

Coordination of federal, state and local disaster management arrangements in Australia

Lessons from the UK and the US

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Executive summary

There are gaps in Australia's emergency management legislation. The states and territories have extensive and comprehensive emergency management legislation, but the provisions dealing with local government range from almost non-existent (in New South Wales) to significant (in Queensland) despite the clear recognition that local government has, or should have, an important role in this area. The Commonwealth has no federal emergency management legislation, and the Australian Government's authority to act during times of national crisis can be, and has been, challenged.

Australia shares political traditions with both the UK and the US. Analysis of key legislation from those jurisdictions—the Civil Contingencies Act 2004 (UK) and the Robert T Stafford Disaster Relief and Emergency Assistance Act (US)—reveals important learning that could be adopted in Australia. The UK's Civil Contingencies Act provides an example of legislation that if modelled by the Australian states and territories would go a long way to mainstreaming local government involvement in contingencies management.



Graphic of gavel, law book and Australian flag © zerbor/shutterstock.

The UK Act has less application at the Commonwealth level, given the different constitutional arrangements in Australia. For the Commonwealth, an Act modelled on the US Stafford Act would provide legislative authority for Commonwealth action, thereby reducing the possibility of legal challenge to the validity of emergency arrangements. Such emergency management legislation would also identify how the Commonwealth response is to be coordinated and managed. It would help ensure that there could be a considered whole-of-government response to any overwhelming national disaster. A Stafford-type Act may provide a clearer way through the maze that is Commonwealth–state relations at a time when action is required and clarity of responsibility is most urgently needed.

Introduction

Effectively planning for and responding to a catastrophic natural disaster is beyond the capacity of any single agency or government. It's generally recognised in most developed economies that responsibility for all aspects of disaster management—across the spectrum of prevention, preparation, response and recovery (PPRR)—is shared between government, individuals, the business and non-government sectors, and communities.

This is more complex in a federation, such as Australia, where responsibility is shared between the federal government, the state and territory governments and local government.

Unlike many economies, such as the UK, the Australian Government has no defined legislative standing over other jurisdictions regarding emergency and disaster management issues. While current administrative arrangements assign emergency management to the Attorney-General's Department, this connection is not a legislative enabler but rather an allocation of responsibility.

This paper considers legal arrangements for the allocation of responsibility for disaster management across the three levels of government in Australia in contrast to the UK's Civil Contingencies Act and the Stafford Act in the US. It argues that the Australian states could benefit from a UK-type Act, and the Commonwealth from an Act more aligned to the US legislation.

Section 1 reviews the emergency management arrangements in Australia, identifying gaps in Australian emergency legislation and authority. Australia is a federation in which state and territory governments exercise significant independent authority, so this identifies the role of the state and federal governments.

Section 2 provides an overview of the UK Civil Contingencies Act. This Act sets out how emergencies or disasters are managed in the UK and how responsibility is shared between the national government and local authorities. As a modern, comprehensive piece of legislation, this Act is offered as an example of 'exemplary practice'.

Section 3 undertakes a similar analysis of the Stafford Act in the US. The US, like Australia, is a federation in which responsibilities are shared between the state and federal governments. This Act governs the federal response to disasters and may have significant learning for Australia.

Finally, Section 4 considers whether there are provisions of the UK and US legislation that can or should be adopted in Australia and whether an Australian Civil Contingencies Act, or Stafford Act, would be a useful addition to the Australian emergency management legislative framework.

But first, some terminology.

The words 'disaster' and 'emergency' are sometimes interchangeable. Within the Australian emergency management community, an 'incident' is an event that is business as usual for the emergency services. For example, a car accident or a house fire is described as an 'incident'. A disaster or emergency is the impact of a hazard at a larger scale, whether a natural hazard such as a fire, flood or storm, or a human-caused incident such as an explosion or industrial accident. A disaster or emergency will normally require a significant multiagency response. The immediate event may last for days or weeks, and community recovery may be complex and take a great deal of time.

In some states and territories, such an event is referred to as a 'disaster' and there may be a formal 'disaster declaration'¹; other jurisdictions use the term 'emergency', with corresponding 'emergency declarations'.² The Northern Territory provides for both a state of emergency and a state of disaster.³ The choice between 'emergency' and 'disaster' is of little significance, provided it's understood that this paper is considering the response to events that have a significant and extended impact upon the affected area and the communities and people within that area.

1. The position in Australia

There's no single legal position on emergency management arrangements in Australia. The arrangements for responding to a 'civil contingency' or emergency vary among the states and territories.

The Commonwealth

The starting point for identifying the legal position in Australia (to the extent that there is one) is the Australian Constitution. This foundation document makes no specific mention of disasters or emergencies, so the distribution of relevant powers between the various levels of government is a matter to be inferred. The Australian Parliament doesn't have the power to make laws on any subject that it chooses; it's limited by the Constitution and most importantly section 51, which lists 39 subject areas that are within the Commonwealth's legislative authority.

Disasters or emergencies aren't in that list, but that doesn't mean the Commonwealth is powerless. The areas within the Commonwealth's jurisdiction are affected by disasters and are relevant to preparing for and responding to disasters. For example, maintaining telecommunications in a disaster and ensuring that adequate telecommunications bandwidth is available to the emergency services would fall within the Australian Government's jurisdiction, as the Commonwealth has the power to make laws with respect to 'postal, telegraphic, telephonic, and other like services'. The Commonwealth also has the power to make laws with respect to social security, so the payment of support to disaster victims is also a matter of Commonwealth responsibility.

