



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

Legal liabilities of emergency workers and emergency-service organisations  
in New South Wales

Bushfire Cooperative Research Centre

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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 New South Wales

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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 in New South Wales (“NSW”) 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 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.**

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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.

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 NSW, 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

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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.

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 NSW Fire Brigade, NSW Rural Fire Service, police force and emergency services officers when a state of emergency or a disaster area has been declared:

### ***Rural fire and Fire district***

The NSW Rural Fire Service and Fire Brigade do not have specific powers to evacuate persons from their land or property. Instead, the officer in charge (or any officer or member authorised by the officer in charge)<sup>9</sup> in the NSW Fire Brigade have broad powers under section 13(1) of the *Fire Brigades Act* 1989 (NSW) which states:

- (1) At a fire, the officer in charge:
  - (a) may take *such measures as the officer thinks proper* for the protection and saving of life and property and for the control and extinguishing of the fire, and
  - (b) is to control and direct the operations of any fire brigade.

Section 19 of the *Fire Brigades Act* also gives the officer in charge general powers to remove persons and obstacles but only if he, she or it interferes with the operations of the fire brigade. It states:

The officer in charge at a fire or hazardous material incident may cause to be removed any person, vehicle, vessel or thing the presence of whom or which at or near a fire or hazardous material incident might, in the officer’s opinion, *interfere with the work of any fire brigade or the exercise of any of the officer’s functions.*

Similarly, an officer with designated rank (or any officer or member authorised by the officer in charge)<sup>10</sup> in the NSW Rural Fire Service has broad powers under section 22(1) of the *Rural Fires Act* 1997 (NSW) which states:

- (1) An officer of a rural fire brigade or group of rural fire brigades of a rank designated by the Commissioner may, for the purpose of controlling or suppressing a fire or protecting persons, property or the environment from an existing or imminent danger arising out of a fire, incident or other emergency:
  - (a) exercise any function conferred on the officer by or under this Act, or
  - (b) *take any other action that is reasonably necessary or incidental* to the effective exercise of such a function.

There is however no equivalent provision like in the *Fire Brigades Act* that allows for the removal of persons when their presence interferes with the work of the brigade or officer’s functions.

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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.

<sup>9</sup> *Fire Brigades Act* 1989 (NSW), s24.

<sup>10</sup> *Rural Fires Act* 1997 (NSW), s40.

Though the *Fire Brigades Act* and the *Rural Fires Act 1997* (NSW) do not specifically empower officers of the Fire Brigade or Rural Fire Service to forcibly evacuate people who have a pecuniary interest in land or property, it could be implied that this is within the broad powers given to these officers under these Acts. This is as long as the officers can show that these measures are what the officers consider to be “proper” or “reasonably necessary or incidental” to their functions.

### ***State of emergency declared***

Where a state of emergency is declared by the Premier of NSW in accordance with s33 of the *State Emergency and Rescue Management Act 1989* (NSW) (“*SERM Act*”), the Minister or Emergency services officer authorised by the Minister is given the following powers under section 37 of the *SERM Act*:

#### *Power to evacuate or to take other steps concerning persons*

- (1) The Minister may, if satisfied that it is necessary or convenient to do so for the purpose of responding to an emergency, direct, or authorise an emergency services officer *to direct, a person* to do any or all of the following:
  - (a) *to leave any particular premises and to move out* of an emergency area or any part of an emergency area,
  - (b) *to take any children or adults present* in any particular premises who are in the person’s care and to move them outside the emergency area or any part of the emergency area,
  - (c) *not to enter the emergency area* or any part of the emergency area.
- (2) If the person does not comply with the direction, an emergency services officer may *do all such things as are reasonably necessary* to ensure compliance with it, using such force as is reasonably necessary in the circumstances.

This means that once an area has been declared to be under a state of emergency, the emergency services officer may forcibly evacuate persons outside of that area should evacuation be considered the most necessary option in the emergency situation. Please see comments below for a further discussion.

An emergency services officer that may be authorised by the Minister to carry out the powers provided for by section 37 of *SERM Act* is defined under section 32A of *SERM Act* as:

- (a) a police officer,
- (b) an officer of New South Wales Fire Brigades of or above the position of station commander,
- (c) an officer of the State Emergency Service of or above the position of unit controller,
- (d) a member of a rural fire brigade of or above the position of deputy captain,
- (e) a District Emergency Management Officer.

A member from an ESO that is of a lower rank than stated above may not be authorised accordingly.

