



Australian  
Human Rights  
Commission

# Review of National Emergency Declaration Act 2020 (Cth)

Submission to the Senate Legal and Constitutional Affairs  
Legislation Committee

24 March 2021

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# 1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee (SLCALC) in relation to its review of the operation of the *National Emergency Declaration Act 2020* (Cth) (the Act).
2. This is a statutory review of the operation of the Act pursuant to s 18(a) of the Act. The SLCALC is required to conduct its review and report its findings to the Senate by 30 June 2021.
3. The Commission welcomes the opportunity to make a submission to this review.
4. States of emergency in Australia are primarily managed by the governments of the States and Territories of Australia. However, the Commonwealth has powers and functions in various Commonwealth laws which may be exercised during states of emergency to assist the States and Territories in responding to and managing the emergency.
5. The Act aims to clarify and consolidate the Commonwealth's various emergency powers and functions and establish a framework by which the Governor-General, on the advice of the Prime Minister, may declare a national emergency, triggering the Commonwealth's ability to exercise its emergency powers and perform its emergency functions. The Prime Minister must be satisfied of certain criteria prescribed in the Act before a national emergency may be declared.
6. The Commission welcomes clarification of the Commonwealth's powers during states of national emergency. However, the Commission is concerned that the Act confers largely uncontrolled power on the Executive during a period in which a national emergency declaration is in force. That is, the Act does not provide sufficiently for scrutiny or accountability. The Act does not define a number of key terms, which establish the boundaries of the Governor-General's powers to make or extend a declaration of national emergency on the advice of the Prime Minister. Declarations made by the Governor-General, and variations and revocations of those declarations, are exempt from disallowance under the Act, significantly decreasing the capacity for parliamentary scrutiny of these legislative instruments. Further, Ministers administering national emergency laws are conferred with power under the Act to vary, replace or dispense with regulatory requirements with very little scrutiny.

## 2 Recommendations

7. The Commission makes the following recommendations.

### **Recommendation 1**

Section 12 of the Act should be amended to limit the number of extensions of a national emergency declaration which can be made by the Governor-General and s 14A of the Act should be amended to require an immediate review of a declaration of a national emergency if it is extended more than once.

### **Recommendation 2**

Definitions for the terms 'emergency' and 'Commonwealth interests' should be inserted into the Act and 'emergency' should be defined in similar terms to the definitions of 'emergency' and 'disaster' in the emergency management legislation enacted in each State and Territory.

### **Recommendation 3**

Section 15 of the Act should be amended to include a condition that, before a Minister is able to make a determination under s 15, the Minister must be satisfied that, by reason of the emergency, Parliament is unable to sit within a reasonable time of the commencement of the national emergency declaration. It should also be amended to make clear that any exercise of this power by a Minister must be proportionate to the demonstrated need resulting from the emergency.

### **Recommendation 4**

The Act should provide for the establishment of a specialised committee upon the declaration of a national emergency by the Governor-General, focused on the exercise of the national emergency laws under the Act.

### **Recommendation 5**

Sections 11(6), 12(5), 13(3) and 14(2) of the Act should be amended to remove the exemption from disallowance with respect to the relevant legislative instrument.

### 3 Background

8. The Act was introduced into Parliament on 3 December 2020 and assented to, along with the *National Emergency Declaration (Consequential Amendments) Act 2020* (Cth), on 15 December 2020.
9. The Revised Explanatory Memorandum provides that the Act is intended to give effect to recommendation 5.1 of the *Royal Commission into National Natural Disaster Arrangements*, reported on 28 October 2020.<sup>1</sup> That recommendation was to make legislative provision for a declaration of a state of emergency which provides for:
  - (a) the Australian Government to make a public declaration to communicate the seriousness of a natural disaster
  - (b) processes to mobilise and activate Australian Government agencies quickly to support States and Territories to respond to and recover from a natural disaster
  - (c) the power to take action without a State or Territory request for assistance in clearly defined and limited circumstances.<sup>2</sup>
10. Prior to the introduction of the Act, the Commonwealth had the ability through the Australian Government Crisis Management Framework and associated national plans and arrangements to support the States and Territories in any crisis that had the potential to affect, or had affected, more than one jurisdiction, the broader community, or an Australian Government area of responsibility. Action could be taken by the Commonwealth upon the request of the affected State or Territory or where a request had not been made because the government of the affected State or Territory was temporarily incapacitated. The actions which could be undertaken by the Commonwealth were provided for in various pieces of Commonwealth legislation.
11. The Act was introduced to provide a framework for the Governor-General to declare a national emergency in the event that the Prime Minister is satisfied of certain requirements set out in s 11(1) of the Act and to consolidate the Commonwealth's powers during states of emergency.
12. The primary effect of a national emergency declaration is to empower the Commonwealth to exercise certain powers or perform certain functions under other Commonwealth laws, referred to as 'national emergency laws'. The definition of 'national emergency laws' in s 10 of the Act

