Part 1: Is the law enforceable in the courts?

'Every [legislative] provision has its ultimate sanction somewhere.'[1]

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In a recent ABC Boyer lecture, education was appropriately described as 'an important source of social capital'.[2] While the fundamental importance of education *for* the community is unquestioned, education *of* the community is more problematic. Nevertheless, it is a growing concern of policy makers and decision makers throughout society, and involves topics as diverse as companion animals;[3] protection of the environment[4] and appropriate use of resources[5]; the workplace[6]; communications[7]; privacy[8]; accident prevention,[9] drugs[10] and public health[11]; the rights of the incompetent[12], the disabled[13] and others to be free from discrimination[14]; voting[15]; ethical public administration[16]; films and multimedia[17]; and tenancy agreements.[18]

In emergency management, the focus of this article, the desirability of community or public education[19] is widely accepted as an article of faith[20]. Indeed, the need for educating the public is pressed most strongly: 'if we will not educate those who can use the relevant knowledge that is available, it will become increasingly more difficult to prevent, to prepare for, to respond to, and to recover from the disasters of the future.'[21]

But why, in the emergency management area, is community education necessary? It is said that emergency measures are most often taken at the local level, and sometimes emergency organisations can play only a secondary role.[22] Regular emergency services cannot be available to deal with every emergency.[23] Education in the emergency area works by instilling responsibility which in principle leads to progressive commitment to injury reduction.[24] Education and participatory democracy are related too. To the extent that education gives citizens the feeling that they have a 'stake' in community emergency management, it may also increase their propensity to comply with advice and guidance from emergency managers.[25] Finally, a comparative advantage of education is that, although it involves costs in terms of money, time and effort, it is claimed to be relatively less costly than most other counter-disaster measures which could be attempted[26].

There is another, quite different, and less noticed reason why community education is or ought to be regarded as axiomatic in the emergency area: *legislation* makes it part of the role of emergency management. This two-part article accordingly examines the significance and adequacy of legislation providing for or indeed requiring community education in the emergency area[27]. Part One focuses on the legal effects of the provisions. The first section is *contextual*. It elaborates on the reasons why community education is such a difficult policy area. The second section *describes* the legislation. It identifies the matters with which the relevant legislative provisions in the various State and Territory legislation are concerned and constructs a legislative model which is, on the whole, typical of the legislation. The third section examines what (if any) *effects in law* the provisions have or can have, such as whether the administration of a program of community education could lead to liability for breach of statutory duty.

But the significance of the legislation cannot be judged by their effects in law alone. As one theorist has put it, we ought to consider the function of 'law as exhortation'[28]. Part Two considers this function in detail. The first section of this Part considers the *political effects* that the provisions have or could have. In the second section the article considers *alternative*

Notes:

1 Robinson, 1994, p. 127 (fn 5).
2 Cox, 1995, p.76.
3 e.g. Companion Animals Act 1998 (NSW) s 81(e).
4 e.g. Protection of the Environment Administration Act 1991 (NSW) s 27.
5 e.g. Water Industry Act 1994 (Vic) s 80(e).
6 e.g. Workplace Health and Safety Act 1995 (Qld) s 45(3)(h).
7 e.g. Australian Communications Authority Act 1997 (Cth) ss 6, 7.
8 e.g. Privacy Act 1988 (Cth) s 83(c).
9 e.g. State Government Insurance Commission Act 1986 (WA) s 6(e).
10 e.g. Australian Sports Drug Agency Act 1990 (Cth) s 8(b).
11 e.g. New South Wales Cancer Council Act 1995 (NSW) s 5(1)(b).
12 e.g. Guardianship and Administration Act 1990 (WA) s 97(1).
13 e.g. Intellectually Disabled Persons' Services Act 1986 (Vic) s 6(2).
14 e.g. Equal Opportunity Act 1984 (Vic) s 162(1).
15 e.g. Electoral Act 1985 (SA) s 8(1)(c).
16 e.g. Independent Commission Against Corruption Act 1988 (NSW) s 13(1).
17 e.g. Cinemedia Corporation Act 1997 (Vic) s 6(g).
18 e.g. Residential Tenancies Act 1980 (Vic) s 11(1)(c).
19 In this article the term 'community education' is generally adopted, rather than 'public education', 'adult education' or some other similar term. In the general education field, all three terms are commonly used: see the Australian Education Index on *AUSTROM*, RMIT Victoria University of Technology and the National Library of Australia (a web searchable database). In emergency management legislation (the focus of this article) the descriptors 'public' and 'community' are both employed. The term 'community education' is preferred here since 'community' is a more flexible concept. It can refer both to the general public as well as a section of the public—see *The Macquarie Dictionary*, where the first meaning of 'community' refers to a 'a social group of any size', while the first meaning of 'public' refers to the 'people as a whole': Delbridge et al (eds) 1997, pp. 446, 1723 respectively. 'Community education' is also appropriate given the variety of audiences the subject of emergency management education, and the reality that sections of the public may face different hazards and accordingly have different educational needs.
20 Lambley, 1997, p.26; Boughton, 1992, p.6; Lucas-Smith and McRae, 1993, p.4; McKay, 1997; Keys, 1995/1996, p.30.
21 Quarantelli, 1988, pp.1–2.
22 Quarantelli, 1988, pp.5, 14.
23 Fortune, 1988, p.6.
24 Hennessy, 1998, p.12.
25 Nelson and Perry, 1991, p.25.
26 Quarantelli, 1988, p.3; Smith et al, 1996, p.51.
27 Emergency management legislation the subject of this article is concerned with a broadly and variably defined category of 'emergencies' (e.g. VSESA (Vic), drawing on definition of 'emergency' in s 4(1) of EMA (Vic)), but, in practice, it is largely concerned with preventing or minimising the impact of natural disasters; not with other 'emergencies' such as war, collapse of civil government, and strikes in 'essential services': see generally Lee, 1984, pp 4-6, 171–176.
28 Carney, 1991, p. xiii. For a recent illustration of a judicial finding that particular legislative provisions were 'exhortatory', see *Minister for Immigration and Multicultural Affairs v Eshetu*, High Court of Australia, unreported [1999] HCA 21, 13 May 1999 at [106] and [108] per Gummow J, citing with approval the views of Lindgren J in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs*, unreported, Federal Court of Australia [1997] 324 FCA, 6 May 1997. The relevant provision was s 420 of the Migration Act 1958 (Cth).

legislative models. These alternatives are offered to stimulate reflection on the current offerings rather than as part of a case for necessary reform. The final section offers some conclusions from the study as a whole.

