Welcome from Editor

It is my pleasure to bring to you the compiled papers from the Science Day of the AFAC and Bushfire CRC Annual Conference, held in the Sydney Convention Centre on the 1st of September 2011.

These papers were anonymously referred. I would like to express my gratitude to all the referees who agreed to take on this task diligently. I would also like to extend my gratitude to all those involved in the organising, and conducting of the Science Day.

The range of papers spans many different disciplines, and really reflects the breadth of the work being undertaken, The Science Day ran four streams covering Fire behaviour and weather; Operations; Land Management and Social Science. Not all papers presented are included in these proceedings as some authors opted to not supply full papers.

The full presentations from the Science Day and the posters from the Bushfire CRC are available on the Bushfire CRC website www.bushfirecrc.com.

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Disclaimer:
The content of the papers are entirely the views of the authors and do not necessarily reflect the views of the Bushfire CRC or AFAC, their Boards or partners.
Governments and emergency response

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Introduction
This paper introduces the next stage of the ‘Mainstreaming Emergency Management into law and policy’ research project. So far researchers have considered the impact of laws and legal proceedings on the community’s ability to prepare for and respond to emergencies5 and the true picture of litigation against the fire agencies. The next stage of the project will be to identify what is the responsibility of governments and government agencies, such as the fire brigades and various emergency services, to take action to protect individuals from harm. Identifying what are or should be the objectives of emergency management policy is important; unless governments know what they are trying to do and what they are trying to achieve, it is impossible to know whether or not they have succeeded. It is important from a legal perspective because the key issue in a legal action, such as those arising from the 2003 Canberra, and 2009 Black Saturday fires, is ‘did the government via its fire and other agencies, meet it’s ‘duty of care’?’ That, in turn, begs the question of ‘what is (or was) the government’s duty in emergency management?’

This project will consider these issues from a focused legal perspective. It will contribute to, and link with, CRC funded projects on land use planning and emergency management (being conducted by Professor Barbara Norman and Dr Kate Sullivan at the University of Canberra) and on sharing responsibility (being conducted by Professor John Handmer and Dr Blythe McLennan at RMIT University, Melbourne).

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What is the role of government?

Schneider asks

‘(1) Why are disasters viewed as legitimate public problems, requiring governmental action? and
(2) What role should the government play in disaster related activities?’

Ellis starts her history of the South Australian Country Fire Service with this:

‘The man on the land should find his own fire-fighting appliances,’ argued one South Australian parliamentarian in the 1930’s. ‘Landowners as a whole do not want charity.’ But is it really ‘charity’ to supply firefighting equipment to rural groups? Just who is responsible for action? Should every household look after itself, or should people help their neighbours? Or should local government be involved, helping groups of neighbours to organise and to buy or make equipment? Perhaps the whole State has a responsibility to assist, since the main function of a State government is to ensure the safety and security of its citizens on a daily basis?

Australian governments have recently made a clear commitment to developing resilient communities where the community and all levels of government share responsibility for hazard management. The Teague Royal Commission also called for ‘shared responsibility’, that is ‘a situation in which the State, municipal councils, individuals, household members and the broader community all contribute to mitigating bushfire risk …’

Agreeing to share responsibility does not, however, define who is responsible for what.

State parliaments have enacted counter disaster and emergency services legislation to establish the emergency services and vest various officers and officials with powers to respond to a disaster, but they have not expressly stated what the objectives of the emergency response are. In New South Wales, the Minister for Police and Emergency Services is responsible for:

(a) ensuring that adequate measures are taken by government agencies to prevent, prepare for, respond to and assist recovery from emergencies, and

(b) co-ordinating the activities of government agencies in taking those measures, and

(c) approving Displan or any alterations to Displan.

10 Ibid 352.
11 State Emergency and Rescue Management Act 1989 (NSW) s 10.
The measures must be ‘adequate’ but adequate for what purpose? Further the Minister is charged with managing the government preparation and response to emergencies but that in no way identifies the extent of government responsibility in responding to emergencies.

Organized fire brigades were developed by insurance companies and local councils. Over time the various brigades were brought under the control of an organising authority or board but they remained largely independent brigades. In enacting legislation the governments did not necessarily see their role as protecting people from fire. Victoria’s first fire brigade legislation, the Fire Brigades Act 1890 (Vic) was an Act to improve the administration of fire brigades. This Act empowered the local municipalities that had an interest in providing fire protection to do so, if they wished. It did not require them to do so. There was clearly no expectation that local government, let alone State government, would necessarily set up brigades to provide protection for the community, let alone for private assets, or that emergency response was a central government activity.

Today emergency management is seen as a core or central government activity. In Victoria, statutory authorities, the Metropolitan Fire and Emergency Services Board and the Country Fire Authority manage fire brigades and the delivery of fire services, subject to the direction and control of the Minister. In New South Wales, the emergency services are centrally located as divisions of the Government service, rather than independent statutory authorities. Australian governments have moved from a laissez-faire approach to disaster response, to providing direct personal assistance.

