

5 May 2020

Our ref: VK/MC

Royal Commission into National Natural Disaster Arrangements
Locked Bag 2000
Manuka, ACT 2603

By email: [REDACTED]

Dear Sir/Madam

Royal Commission into National Natural Disaster Arrangements

Thank you for the opportunity to provide feedback on the issues raised in the terms of reference to the inquiry (the **Terms of Reference**). The Queensland Law Society (**QLS**) appreciates the opportunity to comment on the important issues which are under review.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with assistance provided by the QLS First Nations Committee and the Access to Justice Committee, in addition to members who have substantial expertise in this area.

We provide the following in response to the Terms of Reference as listed in the Letters Patent.

QLS is pleased to see the Terms of Reference acknowledge the role of climate change in the extreme bushfire season Australia experience in 2019-2020, resulting in devastating loss of life, property and wildlife, as well as environmental destruction across the nation. We also note and support the acknowledgement in the Terms of Reference that the changing climate carries risks for the Australian environment and consequently that action must be taken.

We agree that this action must include the development and implementation of adaptation actions to address the consequences of longer, hotter, drier seasons and severe weather events. Importantly however, action must also have a strong mitigation focus. The scientific consensus supports the critical need for immediate action to limit the devastating consequences of climate change to the greatest extent possible.

Climate change presents unprecedented challenges for society and its impacts will be increasingly detrimental for human health and wellbeing as well as for Australia's economy, government and legal system.¹ To this end, QLS advocates for a robust legal framework for

¹ <https://www.csiro.au/en/Research/OandA/Areas/Oceans-and-climate/Climate-change-information>.

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the implementation and management of climate change related mitigation and adaptation measures.

- a. **the responsibilities of, and coordination between, the Commonwealth and State, Territory and local Governments relating to preparedness for, response to, resilience to, and recovery from, natural disasters, and what should be done to improve these arrangements, including with respect to resource sharing;**

The responsibilities of, and coordination between, the Commonwealth and State, Territory and local Governments relating to natural disasters are complex. To briefly summarise some of the frameworks, government bodies, guidelines and policies that deal with disaster resilience, we have outlined some of the many organisations, committees, departments and working groups who are tasked with aspects (sometimes overlapping), in the development and distribution of policy related to emergency management.

These include the Australian Institute for Disaster Resilience (**AIDR**), which is responsible for developing, maintaining and sharing knowledge to support disaster resilience. AIDR is funded by Emergency Management Australia, a division of the Department of Home Affairs.

Emergency Management Australia is responsible for the coordination of the Australian Government's physical and financial support for disasters and emergencies. It is guided by the National Strategy for Disaster Resilience, and is also tasked with leading the Australian Government's work on the United Nation's global blue print, to build the world's resilience to natural disasters.

Emergency Management Australia houses the Australian Government Crisis Coordination Centre, which provides 'whole-of-government' situational awareness to inform national decision-making during a crisis.

We note that firefighting aircraft are wholly managed by the National Aerial Firefighting Centre (**NAFC**) which was formed by Australian States and territories in July 2003 to provide a cooperative national arrangement for combating bushfires. The national aircraft fleet complements aerial firefighting resources that are arranged directly by the States and Territories. The national fleet receives funding support from the Australian Government as well as State and Territory Governments. NAFC also has a key role in ensuring the sharing of aerial firefighting resources between emergency services and land management agencies throughout Australia.

On 1 July 2018, NAFC transitioned to become a business unit of the Australian Fire and Emergency Service Authorities Council (**AFAC**).

AFAC is responsible for facilitating resources including the sharing of firefighters, specialists and aircraft, enabling national and international responses to large scale emergency events, delivering firefighting resources through the AFAC National Resource Sharing Centre and aircraft through the NAFC.

It is apparent that much of the funding, policy, and 'housing' of agencies and committees tasked with natural disaster preparedness and resilience is the responsibility of the Federal Government, largely under the Department of Home Affairs. The above snapshot does not include any guidelines, frameworks and preparedness programs developed and utilised by the various State and Territory emergency management agencies.

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The issue appears to be a need for greater understanding, at all levels of government and by the community, about which authorities and frameworks are relevant in a specific natural disaster in practical terms.

This Royal Commission provides an important opportunity to conduct a thorough review of existing frameworks and authorities and resolve a clear way forward. A key outcome of this Royal Commission must be a clear set of standards and a framework that avoids duplication and inconsistency. A clear chain of responsibility should also be included in any review and redesign of the response and recovery framework/s.

We note the comprehensive reports and recommendations which have been made in the course of prior Royal Commissions and other government-led inquiries², and which in some instances, are directly relevant to the issues and questions raised in these Terms of Reference. We suggest that a comprehensive review of the recommendations published by previous inquiries be undertaken in the course of this inquiry, to avoid duplication and importantly, to identify repeated recommendations and whether they have been subsequently and properly implemented by Government.

