Assessing the legal liabilities of emergencies

by Nicholas Kanarev, Australian Emergency Management Institute.
Presented at the Emergencies 2000 Conference, Sydney, on 10 April 2000

Introduction

This paper is divided into two thematic parts. First, it examines in a general way what type of emergency powers governments possess and what potential legal pitfalls might await emergency services personnel in undertaking their duties. Second, it explores the landscape of some of the legal liabilities issues associated with planning, crisis decision-making and evacuation.

Part one: emergency powers

Emergency management law is essentially the preserve of the States and Territories

The Australian Commonwealth-States constitutional arrangements assign responsibility for the management emergencies to the states and territories whose responsibility it is to maintain peace, welfare and good government.[1] It is also the reason why there is not a uniform corpus of emergency management law within the Australian Commonwealth. The net effect of this arrangement is that each state and territory has developed its own approach to emergency management.

Within this framework the Commonwealth government, largely through the Department of Defence's Emergency Management Australia organisation, plays a role albeit without any emergency management legislation. Under arrangements agreed with the states and territories the Commonwealth government provides support in two ways. First, it assists the states and territories to develop their capacity for responding to and recovering from emergencies. Second, it provides physical assistance to a requesting state or territory when that state or territory cannot reasonably cope using its own resources during an emergency.[2] The Commonwealth government also performs a specific role in emergency management providing physical and financial assistance to other countries in the event of a major emergency,[3] reception for persons evacuated to Australia following an overseas disaster or civil emergency[4] and in response to the re-entry of radioactive space debris.[5]

Despite there being an absence of uniformity regarding emergency management law among the states and territories, a degree of commonality does exist in the legislation when it comes to conceptualising emergencies and their management. At government level, emergency management is regarded in terms of an escalating scale of destruction with a commensurate level of government agency response. This approach views emergency in terms of magnitude and is measured by the number of deaths, injuries and extent of property damage. For example, Victoria's *Emergency Management Act* 1986 defines emergency as:

> *an actual or imminent occurrence of an event which in any way endangers or threatens to endanger the safety or health of any person in Victoria or which destroys or damages, or threatens to destroy or damage, any property in Victoria or endangers or threatens to endanger the environment or any element of the environment.*[6]

Likewise, in New South Wales the *State Emergency and Rescue Management Act* 1989 regards an emergency as:

> a*n actual or imminent occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or warlike action) which: (a) endangers, or threatens to endanger, the safety or health of persons in the State, or (b) destroys or damages, or threatens to destroy or damage, property in the State.*[7]

Similar sentiments are expressed in the emergency management statutory regimes of South Australia,[8] Tasmania,[9] Queensland,[10] the Northern Territory[11] and the ACT.[12] Western Australia is the only state which has not enacted specific emergency management legislation and relies on a cabinet directive, Policy Statement number 7, which is interspersed with applicable police, fire and state emergency service legislation.[13]

Response to an emergency is thus treated as a reactive process implemented by government instrumentalities (Salter 1995/1996). Moreover, the policy underlying emergency response is based on coercive power exercised by governments in a time of crisis in the interests of public safety.

Notes

1. *Australian Emergency Management Arrangements*, sixth edition 1999, EMA, p.6. See also for example, s5 *Constitution Act* 1902 (NSW).
2. Under COMDISPLAM, see *Australian Emergency Management Arrangements*, p. 6 and p.12.
3. Under AUSASSISTPLAN.
4. Under COMRECPLAN.
5. Under AUSCONPLAN SPRED.
6. Section 4(1).
7. Section 4.
8. Section 4 *State Disaster Act* 1980.
9. Section 2 *Emergency Services Act* 1976.
10. Section 6 *State Counter-Disaster Organisation Act* 1975.
11. Section 4 *Disasters Act* 1994.
12. Section 3 *Emergency Management Act* 1999.
13. Sociologists such as Enrico Quarantelli of the Disaster Research Center, University of Delaware, dispute that the scope of an emergency ought to be measured by numbers of casualties or the extent of property damage. In Quarantelli's view it is possible to have a disaster or an emergency without deaths, injuries or property damage as happened in the United States in 1979 when minor spillage occurred at the Three Mile Island nuclear reactor. Following that event there was social disruption which lasted several weeks to the everyday lives of millions of people living within an eighty mile radius of the affected area. Social routines such as attendance at work, school and participation in recreational activity virtually ceased to exist. According to Quarantelli the essential character of a disaster is the way in which it disrupts social organisation. Quarantelli, E., *Disasters are Different*, Preliminary paper #221, University of Delaware (1995) pp. 11-12. For other exponents of the social disruption model over the magnitude of event model see Dynes, R. R., Tierney, K., J., *Disasters, Collective Behaviour and Social Organzsation*, U. of Delaware Press, Newark, 1994, pp.1-10; Drabek, T. E., *Human System Responses to Disaster*, Springer-Verlag, New York, 1986, pp. 6-7. Indeed, from a litigious point of view the social disruption model makes sense as it readily identified those who are responsible for the disruption. For example, the Longford gas explosion in Victoria in September 1998 brought several class actions against Esso Petroleum and recent aviation fuel cris saw similar action brought against Mobil Petroleum. 'Mobil hit with two class actions,' *The Age*, 25 January 2000.

