

## You own the fuel, but who owns the fire?

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**Abstract.** In this paper, we argue that the statement ‘Whoever owns the fuel owns the fire’ implies a duty on landowners to manage fuel on their land to reduce the likelihood of bushfires, however started, from spreading to neighbouring properties. However, the notion ‘Whoever owns the fuel owns the fire’ has not been analysed from a legal perspective. This paper reviews Australian law to identify who is legally responsible for fire that starts on privately owned land. We argue that the correct interpretation of existing Australian law is: ‘Whoever owns the ignition owns the fire’ – that is, liability to pay for losses caused by bushfire has always fallen on those that intentionally start a fire, not on the owner of the fuel that sustains the fire. That legal conclusion could have dramatic implications for fire management policies. It will be shown that liability for starting a prescribed burn is clear-cut whereas liability for allowing accumulated fuel loads to contribute to the spread of fire is almost unheard of. As a result, we argue that the law is pushing landowners in a direction away from the policy direction adopted by all Australian governments. After identifying the current legal position, we recommend changes to align the law with the national policy direction.

**Additional keywords:** duty of care, law, liability, negligence.

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### Introduction

The statement ‘Whoever owns the fuel owns the fire’ is attributed to Phil Cheney (1989), then Director of the National Bushfire Research Unit in CSIRO, who said of people living in the Australian environment ‘... since they own the fuel, they also own the fire it produces ...’. The statement ‘Whoever owns the fuel owns the fire’, or variants with the same meaning, have also been used by fire managers, agencies, scientists, politicians, and in enquiries and parliamentary proceedings, including:

- (i) the Queensland Rural Fire Service in 2001 (Ockwell and Rydin 2010);
- (ii) the Commissioner of the NSW Rural Fire Service (Koperberg 2003);
- (iii) the House of Representatives (2003) *Select Committee on the Recent Australian Bushfires*;
- (iv) the Director, Asset Protection, CSIRO Forestry and Forest Products (Vercoe 2003);
- (v) Cheney and Sullivan (2008): ‘The landholder effectively owns the fuel and so determines whether the fire can spread and how intense it will be. In other words, the landholder owns the fire’;
- (vi) the Chief Officer of the Tasmanian Fire Service who said, ‘If you own the land, you own the fuel on that land and therefore own the risk’ (ABC News 2013);

- (vii) Dr Kevin Tolhurst (AM), Associate Professor with expertise in bushfire science and management (Tolhurst 2013);
- (viii) the Western Australian Fire and Emergency Services Commissioner who said, ‘If you own the fuel, you own the risk’ (ABC News 2014);
- (ix) the Queensland Minister for Police Fire and Emergency Services (2014); and
- (x) The *Report of the Special Inquiry into the January 2016 Waroona Fire in Western Australia*, which states ‘If you own the fuel load, you own the problem’ (Ferguson 2016, p. 112).

The statement, which has become widespread and influential across a wide spectrum of bushfire management in Australia, has been invoked with a range of meanings in this context. First, in some cases, it implies that landholders with sufficient fuel to sustain a fire that ignites on their property, or arrives from a neighbouring property, now ‘own’ the fire (Cheney 1989; Koperberg 2003; Cheney and Sullivan 2008; Ockwell and Rydin 2010); that is, it is now their problem. Second, the statement has been invoked to imply that landholders with insufficiently treated fuel loads to some extent ‘own’ a fire that spreads from their property to a neighbouring property (Cheney 1989; House of Representatives 2003; Koperberg 2003; Ferguson 2016). Third, the statement has been used to imply that neighbourhoods

can be made safer by the fuel treatment actions of individuals ‘because fire itself is not going to know boundaries’ (ABC News 2013) and it is time to ‘make neighbourhoods safer by reducing bushfire fuels on freehold land’ (Tolhurst 2013).

The second and third set of meanings imply a duty – in the sense of potential liability – on landowners to manage fuel on their land to reduce the likelihood of bushfires spreading to neighbouring properties. If one ‘owns’ a hazardous item, in this case fire, there is a concomitant duty to take care to control or contain it and legal responsibility for the consequences should it escape (*Rylands v. Fletcher* 1868; *Goldman v. Hargrave* 1967; *Burnie Port Authority v. General Jones* 1994). This argument was explicitly made by Cheney (1989), who said people must ‘be convinced that, since they own the fuel, they also own the fire it produces and are responsible for the damage they or others nearby incur’.

When read in context, the statement can imply a duty on public and private landowners to manage fuel on their land to reduce the likelihood of wildfire, however started, from spreading to neighbouring properties on the basis that if they do not, they will be responsible for the damage to their neighbours. Governments and private citizens sometimes go to extensive efforts to manage fuel so that ‘their’ fire is more easily contained, and where fire does escape from areas with natural, untreated levels of accumulated fuel, including some publicly managed natural areas, there are inevitable questions about fuel treatment practices and claims for compensation (Legislative Council 2015). However, the notion ‘Whoever owns the fuel owns the fire’ has not been analysed from a legal perspective.

