

# RESPONDING TO CATASTROPHIC NATURAL DISASTERS AND THE NEED FOR COMMONWEALTH LEGISLATION

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## ABSTRACT

The paper reviews the role of the Commonwealth in responding to natural disasters in Australia and argues that the Commonwealth can and should legislate to define its role, powers and responsibilities. In the absence of legislation governments may be able to rely on non-statutory authority to manage emergencies but it is considered prudent to ensure that the necessary powers are enshrined in legislation, before a disaster strikes. Examples from Canada and the United States are given to show how these federated states have approached the need to empower their federal governments to respond to an emergency.

## I NATURAL DISASTERS IN AUSTRALIA

Australia has always been impacted by natural disasters, including floods, severe storms, bushfires and earthquakes. The Australian Disasters Database records 145 events since 1954 where insured losses exceeded \$10 million. The number of events exceeding that threshold would be much higher if costs were adjusted in real terms, and all losses, not just insured losses, were counted.<sup>1</sup> Severe weather poses the greatest cost; severe storms, flood, hail and cyclones have cost the community in excess of nine times more than bush and urban fires.<sup>2</sup>

Australia has well-developed emergency response organisations and management structures that have allowed Australian states and territories, with Commonwealth assistance, to manage the response to, and recovery from, the disasters that have occurred.<sup>3</sup> Planning for response to a catastrophic disaster is in its early stages<sup>4</sup> but a

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<sup>1</sup> Attorney General's Department, *Attorney-General's Department Disasters Database* <<http://www.disasters.ema.gov.au/>>. There are severe limitations on the ability to calculate the costs of disasters and to obtain accurate figures on past disasters, so estimates should be read with caution.

<sup>2</sup> Ibid. The database records the combined costs for weather events in excess of \$20 billion, while fires are recorded to have cost nearly \$2.2 billion.

<sup>3</sup> Council of Australian Governments (COAG), *Natural Disasters in Australia: Reforming Mitigation, Relief and Recovery Arrangements* (Commonwealth of Australia, 2002).

number of reviews<sup>5</sup> have found that Australia is ill prepared to deal with a catastrophic disaster. It is argued below that the arrangements that are to be relied on in the event of a catastrophic disaster should be supported by legislation.

## II WHAT SHOULD BE THE ROLE OF THE COMMONWEALTH?

It is generally argued that managing a counter-disaster response is a matter for the Australian states and territories.<sup>6</sup> The Commonwealth does, however, have Constitutional responsibilities that are relevant to natural disaster relief and response. The Commonwealth has responsibility for managing the disaster response in Australia's non-self-governing territories.<sup>7</sup> The Commonwealth also has responsibilities to protect life and property across Australia,<sup>8</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 it's responsibility for managing Australia's 'external affairs'.<sup>9</sup> The Commonwealth also manages Australia's international border and has legislative 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 legislative 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>10</sup>

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<sup>4</sup> Emergency Management Australia, *National Catastrophic Disaster Plan (NATCATDISPLAN)* (Commonwealth of Australia, 2010); Department of Health and Aging, *National Action Plan for Human Influenza Pandemic* (Commonwealth of Australia, 2010); Department of Health and Aging, *Australian Health Management Plan for Pandemic Influenza* (Commonwealth of Australia, 2009)

<sup>5</sup> Ric Smith, *Summary and Conclusions: Report of the Review of Homeland and Border Security* (4 December 2008) Prime Minister of Australia

<[http://pmrudd.archive.dpmc.gov.au/sites/default/files/file/documents/20081204\\_review\\_homeland\\_security.rtf](http://pmrudd.archive.dpmc.gov.au/sites/default/files/file/documents/20081204_review_homeland_security.rtf)>; Australian Emergency Management Committee, *Catastrophic Disasters Emergency Management Capability Working Group Review of Australia's Ability to Respond to and Recover from Catastrophic Disasters* (Commonwealth of Australia, 2005) 6; Anthony Bergin and David Templeman, 'Get ready for the big one' *The Australian* (Sydney) 7 March 2009, 22.

<sup>6</sup> 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; Australian Emergency Management Committee, above n 3, 5.

<sup>7</sup> 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/>>.

<sup>8</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549 (Kevin Rudd, Prime Minister).

<sup>9</sup> *Australian Constitution* s 51(xxix).

<sup>10</sup> *Ibid* s 51.

That the Commonwealth has responsibility to respond to a truly national emergency has been recognised by the Auditor-General<sup>11</sup> and in the 2010 National Catastrophic Disaster Plan (NATCATDISPLAN). This plan defines 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>12</sup>

Under the NATCATDISPLAN plan 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>13</sup> The plan is not supported by legislation and the Commonwealth has no special or necessary emergency powers to give effect to the plan.

## A The Need For Emergency Powers

A government faced with an emergency of catastrophic proportions requires powers that would allow the government to take immediate, urgent action that may not be justified in the normal course of events.<sup>14</sup> Lee says:

When a natural disaster occurs, some person needs to be put in charge of the site to direct the counter-disaster operation. It is essential that the person be conferred with extraordinary legal powers to enable him to discharge his responsibilities.<sup>15</sup>

Governments may seek to rely on non-statutory emergency powers<sup>16</sup> but increasingly powers of this sort are provided for in legislation. As it is the states and territories that will take the primary role of managing the response to a disaster, all Australian states and territories provide for emergency powers to be exercised by emergency controllers. The Commonwealth has legislated for extra-ordinary emergency powers to be exercised by the Australian Defence Force when using force to defend Commonwealth interests or the states and territories from domestic violence.<sup>17</sup> There is, however, no similar legislation to empower the Commonwealth, Ministers or Commonwealth agencies during a catastrophic natural disaster. Defence aid to the

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<sup>11</sup> Australian National Audit Office, above n 6, 40.

