



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

Legal liabilities of emergency workers and emergency-service organisations
in Queensland

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 Queensland

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I. Introduction

The “Prepare, Stay and defend or Leave Early” policy (the Policy)² 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 building³.

This paper focuses on addressing the question of what the Policy would mean to individual emergency workers and emergency service organisations in Queensland 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)⁴. 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.**

¹ Elsie Loh is a Research Officer at the Centre for Risk and Community Safety and qualified legal practitioner. This work was carried out under the funding of the Bushfire CRC and the Program C *Prepare, Stay and Defend or Leave Early* project. I also wish to thank Prof John Handmer for his comments and his time in reviewing the paper and Ms Rebecca Monson for her initial work on the Program C Legal project.

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.

² See Australasian Fire Authorities Council (AFAC)’s *Position Paper on Bushfires and Community Safety* issued on 28 November 2005.

³ 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.

⁴ 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 allowed⁵. Historically, an order to evacuate could be lawfully refused on the basis of pecuniary interest.⁶ 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.⁷ In some states, however, the right to refuse an order to evacuate on the basis of pecuniary interest has been overridden.

In **Queensland**, 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

⁵ Nicholas Karanev, ‘Assessing the legal liabilities of emergencies’ (2001) Autumn, *Australian Journal of Emergency Management* 21.

⁶ *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.

⁷ *Ibid* 571.

their initial location.⁸ 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 Queensland Fire Brigade, Rural Fire Service, police force and emergency services officers when a state of disaster has been declared:

Danger or potential danger caused by fire

Under section 53(1) of the *Fire and Rescue Service Act 1990* (Qld), ‘an authorised fire officer’ (being the Commissioner or a fire officer authorised by the Commissioner as defined by section 6A of the *Fire and Rescue Service Act*) have broad powers to take ‘any reasonable measure to protect persons, property or the environment from danger or potential danger caused by a fire...’

Section 53(2)(k) of the *Fire and Rescue Service Act* provides the authorised fire officer with more specific powers to ‘require any person not to enter or remain within a specified area around the site of the danger’ where there is a danger or potential danger caused by fire. If the person fails to comply with these orders, the authorised fire officer may then use ‘force as is reasonably necessary’ to ensure compliance⁹.

Fire wardens and the first officer of the rural fire brigade under section 76 and s83(1)(a) of the *Fire and Rescue Service Act* respectively both have the same powers as an authorised fire officer but may be subject to any limitation imposed by the Commissioner. Further, ‘any person’ under the direction of the first officer of a rural fire brigade may also exercise these powers¹⁰. Where the first officer of a rural fire brigade is absent, the next most senior officer may exercise these powers¹¹.

It is also noted that the Commissioner may delegate his or her powers, including powers as ‘an authorised fire officer’, to a fire service officer, an officer of a rural fire brigade, a fire coordinator, a chief fire warden and a fire warden¹².

Section 86 of the *Fire and Rescue Service Act* allows a rural fire service from New South Wales, South Australia and the Northern Territory to take measures in Queensland to extinguish or control fires in certain prescribed circumstances¹³. In such circumstances, the senior officer of the interstate fire service may exercise any of the powers of a first officer of a Queensland rural fire brigade as outlined above¹⁴.

Declaration of disaster situation

⁸ 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.

⁹ *Fire and Rescue Service Act 1990* (Qld) s52(2)(l).

¹⁰ *Fire and Rescue Service Act 1990* (Qld) s83(2).

¹¹ *Fire and Rescue Service Act 1990* (Qld) s83(4).

¹² *Fire and Rescue Service Act 1990* (Qld) s19.

¹³ Where an officer from NSW, South Australia or Northern Territory determines in good faith that a fire burning in Queensland may continue burning into their State/ Territory, or that a fire burning in their State/Territory may continue burning into Queensland: *Fire and Rescue Service Act 1990* (Qld) s86(2).

¹⁴ *Fire and Rescue Service Act 1990* (Qld) s86(3).

