



THE AUSTRALIAN NATIONAL UNIVERSITY



# News from the courts – post disaster legal proceedings and implications for emergency managers

Michael Eburn

Senior Research Fellow

ANU College of Law and

Fenner School of Environment and Society

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# 2009 Victorian Bushfires Royal Commission

## Two recommendations from the interim report

1. Neighbourhood Safer Places;
2. Individual advice on the whether property can be defended.

## Neighbourhood Safer Places

- Does vulnerability and control lead to a 'duty of care'?
- The final report noted that council signs may discourage their use.



## WARNING

THIS DESIGNATED NEIGHBOURHOOD SAFER PLACE (NSP) IS A PLACE OF LAST RESORT DURING THE PASSAGE OF A BUSHFIRE. WHILST IT MAY OFFER SOME PROTECTION FROM BUSHFIRE, THE SAFETY OR SURVIVAL OF THOSE WHO ASSEMBLE HERE IS NOT GUARANTEED.

BEFORE DECIDING TO HEAD TOWARDS, OR ENTER, THIS NSP IN THE EVENT OF BUSHFIRE, BE AWARE THAT:

- MANY HOUSES MAY OFFER BETTER PROTECTION THAN THIS NSP
- TRAVELLING TO THIS NSP WHEN THERE IS BUSHFIRE CAN BE EXTREMELY DANGEROUS. THERE IS NO GUARANTEE THAT YOU WILL BE SAFE DOING SO
- THIS NSP MAY NOT PREVENT DEATH OR INJURY FROM FIRE, SMOKERS OR RADIANT HEAT WHEN YOU GET HERE
- YOU SHOULD ONLY USE THIS NSP WHEN YOUR PRIMARY BUSHFIRE PLAN HAS FAILED OR CANNOT BE IMPLEMENTED
- THIS NSP ONLY HAS LIMITED CAPACITY
- THERE IS NO GUARANTEE THAT CPA OR OTHER EMERGENCY SERVICES WILL BE PRESENT AT THIS NSP DURING A BUSHFIRE
- NO FACILITIES ARE PROVIDED FOR PEOPLE WITH SPECIAL NEEDS, INCLUDING THOSE REQUIRING MEDICAL ATTENTION
- THIS NSP MAY BE UNCOMFORTABLE AND NO AMENITIES SUCH AS FOOD AND DRINK WILL BE PROVIDED
- THERE IS NO PROVISION FOR ANIMALS

VICTORIAN BUSHFIRE INFORMATION LINE – 1800 240 627

## Individual assessments

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

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

- In the final report it was noted that the CFA had developed
  - “... the Household Bushfire **Self-Assessment** Tool “
  - But “... demand for individual site visits had been minimal, **possibly reflecting the CFA’s reluctance to date to provide such advice.**” (pp 36-7, emphasis added)

## The final report

- 67 Recommendations
- Consider:
  - Recommendations 1 – 5 – retain ‘stay or go’ but add options including shelters and evacuations;
  - Recommendations 8- 18 – regarding incident management, leadership and the application of AIIMS;

## Stay or go

- The essential elements of ‘stay or go’ are retained,
- But the emergency services need to have alternatives; shelters and evacuation.
- People can’t make decisions without information.
- “Fire agencies should attach the same value to community education and warnings as they do to fire-suppression operations.”

“... it likewise appears clear that, with adequate warning, lives could, and would, have been saved.”

And later

“... there does not appear to be any logical reason or excuse why adequate warning was not given to the residents ...”

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

## Rush QC

“Inquiry reports, commentaries over the years have all indicated and emphasised that a key agency responsibility is to provide informative, timely warnings to communities potentially threatened by bushfire.”

# Leadership

- Criticisms were about leadership, both at incident control level and primarily at State level.
- At incident control level - follow the plan!
- At State level – the ‘buck stops at the top’.

## Royal Commissions v litigation

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

## *West and others v ACT & NSW*

- Litigation from 2003 Canberra fires.
- Will deal with definitive legal questions.
  - What is the duty of governments and emergency services to protect individuals. Is there a duty to save everyone from harm?
  - What is the obligation to warn?
  - Resolution will depend on resolving unclear High Court authorities.
- The relevant issue is the, rather unhelpful concept of, the 'salient features' in the relationship. Critical are 'vulnerability' and 'control'.

## The issue of warnings

- Residents of Canberra allege a failure to warn contributed to their losses.
- The law expects agencies to ‘act reasonably’. What that means depends on the circumstances and the state of knowledge at the time; BUT eventually agencies will be expected to learn the lessons of the past.
- The Canberra litigation will test this – it may be the time the court says ‘a reasonable agency must, by now, know of the need to warn’.
- If not this case, the next one or the one after that...

## Whatever the result...

- The decision may be the subject of appeals to:
  - the ACT Court of Appeal; then
  - The High Court of Australia.

## Common themes

- The role of government/agencies in ‘shared responsibility’ and
- The need to keep the community informed and warned of impending danger.
- **The key lesson** – hazard emergency management agencies, in particular fire agencies, have to see themselves as managing the *impact* of the hazard, rather than the hazard itself.

## Questions?

Thank you for your attention.

Michael Eburn

E: [michael.eburn@anu.edu.au](mailto:michael.eburn@anu.edu.au)

P: 0409 727 054

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