Legal risks of volunteer firefighters – how real are they?

Elsie Loh examines Australian legislation arguing that perception regarding firefighters' protection from liability may not be reality.

Abstract

Australian fire services outside major metropolitan areas depend highly on volunteer firefighters. As volunteers, they are accorded protection by legislation from personal liability for any damage or harm caused in the course of their volunteering. Volunteer firefighters are protected under two types of legislation – legislation that apply to all types of volunteers and legislation that specifically protects volunteer firefighters. This paper examines the extent to which volunteer firefighters are protected by both sets of legislation. It will also outline the exceptions and the important discrepancies and gaps in protection that volunteers and fire services should be aware of. The paper concludes that volunteer firefighters are well covered by immunities from legal liabilities, although there are some gaps in the coverage.

Introduction

There are 194,000 volunteers serving in the various state and territory fire services organisations in Australia (SCRGSP, 2007). This is compared to the 12,000 full time equivalent paid firefighters in the country. There is no doubt that the Australian fire services will be significantly impacted if volunteers cease serving because of any fears of personal legal liability arising in the course of their volunteering. As a couple of volunteer firefighters, Mr Robin Box, First Lieutenant and Deputy Group Officer, Moyhu Group of Fire Brigades, Carboor Rural Fire Brigade, and Mr Tony Menz, Captain, Buffalo River Country Fire Association, told a federal inquiry:

> *"[The fear of liability] has affected the effectiveness of brigades getting in and doing their job. We tend to be told, 'If in doubt, get out.' We have better resources, much more expensive equipment and more training and yet our ability to get water onto a fire has deteriorated because people are worried about the liability. If you say, 'Go in and do it' and something happens, they do not want it on their neck …"*
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> *Unfortunately, the way the law operates today, if you do something and it goes wrong, you know you are going to cop it—so you don't do it. People have got the wind up (Hansard, 2003, p.66)".*

In May 2002, a panel of experts headed by Hon David Andrew Ipp was appointed by the Commonwealth to investigate the area of tort law in Australia in light of concerns about the increase of litigation and occasional high profile awards of damages for personal injury claims in Australia. A tort is a civil wrong where one party (the plaintiff) alleges another party (the defendant) has done something that has caused harm to the plaintiff for which he/she is entitled compensation. In the context of bushfire emergencies, the torts of assault/battery, trespass and negligence are the most relevant. After their investigations, the Ipp Panel states in relation to volunteers' liability that it:

> *"…is not aware of any significant volume of negligence claims against volunteers in relation to voluntary work… (Ipp Report, 2002, p. 170)".*

This is also the case in relation to Good Samaritans. A Good Samaritan is a person who, in good faith and without expectation of payment or other reward, comes to the assistance of a person who is apparently injured or at risk of being injured. Such a person is also usually immune from liability under common law and legislation in the event the person the Good Samaritan is attempting to help is injured from the rescue. The Ipp Panel recognises that it has not been able to find any cases in Australia where Good Samaritans have been sued by the people they were trying to help. The Ipp Report states that the Panel is:

> *"…not aware, from its researchers or from submissions received by it, of any Australian case in which a good Samaritan (a person who gives assistance in an emergency) has been sued by a person claiming that the actions of the good Samaritan were negligent (Ipp Report, 2002, p. 170)."*

The Ipp Report proposes that it is unnecessary for any further protection for volunteers to be enacted in statute as there is sufficient protection by the common law (which is made of decisions and reasons for decisions made by judges sitting in court based on the factual cases which are brought before them).

Statute law (which is also known as "legislation") is made of legal rules enacted by Parliament. Statute law overrides the common law where there is conflict between the two. Where statute is silent on an issue, then the common law is applicable. The Ipp Report also found that cases against volunteers are negligible and the fears are unfounded. Despite these findings, all states and territories as well as the Commonwealth have introduced protection clauses for volunteers in statutory law. Further, all states and territories except for Tasmania and Queensland (and the Commonwealth) have introduced protection clauses for Good Samaritans. This fear of personal liability, however unfounded, indeed appears to be very real in the public mind (Tibballs, 2005).

This paper summarises legislative protection in relation to volunteers in the context of fire fighting and the 'Prepare, Stay and Defend or Leave Early' policy (the Policy) (see AFAC, 2005). The Policy emphasises that in the case of bushfires, often the safest option for people caught in the path of a bushfire is to remain in their homes so that they are (i) protected from the radiant heat of the oncoming fire and (ii) able to take measures such as putting out invading embers to protect their homes from being destroyed by the fire. If homeowners feel they are unable to protect their homes whether it is due to physical impairment or lack of preparedness, then it would be safer for these people to leave early long before the danger of the fire presents itself. The policy recognises the most dangerous option is to evacuate through the fire front and that most houses are lost due to ember attack which can greatly be controlled by able-bodied people in the building (Handmer and Tibbits, 2005).

General principles also exist in our common law that determine when personal and legal liabilities are incurred by an individual. Common law is made of decisions and reasons for decisions made by judges sitting in court based on the factual cases that are brought before them. Parliament, however, also enact law in the form of legislation that has, in some cases, amended the position in the common law. The extent to which the common law has been amended by legislation is different in every state and territory. This article does not focus on the common law position dealing with legal liabilities but limits its analysis to the two sets of legislation which have immunity provisions that cover (i) all volunteers (to the extent it covers volunteer firefighters) and (ii) volunteer firefighters specifically. The legislation that relates to volunteers in general has only been introduced within the last seven years by all States and Territories. These volunteer protection provisions are in addition to the protection already accorded to volunteer firefighters by the relevant fire services legislation (see references). The paper also highlights the gaps in legislation that volunteers and fire service organisations should be aware of, including where changes would provide greater clarity and/or better protection.