The *Disaster Management Act 2003* (Qld) provides two provisions for the declaration of a disaster situation – one being over a district and the other being over the whole State. A district disaster coordinator may, with the approval of the Minister, declare a disaster situation for the relevant disaster district if he or she is satisfied that,

- (a) a disaster has happened, is happening or is likely to happen, in the disaster district; and
- (b) it is necessary for the district disaster coordinator or a declared disaster officer to exercise declared disaster powers to prevent or minimise any of the following—
 - (i) loss of human life;
 - (ii) illness or injury to humans;
 - (iii) property loss or damage;
 - (iv) damage to the environment¹⁵.

Similarly, the Minister and the Premier may declare a disaster situation over the State or part of the State if he or she is satisfied that,

- (a) a disaster has happened, is happening or is likely to happen, in the State; and
- (b) it is necessary for a district disaster coordinator or a declared disaster officer to exercise declared disaster powers to prevent or minimise any of the following—
 - (i) loss of human life;
 - (ii) illness or injury to humans;
 - (iii) property loss or damage;
 - (iv) damage to the environment¹⁶.

Once a disaster situation has been declared over an area, the relevant district disaster coordinator, a declared disaster officer¹⁷ (who may be subject to conditions) and police officers¹⁸ are given the specific powers under section 76(1) of the *Disaster Management Act* to deal with the disaster situation. These powers may only be exercised:

- (a) during the period of the disaster situation; and
- (b) to do any of the following—
 - (i) ensure public safety or public order;
 - (ii) prevent or minimise loss of human life, or illness or injury to humans or animals;
 - (iii) prevent or minimise property loss or damage, or damage to the environment¹⁹.

Section 77(1) of the *Disaster Management Act* sets out these powers, which include the ability of the district disaster coordinator or declared disaster officer to,

- (a) control the movement of persons, animals or vehicles within, into, out of or around the declared area for the disaster situation;
- ...

¹⁵ *Disaster Management Act 2003* (Qld) s64.

¹⁶ *Disaster Management Act 2003* (Qld) s69.

¹⁷ “Declared disaster officers” may include ambulance, fire and health officers (but may be subject to conditions) as authorised by Chairperson of State Group or District co-ordinator (s75(1) of *DM Act*). “Declared disaster officers” may also include a person whom the Chairperson or District co-ordinator believes has the necessary expertise or experience (s75(1) of *DM Act*).

¹⁸ Section 75(2) states that police officers may also exercise declared disaster powers for a disaster situation.

¹⁹ *Disaster Management Act 2003* (Qld) s76(2).

(c) evacuate persons or animals from the declared area or a part of the area²⁰;

Section 77(4) of the *Disaster Management Act* also gives the district disaster coordinator or declared disaster officer power to use force that is ‘reasonable’ in the circumstances when exercising his or her powers.

Declaration of emergency situation

The *Public Safety Preservation Act* 1986 (Qld) deals with chemical, biological, radiological and other emergencies. Certain extreme fire emergency situations would fall under the “other emergencies” category of this Act. The incident coordinator may declare that an emergency situation exist should he or she be satisfied on reasonable grounds that an emergency situation has or may arise under section 5 of the *Public Safety Preservation Act*. Section 8(1)(d) of the *Public Safety Preservation Act* gives the incident coordinator powers to act (including the use of force) during the period of the emergency situation in the following way,

(1) Where during the period of and in the area specified in respect of an emergency situation the incident coordinator is satisfied on reasonable grounds that it is necessary to effectively deal with that emergency situation he or she (and any other police officer acting on his or her instructions) may—

...

(d) direct the evacuation and exclusion of any person or persons from any premises and for this purpose may remove or cause to be removed (using such force as is necessary for that purpose) any person who does not comply with a direction to evacuate or any person who enters, attempts to enter or is found in or on any premises in respect of which a direction for the exclusion of persons has been given.