### ***Area is specified to be a “danger area”***

A “danger area” has been defined in section 60KA of the *SERM Act* to be ‘the area specified by a senior police officer as the area in which an emergency is causing or threatening to cause injury or death’. Once an area has been declared a “danger area” by the senior police officer, section 60L of the *SERM Act* states that the senior officer (or another officer under the direction of the senior officer) can do the following:

#### *Power of police to evacuate or to take other steps concerning persons*

- (1) A senior police officer may, if satisfied that there are reasonable grounds for doing so for the purpose of protecting persons from injury or death threatened by an actual or imminent emergency, direct, or authorise another police officer to direct, a person to do any or all of the following:
  - (a) to *leave any particular premises* and to move outside the danger area,
  - (b) to *take any children or adults present* in any particular premises who are in the person’s care and to move them outside the danger area,
  - (c) *not to enter the danger area*.
- ...
- (2) If a *person does not comply* with a direction given under this section, a police officer may *do all such things as are reasonably necessary to ensure compliance* with it, using such force as is reasonably necessary in the circumstances.

This means that once an area has been declared to be a danger area by a senior police officer, the senior officer or another officer under his/her directions may forcibly evacuate persons outside of that area should evacuation be considered the most necessary option in the emergency situation. Please see comments below for a further discussion.

### **Summary**

It is only clear in legislation that forced evacuations is allowed when a state of emergency has been declared by the Premier or when an area has been declared a “disaster area” by a senior police officer. During a state of emergency, only authorised “emergency service officers” may forcibly evacuate people irrespective of their pecuniary interests in the land, building or goods and only a senior police officer or an officer who has been authorised by a senior police officer may forcibly evacuate people in a declared disaster area. Where there has not been a state of emergency or a disaster area declared, there is only an implication in the *Fire Brigades Act* and *Rural Fires Act* based on the broad powers that is given to 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.

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>11</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.

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<sup>11</sup> Kanarev, above n 4, 22.

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 importance<sup>12</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>12</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
<ul style="list-style-type: none"> <li>- Officer in charge (s13(1) <i>Fire Brigades Act 1989</i> (“<i>FB Act</i>”))</li> <li>- Any officer or member of fire brigade authorised by the Officer in charge (s24 <i>FB Act</i>)</li> </ul>	Broad powers – no specific power to evacuate.	Within a ‘fire district’		May take such measures as the officer thinks proper for the protection and saving of life and property and for the control and extinguishing of the fire.
Officer in charge	Remove any person who interferes with the work of any fire brigade or the exercise of any of the officer’s functions (s19 <i>FB Act</i> )	Within a ‘fire district’	It is an offence to obstruct or hinder the Commissioner, any member of the staff of the Department or any member of a fire brigade in the exercise of a function (s35 <i>FB Act</i> ).	
Officer of a rural fire brigade	Broad powers – no specific power to evacuate (s22 <i>Rural Fires Act 1997</i> (“ <i>RF Act</i> ”))	Within a ‘rural fire district’		Officers may take any action that is reasonably necessary or incidental to the effective exercise of function conferred by or under this Act.
<ul style="list-style-type: none"> <li>- Senior police officer</li> <li>- Another police officer with the authority of the senior police officer</li> </ul>	May direct the evacuation of premises (s60L <i>State Emergency and Rescue Management Act 1989</i> (“ <i>SERM Act</i> ”))	<ul style="list-style-type: none"> <li>- Area is specified to be a ‘danger area’</li> <li>- Must be necessary to protect people from injury or death</li> </ul>	It is an offence to obstruct or hinder the Minister or any other person acting with authority of Minister in exercise of function (s40 <i>SERM Act</i> ).	Statutory powers privilege emergency response operations over the pecuniary interests of owners.



Who has power/authority to act?	Action which is permitted by legislation	Conditions required for exercise of power	Enforcement of power	Comments
<ul style="list-style-type: none"> <li>- The Minister</li> <li>- Emergency services officer as authorised by the Minister</li> </ul>	<p>Direct a person:</p> <ul style="list-style-type: none"> <li>- to leave any premises and to move out of an emergency area</li> <li>- to take any children or adults present in any premises who are in the person’s care and to move them outside the emergency area</li> <li>- not to enter the emergency area</li> </ul> <p>(s37 <i>SERM Act</i>)</p>	<p>Area is declared to be under a state of emergency by the Premier</p>	<p>Discretionary evacuation model – person must follow order should one be made.</p> <p>As above (s40 <i>SERM Act</i>).</p>	<p>Statutory powers privilege emergency response operations over the pecuniary interests of owners.</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>13</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.

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

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<sup>13</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.

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>14</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>15</sup>. In the past, courts have defined it as meaning ‘without any indirect or improper motive’<sup>16</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>17</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 careless...Abstinence from inquiry which amounts to a wilful shutting of the eyes may be a circumstance

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<sup>14</sup> [2003] NSWCA 21.