Declarations of a state of disaster or emergency

The pinnacle of this coercive power is found in that part of the legislation that enables a state or territory to declare a state of emergency or disaster.[14] In its delegated application it arms members of the emergency services with far-reaching operational powers. This includes powers of entry, possession, closure and destruction of private and public property,[15] the use of reasonable restraint against members of the public to prevent them from entering an emergency area,[16] as well as the forceful removal of people from an emergency area.[17] It is important to note that many of these powers can be exercised by the emergency services without a declaration of a state of disaster or emergency as they are part of their routine operational activities. However, a declaration is part of a wider strategy of response incorporating the direct involvement of the highest level of government.

Just how long a declared state of disaster or emergency remains in force is dependent on which state or territory you live and who makes the declaration. In Victoria and New South Wales it is the Premier who makes the declaration and it can be for up to thirty days during which time a further thirty day period can be declared.[18] In South Australia a state of disaster can be declared in three ways. First, the Minister can make an interim declaration of a state of disaster for up to twelve hours which subsequently cannot be renewed or extended;[19] second, the State Coordinator can make a declaration for up to forty-eight hours which, with the Governor's approval, may be renewed or extended;[20] third, the Governor may make a declaration for up to ninety-six hours which can be extended but only on the authority of a resolution of both houses of Parliament.[21] In Tasmania the Minister may declare a state of emergency for up to two days and may, before the expiration of that period, extend the declaration for another two days.[22] A state of disaster may also be declared by the Governor on the recommendation of the Minister and may be in force for up to fourteen days and an extension of fourteen days is also available.[23] In Queensland a state of disaster can be declared in two ways: first, a disaster district coordinator can declare a state of disaster for up to three days; second, the Governor in Council can make a declaration which can remain in force for fourteen days and be extended for a further fourteen days.[24] In the Northern Territory the Administrator can declare a state of disaster for up to seven days.[25] The Administrator, or in his absence two Ministers, can extend the state of disaster for a further fourteen days.[26] The Minister can declare a state of emergency which can be in force for up to two days.[27] In the ACT it is the Chief Minister who can make the declaration of a state of disaster.[28] The ACT legislation, unlike other Australian jurisdictions, does not specify a maximum period for the duration of a declaration of a state of disaster in the Act. Significantly, only the ACT has specifically legislated that a state of emergency cannot be declared in relation to the bringing an industrial dispute to an end or to deal with a riot or other civil disturbance.[29] Thus, theoretically at least, a declared state of or emergency could be applied to quell industrial action or political unrest in all other jurisdictions in Australia.

Declarations of a state of disaster or emergency infrequently activated

Historically, declarations of a state of disaster or emergency have been rarely activated. A state of disaster has never been declared in Victoria or the ACT.[30] New South Wales has invoked a state of emergency on two occasions: in 1993 during an outbreak of green-blue algae along the Murray River and in 1997 in response to the Longford gas crisis in Victoria where the New South Wales government had to use its emergency powers in order to enter properties in order to shut off gas facilities along the Murray River which were being supplied from Victoria. No state of emergency was declared in New South Wales following the Newcastle earthquake in December 1989, nor was there a declaration during the Sydney bushfires in January 1994, nor following the Sydney hailstorm in April 1999. South Australia has declared a state of disaster on one occasion during the 1983 Ash Wednesday bushfires. Tasmania has never declared a state of disaster but did declare a state of emergency on one occasion in 1984 during a bushfire. Queensland has declared a state of disaster on at least nine occasions, all of which were in relation to flooding events. The Northern Territory has had one declaration of a state of disaster in 1998 for the town of Katherine which was inundated by flood waters.