- b. **Australia's arrangements for improving resilience and adapting to changing climatic conditions, what actions should be taken to mitigate the impacts of natural disasters, and whether accountability for natural disaster risk management, preparedness, resilience and recovery should be enhanced, including through a nationally consistent accountability and reporting framework and national standards;**

In accordance with our commitment to evidence-based policy, QLS recognises the scientific consensus that the climate is changing as a result of human activity. According to the UN Intergovernmental Panel on Climate Change (IPCC) and the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the climate is warming due to the emission of greenhouse gases. This warming has a number of impacts that are detrimental to the natural environment and to society, which is reliant on that environment.

Climate change will have significant consequences for human rights, including those now explicitly recognised in the new *Human Rights Act 2019* (Qld) and international instruments. These include the right to life, the right to privacy, family and home, the rights of children and cultural rights.

The Australian Human Rights Commission (the **AHR Commission**) has recognised the social and human rights implications of climate change. It is the AHR Commission's view that the right to life will be impacted by the effects of climate change both immediately, for example, through extreme weather events which cause death, and gradually, for example, through deterioration of health, reduced access to safe food and drinking water and increased susceptibility to disease.³

² See for example: 2003 (national): 'A Nation Charred: Inquiry into the Recent Australian Bushfires', House of Representatives Select Committee on the Recent Australian Bushfires. G. Nairn, Chair; 004 (national): Council of Australian Governments National Inquiry into Bushfire Mitigation and Management. S. Ellis et al; 2010 (Victoria): Victorian Bushfires Royal Commission Final Report. B. Teague et al.

³ <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/climate-change-and-human-rights>.

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QLS notes the international commitments made by Australia as a signatory to the Paris Agreement.⁴ To achieve the aims of the Paris Agreement to limit global warming to 1.5 degrees Celsius, a reduction in emissions is required with a view to achieve net zero emissions by 2050. This commitment fully compliments Australia's objective of mitigating the impacts of natural disasters.

QLS emphasises the need for an evidence-based domestic legislative framework that will effectively allow Australia to meet its Paris Agreement commitments, improve adaptation to changing climatic conditions and mitigate the impacts of natural disasters.

The legal system is a critical tool for both State and Federal governments in reducing emissions. QLS emphasises the need for an evidence-based legislative framework that will effectively allow Australia to meet its emission reduction commitments pursuant to the Paris Agreement.

The legal framework should:

- include clear accountability pathways;
- set out targets and reporting to achieve the agreed emissions reduction levels;
- mandate measures to reduce negative impacts of climate change and environmental degradation on the community;
- enable the equitable transition of those relying on carbon intensive industries to more sustainable alternatives, including with financial assistance; and
- require the government to lead by example in its procurement of energy, vehicles and other resources, and in its investment in research and development of sustainable technologies.

Further, any review undertaken regarding the existing legal framework's suitability to appropriately manage and mitigate national natural disasters and their effects must consider amending the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**). Protecting 'matters of national environmental significance' is a fundamental objective of the EPBC Act,⁵ as is the conservation of biodiversity.⁶

The 2019-2020 bushfires resulted in significant damage to many areas of 'national environmental significance', including to seven of Australia's nineteen World Heritage sites⁷ as well as causing substantial agricultural, habitat and animal losses.

In order for the objectives of the EPBC Act to be met amendments must be made to:

- recognise the impacts of climate change as a major risk to achieving the environmental and biodiversity protections required under the Act, as well as an inherent future risk to 'matters of significant national environmental significance';
- clarify the Act's objectives under section 3, to include the need for proactive action and mitigation steps to limit future environmental and biodiversity impacts; and

⁴ <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>.

⁵ *EPBC Act 1999* (Cth) s 3(1).

⁶ *Ibid.*

⁷ Department of Agriculture, Water and the Environment, 'Wildlife and Threatened Species Bushfire Recovery Research and Resources' (Impact of Bushfires on World Heritage Areas), Australian Government, available at: <http://environment.gov.au/biodiversity/bushfire-recovery/research-and-resources>; Department of Agriculture, Water and the Environment, 'Australia's World Heritage List', Australian Government, available at: <https://www.environment.gov.au/heritage/places/world-heritage-list>.

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- expand the Minister's mandatory considerations when deciding whether or not to approve an action under section 136, to include the cumulative contribution to global greenhouse gas emissions of a project.

c. whether changes are needed to Australia's legal framework for the involvement of the Commonwealth in responding to national emergencies, including in relation to the following:

- i. thresholds for, and any obstacles to, State or Territory requests for Commonwealth assistance;**
- ii. whether the Commonwealth Government should have the power to declare a state of national emergency;**
- iii. how any such national declaration would interact with State and Territory emergency management frameworks;**
- iv. whether, in the circumstances of such a national declaration, the Commonwealth Government should have clearer authority to take action (including, but without limitation, through the deployment of the Australian Defence Force) in the national interest;**

It is critical that there is no doubt or uncertainty about the responsibility of each level of Government in Australia in responding to national emergencies.

