

## Australian wildfire litigation

Michael Eburn<sup>A,B,C</sup> and Stephen Dovers<sup>A</sup>

<sup>A</sup>Fenner School of Environment and Society, Building 48, Linnaeus Way,  
Australian National University, Canberra, ACT 0200, Australia.

<sup>B</sup>ANU College of Law, Building 5, Fellows Road, Australian National University,  
Canberra, ACT 0200, Australia.

<sup>C</sup>Corresponding author. Email: michael.eburn@anu.edu.au

**Abstract.** Legal liability is an issue that concerns volunteer firefighters and may affect the ability of fire managers to perform their tasks. There are calls to guarantee firefighters will not be personally liable for actions undertaken in good faith. This paper reviews post-wildfire litigation in Australia and claims for compensation made against the New South Wales Rural Fire Service. Although the data are incomplete and likely to underestimate the actual claims history, analysis of the available data does show that the number of claims for compensation is small given the very large number of fires and hazard reduction burns across Australia. There is no evidence of extensive post-fire litigation or of fire agencies or firefighters being held liable for actions taken in the course of firefighting. The evidence does not support assertions that there is an ‘increasing flood’ of legal claims arising from firefighting. Post-fire litigation is compared with other proceeding such as Royal Commissions and coronial inquiries. It is argued that it is not liability, but the lengthy post-event inquiry process and the risk of personal criticism that should be the concern of fire managers and firefighters.

**Additional keywords:** duty of care, law, legislation.

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### Introduction

Liability is an issue that concerns volunteer firefighters and that affects the ability of fire managers to perform their tasks (McLennan and Birch 2007). There are repeated calls to guarantee that firefighters will not be personally liable for actions undertaken in good faith (Murray and White 1995; Cameron 2003; McLeod 2003; Nairn 2003; Ellis 2004; Heffernan 2010).

This paper reviews post-wildfire litigation in Australia and claims for compensation made against the New South Wales Rural Fire Service (RFS). Although the data are likely to underestimate the actual claims history, it is argued that the number of claims for compensation is small given the large number of fires and hazard reduction burns across Australia. It is argued that the available evidence does not support the claim that there is an ‘increasing flood’ (Esmond 2009) of legal claims against either the fire agencies or individual firefighters.

The extent of post-fire litigation is then compared with other quasi-judicial proceeding such as Royal Commissions and coronial inquiries. It is shown that it is not liability that is a significant issue; rather, the real issue is the time and emotional commitment involved in responding to post-event inquiries, and the risk of personal blame even when that blame does not equate to legal liability.

#### *What does ‘liability’ mean?*

The Heffernan (2010) report included a section on ‘Liability’ but did not deal with litigation or legal liability. Evidence was

given of ‘adverse publicity’ or ‘an outcry if a prescribed burn escapes’ but not *legal* liability.

Only a court can determine whether or not there is legal liability. Court proceedings are different from other post-fire judicial proceedings, in particular coronial inquests and judicial reviews such as a Royal Commission. Inquests and inquiries have similar processes to courts but they do not determine liability. The proceedings look like adversarial litigation – lawyers or judges make up the tribunal, they are assisted by legal counsel, and organisations and individuals are represented by lawyers whose task is to protect their client’s interests – but they are not courts, and the adversarial nature of the proceedings is not intended, and may not advance the tribunal’s fact-finding mission (Doogan 2006).

#### *The extent of bush or wildfire in Australia*

The Australian fire and land-management agencies attended 268 398 bush and grass fires between 2002 and 2007 (Australian Productivity Commission 2008), an average of 53 680 fires each year. If that trend had been constant over the 20th century, they would have responded to nearly 5.5 million fires in the 100 years from 1901 to 2000.

Notwithstanding the ever-present threat of fire, the contribution of human elements and the significant loss of life and property, as shown below, there has been relatively little litigation or claims for compensation against the fire agencies.

## Methodology

The data for this review are reported and unreported judicial decisions as well as a review of the insurance claims made against the RFS. The cases were identified by using the search term <bushfire or 'bush fire'> across three legal databases: Austlii, Lexis/Nexis and WestLaw, in each case limited to Australian case law. The effectiveness of the search was determined by comparing the results:

- with the Australian Digest (a case law index);
- across the various databases to ensure that the same cases were brought up in each search;
- with New South Wales Treasury Managed Fund claims files (to ensure that litigated cases identified in a review of claims against the RFS were also identified in the search); and
- by cross-references to cases cited in later decisions to ensure that appropriate precedent cases had been discovered.

The search identified cases concerned with legal liability for causing or allowing a fire to spread as well as claims alleging negligence in training firefighters, the right to criminal injuries compensation for fires started by arson, the jurisdiction and role of the coroner, the spread of urban fires, the interpretation of insurance policies relating to fire, liability for accidents involving fire appliances and the application of planning law to fire-prone areas. The cases were reviewed to select only those cases that were a claim for compensation for starting or failing to extinguish a wildfire.

