

THE FUTURE FOR BUSHFIRE LAW

Despite popular opinion to the contrary, bushfires have not taken up a great deal of the law's interest. The history of the law can be traced to 1410. In that year it was said that there was 'strict liability' for fire that spread from private property, except where the fire was lit by a stranger.¹ Strict liability means the landowner is liable for the damage caused by the escaping fire without the need to prove negligence, or even knowledge of the fire. This harsh rule was modified by statute in 1707² and again in 1774³ which provided for no liability for fires 'accidentally begun'. This reflected the law that was transported to Australia with the First Fleet in 1788.

In Australia it was said that the previous rules in relation to fire had been absorbed into the rule of *Rylands v Fletcher*;⁴ this rule said that a person who brings onto his land, and 'collects and keeps there anything...' that would be dangerous is strictly liable if it escapes subject to an exception where the use of the 'dangerous thing' is part of the 'natural use' of the land. Subsequent case law had to decide whether or not the use of fire or the introduction of other hazards was a 'natural use' of the land and whether or not a person who failed to extinguish a fire, even one naturally caused, had collected, or kept or otherwise 'used' the fire so as to bring themselves within this rule.⁵

The confusing collection of case law (some of which dealt with fire, but some did not) led the High Court to declare, in 1992, that the rule in *Rylands v Fletcher* was no longer good law. Liability for the spread of fire was to be determined by the normal rules of negligence.⁶ A plaintiff would have to show that a defendant who caused a fire, or allowed it to spread, owed a legal duty to prevent or control the fire, that they failed to take reasonable steps to perform that duty and that as a result the plaintiff had suffered damage. What are reasonable steps has to be assessed against the circumstances in which the person finds themselves and takes into account the 'expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.'⁷ A court could well find that having the resources necessary to fight a fire, and the ability to do so, exceeds what may reasonably be expected in which case there would be no liability for the spread of fire, in particular where the fire was not lit by the landowner.

When looking at the extent of post fire litigation we can see that landowners were the subject of litigation from 1868 through to 1997; but there have been no identified cases against land owners after that time. From 1977 electrical supply authorities have been named as defendants as failing electrical assets have been blamed for fires, and from 1995 fire and land management agencies are being named, and blamed, for failing to extinguish fires or failing to control fuel loads to reduce the incidence or severity of wildfires.⁸

¹ *Beaulieu v Finglam* (1401) YB 2 Hen. IV, f.8, pl.6.

² (1707) 6 Anne c. 31, s 6.

³ *Fires Prevention (Metropolis) Act* (UK) 1774.

⁴ [1868] LR 3 HL 330.

⁵ *Hargrave v Goldman* (1963) 110 CLR 40 (HCA); *Goldman v Hargrave* (1966) 115 CLR 458 (PC).

⁶ *Burnie Port Authority v General Jones* (1994) 179 CLR 520.

⁷ *Wyong Shire Council v Shirt* (1980) 146 CLR 40 (Mason CJ).

⁸ Eburn M and Dovers S 'Understanding Fire Law' (2011) 82 *Fire Note* (Bushfire CRC).

The explanation for that is perhaps self-evident. If it is not reasonable to expect land owners to deal with fires, due to the 'expense, difficulty and inconvenience of taking alleviating action' we can look to agencies that are specifically created and funded to prevent and fight fires. These agencies are specifically funded to meet the community need; a farmer cannot afford to buy a fire pumper and recruit, train and equip a fire crew, so the state has established, and funded, fire agencies to do just that. Land management agencies, like farmers, may not see firefighting as a core duty, and they may, again like farmers, have many calls on their resources that might, otherwise, make it 'reasonable' to invest in, say, a tractor rather than a fire appliance. But land management agencies, unlike farmers, are given duties and obligations under statute that they must fulfil, so, for example, in Victoria the Secretary to the Department of Sustainability and Environment⁹ *must* 'carry out proper and sufficient work in State forests, national parks and on protected public land' to prevent and suppress fire.¹⁰ Unlike a farmer they can not balance that call upon their resources and decide that they will leave it to the CFA to provide fire fighting services they must make at least some commitment to meet that obligation. This, in turn, means that the fire and land agencies have some duty to prepare for and respond to fires so making it at least easier to look to them as legally obligated to respond to fires. So litigation against fire agencies, rather than landowners, is a more likely future scenario.

Not only do fire agencies have statutory duties with respect to fires, the communities expectation is also growing, as is, it appears, their inability to learn from lessons past. The opening words of the Queensland Floods Commission Interim Report were:

The floods of December 2010 and January 2011 ... were shocking; no-one could have believed that people could be swept by a torrent from their homes and killed...; that nine motorists could be drowned in the attempt to negotiate floodwaters; that some towns could be completely isolated for weeks, or that every last citizen of others would have to be evacuated; that residents of cities like Ipswich and Brisbane could lose everything they owned in waters which wrecked thousands of homes."