<sup>12</sup> Emergency Management Australia, NATCATDISPLAN, above n 4, [2]

<sup>13</sup> Ibid [19] - [20].

<sup>14</sup> Clement Fatovic, *Outside the Law: Emergency and Executive Power* (John Hopkins University Press, 2009) 4.

<sup>15</sup> H P Lee, *Emergency Powers* (Law Book, 1984) 171–172.

<sup>16</sup> See the discussion on the Executive Power of the Commonwealth and the response to Cyclone Tracy in 1974, below.

<sup>17</sup> *Australian Constitution* ss 51(vi), 61, 119; *Defence Act 1903* (Cth) Part IIIAAA.

civil community, as with other Commonwealth disaster response arrangements, are governed by administrative arrangements only.<sup>18</sup>

Government departments and authorities are bound by legislation to exercise various powers and perform their statutory functions.<sup>19</sup> How they exercise those powers and perform those functions may have an impact upon the disaster response, for example a requirement by a government department that people provide particular documentation in order to access a benefit may be appropriate in normal times, but not in a disaster when people cannot access their homes or their homes and personal papers have been lost.

Following the devastation of Burma by Cyclone Nargis in 2008, there were demands by the international community that the Burmese government should waive visa and customs requirements to allow international aid agencies to access to the affected population.<sup>20</sup> If a similar situation were to occur in Australia, without specific legislative authority, it would be difficult, if not impossible for the minister to simply 'waive' the application of the relevant legislation.<sup>21</sup> In this context the Victorian emergency management arrangements are unique in Australia. Where the Victorian Premier has declared a state of disaster<sup>22</sup> the Minister may direct any government agency to do or not do anything and may suspend the operation of any Act or regulation if it appears that compliance with that law would inhibit the response to, or recovery from, the disaster.<sup>23</sup>

The New Zealand Law Commission said:

Emergencies are likely to call for immediate and drastic action. It follows that legislation authorising an appropriate response should be in place in advance of the emergency itself. This factor, and the likelihood that the emergency response will involve interference with established rights, points to the desirability of preparing emergency legislation at leisure rather than under the pressure of an actual or imminent emergency.<sup>24</sup>

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<sup>18</sup> Defence Instruction (General) OPS 05-1, *Defence Assistance to the Civil Community – policy and procedures*. Emergency Management Australia, COMDISPLAN, above n 6; Emergency Management Australia, NATCATDISPLAN, above n 4.

<sup>19</sup> Lee, above n 15, 171.

<sup>20</sup> Reuters, 'Burma cyclone deaths may top 100,000', *The Age* (Online), 8 May 2008 <<http://www.theage.com.au/news/world/burma-cyclone-deaths-may-top-100000/2008/05/08/1210131102642.html>>; Anne Penketh and Pete Pattison, 'Burma generals agree to UN aid for cyclone victims', *The Independent* (Online), (20 May 2008) <<http://www.independent.co.uk/news/world/asia/burma-generals-agree-to-un-aid-for-cyclone-victims-831034.html>>.

<sup>21</sup> Lee, above n 15, 171–172; though in the context of visas, the Minister could issue a special purpose visa to individuals or to a class of persons such as members of specified relief agencies but that in no way involves a 'waiver' of the Act; *Migration Act 1958* (Cth) s 33.

<sup>22</sup> *Emergency Management Act 1986* (Vic) s 23.

<sup>23</sup> *Ibid* s 24.

<sup>24</sup> New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, 1991) [4.12].

Fatovic argues against passing legislation at the time of the emergency. He says that the ‘consensus generating effect’ of emergencies restricts the ability, or willingness of Parliamentarians to scrutinise emergency legislation and to question either its necessity or the appropriateness of particular provisions.

Legislation created in a state of panic tends to be of poor quality. It is more likely to be either over-inclusive or under-inclusive, indiscriminate, or unenforceable. The legislature might abdicate too much of its own power or oversight responsibilities, confer too much power on the executive, fail to make necessary exception to the law, abridge liberties that actually pose no danger to public order or safety, or some combination of these things.<sup>25</sup>

## **B The Legislative Power Of The Commonwealth**

The Commonwealth can pass emergency management legislation. The Commonwealth Parliament has the power to make laws with respect to how Commonwealth agencies will behave, and Commonwealth services will be provided and maintained during a disaster. The parliament could provide that the Minister for Immigration may waive visa requirements in an emergency as an exercise of the legislative power with respect to aliens and immigration;<sup>26</sup> the Commonwealth has the power to make laws with respect to various social security benefits<sup>27</sup> so the Commonwealth can, and does, make laws with respect to how those benefits will be delivered during an emergency.<sup>28</sup> Commonwealth agencies have offices and staff and provide services around the nation. Commonwealth staff and buildings will be affected by catastrophic events and the agencies need to plan how they will deal with the disruption and damage caused by a natural hazard. They will need to respond to the disaster to ensure that federal services are maintained and people who need and are eligible for Commonwealth assistance can receive it. It follows that the Commonwealth has constitutional authority to legislate for the emergency response by Commonwealth agencies and to legislate how the Commonwealth will respond to disasters.

The parliament could also include provisions in specific legislation to allow a minister to make particular decisions that are necessary in an emergency and there are examples where this has been done. 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:

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<sup>25</sup> Fatovic, above n 14, 263.

<sup>26</sup> *Australian Constitution* s 51(xix), (xxvii).

<sup>27</sup> *Ibid* ss 51(xxiii), (xxiv).

<sup>28</sup> *Social Security Act 1991* (Cth) ss 1061K-1061P.

