

NSW Submission to the Australian Senate Inquiry:

Operation of the *National Emergency
Declaration Act 2020*

Legal and Constitutional Affairs Legislation Committee

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Introduction

The Senate Legal and Constitutional Affairs Legislation Committee wrote to NSW Government agencies on 10 February 2021 to invite a submission in relation to their review of the *National Emergency Declaration Act 2020* (the Act).

The Act was introduced to implement recommendation 5.1 of the Royal Commission into National Natural Disaster Arrangements by establishing a legislative framework for declaring national emergencies. The *National Emergency Declaration (Consequential Amendments) Act 2020* was also introduced to address consequential matters related to the enactment of the Act.

NSW fully participated in the Royal Commission into National Natural Disaster Arrangements (Royal Commission), providing detailed information on the NSW preparation for, response to and recovery from the 2019-20 bush fires.

States and Territories have primary responsibility for preparing for and responding to natural disasters. As set out in the NSW Response to the Royal Commission's Propositions paper, **NSW maintains that any Commonwealth efforts should be targeted at supporting States and Territories' lead role in emergency response and recovery operations.**

National Emergency Declaration

The Act allows the Governor General to make a national emergency declaration, where the Prime Minister is satisfied that an emergency – whether within or outside Australia – has, is or is likely to cause ‘nationally significant harm’ in Australia or in an Australian offshore area, and the Prime Minister is satisfied that it is desirable that the declaration be made for the purposes of one or more ‘national emergency laws’.

The Act creates two pathways for the declaration of a national emergency declaration. The governments of each State and Territory where the harm has, is or is likely to occur can request in writing that the declaration be made. Whilst the Act does not appear to create any

broad new Commonwealth powers to deal with a national emergency, the Act does provide a new power to the Prime Minister to unilaterally request the declaration if satisfied that:

- because of the emergency, it is not practicable for the request to be made
- the emergency has, is or is likely to affect Commonwealth interests;
- the making of the declaration is appropriate, having regard to the nature of the emergency and the nature and severity of the nationally significant harm.

It is noted that “Commonwealth interest” is undefined in the Act. The revised explanatory memorandum circulated with the *National Emergency Declaration Bill 2020* provided clarification that the term is “intended to reflect the full extent of the Commonwealth’s constitutional interests and power”. Accordingly, it seems apparent that, subject to compliance with section 11, **the circumstances in which a declaration could be made are particularly broad as it appears Commonwealth interests could extend beyond property interest to the full range of matters in which it has legislative power, such as telecommunications or corporations.**

It is also important to note that the scope of what could fall within “nationally significant harm” for the purposes of making a declaration is broad and interpretations could differ as to when the scale or consequences of a particular emergency might have a significant national impact.

NSW notes Section 9 of the Act states that the Act does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

Modification of Administrative Requirements under a National Emergency Declaration

As set out in the NSW Response to the Royal Commission's Propositions paper, a national emergency declaration should be premised on provision of expedited assistance to the States, recognising the States’ primary role in emergency response and recovery.

It is noted that the Act works to expedite the provision of assistance by reducing administrative and procedural requirements. Part 3 of the Act empowers federal Ministers to vary, suspend, or substitute procedural matters in legislation they administer such as requirements for signatures, document retention and verification of identity of persons by the production of documents.

The Commonwealth Government has indicated these measures are intended to facilitate the early provision of Commonwealth assistance through existing legislation in an emergency which might be delayed by such procedural requirements and ensure that Australians affected by a declared national emergency can get the support they need quickly with minimal barriers to assistance.

NSW Emergency Management Arrangements

New South Wales has a robust framework for the planning, prevention, response and recovery to natural disasters.

In NSW, the *State Emergency and Rescue Management Act 1989* (the SERM Act) , governs emergency management arrangements. The SERM Act provides for the preparation of the State Emergency Management Plan (EMPLAN), and establishes the State Emergency

Management Committee and the positions of State Emergency Operations Controller (SEOCN) and State Emergency Recovery Controller (SERCON).

The SERM Act requires the SEOCN to establish and control a State Emergency Operation Centre, which facilitates effective communication, control and coordination with regions as well as emergency service organisations, and other jurisdictions, including the Commonwealth Government.