Although it is the case that both public and private landowners are encouraged to take steps to manage fuel loads, the present paper will review Australian law to identify who is legally responsible for fire that starts on privately owned land. Public landowners are governed by statutory provisions that give rise to defences and immunities that are not available to private landowners. Further, as discussed below, government policy is committed to managing fuel loads, so public landowners do not have the option to refrain from undertaking fuel treatment, which commonly involves prescribed burning. They must implement the policy choices of the governments of the day. As will be argued below, the potential liability of private landowners is largely governed by the Australian common law and private landholders always have the option to do nothing. Exercising that option – to do nothing – may be the more prudent legal option but if the law says that it is safer to do nothing, then the law is pushing landowners in a direction away from the policy direction adopted by all Australian governments. This paper will identify the current legal position and recommend changes to align the law with the national policy direction.

It will be argued that the correct interpretation of existing Australian law is: if you own the ignition, you own the fire – that is, liability to pay for losses caused by bushfire has always fallen on those that start the fire, not on the owner of the fuel that sustains the fire. That legal consequence could have dramatic implications for fire management policies as it will be shown that liability for intentionally starting a prescribed fire, even where the intention is to reduce an accumulated fuel load, is clear-cut whereas liability for allowing fire to spread in untreated fuel is almost unheard of.

Although we are reviewing Australian law, the issue of comparative risk of legal liability is not only of concern to Australian fire managers and landowners. Prescribed burning aimed at wildfire mitigation is commonplace in fire-prone environments around the world (Fernandes and Botelho 2003; Penman *et al.* 2011; Moritz *et al.* 2014; Price *et al.* 2015; Cary *et al.* 2017). It is also globally recognised that effective bushfire risk reduction requires a partnership between public and private landholders (Doerr and Santin 2013). Although the statement ‘Whoever owns the fuel owns the fire’ may be uniquely Australian, the sentiment is not. For example, Keith Worley, a professional forester and certified arborist from Colorado, has been quoted saying ‘For property owners in the urban interface, they own the fuel; they own the fire’ (Garrison 2014). Equally, the notion of liability for failing to manage wildland fuel loads is highly relevant in fire-prone ecosystems around the world. For example, Varner *et al.* (2001), in the context of south-eastern USA, argue that by not using prescribed burning, a landholder increases the risk of damage from wildfire and that it can be argued that they should be ‘liable for damages to neighbouring landowners and residents and to the public at large if and when wildfires occur’. However, Yoder (2012, p. 62) argues that ‘weaker liability risk for fuel accumulation’ contributes to weak incentives for fuel treatments in the United States. Kobziar *et al.* (2015) also identified that liability presents a challenge to prescribed fire use by private individuals in southern USA.

Finally, the present paper is a critique of current law. We do not analyse, and therefore do not question, the importance of bushfire fuel for fire behaviour. Fire intensity (Byram 1959) and rate of fire spread (Cheney *et al.* 2012) are generally positively related to amount of fuel consumed and level of fuel ‘hazard’ respectively, when other factors are held constant.

## The common law

Negligence arises when a person has a legal duty to avoid acts or omissions that might cause injury or loss to another and fails to take reasonable care to prevent those losses.

### *A duty to prevent the spread of fire that is not ignited by the defendant*

In *Goldman v. Hargrave* [1967] AC 645 (see Appendix 1 for explanation of legal citations), the question for the Supreme Court of Western Australia, the High Court of Australia and ultimately the Queen’s Privy Council was whether the landowner was liable in negligence for the spread of a fire where the defendant ‘did not bring the fire upon his land, nor did he keep it there for any purpose of his own. It came there from the skies’ (*Hargrave v. Goldman* (1963) 110 CLR 40, 59 (Windeyer J) see Appendix 1 for explanation of abbreviations). In the Supreme Court, the trial judge found that there was no liability ‘for anything which happens to or spreads from his land in the natural course of affairs, if the land is used naturally’ (*Hargrave v. Goldman* 1963, p. 50 (Taylor and Owen JJ)).

The High Court of Australia came to a different conclusion. Justice Windeyer said (at para. 25):

In my opinion a man has a duty to exercise reasonable care when there is a fire upon his land (although not started or continued by him or for him), of which he knows or ought

to know, if by the exercise of reasonable care it can be rendered harmless or its danger to his neighbours diminished.

On appeal, the Privy Council (*Goldman v. Hargrave* 1967) agreed, finding that there is ‘a general duty upon occupiers in relation to hazards occurring on their land’ but what may be expected to control that hazard depends on many factors.

... the standard ought to be to require of the occupiers what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more.

The duty to make an effort to extinguish a fire, or to call for assistance, is now reflected in modern legislation that is discussed in more detail below.

What follows is that while an Australian landowner does owe a duty to take action to contain a fire that they did not light, what that landowner must do to *meet* that duty may be limited and reasonably easy to meet. It may, depending on the landowner’s personal circumstances, be no more than a duty to alert relevant authorities or it may be a duty to allocate resources to try to extinguish the fire. But whatever the duty entails, once they have done all that they could and should reasonably do, then there is no legal liability regardless of where the fire goes or the damage that it does.

#### *A duty to prevent the spread of fire that is ignited by the defendant*

Although there is a duty to respond to a fire that occurs on land occupied by a defendant, there are few reported Australian cases of defendants being successfully sued for failing to contain a fire that they did not start, *Hargrave v. Goldman*, discussed above, being the notable exception.