- 1) The Minister for Health and Aging would make an ‘emergency dealing determination’ to allow emergency dealing with a genetically modified organism<sup>29</sup> and
- 2) grant an exemption to allow the use of the medicaments that have not gone through the normal registration process.<sup>30</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>31</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>32</sup>

There would need to be further, separate determinations, to ensure social security payments to the affected population,<sup>33</sup> to allow people to obtain necessary medication without being able to prove their identity with their Medicare card,<sup>34</sup> to allow government agencies to share information so that people can be located and the missing and dead identified<sup>35</sup> and to ensure fuel reserves are maintained for the emergency operations.<sup>36</sup> There would also need 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.

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>37</sup> to manage and coordinate the Commonwealth response. As noted, above, the provisions in various Acts allow for the relevant minister to 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 unit within the Attorney-General’s department that is responsible for the ‘ordination of Australian Government crisis response and recovery efforts’,<sup>38</sup> might fill the principle coordinating role but without a clear mandate and legal authority, his or her ability to

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<sup>29</sup> *Gene Technology Act 2000* (Cth) s 72B.

<sup>30</sup> *Therapeutic Goods Act 1989* (Cth) s 18A.

<sup>31</sup> *Airports Act 1996* (Cth) s 250.

<sup>32</sup> *Defence Act 1903* (Cth) pt IIIA.

<sup>33</sup> *Social Security Act 1991* (Cth) s 36.

<sup>34</sup> *National Health Act 1953* (Cth) s 86E.

<sup>35</sup> *Privacy Act 1988* (Cth) s 80J.

<sup>36</sup> *Liquid Fuel Emergency Act 1984* (Cth) s 16.

<sup>37</sup> Christine E Wormuth and Anne Witkowsky, *Managing the Next Domestic Catastrophe: Ready (or Not)?* (Center for Strategic and International Studies, 2008).

<sup>38</sup> Attorney General’s Department, *Emergency Management Australia* (2011)

<[http://www.ag.gov.au/www/agd/agd.nsf/Page/OrganisationalStructure\\_EmergencyManagementAustralia](http://www.ag.gov.au/www/agd/agd.nsf/Page/OrganisationalStructure_EmergencyManagementAustralia)>



fulfil that role is uncertain.<sup>39</sup> Emergency Management Australia has no statutory authority, must seek approval from the Attorney-General and any other relevant minister before committing Commonwealth resources<sup>40</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 Attorney-General's Department. Within that department is the Secretary to the Department, the Deputy Secretary in charge of the National Security and Criminal Justice Group and the Branch Head of Emergency Management Australia. There are two relevant ministers; the Minister for Home Affairs and the Attorney-General.<sup>41</sup> In the normal course of events, it would be the Secretary that would convey the Department's advice to the Minister, but with a Deputy Secretary specifically in charge of the National Security Group, and the Branch Head of EMA responsible for the operational coordination of responses to hazard events<sup>42</sup> there could be multiple sources of information and advice when clarity is most required. In the United States 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>43</sup> There is an equal need for similar clarity in Australia.

## C The Executive Power Of The Commonwealth

Without specific legislation granting the necessary powers, the Commonwealth government 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>44</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>45</sup>

There is debate about the source and meaning of 'the executive power of the Commonwealth'.<sup>46</sup> On one view it is derived from the prerogative powers of the

<sup>39</sup> David Templeman and Anthony Bergin, *Taking a punch: Building a more resilient Australia*, (Australian Strategic Policy Institute, 2008) 7.

<sup>40</sup> Emergency Management Australia, COMDISPLAN, above n 6.

<sup>41</sup> Attorney-General's Department, *Attorney-General's Department Organisation Chart* (12 May 2011) <[http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/%288AB0BDE05570AAD0EF9C283AA8F533E3%29~AGD+org.pdf/\\$file/AGD+org.pdf](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/%288AB0BDE05570AAD0EF9C283AA8F533E3%29~AGD+org.pdf/$file/AGD+org.pdf)>.

<sup>42</sup> Ibid.

<sup>43</sup> Ronald Waldman, 'Responding to Catastrophes: A Public Health Perspective' (2005–2006) 6 *Chicago Journal of International Law* 553; Wormuth and Witkowsky, above n 37, vii–viii.

<sup>44</sup> *Australian Constitution* s 61; Fatovic, above n 14, 9.

<sup>45</sup> *Barton v The Commonwealth* (1974) 131 CLR 477, 498 (Mason J).

<sup>46</sup> *Australian Constitution* s 61.

English monarch<sup>47</sup> ‘which, according to subsequent doctrine, was frozen in 1689 [though it] can be abrogated by statute’.<sup>48</sup> An alternative view, espoused by French J in *Ruddock v Vadarlis*,<sup>49</sup> is that the executive power of the Commonwealth is derived from the agreement that lead 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>50</sup> Even so, French J described the common law prerogative power as providing the ‘historical antecedents’<sup>51</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>52</sup> On either view, the executive power ‘includes the prerogative powers of the Crown’.<sup>53</sup> The scope of the prerogative power is uncertain<sup>54</sup> and resists being defined as a list of powers or subject areas.<sup>55</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>56</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>57</sup>

<sup>47</sup> *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [233] (Gummow, Crennan and Bell JJ).

<sup>48</sup> Robin Creyke, ‘Executive Power — New Wine in Old Bottles’ (2003) 31 *Federal Law Review* i, iii.

<sup>49</sup> *Ruddock v Vadarlis* (2001) 110 FCR 491; and also in *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [126]–[129] (French CJ).

<sup>50</sup> *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.

<sup>51</sup> *Ruddock v Vadarlis* (2001) 110 FCR 491, 538 (French J).

<sup>52</sup> *Ibid* 540.

<sup>53</sup> *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 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 50, 497; 503; 505; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, Federation Press, 2006) 522; 526; Lee, above n 15, 67.

<sup>54</sup> *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, above n 24, [4.37]–[4.41].

<sup>55</sup> Blackshield and Williams, above n 53, 523–525; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 114 (Viscount Radcliffe).