Section 7(1) of the *Public Safety Preservation Act* also provides powers of delegation to the incident coordinator where powers may be delegated to a police officer for the period, as follows:

If during any period the incident coordinator ceases to act as incident coordinator, the incident coordinator may delegate his or her powers under this Act, (including the power to subdelegate the powers), to a police officer for the period.

Other positions with powers to evacuate

The *Disaster Management Act* also appoints a number of other positions with powers to forcibly remove persons. For example, a fire coordinator of an Emergency unit has the same powers (though this may be subject to conditions) as an authorised fire officer under the “Fire Act” under section 97 and 98 of the *Disaster Management Act*:

97 Appointment of fire coordinator

- (1) The chief executive is to appoint a member of the unit as the fire coordinator for the unit.
- (2) The chief executive may appoint a person as the fire coordinator only if satisfied the person has the necessary expertise or experience to exercise the powers of the fire coordinator.

98 Powers of fire coordinator

- (1) This section applies to a person appointed under section 97(1) as a fire coordinator for an ES unit.
- (2) Subject to subsections (3) and (4), the person has, for controlling and extinguishing a fire in the unit’s emergency service area, the powers of an authorised fire officer under the Fire Act.

²⁰ *Disaster Management Act* 2003 (Qld) s77(1)(a) and (b).

- (3) The commissioner of the Queensland Fire and Rescue Service under the Fire Act may impose conditions on the exercise of the powers by the person by written notice given to the person.
- (4) The person may exercise the powers only subject to the conditions.

Further, an authorised rescue officer appointed under section 100 of the *Disaster Management Act* is given broad as well as specific powers. Section 107(1) of the *Disaster Management Act* gives an authorised rescue officer broad powers to take reasonable steps to protect:

- (a) a person who is trapped, or endangered in another way, in a place; or
- (b) the officer or another person from danger, potential danger or assault.

For the above two purposes set out in section 107(1)(a) and (b) of the *Disaster Management Act* (to protect person trapped or in danger, etc.), authorised rescue officers are also empowered to take the following actions but only when reasonable in the circumstances to do so under section 107(2) of the *Disaster Management Act*:

...

- (g) direct a person to leave, or not to enter, an area in or near a place if the authorised rescue officer reasonably considers the direction is necessary to protect a person’s life or health;

It is an offence to fail to comply with the abovementioned direction to leave or not enter an area, which the authorised rescue officer must inform the relevant persons in accordance with section 107(3) of the *Disaster Management Act*:

- (3) When giving a direction or making a requirement mentioned in subsection (2)(g) or (h), the authorised rescue officer must warn the person it is an offence to fail to comply with the direction or requirement unless the person has a reasonable excuse.

(For offences about failing to comply with a direction or requirement under section 107(2)(g) or (h), see sections 116 (Failure to comply with direction) and 117 (Failure to help particular persons).)

The Chairperson of the State group and a district disaster coordinator are also given broad powers to authorise persons to exercise rescue powers in particular circumstances in section 110 of the *Disaster Management Act*:

(1) This section applies if the chairperson of the State group or a district disaster coordinator is satisfied on reasonable grounds it is necessary to act as mentioned in subsection (2) to ensure the following are carried out effectively—

- (a) rescue or similar operations in an emergency situation;
- (b) other operations in an emergency situation to—
 - (i) help injured persons; or
 - (ii) protect persons or property from danger or potential danger associated with the emergency situation.

(2) The chairperson or district disaster coordinator may authorise a person to exercise rescue powers in relation to the emergency situation if satisfied the person has the necessary expertise or experience to exercise the rescue powers.

...

(5) A person authorised by the chairperson or district disaster coordinator under subsection (2) may exercise the rescue powers only—

- (a) under the authorisation; and
- (b) subject to the directions of the chairperson or district disaster coordinator.

