



# THE POTENTIAL ROLE OF THE COMMONWEALTH IN RESPONDING TO CATASTROPHIC DISASTERS

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## EXECUTIVE SUMMARY

The research question posed, and considered in this paper, is 'in the absence of legislation, what is the role in, and more importantly what power might the Commonwealth have, when responding and recovering from a catastrophic disaster?'

Currently the Commonwealth has no overarching or specific counter-disaster legislation. This paper argues that even in the absence of legislation there is Commonwealth power to respond to emergencies within the areas of Commonwealth responsibility. Further there is an inherent power to deal with catastrophic disasters vested in the Crown as part of the prerogative power of the Crown and now incorporated into the Executive Power of the Commonwealth. Exactly what constitutes a 'catastrophic disaster' would be open to debate and, in the absence of legislation, may be the subject of judicial challenge. It is argued that a disaster where a state government is overwhelmed so that the state itself is at risk of collapse and there is no effective state government would be a national catastrophic disaster that would justify Commonwealth intervention in the affairs of the state in order to restore effective state government. What disaster, short of the collapse of state government, would be sufficient for direct Commonwealth action cannot be conclusively defined.

In the absence of legislation and a truly catastrophic event, the Commonwealth's authority to exercise national leadership and coordinate Commonwealth, state and private assets will depend on good will and cooperation. The extent of the Commonwealth's executive power cannot be identified until the circumstances of the particular disaster have been identified.

Failing to define, in legislation, the role and power of the Commonwealth will leave the Commonwealth to 'cope ugly' with any particular catastrophe. That may be acceptable as it will leave the Commonwealth with adaptive flexibility. It has however been a consistent recommendation of commentators that the Commonwealth should legislate to ensure that the Commonwealth is able to cope with an inevitable catastrophe.

The absence of legislation makes it impossible to define, except in the most generic terms, what the Commonwealth's powers are.



## **THE RESEARCH QUESTION**

The research question posed, and considered in this paper, is 'in the absence of legislation, what is the role in, and more importantly what power might the Commonwealth have, when responding and recovering from a catastrophic disaster?'



## BACKGROUND

With the possible exception of the Spanish Flu (1918-1919) and Cyclone Tracey (1974), Australia has never had a catastrophic disaster.<sup>1</sup> A catastrophic event is '...so big that it overwhelms our social systems and resources, and degrades or disables governance structures and strategic and operational decision-making'.<sup>2</sup> The 2010 National Catastrophic Disaster Plan (NATCATDISPLAN) defined a catastrophic disaster as:

... an extreme hazard event that affects one or more communities, resulting in widespread, devastating, economic, health, social and environmental consequences, and that exceeds the capability of existing State or Commonwealth Government emergency and disaster management arrangements.<sup>3</sup>

A more recent definition is provided in the Australian Disaster Preparedness Framework as:

...is what is beyond our current arrangements, thinking, experience and imagination (i.e. that has overwhelmed our technical, non-technical and social systems and resources, and has degraded or disabled governance structures and strategic and operational decision-making functions)<sup>4</sup>.

In Australia the conventional wisdom is that responding to and managing the impacts of disasters - and in context we are talking about disasters caused by natural hazards such as storms, floods and bushfires - is the responsibility of the state and territory governments. The Commonwealth takes no direct management responsibility but assists the states and territories by making available, on request, Commonwealth assets (most often personnel and equipment from the Australian Defence Force)<sup>5</sup> and making funds available to individuals and to the states and territories where the cost of responding to the disaster exceeds prescribed thresholds.<sup>6</sup>

NATCATDISPLAN anticipates that the Commonwealth may take a key role in responding to a catastrophic disaster by assisting with re-establishing the government of the affected State or Territory, coordinating inter-state and international assistance and, if necessary, appointing a coordinator to support the affected state.<sup>7</sup> The plan is not supported by legislation and the Commonwealth has no special or necessary emergency powers to give effect to the plan.

1 Andrew Gissing, Michael Eburn and John McAneney, Planning And Capability Requirements For Catastrophic and Cascading Events, Non-peer reviewed research proceedings from the Bushfire and Natural Hazards CRC & AFAC conference Perth, 5 - 8 September 2018, p. 1

2 Ibid, p. 3.

3 Emergency Management Australia, National Catastrophic Disaster Plan (NATCATDISPLAN) (Commonwealth of Australia, 2010), [2]. We understand that this plan is currently under review.

4 Australian Disaster Preparedness Framework

5 Emergency Management Australia, Commonwealth Government Disaster Response Plan (COMDISPLAN) (Commonwealth of Australia, Canberra, 2002).

6 Attorney General's Department, Natural Disaster Relief and Recovery Arrangements: Determination 2017 available at <https://www.disasterassist.gov.au/Documents/Natural-Disaster-Relief-and-Recovery-Arrangements/NDRRA-determination-2017.PDF>, accessed 24 January 2019.

7 Emergency Management Australia, above n 3, [19] - [20].



It has been argued elsewhere<sup>8</sup> that the Commonwealth should, and has the power to, enact counter-disaster legislation 'to allow the Commonwealth government to exercise necessary emergency powers should a catastrophic disaster occur and to clarify the roles and reporting lines for Commonwealth agencies.'<sup>9</sup>

Notwithstanding these recommendations the Commonwealth has not enacted legislation.

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8 Alan Stretton, *Soldier in a Storm: An Autobiography* (Collins, Sydney, 1978) 285; H P Lee, *Emergency Powers* (Law Book Company, Sydney, 1984) 171-172; David Templeman and Anthony Bergin, *Taking a punch: Building a more resilient Australia* (Australian Strategic Policy Institute, Canberra, 2008); Clement Fatovic, *Outside the Law: Emergency and Executive Power* (John Hopkins University Press, 2009); Michael Eburn, *Australia's International Disaster Response – Laws, Rules and Principles* (VDM-Verlag, Saarbrücken, Germany, 2010); Michael Eburn, 'Responding to Catastrophic Natural Disasters and the Need for Commonwealth Legislation' (2011) Vol. 10, Issue 3 *Canberra Law Review* 81-102; Michael Eburn, 'Managing 'civil contingencies' in Australia' in Walker, C. (ed) *Contingencies, Resilience and Legal Constitutionalism* (Routledge, 2015); Michael Eburn, *Coordination of federal, state and local disaster management arrangements in Australia: lessons from the UK and the US* (Australian Strategic Policy Institute, Canberra, 2017)). See also New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) [4.12] on the need for legislation before a disaster strikes.

9 Eburn, *Canberra Law Review*, above n 7, 102.



## THE CURRENT POSITION

It is generally argued that managing a counter-disaster response is a matter for the Australian states and territories.<sup>10</sup> In *The King v Sharkey*, Dixon J said:

Section 119 of the *Constitution* provides that the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence... The comments made by Quick & Garran in the *Constitution of the Australian Commonwealth* bring out clearly [that]...: 'The maintenance of order in a State is primarily the concern of the State, for which the police powers of the State are ordinarily adequate. But even if the State is unable to cope with domestic violence, the Federal Government has no right to intervene, for the protection of the State or its citizens, unless called upon by the State Executive ...'<sup>11</sup>

In this context the 'police powers of the State' are not limited to the types of powers exercised by a police force. The 'police powers of the State' are 'the reserve powers of internal regulation and control'.<sup>12</sup> When used in the context of Constitutional Law state 'police powers' relate to the 'fundamental right of a government to ... establish and enforce laws protecting the welfare, safety, and health of the public'<sup>13</sup> or 'the general power of regulation of internal affairs'.<sup>14</sup> Finally, in *Australian Steamships Ltd v Malcolm*, Griffith CJ said:

In *United States v. E. C. Knight Co.* Fuller C.J. said:—"It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, the power to govern men and things within the limits of its dominion, is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

The power spoken of in that passage is generally called the "police power." As in the United States, so in Australia, it is not surrendered by the States to the general government, nor directly restrained by the Constitution, and is essentially exclusive...<sup>15</sup>

Providing emergency management, and in particular providing emergency response is an example of the state's 'police powers'.

The Commonwealth does, however, have Constitutional responsibilities that are relevant to natural disaster relief and response. The Commonwealth has

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10 Emergency Management Australia, Australian Government Disaster Response Plan (COMDISPLAN) (Commonwealth of Australia, 2008) [1.1]; Senate Standing Committee on Industry Science Technology Transport Communications and Infrastructure, Parliament of Australia, Disaster Management (1994) Chapter 1; Australian National Audit Office, Commonwealth Emergency Management Arrangements (Commonwealth of Australia, 2000) Chapter 2.

11 (1949) 79 CLR 121, 150. Zines appears to support Dixon J's statement in Leslie Zines, "The Inherent Executive Power of the Commonwealth" (2005) 16 Public Law Review 279, 279.

12 *R v Barger* (1908) 6 CLR 41 (Isaacs J).

13 Nolo's Plain-English Law Dictionary cited in Cornell Law School, Legal Information Institute ([https://www.law.cornell.edu/wex/police\\_powers](https://www.law.cornell.edu/wex/police_powers)) accessed 26 February 2019.

14 *R v Smithers* (1912) 16 CLR 99 (Griffith CJ).

15 (1914) 19 CLR 298.





responsibility for managing the disaster response in Australia's non-self-governing territories.<sup>16</sup> The Commonwealth also has responsibilities to protect life and property across Australia,<sup>17</sup> reflected in the Commonwealth's involvement in areas such as health, social security, defence, national security and anti-terrorism.

Where there is a disaster that causes disaster relief to flow from overseas, the Commonwealth has particular interest because of its responsibility for managing Australia's 'external affairs'.<sup>18</sup> The Commonwealth also manages Australia's international border and has responsibility in the areas of customs and quarantine, international trade and commerce and the operation of foreign trading and financial corporations in Australia. In terms of the domestic response to a disaster, the Commonwealth has responsibility for taxation, postal and telegraphic communications, defence (which is relevant to the use of the defence force in disaster response), insurance and the payment of social security benefits.<sup>19</sup>

That the Commonwealth has responsibility to respond to a truly national emergency has been recognised by the Auditor-General<sup>20</sup> and NATCATDISPLAN. Pursuant to NATCATDISPLAN the Commonwealth may take a key role in responding to a catastrophic disaster by assisting with re-establishing the government of the affected State or Territory, coordinating inter-state and international assistance and if necessary appointing a coordinator to support the affected state.<sup>21</sup> The plan is not supported by legislation and the Commonwealth has no special or necessary emergency powers to give effect to the plan.

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16 Christmas Island; Cocos (Keeling) Islands; Jervis Bay; Ashmore & Cartier Islands and the Coral Sea Islands; Department of Regional Australia, Regional Development and Local Government, Territories of Australia (16 September 2011) <<http://www.regional.gov.au/territories/>>.

17 Commonwealth, Parliamentary Debates, House of Representatives, 4 December 2008, 12549 (Kevin Rudd, Prime Minister).

18 Australian Constitution s 51(xxix).

19 Ibid s 51.

20 Australian National Audit Office, above n 10, 40.

21 Ibid [19] and [20].



## COORDINATION OF THE COMMONWEALTH RESPONSE

Although there is no comprehensive Commonwealth emergency management legislation, the Commonwealth has included provisions in specific legislation to allow a minister to make particular decisions that are necessary in an emergency. For example, in the event of a national disaster that required incoming international aid agencies to access Sydney airport without charge and to bring in urgently required medications based on genetically modified organisms, there would need to be four separate determinations that an 'emergency' existed:

1. The Minister for Health and Aging would make an 'emergency dealing determination' to allow emergency dealing with a genetically modified organism<sup>22</sup> and
2. grant an exemption to allow the use of the medicaments that have not gone through the normal registration process.<sup>23</sup>
3. The Minister for Infrastructure and Transport would give an airport operator notice to require them to give priority access to the airport for relief flights<sup>24</sup> but if, and only if, the defence force is involved in the response to the hazard event, so before the minister could give that notice;
4. the Prime Minister, the Attorney General or the Minister for Defence would need to authorise the use of the defence force in the response.<sup>25</sup>

There would need to be further, separate, determinations to ensure social security payments to the affected population,<sup>26</sup> to allow people to obtain necessary medication without being able to prove their identity with their Medicare card,<sup>27</sup> to allow government agencies to share information so that people can be located and the missing and dead identified<sup>28</sup> and to ensure fuel reserves are maintained for the emergency operations.<sup>29</sup> There would also need to be action by the Minister for Immigration to allow foreign aid workers to enter the country and then further action at the state level to facilitate the recognition of professional qualifications.

## THERE IS NO FEDERAL COORDINATING OFFICER

Notwithstanding the broad range of Commonwealth agencies involved, there is no equivalent of the Principal Federal Official or Federal Coordinating Officer of the United States<sup>30</sup> to manage and coordinate the Commonwealth response. As noted, above, the provisions in various Acts allow for the relevant minister to

22 Gene Technology Act 2000 (Cth) s 72B.

23 Therapeutic Goods Act 1989 (Cth) s 18A.

24 Airports Act 1996 (Cth) s 250.

25 Defence Act 1903 (Cth) pt IIIAAA. Alternatively that may be supported as 'Defence Aid to the Civil Community', relying upon executive power rather than a statutory call out, if there was no requirement to use force.

26 Social Security Act 1991 (Cth) s 36.

27 National Health Act 1953 (Cth) s 86E.

28 Privacy Act 1988 (Cth) s 80J.

29 Liquid Fuel Emergency Act 1984 (Cth) s 16.

30 Christine E Wormuth and Anne Witkowsky, *Managing the Next Domestic Catastrophe: Ready (or Not)?* (Center for Strategic and International Studies, 2008).



make a declaration that an 'emergency' exists. Without a single, coordinating authority, each minister must make their declaration rather than a single declaration of a national emergency being sufficient to activate all the emergency provisions.

The Branch Head of Emergency Management Australia, an administrative division within the Department of Home Affairs that is to 'coordinate the Australian Government physical and financial support for disasters and emergencies'<sup>31</sup> might fill the principle coordinating role but without a clear mandate and legal authority, his or her ability to fulfil that role is uncertain.<sup>32</sup> Emergency Management Australia has no statutory authority, must seek approval from relevant ministers before committing Commonwealth resources<sup>33</sup> to a disaster response and cannot direct any of the Commonwealth agencies on how they are to respond to a catastrophic disaster.

There is also room for uncertainty in the structure of the Department of Home Affairs. Within that department is the Secretary to the Department and the Director General of Emergency Management Australia.<sup>34</sup> There are three ministers; the Minister for Home Affairs, the Minister for Immigration, Citizenship and Multicultural Affairs and the Assistant Minister for Home Affairs<sup>35</sup> who is also the Minister for Emergency Management and North Queensland Recovery. Without clear legislative authority the existence of multiple office holders can lead to confusion at the time when clarity is most required, that is when responding to a catastrophic disaster. A similar system exists in the United States where different federal officers are given different responsibilities and reporting lines. It has been recommended that the role of federal officers needs to be clearly defined in statute to ensure that there are procedures in place for optimal response.<sup>36</sup>

The position was summarised by Bergin and Templeman in 2009. They argued that:

*Our approach to catastrophic disasters is inadequate. It's not clear which commonwealth agency or federal official will be in charge. There are no clear national guidelines to assess what capabilities the states need to be prepared. This was pointed out seven months ago to the Rudd Government in a commissioned report on our homeland security arrangements by a former secretary of the Defence Department, Ric Smith. He concluded that we needed a more integrated approach to emergency management to deal with the fundamental gap in our national emergency planning to respond to*

31 Department of Home Affairs, Emergency Management (23 November 2018) <<https://www.homeaffairs.gov.au/about-us/our-portfolios/emergency-management/about-emergency-management>> accessed 25 January 2019.