'General' Volunteers Protection Provisions

Fire service organisations in Australia (and the Australian public) would plunge into crisis should volunteer firefighters across Australia decide to withdraw their services. It is therefore understandable that the introduction of legislative protection against civil liability for volunteers in general is of particular interest to the fire services sector. The relevant 'general' volunteers protection provisions for the states and territories are the Wrongs Act 1958 (Vic), Civil Liability Act 2002 (NSW), Volunteer Protection Act 2001 (SA), Volunteers (Protection from Liability) Act 2002 (WA), Personal Injuries (Liabilities and Damages) Act 2003 (NT), Civil Law (Wrongs) Act 2002 (ACT), Civil Liability Act 2002 (Tas) and Civil Liability Act 2003 (Qld). These provisions apply to all volunteers in the respective state or territory, including volunteer firefighters.

There are three main definitions that are outlined by legislation which must be considered before the volunteer protection provisions apply. These are as follows:

1) Definition of the individual concerned – Does this person fall within the definition of a "volunteer"?
2) Definition of the activity of the individual – Is this person performing "community work"?; and
3) The status of the organisation that organised the activity – Is the relevant organisation a "community organisation" as defined by legislation?

Additionally, the volunteer must show that his or her act was performed in "good faith", a concept that will be discussed below.

Should the above considerations be satisfied, then the question is whether the volunteer or the type of liability falls within an exception or is excluded from being covered by the protection provisions.

A. Definition #1 - Volunteer

To be accorded protection, the individual must firstly fall within the definition of a volunteer as outlined in the relevant legislation. The definition of a volunteer is pretty much consistent throughout all jurisdictions, being a person who does not receive remuneration for their services[1]. This does not include a person

1 Wrongs Act 1958 (Vic) s35; Civil Liability Act 2002 (NSW) s60(1); Volunteer Protection Act 2001 (SA) s3; Volunteers (Protection from Liability) Act 2002 (WA) s3(1); Personal Injuries (Liabilities and Damages) Act 2003 (NT) s7(7); Civil Law (Wrongs) Act 2002 (ACT) s6; Civil Liability Act 2002 (Tas) s45; Civil Liability Act 2003 (Qld) s38.

performing work under a court order. Most jurisdictions however allow for the reimbursement of costs that may have been incurred by the volunteer during the course of their service and/or provide for regulations to specify limits to the amount a person can receive without losing their status as a volunteer.

B. Definition #2 – Community work

The volunteer must be found to be performing community work to qualify for protection. The definition of 'community work' differs slightly across the jurisdictions but the list of purposes include charitable, benevolent, educational and sporting. Other purposes which are included in the definition depending on the jurisdiction are cultural, philanthropic, religious, political, protecting the environment and assisting physical or mentally disabled people[2]. Fire-fighting could easily be classified as being benevolent in nature and carried out for the public good. This activity would undoubtedly fall within the definition of "community work" across all jurisdictions.

C. Definition #3 – Community organisation

The organisation for which the volunteer is connected with must be one which is responsible for organising the community work in question (which the volunteer was engaged in). This organisation must have a particular status or be a particular 'type'. Across all the jurisdictions, the 'body corporate' and 'corporation' are recognised as a 'community organisation'. The definitions of 'community organisation' in most jurisdictions also include government organisations (ie. 'public entities', 'public service bodies', 'authorities of the State', 'the Crown', 'state agencies or instrumentalities or departments' or 'statutory authorities'). It is noted that for-profit organisations can also be covered under this definition. Unincorporated entities are also covered in some jurisdictions such as 'church or other religious groups' and 'registered political parties'. This means that most fire services in Australia would also fall under this definition as they are all government organisations in one form or another and would fall under the definition of 'community organisation' in their respective jurisdiction (see Table 1). The Victorian[3], South Australian[4] and Tasmanian[5] fire services are also corporate bodies/corporations and would therefore fall within the definition of 'community organisation' on this basis. Further, section 56(9) of the Fire and Emergency Act 1996 (NT) provides that "A volunteer fire brigade …be deemed, for the purposes of the Associations Incorporation Act, to be an association incorporated under that Act…"

The ACT fire services, however, do not fall under the definition of 'community organisation' as defined by section 6 of ACT's Civil Law (Wrongs) Act 2002. Section 6 requires the 'community organisation' to be a corporation and does not make any provisions for organisations that may be government or government-related bodies to be included under the definition. The ACT Fire Brigade and the Rural Fire Service are the operational arms of the ACT Emergency Services Agency (the Agency). The Agency is part of the Department of Justice and Community Safety and, as such, is not a corporation. This means that volunteers from the ACT Fire Brigade and Rural Fire Service are not legislatively protected under the ACT's Civil Law (Wrongs) Act 2002. Volunteers from the ACT Fire Brigade and Rural Fire Service are instead protected under the Emergencies Act 2004 (ACT) only (see later discussions). The Emergency Services Authority which was clearly a corporation under section 7(2) of the old Emergencies Act 2004 existed prior to the Agency.. Subclause 7(2) was removed when the Agency was created in 1 July 2006 and integrated with the Department of Justice and Community Safety (DOJCS, 2007). This transition effectively removed the protection accorded to volunteer firefighters provided by the Civil Law (Wrongs) Act 2002. This example emphasises the importance of paying close attention to the seemingly small discrepancies and omissions that exist in different state/territory legislation and the potential significant effect such discrepancies and omissions may have.

D. Good faith

Most states and territories in Australia have different legislation outlining the liabilities of volunteers which means that it is important that the volunteer or the organisation for which the volunteer is practising is aware of their immunities and the exceptions to these immunities. Please note that as there is no Commonwealth fire agency, the Commonwealth Volunteers Protection Act 2003 (Cth) will not be covered in this paper. Generally, liability for any negligent act is transferred from volunteer to the organisation if the volunteer has acted 'in good faith' (see Table 2). This concept of "good faith", however, is not clear as it is undefined in legislation and judicial guidance on its definition is limited.

2 Wrongs Act 1958 (Vic) s36; Civil Liability Act 2002 (NSW) s60(1); Volunteer Protection Act 2001 (SA) s3; Volunteers (Protection from Liability) Act 2002 (WA) s3(1); Personal Injuries (Liabilities and Damages) Act 2003 (NT) s7(7); Civil Law (Wrongs) Act 2002 (ACT) s6; Civil Liability Act 2002 (Tas) s44(1); Civil Liability Act 2003 (Qld) s38.