Such persons as authorised in the above section 110(2) of the *Disaster Management Act* may exercise the powers as set out in section 111 and section 112 of the Act. Section 111 of the Act empowers authorised persons to enter places and section 112 of the Act gives such authorised persons upon entry powers to then direct people to leave. Section 111 of *Disaster Management Act* states:

111 Power to enter places

- (1) A person authorised under section 110(2) may enter a place if the person is satisfied on reasonable grounds it is necessary to enter the place to avoid an imminent risk of death or injury of a person.
- (2) The person may enter the place, using reasonable force, without a warrant or the consent of the owner or occupier of the place.
- (3) However, if the occupier is present at the place, before entering the place, the person must do, or make a reasonable attempt to do, the following things—
 - (a) tell the occupier the purpose of the entry;
 - (b) seek the consent of the occupier to the entry;
 - (c) tell the occupier the person is permitted under this Act to enter the place without the occupier’s consent.
- (4) Subsection (3) does not require the person to take a step that the person reasonably believes may frustrate or otherwise hinder the person’s ability to protect a person’s life or health.

Section 112 of the *Disaster Management Act* then provides the authorised person the power to do as follows:

112 General powers

- (1) This section applies if, under section 111(1), a person enters a place.
- (2) The person may take reasonable steps to avoid the imminent risk of death or injury of a person.
- (3) If it is reasonable in the circumstances, the person may do all of the following having regard to the purpose of the entry—
 - ...
 - (f) direct another person to leave, or not to enter, an area in or near the place if the person considers the direction is necessary to protect a person’s life or health;

It is also an offence for a person to not comply with the instruction of these authorised persons to leave in accordance with section 112(4) of the *Disaster Management Act*:

- (4) When giving a direction or making a requirement mentioned in subsection (3)(f) or (g), the person must warn the other person it is an offence to fail to comply with the direction or requirement unless the other person has a reasonable excuse.

(For offences about failing to comply with a direction or requirement under section 112(3)(f) or (g), see sections 116 (Failure to comply with direction) and 117 (Failure to help particular persons).)

Summary

It is clear in Queensland that statutory powers privilege emergency response operations over the pecuniary interests of owners. During a fire incident or when a disaster situation has been declared, authorised persons under the *Fire and Rescue Service Act* and *Disaster Management Act* may not only evacuate people and prohibit people from remaining in a specified area but to also use reasonable force to ensure persons comply with orders to be evacuated or excluded from an area. There are only a couple of situations where the provisions of the *Disaster Management Act* are silent as to whether force may be used to ensure compliance. An authorised rescue officer under s100 of the *Disaster Management Act* and a person authorised by the Chairperson of the State group and a district disaster coordinator under section 110 of the *Disaster Management Act* may only direct a person to leave. The

Act only provides that it is an offence to not comply and does not clearly give powers to the emergency worker to forcibly remove people.

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 only 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.’²¹ 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.

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 importance²².

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.

²¹ Kanarev, above n 4, 22.

²² 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"> - An “authorised fire officer” (s6A <i>FRS Act</i>) - Fire warden (subject to any limitation imposed by Commissioner) (s76 <i>FRS Act</i>) - First officer of rural fire brigade (subject to any limitation imposed by Commissioner) (s83 <i>FRS Act</i>) - ‘Any person’ under the direction of the first officer (s83(2) <i>FRS Act</i>) - Next most senior officer in the absence of first officer (s83(4) <i>FRS Act</i>) - Fire coordinator of an Emergency Service unit also have the same powers as an authorised fire officer (may be subject to conditions) but can only exercise power to control and extinguish fire within the unit’s emergency service area (s98 <i>Disaster Management Act</i>). 	<p>May require a person not to enter or remain within a specified area (s53(2)(k) <i>Fire and Rescue Service Act 1990</i> (“<i>FRS Act</i>”)).</p>	<p>There is a need to protect persons, property or the environment from danger or potential danger caused by a fire.</p>	<p>May use such force as is ‘reasonably necessary’ to remove persons who refuse to comply with order (s53(2)(1) <i>FRS Act</i>).</p>	<ul style="list-style-type: none"> - An “authorised fire officer” is the Commissioner, or a fire officer authorised by the Commissioner (s6A <i>FRS Act</i>). - Please also note delegation powers of Commissioner (s19 <i>FRS Act</i>). - Please note broad powers of “authorised fire officers” to take any “reasonable measures” under s53(1) <i>FRS Act</i>. - Statutory powers appear to privilege emergency response operations over the pecuniary interests of owners.