32 David Templeman and Anthony Bergin, Taking a punch: Building a more resilient Australia, (Australian Strategic Policy Institute, 2008) 7.

33 Emergency Management Australia, COMDISPLAN, above n 10.

34 Department of Home Affairs, Department of Home Affairs organisational structure – 11 February 2019 <https://www.homeaffairs.gov.au/about-us-subsite/files/home-affairs-org-structure.pdf> (accessed 25 March 2019).

35 Australian Government, Directory – Home Affairs, 9 January 2018 <https://www.directory.gov.au/portfolios/home-affairs> (accessed 25 March 2019).

36 Ronald Waldman, 'Responding to Catastrophes: A Public Health Perspective' (2005–2006) 6 Chicago Journal of International Law 553; Christine E. Wormuth and Anne Witkowsky, Managing the Next Domestic Catastrophe: Ready (or Not)? (Center for Strategic and International Studies, Washington DC, 2008) vii-viii.



*catastrophic disasters.*<sup>37</sup>

There have been no significant legal developments to change that position and that summary remains correct in 2019.

## **THE EXECUTIVE POWER OF THE COMMONWEALTH – A POTENTIAL SOURCE OF COMMONWEALTH POWER TO LEAD THE RESPONSE TO A NATIONAL EMERGENCY**

In the event of a truly national emergency that required Commonwealth leadership, not just support to the states and territories, the Commonwealth government, in the absence of specific legislation granting the necessary powers, would need to rely on non-statutory powers such as the prerogative power of the Crown, now encompassed in the phrase ‘the Executive power of the Commonwealth’<sup>38</sup> to manage its emergency response. The executive power of the Commonwealth:

... enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibilities vested in it by the Constitution. It includes the prerogative powers of the Crown, that is the powers accorded to the Crown by common law.<sup>39</sup>

There is debate about the source and meaning of ‘the executive power of the Commonwealth’.<sup>40</sup> On one view it is derived from the prerogative powers of the English monarch<sup>41</sup> ‘which, according to subsequent doctrine, was frozen in 1689 [though it] can be abrogated by statute’.<sup>42</sup> An alternative view, espoused by French J in *Ruddock v Vadarlis*,<sup>43</sup> is that the executive power of the Commonwealth is derived from the agreement that led to the creation of the Commonwealth and is to be ‘ascertained from within the Constitution itself and that it is not subject to the common law limitations upon the royal prerogative’.<sup>44</sup> Even so, French J described the common law prerogative power as providing the ‘historical antecedents’<sup>45</sup> to the Commonwealth executive power and conceded that the executive power ‘may derive some of its content by reference to the royal prerogative’ even if it ‘is subject ... to the limitations as to subject matter that flow directly from the Constitution’.<sup>46</sup> On either view, the executive power ‘includes the prerogative powers of the Crown’.<sup>47</sup>

37 Anthony Bergin and David Templeman, *Get ready for the big one* (2009) *The Australian* <<http://www.theaustralian.news.com.au/story/0,25197,25148472-5015664,00.html>> at 10 March 2009.

38 Australian Constitution s 61; Fatovic, above n 8, 9.

39 *Barton v The Commonwealth* (1974) 131 CLR 477, 498 (Mason J).

40 Australian Constitution s 61.

41 *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [233] (Gummow, Crennan and Bell JJ).

42 Robin Creyke, ‘Executive Power — New Wine in Old Bottles’ (2003) 31 *Federal Law Review* i, iii.


43 *Ruddock v Vadarlis* (2001) 110 FCR 491; and also in *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [126]-[129] (French CJ).

44 *Ruddock v Vadarlis* (2001) 110 FCR 491, 540 (French J); *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [127] (French CJ); [337] (Hayne and Kiefel JJ); see also Bradley Selway, ‘All at Sea — Constitutional Assumptions and the Executive Power of the Commonwealth’ (2003) 31 *Federal Law Review* 495, 497.

45 *Ruddock v Vadarlis* (2001) 110 FCR 491, 538 (French J).

46 *Ibid* 540.

47 *Barton v The Commonwealth* (1974) 131 CLR 477, 498 (Mason J) (emphasis added). See also *Ruddock v Vadarlis* (2001) 110 FCR 491, [9] (Black CJ); *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [127] (French CJ); H. E. Renfree, *The Executive Power of the*



The scope of the prerogative power is uncertain<sup>48</sup> and resists being defined as a list of powers or subject areas.<sup>49</sup> The prerogative power has included a power vested in the Crown to respond to emergencies, that are ‘... a national emergency, [where there is] an urgent necessity for taking extreme steps for the protection of the Realm’.<sup>50</sup> Lee, in his review of emergency powers, said:

... a special or emergency prerogative lies dormant in the fabric of executive powers. Such a prerogative awaits activation in the face of extreme necessity. The submission in this work is that the Commonwealth possesses a prerogative power to requisition a subjects’ property ... Another assertion ... is that a case can be made for an extraordinary prerogative which extends to the assumption of legislative power when the legislative arm of government is paralysed.<sup>51</sup>

Renfree states:

A prerogative of the Crown regarding the preservation of the public safety was early recognized by the common law. It was described by the maxim *salus populi suprema lex*.<sup>52</sup>

The prerogative of the Crown in the exercise of the *suprema potestas* arises from a general principle that in time of emergency the law arms Crown and subject alike with the right of intervening, and sets public safety above private right.

Apart from natural disasters and political crises, there are two main crises that may confront a nation — attack from abroad and domestic violence within.<sup>53</sup>

Having identified natural disasters as a possible emergency, Renfree discusses only the examples of violent attacks. The case law on this subject, however, leaves open the possibility that the Commonwealth Executive, that is the Governor-General, the Prime Minister and Cabinet and the public service,<sup>54</sup> retain necessary powers to respond to national natural disasters despite no specific grant of legislative power in this area.<sup>55</sup>

The basis of the war prerogative is the obligation on the government to defend itself and the fundamental structures of the society, that is, it is to defend the

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Commonwealth of Australia (Legal Books, 1984) 392, 403, 419 and 420; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 232 (Williams J); George Winterton, ‘The Limits and Use of Executive Power by Government’ (2003) 31 *Federal Law Review* 421, 425-6; 430; Selway, above n 44, 497; 503; 505; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, Federation Press, 2006) 522; 526; Lee, above n 8, 67.

48 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 99 (Lord Reid); 145 (Lord Pearce); *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [126] (French CJ); [233]-[234] (Gummow, Crennan and Bell JJ); H E Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 389, 394; New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) [4.37]-[4.41].

49 Blackshield and Williams, above n 47, 523-525; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 114 (Viscount Radcliffe).

50 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 136 (Lord Hodson).

51 Lee, above n 8, 322.

52 The Latin phrase ‘*salus populi est suprema lex*’ is translated as ‘the welfare of the people, or of the public, is supreme law’: Latin for Lawyers (Sweet and Maxwell, 1915) 241.

53 Renfree, above n 48, 466 see also Winterton, above n 47, 425.

54 Blackshield and Williams, above n 47, 520.

55 *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [233] (Gummow, Crennan and Bell JJ).



system of constitutional government established in Australia and to keep the population safe. A war or civil violence that aims to usurp the government and the constitutional order is a direct threat to the national polity and may be resisted by the national government.<sup>56</sup> A natural disaster, even a catastrophic disaster, does not pose the same threat to the underlying basis of government, but it can pose a significant threat to the government's ability to function.

Viscount Radcliffe thought the emergency prerogative need not be limited to the outbreak of war. He said:

There is no need to say that the imminence or outbreak of war was the only circumstance in which the prerogative could be invoked. Riot, pestilence and conflagration might well be other circumstances...<sup>57</sup>

It is the Crown's '...right and duty to protect its realm and citizens in times of war and peril'.<sup>58</sup> Ensuring the safety and security of the citizens could extend to ensuring their security from catastrophic natural hazards as well as from war. 'Peril' means 'risk, jeopardy, danger'.<sup>59</sup> A catastrophic disaster will expose the Commonwealth and its citizens to jeopardy and danger. The threat to the Commonwealth can arise if a disaster threatens the ability of the Commonwealth government to operate, and also if it threatens the ability of the states. The continued existence of the states is a fundamental part of the Australian Constitutional arrangements so taking steps to protect and restore effective state government following a disaster would appear to be a legitimate action to protect the Australian Commonwealth.

It follows that the case law identifies that the source of the prerogative power is to protect the political entity (which includes the effective existence of the states) and its citizens from threat and danger, and is not expressly limited to the dangers posed by enemies in war. It must also follow, as a matter of practical reality, that when an overwhelming disaster strikes a state, regardless of its cause, the executive government must have power to respond to that disaster.<sup>60</sup>

The Commonwealth executive power also includes powers implied by the standing of the government as a national government.<sup>61</sup>

... s.61 [of the Constitution] does confer on the Executive Government power "to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation" ... **It invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit.**<sup>62</sup> (Emphasis added).

56 Attorney General v De Keyser's Royal Hotel [1920] AC 508; Australian Communist Party v Commonwealth (1951) 83 CLR 1.

57 Burmah Oil Co Ltd v Lord Advocate [1965] AC 75, 143.

58 Ibid 115 (Lord Pearce).

59 The Shorter Oxford English Dictionary (Oxford University Press, Oxford, 1973) 1555.

60 Fatovic, above n 8, 1-10.

61 Davis v Commonwealth (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ); Pape v Commissioner for Taxation (2009) 238 CLR 1, [128]-[132] (French CJ); Winterton, above n 47, 427; 430-431; Selway, above n 44, 505; Blackshield and Williams, above n 47, ' 534.

62 Davis v Commonwealth (1988) 166 CLR 79, 111 (Brennan J).



The need for national action in the face of a disaster that requires coordinated national assets or has effects across more than one state and/or territory suggests that the Commonwealth, by virtue of its position as the national government, has the necessary power to move into areas normally the responsibility of the states, and in extreme cases could exercise legislative authority if required.<sup>63</sup> This authority could allow the government to waive compliance or suspend the operation of the legislation if that was required to meet the urgency of the situation.

History shows that the Commonwealth can exercise such power. In 1974 the Director-General of the Commonwealth's Natural Disasters Organisation was appointed to take supreme command of recovery operations following the devastation of Darwin by Cyclone Tracey. The appointment of the Commonwealth officer as supreme commander was 'because the situation in Darwin was a **national disaster of major dimensions**'.<sup>64</sup> In the absence of any specific constitutional head of power, any power of the Commonwealth to manage 'a national disaster of major dimensions' must be an exercise of the executive or prerogative power of the Commonwealth.<sup>65</sup>

In the case of Cyclone Tracy, the Government could have relied on its power to make laws with respect to territories<sup>66</sup> as the Northern Territory was not a self-governing territory but was administered by the Commonwealth Government. That was not, however (according to Major General Stretton) the basis of his appointment.

In 2009 the Commonwealth determined that the pending Global Financial Crisis was a national emergency. The government sought to protect the national economy by making payments to tax payers to encourage spending. The authority of the government to make a payment without any clear reference to an area of constitutional authority was challenged.<sup>67</sup> By a 4:3 majority the High Court upheld the validity of the payment. In the course of their judgment Gummow, Crennan and Bell JJ said:

As already mentioned, that there is a global financial and economic crisis is not contested in this proceeding. It can hardly be doubted that the current financial and economic crisis concerns Australia as a nation. Determining that there is the need for an immediate fiscal stimulus to the national economy in the circumstances set out above is somewhat analogous to determining a state of emergency in circumstances of a natural disaster. The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the

63 Pape v Commissioner for Taxation (2009) 238 CLR 1; Lee, **Error! Bookmark not defined.**, 322.

64 Alan Stretton, Darwin Disaster: Cyclone Tracy. Report by Director-General Natural Disasters Organisation on the Darwin Relief Operations 25 December 1974–3 January 1975 (Commonwealth of Australia, 1975) [8] (emphasis added).

65 Australian Constitution s 61. Stretton, above n 64, [8]; see also Alan Stretton, *The Furious Days: The Relief of Darwin* (Collins, 1976) and Alan Stretton, *Soldier in a Storm: An Autobiography* (Collins, 1978). See also Lee, above n 8, 322.

66 Australian Constitution s 122.

67 Pape v Commissioner for Taxation (2009) 238 CLR 1.



adoption of the Constitution but in form today in Australia it is a power to act on behalf of the federal polity.<sup>68</sup>

As noted, above, the NATCATDISPLAN assumes a role for the Commonwealth in re-establishing state governments. This role is consistent with the Commonwealth exercising its prerogative power to respond when only the national government can.

If, for example<sup>69</sup> an earthquake and tsunami were to level Hobart and the Tasmanian State Government ceased to be effective, the Commonwealth Executive could arguably step in to restore its functioning. Commonwealth action might include maintaining public order and delivering essential services until the State services could do this again themselves.<sup>70</sup> This is essentially what occurred in Darwin after Cyclone Tracy in 1974 (but, as that was in a Territory, different constitutional considerations applied<sup>71</sup>).

Under the federal division of executive power, the prerogative for a government to restore order must rest primarily with the States. The Commonwealth, arguably, may act to protect its own functions<sup>72</sup> but this power does not extend to restoring State government functions. On the other hand, if a State government effectively collapsed, it would self-evidently be beyond its power to restore itself. It is likely that the ability to restore the Tasmanian State Government would then be 'peculiarly within the capacity and resources of the Commonwealth Government'.<sup>73</sup> A reading of s 61 authorising the 'maintenance of the Constitution'<sup>74</sup> would support this because having functioning States is fundamental to the *Constitution*.<sup>75</sup> Such an approach would also be consistent with a view that preserving the States is implicit in s 119, which obliges the Commonwealth to protect them from 'invasion and violence.'<sup>76</sup> Restoring a State government is also, arguably, a more facultative application of the power, although it may possibly have a very limited coercive aspect to it which would be in proportion to the purpose of the intervention. This example should illustrate

68 Ibid, [233].

69 See Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2018) 75-76 (<https://press-files.anu.edu.au/downloads/press/n3911/pdf/book.pdf>).

70 See Michael Eburn, 'Responding to Catastrophic Natural Disasters and the Need for Commonwealth Legislation' (2011) 10 *Canberra Law Review* 81, 82, 91; Joe McNamara, 'The Commonwealth Response to Cyclone Tracy: Implications for Future Disasters' (2012) 27 *The Australian Journal of Emergency Management* 37.

71 Australian Constitution s 122.

72 *R v Sharkey* (1949) 79 CLR 121, 151 quoting Quick and Garran's *Constitution of the Australian Commonwealth*, 194 (Dixon J). Zines supports this view in Zines, 'The Inherent Executive Power of the Commonwealth', (2005) 16 *Public Law Review* 279, 289.

