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RE: RECENT TRENDS IN AND PREPAREDNESS FOR EXTREME WEATHER EVENTS

I am pleased to be able to make a submission to the Senate Standing Committees on Environment and Communications with respect to items (e) and (g) of the current terms of reference. In particular this submission will address:

- the current roles and effectiveness of the division of responsibilities between different levels of government (federal, state and local) to manage extreme weather events (terms of reference (e));
- ... the steps required for effective national coordination of climate change response ... (terms of reference (g)).

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Author background and summary

In making this submission I draw on my experience as an academic researcher in the area of the law and emergency management and the Australian emergency services. I am a Senior Fellow (or Associate Professor) at the Australian National University, jointly in the ANU College of Law and the Fenner School of the Environment. I am currently engaged on a Bushfire CRC funded project looking at the impact of law upon emergency management and emergency response but I have been writing and researching in this field for many years.¹ My professional CV can be seen at <http://law.anu.edu.au/staff/michael-eburn>.

With that background this submission will be limited to issues arising from the management of 'climate change response' which I define to mean the emergency response to extreme weather events, not the long term adaptation response that is required to prepare for, and minimise the impact of these predicted events. Extreme weather events will include storms and cyclones as well as bushfires that are triggered by extreme weather and the risk of storm surge and coastal inundation that may occur with changing weather patterns and predicted sea level rise.

It is my submission that:

1. State Governments should expressly set out the role of local government in emergency response and clearly articulate the relationships between state agencies and local governments when it comes to emergency response. The presence of state agencies such as the fire services and State Emergency Services, with mandated 'combat roles' for responding to natural hazards and vague requirements on councils to 'prepare for emergencies' does not adequately articulate the roles and responsibilities for local government in responding to extreme climate events; and
2. The Commonwealth, and the Australian community, would be better served by clear legislative provisions detailing the roles and responsibilities of the Federal government including 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, extreme weather event. 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.

¹ Much of this material is drawn from or based upon previously published work including my PhD thesis 'Australia's international disaster response : laws, rules and principles' (2009) <<http://arrow.monash.edu.au/vital/access/manager/Repository/monash:14147>> (published as a book by VDM-Verlag, Saarbrücken, Germany, 2010) and Eburn, M., 'Responding to catastrophic natural disasters and the need for Commonwealth legislation' (2011) 10(3) *Canberra Law Review* 81-102 <<http://www.austlii.edu.au/au/journals/CanLawRw/2011/30.html>>.

The current roles and effectiveness of the division of responsibilities between different levels of government (federal, state and local) to manage extreme weather events (terms of reference (e)).

The current roles and responsibility division between the levels of government for managing the response to extreme weather events is not clear. The traditional view is that the response to such events is the responsibility of State governments with the Federal government serving to support state operations but not taking direct command or control responsibility.² Local Government is said to be closest to the community with direct involvement but the legal obligations, duties and powers of Local Government are not clear.

The Commonwealth

It is argued that the Commonwealth has not clearly defined its role, and more importantly, who is to take responsibility for the Commonwealth's response to extreme weather events.

The Commonwealth does 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.³ The Commonwealth also has responsibilities to protect life and property across Australia,⁴ 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'.⁵ 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

² Emergency Management Australia, *Australian Government Disaster Response Plan (COMDISPLAN)* [1.1], Asia Pacific Gateway for Disaster Risk Reduction and Development <<http://www.drrgateway.net/content/australian-government-disaster-response-plan-comdisplan/>> (COMDISPLAN is no longer available via official Federal Government websites, the latest version appears to have been issued in 2008 but that cannot be readily confirmed); 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; Council of Australian Governments (COAG), *Natural Disasters in Australia: Reforming Mitigation, Relief and Recovery Arrangements* (Commonwealth of Australia, 2002), 5.

³ 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/>>.

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

⁵ *Australian Constitution* s 51(xxix).