However, liability for damage done by a fire that was intentionally started by the defendant is unquestioned. Historically, there was strict liability for the spread of fire (*Beaulieu v. Finglam* 1401); that is, a landholder was liable if fire escaped from their property regardless of the care that they took to contain the fire. The High Court of Australia has moved the law away from special rules relating to different hazards or the status of various plaintiffs and defendants (*Safeway Stores v. Zaluzna* 1987; *Imbree v. McNeilly* 2008) and today, the rules of strict liability are ‘absorbed by the principles of ordinary negligence’ (*Burnie Port Authority v. General Jones* 1994, para. 43). These principles require that a person seeking compensation must establish that there was a legal duty on a person to take some action and a failure by that person to take ‘reasonable care’. Even so, the court recognised that the degree of control that could be exercised by a person who was introducing fire (or in that case, an ignition source in the form of sparks from a welder) and the danger meant that the duty amounted to ‘a degree of

diligence so stringent as to amount practically to a guarantee of safety’ (*Burnie Port Authority v. General Jones* 1994, para. 41 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ)).

Liability has been established where fires have been deliberately lit and then allowed to escape, regardless of whether the fires were lit for cooking, land-clearing or ‘hazard reduction’ (Eburn 2012). When it comes to fires that are ‘introduced’ to the land by the defendant, the situation is clear; a person responsible for the ignition of a fire has a duty to take reasonable steps to contain that fire.

Where a prescribed burn is planned, the landowner or agency conducting the burn will have a duty to ensure the fire is contained. Given the risk if fire escapes, they will have to consider a variety of factors including the weather, the availability of firefighting resources and the special vulnerabilities of anyone likely to be affected by the fire. They have the ultimate control as they can elect not to light the fire (*Southern Properties (WA) v. Executive Director of the Department of Conservation and Land Management* 2012, para. 287 (Pullin JA (dissenting))). Whereas state agencies may enjoy some extra legal protection from liability in negligence when implementing state policy (see for example *Civil Liability Act 2002* (NSW) ss 40–46 (see [Appendix 2](#) for explanation of legislation citations); see also *Southern Properties (WA) v. Executive Director of the Department of Conservation and Land Management* 2012), private landowners must exercise that ‘degree of diligence so stringent as to amount practically to a guarantee of safety’. Allowing a fire to escape will almost certainly lead to legal liability.

#### *A duty to prevent the spread of fire that is burning in fuel owned by the defendant*

The authors can find only one reported case where the presence of fuel was an issue in determining liability. In *Dennis v. Victorian Railways Commissioner* (1903), the defendant was liable when sparks from the defendant’s locomotive set fire to ‘grass and herbage’ on the defendant’s land, ‘and thence such fire spread to and damaged and injured the plaintiff’s land and fences’ (*Dennis v. Victorian Railways Commissioner*, p. 576). There was no negligence in the management of the locomotive that caused the sparks, but Williams J, on behalf of the Supreme Court of Victoria, said ‘there is an obligation on the part of the defendant to use reasonable care to prevent ignition of the dry grass and herbage on its property through the agency of the sparks which escape from the engines’ (*Dennis v. Victorian Railways Commissioner*, p. 579); i.e. the defendant owed a duty to ensure that its activities did not cause the ignition of its own grass and so spread the fire to the neighbouring property. Allowing the grass (or fuel) to accumulate was not a breach of duty but failing to take precautions against the risk of fire caused by the inevitable sparks was – they were not under a duty to prevent the ignition of their grass from natural causes, they were under a duty to prevent the ignition of *their* grass from *their* steam engine.

#### *A duty to control fuel loads to reduce the risk to others*

Private nuisance involves an act or omission that unreasonably interferes with another person’s use, or enjoyment of, their land. Allowing something on one property to encroach onto another

may be an actionable nuisance. However, in *Spark v. Osborne* 1908, dealing with the spread of prickly pear, Justice Higgins in the High Court of Australia said:

I know of no duty imposed by the British common law ... on a landowner to do anything with his land, or with what naturally grows on his land, in the interests of either his neighbour or himself. If he use the land, he must so use it as not thereby to injure his neighbours ... But if he leave it unused, and if thereby his neighbours suffer, he is not responsible. So long as he does nothing with it, he is safe. It is not he who injures the neighbour. It is Nature; and he is not responsible for Nature's doings.

*Spark v. Osborne* might have stood for authority that there was no legal duty to control vegetation naturally growing on land even though the presence of the vegetation or associated dead plant litter increases the risk of fire, once started, spreading to neighbouring properties. However, *Spark v. Osborne* is no longer regarded as good law (*Goldman v. Hargrave* 1967, para. 23; *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* 1980; *Robson v. Leischke* 2008, para. 90 (Preston CJ)). Today, it can be a nuisance to fail to control vegetation such as trees that grow on one property but interfere with the neighbouring property (*Marsh v. Baxter* 2015; *Robson v. Leischke* 2008; *South Australia v. Simionato* 2005) or rocks that fall from a cliff face owing to no fault of the owner (*Leakey v. National Trust for Places of Historic Interest or Natural Beauty* 1980; *Owners Strata Plan 4085 v. Mallone* 2006).