73 Pape (2009) 238 CLR 1, 63.

74 Williams (2012) 248 CLR 156, 184-185 (French CJ).

75 Chordia, Lynch and Williams appear to suggest that, based upon the judgments of Jacobs J and Mason J in the AAP Case (1975) 134 CLR 338, this might be all nationhood power was meant to be, in Shipra Chordia, Andrew Lynch and George Williams, 'Case Note: Williams v Commonwealth [No 2]: Commonwealth Executive Power and Spending After Williams [No 2]' (2015) *Melbourne University Law Review* 306, 33-34.

76 This is the quid pro quo for the State's handing over their existing naval and military forces, and the power to raise them in the future, to the Commonwealth under Constitution ss 69, 'Transfer of Certain Departments', 51(vi) 'Power to Make Laws ... with Respect to the naval and military defence of the Commonwealth and of the several States ...' and s 114 'States may not raise forces.'. Selway argues that 'the Commonwealth Constitution is predicated upon, and requires the co-operation of, the States and the Commonwealth to a much greater degree than is the case in either Canada or the United States.' in Bradley Selway, 'Horizontal and Vertical Assumptions within the Commonwealth Constitution' (2001) 12 *Public Law Review* 113, 114.





that there is a place for executive power to support Commonwealth action but it should only be in an extreme case.

Whatever power the Commonwealth has is however limited by the Constitution. In their dissenting opinion, Hayne and Kiefel JJ said:

Words like "crisis" or "emergency" do not readily yield criteria of constitutional validity. It may be accepted, for the purposes of argument, both that there is shown to be a national crisis to which a national response is required and that only the Commonwealth has the administrative and financial resources to respond. It does not follow, however, that the Commonwealth's executive power to respond ... is a power that is unbounded. Were it so, the extensive litigation about the ambit of the defence power during World War II was beside the point.

Though variously expressed, the argument by reference to national "crisis" or "emergency" can be summed up as being: "There is a crisis; if the Commonwealth cannot do this, who can?"

What that and similar forms of rhetorical question obscure is a conflation of distinct questions about ends and means. The questions are conflated because the legislative power to enact the Impugned Act is treated as depending upon the execution of a power, said to be implicitly vested by the Constitution in the Executive, to meet a national crisis (in this case a financial or economic crisis). But if that is the *end* to which the exercise of power is to be directed, it by no means follows that any and every *means* of achieving that end must be within power. To argue from the existence of an emergency to either a general proposition that the Executive may respond to the crisis in any way it sees fit, or to some more limited proposition that the Executive has power to make this particular response, is circular.<sup>77</sup>

In essence the presence of a national emergency may engage the Commonwealth's executive power, but it does not follow that the Commonwealth can then do anything it desires. Merely calling something an emergency is not sufficient to determine whether the executive power is enlivened. The end to be achieved, protecting the Commonwealth, is a matter for government; the means available to achieve that end are subject to law. Ultimately 'it is for the Court to identify ...whether those particular means are constitutionally valid.'<sup>78</sup>

77 Ibid, [347]-[349]

78 Ibid, [350]. See also the judgment of Heydon J (dissenting) [548]-[552]. And for a contemporary discussion of the issue in the United States, see William E. Nelson, 'Trump vs. Congress: The emergency declaration should not be resolved in court' *The Conversation*, February 26, 2019 (<https://theconversation.com/trump-vs-congress-the-emergency-declaration-should-not-be-resolved-in-court-112118>) accessed 26 February 2019.



## LIMITATIONS

Where a government purports to rely on non-statutory authority, there may be challenges as to whether the power existed and whether it has been displaced by legislation.<sup>79</sup> The Crown cannot exercise a prerogative power where the parliament has passed legislation curtailing that power or setting out who is to exercise various powers. It is arguable that if the legislature does not provide emergency powers in an Act, such as the *Migration Act*, there can be no prerogative power to suspend or vary the Act to deal with an emergency: if such a power were intended it would have been provided for by the legislature.<sup>80</sup> Leaving the matter up to a court to determine when and how the Commonwealth may act in an emergency is not appropriate when such powers are required as a matter of urgency.

In recent times the Commonwealth has purported to act in a number of 'emergencies'. Efforts to take extra-ordinary action, even when the government believes such action is overwhelmingly in the national interest, do not go unchallenged when private interests are involved. Deploying troops to secure the MV Tampa, to protect indigenous children in the Northern Territory<sup>81</sup> and allocating funds to respond to the Global Financial Crisis<sup>82</sup> has been done in response to a claimed emergency and all have triggered litigation over the scope of the Commonwealth's power.<sup>83</sup> Even during war, the ultimate national emergency, plaintiffs have sought court intervention to challenge government action or to seek compensation after the event. In the United Kingdom, actions that relied on the prerogative power of the Crown to commandeer accommodation for troops<sup>84</sup> or to destroy private assets to stop them falling into the hands of the enemy<sup>85</sup> have been challenged; whilst in Australia, actions based on legislation designed to secure the defence of the nation<sup>86</sup> have been subject to challenge and judicial review. In modern times, during the war against terror, efforts by governments to reduce or restrict the rights of citizens have not gone unchallenged.<sup>87</sup>

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79 As was the case in *Ruddock v Vadarlis* (2001) 110 FCR 491.

80 *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; Renfree, above n 48, 397ff; *Ruddock v Vadarlis* (2001) 110 FCR 491.

81 Northern Territory National Emergency Response Act 2007 (Cth).

82 Tax Bonus for Working Australians Act (No 2) 2009 (Cth).

83 *Ruddock v Vadarlis* (2001) 110 FCR 491; *Wurridjal v Commonwealth* (2009) 237 CLR 309; *Pape v Commissioner for Taxation* (2009) 238 CLR 1 respectively.

84 *Attorney General v De Keyser's Royal Hotel* [1920] AC 508.

85 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75.

86 See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 and the cases cited therein.

87 *Hamdan v. Rumsfeld* 548 U.S. 557 (2006); *R v Thomas* [2006] VSCA 165.



## IMPLICATIONS

### COORDINATION OF THE COMMONWEALTH RESPONSE

Let us assume, for the sake of the argument, that there is a catastrophic disaster that the Commonwealth believes is beyond the capacity of the states to manage. That is truly a national disaster and only the Commonwealth, as the national government, can manage the response. The response in the Commonwealth's view may require reallocation of Commonwealth resources from one state or territory to another on the basis that the priority has to be in the larger population or economic centre rather than the smaller one.

As the owner of its own assets, the Commonwealth can choose how it allocates its resources. It follows that if two states are demanding Commonwealth assistance it would be open to the Commonwealth to determine how resources are to be allocated between the states based on the Commonwealth's assessment of the needs and priorities.

However, in the absence of legislation there is no clear power to waive the application of current legislation and there may be limitations in current legislation that would impede decisions that would otherwise aid the nation's recovery. Further, in the absence of a clear mandate it is uncertain who would advise the Commonwealth government on what decisions it would make and any decision would, as suggested in the example given above of 'a national disaster that required incoming international aid agencies to access Sydney airport without charge and to bring in urgently required medications based on genetically modified organisms' there would need to be complex coordination of, and agreement between, various Ministers.

### COORDINATION, OR LEADERSHIP, OF THE RESPONSE BY STATES AND TERRITORIES

(The Commonwealth can make laws with respect to the Territories.<sup>88</sup> This means that the territories are not, constitutionally, in the same position as the states. The Commonwealth has, however, granted the Northern and the Australian Capital Territories self-government<sup>89</sup> and they operate for all practical purposes as a state. In this discussion that follows we do not distinguish between the states and the self-governing territories.)

In an extreme situation the Commonwealth even may seek to move state assets from South Australia or Tasmania to be used in Victoria or New South Wales at the expense of the population or assets in their home jurisdiction. It would be our view that the executive power of the Commonwealth would not extend that far. The Executive Power in the Australian Constitution has to be read in the context and setting of that Constitution which includes the premise that the States exist

88 Australian Constitution, s 122.

89 Northern Territory (Self-Government) Act 1978 (Cth) and Australian Capital Territory (Self-Government) Act 1988 (Cth).



and make up part of the body politic that is Australia.<sup>90</sup> In *Melbourne Corporation v Commonwealth*,<sup>91</sup> Dixon J said

The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities.

From that case came the *Melbourne Corporation Principle* described by Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ as ‘... the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments’.<sup>92</sup>

The Commonwealth, even in times of emergency, seeking to commandeer state assets that would deprive the State of its ability to govern its own response would be inconsistent with the exercise of executive power in the Australian constitutional framework.

Further, the management of natural disasters has been considered a matter for the states, as it is not an express power of the Commonwealth within s 51 of the *Constitution*. If the Commonwealth wanted to take the lead in the response to a disaster, certainly the case of a disaster where the state governments continued to function, but the Commonwealth thought that the national interest required different priorities than those determined by state interests, the Commonwealth could not intervene. As French CJ said in *Williams v Commonwealth (No. 1)*:

The character of the Commonwealth Government as a national government does not entitle it, as a general proposition, to enter into any such field of activity by executive action alone. Such an extension of Commonwealth executive powers would, in a practical sense, as Deakin predicted, correspondingly reduce those of the States and compromise what Inglis Clark described as the essential and distinctive feature of "a truly federal government".<sup>93</sup>

Putting aside there would also be practical difficulties. If the Commonwealth, in the absence of legislation, ordered a state to hand over assets or resources so that they could be tasked in accordance with priorities set by the Commonwealth, what would be consequences of a refusal? In the absence of legislation there could be no criminal penalty and the extent of the Commonwealth's authority would be unknown. The state, or any individual, that simply refused would not be subject to any consequences.

It is important to remember too that emergency responders are always local. People will be responding to the emergency in their area, volunteers in the emergency services volunteer to support their community. Volunteers from the Tasmania Fire Service who are directed to leave their communities to suffer whilst they travel to another State at the direction of the Commonwealth are likely to

90 *Williams v Commonwealth of Australia (No. 2)* [2014] HCA 23.

91 (1947) 74 CLR 31.

92 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, at 231.

93 *Williams v Commonwealth of Australia (No. 1)* [2012] HCA 23, [83] (French CJ).



simply down tools and walk away. And there is nothing the Commonwealth could do, absent legislation, to stop them.

Commonwealth agents on the ground, eg the Australian Defence Force, may exercise de facto power if they ordered a person or an agency to surrender their property or to take direction and the person actually did so. But whether there would be lawful authority for that would be open to doubt, but if the person does what is asked, the need for lawful authority is moot.

Where the disaster does indeed overwhelm the government of the affected state then the Commonwealth would have power to step in to exercise leadership in order to restore the state and therefore to restore Australia's constitutional arrangements. As noted, s 61 of the Australian Constitution says (emphasis added):

**The executive power of the Commonwealth** is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and **extends to the execution and maintenance of this Constitution...**

Restoring the states to functioning self-government would be consistent with the 'maintenance of this Constitution'. What power that might require would depend on what was needed. It may be that the population in the affected state, public sector employees and the broader population would welcome any sort of leadership and may well be happy to follow the directions given from the Commonwealth appointed administrator or Commonwealth led recovery force. But that may not really be a question of legal power but simply a vacuum and governing by consent if the population are looking for leadership and direction from somewhere.

The power of the Commonwealth would extend to power of its own agencies. The Commonwealth in times of crisis could direct agencies to take action or perform tasks that may be considered beyond their normal operations, for example the Commonwealth could task the Australian Defence Force or the Australian Federal Police to take the lead in the Commonwealth's disaster response even if that is not in their legislated mandate. It would be consistent to use those resources to protect the Commonwealth's interests and assets but that does not extend to usurping the role of state governments and their agencies.

The important conclusion at this point is that where the state governments continue to function, the Commonwealth has no authority to direct how the states are to manage the response to and recovery from the disaster nor can they direct the states to allocate their resources to other states or to the Commonwealth. Further, constitutional limitations mean that this limitation is not simply a product of no Commonwealth legislation. The Commonwealth could not, unilaterally, grant that power to itself. Any plan to allow the Commonwealth to exercise leadership in the response and recovery where state governments continue to function would require agreement with the state and territory governments.



## WAY FORWARD

As noted above, the Commonwealth has not passed emergency management legislation and, we are advised, there is no appetite to do so. In the absence of legislation what can the Commonwealth do in order to clarify its role and to secure effective national leadership when required?

Given the role of the states the first step would be to develop a comprehensive catastrophic emergency plan that is made with, supported and adopted by the States, That is it would need to be truly cooperative, not the Commonwealth telling the states what it, and they, are expected to do. The states and territories would need to fully endorse the plan and ensure it was built into local emergency management arrangements so state emergency management leaders recognised the authority of the Commonwealth when acting according to the plan

Another alternative is to rely on Catch-22. In the famous book by Joseph Heller, Catch-22 is described by an old woman recounting an act of violence by soldiers:

... 'Catch-22 says they have a right to do anything we can't stop them from doing.'

What the hell are you talking about?' Yossarian shouted at her in bewildered, furious protest. 'How did you know it was Catch-22? Who the hell told you it was Catch-22?'

'The soldiers with the hard white hats and clubs. The girls were crying. "Did we do anything wrong?" they said. The men said no and pushed them away out the door with the ends of their clubs. "Then why are you chasing us out?" the girls said. "Catch 22," the men said. All they kept saying was "Catch-22, Catch-22." What does it mean, Catch 22? What is Catch-22?'

'Didn't they show it to you?' Yossarian demanded, stamping about in anger and distress. 'Didn't you even make them read it?'

'They don't have to show us Catch-22,' the old woman answered. 'The law says they don't have to.'

'What law says they don't have to?'

'Catch-22.'<sup>94</sup>

If, in a catastrophic disaster, the Commonwealth behaves as if it has power to do things, and others comply, then it has a defacto power. If the Commonwealth directs state governments, agencies or private companies and individuals to allocate resources as the Commonwealth directs, and they comply, then the Commonwealth has the power. And if the Commonwealth purports to Act and no-one can stop them, then they have the power to act – Catch-22. (Noting that acquiescence or consent does not create a legal power or establish a precedent for the future, the constitution cannot be changed by consent).



On the one hand that's not a completely unreasonable response. A catastrophic disaster will by definition be overwhelming and unique. It may be impossible to plan for that which has not been contemplated or foreseen. Governments will need to 'cope ugly':

Flexibility is adaptive because different kinds of adversity create different kinds of demands. The better able we are to adapt ourselves to those demands, the more likely we are to survive. An intriguing application of this idea is that in some circumstances it is adaptive to think or behave in ways that we normally think of as inappropriate or even unhealthy.

Imagine yourself among those seeking emergency shelter during Hurricane Katrina... How would you deal with that situation? You would probably take whatever measures were necessary to get by, and you might not behave exactly as you would under normal circumstances. As long as your behavior helps you get through the ordeal, and you don't directly harm anybody, it is probably adaptive. I have come to call this kind of behaviour "coping ugly".<sup>95</sup>

Given the unique nature of any truly catastrophic event, governments planning to see what needs to be done and then doing it, without attention to legal niceties may be the best response. In those circumstances citizens and court might be expected to give leeway to governments to act as they see fit. Governments would not expect citizens to take them to court to challenge their response to an emergency, but presumably the Commonwealth may well have expected no-one would object to a cash payment and therefore challenge their authority to respond to the Global Financial Crisis.<sup>96</sup> The need to react did put pressure on the Court to deal with the matter urgently. Responding to urgent court applications is, perhaps, not the best use of Commonwealth resources during a catastrophic disaster.