(which is relevant to the use of the defence force in disaster response), insurance and the payment of social security benefits.⁶

That the Commonwealth has responsibility to respond to a truly national emergency has been recognised by the Auditor-General⁷ 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.⁸

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.⁹ In essence however, NATCATDISPLAN provides that the Prime Minister and the Premier or Chief Minister of the affected jurisdiction will work together to coordinate the necessary response.¹⁰ The plan is not supported by legislation and the Commonwealth has no special or necessary emergency powers to give effect to the plan.

When responding to a natural disaster that falls short of a National catastrophic disaster, the relevant plan is the Australian Government Disaster Response Plan (COMDISPLAN).¹¹ The COMDISPLAN provides how Commonwealth agencies will respond to requests for assistance from the States and Territories but does not envisage any command or coordination role for the Commonwealth. As with NATCATDISPLAN, the plan is not supported by legislation and the Commonwealth has no special or necessary emergency powers to give effect to the plan.

Notwithstanding the broad range of Commonwealth agencies involved in responding to an emergency, there is no equivalent of the Principal Federal Official or Federal Coordinating Officer of the United States¹² to manage and coordinate the Commonwealth response. The Director of Emergency Management Australia might fill the principle coordinating role but without a clear mandate and legal authority, his or her ability to fulfil that role is uncertain. The director has no statutory authority, must seek approval from the Attorney-General and any other relevant minister before committing

⁶ Ibid s 51.

⁷ Australian National Audit Office, above n 1, 40.

⁸ Emergency Management Australia, National Catastrophic Disaster Plan (NATCATDISPLAN) (Commonwealth of Australia, 2010), [2]
<http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/estimates/sup_1011/ag/052_EMA_Attachment.pdf>.

⁹ Ibid [19] and [20].

¹⁰ Ibid, [16] and Attachment 1 'Model Arrangements For Leadership During Emergencies Of National Consequence'.

¹¹ COMDISPLAN, above n 2.

¹² Christine E Wormuth and Anne Witkowsky, *Managing the Next Domestic Catastrophe: Ready (or Not)?* (Center for Strategic and International Studies, Washington DC, 2008).

Commonwealth resources¹³ to a disaster response and cannot direct any of the Commonwealth agencies on how they are to respond to a catastrophic disaster.

The National Security Adviser advises the government on policy response¹⁴ and during a terrorist event or a National Catastrophic Disaster, would chair the National Crisis Committee to, in the event of a terrorist incident 'coordinate information exchange regarding response and recovery within the Commonwealth Government and with the States and Territories'¹⁵ and, in the event of a catastrophic disaster, to 'support the Prime Minister and First Ministers in the coordination of strategic support to the affected jurisdiction(s) to assist in the response ... and recovery'.¹⁶ There is a clear opportunity for role conflict with the Director of EMA. According to the Attorney General's Organisational Chart, the Director of EMA

... is responsible for Operational coordination of responses to all hazards, including natural disasters, terrorism and pandemics. Also incorporates the national security hotline, disaster relief, dignitary protection and protective security.¹⁷

The National Security Advisor does not appear on the chart so his or her line for reporting to the Attorney-General is unclear, and may lead to a situation where the Director of EMA is reporting, via the Departmental Secretary, to the Attorney General whilst the National Security Adviser is reporting to and advising the Prime Minister. Neither the Director of EMA nor the National Security Adviser has a statutory appointment. Without clear legislative authority the existence of multiple office holders can lead to confusion at the time when clarity is most required, that is when responding to a catastrophic disaster. A similar system exists in the United States where different federal officers are given different responsibilities and reporting lines. It has been recommended that the role of federal officers needs to be clearly defined in statute to ensure that there are procedures in place for optimal response.¹⁸

It is interesting to compare this limited role of the Commonwealth and the rather vague provisions of COMDISPLAN and NATCATDISPLAN to the Commonwealth's proposed role if and when Australia is the victim of terrorism. The National Counter-Terrorism Plan provides for the declaration of a 'national terrorist situation'.¹⁹ Where there is a 'national terrorist situation', it is envisaged that the Commonwealth will take on a key leadership and coordination role. The Commonwealth will take on 'overall responsibility for policy and broad strategy'.²⁰ This may require the Commonwealth to determine

¹³ COMDISPLAN, above n 2..