Notwithstanding that Australian history is full of stories of similar tragedies, of homes and lives lost to fire and floods the Commission thought that 'no-one could have believed' that these things would happen, let alone happen again. If no-one can believe that these things will happen, they will, and do, look to someone to blame for the failure to prevent the event, or more recently for failing to warn them of the impending event. No one could have 'fought' or extinguished the 2003 Canberra or the 2009 Victorian fires, so the focus of after event reviews¹¹ moved to the failure of the fire agencies to warn communities likely to be impacted. Notwithstanding the repeated findings in post event inquiries that fire ground communication is overwhelming, confused and inevitably

⁹ *Forests Act 1958* (Vic) s 3 and *Conservation, Forests and Lands Act 1987* (Vic) s 6.

¹⁰ *Forests Act 1958* (Vic) s 62(2).

¹¹ Doogan M *Inquests and Inquiry into Four Deaths and Four Fires between 8 and 18 January 2003* (2006, ACT Coroner's Court, Canberra) and Teague B, McLeod R and Pascoe S *2009 Victorian Bushfires Royal Commission Final Report* (2010, Government of Victoria, Melbourne).

compromised by the impact of the fire weather and terrain,¹² the fire agencies are expected to be able to identify where the fire is, where it's going, and communicate that through instant, accurate, geographically relevant message services ranging from door knocking to SMS, twitter feeds, webpage updates and automated telephone calls. The slightest failure, either as to timing, who receives or does not receive the call or spelling brings instant criticism.¹³ In earthquake prone Italy, residents do not accept that they have been warned of an impending earthquake when they feel the earth move under their feet; instead they expect, demand, that geologists warn them, even though science cannot predict, when a catastrophic earthquake is going to happen.¹⁴ Suing for failure to warn is likely to be easier than suing for failing to prevent a hazard event, either fire or flood¹⁵ and is a developing and likely future scenario.

Policy is being developed by lawyers and inquiries rather than by government with advice from fire agencies and scientists. Following the 2009 Victorian bushfires, the Teague Royal Commission called for a revision of the 'stay and go' policy and a clear commitment to saving life as the first

¹² Stretton LEB *Report of the Royal Commission to inquire into the causes of and measures taken to prevent the bush fires of January, 1939* (1939, Government of Victoria, Melbourne); Rodger GJ *Report of the Royal Commission appointed to enquire into and report upon the bush fires of December 1960 and January, February and March 1961, Western Australia* (1961, Government of Western Australia, Perth); Barber E *Report of the Board of Inquiry into the occurrence of bush and grass fires in Victoria* (1977, Government of Victoria, Melbourne); Miller SI (Chair) *Report of the Bushfire Review Committee on bushfire preparedness in Victoria, Australia, following the Ash Wednesday fires 16 February 1983* (1984, Government of Victoria, Melbourne); Hiat JW *Recommendations from the New South Wales Inquiry into 1993/94 Fires* (1996, NSW State Coroner's Office, Sydney); Stevenson J *Recommendations from the Inquiry into the Fire at Mt Ku-Ring-Gai Chase National Park* (201, NSW State Coroner's Office, Sydney); Johnstone G *Report of the Investigation and Inquests into a Wildfire and the Deaths of Five Firefighters at Linton on 2 December 1998* (2002, State Coroner's Office, Victoria, Melbourne); Esplin B, Gill M and Enright N *Report of the Inquiry into the 2002–2003 Victorian Bushfires* (2003, Government of Victoria, Melbourne); Victorian Auditor General *Fire prevention and preparedness* (2003, Government of Victoria, Melbourne); Nairn G (Chair) *A Nation Charred: Inquiry into the Recent Australian Bushfires* (2003, Parliament of Australia, Canberra); Auditor-General of Western Australia *Performance Examination: Responding to Major Bushfires* (2004, Government of Western Australia, Perth); Doogan M *Inquests and Inquiry into Four Deaths and Four Fires between 8 and 18 January 2003* (2006, ACT Coroner's Court, Canberra); Schapel AE *Inquests into the deaths of [9 named people]* (2007, Government of South Australia, Adelaide).; Teague B, McLeod R and Pascoe S *2009 Victorian Bushfires Royal Commission Final Report*. (2010, Government of Victoria, Melbourne); Keelty M *Shared Responsibility: The Report of the Perth Hills Bushfire February 2011 Review* (2011, Government of Western Australia, Perth).

¹³ Knaus C 'Fire finally out as alert system scrutinised' *Canberra Times*, 17 September 2011 <<http://www.canberratimes.com.au/news/local/news/general/fire-finally-out-as-alert-system-scrutinised/2295093.aspx?storypage=1>> accessed 26 September 2011.

¹⁴ Emma Alberici E 'Italian scientists go on trial over 2009 earthquake' *ABC News Online*, 21 September 2011, <<http://www.abc.net.au/news/2011-09-21/italian-scientists-on-trial-over-quake/2908980>> accessed 26 September 2011.