Declarations of a state of disaster are infrequent because major emergencies are themselves a relatively infrequent event. In reality, declarations are the power of last resort which governments exercise to meet the exigencies of a crisis. Moreover, they are of limited duration and intended for a specific purpose such as quarantine or evacuation. Another reason is that relief funding arrangements from both state and Commonwealth treasury departments and welfare agencies are not usually dependent on a state

Notes

14. Division 4 *State Emergency and Rescue Management Act* 1989 (NSW); Part IV *Emergency Services Act* 1976 (Tas); Part 5 *Emergency Management Act* 1986 (Vic); Part 3 *State Counter-Disaster Organisation Act* 1975 (Qld); Part 4 *State Disaster Act* 1980 (SA); Part VII *Disasters Act* 1994 (NT); Part III *Emergency Management Act* 1999 (ACT).

15. Section 37A(1)(b) and (c) and s37F (1) *State Emergency and Rescue Management Act* 1989 (NSW); s28(1)(a) and (2)(a) *Emergency Services Act* 1976 (Tas); s24(2)(c) *Emergency Management Act* 1986 (Vic); s25(2)(i) *State Counter-Disaster organisation Act* 1975 (Qld); s15(2)(c) and (d) *State Disaster Act* 1980 (SA); s 37(1)(e) *Emergency Act* 1994 (NT); s27(1)(p) *Emergency Management Act* 1999 (ACT).

16. Section 37(c) *State Emergency and Rescue Management Act* 1989 (NSW); s28(1)(b) *Emergency Services Act* 1976 (Tas); s24(2)(d) *Emergency Management Act* 1986 (Vic); s25(2)(b) *State Counter-Disaster Organisation Act* 1975 (Qld); s15(2)(g) *State Disaster Act* 1980 (SA); s37(1)(d) *Disasters Act* 1994 (NT); s27(1)(b) *Emergency Management Act* 1999 (ACT).

17. Section 37(1) and (2) *State Emergency and Rescue Management Act*1989 (NSW); s28(1)(b) *Emergency Services Act* 1976 (Tas); s24(2)(e) *Emergency Management Act* 1986 (Vic); s25(2)(ii) *State Counter-Disaster Organisation Act* 1975 (Qld); s15(2)(b) *State Disaster Act* 1980 (SA); s37(1)(d) *Disasters Act* 1994 (NT); s27(1)(i) *Emergency Management Act* 1999 (ACT).

18. Section 23(1) and (6) *Emergency Management Act* 1986 (Vic); s33(1), s35(2) *State Emergency and Rescue Management Act 1989*.

19. Section 12(1) and (2)(b) and (c) *State Disaster Act* 1980 (SA).

20. Section13A (b) and (c) *State Disaster Act* 1980 (SA).

21. Section 13(1), (2)(b) and (3) *State Disaster Act* 1980 (SA).

22. Section 25 *Emergency Services Act* 1976 (Tas).

23. Section 26. *Emergency Services Act* 1976 (Tas).

24. Sections 23(1) and (2) and 24(1) and (2) *State Counter-Disaster Organisation Act* 1975 (Qld).

25. Section 35(1) and (3)(b) *Disasters Act* 1994 (NT).

26. Section 35(4) *Disasters Act* 1994 (NT).

27. Section 39(1) and (2) *Disasters Act* 1994 (NT). Under s40(2) the same powers that are available to the emergency services under a declared state of disaster (outlined in ss37 and 38) are similarly available under a declared state of emergency.

28. Section 20(1) *Emergency Management Act* 1999 (ACT).

29. Section 19 *Emergency Management Act* 1999 (ACT).

30. In the case of the ACT this is not surprising as the *Emergency Management Act* was not enacted until late 1999.

of disaster or emergency having been declared. Legally, it requires the approval from the highest levels of government, and can be problematic politically as it allows the emergency services to override the public's civil rights during the time of the response operation. Indeed, to what extent civil rights are suspended, deferred or subrogated in the interests of public safety during a time of emergency remain somewhat enigmatic.