3 See Wrongs Act 1958 (Vic) s34 and Public Administration Act 2004 s5(1)(a); Civil Liability Act 2002 (NSW) s60; Volunteer Protection Act 2001 (SA) s3; Volunteers (Protection from Liability) Act 2002 (WA) s3(1)(a); Personal Injuries (Liabilities and Damages) Act 2003 (NT) s7; Civil Liability Act 2002 (Tas) s44; Civil Liability Act 2003 (Qld) s34 and s38.

4 Metropolitan Brigades Act 1958 (Vic) s6(2) and Country Fire Authority Act 1958 (Vic) s6(2).

Table 1: Type of entity of fire service organisations (see Australian Government, 2007, p. 8.5-8 DOJSC, 2007, p.7)

Jurisdiction	Type of Fire Service	Type of Entity	Reports to
NSW	Fire Brigades	Government Department	Minister for Emergency Services
	Rural Fire Service	Government Department	Minister for Emergency Services
VIC	Metropolitan Fire and Emergency Services Board	Statutory Authority	Minister for Police and Emergency Services
	Country Fire Authority	Statutory Authority	Minister for Police and Emergency Services
QLD	Fire and Rescue Services (Incorporates Rural Fire Service)	Division of the Government Department (of emergency services)	Minister for Emergency Services
WA	Fire and Emergency Services Authority of WA	Statutory Authority	Minister for Police and Emergency Services
SA	Metropolitan Fire Service	Body Corporate	Board of the SA Fire & Emergency Services Commission
	Country Fire Service	Body Corporate	Board of the SA Fire & Emergency Services Commission
TAS	Fire Service	Operational arm of State Fire Commission (Established by fire service Act 1979)	Minister for Health and Human Services
ACT	Fire Brigade and Rural Fire Service	Operational arms of ACT Emergency Services Agency as part of the Department Of Justice & Community Safety	Minister for Health and Human Services
NT	Fire & Rescue Service	Branch of Government Department (of Police, Fire & Emergency Services)	Director reports to the Commissioner for Police who then reports to the Minister for Police, Fire & Emergency Services
	Bushfires NT	Division of Department of Natural Resources Environment and the Arts (NEAT)	Chief Fire Control Officer reports to CEO of NEAT who reports directly to Minister

For example, in Central Estates (Belgravia) Ltd v Woolgar (1971), a decision of the Court of Appeal of the United Kingdom, Phillimore LJ, expounds at 650 on the difficulties that are encountered by courts in giving a definitive statutory interpretation to the expression 'in good faith" (my emphasis):

> *"Was the claim made otherwise than in good faith? Counsel could not help us very much. One said that a claim was not made in good faith when it was made in bad faith. Another said that a claim must be dishonest if it was to be described as made otherwise than in good faith. It was said that a claim would not be made in good faith if the facts stated in it were untrue to the knowledge of the tenant or if the claim was made for some ulterior motive. One counsel said that it all depended on `quo animo' the claim was made and another said that motive must be distinguished from intention ...I have come to the conclusion that the only course that this court can follow is to deal with this matter on the facts of this case."*

Generally, courts in Australia have also unhelpfully found that what is 'good faith' will depend on the circumstances of each case (Bankstown City Council, 2005, at 59). In the past, courts have defined it as meaning 'without any indirect or improper motive' (Argouin, 1961, at 115). More recently, the Federal Court has emphasised the notion of honesty, although this requires more than honest incompetence. In Mid Density Developments Pty Ltd v Rockdate Municipal Council (1993), Gummow, Hill and Drummond JJ describes the concept at paragraph 27:

> *" 'Good faith' in some contexts identifies an actual state of mind, irrespective of the quality or character of its inducing causes; something will be done or omitted in good faith if the party was honest; albeit careless… Abstinence from inquiry which amounts to a wilful shutting of the eyes may be a circumstance from which dishonesty may be inferred…On the other hand, 'good faith' may require that exercise of caution and diligence to be expected of an honest person of ordinary prudence (Mid Density Developments, 1993, at 468)."*

Table 2: Standard of care required

Jurisdiction	Standard required
Victoria*	"A volunteer is not liable in any civil proceeding for anything done, or not done, in good faith by him or her in providing a service in relation to community work organized by a community organization." *S37(1) Wrongs Act 1958 (Vic)*
NSW	"A volunteer does not incur any personal civil liability in respect of any act or omission done or made by the volunteer in good faith when doing community work: (a) Organized by a community organization, or (b) As an office holder of a community organization." *S61 Civil Liability Act 2002 (NSW).*
South Australia	"Subject to the following exceptions, a volunteer incurs no personal civil liability for an act or omission done or made in good faith and without recklessness in the course of carrying out community work for a community organization." *S4 Volunteers Protection Act 2001 (SA).*
ACT*	"A volunteer does not incur personal civil liability for an act done or omission made honestly and without recklessness while carrying out community work for a community organization on a voluntary basis." *S8(1) Civil Law (Wrongs) Act 2002 (ACT).*
Western Australia	"A Volunteer does not incur civil liability for anything that the volunteer has done in good faith when doing community work." *S6(1) Volunteers (Protection from Liability) Act 2002 (WA).*
Northern Territory	"A volunteer does not incur personal civil liability for a personal injury caused by an act done in good faith and without recklessness while doing community work for a community organization." *S7(1) Personal Injuries (Liabilities and Damages) Act 2003 (NT).*
Tasmania	"A Volunteer does not incur civil liability for anything that the volunteer has done in good faith when doing community work." *S47(1) Civil Liability Act 2002 (Tas).*
Queensland	"A volunteer does not incur any personal civil liability in relation to any act or omission done or made by the volunteer in good faith when doing community work – (a) Organized by a community organization; or (b) As an office holder of a community organization." *S39(1) Civil Liability Act 2003 (Qld).*

*Note: Victorian CFA volunteers and ACT volunteer fire-fighters are not protected under these Acts which provide protection to volunteers generally. Text has been provided for comparative purposes only.

This means that a court will consider what a person's state of mind actually was, as well as how a reasonable person with the same level of experience and expertise would have conducted themselves in the same circumstances in determining whether the act or omission was done in 'good faith'.