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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"> - Relevant district co-ordinator - Declared disaster officers (s75(1)(a)-(d)) - Police officer (s75(2) <i>DM Act</i>) <p>(s77 <i>Disaster Management Act</i> 2003 (“<i>DM Act</i>”)).</p>	<ul style="list-style-type: none"> - Control the movement of persons, animals or vehicles, - Evacuate persons or animals from the declared area. <p>(s 77(1)(a) and (c) <i>DM Act</i>).</p>	<ul style="list-style-type: none"> - Disaster situation declared over district (s64 <i>DM Act</i>) - Disaster situation declared over State (s69 <i>DM Act</i>) - Necessary to ensure public safety/order; prevent/minimise loss of human life, illness or injury to humans and animals; and to prevent/minimise the loss/damage to property and environment (see s76(2)(b) <i>DM Act</i>). 	Force that is reasonable in the circumstances may be used in the exercise of powers (s77(4) <i>DM Act</i>).	<ul style="list-style-type: none"> - “Declared disaster officers” may include ambulance, fire and health officers (but may be subject to conditions) as authorised by Chairperson of State Group or District co-ordinator (s75(1) of <i>DM Act</i>). - “Declared disaster officers” may also include a person whom the Chairperson or District co-ordinator believes has the necessary expertise or experience (s75(1) of <i>DM Act</i>). - Statutory powers appear to privilege emergency response operations over the pecuniary interests of owners.
Incident coordinator	Direct the evacuation and exclusion of any person or persons from any premises. s8(1)(d) <i>Public Safety Preservation Act</i> 1986 (“ <i>PSP Act</i> ”).	An emergency situation has been declared (s5 <i>PSP Act</i>).	Force as is necessary may be used to remove or cause to be removed any person who fails to comply with a direction to be evacuated or be excluded from premises. (s8(1)(d) <i>PSP Act</i>).	<ul style="list-style-type: none"> - Powers may be delegated to a police officer should the incident coordinator ceases to act (s7(1) <i>PSP Act</i>). - Statutory powers appear to 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
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<p>An authorised rescue officer (appointed under s100 of <i>DM Act</i>)</p>	<p>Direct a person to leave or not enter an area (s107(2)(g) of <i>DM Act</i>).</p>	<p>Direction is necessary to protect a person’s life or health (s107(2)(g) of <i>DM Act</i>).</p>	<p>It is an offence to fail to comply with direction (s107(3) of <i>DM Act</i>).</p>	<ul style="list-style-type: none"> - Provisions are silent as to whether force may be used to ensure compliance.
<p>Particular persons authorised by the Chairperson of State group or district disaster coordinator (appointed under s110 of <i>DM Act</i>).</p>	<p>Enter a place and direct a person to leave or not enter an area (s112(3)(f) of <i>DM Act</i>).</p>	<ul style="list-style-type: none"> - Direction is necessary to protect a person’s life or health (s112(3)(f) of <i>DM Act</i>). - In an emergency situation to help injured persons or protect persons or property from danger or potential danger associated with emergency situation (s110(1) of <i>DM Act</i>). 	<p>It is an offence to fail to comply with direction (s112(4) of <i>DM Act</i>).</p>	<ul style="list-style-type: none"> - Authorised persons may only exercise rescue powers under the authorisation and subject to directions of chairperson or district disaster coordinator (s110(5) of <i>DM Act</i>). - Broad powers to take reasonable steps once an authorised person has entered a place to avoid the imminent risk of death or injury of a person (s112(2) of <i>DM Act</i>). - Provisions are silent as to whether force may be used to ensure compliance.