With no specific legislative authority, the Commonwealth sees its primary role as providing some funding for mitigation and prevention activities, providing federal assets to assist the states during a time of disaster and providing significant post-disaster or recovery funding. Elsewhere, I've argued that, apart from responding to requests for assistance from disaster-affected states, the Commonwealth should acknowledge that it has a responsibility to lead the response to a disaster of such widespread and significant impact as to be a 'national' disaster:

... the Commonwealth has significant interests and associated legislative powers that would allow the Commonwealth to pass legislation to define its role in responding to a disaster of national consequence ... the Commonwealth, and the Australian community, would be better served by a clear legislative statement detailing who, on behalf of the Commonwealth, is empowered to exercise the necessary, extraordinary emergency powers that will be required when responding to an unlikely, but devastating, national disaster.⁴

Even so, it remains the case that there's no overarching national disaster legislation.

Under current legal arrangements, oversight of federal emergency management is the responsibility of Emergency Management Australia (EMA), an administrative unit within the Attorney-General's Department. In December 2011, a Minister for Emergency Management was appointed but that office existed only until March 2012, when the portfolio responsibility was returned to the Attorney-General, who took on the title of 'Attorney-General and Minister for Emergency Management'. Following the 2013 federal election, the new government removed the reference to 'emergency management'. Today, emergency management is the responsibility of the Minister for Justice, a junior minister in the 'outer ministry'.

There's no legal provision for the minister, the department, EMA or any person to take on a role of 'federal emergency coordinator' or 'federal coordinating officer' in Australia. Coordination of a whole-of-federal-government response could be managed by the processes of the National Security Committee⁵ or the cabinet, save that the minister with portfolio responsibility for emergency

management isn't a member of either of those bodies. Without a voice in cabinet and with no legislated powers to direct or allow government departments to depart from 'business as usual' in an emergency, the Commonwealth response may be constrained and may be subject to legal challenge.⁶

The situation in 2017 remains as Templeman and Bergin described it in 2008:

The Commonwealth agency seen to be responsible for [Commonwealth disaster response] ... Emergency Management Australia (EMA), has no mandate, legislation or Cabinet endorsement with which to take command. The delivery of EMA functions for the most part is the result of goodwill on behalf of other agencies. This is clearly not a satisfactory situation.⁷

State and territory governments

The states existed as colonies prior to federation and retain legislative powers that allow them to make laws on any matter that is not within the exclusive power of the Commonwealth. Where a state law is inconsistent with a valid Commonwealth law, the Commonwealth law prevails.⁸

The Northern Territory and Australian Capital Territory are subject to the legislative power of the Commonwealth, but they have been given the right of self-government. For all practical purposes, the territories are in the same position as the original states and in the context of this work are discussed as if they were states.

In the absence of overarching Commonwealth legislation or an effective delegation to local government, emergency management remains primarily a matter for the states and territories. Except in Tasmania, each state and territory government has a Minister for Emergency Services.⁹ Only Tasmania has a minister responsible for emergency *management*.¹⁰ Having a Minister for Emergency Management may go some way to making emergency management a whole-of-government affair. Canada, for example, has a Minister of Public Safety and Emergency Preparedness to exercise leadership in emergency management. The minister has statutory authority to ensure that there are policies and plans in place, and across government, to mitigate, prepare for and respond to national emergencies. He or she is tasked to coordinate the response by the Canadian Government to an emergency and to participate in international emergency management activities. A similar role for an Australian minister (at both state and federal levels) would go some way to ensuring a whole-of-government approach to all aspects of emergency management.

Each state and territory government has established emergency response agencies as well as overarching emergency or disaster management legislation. It's in that legislation, and in supporting state emergency management plans, that the roles of various agencies are set out. The focus of the legislation and the various plans tends to be on preparing for, responding to and recovering from an emergency. While the plans recognise the need to mitigate risk and develop resilience, taking steps to prevent losses or taking a long-term approach to developing a resilient community are not part of an emergency plan but are expected to be considered in 'business as usual' (for example, when state departments and local governments are making land-use planning decisions).

In terms of emergency powers, the legislation does provide that a relevant minister, appointed emergency controller or, in some cases, senior police can exercise authority to restrict movement, commandeer property and the like. Only in Victoria can the minister suspend the operation of legislation that is impeding the emergency response or recovery operations.¹¹

Local government

There are 547 local government bodies in Australia¹² with 'about 6,600 elected councillors'.¹³ Even so, local government isn't mentioned in the Australian Constitution. What follows is that the creation of local government is a matter for the state and territory governments. Except for the Australian Capital Territory, each Australian jurisdiction has passed a Local Government Act to establish local government authorities and define their roles and responsibilities. The functions of local government include:

- infrastructure and property services, including local roads, bridges, footpaths, drainage, waste collection and management
- provision of recreation facilities, such as parks, sports fields and stadiums, golf courses, swimming pools, sport centres, halls, camping grounds and caravan parks
- health services, such as water and food inspection, immunisation services, toilet facilities, noise control, meat inspection and animal control
- community services, such as child care, aged care and accommodation, community care and welfare services
- building services, including inspections, licensing, certification and enforcement
- planning and development approval
- administration of facilities such as airports, aerodromes, ports, marinas, cemeteries, parking facilities and street parking
- cultural facilities and services, such as libraries, art galleries and museums
- water and sewerage services in some states
- other services, such as abattoirs, saleyards and group purchasing schemes.¹⁴

While limited reference is made to emergency management responsibilities, local government does have a key role to play in disaster risk reduction. Decisions on where development is to take place, building standards, the maintenance of infrastructure so that it can resist floods, fires or other hazards and the provision of community services such as risk education all help to create resilient communities.

Equally important is making council facilities available as evacuation centres, providing housing and welfare services and clearing up debris as part of the response to an emergency. Finally, it is said that local government will be in place long after emergency responders have left, so local government will have a key role in helping communities to recover following disaster or emergency impacts.

Ratepayers understand that local government is a key player in the emergency management field. A recent report found that 79% of 1,002 South Australian respondents rated local government's role in 'emergency and disaster management' as extremely or very important.¹⁵

Notwithstanding this, the role of local governments in emergency management is generally poorly defined. In Australia, it's state and territory governments that operate the emergency services, including the urban and rural fire brigades and the various state emergency services.¹⁶ Local governments often have no mandated emergency response functions; nor do they have a leadership role in emergency preparation and planning.