The right to sue in nuisance only arises when the damage occurs (*South Australia v. Simionato* 2005). Fuel that accumulates naturally does not limit a neighbour's enjoyment of his or her land. The nuisance, and therefore the right to damages arises if, and only if, a fire starts and spreads or threatens to spread to the neighbouring property.

In terms of the required response by a defendant, it does not matter if the action is brought in nuisance or negligence (*Goldman v. Hargrave* 1967; *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* 1980). Where the alleged nuisance is fire, the duty on the landowner, like the duty in negligence law, will be to act 'if by the exercise of reasonable care it can be rendered harmless or its danger to his neighbours diminished' (*Hargrave v. Goldman* 1963, para. 25 (Windeyer J)).

If, however, the presence of an untreated accumulation of bushfire fuel, even in the absence of fire, could constitute a nuisance, then there would be a duty to take reasonable steps to manage that fuel load. In a case from the United Kingdom, *Leakey v. National Trust for Places of Historic Interest or Natural Beauty* (1980), Lord-Justice Megaw said:

The duty is a duty to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property. .... Thus, there will fall to be considered the extent of the risk; what, so far as reasonably can be foreseen, are the chances that anything untoward will happen or that any damage will be caused? What is to be foreseen as to the possible extent of the damage if the risk becomes a reality? Is it practicable to prevent, or to minimise, the happening of any damage? If it is

practicable, how simple or how difficult are the measures which could be taken, how much and how lengthy work do they involve, and what is the probable cost of such works? Was there sufficient time for preventive action to have been taken, by persons acting reasonably in relation to the known risk, between the time when it became known to, or should have been realised by, the defendant, and the time when the damage occurred? Factors such as these, so far as they apply in a particular case, fall to be weighed in deciding whether the defendant's duty of care requires, or required, him to do anything, and, if so, what.

In *Yared v. Glenhurst Gardens Pty Ltd* (2002), Justice Austin said the principle in *Leakey* should be seen as good law in Australia. His Honour said (at para. 105):

The case supports the proposition that a landowner in occupation of his land has a duty, when he is aware or ought to be aware of a hazardous condition on the land which puts the neighbouring land at risk, to take such steps as are reasonable in all the circumstances to prevent or minimise the risk of injury or damage to the neighbour's property.

That reasoning could establish a duty to mitigate the risk posed by an accumulation of bushfire fuel. If, however, the proposed treatment is to light a prescribed burn, then the duty to prevent that burn from escaping from what has already been identified as an area with an accumulation of fuel warranting treatment, will be clear. If a landowner cannot rally the relevant resources and assets to guarantee that any prescribed fire is contained, it may be 'reasonable' to leave the fuel load untreated, or at least untreated by fire (as opposed to actions like slashing, physical removal of fuel, or the application of herbicides).

*Yared's* case (2002) involved liability for the collapse of a retaining wall from an elevated property onto a lower one. In that case, the duty to take steps to restore the retaining wall was a duty to control the thing that was causing the damage. *Yared's* case does not directly address the issue, relevant in the context of the present paper, of whether there is a duty to control a potential hazard. The accumulated fuel is not a hazard until there is a fire, so, unlike the collapsing retaining wall, it is not the fuel that is the nuisance. At best, therefore, *Yared's* case gives some basis to argue for a duty of care owed by landowners to reduce accumulated fuel loads, but it cannot be said whether or not such a duty has been established.

Beyond the Australian law (which, because of our historical ties, includes references to case law from the United Kingdom), it is interesting to note that similar conclusions have been drawn in the United States. In Florida, *Varner et al.* (2001) found 'no cases ... that hold a landowner liable for not conducting prescribed burning' and that a lack of liability for failing to use prescribed fire meant there was no legal motivation for landowners to burn. *Yoder* (2012, p. 53) in his analysis of US law concluded that 'natural accumulation of biomass fuels generally has not been sufficient as a basis for landowner liability.' However, 'Prescribed fire ... is among the more complex and potentially risky uses of fire'. As recently as 2017, the Arizona Court of Appeals held that the State did not owe a duty to protect its citizen or contain a wildfire that 'arose from a natural cause on land that remained unused and in natural condition...' (*Gordon Aciri et al. v. State of Arizona et al.* 2017).

### Conclusion on the common law

When considering hypothetical scenarios, the best that can be done is to make a prediction on how a court, if asked, might see the law and how the law applies to the facts that may be established by the evidence. Even with that limitation, it can be said that the risk of liability falls on a spectrum, ranging from little or no chance of establishing an obligation to pay damages to cases where liability is almost strict.

The review of the common law above reveals that a person who intentionally introduces fire into the landscape is under a duty to control that fire. Liability for starting a fire is well established and is recognised by the care that must go into planning and igniting prescribed burns and the limited opportunities for burning when all relevant factors are considered (*Southern Properties v. Executive Director of the Department of Conservation and Land Management* [No. 2] 2010, paras 152–188 (Murphy J (at first instance))).

