



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

Legal liabilities of emergency workers and emergency-service organisations  
in Tasmania

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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 Tasmania

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### I. Introduction

The “Prepare, Stay and defend or Leave Early” policy (the Policy)<sup>2</sup> 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 building<sup>3</sup>.

This paper focuses on addressing the question of what the Policy would mean to individual emergency workers and emergency service organisations Tasmania 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)<sup>4</sup>. 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

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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.

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

<sup>3</sup> 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.

<sup>4</sup> 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.

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.**

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 allowed<sup>5</sup>. Historically, an order to evacuate could be lawfully refused on the basis of pecuniary interest.<sup>6</sup> 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.<sup>7</sup> In some states, however, the right to refuse an order to evacuate on the basis of pecuniary interest has been overridden.

In Tasmania, 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

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

<sup>6</sup> *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.

<sup>7</sup> *Ibid* 571.

members, from a dangerous or potentially dangerous area to a safer area, and the eventual return of those persons to their initial location.<sup>8</sup> 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 Tasmanian Fire Service, police force and emergency services officers when a state of emergency or disaster or alert has been declared:

### ***At a fire emergency – Fire Services***

The Tasmanian Fire Services do not have specific powers to evacuate persons from their land or property. Instead, the Brigade Chief may remove or cause to be removed persons who are interfering with the work of the brigade as stated in section 29(3)(g) of the *Fire Services Act 1979* (Tas) as follows:

A brigade chief –

...

(g) may remove or cause to be removed any person, vehicle, or thing whose presence at or in the vicinity of any fire in his opinion interferes with the operations of the brigade, and may take any measures which appear to him expedient for the protection of life and property;

According to this provision, the brigade chief also has broad powers to take any measures which he or she believes to be “expedient for the protection of life and property”. Though this provision does not specifically empower the brigade chief to forcibly evacuate people who have a pecuniary interest in land or property (unless they are interfering with the operations of the brigade), it could be implied that such an action is allowed as long as the brigade chief can show that these measures are “expedient for the protection of life and property”.

Section 128(1)(a) and (c) of the *Fire Services Act* makes it clear that it is an offence to obstruct operations of the Fire Service or disobey orders to leave. It states that:

A person shall not –

(a) wilfully obstruct, hinder or interfere with a member of the Fire Service who is performing any function or exercising any power under this Act; or

...

(c) remain on any land or in any premises where there is or has recently been a fire, after being order to quit the premises by an officer of the Fire Service or a police officer;

The penalty for breaching this section is a “fine not exceeding 26 penalty units (i.e. \$2,600.00) or imprisonment for 6 months”. A penalty unit is defined in section 4 of the *Penalty units and Other Penalties Act 1987* (Tas) as “...a penalty of a number of dollars equal to the product obtained by multiplying \$100 by the number of penalty units so prescribed or so specified”.

The *Fire Services Act* also provides for a group officer to exercise the functions of a brigade chief in accordance with section 35 of the Act which states:

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<sup>8</sup> 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.

Where a group officer is controlling a fire-fighting operation or an operation in respect of a civil emergency, the powers and functions imposed by this Act on a brigade chief may be performed and exercised by the group officer.

Further, section 29(11) allows the most senior fire officer to exercise the powers and functions of a brigade chief where the brigade chief instructs such an officer to do so or the brigade chief is absent or unable to act. If a fire officer is absent, then the most senior fire-fighter of the brigade may do so. This is provided for by section 29(11) of the *Fire Services Act* as follows:

The powers and functions of a brigade chief under this section may, on the brigade chief's instructions or in the case of the brigade chief's absence or incapacity, be exercised or performed by the most senior fire officer of the brigade or, in the absence of a fire officer, the most senior fire-fighter of the brigade.

### ***At a fire emergency – Police officer***

Firstly, section 47(1) and (2) of the *Fire Services Act* provides that police officers are to aid fire officer in charge and brigades in maintaining authority and in their performance of their functions under the Act:

- (1) A police officer who is present at a fire shall aid the appropriate fire officer in maintaining the fire officer's authority and in enforcing compliance with the orders and directions of the fire officer in the performance of his functions under this Act.
- (2) A police officer who is present at a fire shall aid a brigade or group of brigades in the performance of its functions under this Act.