Whatever the precise definition of 'good faith', it is generally accepted that what is required of 'good faith' is no different nor less than what is required in common law for liability, being 'reasonable' (which is the relevant standard in relation to negligence). Therefore, volunteers will generally be protected under these new volunteers' protection provisions if they can show their acts were in good faith, even though their acts may have been un-reasonable (ie. could not pass the 'what a reasonable man would do' test). If their acts had been reasonable in the first place (a higher standard than 'good faith') then they would have nothing to fear.

The term 'good faith' is used in all jurisdictions except in the ACT where the term 'honestly' is used instead. The term 'honestly' (or 'honesty') may have the same connotation as 'good faith' but this is not definite as neither terms are defined by legislation nor have they been clearly interpreted by the Courts.

Further, it should also be noted that the act or omission of the volunteer must also be 'without recklessness' (as for example in the wilful shutting of the eyes by the volunteer as to the consequences of his or her act or omission) in South Australia and the Northern Territory.

It is important to be also aware of the additional requirements imposed by the NSW and Queensland legislations that exempt protection if it can be shown that the volunteer failed to exercise 'reasonable care and skill' and 'due care and skill' respectively. Therefore, it would appear that NSW and Queensland have legislated for a standard of care for volunteers similarly to that expected in common law, and no additional protection from liability actually exists for volunteers in these jurisdictions. The legislation in NSW and Queensland that seemingly provides protection for volunteers actually only restates the position in common law that requires rescuers must show that they have acted reasonably or else be found liable in negligence.

E. Exceptions and excluded liabilities

Even if it is found that the protection provisions are applicable, there are exceptions that 'disqualify' the volunteer from protection (see table 3). All jurisdictions provide that protection will not be available if the volunteer knew or ought reasonably to have known that the action was outside the scope of the activities authorised or contrary to instructions given by the organisation.

Further, a volunteer would not be protected from liability if his or her ability to provide the service in a proper manner was impaired by alcohol or drugs, unless the substance was consumed involuntarily or for therapeutic reasons. In New South Wales, however, it is irrelevant whether the alcohol or drugs were taken for therapeutic reasons. Volunteers in NSW should therefore ensure that they are not 'active' while taking therapeutic drugs and if they are, to ensure that the therapeutic drug they are taking will not 'significantly' impair their ability to provide the service in a proper manner. The ACT is silent on the issue of whether immunity will still apply even if the drug was taken voluntarily and/or if it was for therapeutic reasons. However, the provision refers to 'recreational drug', not just 'drug' or even to alcohol. There is no definition provided in legislation for what constitutes 'recreational drug' but this would most likely include all drugs which are not used for medicinal purposes, such as alcohol, marijuana, cocaine, ecstasy, speed, and heroin. In South Australia, the term 'recreational drug' is also used but this is defined by legislation to mean "drug consumed voluntarily for non-medicinal purposes and includes alcohol."

In Northern Territory, the immunity will not apply if the volunteer did the act while intoxicated. Section 16 of the Personal Injuries (Liabilities and Damages) Act 2003 (NT) states that a person is considered 'intoxicated' if it was found that she or he had a blood alcohol reading of 0.08 or more at or about the time of the relevant incident. It is unclear in the NT Act whether it needs to be shown that the volunteer's ability to provide the service had been impaired from being intoxicated however in Australia it is a criminal offence to provide volunteer services while intoxicated. Further, it does not appear that this would include impairment due to drugs due to the narrow definition accorded to 'intoxicated' in section 16. Similarly, the relevant provision in Queensland provides only that the volunteer be intoxicated to be disqualified from protection. Unlike the Northern Territory provision, however, it clearly also requires that the volunteer 'failed to exercise due care and skill' when doing the work.

There are other exceptions. In other states protection is provided by general emergency services legislation however inVictoria, the protection of the Wrongs Act 1958 (Vic) will be denied if the volunteer is a member of the CFA or SES. Significantly, CFA and SES members, including volunteers, are instead covered under the specific legislative provisions of s92 of the Country Fire Authority Act 1958 (Vic) and s42 of the Victoria State Emergency Service Act 2005 (Vic) respectively.

In NSW and Queensland, the legislation does not protect volunteers from liability if the volunteer was committing an offence at the time. Similarly, in the ACT, the protection will not apply if the act of the volunteer involves a threat or act of violence or creates serious risk to the health and safety of the public (as such acts do not fall within the definition of 'community work').

The legislative protection, or immunity, provided for NSW volunteers is not confined to personal injury cases. Section 59 provides that immunity applies to civil liability of any kind, including property, except for defamation. On the other hand, Northern Territory legislation will not provide protection in relation to damage to property therefore protection is only from civil liability for personal injury.

Finally, there are other liabilities that are excluded from coverage under the protection provisions of state legislation. There are variations between states but the list of exclusions includes liabilities that are covered under compulsory third party motor vehicle insurance, defamation, discrimination and liabilities covered under workers' compensation legislation.

F. Liability of Fire Service Organisations

Generally, it appears that the legislation provides protection for negligent acts by volunteers since the immunity provisions protect volunteers from personal liability only. However in some instances the legislation expressly transfers that liability to the Emergency Service Organisation (ESO) that is then ultimately vicariously liable. This is similar to the way an employer is often liable for their employee's acts. While volunteers are on duty they are considered by the ESO as equivalent to an employee and therefore much of the same protection and expectations apply – this is certainly the case when volunteers make compensation claims, and probably bears on the issue of liability and protection as well. The Civil Liability Act 2003 (Qld) is silent on the issue of whether the liability is transferred to the community organisation. It would appear that the Civil Liability Act 2002 (NSW) unsatisfactorily leaves the position unclear in that jurisdiction. This is because section 3C of the Civil Liability Act 2002 (NSW) specifically states that the Act not only excludes or limits the civil liability of a person but also operates to exclude or limit the vicarious liability of another person for that tort. This may mean that in accordance with the common law principles of vicarious liability, the 'principal' (the community organisation) cannot be found liable because its 'agent' (the volunteer) is excluded from liability by

