in general has always proven to be sympathetic to the cause of emergency workers. Australian Courts have proven to be sympathetic to the cause of emergency workers. The NSW Court of Appeal in *Northern Territory v Brown*¹⁴ found that the plaintiff “faced great difficulties” in finding that there was a duty of care owed by the police officers who were the emergency rescuers at that instance and recognises that,

“After the event it is always easy to suggest some further step, which will often be a small one, which could have been taken which would have avoided the accident or injury. However the standard is one of reasonable care, not one of perfection...”

The Court also recognizes the police officers “were not responsible for the accident and were simply trying to do their best in its aftermath”.

V. Indemnities

In almost all civil cases, volunteers or employees will not face personal financial loss as they will be covered by common law vicarious liability or by its statutory equivalent. ESOs will, therefore, usually bear the financial cost of their members’ actions. In the last 2-3 years, there has been increased regulation of liability by statute, and in many states there are now statutory immunities ensuring that neither the individual nor their organisation is liable at all.

In some legislation, the ESO or member of ESO must show that the matter or thing was done in “good faith” in order to be protected under the immunity provisions. This concept of “good faith”, however, is not clear as it is undefined in legislation and judicial guidance on its definition is limited. Nevertheless, it is generally accepted that what is required of “good faith” is less than what is required in common law for liability, being “reasonable” (which is the relevant standard in relation to negligence). Therefore, volunteers will generally be protected under such protection provisions if they can show their acts were in good faith, even though their acts may have been unreasonable. If their acts had been reasonable in the first place (a higher standard than “good faith”) then they would have nothing to fear.

Generally, courts have found (rather unhelpfully) that what is ‘good faith’ will depend on the circumstances of each case¹⁵. In the past, courts have defined it as meaning ‘without any indirect or improper motive’¹⁶. More recently, the Federal Court has emphasised the notion of honesty, although this requires more than honest incompetence. In *Mid Density Developments Pty Ltd v Rockdale Municipal Council*¹⁷, Gummow, Hill and Drummond JJ describes the concept at paragraph 27:

“Good faith” in some contexts identifies an actual state of mind, irrespective of the quality or character of its inducing causes; something will be done or omitted in good faith if the party was honest; albeit careless...Abstinence from inquiry which amounts to a wilful shutting of the eyes may be a circumstance

¹⁴ [2003] NSWCA 21.

¹⁵ *Bankstown City Council v Alamo Holdings Pty Limited* [2005] HCA 46 at 59 (as per Gleeson CJ, Gummow, Hayne and Callinan JJ).

¹⁶ *Board of Fire Commissioners v Argouin* (1961) 109 CLR 105 at 115.

¹⁷ (1993) 116 ALR 460.

from which dishonesty may be inferred...On the other hand, “good faith” may require that exercise of caution and diligence to be expected of an honest person of ordinary prudence.¹⁸

This means that a court will consider what a person’s state of mind actually was, as well as how a reasonable person with the same level of experience and expertise would have conducted themselves in the same circumstances. It would generally cover acts which are well meant but unreasonable.

The exclusion clauses in existence in Australia can be generally classified into three types – those that make no change to the common law, those that merely reinforce the notion of vicarious liability and those that appear to make some changes to the common law¹⁹. It is unclear the extent of coverage provided for by the *Bushfire Act 1980* in relation to individuals acting under this Act, but it is most likely that the *Fire and Emergency Act 1996* and *Disasters Act 1982* provide comprehensive protection to emergency workers, the relevant emergency service agency and the Crown. The latter two Acts most likely changes the common law by lowering the standard of care that is expected from a duty to take reasonable care to a duty to act in “good faith”. The effect of these Acts is that liability of the member concerned is removed completely even if it can be shown that the conduct was not “reasonable” but only if “good faith” can be established²⁰.

Section 53 of the *Bushfires Act 1980* is unclear as to the extent of the protection provided. It states,

53. Damage

(1) A person who causes damage in the course of exercising a power conferred on him by this Act is not liable in respect of that damage.

