AUSTRALIA'S INTERNATIONAL DISASTER RESPONSE — LAWS, RULES AND PRINCIPLES.

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SYNOPSIS

This thesis reviews the law that governs Australia's international, natural disaster response arrangements An international response to a disaster occurs when aid is sent to, or received by, a state that has been affected by the disaster event. From Australia's perspective this means there is an international disaster response if Australia sends disaster relief to an affected state or if Australia, affected by a disaster, receives assistance from another state or internationally based non-government or inter-government organisation.

To conduct this review of Australia's legal position, relevant international law is identified and it is demonstrated that, although there are theoretical scenarios that could justify the provision of international assistance without the consent of the affected state, for all practical purposes the consent of the affected state is a necessary pre-condition for the delivery of international disaster assistance. This means that Australia will not send aid without the consent of a disaster-affected State, and Australia need not receive assistance unless that is consented to by the Commonwealth government.

After reviewing the international law of general application between states, particular bi-lateral and multi-lateral agreements that Australia has entered are reviewed and their impact upon Australia's legal position on sending or receiving disaster assistance is identified.

Having identified international law that impacts upon Australia, relevant Australian domestic law is considered. This analysis identifies the basis of Commonwealth legislative power in the area of disaster response and identifies legislation from Canada and the United States that can serve as examples for Australian legislative action. Australian law and policy is then benchmarked against the International Federation of Red Cross and Red Crescent Societies' *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (2007).

The process of reviewing and benchmarking Australia's law and policies shows that the legal and policy arrangements that are in place do not adequately address foreseeable legal issues that will arise in the event of a catastrophic natural disaster in Australia, or where Australia wishes to provide natural disaster relief assistance to another state.

It is the recommendation of this thesis that the Commonwealth should pass a comprehensive counter-disaster Act to formalise and strengthen Australia's ability to respond to a catastrophic natural disaster both in Australia and overseas. A model Act, based on Canadian, American and Australian state and territory legislation, is developed. The model Act identifies the essential features that should be incorporated into Commonwealth legislation.

This thesis identifies the law and policy applicable in Australia as at 6 February 2009. On 7 February 2009 bushfires swept through Victoria killing 173 people and destroying at least 2000 homes. At the same time floods in Queensland and New South Wales did significantly more property damage. This was followed by cyclone Hamish off the Queensland coast. During the cyclone a cargo ship, the *Pacific Adventurer*, lost several containers of fertiliser and 230 litres of fuel, causing a widespread environmental emergency. There is to be a Royal Commission into the Victorian fires and there will, inevitably, be 'lessons learned' reports from the other events. Whether or not these reports will lead to recommendations regarding Australia's emergency arrangements remains to be seen, but the outcomes from the inquiries into these events may well impact upon the findings in this thesis. Accordingly this thesis identifies the position at February 2009, but this will inform any subsequent recommendations for change arising out of the 2009 natural disasters.

DECLARATION

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution. To the best of my knowledge, the thesis contains no material written by another person, except where due reference is made in the text of the thesis.

Parts of this thesis, in particular parts of Chapters 5, 6 and 7, are due to be published as

> Michael Eburn, *IDRL Asia-Pacific Study — Australia*, International Federation of the Red Cross and Red Crescent Societies, Geneva, 2009.

Candidate's signature: _____ Date: _____

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Michael Eburn
14 August 2009.

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The presentation of this thesis has benefited from the input of Catherine Britton, a professional editor, who reviewed the penultimate version to correct the inevitable typographical errors and to ensure that the thesis was legible to someone who had not immersed themselves in the subject for the last four years. Catherine holds an LLB from Southampton University but has worked as an Australian editor and publisher since 1994. Her contribution has been provided in accordance with the *Guidelines for Editing Research Theses*[1] developed by the Deans and Directors of Graduate Studies collaboratively with the Council of Australian Societies of Editors and endorsed by the Monash University Research Graduate School

[1] Council of Australian Societies of Editors, *National Policy on Editing Theses* Institute of Professional Editors Limited <http://www.iped-editors.org/sites/iped-editors.org/files/case_thesis_standards.pdf> at 5 May 2009.

Committee.[2] Her advice has been limited to reviewing the thesis and providing advice on language and consistency, as defined in *Australian Standards for Editing Practice*, Standards D and E.[3]

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This thesis is dedicated to the memory of my mother-in law, Phyllis Avis, who always urged me to undertake PhD studies, but did not survive to see them completed.

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2 Monash University, *Handbook for Doctoral and MPhil Degrees* (Monash University, Melbourne, 2008) [7.3.4].

3 Council of Australian Societies of Editors, *Australian Standards for Editing Practice* Institute of Professional Editors Limited <http://www.iped-editors.org/sites/iped-editors.org/files/Australian%20Standards%20for%20Editing%20Practice.pdf.> at 5 May 2009.

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CHAPTER ONE
INTRODUCTION AND DEFINITIONS

This thesis reviews the law that governs Australia's international, natural disaster response arrangements. An international response to a disaster occurs when aid is sent to, or received by, a state that has been affected by the disaster event. From Australia's perspective this means there is an international disaster response if Australia sends disaster relief to an affected state or if Australia, affected by a disaster, receives assistance from another state or internationally-based non-government or inter-government organisation.

To conduct this review of Australia's legal position, relevant international law is identified and it is demonstrated that, although there are theoretical scenarios that could justify the provision of international assistance without the consent of the affected State, for all practical purposes the consent of the affected state is a necessary pre-condition for the delivery of international disaster assistance. This means Australia will not send aid without the consent of a disaster-affected state and Australia need not receive assistance unless that is consented to by the Commonwealth government.

After reviewing law of general application between states, particular bi-lateral and multi-lateral agreements that Australia has entered are reviewed and their impact upon Australia's legal position on sending or receiving assistance is identified.

Having identified international law that impacts upon Australia, relevant Australian domestic law is reviewed. This review identifies Commonwealth and state law and policy. It identifies the basis of Commonwealth legislative power in the area of disaster response, and identifies legislation from Canada and the United States that can serve as examples for Australian legislative action. Australian law and policy is then benchmarked against the International Federation of Red Cross and Red Crescent Societies' *Guidelines for the Domestic*

Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.[1]

The process of reviewing and benchmarking Australia's law and policies shows that the legal and policy arrangements that are in place do not adequately address foreseeable legal issues that will arise in the event of a catastrophic natural disaster in Australia, or where Australia wishes to provide natural disaster relief assistance to another state. A review of Australia's homeland and border security arrangements has found that:

> While crisis management by the Commonwealth has generally been done well 'on the day', the current hazard-specific approach and the absence of consistent national arrangements for handling significant crises exposes the Government to several areas of vulnerability.[2]

It is the recommendation of this thesis that the Commonwealth should pass a comprehensive counter-disaster Act to formalise and strengthen Australia's ability to respond to a catastrophic natural disaster both in Australia and overseas. A model Act, based on Canadian, American and Australian state and territory legislation, is developed. The model Act identifies the essential features that should be incorporated into Commonwealth legislation.

Although this thesis is primarily concerned with international natural disaster response, the discussion in this thesis and the provisions in the model Act necessarily touch on matters of domestic disaster management.

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1 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

2 Ric Smith, *Summary and Conclusions: Report of the Review of Homeland and Border Security* (2008) Prime Minister of Australia <http://www.pm.gov.au/docs/20081204_review_homeland_security.rtf> at 6 March 2009, 2.

INTERNATIONAL DISASTER RESPONSE LAW

The thesis builds upon work done by the International Federation of Red Cross and Red Crescent Societies (the IFRC) in their International Disaster Response Laws, Rules and Principles (IDRL) project.[3]

For the purposes of the Project, IDRL was defined as:

> The laws, rules and principles applicable to the access, facilitation, coordination, quality and accountability of international disaster response in times of non-conflict related disaster, which includes preparedness for imminent disaster and the conduct of rescue and humanitarian assistance activities.[4]

The definition is not limited to international law, but all relevant laws, rules and principles, both domestic and international. The IFRC concluded that the effective management of an international disaster response depended on effective domestic, rather than international law;[5] the reference to 'International' in the acronym IDRL refers to the international nature of the disaster response, rather than the law.

If Australia was affected by a catastrophic natural disaster, it might receive assistance from other states, non-government organisations and inter-government organisations, such as the United Nations. In considering the law that applies to receiving international disaster assistance, the position of assistance from these three sources must be considered. When it comes to sending international assistance from Australia, that aid may come from the Australian government, state and territory governments and non-government organisations. Non-government organisations may work in another country as part of the Australian

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3 International Federation of Red Cross and Red Crescent Societies, *International Disaster Response Laws, Rules and Principles Programme (IDRL)* <http://www.ifrc.org/what/disasters/idrl/index.asp> at 8 February 2008; Victoria Bannon (ed), *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2003); David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

4 International Federation of Red Cross and Red Crescent Societies, *IDRL — What's in a name?* <http://www.ifrc.org/cgi/pdf_disasters.pl?FactSheet8Eng.pdf> at 5 April 2006.

5 See also David P Fidler, 'Disaster Relief and Governance After the Indian Ocean Tsunami: What Role for International Law?' (2005) 6 *Melbourne Journal of International Law* 458.

government's response, that is the Australian government may fund them, or contract with them, to deliver aid from the Australian government, or they may be quite independent, providing aid and assistance of their own initiative. Australian law that is relevant to both types of aid will be considered, but the primary focus of the thesis, when it comes to sending post disaster assistance, will be on the role of the Australian government rather than non-government organisations based in Australia.

METHODOLOGY

One of the aims of the IDRL project was to increase awareness of the issues that countries face when they require international disaster assistance so that they may better prepare for international disaster relief before disaster strikes. The IFRC adopted guidelines (the 'IDRL Guidelines') to assist local lawmakers to enact appropriate laws to facilitate sending and receiving international disaster assistance.[6] It was intended that countries would use the IDRL Guidelines 'as a tool to examine their own legal, institutional and policy frameworks'.[7]

The IDRL Guidelines were adopted by the International Red Cross and Red Crescent Movement at its 30th International Conference.[8] The International Conference of the Red Cross and Red Crescent Movement 'brings together all components of the Movement together with the world's states signatory to the Geneva Conventions',[9] which includes Australia.[10] Australia is not legally bound by the resolutions of the conference, but as Australia was part of the conference that adopted the IDRL Guidelines it is appropriate to consider how Australian law

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6 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

7 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study*, (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 9.

8 *Adoption of The Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Resolution 4, 30th International Conference of the Red Cross and Red Crescent, Document Number 30IC/07/R4 (2007).

9 International Federation of Red Cross and Red Crescent Societies *30th International Conference* (2007)<http://www.ifrc.org/meetings/statutory/intconf/30th/index.asp> at 12 August 2008.

10 *Geneva Conventions Act 1957* (Cth).

meets the recommendations in the IDRL Guidelines. After identifying relevant international and Australian law, a gap analysis is conducted to benchmark Australian law against the IDRL Guidelines.[11]

The analysis of Australia's legal position is comprehensive, considering both Australia's international obligations as well as relevant domestic law. It is argued that there are gaps in Australia's legal preparedness, particularly when it comes to receiving international assistance, and that appropriate legal measures should be put in place to ensure that aid can be received should it be required. The thesis concludes by recommending that the Commonwealth should follow the examples set by other federated states, in particular Canada and the United States, and enact comprehensive disaster management legislation. Legislation would ensure that international assistance is channelled through the federal agencies, consistent with the Commonwealth's role in managing Australia's external affairs,[12] and would allow the appropriate minister or the Prime Minister to ensure a whole of government approach in the response to disasters.

The thesis is presented in nine chapters:

Chapter One (this chapter) sets out the issues addressed, the methodology adopted and the necessary limitations in this thesis.

Chapter Two reviews and summarises the findings of the Red Cross Movement's detailed study of international disaster response.[13] This study informed the drafting, and subsequent adoption, of the IDRL Guidelines. The study identifies the key issues that need to be addressed in domestic law if international disaster assistance is to be promptly received when it is most needed.

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11 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

12 *Australian Constitution.*

13 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

Chapter Three considers international law and disaster response. As a nation state Australia is a subject of international law, so this chapter will identify Australia's rights and obligations in this area. This discussion establishes that a state, such as Australia, is primarily responsible for the management of a disaster occurring on its territory.

Notwithstanding the primary role of the affected state, it is argued that another state (an 'assisting state') could, in extreme circumstances, intervene to provide post-disaster assistance without the consent of the affected state in one of four possible scenarios.[14] The scenarios will be identified and discussed as theoretical possibilities, but the reality is that the critical thresholds that could justify such intervention are unlikely to be met. It is concluded that regardless of the legal arguments, for all practical purposes, no state has a binding legal obligation to go to the assistance of another state, and no state or non-government organisation has a right to insist that they be allowed to access a disaster-affected population, without the consent of the affected state.

A disaster-affected state should, however, consider very carefully whether or not to request, or accept offers of, assistance when dealing with a catastrophic disaster, as failure to do so may be a breach of the human rights obligations of that state.

It follows that Australia should be prepared to consider receiving international disaster assistance in the event of a catastrophic disaster and should be prepared to offer assistance to a disaster-affected state, in order to ensure the human rights of a disaster-affected population are protected and advanced.

Chapter Four reviews Australia's specific treaty obligations that are relevant to sending and/or receiving international disaster assistance.

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[14] The affected state is 'the State upon whose territory persons or property are affected by a disaster'. An assisting state is 'a State providing disaster relief or initial recovery assistance, whether through civil or military components'. International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [2(8)] and [(9)].

Chapter Five considers Australia's disaster management arrangements and how current domestic law would facilitate sending and receiving assistance following a catastrophic disaster. This chapter identifies the respective roles and responsibilities of the Commonwealth and the States under the *Australian Constitution* and gives a detailed discussion of the powers that the Commonwealth could rely on in order to pass necessary counter-disaster legislation. It draws on the experience of Canada and the United States, as examples of federated states, and of the Australian states and territories to argue that there should be an *Emergencies Act* (Cth) to manage Australia's response to natural disasters. The key principles that should be incorporated into that legislation are identified.

Chapter Six benchmarks Australian law (identified in Chapter Five) against the IDRL Guidelines to determine where Australian law is in accordance with the IDRL Guidelines and where there are gaps in Australia's legal preparedness to *receive* international disaster assistance.

Chapter Seven again benchmarks Australian law (identified in Chapter Five) against the IDRL Guidelines to determine where Australia law is in accordance with the IDRL Guidelines and where there are gaps in Australia's legal preparedness to *send* international disaster assistance to a disaster-affected State.

Chapter Eight sets out a model Commonwealth Act along with explanatory notes. The model Act would, if passed, bring Australian law into line with the IDRL Guidelines and enhance Australia's ability to respond to a natural disaster, whether in Australia or overseas.

Chapter Nine reviews and summarises the conclusions that are drawn from this study.

Before moving on to substantive study, it is necessary to identify some limits to the research, and key definitions.

IDRL Applies in the Absence of Armed Conflict

The first limitation is restricting the research to disasters that occur in the absence of armed conflict. Identifying what are the obligations of states, including Australia, to give and receive aid, will form a significant part of the thesis. Since the situation is reasonably well-settled where there is armed conflict, this thesis is concerned with the delivery of humanitarian aid *in the absence of* armed conflict, or to use the phrase adopted by the IDRL project, 'non-conflict related disaster'.[15]

Where there is an armed conflict, international humanitarian law applies. International humanitarian law has, as its fundamental source, the Geneva Conventions of 1949 and their Additional Protocols of 1977.[16] Provisions in *Convention (IV)* [17] and *Additional Protocol I*[18] provide that parties to an armed conflict must allow international organisations to provide relief and succour to the civilian population. They must accept offers of international assistance where they are unable to adequately provide for the population in an occupied territory;[19] they

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15 International Federation of Red Cross and Red Crescent Societies, *IDRL — What's in a name?* <http://www.ifrc.org/cgi/pdf_disasters.pl?FactSheet8Eng.pdf> at 5 April 2006.

16 *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 32, (entered into force 21 October 1950); *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 86, (entered into force 21 October 1950); *Convention (III) relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 136, (entered into force 21 October 1950); *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288, (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* opened for signature 8 June 1977, 1125 UNTS 4, (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* opened for signature 8 June 1977, 1125 UNTS 610, (entered into force 7 December 1978); *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)* opened for signature 8 December 2005, UNTS 2404, (entered into force 14 January 2007).