Table 3: Exceptions to immunity (a non-exhaustive list)

Jurisdiction	Exceptions to protection
Victoria*	The immunity does not apply if (s38(1) and (3)): - The volunteer knew, or ought reasonably to have known, that the action was outside of the work undertaken by the organization or contrary to instructions. - The volunteer's ability to provide the service in a proper manner was impaired by alcohol or drugs, unless consumed involuntarily or for therapeutic reasons. - If the volunteer is a member of the CFA or SES (s35(3)).
NSW	The immunity does not apply if: - The volunteer knew, or ought reasonably to have known, that the action was outside of the work undertaken by the organization or contrary to instructions (s64). - The volunteer was committing an offence at the time (s62). - The ability of the volunteer to exercise reasonable care and skill when doing the work was significantly impaired by alcohol or a drug voluntarily consumed (it is irrelevant whether for therapeutic reasons or not) (s63).
South Australia	The immunity does not apply if: - The volunteer knew, or ought reasonably to have known, that the action was outside of the work undertaken by the organization or contrary to instructions (s4(3)). - The volunteer's ability to provide the service in a proper manner was impaired by a recreational drug or alcohol, unless consumed involuntarily or for therapeutic reasons (s4(2)).
ACT*	The immunity does not apply if: - The volunteer knew, or ought reasonably to have known, that the action was outside of the work undertaken by the organization or contrary to instruction (s8(2)(d)). - The volunteer's capacity to carry out the work properly was, at the relevant time, significantly impaired by a recreational drug (s8(2)(c)). - Involves threat or act of violence or creates serious risk to health/safety of the public (s7(2)).
Western Australia	The immunity does not apply if: - The volunteer knew, or ought reasonably to have known, that the action was outside of the work undertaken by the organization or contrary to instructions (s6(3)(a)). - The volunteer's ability to provide the service in a proper manner was impaired by alcohol or drugs, unless consumed involuntarily or for therapeutic reasons (s6(3)(b) & (4)).
Northern Territory	The immunity does not apply if: - The volunteer knew, or ought reasonably to hace known, that the action was outside of the work undertaken by the organization or contrary to instructions (s7(2)(a)). - The volunteer did the act while intoxicated (s7(2)(b)). - The damage relates to personal damage only rather than personal injury (s4(2)).
Tasmania	The immunity does not apply if: - The volunteer knew, or ought reasonably to have known, that the action was out of the work undertaken by the organization or contrary to instruction (s47(3)(a)). - The volunteer's ability to provide the service in a proper manner was impaired by drugs or alcohol, unless consumed involuntarily or for therapeutic reasons (s47(3)(b) & (4)).
Queensland	The immunity does not apply if: - The volunteer knew, or ought reasonably to have known, that he or she was acting outside scope of activities authorized by the organization or contrary to instructions (s42). - The volunteer was committing an offence at the time (s40). - The volunteer was intoxicated and failed to exercise due care and skill when doing the work (s41).

*Note: Victorian CFA volunteers and ACT volunteer fire-fighters are not protected under these Acts which provide protection to volunteers generally. Text has been provided for comparative purposes only.

the volunteer protection provisions in the Act. This, however, is unclear and is still subject to interpretation by the court.

Particular provisions in Victoria, South Australia, ACT, Western Australia and Tasmania provide that the liability, that under certain circumstances would,apply to the volunteer, instead attaches to the community organisation. This means that though the community organisation will not be liable for any act (or omission) of a volunteer that is done in good faith (honestly and/or without recklessness) it would nevertheless still be liable for acts committed by the person that are not reasonable. This appears to be a form of vicarious liability that has been adopted in the legislation that does less to protect volunteers than it does to protect the public, and that changes the usual stance taken in common law. The doctrine of vicarious liability does not usually apply to volunteers but only to employees, as acknowledged by the Ipp Panel in their 2002 Report:

> *"11.22 Section 4 of the Volunteers Protection Act 2001 (SA) protects volunteers from personal liability in certain circumstances. S 5 provides that the liability that would, but for s 4, rest on the volunteer, attaches instead to the community organisation for which the volunteer works. The effect of section 5 is to create an exception to the basic rule that vicarious liability attaches to the relationship of employer and employee. Volunteers are not employees of the organisations for which they work because there is no contract of service between them. In some situations, the common law imposes vicarious liability for the negligence of independent contractors. Likewise, voluntary workers are not independent contractors of the community organisations for which they work because there is no contract for services between them. The common law sometimes imposes vicarious liability on the basis that the negligent person was an 'agent' of the person held vicariously liable. Typically, voluntary workers would not be agents (in the relevant sense) of community organisations for which they work (Ipp Report, 2002, p. 170)."*

The object of the Ipp review was to limit liability and quantum of damages arising from personal injury and death and to make recommendations for capping awards to plaintiffs and other reforms aimed at reducing spiralling payouts and premiums. Though the Panel was able to acknowledge that organisations are generally not liable for the acts of their volunteers in common law, it was unable to make any recommendations that would expand the protection of volunteers (such as to recommend that volunteers be protected in other states and territories in the same way as in South Australia) as this would be contrary to their objectives:

> *"11.23. It follows that a recommendation by the Panel that community organisations should be vicariously liable for the negligence of volunteers who work for them would be in conflict with the objectives of the Terms of Reference because it would expand rather than limit liability for negligence (in this case, the negligence of others). In particular, such a recommendation would adversely affect the interests of not-for-profit community organisations, contrary to the clear intent of Term of Reference 3(f) (dealt with in Chapter 4). We therefore make no recommendation on this issue (Ipp Report, 2002, p. 170-171)."*

It would appear that states and territories have nevertheless proceeded to widen the immunity provisions to include volunteers in this way despite the findings made by the Ipp Panel and the objectives of the review. The following are the dates on which the protection provisions (very similar to South Australia's provisions) were assented to by the respective state/territory after the release of the Ipp Report: the ACT - 10 October 2002, Victoria - 22 October 2002, Western Australia - 14 November 2002 and Tasmania 4 July 2003.