Liability for failing to treat a fuel load that has been allowed to naturally accumulate (rather than deliberately bringing fuel onto a property) is much less certain. Whether the presence of the fuel would itself constitute a nuisance could be argued. If it were established that the untreated fuel, even in the absence of fire, did constitute a nuisance, then the duty on the landowner would be to take ‘reasonable steps’ to deal with that fuel load. What is reasonable would necessarily take into account ‘the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have...’ (*Wyong Shire Council v. Shirt* 1980, para. 14 (Mason J)).

On the spectrum for establishing liability, it can be predicted that liability for the spread of a fire that is deliberately started as a prescribed burn will be an almost certainty. Liability for doing nothing while a fuel load naturally accumulates will be, at best, ‘arguable’. For a gambler, doing nothing is legally safer. Liability for failing to reduce fuel loads, and so possibly contributing to fire spreading from one property to another, is theoretically possible, but so far unheard of and would be difficult to establish.

In short, the common law says that if you light a fire and allow it escape, you are legally responsible for the consequences, but so far, there is no legal precedent to say that if you own the fuel that carries a fire from one property to another, then you own or are responsible for the damage done to your neighbour.

### Statutory intervention

The discussion above does not address various rules that have been put in place by the Australian state and territory parliaments. For example, in the Australian Capital Territory:

The owner or manager of land in a rural area must take all reasonable steps:

- (i) to prevent and inhibit the outbreak and spread of fire on the land; and
- (ii) to protect property from fire on the land or spreading from the land.

When considering what is reasonable, the court must consider ‘the amount and kind of litter, timber or vegetation on the land (whether alive or dead)’ (*Emergencies Act 2004* (ACT) s 120).

Failure to take those steps is a criminal offence with a maximum fine of AU\$15 000 for an individual or AU\$75 000 for a corporation (*Emergencies Act 2004* (ACT) s 120(4) and *Legislation Act 2001* (ACT) s 133 (definition of ‘penalty units’)). An authorised inspector may give the owner or manager of the land a notice requiring them to take action to comply with these obligations. Failure to comply with that notice is also an offence (*Emergencies Act 2004* (ACT) ss 109 and 110).

In New South Wales, similar provisions apply save that it is the duty of the owner of private land to take ‘notified’ steps to reduce the fire risk; that is, there is not a general duty that the landowner must exercise on their own initiative (*Rural Fires Act 1997* (NSW) s 63(2)). A hazard management officer may give a private landowner notice requiring them ‘to carry out bush fire hazard reduction work specified in the notice ...’ (*Rural Fires Act 1997* (NSW) s 66(1)). It is an offence to fail to comply with the notice, punishable by a maximum fine of AU\$5500 or 12 months’ imprisonment, or both (*Rural Fires Act 1997* (NSW) s 66(8) and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17 (definition of ‘penalty units’)). If the landowner fails to comply with the notice, the Commissioner of the Rural Fire Service may ‘carry out the bushfire hazard reduction work the owner or occupier was required to do’ and recover the costs of that work from the owner or occupier. Similar provisions apply in other states and territories (*Bushfires Management Act 2016* (NT) ss 92 (Establishment of firebreaks or removal of flammable material) and 95 (Offence not to comply with notice); *Fire and Emergency Services Act 1990* (Qld) s 69 (Requisition by Commissioner to reduce fire risk); *Fire and Emergency Services Act 2005* (SA) ss 105F (Duties to prevent fires – Private land) and 105J (Additional provision in relation to powers of authorised persons); *Fire Service Act 1979* (Tas) s 49 (Fire hazards); *Country Fire Authority Act 1958* (Vic) ss 41 (Fire prevention notices), 41D (Compliance with notices) and 42 (Brigades may carry out fire prevention work); *Bushfires Act 1954* (WA) s 33 (Local government may require occupier of land to plough or clear fire-break)).

The critical points to note from these provisions are:

- (1) The duty to clear flammable material arises when a notice to do so has been served on the occupier or owner.
- (2) The consequences for failing to comply with the notice are criminal penalties; and
- (3) The relevant authority is authorised to enter the land, complete the hazard reduction work and charge the occupier for the work done.

What is critical for this discussion is that none of the provisions purport to affect civil liability. Whether or not a duty imposed by statute law allows a person to sue depends on the intention of the legislature. In the High Court of Australia, Brennan CJ said ‘before a right of action in damages for breach of statutory duty arises, “the statute must (either expressly or by implication) impose a duty to exercise the power and confer a private right of action in damages for a breach of the duty so imposed”’ (*Pyrenees Shire Council v. Day* 1998, para. 15). In context, that means: did the legislature, when passing this legislation, confer a private right of action in damages for any person who suffered as a result of the failure to comply with the duty?

Despite early authority to the contrary, it is now accepted that statutory obligations can give rise to a private right to sue even though the statute says the consequence is a criminal penalty (*Downs v. Williams* 1971). In *Brodie v. Singleton Shire Council* (2001), at para. 326, Justice Hayne said:

Ordinarily, the more general the statutory duty and the wider the class of persons in the community who it may be expected will derive benefit from its performance, the less likely is it that the statute can be construed as conferring an individual right of action for damages for its non-performance. In particular, a statutory provision giving care, control and management of some piece of infrastructure basic to modern society, like roads, is an unpromising start for a contention that, properly understood, the statute is to be construed as providing for a private right of action.