17 *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288, (entered into force 21 October 1950).

18 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* opened for signature 8 June 1977, 1125 UNTS 4, [70(1)] (entered into force 7 December 1978).

19 *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288, [59] (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the*

must allow the free entry of relief goods and facilitate the distribution of those goods;[20] they must allow the Red Cross movement and other humanitarian organisations to perform their work with the affected populations;[21] they must respect civil defence organisations not only from the occupied country but also from other countries and allow them to perform their civil defence tasks.[22] All these obligations have been accepted by the majority of countries in the world as there has been universal acceptance of the Geneva Conventions and 168 out of 194 countries have adopted *Additional Protocol I*.[23]

Where there is a disaster but no armed conflict, then neither the Geneva Conventions nor the additional protocols apply. In those circumstances, and absent a specific convention, the question of who can provide relief, what is the role of international organisations, what is the status to be afforded to relief personnel and consignments is unsettled.[24] It is because of the unsettled law that the IDRL Guidelines, and this thesis, are focused on international disaster response in the absence of armed conflict.

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20 *Protection of Victims of International Armed Conflicts (Protocol I)* opened for signature 8 June 1977, 1125 UNTS 4, [70(1)] (entered into force 7 December 1978).

21 *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288, [59]-[61] (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* opened for signature 8 June 1977, 1125 UNTS 4, [70(2)] (entered into force 7 December 1978).

22 *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288, [63] (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* opened for signature 8 June 1977, 1125 UNTS 4, [81] (entered into force 7 December 1978).

23 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* opened for signature 8 June 1977, 1125 UNTS 4, [62]–[64] (entered into force 7 December 1978).

24 Jean-Philippe Lavoyer, *A milestone for international humanitarian law* (2006) International Committee of the Red Cross <http://icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-statement-220906?opendocument> at 2 April 2007; International Committee of the Red Cross, *International Humanitarian Law — Treaties & Documents* <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> at 6 March 2009.

These issues are discussed in detail in Chapter Three, below.

DEFINITIONS

Another limitation in the research is the type of disaster to be considered. This thesis will consider the international response to sudden onset, natural disasters; events such as major floods, storms, earthquakes, landslides, tsunamis or the like. The thesis will not consider the response to slow-onset disasters, such as famine or drought, nor will it consider legal issues arising from long-term development aid that may be necessary post disaster, or to reduce vulnerability to hazards and thus prevent future disasters. The thesis will touch on the response to sudden-onset human-caused disasters, such as the release of hazardous materials, where the legal issues are similar to those raised by the response to natural disasters.

In order to make these limitations clear, the definition of key terms regarding disasters and their cause is discussed.

Types of disasters

Definitions of disasters can depend on the purpose of the organisation giving the definition, and can be the subject of debate or disagreement. [25]

Green distinguishes between 'sudden disasters'[26] (such as floods, fires, earthquake or tsunami) and 'slow-developing natural disasters'[27] (such as drought and famine). Kent uses a similar analysis and defines disasters as sudden onset, creeping and chronic disasters.[28] The classic examples of sudden onset disasters are earthquakes, tsunamis, hurricanes, cyclones or other storm events, mud or landslides, floods or widespread bush, forest or wild fires; their key features being that they are hard to predict, have a rapid build up and give little warning of their occurrence. Creeping disasters, like insect infestation or drought, have a longer build-up giving clearer indications of their onset; chronic disasters have no

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25 K N Westgate and P O'Keefe, *Some Definitions of Disaster* (Disaster Research Unit, University of Bradford, Bradford, 1976) 45.

26 Stephen Green, *International Disaster Relief: Toward a Responsive System* (McGraw-Hill Book Company, New York, 1977) 19.

27 Ibid.

28 Randolph C Kent, *Anatomy of Disaster Relief: The International Network in Action* (Pinter Publishers, London, 1987) 2.

specific time limit, are continuing and arise from 'irreversible structural deterioration' such as 'soil erosion and deforestation'.[29]

Macalister-Smith gives a similar analysis: he distinguishes between sudden disasters arising from '… the effects of a variety of natural phenomena having in common speed and relative unpredictability of impact' and slow disasters, 'which may offer a greater degree of warning, or have effects which endure for longer periods of time'.[30]

A complex disaster arises when 'one disaster agent exposes vulnerabilities which open the way for the impact of other disaster agents'.[31] This situation arises, for example, where civil war exposes the population to starvation as citizens are unable to look to their own government for aid or when drought causes the crops to fail, which in turn leads to political instability and opens the opportunity for internal armed conflict.

What makes a natural event a disaster?

Earthquakes, droughts and floods are not necessarily disastrous. Only when the hazard impacts upon a population that is vulnerable to its effects is there a disaster.[32] Kent states:

> … a disaster occurs when a disaster agent exposes the vulnerability of a group or groups in such a way that their lives are directly threatened or sufficient harm has been done to economic and social structures, inevitably undermining their ability to survive.[33]

The critical aspect of this definition is that it is focused on the impact of the disaster agent upon the vulnerable population. Macalister-Smith gives another definition. He states:

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29 Ibid.

30 Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985) 3.

31 Randolph C Kent, *Anatomy of Disaster Relief: The International Network in Action* (Pinter Publishers, London, 1987) 6.

32 Ibid 2. K N Westgate and P O'Keefe, *Some Definitions of Disaster* (Disaster Research Unit, University of Bradford, Bradford, 1976) 46.

33 Ibid 4.

> … disasters are viewed here as emergency situations in where there is an urgent need for international assistance to relieve human suffering. In such situations normal patterns of social and economic interaction may be disrupted, or the impact of a specific event may simply exceed the local capacity for response within the limits of available resources.[34]

This definition has two key elements. An event is a disaster either because of its impact upon the victims, that is the 'normal patterns of social and economic interaction may be disrupted' or because of its impact upon the responders that is where the event 'may simply exceed the local capacity for response within the limits of available resources'. This is similar to the definition adopted in Australian domestic law. For example in New South Wales law an 'incident' becomes an 'emergency', not because of the scale of impact upon the victims but when it requires a coordinated multi-agency response.[35] Under the Commonwealth Disaster Response Plan[36] (COMDISPLAN) a disaster becomes a Commonwealth concern only when its effects exceed the capacity of the state or territory authorities to respond. From the Commonwealth's point of view, a disaster in Australia would only become a matter of international concern when its effects exceed the capacity of Australian resources to response.

This thesis adopts Macalister-Smith's definition of disaster. This definition specifically identifies what makes a disaster a matter of international concern, and it is consistent with Australian domestic and international law. As this thesis demonstrates, it is the impact upon a local population, where the appropriate response is beyond the capacity of the local resources that makes it both necessary and appropriate for a state to seek and receive international assistance.

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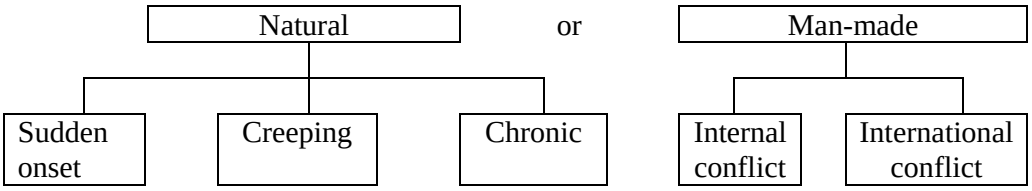
34 Peter Macallister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985) 3.

35 *State Emergency and Rescue Management Act 1989* (NSW) s 4.

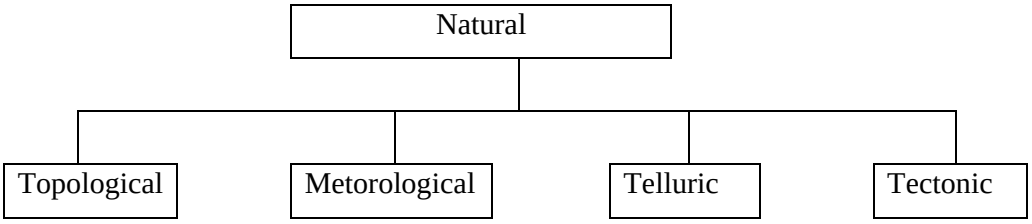
36 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002).

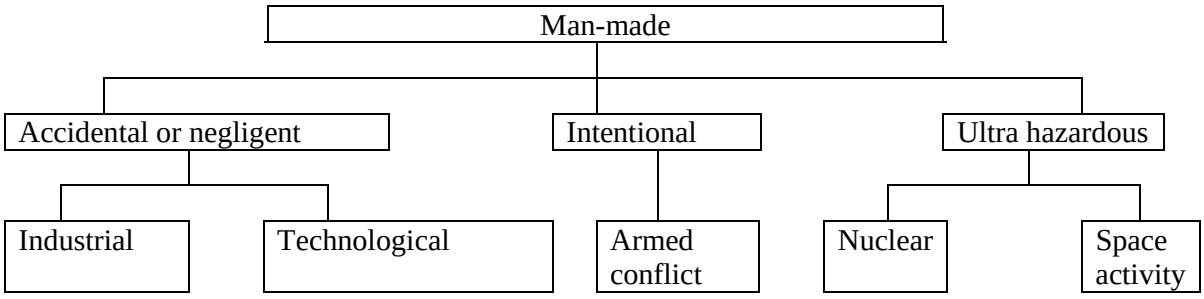
The cause of disasters

Having defined what a disaster is, Kent[37] gives a classical analysis by which disasters are seen as either:



Macalister-Smith also says disasters may be 'man-made' or 'natural' as shown below:[38]





This type of analysis is, arguably, out of date as the distinction between 'man-made' and 'natural' disasters is not clear cut.[39] If a creeping disaster is caused by

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37 Randolph C Kent, *Anatomy of Disaster Relief: The International Network in Action* (Pinter Publishers, London, 1987) 2.

38 Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985) 2-3.

39 See Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, Cambridge, 2003); Kofi N Awoonor, 'The Concerns of Recipient Nations' in K M Cahill (ed), *A Framework for*

soil erosion due to over-farming or deforestation then that is, at least in part, a man-made disaster. This is an issue that Macalister-Smith acknowledges when he writes:

> In practice, humanitarian emergencies may result from a mixture of causes: they may be partly natural and partly man-made; they may have several independent causes; and they may occur as a series of linked events. It is also apparent that a disaster caused by purely natural phenomena is no longer simply a 'natural' disaster when the authorities of the stricken country decline to acknowledge the problem or when the international community fails to respond with the relief that is required. It has therefore rightly been stated that 'the multiple causes often associated with disasters make the 'natural'–'man-made' distinction … difficult to uphold in any rigorous way'. So-called natural disasters are misnamed essentially because they include a component which reflects mankind's relationship with the environment. This is increasingly demonstrated as more people become vulnerable to the effects of natural phenomena.[40]

In spite of the lack of a clear line between natural and human induced disasters, the distinction is still of practical use. It is possible to distinguish industrial accidents caused by an aircraft or transport accident from a natural disaster caused, at least at the time of worst impact, by rain, storms, floods or fire. This thesis will maintain the distinction between what are traditionally labelled natural disasters and 'man-made' disasters.

RELEVANCE TO AUSTRALIA

There is a clear link between development and reduced vulnerability to natural hazards.[41] Countries that have well-developed infrastructure and economies are able to withstand disasters, as their varied economy can continue to function and they can afford to deal with the emergency using their own resources. Between

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Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters (Basic Books and the Council on Foreign Relations, New York, 1993) 63; Ellen Johnson Sirleaf, 'From Disaster to Development' in K M Cahill (ed), *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 299.

40 Peter Macallister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985) 3, quoting B A Turner, *Man-made disasters* (1978) 14.

41 Kofi N Awoonor, 'The Concerns of Recipient Nations' in K M Cahill (ed) *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 63; Ellen Johnson Sirleaf, 'From Disaster to Development' in K M Cahill (ed), *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 299.

1970 and 1985 developed countries suffered 3% of the 'world's major disasters' but suffered only 0.05% of the world's disaster related deaths and only 0.0469% of the world's disaster related 'severe social disruptions'.[42]

Australia is a relatively rich nation in the relatively poor Asia-Pacific, and consistently provides disaster assistance to countries in the region. Australian assistance often consists of funding relief efforts undertaken by affected governments or non-government organisations.[43] It also includes sending emergency responders such as members of the emergency services[44] and defence force personnel and equipment.[45] According to the Australian government 'Australia gives aid because we want to help those less fortunate than ourselves' and because '… [b]y helping to build stronger communities and more stable governments we improve our own economic and security interests'.[46]

Australia is a regular aid donor but has had little experience in receiving international aid. Australia has always been impacted by natural disasters, including floods, severe storms, bushfires and earthquakes. Since 1967 there have been 281 natural disasters that have each cost the Australian community more than $10 million.[47] Severe weather poses the greatest cost; severe storms, flood,

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42 Randolph C Kent, *Anatomy of Disaster Relief: The International Network in Action* (Pinter Publishers, London, 1987) 4.

43 AusAid, *Humanitarian Action Policy* (Commonwealth of Australia, Canberra, 2005).

44 New South Wales Fire Brigades, *South-East Asian Tsunami: NSWFB Deployment*, (2002) <http://www.nswfb.nsw.gov.au/incidents/history/tsunami04/index.php> at 2 November 2005; Andrew G Robertson, Dominic D Dwyer and Muriel G Leclercq, '"Operation South East Asia Tsunami Assist": An Australian Team in the Maldives' (2005) 182(7) *Medical Journal of Australia* 340; Ambulance Service of New South Wales, *Specialist skills in disaster situations* (2002) <http://www.asnsw.health.nsw.gov.au/what/countdisaster.html> at 16 December 2005; New South Wales Rural Fire Service, *NSW Firefighting Force Heading for USA* (2002) <http://www.rfs.nsw.gov.au/dsp_more_info.cfm?CON_ID=1497&CAT_ID=601> at 2 November 2005.

45 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)*, (Commonwealth of Australia, Canberra, 2002) [5.6].

46 AusAID, *About Australia's Aid Program* <http://www.ausaid.gov.au/makediff/default.cfm> at 20 January 2008.

47 Bureau of Transport Economics, *Economic Costs of Natural Disasters in Australia* (Commonwealth of Australia, Canberra, 2001) xvi (for figures up to 1999); *Disaster Database* Emergency Management Australia <http://www.ema.gov.au/agd/ema/emaDisasters.nsf> at 6 March 2009. There are severe limitations on the ability to calculate the costs of disasters and to obtain accurate figures on past disasters, so all figures are likely to be underestimates.

hail and cyclones have cost the community in excess of six times more than bush and urban fires.[48] Since 1788, disasters on mainland Australia have left in excess of 26 000 people dead, 155 000 injured, 3.6 million affected and 162 000 homeless. [49]

The table below shows the sudden impact, natural disasters, that have caused 50 or more deaths since the start of the 20th century,[50] excluding the 2009 Victorian bushfires which occurred as this thesis was being concluded and which killed at least 173 people.

Title	**Year**	**Fatalities**
Port Hedland — Broome Region, WA: Cyclone	1912	173
Broome and NW Coast, WA: Cyclone	1935	141
Coastal North QLD: Cyclone	1911	122
Cape York— Townsville, QLD: Cyclone (incl storm surges)	1934	99
Innisfail — Babinda, QLD: Cyclone (incl storm surges)	1918	90
Southern Vic and SA: Bushfires	1983	75
Southern Vic: Bushfires	1939	71
Darwin, NT: Cyclone Tracy	1974	71
Clermont and Peak Downs, QLD: Floods	1916	65
Hobart and Region, Tas: Bushfires	1967	62
SE Vic (incl Gippsland and Dandenong): Bushfires	1926	60
Western, Central and Southern Vic: Bushfires	1943	51

48 *Disaster Database*, Emergency Management Australia <http://www.ema.gov.au/agd/ema/emaDisasters.nsf> at 6 March 2009. The database records the combined costs for weather events in excess of $11 billion, while bushfires are recorded to have cost nearly $2 billion.

49 Ibid.

50 Ibid.

The second table lists the 10 most expensive sudden impact natural disasters in dollar terms.[51] This table also excludes the February 2009 Victorian bushfires and Queensland and New South Wales floods. The value of the property losses and economic disruption caused by these events is yet to be calculated.

