



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

Legal liabilities of emergency workers and emergency-service organisations
in Australian Capital Territory

Bushfire Cooperative Research Centre

July 2007

“What does the ‘Prepare, Stay and Defend or Leave Early’ policy mean for me?” – Legal liabilities of emergency workers and emergency-service organisations in Australian Capital Territory

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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 Australian Capital Territory specifically⁴. 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)⁵. 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

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 Australian Capital Territory State Emergency Services (SES) was not covered in this paper as it is not expected that the SES would be dealing with the Policy.

⁵ 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.

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.**

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 allowed⁶. Historically, an order to evacuate could be lawfully refused on the basis of pecuniary interest.⁷ 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.⁸ In some states, however, the right to refuse an order to evacuate on the basis of pecuniary interest has been overridden.

In the Australian Capital Territory, 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

⁶ Nicholas Karanev, ‘Assessing the legal liabilities of emergencies’ (2001) Autumn, *Australian Journal of Emergency Management* 21.

⁷ *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.

⁸ *Ibid* 571.

their initial location.⁹ This is the definition as adopted by the Emergency Management Australia (EMA). It is noted that “evacuation” is not defined by AFAC.

The *Emergencies Act* 2004 (ACT) provides Chief Officers with broad powers often stating that the Chief Officer may ‘do anything the chief officer considers necessary to make premises safe at or immediately after a fire’¹⁰. Other more specific powers are outlined in section 34 of the *Emergencies Act*, including evacuating people ‘for the protection or preservation of life, property or the environment’¹¹.

The following is a summary of the evacuation powers of the Chief Officer of the Fire Brigade and the Rural Fire Service (“RFS”), members of the Fire Brigade and the RFS, police officers as well as the powers of the Territory Controller when a state of emergency has been declared:

Rural area

Within a rural area, the Chief Officer of the RFS, a member of the RFS and a police officer may direct a person to leave land or premises that is on fire. They may also remove anyone who is interfering or may interfere with the firefighting operations. Section 68(2)(b) and (c) states that,

(2) For the purpose of extinguishing or preventing the spread of the fire, the chief officer (rural fire service) may—

...

(b) direct a person to leave any land or premises on fire or near the fire; and

(c) remove to any place the chief officer considers appropriate anything that the chief officer considers is interfering with, or may interfere with, the fire control operation;

Powers can only be exercised by a person other than the Chief Officer without the Chief Officer’s direction or authority if it is not practicable for the direction or authority to be obtained or it is in accordance with the relevant authority guidelines¹². Further, it is an offence to refuse to comply with the order under section 189 of the *Emergencies Act* 2004 (ACT).

Built-up area

Similarly, within the built-up area of the ACT, the Chief Officer of the fire brigade, a member of the fire brigade and a police officer may similarly direct a person to leave land or premises that is on fire. They may also remove anyone who is interfering or may interfere with the firefighting operations. Section 67(2)(b) and (c) states that,

(2) For the purpose of extinguishing or preventing the spread of the fire, the chief officer (fire brigade) may—

...

(b) direct a person to leave any land or premises on fire or near the fire;

(c) remove to any place the chief officer considers appropriate anything that the chief officer considers is interfering with, or may interfere with, the fire control operation;

⁹ 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.

¹⁰ *Emergencies Act* 2004 (ACT) s69.

¹¹ *Emergencies Act* 2004 (ACT) s34(1)(l).

¹² *Emergencies Act* 2004 (ACT) s67(5).

Powers can only be exercised by a person other than the Chief Officer without the Chief Officer’s direction or authority if it is not practicable for the direction or authority to be obtained or it is in accordance with the relevant authority guidelines¹³. It is also an offence to refuse to comply with the order under section 189 of the *Emergencies Act 2004* (ACT).