<sup>56</sup> *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 136 (Lord Hodson).

<sup>57</sup> Lee, above n 15, 322.



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>58</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>59</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>60</sup> retain necessary powers to respond to national natural disasters despite no specific grant of legislative power in this area.<sup>61</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 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>62</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:

here 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>63</sup>

It is the Crown's '...right and duty to protect its realm and citizens in times of war and peril'.<sup>64</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

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<sup>58</sup> 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.

<sup>59</sup> Renfree, above n 54, 466 see also Winterton, above n 53, 425.

<sup>60</sup> Blackshield and Williams, above n 53, 520.

<sup>61</sup> *Pape v Commissioner for Taxation* (2009) 238 CLR 1, [233] (Gummow, Crennan and Bell JJ).

<sup>62</sup> *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

<sup>63</sup> *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 143.

<sup>64</sup> *Ibid* 115 (Lord Pearce).

‘risk, jeopardy, danger’.<sup>65</sup> A catastrophic disaster will expose the Commonwealth and its citizens to jeopardy and danger. It follows that the case law identifies that the source of the prerogative power is to protect the political entity 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>66</sup>

The Commonwealth executive power also includes powers implied by the standing of the government as a national government.<sup>67</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>68</sup> (Emphasis added).

The need for national action in the face of a disaster that requires coordinated national assets or has affects 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>69</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 (now Emergency Management Australia) 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>70</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>71</sup>

<sup>65</sup> *The Shorter Oxford English Dictionary* (Oxford University Press, Oxford, 1973) 1555.

<sup>66</sup> Fatovic, above n 14, 1-10.

<sup>67</sup> *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 53, 427; 430-431; Selway, above n 50, 505; Blackshield and Williams, above n 53, 534.

<sup>68</sup> *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J).

<sup>69</sup> *Pape v Commissioner for Taxation* (2009) 238 CLR 1; Lee, above n 15, 322.

<sup>70</sup> 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).

<sup>71</sup> *Australian Constitution* s 61. Though in the case of Cyclone Tracy, the Government could have relied on its power to make laws with respect to territories (*Australian Constitution* s 122) as the Northern Territory was not a self-governing territory but was administered by the Commonwealth

Having established that the executive power of the Commonwealth includes an undefined power to respond to truly national disasters then the Commonwealth will also have legislative power in this area. Making laws incidental to the exercise of that executive power<sup>72</sup> is a valid exercise of Commonwealth legislative power<sup>73</sup> though the exercise of that power could not transcend the express terms of the Constitution.<sup>74</sup>

## D Is There A Need For Commonwealth Legislation?

If it is accepted that the Commonwealth has legislative power to make laws with respect to the response to a national emergency, it can be asked whether legislation is required or whether current, administrative arrangements are sufficient.

The need for pre-existing legal arrangements was the subject of comment by Major-General Alan Stretton who, following Cyclone Tracy's devastation of Darwin in 1974, commandeered property and restricted the movement of people without clear legal authority.<sup>75</sup> Notwithstanding his ability to rely on *de facto* authority and goodwill, he recommended that legal authority was required to allow the coordinator to operate in a disaster.<sup>76</sup>

H P Lee argues that '... emergency provisions should be embodied in legislation which makes their existence conspicuous'.<sup>77</sup> He notes that following the bombing of the Hilton Hotel in 1978 the then Leader of the Opposition (and later, Governor-General) Mr Hayden argued for Commonwealth emergency legislation:

... not so much in order to confer sweeping new powers but rather to circumscribe, confine and define their exercise, and to remove some of the extraordinary uncertainties which now prevail.<sup>78</sup>

As noted above, the Commonwealth has acted to legislate for the use of force when responding to domestic violence<sup>79</sup> but not when responding to natural disasters.

The New Zealand Law Commission recommended against relying on non-statutory authority to manage disaster response because it is 'vague and ill defined'<sup>80</sup> and is not

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Government. That was not, however (according to Major General Stretton) the basis of his appointment. Stretton, above n 70, [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 15, 322.

<sup>72</sup> *Australian Constitution* s 51(xxxix).

<sup>73</sup> *Davis v Commonwealth* (1988) 166 CLR 79; See also *Ruddock v Vadarlis* (2001) 110 FCR 491.

<sup>74</sup> *Pape v Commissioner for Taxation* (2009) 238 CLR 1.

<sup>75</sup> Stretton, *The Furious Days*, above n 71, 80.

<sup>76</sup> Stretton, *Soldier in a Storm*, above n 71, 285.

<sup>77</sup> Lee, above n 15, 193.

<sup>78</sup> *Ibid* 192.

<sup>79</sup> *Australian Constitution* ss 51(vi), 61, 119; *Defence Act 1903* (Cth) Part IIIAAA.

<sup>80</sup> New Zealand Law Commission, above n 24, [1.29].

subject to scrutiny. The commission argued it is better to plan for the possible eventualities and to define in statute, before a disaster strikes, what the scope of necessary emergency powers will be.<sup>81</sup>

The Australian Strategic Policy Institute found that:

The Commonwealth agency seen to be responsible for [Commonwealth disaster response] ... Emergency Management Australia (EMA), has no mandate, legislation or Cabinet endorsement with which to take command. The delivery of EMA functions for the most part is the result of goodwill on behalf of other agencies. This is clearly not a satisfactory situation.<sup>82</sup>

There is, therefore, strong support, dating back to at least 1974, for the idea that the Commonwealth should have in place emergency legislation to define the powers that the Commonwealth government may exercise in times of natural disaster.

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>83</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>84</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. The better solution is to enact legislation, before disaster strikes, to ensure that the necessary emergency powers are in place, with clear criteria for when they may be used. Having a comprehensive Act will ensure that the Commonwealth does not purport to act on the basis of ill-defined powers with inadequate or no existent safeguards.