Title	**Year**	**Estimated cost (A$ million)**
Sydney, NSW: Severe hailstorm (incl lightning)	1999	$1,700
NSW east coast storm and flood event	2007	$1,350
Newcastle, NSW: Earthquake	1989	$1,124
Darwin, NT: Cyclone Tracy	1974	$837
Western Sydney, NSW: Severe hailstorm	1990	$384
Innisfail, QLD: Tropical cyclone Larry	2006	$360
Canberra, ACT: Bushfire	2003	$350
Mackay, QLD: Flash flooding	2008	$342
Brisbane - Ipswich, QLD: Floods	1974	$328
Southern Vic and SA: Bushfires	1983	$324

These disasters have been expensive in dollar terms, but the number of people killed or injured has been relatively small compared to significant events in other countries.[52] Australia has well-developed emergency response organisations and management structures that have allowed Australian states and territories, with Commonwealth assistance, to manage the response to, and recovery from, the

[51] Ibid

[52] For example 5804 people were killed in natural disasters in Nepal between 1996 and 2003; Victoria Bannon, *IDRL Asia Pacific Study: Nepal* (International Federation of Red Cross and Red Crescent Societies, Bangkok, 2005) 5. The 10 worst disasters on record in Indonesia killed nearly 208 000 people, the majority (about 80%) died in the 2004 Boxing Day tsunami; Victoria Bannon, *IDRL Asia Pacific Study: Indonesia* (International Federation of Red Cross and Red Crescent Societies, Bangkok, 2005) 5.

disasters that have occurred.[53] There has been little recorded in the way of international assistance to Australia, other than in the response to the devastation of Darwin in 1974,[54] and the provision of fire-fighters to assist in the traditional summer bushfire season.[55] Reports into recent post-disaster recovery operations do not record either calling for, or receiving significant international recovery assistance.[56] Nothing on the scale of the 2003 Iranian earthquake, the 2004 Boxing Day South-East Asian tsunami or the 2005 Pakistan earthquake has occurred in Australia. It may appear that significant international assistance to Australia is not required, and therefore reviewing Australian law to determine how well-prepared Australia is to receive that assistance is unnecessary.

The reality is, however, that the risk of a catastrophic disaster, although low, is real and the consequences of such a disaster will, by definition, be extreme. Disaster planners tend to focus on the 'known' or familiar disaster, rather than the very unlikely but highly catastrophic disaster, such as a collision with an asteroid. However, it is exactly that type of disaster that will have the most adverse consequence.[57] Consequently, Australia should prepare for the unlikely but catastrophic disaster, as well as the more common emergency that governments are familiar with.

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53 Council of Australian Governments, *Natural Disasters in Australia: Reforming Mitigation, Relief and Recovery Arrangements* (Commonwealth of Australia, Canberra, 2002).

54 Alan Stretton, *Darwin Disaster: Cyclone Tracy. Report by Director-General Natural Disasters Organisation on the Darwin Relief Operations 25 December 1974–3 January 1975* (Commonwealth of Australia, Canberra, 1975) 54 and 58.

55 Bruce Esplin, Malcolm Gill and Neal Enright, *Report of the Inquiry into the 2002–2003 Victorian Bushfires* (State Government of Victoria, Melbourne, 2003) 3; Stuart Ellis, Peter Kanowski and Rob Whelan, *Council of Australian Governments National Inquiry on Bushfire Mitigation and Management* (Commonwealth of Australia, Canberra, 2004) 29.

56 Peter Cosgrove, *Final Report of the Operation Recovery Task Force: Severe Tropical Cyclone Larry*, (Queensland Government, Brisbane, 2007); Peter Camilleri, et al, *Recovering from the 2003 Canberra Bushfire: A Work in Progress* (Emergency Management Australia, Canberra, 2007).

57 E Evan R Seamone, 'When Wishing on a Star Just Won't Do: The Legal Basis for International Cooperation in the Mitigation of Asteroid Impacts and Similar Transboundary Disasters' (2002) 87(3) *Iowa Law Review* 1091, 1094.

Australia is taking some steps to plan for catastrophic events, but not with an 'all hazards' approach.[58] Australia has in place plans and stockpiles to deal with the outbreak of pandemic influenza[59] and Australia is developing its response capacity for terrorism events.[60] To some extent, both cases reflect 'past experiences', for example, the outbreak of Sudden Acute Respiratory Syndrome (SARS) in 2003 and the terrorist attack on the United States on 11 September 2001. These response preparations confirm a tendency to plan for the events that are similar to those that have already been experienced, rather than to put in place plans of general application to be implemented when a catastrophic event, caused by any hazard, occurs. These plans do not envisage a role for significant international assistance to be provided to Australia as part of the response to those events.

A review of Australia's natural disaster response arrangements[61] considered Australia's state of preparation to deal with a catastrophic disaster, that is 'an extreme natural hazard event which impacts on a community, or communities, resulting in widespread, devastating, economic, social and environmental consequences'.[62] The review found

> Such disasters would exceed the response and recovery capacity of the affected States or Territories and the national capacity of all jurisdictions combined. They would require the provision of significant resources from other States, the Commonwealth and overseas, for certain capabilities. They give rise to complex situations that need to be managed in a whole-of-government, whole-of-community effort.

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58 Ric Smith, *Summary and Conclusions: Report of the Review of Homeland and Border Security*, Prime Minister of Australia <http://www.pm.gov.au/docs/20081204_review_homeland_security.rtf> at 6 March 2009.

59 Department of Health and Aging, *National Action Plan for Human Influenza Pandemic* (Commonwealth of Australia, Canberra, 2006); Department of Health and Aging, *Australian Health Management Plan for Pandemic Influenza* (Commonwealth of Australia, Canberra, 2008).

60 *National Counter-Terrorism Plan* (2nd ed, Commonwealth of Australia, Canberra, 2005).

61 Council of Australian Governments, *Natural Disasters in Australia: Reforming Mitigation, Relief and Recovery Arrangements* (Commonwealth of Australia, Canberra, 2002).

62 Ibid 63.

> The risk of disasters with consequences that far exceed anything yet experienced in Australia cannot be discounted. While the probability of such events is low, the consequences would be extreme.[63]

The report concluded that 'Australia is currently ill prepared to deal with such a contingency and it is important that action be initiated now'[64] including 'investigating the development of an enhanced Commonwealth role in providing assistance and in coordinating external support'.[65]

The events in the United States following Hurricane Katrina in 2005 demonstrated that even wealthy, developed countries can be overwhelmed both by a cataclysmic event, and then by the pressure of responding to offers of international assistance.[66]

Although the risk of a cataclysmic disaster requiring international assistance is low, the consequences will be extreme. It is foreseeable, if not inevitable, that a catastrophic disaster will strike, and the consequences of poor planning for dealing with that disaster, including dealing with incoming international assistance, are known.[67] It follows that, even though Australia has had little need for international disaster assistance, it is appropriate to review Australian law and consider Australia's legal preparedness for receiving international disaster assistance.

As Australia is a frequent aid donor, it is also appropriate to consider Australian law that facilitates delivery of post-disaster assistance to disaster-affected states.

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63 Ibid.

64 Ibid 64.

65 Ibid 65.

66 *US receives aid offers from around the world*, (2005) CNN <http://edition.cnn.com/2005/US/09/04/katrina.world.aid/> at 14 March 2008; Juan Forero and Steven R. Weisman, *US Allies, and Others, Send Offers of Assistance* (2005) New York Times International <http://www.nytimes.com/2005/09/04/international/americas/04offers.html?_r=1&oref=slogin > at 14 March 2008; John Solomon and Spencer S Hsu, *Most Katrina Aid From Overseas Went Unclaimed* (2007) Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/28/AR2007042801113_pf.html> at 5 May 2009.

67 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

CONCLUSION

This introductory chapter has introduced the International Disaster Response Law project conducted by the International Federation of Red Cross and Red Crescent Societies. The outcome of that project has been to identify common problems experienced with the delivery of international assistance following a sudden onset natural disaster. The International Disaster Response Law project called for a review of national laws to ensure that countries are prepared to send and receive international disaster assistance, in the absence of armed conflict. This thesis will conduct that review for Australia.

In introducing the thesis, the reason why the absence of armed conflict is essential has been explained and key terms have been defined. Acknowledging these limitations it has been explained why, notwithstanding Australia's status as one of the world's developed nations and its historical ability to deal with natural disasters occurring on Australian territory, it is important to consider our legal position both with respect to sending, and receiving, international assistance.

The next chapter will consider the outcomes of the International Disaster Response Law project in more detail. It identifies the problems that have been experienced in managing the international response to disasters, and introduces the *IDRL Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* ('the IDRL Guidelines'). This thesis, in subsequent chapters, considers how the issues identified by the International Red Cross may be dealt with in Australian law, and will benchmark Australia's legal position against the IDRL Guidelines.

CHAPTER TWO
INTERNATIONAL DISASTER RESPONSE AND THE IDRL GUIDELINES

This chapter identifies the common issues that arise when sending or accepting international disaster relief. It concludes by reviewing the International Federation of Red Cross and Red Crescent Societies' *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* ('the IDRL Guidelines').[1]

The following chapters will consider how the various problems identified by international experience are addressed in Australian law. Australian law, rules and policy are then 'benchmarked' against the IDRL Guidelines. This process will identify how well-prepared Australia is to deal with a national, catastrophic, disaster and will lead to the key recommendation of this thesis, which is that the Commonwealth Parliament should pass comprehensive counter-disaster legislation to ensure that the government of the day is sufficiently empowered to respond to a sudden onset disaster, if and when it occurs.

PROBLEMS WITH THE DELIVERY OF INTERNATIONAL DISASTER RELIEF

Telford, Cosgrave and Houghton say that the problems with international disaster response:

> … have been described year after year… [but] the lack of enforcement mechanisms for good practice mean that the same problems keep reappearing in emergency responses.[2]

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1 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007); *Adoption of the Guidelines for the Domestic Facilitations and Regulation of International Disaster Relief and Initial Recovery Assistance*, Resolution 4, 30th International Conference of the Red Cross and Red Crescent, Document Number 30IC/07/R4 (2007).

2 John Telford, John Cosgrave and Rachel Houghton, *Joint Evaluation of the International Response to the Indian Ocean Tsunami: Synthesis Report* (Tsunami Evaluation Coalition, London, 2006) 106.

In principle, international aid should be supplied to a disaster-affected country solely on the basis of need. International aid is, however, ad hoc, unpredictable, often inappropriate, and sometimes delivered in a high-handed way without due regard to local sensitivities or needs by organisations of varying ability, capacity and integrity.[3] There are no enforceable international legal standards applicable to the delivery of international disaster relief. At best a number of non-binding international instruments, such as United Nations resolutions, and resolutions of international organisations such as the International Red Cross, encourage states to plan for disasters and disaster response, including the management of an international response. Without clear standards of what should be done in an emergency, '… the disaster victim is at the mercy of the vagaries of humanitarian response, political calculation, indifference or ignorance'.[4]

The latest, comprehensive analysis of the international response to disasters, the International Disaster Response Law Desk Study, has identified continuing, common problems in the areas of:

a. initiation and termination of the international response;

b. goods and equipment (including issues of inappropriate aid and delays in getting humanitarian supplies into an affected country due to customs, transport or administrative barriers);

c. personnel (including issuing visas and recognition of professional qualifications);

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3 See Randolph C Kent, *Anatomy of Disaster Relief: The International Network in Action* (Pinter Publishers, London, 1987); Richard Falk, 'Human Rights, Humanitarian Assistance and the Sovereignty of States' in K M Cahill (ed), *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 27; Kofi N Awoonor, 'The Concerns of Recipient Nations' in K M Cahill (ed), *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 63; Abdulahim A Farah, 'Responding to Emergencies: A View from Within' in K M Cahill (ed), *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 259.

4 Michael Hoffman, 'Towards an international disaster response law' in *World Disasters Report 2000* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2000) 145, 146.

d. transport and movement around the disaster area;

e. operational matters (such as establishing an office, opening bank accounts and employing staff);

f. quality and accountability; and

g. the coordination of international responders.[5]

Initiation and termination of the international response

As shown in Chapter Three, the responsibility for managing the response to a natural disaster falls first and foremost on the government of the affected state. Respect for state sovereignty means that international relief cannot, normally, be provided without the request or at least the permission of the affected state.

A request for assistance should be made as soon as possible but can be delayed due to political problems and legal issues in domestic law, such as who has the authority to make the request and how it is to be made.

Political factors may delay a government acknowledging the scope of a disaster and thereby delay aid. States may be reluctant to seek international aid for fear of losing sovereignty[6] or control over the disaster response or appearing weak or incompetent.[7]

Fear of the international response may be justified if the response is going to be overbearing or inappropriate. A state may be reluctant to call for international assistance if that assistance is then provided by well-funded non-government organisations without regard to domestic capacities, sensibilities or needs.[8]

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5 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

6 Stephen Green, *International Disaster Relief: Toward a Responsive System* (McGraw-Hill Book Company, New York, 1977) 63.

7 Ibid 60.

8 Kofi N Awoonor, 'The Concerns of Recipient Nations' in K M Cahill (ed), *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters*, (Basic Books and the Council on Foreign Relations, New York, 1993) 63. See also John Telford, John Cosgrave and Rachel Houghton, *Joint Evaluation of the*

Some countries prefer to accept offers of assistance, rather than make requests, but that can cause problems, particularly for the United Nations that requires a 'clearer expression of need before taking action'.[9]

Offers of assistance may flow in as soon as the disaster is recognised and without a formal request from the government of the affected state. Some large non-government organisations may wait for formal approval, but most do not. They may respond on their own initiative or at the request of their own in country offices, so for example the International Red Cross Movement may respond at the request of the local Red Cross/Red Crescent Society rather than at the request of the government.[10]

Dealing with, and responding to, offers of assistance may be beyond the capacity of the affected state. This was true even in Australia after Cyclone Tracy devastated Darwin in 1974[11] and in the United States after Hurricane Katrina struck New Orleans in 2005.[12]

International aid may come in the form of the private flow of aid from citizens to friends and family, and spontaneous international assistance, for example by well meaning volunteers simply turning up in the affected area to provide whatever help they think they can. The problem with such ad hoc help is that it is uncoordinated, may not reflect the actual needs of the people, fails to recognise

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international response to the Indian Ocean tsunami: Synthesis Report (Tsunami Evaluation Coalition, London, 2006).

9 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study*, (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 91.

10 Ibid 92.

11 Alan Stretton, *Darwin Disaster: Cyclone Tracy. Report by Director-General Natural Disasters Organisation on the Darwin Relief Operations 25 December 1974– 3 January 1975* (Commonwealth of Australia, Canberra, 1975).

12 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007); *US receives aid offers from around the world*, (2005) CNN <http://edition.cnn.com/2005/US/09/04/katrina.world.aid/> at 14 March 2008; Juan Forero and Steven R. Weisman, *US Allies, and Others, Send Offers of Assistance* (2005) New York Times International <http://www.nytimes.com/2005/09/04/international/americas/04offers.html?_r=1&oref=slogin > at 14 March 2008; John Solomon and Spencer S Hsu, *Most Katrina Aid From Overseas Went Unclaimed* (2007) Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/28/AR2007042801113_pf.html> at 5 May 2009.

the role of the affected community in helping themselves and may be inadequate and unhelpful.

The scope of disasters may be under-reported, misunderstood, politically sensitive for donor countries or simply missed.[13] There is no accepted standard of when an event warrants international assistance; the international response depends on some entity, whether it is the affected state, a non-government organisation or another state, making the assessment that aid is required. That assessment may be based more on media images and domestic pressure rather than the needs of the local population. Kent gives the example of a severe frost incident in New Guinea in 1972. Outsiders perceived this as a major disaster and delivered aid. 'The only group that did not regard the ground frost as a disaster was the group for whom the operation was initiated. … All the available evidence indicates … that they knew quite well how to deal with a familiar hazard'.[14]

Where international assistance is required, principle says that it should be delivered on the basis of need alone, without regard to ethnicity or political affiliation of those in need. Humanitarian responders, whether state-based or non-government organisations, should provide aid that is based on humanity, impartiality and neutrality.[15] Non-government organisations, states and private donors are, however, influenced by the material presented to them, so a response to emergencies may be a reflection of media attention rather than need.[16]

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13 Jonathan Walter (ed) *World Disasters Report 2006; Focus on Neglected Crises* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2006) Chapter 1.