¹⁴ National Counter-Terrorism Committee, *National Counter-Terrorism Plan* (3rd ed, Commonwealth of Australia, Canberra, 2012) [Glossary].
<[http://www.nationalsecurity.gov.au/agd/WWW/rwpattach.nsf/VAP/\(339383A93E59A076831A75961C22D2A2\)~2012NationalCounter-TerrorismPlan.PDF/\\$file/2012NationalCounter-TerrorismPlan.PDF](http://www.nationalsecurity.gov.au/agd/WWW/rwpattach.nsf/VAP/(339383A93E59A076831A75961C22D2A2)~2012NationalCounter-TerrorismPlan.PDF/$file/2012NationalCounter-TerrorismPlan.PDF)>

¹⁵ *National Counter Terrorism Plan*, above n 14.

¹⁶ NATCATDISPLAN, above n 8, [17].

¹⁷ <http://www.ag.gov.au/About/Documents/Attorney-Generals%20Department%20Organisational%20Chart.pdf>.

¹⁸ Ronald Waldman, 'Responding to Catastrophes: A Public Health Perspective' (2005–2006) 6 *Chicago Journal of International Law* 553; Christine E. Wormuth and Anne Witkowsky, *Managing the Next Domestic Catastrophe: Ready (or Not)?* (Center for Strategic and International Studies, Washington DC, 2008) vii-viii.

¹⁹ National Counter-Terrorism Plan, above n 14, [101].

²⁰ *Ibid* [102].

‘overall policy objectives’ as well as ‘setting priorities between policy objectives where resources are inadequate, pre-positioning resources, international liaison, and determining public communication messages’.²¹ The Nation Counter-Terrorism Plan provides specific roles for:

- The Council of Australian Governments (COAG);
- The National Counter-Terrorism Committee;
- The National Crisis Committee;
- The Australian Government Crisis Coordination Centre;
- State and Federal Police commissioners;
- Emergency management Australia;
- The Australian Health Protection Committee;
- The Security Standing Sub-Committee (Security SSC) of the Standing Committee on Transport;
- The Australian Security Intelligence Organisation (ASIO);
- National Security Committee of Cabinet;
- The Secretaries Committee on National Security;
- The National Security Adviser;
- The Australian Government Crisis Committee;
- The Interdepartmental Emergency Task Force;
- Australian Government Disaster Recovery Committee;
- National Security Policy Coordination Group;
- State and Territory security coordination bodies; and
- State or Territory Crisis Centres.

COMDISPLAN on the other hand mentions a role for the Australian Government Counter Disaster Task Force (AGCDTF) and the Australian Government Disaster Recovery Committee (AGDRC). The NATCATDISPLAN provides a role for the National Crisis Committee and an ad hoc coordinator.

What is evident is the far greater level of planning in the response to a terrorist event, than a response to an extreme weather event even though either may cause massive disruption to the community and the economy. A similar Commonwealth response would be appropriate following a national, natural disaster.²² There is nothing inherent in terrorism that brings it within the Commonwealth sphere or when it comes to response and recovery, sets it aside from natural disasters.²³ The fact that the Commonwealth has chosen to provide for a national coordinated effort following a terrorist incident demonstrates that the Commonwealth could do the same with respect to natural disaster response (which is discussed in more detail, below) but it has chosen not to.

²¹ Ibid.

²² Anthony Bergin and David Templeman, *Get ready for the big one* (2009) *The Australian* <<http://www.theaustralian.news.com.au/story/0,25197,25148472-5015664,00.html>>.