State of emergency

When a state of emergency has been declared by the Chief Minister under section 156 of the *Emergencies Act*, the Territory Controller¹⁴ may direct the movements of persons and regulate and/or prohibit the movements of persons. Section 163 of the *Emergencies Act* states,

- (2) For the management of the declared state of emergency, the territory controller may—
- (a) direct the movement of people, animals or vehicles within, into or around the area to which the state of emergency applies (the ***emergency area***); and
 - (b) give directions regulating or prohibiting the movement of people, animals or vehicles within, into or around the emergency area;

A head of an ESO may also exercise these powers should they be authorised to do so by the Territory Controller¹⁵. The authorised head of an ESO may in turn then authorise its member(s) to exercise these powers¹⁶.

It is an offence to refuse to comply with the order to leave a fire area under s164 of the *Emergencies Act*. Section 168 of the *Emergencies Act* also empowers the Territory Controller may forcibly remove any person who is interfering with firefighting activities.

Summary

In all circumstances, whether a state of emergency has been declared or not, it appears that the statutory powers privilege emergency response operations over the pecuniary interests of the owners. Nevertheless, though it is an offence for a person not to follow directions to leave a fire-affected area, the legislation does not empower fire-fighters or emergency workers to actually use force to remove people from an area unless it can be shown that they are interfering with fire-fighting operations. The legislation only empowers fire-fighters and emergency workers to direct persons to leave area during fires and to direct, regulate and prohibit movements of persons during a state of emergency¹⁷.

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 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

¹³ *Emergencies Act 2004* (ACT) s68(7).

¹⁴ Territory Controllers are appointed by the Chief Minister under section 159 of the *Emergencies Act 2004* (ACT).

¹⁵ *Emergencies Act 2004* (ACT) s163(4).

¹⁶ *Emergencies Act 2004* (ACT) s163(5).

¹⁷ *Emergencies Act 2004* (ACT) s67(2)(b), 68(2)(b), s163(2)(a) and (b).

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.”¹⁸ 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 importance¹⁹.

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.

¹⁸ Kanarev, above n 4, 22.

¹⁹ 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"> - Chief Officer (fire brigade or rural fire service as applicable) - A member of fire brigade (and/or rural fire service) and police officer with or without direction or authority from Chief Officer (s67(5) and s68(7) <i>Emergencies Act</i>) - Include volunteer members (s45 and s53 <i>Emergencies Act</i>) 	<p>Direct a person to leave land or premises on fire</p>	<ul style="list-style-type: none"> - In a built-up area (s67 <i>Emergencies Act 2004</i>) or - In a rural area (s68 <i>Emergencies Act</i>) 	<p>It is an offence to refuse to comply with an order to leave fire area (s189 <i>Emergencies Act</i>).</p> <p>Statutory powers appear to privilege emergency response operations over the pecuniary interests of owners.</p>	<ul style="list-style-type: none"> - Please refer to s34 and s69 of the <i>Emergencies Act 2004 (ACT)</i> for broad powers of Chief Officers. - Powers can only be exercised by a person other than the Chief Officer, without the Chief Officer’s direction/authority if it is not practicable for this direction/authority to be obtained or it is in accordance with the relevant authority guidelines.
<ul style="list-style-type: none"> - Territory Controller as appointed by the Chief Minister (s159 <i>Emergencies Act</i>) - A head of an entity who has been authorised by the Territory Controller to act in that manner (s163(4) <i>Emergencies Act</i>) - A member of an ESO who has been authorised by the head of their organization to act in that manner (s163(5) <i>Emergencies Act</i>) 	<ul style="list-style-type: none"> - Direct the movement of persons - Regulate or prohibit the movement of persons <p>(s163 <i>Emergencies Act</i>)</p>	<p>A state of emergency has been declared by the Chief Minister (s156 <i>Emergencies Act</i>)</p>	<p>It is an offence to refuse to comply with an order to leave fire area (s164 <i>Emergencies Act</i>)</p>	<p>The territory controller may also use force to remove anyone who is interfering with firefighting activities under s168 of <i>Emergencies Act</i>.</p>

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”²⁰.