14 Randolph C Kent, *Anatomy of Disaster Relief: The International Network in Action* (Pinter Publishers, London, 1987) 5.

15 *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 46th sess, 78th plen mtg, [2], UN Doc A/RES/46/182 (1991); Good Humanitarian Donorship, *Principles and Good Practice of Humanitarian Donorship* <http://www.goodhumanitariandonorship.org/> at 25 February 2008 adopted in AusAID, *Humanitarian Action Policy* (Australian Government, Canberra, 2005) Appendix 1; International Federation of Red Cross and Red Crescent Societies *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief* (International Federation of Red Cross and Red Crescent Societies, Geneva, 1995) [2].

16 Abdulahim A Farah, 'Responding to Emergencies: A View from Within' in K M Cahill (ed), *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 259, 262.

Awoonor argues that the West is only concerned with the drama that comes to them via television, and television is only concerned with the

> … bloody, traumatic and spectacularly devastating or sensational… [i]t is as if the only news worth reporting from those benighted parts of the world are human tragedy and suffering, vividly depicting colossal miseries and never-ending disasters …[17]

A review of the international response to the 2004 Boxing Day tsunami identified that the response to this disaster was the best funded, with donations from governments, the corporate sector and private citizens. The review found that the disaster was the most widely reported in the Western media; 'press coverage of the tsunami in the first six weeks was more than the combined total coverage for the previous year for 10 key humanitarian "stories"'.[18] The review concluded that it was this saturation media coverage that 'prompted an unprecedented flood of both official and private funding and of material assistance'[19] so that donated resources exceeded those needed by the affected governments. The 'flip side' of a media driven flow of aid, is that aid is not forthcoming for disasters that have a significant humanitarian impact, but which are not the subject of media attention.[20]

There is no standard for when affected states must request international assistance or when or how they should allow access to an affected population by humanitarian responders. Equally for assisting states and non-government organisations there is no clearly defined principle of when or how they should offer assistance. Assistance that does come is not necessarily based on humanitarian need, but on other significant factors, not least of which is the media attention paid to a disaster.

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17 Kofi N Awoonor, 'The Concerns of Recipient Nations' in K M Cahill (ed), *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters*, (Basic Books and the Council on Foreign Relations, New York, 1993) 63, 64.

18 John Telford, John Cosgrave and Rachel Houghton, *Joint Evaluation of the international response to the Indian Ocean tsunami: Synthesis Report* (Tsunami Evaluation Coalition, London, 2006) 36.

19 Ibid 38.

20 Jonathan Walter (ed), *World Disasters Report 2006; Focus on Neglected Crises* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2006).

The termination of disaster relief can also be problematic, particularly if it is withdrawn suddenly or before the affected community is sufficiently re-established to be able to manage its own long term recovery. Donors can lose interest and aid organisations can be diverted to other crises. Further, a response to a disaster to provide life-saving, urgently needed material has to eventually shift to long-term recovery operations. Where there is a distinction between organisations involved in emergency response and long term development they need to coordinate their operations to ensure that there is a smooth transition from emergency relief to longer term recovery so that affected populations are not abandoned.

The delivery of goods and equipment

This heading covers many different issues. First is the delivery of unsuitable goods, such as inappropriate clothing, inappropriate foods (such as pork products to Muslim communities, or food past its 'use by' date) and out-of-date and/or poorly labelled medication. Here the problem is that aid is 'supply side' driven, that is donors donate what they have rather than what the people affected by the disaster need. In the United States there are legislative requirements that aid be sourced from the United States, even though more appropriate, cheaper material may be available closer to the disaster-affected community.[21] The influx of goods, as opposed to the influx of cash to allow the local economy to operate, can affect recovery by driving down demand for local products, thereby reducing the ability of people affected by the disaster to earn a living.[22]

Where appropriate goods are delivered to the affected country, their delivery to the affected population, or to organisations that will use them to assist in their programs, can be hampered by administrative burdens such as customs and quarantine regulations, and local authorities being overwhelmed by the sheer amount of material being deposited at their air and sea ports. Despite international

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21 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 107.

22 Randolph C Kent, *Anatomy of Disaster Relief: The International Network in Action* (Pinter Publishers, London, 1987) 17.

calls to facilitate the delivery of relief goods,[23] countries may not have in place special rules to be applied during a disaster, or may not have adequately trained their staff in how to apply those rules.

The use of telecommunications equipment to allow aid organisations to operate in the field, to obtain data and to report back to their own headquarters, is now subject to the world's only genuine disaster related treaty, the *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations*.[24] Australia is not a signatory to the Tampere Convention.

Personnel

Foreign aid workers may have difficulties obtaining necessary visas, particularly visas to allow them to work in disaster-affected countries. This has been circumvented by entry on tourist visas, but these visas may require people to leave a country in order to renew the visa, and this takes up resources that may otherwise be devoted to aid work. Furthermore if workers are breaching the terms of their visas, they may find themselves subject to legal penalties, notwithstanding their humanitarian motivation.

Apart from entry requirements, there are issues involved in the recognition of professional qualifications. Can doctors, nurses and paramedics operate in the affected country? Can pilots fly, and equipment operators conduct operations with their foreign licences and qualifications?

These sorts of issues do not generally apply to representatives of the United Nations who can point to the international *Convention on the Privileges and Immunities of the United Nations*[25] to ensure that their staff are able to operate in

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23 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 103.

24 *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations*, opened for signature 18 June 1998, UNTS 2296 (entered into force 8 January 2005).

25 *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, [1949] ATS 3, (entered into force 17 September 1946); *Convention on*

all countries of the world, but it will remain to be seen how these issues are managed in Australia. A particular complication in Australia is that the management of disasters and the recognition of professional qualifications are matters of state law, whereas the management of immigration and customs is a Commonwealth matter.

Transport and movement around the disaster area

Free access to disaster-affected populations is essential,[26] but responding organisations may face difficulties where movement is restricted for security reasons[27] or due to normal administrative requirements. An influx of aid flights can overwhelm local airports and their ability to deal with incoming freight, and airlines may face landing and parking fees that limit the ability of responding organisations to deliver aid.

Operational matters

This section raises issues of legal personality and the ability of humanitarian responders to operate 'in country'. Again this is not usually a problem for the United Nations or the Red Cross Movement; the United Nations agencies can rely on the *Convention on the Privileges and Immunities of the United Nations*[28] and the *Convention on the Privileges and Immunities of the Specialized Agencies*[29] while the Red Cross can rely on standing agreements or work through local

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the Privileges and Immunities of the Specialized Agencies, opened for signature 21 November 1947, [1988] ATS 41, (entered into force 10 February 1949).

26 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 122.

27 John Telford, John Cosgrave and Rachel Houghton, *Joint Evaluation of the international response to the Indian Ocean tsunami: Synthesis Report* (Tsunami Evaluation Coalition, London, 2006) 43.

28 *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, [1949] ATS 3, (entered into force 17 September 1946); *Convention on the Privileges and Immunities of the Specialized Agencies*, opened for signature 21 November 1947, [1988] ATS 41, (entered into force 10 February 1949); Katrien Beeckman, 'Response to Non-Armed Conflict Disasters: Legal Challenges Encountered in Light of the Current Regulatory Framework' (Paper presented at the Eleventh Annual Humanitarian Conference, Webster University, Geneva, 2–3 March 2006).

29 *Convention on the Privileges and Immunities of the Specialized Agencies*, opened for signature 21 November 1947, [1988] ATS 41, (entered into force 10 February 1949).

societies.[30] For other humanitarian actors, however, establishing an office can be expensive and difficult, as they have to comply with local laws relating to corporate personality, tenancy, occupational health and safety, employment and so on.

Once established in the affected country, humanitarian agencies need to become involved in the local financial system. This requires them to be able to open and operate a bank account, be accepted as a charitable institution for tax purposes, including tax exemptions and being able to accept tax deductible donations

Humanitarian operations require either insurance or some form of indemnity from the host government. Claims for indemnity or exemption from liability go to the issue of accountability discussed below. In Australia, one of the normal routes to hold professionals and service providers accountable is to provide for the tort-based remedy of negligence; people affected by sub-standard service can sue for compensation. The level of service expected is that which is reasonable in the circumstances, which must include the circumstances of the disaster. Organisations that purport to provide humanitarian assistance should be able to provide 'reasonable' assistance, and to be held accountable if they do not. If they are provided an indemnity from tort liability, then one avenue of accountability is withdrawn and needs to be replaced.

Quality and accountability

The Good Humanitarian Donorship principles urge humanitarian organisations to involve local beneficiaries in 'the design, implementation, monitoring and evaluation of humanitarian response'.[31] In terms of accountability however, the principles focus on being accountable to donors, rather than recipients of aid.[32]

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30 Katrien Beeckman, 'Response to Non-Armed Conflict Disasters: Legal Challenges Encountered in Light of the Current Regulatory Framework' (Paper presented at the Eleventh Annual Humanitarian Conference, Webster University, Geneva, 2–3 March 2006).

31 Good Humanitarian Donorship, *Principles and Good Practice of Humanitarian Donorship* [7] <http://www.goodhumanitariandonorship.org/> at 25 February 2008.

32 Ibid [23]–[29].

Requiring non-government organisations and governments to be accountable for the aid they provide requires some assessment of the non-government organisation's credibility. If a non-government organisation is offering assistance, it should be able to deliver the aid it promises, in a culturally sensitive way and be accountable to those in need.

The problem for disaster-affected countries, when faced with a flood of international aid, as, for example, after the 2004 Boxing Day tsunami, is that they cannot determine who should be allowed to operate and on what terms, once the disaster has struck. At that time, government agencies are themselves disabled by the disaster or so overwhelmed with trying to provide their services to the affected community that they are unable to properly assess who is offering what sort of aid. The Tsunami Evaluation Coalition report recommended that

> The international relief system should establish an accreditation and certification system to distinguish agencies that work to a professional standard in a particular sector.[33]

However, such a system is likely to face many obstacles. Organisations will not agree on who has the authority to create such a regulatory scheme, and such a scheme necessarily excludes new non-government organisations that may arise in response to a particular incident and be able to provide a valuable service, but who have not had the time to commit themselves to a particular standard.[34]

There are various standards, such as the Red Cross Code of Conduct,[35] the Sphere Project's Minimum Standards in Disaster Response[36] and the Humanitarian

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33 John Telford, John Cosgrave and Rachel Houghton, *Joint Evaluation of the international response to the Indian Ocean tsunami: Synthesis Report* (Tsunami Evaluation Coalition, London, 2006) 23.

34 Nicholas Stockton, Humanitarian Accountability Partnership – International, Personal communication, 8 February 2007.

35 International Federation of Red Cross and Red Crescent Societies *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief* (International Federation of Red Cross and Red Crescent Societies, Geneva, 1995).

36 *The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response* (2004 ed, The Sphere Project, Geneva, 2004).

Accountability Partnership — International standard,[37] but no universal consensus on which should be adopted by particular organisations. An alternative is to have a scheme where a particular organisation, such as the United Nations, gives endorsement to non-government organisations and an affected state may chose only to admit organisations so endorsed, but again the limited mandate of the United Nations and the desire of non-government organisations to remain independent, including independent of an inherently political organisation like the United Nations, means that such a process would not be welcomed by vital humanitarian actors.

One scheme that is discussed in Chapter Seven is the accreditation process adopted by the Australian Agency for International Development ('AusAID') where non-government organisations that wish to deliver AusAID funded projects must go through a process to demonstrate their commitment to humanitarian principles, their ability to deliver projects in an appropriate way and their processes to ensure that they are accountable to both donors and beneficiaries. It will be argued that this process will go some way to giving countries that receive aid from Australia comfort that AusAID-accredited partner organisations are accountable and competent, and therefore appropriate agencies to be allowed to access a disaster-affected population for the purpose of delivering aid.

Coordination of international responders

Macalister-Smith notes that '[t]he failure of coordination in the disaster affected country accounts for much of the confusion which may accompany relief operations...'.[38] But, says Minear, '[e]veryone reveres coordination, but few wish to be coordinated …'[39] Seeking to coordinate international actors, both amongst

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37 *HAP 2007 Standard in Humanitarian Accountability and Quality Management (*Humanitarian Accountability Partnership — International, Geneva, 2007).

38 Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985) 143.

39 Larry Minear, 'Making the Humanitarian System Work Better' in K M Cahill (ed), *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 234, 236.

themselves and with domestic responders, remains an area of constant discussion and failure.[40]

Beigbeder argues that the coordination of inter-government organisations and non-government organisations is virtually impossible. The United Nations is not able to effectively coordinate its own agencies[41] and no-one can coordinate the inter-government/non-government sector:

> NGOs are multiple and independent: they resist any attempt by governments, IGOs, or other NGOs, to be told, and even less ordered, to undertake, or not, relief activities at specific places, times, and in determined ways. Autonomy is the essence of NGO identity and coordination can only be voluntary. In most cases coordination is even limited to voluntary cooperation.[42]

Coordination requires international responders to coordinate their activities to avoid duplication of projects and duplication of assessments. Rather than have every non-government organisation survey the affected population and decide what civilians need and then have them all trying to deliver what is needed, they need to work together to produce single needs assessments and then deliver the projects that each agency is best placed to provide. Failure to coordinate the response leads to inefficiency, duplication, competition and conflict. Attempting to coordinate the response has costs too, including the time spent in meetings and the costs involved in setting up common information sharing protocols and systems.[43]

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40 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 150.

41 Laura M E Sheridan, 'Institutional Arrangements for the Coordination of Humanitarian Assistance in Complex Emergencies of Forced Migration' (1999–2000) 14 *Georgetown Immigration Law Journal* 941; Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985) 151.

42 Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance* (Marinus Nijhoff, Dordrecht, 1991) 95.

43 Larry Minear, 'Making the Humanitarian System Work Better' in K M Cahill (ed) *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 234, 237.

The role of the United Nations as international coordinator

The United Nations could play a lead role in the coordination of international disaster response, but has been unable to clearly establish its authority in this area.

In 1971 the United Nations created the Office of the United Nations Disaster Relief Coordinator (UNDRO).[44] The Relief Coordinator was to mobilise and coordinate United Nations relief efforts,[45] as well as to coordinate with inter-government organisations and non-government organisations, and in particular with the Red Cross Movement.[46] The Relief Coordinator was to receive and distribute funds[47] and assist affected governments with the assessment of their relief needs and to communicate those needs to the donor countries.[48] The office would facilitate research in disaster reduction and resilience and assist countries in the development of disaster response plans.[49]

A further resolution in 1981 required the United Nations resident coordinator to take on the in-country role of coordinating the United Nations response to disasters. As a result, a single United Nations representative, usually from the United Nations Development Program (UNDP) takes on the role of coordinating the entire United Nations response to disasters. The United Nations coordinator, however, can only exercise authority over United Nations agencies. Non-government organisations and inter-government organisations that are not part of the United Nations response are not required, at least by this resolution, to cooperate or coordinate with the United Nations. The resident coordinator may invite these organisations to participate in coordination meetings.[50]

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44 *Assistance in Cases of Natural Disaster and Other Disaster Situations*, GA Res 2816(XXVI), UN GAOR 26th sess, 2018th plen mtg, UN Doc A/RES/2816(XXVI) (1971).

45 Ibid art 1(b).

46 Ibid art 1(c).

47 Ibid art 1(d).

48 Ibid art 1(e).

49 Ibid arts 1(f) and (g).

50 *Strengthening the Capacity of the United Nations System to Respond to Natural Disasters and Other Disaster Situations*, GA Res 36/225, UN GAOR 36th sess, 103rd plen mtg, UN Doc A/RES/36/225 (1981).

