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**VOLUNTEERS IN THE 2000S  
- VOLUNTEER LIABILITY IN THE  
EMERGENCY SERVICES**

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I also briefly examine some of the relevant Australian legislation. The most elaborate provisions on the conditions of employment of emergency volunteer workers and their deployment are found in legislation in Northern Territory, Queensland and Tasmania. These include the appointment of various types of volunteers, their role in emergency operations, the protection of employment rights of volunteers in their usual places of work, and issues of their remuneration.

Most State Governments have provided accident compensation for recognised volunteer organisations. However it is not clear whether persons providing other forms of voluntary community service during a disaster relief effort are similarly covered for any length of time.<sup>2</sup>

Victoria and New South Wales provide the most comprehensive statutory framework for compensation, immunity and liability relating to emergency response organisations, emergency workers and volunteers. These states also provide quite comprehensive legislation encompassing issues of employment and deployment of emergency volunteers.

It is often said that it is not wise to educate our firefighting volunteers about their potential liability, for fear that we will scare them off. However, without further attention to this issue, our volunteers will continue to undergo the stresses of lengthy coronial inquests and will, over time, increasingly find themselves in the civil and possibly criminal courts.

Many legal disputes in this area concern the demarcation of roles and the exact responsibilities of personnel. A national approach is needed which achieves the delicate balance between the clear definition of roles and reporting procedures<sup>3</sup> and not imposing heavy administrative burdens on the volunteer workforce.

Further, a national approach is needed to ensure that volunteers are adequately protected. There are no logical policy reasons why the states could not enact uniform legislation in this regard. This International Year of the Volunteer may be the time to start to work towards this goal.

## 2. SOURCES OF LEGAL LIABILITY FOR THE EMERGENCY SERVICES

Generally, the main areas of civil liability for the emergency services, including volunteers, will be for negligence and for trespass at common law. In most states, emergency services personnel may also be subject to criminal prosecution, although this is far less common.

It should be remembered that in almost all civil cases the individual firefighter will not face personal financial loss as this will be covered by the firefighting agency. However, the stress that litigation can cause, and the time required of the volunteer to liaise with lawyers and attend court should not be underestimated.

The past few years have highlighted, following the tragedy at Linton in Victoria, that personnel may also be subject to intense scrutiny at Coronial Inquests which are

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<sup>2</sup> P Millican, *Volunteers: a vision*, AJEM, Winter 1997, p 11.

<sup>3</sup> P Millican, *Volunteers: a vision*, AJEM, Winter 1997, p 11.

neither civil or criminal in nature (although in some jurisdictions, individuals may still be committed for trial<sup>4</sup>).

As discussed below, specific immunities may exist for volunteers against many forms of liability. I have examined the principles of the major sources of liability below.

### 3. NEGLIGENCE

The most likely cause of action against either an Emergency Service Organisation (ESO) or a member of that service will be an action alleging negligence. A person who is harmed by the action (or inaction) of an ESO will argue that the service owed him or her a duty of care, that they failed in that care and that as a result the person suffered harm.

A duty of care may be owed to a potential user of that service in three circumstances, namely:

#### 3.1 Common law Duty of Care

Under the traditional law of negligence three questions will be asked. These are:

1. Was it foreseeable that an action of the defendant would expose the injured party to harm?
2. Is there a relationship of "proximity" between the plaintiff and the defendant?
3. Is the action or inaction of the defendant the cause of the plaintiff's damage or loss?

#### 3.2 Under a Statutory Obligation or duty

Where a statute provides that the ESO or a member of the ESO has an obligation to act, then that obligation is a positive statutory duty of care.

#### 3.3 Under a Statutory Power

The ESO or member may be found to owe a duty of care in circumstances where the service has a statutory power to act, and either:

1. The duty of care arises from the knowledge of the ESO, or through information that has come to the attention of the statutory authority<sup>5</sup>.
2. The duty of care arises from circumstances which are reasonably foreseeable to the statutory authority<sup>6</sup>.

### 4. TRESPASS TO LAND OR GOODS

Trespass to land is defined as an act which is:

<sup>4</sup> As occurred in New South Wales where the Deputy Coroner referred the papers to the Director of Public Prosecutions in relation to individuals involved in the Scotchmans Hill fire at Lithgow.