The EMPLAN adopts an ‘all-hazards’ and ‘all-agency’ approach. It describes the NSW approach to emergency management, and the roles and responsibilities of different agencies. Under the EMPLAN, sub-plans, such as the NSW State Bush Fire Plan, are maintained for specific hazards and the support requirements related to them.

The NSW Rural Fire Service (RFS) maintains the NSW State Bush Fire Plan as the lead combat agency for bush fires in NSW. The RFS has responsibility for the protection of life and property from bush fire under the *Rural Fires Act 1997*, and the coordination of bush fire-fighting and bush fire prevention across the State. The RFS Commissioner has broad powers to ensure appropriate coordination of the four agencies in NSW with fire-fighting capability: Fire and Rescue NSW, National Parks and Wildlife Service and Forestry Corporation of NSW. Under Section 44 of the *Rural Fires Act 1997*, RFS Commissioner is able to take charge of bush firefighting operations and bush fire prevention and may give such directions as they consider necessary to officers of rural fire brigades, local authorities, officers or members of Fire and Rescue NSW, members of the NSW Police Force and other persons in connection with the prevention, control or suppression of any bush fire in the area or locality in which the Commissioner has taken charge.

The EMPLAN is supported also by the NSW Recovery Plan, which provides a more detailed framework for recovery operations that can be tailored to support the particular affected community or communities. Emergency Management Committees at State, regional and local levels are responsible for recovery planning. Resilience NSW supports the Minister and SERCON to coordinate formal recovery processes, including recovery operations, at each of these levels.

Noting the well-established and robust emergency management framework in NSW, it is important the *National Emergency Declaration Act 2020* be aimed solely at improving Commonwealth arrangements for the provision of expedited assistance to the States, and not operate so as to disrupt or interfere with these arrangements.

NSW State of Emergency powers

It is noted that the function of a National Emergency Declaration under the Act has a different function to the existing power in NSW for the Premier to declare a “State of Emergency”.

Under the SERM Act, the NSW Premier has the power to declare a State of Emergency if satisfied that an emergency constitutes a significant and widespread danger to life and property. “Emergency” is defined under the Act to mean an emergency due to an actual or imminent occurrence which requires a significant and co-ordinated response, and endangers, or threatens to endanger, the safety or health of persons or animals in the State; destroys or damages, or threatens to destroy or damage, property in the State; or causes a failure of, or a significant disruption to, an essential service or infrastructure,

Declaration of a State of Emergency authorises the Minister for Police and Emergency Services, or the Minister’s chosen delegate, to exercise extraordinary powers to expedite

response and recovery operations. These powers may be assigned to the Commissioner of the combat agency controlling the emergency such as the Commissioner of the NSW Police Force or the NSW RFS Commissioner.

A State of Emergency enlivens powers for the Minister or delegate to direct the activities of Government agencies in responding to an emergency, take steps to evacuate people from an emergency area, or prevent people from entering an emergency area, and to direct the taking of safety measures such as closing roads, pulling down or shoring up damaged properties, shutting off or disconnecting water gas or electricity supplies, and taking possession of property that may be dangerous.

During the 2019/20 bushfire season, a State of Emergency was declared on three occasions to meet the heightened level of threat to the people of NSW.

Coordination with the Commonwealth Government during the 2019/20 bushfire season

The Commonwealth Government has provided and continues to provide significant assistance to the NSW recovery efforts following the 2019/20 bushfire season.

The NSW Government acknowledges the Commonwealth's role in supporting States' management of disasters and emergencies, with arrangements for non-financial support set out in the Australian Government Disaster Response Plan (COMDISPLAN), and for financial assistance set out under the Disaster Recovery Funding Arrangements (DRFA).

The experience of the 2019/2020 bushfire season highlighted opportunities for continued collaboration between the NSW and Commonwealth Governments to streamline and improve existing processes.

The NSW Government is of the view that the *National Emergency Declaration Act 2020* may assist in expediting Commonwealth assistance to States and Territories in future events.

Disaster Recovery Assistance

The Commonwealth Government has demonstrated significant flexibility in the design and activation of disaster recovery assistance measures following the extraordinary 2019/20 season and that this allowed for a much faster rollout of assistance than would have usually been the case.

Under current arrangements, many assistance measures, including those available under category C and D of the Disaster Recovery Funding Arrangements typically require a substantial detailed impact assessment and evidence base to be presented to the Commonwealth before assistance measures can be activated.