Bilateral and multi-lateral agreements mean that this resolution does not represent all the international law on disaster relief. United Nations law governs how the United Nations responds, but the United Nations is only one of many responders to a disaster, and the room for duplication and competition for resources continues. In 2000 the United Nations Secretary-General reported that:

> … there is a growing challenge to coordination, in both natural disaster and complex emergency situations, arising from the increasing number of actors — regional, subregional and bilateral — involved in the provision of humanitarian assistance and protection. That challenge arises from a success, namely, the increasingly widespread support that exists for humanitarian efforts, the increases in the overall level of humanitarian aid and the growing interest of a range of actors, including the private sector, in being involved in humanitarian operations. Challenges arising from that positive development include the fact that the growing number of those involved increases the complexity of coordination. Research commissioned by the Office for the Coordination of Humanitarian Affairs for the Inter-Agency Standing Committee indicates that, in the 10 years from 1988 to 1998, while the amounts of international humanitarian assistance provided through multilateral channels remained roughly constant and overall levels of humanitarian aid increased substantially, the proportion of international humanitarian aid delivered through multilateral channels declined from 45 per cent to about 25 per cent. The tendency of some Member States to deliver a high proportion of their humanitarian aid through international non-governmental organizations based in their own countries not only makes coordination of the international response more difficult, but may also lead to missed opportunities to strengthen national and local coping mechanisms in the affected countries.[51]

These problems were manifest in the response to the 2004 Boxing Day tsunami. There it was reported that:

> The large number of actors both significantly increased the costs of coordination (as there were so many more agencies to coordinate with) and reduced the effectiveness of coordination (as there were large numbers of agencies falling outside any coordination mechanism). In general, large private funding permitted INGOs and the RC Movement an unusual degree of flexibility and independence from formal coordination structures. The need and (in some cases) the will for INGOs to coordinate was consequently reduced.[52]

The United Nations Coordinator of Humanitarian Affairs is left, ultimately, with the responsibility of coordinating the response of the various United Nations

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51 Kofi A Annan, *Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations: Report of the Secretary-General*, General Assembly & Economic and Social Council, [72] UN Doc A/55/82–E/2000/61 (2000).

52 John Telford, John Cosgrave and Rachel Houghton, *Joint Evaluation of the International Response to the Indian Ocean Tsunami: Synthesis Report* (Tsunami Evaluation Coalition, London, 2006) 62.

agencies (for example, the World Food Programme, the United Nations International Children's Emergency Fund (UNICEF) and so on) but not the international response to a disaster. The desire of non-government organisations to remain independent of government and the desire of governments to make decisions based on their own political assessment of the situation means that the United Nations has not been able to take on a clear leadership role in this area.

Local coordination

Apart from coordination between themselves, international responders need to coordinate with local agencies and responders. First, and foremost, it must be remembered that the primary responders to any disaster are in fact the members of the affected community who immediately respond to the disaster by taking action to save themselves and their neighbours. After they have responded, local government authorities bring assistance, followed at a distant third by international responders, when required. The need to recognise, respect and work with local authorities is inherent in the principle that the primary responsibility for protecting an affected population lies with the government of the affected state (discussed in more detail in Chapter Three). It is also expressly provided for in various statements of international non-government organisations and standards of good practice in humanitarian work, discussed below.

The Red Cross Code of Conduct ('the Code') sets out that the Red Cross and Red Crescent Movement, and other organisations that have agreed to adopt the Code, shall 'respect culture and custom' and 'attempt to build disaster response on local capacities'[53] though this latter commitment is relatively limited as they commit themselves to strengthening local capacities 'by employing local staff, purchasing local materials and trading with local companies'. Organisations that have adopted the Red Cross Code of Conduct (including national Red Cross societies) only commit to working with other non-government organisations '[w]here

[53] International Federation of Red Cross and Red Crescent Societies *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief* (International Federation of Red Cross and Red Crescent Societies, Geneva, 1995) [5] and [6].

possible' and to work with government authorities where it is, in their view 'appropriate'.[54]

The Humanitarian Accountability Partnership — International standard[55] does not require organisations to coordinate with local governments, even though it does reaffirm that it is '… the primary duty of states to protect and assist people in times of armed conflict and calamity'.[56] The associated Principles of Accountability commit organisations that adopt them to '… involve beneficiaries in the planning, implementation, monitoring and evaluation of programmes and report to them on progress'.[57] The beneficiaries need not include the government agencies charged, under local law, with managing the effects of the disaster.

The Sphere Project,[58] in setting out minimum standards for needs assessment, states that organisations adhering to the Sphere Standard will ensure that their initial needs assessment will take

> … into account the responsibility of relevant authorities to protect and assist the population on the territory over which they have control, and also takes into account national law, standards and guidelines applicable where the affected population is found, as they conform with international law.[59]

It is understandable that humanitarian organisations are reluctant to commit to working with local government authorities. The history of humanitarian action is action in times of armed conflict. In Chapter One, the provisions of international humanitarian law and the Geneva Conventions of 1949 were briefly discussed. These provisions apply during armed conflict where humanitarian organisations need to remain, and be seen to be, independent of all sides to the conflict. Where sovereignty is in issue, that is where it is not clear who has the power or authority to take responsibility for an affected population, coordinating with one side or the other may be seen to be lending support to that side during the conflict. In those

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54 Ibid [6].

55 *HAP 2007 Standard in Humanitarian Accountability and Quality Management* (Humanitarian Accountability Partnership — International, Geneva, 2007).

56 Ibid 8.

57 Ibid 5.

58 *The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response* (2004 ed, The Sphere Project, Geneva, 2004).

59 Ibid 30.

circumstances the declared commitment to independent action and, in particular, independence from government, is essential. Whether that justification continues in natural disasters in the absence of armed conflict is unclear. The need for independent assessment and action may be justified where an affected state refuses to acknowledge a disaster or to allow any assistance to be provided, but the need for independent assessment is less clear when an affected state is managing the disaster response, but requires international assistance to provide further assets or personnel. In these circumstances coordination with local government authorities would seem essential to ensure that the response is efficient and planned, but it would require responding non-government organisations to become part of government planning and response. This may conflict with their long held commitment to independence.

If international responders are to coordinate their actions with domestic authorities, it must be clear which governmental authority is in charge of coordination of the disaster response. In many cases that is not clear or the task is entrusted to institutions lacking full authority or capacity. [60]

THE IDRL GUIDELINES

In order to assist countries to develop legal frameworks to facilitate international disaster assistance and to avoid the problems discussed above, the International Federation of Red Cross and Red Crescent Societies developed the *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* ('the IDRL Guidelines'). The IDRL Guidelines are set out in full in the Appendix at the end of this thesis.

It is the intention of the Federation that that the IDRL Guidelines are used by states 'as a tool to examine their own legal, institutional and policy frameworks …'[61] to determine if they are ready to deal with an influx of international disaster relief. They may also be used as a tool to determine if national laws are available

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[60] David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 152.

[61] Ibid 9.

to deal with the common problems when it comes to sending aid. The resolution of the problems facing international assistance is largely a matter for the laws of the affected or receiving state but recognising the common problems, and the solutions recommended in the IDRL Guidelines, may also suggest ways an assisting state can legislate to minimise difficulties faced by the affected state.

The IDRL Guidelines are presented in an introduction and five substantive chapters.

The ***introduction*** sets out the purpose and scope of the IDRL Guidelines and relevant definitions. One of the stated purposes in publishing the IDRL Guidelines is:

> … to contribute to national legal preparedness by providing guidance to States interested in improving their domestic legal, policy and institutional frameworks concerning international disaster relief and initial recovery assistance. [62]

This thesis, by benchmarking Australian law against the IDRL Guidelines, is advancing that purpose for Australia.

Part I sets out the core responsibilities of assisting and disaster-affected states. This part reflects international law that will be discussed in Chapter Three. Since this part is restating the effect of international law, rather than making significant recommendations on features that should be incorporated into domestic law, it will receive only limited attention in the discussion that follows.

Part II deals with early warning and preparedness.

Part III deals with the initiation and termination of international disaster assistance.

Part IV sets out guidelines to assist states in deciding who should be given access to legal facilities to allow them to operate in a disaster-affected area.

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[62] International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [1.3].

Part V identifies the 'minimum legal facilities' that should be extended to assisting states and humanitarian organisations. In short, Part IV urges states to consider which, or what sort of, organisations should be allowed to help with disaster relief, and Part V then identifies what legal facilities should be made available to those states and organisations.

Part I: Core responsibilities

This part reflects current international law that is the subject of detailed discussion in Chapter Three, below. The IDRL Guidelines restate that it is the primary responsibility of the affected state to manage the response to a natural disaster[63] and to 'coordinate, regulate and monitor'[64] disaster assistance provided by international actors.

Consistent with the recognition that the responsibility for managing the response to a disaster lies with the affected state (and perhaps inconsistent with the normally stated claims to independence), assisting actors, that is 'any assisting humanitarian organization, assisting state or other foreign entity or person responding to a disaster in the affected state'[65]

> … should abide by the laws of the affected State and applicable international law, **coordinate with domestic authorities**, and respect the human dignity of disaster-affected persons at all times.[66] (Emphasis added).

The IDRL Guidelines assert that assisting actors

> … should ensure that their disaster relief and initial recovery assistance is provided in accordance with the principles of humanity, neutrality and impartiality, and in particular:
>
> (a) Aid priorities are calculated on the basis of need alone;
>
> (b) Provided without any adverse distinction (such as in regards to nationality, race, ethnicity, religious beliefs, class, gender, disability, age and political opinions) to disaster-affected persons;
>
> (c) …

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63 Ibid [3(1)].
64 Ibid [3(3)].
65 Ibid [2(2)].
66 Ibid.

The IDRL Guidelines set out a number of criteria that should govern international disaster relief. They include that relief efforts should be responsive to the needs of the affected community, and in particular especially vulnerable groups within that community, must be coordinated with other actors, must meet standards of quality and be provided by competent personal with the involvement of the affected community.[67] The IDRL Guidelines further recommend that where states provide aid by funding third party organisations, they should take steps to ensure that the funded organisations comply with the principles[68] that are summed up by the words 'humanity, neutrality and impartiality'.[69]

States are encouraged to ensure that where there is public interest in supporting an international disaster relief effort, people make 'financial donations where possible or otherwise donate only those types of relief goods expressly requested by the affected State'.[70]

In order to ensure aid is delivered as intended, states are urged to 'cooperate to prevent unlawful diversion, misappropriation, or fraud concerning disaster relief or initial recovery goods, equipment or resources and initiate proceedings as appropriate'.[71]

Part II: Early warning and preparedness

This part encourages states to 'have procedures in place to facilitate the expeditious sharing of information about disasters, including emerging hazards that are likely to cause disasters, with other States and assisting humanitarian

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67 Ibid [4(3)].

68 Ibid [5(1)].

69 *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations*, GA Res 43/131, UN GAOR 43rd sess, 75th plen mtg, UN Doc A/RES/43/131 (1988).

70 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [5(2)].

71 Ibid [6(1)].

organizations as appropriate, including the United Nations Emergency Relief Coordinator'.[72]

Paragraph 8 of the IDRL Guidelines begins to deal with legal issues that are the subject matter of analysis in this thesis. States are encouraged to:

> … adopt comprehensive legal, policy, and institutional frameworks and planning for disaster prevention, mitigation, preparedness, relief and recovery which take full account of the auxiliary role of their National Red Cross or Red Crescent Society, are inclusive of domestic civil society, and empower communities to enhance their own safety and resilience….[73]

The IDRL Guidelines recommend that:

> These frameworks should also adequately address the initiation, facilitation, transit and regulation of international disaster relief and initial recovery assistance consistent with these Guidelines. They should allow for effective coordination of international disaster relief and initial recovery assistance, taking into account the role of the United Nations Emergency Relief Coordinator as central focal point with States and assisting humanitarian organizations concerning United Nations emergency relief operations. They should also clearly designate domestic governmental entities with responsibility and authority in these areas. Consideration should be given to establishing a national focal point to liaise between international and government actors at all levels.[74]

Where the relevant power is vested in a level of government other than the national government, such as a state or territory government, then the national government should take steps to ensure that these lower level authorities '… take the necessary steps at their level to implement the Guidelines'.[75]

Guideline 9 urges donor states to 'support developing States, domestic civil society actors and National Red Cross and Red Crescent Societies to build their capacities'[76] and to 'adequately implement legal, policy and institutional frameworks to facilitate international relief and initial recovery assistance'.[77]

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72 Ibid [7(1)].
73 Ibid [8(1)].
74 Ibid [8(2)].
75 Ibid [8(3)].
76 Ibid [9(1)].
77 Ibid [9(2)].

Part III: Initiation and termination of international disaster relief and initial recovery assistance

The IDRL Guidelines affirm that disaster relief should only be provided '…with the consent of the affected state and, in principle, on the basis of an appeal'.[78] An assisting state should wait until their assistance is requested. An affected state should:

> … decide in a timely manner whether or not to request disaster relief or initial recovery assistance and communicate its decision promptly. In order to make this decision, the affected State should promptly assess needs. Consideration should be given to undertaking joint needs assessments with the United Nations and other assisting humanitarian organizations.[79]

Apart from deciding *when* to request international assistance, states should also consider *how* they will request assistance:

> Requests and offers for assistance should be as specific as possible as to the types and amounts of goods as well as the services and expertise available or required, respectively. Affected States may also wish to indicate particular types of goods and services likely to be offered that are not needed.[80]

Consistent with the Oslo *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief* [81] the IDRL Guidelines urge states to use military forces in disaster relief only as a last resort and after 'civilian alternatives have been considered'.[82] If military forces are to be used:

> … terms and conditions (including such issues as the duration of deployment, whether they must be unarmed or may be armed, the use of their national

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78 Ibid [10(1)].

79 Ibid [10(1)].

80 Ibid [10(2)].

81 *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief — Oslo Guidelines (Updated November 2006; Revision 1.1 November 2007).* United Nations Office for the Coordination of Humanitarian Affairs <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1084542> at 25 February 2008.

82 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [11]; see also *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief — Oslo Guidelines (Updated November 2006; Revision 1.1 November 2007)* United Nations Office for the Coordination of Humanitarian Affairs <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1084542> at 25 February 2008, 3.

uniforms, and mechanisms for cooperation with civilian actors) are to be agreed by the affected and assisting States.[83]

Part IV: Eligibility for legal facilities

Part IV, read in conjunction with Part V, is perhaps the most important part of the IDRL Guidelines from the perspective of establishing legal preparedness to send and receive international disaster assistance. Part IV urges states to consider who should be given the necessary legal facilities to allow them to operate in the disaster-affected country, while Part V identifies the minimal legal facilities that should be extended to the states and organisations that meet the criteria for eligibility.

Legal facilities should be extended to:

- assisting states (which would include state agencies such as defence or civil defence organisations);[84]

- humanitarian organisations that meet pre-established and published criteria, including a willingness to ensure that their aid is delivered on the basis of the overriding principles of 'humanity, neutrality and impartiality';[85] and as a corollary to this provision, states should have well-established procedures to allow for potential humanitarian actors to apply for the necessary legal facilities;[86]

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83 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [11].

84 Ibid [13].

85 *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations*, GA Res 43/131, UN GAOR 43rd sess, 75th plen mtg, UN Doc A/RES/43/131 (1988); International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [14(2)].

86 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [14(4)].

- other organisations that can assist 'such as private companies providing charitable relief, provided this does not negatively affect operations of assisting humanitarian organizations or assisting States'.[87]

Part V: Legal facilities for entry and operations

The preamble to this section argues that the legal facilities referred to should be extended to incoming humanitarian actors, but in deference to the concept of national sovereignty they recognise that the grant of legal facilities is not a right enjoyed by the international community, nor is it a simple, overriding legal obligation upon the affected state. Whether legal facilities are granted, to whom and on what terms

> … will be subject to the interests of national security, public order, public and environmental health, and public morals of the concerned affected, originating and transit States. Measures to protect such interests should be tailored to the exigencies of the specific disaster and be consistent with the humanitarian imperative of addressing the needs of affected communities.[88]

Of particular relevance to Australia, as a federated state, is the suggestion that:

> Where specific facilities recommended here are within the competence of authorities other than the national government, the national government should, where possible and appropriate, encourage those authorities to provide the relevant facilities to assisting States and eligible assisting humanitarian organizations.[89]

Part V of the IDRL Guidelines deals with the issues of:

- personnel (including issuing visas and recognition of professional qualifications);
- goods and equipment (including issues of inappropriate aid and delays in getting humanitarian supplies into an affected country due to customs, transport or administrative barriers);
- transport and movement around the disaster area; and

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87 Ibid [15].
88 Ibid pt V Preamble.
89 Ibid.