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consolidates the powers and functions currently available to the Commonwealth during a national emergency by listing the relevant Commonwealth laws which are triggered by a national emergency declaration.

13. These emergency powers make it easier for the Executive to respond to emergency situations. For example, emergency powers may be used to relax curfews at regional airports allowing aircraft carrying vital supplies to take off and land over a broader range of times, or to take steps to ensure therapeutic goods are stockpiled quickly and can be made available urgently. However, the exercise of some of these powers also come with costs. As a result, it is necessary to ensure that they are only used in situations of real emergency. For example, during the period that a national emergency declaration is in force:
  - The Governor-General may, on the advice of the Minister in the event of a shortage or likely shortage of liquid fuel, declare a national liquid fuel emergency, under s 16 of the *Liquid Fuel Emergency Act 1984* (Cth). This declaration enlivens powers for the Minister to direct fuel industry corporations to take certain actions, including maintaining and transferring reserves of liquid fuel, requiring liquid fuel to be made available for purchase, requiring a refinery to produce a specified amount of liquid fuel, and regulating or prohibiting supply of liquid fuel in the course of trade.<sup>3</sup> While the Minister is prevented from regulating price, the degree of control the Minister is empowered to exercise over private industry production and supply would necessarily have an impact on competition and the market price of liquid fuel.
  - The Australian Competition and Consumer Commission (ACCC) may, on application, make a determination authorising conduct which otherwise would contravene Part IV of the *Competition and Consumer Act 2010* (Cth) which relates to restrictive trade practices and includes conduct such as price fixing, market sharing and bid rigging.<sup>4</sup> While the ACCC must be satisfied that the conduct would assist in the response to the emergency and would result in a benefit to the public that outweighs any detriment of the conduct,<sup>5</sup> the allowance of anti-competitive conduct may have an adverse impact on consumers by, for example, increasing the price and decreasing the choice of goods and services.
  - Telecommunications carriers, carriage service providers and carriage service intermediaries are required to give officers and

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authorities of the Commonwealth and the States and Territories such help as is reasonably necessary to prepare for, respond to or recover from an emergency to which the declaration relates.<sup>6</sup> 'Giving help' includes the provision of telecommunications interception services (including services in executing an interception warrant), giving effect to a stored communications warrant, providing relevant information about communications that are lawfully intercepted or accessed, giving effect to authorisations and disclosing information or documents authorised by or under law.<sup>7</sup> The exercise of these emergency powers necessarily limits the right to privacy for any affected person, and this limitation is not attended by some of the usual protections.

- Declarations of emergency may be made by Ministers, Territory Controllers or Administrators in the Territories of Jervis Bay,<sup>8</sup> Christmas Island,<sup>9</sup> Cocos Island<sup>10</sup> and Norfolk Island,<sup>11</sup> which permit authorities to grant broad powers to 'authorised officers' to respond to the emergency. Those powers include entering private premises without a warrant and with the use of force, directing actions with respect to people and property, requiring the provision of personal information from individuals, prohibiting movement of people, taking possession of land, buildings, structures, and vehicles and removing persons who obstruct response or recovery operations.
14. In other words, the powers conferred on the Executive during periods of national emergency serve an important purpose in ensuring that the Commonwealth is able to quickly and effectively implement measures to respond to the emergency. This can be vital in protecting human rights. However, the exercise of these powers can also limit human rights, and this makes it important that the powers are only enlivened in the appropriate circumstances and are strictly limited to what is necessary, reasonable and proportionate to effectively respond to the relevant emergency.
15. The list of national emergency laws also includes two new powers conferred on the Commonwealth in ss 15 and 16 of the Act. The effect of these provisions during the period in which a national emergency declaration is in force, is to empower:
- (a) Ministers to determine, by legislative instrument, that certain provisions in Commonwealth legislation administered by the Minister providing for administrative requirements do not apply, are varied, or are replaced

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- (b) the Prime Minister to require an accountable authority of a Commonwealth entity to provide the Prime Minister with specified information for the purposes of preparing for, responding to, or recovering from an emergency to which the declaration relates, including information concerning stockpiles of medical or other supplies, assets or other resources or recommendations for actions to be taken by the Commonwealth.
- 16. Reviews of the operation of the Act are provided for in s 18, with the first to take place immediately upon commencement, and a second at the five-year anniversary of the commencement of the Act.