Further to this function, police officers have the power to order a person who is not a member of the Fire Service to withdraw from an area if the land or premises is burning and is threatened by fire. The provision also provides that police officers may also removes such a person if he or she is interfering with fire-fighting operations. Accordingly, section 47(3)(c) of the *Fire Services Act* states:

- (3) A police officer of his own motion may, or, at the request of the appropriate fire officer, shall ...
  - (c) order to withdraw or, in the event of a refusal to withdraw, remove –
    - (i) any person who, by his presence or otherwise, interferes with any fire-fighting operations; or
    - (ii) any person, other than a member of the Fire Service, who is in or on any land or premises that is burning or is threatened by fire.

If the person refuses to comply, force may be used but it must be “reasonable”, in accordance to section 47(4):

- (4) For the purpose of removing a person from any land or premises as provided in subsection (3)(c), a police officer may use such force as may be reasonably necessary

As outlined earlier, it is also an offence to not leave land or premises after being ordered to do so by a police in accordance with section 128(1)(c) of the *Fire Services Act* punishable by fine or imprisonment of up to 6 months.

### ***The exercise of ‘emergency powers’***

In certain circumstances, “authorised persons” are able to exercise the ‘emergency powers’ as set out in Schedule 1 of the *Emergency Management Act*, which states, at section 1(a)-(d):

- (1) The following powers are emergency powers:
- (a) to evacuate persons, animals and wildlife;
  - (b) to prohibit, direct, regulate or limit the movement of persons, animals, wildlife, vehicles and other property into, within or out of Tasmania, any area in Tasmania or any premises;
  - (c) to move persons, animals, wildlife, vehicles and other property;
  - (d) to detain persons, and seize animals, wildlife, vehicles, premises and other property, that the authorised officer suspects may be contaminated or infected by chemical, biological or radiological material;

Emergency powers may only be exercised if and when a State Controller or Regional Controller issues authorisation for the use. The State Controller may issue an authorisation for the emergency powers to be exercised under section 40(1) of the *Emergency Management Act* where he or she:

- (a) is satisfied that an emergency is occurring or has occurred in Tasmania and, due to the occurrence of that emergency, there are reasonable grounds for the exercise of those powers for the purpose of –
  - (i) protecting persons from distress, injury or death; or
  - (ii) protecting property or the environment from damage or destruction; or
- (b) is satisfied on credible information that an emergency that may impact on Tasmania is occurring elsewhere in Australia.

In this authorisation, the State Controller must specify which persons or groups of persons are considered “authorised officers” for the purposes of exercising the emergency powers (section 40(3)(e)). “Authorised officers” may include those as listed in section 31 of the *Emergency Management Act*, which include – the State Controller, a Regional Controller, a Municipal Coordinator, the Director of SES, the Commissioner of Police, the Chief Officer of Fire Service, the Director of Ambulance Service, a member of a statutory service and any other person authorised to act as an authorised officer.

The State Controller must also specify which (if not all) emergency powers may be exercised, which may or may not include the relevant powers as outlined above (section 40(3) (f)).

Regional Controllers may also authorise for the exercise of emergency powers under section 45 of the *Emergency Management Act* but only where a state of emergency has been declared in respect of his or her region or the whole state (section 45(1)(a)). The Regional Controller may also authorise for the use of emergency powers under section 45(1)(b) if a state of emergency is declared at another region but he or she believes that the emergency will impact his or her region and that:

- ...it is reasonable to authorise the exercise of those powers in that region for the purpose of –
- (i) protecting persons from distress, injury or death; or
  - (ii) protecting property or the environment from damage or destruction; or
  - (iii) otherwise mitigating the impact of the emergency on that region.

The Regional Controller must similarly specify which persons are “authorised officers” and which emergency powers may be exercised (if not all) (section 45(2)).

A state of emergency may be declared by the Premier in accordance with section 42 of the *Emergency Management Act 2006* (Tas) but only if it is in his or her opinion that the authorisation of emergency powers is not sufficient to manage the emergency and the use of “special emergency powers” are necessary. These circumstances are not as relevant to our discussions here.