The duties set out in the firefighting legislation are quite specific in terms of what is required and who is to meet those duties, but unlike, say, duties imposed on employers to take steps to protect workers or employees, they are not directed at protecting a particular class of persons. That is, they are not created for the benefit of neighbours as a specific class.

Even if there is no action for breach of statutory duty, failure to comply with a notice may be evidence of want of reasonable care, or negligence. In that case, however, a plaintiff would have to demonstrate, not merely allege, that if the notice had been complied with, the outcome on the day would have been different.

Finally, for most Acts (the notable exceptions being South Australia and the Australian Capital Territory), the duty to remove the fuel hazard arises only on the service of a notice by an authorised officer. It does not create a general duty that applies to the landowner.

#### *Conclusion on statutory intervention*

Statute law in all Australian jurisdictions can impose a duty on landowners to reduce naturally accumulating fuel loads but, except in the ACT and South Australia, that duty is not expressed as a general duty and arises only when a notice has been served. Whether a neighbour whose property is burned out would succeed in suing on the basis of a failure to comply with that notice has not been tested. It would be arguable that failure to comply with the notice was a relevant breach of statutory duty to give rise to a private right of action.

#### **Policy implications**

Australian natural disaster policy focuses on developing resilience and sharing responsibility between governments, communities and individuals (Council of Australian Governments 2011). Fire and land-management agencies have a clearly stated position that prescribed burning plays a central and essential role in mitigating bushfire risk to people, property and environmental health (Australasian Fire and Emergency Service Authorities Council (AFAC) 2016). Resultant programs of strategic prescribed burning aim to reduce the rate of spread and intensity of unplanned fires, enhancing fire suppression effectiveness and reducing the severity of ecological consequences (Penman *et al.* 2011), although the legal, social, economic and

environmental requirements for prescribed burning vary between agencies and jurisdictions (AFAC 2016). The value of prescribed burning, and other means of fuel treatment, close to homes on private land is widely accepted, even though implementing multifaceted bushfire risk reduction programs close to where people live is both more costly and more difficult than broad-scale prescribed burning on public land (Clode and Elgar 2014).

The implication of the discussion above is that the current law may not strongly point in the same direction as national policy. In making that statement, it should be recalled that the present paper is discussing the law that relates to managing bushfire fuel using prescribed fire on private land. Public agencies undertaking prescribed burning, or not, on public land do have other statutory provisions that would affect their legal position. Further, private landowners do have options other than fire to manage fuel loads. With that limitation in mind, what the present paper has shown is that:

- (1) If a private landowner seeks to reduce the fuel load by introducing fire – a prescribed burn – and the fire escapes and damages their neighbour, the landowner's obligation to pay compensation for any losses is almost certain.
- (2) If a private landowner takes no action to control fuel loads and a fire starts by reasons beyond the landowner's control, then it could be argued that their failure to reduce the fuel load gives rise to liability in damages but such an action would be novel and difficult.

If that is correct, a reasonably prudent landowner, concerned about legal liability, might conclude that the lower-risk option is to do nothing. That conclusion is, however, dangerous and does not help deliver on the national policy of building resilient communities.

It would be possible to make changes to the law that would bring the law more in line with the policy direction.

- (1) Bushfire management legislation should provide that where a landowner obtains a permit to conduct a prescribed burn, and the landowner honestly and in good faith complies with the restrictions, requirements and conditions of any permit, that should be *prima facie* evidence that the landowner's conduct was reasonable and should provide a defence to any claim in negligence should the fire escape.
- (2) Legislation should provide that where a person fails to comply with a notified duty to reduce the fuel load on their land and a fire starts on, or escapes from that land, then the fact that they did not comply with the requirement to manage the fuel load should make them *prima facie* liable for either the damage caused by the fire, the cost of fire suppression efforts, or both.
- (3) Finally, legislation in other states should adopt the approach in South Australia and the Australian Capital Territory and impose a duty on landowners to take reasonable steps to manage fuel loads on their property, even without an official notice requiring them to reduce the fuel load or directing them as to the steps they are required to take.

Legislative reform in these areas would ensure that the law encourages private landowners to take steps that reflect the national policy direction to shared responsibility for developing resilience to natural hazards.

Consider the following example to put that conclusion in context. Assume a person's uninsured home is destroyed by a prescribed fire that was lit by their neighbour and that escaped the intended boundaries. Under current Australian law, the owner of the destroyed house could sue that neighbour with a high probability of success. If the changes recommended here were implemented, then the uninsured property owner could not recover their losses provided their neighbour had conducted the burn in good faith compliance with an appropriate permit. Any uninsured property owner runs the risk that their home will be lost to fire, whether that is a wildfire or fire caused by an electrical fault or other issue within the home itself. The irony of the current situation is that if the neighbour, attempting to reduce bushfire risk, lights a prescribed burn and unintentionally destroys the uninsured house, the home-owner can recover, but if the neighbour does nothing and a wildfire is carried across the boundary because of untreated fuel loads, the home-owner gets no remedy. The paradox is that for the neighbour, who has the option of reducing the fuel load on their property or doing nothing, their potential liability is less if they do nothing. Putting the onus on the home-owner to insure or take the risk of fire is to put him or her in the same position regardless of whether the loss is caused by a naturally occurring wildfire or a good-faith and compliant attempt to mitigate risk. If there is also a duty on the neighbouring landowner to take steps to mitigate risk (point 2 and 3, above), then the cost-benefit shifts in favour of risk mitigation rather than in favour of doing nothing.