On the other hand, it is not a level of planning the community would expect from their government and there is the risk that people will not recognise the Commonwealth's authority and may seek to divert Commonwealth resources to defend their action in Court rather than responding to the disaster.

Ideally the Commonwealth should pass legislation and should do so before the disaster, and not wait for the disaster to strike. This has been the consistent recommendation of commentators cited in this report. Further, the International Federation of Red Cross and Red Crescent Societies has identified that inadequate legal planning compounds the impact of disasters and hinders the delivery of aid, in particular international disaster assistance.<sup>97</sup> In response the Red Cross/Red Crescent movement adopted *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*.<sup>98</sup>

95 George A. Bonanno, *The Other Side of Sadness*, (Basic Books, New York, 2009) p. 78.

96 *Pape v Commissioner for Taxation* (2009) 238 CLR 1.

97 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

98 *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007); *Adoption of the Guidelines for the Domestic Facilitations and Regulation*



The Red Cross/Red Crescent guidelines outline issues that should be addressed in domestic laws to allow affected states to send and receive international disaster assistance. Although the guidelines are designed to facilitate international disaster assistance, addressing the matters in the Guidelines would also facilitate domestic assistance particularly in a federation like Australia as implementing the Guidelines would help define the Commonwealth's role. Australia's domestic laws have been benchmarked against the Guidelines.<sup>99</sup>

That thesis developed model legislation for the Commonwealth based on international exemplars. That discussion is reproduced in the appendix, below.

## AN ALTERNATIVE EXEMPLAR

It has been argued elsewhere that the Commonwealth legislation could be modelled on the *Robert T. Stafford Disaster Relief and Emergency Assistance Act* ('the Stafford Act') in the United States.<sup>100</sup> A key element of that legislation is that the Federal government declares a state of emergency at the request of the states and only when it is agreed that the event has exceeded the state's capacity to respond.

If that were built into Commonwealth legislation then it could also be a condition of making that declaration that the States give to the Commonwealth some power to lead or be involved in decision making with respect to the response and recovery arrangements.

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of International Disaster Relief and Initial Recovery Assistance, Resolution 4, 30th International Conference of the Red Cross and Red Crescent, Document Number 30IC/07/R4 (2007).

99 Michael Eburn, *Australia's International Disaster Response — Laws, Rules And Principles* (PhD Thesis, Monash University, 2009) published as Michael Eburn, *Australia's International Disaster Response — Laws, Rules And Principles* (VDM-Verlag, Saarbrücken, 2010).

100 Michael Eburn, 'Managing 'civil contingencies' in Australia' in Walker, C. (ed) *Contingencies, Resilience and Legal Constitutionalism* (Routledge, 2015); Michael Eburn, *Coordination of federal, state and local disaster management arrangements in Australia: lessons from the UK and the US* (Australian Strategic Policy Institute, Canberra, 2017).





## **PUTTING THE CART BEFORE THE HORSE**

Writing legal reviews without a concrete proposal is difficult. The law does not exist in a vacuum, rather it exists or at least consolidates around a particular problem or issue. Asking 'what are the Commonwealth's powers in the event of a catastrophic disaster?' begs the question of 'what is it that the Commonwealth wants to do?' It is not the law that should lead the discussion.

What is required is for Commonwealth, state and territory emergency management leaders to plan for potential catastrophic disasters and identify a plan to manage the preparation for, response to and recovery from those disasters. Once there is a plan then it is possible to ask 'what legal, policy and procedural changes are required to give effect to the plan?' With a proposal in hand the questions of 'who has legal authority to make decisions?' and 'how can legal authority be vested in the right decision maker?' can be answered.



## CONCLUSION

The Commonwealth has an undefined power to respond, where a national response is required, to a catastrophic disaster. A disaster that disables effective state government would be an example of a catastrophic disaster that warrants direct Commonwealth intervention to respond to the event and restore effective state government.

Both for this, and for lesser disasters, this paper joins with other commentators and reviewers that have found the Commonwealth, and the Australian community, would be better served by a clear legislative statement detailing who, on behalf of the Commonwealth, is empowered to exercise the necessary, extraordinary emergency powers that will be required when responding to an unlikely, but devastating, national disaster. Legislation should identify what powers may be exercised, in what circumstances they may be called upon and establish systems of review to ensure that they have been used appropriately. The appendix below is an extract from Eburn's PhD thesis where recommendations are drawn, and a model Act has been drafted. This Act could form a starting point for considering appropriate counter-disaster legislation for the Commonwealth.

The alternative is to rest the Commonwealth's disaster response on the concept of the 'executive power of the Commonwealth', an inadequate foundation of uncertain strength that may be insufficient to deal with the forces unleashed during a catastrophic national disaster. This should only be an option of last resort.



## RECOMMENDATIONS

The authors of this paper recommend:

The Commonwealth should enact comprehensive emergency management legislation to prescribe the Commonwealth's emergency management arrangements.

The Commonwealth should appoint, with legislative authority, a proper Commonwealth coordinating officer – eg the Director General of Emergency Management Australia or the Secretary of the Department of Home Affairs.

Review and publish Commonwealth and State disaster plans that identify when and on what terms the Commonwealth will intervene in state or territory jurisdictions to protect its own interests rather than to displace state or territory public order functions

Review and publish Commonwealth and State disaster plans that identify when and on what terms the Commonwealth may request or direct state or territory resources to respond to a national emergency in accordance with national priorities;

Review and publish Commonwealth and State disaster plans that identify when and on what terms the Commonwealth will intervene in state or territory jurisdictions to restore and protect the effective governance of the state or territory.



## **APPENDIX –**

**EXTRACT FROM**

**MICHAEL EBURN, AUSTRALIA'S INTERNATIONAL DISASTER RESPONSE —  
LAWS, RULES AND PRINCIPLES (PHD THESIS, MONASH UNIVERSITY, 2009)**

**PUBLISHED AS**

**MICHAEL EBURN, AUSTRALIA'S INTERNATIONAL DISASTER RESPONSE —  
LAWS, RULES AND PRINCIPLES (VDM-VERLAG, SAARBRUCKEN, 2010).**



## CHAPTER EIGHT RECOMMENDATIONS

This thesis has reviewed Australia's emergency management arrangements with a particular focus on issues relating to international disaster response. An international disaster response occurs if and when Australia receives assistance from another state or sends assistance to a disaster-affected state. Australia's legal arrangements for managing an international disaster response have been identified and benchmarked against the IDRL Guidelines<sup>1</sup> to identify gaps and deficiencies in Australia's legal preparedness.

Following on from this analysis, this chapter makes recommendations that would enhance Australia's legal preparedness to send and receive international disaster assistance. The essential components of the recommendations will be that the Commonwealth should pass a single piece of comprehensive disaster management legislation, and should adopt as a model agreement to be entered into by Australia and assisting non-government organisations, the model bilateral civil defence agreement published by the International Civil Defence Organisation.<sup>2</sup>

It has been argued, in Chapter Five, above, that notwithstanding the Commonwealth has no specific grant of legislative power to deal with a disaster or an emergency, such a power must exist. It was argued that the power of the Commonwealth exists as an exercise of the specific legislative powers granted to the Commonwealth Parliament,<sup>3</sup> so that the Commonwealth can pass legislation dealing with the areas of Commonwealth responsibility and how they are to be managed during an emergency. There is also an inherent power to deal with emergencies vested in the Crown as part of the prerogative power of the Crown and now incorporated into the Executive Power of the Commonwealth.<sup>4</sup>

This chapter draws on the experience of the Australian states and territories, as well as Canada and the United States,<sup>5</sup> to develop a model Commonwealth Act. The model Act, called the *Emergencies Act 20XX* (Cth), is set out below. The discussion that follows provides a detailed explanation, and justification of, the draft provisions.

As has been shown in the preceding chapters, Australia's domestic law is incomplete, as the role of the Commonwealth in responding to domestic disasters is not clearly identified and no specific Commonwealth agency or minister is charged with coordinating the Commonwealth response or with directing Commonwealth agencies in the time of disaster. Although this thesis is concerned with sending and receiving international disaster

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1 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

2 International Civil Defence Organisation, *Model Bilateral Agreement in the Matter of Civil Defence* (International Civil Defence Organisation, Geneva, 2002).

3 Australian Constitution s 51.

4 Australian Constitution s 61.

5 Discussed in detail in Chapter Five, above.



assistance, the model legislation that will be proposed will necessarily touch on these matters of purely domestic disaster management.

## RECEIVING AID

**Part one** of the model Act is an introductory part. It contains relevant definitions and a clause providing that the Crown is bound by the Act. It is necessary to bind the Crown to ensure that the Act sets out and defines how the Commonwealth is to exercise emergency powers. This is consistent with the findings of the New Zealand Law Commission<sup>6</sup> that argued legislation should be enacted before a disaster to ensure that there are safeguards against abuse and to ensure that the appropriate powers are available to be used when required. The alternative is for governments to rely on non-statutory sources of power, such as the prerogative power of the Crown, necessity or martial law.<sup>7</sup> The scope and extent of those non-statutory powers is uncertain and they do not provide sufficient safeguards against abuse and protection for the rights of citizens.<sup>8</sup>

It follows that legislation provides a better basis for action. In this case the legislation is intended to govern the power of the executive to act in an emergency. The executive power of the Commonwealth is vested in the Queen, but exercised via her representative, the Governor-General.<sup>9</sup> As discussed in Chapter Five, above, it is intended that this Act will govern the use of the prerogative power so it is necessary to bind the Crown rather than leaving it open to the Crown to rely on the older, non-statutory basis if and when it chooses to do so.<sup>10</sup>

Having a comprehensive Act that binds the Crown will ensure that not only are the rights of citizens protected but so are the rights of states, reflected in the 'negotiated federal compact'.<sup>11</sup> Legislation prescribing and limiting the use of the executive power will reassure the states that the Commonwealth will only act in a truly national emergency, in consultation with the states, and that the Act will not be used to further enhance Commonwealth legislative authority. Determining when and how the Commonwealth will act in an emergency, when negotiated in the calm before any actual emergency arises,<sup>12</sup> will help to ensure that political disputes will not disrupt or hinder the response that will be required if and when the emergency arises.

Section 3 is the definition section. The definition of 'national emergency' is taken from the Canadian legislation,<sup>13</sup> save that the word 'drought' has been removed. A drought is not a sudden onset emergency<sup>14</sup> and, although it may require special assistance and Commonwealth measures,

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6 New Zealand Law Commission, Final Report on Emergencies (Government of New Zealand, Wellington, 1991).

7 Ibid [4.35].

8 Ibid [4.51].

9 Australian Constitution s 61.


10 Attorney General v De Keyser's Royal Hotel [1920] AC 508; Ruddock v Vadarlis (2001) 110 FCR 491.

11 Ruddock v Vadarlis (2001) 110 FCR 491, [183].

12 New Zealand Law Commission, Final Report on Emergencies (Government of New Zealand, Wellington, 1991) [1.25]-[1.26].

13 Emergencies Act RSC 1985, c 22 (4th Supp), s 5.

14 As defined in Chapter Two, above.



it does not usually require urgent action, nor is a drought an 'urgent and critical situation of a temporary nature' that requires emergency powers. Although responding to climate change or water issues may be urgent in the sense that action is required sooner rather than later, it is still action that can be taken over weeks rather than hours as would be the case during a sudden onset emergency. It may also be argued that in Australia, drought is a permanent rather than temporary situation.

'State' is defined to include the self-governing territories of the Northern Territory and the Australian Capital Territory, in order to avoid constant use of the term 'state or territory'. It does not include the non-self governing territories such as Jervis Bay or Christmas Island,<sup>15</sup> as they are subject to Commonwealth administration and the Commonwealth is responsible for emergency management arrangements on those territories in any event.

**Part two** of the model Act contains provisions to allow a state of National Emergency to be declared either by the relevant minister or the Governor-General. The wording of sections 4 to 8 inclusive are based on the Canadian law,<sup>16</sup> with some significant changes.

First, sections 4 and 5 do not appear in the Canadian legislation. The minister should have a power to declare an emergency in urgent circumstances. By convention, the Governor-General acts on the advice of the Cabinet and it may take time to convene the Cabinet. In circumstances where the declaration is required urgently, but it is not practicable to arrange for the Governor-General to make the declaration, the minister may make the necessary declaration. A declaration by the minister remains in force for only seven days which should be sufficient time to allow, if required, for an appropriate declaration to be made by the Governor-General.

The provision for expedited measures has a parallel in Part IIIAAA of the *Defence Act*.<sup>17</sup> Part IIIAAA deals with the use of the defence forces to protect national interests and the states and territories. Although the Governor-General, as custodian of the executive power of the Commonwealth and as Commander in Chief of the defence force,<sup>18</sup> is the appropriate person to issue the relevant orders, the Act provides that in urgent circumstances a call-out order may be made by the Prime Minister, by two 'authorising Ministers' or an 'authorising Minister and another Minister'.<sup>19</sup>

Northern Territory legislation also provides for an expedited or urgent disaster declaration. Under the Territory legislation, two ministers may declare a state of emergency if the administrator is absent or otherwise unable to perform his or her duties, or the office is vacant.<sup>20</sup>

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15 Attorney-General's Department, Territories of Australia  
<[http://www.ag.gov.au/www/agd/agd.nsf/page/Territories\\_of\\_Australia](http://www.ag.gov.au/www/agd/agd.nsf/page/Territories_of_Australia)> at 28 March 2008.


16 Emergencies Act RSC 1985, c 22 (4th Supp), ss 6 and 7.

17 Defence Act 1903 (Cth).

18 Australian Constitution ss 61 and 68.

19 Defence Act 1903 (Cth) s 51CA.

20 Disasters Act 1982 (NT) s 35.



It is consistent with these models that an appropriate minister should be able to make a declaration of a national emergency, in the event of a sudden onset natural disaster where emergency powers are required and where it is not practicable to wait until the Cabinet or Executive Council can be called to advise the Governor-General.

The procedures outlined in the model Act are not as extensive as those of the *Defence Act* as the *Defence Act* contemplates the use of force and restrictions on personal liberty that are not contemplated in the draft *Emergencies Act*. It has been noted, however,<sup>21</sup> that many of the impacts of a disaster will equal those of, for example, a terrorist action and the response may be similar. It may be prudent, if the Commonwealth were to truly adopt an all hazards approach to risk management, to consider whether the procedures for responding to a national emergency caused by violence should be provided for here, rather than in the *Defence Act*. That is the case in Canada<sup>22</sup> but the idea of a general act was rejected in New Zealand where the Law Commission argued for 'sectoral' legislation that is separate items of legislation to deal with different types of disasters.<sup>23</sup> Resolving the issue of whether the response to natural disasters should be equated with the response to terrorist or violent emergencies is beyond the scope of this thesis.

Section 8 outlines what must be included in a declaration. The drafting is based on the Canadian Act,<sup>24</sup> and is intended to apply to a declaration issued either by the minister or the Governor-General.

Section 9 provides that any declaration must be formally published. This is to ensure that citizens who may be subject to special regulations are aware that the Act has been invoked and of the powers that may be exercised in response to the emergency. This provision is consistent with the New Zealand recommendation<sup>25</sup> and Australian state and territory legislation.<sup>26</sup>

Section 10 empowers the Governor-General to make 'such orders or regulations as the Governor-General believes, on reasonable grounds, are necessary for dealing with the emergency'. This is intended to be a very broad power allowing the Governor-General to put in place whatever arrangements are required to deal with the national emergency.