For example, in South Australia it's a function of the local government 'to take measures to protect its area from natural and other hazards and to mitigate the effects of such hazards'.¹⁷ The Local Government Act doesn't give further guidance on how local government is to achieve that goal. The *Emergency Management Act 2004 (SA)* makes little reference to local government. The South Australian State Emergency Management Plan is made by the State Emergency Management Committee. The committee may establish a management committee for each emergency management zone, which may or may not match council boundaries, and it's the management committee that maintains local emergency management plans for that zone.

In New South Wales, the *Local Government Act 1999 (NSW)* lists emergency management as one of a council's 'other functions'. Those emergency management functions are an obligation to nominate a person as the controller for the local unit of the State Emergency Service, to issue fire permits during bushfire danger periods, to pay the council's contribution to Fire and Rescue NSW, to provide 'information to the Rural Fire Service Advisory Council and its Co-ordinating Committee' and to, generally, 'prepare for emergencies'.

The State Emergency and Rescue Management Act doesn't mention 'local government', and the only reference to a local council says that it is council's role 'to provide executive support facilities for the Local Emergency Management Committee and the Local Emergency Operations Controller in its area'. During a declared emergency, all government agencies, which includes local councils, are subject to the direction of the minister, who may direct them to provide resources to the government and who may also direct them 'to do or refrain from doing any act, or to exercise or refrain from exercising any function'.

The NSW State Emergency Management Plan says this about local government:

Given the principle that emergency management and risk management should be conducted at the lowest effective level, local government has a key role across the PPRR spectrum. The Division of Local Government—Department of Premier and Cabinet is a member of the SEMC [State Emergency Management Committee].

Local government roles include:

- convening Local Emergency Management Committees and Recovery Committees
- working with State agencies to identify and prioritise risk mitigation options
- undertaking an all-hazards approach to emergency risk management
- working with insurers to minimise disaster risk exposure.

Recognising that Local Councils have many other tasks to perform, State agencies support Councils with resources, personnel and advice.

It's a principle of recovery, as set out in the New South Wales Recovery Plan, to 'involve local government'.

In terms of response, there's no specific function for councils. The NSW State Emergency Plan lists the 'combat agencies' for:

- search and rescue (NSW Police)
- fire within a fire district, hazardous materials incidents and structural collapse (Fire and Rescue NSW)
- fire within a rural fire district (NSW Rural Fire Service)¹⁸
- biosecurity emergencies (animal, plant and fish disease emergencies) (NSW Department of Primary Industries—Agriculture & Animal Services)
- pandemic influenza and other human infectious disease emergencies (NSW Health).

The *State Emergency Service Act 1989* (NSW), rather than the State Emergency Plan, identifies the State Emergency Service (SES) as the combat agency for floods, storms and tsunamis.

Various other agencies support the operational agencies in their response role. For example, NSW Public Works is required to provide engineers in support of operational first responders. The Welfare Services Functional Area Coordinator is 'responsible for the setting up and management of Evacuation Centres to provide welfare services for those affected by a disaster'.

Consider then, the example of a flood. The SES is the response agency for floods and is 'to co-ordinate the evacuation and welfare of affected communities'. Within a local government area, the council (subject to the terms of the Local Emergency Management Plan) has little to do. The Local Emergency Management Committee is not a committee of council; nor is the council the author of the Local Emergency Management Plan or the employer of the Local Emergency Operations Controller.

The role of council is to supply material to and follow the directions of the SES. This is the case even though the council is the roads authority that owns and controls the local roads that are being affected by the flood.¹⁹ The council may also own the buildings and facilities that will be required as an evacuation centre. The council would normally employ engineers and own or have access to

heavy earthmoving equipment that will be necessary for both flood mitigation work and subsequent clean-up operations. Further, elected councillors are politically accountable to local ratepayers for the decisions made by council that have impacts upon the exposures faced by the community, the emergency response and the long-term recovery.

While this approach, in which the local government role is largely ancillary to or in support of the state-based emergency services, is reasonably consistent across Australia, there are exceptions and differences. In Queensland, for example, it's the local government that must prepare the Local Emergency Management Plan and establish the Local Disaster Management Group. The Local Disaster Management Group appoints a Local Disaster Coordinator and is 'to manage disaster operations in the area under policies and procedures decided by the State group' and supported by state agencies.²⁰ The emergency services operated by the state perform disaster management functions 'in support of local government disaster operations', rather than the other way around.²¹

Having reviewed the legal arrangements in Australia, it's now possible to look at the key legislation in the UK and US to see whether those countries' arrangements have lessons or concepts that can or should be adopted in Australia.

2. The position in the UK: the Civil Contingencies Act

The UK has political similarities with Australia. Both countries are constitutional monarchies. The legal traditions of modern Australia were inherited from the UK with the arrival of the First Fleet in 1788. The separation of powers between the executive, judicial and legislative arms of government reflects the Westminster tradition.

In the UK, the Civil Contingencies Act 2004 is the legislation governing the preparation for and response to disasters. For the purposes of this paper, the discussion focuses on the Act as it applies in England and Wales. There are differences in both Scotland and Northern Ireland in the devolved administration in those jurisdictions.

Other differences include the titles of relevant bodies, decision-makers and to some extent the scope of some obligations, but for the sake of comparison with Australia the finer points of difference between the jurisdictions aren't considered here.

In the Civil Contingencies Act, the definition of 'emergency' is very broad, applying to any event that 'threatens serious damage' to human welfare, the environment or 'the security of the United Kingdom'. An event threatens 'human welfare' if it threatens to cause loss of life or injury, but also if it causes 'homelessness' or the disruption of various essential services.²²

The Act defines responders as either 'Category 1' and 'Category 2' responders. A Category 1 responder is a county council or local authority, a chief officer of a police force, a fire and rescue authority, the National Health Service, Health Service trusts (which include the various ambulance services) and other traditional emergency responders. Category 2 responders include utility and transport providers, the Health and Safety Executive and the Office for Nuclear Regulation.

