

FIRE NOTE

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SHIFTING RISKS AND RESPONSIBILITIES - THE BALANCING EXERCISE

THE OUTCOMES OF A WORKSHOP ON THE LEGAL ISSUES OF 'STAY OR GO' AND COMMUNITY WARNINGS IN RELATION TO COMMUNITY SAFETY PROGRAMS.

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A joint workshop between the Bushfire CRC and Maddocks Lawyers was held on 10 August just prior to the 2006 AFAC/Bushfire CRC/IFCAA Annual Conference. The workshop attracted 37 participants from fire, land management and emergency service agencies.

This paper highlights the key points made at the workshop by the presenters, Catherine Dunlop and Rebecca Monson from Maddocks Lawyers and John Handmer from Bushfire CRC, and also by the participants who were at the workshop.

The two and a half hour workshop involved short presentations as well as two interactive exercises which covered the legal aspects of the 'stay and defend-or-leave early' ('Stay or Go') policy and community information and warnings ('Community Warnings').

1. LEGAL RESEARCH VS LEGAL ADVICE

An important point made at the outset was the complementary and equally important roles that legal research and legal practice play in the area of emergency law. To clarify the difference, the two roles were described as follows:

- **Legal research** is often more focused on the broader themes in law (such as on the social and policy issues related to law) and on critiquing the current state of the law. As well as outlining and critically analysing the current state of law, legal research is also important in that it is able to trace the historical development of the law as well as suggesting recommendations for change.

- **Legal advice** involves providing legal options that are available to a particular client in relation to a specific situation. The important thing to remember in seeking legal advice is to ask broad questions in order to receive a more comprehensive answer from your solicitor. Asking a narrow question, such as one that requires a 'yes' or 'no' answer (e.g. "Can I do this?") may provide you with an answer (usually a "no"!), but will not give your legal counsel an opportunity to explain the reasons behind their answer. These reasons equip you to come to an alternative course of action, that may be equally possible for you as well as involving less legal risk. This point will be illustrated later in this paper.

ABOUT THE LEGAL PROJECT

The Legal project focuses on examining the legal risks faced by emergency workers and looks specifically on the legal issues connected with the "Stay or Go" approach.

The complexity and confusion surrounding law in this area is partly due to the different jurisdictions that exist in Australia, which includes eight separate state/territory jurisdictions and federal law. A comprehensive paper has been completed as part of the project outlining the powers, liabilities and immunities of emergency workers in the context of the "Stay or Go" policy.



2. BALANCING ACT

Legal risk in the area of emergency law cannot be eradicated. Danger is an inherent element of any emergency, especially bushfires. The aim is not to see risk eradicated from practice (one may as well decide not to rescue or fight fires in the first place!) but rather to mastering the fine balancing act between what organisations can cope with (in a practical sense considering workload, budgetary limitations, ability of community to cope/understand, etc.) and the legal risk which the emergency organisation can bear.

Such decisions are best made by the emergency managers and their organisations. It would be prudent that managers and the organisational staff 'on the ground' work out the issues involved and come to a conclusion about what degree they are willing to bear risk and in which area of their practice. This, of course, is a decision that is best made by the emergency practitioners who are familiar and have an intimate knowledge of their practice, organisation and people and not necessarily your legal practitioner. Though lawyers may be able to provide you with options in light of the legal environment you are in, the ultimate decision must be made by you, the emergency service representative.

3. IN PRACTICE

The two examples illustrating this process are the legal issues involved with the implementation of the 'Stay or Go' policy, and the communication of community information and warning prior to and during a bushfire emergency.

The 'Stay or Go' policy 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 damaged 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 "go" 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 often be controlled by able-bodied people on site.

A legal analysis of this policy was carried out in terms of the emergency worker's role in early evacuation.

The aim in Community Warnings is to inform the public of the danger of bushfire in their area. This is so those at risk are able to make informed decisions and take appropriate actions.

In the 'Stay or Go' and Community Warnings examples, the extent to which an emergency service organisation can go in achieving the goals in either example can be weighed against the various considerations/risks that would affect the organisation. Considerations may include legal risk, the organisation's duty of care, financial costs, media/political accountability, community expectations, etc. This weighing exercise is important as different degrees of implementation carry a variety of risks. To illustrate this exercise, we will focus on Community Warnings¹.

COMMUNITY INFORMATION AND WARNINGS

For the purposes of the workshop, examples of various steps that an emergency service organisation may take to inform the community of fire danger included:

- Provide no information about bushfires at all,
- Provide information only when there is a specific bushfire threat,
- Provide information throughout the fire season, and
- Provide information throughout the whole year.

¹ This is to avoid the potential confusion that may arise with the use of the 'Stay or Go policy' example as forced evacuation by emergency workers in general (in particularly last minute evacuations) should be avoided in accordance with the policy. For clarity this note only covers Community Warnings.



These different actions can be weighed up against various considerations such as (this list is not exhaustive):

- Duty of care to provide adequate/accurate information,
- Legal risk – eg. negligence,
- Financial Costs,
- Media/political accountability (including community expectation), and
- Community safety.

