



YOU OWN THE FUEL, BUT WHO OWNS THE FIRE?

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The statement 'Whoever owns the fuel owns the fire' was coined during the 1994 Sydney bushfires¹ and is attributed to Phil Cheney,² the then Project Leader for Bushfire Behaviour and Management in CSIRO and a former Director of the National Bushfire Research Unit. Cheney and Sullivan³ say: '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.'

This quote, or variants with the same meaning, have been used by fire managers, agencies, scientists, and politicians, and in enquiries and parliamentary proceedings, including:

- (i) the Queensland Rural Fire Service (2001);⁴
- (ii) the Commissioner of the NSW Rural Fire Service (2003);⁵
- (iii) the House of Representatives *Select Committee on the Recent Australian Bushfires* (2003);⁶
- (iv) the Chief Officer of the Tasmanian Fire Service (2013) who said 'if you own the land, you own the fuel on that land and therefore own the risk';⁷
- (v) Dr Kevin Tolhurst (AM) Associate Professor with expertise in bushfire science and management (2013);⁸
- (vi) the Western Australian Fire and Emergency Services Commissioner (2014) who said 'If you own the fuel, you own the risk';⁹
- (vii) the Queensland Minister for Police, Fire and Emergency Services (2014);¹⁰ and
- (viii) The recent *Report of the Special Inquiry into the January 2016 Waroona Fire in Western Australia*.

Thus, the understanding represented by the saying 'Whoever owns the fuel owns the fire' has become widespread and influential across a wide spectrum of bushfire management in Australia.

The statement implies a duty on public and private landowners to manage fuel on their land to reduce the likelihood of bushfires, however started, from spreading to neighbouring properties. 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 publicly managed natural areas, there are inevitable questions about

¹ Phil Kopperberg, 'The Politics of Fire Management' (2003) *3rd International Wildland Fire Conference*, 3-6 October 2003, Sydney, Australia.

² T. Vercoe, 'Whoever owns the fuel owns the fire' (2003) Liftout number 65, *Australian Forest Grower*.

³ P Cheney & A Sullivan, *Grassfires: fuel, weather and fire behaviour* (CSIRO Publishing, 2008).

⁴ D Ockwell & Y Rydin 'Analysing dominant policy perspectives: the role of discourse analysis' in J. C. Lovett & D. Ockwell (Eds), *A handbook of environmental management* (Edward Elgar 2010), 168-197.

⁵ Kopperberg, above n. 1.

⁶ Hansard (2003) *House of Representatives Select Committee on the Recent Australian Bushfires*, Wednesday, 9 July 2003, Katoomba.

⁷ ABC News (29 May, 2013) 'Fuel reduction burns debate after Tasmanian bushfires', <http://www.abc.net.au/worldtoday/content/2013/s3769981.htm>

⁸ K. Tolhurst, 'Bushfire risk is not someone else's problem' (2013) *Australian Forest Grower*.

⁹ ABC News (16 April, 2014) 'Emergency services call for law change to compel agencies to reduce fire risks', <http://www.abc.net.au/news/2014-04-16/proposed-changes-to-wa-fire-management-laws/5394976>

¹⁰ Media Statement, Minister for Police, Fire and Emergency Services (4 April 2014) <http://statements.qld.gov.au/Statement/2014/4/4/operation-cool-burn-activated>



fuel treatment practices and claims for compensation.¹¹ However, as far as we are aware, the notion ‘Whoever owns the fuel owns the fire’ has not been interpreted from a legal perspective.

This paper will review the Australian law to identify who is legally responsible for the fire. It will be argued that the correct legal position is that ‘if you own the ignition source, you own the fire’—that is, liability has always fallen on those that start the fire, not on the ‘owners’ of the fuel that sustain the fire. That legal consequence could have dramatic implications for prescribed burning policies as it will be shown that liability for starting a prescribed burn is clear-cut whereas liability for allowing fire to spread in untreated fuel is unheard of.

Whilst we review the law, we do not analyse, and therefore do not question, the importance of bushfire fuel for fire behaviour. Fire intensity¹² and rate of fire spread¹³ are generally positively related to amount of fuel consumed and level of fuel ‘hazard’ respectively, when other factors are held constant.

The law

Historically there was strict liability for the spread of fire;¹² that is a person was liable if fire escaped from their property regardless of the care that they took to contain the fire. The High Court has moved the law away from special rules relating to different hazards or the status of various plaintiffs and defendants¹³ and today the former rules of strict liability are ‘... absorbed by the principles of ordinary negligence’.¹⁴ 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’.

In *Goldman v Hargrave* the Privy Council had to consider liability for the 1961 Western Australia bushfires. The question for the Supreme Court of Western Australia, the High Court of Australia and ultimately the Privy Council was whether the landowner was liable in negligence for the spread of a fire that he did not start. 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’.¹⁵ The High Court came to a different conclusion. Windeyer J said:

*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.*¹⁶

On appeal, the Privy Council 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

¹¹ See Legislative Council General Purpose Standing Committee No. 5 *Wambelong fire* (Parliament of NSW, 2015).

¹² *Beaulieu v Finglam* (1401) YB 2 Hen. IV.

¹³ *Safeway Stores v Zaluzna* (1987) 162 CLR 479; *Imbree v McNeilly* (2008) 236 CLR 510.

¹⁴ *Burnie Port Authority v General Jones* (1994) 179 CLR 520, [43].