In terms of preparing for and mitigating the impact of an emergency, the Civil Contingencies Act imposes an obligation upon Category 1 responders to undertake risk assessments and develop plans to prevent, mitigate and respond to an emergency. Local authorities are required to provide guidance to the public on how to prepare for emergencies and how to make business continuity arrangements. Regulations can be made to require Category 2 responders to cooperate with and share information with Category 1 responders.

The relevant minister (who is the Minister for the Cabinet Office) may issue orders to relevant Category 1 responders requiring them to take steps and to perform their functions in order to prevent or mitigate the likely impact of an emergency. Regulations may also be made to facilitate information sharing between Category 1 and Category 2 responders. In an urgent situation, the minister may make those orders or regulations without the need to go through the normal lawmaking process.

The performance of Category 1 and 2 responders is subject to judicial review at the request of the minister or a prescribed authority. If an authority isn't complying with the requirements of the Act, regulations or orders, an order can be sought in the High Court or the Court of Session to compel compliance.

Part 2 of the Act deals with the response to an emergency. It empowers Her Majesty 'by Order in Council' to make urgent emergency regulations to deal with any urgent emergency. If the matter is so urgent that even taking the time necessary to arrange for an Order in Council is not practicable, then a 'senior Minister of the Crown' may make urgent emergency regulations:

... emergency regulations may make any provision which the person making the regulations is satisfied is appropriate for the purpose of—

- (a) protecting human life, health or safety,
- (b) treating human illness or injury,
- (c) protecting or restoring property,
- (d) protecting or restoring a supply of money, food, water, energy or fuel,
- (e) protecting or restoring a system of communication,
- (f) protecting or restoring facilities for transport,
- (g) protecting or restoring the provision of services relating to health,
- (h) protecting or restoring the activities of banks or other financial institutions,
- (i) preventing, containing or reducing the contamination of land, water or air,
- (j) preventing, reducing or mitigating the effects of disruption or destruction of plant life or animal life,
- (k) protecting or restoring activities of Parliament, of the Scottish Parliament, of the Northern Ireland Assembly or of the National Assembly for Wales, or
- (l) protecting or restoring the performance of public functions.

Further, the scope of permissible emergency regulations is very broad. They may authorise a minister, coordinator or any other person to give directions or orders, to requisition or confiscate property, to take and destroy property, to prohibit or allow movement to or from a specified place and to limit travel and other activities. The regulations may suspend or modify the operation of other legislation and may allow the Defence Council to authorise the deployment of the armed forces 'for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency'.

Where emergency regulations are made, a 'regional' or 'emergency' coordinator is to be appointed for the area where the regulations apply. The function of the coordinator is to 'facilitate coordination of activities under the emergency regulations'. Emergency regulations must be tabled in parliament and, subject to approval by parliament, remain in force for no more than 30 days.

The Act is supplemented by the Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005. The regulations bring Category 1 and Category 2 responders for each area together into a 'local resilience forum'. The regulations also provide details of the obligations on Category 1 responders (which include local government authorities) to develop and make available risk registers and emergency plans and also to identify agencies with the lead responsibility 'for warning, informing and advising' the community of the potential for disturbance and mitigation measures that they may take to reduce the impact of an emergency and to issue relevant warnings in the event of an emergency.

Part 1 of the Act is most relevant to considering lessons for Australia. Significantly, the Act, dealing with 'Local Arrangements for Civil Protection', identifies responders as more than the traditional 'blue light' agencies (the police, fire and ambulance services) and includes local authorities and the health services.

Each Category 1 responder is required to plan its response and how, within its respective functional area, it will plan to take steps to prevent an emergency and mitigate its impact. Oversight of the responders is managed by the minister, the parliament and ultimately the courts to ensure that agencies are engaged with the duties imposed upon them by the Act.

The other significant feature of the UK Act is the power to make emergency regulations during the event, with a process for expedited rule making where that's required. That the regulations are made at the highest level and subject to parliamentary scrutiny provides checks and balances to ensure that emergency powers aren't misused or left in place longer than is necessary.

The ability to make the regulations, as required, rather than relying on a legislated list of powers, ensures that the emergency regulations and powers can be tailored to the emergency that's unfolding.

3. The position in the US: the Stafford Act

Australia, unlike the UK, has a written Constitution and is a federation made up of the Commonwealth, six states and two self-governing territories. The Commonwealth government is a government of limited authority, being restricted to those areas where power is expressly granted by the Australian Constitution. In that respect, Australia also shares legal traditions and arrangements with the US.²³

In the US, the federal emergency management legislation is the Robert T Stafford Disaster Relief and Emergency Assistance Act.²⁴ This Act doesn't govern the response by the states but it does govern, and empower the President to manage emergency management programs across the whole PRR spectrum.

With respect to prevention or mitigation, the Stafford Act provides for the establishment of federal disaster preparedness programs and the provision of technical and financial assistance to the states to allow them to develop programs and maintain emergency management plans. It requires the President to 'insure that all appropriate Federal agencies are prepared to issue warnings of disasters to State and local officials'. It further allows the federal government to disperse funds from the National Pre-disaster Mitigation Fund to state and local governments to provide up to 75% of the cost of hazard mitigation projects (or 90% for 'small impoverished communities'). A federal interagency taskforce is normally established by the federal government for the purpose of coordinating the implementation of pre-disaster hazard mitigation programs.

Further, where an area has been affected by a major disaster, the President may 'contribute up to 75 percent of the cost of hazard mitigation measures which the President has determined are cost-effective and which substantially reduce the risk of future damage, hardship, loss, or suffering'.