This method of data collection has necessary and significant limitations. Prior to 1995, details of court cases were generally only available in published law reports. Cases were only selected for inclusion in the law reports if they involved an appeal on an important point of law. In some cases, pre-1995 data have been added to electronic databases and some commercial databases provide details of 'unreported judgements', but it is still the case that before 1995, primarily only reported decisions are available. The decisions of trial courts were not published and there is no public record of cases that were settled out of court.

Since the development of online resources, in particular the Australian Legal Information Institute in 1995 (AustLII 2010), many more judgments are available, including judgments delivered in the lower courts and interlocutory judgments (which address points of procedure). Locating these judgments shows that litigation took place, even if it was ultimately settled rather than heard in court.

To give further insight into compensation claims, the files relating to claims made against the RFS, and its predecessor, NSW Bushfire Services, from 1989 to 2010 were reviewed. The RFS is the world's largest volunteer firefighting organisation (Rural Fire Service 2010) and provides fire services for over 95% of the state (Rural Fire Service 2011). As it is such a large organisation, with a large area of responsibility, the claims history of the RFS is presumed to be indicative of the claims history of the rural and country fire brigades across Australia.

The New South Wales Treasury Managed Fund ('TMF') identified 263 claims for compensation made against the RFS from 1989 to 2010, a rate of ~12 per year. The TMF was able to retrieve files for 106 of those claims. These files were reviewed to identify legal issues and common themes in the nature of

claims filed against the RFS. Claims managed by the TMF do not include:

- Claims for personal injuries compensation arising from motor vehicle accidents on public streets as those claims are managed by the Nominal Defendant established under the *Motor Accidents Compensation Act* (1999) (NSW); and
- Claims for personal injuries from staff and volunteer firefighters that are dealt with under the *Workers Compensation Act* (1987) (NSW) (for staff) and the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act* (1987) (NSW) (for volunteers).

The TMF identified:

- 66 claims arising from hazard reduction burns – that is, a planned ignition designed to reduce fuel loads and thereby reduce the intensity of any wildfire that may occur;
- 80 arising from firefighting – including damage done by a back burn, that is, a fire lit to remove fuel from an oncoming fire as part of a fire suppression activity; and
- 50 where the nature of the fire could not be accurately classified – these included claims where the nature of the fire, or the responsibility of the RFS for the fire, was not clear; for example, where the claimant claimed compensation for 'property damaged by a bushfire' or where property was damaged by fire during training or public relations exercises. It also includes claims where it was not possible to identify whether a fire lit by the RFS was a hazard reduction or a back burn.

## Results

### Litigation

The search located 87 judicial decisions, arising from 71 cases from 1868 to 2010 (see Appendix 1). Litigation arose from fires in only 48 out of the 143 years, even though, based on the assumption that bushfire frequency has remained constant over the last century, there may have been in excess of 5 million fires in that period. Table 1 shows the years when bushfires generated litigation, and the nature of the defendant.

The difference between the number of judgments (87), the number of separate cases (71) and the number of years that have generated litigation (48) is explained:

- (1) Because some claims have been before the courts on more than one occasion (for example litigation from the 2001 Warragamba (NSW) fires has produced at least three judgments); and
- (2) Some years have produced more than one claim (for example at least four separate cases in 1884).

In either situation, the effect is shown as a single entry in Table 1. Where there were cases against different types of defendants, then that is shown as two entries; for example, the table shows that fires in 1904 led to two cases, one case against a landowner (*Havelberg v. Brown* 1905) and at least one case against a railway company (*Sermon v. Commissioner for Railways (WA)* 1907).

In cases where the year of the fire could not be determined, we assumed that the fire occurred in the same year as the

Table 1. Cases by year and defendant type

Landowners or occupiers	Railway authorities	Electricity authorities	Fire-management authorities	Number of judgements	Number of individual cases
1867				1	1
1879				1	1
1881				1	1
1882				1	1
	1884			4	4
1887				1	1
1892				1	1
	1902			1	1
1904	1904			2	2
1905				1	1
1906				1	1
1907	1907			2	2
1911	1911			2	2
1912				1	1
1917				1	1
1919				3	2
1922				1	1
1924				1	1
1925				1	1
	1927			1	1
1929				1	1
1933				3	3
1942				1	1
1944				1	1
1945				1	1
	1948			2	2
1950				1	1
	1951			1	1
1957				1	1
1959				1	1
1961				2	1
1965	1965			2	2
1967				1	1
1969				1	1
1976				1	1
		1977		2	1
1978				1	1
	1979			1	1
1980				1	1
1983		1983		7	6
		1991		3	1
1995			1995	3	2
1997			1997	3	2
			2001	9	4
		2002		1	1
		2003	2003	3	2
			2004	2	1
		2009	2009	3	2
			TOTAL	87	71

judgment. Given delays in getting to court, these fires are likely to have occurred one to several years earlier.

