



# Volunteers and litigation



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# Are volunteers getting sued?

- No

# Will they get sued?

- Probably not.

# Are they worried?

- 2003 - House of Representatives ‘A nation charred’ reports on ‘A fear of liability’ (p 136): “One of the great fears we are now facing as volunteers is the threat of litigation.” (p 139)
- 2007 Bushfire CRC report of new volunteers in the CFA and their fear of being sued:
  - 17% very concerned,
  - 41% somewhat concerned;
  - 42% not at all concerned.
- 2008 survey of RFS volunteers – fear of legal action a concern for 18% of respondents; 74% not at all concerned.

Judy Esmond, 2009, *Report on the Attraction, Support and Retention of Emergency Management Volunteers* (p 51):

“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”.

## 2010 Senate report

- Heading ‘liability’; but the report talks about ‘adverse publicity’, an ‘outcry’
- ‘If the burn gets over my fence and burns my neighbour’s grass, he’s going to sue me.’ But where’s the evidence that this happens?

# Suing the emergency services is hard

- Do they owe a duty of care?
- What is the extent of that duty?
- The answers to these questions are not clear – they are being considered in litigation currently before the ACT and Victorian Supreme Courts. The answers may be some time off.
- Suing the volunteers is harder...

## The State is the defendant

- The State will be liable (if anyone is) for the actions of the RFS, but the RFS can only act through it's staff and volunteers.
- The only remedy the court can give is money, so sue where the money is...



# Volunteers are protected

See for example:

- *Rural Fires Act 1997* (NSW) s 128
- *Emergency Management Act 1986* (Vic)
- *Civil Liability Act 2002* (NSW) s 61

# Will the State abandon its volunteers?

- Consider
  - *Gardner v NT* [2004] NTCA 14
  - *NSW v Fahy* [2007] HCA 20
  - *NSW v West* [2008] ACTCA 14

# Is anyone suing the emergency services?

- Yes, but probably not as much as you think.

## What we've done

- Reviewed available reported, and post 1995 unreported judgments dealing with liability for bushfire.
- Reviewed the compensation claims made against the NSW RFS over 20 years; 263 claims; 28 went to court.

# Litigation

- Available judgments from 1867. Only 87 relate to liability for causing or failing to extinguish a fire. An average of fires leading to litigation every 3 years.
- Is that a lot in 150 years?

## Who were the defendants

- 1867 – 1997: other land owners
- 1884 – 1979: Railway authorities
- 1977 – 2009: Electrical authorities
- 1995 – 2009: Fire and land management agencies.

## Personal liability?

- *Lobsey v Care* (1983) 1 MVR 1 (NSWCA);
- *S v M* (Unreported, Sutherland Local Court, 1 September 2006, Clugston LCM).
- But were they acting under the Act or in their own interests?

# Claims history of the RFS

- 263 claims 1989-2010.
- Doesn't include fire fighters' 'Workers Comp' or car accidents on public streets.
- Range from the very small to the large.
- 28 had court proceedings filed;
- 235 settled 'out of court'.
  - 65% were about fires;
  - 27% were about motor vehicle accidents
  - 8% were 'other'.



# Litigated cases

- Firefighter death/personal injury 8
- MVA 5
- Property damage – context not identified 1
- Property damage – backburn 3
- Property damage – hazard reduction burn 6
- Property damage – firefighting 5
- **Total 28**

# Claims settled

- Payments were made in 203 (77% of) cases.
- No payment in 60 (23% of) cases.

# Why?

- Why does the insurer make payments in 77% of cases when:
  - The law on when a fire brigade owes a duty is not clear; and
  - The Rural Fire Service is, in theory, protected by ss 28, 72 and 128 of the RFS Act?
  - What does it mean for volunteers?

# Why?

- It costs more to defend claims (particularly small claims) than to settle the matter.
- State agencies are bound by ‘model litigant’ rules which require them to ‘avoid litigation’.
- Fear of adverse publicity.
- Courts have a number of ‘dispute resolution’ processes.
- The overriding objective of litigation is to settle disputes, not enforce legal rights and duties.

## Reluctance to rely on s 128

- Clear statement on the files not to use s 128 against the interest of RFS volunteers (including those whose property damage was not related to their volunteering).

# So

- Post fire litigation is not new, it's been around since 1867.
- Litigation against fire agencies is a new phenomena.
- Routine fires are dealt with without frequent litigation but a constant stream of claims for compensation that are met for pragmatic reasons.

## Significant fire events ...

- Such as the 2009 Black Saturday fires, now trigger litigation almost before the fires are extinguished (*Matthews v SPI Electricity & Utility Services Corporation (No. 1)* [2011] VSC 167).

# Are volunteers exposed?

- There's no evidence of that.
- No evidence that 'If the burn gets over my fence and burns my neighbour's grass, he's going to sue me.'



## Perhaps we don't mean liability

- The Royal Commission and the Coroner - 1939 Streeton Commission – 6 months; 32 page report. Compare that to 2009! Coroner's inquests taking 2-3 years. (Litigation 10 years)
- Personal attribution – consider Wangarry (SA), Boorabin (WA); Black Saturday (Vic)
- Is that what is meant by liability?

## A case study

- A fire in starts in a national park and spreads to private property.
- A s 44 declaration is made.
- All fire fighting resources are heavily stretched.

# Was anyone sued?

- No
- Would the volunteers agree with my assessment?
  - I doubt it.
- What's the solution?
  - Can volunteers be protected from these costs but the RFS remain a creditable, responsive learning organisation?

# Coroners and Royal Commissions

- These do not equal litigation. They cannot determine any liability.
- They can ask tough questions. Counsel can ask for adverse findings (see 2009 Victorian Bushfires Royal Commission) and they can be made (see Coroner's Inquest into 2003 Canberra fires).

# Wangarry (SA) fires

Mr Anthony E Schapel, Deputy State Coroner, South Australia

“While recognising that without voluntary workers the CFS would cease to function ...it also has to be recognised that volunteerism is not the same thing as amateurism. Given the onerous statutory responsibilities that the CFS carries out, although carried out as it is by voluntary workers for the most part, it is difficult to support any conclusion other than that volunteer individuals who aspire to positions of seniority within the volunteer ranks, and who aspire to perform tasks of significant responsibility during the course of incidents, should be anything other than trained and competent and act as part of a team.” [13.6]

“... while there may be difficulties in terms of the accountability of volunteers, in as much 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.”[13.8]

## Different problems lead to different solutions

- Rural Fires Association (2010)  
“...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.”

- That may help if the issue is legal liability but not if the problem is accountability or the process.
- Solution depends on the policy objective



# Conclusion

- Litigation is less often than feared.
- Volunteers are not exposed to personal liability.
- But may be exposed to criticism by, or sheer inconvenience of being called before, the Coroner or Royal Commissioner or internal investigations – but these *must* take place.