### **Summary**

It is only clear in legislation that forced evacuations (in the exercise of “emergency powers) are only allowed to be carried out if it has been specifically authorised either by the State Controller or the relevant Regional Controller. There is no “blanket” provision in the *Fire Services Act* or the *Emergency Management Act* that allows for forced evacuations. There is only an implication in the *Fire Services Act* based on the broad powers that is given to fire officers that forced evacuations are allowed. This, however, is still subject to interpretation whether these broad powers is sufficient to override the common law position 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 and thus should not be forcibly evacuated when he or she has a pecuniary interest in the land, building or goods in question. Police officers on the other hand may remove persons from land or premises that are on fire or being threatened even if they are not interfering with fire-fighting operations. This may be on the police officer’s own accord or upon the request by the appropriate fire officers. In this way, persons with pecuniary interests may be forcibly removed should such a decision to evacuate be made.

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 only be 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.”<sup>9</sup> 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

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<sup>9</sup> Kanarev, above n 4, 22.

well-informed decision-making by the residents themselves and as such, prudence in advising residents is of utmost importance<sup>10</sup>.

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.

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<sup>10</sup> 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).



**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>Brigade Chief</p> <p>Group officer – s35 <i>FS Act</i></p> <p>Most senior fire officer on the instructions or in the absence or incapacity of the Brigade Chief.</p> <p>Most senior firefighter in the absence of a fire officer.</p> <p>(s29(11) <i>FS Act</i>)</p>	<p>Remove or cause to be removed any person.</p> <p>(s29(3)(g) <i>Fire Services Act 1979</i> (“<i>FS Act</i>”))</p>	<ul style="list-style-type: none"> <li>- At a fire or potential fire.</li> <li>- The person’s presence interferes with the operations of the brigade.</li> </ul>	<p>It is an offence to wilfully obstruct, hinder or interfere with a member of the Fire Service exercising his/her powers (s128(1)(a) of <i>FS Act</i>).</p> <p>It is an offence to remain on any land/premises after being ordered to leave the premises (s128(1)(c) of <i>FS Act</i>).</p>	<p>Note provision also empowers Brigade Chief to take <u>any measures</u> which appear to be expedient for the protection of life.</p>
<p>Police officer</p>	<p>Order a person to withdraw (s47(3)(c) <i>FS Act</i>)</p>	<ul style="list-style-type: none"> <li>- Person is not a member of the Fire Service, and</li> <li>- On land or premises that is burning or threatened by fire, or</li> <li>- Interferes with any fire-fighting, operations</li> </ul>	<p>May remove using such force as is reasonably necessary (s47(4) <i>FS Act</i>).</p> <p>It is an offence to remain on any land/premises after being ordered to leave the premises (s128(1)(c) of <i>FS Act</i>).</p>	
<p>Authorised officers as specified by State/Regional Controller.</p> <p>May include those as defined in s31 of the <i>EM Act</i>.</p>	<p>Evacuate persons, control movement of persons and detain persons (Schedule 1, s1(a)-(d) of the <i>Emergency Management Act 2006</i>)</p>	<p>An authorisation has been issued by the State or relevant Regional Controller in accordance with s40 and s45 of the <i>EM Act</i>)</p>	<p>An authorised officer or person assisting may use force as is reasonably necessary in performing functions and exercising powers in managing an emergency (s52 of <i>EM Act</i>).</p>	<p>Statutory powers appear to privilege emergency response operations over the pecuniary interests of owners, but only where this has been authorised by State/Regional Controller.</p>

#### **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”<sup>11</sup>.

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.

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<sup>11</sup> Please refer to H Luntz and D Hambly *Torts: Cases and Commentary* (5<sup>th</sup> ed, 2002) and D Baker et al, *Torts Law in Principle* (4<sup>th</sup> ed, 2005) for a more in depth look at the area.

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 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 *New South Wales v Brown*<sup>12</sup> 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 case<sup>13</sup>. In the past, courts have defined it as meaning ‘without any indirect or improper motive’<sup>14</sup>. 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*<sup>15</sup>, 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

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<sup>12</sup> [2003] NSWCA 21.

<sup>13</sup> *Bankstown City Council v Alamo Holdings Pty Limited* [2005] HCA 46 at 59 (as per Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>14</sup> *Board of Fire Commissioners v Argouin* (1961) 109 CLR 105 at 115.