## **4 Duration of declarations**

- 17. Section 11 of the Act sets out the matters the Prime Minister must be satisfied of before the Governor-General may make a national emergency declaration. Section 11(5) provides that the period for which a national emergency declaration made by the Governor-General is in force must not be longer than the period that the Prime Minister considers necessary for the purposes of emergency management and, in any event, must not be longer than 3 months.
- 18. By section 12 of the Act, the Governor-General is empowered, on the advice of the Prime Minister, to extend the duration of a national emergency declaration. While each extension of a declaration is limited to a duration of three months, the Act does not limit the number of extensions which can be made by the Governor-General.
- 19. The Revised Explanatory Memorandum states that the purpose of limiting the duration of a declaration to three months is to ensure that the period during which the declaration is in force is proportionate to the purpose for which the declaration is made. This limit is said to ensure a fixed point at which the declaration must be re-evaluated to determine whether it is still required or appropriate.<sup>12</sup>
- 20. This approach appears to be modelled on the *Biosecurity Act 2015* (Cth) (Biosecurity Act), which empowers the Governor-General to make declarations concerning biosecurity emergencies for a period of up to three months which may be extended by the Governor-General for a period of three months without a limit on the number of extensions.<sup>13</sup>



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21. As recognised in the Revised Explanatory Memorandum:

The profound symbolic nature of a declaration of a national emergency, as well as the range of powers which are available, or more easily satisfied, when a national declaration is in force, requires that declarations should only be in force for as long as necessary to manage the nationally significant harm posed by the emergency.<sup>14</sup>

22. While the limit on the duration of an extension of a declaration may provide a point at which the Government can assess the appropriateness and continued need for a declaration to remain in force, the Commission considers that the ability to continue to extend a declaration indefinitely gives the Executive a broad and unlimited discretion. This is particularly significant, given that the declaration of a national emergency enables the Commonwealth to exercise certain powers and perform certain functions which are strictly limited to times of national emergency, including the power of Ministers to make determinations dispensing with certain regulatory requirements without any parliamentary oversight.

23. Section 14A of the Act provides that the Senate Standing Committee on Legal and Constitutional Affairs, or such other committee constituted under a resolution of the Senate, is to conduct a review of each national emergency declaration made pursuant to s 11 of the Act by the first anniversary of the date the declaration was made and report its findings to the Senate as soon as practicable after completing the review. The Revised Explanatory Memorandum explains that the purpose of this provision is to ‘ensure that the effectiveness of the framework is assessed in relation to each national emergency declaration, and the unique circumstances giving rise to it, to allow the framework to be refined based on experience’.<sup>15</sup>

24. The Commission considers that the requirement for a review of each declaration at the first anniversary of the declaration being made provides some accountability in relation to the historical use of these emergency powers, but does not provide sufficient oversight in the case of ongoing national emergency declarations. Given that a declaration may be continuously extended, a declaration could be made and extended three times for the maximum duration each time before it is subject to any independent oversight.

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25. Consistent with s 11(5) of the Act, the Revised Explanatory Memorandum provides that:

The declaration of a national emergency is intended to be time-limited, and ordinary processes should be restored once the immediate response and recovery need is addressed.<sup>16</sup>

The Commission considers that there needs to be a greater level of accountability where a national emergency is protracted to give effect to this intention. This could be done in a number of ways. The Act could include a limit on the number of extensions of a national emergency declaration which may be made by the Governor-General. Alternatively, it could require an immediate review of a declaration of a national emergency if it is extended more than once. This would ensure that Australians would not be subject to continuous emergency conditions for more than 6 months without some independent oversight from Parliament.

