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# TRENDS IN AUSTRALIAN WILDFIRE LITIGATION

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Wildland Fire Litigation Conference,  
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## What can we infer?

The amount of litigation is growing:

1925-1977 – one case every 10.4 years

1978-2009 – one case every 3.8 years

The nature of the claims and the type of defendant is changing:

1925 – other land owners;

1977 – *add* electricity authorities;

1995 – *add* land and fire management authorities.

# THAT WAS 2011 AND THE 5<sup>TH</sup> WILDLAND FIRE LITIGATION CONFERENCE ...

- 1) Today, the trend continues.
- 2) Since 2011 we've had:
  - a) Judgements in two cases (Sydney 2001, Canberra 2003)
  - b) Settlements in many more (Victoria 2009).
  - c) More mega-fires (Western Australia 2011; Tasmania and New South Wales 2013).
  - d) Floods (Queensland 2011).

# CLASS ACTIONS

- 1) Are relatively new and not yet in all jurisdictions.
- 2) Litigation prior to 2009 was multiple plaintiffs.
- 3) Litigation from Black Saturday (Victoria, February 7, 2009) and the 2011 Queensland floods are representative class actions.
- 4) Litigation funders are getting involved.
- 5) Will that encourage more litigation?
- 6) [Maddens](#) are claiming expertise in this area and are running class actions from 5 fires in 2012, 2013 and 2014.

# PICK YOUR DEFENDANT

1) Actions against the government agencies are vigorously defended...

and so far, the government's winning:

*Warragamba Winery v NSW* [2012] NSWSC 701;

*Electro Optic Systems and West v NSW* [2014] ACTCA 45.

2) Actions against electricity companies settle:

*Ash Wednesday 1983*

*Black Saturday 2009.*

## 'BLACK SATURDAY' 7 FEBRUARY 2009

- 1) 855 fires across Victoria;
- 2) '...12 fires where [173] lives were lost or significant damage occurred...'  
2009 Victorian Bushfires Royal Commission, *Interim Report*, (2009) p 48.
- 3) Class actions arising from those significant fires have settled; eg:
  - a) Churchill - A\$32 (US\$24.7) million;
  - b) Marysville - A\$300 (US\$231.3) million;
  - c) Kilmore East-Kinglake - A\$494.7 (US\$381.4) million; including A\$60 (US\$46.3) million for costs.

# GOVERNMENT DEFENDANTS

- 1) Enjoy statutory and common law immunity, but
- 2) Police and fire agencies have been joined in some of these cases.
- 3) In the Kinglake settlement, the state of Victoria contributed A\$103.6 (US\$79.82) million.
- 4) The Premier said:  
'... the Government's insurance would cover the cost.  
"It won't affect our budget, won't affect our bottom line, will not affect services," Dr Napthine said.  
"This is a normal insurance procedure and our decision on this matter is based on the best legal and professional advice. "'

<http://www.abc.net.au/news/2014-07-15/black-saturday-bushfire-survivors-secure-record-payout/5597062>



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# 'BUSHFIRES; THE PRICE WE PAY FOR ELECTRICITY'

[HTTPS://EMERGENCYLAW.WORDPRESS.COM/2014/05/20/BUSHFIRES-THE-PRICE-WE-PAY-FOR-ELECTRICITY/](https://emergencylaw.wordpress.com/2014/05/20/bushfires-the-price-we-pay-for-electricity/)

- 1) Neither the electricity companies, nor their insurers are going broke.
- 2) Communities have been unwilling to pay the cost of burying powerlines;  
*Royal Commission* recommendation 27;  
[Powerline Bushfire Safety Taskforce](#) (pp 8-11)
- 3) Or to accept reduced reliability on high fire danger days;  
*Royal Commission* recommendation 32;  
[Powerline Bushfire Safety Taskforce](#) (pp 70-71)

# OUTSTANDING ISSUES

## Legal

- 1) Liability for failing to reduce bushfire hazards – it get's talked about, but it's not been tested.

## Logistics

- 1) Delay – the Canberra litigation took 10 years!
- 2) Forensic experience – consider that the Royal Commission took 2 years and cost A\$40 (US\$30.8) million but issues still had to be litigated.

## SO WHAT ARE THE TRENDS?

1) In 2012 we reported that:

'... routine fires continue to be dealt with without frequent litigation... However, significant fire events, such as the 2009 Black Saturday fires, trigger litigation almost before the fires are extinguished...'

Eburn M and Dovers, S., 'Australian wildfire litigation' (2012) 21(5) *International Journal of Wildland Fire* 488-497.

2) That prediction has been confirmed.

3) Plaintiff's are testing the waters against the governments, but without success (so far).

4) Civil defendants, in particular electricity authorities, have not tested the law.



## AND NOW A WORD FROM OUR SPONSOR...

- 1) We are conducting research into alternative ways to learn lessons from catastrophic events.
- 2) We're interested to know what you think law and litigation contributes to improving future practice. Are parties willing to reflect on their performance to do better next time, or does fear of liability, or cross examination, hinder truth finding? Are lawyers a help or a hinderance?



## IF YOU'RE WILLING TO TALK TO ME

- 1) I'd love to hear what you think.
- 2) If I can record our conversation you could contribute to improving learning in Australia.
- 3) There is an information sheet that gives more information.
- 4) If you want to take part, just let me know, I'll be here for the conference and we can find time for a chat!

## QUESTIONS? COMMENTS?

Thank you for your time and attention.

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