Good faith

Underpinning emergency management legislation is the policy that emergency services personnel exercise their authority within the confines of their authority. That is, even though legislation provides emergency services personnel with a degree of immunity in undertaking their duties, it does so only as long as the undertakings are performed in good faith and not negligently.[31] What does 'in good faith' actually mean? None of the state or territory legislation provides a definition of good faith. Moreover, the courts have tended to read such immunities restrictively meaning that each case turns on the merits of its own circumstances (Barber & Parthimos 1994). The High Court in the 1961 case, *Board of Fire Commissioners (NSW) v Ardouin*, regarded the term to mean an act which is undertaken 'without any indirect or improper motive'.[32] The notion of honesty was amplified in the 1993 case, *Mid Density Developments Pty Ltd v Rockdale Municipal Council*,[33] where the Federal Court held that, within a statutory context, the notion of honesty needs to be understood to be something more than honest incompetence. That is, the court needs to take into account what was a person's state of mind was at the time of the incident (subjective test) as well as how would a reasonable person with the same level of experience have conducted him or herself in the same circumstances (objective test). In short, good faith in an emergency management context requires that emergency services personnel act not merely in accordance with recognised existing procedural practices but also in the circumstances need to exercise sound professional prudence, better known as 'common sense' (Henry 2000).

Negligence

To date in Australia there has not been an action of negligence by a member of the public against operational emergency services personnel following a major emergency event. This is not surprising as emergencies require a multi-agency response effort and it is not always clear which agency is responsible for what aspect of the event, especially during the initial stages. Nevertheless, there have been occasions where operational personnel have been criticised in the media for the way in which they managed the response effort Kanarev 1997). Where operational emergency services personnel leave themselves vulnerable to possible negligence claims would be in the following circumstances: they are in control of an emergency situation; they have a public safety role to perform on behalf of particular and identifiable members of the public; and their action or inaction directly causes people affected by their decision-making to suffer harm or injury.

While emergency services personnel do not have a duty of care to the world at large, (Barber & Parthimos 1994) it is the public safety role which they perform that can place them in a 'special relationship' with particular members of the public. It is this special relationship which can also create a duty of care. Breach of this duty, if reasonably foreseeable and resulting in property or personal injury, could render the agency responsible liable to an action of negligence. Duty of care rests on two principles. With regard to emergency services personnel, first, there needs to be the element of agency control of an emergency situation in a specific area involving members of the public or private property within that area.[34] Second, within the control element there needs to exist a proximate relationship between the emergency services personnel and the public. This could be established when (a) the emergency services personnel were within a reasonable physical proximity to members of the public and could reasonably render assistance;[35] and (b) when the emergency services personnel had the requisite authority to act on behalf of the public[36] and that a member of the public was vulnerable to harm as a result of their activities.[37]

How then, might responsibilities such as a duty of care affect emergency management operation practice in areas like planning, crisis decision-making and evacuation?

Part two: operational liabilities

Legal liabilities associated with planning

In a legal sense emergency management plans and the planning process come under the same rubric as budgets, standing orders, standing operating procedures, guidelines and manuals. That is, it is part of the broad and amorphous concept of policy. The courts have distinguished between policy decisions and operational decisions. As a rule policy decisions are not subject to negligence actions.[38] This is because policy matters generally do not attract a duty of care as they are dictated by financial, economic, social or political factors or constraints.[39] Moreover, policy decisions lack the specificity of what sort of actions ought to be taken in particular circumstances; those decisions are left to operational staff (Taylor 1998). Thus, the elements of negligence such as the foreseeability of risk, requisite proximity and an identifiable vulnerable class of persons or property is simply too remote to attract a duty of care.

Operational decisions, however, do attract a duty of care. How policy decisions are implemented operationally are examinable at law which means that both emergency management staff and their employer can be held liable in negligence. While the defence of necessity[40] is available to the emergency services, there is no defence based on 'merely fulfilling the emergency management plan'. In short, how operational decisions are managed on the ground do come into the purview of the law whereas the policy decisions formulated at a distance by senior management most likely do not (Barber & Parthinmos 1994).