- operational matters (such as establishing an office, opening bank accounts and employing staff).[90]

Personnel

With respect to incoming personnel, the recommendations are designed to overcome the problems identified with access to visas and recognition of professional qualifications. The IDRL Guidelines urge affected states to grant visas and permits without cost and without delay, and to recognise professional qualifications and to facilitate freedom of movement to and about the disaster area.[91]

Goods and equipment

Relief goods should be exempt from all duties, tariffs, fees and import and export restrictions. They should not be subject to unnecessary inspection, and where inspection is required, it should be done as a matter of priority and arrangements should be in place to allow that to take place at any time and at any place.

In order to take advantage of priority clearance arrangements, assisting states and organisations should '… appropriately pack, classify and mark disaster relief and initial recovery goods and equipment, and include detailed manifests with each shipment'.[92] Where the relief supplies include medicines, they must be approved for use in the donor state, transported in a way to ensure their usability and quality and safeguarded to ensure they are not lost or misappropriated. Where it is intended to donate medication for use by the affected state (rather than import them for use by a foreign relief team) the drugs should be at least 12 months from their expiry or 'use by' date and

> … appropriately labelled in a language understood in the affected State with the International Nonproprietary Name or generic name, batch number, dosage form,

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90 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

91 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [16)].

92 Ibid [17].

> strength, name of manufacturer, quantity in the container, storage conditions and expiry date.[93]

When receiving imports of food, the affected state should consider whether they can relax or waive normal restrictions on the importation of food and the normal requirements to fumigate or quarantine food imports.[94]

With respect to motor vehicles, and presumably also aircraft and boats, the IDRL Guidelines urge affected states to recognise the assisting states registration, and allow the vehicles to be operated without being registered or issued with domestic registration or number plates.[95]

Affected states should allow assisting organisations and states to import and use their own telecommunications equipment, and should allocate the necessary frequencies and bandwidth to operate their communications devices.[96]

Transport

An affected state should facilitate the arrival of foreign relief aircraft, ships and vehicles and should allow them to arrive and carry out their relief work without the usual fees and charges, for example, landing fees at international airports and port fees at sea ports.[97] Aircraft should be allowed to operate freely in the affected country.[98]

Operational matters

Affected states should grant to assisting states and organisations whatever authority is required to allow them to operate their relief mission. This would include the necessary status or authority to '… open bank accounts, enter into contracts and leases, acquire and dispose of property and instigate legal proceedings…',[99] and to employ local staff.[100] Assisting organisations should be

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93 Ibid [18(3)].
94 Ibid [18(4)].
95 Ibid [18(1)].
96 Ibid [18(2)].
97 Ibid [19(1)].
98 Ibid [19(2)].
99 Ibid [20(1)].
100 Ibid [20(3)].

free to import and export relief funds without regards to domestic currency restrictions.[101]

Further an affected state should

- exempt humanitarian relief agencies from all taxes including 'value-added' tax, or, in the Australian context, goods and services tax (GST);[102]
- provide security for relief workers, relief supplies and for the premises and equipment used by relief agencies and assisting states;[103]
- ensure that all state agencies that are required to operate to liaise with assisting organisations and states are open for extended hours during the disaster relief operations.[104]

The cost of providing disaster relief should be borne by the assisting state or humanitarian organisation, unless it has been agreed that the affected state will meet some or all of those costs.[105] Affected states should, however, assist in meeting the costs of disaster relief by waiving fees and charges and by providing domestic transport, the use of buildings and land free of charge and providing any 'cargo handling equipment and logistic support', without charge.[106]

Matters not dealt with in the IDRL Guidelines

The International Red Cross noted that there are problems with international disaster response in the areas of

- quality and accountability; and the

101 Ibid [20(2)].
102 Ibid [21].
103 Ibid [22].
104 Ibid [23].
105 Ibid [24(1)].
106 Ibid [24(2)].

- coordination of international responders.[107]

The IDRL Guidelines do not address these matters, recognising that the responsibility for managing the disaster response falls upon the affected state, and urging the affected state to set out, in advance, the criteria that must be met by assisting actors before they receive the benefit of the legal facilities identified in Part V. This leaves it to the affected state to impose a condition that incoming agencies will work with, and at the direction of, the local emergency controller or equivalent and to impose their own conditions regarding accountability and quality. One way that could be done, as Australia has done with accrediting non-government organisations to receive Australian aid funding, is to ensure or require that such agencies commit themselves to adopting and complying with an appropriate quality and accountability standard such as the Red Cross Code of Conduct,[108] the Sphere Charter[109] or the Humanitarian Accountability Partnership Standard.[110] How that might be done by way of a standard form of agreement between the assisting actor and Australia is discussed in Chapter Eight.

CONCLUSION

This chapter has identified a number of common problems experienced in the delivery of international disaster assistance and introduced the *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*. Having identified the problems that are regularly encountered in international disaster response, relevant law that has an impact upon the resolution of these problems can be identified.

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107 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

108 International Federation of Red Cross and Red Crescent Societies *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief* (International Federation of Red Cross and Red Crescent Societies, Geneva, 1995).

109 *The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response* (2004 ed, The Sphere Project, Geneva, 2004).

110 *HAP 2007 Standard in Humanitarian Accountability and Quality Management (*Humanitarian Accountability Partnership — International, Geneva, 2007).

This thesis is concerned with Australia's legal position, but Australia, as a sovereign state and member of the United Nations, is bound by international law. The next chapter will identify international law regarding the right or obligation of states and non-government organisations to request or provide international assistance. Chapter Four will then consider those specific treaty or convention obligations that Australia has entered into and that have an impact upon Australia's capacity for sending and receiving post-disaster assistance.

CHAPTER THREE
INTERNATIONAL LAW AND DISASTER RESPONSE

Chapter Two identified recurring problems that have been experienced by states that receive international disaster assistance and the recommendations made in the International Disaster Response Law ('IDRL') Guidelines regarding the content of domestic law that may assist states to overcome these common problems.

This thesis is considering the law that governs Australia's international, natural disaster response arrangements, and benchmarks that law against the IDRL Guidelines. Part of the law applying to Australia is international law. This chapter identifies the general principles of international law that impact upon the delivery of international disaster assistance. Subject to the methodological limitations discussed below, this chapter deals with the rules of international law that apply to all states, which necessarily includes Australia. The chapter that follows will deal bilateral and multi-lateral conventions that Australia has entered into, and which have implications for sending or receiving international disaster assistance.

International law of general application will determine answers to the following questions:

- When may a state offer international assistance?
- Is there an international obligation to provide aid?
- Must a state accept international assistance?

Answering the last question will also identify whether or not a population (as opposed to a state) affected by a natural disaster has a legal right to international assistance, and whether or not non-government organisations have a right to meet an affected population's humanitarian needs.

SOURCES OF INTERNATIONAL LAW

International law, unlike domestic law, is not easy to find. In the absence of an international legislature, determining what constitutes binding law can be

difficult. The *Statute of the International Court of Justice* directs the Court to consider:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations; [and]
>
> d. … judicial decisions and the teachings of the most highly qualified publicists of the various nations …[1]

The order of sources listed in article 38 reflects a practical hierarchy of sources of law. Where there is a convention governing inter-state relations, specified legal rights and obligations will regulate their legal relations in relation to the matters covered.[2] Where there is no such convention, the other sources of law, in the order listed, are considered to identify relevant rules of international law. This hierarchy is not a strict legal requirement but reflects the practice of the international legal community.[3]

Sources identified in article 38 (a), (b) and (c) (international conventions, customary international law and the general principles of law), are considered primary sources of law. Sources identified in article 38(d) (judicial decisions and scholarly commentary) are secondary sources that may support, or provide evidence for, claims that various rules or customs have reached the status of binding international law.[4]

This thesis will consider all the sources of international law, but there are significant difficulties in determining the existence of a principle of customary international law. To determine if state behaviour reflects a rule of customary international law

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1 *Statute of the International Court of Justice 1945* (Int) art 38.

2 *North Sea Continental Shelf cases (FRG v Denmark; FRG v The Netherlands)* (1969) 41 ILR 29 cited in Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Sydney, 2006) 42.

3 Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Sydney, 2006) 42–43.

4 Ibid 42; Malcolm N Shaw, *International Law* (Cambridge University Press, Cambridge, 2003) 67.

> … two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. … The States concerned must therefore feel that they are confirming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.[5]

The requirement to show that states subjectively accept that action is required by law, rather than rules of custom, courtesy or convenience, is 'implicit in the very notion of *opinio juris sive necessitatis*'.[6] To determine whether the necessary *opinio juris* exists, regard may be had to:

> … diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by government on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of resolutions relating to legal questions in the United Nations General Assembly.[7]

To identify state practice and to also identify their official reasons for action is a complex and lengthy task.[8] In trying to identify customary international humanitarian law (that is customary rules of the law of war), the International Committee of the Red Cross required ten years and the assistance of at least 47 researchers.[9] In preparing their study on International Disaster Response Law, the International Federation of Red Cross and Red Crescent Societies also declined to make a full study of customary law. They said

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5 *North Sea Continental Shelf cases (FRG v Denmark; FRG v The Netherlands)* (1969) 41 ILR 29 in Eric Heinze and Malgosia Fitzmaurice, *Landmark Cases in Public International Law* (Kluwer Law International, London, 1998) 77.

6 *North Sea Continental Shelf cases (FRG v Denmark; FRG v The Netherlands)* (1969) 41 ILR 29 in Eric Heinze and Malgosia Fitzmaurice, *Landmark Cases in Public International Law* (Kluwer Law International, London, 1998) 77. See also Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Sydney, 2006) 48.

7 Ian Brownlie, *Principles of Public International Law* (6th ed, Oxford University Press, Oxford, 2003) 6.

8 Malcolm N Shaw, *International Law* (Cambridge University Press, Cambridge, 2003) 69. See also *North Sea Continental Shelf cases (FRG v Denmark; FRG v The Netherlands)* (1969) 41 ILR 29 (Dissenting Opinion of Judge Tanaka) in Eric Heinze and Malgosia Fitzmaurice, *Landmark Cases in Public International Law* (Kluwer Law International, London, 1998) 90.

9 Jean-Marie Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 857 *International Review of the Red Cross* 175, 177 and 184.

> … precisely because proof of customary international law must be pieced together from a myriad of indications of state intent and belief, it requires a scholarly depth beyond the scope of this introductory desk study.[10]

This thesis faces similar limitations, and it is not possible to identify all state practice in international disaster response or to identify the official documents whereby states explain their reasons for action (or inaction). Therefore, in considering international disaster response law, as it applies to Australia, this thesis will not endeavour to fully consider customary international law.

What this chapter will do is review the literature, rather than state practice, to identify rules of international law that are identified by academic writers as rules that apply to the delivery of international disaster assistance. The discussion that follows looks at issues of sovereign equality, prohibitions on the use of force and intervention in the domestic affairs of other states as well as issues arising from instruments declaring universal human rights.

IS THERE AN INTERNATIONAL OBLIGATION TO SEND OR RECEIVE AID?

The question of international disaster assistance has been of interest to international lawyers for many years. In 1758 de Vattel believed that there was natural law, binding both on 'men' and on states, and that the rules of natural law can be derived from observing the nature of men.[11] He observed that

> … every man realizes that he could not live happily or improve his condition without the help and intercourse with other men. Therefore, since nature has constituted men thus, it is clear that it means them to live together and mutually aid and assist one another.[12]

Applying his analogy, that 'men' and states live in a morally equivalent world, he argued that it followed that states, like 'men', have an imperfect obligation to assist other states in times of need. The obligation is imperfect as it is up to each

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10 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 21–22.

11 E De Vattel, *The Law of Nations or the Principles of Natural Law; Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1916 ed, Carnegie Institution of Washington, Washington, 1758) 5.

12 Ibid.

state to determine what aid it can afford to give and no state is required to sacrifice its own self-preservation or needs for those of another. Although an affected state may ask for assistance, it is up to the potential donor to determine what if any assistance it can or should give.[13] De Vattel believed there was no binding obligation to force nations to assist one another but '[t]o give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would refuse absolutely to do so'.[14]

In the 19th Century de Vattel's 'natural law' theory gave way to positivism, the view that international law is created by the will of the states,[15] and then to subsequent modern theories of international law.[16] Although de Vattel's theory of law is no longer accepted, his writings demonstrate that the issue of international disaster response has been a matter of continuing interest to international lawyers.

International conventions

De Vattel provides an historical perspective, but as noted above, to identify modern international law it is necessary to consider the sources of law listed in the *Statute of the International Court of Justice*. The first source is 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting states'.[17]

Between the period of de Vattel and the establishment of the League of Nations in the aftermath of World War I, states made no attempt to identify or formalise the

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13 Ibid 114-116.

14 Ibid 115.

15 Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Sydney, 2006) 12; see also *The Case of the S.S. 'Lotus': France v Turkey* (1927) 10 PCIJ Reports 4 in Eric Heinze and Malgosia Fitzmaurice, *Landmark Cases in Public International Law* (Kluwer Law International, London, 1998) 33.

16 Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Sydney, 2006) 13–17; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, Oxford, 2007) 10–19.

17 *Statute of the International Court of Justice 1945* (Int) art 38(1)(a).

laws that would govern the delivery of international aid. Without a binding legal obligation, states were free to ask for, and to give, aid as they saw fit.[18]

The International Relief Union

In 1921, following the 1908 Messina earthquake, the President of the Italian Red Cross, Senator Giovanni Ciraolo, suggested that the international community establish an 'International Federation for Mutual Relief to Peoples overtaken by disaster'.[19] The proposal was adopted by the League of Nations in 1927, and on 27 December 1932, the Convention and Statute Establishing the International Relief Union[20] ('the Union') entered into force. 'This was the first, and so far, only instance of States establishing a treaty-based system for responding to natural disasters'.[21]

The Union was to manage the international response to disasters so that donations to affected countries did not depend upon the generosity of donor states and individuals as 'such generosity is capricious, often delayed for lack of information, and even more wasted by the lack of coordination'.[22] Further the delivery of international aid was adversely affected by

> [t]he system — or rather the multiplicity of systems employed — and the lack of coordination among them [that] results in waste, duplication, increase in overhead charges, delays and sometimes abuses…[23]

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18 Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985); John Hutchinson, 'Disasters and the International Order: Earthquakes, Humanitarians and the Ciraolo Project' (2000) 22 *International History Review* 1; David P Fidler, 'Disaster Relief and Governance After the Indian Ocean Tsunami: What Role for International Law?' (2005) 6 *Melbourne Journal of International Law* 458; Alejandra de Urioste, 'When Will Help Be on the Way? The Status of International Disaster Response Law'(2006) 15 *Tulane Journal of International and Comparative Law* 182.

19 'Question of the Establishment of an International Union for the Relief of Peoples Overtaken by Disaster' (1925) 6 *League of Nations O J* 1257, 1259.

20 *Convention and Statute Establishing an International Relief Union*, opened for signature 12 July 1927, CXXXV (1932-1933) LNTS 247, (entered into force 27 December 1932).

21 Alejandra de Urioste, 'When Will Help Be on the Way? The Status of International Disaster Response Law' (2006) 15 *Tulane Journal of International and Comparative Law*182, 184.

22 'Question of the Establishment of an International Union for the Relief of Peoples Overtaken by Disaster' (1925) 6 *League of Nations O J* 1257, 1260.

23 Ibid.

The Union was intended to serve as a clearing house for international aid. Member states were required to make an initial contribution to the Union in the same share as their contribution to the League,[24] but thereafter the Union was to be funded by voluntary donations.[25] States seeking assistance could apply to the Union and relief would be provided in accordance with the convention, thereby establishing that assistance was given 'as an act not of charity but of justice'.[26] Aid would be given by the international community, acting through the Union, rather than by direct state-to-state aid to ensure that the delivery of aid was seen as humanitarian only, and did not create any bonds of obligation.