It was mentioned here earlier that a legislative provision is merely a 'form' of vicarious liability that has been adopted – as recognised by McGregor-Lowndes and Nguyen (2005) in their observation of the Personal Injuries (Liabilities and Damages) Act 2003 (NT). With slightly different wording to that adopted by Victoria, South Australia, ACT, Western Australia and Tasmania, the Northern Territory legislation appears to have also placed the volunteer in the same position as an employee through a vicarious liability arrangement. The Act states that the community organisation is liable for the acts of the volunteer "as if the volunteer were an employee of the community organisation". As McGregor-Lowndes and Nguyen (2005) observe, this is confusing as the provision has an exception that states volunteers would not be protected if they were "acting outside the scope of activities" or "acting contrary to instructions". These exceptions also exist in the legislative provisions of Victoria, South Australia, ACT, Western Australia and Tasmania.. The confusion arises because the common law principle of 'vicarious liability' requires that an employer be liable for acts done by the employee even if they were contrary to the instructions of the employer. All that needs to be shown is that the employee was acting in the course of their employment. As mentioned previously, volunteers do not as a matter of course, fall within a recognised category where common law vicarious liability applies. This means that while an employee may be protected even for acts done contrary to instructions, the volunteer is not accorded the same protection.

Table 4: Transfer of liability to third party

Jurisdiction	Transfer of liability to third party
Victoria	Any liability resulting from an act or omission that would but for s37(1) attach to the volunteer attaches instead to the community organisation (s37(2)). Section 37(2) does not override any protection from liability that would have applied to a community organisation if the thing done/not done by the volunteer had been done/not done, by the community organisation (s39(1)). The principal organisation who coordinated the community work would be accorded the liability if there are more than one organisation involved in the work (s39(2)) The State will incur the liability instead of the community organisation if the community organisation is a public entity or public service body within the Public Administration Act 2004 or another person or body acting on behalf of the State (s39(3)).
NSW	Any provision of the Act that excludes or limits the civil liability of a person for a tort also operate to exclude or limit the vicarious liability of another person for that tort (s3C)
South Australia	A liability that would, but for this Act, attach to a volunteer attaches instead to the community organisation for which the volunteer works (s5(1)).
ACT	A liability that would, apart from this part, attach to a volunteer, attaches instead to the community organisation for which The volunteer was carrying out the relevant community work. (s9(1)). The territory may assume liability of community organisations of volunteers by agreement where the community organisation carries out a function that is a recognised government responsibility (s10).
Western Australia	A community organisation incurs the civil liability that, but for the operation of section 6(1), a volunteer would incur for a thing done by the volunteer when doing community work organised by the community organisation (s7(1)). The operation of the s7(1) is subject to any protection from liability that would have applied to the community organisation if the thing done by the volunteer had been done by the community organisation (s7(2)). The principal organisation who coordinated the community work would be accorded the liability if there are more than one organisation involved in the work (s7(3)) Liability that would be incurred by a community organisation that is a State agency is incurred by the State instead (s7(4)).
Northern Territory	A community organisation incurs the civil liability that would, but for subsection (1), have been incurred by the volunteer doing work for that organisation; and is liable for the personal injury caused by the act of the volunteer as if the volunteer were an employee of the community organisation (s7(3)). Liability that would be incurred by a community organisation that is an Agency department of the Territory is incurred by the Territory (s7(4)).
Tasmania	A community organisation incurs the civil liability that, but for the operation of s47(1), a volunteer would incur for a thing done by the volunteer when doing community work organisation by the community organisation (s48(1)). This is subject to any protection from liability that would have applied to the community organisation if the thing done by the volunteer had been done by the community organisation instead (s48(2)).
Queensland	No express transfers of liability to the community organisation or State.

*Note: Victoria's CFA volunteers and ACT volunteer fire fighters are not protected under these Acts, which provide protection to volunteers generally. Text has been provided here for comparative purposes only.

There are arguments that this trend should and/or will change due to the fact that volunteers are increasingly being recognised as important contributors in organisations (whether profitable or non-profitable) and deserve equal protection as such. For example, Volunteering Australia's model code of practice for organisations involving volunteer staff requires that "appropriate and adequate insurance coverage for volunteer staff" be provided for by organisations (Volunteering Australia, 2005, p.1). This is especially true in the fire service organisations (FSO) in Australia where the majority of firefighters are volunteers. McGregor-Lowndes and Nguyen also argue that legislative protection of volunteers should increase on the basis that volunteers often undergo the same rigorous recruitment processes as paid employees and there are arguably very little practical and social differences between these two groups. For example, Volunteering Australia's national standards for involving volunteers in not-for-profit organisations recommend common employment practices in recruiting volunteers, including reference checks, screening and interviews, job descriptions, induction processes, ongoing training, grievance procedures, discipline, termination and exit interviews (McGregor-Lowndes and Nguyen, 2005). It should be noted that Volunteering Australia has created its recommendations for volunteers in general, not just emergency services volunteers In the context of the FSOs, however, this argument does not carry as much weight as there are vast differences between volunteers and professional firefighters in the way they are recruited and the level of skill and training required of both groups. Nevertheless, as examined here and later, legislation exists providing wide protection of volunteers and courts have generally interpreted legislation in a way that encourages rescue of people in emergency situations (see eg. Brown, 2003).

There may be occasions where several FSOs may be working together to fight a cross-territory fire or where one organisation is called upon to help another organisation with a fire in the latter's territory. In Western Australia, Victoria and Tasmania, if there is more than one FSO involved in an emergency response event, then the FSO that is principally responsible for incident control (ie. coordinating the response) would be held vicariously liable. This may mean that an FSO may be held vicariously liable for the wrongful acts of an interstate volunteer fire-fighter or one from a different emergency services organisation who is aiding the response in their territory. This kind of liability is not clear in the other states and territories.

In some states indemnity agreements are allowed to be entered into where the volunteer agrees to provide the community organisation with an indemnity should the organisation suffer any loss arising from the volunteer's wrongful acts or omissions. Most jurisdictions in Australia do not allow such contracts to be enforced though NSW and Queensland still allow volunteers to enter such contracts. This may be because their provisions do not of themselves make the community organisation vicariously liable for the volunteer's liability.