<sup>5</sup> *Pyrenees Shire Council v Day* (1998) 192 CLR 330

<sup>6</sup> *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431.



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committed . . . directly and intentionally . . . [by] entering or remaining upon, or causing some object to come into contact with, land in the possession of another without the consent of the person in possession or other legal justification or excuse.<sup>7</sup>

Fire services often extinguish fires on private land without the permission of the landowner. The reason they are generally not liable is, as stated in *Vaughan v Webb*<sup>8</sup>, that where the service is exercising a power specifically granted to it in legislation, there can be no liability for the exercise of that power. Problems arise in circumstances where the service goes outside what is authorised by the legislation, usually by entering into an area outside their jurisdiction or mutual aid area.

There is also a civil wrong of trespass to goods which is an intentional interference with a person's goods. This would warrant compensation. To put this in a rescue context, the act of cutting a roof off a person's car would normally warrant the payment of compensation.<sup>9</sup>

### 5. CRIMINAL PROSECUTION

Where legislation contains no immunity from criminal prosecution, ESO personnel may be subject to ordinary criminal prosecution under a state's criminal legislation for crimes such as homicide (including industrial manslaughter), causing serious injury, assault and theft, amongst others. Driving offences which involve emergency vehicles are also criminal in nature.

In order to prove most criminal offences, it must be shown that the person had the requisite state of mind to perform the act and has performed the criminal act. Some crimes require only that the person committing the crime was reckless in relation to the consequences of their actions.

Relevant to ESOs there is the common law defence of necessity. Necessity may arise when a person is faced with a choice to either comply with the law and see great harm done, or to minimise the harm but in so doing, they break the law. In order to succeed in this context, it must be shown that the accused did no more than was reasonably necessary in the circumstances and that harm done was not out of proportion to the harm to be avoided.<sup>10</sup>

### 6. INDUSTRIAL MANSLAUGHTER

Industrial Manslaughter (or Corporate Manslaughter) is governed by common law, although there is a move to codify this into state-based statute. This reform has taken place in the similar jurisdictions of UK, Ireland and Canada. Under common law, a body corporate can be guilty of manslaughter if the individual guilty of manslaughter can be "identified as the embodiment of the company itself".

Victoria is the first state to attempt to introduce specific legislation in relation to Industrial Manslaughter, the *Crimes (Industrial Manslaughter) Bill*. The proposed Victorian legislation not only creates the criminal offences of corporate manslaughter and negligently causing serious injury by a body corporate, but also imposes criminal liability on directors and senior managers of a body corporate ("officers").

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<sup>7</sup> Luntz, H and Hambly, D, *Torts (Cases and Commentary)*, Butterworths, Sydney 1996, p.680.

<sup>8</sup>

<sup>9</sup> M Eburn, *Emergency Law*, The Federation Press, 1999, Leichardt, NSW, Chapter 10: Liability of Emergency Services.

<sup>10</sup> M Eburn, *Emergency Law*, The Federation Press, 1999, Leichardt, NSW, Chapter 10: Liability of Emergency Services.



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Under the current draft Bill an officer may be "a person in accordance with whose directions or instructions the directors of the body corporate are accustomed to act", and "a person concerned in the management . . . of a relevant activity of the body corporate". Therefore volunteers who hold senior positions or who undertake roles with significant responsibilities at emergencies may also come under the ambit of the Bill. The penalties for officers include imprisonment for up to 5 years or a fine of \$1.8 million.

### 7. OCCUPATIONAL HEALTH AND SAFETY (OH&S)

There are no substantial variations in OH&S legislation between the various jurisdictions. Each of the principal OH&S statutes impose certain duties and obligations on employers, manufacturers, suppliers and managers in relation to places of work, to provide a safe workplace to either a reasonable standard or as far as practicable. The legislation in each jurisdiction provides a general framework for ensuring "normal" workplace health and safety. However, there are no provisions in any of the statutes that recognise emergency or disaster workplaces.

The "duty of care" placed on employers in almost all states is a duty to ensure that health, safety and welfare, not just of employees / workers, but of all persons in the workplace or undertaking<sup>11</sup>. This indicates that employers have a duty to ensure the health, safety and welfare of interstate workers, volunteers and other persons who are at their workplaces<sup>12</sup>.

The consequences of injury and disability in respect of employees / workers and others may differ, but this is not covered by any principal occupational health and safety legislation throughout the states.