Problems underlying the current law

Community education in the emergency management area, as in other areas of general importance to the community (such as public health), poses enormous challenges to the educator. While some success is claimed[29], surveys indicate widespread failure, especially if success is measured by behavioural change, rather than simply improving knowledge[30]. In summary, the problems stem from the inherent nature of community education; from a lack of understanding about communication principles; and from political, cultural and 'human' dimensions to the task.

The problems caused by the inherent nature of community education in the emergency area include:

- The inadequacy of learning by experience, due to the infrequency of some disasters and the transient nature of the population[31]. Even those with experience can be 'prisoners of that experience, unable to contend effectively with floods outside the range of severities that they have witnessed'[32].
- The general recognition that there is 'no single public' to be educated[33]; rather the community contains multiple audiences with differing needs. Accordingly, multiple channels of communication and multiple strategies are required[34], taking account of factors such as cultural preferences[35], age[36], differing literary standards[37] and the needs of vulnerable groups generally[38].
- The lack of certainty about some of the risks. This creates differences of view as to whether, and if so how, the community ought to be informed.
- The inability of state-based organisations to communicate easily to the population of their state because of the need to take account of local knowledge, local political structures and local priorities.[39]
- The general complexity of the task of 'risk communication'. Risk communication goes way beyond the task of message design and dissemination (the risk message) and involves 'an interactive process of exchange of information and opinion among individuals, groups, and institutions'[40]. Risk communication must also be ongoing—otherwise previous messages will simply 'die'.[41]

Part of the problems also lie in incomplete understanding of the principles of communication; itself a subset of the field of 'community education'. Risk communication is a relatively new subject of interest.[42] In the not so recent past community education campaigns were conducted on a pretty primitive basis.[43] There are still many unresolved issues surrounding the most effective means of raising public awareness of potential disasters, communicating information about risk and achieving resident compliance with emergency warnings.[44] Risk communication is also hampered by the lack of understanding of community education generally. In a recent review, two researchers were blunt in their assessment of community education theory: describing it as 'elusive and under-researched, with rhetoric lacking structure, and vagueness and contradictions rife'.[45]

The wider context of community education cannot be ignored in considering the challenges educators face. Community awareness has suffered in the past from a lack of political attention.[46] Inevitably, of course, there are limited funds available to government and competing political priorities.[47] Lip service by community and political leaders continues to be paid to community education in some areas.[48] Insiders additionally point to cultural obstacles within emergency organisations themselves. The traditions of most emergency services are said to be 'skills-based and incident oriented'. As a consequence, flood planning at least was given relatively little attention until recently.[49] But the most important reason for failure of risk communication is said to be human failure.[50] In particular, there is apathy and complacency by politicians and the general public towards events that may be infrequently experienced or not previously experienced. Contributing factors are a lack of understanding and a lack of information.[51] Contrarily, it is said that people sometimes put themselves at risk with full knowledge, the reasons being overriding values, wilfulness and addiction.[52] In short, '[i]nformation rarely trumps beliefs'.[53]

An overview of legislative provisions concerned with community education in relation to emergencies or disasters

Introduction

The topic 'community education' is a vague criterion for examining legislation, so it has been necessary to define the scope of the exercise. First, I have opted for legislation which refers to education as an *administrative responsibility* (especially on emergency management). Thus, I have not concerned myself with the way legislation *itself* imposes certain duties on private persons such as landholders, backed up by criminal sanctions, even though such legislation may have an educative function.[54] Secondly, I have selected legislation referring explicitly to *public* or *community* education (or some similar phrase) or involving some pro-active educational activity, such as publicity or the dissemination of educational material. I do not therefore examine legislation solely directed to the training of staff and volunteers. Thirdly, while I recognise that community education can occur indirectly through a variety of means, such as the use of volunteers and the preparation of emergency management plans (especially when the plans have been made through community representation)[55] I have restricted myself to legislation providing for *direct* education of the community.

All States and Territories have legislation concerning community education in the emergency management area which meets the above criteria. But the approaches vary according to the emergency area and in the level of regulation. In Victoria, New South Wales, Queensland, Tasmania and the Northern Territory general emergency or disaster statutes provide explicitly for some regulation of community education.[56] In South Australia and Western Australia there

Notes:

29 Scanlon, 1990, pp.241–242.
30 Scanlon, 1990, p.233; Handmer and Penning-Rowsell, 1990, p.318.
31 Nielsen and Lidstone, 1998, p. 17; Boughton, 1992, p.4.
32 Keys, 1995/1996, p.31.
33 Keys, 1991, p.16.
34 Quarantelli, 1988; Nelson and Perry, 1991, p.25.
35 Nelson and Perry, 1991; Dovers, 1998, p.8; Salter et al, 1993–94, p.5.
36 Salter et al, 1993–1994, p.5.
37 Dovers, 1998, p.8.
38 Keys, 1991, p.13.
39 Young, 1998, p.16.
40 National Research Council, 1989, p.21. For a local discussion of these issues, see Beckwith and Bishop, 1993.
41 Keys, 1995/1996, p.32.
42 National Research Council, 1989, p.16.
43 Salter et al, 1993–94, p.5; Keys, 1995, p.11.
44 Beckwith and Bishop, 1993, p.11. Keys, 1995, p.10 acknowledges that the expertise is still being developed to determine the relative levels of cost effectiveness of different approaches to public awareness campaigns.
45 Nielsen and Lidstone, 1998, p.15.
46 Keys, 1995, p.2.
47 Smith et al, 1996, pp.52–53.
48 Heatherwick, 1990, p.10.
49 Keys, 1995–96, p.31.
50 Scanlon, 1990, p.233.
51 Smith et al, 1996, p.53.
52 National Research Council, 1989, p.28
53 De Marchi and McDermott, 1988, p.7.
54 e.g. BA (ACT) s 55.
55 e.g. EMA (Vic) s 21
56 VSESA (Vic); EMA (Vic); SERMA (NSW); SESA (NSW) DA (NT), SC-DOA (Qld); ESA (Tas); SDA (SA); SESA (SA).

is general emergency legislation but no explicit reference to community education. In the Australian Capital Territory, there is no general emergency statute. But in these last three jurisdictions there is bush fire legislation providing for community education in similar terms to that provided in the general emergency statutes applying elsewhere.