### **Recommendation 1**

Section 12 of the Act should be amended to limit the number of extensions of a national emergency declaration which can be made by the Governor-General and s 14A of the Act should be amended to require an immediate review of a declaration of a national emergency if it is extended more than once.

## **5 Definitions of 'emergency' and 'Commonwealth interests'**

26. The terms 'emergency' and 'Commonwealth interests' in s 11 of the Act are critical to the scope of the Act and the powers that may be exercised pursuant to it, including the declaration or extension of a national emergency. However, these terms are not defined in the Act. The Senate Standing Committee for the Scrutiny of Bills has expressed concern about the lack of guidance on the meaning of these terms in the Act.<sup>17</sup>
27. Pursuant to s 11(1) of the Act, the Governor-General may make a national emergency declaration if the Prime Minister is satisfied that:
- (a) an emergency has recently occurred, is occurring or is likely to occur (whether in or outside Australia); and

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(b) the emergency has caused, is causing or is likely to cause nationally significant harm in Australia or in an Australian offshore area; and

(c) any of the following subparagraphs apply:

...

(iii) the emergency has affected, is affecting or is likely to affect Commonwealth interests;

...; and

(d) for reasons relating to emergency management, it is desirable for the declaration to be made for the purposes of one or more national emergency laws.

(emphasis added)

28. Similar tests using the same terms are set out in ss 12(1) and 13(1) of the Act, which empower the Governor-General to extend the period for which a national emergency declaration is in force and vary any other aspect of a national emergency declaration.
29. The Revised Explanatory Memorandum states that 'emergency' is deliberately not defined in the Act and, instead, is to be given its natural and ordinary meaning.<sup>18</sup> The rationale behind this is said to be to support an 'all hazards' approach which does not limit the circumstances in which a declaration can be made to certain types or kinds of defined emergencies or single incidents or disasters. The Macquarie Dictionary defines 'emergency' in broad terms as 'an unforeseen occurrence; a sudden and urgent occasion for action'. In the case of the making of an initial declaration, the term 'emergency' is further broadened to include not only emergencies that have recently occurred or are occurring but also emergencies that are 'likely to occur'.<sup>19</sup>
30. The Revised Explanatory Memorandum also provides that 'emergency' is intended to be read in conjunction with the term 'nationally significant harm' and provides examples of the types of emergencies that may be the subject of a national emergency declaration.<sup>20</sup> The definition of 'nationally significant harm' in s 10 of the Act is also very broad, being harm that:
- (a) has a significant national impact because of its scale or consequences; and

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(b) is any of the following:

- (i) harm to the life or health (including mental health) of an individual or group of individuals;
- (ii) harm to the life or health of animals or plants;
- (iii) damage to property, including infrastructure;
- (iv) harm to the environment;
- (v) disruption to an essential service.

31. The examples of emergencies which have caused, are causing or are likely to cause nationally significant harm provided in the Revised Explanatory Memorandum are:<sup>21</sup>

- major natural disasters—such as, bushfires that spread across multiple jurisdictions and threaten significant danger to life and property, or a geomagnetic storm that causes, or threatens to cause, extensive disruption or damage to electricity, satellite and communications networks
- communicable disease outbreaks that pose a major threat to the health and life of Australians, including outbreaks that are spreading out of control overseas and are likely to reach Australia
- large-scale cyber incidents or terrorist attacks—such as a malicious cyber-attack that causes a prolonged and widespread failure in the energy sector, resulting in shortages of essential medical supplies, impacts on water supply and sanitation and disruption to the supply of food
- major chemical, biological or radiological incidents, whether accidental or deliberate
- emergencies occurring overseas, to the extent that such emergencies cause, or are likely to cause, nationally significant harm within Australia—such as a natural disaster that causes extensive damage to major international maritime ports or disruption to critical shipping channels and disrupts the availability of essential services in Australia, and
- a combination of the above emergencies occurring concurrently or consecutively, that together has caused, is causing, or is likely to cause nationally significant harm—such as multiple natural disasters occurring concurrently in different parts of the country, during a

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pandemic that complicates response and recovery efforts, and that collectively cause, or are likely to cause, nationally significant harm.