<sup>15</sup> (1993) 116 ALR 460.

careless...Abstinence from inquiry which amounts to a wilful shutting of the eyes may be a circumstance 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.<sup>16</sup>

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 law<sup>17</sup>.

In Tasmania, emergency services legislation appears to reinforce the principle of vicarious liability<sup>18</sup>. The common law doctrine of vicarious liability provides that an ESO, as the employer, would be liable for acts done by the employee officer, if the member was acting within the scope of their employment or authority. To disprove vicarious liability, the ESO must show that the conduct of the employee was so far removed from what was authorised as to be beyond the control or influence of the ESO.

For example, section 58 of the *Emergency Management Act* protects an emergency management worker from incurring any civil or criminal liability for any acts done or omitted to be done in good faith, as follows:

An emergency management worker does not incur any civil or criminal liability in respect of any act done or omitted to be done by the person in good faith –

- (a) in undertaking emergency management, rescue and retrieval operations or a prescribed activity;
- or
- (b) in the performance or exercise, or the purported performance or exercise, of any function or power under this Act; or
- (c) in the administration or execution, or the purported administration or execution, of this Act.

An individual’s liability is, therefore, reduced from the test of “reasonableness” to one of “good faith”<sup>19</sup>. Section 3 of the *Emergency Management Act* defines “emergency management workers” broadly to include the following:

- (a) a member of a statutory service, whether for payment or other consideration or as a volunteer; or
- (b) an authorised officer; or
- (c) a person who does or omits to do any act in the assistance of, or under the direction or control of, an authorised officer; or
- (d) a person prescribed by the regulations to be an emergency management worker; or
- (e) any other person who, in good faith –
  - (i) participates in emergency management or rescue and retrieval operations; or

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<sup>16</sup> Ibid 468.

<sup>17</sup> Michael Eburn, *Emergency Law* (2<sup>nd</sup> ed, 2005) 144-6.

<sup>18</sup> *Fire Services Act 1979* (Tas) s121.

<sup>19</sup> Other examples from other legislation include: *Country Fire Authority Act 1958* s92, *Emergencies Act 2004* (ACT) s198 and *Emergency Management Act 2004* (SA) s 32 and *Victoria State Emergency Service Act 2005* (Vic) s42.

- (ii) performs or exercises, or purportedly performs or exercises, functions or powers under this Act; or
- (iii) is involved in the administration or execution, or the purported administration or execution, of this Act;

While the emergency management worker may not incur any liability, section 55(1) of the *Emergency Management Act 2006* makes it clear that the liability of an emergency management worker, State Committee, a Regional Committee, a Municipal Committee or “another person” is incurred by the Crown instead:

- (1) The Crown is liable in tort in respect of the death of or injury to a person other than an emergency management worker, subject to the defences and other incidences ordinarily applicable in proceedings in tort, if the death or injury is a result of an emergency management worker, the State Committee, a Regional Committee, a Municipal Committee or another person –
- (a) failing to perform or exercise a function or power imposed or conferred by or under this Act; or
  - (b) improperly performing or exercising a function or power imposed or conferred by or under this Act; or
  - (c) contravening a provision of this Act or the regulations that prohibits the doing of any act; or
  - (d) performing or exercising, or purportedly performing or exercising, any function or other power under this Act.

Section 55(2) on the other hand provides that the Crown is only liable when it does not involve the exercise of emergency power or special emergency power or during rescue and retrieval operations as follows:

- (2) Despite subsection (1), the Crown is not liable in tort in respect of the death of or injury to a person if the death or injury is attributable wholly or partly to an act or omission by an emergency management worker while –
- (a) exercising, or purportedly exercising, an emergency power or special emergency power; or
  - (b) undertaking, or purportedly undertaking, rescue and retrieval operations.

It would appear, therefore, that in relation to the evacuation of persons, both the emergency management worker and the Crown is protected in tort from liability as neither can be found liable when emergency powers involving the evacuation of persons are involved.