Most natural disasters will typically be fairly localised, in which case primary responsibility should rest with the State or Territory, in consultation with the affected local governments.

It is well understood that responsibility for preparedness for fire events and safety outcomes is one that is shared by the Commonwealth, State/Territory and local governments, fire agencies, and some individuals. The 2009 Victorian Bushfires Royal Commission (the **Victorian Bushfires Royal Commission**) reports on this, stating *"The recommendations further reflect the Commissions' recognition that individuals, fire agencies and Commonwealth, State and local governments share responsibility for preparing for fire and improving people's safety."*⁸

However, some emergencies will be of a truly national nature, as demonstrated by the 2019-2020 bushfires and the current COVID-19 pandemic. With the anticipated increasing effect of climate change, national natural disaster emergencies may become more frequent.

In such national emergencies, there is clearly a role for the Commonwealth and that role should be clearly defined.

It is arguable that this power is effectively already held by the Commonwealth Government. There is residual power in the Commonwealth to deal with emergency events that are national in scale, and as a result some or all aspects of these events can only be dealt with by the Commonwealth.

⁸ http://royalcommission.vic.gov.au/finaldocuments/summary/PF/VBRC_Summary_PF.pdf page 2 under heading 'The Royal Commission'.

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Where a disaster requires a coordinated national response, or affects more than one state or territory, it is suggested that the Commonwealth already harbours the necessary power to take responsive actions that would normally fall within the purview of the states.⁹

This is supported by the High Court following consideration of this power in *Pape v Commissioner for Taxation*.¹⁰ On the question of executive powers, a majority of the court concluded that the Australian Constitution supports the use of these powers. Gummow, Crennan and Bell JJ stated:

*"As already mentioned, that there is a global financial and economic crisis is not contested in this proceeding. It can hardly be doubted that the current financial and economic crisis concerns Australia as a nation. Determining that there is the need for an immediate fiscal stimulus to the national economy in the circumstances set out above is somewhat analogous to determining a state of emergency in circumstances of a natural disaster. The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis on the scale here. This power has its roots in the executive power exercised in the United Kingdom up to the time of the adoption of the Constitution but in form today in Australia it is a power to act on behalf of the federal polity."*¹¹

Where there is a disaster that warrants disaster relief to flow from overseas, the Commonwealth has particular interest because of its responsibility for managing Australia's 'external affairs'.¹²

When addressing this particular term of reference, QLS suggests that to the extent that there is any uncertainty and that changes are needed to Australia's legal framework, the following approach should be applied:

- The Commission must determine whether there is a gap which requires a legislative solution. If section 61 of the Constitution already responds to a national emergency, then it is a policy or structural solution which is required by the executive, not a legislative solution.
- If there is no legislative gap, the Commission must also determine whether the existing processes at both State and Federal level overlap, are inconsistent, or involve duplication of responses.
- In our federal system, any solution must be one which is supported by States and Territories, as well as the Commonwealth.
- If the recommended solution involves the referral of powers by the States to the Commonwealth, this will take time given that it requires legislation across the country. The solution will need to be carefully developed and balanced, in order to be acceptable to all parties.
- Any new process developed must avoid duplication or inconsistency across different levels of government and different agencies. Otherwise, it will lead to confusion when agencies seek to implement the new process at a time of crisis.
- The solution must set out clear processes and triggers for the involvement of:

⁹ <http://www.austlii.edu.au/au/journals/CanLawRw/2011/30.pdf> Canberra Law Review (2011) Vol. 10, Issue 3, pg 90.

¹⁰ [2009] HCA 23

¹¹ *Pape v Commissioner for Taxation* [2009] HCA at [232].

¹² *Australian Constitution* s 51 (xxix).

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- The Commonwealth
- Each State and Territory government
- The relevant emergency services
- Any new framework must be flexible enough to absorb and respond to new scientific developments or other best practice outcomes identified by relevant experts.
- The funding arrangements between the Commonwealth and other levels of government must be clear and well-understood in advance of an emergency. Knowing in advance what funds are available and who has the authority to spend those funds ensures that each agency can take immediate action as required, without losing time to paperwork and additional authorisations. This is particularly critical if the necessary equipment must be sourced from overseas, as in the bushfire crisis.

The solution must be developed now, in advance of any future emergency. Legislation passed in the time of an emergency tends to be rushed, developed with little public or parliamentary scrutiny and is likely to be “over-inclusive or under-inclusive, indiscriminate, or unenforceable.”¹³ Such a solution (legislative or otherwise) is likely to include extraordinary powers for various government agencies.

