



Australian
National
University

Fire Law

Dr Michael Eburn
ANU College of Law and
Fenner School of Environment and Society

“The basic thesis is simple enough

-- if you own the fuel you own the fire”.

Phil Cheney “*The Green Inferno*” (*The Politics of Bushfires and Conservation*)’ (The Stretton Group, Melbourne, 25th November, 2004).

See also:

- Tim Flannery, ‘Own the fuel, own the fire’, *Mail & Guardian*, 18 February 2009 (<http://mg.co.za/article/2009-02-18-own-the-fuel-fire>).
- Tim Marshall, ‘Working together to manage the risks’, *South Australian Country Hour* (ABC Rural), 18 October 2010 (<http://www.abc.net.au/site-archive/rural/sa/content/2010/10/s3041387.htm>).
- Roger Underwood, ‘Only Canberra can cool these fires’ *Quadrant Online*, 22 October 2013 (<http://quadrant.org.au/opinion/doomed-planet/2013/10/canberra-can-cool-fires/>).

“But in reality it's not that simple...” (Cheney, *ibid*).

Where does law come from?

- The Parliament
 - Acts or legislation – designed to deal with particular issues;
 - May be written with differing degrees of precision.
- The Courts (the ‘common law’)
 - Principles developed as issues arise in court proceedings;
 - Flexible, but often imprecise – eg an obligation to act ‘reasonably’.

The Australian Constitution

The Commonwealth Government is a government of limited power.

“s 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...”

Then follows a list of 39 subject areas.

Fire law – are any of these relevant?

- Trade and commerce – s 51(i)
- Taxation – s 51(ii)
- Post and telegraph – s 51(v)
- Defence – s 51(vi)
- Quarantine – s 51(ix)
- Insurance – s 51(xiv)
- Corporations – s 51(xx)
- Social Security – s 51(xxiii) and (xxiiiA)
- Immigration and ‘the influx of criminals’ – s 51 (xxvii) and (xxviii)
- External affairs – s 51(xxix)
- Relations with the nations of the Pacific – s 51(xxx)
- The acquisition of property on just terms – s 51(xxxi)
- ‘Matters incidental to the execution of any power vested by this Constitution...’ – s 51(xxxix)
- Territories Power – s 122

States – have unlimited legislative power

- **ACT**: ‘... the Assembly has power to make laws for the peace, order and good government of the Territory.’
(*Australian Capital Territory (Self-Government) Act 1988* (Cth) s 22).
- **New South Wales**: ‘The Legislature [has] ... power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.’
(*Constitution Act 1902* (NSW) s 5).
- **Victoria**: ‘The Parliament shall have power to make laws in and for Victoria in all cases whatsoever.’
(*Constitution Act 1975* (Vic) s 16).

Local Government – for example in Victoria

- “A municipal council must prepare and maintain a municipal emergency management plan.” (*Emergency Management Act 1986 (Vic)* s 20(1))
- Councils to have municipal fire management plan (*Country Fire Authority Act 1958 (Vic)* s 55A).
Prepared in accordance with EMMV Pt 6A.
- “Victoria Police has the responsibility under the *Emergency Management Act 1986* for emergency response coordination at municipal, regional and state level for most emergencies.” (EMMV p 3-13)

Batchelor v Smith (1879) 5 VLR 176

‘It is the duty of anyone who brings anything dangerous on his land to contain it, but there is no authority for the proposition that a person who did not bring the dangerous thing is under a duty to remove it’.

There was no duty on the defendant provided he remained passive. ‘Had he interfered in any way, he might possibly have rendered himself liable’.



Ignis Suus

A fire negligently started is not an accident – liability extends to the negligence of everyone other than a ‘stranger’. The Act does not protect from negligent failure to extinguish a fire even if it was accidentally started.

UK

- 1957 – *Balfour v Barty-King*
- 1963 – *Hargrave v Goldman*
- 1971 – *H&N Emanuel v Greater London Council*

The ignis suus rule does not apply in Australia because of Australian conditions. The rule was ‘absorbed’ into the rule in *Rylands v Fletcher*.

Australia

- 1919 – *Bugge v Brown*
- 1963 – *Hargrave v Goldman*

Strict liability for fires started except by ‘strangers’

No liability for fires that ‘accidentally begin’

1410 – *Beaulieu v Finglam*

1707 – 6 Anne c. 31 s 6
1774 – *Fires Prevention (Metropolis) Act*

From judgment of Brennan J in *Burnie Port Authority v General Jones Pty Ltd*



The Rule in *Rylands v Fletcher* [1868] LR 3 HL 330

A person who brings onto his land, and “collects and keeps there anything...” that would be dangerous if it escapes is liable if it does escape; without regard to the care taken; subject to an exception where it is part of the ‘natural use’ of the land.