There are no records for cases that were settled out of court and few records of cases that were heard only in lower or intermediate trial courts. It is likely that many more cases were commenced, but given the few that have been identified, we infer that, relatively speaking, there has been little post-fire litigation.

### Outcomes

The cases reviewed included appeals on points of law where, once the legal issue was resolved, the matter was sent back to a lower court for trial. The matter may have proceeded to trial or been settled but there is no public record on whether liability for the fire was established or not. More recent cases, such as those arising from fires in 2001, 2003 and the Black Saturday fires of

2009 remain unresolved, so there is no answer as to whether or not the defendants are liable. Subject to those limitations, the cases show that plaintiffs obtained compensation in 42 (48%) of the litigated claims. Defendants were not liable in 14 (16%) of cases. The remaining 31 (36%) judgements demonstrate litigation occurred but do not resolve the question of whether the defendant was liable.

#### *RFS claims for compensation*

In the period 1989 to 2010, the RFS responded to 184 888 fires and burned over  $7.28 \times 10^6$  ha of land in hazard reduction activities (RFS, pers. comm., 23 May 2011). It follows that between 0.04 and 0.07% of fire responses led to some form of compensation claim. There was one claim for compensation for every 62 000 to 110 000 ha of land subjected to hazard reduction burning.

#### **Discussion**

Fires in 8 of the 34 years from 1867 and 1900 led to litigation, an average of at least one claim every 4.25 years. From 1901 to 2000, fires in only 36 years generated litigation, an average of at least one litigated claim every 2.7 years. From 2001 to 2010, fires in 4 years generated litigation, at least one incident of post-fire litigation every 2.5 years. Over the 144 years from 1867 to 2010, fires generated litigation, on average, every 3 years.

Today, routine fires continue to be dealt with without frequent litigation although there is a constant stream of claims for compensation arising from fires. However, significant fire events, such as the 2009 Black Saturday fires, trigger litigation almost before the fires are extinguished (*Matthews v. SPI Electricity & Utility Services Corporation (Number 1)* 2011; Orr 2011).

#### *Changing defendants*

The incidence of post-fire litigation may be reasonably steady, but the defendants are changing. Historically, landowners and railway companies were sued; railway operators were defendants in one-third of the reported cases between 1884 and 1960.

In modern times, the focus has turned to electrical authorities and fire-management agencies. As the distribution of electricity has spread across the Australian bush, there is more chance for electrical assets to fail and cause more fires. It stands to reason that the electrical authorities have become the subject of litigation. At the same time, railway companies have moved from steam locomotives to electric and diesel trains, thereby reducing their place as defendants.

With respect to firefighting agencies, historically, the local bush fire brigade was formed by landowners as a self-help group. With little or no equipment, they would do what they could to protect their own properties in a mutual aid arrangement. The Country Fire Brigades Board, formed in 1890, was to provide firefighting resources in country towns.

It was never intended to combat the bushfires that burned around the towns. Indeed such an objective would have been virtually impossible... It was usually a difficult enough feat for volunteers to get their hose or manual engine to a fire on the outskirts of an average country town in time to be effective; and for the water supply to be effective as well. [Murray and White 1995, p. 70]

If fire brigades were never expected to fight bushfires, there could be no legal basis to sue them for failing to do so. The establishment of a modern, organised, effective, government-run fire brigade may have changed community expectations. In a case dealing with war emergencies (rather than fires), Lord Upjohn said:

Those rights of the individual [to take personal action to respond to an emergency] are now at least obsolescent. No man now, without risking some action against him in the courts, could pull down his neighbour's house to prevent the fire spreading to his own; he would be told that he ought to have dialled 999 and summoned the local fire brigade. [*Burmah Oil v. Lord Advocate* 1965, p. 165]

In the late 19th and early 20th centuries, people expected landowners to extinguish fires that occurred on their property (*Hargrave v. Goldman* 1963). By 1995, those expectations 'are now at least obsolescent'. The expectation now is that the fire agencies will extinguish the fires. That would, at least in part, explain why the fire agencies are now defending claims that, historically, were made against landowners and why landowners are no longer appearing as defendants. This view is reinforced by the fact that actions against rural brigades only appear in the case books after fires in 1995 (*Gardner v. Northern Territory* 2003) but actions against urban brigades can be traced back to at least 1902 (*Vaughan v. Webb* 1902).

#### *Factors that limit the need for, or attraction of litigation*

The matters of changing expectations may explain why litigation is changing and fire agencies are being named as defendants. There are other factors, however, that may explain why post-fire litigation remains relatively uncommon.