When a disaster does affect a state, the Act provides for 'Major Disaster and Emergency Assistance Programs'. The essential first step in receiving federal assistance is for the President to make a declaration that a 'major disaster exists'. The President makes that declaration when asked to do so by the governor of the affected state. When making that application, the governor must demonstrate that:

... the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary. As part of such request, and as a prerequisite to major disaster assistance under this Act, the Governor shall take appropriate response action under State law and direct execution of the State's emergency plan. The Governor shall furnish information on the nature and amount of State and local resources which have been or will be committed to alleviating the results of the disaster, and shall certify that, for the current disaster, State and local government obligations and expenditures (of which State commitments must be a significant proportion) will comply with all applicable cost-sharing requirements of this Act. Based on the request of a Governor under this section, the President may declare under this Act that a major disaster or emergency exists.

Once an event is declared a 'major disaster', a number of administrative procedures are activated. First, any federal agency can waive administrative conditions that usually apply to the request for federal assistance if a state or local community can't comply with those requirements because of the impact of the disaster.

The President is to appoint a Federal Coordinating Officer who makes an assessment of the affected area to identify the 'types of relief most urgently needed'. The officer will establish federal 'field offices' and otherwise coordinate the administration of relief, including relief services offered by the non-government sector.

As a condition of receiving federal assistance, the President can request the affected state to appoint a State Coordinating Officer to work with the Federal Coordinating Officer to ensure that federal, state and local efforts are working together. The President is also required to send 'emergency support teams' into the area to assist the Federal Coordinating Officer.

All federal agencies are required to provide personnel to the teams, as requested by the President. In order to ensure a prompt response, the Federal Emergency Management Agency (FEMA) is required to have standing national and regional response teams that can be called upon to deploy on short notice. When responding to an emergency, federal agencies may enter into contracts and hire staff without normal procurement or employment processes. Importantly, if contracting with service providers 'for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities', preference is to be given to contractors that normally live or do business in the affected area. This will help maintain the local economy by putting funds into the affected areas and giving people in those areas the chance to gain or retain their employment.

In granting such assistance, there are provisions to ensure that future mitigation or risk sharing takes place. Where a person or entity receives assistance 'relating to repair, restoration, and replacement of damaged facilities', an obligation to ensure that the facilities are insured thereafter is imposed.

Equally, a person can't receive assistance following a flood if they had previously obtained assistance but didn't subsequently take out flood insurance. The requirement to maintain insurance transfers with the property, so if a person is affected by a flood and receives federal assistance with a condition that they also obtain flood insurance, any subsequent purchaser of the land is also bound by the condition to maintain flood insurance. If they don't, then they, too, are banned from receiving assistance.

Once an event is declared a major disaster, the President may:

- direct any federal agency to use its resources to assist the affected state
- coordinate all disaster relief assistance, including assistance provided by state and local governments and the non-government sector
- provide technical and advisory assistance to the states and local government authorities
- assist state and local governments in the distribution of medicine, food and other emergency assistance
- even without a specific request, use federal resources to take action 'where necessary to save lives, prevent human suffering, or mitigate severe damage'
- approve a request to use the resources of the Department of Defense (that is, the US Armed Forces) 'for the purpose of performing on public and private lands any emergency work which is made necessary by such incident and which is essential for the preservation of life and property' (the use of the armed forces is limited to not more than 10 days).

4. Does Australia need a Civil Contingencies Act, or a Stafford Act?

The UK's Civil Contingencies Act 2004 has some valuable features that could be used to inform Australia's emergency management arrangements and facilitate a coordinated approach to the prevention of, preparation for, response to and recovery from various disaster impacts. Even so, it wouldn't be possible to simply copy the UK Act into Australian law.

Putting aside any consideration of the role of the devolved authorities in Scotland and Northern Ireland, the UK does not have states. The various functions of the Australian state governments are, in the UK, shared between the national government and local authorities. With a much larger population (64.1 million in the UK compared to 23.13 million in Australia) in a much smaller area (the UK is 243,610 km², Australia 7.692 million km²), it follows that each local authority in England has a concomitant small area and large population.

For example, the population of London in 2015 was 8.674 million in an area of 1,572 km². The population of New South Wales (in June 2016) was only 7.725 million in an area of 809,444 km². Australia's smallest state, Tasmania, had a population (in June 2016) of just 519,100. The population of the two territories is even smaller.

The various UK emergency services are also operated on a local or regional rather than national level, even though they are governed by national legislation. For example, the Fire Services Act 1947 (UK) governs the establishment of fire brigades, but each fire authority has its own service, so there are separate fire and rescue services across the UK.

Because many people are concentrated in such small areas, the local authorities have a significantly bigger ratepayer base, and it's impracticable to focus emergency management at the national or regional level (although emergency planning is required to deal with large-scale and national emergencies). In many respects, the UK local authorities are the equivalent of the Australian states except that they don't have independent legislative authority—hence the presence of national legislation such as the Civil Contingencies Act and the Fire Services Act.

In this context, the powers of an Act similar to the Civil Contingencies Act don't have a perfect fit with the relationships between the Australian federal government and the state and local jurisdictions. While arrangements flowing from such legislation would be useful at the local–state government interface, a different suite of powers would assist in better aligning links between all three levels of government.

The states and territories

The states and territories may well benefit from an act modelled on the Civil Contingencies Act. First, if all the states were to adopt that model there would at least be consistent emergency management legislation across the country.

Mainstreaming the role of local government

Most importantly, the UK's Civil Contingencies Act gives effect to the notion that local government *is* government, and not just a state government agency. Placing local government on an equal footing with the traditional emergency services would promote local government to an equal role with the Australian state-based agencies and would show that emergency management means more than emergency response.