²³ David Templeman and Anthony Bergin, *Taking a punch: Building a more resilient Australia*, (Australian Strategic Policy Institute, Canberra, 2008) 8.

Local Government

The Productivity Commission, in its draft report 'Barriers to Effective Climate Change Adaptation' said

... local governments are primarily responsible for managing disasters in their local government area, while other agencies such as the police and State Emergency Service perform emergency management activities on a larger scale under command structures determined at the state or territory level.²⁴

With respect to the productivity commission that does not reflect the law in most Australian States and Territories (the notable exception is Queensland). If we take New South Wales as an example, the Local Government Act 1993 (NSW) makes very little mention of the role of local government in emergency response. That Act says that 'A council has the functions conferred or imposed on it by or under any other Act or law' and then lists relevant laws. In terms of emergency response the identified laws are:

- The *Fire Brigades Act 1989* (NSW) which imposes an obligation on councils to pay contributions toward the costs of maintaining the fire brigades.
- The *State Emergency Service Act 1989* (NSW) which requires council to recommend a person for appointment as the local SES controller; and
- The *State Emergency and Rescue Management Act 1989* (NSW) which requires a council to prepare for emergencies.²⁵

The *State Emergency and Rescue Management Act 1989* (NSW) provides that in preparing for an emergency, the Local Government is to provide secretarial support to the Local Emergency Management Committee that prepares the local emergency plan.²⁶ The response to any actual emergency is managed by the designated combat agency or the police.²⁷ Response operations are supported by the Local Emergency Operations Committee that is established by the Local Emergency Operations Controller who is a police officer not a council employee or nominee.²⁸

It is simply not true that Local Governments 'are primarily responsible for managing disasters in their local government area' at least not where those emergencies are caused by extreme weather events. In that case it will be the State Emergency Service, NSW Fire and Rescue or the NSW Rural Fire Service, or NSW Police that are primarily responsible for managing *the response* (recognising that there is a difference between emergency management and emergency response) to an emergency whether it is a small incident or a state wide disaster.

Local Governments are however closest to the community and to repeat an aphorism, are there before, during and after the disaster. Further assertions that they are 'are primarily responsible for managing disasters in their local government area' must be confusing where local governments are neither resources, nor statutorily empowered to exercise that sort of control.

²⁴ Productivity Commission, *Draft Report: Barriers to Effective Climate Change Adaptation* (Commonwealth of Australia, 2012), 197-198.

²⁵ *Local Government Act 1993* (NSW) s 22.

²⁶ *State Emergency and Rescue Management Act 1989* (NSW) ss 28 and 29.

²⁷ *Ibid*, s 31.

²⁸ *Ibid*; NSW State Emergency Management Plan (DISPLAN) (Government of NSW, 2012), [420]-[423].

As noted, the exceptional difference is Queensland. In that State it is an expressed principle that 'local governments should primarily be responsible for managing events in their local government area'.²⁹ Local Governments are required to ensure that they have a disaster response capacity³⁰ which means

... the ability to provide equipment and a suitable number of persons, using the resources available to local government, to effectively manage, or help another entity to manage, an emergency situation or a disaster in the local government area.³¹

Local Disaster Management Groups are established and the coordinator for that group is a local government employee and who is to coordinate disaster operations.³² In most States the State Emergency Service is an independent statutory authority³³ that reports to the relevant Minister and Local and Regional Controllers report to their Commissioner or Chief Officer. In Queensland it is the Chief Executive of the Department of Community Safety that must establish an SES unit for a local government area and determine, in agreement with the Local Government, determine the responsibilities for both the local government and the SES in that area. The establishment of Local Disaster Management Groups with clearer roles for local government give local government a much greater, and direct role in managing the response to an emergency including an emergency caused by an extreme weather event.

Recommendations

With reference to the current roles and responsibilities for the Federal government, I make my recommendation in the next section.