Notes

31. Section 62 *State Emergency and Rescue Management Act*1989 (NSW); s36 *Emergency Services Act* 1976 (Tas); s37 *Emergency Management Act* 1986 (Vic), this Act specifically refers to volunteer emergency workers; s29 *State Counter-Disaster Organisation Act* 1975 (Qld); s17 *State Disaster Act* 1980 (SA); s42 *Disasters Act* 1994 (NT); s78 *Emergency Management Act* 1999 (ACT).

32. (1961) 109 CLR 105 at 115 as per McTiernan J.

33. (1993) 116 ALR 460.

34. *Hill v Chief Constable of West Yorkshire* [1988] 2All ER 238; *Dorset Yacht Co Ltd v Home Office* [1970] AC 1060; *Glasheen v Waverley Municipal Council* (1990) Aust Torts Reports 81-016.

35. *Woods v Lowns* (1996) Aust Torts Reports 81-376.

36. *Knightley v Johns* [1982] 1 All ER 851; *Jaensch v Coffey* (1985) 155 CLR 549; *Sutherland Shire Council v Heyman* (1985) 157 CLR 614.

37. *Perre v Apand Pty Ltd* (1999) 73 ALJR 1190. See also Hancock, G., and Baron, A., "Pure economic loss: the implications of *Perre's* case," *Law Institute Journal*, February 2000 p. 83.

38. *Anns v Merton London Borough Council* [1978] AC 728; *Sutherland Shire Council v Heyman* (1985) 157 CLR at 424 at 466-467 as per Mason J.

39. *Sutherland Shire* at 468 as per Mason J.

40. *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.

Legal liabilities associated with crisis decision-making

Unlike routine decision-making, making decisions in an emergency involves crisis decisions. Professor Uriel Rosenthal (1989) put forward three reasons why crisis decision-making is qualitatively different to routine decision-making. First, crises create a stress-inducing environment. Second, there are time constraints in which decision-makers need to act. Third, there is the pressure of an expectation, from senior management, government and the public, that the decision-making will produce a positive result (Rosenthal 1989). Having to make crucial decisions in a time of emergency can affect decision-makers in several ways. For example:

- incomplete, contradictory or ambiguous information from the field may create a sense of uncertainty in the decision-maker which in turn may create a state of high anxiety and lead to feelings that the decision-maker has lost control of the situation
- as stress increases a person's perception of the situation is likely to become increasingly rigid along 'black' and 'white' lines of 'the issue is either this or its that'
- people from outside agencies may become stereotyped
- decision-makers may lose perspective by focusing entirely on the immediate and ignore how their decisions might have future ramifications (Rosenthal 1989).

Since operational decisions are crisis decisions and thereby examinable by the courts, by what standard does the law measure the decisions of emergency management personnel during an emergency?

Like the issue of good faith, the court would apply the subjective and objective test to the actions of the decision-maker. The subjective test examines the state of mind of the decision-maker. The objective test examines the standard of care that would be exercised by a prudent emergency management decision-maker in the same circumstances as the decision-maker (Luntz 1992). That is, breach of the standard is dependent on what the decision-maker knew or ought to have known at the time when the alleged act of negligence occurred.[41] Breach is comprised of three elements:

- gravity of risk: the degree to which care was required by the decision-maker is exponential to the risk of damage or injury which was incurred by the recipient of that decision[42]
- probability of occurrence: if the probability of damage or an injury occurring is very slight, then the decision-maker may be excused from taking precautions[43]
- practicality of precautions that could have prevented the damage or injury: what expense, difficulty and inconvenience would have been required by the decision-maker to deal effectively with the emergency?[44]

There is also the addition of policy factors which the court would need consider. These include the prevailing community values of fairness, freedom of conduct and the role the emergency services perform within the community.[45]

In short, the court would look at three things. First, what were the consequences of the decision-maker's decisions. Second, compare and contrast the decision-making process with what a reasonable decision-maker having the same level of experience would have done in the same circumstances. Third, gauge the consequences in the light of the prevailing community standards of what ought to be expected of an operational emergency manager.

Legal liabilities associated with evacuation management

From an emergency management perspective, an evacuation has all of the ingredients that highlight the legal liabilities of the emergency services: the exercise of coercive power, a duty of care and operating in a crisis decision-making environment. It is also a time when emergency services personnel are potentially at some level of risk of being sued for negligence by a member of the public who may have been affected by operational decisions.