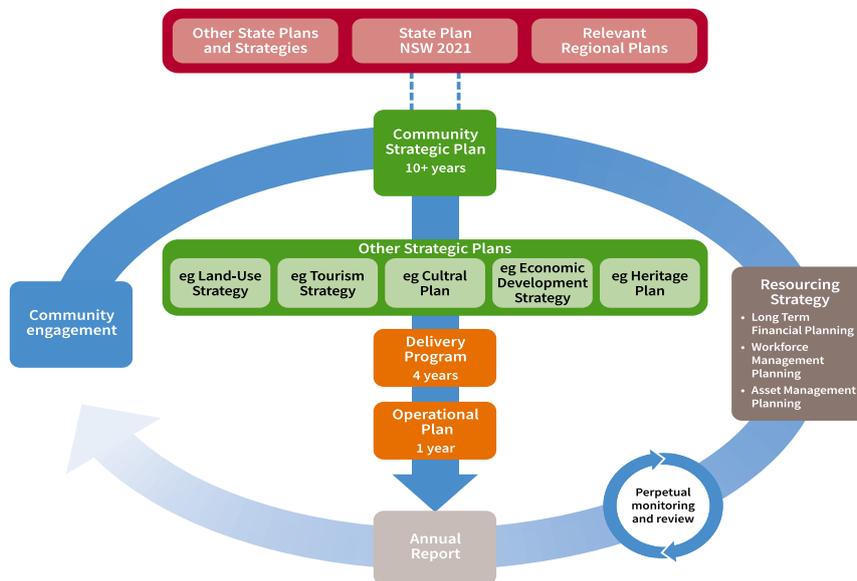
Bringing all responders together in a 'local resilience forum' (a feature of the Civil Contingencies Act) would also aid in enhancing cooperation and mainstreaming emergency management. A local resilience forum brings together the traditional responders, along with local government, that not only make response decisions but also important decisions that affect mitigation efforts and critical infrastructure protection.

The UK Act requires all responders to assess the likelihood of an emergency occurring and to develop a risk register detailing projected impacts and mitigation options. Those registers are also required in Australia. For example, in New South Wales, local councils must 'manage risks to the local community or area or to the council effectively and proactively'²⁵ and are to engage in comprehensive planning.

A council should, at a minimum, be planning how it will continue to deliver council services in the event of an emergency (as a form of business continuity management) and to meet any projected increase in demand from disaster-affected residents.

What's missing, however, is a consistent and mainstreamed approach. To again use New South Wales as an example, local governments are required to comply with an 'integrated planning and reporting framework', as shown in Figure 1.²⁶

Figure 1: Integrated planning and reporting framework (NSW)



Source: Office of Local Government, *Integrated planning and reporting framework*, online.

The clear intention is to have the various plans of the council integrated with each other and with regional and state plans. There's no reference to any emergency plan in the list of councils' 'other strategic plans', possibly because the local emergency plan is written by the Local Emergency Management Committee, not the council.

The NSW Office of Local Government's *State & regional planning—resources* sets out the relevant high-level plans required, but doesn't mention the State Emergency Response Plan.²⁷

In the *Integrated Planning and Reporting Manual for Local Government in NSW* (March 2013) the words 'crisis' and 'emergency' aren't mentioned.²⁸ Disasters are referred to as a reason why, post-disaster, the Community Strategic Plan or Asset Management Strategy and Plan may need amendment. Emergency planning isn't mainstreamed into councils' planning arrangements and remains something that 'someone else' (that is, the Local Emergency Planning Committee) is required to do.

Enhanced emergency powers and parliamentary scrutiny

All Australian emergency management legislation grants emergency powers to relevant people to deal with emergencies. Those powers are vested in chief officers, police officers, firefighters, the minister or a relevant emergency or state controller. What the UK's Civil Contingencies Act does, which is not reflected in Australian legislation, is allow the government to proclaim urgent regulations and subject them to parliamentary review.

The value of the 'fast-tracked' regulation-making power is that it allows the government or the relevant minister to tailor the emergency response, rather than having a fixed list of powers that may or may not be relevant in the particular emergency that has arisen.

The process of requiring confirmation by the parliament, and reserving parliament the right to revoke a declaration, ensure that the action by the executive arm of government is subject to review by the legislative arm, which can revoke the declaration if it isn't satisfied that the circumstances justify the making of the declaration.

This type of oversight ensures that the Act and a declaration of emergency can't be used by a government to extend its powers inappropriately. The ability of parliament to review and revoke a declaration is particularly important if the courts are willing to give great latitude to declarations of emergency so that it's hard, if not impossible, to seek judicial review on the question of whether an emergency exists or whether the steps taken to deal with the emergency are justified by the circumstances.

The Commonwealth

Unlike the UK, Australia does have states and a federal government with limited areas of legislative responsibility. A Commonwealth Civil Contingencies Act may overreach the Commonwealth's legislative authority. While the federal parliament can make laws with respect to the Commonwealth's response to an emergency, and the management of national risks and emergencies, it's not open to the parliament to make laws governing how states and therefore local governments respond to emergencies within their own jurisdictions. For the Commonwealth, a more useful model would be the US's Stafford Act.

As already noted, there's no Commonwealth emergency management legislation. As a result, there's no person or body authorised to direct the Commonwealth's response or to coordinate with the states. The Minister for Justice is a member of the outer ministry, not the cabinet, and the office of EMA has no legal mandate. To borrow again from Templeman and Bergin, the 'delivery of EMA functions for the most part is the result of goodwill on behalf of other agencies'.²⁹

One area of Commonwealth response is financial assistance to the states under the Natural Disaster Relief and Recovery Arrangements (NDRRA). Under that scheme, the Commonwealth agrees to meet a share of the expenses incurred by a state or territory when responding to or recovering from a natural disaster. The NDRAA is governed by an administrative instrument, currently the NDRAA Determination 2012 (v 2).³⁰

An 'eligible disaster' is a disaster in which the affected state or territory incurs expenditure in response and recovery that exceeds the prescribed amount. The prescribed amount varies from jurisdiction to jurisdiction, based on the size of the jurisdiction's economy. Where an eligible disaster occurs, the states are required to notify the Commonwealth. The determination then provides for a claims process, including various provisions for audited claims and assurance activities.