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

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

<sup>17</sup> (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.<sup>18</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>19</sup>. Unlike legislation in other states and territories, all relevant NSW emergency services legislation changes the common law significantly by changing the standard of care that is expected from a duty to take reasonable care to a duty to act in “good faith”<sup>20</sup>. 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 established<sup>21</sup>.

For example, section 128 of the *Rural Fires Act* provides comprehensive protection by lowering the standard to “good faith” and expressly protecting a wide range of people, including the Minister, Commissioner and members. Section 128 (1) and (2) states:

(1) A matter or thing done or omitted to be done by a protected person or body does not, if the matter or thing was done in good faith for the purpose of executing any provision (other than section 33) of this or any other Act, subject such person personally, or the Crown, to any action, liability, claim or demand.

(2) In this section:

***protected person or body*** means the following:

- (a) the Minister,
- (b) the Commissioner and any person acting under the authority of the Commissioner,
- (c) any member of the Service,
- (d) a member of the Advisory Council or Bush Fire Co-ordinating Committee,
- (d1) a member of a Bush Fire Management Committee,
- (e) the Commissioner of NSW Fire Brigades, the commissioner constituting the Forestry Commission, the Director-General of National Parks and Wildlife and any person acting under the authority of those persons,
- (f) an interstate fire brigade acting in pursuance of section 43.

Similarly, section 78 of the *Fire Brigades Act* and section 62 of the *State Emergency and Rescue Management Act* also provides comprehensive protection (see table 2). Section 41 of the *State*

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<sup>18</sup> Ibid 468.

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

<sup>20</sup> *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.

<sup>21</sup> 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, *Disasters Act 1982* (NT) s42, *Fire and Emergency Act 1996* (NT) s47, *Metropolitan Fire Brigades Act 1958* s54A.

*Emergency and Rescue Management Act* provides further protection to the Crown and Minister (as well as “any body or person”) in the event of a state of emergency.

Police officers acting in the event of a state of emergency (under Division 4 of the *SERM Act*) may be protected under section 41 of the Act but police officers acting under section 60L (in the case of a declared disaster area) will not be protected under this section, as it is only limited to acts under Division 4, or section 62 of the Act. Section 62 of the act only covers a member of an emergency or rescue management organisation, which does not include a member of a police force as defined under section 60KA of *SERM Act*. Police officers would be only protected under section 213(1) of the *Police Act* 1990 (NSW) which also only requires the officers to act in good faith (cf. reasonable).

State Emergency Services (“SES”) members do not have powers to evacuate in the event of a bushfire. They only have powers to evacuate in the event of a flood or storm or where they are directed by the State Emergency Operations Controller to deal with an emergency where no other agency has *lawful authority* to assume command of the emergency operation<sup>22</sup>. As there are lawful authorities who deal with bushfires, the latter case would not apply in the Policy context. SES members may however be asked to assist, at their request, members of NSW Police, New South Wales Fire Brigades or the NSW Rural Fire Service in dealing with any incident or emergency<sup>23</sup>. In this event, they are not protected under the *Fire Brigade Act* or *Rural Fire Service Act* which only specifically covers members of the fire services but under their own SES Act.

### 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.

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<sup>22</sup> *State Emergency Services Act* s19 and 22.

<sup>23</sup> *State Emergency Services Act* s8(1)(g).

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

Party protected	Form of protection and conditions under which it will be provided	Comments
Crown (State) , Minister, Commissioner, and members of fire services	Immune from any claim for any act done or omitted to be done in good faith, and for purposes of executing any Act (s78 <i>Fire Brigades Act</i> 1989 (NSW) and s128 <i>Rural Fires Act</i> 1997 (NSW)).	Comprehensive protection from liability.
ESO, members and controllers of ESOs	ESO, members and controllers of ESOs are not liable for anything done in good faith and for the purpose of executing the <i>State Emergency and Rescue Management Act</i> 1989 (NSW) or “any other Act”.  Relevant reference: s62 <i>State Emergency and Rescue Management Act</i> 1989 (NSW).	ESO, also protected from liability.
Crown, Minister, body or person	No proceedings can be brought against the Crown, Minister, body or person for any acts done relating to an event of a state of emergency.  Relevant reference: s41 <i>State Emergency and Rescue Management Act</i> 1989 (NSW).	Comprehensive protection from liability.
Members of the SES, emergency worker or casual volunteer	The individual is protected from liability for acts done in good faith for the purpose of exercising the functions of or assisting the State Emergency Service (s25 <i>State Emergency Services Act</i> 1989 (NSW)).	Silent on whether protects ESO and/or government but most likely does under the doctrine of vicarious liability.
Police officers	Protected from personal liability for any injury or damage caused by an act/omission made by them, provided they were exercising in good faith a function imposed by law (s213(1) <i>Police Act</i> 1990 (NSW)).	Silent on whether protects ESO and/or government but most likely does under the doctrine of vicarious liability.