In New Zealand, the Law Commission argued against such a broad power to make delegated legislation in an emergency. The commission argued that it is better to set out all necessary powers in the relevant legislation but they recognised that there may be circumstances where the best pre-planning will still not cover the situation that in fact arises. They accepted

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21 See p Error! Bookmark not defined., above.

22 Emergencies Act RSC 1985, c 22 (4th Supp), pts II, III and IV.


23 New Zealand Law Commission, First Report on Emergencies: Use of the armed forces (Government of New Zealand, Wellington, 1990); New Zealand Law Commission, Final Report on Emergencies (Government of New Zealand, Wellington, 1991).

24 Emergencies Act RSC 1985, c 22 (4th Supp) s 6.

25 New Zealand Law Commission, Final Report on Emergencies (Government of New Zealand, Wellington, 1991) [5.61].

26 Emergencies Act 2004 (ACT) s 153; State Emergency and Rescue Management Act 1989 (NSW) s 34; Disaster Management Act 2003 (Qld) ss 65 and 70; Emergency Management Act 2004 (SA) ss 23 and 24; Emergency Management Act 1986 (Vic) s 23(4) and Emergency Management Act 2005 (WA) s 60.





that in an extreme situation 'the whole government of the country may have to be carried on under [emergency] authority',<sup>27</sup> and there was a need to provide a power to make delegated regulations to deal with these extreme situations.

The draft section is less restrictive than the Canadian section on which it is based.<sup>28</sup> The Canadian Act sets out a number of subject areas that may be subject to emergency regulation. These limit the Canadian Governor in Council to making regulations relating to

- (a) *the regulation or prohibition of travel to, from or within any specified area, where necessary for the protection of the health or safety of individuals;*
- (b) *the evacuation of persons and the removal of personal property from any specified area and the making of arrangements for the adequate care and protection of the persons and property;*
- (c) *the requisition, use or disposition of property;*
- (d) *the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered;*
- (e) *the regulation of the distribution and availability of essential goods, services and resources;*
- (f) *the authorization and making of emergency payments;*
- (g) *the establishment of emergency shelters and hospitals;*
- (h) *the assessment of damage to any works or undertakings and the repair, replacement or restoration thereof;*
- (i) *the assessment of damage to the environment and the elimination or alleviation of the damage; and*
- (j) *the imposition*
- (k) (i) *on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or*  
  
*(ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment, for contravention of any order or regulation*

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27 New Zealand Law Commission, Final Report on Emergencies (Government of New Zealand, Wellington, 1991) [5.79].

28 Emergencies Act RSC 1985, c 22 (4th Supp) s 8.



made under this section.<sup>29</sup>

Powers of this type are generally required to manage an incident or emergency and are to be exercised by incident controllers. All state and territory counter-disaster legislation has provisions to allow someone to make these sorts of orders if they are required.<sup>30</sup>

In the context of Australia, the states have comprehensive counter-disaster legislation setting out the powers to be exercised by relevant authorities, ministers and incident controllers. It is not intended that the Commonwealth will take on active coordination of the emergency response, and this Act will only apply in the most extreme and therefore unpredictable emergencies that constitute a national disaster. In these circumstances it is argued that the Canadian limitations would not be helpful and that this Act will apply in the very extreme circumstances envisaged by the New Zealand Law Commission. The Governor-General can only exercise these powers when a national emergency has been declared, the power to make regulations will be limited by the obligation to have regard to the counter-disaster operations that will be conducted by the states and will only operate in the area affected by the emergency, and both the regulations<sup>31</sup> and the declaration that a national emergency exists will be subject to parliamentary review. In these circumstances it is recommended that there is no fetter on the Governor-General's power, other than an opinion that the regulations are required to deal with the emergency.

**Parts Three and Four** are taken from the Canadian model and provide for the amendment and continuation of an emergency declaration and supervision by parliament. The powers granted in the emergency legislation are wide-reaching and are intended to be used when the response to an emergency cannot be adequately managed under other law. Regulations made under the Act may not be subject to the normal process of development and consultation, and the risk of abuse<sup>32</sup> or unforeseen adverse consequences is real. Parliamentary review, ranging from the sort of scrutiny envisaged here to a simple obligation to table regulations made during an emergency, is included in the legislation from Canada, New Zealand and some Australian states.<sup>33</sup>

**Part five** establishes Emergency Management Australia as a statutory authority with clearly defined roles and responsibilities. Section 26(3) is modelled on the *Homeland Security Act*<sup>34</sup> and will ensure that the Director-General of Emergency Management Australia is the primary adviser to the Australian Government on emergency issues ensuring that there can be no conflict, as might now occur, between Emergency Management Australia,

29 Emergencies Act RSC 1985, c 22 (4th Supp) s 8.

30 See for example Emergencies Act 2004 (ACT) s 163; State Emergency and Rescue Management Act 1989 (NSW) s 37 and Emergency Management Act 1986 (Vic) s 24.

31 Legislative Instruments Act 2003 (Cth).

32 New Zealand Law Commission, Final Report on Emergencies (Government of New Zealand, Wellington, 1991).

33 Emergencies Act RSC 1985, c 22 (4th Supp), pt VI; Civil Defence Emergency Management Act 2002 (NZ) s 67; Emergency Management Act 1986 (Vic) s 23(7); Emergencies Act 2004 (ACT) ss 153 and 158; Emergency Management Act 2004 (SA) s 24; Emergency Management Act 2006 (Tas) s 63.

34 Homeland Security Act 6 USC 311-321j § 503(4).



the National Security Adviser and the broader Attorney-General's Department.

The model Act empowers the Director-General, as the National Coordinator, to direct government departments and to waive requirements with other laws. The model section 29(3) is based on the Victorian provision.<sup>35</sup> Like that provision, it allows the National Coordinator to give direction to government departments but not necessarily ministers of the Crown. There would be political issues involved in allowing an appointed office holder to give directions to a minister to require the minister for example to declare that a situation constitutes an emergency.<sup>36</sup>

What is considered prudent is to distinguish between the office holder that can declare a state of emergency, in this case the Governor-General or the relevant minister, and the office holder who is then empowered to exercise the special powers necessary to respond to the emergency.<sup>37</sup> If they are the same, a declaration of a national emergency by the minister would empower the minister him or herself to take action and that may be a source of real or perceived conflict of interest. Accordingly it is recommended that it is the minister or Governor-General who must be satisfied that a national emergency exists, but it is the National Coordinator who is thereby empowered to Act. The power to make regulations is vested in the Governor-General so where the National Coordinator requires further legal authority, again he or she cannot grant that to him or herself, but must seek approval from the Governor-General. In this way the Governor-General and the coordinator serve as a check on each other.


Missing from the model Act is detailed consideration of the amount of political control that may be exercised over Emergency Management Australia and the Director-General. Traditionally an Act such as this would declare that a body such as Emergency Management Australia is to be subject to ministerial direction or must comply with rules, orders, standards or other formal directives issued by the relevant minister. The extent of political oversight and the extent to which the political organs of government should direct the general conduct of the organisation, and more importantly, the management of a response to a disaster would require political compromise. Considering and making recommendations on these points is beyond the scope of this thesis, but it should be noted that those issues would need to be considered before a final Act was passed into law.

All state counter-disaster legislation provides for some form of committee to assist in the development of state counter-disaster plans and to assist the controller or coordinator during a disaster. The committee, or committees, bring together stakeholders to develop counter disaster plans and can

35 Emergency Management Act 1986 (Vic) s 24.

36 The requirement for multiple declarations was discussed in chapter seven, above.

37 H P Lee, *Emergency Powers* (Law Book Company, Sydney, 1984) 192–193; New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) [5.42].




work together to coordinate the response of the agencies they represent.<sup>38</sup> A similar committee should exist at the national level and this model Act has adopted the Counter Disaster Task Force that currently operates. Again it would be a matter for political decision whether that task force should be made up of ministers or departmental representatives, and whether its membership should be expanded to include not-for-profit and private sector representatives.<sup>39</sup>

**Part six** is the significant part for international disaster relief. This part provides details on who is authorised to make or receive requests for assistance.<sup>40</sup> The part makes it clear that a request can be made even in the absence of a declared national emergency to ensure that delays are not occasioned by waiting for a formal process.<sup>41</sup> The model Act provides for a process to determine who should receive legal facilities to operate in Australia by giving preference to those that have entered into a 'cooperative agreement'.<sup>42</sup>

A model agreement that could be used between Australia and other countries as well as with non-government organisations is set out as a schedule to the model Act. This agreement is derived from the model bilateral agreement published by the International Civil Defence Organisation, discussed in more detail below.<sup>43</sup> Again there are issues that would need to be considered before making these bilateral agreements, in particular issues as to which organisations or countries Australia would wish to accept assistance from. There is no provision in this model Act to define criteria such as that used by AusAID to accredit Australian non-government organisations,<sup>44</sup> but such criteria could be developed in time and with sufficient consultation.

The Act does provide for the recognition of foreign qualifications. Assuming the Commonwealth can pass this law relying on the executive power and the power of the Commonwealth to make laws with respect to external

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- 38 Emergencies Act 2004 (ACT) s 141 Emergency Management Committee and s 161 Management Executive for declared state of emergency; State Emergency and Rescue Management Act 1989 (NSW) s 11 State Disasters Council and s 14 State Emergency Management Committee; Disasters Act 1982 (NT) s 7 Counter Disaster Council; Disaster Management Act 2003 (Qld) s 17 State Disaster Management Group; Emergency Management Act 2004 (SA) s 6 State Emergency Management Committee; Emergency Management Act 2006 (Tas) s 7 State Emergency Management Committee; Emergency Management Act 1986 (Vic) s 8 Victoria Emergency Management Committee and Emergency Management Act 2005 (WA) s 13 State Emergency Management Committee and s 26 State Emergency Coordination Group.
- 39 Commonwealth, Parliamentary Debates, House of Representatives, 4 December 2008, 12549 (First National Security Statement to the Australian Parliament, Kevin Rudd, Prime Minister) 12560.
- 40 International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [10].
- 41 David Fisher, Law and Legal Issues in International Disaster Response: A Desk Study (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 90.
- 42 The terminology of 'cooperative agreement' comes from the Emergencies Act 2004 (ACT) s 180.
- 43 International Civil Defence Organisation, Model Bilateral Agreement in the Matter of Civil Defence (International Civil Defence Organisation, Geneva, 2002).
- 44 AusAid, Base AusAID NGO Accreditation Criteria Table — May 2008 <[http://www.ausaid.gov.au/ngos/pdfs/criteria\\_table\\_base.pdf](http://www.ausaid.gov.au/ngos/pdfs/criteria_table_base.pdf)> at 19 July 2008; AusAid, Accreditation Non-Government Organisations <[http://www.ausaid.gov.au/ngos/pdfs/accreditation\\_policy.pdf](http://www.ausaid.gov.au/ngos/pdfs/accreditation_policy.pdf)> at 19 July 2008.



affairs,<sup>45</sup> then the recognition of these qualifications in accordance with a valid law of the Commonwealth will apply regardless of any inconsistent state law,<sup>46</sup> though the process would naturally be smoother with consultation with the states and, where necessary, complimentary supporting legislation.

**Part seven** contains provisions on compensation. These provide that assisting organisations will not be liable to the community for any default; rather the Crown will assume liability for any acts or omissions undertaken by agencies acting in good faith in furtherance of the Act. This provision is consistent with the provisions in state emergency management legislation and encourages volunteers and others to contribute to the counter-disaster effort. The difficulties that a potential claimant would face in making such a claim are not discussed here, but suffice to say this clause would go some way to meeting the concerns of donor nations and non-government organisations.<sup>47</sup>

## MODEL BILATERAL AGREEMENT

The Act empowering various agencies, such as Emergency Management Australia, to undertake a controlling role in a disaster response and to waive compliance with laws designed to operate in a 'normal' environment, will not resolve all the legal issues that arise during a natural disaster.

Many of the issues relating to the granting of legal facilities, recognition of qualifications and entry of personnel depend on assisting organisations being identified and agreeing to comply with the requirements of the affected country. To deal with these issues, Australia could adopt the *Framework Convention on Civil Defence Assistance*<sup>48</sup> (or a regional convention in similar terms<sup>49</sup>) and encourage potential aid recipients and donors to do the same. Aid would then be provided in accordance with an overarching framework rather than a series of bilateral agreements.

The *Framework Convention on Civil Defence Assistance* deals with many issues dealt with in the IDRL Guidelines.<sup>50</sup> It confirms that assistance can only be provided at the request of or with the consent of the disaster-affected state.<sup>51</sup> That assistance must respect the sovereignty of the affected state but must not be viewed as interference in the internal affairs of the affected

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45 Australian Constitution s 51(xxix).

46 Ibid s 109.

47 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 144–146.

48 *Framework Convention on Civil Defence Assistance*, opened for signature 22 May 2000, 2172 UNTS, (entered into force 23 September 2001).

49 For example, the ASEAN Agreement on Disaster Management and Emergency Response, opened for signature 26 July 2005 (not yet in force).

50 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

51 *Framework Convention on Civil Defence Assistance*, opened for signature 22 May 2000, 2172 UNTS, (entered into force 23 September 2001) art 3(a).

state.<sup>52</sup> Assistance must be provided without regard to race, language, gender and the like and in accordance with the principles of humanity, impartiality and solidarity.<sup>53</sup>

The convention further provides that an affected state must provide timely information regarding their needs and shall facilitate the entry of assisting civil defence units as well as all legal facilities necessary to allow them to operate in country.<sup>54</sup>

Requiring a country to do something, such as providing legal facilities, does not automatically modify domestic law to ensure that the obligations entered into are met. The convention, if adopted by Australia, would commit Australia to undertaking these tasks, but would not directly impact upon Australian law. Legislative and policy reform such as that already discussed would still be required. Further the framework convention is intended to be applied between states, and would have little application where it is intended to receive disaster assistance from, or provide disaster assistance through, non-government organisations.

Accordingly a more appropriate model, incorporated into the model Act, is to use bilateral agreements between Australia and assisting states and organisations to facilitate civil defence assistance following a natural disaster. The agreement, annexed to the model Act, is based on the model agreement prepared by the International Civil Defence organisation.<sup>55</sup>

The agreement, suitably amended, could also be used by Australia as a model for negotiation with other countries that seek Australian assistance and agencies endorsed by Australia could gain access to disaster-affected populations in the same terms. Australia could insist that it would not provide counter-disaster assistance, except where such an agreement has been entered into but such a policy may be unduly restrictive in a sudden onset emergency.

Giving effect to the agreement may require further legal amendment of Acts such as the *Customs Act*<sup>56</sup> or the *Migration Act*.<sup>57</sup> Analysis of that legislation is beyond the scope of this thesis, but it is clearly within the power of the Commonwealth to make whatever amendments are required.

The agreement set out in the schedule to the model Act contains a number of provisions to facilitate international disasters assistance.

**Clause 1** adopts the definition of civil defence from the First Optional Protocol to the Geneva Conventions dealing with the protection of victims

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52 Ibid art 3(b); this is consistent with current international law — see *Nicaragua v United States of America* [1986] ICJ Reports 14.