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”²³.

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

²³ Please refer to H Luntz and D Hambly *Torts: Cases and Commentary* (5th ed, 2002) and D Baker et al, *Torts Law in Principle* (4th 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 *Queensland v Brown*²⁴ 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 case²⁵. In the past, courts have defined it as meaning ‘without any indirect or improper motive’²⁶. 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*²⁷, 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

²⁴ [2003] NSWCA 21.

²⁵ *Bankstown City Council v Alamo Holdings Pty Limited* [2005] HCA 46 at 59 (as per Gleeson CJ, Gummow, Hayne and Callinan JJ).

²⁶ *Board of Fire Commissioners v Argouin* (1961) 109 CLR 105 at 115.

²⁷ (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.²⁸

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 law²⁹. The legislation in Queensland either do not make any changes to the common law or do change 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”³⁰.

No Changes

Section 129(1) of the *Fire and Rescue Services Act 1990* (Qld) and section 47 of the *Public Safety Preservation Act 1986* (Qld) appear to be mere re-statements of the current common law position³¹. The relevant sections provide that there is no liability where the act or omission was done “without negligence”. This is, of course, the current common law position – that the exercise of statutory power which is not negligent cannot attract liability even if damage was caused.

Section 129 of the *Fire and Rescue Services Act 1990* (Qld) provide the following protection to any person acting under the Act:

129 Protection for acts done pursuant to Act

(1) No matter or thing done or omitted to be done by any person pursuant to this Act or bona fide and without negligence for the purposes of this Act subjects that person to any liability.

(2) A person (and any assistant) who discharges a function or exercises a power under this Act in order to avert or reduce actual danger to any person or property or to the environment may use force to a person that is reasonable in the circumstances and that does not cause and is not likely to cause death or grievous bodily harm and is not liable to be charged with any offence in respect of the use of that force.

Further, section 47 of the *Public Safety Preservation Act 1986* (Qld) similarly requires that the any act or omission be ‘without negligence’, in the following way:

47 Protection from liability

(1) Liability at law does not attach to the State, a Minister or an official because of anything done or omitted to be done under this Act in good faith and without negligence.

²⁸ Ibid 468.

²⁹ Michael Eburn, *Emergency Law* (2nd ed, 2005) 144-6.

³⁰ Examples of other similar protection clauses include: *Fire Brigades Act 1989* (NSW) s78, *Rural Fires Act 1997* (NSW) s128, *State Emergency and Rescue Management Act 1989* (NSW) s41 and s62, *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.

³¹ Another example of such a provisions is the *Emergency Management Act 1986* (Vic) s37.

According to section 47(2) of the *Public Safety Preservation Act 1986 (Qld)*, ‘official’ include the following people:

- an ambulance controller; or
- the CBRE coordinator; or
- the chief veterinary officer; or
- an emergency responder; or
- a fire controller; or
- the incident coordinator; or
- a medical controller; or
- a person acting under a help direction or a resource operator direction.

Lowering of standard

Section 144 of the *Disaster Management Act 2003 (Qld)* does change 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”³². The effect of these acts is that liability of the member concern is removed completely even if it can be shown that the conduct was not “reasonable” but only if “good faith” can be established.

Section 144(1) of the *Disaster Management Act 2003 (Qld)* provides the following comprehensive protection:

144 Protection from liability

(1) Other than as provided for under part 11, civil liability does not attach to the State, a Minister, a local government or an official because of anything done or omitted to be done under this Act in good faith without reckless disregard for the possible occurrence of the personal injury or loss or damage to property from which liability would arise, if this section did not apply.

“An official” is defined in section 144(3) of the *Disaster Management Act 2003 (Qld)* as being the following classes of people:

- a member of the State group, a district group or a local group;
- a declared disaster officer;
- an authorised rescue officer;
- a person authorised under this Act to exercise rescue powers;
- a person required to give reasonable help under the Act³³;
- an SES member or an ESU member.