¹⁵ *Hargrave v Goldman* (1963) 110 CLR 40, [6] (Taylor and Owen JJ).

¹⁶ *Ibid.*, [25] (Windeyer J).



*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.*¹⁷

The duty to make an effort to extinguish a fire, or to call for assistance, is now reflected in modern legislation.¹⁸

However, these cases involve liability to deal with a fire once started. In the absence of a fire, the fuel per se does not pose a threat to the neighbours. Allowing vegetation to grow or dead fuel to accumulate may increase the risk that fire, once started, will spread but the vegetation and dead plant material is not itself the risk.¹⁹ That is, it is not the vegetation that causes the harm to the neighbour, but the fire.

Even if it is the vegetation that is the risk there may be no duty on a landowner to take steps to control it for the benefit of his or her neighbour. In *Spark v Osborne*, dealing with the spread of prickly pear, Higgins J 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.*²⁰

Spark v Osborne is an old case that today would likely be judged in accordance with the modern law of negligence.²¹ In modern law, determining whether or not a duty of care exists depends on more than mere foreseeability of risk, rather it requires consideration of all the 'salient features' that define the entire relationship between the plaintiff and the defendant.²² Even if we assume there is some legal duty to control the build-up of fuel then liability can only be established if there is a negligent failure to take reasonable care.

The perception of the reasonable man's response calls for a consideration of 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.²³

The 'expense, difficulty and inconvenience of' fuel treatment may be very high. Planning and conducting prescribed burns requires multiple resources and suitable weather conditions, and requires strict compliance with legislative provisions. Other fuel treatment activities may be less risky but can incur significant costs.

This does not mean that in the right circumstances liability could not be established against a landowner or occupier who fails to take reasonable steps to undertake bushfire fuel treatment, but such an action would be a novel development of the law and would no doubt be both costly and time consuming.

¹⁷ *Goldman v Hargrave* [1967] AC 645, [25].

¹⁸ See, for example, *Emergencies Act 2004* (ACT) ss 120 and 121; *Rural Fires Act 1997* (NSW) ss 63 and s 64; *Country Fire Authority Act 1958* (Vic) s 34; and *Bushfires Act 1954* (WA) s 28.

¹⁹ *Stannard v Gore* [2012] EWCA Civ 1248.

²⁰ *Sparke v Osborne* (1908) 7 CLR 51.

²¹ *Goldman v Hargrave* [1967] AC 645, [23].

²² For a discussion of those relevant features, see *Caltex Refineries (Old) Pty Limited v Stavar* [2009] NSWCA 258, [103]-[105] (Allsop P).

²³ *Wyong Shire v Shirt* (1980) 146 CLR 40, 48 (Mason J).



On the other hand, liability for starting a fire is unquestioned. Liability has been established for fires started by negligence of farmers, train operators and electricity suppliers, and 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'.²⁴ Therefore, when it comes to fires that are 'introduced' to the land, the situation is clear; a person lighting a fire will have a duty to take reasonable steps to contain that fire and, given the risk, 'the standard of "reasonable care" may involve "a degree of diligence so stringent as to amount practically to a guarantee of safety"'.²⁵

When it comes to accidental fires liability has been established since at least 1868.²⁶ Since 1977 electricity supply authorities have settled claims for fires caused by their assets²⁷ culminating in the largest class action settlement in Australian history.²⁸ The authors can find only one reported case where the presence of fuel was an issue. In *Dennis v Victorian Railways Commissioner*²⁹ the defendant was being sued for a fire caused by a steam engine that was 'properly constructed and managed'. 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';³⁰ i.e. the defendant owed a duty to ensure that its activities did not cause the ignition of the grass. The presence of the grass itself was not a breach of duty save that the defendant was operating a steam engine that, with the best care would still produce sparks, and so they were under a duty to prevent the ignition of their grass from their steam engine.

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. State agencies may enjoy some extra legal protection from liability in negligence when implementing state policy³¹ whereas private landowners must exercise 'a degree of diligence so stringent as to amount practically to a guarantee of safety'.³²

Conclusion

What this review of the law reveals is that a person who introduces fire into the landscape, whether intentionally or accidentally, 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.³³

²⁴ Michael Eburn, *Australian Bushfire Cases: Annotated Litigation 1867-2011* (Bushfire CRC, u.d) <<http://www.bushfirecrc.com/resources/external-resource/australian-bushfire-cases-annotated-litigation-1867-2011>> accessed 3 July 2016.

²⁵ *Burnie Port Authority v General Jones* (1994) 179 CLR 520, [41] (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

²⁶ *Macdonald v Dickson* (1868) 2 SALR 32.

²⁷ See for example *Wollington v State Electricity Commission* [1979] VR 115.

²⁸ *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663.

²⁹ (1903) 28 VLR 576.

³⁰ *Ibid*, 579.

³¹ See for example *Civil Liability Act 2002* (NSW) ss 40-46; see also *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* [2012] WASC 79.

³² Above, n 25.

³³ *Southern Properties v Executive Director of the Department of Conservation and Land Management* [No 2] [2010] WASC 45, [152]-[188] (Murphy J (at first instance)).



The alternative, of doing nothing, is legally much safer. Whilst there is a duty to attempt to control a fire once it is started, what can be expected might be very limited and may amount to no more than calling triple zero. 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 if you own the ignition source you own—are responsible for—the fire, 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 fire.