53 Ibid art 3(c) and (d); See also Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, GA Res 46/182, UN GAOR, 46th sess, 78th plen mtg, UN Doc A/RES/46/182 (1991) and AusAid, Humanitarian Action Policy (Commonwealth of Australia, Canberra, 2005).

54 Ibid art 4.

55 International Civil Defence Organisation, Model Bilateral Agreement in the Matter of Civil Defence (International Civil Defence Organisation, Geneva, 2002).

56 Customs Act 1901 (Cth).

57 Migration Act 1958 (Cth).



to armed conflict.<sup>58</sup> Often civil defence is assumed to mean the defence of a population from the effects of war. The fact that the term is defined in Protocol I<sup>59</sup> does not mean, however, that civil defence is limited to those activities designed to protect the population from the effect of the war. Rather:

Civil Defence means 'the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters ...'<sup>60</sup>

What follows is a list of activities including fire-fighting, rescue, the provision of medical services and many other activities that are provided as part of a civil society and which are required following a natural disaster. The importance of including a definition in the additional protocol is to ensure that in the event of an armed conflict the organisations that normally provide those services can continue to do so, unmolested by invading forces.<sup>61</sup> Civil defence services may be provided by any organisation and need not be limited to government services.

It follows that after a sudden onset natural disaster, what is required is 'civil defence' services and so the definition from the additional protocol is applicable even though what is being sought is assistance to deal with a disaster, not armed conflict.

In adopting the definition of civil defence from the first additional protocol, the reference to 'hostilities' has been removed as this agreement is not intended to apply during armed conflict. For the same reason reference to the 'management of blackout measures'<sup>62</sup> has been deleted as this task will not be relevant to post-natural disaster assistance.

**Clause 3** identifies a clear point of contact within Australia for making requests for international assistance.<sup>63</sup> Other states and assisting organisations will know that a request from Australia will be directed through Emergency Management Australia. This will distinguish requests from Australia from lower level requests for assistance such as those that may be arranged on an inter-agency basis.<sup>64</sup>

**Clause 4** deals with issues of the entry of personnel.<sup>65</sup> It provides that incoming relief workers will not require visas and identifies the necessary

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58 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) opened for signature 8 June 1977, 1125 UNTS 4, (entered into force 7 December 1978) art 61(1).

59 Ibid.

60 Ibid art 61 (emphasis added).


61 Ibid art 62.

62 Ibid art 61(1)(d).

63 International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [8(2)].

64 Discussed in chapters five and six, above.

65 International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [16].



identification that will be required. A person who ceases to be a member of the staff of the assisting party, or who is required by Australian law or the Australian authorities to leave Australia, must be removed by, and at the expense of, the assisting party.

**Clause 6** confirms that personnel operating in Australia are bound by, and subject to, Australian law.

**Clause 7** does not reflect any provision in the IDRL Guidelines, but is necessary as civil defence organisations, whether government or non-government, will usually be equipped with distinctive uniforms that also form part of their personal protective equipment and therefore they need to be able to wear them to identify and protect themselves.

**Clause 15** provides for the resolution of disputes arising under the agreement. The Model Agreement prepared by the International Civil Defence Organisation has a dispute resolution clause that says:

All disputes relating to the interpretation or application of the present agreement are dealt with by means of negotiations between the contracted parties.<sup>66</sup>

The IDRL Guidelines<sup>67</sup> are silent on the issue of dispute resolution.

In Australia, with a well-established judiciary and respect for the rule of law, and where the issues that may arise cannot be accurately predicted, it is appropriate to allow the normal legal processes to apply. Accordingly the parties commit themselves to attempting to negotiate a solution to any dispute. There is also the power to turn to the courts for a definitive resolution. In this case, because the agreement is between the Commonwealth and the assisting state or organisation, the proposed Act is a Commonwealth Act and the arrangements are based on Commonwealth constitutional authority, the appropriate court is the Federal Court of Australia.<sup>68</sup>

**Clauses 5, 8, 9, 10, 11, 12, 13 and 14** deal with other matters raised in the IDRL Guidelines, in particular with the duty free importation and export of relief goods,<sup>69</sup> the use of vehicles and aircraft,<sup>70</sup> coordination and the sovereign right of the affected state to coordinate the disaster relief effort,<sup>71</sup> security,<sup>72</sup> the use of telecommunications equipment,<sup>73</sup> the termination of the assistance mission<sup>74</sup> and costs.<sup>75</sup>

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66 International Civil Defence Organisation, Model Bilateral Agreement in the Matter of Civil Defence (International Civil Defence Organisation, Geneva, 2002) art 10.

67 International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

68 Constituted by the Federal Court of Australia Act 1976 (Cth).

69 Ibid [17].

70 Ibid [18(1)] and [19].

71 Ibid [3(3)].

72 Ibid [22]

73 Ibid [18(2)]

74 Ibid [12].

75 Ibid [24].



## THE PROPOSED LEGISLATION AND THE IDRL GUIDELINES — MATTERS DEALT WITH

Legislation in the form suggested here would ensure that Australia was well equipped to receive international assistance should that be required. It would also enhance Australia's ability to respond domestically to disasters occurring within Australian territory.

With respect to the IDRL Guidelines,<sup>76</sup> the model legislation and associated model agreement deal with the responsibilities of Australia as an affected state and the responsibilities of incoming actors.<sup>77</sup> It provides for the establishment of necessary legal and policy frameworks.<sup>78</sup> It establishes processes for the initiation and termination of assistance, including assistance by foreign and domestic militaries.<sup>79</sup> It deals with the provision of necessary legal facilities to assisting states and organisations.<sup>80</sup> It makes provision for the arrival of personnel, goods and equipment, security and costs.<sup>81</sup>

The model Act does not specifically identify who may benefit from the Act, or who may enter into the bilateral agreements. Identifying who are appropriate aid providers would be a matter for policy debate and ultimate determination by the National Coordinator. There is no reason why, however, a private company or other appropriate entity could not enter into an agreement to provide assistance and therefore benefit from the terms of the Act and the agreement. Although not specifically stated, the model Act does therefore deal with the question of providing legal facilities for assisting actors other than states.<sup>82</sup>

## THE PROPOSED LEGISLATION AND THE IDRL GUIDELINES — MATTERS NOT DEALT WITH

The draft legislation does not deal with matters raised in the introductory parts of the IDRL Guidelines,<sup>83</sup> as these set out terms to aid in the interpretation of the IDRL Guidelines rather than being requirements or recommendations in themselves. The model Act and agreement do not deal with the responsibilities of states<sup>84</sup> as it is not up to Australia to try and impose obligations upon other countries. Further, the interpretation in the IDRL Guidelines as to what are the obligations upon states is a reflection of current international law rather than a requirement or recommendation requiring implementation.

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76 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

77 Ibid [3] and [4].

78 Ibid [8].

79 Ibid [10] to [12].


80 Ibid [13] and [14].

81 Ibid [16], [17], [18], [20], [22] and [24].

82 Ibid [15].

83 Ibid [1] and [2].

84 Ibid [5].



Matters concerning the cooperation in ensuring aid money is not misappropriated or misapplied, issues of cooperation in early warning and developing regional disaster relief arrangements<sup>85</sup> are dealt with in other areas<sup>86</sup> of law rather than in an Act designed to facilitate response to an actual event, and so are not dealt with in this model legislation.

The model Act is silent on the issues of taxation.<sup>87</sup> Taxation law and exemption from goods and services tax is a significantly complex area beyond the scope of this thesis. Where an exemption from goods and services or other taxes is to be applied, it would be more appropriate to place that exemption in the relevant taxing Act.<sup>88</sup>

Matters of transport and extended hours<sup>89</sup> are not specifically dealt with in the Act but could be dealt with by the National Coordinator exercising his or her powers under section 29 of the model Act.

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85 Ibid [6], [7] and [9].

86 See the discussion in chapter seven.

87 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [21].

88 In particular, the A New Tax System (Goods And Services Tax) Act 1999 (Cth) chpt 3 —The exemptions.

89 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [19] and [23].

## SENDING AID

Aid will travel to countries from Australia in many forms. Australia deploys human resources, usually but not exclusively from the defence forces, as well as providing money to local and foreign non-government organisations to allow them to provide post-disaster assistance. Aid also flows from the community without the direct involvement of the government when people chose to make their own donations to charities and relief appeals. Organisations can and do act independently of government to deliver aid or funding for aid.

There is therefore no clear policy that needs to be contained within Australian legislation. There is no overarching international legal convention that needs to be applied. As has been argued above, it is not the domestic law of the sending state or even international law that is critical in facilitating international disaster response, rather it is the domestic law of the receiving state.<sup>90</sup>

Australia could attempt to pass laws that require people who wish to donate aid funds, or who wish to travel to disaster-affected countries to provide aid, to act through government channels,<sup>91</sup> but this would be inconsistent with the general freedoms of the Australian population and would be unenforceable.

Australia is well prepared to send aid and has done so on numerous occasions without reported legal complications arising from its actions. Australian humanitarian policy reflects the principals that aid should only be sent at the request of the affected state and must be delivered in accordance with principles of humanity and neutrality.<sup>92</sup> The single most useful aspect of Australian law and policy when dealing with the delivery of aid is the process of accreditation of non-government organisations, so receiving countries can accept assistance from those organisations knowing that they meet publicly disclosed standards of professionalism and accountability. This process does not need further legislative backing. Accordingly there appears to be no need for further legislative reform in the area of sending international assistance from Australia.

The model Act and agreement are now set out in full. Reference is made to the relevant source (if any) that the clause was based on and the relevant provision of the IDRL Guidelines that the clause gives effect to.

90 See p Error! Bookmark not defined., above. See also David P Fidler, 'Disaster Relief and Governance After the Indian Ocean Tsunami: What Role for International Law?' (2005) 6 Melbourne Journal of International Law 458; David Fisher, Law and Legal Issues in International Disaster Response: A Desk Study (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

91 International Federation of Red Cross and Red Crescent Societies, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [5(2)].

92 AusAid, Humanitarian Action Policy (Commonwealth of Australia, Canberra, 2005).

## EMERGENCIES ACT

An Act to authorise the taking of special temporary measures to ensure safety and security during national emergencies, and to amend other Acts.

### PREAMBLE

(*Emergencies Act RSC 1985, c 22 (4th Supp)*, Preamble)

WHEREAS the safety and security of the individual, the protection of the values of the body politic and the preservation of the sovereignty, security and territorial integrity of the state are fundamental obligations of government;

AND WHEREAS the fulfilment of those obligations in Australia may be seriously threatened by a national emergency and, in order to ensure safety and security during such an emergency, the Governor-General should be authorised, subject to the supervision of Parliament, to take special temporary measures that may not be appropriate in normal times;

### PART 1 — INTRODUCTORY

#### 1. *Short title*

This Act may be cited as the *Emergencies Act*.

#### 2. *Act to bind Crown*

This Act binds the Crown in all its capacities.

#### 3. *Interpretation*

(*Emergencies Act RSC 1985, c 22 (4th Supp)* s 5)

In this Act

“**declaration of a national emergency**” means a proclamation issued pursuant to section 4 or section 6.

“**national emergency**” means an urgent and critical situation of a temporary nature that is caused by a real or imminent:

- (a) fire, flood, storm, tsunami, earthquake or other natural phenomenon;
- (b) disease in human beings, animals or plants; or
- (c) accident or pollution;

and that results or may result in

- (d) a danger to life or property;



- (e) social disruption; or
  - (f) a breakdown in the flow of essential goods, services or resources;
- and
- (g) is of such proportions or nature as to exceed the capacity or authority of a State to deal with it; or
  - (h) seriously threatens the ability of the Government of Australia to preserve the sovereignty, security and territorial integrity of Australia;

and that cannot be effectively dealt with under any other law of Australia.

“**State**” includes the Australian Capital Territory and the Northern Territory.

## **PART 2 — DECLARATION OF A NATIONAL EMERGENCY**

### **4. Declaration of a national emergency by the Minister**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 6).*

- 1) If there is an emergency which the Minister after considering the advice of the National Coordinator is satisfied:
  - a) constitutes or is likely to constitute a National Emergency and necessitates the taking of special temporary measures for dealing with the emergency; and
  - b) because a sudden and extraordinary emergency exists, it is not practicable for an order to be made pursuant to section 6; then

the Minister may declare a state of national emergency to exist in the whole or in any part or parts of Australia.

### **5. Effective date**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 7)*

- 1) A declaration of a national emergency under section 4 is effective on the day on which it is issued.
- 2) A declaration of a national emergency under section 4 expires at the end of seven days unless the declaration is previously revoked or continued in accordance with this Act.

### **6. Declaration of a national emergency by the Governor-General**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 6)*

If there is an emergency which the Governor-General is satisfied



constitutes or is likely to constitute a national emergency and necessitates the taking of special temporary measures for dealing with the emergency; and

has been the subject of consultation required by section 15;

the Governor-General may, declare a state of national emergency to exist in the whole or in any part or parts of Australia.

## **7. Effective date**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 7)*

- (1) A declaration of a national emergency under section 6 is effective on the day on which it is issued, but a motion for confirmation of the declaration shall be laid before each House of Parliament and be considered in accordance with section 20.
- (2) A declaration of a national emergency under section 6 expires at the end of thirty days unless the declaration is previously revoked or continued in accordance with this Act.

## **8. Contents of a declaration of national emergency**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 6)*

- (1) A declaration of a national emergency shall specify:
  - (a) concisely the state of affairs constituting the emergency;
  - (b) the special temporary measures that may be necessary for dealing with the emergency; and
  - (c) if the direct effects of the emergency do not extend to the whole of Australia, the area of Australia to which the direct effects of the emergency extend.

## **9. Publication of a declaration of national emergency**

- (1) Where
  - (a) a national emergency is declared under section 4 or section 6;
  - (b) a declaration of national emergency is revoked under section 11 or section 12;
  - (c) a declaration of national emergency is continued under section 13; or
  - (d) a declaration of national emergency is amended under section 14;

the Minister shall forthwith cause to be published in the Government Gazette and in a newspaper published in the



capital city of each State to which the declaration applies, a copy of the declaration or proclamation.

- (2) Failure to comply with subsection (1) shall not render invalid any such declaration or proclamation.

## **10. Orders and regulations**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 8)*

- (1) While a declaration of a national emergency is in effect, the Governor-General may make such orders or regulations as the Governor-General believes, on reasonable grounds, are necessary for dealing with the emergency.
- (2) Where a declaration of a national emergency specifies that the direct effects of the emergency extend only to a specified area of Australia, the power under subsection (1) to make orders and regulations, and any powers, duties or functions conferred or imposed by or pursuant to any such order or regulation, may be exercised or performed only with respect to that area.
- (3) The power under subsection (1) to make orders and regulations, and any powers, duties or functions conferred or imposed by or pursuant to any such order or regulation:
  - (a) shall be exercised or performed:
    - (i) in a manner that will not unduly impair the ability of any State to take measures, under an Act of the legislature of the State, for dealing with an emergency in the State; and
    - (ii) with the view of achieving, to the extent possible, concerted action with each State with respect to which the power, duty or function is exercised or performed; and
  - (b) shall not be exercised or performed for the purpose of terminating a strike or lock-out or imposing a settlement in a labour dispute.



## **PART 3 — REVOCATION, CONTINUATION AND AMENDMENT OF DECLARATION**

### **11. Revocation by Parliament**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 10)*

Parliament may revoke a declaration of a national emergency in accordance with section 19 or 20.