32. The Revised Explanatory Memorandum can usefully provide guidance on principles that assist in understanding key terms, especially 'emergency' and 'Commonwealth interests', and it can usefully also give examples that the Government considers would fall within the scope of these terms. However, such guidance, in material extrinsic to the Act itself, cannot perform the function of a statutory definition of key terms. As a question of administrative law, whether an emergency exists within the meaning of the Act is a jurisdictional fact. The powers triggered by a declaration are extraordinary in nature, broad in scope and may be exercised expediently. This heightens the importance of ensuring that a declaration is made only in appropriate circumstances. That, in turn, suggests that the Act should provide a clear definition of these key terms.
33. The term 'emergency' is defined in the emergency management legislation enacted in each State and Territory, with the exception of Queensland which, instead, defines 'disaster' as an equivalent term.<sup>22</sup> Legislation in the Northern Territory provides definitions for both 'emergency' and 'disaster'.<sup>23</sup> Given that responsibility for responding to and managing emergencies is largely within the powers of the States and Territories, and the purpose of the Act is to provide a framework by which the Commonwealth can provide assistance to the States and Territories in emergencies, it would better achieve a key purpose of the Act if the Commonwealth adopted a similar definition to those in corresponding State and Territory legislation. Doing so would increase public certainty about when these extraordinary powers are available to be used.
34. The Revised Explanatory Memorandum states that the absence of a definition for the term 'Commonwealth interests' in the Act is intended to reflect the full extent of the Commonwealth's constitutional interests and power. It is not clear why providing a definition of this term would limit the Commonwealth's constitutional interests and powers, particularly given that these matters are clearly defined in legislation.
35. In the Commission's view, the lack of definitions for the terms 'emergency' and 'Commonwealth interests' has the effect of providing a very broad discretionary power to declare, extend and vary national emergency declarations under this Act. The Commission recommends that definitions for the terms 'emergency' and 'Commonwealth interests' be inserted into the Act to more clearly delineate the circumstances in which a national emergency may be declared.

## **Recommendation 2**

Definitions for the terms 'emergency' and 'Commonwealth interests' should be inserted into the Act and 'emergency' should be defined in similar terms to the definitions of 'emergency' and 'disaster' in the emergency management legislation enacted in the States and Territories.

## **6 Modification of primary legislation through delegated legislation**

36. Section 15(2) of the Act empowers Ministers during a national emergency to determine, by legislative instrument, that certain provisions in legislation administered by the Minister do not apply, are varied, or are replaced.<sup>24</sup> This power applies to any Commonwealth law administered by the Minister, subject to exclusions in s 15(8) of the Act, which requires the:
- (a) giving of information in writing
  - (b) signature of a person
  - (c) production, recording, and retention of documents or information
  - (d) witnessing of signatures and certification of matters by witnesses
  - (e) verification of a person's identity
  - (f) attestation of documents
  - (h) reporting or notification of a matter to a Department, agency or authority of the Commonwealth.<sup>25</sup>
37. The Minister must be satisfied that the determination is in response to circumstances relating to the emergency the subject of the declaration and that the determination will be of benefit to the public or a section of the public.<sup>26</sup> A determination may be varied or revoked by the responsible Minister.<sup>27</sup>
38. A determination by a Minister under this provision may also operate retrospectively. It takes force from the date specified in the determination, which may be prior to the date of the determination.<sup>28</sup> It will cease to have effect on the date specified in the determination or, if no date is specified, the date it is revoked or the national emergency declaration ceases to be in force.<sup>29</sup>

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39. Provisions such as s 15(2) of the Act are known as Henry VIII clauses because they authorise the amendment of either the empowering legislation, or any other legislation, by means of delegated legislation,<sup>30</sup> which has not been scrutinised by, and passed through, Parliament.
40. The Commonwealth's Legislation Handbook provides guidance on appropriate matters for subordinate legislation and matters which should be implemented only through Acts of Parliament.<sup>31</sup> It provides that drafters of explanatory memoranda should ensure that the use of subordinate legislation is appropriate and an explanation is given for the use of unusual arrangements such as Henry VIII clauses.<sup>32</sup> The Senate Standing Committee for the Scrutiny of Bills has consistently drawn attention to the use of Henry VIII clauses in legislation since the committee's formation.<sup>33</sup> The appropriateness of the use of such clauses has also been raised by the Australian Law Reform Commission and other State and Territory bodies.<sup>34</sup>
41. The Revised Explanatory Memorandum states that this provision is intended to:

allow Ministers and decision-makers to act quickly and decisively in response to a declared national emergency and adopt a tailored approach to suspending, varying and substituting regulatory requirements, depending on the particular emergency event.<sup>35</sup>

...