In the “normal” exercise of powers under the *Fire Services Act 1979* (Tas) (c.f. emergency powers under the *Emergency Management Act 2006*), the doctrine of vicariously is also affirmed. Section 121 of the *Fire Services Act 1979* (Tas) provides the following protection to a brigade or an officer, fire-fighter, employee or agent of the Commission or a brigade (including volunteers – s121(5)):

- (1) Where any person dies or sustains injury or damage and the death, injury, or damage is wholly or partly attributable to –
- (a) the failure of the Commission or a brigade or an officer, fire-fighter, employee, or agent of the Commission or a brigade to perform or properly perform any function imposed on it or on him by or under this Act;

(b) the improper exercise by the Commission or a brigade, or by any officer, fire-fighter, employee, or agent of the Commission or a brigade, of any power conferred on it or on him by or under this Act; or

(c) the contravention by the Commission or a brigade or any officer, fire-fighter, employee, or agent of the Commission or a brigade, of any provision of this Act or the regulations, being a provision that prohibits, whether conditionally or unconditionally, the Commission, brigade, officer, fire-fighter, employee, or agent from doing any act –

the Commission shall, except as provided in subsection (2) and subject to the defences and other incidences ordinarily applicable in proceedings in tort, be liable in tort in respect of the death, injury, or damage, but no such brigade, officer, fire-fighter, employee, or agent shall be so liable unless it is proved by or on behalf of the plaintiff that the brigade, officer, fire-fighter, employee, or agent in failing to perform or properly perform a function referred to in paragraph (a), in the improper exercise of a power referred to in paragraph (b), or in contravening a provision referred to in paragraph (c), acted, or, as the case may be, failed to act, in bad faith.

(2) Subject to subsection (4), the Commission is not liable for any death, injury, or damage if the death, injury, or damage is attributable wholly or partly to any act or failure to act by a brigade or an officer, fire-fighter, employee, or agent of the Commission or a brigade if the act or failure to act occurred in the course of, or was directly connected with, any operation specified in subsection (3) unless it is proved that the brigade or the officer, fire-fighter, employee, or agent of the Commission or a brigade acted, or, as the case may be, failed to act, in bad faith.

(3) The operations referred to in subsection (2) are those directed to extinguishing, or preventing the spread of, a fire or reducing the risk of a fire occurring, or to the training of persons in the carrying out of any of those operations.

The layout of the Tasmanian provisions appears wordy and complicated compared to the other states/territories. Nevertheless, the provision appears to establish the notion of vicarious liability. In summary, the provision provides the following:

- A brigade, officer, officer, fire-fighter, employee or agent cannot be liable in tort unless the act or omission (as outlined in ss121(1)(a) – (c) above) was done in “bad faith”. If done in good faith, then no liability can be established (s121(1)).
- The Commission will instead be liable for, effectively, any negligent acts (as outlined in ss121(1)(a)-(c) above) of the brigade, officer, fire-fighter, employee or agent (s121(1)) with the following exception (see next point).
- Commission will however *not* be liable if operations were directed to extinguishing, preventing the spread of a fire or reducing the risk of fire occurring (or training relating to these operations) unless bad faith is shown on part of the brigade, officer, fire-fighter, employee or agent (s121(2) and (3)).

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Type of activity	Party	Acted in good faith	Acted in bad faith
Fire-fighting activities (ss3 activities)	Commission	Protected (ss2)	Liable (ss2)
	Brigade, officer, fire-fighter (etc.)	Protected (ss1)	Liable (ss1)
Non- fire-fighting activities (not within ss3)	Commission	Liable (ss1)	Liable (ss1 or under common law vicarious liability)
	Brigade, officer, fire-fighter (etc.)	Protected (ss1)	Liable (ss1)

The provisions under the *Fire Services Act* makes a distinction between fire-fighting activities within the definition of s121(3) which involves the extinguishing, preventing the spread of fire or reducing the risk of fire from occurring to non-fire fighting activities which do not include these operations.

Subsection 121(1) clearly states that the brigade, officer, fire-fighter, employee or agent (individuals) are not liable for tortious acts unless bad faith can be shown. This means that these individuals are not liable for acts or omissions done in good faith, regardless of whether these acts were fire-fighting activities or not. Conversely, these individuals *are* liable for acts or omission done in bad faith.