The various acts may, depending on their terms, impose liability on volunteers, either for breaches of the Act or in determining the relevant duty of care owed in negligence.

### 8. STATUTORY IMMUNITY FROM LIABILITY AND PROSECUTION

There is no general rule for liability of volunteers in the ESOs, either within a particular state or on a national basis. Legislation within each state differs in the provision of immunity for its volunteers in circumstances which would otherwise invoke legal liability. It is therefore necessary to look at the various enactments from each State.

#### 8.1 Victoria

There are three relevant Acts.

The *Emergency Management Act* (1986) in section 37 (Immunity) provides that:

A volunteer emergency worker is not personally liable in respect of any loss or injury sustained by any other person as a result of the engagement of the volunteer emergency worker in emergency activity

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<sup>11</sup> Occupational Health & Safety Act 1986 (Vic) s.22, Occupational Health & Safety Act 1983 (NSW) s.16, Occupational Health & Safety Act 1989 (ACT) s.28, Occupational Health & Safety Act 1984 (WA) s.22, Workplace Health & Safety Act 1995 (Tax) s.9(3), Workplace Health & Safety Act 1995 (Qld) s.30(1), Work Health Act 1986 (NT) s.29.

<sup>12</sup> It is very possible that in most jurisdictions a fireground would be considered a workplace or undertaking for the purposes of the legislation. Whilst this point has not been covered directly by the courts, the case of *Whittaker v Delmina* [1998] VSC 175 held that the work "undertaking" refers to the acts or omissions occurred on a temporary or permanent site.



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unless the loss or injury is caused by the negligence or wilful default of that worker.<sup>13</sup>

The *Country Fire Authority Act* (1958) in section 92A (Immunity of volunteer auxiliary workers) provides that:

A volunteer auxiliary worker shall not be liable in respect of any loss, damage or injury sustained by any person as the result of the worker engaging in the performance of an authorised activity, unless the loss, damage or injury was caused by the negligence or wilful default of the worker.<sup>14</sup>

However, section 18A specifically excludes volunteer officers or members from claiming immunity with respect to any action, liability, claim or demand. That section states that:

An officer, member or employee of the Authority (not being a volunteer officer or member) is not subject to any action, liability, claim or demand for any matter or thing done or contract entered into by the Authority if the matter or thing is done or contract is entered into in good faith for the purposes of carrying out a power or duty of the Authority under this Act or the regulations or any other Act or regulations.<sup>15</sup>

### 8.2 New South Wales

The *Rural Fires Act* (1997) in section 128 (Protection from liability) provides that:

A matter or thing done or omitted to be done by a protected person or body does not, if the matter or thing was done in good faith for the purpose of executing any provision (other than section 33) of this or any other Act, subject such person personally, or the Crown, to any action, liability, claim or demand.

. . . protected body or person means . . . any member of the Service.<sup>16</sup>

The *Fire Brigades Act* (1989) in section 78 (Protection from liability) reads:

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<sup>13</sup> "volunteer emergency worker" means a volunteer worker who engages in emergency activity at the request (whether directly or indirectly) or with the express or implied consent of the chief executive (however designated), or of a person acting with the authority of the chief executive, of an agency to which DISPLAN or the state emergency recovery plan applies.

<sup>14</sup> Section 3 defines "volunteer auxiliary worker" as a person appointed under section 17A. Section 17A provides that the secretary of a brigade (other than an industry brigade) or the group secretary of a group of brigades may from time to time appoint any person as a volunteer auxiliary worker with respect to that brigade or group.

<sup>15</sup> Section 3 defines "volunteer officer or member" of a brigade as an officer or member who received no remuneration for his services in relation to the brigade but does not include an officer or member of an industry brigade.

<sup>16</sup> Section 8(2) provides that the NSW Rural Fire Service comprises, among others, volunteer rural fire fighters. Section 8(3) defines "volunteer rural fire fighters" as (a) officers and other members of rural fire fighting brigades, and (b) any person other than a member of a rural fire brigade who, without remuneration or reward, voluntarily and without obligation engages in fighting (or in activities associated with fighting) a fire with the consent of or under the authority and supervision of an officer of a rural fire brigade.