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>85</sup> and allocating funds to respond to the Global Financial Crisis<sup>86</sup> has been done in response to a claimed emergency and all have triggered litigation over the scope of the Commonwealth's power.<sup>87</sup> Even

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<sup>81</sup> Ibid.

<sup>82</sup> Templeman and Bergin, above n 39, 7.

<sup>83</sup> As was the case in *Ruddock v Vadarlis* (2001) 110 FCR 491.

<sup>84</sup> *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; Renfree, above n 54, 397ff; *Ruddock v Vadarlis* (2001) 110 FCR 491.

<sup>85</sup> *Northern Territory National Emergency Response Act 2007* (Cth).

<sup>86</sup> *Tax Bonus for Working Australians Act (No 2) 2009* (Cth).

<sup>87</sup> *Ruddock v Vadarlis* (2001) 110 FCR 491; *Wurridjal v Commonwealth* (2009) 237 CLR 309; *Pape v Commissioner for Taxation* (2009) 238 CLR 1 respectively.

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>88</sup> or to destroy private assets to stop them falling into the hands of the enemy<sup>89</sup> have been challenged; whilst in Australia, actions based on legislation designed to secure the defence of the nation<sup>90</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>91</sup>

Specific natural disaster legislation that gives emergency powers to the Commonwealth, Commonwealth Ministers or Commonwealth agencies such as EMA, the Australian Defence Force or the Australian Federal Police would not rule out constitutional or other legal challenges, or stop the Commonwealth relying on the executive power to deal with other perceived emergencies. Legislation may, however, go some way to limiting the use of the executive power and could reassure the states that the Commonwealth will only act in a truly national, natural disaster. An Act, when negotiated in the calm before any actual emergency arises,<sup>92</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 and would stop the Commonwealth using the occurrence of a natural hazard event to expand its legislative authority.

### III INTERNATIONAL EXAMPLES

Legislation from Canada and the United States will serve as useful examples of legislative models that could inform the development of Commonwealth legislation in Australia. Like Australia, Canada and the United States are federated states where the primary responsibility for disaster management is vested in the states.

#### A Canada

##### 1 *Constitutional considerations*

The Canadian constitution<sup>93</sup> lists the areas of legislative power for the national and provincial governments. The provincial legislatures are given exclusive legislative power in 15 specified areas.<sup>94</sup> The national legislature is granted the residual legislative power, that is, the power to make law on any subject matter not

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<sup>88</sup> *Attorney General v De Keyser's Royal Hotel* [1920] AC 508.

<sup>89</sup> *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75.

<sup>90</sup> See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 and the cases cited therein.

<sup>91</sup> *Hamdan v. Rumsfeld* 548 U.S. 557 (2006); *R v Thomas* [2006] VSCA 165.

<sup>92</sup> New Zealand Law Commission, above n 24, [1.25]-[1.26].

<sup>93</sup> *Constitution Act 1867* (Imp) and *Constitution Act 1982* (being Sch B to the *Canada Act 1982* (UK) c11) s 52.

<sup>94</sup> *Constitution Act 1867* (Imp) s 92.

specifically reserved to the provinces. The national legislature is also granted exclusive power to make law with respect to thirty enumerated subject areas.<sup>95</sup> There is no specific grant of legislative power in the area of disaster or emergency management, but the federal legislature has the power to make laws for the ‘peace order and good government’ of Canada as a whole.<sup>96</sup> This broad provision includes the power to make laws to deal with a national emergency.

The Canadian constitution, like the Australian constitution, vests the executive power of the national government in the Queen.<sup>97</sup> This executive power includes the traditional prerogative powers of the monarch,<sup>98</sup> including an emergency prerogative that is ‘the right in an emergency to take actions that are necessary in order to defend the sovereignty of the country’.<sup>99</sup> The use of the executive power to manage emergencies is now governed by the *Emergencies Act*.<sup>100</sup>

The provinces have a legislative power to deal with emergencies occurring within their own borders, in order to ensure the delivery of provincial services and the continuation of the provincial government. Provincial governments also have the exclusive power to make laws dealing with ‘Property and Civil Rights in the Province’<sup>101</sup> which will include rights such as the right to ‘life, liberty and the security of the person’.

Despite the aim of the Canadian constitution to distribute legislative power between the national and provincial legislatures, there is room for significant overlap.<sup>102</sup> Where there is an inconsistency between federal and provincial law, the courts have held that even without a specific Constitutional provision,<sup>103</sup> the federal law is to prevail.<sup>104</sup> Further, where there is a national emergency, the federal legislature, relying on the residual power to make laws for the peace, order and good government of Canada, can make laws dealing with any subject matter including those matters otherwise within the exclusive jurisdiction of the provinces.<sup>105</sup>

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<sup>95</sup> Ibid s 91.

<sup>96</sup> Ibid; see also *Fort Frances Pulp and Paper Co v Manitoba Free Press* [1923] AC 695, in J D Whyte, W R Lederman and D F Bur, *Canadian Constitutional Law* (Butterworths, 1992) 7-32 see also *Reference Re Anti-Inflation Act* (1976) 68 DLR (3d) 452 in J D Whyte, W R Lederman and D F Bur, *Canadian Constitutional Law* (Butterworths, 1992) 7-106 and commentary at 7-35.

<sup>97</sup> *Constitution Act 1867* (Imp) s 9; *Australian Constitution* s 61.

<sup>98</sup> Patrick Monahan, *Constitutional Law* (2nd ed, Irwin Law, 2002) 62.

<sup>99</sup> Ibid 63.

<sup>100</sup> *Emergencies Act* RSC 1985 (4th Supp), c 22.

<sup>101</sup> *Constitution Act 1867* (Imp) s 92(13).

<sup>102</sup> Monahan, above n 98, 107-108.

<sup>103</sup> Such as *Australian Constitution* s 109.