The rule has no application where the land owner did not start the fire, or it having started, he did not ‘keep it there’ or do anything to increase the danger to his neighbour.

With all the exceptions and limitations, the rule no longer exists, it has been taken over by the law of negligence.

1868 – *Rylands v Fletcher*

1963 – *Hargrave v Goldman* (HCA)

1966 – *Goldman v Hargrave* (PC)

1992 – *Burnie Port Authority v General Jones*

Today...

- *Emergencies Act 2004* (ACT) ss 120 and 121.
- *Rural Fires Act 1997* (NSW) ss 63 and s 64.
- *Country Fire Authority Act 1958* (Vic) s 34.
- *Bushfires Act 1954* (WA) s 28.
- *Burnie Port Authority v General Jones* (1994) 179 CLR 520.

Emergencies Act 2004 (ACT) ss 120 and 121

120 Fire prevention—obligations of rural land owners or managers

- (1) The owner or manager of land in a rural area must take all reasonable steps—
 - (a) to prevent and inhibit the outbreak and spread of fire on the land; and
 - (b) to protect property from fire on the land or spreading from the land.

121 Notification of fire etc—obligations of owners or occupiers of rural land

- (1) If a person who is the owner or occupier of rural land becomes aware of an outbreak of uncontrolled fire on the land (or on unleased Commonwealth or territory land adjacent to the land), the person must—
 - (a) immediately take all reasonable steps to tell the commissioner, a member of the fire brigade or rural fire service, or a police officer, of the outbreak; and

Rural Fires Act 1997 (NSW) s 64

If a fire ... is burning on any land at any time during a bush fire danger period applicable to the land the occupier of the land must:

- (a) immediately on becoming aware of the fire and whether the occupier has lit or caused the fire to be lit or not, take all possible steps to extinguish the fire, and
- (b) if the occupier is unable without assistance to extinguish the fire and any practicable means of communication are available, inform or cause to be informed an appropriate officer of the existence and locality of the fire if it is practicable to do so without leaving the fire unattended.

Burnie Port Authority v General Jones (1994) 179 CLR 520

Liability for the spread of fire is to be determined in accordance with the normal principles of negligence.

- Was there a duty to take some action?
- Did the property owner do all that was reasonable to control the spread of fire?
- The issue of ‘duty’ will be determined by factors such as the cause of the fire; the ability to control it etc. Where a person ‘brings’ on a fire they will have a duty to ensure that appropriate care is taken that it does not spread.

What about the fire agencies?

- Is there a duty to control a fire?
- What if the fire is one they lit (eg hazard reduction)?
- Is there an obligation to respond to fire calls?
- Can the fire agency prioritise its response?
- These questions have been considered in recent cases arising from 2001 Sydney, and 2003 Canberra fires. Their answers are not clear as we discussed with today's reading.

Suing the government...

- In theory you can sue them as you can anyone else (see for example *Crown Proceedings Act 1988* (NSW) s 5);
- “But the position of a public authority is not the same as that of a citizen and the rule of equality is not regarded as wholly applicable...”

(*Stuart v Kirkland-Veenstra* [2009] HCA 15, [129] (Crennan and Kiefel JJ)).

A public authority...

‘...has public functions and it has statutory powers which the citizen does not. Some powers might be effective to avert or minimise a risk of harm to particular persons or their property, but the statute might not oblige their use. The relevant concern of the common law is whether a public authority might nevertheless be considered to be under a duty of care which obliges it to exercise its powers in a particular way.’

(*Stuart v Kirkland-Veenstra* [2009] HCA 15, [129] (Crennan and Kiefel JJ)).

Consider a land management agency...

- [National Parks And Wildlife Act 1974 \(NSW\) s 2A.](#)
- ‘The answer to Australia’s bushfire problem is thus abundantly clear... Get decision-making about land management into the hands of people with hard-won practical experience, people who understand the principle of preventative medicine, people who are not afraid to enforce bushfire regulations.’

Roger Underwood, ‘Flaming idiocy’, *Quadrant Online*, 31 January 2013 (<http://quadrant.org.au/opinion/doomed-planet/2013/01/flaming-idiocy/>).