#### *Insurance*

Details of the penetration of private insurance are not readily available (Teague *et al.* 2010). Homeowner insurance is, however, reasonably common (Mortimer *et al.* 2011) and covers, as a standard term, losses caused by fire.

Unlike the position in the United States of America, Australian insurers do not appear to vigorously pursue their rights to recover damages when they have paid out on an insurance claim (but see Orr 2011). The 2003 Canberra fires saw several insurers join the litigation, but all but one of them have now withdrawn from the litigation. The insurers have kept their reasons for withdrawing secret; however, if people are able to recover their losses from insurance, and until now, insurance companies have appeared unwilling to seek to recover the amounts they have paid to settle claims, then there is little incentive for post-fire litigation.

#### *Limited rights to cost recovery*

More litigation would be expected if fire agencies took steps to recover the costs of fighting negligently or deliberately caused wildfires, as does happen in other, international, jurisdictions (*Cal Health & Saf Code* 2010 §13009; *Forest and Rural Fires Act* 1977 (NZ) s. 43). In New Zealand, a defendant was fined NZ\$300 but received a bill for fire suppression costs in excess of NZ\$115 000 (*Department of Conservation v. Smythe* 2007, 2008).

In 2008–09, the Californian Civil Cost Recovery program cost US\$2.4 million to establish but recovered in excess of US\$12 million. In 2010, the program recovered in excess of US\$17 million (Hoover 2010). Apart from the financial benefit to the State, a threat of significant personal liability may encourage more careful, prudent behaviour.

In some Australian jurisdictions, fire brigades may charge a prescribed fee when responding to a fire, hazardous materials incident or false alarm (*Emergencies Act* 2004 (ACT) s. 201; *Fire and Emergency Act* 1996 (NT) s. 43; *Fire Brigades Act* 1989 (NSW) s. 40 (but only where NSW Fire and Rescue are responding to a fire outside a Fire District or to a hazardous materials incident); *Fire and Rescue Service Act* 1990 (Qld) s. 144; *Fire and Emergency Service Act* 2005 (SA) s. 143; *Fire Service Act* 1979 (Tas.) ss. 109 and 109A (but only where the property affected by the fire is uninsured or the response is due to a false automatic fire alarm)). Charging a fee is not the same as charging the actual costs of firefighting.

In Victoria, the costs of providing firefighting services, both urban and rural, may be recovered from the owners of uninsured property (*Metropolitan Fire Brigades Act* 1958 (Vic.) ss. 66, 66A; *Country Fire Authority Act* 1958 (Vic.) ss. 87, 87A). Similarly, the South Australian Country and Metropolitan Fire Services can recover the costs of fighting a fire on a boat where an emergency services levy has not been paid (*Fire and Emergency Service Act* 2005 (SA) s.142). Recovering the costs incurred in protecting one property is not the same as collecting the costs of the entire response to a large fire and liability falls on the owner of the property that needs protection, rather than on the person or organisation that started the fire.

In the Northern Territory and Western Australia, the costs of firefighting may be recovered if it can be shown that the fire was started illegally (*Bushfires Act* 1980 (NT) s. 57A; *Bush Fires Act* (1954) (WA) s. 58). Actions to recover firefighting costs would lead to further litigation if a person served with an account tried to defend the claim by showing that they did not cause the fire or that the amount claimed was unreasonable. There appear, however, to be no cases where these sections have been tested, suggesting that they are not widely, if ever, used.

#### Legal issues

Many legal issues regarding liability for bushfires remain unresolved. The law regarding the spread of fires from private property is now settled (*Burnie Port Authority v. General Jones Pty Ltd* 1994), so cases dealing with private landowners may tend to settle rather than be litigated. Actions against the electricity authorities that were reviewed for this paper were settled rather than resolved by a binding judgement.

With respect to actions against the fire agencies, only one case, *Gardner v. Northern Territory* (2003, 2004), has been resolved by a court but that case turned on the particular facts and did not establish any significant legal rule or precedent (*New South Wales v. West* 2008).

Major litigation arising out of the 2001 New South Wales, 2003 Canberra and 2009 Victorian Black Saturday fires remain ongoing. The judgments, when they are received, are unlikely to be the end of the matter, as there are likely to be appeals to the various Courts of Appeal, and then, possibly, to the High Court of Australia. Until there is a final judgment in one of these cases,

there are no clear rules on the question of if and when the electrical and fire-management authorities will be liable for bushfire. How those questions are answered will have significant implications for future litigants and will affect whether or not there is more litigation in the future.