<sup>104</sup> Monahan, above n 98, 127-128.

<sup>105</sup> Ibid 261; H Marx, ‘The Apprehended Insurrection of October 1970 and the Judicial Function’ (1972) *University of British Columbia Law Review* 55 in Whyte, Lederman and Bur, above n 96, 7-36; *Reference Re Anti-Inflation Act* (1976) 68 DLR (3d) 452 in Whyte, Lederman and Bur, above n 96, 7-96 and 7-107.



Where the national legislature purports to rely on the emergency power to legislate in areas that are normally within the exclusive power of the provinces, they should make it clear that they are relying on the emergency power. Beetz J said:

What is required from Parliament when it purports to exercise its extraordinary emergency power in any situation where a dispute could arise as to the existence of the emergency and as to the constitutional foundation of its action, is an indication, I would even say a proclamation, in the title, the preamble or the text of the instrument, which cannot possibly leave any doubt that, given the nature of the crisis, Parliament in fact purports to act on the basis of that power.<sup>106</sup>

If a disaster occurs within the boundaries of a province and is managed by the provincial government, relevant provincial law would apply. Where the effect of the disaster impacts upon the rights of people outside the province or involves the federal government, or constitutes a national emergency,<sup>107</sup> there is room for federal law to apply.

## 2 The Emergencies Act and the Emergency Management Act

The Canadian parliament has passed two complementary pieces of emergency management legislation; they are the *Emergencies Act 1985* and the *Emergency Management Act 2007*.

The 1985 Act defines a national emergency as:

- ... an urgent and critical situation of a temporary nature that
- (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
  - (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada
- and that cannot be effectively dealt with under any other law of Canada.<sup>108</sup>

The Act provides for four types of national emergency. They are:

- a public welfare emergency;<sup>109</sup>
- a public order emergency;<sup>110</sup>
- an international emergency;<sup>111</sup> and
- a war emergency.<sup>112</sup>

<sup>106</sup> *Reference Re Anti-Inflation Act* (1976) 68 DLR (3d) 452 in Whyte, Lederman and Bur, above n 96, 7-108.

<sup>107</sup> Monahan, above n 98, 257.

<sup>108</sup> *Emergencies Act* RSC 1985 (4th Supp), c 22, s 3.

<sup>109</sup> *Ibid* ss 5-15.

<sup>110</sup> *Ibid* ss 16-26.

<sup>111</sup> *Ibid* ss 27-36.

<sup>112</sup> *Ibid* ss 37-45.

An international emergency involves ‘acts of intimidation or coercion or the real or imminent use of serious force or violence’.<sup>113</sup> A ‘public order emergency’ and a ‘war emergency’ are also emergencies caused by armed conflict or other violence. In Australia the *Defence Act*<sup>114</sup> and the defence power of the Commonwealth<sup>115</sup> can be relied upon to respond to threats caused by war or domestic violence.<sup>116</sup> What Australia lacks is federal legislation dealing with natural disasters termed, in the Canadian legislation, a ‘public welfare emergency’. A public welfare emergency is:

... an emergency that is caused by a real or imminent  
 (a) fire, flood, drought, storm, 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 a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.<sup>117</sup>

The Canadian Act empowers the Governor in Council (that is the Governor acting on the advice of the Cabinet<sup>118</sup>) to issue a declaration of a public welfare emergency<sup>119</sup> and to make orders to deal with the emergency. The orders may:

- restrict travel to or from the area affected by the emergency;
- direct the evacuation of people or property and make arrangements for the care of evacuated people and property;
- requisition or authorise the use or disposal of private property;
- require people to provide essential services as part of the response to, and recovery from, the emergency;
- regulate the distribution and availability of ‘essential goods, services and resources’;
- authorise emergency payments;
- authorise the establishment of emergency medical facilities and shelters;
- authorise the assessment of damage and the repair of such damage;
- authorise assessment of environmental damage and remediation; and
- create criminal offences for failure to comply with orders made in response to the emergency.<sup>120</sup>

Orders made by the Governor in Council must not ‘unduly’ impede the ability of a provincial government to respond to the disaster, and must be aimed at achieving a coordinated response with the provincial authorities.<sup>121</sup> To this end the Governor must consult with the lieutenant-governor of each province that is affected by the disaster before making a declaration of a national emergency.<sup>122</sup> Where the effects of the disaster are principally in one province, a declaration of a national emergency cannot be made unless the lieutenant-governor has ‘indicated ... that the emergency exceeds

<sup>113</sup> Ibid s 27.

<sup>114</sup> *Defence Act 1903* (Cth).

<sup>115</sup> *Australian Constitution* s 51(vi).

<sup>116</sup> See Ibid s 119; *Defence Act 1903* (Cth) ss 51 - 51Y.

<sup>117</sup> *Emergencies Act* RSC 1985 (4th Supp), c 22, s5.

<sup>118</sup> Monahan, above n 98, 64–67.

<sup>119</sup> *Emergencies Act* RSC 1985 (4th Supp), c 22, s 6.

<sup>120</sup> Ibid s 8(1).

<sup>121</sup> Ibid s 9.