As the provision does not refer to “good faith” or “bona fide”, courts can still find that the section does not intend to cover the *negligent* exercise of power under the Act. If this is the interpretation adopted by courts, then the provision is a mere restatement of the common law. Individuals are still liable for negligent acts done.

In contrast, the *Disasters Act 1982* clearly provides comprehensive protection to the emergency workers acting under the Act as well as the Crown if good faith can be shown. The relevant provision provides,

42. Certain proceedings not to be taken

No civil or criminal action or proceedings shall lie or be brought against the Crown or any person acting in the execution or intended execution of this Act, the Regulations or a delegation under this Act, or in compliance or intended compliance with any direction given or purported to be given under this Act or the Regulations, in respect of anything done or omitted to be done in good faith by that person under or for the purposes of this Act or the Regulations.

¹⁸ Ibid 468.

¹⁹ Michael Eburn, *Emergency Law* (2nd ed, 2005) 144-6.

²⁰ Examples of other similar protection clauses include: *Disaster Management Act 2003* (Qld) s144, *Bush Fires Act 1954* (WA) s63, *Fire Brigades Act 1942* (WA) s64, *Fire and Emergency Services Authority of Western Australia Act 1998* (WA) s37, *Emergency Management Act 2005* (WA) s100, *Fire Brigades Act 1989* (NSW) s78, *State Emergency and Rescue Management Act 1989* (NSW) ss41 and 59, *State Emergency Services Act 1989* (NSW) s25, *Rural Fires Act 1997* (NSW) s128, *Metropolitan Fire Brigades Act 1958* s54A.

Section 47 of the *Fire & Emergency Act* 1996 also protects any member from anything done or omitted to be done in good faith in the exercise of his or her functions under the Act. The provision provide as follows,

47. Protection of members

An action or proceeding shall not be brought against a member to recover damages in respect of damage to property or injury to a person arising out of anything done or omitted to be done by the member in good faith in the exercise of a power of the performance of a function under this Act or the Regulations or done or omitted by the member in good faith in the purported exercise of a power or the performance of a function under this Act or the Regulations.

Unlike the *Disasters Act* 1982, it is not clear whether liability is also removed from the Fire Service and Rescue as an organisation or from the Territory if good faith can be shown. The *Fire & Emergency Act* 1996 is silent on this issue. Under the doctrine of vicarious liability, however, if the member is not liable, then the employer will not be liable either. Though silent, it would appear that this section also provide protection for the member and ESO.

Conclusion

The protection accorded by legislation differs according to which State or Territory the emergency worker and/or service is in. There is no doubt that it is Parliament’s intention that some form of protection is accorded to ESOs and their members. Of course, none of these provisions have actually been brought to Court and been interpreted to date. Though the above analysis is helpful to give some idea as to immunities that exist for practitioners in the emergency area, the extent of protection these provisions *actually* provide (above that which is accorded in common law) is yet to be seen.

Table 2: Indemnities available to ESOs and their members

Party protected	Form of protection and conditions under which it will be provided	Comments
Individual acting under <i>Bushfires Act 1980</i> .	A person who causes damage in the course of exercising a power conferred on him by this Act is not liable in respect of that damage (s53 <i>Bushfires Act 1980</i> (NT)).	It is unclear the extent of protection provided by this provision. This may be a mere restatement of the common law. Individuals may still be liable for negligent acts done regardless of whether good faith can be shown.
Crown and any person acting under <i>Disasters Act 1982</i> .	No action can be brought for any act or omission done in good faith by the person under or for the purposes of Act or Regulations (s42 <i>Disasters Act 1982</i> (NT)).	Comprehensive protection from liability.
A member of fire and emergency response groups – includes volunteers.	No action can be brought for any act or omission done in good faith by the person under or for the purposes of Act or Regulations (s47 <i>Fire and Emergency Act 1996</i> (NT)).	Probably provides protection for negligent acts.