#### Findings with respect to litigation and liability

We infer that litigation over, and liability for, actions taken to control wildfire are limited. The presence of insurance and the unwillingness of insurance companies to pursue their rights to recover their losses mean that many householders are compensated without the need for litigation. The fact that the fire agencies cannot, or do not, seek to recover the costs of firefighting also means that there are no claims to be litigated. Finally, outstanding legal issues may have meant that potential plaintiffs were unwilling to run 'test' cases, though this may be resolved when some of the current litigation makes its way through the courts.

Although there is a constant flow of claims for compensation, the number of cases that have appeared before the courts, given Australia's long history with fire, is relatively low. If those conclusions are correct, then assertions that legal liability is an issue for the fire agencies appear to be overstated, and fear of legal liability is not warranted. So why is such fear reported?

#### Other proceedings

Even if fire agencies are not sued very often, there are cases that look and *feel* like litigation. One RFS matter went for over 2 years, with firefighters being interviewed and asked to give written statements and ongoing correspondence between the claimants, the insurers and the RFS. This was not a case of 'litigation', as no court proceedings were commenced and there was no liability. Notwithstanding this, the process itself must have been traumatic; volunteers had turned out to protect a property and then spent the next 2 years defending and explaining their actions. This was not a case where the law on liability was defective; the RFS was not liable and there was no suggestion that the firefighters could be personally liable. The issue was the process that had to be gone through to investigate the facts and to convince the claimants that their claim had no legal merit. None of the solutions suggested in earlier reports, such as further statutory indemnity (Heffernen 2010) would have affected the outcome of this particular matter.

Even if litigation is reasonably rare, quasi-judicial proceedings are increasing in number and complexity. Heffernen (2010) identified 20 previous reports from Royal Commissions, coroner's inquests and parliamentary inquiries. There were formal inquiries after significant fire events in 1939 (Stretton 1939), 1961 (Rodger 1961), 1967 (Chambers and Brettingham-Moore 1967), 1977 (Barber 1977), 1998 (Johnstone 2002), 2000 (Stevenson 2001) and 2001–02 (Price 2002). The Ash Wednesday fires of 1983 generated two reports (Miller 1984; Milton 1984) as did the Sydney fires of 1994 (Cochran 1994; Hiatt 1996).

The 2003 fires, including those that burned into Canberra, generated four reports (McLeod 2003; Esplin *et al.* 2003; Ellis 2004; Doogan 2006) and the Teague Royal Commission into the 2009 Victorian Bushfires produced two interim reports as well as its final report (Teague *et al.* 2009a, 2009b, 2010).

To this list can be added reports from the Auditors General in Victoria (Cameron 2003) and Western Australia (Pearson 2004), the coroner's inquiries into the 2005 South Australian Eyre Peninsula fires (Schapel 2007) and the 2007 Boorabin Fires in Western Australia (Hope 2009), the Victorian inquiry into public land management and its effect on bushfires (Pandazopoulos 2008), the report into the 2011 Perth Hills fires (Keelty 2011) and the Heffernan (2010) inquiry itself. That is 26 inquiries between 1939 and 2011 or one every 2.8 years. Twelve of those inquiries have occurred in the 9 years since 2002, a rate of more than one per year! Although the rate of litigation has remained relatively constant, the number of inquiries is growing, and, as with litigation, there are undoubtedly many more coronial inquests and inquiries than are reported here. The RFS reports that it has responded to probably over 30 inquests and inquiries since 1994 (RFS, pers. comm., 23 May 2011).

Not only has the number of inquiries increased, so too has the complexity. The 1939 Stretton Royal Commission was established on 27 January 1939 to investigate fires that had occurred in that month and that claimed 71 lives. The Commission sat from January to April 1939. The 36-page final report was signed off on 16 May (Stretton 1939). The Rodger Royal Commission into fires that burned in Western Australia from December 1960 to March 1961 sat for 23 days, heard from 54 witnesses and produced a 61-page report in August 1961 (Rodger 1961).<sup>A</sup>

Compare those inquiries with the inquest held into the 2005 Eyre Peninsula fires that claimed nine lives. That inquest ran from October 2005 to May 2007, heard from 141 witnesses and produced a 617-page report (Schapel 2007). The Doogan inquest into the Canberra fires of January 2003, which claimed four lives, was not completed until 2006. The inquest sat for 103 days, heard from 95 witnesses and finally produced a 2-volume report of in excess of 850 pages (Doogan 2006). The Teague Royal Commission heard from 434 witnesses over 155 sitting days, and produced two interim reports and a final report that was in excess of 1000 printed pages plus an additional volume that was only available in electronic format.

The fact that these events take years to resolve (and these time-frames are nothing compared with the 10 years or more that litigation is taking to resolve, *Warragamba Winery Pty Ltd v. New South Wales* 2010) must affect the firefighters who must relive their actions, and the resources of the fire agencies that are required to respond to the inquiry and then to any recommendations that are made.