<sup>122</sup> Ibid s 14(1).

the capacity or authority of the province to deal with it'.<sup>123</sup> The initial proclamation remains in force for not more than ninety days,<sup>124</sup> but it may be extended. There may be more than one extension, but in each case the declaration cannot be extended for more than ninety days.<sup>125</sup>

The process of making a declaration or orders under the Act is subject to parliamentary review. Each time that a declaration is made, continued or amended,<sup>126</sup> a 'motion for confirmation of the declaration' must be put before both Houses of Parliament.<sup>127</sup> If either House (that is the House of Commons or the Senate) does not support the confirmation motion, then the declaration is deemed to be revoked.<sup>128</sup> Even if a declaration is confirmed it may subsequently be revoked by the parliament.<sup>129</sup> Every order or regulation made by the Governor to deal with the emergency must also be laid before parliament<sup>130</sup> or, in some cases, the Parliamentary Review Committee,<sup>131</sup> and may be revoked.<sup>132</sup>

A multi-party Parliamentary Review Committee operates during the period of the emergency and is to review 'the exercise of powers and the performance of duties and functions pursuant to a declaration of emergency'.<sup>133</sup> After the emergency has ended, an inquiry must be held looking into 'the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency'.<sup>134</sup> The report of the enquiry must be tabled before the parliament within one year of the revocation or lapsing of the emergency declaration.<sup>135</sup>

This process of requiring confirmation by the parliament, and reserving to the parliament the right to revoke a declaration, ensures that the action by the executive arm of government (that is, the Governor in Council) is subject to review by the legislative arm (that is, the parliament) which can revoke the declaration if they are not satisfied that the circumstances justify the making of the declaration. This type of oversight reduces the risk that the Act and a declaration of emergency cannot be used by a government to extend its powers inappropriately. It is consistent with the recommendations made in New Zealand that either parliamentary or judicial oversight is required to ensure that the emergency provisions are not over used or abused.<sup>136</sup> The ability of parliament to review and revoke a declaration is particularly important

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<sup>123</sup> Ibid s 14(2).

<sup>124</sup> Ibid 7(2).

<sup>125</sup> Ibid s 12(1).

<sup>126</sup> Ibid s 13(1).

<sup>127</sup> Ibid ss 7(1), 12(4), 13(2), 58, 59, 60.

<sup>128</sup> Ibid ss 58(7), 60(6).

<sup>129</sup> Ibid ss 11, 59.

<sup>130</sup> Ibid s 61(1).

<sup>131</sup> Ibid s 61(2).

<sup>132</sup> Ibid s 61(3)–61(8).

<sup>133</sup> Ibid s 62.

<sup>134</sup> Ibid s 63(1).

<sup>135</sup> Ibid s 63(2).

<sup>136</sup> New Zealand Law Commission, above n 24, [1.38]–[1.40]. See also Lee, above n 15, 193–194.

when the Canadian courts have indicated that they will give great latitude to declarations of emergency so that it is hard, if not impossible, to seek judicial review on the question of whether an emergency exists or whether the steps taken to deal with the emergency are justified by the circumstances.<sup>137</sup>

The *Emergencies Act 1985* is complemented by the *Emergency Management Act 2007*. This latter Act sets out the obligations of the Minister of Public Safety and Emergency Preparedness to exercise leadership in the area of emergency management.<sup>138</sup> The minister's responsibilities including ensuring that there are policies and plans in place to ensure an adequate and timely emergency response.<sup>139</sup> The minister is to coordinate the response by the Canadian government to an actual emergency,<sup>140</sup> and to participate in 'international emergency management activities'.<sup>141</sup>

All ministers are charged with the responsibility of ensuring that their departments have emergency management plans in place that include consideration of how their department will ensure business continuity and support the provincial and local authorities in their emergency management responsibilities.<sup>142</sup>

## B The United States of America

The United States, like Australia and Canada, is also a federated state where the principle obligation for disaster management lies with the state governments, but the federal government recognises a significant role in assisting the states and can take an active role in the management of a disaster that, because of its scale, becomes a disaster of national proportions.

### 1. Constitutional considerations

As with Canada and Australia, the United States has a written constitution that sets out the legislative power of the federal and state governments. There is no specific power to legislate for 'disasters' or 'emergencies'. As with the Australian Government<sup>143</sup> there is an 'incidental' power to:

... make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.<sup>144</sup>

<sup>137</sup> Monahan, above n 98, 258; Whyte, Lederman and Bur, above n 96, 7-28 – 7-39.

<sup>138</sup> *Emergency Management Act* SC 2007, c15, s 3.

<sup>139</sup> *Emergencies Act* RSC 1985, c 22 (4th Supp) s 4.

<sup>140</sup> *Ibid* s 4(1)(e).

<sup>141</sup> *Ibid* s 4(1)(k).

<sup>142</sup> *Ibid* s 6.

<sup>143</sup> *Australian Constitution* s 51(xxxix).

<sup>144</sup> *United States Constitution*, art 8.

The executive power of the United States is vested in the President.<sup>145</sup> The President is also commander-in-chief of the military and naval forces of the United States, as well as of the state militias when they are engaged in the service of the United States.<sup>146</sup>

## 2. The Robert T Stafford Disaster Relief and Emergency Assistance Act and the Homeland Security Act.

The principal item of Federal legislation is the *Robert T Stafford Disaster Relief and Emergency Assistance Act* ('the *Stafford Act*'). The *Stafford Act* is intended to enhance assistance that is delivered to state and local governments by the federal government rather than to allow the federal government to take charge of the disaster response.<sup>147</sup> The Act is fundamentally concerned with the expenditure of federal funds to assist state and local governments with disaster preparation.<sup>148</sup> The concern of this paper is in the area of response to, rather than preparation for, a major disaster, but in this area, too, the *Stafford Act* has significant provisions.

First, the Act provides that *any* federal agency that is 'charged with the administration of a Federal assistance program may waive compliance with administrative requirements that would normally apply, but that would 'otherwise prevent the giving of assistance under such programs if the inability to meet such conditions is a result of the major disaster'.<sup>149</sup>

Where the President of the United States declares that there is an emergency or a major disaster then he or she is to appoint a Federal Coordinating Officer who is to undertake a needs assessment of the area affected by the event, establish field offices and take on the role of coordinating the response by federal agencies and non-government organisations, such as the American Red Cross and the Salvation Army, where they agree to operate under the Coordinating Officer's direction.<sup>150</sup>

The federal government is to establish 'Emergency Response Teams', made up of federal government employees, who may be deployed to assist the coordinating officer.<sup>151</sup> A federal agency operating under the Act may engage temporary employees, seek expert advice and consulting services, and enter contracts to hire equipment, obtain supplies and resources, undertake travel and the like without

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<sup>145</sup> Ibid art II(1).