Article 3 of the convention provided that the Union was to operate for the benefit of all stricken people, irrespective of nationality or any other distinctions, while also limiting the Union's actions to disasters occurring in the territory of the parties. Article 4 of the convention provided that the Union's operations were to be undertaken only with the consent of the state concerned. These two articles embodied the two main principles of the Union, namely, respect for the territorial sovereignty of parties and non-discrimination in assistance.[27] The convention did not, however, '…expressly formulate the right of relief'.[28]

The International Relief Union provided operational assistance in only two disasters; in 1934 following an earthquake in Orissa and in 1935 following an earthquake in Baluchistan.[29] In other disasters, political issues including reluctance by affected states to accept international aid, continued to hamper the delivery of effective aid. With the outbreak of World War II the work of the Union was further hampered. The Union continued, at least in theory, following

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24 *Convention and Statute Establishing an International Relief Union*, opened for signature 12 July 1927, CXXXV (1932–1933) LNTS 247, art 8 (entered into force 27 December 1932).

25 Ibid art 12.

26 'Question of the Establishment of an International Union for the Relief of Peoples Overtaken by Disaster' (1925) 6 *League of Nations O J* 1257, 1260.

27 Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985) 19.

28 Ibid 20.

29 Peter Macalister-Smith, 'The International Relief Union: Reflections on the Convention Establishing an International Relief Union of July 12, 1927' (1986) 54 *Tijdschrift voor Rechtsgeschiedenis* 363, 370.

the establishment of the United Nations but efforts to revive it were unsuccessful and the Union's assets and functions were finally transferred to the United Nations Economic and Social Council in 1967.[30] Despite the lack of practical success, Macalister-Smith argues that:

> … the IRU's activities are of significance not for their achievements in the field, but rather as evidence of the early recognition by States of the need for collaboration in matters of humanitarian assistance through international organization, on the foundations of international law.[31]

1984 draft convention

In 1984 there was a proposed draft convention to deal with the delivery of international aid, but it was not adopted. This draft convention[32] noted that '… the international community has willingly rendered assistance …' during disasters but recalled

> … the principle duty of States to cooperate with one another in accordance with the Charter [of the United Nations] and the principles of sovereign equality of States and non-intervention with the domestic jurisdiction of any State.[33]

The draft convention in no way suggested that assisting affected states, or accepting assistance, was a legal obligation. An offer of assistance was to be made voluntarily, and reference to the principles of sovereign equality and non-intervention confirmed that acceptance of aid was a matter for the affected state.

With the failure of the 1984 draft convention, it is now the case that there are no binding international conventions in the area of disaster relief in the absence of armed conflict. In cases of armed conflict the Geneva Conventions of 1949 and the Protocols of 1977[34] apply. Those conventions and their additional protocols

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30 Ibid 371–372.

31 Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985) 21.

32 *Draft Convention on Expediting the Delivery of Emergency Assistance* (1984) in ibid 222–230.

33 Ibid 222.

34 *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 32, (entered into force 21 October 1950); *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 86, (entered into force 21 October 1950); *Convention (III) relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75

specify that parties to an armed conflict (whether an international or non-international conflict) must facilitate the relief of an affected civilian population but there is no equivalent convention to establish similar obligations during a natural disaster.

Customary international law

Having identified that there are no binding international conventions in the area it is appropriate to look to 'international custom, as evidence of a general practice accepted as law'.[35] As noted above, it is not practical to fully consider all examples of state practice or to establish that whether or not there is the necessary *opinio juris* to show that states accept or deliver aid because they believe that such action is required by law. This chapter will, therefore, review statements made by the international community in the forum of the United Nations, and academic commentary, to determine if there is any evidence of customary international law that requires states to send or accept international disaster relief.

Resolutions and the role of the United Nations

The Charter of the United Nations does not specifically address international disaster response, but it does identify some guiding principles in international relations that have implications for disaster response. First, the member states 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person [and] … to promote social progress and better standards of life in larger freedom'.[36] In order to advance these principles, they agree to '… live together in peace with one another as good neighbours, and … to employ

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UNTS 136, (entered into force 21 October 1950); *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288, (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* opened for signature 8 June 1977, 1125 UNTS 4, (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* opened for signature 8 June 1977, 1125 UNTS 610, (entered into force 7 December 1978).

35 *Statute of the International Court of Justice 1945* (Int) art 38(1)(b).

36 *Charter of the United Nations*, Preamble.

international machinery for the promotion of the economic and social advancement of all peoples'.[37]

One of the purposes of the United Nations is:

> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;[38]

Responding to disasters in an affected state could be an example of living together as 'good neighbours'. Relieving disaster-affected populations, particularly when the affected state is unable to manage the response, could be an example of 'international co-operation in solving' problems of a humanitarian character. Statements that set out the purpose of an organisation such as the United Nations are, however, statements of intention and desirable outcomes but not definitive rules identifying conduct as obligatory.

Since its creation, the United Nations has played a role in international disaster relief, and various resolutions of the General Assembly have recognised the value of the United Nations' role and directed the Secretary-General to develop and improve the organisation's ability to respond to a disaster. Details of United Nations resolutions dealing with the role of the United Nations as the coordinator of international assistance were discussed in Chapter Two. The discussion that follows considers whether United Nations resolutions have identified, or created, a legal obligation upon states to assist each other following a natural disaster.

In 1964, the Economic and Social Council resolved that the Secretary-General should enquire into the types of assistance the United Nations could provide in times of natural disasters, including whether it would be useful to establish a 'United Nations fund for assistance in cases of natural disaster, financed through voluntary contributions'.[39] The Secretary-General was also to consider how

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37 Ibid.

38 Ibid art 1(3).

39 *Assistance in Cases of Natural Disaster*, GA Res 2034(XX) UN GAOR 20th sess, 1390th plen mtg, UN Doc A/RES/2034(XX) (1964) Preamble.

international assistance could be better coordinated.[40] The issues that concerned the Economic and Social Council were reminiscent of the concerns that lead to the establishment of the International Relief Union, discussed above.

In 1981 the General Assembly of the United Nations passed a detailed resolution[41] intended to improve the United Nations' capacity to respond to disasters. This resolution made clear that sovereignty remained a key feature of international disaster assistance.[42] The resolution:

> *Reaffirms* the sovereignty of individual Member States, recognizes the primary role of each State in caring for the victims of disasters occurring in its territory and stresses that all relief operations should be carried out and co-ordinated in a manner consistent with the priorities and needs of the countries concerned.[43]

United Nations General Assembly Resolution 43/131 (8 December 1988)[44] was significant as, for the first time, the General Assembly made reference to the aims of the United Nations in solving international humanitarian crises and began to tie disaster response to human rights issues by stating '… the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity'.[45] This resolution also gave voice to the principles espoused by the Red Cross Movement and other humanitarian organisations by affirming that '… in the event of natural disasters and similar emergency situations, the principles of humanity, neutrality and impartiality must be given utmost consideration by all those involved in providing humanitarian assistance'.[46]

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40 Ibid.

41 *Strengthening the Capacity of the United Nations System to Respond to Natural Disasters and Other Disaster Situations*, GA Res 36/225, UN GAOR 36th sess, 103rd plen mtg, UN Doc A/RES/36/225 (1981).

42 Ibid Preamble.

43 Ibid art 2.

44 *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations*, GA Res 43/131, UN GAOR 43rd sess, 75th plen mtg, UN Doc A/RES/43/131 (1988).

45 Ibid Preamble.

46 Ibid.

This resolution gave specific recognition to the 'important contribution' made by humanitarian non-government and inter-governmental organisations.[47] It:

> *Invites* all States in need of such assistance to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines and health care, for which access to victims is essential [and] *Appeals* … to all States to give their support to these organizations working to provide humanitarian assistance, where needed, to the victims of natural disasters and similar emergency situations.[48]

The resolution tied the provision of disaster relief to the aims of the United Nations and human rights, establishing the basis for a finding that how a country responds to a disaster is a matter of international concern. The resolution is non-binding and does not require countries to allow access by non-government organisations, but it certainly urges disaster-affected countries to work with humanitarian organisations to provide relief to disaster-affected populations.

The provisions dealing with inter-government and non-government organisations are directed at disaster-affected states encouraging them to accept assistance. The resolution also refers to other states, in particular states that neighbour the affected state and the part that they may play in facilitating disaster relief. Resolution 43/131:

> *Urges* States in proximity to areas of natural disasters and similar emergency situations, particularly in the case of regions that are difficult to reach, to participate closely with the affected countries in international efforts with a view to facilitating, to the extent possible, the transit of humanitarian assistance.[49]

Such a provision does not suggest that there is a binding legal obligation on one state to go to the aid of others. At best it urges international cooperation but such cooperation is still on a voluntary basis.

In December 1991, the United Nations General Assembly adopted resolution 46/182. This resolution set out guiding principles for the coordination and provision of humanitarian assistance, putting particular emphasis on prevention and preparedness. Resolution 46/182:

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47 Ibid art 3.
48 Ibid arts 4 and 5.
49 Ibid art 6.

- restated that the principles of humanity, neutrality and impartiality were fundamental principles governing the delivery of international aid;[50]

- reaffirmed the paramount issue of sovereignty and that aid should only be delivered at the request of the affected government;[51]

- called upon states to work with IGOs and non-government organisations and to facilitate their access to affected populations;[52] and

- called upon neighbouring states to facilitate the transhipment of relief supplies.[53]

Once again the international community was 'urged' to provide the resources to allow the United Nations to meet the goals set out in the resolution.[54]

In essence resolution 46/182 represented a clean start. The resolution drew on previous experience, starting with the International Relief Union and the League of Nations. Since that time, reports had identified weaknesses in the United Nations' system and had called for various incremental steps to strengthen the United Nations' ability to respond to natural disasters. The result was many resolutions gradually increasing the strength of the United Nations' position. Resolution 46/182 gathered together that past experience and placed it all in one document. It reaffirmed much that had gone before about the primary role of the affected state, but recognised the vital need, based on human rights and the Charter of the United Nations, for the international community to respond. It reiterated the need for resources and rapid response and provided a detailed list of responsibilities to the Emergency Relief Coordinator, established emergency funding procedures and established the Inter-Agency Standing Committee to try and improve United Nations/non-United Nations coordination. This resolution

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50 *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 46th sess, 78th plen mtg, Annex [2], UN Doc A/RES/46/182 (1991).

51 Ibid Annex [3] and Annex [4].

52 Ibid Annex [5] and Annex [6].

53 Ibid Annex [7].

54 Ibid Annex [17].

represented the single most dramatic move by the United Nations to improve its response to calls for assistance, and remains the primary governing instrument for the United Nations' disaster response.

Notwithstanding the United Nations continued work in this area, and developments in the way the United Nations approaches its task in disaster relief, nothing in the United Nations' resolutions suggests that the law has moved to impose an obligation upon states to come to the aid of their neighbours. The United Nations has moved away from attempts to develop international law that governs state responsibilities (those attempts at best being the International Relief Union and the 1984 Draft Convention), and instead moved to enhance its own ability to respond and to manage the response by non-government organisations and states that choose to respond through the United Nations process.

There is nothing in the United Nations' resolutions that could suggest that the members of the United Nations are of the view that providing assistance to another state is a requirement of international law, and no commentators have argued for such a conclusion. Macalister-Smith states:

> … it should be apparent that the individual nature of at least some disaster situations, the uncertainty as to the general character of humanitarian practices and, above all, the influence of political factors in relief, work firmly against the crystallization of particular customary international rules in this area.[55]

Fidler argues:

> Concerns and controversies about advocacy for a right of humanitarian intervention grounded in a 'responsibility to protect' reinforce the reticence of many states to bind themselves to rules concerning disaster relief. …
>
> Assisting states do not want legally binding obligations to pay for the significant costs that in-depth disaster governance presents for many countries. States facing potentially adverse effects from disasters will likewise stress sovereignty in the face of a potential avalanche of demands from the international community on preparing for, protecting against, and responding to natural disasters.[56]

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55 Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985) 54.

56 David P Fidler, 'Disaster Relief and Governance After the Indian Ocean Tsunami: What Role for International Law?' (2005) 6 *Melbourne Journal of International Law* 458, 472.

United Nations' resolutions and attempts to establish binding international law have all reiterated that the key principle in disaster relief is national sovereignty.[57] The consequence of sovereignty is

> [a] government may request international assistance or it may choose to deal with a disaster in its own way. Likewise, international law imposes no obligation on States to respond to requests for assistance or to make offers of contributions for relief operations in other countries. A government concerned may also set conditions for the use of contributions or the conduct of relief operations. [58]

It is the responsibility of the affected state to manage the response to a disaster, leaving them, generally speaking, free to seek international assistance as they see fit; and it is the sovereign right of states to offer only that assistance that they wish to offer. There is no universal obligation imposed by international law that requires states to make assistance available.[59]

A review of General Assembly resolutions has shown that states have not accepted or asserted that disaster relief is required by international law. The view of states, expressed via United Nations resolutions, has consistently been that the delivery, and receipt of aid is a matter for the donor and affected states alone. Academic commentators have also been reasonably consistent that there is no obligation in international law to offer or accept assistance.[60] The evidence fails to establish that customary international law requires states to either offer or accept humanitarian aid, following a natural disaster in the absence of armed conflict.

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57 Fidler shows that an '… analysis of General Assembly resolutions on disasters from 1981 until 2002 reveals an increasingly explicit emphasis on sovereignty.' Ibid 472.

58 Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985) 55.

59 See also Victoria Bannon, *Rethinking Legal Mechanisms for Access and Facilitation of International Disaster Response in Cases of Natural Disaster* (Master of Laws thesis, University of Melbourne, 2004) 43–73; Boniface Okere and Ernest M Makawa, 'Global Solidarity and the International Response to Disasters' in David D Caron and Charles Leben (eds) *The International Aspects of Natural and Industrial Catastrophes* (Martinus Nijhoff, The Hague, 2001) 429, 436–441.

60 See also David P Fidler, 'Disaster Relief and Governance After the Indian Ocean Tsunami: What Role for International Law?' (2005) 6 *Melbourne Journal of International Law* 458 but cf Rohan J Hardcastle and Adrian T Chua, 'Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters' (1998) 325 *International Review of the Red Cross* 589.

The general principles of law recognised by civilised nations

Another source of international law, as set out in the *Statute of the International Court of Justice*, is 'the general principles of law recognized by civilized nations'.[61] That is not to say that the International Court of Justice will simply adopt domestic law, rather, Brownlie argues it allows the Court to borrow from domestic law those principles and reasoning that would assist the development of interstate relations.[62] If the national laws of 'civilized nations'[63] impose a widely recognised legal duty to rescue, then that duty could, if it 'would assist the development of interstate relations',[64] be borrowed and applied to states as part of international law.

A duty to come to the aid of other people is not a principle universally recognised in domestic law. It is traditionally said that common law countries, such as Australia, the United Kingdom, the United States and Canada do not have a legal duty to rescue,[65] whereas the civil law countries, such as most European countries, do.[66] That analysis may be too simplistic, as there are examples where the common law[67] or legislative provisions in common law countries[68] do impose a duty, but it can be accepted as a statement of general principle.

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61 *Statute of the International Court of Justice 1945* (Int) art 38(1)(c).

62 Ian Brownlie, *Principles of Public International Law* (6th ed, Oxford University Press, Oxford, 2003) 16.

63 *Statute of the International Court of Justice 1945* (Int) art 38(1)(c).

64 Ian Brownlie, *Principles of Public International Law* (6th ed, Oxford University Press, Oxford, 2003) 16.

65 Alexander McCall-Smith, 'The Duty to Rescue and the Common Law' in Michael A Menlowe and Alexander McCall-Smith (eds) *The Duty to Rescue: The Jurisprudence of Aid* (Dartmouth Publishing Company Limited, Aldershot, 1993) 55.

66 Alberto Cadoppi, 'Failure to Rescue and the Continental Criminal Law' in Michael A Menlowe and Alexander McCall-Smith (eds) *The Duty to Rescue: The Jurisprudence of Aid* (Dartmouth Publishing Company Limited, Aldershot, 1993) 93.

67 For example, *Woods v Lowns* (1995) 36 NSWLR 344 (NSWSC) and *Lowns v Woods* [1996] Aust Torts Reports 81_376 (NSWCA).

68 For example, see *Criminal Code Act 1983* (NT) s 155.

Where a duty to rescue is part of domestic law it is not without criticism.[69] That criticism would be even greater if there was a duty on states to go to the aid of another state. The questions arising would be: At what cost to the assisting state? What sort of assistance is required? If one state intervenes in another, what does that do to the stability of the affected state and the local economy and infrastructure? How is the rescuing or intervening state to be held accountable to the affected population to provide aid that is desired and needed? Saying there is a legal obligation to go to the aid of another raises significant legal questions that would become more complex if the duty were to a whole population and not just an individual at risk.