Typically, the level of regulation is relatively low with few if any procedures specified. One striking exception (which may not be unique) comes from the Northern Territory where the Fire and Emergency Regulations 1996 provides a very detailed scheme of community education in relation to fire matters. The legislation imposes a duty on the owner or occupier of certain buildings ('prescribed buildings') to ensure that all persons who work in the building are 'given instruction on measures for the protection of persons in the building from fire and fire related emergencies' (regulation 11(3)). The legislation goes further by:

- specifying the matters which must be governed by the instruction
- incorporating a particular Australian Standard recommended or adopted by the Standards Association of Australia
- specifying the period of the instruction
- specifying the procedures for recording the instruction
- providing for enforcement, including provision for inspection and a penalty (reg 20).

But this legislation is exceptional in the current context because the duties are not cast on emergency management but on a range of persons who own or occupy certain buildings in a public or private capacity.

Although the legislative provision for community education by emergency management is generally very brief, there are some significant differences. The legislation is now compared along the following lines:

- upon whom the function of education is cast
- whether the scope of the activity commanded or conferred is wide or narrow
- whether education is a statutory duty of the relevant agency, or merely a function or power of the agency
- whether the educational activity is restricted by reference to stated purposes
- whether the persons to be educated are named and, if so, how they are referred to
- whether the education is to be, or may be, provided by another organisation
- whether there is express political control
- whether outside consultation is required or expressly permitted
- whether community education must be reported on in an annual report to Parliament
- whether acts or omissions are immunised from civil liability
- whether the legislation provides for detailed rules to be made by the Executive.

Upon whom the function of education is cast

The function of community education is cast upon a range of persons and bodies. In some legislation it is the emergency authority[57] or its chief officer[58]. In others it is an advisory or planning body[59]. Exceptionally, as already mentioned, it is the owner or occupier of prescribed buildings[60].

Scope of the activity

Much of the legislation applies to community education generally[61]. For example, section 14(1) of the (Queensland) *State Counter-Disaster Organisation Act* 1975 provides, among other things, that the functions of the State Emergency Service are: 'to educate and train members of the public . . . with respect to counterdisaster purposes'.

This provision must be read with section 15 which states that the Director 'shall arrange counterdisaster education and advisory programs and disseminate information'.

Other legislation focuses more narrowly on particular educational processes.[62] For instance, section 15(2)(k) of the (NSW) State Emergency and Rescue Management Act 1989 confers on the State Emergency Management Committee the following function: 'to produce and disseminate educational material on established emergency management policies and procedures'

Powers or duties

There is no unanimity as to whether community education ought to be expressed as merely a statutory function or power, or, on the other hand, as a statutory duty. While regimes in New South Wales, Queensland, Tasmania, Western Australia and the Northern Territory are backed up by statutory duties[63], mere powers or functions are conferred in New South Wales, Victoria, South Australia and the Australian Capital Territory[64].

Statement of purposes

The legislation in many of the jurisdictions includes some *general* reference to the purposes. For example, the Tasmanian legislation refers to education for 'counterdisaster purposes', and 'counter-disaster' is generally defined as 'the planning, organisation, co-ordination, and implementation of measures that are necessary or desirable to prevent, minimise, or overcome the effects of a disaster upon members of the public or any property in the State . . .'[65]. But there is no *specific* statement of the purposes of the educational programs, etc.

Who is to be educated

The legislation varies in specifying the intended audience. Some refer to 'public education' or 'members of the public'.[66] Others opt for 'the community' or 'community education'[67]. But some do not refer to the audience specifically[68].

Whether the education can be provided by a third party

While most of the provisions speak of a direct relationship with the ultimate audience, in at least two jurisdictions the education is mediated. In Victoria, the State Emergency Service's function is to assist municipal councils[69]. Under the New South Wales Rural Fires Act, the immediate audience of the education are members of the NSW Rural Fires Service[70], or the NSW Rural Fire Service Commissioner[71]. In a less direct fashion, some jurisdictions provide for the emergency authority to enter into a contract with another body for the dissemination of the relevant educational material etc[72].

Political control

At common law, government departments are probably subject to direction from their Ministers on matters of policy even where an official is the repository of a statutory power or duty.[73] Legislation may extend this duty. In South Australia, Regulations made

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Notes:

57 CFA (Vic) s 23(1); VSESA (Vic) s 5(1)(a)(ii); BA (ACT) s 5H(1); PCR (SA) reg 13(1)(d), (e); SC-DOA (Qld) s 14(1)(b); DA (NT) s 18(a); ESA (Tas) s 21(a); FEA (NT) s 6(d), (e).

58 SC-DOA (Qld) s 15(b); DA (NT) s 15(k); ESA (Tas) s 22(b); RFA (NSW) s 13(2)(j).

59 SERMA s 15(2)(k); RFA (NSW) s 124(1)(b); SERMA (NSW) s 48(1)(e); BFA (WA) s 10(1)(g).

60 FER (NT), reg 11.

61 VSESA (Vic) s 5(1)(a)(ii); RFA (NSW) ss 13(2)(j), 124(1)(b); DA (NT) ss 15(k), 18(a); FEA (NT) s 6(d); BFA (WA) s 35A; PCR (SA) reg 13(1)(d); SC-DOA (Qld) ss 14(1)(b), 15(b); ESA (Tas) ss 21(a), 22(b).

62 CFA (Vic) s 23(1)(l).

63 SERMA (NSW), s 48(1)(e); SC-DOA (Qld) s 15(b); ESA (Tas) s 22(b) ; BFA (WA) s 10; DA (NT) s 15(k), FER (NT) reg 11.

64 SERMA (NSW) s 15(2)(k); VSESA (Vic) s 5(1)(a)(ii); PCR (SA) reg 13(1)(d), (e); BA (ACT) s 5H(1); CFA (Vic) s 23(1)(l).

65 ESA (Tas) s 2.

66 RFA (NSW) s 124(1)(b); VSESA (Vic) s 31(1)(f); SC-DOA (Qld) s 14(1)(b); DA (NT) s 18(a); ESA (Tas) s 21(a).

67 RFA (NSW) s 13(2)(j); PCR (SA) reg 13(1)(d); FEA (NT) ss 6(d), 54(2)(a).

68 BA (ACT) s 5H(1); SERMA (NSW) ss 15(2)(k), 48(1)(e); VSESA (Vic) s 5(1)(a)(ii); BFA (WA) s 10(1)(g); DA (NT) s 15(k); CFA (Vic) s 23(1)(l).