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A matter or thing done by the Minister, the Commissioner, any member of staff of the Department, any member of a fire brigade or any person acting under the authority of the Commissioner does not, if the matter or thing was done in good faith for the purposes of executing this or any other Act, subject such a person personally, or the Crown, to any action, liability, claim or demand.

### 8.3 Queensland

The *Fire and Rescue Authority Act* (1990) in section 129 (Protection for acts done pursuant to Act) provides that:

- (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.  
 . . . .
- (4) If a person against whom proceedings are taken in any court for an act or omission alleges that the act was done or omission made for the purposes of this Act, the court may, on application, order a stay of proceedings if satisfied--
  - (a) that there is no reasonable ground for alleging either negligence or want of good faith; or
  - (b) that the proceedings are frivolous or vexatious.

### 8.4 South Australia

The *South Australian Metropolitan Fire Service Act* 1936 in section 79 (Immunity of officers, firefighters and others from liability) provides that:

No liability shall attach to an officer, firefighter or other person for an act or omission by him in good faith . . . in the exercise, or purported exercise, of his powers or functions or in the discharge, or purported discharge, of his duties pursuant to this Act; or in carrying out the orders of the commanding officer at the scene of a fire or other emergency.<sup>17</sup>

The *Country Fires Act* 1989 in section 64 (Immunity of officers, etc.) provides that:

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<sup>17</sup> The South Australian Metropolitan Fire Service contains volunteer fire brigades defined in section 5 as "any fire brigade supported by voluntary contributions..."



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A person incurs no civil or criminal liability for an honest act or omission in the exercise of performance, or purported exercise of performance, of a power or function under this Act.<sup>18</sup>

### 8.5 Western Australia

The *Fire Brigades Act* 1942 in section 64 (Protection from liability) provides that:

An action in tort does not lie against a person for anything that either that person or any other person has, in good faith, done in the performance or purported performance of a function or duty or the exercise or purported exercise of a power under this Act.<sup>19</sup>

### 8.6 Tasmania

The *Fire Service Act* 1979 in section 121 (Liability of Commission) provides that:

Where any person dies or sustains injury or damage and the death, injury or damage is wholly or partly attributable to [the Commission], the Commission shall. . . be liable in tort in respect of the death, injury or damage, but no such brigade, officer, fire-fighter, employee or agent shall be so liable unless it is proved by or on behalf of the plaintiff. . . that in failing to perform or properly perform a function. . . , improperly exercise a power. . . , or contravene a provision. . . (prohibiting an act), acted, or as the case may be, failed to act, in bad faith.<sup>20</sup>

### 8.7 Australian Capital Territory

The *Emergency Management Act* 1999 in section 78 (Exclusion of Liability) provides that:

. . . a person is not liable to any action, suit or proceeding in relation to any act done or omitted to be done in good faith in the exercise or purported exercise of any power conferred by or under this Act.<sup>21</sup>

The *Bushfire Act* 1936 in section 5P (Indemnity for firefighters) provides that:

The Territory shall indemnify a person against liability for damage or personal injury caused either directly or indirectly by . . . the exercise of purported exercise, in good faith, by that person of a power

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<sup>18</sup> Although not specifically prescribed by the Act, the Country Fire Service comprises of 17,000 volunteer members, and reference to "a person" undoubtedly also refers to volunteer members.

<sup>19</sup> Reference to a person includes reference to volunteer fire-fighters. Section 4 defines "volunteer fire brigade" as any association of persons authorised by the Board and formed for the purpose of the prevention and extinguishing of fires and the protection of property and life from fire, if the carrying out of the purpose of such association is not the sole or principal calling or means of livelihood of such persons or of a majority of them.

<sup>20</sup> Section 26(2) provides that, among other things, a brigade may be established as a (a) permanent brigade in which the Commission may appoint such volunteers as fire officers and fire-fighters of the brigade, (b) composite brigade comprising permanent and volunteer fire-fighters, or (c) a volunteer brigade.

<sup>21</sup> Reference to a person includes reference to volunteer fire-fighters. Sections 49 and 50 refer to volunteer members / casual volunteers. The section 3 definition of "casual volunteer" does not include a member of a Territory service, or a member of a support unit or specialised person operating under an arrangement.