Under current administrative arrangements, the Commonwealth has no ability to determine whether the disaster meets the criteria or the amount it will spend in relation to the disaster. In short, the states determine whether a disaster is an 'eligible disaster' and then make claims that are open-ended.

Compare that to the position in the US, where federal disaster assistance requires a presidential declaration. In the US, as in Australia, federal assistance is intended to supplement the states' resources and be applied when an event exceeds the capacities of the states. An American state that seeks federal assistance must demonstrate that the relevant criteria have been met before being declared eligible for assistance. In that case, it's the federal government that determines whether the criteria for federal assistance have been met, not the state that's seeking the assistance.

In Australia, in the absence of local legislation, the authority to appropriate money from the national treasury for the purposes of the NDRRA is unclear. The Productivity Commission, in its report on disaster funding, noted that:

... the Australian Government treats recovery costs from future natural disasters as an unquantified contingent liability, and so does not provision for them in the budget forward estimates ... the Australian Government should provision for some level of future natural disaster recovery costs in the forward estimates ...³¹

By not providing for future spending in the Budget, the government does not get parliamentary approval for the allocation of funds. It follows that when a disaster occurs the government will have to appropriate money from consolidated revenue to meet its unfunded and unplanned disaster recovery expenditure.

The Australian Government can of course appropriate money from consolidated revenue 'for the purposes of the Commonwealth'. Where the federal parliament has passed legislation setting out the role, power and function of the Commonwealth, the Commonwealth purposes are clear. In the absence of any emergency legislation, a claim that funding mitigation, response and recovery is a legitimate 'purpose' of the Commonwealth could be subject to challenge.

In response to the 2008 global financial crisis, the Commonwealth sought to make payments to all Australian taxpayers to stimulate the economy and avoid the worst effects of the crisis. The appropriation of that money, from consolidated revenue, was challenged on the basis that there was no relevant Commonwealth purpose or head of legislative power to allow that expenditure.

In the High Court, a 4:3 majority accepted that the payment was justified as a response to the 'emergency'. Forming part of the four-judge majority (along with Chief Justice French, who gave his reasons in a separate judgement), Justices Gummow, Crennan and Bell said:

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.

The dissenting minority (Justices Hayne and Kiefel in a joint judgement, along with Heydon) accepted that the Commonwealth may have the power to act in a national emergency but the mere fact that the Commonwealth *said* there was a national emergency was not enough to establish that the Commonwealth had the power to respond. As Justices Hayne and Kiefel said, ‘... if it is to be for the Executive to decide whether there is some form of “national emergency” ... then the Executive’s powers in such matters would be self-defining.’

Justice Heydon said:

... there is no constitutional warrant for the supposed power to deal with a national fiscal emergency... Its existence is doubtful because of its potential for abuse ... The truth is that the modern world is in part created by the way language is used. Modern linguistic usage suggests that the present age is one of ‘emergencies’, ‘crises’, ‘dangers’ and ‘intense difficulties’, of ‘scourges’ and other problems. They relate to things as diverse as terrorism, water shortages, drug abuse, child abuse, poverty, pandemics, obesity, and global warming, as well as global financial affairs. In relation to them, the public is endlessly told, ‘wars’ must be waged, ‘campaigns’ conducted, ‘strategies’ devised and ‘battles’ fought. Often these problems are said to arise suddenly and unexpectedly. Sections of the public constantly demand urgent action to meet particular problems. The public is continually told that it is facing ‘decisive’ junctures, ‘crucial’ turning points and ‘critical’ decisions. Even if only a very narrow power to deal with an emergency on the scale of the global financial crisis were recognised, it would not take long before constitutional lawyers and politicians between them managed to convert that power into something capable of almost daily use. The great maxim of governments seeking to widen their constitutional powers would be: ‘Never allow a crisis to go to waste.’

In summary, the dissenting judges (Justices Hayne, Kiefel and Heydon) took the view that if it were up to the Australian Government to determine what a national emergency was, and therefore what emergency warranted Commonwealth action, then the Australian Government, and not the Australian Constitution, would be defining the scope of the government’s powers.

Although the High Court in *Pape v Commissioner for Taxation* found that the Australian Government’s response to the global financial crisis was a valid exercise of the Commonwealth’s power to respond to a national emergency, the problems that the decision identified for the next emergency are clear. In the absence of Commonwealth legislation identifying the ‘purpose’ that the Commonwealth is trying to advance and how that ‘purpose’ falls within the areas of responsibility assigned to the Commonwealth by the Australian Constitution, it would fall to a court to determine whether an emergency was of sufficient scale to require Commonwealth intervention. A future decision that something represents a national emergency may again be subject to challenge, along with the decision by the government to appropriate money for the purpose of meeting that national emergency.

So, in summation, if the Commonwealth had legislation, perhaps modelled on the Stafford Act, the purposes of the Commonwealth could be made explicit, the constitutional basis for its actions in response to a national emergency or to assist the states could also be made explicit and funds could be appropriated for the purposes of both mitigation and response. In this context, as alluded to above, the Commonwealth doesn’t need a Civil Contingencies Act; it needs a Stafford Act.

Conclusion

In the Australian context, the UK Civil Contingencies Act provides fine details for emergency risk management and response that would not be appropriate for the Commonwealth. The states and territories have extensive and comprehensive emergency management legislation, but the provisions dealing with local government range from almost non-existent (in New South Wales) to significant (in Queensland), despite the clear recognition that local government has, or should have, an important role in this area. Adopting legislation based on a Civil Contingencies Act template would go a long way to mainstreaming local government involvement in contingencies management.

The Commonwealth, on the other hand, doesn't have national emergency management legislation. As a result, Australia is underprepared for a truly national emergency in which the Commonwealth may be expected to lead but doesn't have defined roles or responsibilities for doing so. The Commonwealth has no legislative provisions or mandate to coordinate its own response, let alone that of the states or other aid providers. Further, federal legislation that specifically recognises local government and allows the Australian Government to deal with and aid local government authorities would go a long way to mainstreaming local government's role in emergency management and fulfilling its democratic responsibilities to the residents of the local government area.