This is summarised in Table 1².

It is generally accepted that where information is provided, the information provider (i.e. the emergency services organisation) has a duty to ensure that the information is accurate, timely and appropriately targeted. It is clear therefore that as more information is provided, this duty of care increases along with the volume of information. Similarly, as more information is provided, the immediate financial costs in providing the information will also increase as more action is taken to communicate with the public (such as by use of pamphlets, radio announcements, community meetings, websites, etc.).

Legal risk does not necessarily follow in the same way. Though legal risk will generally increase as the duty of care increases, it may be offset by the fact that the organisation may be able to meet its duty (e.g. by providing accurate information). Further, legal risks may actually be high even when there is no duty of care to ensure information is accurate (such as when no information is provided). In this situation, there is a high chance that the emergency organisation may still run the risk of being negligent for failing to provide insufficient information or any information at all! And thus begins the balancing exercise of how much information an emergency service should provide.

Similarly, media and/or political accountability as well as community expectations will most likely be high in the situation when information is provided throughout the year. This is because such frequent fire updates would probably create an expectation and reliance by the public on the agencies involved. Similarly, it can safely be presumed that it is generally expected that regular updates be provided during a specific bushfire threat. However, in a case where no information is provided at all, the public may

not have any expectation or reliance on such information (as they have never received any). Should damage or harm result however due to the lack of information, it would be highly likely that the emergency organisation would nevertheless be held accountable for not providing the necessary information to the public in the first place. Once again, the emergency organisation must weigh up these factors to decide how much information should be provided.

All of the above considerations must be balanced with the ultimate aim of keeping the community safe during bushfires. Generally, it is presumed that community safety would increase when more information is provided as this should enable affected individuals to make informed decisions based on the information. This is on the premise that the information provided is accurate in the first place and presented in a way that is comprehensible by those at risk. It may therefore also be important to consider whether too much information (or too much detail) might confuse the message and result in a decrease in community safety.

ISSUES ARISING IN WORKSHOP DISCUSSIONS:

The following are some points and comments from the workshop in relation to this 'balancing act':

- Sometimes the course of action that will result in the lowest legal risk will not be possible to implement due to other limitations, such as the high financial costs that may be involved or the actions would lead to disappointment of community expectations (etc.).

▼ BELOW: TABLE 1: COMMUNITY INFORMATION AND WARNINGS - RISK ANALYSIS OF ACTIONS AND CONSIDERATIONS

	NO INFORMATION	SPECIFIC BUSHFIRE THREAT	THROUGHOUT BUSHFIRE SEASON	THROUGHOUT THE YEAR
DUTY OF CARE	NONE	LOW	MEDIUM	HIGH
LEGAL RISKS	HIGH	MEDIUM	MEDIUM	MEDIUM
IMMEDIATE FINANCIAL COSTS	NONE	LOW	MEDIUM	HIGH
MEDIA/POLITICAL ACCOUNTABILITY	MEDIUM	HIGH	MEDIUM	HIGH
COMMUNITY SAFETY	LOW	MEDIUM	MEDIUM	HIGH

² The table along with its contents are provided only as a guide/example and not to be relied upon for making organisational decisions.



FURTHER INFORMATION

Comments on this paper are welcome at

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- Though the duty of care may be high by doing more, the legal risk may nevertheless be low(er) as you are able to meet that duty of care.
- There is a high risk that emergency organisations will be criticised if nothing is done but they may also be criticised if information is provided (even if done so in a timely manner and in a targeted fashion) where some of the details may be incorrect.
- The quality and type of information provided is important. Care must be taken to find a balance between accuracy, detail and volume. The presumption is that the more accurate, detailed and frequent the information is provided, the lower the legal risk and community risk will be. However, a scientific detailed public announcement may be accurate but may not be comprehensible or be misinterpreted by the public. All these factors need to be weighed up.
- Though legal liability might not be attached to your actions/non-action by the courts, you and/or your organisation may nevertheless be held accountable politically or by the media to the public.
- There is unease and discomfort among fire agency staff in relation to the law surrounding this area.
- There is much more work that remains to be done in this area.

It is recommended that you discuss with your colleagues (if you have not already) the issues raised above and/or to discuss with your legal advisor any concerns you may have about this decision-making process to ensure your organisation is fully considering all the relevant factors involved in each decision.

CONCLUSION

The above exercise is not necessarily to provide you with any “answers” but seeks to explore the balancing exercise which all emergency organisations must undertake in order to manage their risks. It illustrates the balancing exercise that all emergency organisations must undertake not only in relation to Community Warnings but in the making of any organisational decision. Though lawyers are useful and helpful in guiding you through this process, the ultimate decision of how much risk an organisation takes and in which areas (media/political accountability, costs, legal, community safety, etc.) must be made by the relevant organisational representatives who have intimate knowledge of their organisation, their people, culture, the community they are seeking to protect and the realities of firefighting.

A similar workshop is planned for early 2007 to facilitate further discussions of issues that were raised in our first workshop.

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DISCLAIMER

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.