It is important that there is an opportunity for public consultation and wide-ranging debate about what will be an acceptable level of government control in such times, without the urgency attached to an unfolding crisis.

In terms of how Commonwealth processes would interact with State processes (paragraphs (ii) and (iii)), the National Cabinet which has been convened in response to the current COVID-19 pandemic provides an example of how communication is key. The current emergency is being responded to by way of a mix of federal and State announcements and directives, with an overarching body of first Ministers coordinating the response.

We note that the current National Cabinet is developing policy in line with the scientific advice about the pandemic and its impacts. The same process should be adopted with respect to natural disaster management.

- e. ways in which Australia could achieve greater national coordination and accountability — through common national standards, rule-making, reporting and data-sharing — with respect to key preparedness and resilience responsibilities, including for the following:**
- i. land management, including hazard reduction measures;
 - ii. wildlife management and species conservation, including biodiversity, habitat protection and restoration;
 - iii. land-use planning, zoning and development approval (including building standards), urban safety, construction of public infrastructure, and the incorporation of natural disaster considerations;

QLS agrees that greater national coordination and accountability in relation to each of the areas listed under clause f (i) – (iii) above will assist in preparedness to and resilience against

¹³ <http://www.austlii.edu.au/au/journals/CanLawRw/2011/30.pdf> Canberra Law Review (2011) Vol. 10, Issue 3, pg 85

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future natural disasters, including bushfires which are of national or multi-state and/or territorial effect.

We refer to our responses to clauses a. and b. above, and reiterate that any legislative measures which may be introduced, or any efforts to refine existing and intersecting frameworks to improve national cohesion and clarify accountability must be underpinned by the evidence setting out the scientifically concluded causative factors to those disasters.

f. any ways in which the traditional land and fire management practices of Indigenous Australians could improve Australia's resilience to natural disasters.

Aboriginal and Torres Strait Islander Peoples have been caring for country since time immemorial, and the practices of Australia's Indigenous Peoples have continued to develop for 65,000 years. The collective traditional ecological knowledge held by Aboriginal and Torres Strait Islander peoples is unique, specific to geographic locality, and if properly and collaboratively utilised, can enhance the ways in which Australia approaches the protection and conservation of our biodiversity and environment.

It is essential to engage and consult with the appropriate Aboriginal and Torres Strait Islander peoples, that is, those with authority and knowledge of country. There exists not only an intimate knowledge of traditional ecological practices, but also a cultural and spiritual obligation to the land and waters that Aboriginal and Torres Strait Islander peoples are connected to. This knowledge cannot be underscored enough, and is a critical component of effective land management and environmental protection.

In engaging Aboriginal and Torres Strait Islander peoples, QLS suggests that those persons and groups who are recorded in the system of Representative Aboriginal And Torres Strait Islander Bodies (also known as Native Title Representative Bodies), which sets out the Native Title Holders for a particular country, will assist with determining who are the right persons to be consulted with in relation to a specific area of land. However, further due diligence may be required, and consultation with Prescribed Bodies Corporate (**PBC**) may also be utilised where a PBC has been established following a determination of native title.

It must be noted that traditional land management practices and caring for country will vary from place to place, and in response to the various kinds of environment. Incorporation of traditional land management, particularly as a critical component of preparing for bushfires and natural disaster events against the background of a climate which is evidentially becoming increasingly hotter and drier, must be cognisant of these landscape variances. Fire management and flora and fauna care strategies developed to increase preparedness for bushfire and natural disaster events would benefit from the inclusion of unique traditional ecological knowledge.

A practice of Traditional Owners that is commonly known to wider Australia is the practice of "burning country", which clears the land from excess and is the catalyst for various native flora to germinate and rejuvenate. This practice has largely been suppressed across much of the country, and as a result, has largely impacted on the ability of Traditional Owners to engage with land management practice. The outcomes of this reduced practice and land management consultation was demonstrable in the recent bushfires, impacting on the ability of fire services to adequately prepare and reduce fire hazards.

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We submit that regard should also be had to:

- the Convention on Biological Diversity (ratified by Australia in 1993), and in particular Articles 8 (In-situ Conservation), 17 (Exchange of Information), and 18 (Technical and Scientific Cooperation) relating to the use of Traditional Knowledges and the involvement of Indigenous Peoples;
- Indigenous intellectual property and Traditional Knowledges of biological diversity should not be exploited and mechanisms need to be developed to ensure the protection against this;
- Adequate systems of consultation and remuneration are needed if Traditional Owners are to be mobilised to engage and assist with land and environmental management. It is recommended that engagement with Traditional Owners is supported by access to culturally appropriate independent legal and other professional advice, as may be required.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor Vanessa Krulin via [REDACTED] or by phone on [REDACTED]

Yours faithfully,

[REDACTED]
Luke Murphy
President