## Conclusion

This paper set out to test the hypothesis 'Whoever owns the fuel owns the fire'. While that claim may reflect a moral position, the question considered here was whether it was reflected in Australian law.

The conclusion is that the law is clear: whoever owns the *ignition* owns the fire. The question of whether the 'owner' of the fuel 'owns', or is legally responsible for, the fire has not been tested. Analysis of the law shows that the best that can be said is: whoever owns the fuel *might* own the fire. That means that a (legally) cautious landowner, considering whether to set a prescribed burn, would be correct to conclude that the legally lower-risk option is to do nothing.

If the law says that it is safer to do nothing, then the law is pushing landowners in a direction away from the policy direction adopted by all Australian governments. National policy is focused on all stakeholders doing their share to make communities resilient to hazards, in this case bushfire. If the law discourages action designed to mitigate risk, the law is pushing in the wrong direction.

It follows that the laws should be amended to bring them into line with national policy. This could be achieved by:

- (1) Providing landowners with a defence if they set a prescribed burn in accordance with the terms and conditions of any permit;
- (2) Providing that landowners who do not comply with legal obligations to manage fuel loads are *prima facie* liable for the damage caused by the fire, the fire suppression efforts, or both; and
- (3) Providing that landowners, even in the absence of formal notice, have a duty to mitigate risk by managing fuel loads on their land.

If those amendments were put in place, then it would be the case that 'whoever owns the fuel owns the fire'. This would encourage a landowner, when conducting a risk assessment, to conclude that to do nothing is a greater risk than acting to reduce the risk of fire. And with more action to reduce the risk of wildfires, communities in fire-prone environments may be safer and more resilient.

## Conflicts of interest

The authors declare that they have no conflicts of interest.

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## Appendix 1

### Cases

A note on legal citations: the citations given here follow traditional legal referencing.

If the year is in parentheses, the report series is indexed by volume number. For example, (1994) 206 CLR 512 means the case was reported in 1994; it is in volume 206 of the Commonwealth Law Reports and starts on page 512.

If the year is in square brackets, the law reports are indexed by year. For example, [1967] AC 645 means the case was reported in 1967, in the reports of Appeal Cases for that year, starting at page 645. There are no separate volumes for that year and no volume number. The year is essential to find the relevant report.

For a list of law report abbreviations, see the *Cardiff Index to Legal Abbreviations* available at <http://www.legalabbrevs.cardiff.ac.uk/> [Verified 1 November 2017]

Where, in the text, references are given to particular pages or paragraphs, the following abbreviations apply:

CJ Chief Justice

J Justice

JJ Justices

AJ Acting Justice

For example 'Windeyer J' would be read as 'Justice Windeyer'.

To assist readers, we have put links to online versions of the cited cases where available.

*Beaulieu v. Finglam* (1401) YB 2 Hen. IV (not available online)

*Brodie v. Singleton Shire Council* (2001) 206 CLR 512 (available at <http://www.austlii.edu.au/au/cases/cth/HCA/2001/29.html> [Verified 1 November 2017])

*Burnie Port Authority v. General Jones* (1994) 179 CLR 520 (available at <http://www.austlii.edu.au/au/cases/cth/HCA/1994/13.html> [Verified 1 November 2017])

*Dennis v. Victorian Railways Commissioner* (1903) 28 VLR 576 (available at <http://www.austlii.edu.au/au/cases/vic/VicLawRp/1903/83.html> [Verified 1 November 2017])

*Downs v. Williams* (1971) 126 CLR 61 (available at <http://www.austlii.edu.au/au/cases/cth/HCA/1971/45.html> [Verified 1 November 2017])

*Goldman v. Hargrave* [1967] AC 645 (available at [http://www.bailii.org/uk/cases/UKPC/1966/1966\\_12.pdf](http://www.bailii.org/uk/cases/UKPC/1966/1966_12.pdf) [Verified 1 November 2017])

*Gordon Acri et al. v. State of Arizona et al.* Nos 1 CA-CV 15-0349, 1 CA-CV 15-0350 (available at <http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2017/1%20CA-CV%2015-0349,%201%20CA-CV%2015-0350.pdf> [Verified 1 November 2017])

*Hargrave v. Goldman* (1963) 110 CLR 40 (available at <http://www.austlii.edu.au/au/cases/cth/HCA/1963/56.html> [Verified 1 November 2017])

*Imbree v. McNeilly* (2008) 236 CLR 510 (available at <http://www.austlii.edu.au/au/cases/cth/HCA/2008/40.html> [Verified 1 November 2017])

*Leakey v. National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 (available at <http://www.bailii.org/ew/cases/EWCA/Civ/1979/5.html> [Verified 1 November 2017])

