

Extreme weather, local governments and liability

*Cities Power Partnership
Climate Change, Bushfires and Local Government
Roundtable,
Katoomba, 19 Feb 2019*

Dr Michael Eburn
ANU College of Law
Australian National University
CANBERRA

What can we talk about in 15 minutes?

- Liability for contributing to climate change and increasing the level of fire risk.
- Judicial review of decision making.
- Liability in negligence for allowing development in fire (or other hazard) prone areas.
- Liability in negligence for failing to provide risk information.

What can we talk about in 15 minutes?

- ~~Liability for contributing to climate change and increasing the level of fire risk.~~
- Judicial review of decision making.
- Liability in negligence for allowing development in fire (or other hazard) prone areas.
- Liability in negligence for failing to provide risk information.

What can we talk about in 15 minutes?

- ~~Liability for contributing to climate change and increasing the level of fire risk.~~
- ~~Judicial review of decision making.~~
- Liability in negligence for allowing development in fire (or other hazard) prone areas.
- Liability in negligence for failing to provide risk information.

Liability in negligence for allowing development in fire (or other hazard) prone areas.

- Landowners are not passive. They *want* to build on their land.
- There is a duty not to *cause* harm;
There is (generally) no duty to *protect* from harm.

To whom is a duty of care owed?

- Consider *Makawe Pty Limited v Randwick City Council* [2009] NSWCA 412.
- 1996 - Council approved a building even though it was known that the water table was at the level of basement floor.
- 1997 - Makawe Pty Ltd buys the building and (in 1998) discovers it is subject to flooding, sues the Council.

Hodgson JA at [43]:

“If the approving authority actually knows something seriously detrimental to the subdivision or the building, and is aware that it is likely that developers and/or purchasers do not know this, the courts may well find a duty owed to developers and purchasers to exercise reasonable care in relation to that detrimental feature”.

Hodgson JA at [43]:

“If the approving authority **actually knows something seriously detrimental to the subdivision or the building**, and is aware that it is likely that developers and/or purchasers do not know this, the courts may well find a duty owed to developers and purchasers to exercise reasonable care in relation to that detrimental feature”.

Hodgson JA at [43]:

“If the approving authority actually knows something seriously detrimental to the subdivision or the building, **and is aware that it is likely that developers and/or purchasers do not know this**, the courts may well find a duty owed to developers and purchasers to exercise reasonable care in relation to that detrimental feature”.

Hodgson JA at [43]:

“If the approving authority actually knows something seriously detrimental to the subdivision or the building, and is aware that it is likely that developers and/or purchasers do not know this, **the courts may well find a duty owed to developers and purchasers to exercise reasonable care in relation to that detrimental feature**”.

Fire v flood

- There may be a defined risk that sets the benchmark:
 - The 1:100 year flood
 - No such risk measure for bushfire.

Risk of house loss

“the annual chance of a random home being threatened by a bushfire [is in] ... the order of 1 in 3000, a factor of three lower than the ignition probability of a structural house fire. The probability of destruction is lower still at around 1 in 5000.

Australian bushfire losses: Past, present and future. https://www.researchgate.net/publication/228643484_Australian_bushfire_losses_Past_present_and_future [accessed Jan 24 2019].

What is too great a risk and who decides?

- Governments have to balance risk against other competing benefits.
 - People need to live somewhere.
 - No-where is risk free.
 - Respect for private property rights and the right of people to chose – the ‘dignity of risk’.
- Resilient communities understand and accept risk, they don’t get sheltered from it

Where a duty may arise

- Giving information.
- Council's have been liable for not acting on information that they knew but the developer did not, for issuing misleading information and for failing to look for information.

Eburn and Handmer

- ‘... there are no cases where anyone has successfully sued a council for releasing up to date, accurate hazard information’.
(‘Legal issues and information on natural hazards’ (2012) 17 *LGLJ* 19, 26).

Civil Liability legislation limits liability

- Allocation of resources cannot be questioned.
- Test of 'good faith' – '
 - ... calls for more than honest ineptitude. There must be a real attempt by the authority to answer the request for information at least by recourse to the materials available to the authority.

Mid Density Developments Pty Ltd v Rockdale Municipal Council
(1993) 44 FCR 290 at 300 (Gummow, Hill and Drummond JJ).

Conclusion

- Liability for allowing developments will be hard and probably overstated.
- Liability does arise where Councils fail to give information about risk.
- Risk mapping and public information is the key. If people still want to live in bushfire prone land, that's their lookout.

Questions or comments?

Thank you for your attention.

Michael Eburn

Associate Professor

ANU College of Law

P: 0409 727 054

E: michael.eburn@anu.edu.au

Blog: <https://emergencylaw.wordpress.com/>