69 VSESA (Vic) s 5(1)(a).

70 RFA (NSW) s 13.

71 RFA (NSW) s 124(1)(b).

72 CFA (Vic) s 23(1)(l).

73 *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 61 per Barwick CJ, 87 per Murphy J and 116 per Aickin J. Aickin J's view was tentatively put.

under the Public Corporations Act 1993 require the agency to obtain the approval of the Minister before it makes a 'material change to its policy direction or budget'[74]. Other legislation is more subtle in providing for political control: for example in providing for Ministerial appointments to advisory bodies[75].

Outside consultation

The requirement to engage in consultation beyond government or emergency management is somewhat of a rarity in emergency legislation. The Rural Fire Service Advisory Council under the (NSW) Rural Fires Act is a partial exception to the general rule since a majority of its members are required to be non emergency services personnel (section 123). The new Western Australian legislation (FESAA) may also enable outside consultation to be a practical requirement. It provides for the establishment of three consultative committees. Section 23(3) permits, but does not explicitly require, outside consultation through the appointment by the Minister of non-emergency services personnel.

Annual report

Legislation frequently requires public bodies to report to Parliament on an annual basis. Emergency legislation in some jurisdictions requires or refers to such reports[76]. In other jurisdictions general legislation is said to be the basis for the annual reporting[77].

Immunity

Parliament might attempt to protect an agency or a member of an agency from civil or criminal action. In respect of civil liability it might purport to protect the agency or member from simply negligence, or from damages actions, or from all civil liability where some remedy extraneous to the statute such as damages is sought. Parliament might also attempt to protect the agency or member from judicial review being sought in a State supreme court on the grounds established by administrative law. There are two main cases which might be sought to be prohibited: cases in which the applicant seeks an order requiring a statutory duty to be performed, and cases in which the applicant seeks review, on the ground of illegality, of the exercise of a statutory discretion.

Where such provisions come to the attention of the courts, they are customarily 'read down' so as to protect common law rights to take action in the courts[78]. This means that, in the event of ambiguity, the provision is read in favour of the plaintiff or applicant for review. In the case of a provision which purportedly prohibits judicial review totally on administrative law grounds, there is authority which holds that such a provision must be read down also. The explanation is that, without such an 'interpretation' such a provision conflicts with the express limits of the authority provided in the same legislation[79].

Despite the relative freedom to immunise acts or omissions from civil liability, in particular for damages, it is notable that not all jurisdictions go that far[80]. Queensland, Western Australia, Tasmania and the Northern Territory contain wide immunity provisions which protect against liability for negligence, whether personal or vicarious[81]. But Victoria does not immunise negligence[82], and South Australia only immunises personal liability[83], leaving vicarious liability possible. New South Wales has a patchwork of provisions which together fall short of a comprehensive civil immunity[84].

Provision for making of delegated legislation and other rules

Victoria and the Northern Territory expressly provide for delegated legislation on the topic of community education[85]. Northern Territory's delegated legislation, applying to occupiers and owners of certain buildings, was mentioned in the introduction, above.

Summary

Although the matter of community education forms a small part of emergency legislation, a number of variables have been shown to exist. Principally, they concern the emergency area, the level of regulation generally and the particulars of regulation. If one was to construct a typical model based on the most popular provisions, the legislation might include the following:

- an explicit reference to community education, rather than none at all
- the conferment of a power or duty to educate on specialist emergency service authorities rather than on advisory bodies
- a general reference to education rather than merely to particular processes
- the imposition of a mere statutory power rather than the conferment of a statutory duty to educate (marginally)
- restriction by way of express purposes, though generally stated
- specification of the audience in very general terms, commonly 'members of the public' or the 'community'
- a direct relationship between emergency management and the intended audience
- annual reporting requirement on educational activities
- less than comprehensive immunity from civil liability
- absence of express political control
- absence of requirement of outside consultation
- no specific regulation making power

Effects in law[86]

Effect of legislation per se

To test the legal effect of legislation about community education one could ask, first of all, what if there was no *express* legislative power to educate? Would there be no power to educate? It is submitted that, although direct authority is scarce[87], in the absence of such an express power, there would nevertheless be a power to educate. Three bases may be mentioned. The first two assume legislation has been enacted in the area of emergency management but without an express power to educate the community (as in South Australian and Western Australian emergency legislation). The third does not rely on that assumption. The first basis of a power to educate arguably arises from their being an (implied) incidental power to educate. It is a well established general proposition that 'any grant of power statutory or otherwise carries with it by implication all incidental powers necessary for its effective exercise'[88]. It could be argued that specific legislative powers of emergency management carry with them the incidental power to prevent or minimise dangers to the public caused by disasters. The second basis of the power to educate arguably arises from

Notes:

74 PCR (SA) reg 13(2).
75 Advisory Council under the RFA (NSW) s 123; consultative committees under FESAA (WA).
76 SERMA (NSW) s 17; CFA (Vic) s 24(1); SESA (SA) s 7.
77 Financial and Administration and Audit Act 1985 (WA) s 62, for the Western Australian State Emergency Service, and the Fire and Emergency Services Authority of Western Australia (FESAA (WA), s 36); Annual Reports (Statutory Bodies) Act 1984 (NSW), for the State Rescue Board of New South Wales; Annual Reports (Departments) Act 1985 (NSW), for the New South Wales State Emergency Service; Tasmanian State Service Act 1984 (Tas) s 33AB and the Financial Management and Audit Act 1990 (Tas) s 27, for the State Emergency Service (Department of Police and Public Safety); Public Sector Employment and Management Act 1993 (NT) s 28, for the Northern Territory Police Fire and Emergency Services.
78 See Bell and Engle, 1995, pp.171-172.
79 *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 630-634 per Gaudron and Gummow JJ.
80 FESAA (WA) s 37 is a wide liability provision since it immunises all acts and omissions done in 'good faith', including acts or omissions in the 'purported performance of a function' under relevant legislation.
81 DA (NT) s 42; FEA (NT) s 47.
82 VSESA (Vic) s 17; CFA (Vic) s 92(1).
83 SDA (SA) s 17; SESA (SA) s 17.
84 SERMA (NSW) s 41: wide immunity but only for state of emergency; SERMA (NSW) s 59: wide immunity for rescuers only; SERMA (NSW) s 62: personal liability only protected.
85 VSESA (Vic) s 31(1)(f); FEA (NT) s 54(2)(a).
86 Due to space restrictions, this section is a sketch only of some of the more important legal effects.
87 The scarcity of authority may not disprove a point of law; rather it may point to an unspoken assumption that it exists: *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26 at 58 per Nourse LJ.
88 *Burns Philp and Co Ltd v Murphy* (1993) 29 NSWLR 723 at 730 (FC).

their being an implied power to educate. The Federal Court has ruled that '[the] question whether some power, right or duty is to be implied into a statute will depend upon the construction of the provisions under consideration having regard to their purpose and context and other traces of the convenient phantom of legislative intention'[89]. It would not be difficult to imply a power to educate in the relevant authorities where the statute refers to a purpose of preventing or minimising the impact of natural disasters. The third basis is the prerogative[90]. There is dicta supporting the inherent power of government 'for protecting the public safety'[91]. An actual emergency need not exist[92]. It has been held that the government has an inherent power to circulate information about tourism[93]; *a fortiori*, it would have such a power to circulate information and educate generally about preventing or minimising the impact of disasters.