Liability of the Commission is not as clear. Subsection 121(1) states that the Commission is liable for tortious acts committed by itself or the brigade, officer, fire-fighter (etc.) subject to subsection 121(2) which distinguishes its liability for fire-fighting activities as defined in subsection 121(3). Taking these provisions together, the Commission is not liable for death, injuries or damage arising from fire-fighting activities unless bad faith can be shown on the part of the brigade, officer, fire-fighter (etc.). Therefore, the Commission is not liable for acts or omission relating to fire-fighting done in good faith and is conversely liable for acts or omission done in bad faith.

It is unclear in legislation whether the Commission would be liable for acts done in bad faith for non-fire-fighting activities. The legislation however makes it clear that the brigade, officer, fire-fighter (etc.) would be liable for acts done in bad faith. According to common law, the Commission would be vicariously liable for the negligent acts or omissions of its employees and agents, even when done in “bad faith” (depending on the circumstances). Nevertheless, subsection 121(1) makes it clear that the Commission is liable in tort in respect of death, injury or damage caused by the brigade, officer, fire-fighter (etc.) with only one exception relating to fire-fighting activities. So though it may be possible for the Commission to argue that only the individual concerned is liable (protecting itself from liability), it is also possible to argue in the contrary – that the Commission would be liable (whether in common law or in statute) for negligent acts or omissions relating to non-fire-fighting activities that were done in bad faith.

The doctrine of vicarious liability is also affirmed in the case of police officers. The relevant provisions of the *Police Service Act 2003* (Tas) protect police officers from liability for any act or omission done in good faith and transfers the liability to the Crown instead. Section 84 of the *Police Service Act* provides:

- (1) A police officer does not incur any personal liability for any act or omission done or made in good faith in the exercise or performance, or purported exercise or performance, of any powers or duties at common law or under this or any other Act or law.

(2) A liability that, but for subsection (1), would lie against a police officer, lies against the Crown.

Section 86 of the *Police Service Act* also protects people who are not police officers but have assisted police officers in the same way:

(1) A person who, at the request and under the direction of a police officer, assists the police officer does not incur any personal liability for any act or omission done or made in good faith.

(2) A liability that would, but for subsection (1), lie against a person assisting a police officer lies against the Crown.

In sections 84 and 86 of the *Police Service Act*, individuals are protected where good faith can be shown with the liability being expressly transferred to the Crown instead.



**Table 2: Indemnities available to ESOs and their members**

Party protected	Form of protection and conditions under which it will be provided	Comments
A brigade or an officer, fire-fighter, employee, or agent of the Commission or a brigade (including volunteers)	<p>Does not incur any liability in respect of an act/omission done by them in <i>good faith</i> (i.e. not in “bad faith”): s121 <i>Fire Services Act 1979</i> (Tas).</p> <p>Instead the Commission appears to incur liability that a member of the authority would otherwise incur.</p> <p>Where act is related to operations directed to extinguishing, or preventing the spread of a fire or reducing the risk of a fire occurring then Crown will only be liable if “bad faith” can be shown on the part of the relevant member of the Fire Service.</p>	<p>Appear to reinforce vicarious liability.</p> <p>Not as clear in relation to non-fire-fighting activities.</p>
An emergency management worker (defined in s3 of the <i>Emergency Management Act</i> )	<p>An emergency management worker does not incur any civil or criminal liability in respect of any act done or omitted to be done by the person in <i>good faith</i> in emergency management or rescue &amp; retrieval operations, in the performance of Act and in administration or execution of Act (s58 <i>Emergency Management Act 2006</i> (Tas)).</p> <p>Instead Crown will be liable but only under conditions as set out in s55 of the <i>Emergency Management Act</i> which does not include where emergency powers are exercised, such as the evacuation of people.</p>	<p>Reinforces vicarious liability but not appear to cover powers relating to the evacuation of people. In this case, both emergency management worker and Crown are protected.</p>
Police officer	<p>Civil liability for an honest act/omission when exercising or discharging a power/duty conferred upon them by law is transferred to the Crown.</p> <p>s84 <i>Police Service Act 2003</i> (Tas).</p>	<p>Police officer also protected as an “emergency management worker” under <i>Emergency Management Act</i>.</p>
Person assisting a police officer	<p>Transfer of civil liability to Crown where person assisting a police officer in a search and rescue operation (where it is at the request and under direction of a police officer) (s86 <i>Police Service Act 2003</i> (Tas)).</p>	

### 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.