The Commonwealth's agreement to forego these requirements over the season was sensible and appreciated and ensured minimal delay of the roll out of much needed assistance.

The NSW Government acknowledges the significant and ongoing review of the Disaster Recovery Funding Arrangements that has been underway since the 2019-20 fires but anticipates that the *National Emergency Declaration Act 2020* may facilitate further streamlined arrangements in future events of national significance.

Australian Defence Force assistance

In a submission to the Royal Commission (in response to NTG-HB2-216), NSW also noted the significant and valuable assistance provided by the Australian Defence Force (ADF) throughout the 2019/20 bushfire season and recovery process.

The role the ADF played in providing assistance to the people of NSW during the 2019/2020 bushfire season should not be understated. Due to the extraordinary efforts of ADF personnel, this assistance included the delivery of 629 tonnes of fodder, the clearing 3,027 kilometres of roads, delivering 4,700 kilolitres of water, inspecting 974 kilometres of fencing and supplying 11,800 litres of diesel.

Within NSW the SEOCON is the authorising officer for requesting Commonwealth assistance. In accordance with the requirements of the Australian Government Disaster Response Plan (COMDISPLAN), requests must be made in writing to Emergency Management Australia (EMA) and on the prescribed form. It is then necessary to wait for EMA's advice about whether assistance can be provided and, if it is to be provided, what form that assistance might take.

A key factor in the decision-making process is the nature of the assistance required. Importantly, the Commonwealth (including the ADF) is not a firefighting agency and generally cannot assist with the direct firefighting response. It can, however, assist the firefighting effort in a range of ways which including transport (for example, to transport firefighters from other regions, including interstate), providing aircraft to assist in search & rescue, providing logistical support (such as base camp and catering).

Due to the scale of the bushfires throughout the 2019/2020 season, the ADF was embedded into the NSW State Operations Centre. Decisions regarding the deployment of ADF assistance was delegated to Brigadier Mick Garraway. A Joint Recovery Taskforce (JRTF) was established comprising co-located ADF and NSW staff who coordinated ADF tasking requests and deployment. To ensure consistency, the Joint Operations Support Staff (JOSS) Liaison remained the single point of contact for the SEOC and the JRTF then prioritised and actioned the large number of requests. During the 2019/2020 bushfire season, the JRTF referred tasks to the ADF in NSW, including engineering, equipment and logistical support, site security and aerial, mechanical, and medical support.

This approach highlighted the opportunity for a collaborative approach to integrate ADF assistance for future events.

Amendments introduced to the COMDISPLAN and Defence Assistance to the Civil Community (DACC) manual in August 2020 has enabled flexibility where jurisdictions attest that all government and commercial options have been exhausted before support can be requested, in that the availability of commercial options do not preclude consideration of defence assistance.

It is recognised that this change in policy will allow for greater pro-active participation from the Commonwealth Government and ADF and ensure jurisdictions can maximize available resources during future emergency events. **It is important to note there will always be a need for a collaborative approach when utilising these arrangements to ensure activities conducted by ADF or any Commonwealth entity occurs in close consultation with the states and territories. This will help to ensure there is no duplication or conflict that may impact on response and relief operations. Similarly, any reduction in administrative burden to commence ADF assistance should include**

the option to empower deployed officers with the authority to consider actions that may fall beyond the original request if such actions will ensure operational effects are delivered based on the immediate need with the best outcomes for the community in mind.

It is envisaged that the *National Emergency Declaration Act 2020* may further support this streamlining in future events of national significance.

Concluding remarks

NSW would be pleased to work with the Commonwealth Government to ensure the new powers established by the Act will work to enhance emergency management in NSW and lead to improved outcomes for the people and communities of NSW.

Exercises are a valuable tool to reviews to identify better practice and opportunities for improvement. **The NSW Government would support consideration of future multi-agency national level exercises to test how the *National Emergency Declaration Act 2020* can support improved response and recovery in NSW, and other jurisdictions.**

The NSW Government also notes the recommendations of the Royal Commission in relation to revision of the COMDISPLAN (recommendation 3.3), review of the Defence Assistance to the Civil Community manual (recommendation 7.2) and review of the Disaster Recovery Funding Arrangements (recommendation 22.3-22.8), and acknowledges much work has been done since the 2019-20 fires to improve these processes.