### **12. Revocation by Governor-General**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 11)*

The Governor-General may, by proclamation, revoke a declaration of a national emergency either generally or with respect to any area of Australia effective on such day as is specified in the proclamation.

### **13. Continuation by Governor-General**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 12)*

- (1) At any time before a declaration of a national emergency would otherwise expire, the Governor-General, after such consultation as is required by section 15, may, by proclamation, continue the declaration either generally or with respect to any area of Australia for such period, not exceeding thirty days, as is specified in the proclamation if the Governor-General believes, on reasonable grounds, that the emergency will continue to exist or that the direct effects of the emergency will continue to extend to that area, as the case may be.
- (2) Before issuing a proclamation continuing a declaration of a national emergency, the Governor-General shall review all current orders and regulations made under section 9 to determine if the Governor-General believes, on reasonable grounds, that they continue to be necessary for dealing with the emergency and shall revoke or amend them to the extent that they do not so continue.
- (3) A declaration of a national emergency may be continued more than once pursuant to subsection (1).
- (4) A proclamation continuing a declaration of a national emergency is effective on the day on which it is issued, but a motion for confirmation of the proclamation shall be laid before each House of Parliament and be considered in accordance with section 60.

### **14. Amendment by Governor-General**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 13)*





- (1) Where the Governor-General
  - (a) has issued a declaration of a national emergency specifying that the direct effects of the emergency extend only to a specified area of Australia; and
  - (b) believes, on reasonable grounds, that the direct effects of the emergency have extended to any other area of Australia or to the rest of Australia;

the Governor-General, after such consultation as is required by section 15, may, by proclamation, amend the declaration to specify that other area as an area of Australia to which the direct effects of the emergency extend or to remove the existing specification, as the case may be.

- (2) A proclamation amending a declaration of a national emergency is effective on the day on which it is issued, but a motion for confirmation of the proclamation shall be laid before each House of Parliament and be considered in accordance with section 60.

## **15. Consultation**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 14)*

- (1) Subject to subsection (2), before the Governor-General issues, continues or amends a declaration of a national emergency, the Premier or Chief Minister of each State in which the direct effects of the emergency occur shall be consulted with respect to the proposed action.
- (2) The Governor-General may not issue a declaration of a national emergency where the direct effects of the emergency are confined to, or occur principally in, one State unless the Premier or Chief Minister has indicated to the Governor-General that the emergency exceeds the capacity or authority of the State to deal with it.

## **16. Effect of expiration of declaration**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 15)*

- (1) Where, pursuant to this Act, a declaration of a national emergency expires either generally or with respect to any area of Australia, all orders and regulations made pursuant to the declaration or all orders and regulations so made, to the extent that they apply with respect to that area, as the case may be, expire on the day on which the declaration expires.
- (2) Where, pursuant to this Act, a declaration of a national emergency is revoked either generally or with respect to any



area of Australia, all orders and regulations made pursuant to the declaration or all orders and regulations so made, to the extent that they apply with respect to that area, as the case may be, are revoked effective on the revocation of the declaration.

- (3) Where, pursuant to this Act, a proclamation continuing a declaration of a national emergency either generally or with respect to any area of Australia is revoked after the time the declaration would, but for the proclamation, have otherwise expired either generally or with respect to that area:

- (a) the declaration and all orders and regulations made pursuant to the declaration; or
- (b) the declaration and all orders and regulations made pursuant to the declaration to the extent that the declaration, orders and regulations apply with respect to that area;

as the case may be, are revoked effective on the revocation of the proclamation.

- (4) Where, pursuant to this Act, a proclamation amending a declaration of a national emergency is revoked, all orders and regulations made pursuant to the amendment and all orders and regulations to the extent that they apply pursuant to the amendment are revoked effective on the revocation of the proclamation.

## PART 4 — PARLIAMENTARY SUPERVISION

(*Emergencies Act* RSC 1985, c 22 (4th Supp) pt VI)

### 17. Definitions

In this Part:

“**Parliamentary Review Committee**” means the committee referred to in section 21(1);

“**sitting day**”, in respect of a House of Parliament, means a day on which that House is sitting.

### 18. Tabling in Parliament

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 58)

- (1) Subject to subsection (4), a motion for confirmation of a declaration of emergency, signed by the Minister together with an explanation of the reasons for issuing the declaration and a report on any consultation with the Premiers of the States with respect to the declaration, shall be laid before each House of



Parliament within seven sitting days after the declaration is issued.

- (2) If a declaration of emergency is issued during a prorogation of Parliament or when either House of Parliament stands adjourned, Parliament or that House, as the case may be, shall be summoned forthwith to sit within seven days after the declaration is issued.
- (3) If a declaration of emergency is issued at a time when the House of Representatives is dissolved, Parliament shall be summoned to sit at the earliest opportunity after the declaration is issued.
- (4) Where Parliament or a House of Parliament is summoned to sit in accordance with subsection (2) or (3), the motion, explanation and report described in subsection (1) shall be laid before each House of Parliament or that House of Parliament, as the case may be, on the first sitting day after Parliament or that House is summoned.
- (5) Where a motion is laid before a House of Parliament as provided in subsection (1) or (4), that House shall, on the sitting day next following the sitting day on which the motion was so laid, take up and consider the motion.
- (6) A motion taken up and considered in accordance with subsection (5) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.
- (7) If a motion for confirmation of a declaration of emergency is negated by either House of Parliament, the declaration, to the extent that it has not previously expired or been revoked, is revoked effective on the day of the negative vote and no further action under this section need be taken in the other House with respect to the motion.

### **19. Motion for revocation**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 59)*

- (1) Where a motion, for the consideration of the Senate or the House of Representatives, to the effect that a declaration of national emergency be revoked either generally or with respect to any area of Australia, signed by not less than 10 members of the Senate or twenty members of the House of Representatives, as the case may be, is filed with the Speaker thereof, that House



of Parliament shall take up and consider the motion within three sitting days after it is filed.

- (2) A motion taken up and considered in accordance with subsection (1) shall be debated without interruption for not more than 10 hours and, on the expiration of the tenth hour or at such earlier time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.
- (3) If a motion debated in accordance with subsection (2) is adopted by the House, the declaration, to the extent that it has not previously expired or been revoked, is revoked in accordance with the motion, effective on the day specified in the motion, which day may not be earlier than the day of the vote adopting the motion.

## **20. Motion for confirmation of proclamation continuing a declaration**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 60)*

- (1) A motion for confirmation of a proclamation continuing a declaration of emergency and of any orders and regulations named in the motion pursuant to subsection (3), signed by the Minister, together with an explanation of the reasons for issuing the proclamation, a report on any consultation with the Premiers of the States with respect to the proclamation and a report on the review of orders and regulations conducted before the issuing of the proclamation, shall be laid before each House of Parliament within seven sitting days after the proclamation is issued.
- (2) A motion for confirmation of a proclamation amending a declaration of emergency, signed by the Minister, together with an explanation of the reasons for issuing the proclamation and a report on any consultation with the Premiers of the States with respect to the proclamation, shall be laid before each House of Parliament within seven sitting days after the proclamation is issued.
- (3) A motion for confirmation of a proclamation continuing a declaration of emergency shall name the orders and regulations in force on the issuing of the proclamation that the Governor-General believed, on reasonable grounds, continued at that time to be necessary for dealing with the emergency.
- (4) Where a motion is laid before a House of Parliament as provided in subsection (1) or (2), that House shall, on the sitting



day next following the sitting day on which the motion was so laid, take up and consider the motion.

- (5) A motion taken up and considered in accordance with subsection (4) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.
- (6) If a motion for confirmation of a proclamation is negatived by either House of Parliament, the proclamation, to the extent that it has not previously expired or been revoked, is revoked effective on the day of the negative vote and no further action under this section need be taken in the other House with respect to the motion.
- (7) If a motion for confirmation of a proclamation continuing a declaration of emergency is amended by either House of Parliament by the deletion therefrom of an order or regulation named in the motion pursuant to subsection (3), the order or regulation is revoked effective on the day on which the motion, as amended, is adopted.

## **21. Review by Parliamentary Review Committee**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 62)*

- (1) The exercise of powers and the performance of duties and functions pursuant to a declaration of emergency shall be reviewed by a committee of both Houses of Parliament designated or established for that purpose.
- (2) The Parliamentary Review Committee shall include at least one member of the House of Representatives from each party that has a recognised membership of twelve or more persons in that House and at least one senator from each party in the Senate that is represented on the committee by a member of the House of Representatives.
- (3) The Parliamentary Review Committee shall report or cause to be reported the results of its review under subsection (1) to each House of Parliament at least once every sixty days while the declaration of emergency is in effect and, in any case:
  - (a) within three sitting days after a motion for revocation of the declaration is filed under subsection 19(1);
  - (b) within seven sitting days after a proclamation continuing the declaration is issued; and



(c) within seven sitting days after the expiration of the declaration or the revocation of the declaration by the Governor-General.

## **22. Inquiry**

*(Emergencies Act RSC 1985, c 22 (4th Supp) s 63)*

- (1) The Governor-General shall, within 60 days after the expiration or revocation of a declaration of emergency, cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency.
- (2) A report of an inquiry held pursuant to this section shall be laid before each House of Parliament within 360 days after the expiration or revocation of the declaration of emergency.

## **PART 5 — EMERGENCY MANAGEMENT AUSTRALIA**

### **23. Establishment of Emergency Management Australia**

- (1) There is established by this Act an agency known as Emergency Management Australia.
- (2) Emergency Management Australia is a body corporate with perpetual succession.
- (3) Proceedings may be taken by or against Emergency Management Australia in its corporate name.

### **24. Agent of Crown**

Emergency Management Australia is an agent of the Crown and enjoys the status, immunities and privileges of the Crown.

### **25. Functions of Emergency Management Australia**

*(Emergencies Management Act SC 2007, c 15 s 4; This is EMA;<sup>93</sup> Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [8.2])*

- (1) The functions of Emergency Management Australia are to:
  - (a) advise the Minister on all aspects of policy in relation to emergency management;
  - (b) provide national strategic leadership in the area of emergency management;
  - (c) develop intergovernmental and international partnerships to enhance Australia's emergency management capacity;

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Emergency Management Australia, *This is EMA* (Commonwealth of Australia, Canberra, 2008).



- (d) develop community capacity and resilience to natural hazards;
- (e) monitor potential, imminent and actual emergencies;
- (f) manage, on behalf of the Australian government, the response to a national emergency;
- (g) manage, on behalf of the Australian government, the response to requests from foreign countries for Australian assistance to deal with disasters occurring overseas;
- (h) manage, on behalf of the Australian government, the response to requests by an Australian State or States for Commonwealth assistance in dealing with an emergency or disaster occurring within their State;
- (i) coordinate the provision of assistance to a State or Territory in respect of a disaster or emergency other than the calling out of the Australian Defence Force in aid of the civil power under Part IIIAAA of the *Defence Act 1903*;
- (j) participate in international emergency management activities;
- (k) establish policies, programs and other measures respecting the preparation, maintenance, testing and implementation by Australian government agencies and departments of emergency management plans;
- (l) provide advice to Australian government agencies and departments with respect to the preparation, maintenance, testing and implementation of emergency management plans;
- (m) analyse and evaluate emergency management plans prepared by Australian government agencies and departments;
- (n) coordinate the activities of Australian government agencies and departments relating to emergency management with those of the States and Territories;
- (o) conduct research related to emergency management;
- (p) such other functions that are given to by this or any other Act.

## **26. Director-General**

*(The Homeland Security Act 6 USC 311-321j §503(4))*

- (1) The Governor-General shall appoint a suitably qualified person to be the Director-General of Emergency Management Australia.



- (2) The Director-General is responsible for the overall strategic direction and management of Emergency Management Australia.
- (3) The Director-General is the principal advisor to the Governor-General, the Prime Minister and the Commonwealth Counter-Disaster Task Force for all matters relating to emergency management in Australia.

## **27. National Coordinator and Deputy**

*(Emergency Management Act 1986 (Vic) s 5)*

- (1) The Director-General is the National Coordinator of Emergency Management for the purposes of this Act.
- (2) The National Coordinator shall appoint a Deputy National Coordinator of Emergency Management.

## **28. Delegation by National Coordinator**

*(Emergency Management Act 1986 (Vic) s 7)*

The National Coordinator may, by instrument, delegate to the Deputy National Coordinator or any other person any power or function of the National Coordinator under this Act or the regulations, except this power of delegation.

## **29. Powers and duties of National Coordinator**

*(Emergency Management Act 1986 (Vic) s 11)*

- (1) Subject to section 2, during a declared national emergency the National Coordinator is responsible for directing and coordinating the activities of all government agencies, and the allocation of all available resources of the Government, which the National Coordinator considers necessary or desirable for responding to the disaster.
- (2) As far as practicable, National Coordinator must exercise the National Coordinator's functions in accordance with any relevant national emergency plan.
- (3) In addition to and without in any way limiting the generality of subsections (1) and (2), in a National Emergency the National Coordinator may —
  - (a) direct any government agency to do or refrain from doing any act, or to exercise or perform or refrain from exercising or performing any function, power, duty or responsibility; and





- (b) if it appears to the National Coordinator that compliance by a government agency with an Act or subordinate instrument, which prescribes the functions powers duties and responsibilities of that agency, would inhibit response to or recovery from the disaster, declare that the operation of the whole or any part of that Act or subordinate instrument is suspended; and
- (4) If a direction is given to a government agency under subsection (2)(a)—
  - (a) the government agency must comply with the direction; and
  - (b) the direction prevails over anything to the contrary in any Act or law.
- (5) A declaration made under subsection (2)(b) has effect according to its tenor until a further declaration is made by the National Coordinator reviving the operation of the Act or subordinate instrument.

### **30. Use of the Australian Defence Force**

*(Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [11])*

- (1) The National Coordinator may not direct the Australian Defence Force to take part in counter-disaster activities without the approval of the Chief of the Defence Force.
- (2) The National Coordinator shall not request the Chief of the Defence Force to approve the use of Australian Defence Force resources, unless he or she is satisfied that no civilian resources are available to meet the needs created by the emergency.

### **31. National Coordinator to prepare COMDISPLAN**

*(Emergency Management Act 1986 (Vic) s 10)*

- (1) The National Coordinator must arrange for the preparation and review from time to time of a national emergency response plan, to be called COMDISPLAN, for the coordinated response to emergencies by all agencies having roles or responsibilities in relation to the response to emergencies.
- (2) The National Coordinator must consult with the Commonwealth Counter-Disaster Task Force before arranging for the preparation and review of COMDISPLAN.



### **32. Commonwealth Counter-Disaster Task Force**

- (1) There is hereby established a council to be called the Commonwealth Counter-Disaster Task Force to:
  - (a) provide necessary policy advice on issues referred to it by the Director General;
  - (b) recommend any special intergovernmental arrangements which may be required to assist longer-term recovery.
  - (c) advise the National Coordinator on all matters, including the coordination of activities of government and non-government agencies, relating to the prevention of, response to and recovery from emergencies.
- (2) The Task Force is to be chaired by a representative of the Department of the Prime Minister and Cabinet, and is comprised of representatives of Australian Government departments and agencies with a significant role to play in the provision of disaster relief or rehabilitation assistance as determined by the National Coordinator.