It is intended to have beneficial application, in that it would make it easier for persons affected by a declared national emergency to obtain government support without having to complete, for instance, certain manner and form requirements, or requirements for official documents to be witnessed or provided.<sup>36</sup>
42. While acknowledging that s 15(2) of the Act could be classified as a Henry VIII clause, the Revised Explanatory Memorandum states that this is justified in the context of a national emergency declaration on the basis that it is limited by time, targeted to facilitate the provision of support to the community and is limited to provisions dealing with the list of matters specified in s 15(1) of the Act.<sup>37</sup> The Revised Explanatory Memorandum provides that such power would not extend to any substantive provisions in the legislation.<sup>38</sup>
43. The purpose of the retrospective application of a Minister's determination is explained to be to validate approaches to manner and form

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requirements, verification of identity requirements and reporting requirements which, in the immediate aftermath of an emergency, may otherwise have been invalid.<sup>39</sup>

44. By s 17 of the Act, if the powers and functions under the national emergency laws listed in s 10 are exercised during the period in which a national emergency declaration is in force, the Minister responsible for administering the relevant national emergency law must prepare a report detailing the powers that have been exercised under the national emergency law and provide it to the Minister administering this Act, who must table the report in each House of Parliament as soon as practicable.
45. In general, the Commission considers that Henry VIII clauses should be avoided unless there is sufficient justification, to ensure that primary legislation is not overridden by the Executive without the appropriate parliamentary oversight and scrutiny. The Commission accepts that, in the context of a national emergency, compliance by the public with legislative requirements of manner and form, verification of identity and reporting may be difficult. This was evidenced in the COVID-19 response during 2020. It may also be difficult in the circumstances of a national emergency for Parliament to sit for extended periods to address such issues. The Commission also acknowledges that some degree of oversight is included in the Act through the requirement for Ministers to report their use of these powers which are then to be tabled in Parliament. However, s 15 of the Act confers significant power on Ministers to make determinations which override the operation of primary legislation they administer without the usual consideration or scrutiny of Parliament and the Commission considers that further protections should be introduced to assist in ensuring that these powers are not misused or overused.
46. Currently, s 15 would operate during the period of a national emergency declaration regardless of the impact of the emergency on Parliament. That is, Ministers are empowered to make determinations under the Act overriding the operation of primary legislation even where Parliament is not affected by the national emergency and may be fully operational. The Commission considers that the operation of s 15 should be conditioned on circumstances preventing Parliament from sitting to consider such matters during a national emergency within a reasonable time after the date on which the declaration is made. Such an approach would ensure that, where a national emergency declaration does not prevent Parliament from sitting, Ministers are not afforded such significant power to override primary legislation by determination.



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47. In addition, the Commission considers that parliamentary scrutiny in the period of a national emergency could be achieved through the establishment of a specialised committee upon the declaration of a national emergency by the Governor-General. The focus of such a committee would be on the exercise of emergency powers under the Act, including s 15 of the Act, and could provide an avenue by which parliamentary oversight and scrutiny are retained in emergency situations, even during periods where Parliament has been affected by the emergency. The establishment and operation of the Senate Select Committee on COVID-19 has provided a useful example of how such a committee could operate.

**Recommendation 3**

Section 15 of the Act should be amended to include a condition that, before a Minister is able to make a determination under s 15, the Minister must be satisfied that, by reason of the emergency, Parliament is unable to sit within a reasonable time of the commencement of the national emergency declaration. It should also be amended to make clear that any exercise of this power by a Minister must be proportionate to the demonstrated need resulting from the emergency.

**Recommendation 4**

The Act should provide for the establishment of a specialised committee upon the declaration of a national emergency by the Governor-General, focused on the exercise of the national emergency laws under the Act.