Governments are now direct providers of emergency services to the community, but, as noted above, the end that they are to achieve is not clear. The most recent inquiry into Australian fires said:

There remains one question the answer to which eluded the Special Inquiry but it is an answer that requires further examination and that is: What is the measure of success of the outcome of a bushfire. Is the loss of no lives the only performance measure? If so, how many houses is an acceptable number to lose? Does one performance indicator have the potential to cloud the ‘Shared Responsibility’ of all to build resilience of our community?

What is missing is a clear policy statement about the objectives to be achieved in emergency management and why it is that governments see emergency response as a government policy issue. The Victorian Bushfires Royal Commission recognized the need for ‘a clear statement of objectives, expressed as measurable outcomes’ but did not recommend such a statement for all of government. Rather they recommended the need to specify objectives

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13 Ellis, above n 7.
14 Victoria, Parliament Debates, Legislative Assembly, 18 June 1890, 381 (Mr Deakin).
15 Ibid 377.
16 Metropolitan Fire Brigades Act 1958 (Vic) ss 6,7 and 8; Country Fire Authority Act 1958 (Vic) ss 6 and 6A.
17 Public Sector Employment and Management Act 2002 (NSW) s 4C and Schedule 1
18 Rutherford H Platt, Disasters and Democracy (Island Press, 1999), 20.
20 2009 Victorian Bushfires Royal Commission, above n 9, Recommendation 59.

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for various government departments. This is evidence of a lack of ‘mainstreaming’; even after the events of Black Saturday 2009 the Royal Commission was not looking at emergency management as a whole of government activity or asking government to specify what it’s whole of government objectives for fire management are.

**What is the duty of government?**

Governments go to great lengths to protect people from harm and to protect their private assets. In his book *Great Australian Bushfire Stories*, Ian Mannix tells the story of a fire crew valiantly saving a private house. As a story it tells of the attributes we value in our firefighters - selflessness, courage and community self-reliance, but viewed another way, those firefighters were exposed to a high risk of death or injury and the state went to a large expense in providing the fire fighting resources to protect a private asset.

In the United States, the objectives of the US Forest Service have been to protect forest assets but it has been noted that over 87% of their commitment is devoted to protecting private property, with the result that resources are diverted to protect private property whilst more valuable, natural resources burn. The Inspector General of the Department of Agriculture has argued that 'In order to reflect the fact that the Federal Government is not primarily responsible for structure protection… [Forest Service] managers need to delineate Federal protection responsibilities' that is clearly define what they are responsible for, and what they are not. The Australian fire services, both urban and rural are responsible for providing fire protection services including structural fire response but the limitation of that responsibility, and when the government should put protection of government and public assets ahead of private assets is not clearly ‘delineated’.

In land use planning regimes restrictions are made on developments to increase the properties ability to withstand hazards. It may be a condition of development consent that there is a prescribed asset protection zone (APZ) but what can, or should be done, after the development is completed, to ensure that the zone is maintained? Are governments under a duty (and by duty we refer to a legal duty) to protect people and to ensure they take steps to protect themselves?

Governments, like citizens are not under a duty to come to the aid of others and are not under a duty to protect people from the harms they expose themselves to. In *Graham Barclay Oysters v Ryan* Gleeson CJ said:

Ordinarily, the common law does not impose a duty of care on a person to protect another from the risk of harm unless that person has created the risk. And public authorities are in no different position. A public authority has no duty to take reasonable care to protect other persons merely

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21 The State with respect to land use planning provisions ((recommendation 39), the Department of Sustainability and Environment with respect to prescribed burning (recommendation 57) and fire management on public land (recommendation 59), and VicRoads with respect to road side fire risk assessment (recommendation 62).
24 Ibid 43.
because the legislature has invested it with a power whose exercise could prevent harm to those persons. Thus, in most cases, a public authority will not be in breach of a common law duty by failing to exercise a discretionary power that is vested in it for the benefit of the general public. 26

The fire and emergency services do not generally create the risk of fire and flood and, by analogy, are not under no legal duty to protect others from the harm that these events can cause.27

In Stuart v Kirkland-Veenstra28 the High Court found there was no duty on police to prevent the suicide of a man they earlier found in his car with a pipe leading from the exhaust into the passenger compartment. Gummow, Hayne and Heydon JJ identified that the plaintiff’s claim was one based on an alleged duty, owed by police, to ‘... prevent harm to the deceased at his own hand, not at the hand of another.’29 They said:

On its face, the proposed duty would mark a significant departure from an underlying value of the common law which gives primacy to personal autonomy …

Personal autonomy is a value that informs much of the common law. It is a value that is reflected in the law of negligence. The co-existence of a knowledge of a risk of harm and power to avert or minimise that harm does not, without more, give rise to a duty of care at common law.30

A duty of care will usually not be found when the duty would impose on personal autonomy31 but how governments manage their role may change the result in specific cases. Specific powers given to allow authorities to manage the specific risks may give rise to a duty of care.32 The more governments exercise, or attempt to exercise, control over hazards, the more responsibility governments take on, and the more people rely on government33 to manage the hazard then the more likely it is that governments will find themselves subject to a legal duty, and therefore liable to pay compensation, should an adverse hazard event take place.