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Post bushfire litigation 1867-2009

Land
owners

Railway
companies

Electricity
suppliers

Fire and land
management
agencies

1867

1884

1977

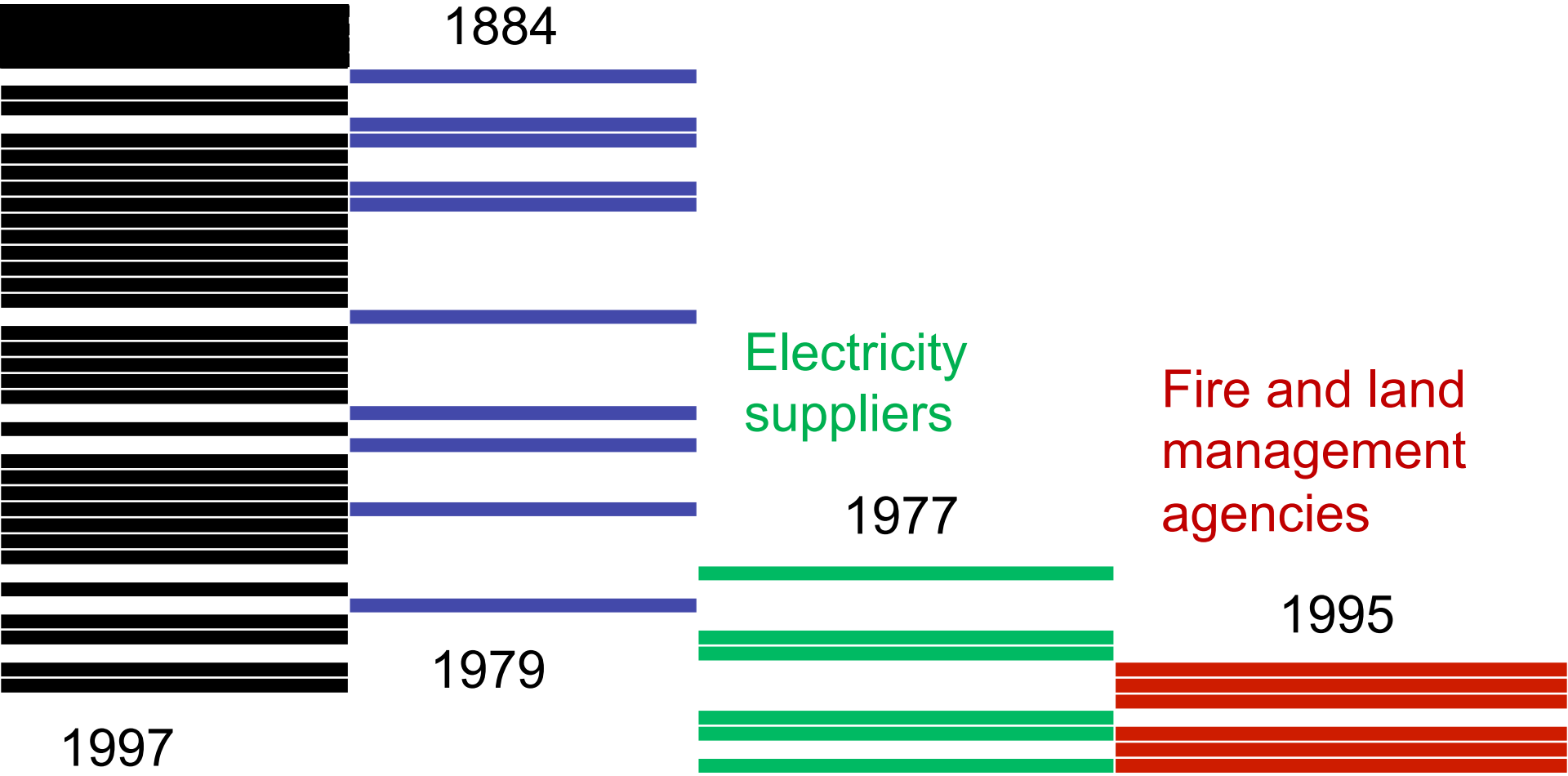
1979

1995

1997

2009

2009



Post event inquiries

- Coroners inquests and inquiries
 - Coroners investigate deaths and fires
- Royal Commissions
- Are these effective tools?
 - Do they reveal the lessons or get caught up in the ‘blame game’?
- *Matthews v SPI Electricity (No. 3)* [2011] VSC 399 (<http://www.austlii.edu.au/au/cases/vic/VSC/2011/399.htm>)

Summary and Review

- The law is complex and resolved by disputes, rather than a prescriptive text.
- In modern law the critical issue is about ‘duty’ – when is there a duty to protect the rights of others? And what is ‘reasonable in the circumstances’?
- If you’re involved in fire and fire management, you will be involved in the law!



Questions? Comments?