In some jurisdictions, provisions have been made to allow the state or territory government to assume the liability of the FSO. For example, the ACT allows the Territory to assume liability at the discretion of the Minister where the community organisation is carrying out a 'recognised government responsibility', which is the case with an FSO.

Legislation in Victoria, the ACT, Western Australia and the Northern Territory expressly transfers liability on to the relevant State or Territory where the community organisation is a State agency, department, public authority or similar representative of the government. Other States are silent on this issue and may wish to push Parliament for further legislative clarification on this issue.

Protection from Specific Emergency Service Legislation

As well as the protection available to volunteer firefighters in the general volunteer protection provisions in each State and Territory, legislation which specifically cover fire services also have protection clauses for their fire services members (see Table 5). These include the Fire Brigades Act 1989 (NSW), Rural Fires Act 1997 (NSW), Fire and Rescue Services Act 1990 (Qld), Fire and Emergency Services Act (SA), Fire Services Act 1979 (Tas), Emergencies Act 2004 (ACT), Metropolitan Fire Brigades Act 1958 (Vic), Country Fire Authority Act 1958 (Vic), Fire and Emergency Services Authority of Western Australia Act 1998 (WA), Bushfires Act 1980 (NT) and Fire and Emergency Act 1996 (NT). These provisions are also relevant to volunteer firefighters acting under the relevant Acts but are restricted to fire fighting activities of members and not to acts or omissions done in the event of a state of emergency or disaster. Powers and immunities during these periods are covered by other legislation which are not considered here. The protection clauses in legislation that is specific to the fire services can be generally classified into three types which are further discussed below – those that make no change to the common law, those that reinforce the notion of vicarious liability (but with the significant variation in that it applies also to volunteers) and those that appear to make changes to the common law by lowering the standard of care required (Eburn, 2005).

A. No changes

The Queensland legislation appears to be mere re-statements of the current common law position. The relevant sections provide that there is no liability

Table 5: Form of protection in fire services specific legislation

Jurisdiction	Party Protected	Form of protection and conditions under which it will be provided
NSW	Crown (State), Minister, Commissioner, and Members or fire services	Immune from any claim for any act done or omitted to be done in good faith, and for purposes of executing any Act (s78 fire brigades Act 1989 (NSW) and s128(2) Rural Fires Act 1997 (NSW)).
QLD	Any person acting pursuant to Fire and Rescue Services Act 1990 (Qld)	The individual is not liable for anything done, or omitted to be done bona fide and without negligence by an person for the purpose of any Act (s129(1) of the Act). An individual who exercises their power under the Fire and Rescue Services Act 1990 (Qld) to forcibly remove someone is not liable to be charged with any offence in respect of that use of force – provided that the force used was reasonable (see s129(2) of the Act)
SA	A member of emergency services, a person appointed or authorised to act under relevant Act by Commission or other person	Immune from civil liability for honest acts or omissions in the performance of a power or function under the Fire and Emergency Services Act 2005 (SA) or in carrying out direction or requirement given or imposed at scene of fire/emergency (s127 of the Fire and Emergency Services Act). A volunteer fire-fighter can only be personally sued if it is clear from the circumstances of the case that the immunity conferred by the legislation does not extend to the case or if the Crown contests its liability.
ACT	An Official (the Commissioner, member of emergency services – including volunteers, etc.) (see s198(1) Emergencies Act 2004 (ACT)	An official is not personally liable for any act or omission done honestly and without recklessness in the exercise of a function under Emergencies Act 2004 (ACT) or in reasonable belief that conduct was in exercise of Act (s198 Emergencies Act 2004 (ACT)).
Tas	A brigade or an officer, fire-fighter, employee or agent of the Commission or a brigade (including volunteers)	Does not incur any liability in respect of an act/omission done by them in good faith, where act is related to operations directed to extinguishing, or preventing the spread of a fire or reducing the risk of a fire occurring, or to the training of persons in the carrying out of any of those operations. Relevant reference: s121 Fire Services Act 1979 (Tas).
Vic	Members of the MFB	The individual is not personally liable for any act or omission done in good faith in the exercise of a function under the relevant Act or in reasonable belief that conduct was in exercise of the Act. Relevant references: s54A Metropolitan Fire Brigades Act 1958 (Vic).
	Members of the CFA (including volunteer workers)	The individual is not personally liable for any act or omission done in good faith in the exercise of a function under the relevant Act or in reasonable belief that conduct was in exercise of the Act. Relevant references: s92 Country Fire Authority Act 1958 (Vic).
WA	Member/officer of private fire brigade or volunteer fire brigade. Volunteer fire fighter (carrying out work within Bush Fires Act 1954).	The individual is not liable for anything done in good faith in the performance or purported performance of a function under the emergency services Acts. Relevant reference: Fire and Emergency Services Authority of Western Australia Act 1998 (WA) s37.
NT	Individual acting under Bushfires Act 1980.	A person who causes damage in the course of exercising a power conferred on him by this Act is not liable in respect of that damage 9s53 Bushfires Act 1980 (NT)).
	A member of fire and emergency response groups - includes volunteers	No action can be brought for any act or omission done in good faith by the person under or for the purposes of Act or Regulations (s47 Fire and emergency Act 1996 (NT)).

where the act or omission was done "without negligence" of an officer. This is, of course, the current common law position – that the exercise of statutory power which is not negligent cannot attract liability even if damage was caused.

B. Reinforces vicarious liability (significant for volunteers)

Further other legislation (see next paragraph) appears to only reinforce the doctrine of vicarious liability. The common law doctrine of vicarious liability provides that an ESO, as the employer, would be liable for acts done by the employee officer, if the member was acting within the scope of their employment or authority. To disprove vicarious liability, the ESO must show that the conduct of the volunteer or employee was so far removed from what was authorised as to be beyond the control or influence of the ESO.