Thus, the effect of provisions expressly referring to community education is not to create a power to do so where none would otherwise exist. A number of strongly arguable bases exist. But, to the extent that such provisions go beyond merely stating a function or a power, they extend the power which would otherwise be implied in the statute or vested by the prerogative.

Effect of particular provision for community education

The particular provisions are now examined. To test their legal effect, we might consider hypothetical legal action to enforce such provisions or to enforce a common law wrong against the background of the provisions.[94] Five actions may be considered:

- legal action by a plaintiff who seeks to enforce a right to be heard before a decision about an education program is made or implemented
- legal action by a plaintiff who seeks from a court an order to enforce any statutory duty to educate
- legal action by a plaintiff who seeks review by a court of an exercise of a power to educate on the ground of illegality, and an order rehearing the matter according to law
- legal action by a plaintiff who sues for damages on the basis of the common law tort of negligence
- legal action by a plaintiff who sues for damages on the basis of the common law tort of breach of statutory duty.

Do the community education provisions have legal effect in the sense that they are enforceable in a court in one of the above mentioned ways? This might seem an unnecessary question. A non-lawyer might well assume that, since statute law is part of the law of the land, its provisions must be enforceable. This assumption is far from the whole truth. There is clear precedent demonstrating that not only will the courts decline to review common law powers of government which are not suitable for review[95], but this extends, to some extent, to some statutory powers and duties[96]. Furthermore, it can be strongly argued that the community education provisions are not enforceable to a great extent.

Enforceability (1): enforcement of right to be heard before education program before a decision about an education program is made or implemented

The common law principle of procedural fairness (or natural justice) generally speaking requires the executive government to afford individuals the right to a hearing before decisions are made which adversely affect them[97]. But there is no duty to a person if, among other things, the person is not affected individually[98], or the nature of the power is such as to make such a duty inappropriate in the particular statutory context[99]. On either of these grounds it would seem that decisions about community education programs would not attract the common law requirements of procedural fairness in decision making. As with a rate increase, a program of *public* or *community* education would not be deemed to affect a person individually. This is because the diffuse nature of what is commanded or conferred by the power would make it difficult for a court to single out an individual as having their rights specially affected.

Exceptionally, a duty to afford procedural fairness can arise if there is a 'legitimate expectation' that a 'right, interest or privilege will be granted or renewed or that it will not be denied without an opportunity being given to the person affected to put his case'[100]. A legitimate expectation may be based on certain circumstances, including a statement, undertaking or regular practice[101]. So if there is, for instance, a regular practice of educating the community in a particular way, a ground for implying the duty to afford procedural fairness would exist.

Enforceability (2): Enforcement of any statutory duty to educate the community

The main difficulty in enforcing a duty to educate the community lies in ascertaining *what* the court would be asked to enforce or, to put it another way, what constitutes a failure to perform the duty. The statutes fail to specify with any clarity such matters as: what is meant by 'education'; to whom the information ought to be disseminated; and how often the education ought to occur. Nor is it easy to imply such aspects of the duty.

Much of the difficulties in ascertaining the scope of any legal duty stem from the underlying problems facing community educators alluded to earlier: the inherent nature of community education; the lack of understanding about communication principles; and the political, cultural and 'human' dimensions to the task. Considered together, the existence of these factors would send a powerful message to a court that community education is a difficult, uncertain, and complex area requiring political, rather than legal judgment. If the court adopted this line of reasoning, it would be likely to hold that the enforcement of the duty was not justiciable[102].

Notwithstanding these difficulties, limited judicial intervention could not be ruled out

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Notes:

89 *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 at 443 per French J.

90 The prerogative of the Crown used to refer to the non statutory powers available to the central government but not private subjects; but now it increasingly refers to non statutory executive powers in general: Aronson and Franklin, 1987, p. 19.

91 *Burmah Oil Company (Burmah Trading) Ltd v Lord Advocate* [1965] AC 75 at 115 per Viscount Radcliffe. See also *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26 at 57 per Nourse LJ, referring to the 'duty or prerogative of protection'.

92 *R v Secretary of State for the Home Department; Ex parte Northumbria Police Authority* [1989] 1 QB 26 at 45, 55, 59 (prerogative of keeping the peace within the realm).

93 *N. MacDonald Pty Ltd v Hamence* (1984) 1 FCR 45 at 50 per Neaves J.

94 In speaking of legal enforceability I am not implying that emergency management are in any way not fulfilling or likely to fail in, their legal duties and obligations.

95 e.g. *R v Toohey (Aboriginal Land Commissioner); Ex parte Northern Land Council* (1981) 151 CLR 170 at 220-221 per Mason J; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374.

96 *Yarmirr v Australian Telecommunications Corp* (1990) 20 ALD 562; 96 ALR 739; *Shire of Beechworth v Attorney-General* [1991] 1 VR 325; *Minister for Immigration and Multicultural Affairs v Eshetu*, unreported, High Court of Australia, [1999] HCA 21, 13 May 1999, in relation to s 420 of the Migration Act 1958 (Cth).

97 *Haoucher v Minister of State for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 653 per Deane J, approved by Mason CJ, Deane and McHugh JJ in *Annetts v McCann* (1990) 170 CLR 596 at 598.

98 *Salemi v Mackellar (No 2)* (1977) 137 CLR 396 at 452 per Jacobs J, cited by Mason J in *Kioa v West* (1985) 159 CLR 550 at 584.

99 *Kioa v West* (1985) 159 CLR 550 at 619 per Brennan J.

100 *Kioa v West* (1985)159 CLR 550 at 583 per Mason J.

101 *Kioa v West* (1985)159 CLR 550 at 583 per Mason J.