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conferred by or under this Act; or the performance or purported performance, in good faith, by that person of a duty imposed by or under this Act.<sup>22</sup>

### 8.8 Northern Territory

The *Fire and Emergency Act* (1996) in section 47 (Protection of Members) reads:

An action or proceeding shall not be brought against a member to recover damages in respect of damage to property or injury to a person arising out of anything done or omitted to be done by the member in good faith in the exercise of a power of the performance of a function under this Act or the Regulations or done or omitted by the member in good faith in the purported exercise of a power or the performance of a function under this Act or the Regulations.

## 9. CRIMINAL LIABILITY VS CIVIL LIABILITY

The terminology used in the various Acts provides for immunity against proceedings brought against the volunteer. Specifically, immunity is provided against:

- any injury or loss (Victoria)
- any loss, damage or injury (Victoria)
- any action, liability, claim or demand (New South Wales)
- any liability for using force which is reasonable in the circumstances (Queensland)
- liability for a matter or thing done or omitted to be done (Queensland)
- any liability (South Australia)
- any civil or criminal liability (South Australia)
- any action in tort (Western Australia)
- death, injury or damage (Tasmania)
- any action, suit or proceeding (ACT)
- liability for damage or personal injury (ACT)
- liability for action or proceedings to recover damage in respect of property damage or injury (NT).

In most instances, liability is solely with respect to civil proceedings e.g. *Fire Brigades Act* 1992 (WA). Simply put, civil liability refers to circumstances in which the person has a legal obligation to pay money to another person as compensation for loss or damage which has been suffered by that other person. The most common way in which liability can arise is through negligence.

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<sup>22</sup> Reference to a person includes emergency volunteers appointed under subsection 5M(3) of the Act.

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While some Acts clearly provide immunity against civil and criminal proceedings e.g. *Country Fires Act* (SA), others are more ambiguous (e.g. *death, injury or damage* may apply to both civil and criminal liabilities). It is necessary to consult each Act to ascertain the extent to which immunity is provided. While the legislature has obviously intended narrow down its application to specific "liabilities", there remains considerable uncertainty.

### 9.1 What does *liability* mean?

The meaning of the word "liability" has been judicially considered. It can apply to both "criminal responsibility and civil responsibility"<sup>23</sup>. However, the meaning depends on the statutory context in which it is used. Dean J in *Fowler v Taylor*<sup>24</sup> held that the word "liability" related solely to civil proceedings. His Honour said (at 595),

*The word "liable" is... frequently [used]... as meaning criminal responsibility. . . But I do not think the protection afforded by [the relevant Act in the case] extends to criminal responsibility. The word "liability" is found in association with the words "action, claim or demand", all of which relate to civil liability. This colours the sense in which the word "liability" is used in the section. . . I therefore think s392 affords no answer to a charge of assault even when committed bona fide in the execution of the Act" (emphasis added)*

Dean J also noted that *"I think if the section had been intended to give protection from criminal responsibility, it would have been clearly so stated."*

Therefore, the extent to which each immunity provision protects a volunteer must be read in the context of what the legislature intended. To do this, neighbouring words, the wording of the section, other provisions within the Act, and the purpose of the enactment should all be consulted. Generally if there is any doubt as to whether the immunity provision applies to criminal matters, the provision will not apply.

### 9.2 The scope of the Act

In order for the volunteers to obtain immunity from liability, they must have been acting within the confines of their statutory functions, or a power conferred by the statute.

The *Rural Fires Act* (NSW) will be used as an illustration:<sup>25</sup>

The NSW Parliament has granted the officers of rural fire brigades necessary and significant powers under the *Rural Fires Act* to control or suppress fires and to protect the community from fires and other threats. They include, among other things, the authority to:

- enter private property;
- close streets and other public places;
- carry out evacuations; and

<sup>23</sup> *Fowler v Taylor* [1957] VR 593, *Byrne v Garrison* [1965] VR 523.

<sup>24</sup> *Ibid.*

<sup>25</sup> Extracts from Brochure issued by the Minister for Emergency Services: *Legal Protection for Volunteer Rural Firefighters*



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- pull down unsafe structures and remove trees and other vegetation.

When exercising these powers, volunteer rural firefighters are protected from liability by section 128 of the *Rural Fires Act* (see above).

Where a person who has suffered loss or damage takes legal proceedings against a volunteer firefighter, and a court decides that the conduct in question falls within the scope of section 128, it will hold that the person who suffered the loss is prevented from recovering for that loss from the volunteer. If it was not for section 128, the court would have no basis to prevent the person from recovering the loss.