### **33. Committees established by National Coordinator**

*(Emergency Management Act 1986 (Vic) s 9)*

The National Coordinator, after considering the advice of the Task Force may establish such committees as are necessary to ensure comprehensive and integrated emergency management.

## **PART 6 — INTERNATIONAL COOPERATION**

### **34. Definitions for Part 6**

In this part:

**“specialist”** means a person who has a skill appropriate for dealing with an aspect of an emergency (whether or not the skill is in a recognised field of expertise).

### **35. Request for international assistance**

*(Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [8] and [10])*

- (1) Where a National Emergency has been declared, the National Coordinator may, if he or she determines that the resources to meet the needs created by a National



Emergency are not available in Australia, seek international assistance in accordance with this part.

- (2) (a) The National Coordinator may seek international assistance at the request of a State where the State has sought Commonwealth Assistance and the National Coordinator, in consultation with the Premier of the affected State or States, has determined that the resources to meet the needs of the State or Territory are not available in Australia.
- (b) Such a request may be made whether or not a national emergency has been declared.
- (3) Before requesting international assistance under subsection (1) or (2) the National Coordinator must consult with the Department of Foreign Affairs and Trade and the Minister.
- (4) A request for international assistance may be made to the United Nations Office for the Coordination of Humanitarian Affairs, any country or agency that the National Coordinator believes will be able to assist meet Australia's needs.
- (5) Without limiting subsection (6) preference shall be given to requesting assistance from countries or agencies that have entered into a co-operative agreement in accordance with this part.

### **36. Cooperative arrangements with overseas agencies**

*(Emergencies Act 2004 (ACT) s 176; (Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [14])*

- (1) The Minister may enter into a written arrangement with the agency of a foreign country or any foreign corporation or non-government agency, (a **cooperative arrangement**) to facilitate cooperation —
  - (a) in emergency management; or
  - (b) in the response to a national emergency
- (2) As far as is practicable, a cooperative agreement shall be in the form set out in Schedule 1.

### **37. Recognition of foreign qualifications**

*(Emergencies Act 2004 (ACT) s 180; (Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [16(1)(c)])*



- (1) This section applies if:
  - (a) a specialist ordinarily resident in a foreign country undertakes activities in Australia under a cooperative arrangement; and
  - (b) the activities are activities that under a Commonwealth, State or Territory law may only be undertaken by a person who holds a qualification (the **required qualification**); and
  - (c) the person holds a qualification recognised by the law of that foreign country as a requirement for undertaking the activities in that country.
- (2) The person is taken to hold the required qualification for the purpose of any Australian State or Territory law regarding the undertaking the activities in Australia under the arrangement.
- (3) In this section:
 

**“qualification”** includes—

  - (a) a degree, diploma, certificate or other award; and
  - (b) registration with or membership of an entity.

### **38. Recognition of foreign corporate status**

*(Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [20])*

- (1) This section applies if an agency that is incorporated under the law of foreign country that undertakes activities in Australia under a cooperative arrangement.
- (2) The agency is deemed to be a registered foreign corporation within the meaning of the *Corporations Act 2001* and shall be entitled to sue and be sued in its corporate name and may can hold property (including land) and enter into contracts.

### **39. Requests for Australian Assistance**

*(Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [8(2)])*

- (1) The National Coordinator shall receive requests for Australian assistance following disasters or emergencies occurring in foreign countries.
- (2) Where a request for Australian assistance is received the National Coordinator shall advise the Minister for Foreign



Affairs and Trade of the request and advise the Minister for Foreign Affairs and Trade whether Australian resources exist to meet the request.

- (3) The Minister for Foreign Affairs and Trade shall determine whether assistance will or will not be provided.
- (4) Where the Minister for Foreign Affairs and Trade has determined that assistance will be provided the National Coordinator is responsible for directing and coordinating the activities of all agencies, and the allocation of all available resources of the Government, which the National Coordinator considers necessary or desirable for responding to the disaster.

## PART 7 — COMPENSATION

### 1. Definitions

In this Part,

“**compensation**” means compensation under subsection 48(1);

“**Crown**” means Her Majesty in right of Australia;

### 2. Protection from personal liability

(*Emergencies Act RSC 1985, c 22 (4th Supp) s 47*)

- (1) No action or other proceeding for damages lies or shall be instituted against a Minister, servant or agent of the Crown, including any person providing services pursuant to an order or regulation made under this Act, for or in respect of anything done or omitted to be done, or purported to be done or omitted to be done, in good faith under this Act or any proclamation, order or regulation issued or made thereunder.
- (2) Subsection (1) does not relieve the Crown of liability for the acts or omissions described therein, and the Crown is liable under the *Crown Liability Act* or any other law as if that subsection had not been enacted.



## SCHEDULE 1

[section 36]

*MODEL CO-OPERATIVE AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA  
AND [THE ASSISTING PARTY] TO PROVIDE CIVIL DEFENCE ASSISTANCE TO  
AUSTRALIA IN THE EVENT OF A NATIONAL EMERGENCY*

The Government of Australia and the [THE ASSISTING PARTY] agree as follows:

### **1. Definitions**

**“Assistance”** means action undertaken by pursuant to this agreement for the benefit of Australia with the aim of mitigating the consequences of a national emergency.

**“Civil Defence”** means the performance of some or all of the undermentioned humanitarian tasks intended to protect the population against the dangers, and to help it to recover from the immediate effects, of disasters and also to provide the conditions necessary for its survival. These tasks are:

- (a) warning;
- (b) evacuation;
- (c) management of shelters;
- (d) [DELETED],
- (e) rescue;
- (f) medical services, including first aid, and religious assistance;
- (g) fire-fighting;
- (h) detection and marking of danger areas;
- (i) decontamination and similar protective measures;
- (j) provision of emergency accommodation and supplies;
- (k) emergency assistance in the restoration and maintenance of order in distressed areas;
- (l) emergency repair of indispensable public utilities;
- (m) emergency disposal of the dead;
- (n) assistance in the preservation of objects essential for survival;



- (o) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organisation.

“**National Emergency**” has the same meaning as it has in the *Emergency Act 20XX* (Cth).

## **2. Objects**

*(Model Bilateral Agreement in the Matter of Civil Defence, art 2)*

The present agreement defines the conditions under which [THE ASSISTING PARTY] offers, and Australia accepts, assistance in the matter of Civil Defence.

## **3. Methods of engagement**

*((Model Bilateral Agreement in the Matter of Civil Defence, art 4; Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [10(1)])*

- (1) Any request for assistance will be addressed to [THE ASSISTING PARTY] by Emergency Management Australia. It will define the nature and extent of the assistance requested, as well as the characteristics of the aid, which is being requested. [THE ASSISTING PARTY] will within the shortest possible time, analyse the request and inform Emergency Management Australia as to whether it is able to assist.
- (2) [THE ASSISTING PARTY] can spontaneously put forward an offer of assistance to Emergency Management Australia which will, within the shortest possible time, analyse the offer and inform [THE ASSISTING PARTY] as to whether assistance is required and whether or not the offer is accepted.
- (3) Emergency Management Australia can accept or refuse all, or part of, the offer put forward by [THE ASSISTING PARTY].

## **4. Entry into Australia**

*(Model Bilateral Agreement in the Matter of Civil Defence, art 5; Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces, art 6; Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [16])*

- (1) The Government of Australia agrees to limit to the indispensable minimum, formalities applicable to members of [THE ASSISTING PARTY] entering into Australia for the purpose of providing Civil Defence assistance in accordance with this agreement.
- (2) Members of [THE ASSISTING PARTY] shall be exempt from any requirement to apply for a visa or entry permit on entering and departing Australia.



- (3) The Australian Government shall permit members of [THE ASSISTING PARTY] to enter into or depart from Australia on official duty, on the basis of:
- (a) a personal identity card issued by [THE ASSISTING PARTY] showing the full name, date of birth, official position and photograph;
  - (b) an individual or collective travel document issued by [THE ASSISTING PARTY] identifying the individual or group as a member or members of [THE ASSISTING PARTY] and authorising the travel; and
  - (c) if applicable, such documents as may be issued by the [THE ASSISTING PARTY] in satisfaction of the national health and quarantine requirements of Australia.
- (5) Nothing in this agreement shall confer upon any member of [THE ASSISTING PARTY] any right to permanent residence or domicile in Australia.
- (6) If any person, other than a national of, or a person otherwise entitled to remain in, Australia ceases to be a member of [THE ASSISTING PARTY], the Authorities of [THE ASSISTING PARTY] shall:
- (a) promptly inform Emergency Management Australia giving such reasonable particulars as they may require;
  - (b) promptly take reasonable steps to effect the departure of that person from Australia, if so required by the Emergency Management Australia; and
  - (c) meet any reasonable costs incurred by Australia in removing that person from Australia.
- (7) If the removal from Australia of a member of [THE ASSISTING PARTY] is:
- (a) requested by Emergency Management Australia; or
  - (b) required by Australian law,
- [THE ASSISTING PARTY] shall:
- (c) promptly take reasonable steps to effect the departure of that person from Australia; and
  - (d) meet any reasonable costs incurred by Australia in removing that person from Australia.
- (8) [THE ASSISTING PARTY] shall inform Emergency Management Australia, giving such reasonable particulars as may be required, of any members of [THE ASSISTING PARTY] who, after having been admitted into Australia, absent themselves for a period in excess of forty-eight hours, otherwise than on approved leave.





## 5. **Import and export**

(Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces, art 7; Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [17])

- (1) In this article
  - (a) “**Duty**” means a tax (including sales tax, customs duty, excise duty or excise equivalent duty and goods and services tax), fee, charge or levy imposed on the Import or Export of Goods by the Authorities of the Receiving State, except fees, charges or levies for services rendered;
  - (b) “**Export**” in relation to Goods, means the transportation of the Goods from the territory of Australia to a point outside the territory of Australia;
  - (c) “**Goods**” means any moveable tangible property, but does not include money; and
  - (d) “**Import**” in relation to Goods, means the transportation of the Goods to Australia from a point outside the territory of Australia.
- (2) Goods belonging to [THE ASSISTING PARTY] or to members of [THE ASSISTING PARTY] may be imported into Australia Duty free.
- (3) Goods which have been Imported free of Duty under paragraph (2) of this Article:
  - (a) may be Exported free of Duty; and
  - (b) may not be disposed of in Australia, whether by sale or otherwise, without the express approval of Emergency Management Australia.
- (4) [THE ASSISTING PARTY] must not bring goods other than equipment and rescue materials necessary for the success of the assistance mission.
- (8) The importation of narcotics into Australia in the case of medical emergency and the exportation of the unused quantity, are not considered as “importation” and “exportation” within the sense of existing international agreements covering narcotics or the *Customs Act* (Cth). Narcotics must only be imported to meet the needs of medical emergencies and must be used solely by qualified personnel. The [THE ASSISTING PARTY] must deliver to Australian Customs a declaration itemising the type and quantity of these drugs.

## 6. **Respect for law**



*(Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces, art 2; Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [4])*

- (1) Except as otherwise provided in this agreement or by operation of law, members of [THE ASSISTING PARTY] shall be subject to Australian law while in Australian territory.
- (2) [THE ASSISTING PARTY] shall take appropriate measures to ensure that members:
  - (a) respect Australian law; and
  - (b) abstain from any activity inconsistent with this agreement.

### **7. Wearing of uniforms**

Members of the [THE ASSISTING PARTY] may wear their uniform, tabards or distinctive logo, if any, while in Australia.

### **8. Driving licences and official vehicles**

*(Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces, art 11; Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [16(1)(c)] and [18(1)])*.

- (1) For the purposes of this Article, the expression "Official Vehicle" means a vehicle, including a hired vehicle, which is exclusively in the service of [THE ASSISTING PARTY].
- (2) Australia shall accept as valid, without a driving test or fee, the driving permit or licence issued by the country where a member of [THE ASSISTING PARTY] is ordinarily resident for the purpose of driving Official Vehicles in the course of his or her official duty.
- (3) Official Vehicles of [THE ASSISTING PARTY], excluding vehicles hired in Australia, shall carry their registration number issued by the authorities of the country in which they are registered and a distinctive nationality mark but shall not be required to be registered in any Australian State or Territory.

### **9. The use of aircraft**

*((Model Bilateral Agreement in the Matter of Civil Defence, art 6; Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [18])*

- (1) Aircraft may be used to accomplish a requested assistance mission.
- (2) The intention to use aircraft must be communicated immediately to Emergency Management Australia, with as precise an indication as possible as to the type and registration of aircraft, the composition of the



team of persons on board, of equipment, time of take-off, the route to be taken, and the place of landing.

- (3) [THE ASSISTING PARTY] will be exempt from payment of taxes and dues concerned with the flying over, landing, stationing and taking off of aircraft, and likewise are exempted from the payment of air navigation services.

## **10. Management coordination and maintenance**

*(Model Bilateral Agreement in the Matter of Civil Defence, art 7; Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [3])*

- (1) The coordination and management of operations carried out in accordance with this agreement are the responsibility of the incident controller as determined by relevant State, Territory or Commonwealth law.
- (2) [THE ASSISTING PARTY] shall act in accordance with any direction or requirement imposed by the incident controller.

## **11. Security**

*(Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces, art 10; Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [22]).*

- (1) The Australian Government shall cooperate with [THE ASSISTING PARTY] to take such steps as may from time to time be necessary to ensure the security of:
- (a) the installations, vessels, aircraft, materiel and official information of [THE ASSISTING PARTY]; and
- (b) the members of [THE ASSISTING PARTY], and their property.

## **12. Communications**

*(Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces, art 12; Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [18(2)]).*

The members of [THE ASSISTING PARTY] may, in accordance with arrangements with Emergency Management Australia, operate communications systems for official communications. The operation of such systems shall not be exercised in a manner likely to interfere with communication systems licensed to operate in Australia.

## **13. Termination**

*(Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [12]).*



(1) The Civil Defence assistance mission may be terminated by either Australia or [THE ASSISTING PARTY] providing reasonable notice, in writing, that the mission is to be terminated.

- (2) In determining what is reasonable, regard shall be had to;
- (a) the needs of the community;
  - (b) whether the services being provided by [THE ASSISTING PARTY] can be provided by alternative providers;
  - (c) whether there has been misconduct, fraud or impropriety by [THE ASSISTING PARTY]; and
  - (d) whether a declaration of a national emergency remains in force and the terms of that declaration, if any.

#### **14. Compensation and expenses**

*(Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [24]).*

- (1) The expenses related to assistance shall be met by [THE ASSISTING PARTY].
- (2) Subject to article (3) below, Australia shall indemnify and hold safe [THE ASSISTING PARTY] for any claims for or in respect of anything done or omitted to be done, or purported to be done or omitted to be done, in good faith under the *Emergency Act 20XX* (Cth) or this agreement.
- (3) [THE ASSISTING PARTY] shall reimburse to the Government of Australia the value of any claim paid for damage that was caused intentionally, or through gross negligence, on the part of a member of [THE ASSISTING PARTY].

#### **15. Resolution of disputes**

Any disputes between the parties on the interpretation or application of this agreement shall be resolved by consultation and negotiation however the provision of Assistance and the interpretation of this agreement shall be subject to Australian law.

The Federal Court of Australia shall have jurisdiction to determine matters arising from this agreement or any assistance mission arising from this agreement.

#### **16. Amendment**

This agreement may be amended by mutual agreement of the parties in writing.