<sup>146</sup> Ibid art II(2).

<sup>147</sup> 42 USC §5121.

<sup>148</sup> Ibid §5131-5132; *United States Constitution* art I(8).

<sup>149</sup> 42 USC §5141.

<sup>150</sup> Ibid §5143.

<sup>151</sup> Ibid §5144.

compliance with normal procedures that apply when creating jobs, appointing staff and entering contracts.<sup>152</sup>

Once a major disaster has been declared, the President may direct federal agencies, including the Department of Defence, to undertake emergency relief work by lending or otherwise making available federal resources, making available medicine, medical equipment, food and other necessary supplies and undertaking emergency relief work such as clearing debris, search and rescue, providing medical or education services, providing technical advice, and public warnings and other urgent activities.<sup>153</sup> The federal government may also contribute to private and government agencies to help them provide these services. Where the Department of Defence (that is the military forces) are engaged in emergency relief work, their commitment is not to exceed 10 days.<sup>154</sup>

In order to facilitate recovery the federal government may authorise the repair of its own facilities, state and local government infrastructure and assets of not-for-profit organisations, without the need for the normal processes required to authorise this expenditure.<sup>155</sup>

The *Stafford Act* is supported and supplemented by the *Homeland Security Act*.<sup>156</sup> This Act establishes the Federal Emergency Management Agency.<sup>157</sup> The 'Primary mission' of the Federal Emergency Management Agency is to:

... reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.<sup>158</sup>

The agency is directed to undertake a number of specific activities to achieve this overarching mission. One of the activities is to '... partner with State, local, and tribal governments and emergency response providers, with other Federal agencies, with the private sector, and with nongovernmental organizations' to develop a disaster response capability.<sup>159</sup>

Notwithstanding what appears to be comprehensive legislation allowing the President and the Federal Emergency Management Agency to plan for and respond to natural disasters, there are problems with the United States model. In particular it has been argued that as the Federal Emergency Management Agency is part of the larger Department of Homeland Security there is no clear line of authority to the President

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<sup>152</sup> Ibid §5149.

<sup>153</sup> Ibid §5170b.

<sup>154</sup> Ibid §5170b.

<sup>155</sup> Ibid §5171-§5172.

<sup>156</sup> 6 USC §311-§321j.

<sup>157</sup> Ibid §313.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.



as the role of the Department and the Agency, and their respective heads, is not clearly defined.<sup>160</sup> Equally problematic is the requirement that there be a Federal Coordinating Officer<sup>161</sup> who reports to the Administrator of the Federal Emergency Management Agency and, at the same time, a Principal Federal Officer who reports to the Secretary of Homeland Security.<sup>162</sup> The presence of multiple advisors, with reporting lines to different heads and Secretary's mean that there is potential for multiple advice sources to the President. Whilst this may be good when dealing with complex issues with time to consider different views, it can lead to confusion in times of crisis as to who is in charge and who is the principal advisor.<sup>163</sup>

#### IV APPLICATION TO AUSTRALIA

Some key features of the Canadian and American legislation can be identified and should be incorporated into any Australian legislation.

Emergency management legislation should facilitate decision-making by a single person, a National Coordinator, who is vested with all the powers of the Commonwealth. It is important however to distinguish between the office holder that can declare a state of emergency, for example 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>164</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 and increase the risk of an abuse of power. The power to declare a national emergency should be vested in the minister or Governor-General, but an office holder such as the head of Emergency Management Australia or some other 'National Coordinator' who should be empowered to exercise the necessary emergency powers.

The declaration of a national emergency should be subject to Parliamentary review. The powers granted in 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>165</sup> or unforeseen adverse consequences is real. Parliamentary review, ranging from detailed scrutiny and a power to revoke a declaration, to a simple obligation to table regulations made during

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<sup>160</sup> Wormuth and Witkowsky, above n 37, vii; 21-28.

<sup>161</sup> 42 USC §5143.

<sup>162</sup> Wormuth and Witkowsky, above n 37, viii.

<sup>163</sup> Ibid.

<sup>164</sup> Lee, above n 15, 192-193; New Zealand Law Commission, above n 24, [5.42].

<sup>165</sup> New Zealand Law Commission, above n 24,

an emergency, is included in the legislation from Canada, New Zealand and some Australian states.<sup>166</sup>

Finally Commonwealth legislation should establish Emergency Management Australia as a statutory authority with clearly defined roles and responsibilities. As noted above the presence of multiple advisors, with reporting lines to different heads and Minister's mean that there is potential for multiple sources of advice at a time when direct clarity is required.<sup>167</sup> Legislation should identify who is to be the principal adviser to government on emergency issues, ensuring that there can be no conflict as might now occur between Emergency Management Australia and the broader Attorney-General's Department.

## V CONCLUSION

This paper has identified that the Commonwealth has significant interests and associated legislative powers that would allow the Commonwealth to pass legislation to define its role in responding to a disaster of national consequence. Notwithstanding this legislative power, the Commonwealth has not legislated in this area. It has been argued that legislation should be enacted 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.

Examples of legislation from Canada and the United States have been given to show how other federated states have dealt with the issues and empowered the national governments to act in conjunction with the provinces and states when responding to a catastrophic disaster. Lessons from those schemes have been drawn out to identify key areas that should be addressed in any Australian emergencies legislation.

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 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.

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<sup>166</sup> *Emergencies Act* RSC 1985 (4th Supp), c 22, 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.

<sup>167</sup> Wormuth and Witkowski, above n 37, viii.