Although the states and territories emergency management legislation makes reference to evacuation, none of them put forward a definition of what an 'evacuation' actually is. While the concept lacks definition, two models of evacuation have evolved in Australia. The first I have called the pecuniary interest evacuation model and other the mandatory evacuation model.

Pecuniary interest evacuation model: Only Victoria has adopted the pecuniary interest evacuation model which is not overridden during a declaration of a state of disaster. Section 24(7) *Emergency Management Act* 1986 states that during a declared state of disaster the Coordinator in Chief cannot 'compel the evacuation of a person from any land or building if the person has a pecuniary interest in that land or in any goods or valuables on the land or in the building'. A pecuniary interest is a property right not merely restricted to a physical area and can include goods and chattels. It is based on the principle, dating back to the middle ages, that a person who is not a felon or likely to act unlawfully or under some custodial order can freely enjoy his or her property rights unencumbered by the state.[46]

The reasons why the Victorian government adopted this model can be found in the parliamentary debates following the February 1983 Ash Wednesday bushfires. Not only was there extensive property damage throughout the state but also forty-seven people died (Cain 1983). The inclusion of the pecuniary interest model was an initiative of the Liberal-National opposition which had a majority in the state's upper house, the Legislative Council. Using its upper house majority as a leverage, the opposition persuaded the Labor government to adopt the model. The opposition's argument for inclusion of the pecuniary interest model was fourfold:

- often the safest place during a bushfire was to remain in the home[47]
- exclusion of a pecuniary interest clause was contrary to individual civil rights
- the power to remove people forcefully from their homes during a disaster was likely to increase public confusion and panic as well as choking the road system making the task of combating the disaster more difficult for the response agencies
- forceful evacuation was administratively unworkable as it imposed a duty of care on response personnel who, in theory, made themselves liable for any injury to or death under their assumed control.[48]

Thus police in Victoria, who carry the overall responsibility for evacuation, can only advise people (who are not in

Notes

41 *Roe v Minister of Health* [1954] 2 QB 66.

42 *Paris v Stepney Borough Council* [1951] AC 367.

43 Bolton v Stone [1951] AC 850.

44 *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

45 *Western Suburbs Hospital v Currie* (1987) 9NSWLR 511 (CA) at 523-524 as per McHugh JA.

46 *Balfour v Balfour* [1919] 2 KB 571.

47 Most of the Ash Wednesday fatalities occurred when people were burnt to death in their cars. Of the people who were burnt in their homes none were lost by being burnt in front of the fire; all were lost after the fire had passed and heated material such as ashes had fallen from surrounding trees. Victoria Parliamentary Debates, Assembly, volume 372 pp. 2520-2525.

48 Parliamentary Debates, Assembly, volume 372 pp. 2530-2533.

custody or are intellectually incapacitated) to leave their homes.

The pecuniary interest model, however, is not without potential legal problems. Take for example the situation where parents decide not to evacuate but the police, guided by child protection workers, decide to evacuate forcefully any children who, it is perceived, might be in imminent danger from an approaching flood or bush fire. In theory pecuniary interest rights are not the preserve of adults but are also extended to children who, for example, might have toys on a property. The police and child protection workers could claim jurisdiction under s63(c) *Children and Young Persons Act* 1989 (Vic) which empowers them to take children away in circumstances of danger. Under the Act a child is in need of official interventionist protection where the child has suffered or is likely to suffer significant harm as a result of physical injury or emotional or psychological harm and that the child's parents have not protected or are unlikely to protect the child from harm.

The civil rights provision under the *Emergency Management Act* which potentially allows adults to keep their children if they decide not to evacuate and the child protection obligation accorded to police and child protection workers appear to be in conflict. The issue awaits either legislative change or court resolution.

Mandatory evacuation model: The mandatory evacuation model which operates in the other states and territories allows the emergency services to evacuate, forcefully if necessary, anyone from any area to another area. It is also a model which has some inherent problems.