The nature of findings is also changing. The early inquiries focussed on the fires and their causes. Later inquiries have made personal comments and judgments about the conduct of individuals. The Boorabin inquest declared that the incident management team demonstrated 'extreme incompetence' (Hope 2009, p. 31); the Doogan inquest made adverse comments against senior managers of the Emergency Services Bureau and the Minister (Doogan 2006; *Lucas-Smith v. Coroner's Court of the ACT* 2009); the Chief Officers of the Country Fire Authority and the Department of Sustainability and Environment as well as the Chief Commissioner of Police were all subject to rigorous scrutiny, and adverse comment, by media and the Teague Royal

Commission (Teague *et al.* 2010), and the Director of the Fire and Emergency Services Authority of Western Australia resigned on the day the Keelty (2011) report was released.

In reviewing the management of fires, the South Australian coroner made it clear, too, that no-one is immune from scrutiny or adverse comment, even volunteers. The Coroner said:

... while there may be difficulties in terms of the accountability of volunteers, inasmuch as they might simply walk away if any sanction is to be visited on them, it does not mean that in the context of an inquiry such as this, their actions are immune from scrutiny and analysis. ... Thus, while it is regrettable that on occasions the actions and failings of certain individuals have to be spelt out, especially in a setting where those actions and failings have occurred in a context of voluntary work, it is in the interests of justice and in the public interest that such a process has to occur. [Schapel 2007, p. 346]

#### *The way forward*

Reports (McLennan and Birch 2007) and anecdotal stories have said that agencies, and volunteers, are worried about the threat of litigation and liability. These fears may hamper decision-makers and may affect the ability of fire agencies to attract volunteers and in particular volunteers who are willing to take on front-line management positions. If it is believed that the problem is 'liability', the solution may be to amend the law to ensure that fire agencies and firefighters are not personally liable. A 2009 report, commissioned by Emergency Management Australia reported that:

Volunteers deserve ... a Government that is prepared to build protective barriers for its volunteer workforce and their families. Sandbagging the increasing flood of litigation is not sufficient. We need ... to deploy volunteers safe in the knowledge that their own personal lives will not needlessly suffer. [Esmond 2009]

In 2010, the Rural Fires Association said:

... our clear policy on this is that where an individual firefighter or a group of firefighters acts in good faith in carrying out their duties, regardless of outcome they must have absolute protection under the law, and that wherever there is a legal manoeuvre or a test case for changes to that, governments must act immediately to restore that protection. [Heffernan 2010]

These suggestions are solutions to a perceived, rather than an actual problem. Statutory provisions are already in place to provide legal indemnity for firefighters and, in some cases, fire agencies (Eburn 2010). Although they receive several claims for compensation and their insurers meet some of them, the fire agencies do have significant legal defences and statutory protection. In only one case has a volunteer been personally sued (*Lobsey v. Care* 1983) but that case turned very much on the question of whether he was acting as a member of the bushfire service or in his own capacity when he started the unlawful hazard reduction burn on his own property. In the litigation

<sup>A</sup>These fires also generated litigation that made its way to the High Court of Australia (*Hargrave v. Goldman* 1963) and then to the United Kingdom's Privy Council (*Goldman v. Hargrave* 1966).

following the 2003 Canberra fires, RFS Commissioner Phil Koperberg was named as a defendant but he was removed when the State of New South Wales made it clear that, rather than the individual officer, it would be liable for any negligence (*West v. New South Wales* 2007). The government acted immediately to ensure his personal protection from legal liability, but as late as 2011, he was appearing before the Supreme Court to give evidence about the management of those fires (Taylor 2011).

It is not, or should not be, 'liability' that is in the minds of those that call for protection of agencies and their members. Rather, it is the growth in quasi-judicial proceedings – the Royal Commissions and the coronial inquiries – and the tendency for all of these legal proceedings to grow in length, complexity and to single out individuals for criticism (but not liability) that are, or should be, the real concern.

In order to identify an appropriate solution to the actual problem, future research should be conducted to determine the effect of modern accountability and 'lessons learned' processes on the management of fire and fire agencies. If, as is suggested here, it is the lengthy process and the personal attribution of blame that is the cause of concern, then appropriate policy responses need to be developed to allow agencies and communities to learn the necessary lessons from disasters, without sacrificing the good will of responders. The answer will not, however, be to change the law of legal liability, as legal liability is not the issue.

## Conclusion

This paper has reviewed the available judicial decisions and claims data from the RFS, as a representative firefighting agency. Although the data are incomplete, they do not support the theory that there is a significant, or more importantly, an increasing amount of post-wildfire litigation in Australia, although there is an increasing amount of litigation against fire and land-management agencies.