If a RFS member acted in good faith, then section 128 would cover loss or damage occurring as a result of:

- Undertaking back-burning operations
- Evacuating members of the public from residential premises
- Removing vegetation in the course of firefighting
- Use of reasonable force to enter premises

In some situations, section 128 may not apply to protect volunteers from liability even if the relevant damage or loss has resulted from firefighting activities.

The way in which RFS members are protected in practice is through Crown representation. In order to be eligible for Crown representation, a member must have shown that their involvement relates to NSW RFS duties, and that they have a substantial and direct interest in the proceedings. Where there has been full disclosure and an application for Crown representation has been approved, the member is entitled to be indemnified against legal cost and any verdict (in civil proceedings) awarded against that member.

Examples where this may be the situation include civil liability arising in the course of:

- Driving to or from a fire in the Rural Fire Service vehicle;
- Attending premises to get food or make purchases of some kind;
- Undertaking maintenance work on firefighting equipment.

Certain categories of conduct will not be covered by any protection or indemnity, and are entirely the responsibility of the member involved. For example, criminal conduct, or serious and wilful misconduct in the course of undertaking duties are matters which may result in officers being personally liable for criminal and / or civil penalties.

Examples of matters where no protection or indemnity would be available:

- Intentional and malicious destruction of property
- Intentionally inflicting harm or injury to a person





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It is difficult to briefly summarise the law in this area, however generally the following principles have been applied:

1. Where there has been an honest attempt to fulfil a statutory duty or function, a subjective test is likely to apply.
2. A subjective test would apply when firefighters are performing tasks relevant to public duty.
3. Any immunity will be strictly limited to activities conducted under the powers and duties given by legislation to firefighters.
4. If the firefighters chose not to avail themselves of relevant and freely available information before making decisions, or are grossly negligent, then an objective test would probably apply.

In short, there are still unresolved issues about when an immunity will apply, even given their unambiguous statutory intent. Further, the application of immunity provisions to volunteers has not yet been tested in the courts.

### 10. CORONER'S INQUESTS

All Australian Coroners have the power to investigate and hold inquests into deaths. Further, all states, bar the Northern Territory and Western Australia, allow for the Coroner to hold inquests into fire<sup>26</sup>, even where no death has occurred. The extent to which the activities of firefighting personnel have been the subject of investigation in these jurisdictions has increased over the last couple of decades with more attention being paid to the activities of fire agencies and fire personnel. The courts will increasingly have to examine the extent of the Coroner's fire jurisdiction, and what that fire jurisdiction involves. It has not been determined whether the Coroner's power is to investigate the circumstances of a fire generally, or whether a Coroner can look specifically at all aspects of the fire suppression<sup>27</sup>.

A result of this increasing use of the Coroner's jurisdiction to investigate fires has been an increased burden on volunteer firefighters who are required to attend court as witnesses. At the recent inquest into the Linton fires in Victoria, some 67 Country Fire Authority personnel, mostly volunteers, gave evidence with further 100 or so additional statements tendered from CFA volunteers. A number of the more significant volunteer witnesses were required to give evidence for two or more days, and were visibly shaken by the experience of giving evidence.

The role of firefighters at inquests has traditionally been to assist the Coroner in finding out how a fire started, why people died and in making recommendations for the future. This role has changed over time such that firefighting personnel are increasingly required to justify their actions against real, or possible criticisms.

Further, in a number of states the Coroner has the power, and often the obligation, to report to either the Director of Public Prosecutions or the Attorney General if he or she believes an indictable offence has been committed<sup>28</sup>. This means that coroners have the power to refer matters to the DPP if they believe there has been a criminal breach

<sup>26</sup> *Coroner's Act* 1985 (Vic) s.31, *Coroner's Act* 1997 (ACT) s.18, *Coroner's Act* 1980 (NSW) s.15, *Coroner's Act* 1958 (Qld) s.8, *Coroner's Act* 1975 (SA) s.12, *Coroner's Act* 1995 (Tas) s.40.

<sup>27</sup> *Queensland Fire and Rescue Authority v Hall Coroner @ Gatton & Anor* [1998] 2 Qd R 162.