## **7 Exemptions from disallowance**

48. Section 11(6) of the Act provides that a national emergency declaration made pursuant to s 11(1) of the Act is a legislative instrument, however it is not subject to disallowance under s 42 of the *Legislation Act 2003* (Cth) (Legislation Act).
49. The Act also provides that the following are legislative instruments which are exempt from disallowance:
- (a) variations of a national emergency declaration by the Governor-General to extend the duration of a declaration under s 12(1) of the Act<sup>40</sup>

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- (b) variations of any other aspect of a national emergency declaration by the Governor-General under s 13(1) of the Act<sup>41</sup>
  - (c) revocation of a national emergency declaration by the Governor-General under s 14(1) of the Act.<sup>42</sup>
50. Exempting legislative instruments from disallowance under s 42 of the Legislation Act is a serious matter, significantly decreasing the capacity for parliamentary scrutiny of the Governor-General's declarations. In the view of the Commission, such exemptions should not be made unless they are sufficiently justified.
51. Again, ss 11 and 12 of the Act appear to have been modelled from the Biosecurity Act which empowers the Governor-General to declare a biosecurity emergency<sup>43</sup> and a human biosecurity emergency<sup>44</sup> and extend the duration of those declarations.<sup>45</sup> The declarations and any extensions of those declarations under that Act are legislative instruments which are exempt from disallowance.<sup>46</sup>
52. The rationale for exempting the legislative instruments from disallowance in the Act is explained in the Revised Explanatory Memorandum as follows:
- A core objective of the declaration is to clearly signal to the Australian community the severity of the emergency event, and provide certainty about the Commonwealth's role, and the statutory powers that are available, in respect of a particular emergency event. This objective would be undermined if such a declaration were disallowable, as the prospect of disallowance is likely to call into question the status of the emergency event.
- ...
- If a declaration were disallowed, it would destabilise the framework under which emergency response agencies are operating, leading to uncertainty and potential delays in the response and recovery effort where time is of the essence.<sup>47</sup>
53. In response to a request from the Senate Standing Committee for the Scrutiny of Delegated Legislation for advice concerning the basis for providing that national emergency declarations in s 11(6) of the Act and extensions of those declarations in s 12(5) of the Act are exempt from disallowance, the Attorney-General advised that:
- Although disallowance of an instrument does not invalidate actions taken under the instrument prior to the time of disallowance, the prospect of a

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declaration being disallowed would undermine the key objective of the [Act] – to provide a clear, certain and unambiguous signal about the significance and severity of an emergency event. If the status of the declaration were to change following a successful motion to disallow, this could suggest (potentially erroneously) that the emergency no longer exists. While it is accepted that the rate of successful disallowance motions are low, the possibility of disallowance cannot be unequivocally discounted.<sup>48</sup>

54. If an emergency, in fact, had recently occurred, was occurring, or was likely to occur, giving rise to the requirement for a national emergency declaration by the Governor-General, it is unclear how the prospect of disallowance would call into question the status of the emergency. In the event of a challenge to a legislative instrument made under the Act, where an emergency had necessitated the declaration, the challenge would likely fail after consideration by Parliament. However, if a declaration were made in circumstances where there was in fact no national emergency, it would be important for this to be able to be scrutinised by Parliament given the far-reaching effects of a declaration. It is precisely because of the significance of the measures contained in this Act that ordinary principles of scrutiny and accountability are so important. Further, as noted by the Attorney-General, given that disallowance of an instrument does not invalidate the actions taken under the instrument prior to the time of disallowance, it is difficult to understand how disallowance of a national emergency declaration would lead to uncertainty in taking action under the declaration while it is in force simply on the grounds that it may be disallowed at a later time.
55. The Commission does not consider the justification for the exemption of these legislative instruments from disallowance to be sufficient to warrant such exemption and recommends deletion of the words ‘but section 42 (disallowance) of the Legislation Act 2003 does not apply to the [declaration, variation or revocation]’ in ss 11(6), 12(5), 13(3) and 14(2) of the Act.

### **Recommendation 5**

Sections 11(6), 12(5), 13(3) and 14(2) of the Act should be amended to remove the exemption from disallowance with respect to the relevant legislative instrument.