If litigation is not very common, what can explain the perception that people are inhibited by fear of legal liability? It is suggested that the problem lies in the use of the term 'liability'; what volunteers and others are, or should be, concerned about is not liability but the time, cost and inconvenience of responding to more and more complex post-event inquiries coupled with the fear of personal attribution of blame. This may not be 'liability' as a lawyer would understand it, but would be understood as such by lay members of the firefighting community.

Those that represent the fire agencies and firefighters should take care to accurately identify what they mean and advocate for legal and policy reform that is targeted at the real, and not the perceived, problem. Identifying appropriate solutions will require further research to determine the extent of these concerns, the effect they have on decision-making and to identify an appropriate way to learn the lessons that must be learned after disasters, without putting at risk the community-based volunteer emergency services that Australia relies on.

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## Appendix 1. Table of bushfire cases

All official abbreviations as used in Australian Guide to Legal Citation and the Cardiff Index to Legal Abbreviations (see <http://www.legalabbrevs.cardiff.ac.uk/>)

	Year of fire	
1	1867	<i>Macdonald v. Dickson</i> (1868) 2 SALR 32
2	1879	<i>Batchelor v. Smith</i> (1879) 5 VLR 176 <sup>A</sup>
3	1881	<i>Sheean v. Park</i> (1882) 8 VLR 25
4	1882	<i>Cotirell v. Allan</i> (1882) 16 SALR 122
5	1884	<i>Quinn v. Commissioner for Railways</i> (1885) 2 WN(NSW) 43
6	1884	<i>Cook v. Commissioner for Railways</i> (1886) 2 WN(NSW) 57
7	1884	<i>Taylor v. Ramsay</i> (1884) 18 SALR 47 <sup>A</sup>
8	1884	<i>McKinnon v. Commissioner for Railways</i> (1885) 2 WN(NSW) 11
9	1887	<i>Roberts v. Webb</i> (1887) 21 SALR 96 <sup>A</sup>
10	1892	<i>Edwards v. Melbourne and Metropolitan Board of Works</i> (1893) 19 VLR 432
11	1902	<i>Dennis v. Victorian Railways Commissioner</i> (1903) 28 VLR 576
12	1904	<i>Havelberg v. Brown</i> (1905) SALR 1
13	1904	<i>Sermon v. Commissioner for Railways (WA)</i> (1907) 5 CLR 239
14	1905	<i>Mitchellmore v. Salmon</i> (1905) 1 Tas. LR 109
15	1906	<i>Craig v. Parker</i> (1906) 8 WALR 161 <sup>A</sup>
16	1907	<i>Street v. Phillips River Roads Board</i> (1908) 10 WALR 102
17	1907	<i>Victorian Railways Commissioner v. Campbell</i> (1907) 4 CLR 1446 <sup>A</sup>
18	1911	<i>Anderson v. Commissioner of Railways (WA)</i> (1911) 13 WALR 10
19	1911	<i>Whinfield v. Lands Purchase and Management Board (Vic.)</i> (1914) 18 CLR 606
20	1912	<i>Young v. Tilley</i> (1913) SALR 87
21	1917	<i>Bugge v. Brown</i> (1919) 26 CLR 110
22	1919	<i>Turner v. Whitfeld</i> (1919) 19 SR(NSW) 345
23	1919	<i>Whitfeld v. Turner</i> (1920) 28 CLR 97
24	1919	<i>Watego v. Byron Shire</i> (1920) 5 LGR 82
25	1922	<i>Prout v. Stacey</i> (1922) 25 WALR 20 <sup>A</sup>
26	1924	<i>Baker v. Durack</i> (1924) 27 WALR 32
27	1925	<i>McInnes v. Wardle</i> (1931) 45 CLR 548
28	1927	<i>Genders v. South Australian Railways Commissioner</i> (1928) SASR 272
29	1929	<i>Mattinson v. Coote</i> (1930) 33 WALR 18
30	1933	<i>Hazelwood v. Webber</i> (1934) 52 CLR 268
31	1933	<i>Wainwright v. Stacy</i> (1933) 35 WALR 102
32	1933	<i>Thompson v. Gosney</i> (1933) St R Qld 190
33	1942	<i>Tolmer v. Darling</i> (1943) SASR 81
34	1944	<i>Wise Bros Ltd v. Commissioner for Railways (NSW)</i> (1947) 75 CLR 59
35	1945	<i>Collins v. The Commonwealth</i> (1945) 62 WN (NSW) 245 <sup>A</sup>
36	1948	<i>SA Railways Commissioner v. Riggs</i> (1951) 84 CLR 586
37	1948	<i>Casalegno v. Pioneer Sugar Mills</i> (1951) St R Qld 141
38	1950	<i>How v. Jones</i> (1953) SASR 82
39	1951	<i>Williamson v. Commissioner for Railways</i> (1959) 60 SR(NSW) 252
40	1957	<i>Edwards v. Blue Mountains City Council</i> (1961) 78 WN(NSW) 864
41	1959	<i>McWhirter v. Emerson-Elliot (Number 2)</i> (1962) WAR 162
42	1961	<i>Hargrave v. Goldman</i> (1963) 110 CLR 40
43	1961	<i>Goldman v. Hargrave</i> (1966) 115 CLR 458 (PC)
44	1965	<i>E.F. Smart v. Shire of Mingenew</i> (1966) WAR 192
45	1965	<i>Francis v. Commissioner for Railways</i> (1967) 70 SR(NSW) 138
46	1967	<i>Smith v. Badenoch</i> (1970) SASR 9
47	1969	<i>Triplett Pastoral and Development Co. v. Weaver</i> (1973) WAR 173
48	1976	<i>Lobsey v. Care</i> (1983) 1 M.V.R. 1
49	1977	<i>Wollington v. State Electricity Commission</i> (1979) VR 115
50	1977	<i>Wollington v. State Electricity Commission</i> (1980) VR 91
51	1978	<i>Haileybury College v. Emanuelli</i> (1983) 1 VR 323
52	1979	<i>R Field (Yass) Pty Ltd v. The State Rail Authority</i> (1985) 2 NSWLR 231
53	1980	<i>Evans v. Delaney</i> (1985) 58 LGRA 405
54	1983	<i>Woodend Water v. Bell</i> 1988 VIC LEXIS 840 (VSC)
55	1983	<i>Woodend Water v. Hyan</i> 1990 VIC LEXIS 1106 (VSCFC)
56	1983	<i>Ballantyne v. ETSA</i> (1993) SASC 4275