With reference to the current roles and responsibilities for local government, I note that the Productivity Commission recommended:

... state and Northern Territory governments should publish a comprehensive list of laws which delegate regulatory roles to local governments. This would assist state, territory and local governments to assess whether local governments have the capacity to effectively discharge their roles.³⁴

It is my submission that this recommendation should be adopted but it needs to go further. Local Governments are the creation of State Government and State Governments need to expressly state what are the roles and functions of local government in emergency management and, in the context of this submission, emergency response to hazards posed by extreme weather events. In most States and Territories the role of local government is assumed, rather than express. As the Productivity Commission has noted 'Poorly-defined roles and responsibilities and inadequate coordination in emergency management may arise from existing institutional arrangements'³⁵ and the confusion shown by the

²⁹ *Disaster Management Act 2003* (Qld) s 4A(c).

³⁰ *Ibid*, s 80.

³¹ Department of Community Safety, *Queensland Local Disaster Management Guidelines* (Queensland Government, 2012), [3.1].

³² *Disaster Management Act 2003* (Qld) s 29, 35 and 36.

³³ See, for example, the *State Emergency Service Act 1989* (NSW).

³⁴ Productivity Commission, above n 24, Draft Recommendation 7.1, p 20.

³⁵ *Ibid*, 197.

Commission, effectively citing the Queensland Disaster Management Act as a model for the nation, demonstrates how poorly defined the role of local government is.

State Governments should expressly set out the role of local government in emergency response and clearly articulate the relationships between state agencies and local governments when it comes to emergency response. The presence of state agencies such as the fire services and State Emergency Services, with mandated 'combat roles' for responding to natural hazards and vague requirements on councils to 'prepare for emergencies' does not adequately articulate the roles and responsibilities for local government in responding to extreme climate events.

... The steps required for effective national coordination of climate change response ... (terms of reference (g)).

Effective national coordination of response to extreme weather events caused by climate change requires, ideally the passage of Commonwealth legislation. I have argued elsewhere the Constitutional basis for that legislation and suggested models based on the legislative experience in Canada and the United States.³⁶ **I have taken the liberty of including a full copy of my paper 'Responding to catastrophic natural disasters and the need for Commonwealth legislation' as part of this submission.**

In essence if there is to be national coordination it will necessarily require the appointment of a national coordinator (whether an individual, an agency or a committee) with the necessary powers to require agencies and states to be coordinated. 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.³⁷ 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.³⁸

Governments may seek to rely on non-statutory emergency powers and in particular, the executive power of the Commonwealth³⁹ but increasingly powers of this sort are provided for in legislation. 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.⁴⁰

³⁶ See above, n 1.

³⁷ Clement Fatovic, *Outside the Law: Emergency and Executive Power* (John Hopkins University Press, 2009) 4.

³⁸ H P Lee, *Emergency Powers* (Law Book, 1984) 171–172.

³⁹ *Australian Constitution* s 61; *Pape v Commissioner for Taxation* (2009) 238 CLR 1.

⁴⁰ 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.⁴¹

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.⁴² There is, however, no similar legislation to empower the Commonwealth, Ministers or Commonwealth agencies during a catastrophic natural disaster. Defence aid to the civil community, as with other Commonwealth disaster response arrangements, are governed by administrative arrangements only.⁴³

Recommendation

The Commonwealth, and the Australian community, would be better served by clear legislative provisions detailing the roles and responsibilities of the Federal government including 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, extreme weather event. 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.

Yours sincerely

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⁴¹ Fatovic, above n 37, 263.

⁴² *Australian Constitution* ss 51(vi), 61 and 119; *Defence Act 1903* (Cth) Part IIIAAA.

⁴³ Defence Instruction (General) OPS 05-1, *Defence Assistance to the Civil Community – policy and procedures*. Emergency Management Australia, COMDISPLAN, above n 2; NATCATDISPLAN, above n 8.