Further, section 114(2) clearly states that the subsection (1) does not stop a person from relying on the *Civil Liability Act 2003 (Qld)* to further limit their liabilities.

³² See also *Fire Brigades Act 1989 (NSW)* s78, *State Emergency and Rescue Management Act 1989 (NSW)* ss41 and 59, *Rural Fires Act 1997 (NSW)* s128, *Disaster Management Act 2003 (Qld)* s144, *Emergency Services Act 1976 (Tas)* s3, *Metropolitan Fire Brigades Act 1958 (Vic)* s54A, *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.

³³ See specifically sections 77(1)(q), 107(2)(h) or 112(3)(g) of the *Disaster Management Act 2003 (Qld)*.

It would therefore be better for an emergency worker to rely on the *Disaster Management Act* (if circumstances allow) as it provides more comprehensive protection. Further, volunteer emergency workers are also accorded protection by the *Civil Liability Act 2003* (Qld) which protects all Queensland volunteers. Section 39(1) of the *Civil Liability Act 2003* (Qld) states,

A volunteer does not incur any personal civil liability in relation to any act or omission done or made by the volunteer in good faith when doing community work—

- (a) organised by a community organisation; or
- (b) as an office holder of a community organisation.

A volunteer who is acting in good faith would therefore be protected from any personal civil liability. The Act is however silent on whether liability is transferred from the volunteer to the ESO or State. It is however clear that it would be better for volunteers acting under the *Fire and Rescue Services Act 1990* and the *Public Safety Preservation Act 1986* (which does not provide any additional protection from the common law) to rely on the protection provided by the *Civil Liability Act 2003* as it provides more comprehensive protection.

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.

Table 2: Indemnities available to ESOs and their members

Party protected	Form of protection and conditions under which it will be provided	Comments
Volunteer	<p>“A <i>volunteer does not incur any personal civil liability in relation to any act or omission done or made by the volunteer in good faith when doing community work—</i></p> <p>(a) <i>organised by a community organisation; or</i></p> <p>(b) <i>as an office holder of a community organisation.</i>”</p> <p>s39(1) <i>Civil Liability Act 2003 (Qld).</i></p>	<p>The immunity does not apply if (i) the volunteer knew, or ought reasonably to have known, that he or she was acting outside scope of activities authorised by the organization or contrary to instructions (s42), (ii) the volunteer was committing an offence at the time (s40), or (iii) the volunteer was intoxicated and failed to exercise due care and skill when doing the work (s41).</p> <p>There is no express transfer of liability to the community organisation or State.</p>
Any person acting pursuant to <i>Fire and Rescue Services Act 1990 (Qld)</i>	<p>The individual is not liable for anything done, or omitted to be done, bona fide and <i>without negligence</i> by any person for the purpose of any Act (s129(1) of the Act).</p> <p>An individual who exercises their power under the <i>Fire and Rescue Services Act 1990 (Qld)</i> to forcibly remove someone is not liable to be charged with any offence in respect of that use of force – provided that the force used was <i>reasonable</i> (see s129(2) of <i>FRS Act</i>).</p>	<p>It appears that the section is just a mere restatement of the common law. Individuals are still liable for negligent acts done (that are not reasonable).</p>
State, Minister, local government or an official	<p>No liability if act done or omitted to be done under <i>Disaster Management Act 2003 (Qld)</i> was in good faith without reckless disregard for the possible occurrence of the personal injury or loss or damage to property from which liability would arise.</p> <p>Reference: s144 <i>Disaster Management Act 2003 (Qld).</i></p>	<p>Comprehensive protection from liability.</p>
State, Minister or an official	<p>No liability if act done or omitted to be done under the <i>Public Safety Preservation Act 1986 (Qld)</i> was in good faith and <i>without negligence</i>.</p> <p>Reference: s47 <i>Public Safety Preservation Act 1986</i></p>	<p>Despite reference to “good faith”, section is just a mere restatement of the common law – there is no action if there no negligence can be shown.</p>