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

²⁰ 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 *New South Wales v Brown*²¹ 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 case²². In the past, courts have defined it as meaning ‘without any indirect or improper motive’²³. 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*²⁴, 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

²¹ [2003] NSWCA 21.

²² *Bankstown City Council v Alamo Holdings Pty Limited* [2005] HCA 46 at 59 (as per Gleeson CJ, Gummow, Hayne and Callinan JJ).

²³ *Board of Fire Commissioners v Argouin* (1961) 109 CLR 105 at 115.

²⁴ (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.²⁵

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 law²⁶.

Reinforcing vicarious liability

In the ACT, it appears that the relevant protection clause merely reinforces the notion of vicarious liability. However, it makes it clear that the liability attaches to the Territory as opposed to the ESO. The common law doctrine of vicarious liability provides that an ESO, as the employer, would be liable for acts done by the employee officer, if the member was acting within the scope of their employment or authority. To disprove vicarious liability, the employer must show that the conduct of the volunteer or employee was so far removed from what was authorised as to be beyond the control or influence of the employer.

Subsections 198 (2) and (3) of the *Emergencies Act* states (emphasis mine):

(2) An official is not personally liable for anything done or omitted to be done *honestly and without recklessness*—

- (a) in the exercise of a function under this Act; or
- (b) in the reasonable belief that the conduct was in the exercise of a function under this Act.

(3) Any liability that would, apart from this section, attach to an official attaches instead to the Territory.

An individual’s liability is, therefore, reduced from the test of “reasonableness” to one of “honesty and without recklessness”²⁷. Just like “good faith”, the term “honestly and without recklessness” has not yet been clearly interpreted by the courts. It is certain, however, that this term is of a lower standard than “reasonableness” though it is not definite if it would have the same meaning as “good faith” (which is the term used in other legislation).

Persons covered under this provision is defined by section 198(1) of the *Emergencies Act* which includes:

- the commissioner,
- an inspector or investigator,
- a member of an emergency service,

²⁵ Ibid 468.

²⁶ Michael Eburn, *Emergency Law* (2nd ed, 2005) 144-6.

²⁷ Other examples from other legislation include: *Country Fire Authority Act 1958* s92, *Emergency Management Act 2004* (SA) s 32 and *Australian Capital Territory State Emergency Service Act 2005* (Vic) s42, *Emergency Management Act 2006* (Tas) s58.

- a member of an interstate or overseas emergency service²⁸,
- a person engaged in an activity under a cooperative arrangement,
- a casual volunteer²⁹,
- a person giving assistance to a member of an emergency service as required by the chief officers³⁰,
- anyone else exercising a function under this Act.

The *Emergencies Act* also states that liability that would, but for the section, apply to the person is to lie against the Territory. This means that though the Territory will not be liable for acts done by the person that are done *honestly and without recklessness* (as if the employee is not found liable, then under the doctrine of vicarious liability, the Territory will also not be liable), the Territory would nevertheless be still liable for acts committed by the person which are *not reasonable*. This, of course, is in accordance with the doctrine of vicarious liability. It would appear that Parliament intends for these sections to merely clarify the applicability of the doctrine in the area of emergency service.

Table 2: Indemnities available to ESOs and their members

Party protected	Form of protection and conditions under which it will be provided	Comments
An Official (the Commissioner, member of emergency services, etc.) (see s198(1) <i>Emergencies Act</i> 2004 (ACT))	An official is not personally liable for any act or omission done honestly and without recklessness in the exercise of a function under <i>Emergencies Act</i> 2004 (ACT) or in reasonable belief that conduct was in exercise of Act (s198 <i>Emergencies Act</i> 2004 (ACT)).	The liability would lie against the Crown instead.

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.

²⁸ See *Emergencies Act* 2004 (ACT) s64.

²⁹ See *Emergencies Act* 2004 (ACT) s59D.

³⁰ See *Emergencies Act* 2004 (ACT) s34(1)(m).