First, the model is antithetical to the notion that the emergency services personnel undertaking an evacuation need the public's consent before the public is to be evacuated. However, forcing the public to evacuate their homes without information about why such an action is necessary and to where they are being evacuated might be a cause for an action in tort. Second, the model may involve a degree of deprivation of civil liberty and raises the spectre of trespass against the person; that is, assault. Third, there is the matter of what the emergency services personnel can do in a situation where a person refuses to leave his or her home based on the reasonable belief that he or she is safer there. What action constitutes reasonable force to evacuate such a person? Certainly it would not be politically acceptable to evacuate a person from their home at gunpoint. It is not difficult to imagine the kind of political fallout for the government of the day if, for example, such a drama were to be screened nationally on the 6 o'clock evening news. After all, any heavy-handed tactics of removing people forcefully from their homes readily conjures up images of jackboots and state repression. In short, having the legislative authority to evacuate people by force might become a public relations disaster for both the emergency services and the government.

Finally, is the issue that at every stage of an evacuation, and this includes withdrawal, shelter and return, the emergency services personnel who are involved in this process also potentially assume a duty of care. Directing or transporting people away from the danger to a safe area, providing welfare for evacuees and ensuring that the evacuees are returned to their homes when it is reasonably safe to do so involves some form of responsibility toward the public. It also means that any one of the stages of the evacuation process may create a claim for negligence.

Conclusions

1. Since it is the Australian states and territories that shoulder the primary responsibility for emergency management in Australia, it is not surprising that emergency management law is state-based and state specific. While the Commonwealth government does perform a significant emergency management role in assisting the states and responding to overseas emergencies, it does so in the absence of emergency management legislation.
2. The states and territories emergency management legislation perceives emergencies in terms of magnitude and consequently response is regarded as a reactive process. In relation to dealing with the public, response agencies are provided with coercive powers, the apotheosis of which is embodied in the government's right to declare a state of emergency or disaster. However, the declaration of a state of emergency or disaster is a power of last resort and, apart from Queensland, has been exercised infrequently.
3. There are potential legal liabilities associated with operational decisions but those associated with policy decisions lack the requisite elements of a duty of care and would therefore be unlikely to attract a negligence action. Crisis decision-making and evacuation management are examples of operational decisions. The standard by which courts would measure decisions made in a crisis have a subjective and objective component and consideration would also be given to policy factors pertaining to community values. Apart from Victoria which has adopted the pecuniary interest evacuation model, all the other Australian states and territories have adopted the mandatory evacuation model. Both models have a level of legal complexity.
4. In summary, although there is a high degree of commonality of emergency management law in Australia, the matter of how the exercise of those powers is undertaken and to what extent that exercise conflicts with civil rights remains an unresolved issue.

References

Barber P. and Parthimos N. (1994), 'Ensuring the health and safety of emergency services personnel — a legal perspective', *The Macedon Digest*, vol. 9, no. 3, Spring p. 29.

Cain J. (1993), 'Ministerial statement, Premier', *Victoria Parliamentary Debates, Assembly*, vol. 368, no. 16, March. pp. 3072-3073.

Drabek T. E. (1986), *Human System Responses to Disaster*, Springer-Verlag, New York, pp. 6–7.

Dynes R. R. and Tierney K. J. (1994), *Disasters, Collective Behaviour and Social Organization*, U. of Delaware Press, Newark, pp. 1–10.

Henry M. (2000), 'Statutory immunities — when is good faith honest ineptitude?' *Australian Journal of Emergency Management*, vol. 15, no. 3, pp. 10–15.

Kanarev N. (1997), 'The political nature of disasters: Part 1,' *Australian Journal of Emergency Management*, vol. 12, no. 3, pp. 18–19.

Kanarev N. (1997/98), 'The political nature of disasters: Part 2', *Australian Journal of Emergency Management*, vol. 12, no. 4, pp. 35–36.

Luntz H. (1992), *Torts: Cases and Commentary*, 3rd ed., Butterworths, Sydney, p. 177.

Quarantelli E. (1995), *Disasters are Different*, Preliminary paper #221, University of Delaware, pp. 11–12.

Rosenthal U. (1989), 'Human factors influencing crisis decision making', *Emergency Preparedness Digest*, vol. 16, no. 3, p. 13.

Salter J., (1995/97), 'Towards a better disaster management methodology', *The Australian Journal of Emergency Management*, vol. 10, no. 4, Summer, p. 8.

Talyor T. (1998), 'How to work with lawyers', in Bland, M., ed. *Communicating Out of a Crisis*, Macmillan, London, p. 99.