The need for articulated policy

There is no clear statement of measurable, identifiable policy objectives that are to be met by emergency managers and governments generally. Rather public policy in this area appears to be developed from one Royal Commission or inquiry to the next. Inquiries such as the 2009 Victorian Bushfires Royal Commission34 or the 2011 West Australian Special Inquiry into the Perth Hills fires35 are not charged with setting policy, but in effect they do. All Australian fire agencies have taken some steps to implement the recommendations from

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26 Ibid [81] (McHugh J).
27 See also Capital and Counties v Hampshire County Council [1996] 1 WLR 1553.
29 Ibid [85] (Gummow, Hayne and Heydon JJ).
30 Ibid [87]-[88] (Gummow, Hayne and Heydon JJ).
34 2009 Victorian Bushfires Royal Commission, above n 9,
35 Keelty, above n 19.
the Victorian Bushfires inquiry even though that inquiry was looking at a particular set of circumstances in only one jurisdiction.

The 2009 Victorian Bushfires Royal Commission called for the preservation of life to be the ultimate priority, this was adopted by the West Australian authorities and implemented in their response to the 2011 Perth Hills fires. Mick Keelty, said, however, ‘the fact no lives were lost should not be used to claim that the response to this fire was an unmitigated success’.36 The policy objectives of encouraging people to prepare their homes and to develop resilient communities is lost if people are not allowed to ‘stay and defend’,37 and people were traumatised by the process of evacuation and dislocation.38 Emergency managers, having heard from, and implemented the recommendations of the Victorian Bushfires Royal Commission to the effect that saving life over property was the overriding priority, now find themselves criticised for doing that very thing in Perth.

Allowing government policy to develop by increment rather than by clearly articulated goals may also lead to the unintended result that governments become liable for the impact of hazard events even in circumstances where people could, and should, have taken steps to protect themselves or been left to face the consequences of their own choices.

Setting policy is an inherently political task39 and achieving the set policy objectives requires specific tools and practices. As Eburn and Jackman argued:

Whatever objectives are selected, different legal and policy tools will be required to achieve them. A clear, specific and measurable goal may be “no one will die in a bushfire” but that will lead to a very different policy response than if the goal is to ensure that “there will be no bushfires”. The latter is unachievable. The former might be achievable but the methods to achieve that may range from improving building design, communication, education and preparing people to live with fire. An alternative objective may be that “people can choose to live with the risk of fire but only if they informed of and understand that risk”. That, again, would require a different policy response to ensure that people are informed, rather than to address the risk of the outbreak of fire.40

Balancing the competing objectives and demands should be a matter for the elected government, not Royal Commissioners. Politicians need to determine and communicate how the balance has been struck and then ensure that government agencies are resourced to achieve the stated objectives. Emergency services can then expect to be judged on whether or not they have achieved the stated objectives.

From both a policy and legal perspective clearly articulated aims and objectives will help everyone, the emergency managers, the community and the next Royal Commissioner, know what it is that governments are seeking to achieve and what they can expect from the government and its emergency services. It would give a benchmark against which

36 Ibid 135.
37 Ibid 41-42.
38 Ibid 136-137.
40 Eburn and Jackman, above n 5, 75.
performance could be judged so that we can see whether the loss from an event shows how well the policy worked to mitigate or minimise losses, or whether governments failed to achieve their stated objectives. At the risk of being insensitive, it allows the community to ask whether the loss of 173 lives in Black Saturday represents policy success, as the death toll could have been much worse, or is it evidence of policy failure? Without knowing what governments and the community were trying to achieve, it is impossible to answer that question.

Conclusion
The policy objectives of government in emergency management appear to have grown by stealth rather than clearly articulated policy aims.\(^{41}\) The rationale for the change, from government as observer to emergency manager, has not been clearly addressed or articulated. Determining what is the role of government, particularly in a culture with competing values including respect for the environment, the free market and personal autonomy, will have significant impacts upon how governments and their agencies prepare for the next event and their legal responsibilities for responding to emergencies.

The way forward
The work on this research theme is in the early stage. Our project will put the role of government and the fire agencies within the context of Australia’s current legal and constitutional arrangements. We will ask:

Is there a clear policy statement that identifies the problem, the policy direction, implementation and monitoring process?\(^ {42}\)

Are policy objectives clearly articulated, measurable and commonly understood?

Who sets emergency response policy? The emergency services, the government, the media or the chair of the last inquiry?

What should be the measure of success?

What should be the measure of failure?

Would the Minister, the electorate or the popular press agree?

This is a much narrower focus than the work being undertaken by McLennan and Handmer but will, in due course, contribute to that work and to our understanding of what shared responsibility means now, and may mean in the future.

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\(^{41}\) Platt above n 18, 20.

\(^{42}\) Stephen Dovers, *Environment and Sustainability Policy* (Federation Press, 2005), 100.