*Marsh v. Baxter* [2015] WASCA 169 (available at <http://www.austlii.edu.au/au/cases/wa/WASCA/2015/169.html> [Verified 1 November 2017])

*Owners Strata Plan 4085 v. Mallone* [2006] NSWSC 1381 (available at <http://www.austlii.edu.au/au/cases/nsw/NWSC/2006/1381.html> [Verified 1 November 2017])

*Pyrenees Shire Council v. Day* (1998) 192 CLR 330 (available at <http://www.austlii.edu.au/au/cases/cth/HCA/1998/3.html> [Verified 1 November 2017])

*Robson v. Leischke* [2008] NSWLEC 152 (available at <http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2008/152.html> [Verified 1 November 2017])

*Rylands v. Fletcher* [1868] UKHL 1 (available at <http://www.bailii.org/uk/cases/UKHL/1868/1.html> [Verified 1 November 2017])

*Safeway Stores v. Zaluzna* (1987) 162 CLR 479 (available at <http://www.austlii.edu.au/au/cases/cth/HCA/1987/7.html> [Verified 1 November 2017])

*South Australia v. Simionato* [2005] SASC 412 (available at <http://www.austlii.edu.au/au/cases/sa/SASC/2005/412.html> [Verified 1 November 2017])

*Southern Properties (WA) v. Executive Director of the Department of Conservation and Land Management* [2012] WASCA 79 (available at <http://www.austlii.edu.au/au/cases/wa/WASCA/2012/79.html> [Verified 1 November 2017])

*Southern Properties v. Executive Director of the Department of Conservation and Land Management* [No. 2] [2010] WASC 45 (available at <http://www.austlii.edu.au/au/cases/wa/WASC/2010/45.html> [Verified 1 November 2017])

*Spark v. Osborne* (1908) 7 CLR 51 (available at <http://www.austlii.edu.au/au/cases/cth/HCA/1908/46.html> [Verified 1 November 2017])

*Stannard v. Gore* [2012] EWCA Civ 1248 (available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/1248.html> [Verified 1 November 2017])

*Wyong Shire v. Shirt* (1980) 146 CLR 40 (available at <http://www.austlii.edu.au/au/cases/cth/HCA/1980/12.html> [Verified 1 November 2017])

*Yared v. Glenhurst Gardens Pty Ltd* [2002] NSWSC 11 (available at <http://www.austlii.edu.au/au/cases/nsw/NWSC/2002/11.html> [Verified 1 November 2017])

## Appendix 2

### Legislation

Legislation is referenced with the name of the Act and the year in which it was originally passed (even though it may have been subsequently amended) in italics, followed by an abbreviation to represent the jurisdiction: Cth = Commonwealth of Australia; ACT = Australian Capital Territory; NT = Northern Territory; NSW = New South Wales; Qld = Queensland; SA = South Australia; Tas = Tasmania; Vic = Victoria and WA = Western Australia. In the text, pinpoint references are given to the section (s) or sections (ss).

To assist readers, we have put links to authorised online versions of the cited legislation.

*Bushfires Act 1954* (WA) (available at [https://www.slp.wa.gov.au/legislation/statutes.nsf/main\\_mrtitle\\_106\\_homepage.html](https://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_106_homepage.html) [Verified 1 November 2017])

*Bushfires Management Act 2016* (NT) (available at <https://legislation.nt.gov.au/en/Legislation/BUSHFIRES-MANAGEMENT-ACT> [Verified 1 November 2017])

*Civil Liability Act 2002* (NSW) (available at <https://www.legislation.nsw.gov.au/#/view/act/2002/22> [Verified 1 November 2017])

*Country Fire Authority Act 1958* (Vic) (available at [http://www.legislation.vic.gov.au/Domino/Web\\_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/59d9f4d8dd527bb1ca2576950006e1a1!OpenDocument](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/59d9f4d8dd527bb1ca2576950006e1a1!OpenDocument) [Verified 1 November 2017])

*Crimes (Sentencing Procedure) Act 1999* (NSW) (available at <https://www.legislation.nsw.gov.au/#/view/act/1999/92> [Verified 1 November 2017])

*Emergencies Act 2004* (ACT) (available at <http://www.legislation.act.gov.au/a/2004-28/default.asp> [Verified 1 November 2017])

*Fire and Emergency Services Act 1990* (Qld) (available at <https://www.legislation.qld.gov.au/view/html/inforce/current/act-1990-010> [Verified 1 November 2017])

*Fire and Emergency Services Act 2005* (SA) (available at <https://www.legislation.sa.gov.au/LZ/C/A/FIRE%20AND%20EMERGENCY%20SERVICES%20ACT%202005.aspx> [Verified 1 November 2017])

*Fire Service Act 1979* (Tas) (available at <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1979-035> [Verified 1 November 2017])

*Legislation Act 2001* (ACT) (available at <http://www.legislation.act.gov.au/a/2001-14/default.asp> [Verified 1 November 2017])

*Rural Fires Act 1997* (NSW) (available at <https://www.legislation.nsw.gov.au/#/view/act/1997/65> [Verified 1 November 2017])