A better model for the Commonwealth would be legislation based on the Stafford Act of the US.³² An Act that spells out federal responsibilities and sets out in advance how the Australian Government will respond to assist affected states, territories and local governments would provide certainty and give a clear legal authority for action. It may provide a clear way through the maze that is Commonwealth–state relations at a time when action is needed and clarity of responsibility is most urgently required.

Enhancing the role of the federal and local governments in emergency management is a desirable step in achieving a whole-of-government approach to emergency management. To do that doesn't need an exact copy of the Civil Contingencies Act or the Stafford Act, but there's much of value in both legislative frames that could be adopted and 'transported' to Australia. Regardless of the use made of international examples, national legislation, coupled with an express role for local government in both the national and state legislation, would facilitate enhanced coordination of federal, state and local disaster management arrangements in Australia.

Notes

- 1 *Disaster Management Act 2003* (Qld); *Emergency Management Act 1996* (Vic.).
- 2 *Emergencies Act 2004* (ACT); *State Emergency and Rescue Management Act 1989* (NSW); *Emergency Management Act 2004* (SA); *Emergency Management Act 2006* (Tas.); *Emergency Management Act 2005* (WA).
- 3 *Emergency Management Act 2013* (NT).
- 4 Michael Eburn, 'Responding to catastrophic natural disasters and the need for Commonwealth legislation', *Canberra Law Review*, 2011, 10(3), 81, 102.
- 5 National Security Committee, [online](#).
- 6 *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32.
- 7 David Templeman, Anthony Bergin, *Taking a punch: building a more resilient Australia*, ASPI, Canberra, 2008, 7.
- 8 *Australian Constitution*, s. 109.
- 9 'Minister for Police, Fire and Emergency Services' (Queensland and the Northern Territory), 'Minister for Police and Emergency Services' (Australian Capital Territory) and 'Minister for Emergency Services' (New South Wales, Victoria, South Australia and Western Australia).
- 10 The Tasmanian minister's full title is 'Minister for Police, Fire and Emergency Management'.
- 11 *Emergency Management Act 1986*(Vic.), s. 24.
- 12 Department of Infrastructure and Regional Development, *Local government*, Commonwealth of Australia, 17 August 2016.
- 13 Australian Local Government Association, *About local government* (u.d).
- 14 Australian Local Government Association, *About local government*.
- 15 Institute for Public Policy and Governance, *Why local government matters in South Australia*, University of Technology Sydney, 2016.
- 16 The notable exception at the time of writing is Western Australia, where bushfire brigades are still established and operated by local councils (*Bushfires Act 1954* (WA) s. 41), but there are plans to review the legislation and establish a state-based rural fire service. Government of Western Australia, 'State government to establish Rural Fire Service', media statement, 29 September 2016.
- 17 *Local Government Act 1999* (SA), s. 7(d).
- 18 The NSW Rural Fire Service is the 'combat agency' for bushfires, but neither the State Emergency Plan nor the *Rural Fires Act 1997* (NSW) use that specific phrase. In the list of 'Detailed PPRR Roles and Responsibilities', the plan does not use the term 'combat agency' when describing the roles of the Rural Fire Service. The plan does say that some 'key hazard types (e.g. fire, bushfire, storm and flood) are assigned to specific agencies in agency enabling legislation'. The Rural Fires Act says that it is a function of the Rural Fire Service 'to provide rural fire services for New South Wales', but the Act, unlike the State Emergency Service Act, does not use the term 'combat agency'. The State Bush Fire Plan says 'The EMPLAN identifies NSW RFS and FRNSW as combat agencies, reflecting these legislative responsibilities.' In a table setting out 'specific control responsibilities', the Rural Fire Service is listed as the 'responsible agency' for 'fire (within rural fire district)', from which it may be inferred that the RFS is the combat agency, but again the term 'combat agency' is not used. Nothing perhaps turns on that, other than it's an inconsistency that appears for no adequate reason and would suggest poor attention to detail by those who wrote the plan and the legislation.
- 19 *Roads Act 1993* (NSW).
- 20 *Disaster Management Act 2003* (Qld).
- 21 *Queensland State Disaster Management Plan* (reviewed September 2016).
- 22 *Civil Contingencies Act 2004* (UK), s. 1.
- 23 *Australian Constitution*, s. 51; *Constitution of the United States*, s. 8.

- 24 Public Law 93-288, as amended, 42 U.S.C. 5121 et seq.
- 25 *Local Government Act 1993* (NSW), s. 8C.
- 26 Office of Local Government (OLG), *Integrated planning and reporting framework*, [online](#).
- 27 OLG, *State and regional planning—resources*, [online](#).
- 28 Department of Premier and Cabinet, 'Community Strategic Plan', *Integrated planning and reporting manual for local government in NSW*, [online](#).
- 29 Templeman & Bergin, *Taking a punch: building a more resilient Australia*.
- 30 Attorney-General's Department, *Natural disaster relief and recovery arrangements*, [online](#).
- 31 Productivity Commission, *Natural Disaster Funding Arrangements*, Inquiry Report 74, V.1, Canberra, 2014, 22.
- 32 Discussed in more detail in Michael Eburn, *Australia's international disaster response—laws, rules and principles*, PhD thesis, Monash University, 2009; Michael Eburn, 'Responding to catastrophic natural disasters and the need for Commonwealth legislation', *Canberra Law Review*, 2011, 10(3), 81, 102; and Michael Eburn, 'Managing "civil contingencies" in Australia', *The International Journal of Human Rights*, 2014, 18(2):143–158.

Acronyms and abbreviations

EMA	Emergency Management Australia
NDRRA	Natural Disaster Relief and Recovery Arrangements
PPRR	prevention, preparation, response and recovery
SES	State Emergency Service

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