102 The complexity of administrative and political factors was the reason given by Bowen CJ in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 278-279 for declining review in that case. For an example of a statutory duty which was found to be not justiciable in the circumstances of the case, see *Yarmirr v Australian Telecommunications Corp* (1990) 20 ALD 562; 96 ALR 739.

in a clear (and possibly far-fetched) case. If there was a known risk of harm and the authority had unreasonably delayed making a decision about whether or not to educate the public, a court may require the decision maker to make the decision. An argument that decision making was affected by a lack of resources will not necessarily be accepted if a court finds defects in the way resources were allocated[103].

Even if the matter was suitable for judicial review (justiciable), legal action to enforce a duty would need to be brought by a person with legal standing. Thus, if the proceedings were launched by a person or organisation without such standing, the court may, upon objection being taken, refuse to entertain the proceedings. The question therefore arises: who would have legal standing to enforce any statutory duty? Until recently, a person wishing to enforce a statutory duty would need to show that they are specially affected - meaning affected to a substantial extent beyond that held by an ordinary member of the public[104]. An ordinary member of the public or an interest group (simply a combination of such individuals) was seemingly precluded[105]. But, at variance with that law, recent case law at the lower levels of the Australian court hierarchy has 'recognised' the rights of both established and well recognised interest groups, as well as representative organisations such as local shires, to take court action[106]. An added confusion has been the unconvincing way in which some interest groups have been treated[107]. Clearly, the area awaits clarification by the High Court or the legislatures. If the case law recognising the rights of certain interest groups and representative organisations is not upheld by the High Court, it is difficult to see how a member of the relevant community or a group of such members could have standing to commence proceedings to enforce a duty to educate the community. If, however, the High Court does however accord standing to such persons and groups, the problem of justiciability remains.

Enforceability (3): legal action seeking a court to review any exercise of a power on the ground of illegality and to order the matter to be redecided according to law

Where a court is reviewing a discretion rather than a duty, the court has in theory more opportunities to intervene, though its review is limited to 'illegality'. An administrator acts illegally (beyond power) if they go beyond the authorised area or if they infringe one of the statutory or common law restrictions on administrative conduct, such as that decision making must not be for an improper purpose or be so unreasonable that no reasonable decision maker would have made the decision in question[108].

Because of the general absence of statutory criteria in the community education provisions, much the same problems we saw with enforcing a statutory duty would arise with any attempted review of a discretion to educate. Instances of the vague generality of the provisions the subject of this article include:

- the general reference to education, with little or no clarification of the activities contemplated
- the absence of reference to prescribed procedures, for example planning procedures, consultative procedures, co-ordinating procedures, and monitoring procedures
- the absence of specific reference to the purpose of the education, other than the general purposes of the Act
- specification of the audience in very general terms

It is a general rule of administrative law that the less confined a discretion is by express considerations, the less likely it will be that a court will be able to intervene on a ground of illegality. In relation to the community education provisions presently being considered, it would be likely that a court could (and would) intervene only in an extreme case. For example, if the education program was without scientific or objective basis, the program could be declared to unreasonable and unlawful[109]. Even in such a case difficulties in enforcement would arise because of the requirement of standing to sue (as discussed above). Assuming a person with standing could prove an illegality, a court would not be able to quash the education program because there is nothing which affects rights which makes it amenable to certiorari[110]. But it would seem open to the court to issue an injunction preventing any continuation of the impugned program, or a declaration that the program was conducted without lawful authority[111].

Enforceability (4): Legal action seeking damages on the basis of the common law wrong of negligence

Negligence is a common law doctrine with its own particular elements. It is conceptually distinct therefore from the other means of enforcement mentioned above. Breach of a statute is not determinative of negligence, nor is observance of a statute determinative of innocence[112]. So the difficulties in ascertaining the limits, if any, provided by the statute which were seen with the second and third means of enforcement above are greatly avoided. An action in negligence does, however, have something in common with the first means for enforcement mentioned above, namely the action to enforce a duty to accord procedural fairness, since the better view is that that duty is a common law duty rather than an implication derived from the statute[113]. But the enforcement of a duty to afford procedural fairness provides, by definition, no more than procedural justice; it does not entail (in itself) any substantive enforcement. In contrast, the remedy of damages, which goes as of right to a party which can prove negligence (or some other such wrong which is the basis of an award of damages) clearly provides substantive enforcement.

The particular elements of negligence are frequently misunderstood. A 'mistake' which occasions harm to another does not necessarily amount to actionable negligence[114]. Negligence is a legal category with a much more complex array of policy objectives than simply assessing whether a mistake has been made. The relationship between the alleged wrongdoer (defendant) and the plaintiff must give rise to a duty of care; the conduct of the defendant (act or omission) must be negligent, and the damage complained of must be consequential and not too remote[115].

As regards the duty of care, there is no duty if Parliament has passed an appropriately

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Notes:

103 *Jianxin v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 23 ALD 778 at 795 per Neaves J.

104 *Central Queensland Speleological Society Inc v Central Queensland Cement Pty Ltd* [1989] 2 Qd R 512; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 74 per Brennan J.

105 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

106 *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70; *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 492; *Shire of Beechworth v Attorney-General* [1991] 1 VR 325.

107 *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50.

108 For a useful summary of the grounds, see their codification in the Administrative Decisions (Judicial Review) Act 1977 (Cth) s 5. The grounds are usefully explained in Douglas, see p XX.

109 Cf *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381.

110 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

111 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

112 *Sibley v Kais* (1967) 118 CLR 424 at 427 per Barwick CJ, McTiernan, Kitto, Taylor and Owen JJ.

113 *Annetts v McCann* (1990) 170 CLR 596 at 598–599 per Mason CJ, Deane and McHugh JJ.

114 As R Wensley QC says (1994, p.3), 'The common law does not require those who plan, design and develop major engineering projects to be the insurers of others who may be harmed by the failure of, or some aspects of the operation of, such developments.'