<sup>28</sup> Section 58 *Coroner's Act* 1997 (ACT), section 19 *Coroner's Act* 1980 (NSW), Section 35(3) *Coroner's Act* 1997 (NT), section 47(4) *Coroner's Act* 1995 (Tas), section 27(5) *Coroner's Act* 1996 (WA), section 21 and 38 *Coroner's Act* 1985 (Vic).

of any legislation. In Queensland, the coroner's power goes further under section 41 of the Coroner's Act 1958. If the coroner believes that there is sufficient evidence he or she may commit persons for trial on particular crimes.

This dual role of the Coroner at inquests means that volunteer personnel should be advised of the Coroner's powers. Whilst it may seem unlikely to any agency that volunteer firefighters could be criminally liable, it is important that they understand the potential for action against them if they are required as a witness.

## 11. COMPENSATION FOR VOLUNTEERS

Compensation for volunteers is provided for in a number of contexts. Examples are compensation for personal injury or damage to personal property as provided by statute. This is illustrated by the *Emergency Management Act 1986* (Vic) in section 27 (When is compensation payable) which provides:

Compensation is payable if a **volunteer emergency worker** suffers personal injury (including death) or loss of or damage to property belonging to the worker or in the worker's possession or control while engaged in emergency activity.

Compensation for loss of or damage to personal property of volunteers is not provided for in some jurisdictions. Some jurisdictions provide for compensation through workers' compensation legislation.<sup>29</sup> It is important to understand the coverage by individual insurance policies in this respect. Some states provide that damage to property occasioned by emergency operations should be covered by the insurance policy in respect of that property notwithstanding anything contrary in that insurance policy.<sup>30</sup>

Except for South Australia and Northern Territory, all other jurisdictions recognise common law claims for damages against employers. Legislation in the ACT, New South Wales, Victoria and Queensland restrict access to common law damages to "workers" only. "Volunteers" in all jurisdictions, however, continue to enjoy unfettered access to common law damages.

There is also special legislation which exists to ensure that the families of deceased volunteer firefighters receive compensation if they were dependent on the firefighter.

## 12. LEGAL REPRESENTATION

It is important to appreciate that no legal immunity will ever prevent emergency volunteers from being asked to attend Court to give evidence at a coronial inquiry or other legal hearing. In the event that a volunteer is called to Court, the ESO may choose to provide them with adequate legal representation.

Likewise, if a volunteer, acting in good faith, is involved in an incident not covered by the statutory immunity, the ESO may choose to provide them with legal representation at any subsequent legal proceeding.

## 13. MANAGING FOR THE FUTURE

Liability issues and the cloud of uncertainty surrounding personal liability for actions taken by unpaid workers must be eliminated. Methods to recruit, train, mobilise and

<sup>29</sup> Those states are New South Wales, Victoria and Queensland.

<sup>30</sup> Found in legislation of New South Wales, Victoria, South Australia, Western Australia, and Tasmania.



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reward volunteers are not well known in some jurisdictions and these must be documented and disseminated.<sup>31</sup>

It is impossible for an organisation to anticipate every legal risk it may face as a result of the work of their volunteers, or for volunteers to anticipate those risks themselves. What is desirable, however is that an assessment of the risks be made, and the most serious risks be conveyed to the volunteers or minimised by some other means.<sup>32</sup>

Proper understanding of the legal consequences for volunteers is part of effective management within the emergency service. Those in management roles should consider:

- conducting an audit of the legal risks of the activities using volunteers;
- adopting strategies to manage those risks by understanding governing law, providing volunteers with clear job descriptions, adequate supervision and other means;
- clearly conveying to volunteers the potential for their own personal legal liability, and the activities in which immunity from liability is granted.

Further ESOs should consider whether the current legal arrangements are adequate. In particular, they should consider the following questions:

- Should volunteers receive immunity for some forms of criminal liability?
- Should any proposed Industrial Manslaughter legislation exclude liability from volunteers?
- Does the current legislation provide sufficient protection and how does the uncertainty in the law affect their personnel?

As indicated above it may be the time for a national approach to examine these questions. AFAC members would do well by their volunteer interests if they resolved to consider this matter further.

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<sup>31</sup> P Millican, *Volunteers: a vision*, AJEM, Winter 1997, pp11-13

<sup>32</sup> S Reynolds, *Volunteers and their Legal Liability in Australia*, Australian Journal of Volunteering, August 1999 at p 43.