(Continued)

## Appendix 1. (Continued)

Year of fire		
57	1983	<i>May v. ETSA</i> (1993) SASC 4149
58	1983	<i>Seas Sapfor Forests v. ETSA</i> (1993) SASC 4004
59	1983	<i>Seas Sapfor Forests v. ETSA</i> (1996) SASC 5718
60	1983	<i>SA Electricity v. Union Insurance</i> (Supreme Court of South Australia, Perry J, 9 July 1997) [Unreported]
61	1991	<i>Telfer v. Flinders Council; ETSA third party (1)</i> (1999) SASC 42
62	1991	<i>Telfer v. Flinders Council; ETSA third party (2)</i> (1999) SASC 117
63	1991	<i>Telfer v. Flinders Council; ETSA third party (3)</i> (1999) SASC 142 (SASC)
64	1995	<i>Wright v. AAMI</i> ( District Court of South Australia, Master Burley, 23 April 1997) [Unreported]
65	1995	<i>Gardner v. The Northern Territory</i> (2003) NTSC 113
66	1995	<i>Gardner v. The Northern Territory</i> (2004) NTCA 14
67	1997	<i>Brechin v. Brookton Shire</i> (2002) WASC 228
68	1997	<i>Brookton Shire v. Brechin</i> (2003) WASC 240
69	1997	<i>Smith v. CALM</i> (1999) WASC 240
70	2001	<i>Atkinson v. NSW (1)</i> (2005) NSWSC 400
71	2001	<i>Atkinson v. NSW (2)</i> (2006) NSWSC 152
72	2001	<i>Atkinson v. NSW (3)</i> (2006) NSWSC 1083
73	2001	<i>Evans v. NSW (1)</i> (2007) NSWSC 955
74	2001	<i>Evans v. NSW (2)</i> (2007) NSWSC 1381
75	2001	<i>Andrews v. NSW</i> (2008) NSWSC 1034
76	2001	<i>Warragamba Winery v. NSW (1)</i> (2010) NSWSC 66
77	2001	<i>Warragamba Winery v. NSW (2)</i> (2010) NSWCA 174
78	2001	<i>Warragamba Winery v. NSW (3)</i> (2010) NSWSC 1314
79	2002	<i>Bonny Glen Pty Ltd v. Country Energy</i> (2007) NSWDC 171
80	2003	<i>West v. NSW</i> (2007) ACTSC 43
81	2003	<i>NSW v. West</i> (2008) ACTCA 14
82	2003	<i>Cohen v. Victoria</i> (2010) VSC 371
83	2004	<i>Southern Properties v. DEC</i> (2006) WASC 40
84	2004	<i>Southern Properties v. DEC</i> (2010) WASC 45
85	2009	<i>Thomas v. Powercor Australia</i> (2010) VSC 489
86	2009	<i>Matthews v. SPI Electricity Number 1</i> (2011) VSC 167
87	2009	<i>Matthews v. SPI Electricity Number 2</i> (2011) VSC 168

<sup>A</sup>The year of the fire is not given and could not be inferred from the judgment, so it is assumed to have been the same year as the cited judgment, but in fact, it may have been the year before, or even several years earlier.