

Balancing nature conservation and emergency risk management

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Abstract

Managing natural disaster risk, and in particular bushfire risk, is necessarily a compromise between competing interests – people want to be able to build their dream home with magnificent views surrounded by gum trees but their actions may adversely impact upon the environment or expose them and more importantly others to a risk that is considered too high. Other people may want to leave natural areas completely alone, allowing nature to develop its own sustainable eco-system but to do that can lead to a build-up of fuels that in turn allow massive, unstoppable fires to develop or restrict the way fire fighters can do their job. Finally, we could make an area totally fire proof by clear felling the land. None of those are acceptable options. Here I look at the various objectives and requirements of the *Emergencies Act 2014* (ACT) the *Nature Conservation Act 2014* (ACT), *Planning and Development Act 2007* (ACT) and the *Environment Protection Act 1997* (ACT) to look at how some of these potentially competing activities align-up from a legal perspective.

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One of the objects of the *Emergencies Act 2014* (ACT) is to ‘to protect and preserve life, property and the environment’ (s 3). That statement doesn’t priorities those objectives, they are all things that must be considered. The final report of the *2009 Victorian Bushfires Royal Commission* (Summary, p. 2) said ‘The Commission views protection of human life and the safety of communities as the highest priority for bushfire policy’. But the report of the 2011 Perth Hills Bushfire was critical of the fire service. In that fire they evacuated the population which ensured that no lives were lost, but people were not allowed to stay and defend their properties so many homes were lost. Former AFP commissioner Mick Keelty sitting as the Special Inquiry said (*A Shared Responsibility: The Report of the Perth Hills Bushfire February 2011 Review* (2011), p 3):

There remains one question the answer to which eluded the Special Inquiry but it is an answer that requires further examination and that is: What is the measure of success of the outcome of a bushfire? Is the loss of no lives the only performance measure? If so how many houses is an acceptable number to lose? Does one performance indicator have the potential to cloud the ‘Shared Responsibility’ of all to build resilience of our community?

Similar concerns could be expressed about protecting the environment. Steps to reduce bushfire risk or to fight bushfire may cause irreparable harm to the environment. Whether it’s clearing land, building fire trails or using toxic fire retardants there is a risk to the environment. My colleagues tell me about the impact of hazard reduction burns on native vegetation and the need to understand that impact to know how often burns can take place without fundamentally altering the ecology of the area. And when it comes to prioritising the response to fires is it always necessary or desirable to save a private home in preference to diverting firefighting resources to protect an area of habitat of an endangered species or to protect a water catchment for a city?

These are questions my colleagues in this forum must grapple with. The Emergency Services Commissioner cannot insist that fire risk reduction and when necessary, firefighting, takes precedence over the needs of the environment. And the Conservator for Flora and Fauna equally cannot insist that the conservation of examples of flora or fauna occurs regardless of the risk that might pose to others.

The various items of legislation discussed today anticipate that there will be coordination and cooperation between the agencies. For example, the Emergency Services Commissioner may declare that an area is a bushfire abatement zone but may only do so after consultation with ‘the conservator and the planning and land authority’ (s 71). The Commissioner is to prepare a strategic bushfire management plan but again he or she ‘must consult with the conservator’ (s 72) and the public (s 75). Where there is an inconsistency between the strategic bushfire management plan and any public land management plan then the land management plan is overridden by the bushfire management plan (s 77A).

The Bushfire Council is established to advise the Minister on issues relating to bushfire. The Council must include a person ‘with relevant skills or experience to represent the

community's interest in the environment' (s 129). The ACT Emergency Plan is there to provide for the 'coordination of Territory, Commonwealth and State agencies' (s 147). It would be expected that the role of the Environment, Planning and Sustainable Development Directorate will be included to ensure that they are appropriately involved in the response to any fire.

On the other side of the equation, the objective of the Territory Plan is to '... provide the people of the ACT with an attractive, *safe* and efficient environment in which to live, work and have their recreation' (*Planning and Development Act 2007* (ACT) s 48; emphasis added).

Neither the *Nature Conservation Act 2014* (ACT) (s 7) nor the *Environment Protection Act 1997* (ACT) (s 6) applies to a person exercising a function under the Emergencies Act for responding to an emergency. It follows that the Chief Fire Officers are free to take whatever action they think is necessary to combat a bushfire. It may be an offence to interfere with the nest of a native animal (*Nature Conservation Act 2014* (ACT) s 128) but not if you are making a fire break at the direction of the incident controller responding to a bushfire.

The result must be that perceived tensions between the Acts are manageable. Given that the agencies are all part of government it is fundamentally up to the government to resolve any impasse between agencies interested in developing land or conserving the environment and the emergency services. One can conclude that the 'trump card' lies in the hand of the emergency services but it would be inappropriate for the Commissioner to simply insist that his or her view prevail in the event of any disagreement. Rather he or she would be expected to work with the other agencies to come up with a compromise solution.

And that is the key. The decision on how to balance private and public rights, fire protection and safety against the protection of nature is essentially political. It is not a matter that the interests of one take priority over the other. That is important for people who want to advance a particular cause – those that want a pristine environment and those that demand that national parks are burned and burned often to reduce fuel loads have to appreciate that neither is going to find in the legislation for their cause a rule that says 'this must occur'. Legislatures appoint people to leadership roles to exercise leadership, not simply apply rules that the legislature has already determined.

The critical issue is risk but risk is more than the probability of an event measured against its likely outcome. It may be agreed that in some areas there is a very high risk of fire but whether the outcome of the fire will be catastrophic or not depends on the assets at risk. Some may prioritise the homes that may be lost and others the natural habitat.

What you perceive as the more significant asset will determine what needs to be done to manage the risk – and the only way to do that is for all stakeholders to be engaged in both prioritising the assets to be protected and the steps to be taken to achieve that outcome (see Michael Eburn 'Bushfires and Australian emergency management law and policy: Adapting to climate change and the new fire and emergency management environment' in Burton, L and Sun, L (eds) *Cassandra's Curse: Law and Foreseeable Future Disasters* (Studies in Law, Politics and Society; Elsevier, 2015)).

Community planning is the key (see for example, Tasmania Fire Service, *Community Protection Planning* <http://www.fire.tas.gov.au/Show?pageId=colCommunityProtection>). Involving the community in identifying priorities for fire and land management and identifying how responsibility for emergency management – preparation, prevention, response and recovery – will be shared across the whole community.

By working together agencies and communities will find the ways to manage both the demands of nature conservation and emergency risk management.

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He has served as an ambulance officer and managed a legal practice. He was born and grew up in Sydney. He has a economics and law degree via the University of New South Wales, graduating with a Bachelor of Commerce (Economics)/Bachelor of Laws in 1988. In 1994 he took up a teaching position with University of New England (UNE). During his time at UNE he taught in the areas of criminal law and procedure, torts, health law and advocacy. In 2010 he took up a position at the ANU. He was initially appointed to both the Fenner School of Environment and Society and the ANU College of Law, but from 1 July 2013 has been full time in the ANU College of Law. He retains links with the Fenner School as a visiting fellow and continues to work on fire and emergency management law and policy.