115 *Jaensch v Coffey* (1984) 155 CLR 549 at 586 per Deane J.

wide immunity clause. In the emergency area, not all jurisdictions have done so. While courts will readily imply a duty in the *furnishing* of information or advice pursuant to a statutory function or duty[116], they will be much less willing to do so if what is alleged is an *omission*[117]. In the words of As Mason J, '[g]enerally speaking, a public authority which is under no statutory obligation to exercise a power comes under no common law duty of care to do so'[118]. One reason for judicial reluctance has been the recognition that the courts were often ill-equipped to review the reasonableness of government inaction. In the 1980s the High Court authoritatively ruled on the duty to act for public authorities in *Sutherland Shire Council v Heyman*[119]. In the subsequently oft-quoted judgment of Mason J, a duty to act would arise in several well established circumstances, including where there is a specific act generating reasonable reliance[120]. Significantly, his Honour suggested a new basis of liability for omissions, which conceivably could have applied to an omission to inform the community about known hazards. This principle, known as 'general reliance', would apply to: 'cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realisation that there is a general reliance or dependence on its exercise of power. The control of air traffic, the safety inspection of aircraft and the fighting of a fire in a building by a fire authority ... may well be examples of this type of function.'[121]

It is submitted that the general reliance concept could well have been applied to the educative function of emergency managers as being a power of the kind contemplated by Mason J. His Honour's proposition (which had been drawn from United States case law) was subsequently adopted or approved in several Australian and New Zealand courts and possibly the House of Lords[122]. While commentators in the emergency area had quite reasonably assumed the judgment of Mason J to be authoritative[123], arguably, it had not been approved by the other members of the High Court in *Heyman*[124]. But in *Pyrenees Shire Council v Day*, by a 3-2 majority, the High Court has rejected the doctrine[125] as 'presenting considerable difficulty'[126], as 'not sound'[127], and as one which 'does not bear sustained analysis'[128]. If, as seems likely, general reliance is not to be considered a basis for implying a duty in the case of a failure to exercise a statutory power by a public authority, it will clearly be much more difficult to demonstrate that the authority is under a duty to take care in such a case[129]. It may be necessary to show some specific conduct generating reliance such as a promise which is acted upon.

Finally, a decision (an act or an omission) may be viewed as a policy decision, in which case a duty will not also arise. This is particularly applicable to acts or omissions which involve or are dictated by budgetary allocations, allocation of resources and like constraints[130]. The 'policy' exception is unlikely to apply however to acts such as the giving out of wrong information. Information which is 'merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness'[131] is subject to a duty of care.

Even if a duty to take reasonable care can be established, negligent conduct must be shown. The standard which the authority must meet is not necessarily 'best practice'. That standard might be below (or indeed above) the legal standard. The legal standard, against which allegedly negligent conduct is judged, is that of the ordinary, competent practitioner[132]. While industry standards are not determinative therefore[133], they are nevertheless highly influential[134]. In calculating the standard other factors are taken into account, namely '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'[135]. In the emergency area the standard is affected by the enormous harm which may be at stake[136]. A very small possibility of harm, which in other areas of life may not require added precautions[137], does not mean that no precautions are legally required.

A person or authority which is guilty of negligent conduct is not liable in law necessarily. The damage must be shown to have been *caused* by the negligent conduct and the damage must not be too remote from the conduct of the defendant. In the case of the provision of information, it is not automatically assumed that a person would have altered their conduct if relevant information had been given to them. If the harm would have resulted anyway, there is no liability[138]. The burden lies on the plaintiff in establishing the causal link between the negligent conduct and the harm.

Notes:

116 *Shaddock & Associates Pty Ltd v Council of the City of Parramatta* (1981) 150 CLR 225.

117 When talking of an omission in this context, one refers to *mere* omissions, rather than omissions in the course of some larger activity, such as failing to stop at a red light in the course of driving: Trindade and Cane, 1993, p.375.

118 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 at 459-460 per Mason J.

119 (1985) 157 CLR 424.

120 (1985) 157 CLR 424 at 460-464.

121 (1985) 157 CLR 424 at 463-464.

122 See *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [70]-[71] per Toohey J, [105] per McHugh J. Cf Gummow J at [164].

123 e.g. McKay 1995, p. 40.

124 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [65] per Toohey J; Davies, 1992, p.173.

125 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [19] per Brennan CJ; [157] per Gummow J; [231] per Kirby J. McHugh J at [106]-[110] and Toohey J at [77] supported the doctrine. Arguably, the discussion of general reliance by Brennan CJ and Gummow J is obiter, since Brennan CJ found a statutory duty at [28] and Gummow J treated the case as one misfeasance, rather than non feasance or pure omissions at [177]. In addition Brennan CJ appeared to reject general reliance only where a public law duty arose at [19]. General reliance is apt, if at all, to cases of omissions to exercise a statutory power.

126 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [19] per Brennan CJ.

127 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [157] per Gummow J.

128 *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [231] per Kirby J.

129 In *Pyrenees Shire Council v Day* (1998) 192 CLR 330 there was no agreement about the criteria for determining, in the absence of the 'general reliance' test, the liability of a public authority in respect of omissions.

130 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 at 469 per Mason J, approved in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [67], [77] per Toohey J. But Gummow J opted for a radical revision in the latter case at [182]-[183]. In *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431 Mason J's statement of the policy exception was applied with some variation by Kirby J at [139]-[140]. Brennan CJ briefly also took a broadly similar line at [18]. But Hayne J doubted its usefulness at [166].

131 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 at 469 per Mason J, cited with approval by Toohey J in *Pyrenees* at [67]. A less orthodox view was taken by Gummow J at [180]–[183].

132 *Chin Keow v Government [of Malaysia* [1967] 1 WLR 813 at 817 (PC); *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* (1963) 63 SR (NSW) 948 at 955.

133 *Mercer v Commissioner for Road Transport and Tramways (NSW)* (1936) 56 CLR 580.

134 Balkin and Davis, 1996, p.280; Fleming, 1998, p.133.

135 *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J.

136 Wensley, 1994, p.3.

137 *Bolton v Stone* [1951] AC 850 (cricket ground accident).

138 An example from the medical area is *Petrunic v Barnes* [1988] ATR 80-147 at 67,329-67,330.

Enforceability (5): Legal action seeking damages on the basis of a breach of statutory duty

Breach of statutory duty is, in theory, a strict liability tort[139] in the sense that the tort does not require an element of fault, such as intentional or negligent conduct, for the right to consequential damages to arise[140]. Nevertheless, the tort does turn on a public and private distinction in that, absent a statutory duty, the tort is not available[141]. Thus, in the case of community education provisions which happen to be phrased in the form of a discretion, the tort is not applicable.