¹⁵ Eburn M 'Litigation for failure to warn of natural hazards and community resilience' (2008) *23 Australian Journal of Emergency Management* 9-13.

priority, urging policy change to encourage people not to stay and defend but to leave early.¹⁶ The Royal Commission had no mandate or power to impose its policy advice. Whether or not that advice should be followed is a matter for government and agencies. It is apparent however that agencies across Australia did, rightly, review their procedures and policies in light of the Royal Commission's findings¹⁷ and without legislative obligation, changed their policy in line with the Royal Commission's recommendations. In 2011 bushfires in the Perth Hills destroyed a number of homes. The West Australian fire agencies moved to implement the sort of policy advocated by the Teague Royal Commission. The Special Inquiry into those fires found that:

The evacuation policy [applied in Western Australia] is guided by the principle of **primacy of life**. Primacy of life has had a more specific focus nationally following the 2009 Victorian Bushfires Royal Commission.¹⁸

But there was evidence that:

... a greater emphasis on evacuation, has lead to an increase in property loss.

The Special Inquiry does not dispute the priority given to protecting life, however, it is concerned that the process of widespread evacuation may be at odds with the focus on educating people about risks and empowering individuals and communities to exercise choice and take responsibility, as set out in the *National Strategy for Disaster Resilience*.¹⁹

And so policy swings in response to the particular incidents of the last event. After the Black Saturday fires the community was shocked by the extent of the loss of life and efforts are made to learn the lessons in order to honour the dead.²⁰ Two years later and the lesson of the Keelty inquiry is that removing people from their homes, not allowing them the opportunity to defend the assets that they have spent a life time acquiring carries its own traumas.

While it is a great credit to all those involved that no lives were lost in the fire of 6 February 2011, the carnage wrought by this fire and the trauma that it inflicted on those caught in its path should not be underestimated....Perhaps somewhat ironically, the emotional impact of losing a home to a bushfire was best made to the Special Inquiry by ... a resident of Kelmscott who successfully defended his own home...

Given the extent of the damage and the impact on people's lives, it is the view of the Special Inquiry that the **fact no lives were lost should not be used to claim that the response to this fire was an unmitigated success**²¹...

¹⁶ Teague B, McLeod R and Pascoe S 2009 *Victorian Bushfires Royal Commission First Interim Report*. (2009, Government of Victoria, Melbourne) p 6 and Recommendation 7.1; *Final Report* (2010) Volume I, p xxvii.

¹⁷ See for example *NSW Government Response to the Final Recommendations of the 2009 Victorian Bushfires Royal Commission* (u.d. NSW Government, Sydney); *Queensland Government Response to the 2009 Victorian Bushfires Royal Commission* (2010, Queensland Government, Brisbane).

¹⁸ Keelty op cit p 41.

¹⁹ Ibid, p 42.

²⁰ Teague B 2009 *Victorian Bushfires Royal Commission, Chairman's Closing Remarks, 27 April 2009* p 1

²¹ Keelty op cit p 136.

The future scenario for bushfires and bushfire management must see policy objectives clearly articulated by governments, advised by emergency managers and scientists. Policy that is set by the last inquiry leaves the emergency services ready to respond to the last disaster, not the next one.

A future scenario should see clear statements of balancing what are competing objectives; objectives to protect lives, the environment and personal autonomy. Policies that recognise that with growing populations and growing cities there will be always be a wildland urban interface, that , people need and want to live on rural properties, in country towns and in mountain hamlets where the wrong combination of events will see them ravaged by fire. These places are at risk but so too is inner city Melbourne; structural fires are more likely to be caused by kitchen or electrical faults than by wildfire.²² Wildfire has the emotional shock particularly when the losses are extreme but well developed policy has to focus on the real risk and acknowledge to the community that we cannot afford the resources that would be required, if enough resources were available, to respond to the catastrophic events such as those of 2003 and 2009. With the best will in the world, and the best endeavours of the emergency services, Australians will, continue to die in bushfires as they have since before European settlement. The risk can be reduced with good planning, education, coordination, communication and resourcing, but it cannot, economically or practically, be reduced to zero. The community, politicians and fire chiefs have to be prepared to say, and accept, that sometimes, death due to fire (or flood, or storm, or earthquake) represents a true tragedy, but it does not necessarily mean that anything went wrong, that there was a failure in the response or that the policy choices were wrong. In the future scenario we will endeavour to learn lessons from fire events, to see where improvements could be made; perhaps the first question will be 'what did we do well' not 'what went wrong' and the community won't be fooled into thinking that *this* inquiry will make sure 'it doesn't happen again.'²³

²² McAneney, Chen and Pitman, '100-years of Australian bushfire property losses: Is the risk significant and is it increasing?' *Journal of Environmental Management* 90 (2009) 2819–2822.

²³ Teague B 2009 *Victorian Bushfires Royal Commission, Chairman's Opening Remarks, 20 April 2009* p 1.