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- <sup>1</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 2; *Royal Commission into National Natural Disaster Arrangements* (Final Report, October 2020) 149.
- <sup>2</sup> *Royal Commission into National Natural Disaster Arrangements* (Final Report, October 2020) 149.
- <sup>3</sup> *Liquid Fuel Emergency Act 1984* (Cth), ss 16-24.
- <sup>4</sup> *Competition and Consumer Act 2010* (Cth), ss 88 and 90 and see s 45AD for an example of conduct that may be authorised.
- <sup>5</sup> *Competition and Consumer Act 2010* (Cth), ss 90(7)(c).
- <sup>6</sup> *Telecommunications Act 1997* (Cth), s 313(4B).
- <sup>7</sup> *Telecommunications Act 1997* (Cth), s 313(7).
- <sup>8</sup> *Jervis Bay Territory Emergency Management Ordinance 2015* (Cth), s 15.
- <sup>9</sup> *Christmas Island Emergency Management Ordinance 2012* (Cth), ss 16A and 17.
- <sup>10</sup> *Cocos (Keeling) Islands Emergency Management Ordinance 2012* (Cth), ss 16A and 17.
- <sup>11</sup> *Disaster and Emergency Management Act 2001* (NI), s 9.
- <sup>12</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 17.
- <sup>13</sup> See *Biosecurity Act 2015* (Cth), ss 444 and 476.
- <sup>14</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 17.
- <sup>15</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 21.
- <sup>16</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 10.
- <sup>17</sup> Standing Committee for the Scrutiny of Bills, Scrutiny Digest 3 of 2021 (February 2021) 35.
- <sup>18</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 13.
- <sup>19</sup> *National Emergency Declaration Act 2020* (Cth), s 11(1)(a).
- <sup>20</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 13.
- <sup>21</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 13-14.
- <sup>22</sup> *State Emergency and Rescue Management Act 1989* (NSW), s 4; *Emergency Management Act 2013* (Vic), s 3; *Emergency Management Act 2004* (SA), s 3; *Emergency Management Act 2005* (WA), s 3; *Emergency Management Act 2006* (Tas), s 3; *Emergencies Act 2004* (ACT), s 4; *Emergency Management Act 2013* (NT), s 8; *Disaster Management Act 2003* (Qld), s 13.
- <sup>23</sup> *Emergency Management Act 2013* (NT), s 8.
- <sup>24</sup> *National Emergency Declaration Act 2020* (Cth), s 15(2).
- <sup>25</sup> *National Emergency Declaration Act 2020* (Cth), s 15(1).
- <sup>26</sup> *National Emergency Declaration Act 2020* (Cth), s 15(4).
- <sup>27</sup> *National Emergency Declaration Act 2020* (Cth), s 15(6).
- <sup>28</sup> *National Emergency Declaration Act 2020* (Cth), s 15(7).
- <sup>29</sup> *National Emergency Declaration Act 2020* (Cth), s 15(7).
- <sup>30</sup> Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 41<sup>st</sup> Parliament November 2004 – October 2007* (September 2008) 5.4.
- <sup>31</sup> Department of the Prime Minister and Cabinet, *Legislation Handbook* (February 2007) 2.
- <sup>32</sup> Department of the Prime Minister and Cabinet, *Legislation Handbook* (February 2007) 43.
- <sup>33</sup> Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 41<sup>st</sup> Parliament November 2004 – October 2007* (September 2008) 5.4.
- <sup>34</sup> See, for example, Australian Law Reform Commission, *ALRC Report 129, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (December 2015) 454-455; Queensland Law Reform Commission, Report No. 39, *Henry VIII Clauses* (June 1990); Legislative Assembly of Queensland, Scrutiny of Legislation Committee, *The use of “Henry VIII Clauses” in Queensland Legislation* (January 2017); Western Australia, Legislative Council, Standing Committee on Legislation, Report 19, *Revenue Laws Amendment Bill 2012*, (September 2012) 1-4; Legislative Assembly for the ACT, Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Henry VIII clauses Fact sheet* (November 2011).

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<sup>35</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 22-23.

<sup>36</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 23.

<sup>37</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 23.

<sup>38</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 23.

<sup>39</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 24.

<sup>40</sup> *National Emergency Declaration Act 2020* (Cth), s 12(5).

<sup>41</sup> *National Emergency Declaration Act 2020* (Cth), s 13(3).

<sup>42</sup> *National Emergency Declaration Act 2020* (Cth), s 14(2).

<sup>43</sup> See *Biosecurity Act 2015* (Cth), s 443(1).

<sup>44</sup> See *Biosecurity Act 2015* (Cth), s 475(1).

<sup>45</sup> See *Biosecurity Act 2015* (Cth), ss 444(1) and 476(1).

<sup>46</sup> See *Biosecurity Act 2015* (Cth), ss 443(2), 444(2), 475(2) and 476(2).

<sup>47</sup> Revised Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 17.

<sup>48</sup> Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 3 of 2021 (February 2021) 36.