For example, section 92 of the Country Fire Authority Act 1958 (Vic) provides that a person is not liable for an act done "in good faith" and section 127 of the Fire and Emergency Services Act (SA), a person is not liable for an "honest act or omission". Similarly, section 198 of the Emergencies Act 2004 (ACT) provides protection for acts done "honestly and without recklessness" and section 121 of the Fire Services Act 1979 (Tas) provides protection for acts related to fire fighting activities that are not done in "bad faith". An individual's liability is, therefore, reduced from the test of 'reasonableness' to one of 'good faith' or 'without recklessness'

The Acts also state that liability that would, but for the provisions in specific sections of the legislation, apply to the person is to lie against the Crown. Similar to the provisions covering volunteers generally (as discussed above), this means that the Crown will be liable for acts committed by the person which are not reasonable. This, of course, is in accordance with the doctrine of vicarious liability. It would appear that Parliament intends for these sections to merely clarify the applicability of the doctrine in the area of emergency service.

As discussed previously, however, this doctrine of vicarious liability does not usually apply to volunteers, only employees. Volunteer firefighters therefore have wider protection under the fire service specific Acts discussed in this section than in Acts covering volunteers generally. Volunteer firefighters are accorded the same protection as employed firefighters as they are both protected under the same provisions in the relevant fire services legislation. This is especially important for NSW and Queensland where there are no specific provisions in their respective 'general' civil liability acts that protect volunteers.

C. Changes to the common law – lowers standards

Other legislation, however, do change the common law significantly by changing the standard of care that is expected from a duty to take reasonable care to a duty to act in "good faith" or to act "honestly and without reckless disregard". These include section 78 of the Fire Brigades Act 1989 (NSW), section 128 of the Rural Fires Act 1997 (NSW), section 54A of the Metropolitan Fire Brigades Act 1958 (Vic), section 37 of the Fire and Emergency Services Authority of Western Australia Act 1998 (WA), section 53 of the Bushfires Act 1980 (NT) and section 47 of the Fire and Emergency Act 1996 (NT). The effect of these acts is that liability of the member concern is removed completely even if it can be shown that the conduct was not "reasonable" but only if "good faith" or "honestly and without reckless disregard" can be established.

Some legislation expressly removes liability from the member of the emergency service and the government if good faith can be shown. Others are silent on whether an action can be brought against the emergency service and/or the government where the member has acted in good faith. Under the doctrine of vicarious liability, however, if the member is not liable, then the employer will not be liable either. Though silent, it would appear that these sections also provide protection for the member and ESO.

The protection accorded by legislation differs according to which State or Territory the emergency worker and/or service is in. There is no doubt that it is Parliament's intention that some form of protection is accorded to ESOs and their members. Of course, none of these provisions have actually been brought to Court and been interpreted to date. Though the above analysis is helpful to give some idea as to immunities that exist for practitioners in the emergency area, the extent of protection these provisions actually provide (above that which is accorded in common law) is yet to be seen.

Conclusion

There are general provisions in state and territory legislation dealing with civil liability that provides protection for volunteers. It would appear that a volunteer fire-fighter would be protected under these provisions as they, the type of work they do and their organisation would fall within the definitions as set out in the Acts. The extra element of "good faith" would need to be shown and ensure that they do not fall within any exceptions and liabilities that are outlined by the relevant Acts. In relation to Victoria, CFA volunteers would not be covered as the Wrongs Act 1958 (Vic) specifically states that they are not covered under the Act. CFA volunteers in Victoria are therefore covered under the fire services Act Further, the Civil

Law (Wrongs) Act 2002 (ACT) do not apply to ACT volunteer firefighters as the Emergency Services Agency is not a corporation and therefore fails to fall within the definition of 'community organisation'. ACT volunteer firefighters are also therefore only protected under its specific fire services Act.

It has been shown in this paper that specific fire services legislation provides volunteer members with a higher level of protection (with one exception)either (i) by providing complete protection to volunteer firefighters from personal liability (in NSW, Western Australia, Northern Territory and Tasmania) and in some circumstances expressly protecting the fire service organisations from liability or (ii) by extending the doctrine of vicarious liability to volunteers (in South Australia, Victoria and ACT – if it was applicable), so that they are treated the same as employees. This means that volunteer firefighters would be protected even if their actions were contrary to the instructions of the employer (which is not the case under general volunteer protection provisions).

While volunteer firefighters may therefore prefer to seek protection under their specific fire services legislation in most States and Territories (and must do so if they are a CFA member or part of the ACT fire services) this may not be the case in Queensland. It would appear that section 129 of the Fire and Rescue Service Act 1990 (Qld) does not accord any extra protection to a volunteer fire-fighter on top of what is provided under common law (therefore, the standard of care is still at the level of "reasonableness"). As this is the case, the volunteer fire-fighter may prefer to seek protection under section 39(1) of the Civil Liability Act 2003 (Qld) which requires the volunteer to show the he or she has acted in 'good faith' in order to be protected. Whether through the general volunteer protection provisions or by specific fire services legislation, volunteer firefighters (and in some cases fire service organisations) are well protected from liability, though there are variations on the level of protection between states and territories.

The persistent problem of emergency law is the lack of uniformity between the states and territories in Australia which adds to the uncertainty (and nervousness) that already exists among practitioners in the area. Nevertheless, trends, arguably, have shown an increase in the number of volunteer firefighters from 2002 to 2005 (although also see McLennan & Birch who demonstrate a recent downward trend) which indicate that despite some confusion that may exist in relation to this area, volunteers are nevertheless still enthusiastic to participate and contribute to their local fire service organisations. There has however been a decrease in the numbers of volunteer firefighters in the last financial year, dropping from 222,000 in 2004/2005 to 194,000 in 2005/2006 (SCRGSP, 2007). It is of continued importance therefore that fire service organisations continue to be aware of their liabilities, even as third parties, in order to manage their and their volunteers' risks. Of note is also the nervousness that has arisen in Victoria from the Linton inquiry that has coloured the volunteer fire sector leading to the situation in Victoria regarding 'perceived' vs. 'actual' liability

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This article does not constitute any form of legal advice. The author recommends seeking independent legal advice on the issues outlined here. The author will not be held accountable for any decisions made based upon the contents of this publication. Please note this article is based on the legal situation as of July/August 2007.

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