Even where there is, on the face of the legislation, a statutory duty to educate, it is extremely doubtful whether a court would find that the action for breach of statutory duty arises. There are two main reasons. The first has to do with the scope of the wrong generally. If there is a breach of a statutory duty, the civil action for breach of statutory duty giving rise to a right of damages to an injured party is not available simply because there has been a breach of the statute. There must be 'something more'[142]. The extra requirement is a legislative intention to create the private right to sue for any such breach. Since legislation is usually on its face silent on this matter, a court must engage in what has been traditionally described as a process of 'construction', but which frequently involves the application of presumptions and policy considerations rather than a search for meaning[143]. The factors the courts take into account are quite numerous and include the scope and object of the duty[144]. But these factors do not result in anything like wide application of the tort, giving rise to claims that the tort is 'almost no more than a curiosity'[145] and a '"token" tort'[146]. In point of fact, breach of statutory duty has rarely been applied outside the area of industrial safety legislation[147]. According to Kneebone[148], the tort is restricted in practice because of an underlying policy *against* strict liability. The basis of the policy is said to be a fear of 'floodgates' liability and judicial overkill[149], and a preference for public duties instead of private rights[150].

The second reason why breach of statutory duty will most likely have no application to community education provisions is because of the particular requirements of the tort. As mentioned previously the courts have developed a range of criteria for determining whether a private right is available[151]. While no factor is itself determinative, and commentators point to their 'ambivalent'[152] and 'very rough'[153] nature, two factors stand out in the case of the community education provisions. The first is the lack of specificity of the duty to educate. The specific nature of a precaution has been held to be important[154]. The second factor to note is the object of the provisions[155]. Even where precise duties have been laid down, as pointed out by Luntz and Hambly[156], the courts have sometimes refused the action for breach of statutory duty, and the object of the provisions as found by the court has often been crucial. Motor Traffic Regulations are an apt analogy. In refusing the action with respect to such legislation, the courts have found that the duty was imposed only by way of 'securing a measure of order . . . in the general interest'[157]. A similar line of reasoning would be expected to apply in the case of the duties regarding community education found in emergency management legislation.

It cannot be assumed that all legislative provisions are equally enforceable at law, nor that any provision is necessarily enforceable *legally* at all.

Summary

It cannot be assumed that all legislative provisions are equally enforceable at law, nor that any provision is necessarily enforceable *legally* at all. As was noted in a recent High Court judgment: 'It should not be thought that all non-observances of statutory directives addressed to a public body must give rise to a civil remedy. Statements of broad objectives to be pursued afford a paradigm illustration of statutory commands which are not intended to generate a private right of action.'[158]

Speaking generally, the extent to which a legislative power may have legal effects depends on the subject matter, the purpose of the provision and the form in which it is expressed. For instance, a power of government expressed in legislation is generally more justiciable than a similar power having a common law source[159].

A brief inquiry was made above as to the legal effects, if any, of the provisions for community education in emergency legislation. Legal effects were gauged by examining whether:

- the provisions were subject to the common law duty to afford procedural fairness
- any statutory duty to educate was capable of being enforced in the courts
- an exercise of the power to educate could be reviewed in the courts
- an act or an omission could give rise to liability in negligence
- a breach of any relevant statutory duty could give rise to an action for breach of statutory duty.

On the whole, the typical legislative provision for community education has limited effects in law, though the possibilities of legal intervention vary according to the legal context. It is unlikely that the provisions would be subject to a duty to afford procedural fairness. A similar fate awaits any statutory duty to educate the community and the related tort of breach of statutory duty. There is a greater possibility that a court would review an exercise of a power to educate (though probably only in an extreme case). Liability in negligence can clearly arise in respect of a positive act, but recent judgments of members of the High Court make liability for an omission difficult to establish.

Legislation is not just a legal document however. It is also a multifaceted political document. The political purposes of the legislative provisions for community education and their effects in this regard are considered in Part Two of this article.

Notes:

139 Kneebone, 1998, p.145

140 *Galashiels Gas Co Ltd v O'Donnell or Millar* [1949] AC 275 at 288 per Lord Reid.

141 Kneebone, 1998, p.154.

142 Kneebone, 1998, p.144.

143 *O'Connor v S P Bray Ltd* (1937) 56 CLR 464 at 477-478 per Dixon J.

144 See further Gardiner and McGlone, 1998, para 18.6.

145 Kneebone, 1998, p.145.

146 Kneebone, 1998, p.146.

147 Kneebone, 1998, pp.152–153; Luntz and Hambly, 1995, para 10.2.11.

148 Kneebone, 1998, p.145.

149 Kneebone, 1998, p.156.

150 Kneebone, 1998, p.166.

151 *Tassone v Metropolitan Water, Sewerage and Drainage Board* [1971] 1 NSWLR 207 at 211 (CA).

152 Luntz and Hambly, 1995, para 10.1.9.

153 Gardiner and McGlone, 1998, para 18.6.

154 *O'Connor v S P Bray Ltd* (1937) 56 CLR 464 at 478 per Dixon J; Kneebone, 1998, pp.154, 166–167; Gardiner and McGlone, 1998, para 18.6.

155 *O'Connor v S P Bray Ltd* (1937) 56 CLR 464 at 485 per Evatt and McTiernan JJ.

156 Luntz and Hambly, 1995, para 10.1.9.

157 *Abela v Glew* (1965) 65 SR (NSW) 485 at 490, 491.

158 Lindgren J in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs*, unreported, Federal Court of Australia, 6 May 1997, [1997] 324 FCA, cited with approval by Callinan J in *Minister for Immigration and Multicultural Affairs v Eshetu*, unreported, High Court of Australia, [1999] HCA 21, 13 May 1999 at [176].

159 *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170 at 219 per Mason J.

Abbreviations

BA (ACT)	Bushfire Act 1936 (ACT)
BFA (WA)	Bush Fires Act 1954 (WA)
CFA (Vic)	Country Fire Authority Act 1958 (Vic)
DA (NT)	Disasters Act (NT)
EMA (Vic)	Emergency Management Act 1986 (Vic)
ESA (Tas)	Emergency Services Act 1976 (Tas)
FEA (NT)	Fire and Emergency Act 1996 (NT)
FER (NT)	Fire and Emergency Regulations 1996 (NT)
FESAA (WA)	Fire and Emergency Services Authority of Western Australia Act 1998
PCR (SA)	Public Corporations (Fire Equipment Services South Australia) Regulations 1996 (SA)
RFA (NSW)	Rural Fires Act 1997 (NSW)
SC-DOA (Qld)	State Counter-Disaster Organisation Act 1975 (Qld)
SDA (SA)	State Disaster Act 1980 (SA)
SERMA (NSW)	State Emergency and Rescue Management Act 1989 (NSW)
SESA (NSW)	State Emergency Service Act 1989 (NSW)
SESA (SA)	State Emergency Service Act 1987 (SA)
VSESA (Vic)	Victoria State Emergency Service Act 1987 (Vic)

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