In international law there are examples where a duty to assist others is imposed. Under the law of the sea there is a duty on seafarers and coastal states to go to the aid of people in distress at sea. This duty is well-established both by convention[70] and by customary international law.[71]

Conventions have also imposed a duty on countries to assist their neighbours when they are aware of environmental or industrial hazards that are likely to have cross-border implications.[72] For example, a state has to warn its neighbour of a

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69 Alberto Cadoppi, 'Failure to Rescue and the Continental Criminal Law' in Michael A Menlowe and Alexander McCall-Smith (eds) *The Duty to Rescue: The Jurisprudence of Aid* (Dartmouth Publishing Company Limited, Aldershot, 1993) 93, 122.

70 Relevant conventions are *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, UNTS 1184, (entered into force 25 May 1980); *International Convention on Salvage*, opened for signature 28 April 1989, UNTS 1953, (entered into force 14 July 1996); *International Convention on maritime search and rescue*, opened for signature 27 April 1979, [1986] ATS 29, (entered into force 22 June 1985).

71 Jessica E Tauman, 'Rescued at sea, but nowhere to go: The cloudy legal waters of the Tampa Crisis' (2002) 11 *Pacific Rim Law and Policy Journal* 461, 463; Martin Davies, 'Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea' (2003) 12 *Pacific Rim Law and Policy Journal* 109, 109; Craig H Allen, 'The Maritime Law Forum: Australia's Tampa Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim: The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea.' (2003) 12 *Pacific Rim Law and Policy Journal* 143, 148 and Richard Barnes, 'Refugee Law at Sea' (2004) 53(1) *International and Comparative Law Quarterly* 47.

72 Nina Nordstrom, 'Managing Transboundary Environmental Accidents: The State Duty to Inform' in David D Caron and Charles Leben (eds) *The International Aspects of Natural and Industrial Catastrophes* (Martinus Nijhoff, The Hague, 2001) 291.

nuclear accident that may threaten the neighbouring state's environment, [73] but that does not extend to an obligation to actually assist the affected population.

The fact that these international duties exist does not, however, establish a general rule that one state must provide aid to another. In fact it may be argued that the various treaties establishing such a duty '… could be seen as a reflection of a lack in general international law of an equivalent norm …'.[74] The fact that treaties create a duty on limited parties (for example coastal states), and in limited circumstances, certainly does not support an argument that the international community has accepted a universal, legal obligation to go to another state's aid.

Looking at 'general principles of law recognized by civilized nations'[75] it cannot be said that there is a general legal obligation upon one state to go to the aid of another. Where such duties do exist, they are established by specific treaties with limited and reasonably specific obligations.

CONCLUSION ON THE OBLIGATION TO SEND OR RECEIVE AID

An analysis of international legal sources including treaties, customary international law to the extent that it can be identified, general principles of law and the writing of academics, has not shown any basis to conclude that there is a legal duty on one state to go to the aid of another following a natural disaster. States do of course provide aid for reasons of humanity, solidarity and to advance their own national interests, but none of that suggests that they are legally required to provide that aid.

Recognition that sovereignty is a key factor in disaster relief suggests that it is a matter solely for the affected state to decide if and when international assistance should be accepted. Sovereignty is however undergoing a change, a change from the right of the sovereign authority to govern as it sees fit to a responsibility to

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73 E Evan R Seamone, 'When wishing on a star just won't do: the legal basis for international cooperation in the mitigation of asteroid impacts and similar transboundary disasters' (2002) 87(3) *Iowa Law Review* 1091, 1132.

74 Nina Nordstrom, 'Managing Transboundary Environmental Accidents: The State Duty to Inform' in David D Caron and Charles Leben (eds) *The International Aspects of Natural and Industrial Catastrophes* (Martinus Nijhoff, The Hague, 2001) 291 376–377.

75 *Statute of the International Court of Justice 1945* (Int) art 38.

protect the sovereign authority's population. The international community is increasingly interested in watching how sovereign governments exercise this responsibility, and this will have implications, discussed in the next section, on the question as to whether or not the international community can provide aid when required.

IS THERE A RIGHT TO PROVIDE AID?

Assuming there is no obligation to provide aid, is there a right to provide aid when that aid is required? As indicated, the view of the United Nations General Assembly as well as various international conventions is that state sovereignty is the primary consideration, so that aid may only be given at the request of, and with the permission of, the government of the affected state. Australian policy states:

> Before Australia can take direct action in an emergency however, the affected country must make an official request for assistance.
>
> To take uninvited action would breach international protocols and show a lack of respect for the affected country's sovereignty.[76]

This section will test the assertion that 'to take uninvited action would breach international protocols'[77] or law. It will consider whether, consistently with current international law, a state might in fact take uninvited action in the territory of another state following a natural disaster. There are four scenarios where a state, such as Australia, may conceivably seek to deploy disaster relief into another state without the consent of the government of that state. They are:

1. to provide humanitarian relief to the victims of the disaster where it is felt that the government of the affected state is unable or unwilling to provide that relief;

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[76] AusAid, *Responding to Emergencies* <http://www.ausaid.gov.au/human/emergencies.cfm> at 20 January 2008.

[77] Ibid.

2. to provide humanitarian relief to the victims of the disaster where, as a result of the disaster, there is no effective government of the affected State or that government cannot be contacted;

3. to protect the assisting state from the spread of the hazard into its own territory; and

4. under the auspices of the United Nations in order to deal with a threat to international peace and security.

It will be argued that the deployment of Australian disaster assistance without the prior permission of the affected state may be justified, and therefore not a breach of international law, in some very limited circumstances. The argument for intervention in scenario 1 will be based on an analogy with the arguments for armed intervention to protect human rights during conflict and the evolving concept of the 'Responsibility to Protect'.[78] The argument for scenarios 2 and 3 will be based on the doctrine of necessity while the argument for scenario 4 will be based on Chapter VII of the Charter of the United Nations.

The deployment of state resources can only be effected by consent.

The starting point of any discussion on the deployment of international assistance to an affected state has to be recognition that, generally speaking, such deployment may only occur at the request of, or at least with the consent of, the government of the affected state.

The Charter of the United Nations relevantly provides that:

- The Organization is based on the principle of the sovereign equality of all its Members.[79]

- All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of

[78] The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001).

[79] *Charter of the United Nations* art. 2(1).

> any state, or in any other manner inconsistent with the Purposes of the United Nations;[80] and
>
> - Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state … .[81]

These clauses reiterate the general principle that delivering aid supplies or deploying people to assist after a disaster, without consent of the affected state, is contrary to international law. As noted in the discussion on the question of whether or not there is an obligation upon states to provide aid, the international community has consistently reaffirmed the principle of state sovereignty and that aid should only be provided with the consent of, and at the request of, the affected state. The United Nations General Assembly has:

> Reaffirm[ed] that the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations and, in this context, humanitarian assistance should be provided with the consent of the affected country and, in principle, on the basis of an appeal by the affected country.[82]

and

> Emphasiz[ed] that the affected State has the primary responsibility in the initiation, organization, coordination and implementation of humanitarian assistance within its territory, and in the facilitation of the work of humanitarian organizations in mitigating the consequences of natural disasters.[83]

The IDRL Guidelines state:

> Affected States have the primary responsibility to ensure disaster risk reduction, relief and recovery assistance in their territory. [Further] … Affected States have the sovereign right to coordinate, monitor and regulate disaster relief and

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80 Ibid art. 2(4).

81 Ibid art. 2(7).

82 *Strengthening the Effectiveness and Coordination of International Urban Search and Rescue Assistance*, GA Res 57/150, UN GAOR 57th sess , 75th plen mtg, UN Doc A/RES/57/150 (2003); *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 46th sess, 78th plen mtg, UN Doc A/RES/46/182 (1991).

83 *International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, From Relief to Development*, GA Res 56/103 UN GAOR 56th sess, 87th plen mtg, UN Doc A/Res/56/103 (2002).

recovery assistance provided by assisting actors on their territory, consistent with international law.[84]

It is undoubted that the principal or primary responsibility for managing the effects of a disaster lies with the government of the affected state. Recognising that the primary responsibility vests in the government of the affected state[85] does not, however, deny that others may have a secondary responsibility. Further it appears that the delivery of aid or the deployment of relief workers into the territory of an affected state will only be contrary to the principles of international law if it represents:

1. a refutation of the principle of sovereign equality;[86]

2. a use of force;[87] or

3. intervention in a matter that is 'essentially within the domestic jurisdiction' of the affected state.[88]

Sovereign equality

The fundamental building block of international law is that all states are sovereign and equal. Brownlie says that the state is the basic player in international law and that '[t]he sovereignty and equality of States represents the basic constitutional doctrine of the law of nations …'[89] The *Responsibility to Protect* report says that

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84 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

85 Above n 82 and n 83.

86 *Charter of the United Nations* art. 2(7).

87 *Strengthening the Effectiveness and Coordination of International Urban Search and Rescue Assistance*, GA Res 57/150, UN GAOR 57th sess , 75th plen mtg, UN Doc A/RES/57/150 (2003); *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 46th sess, 78th plen mtg, UN Doc A/RES/46/182 (1991).

88 *International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, From Relief to Development*, GA Res 56/103 UN GAOR 56th sess, 87th plen mtg, UN Doc A/Res/56/103 (2002).

89 Ian Brownlie, *Principles of Public International Law* (6th ed, Oxford University Press, Oxford, 2003) 287.

the key principle of international law is the independent and equal status of states, regardless of geographical size, economic strength or population.[90]

Sovereignty can be, and is, limited by international obligations, including obligations freely entered into as treaties. Obligations arise from membership of the United Nations which, in turn, 'elevates the solution of economic, social, cultural, and humanitarian problems, as well as human rights, to the international sphere'.[91] From this it can be concluded that 'sovereignty … carries with it primary responsibilities for states to protect persons and property'[92] but equally, carrying out these responsibilities has an international, not purely domestic, sphere. 'By definition, these matters cannot be said to be exclusively domestic, and solutions cannot be located exclusively within the sovereignty of states.'[93] Further, '[s]overeignty is incapable, then, of completely shielding internal violations of human rights that contradict international obligations'.[94]

Prohibited use of force

Under international law, there is a prohibition on the use, or threat, of force in international relations.[95] In the context of responding to a natural disaster, the relevant question is whether the deployment of disaster assistance is a use of force. It is a use of force to deploy armed forces to engage in battle, but what of unarmed forces to deliver food aid? What of unarmed search and rescue teams to rescue people from earthquake devastated towns? If this type of response is not 'force', then it is not contrary to the prohibition contained in article 2(4) of the Charter of the United Nations to deploy them. The critical preliminary question is, therefore, what does 'force' mean in terms of the United Nations Charter?

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90 The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001) 12.

91 The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect Supplementary Volume: Part I Research Essays* (International Development Research Centre, Ottawa, 2001) 8.

92 Ibid.

93 Ibid.

94 Ibid.

95 *Charter of the United Nations* art 2(4).

The *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*[96] defines aggression as '…the most serious and dangerous form of the illegal use of force …'[97] and further:

> Any of the following acts, regardless of a declaration of war, shall … qualify as an act of aggression:
>
> (a) the invasion or attack by the armed forces of a State or the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State of part thereof;
>
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
>
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;
>
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by the other State for perpetrating an act of aggression against a third State;
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[98]

The actions listed are clearly linked to the use of armed or military services by one state against another. The list, however, is not exhaustive.[99] Other actions may also be an act of aggression. Moreover, if aggression is the 'most serious and dangerous form of the illegal use of force', then it is not the only 'form of the

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96 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625(XXV), UN GAOR 25th sess, 1883rd plen mtg, UN Doc A/8018 (1970).

97 *Definition of Aggression*, 3314(XXIX), UN GAOR 29th sess., 2319th plen mtg, (1974) 143.

98 Ibid 143.

99 Ibid 143, art 4.

illegal use of force'. Other conduct by a state may be an illegal use of force, even if it is not an act of aggression. It follows that the definition of 'aggression' in the *Declaration … concerning Friendly Relations and Co-operation among States* …[100] does not fully identify what is, or is not, an illegal use of force.

Brownlie says:

> There can be little doubt that 'use of force' is commonly understood to imply a military attack, an 'armed attack', by the organized military, naval, or air forces of a state; but the concept in practice and principle has wider significance. The agency concerned cannot be confined to military and other forces under the control of a ministry of defence or war, since the responsibility will be the same if a government acts through 'militia', 'security forces', or 'police forces' which may be quite heavily armed and may employ armoured vehicles. Moreover, governments may act by means of completely 'unofficial' agents, including armed bands, and 'volunteers', or may give aid to groups of insurgents on the territory of another state.[101]

Brownlie's conclusion is that 'force' implies an armed 'attack' though it does not matter how the attackers are organised, employed or labelled; if they are 'armed' representatives of a government, attacking another government, then it is an example of prohibited 'force'.

Randelzhofer argues the term 'force' in article 2(4) '… does not cover any possible kind of force, but is, according to the correct and prevailing view, limited to armed force'.[102]

If this analysis is correct, and 'force' in article 2(4) means 'armed force' or 'armed attack', then the use of unarmed responders, whether civilian aid workers, or even unarmed soldiers, to provide assistance after a disaster would not be an example of an unlawful use of force. It would also not be an unlawful use of force to deliver recovery assistance, for example by sailing a warship into port, provided

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100 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625(XXV), UN GAOR 25th sess, 1883rd plen mtg, UN Doc A/8018 (1970).

101 Ian Brownlie, *International Law and the Use of Force* (Oxford University Press, Oxford, 1963 (Reprinted 2002)) 361.

102 Albrecht Randelzhofer, 'Commentary on art 2(4)' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, Oxford, 2002) 112, 117.

the ship was clearly displaying its peaceful intentions. Even though the ship is 'armed', it is not using force or engaging in any form of attack.

Prohibited intervention

The second, relevant, prohibition is the prohibition on intervention '… in matters which are essentially within the domestic jurisdiction of any State'.[103] The prohibition is breached, for example, by '… armed intervention and all other forms of interference … against the personality of the State or against its political, economic and cultural elements …'[104] States must not use 'economic, political or any other types of measures' to obtain an advantage from another state or encourage the violent overthrow of another government.[105] Essentially, '[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State'.[106]

What is inherently within the domestic jurisdiction of a state must be subject to change as the reach of international law expands.[107] If the human rights of a disaster-affected population are affected by the inertia of their own government, is the response to the disaster still a matter solely within the domestic jurisdiction of that government? On this point the International Court of Justice said:

> There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives cannot be regarded as unlawful intervention, or as in any other way contrary to international law.
>
> … An essential feature of truly humanitarian aid is that it is given 'without discrimination' of any kind. In the view of the Court, if the provision of 'humanitarian assistance' is to escape condemnation as an intervention in the internal affairs of [a state] …, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate

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103 *Charter of the United Nations* art 2(7); see also *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625(XXV), UN GAOR 25th sess, 1883rd plen mtg, UN Doc A/8018 (1970).

104 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625(XXV), UN GAOR 25th sess, 1883rd plen mtg, UN Doc A/8018 (1970).

105 Ibid.

106 Ibid.

107 Georg Nolte, 'Commentary on art 2(7)' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, Oxford, 2002) 148, 157.

> human suffering' and 'to protect life and health and to ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need … [108]

It follows from this proposition that sending humanitarian workers into a country with the express mandate of providing aid to all comers would not breach the prohibition on intervention in the domestic affairs of the affected state. It would have to be clear, however, that the mandate was to provide care to everyone simply on the basis of need. Any mission that was intended to privilege the assisting state's citizens, for example to evacuate its own citizens from the disaster area, would not meet this criterion and could be an unlawful interference.

Armed humanitarian intervention

It has been argued that an armed intervention for humanitarian purposes does not infringe the prohibitions on the use of force and unlawful intervention,[109] as the intervention is not directed 'against the territorial integrity or political independence of' the target state and is in fact consistent with 'the Purposes of the United Nations',[110] which includes advancing human rights.

This section considers the arguments both in favour of, and against, a legal right to intervene forcibly to relieve an affected population from violence and oppression. This thesis is considering the delivery of assistance *in the absence of armed conflict*, so these arguments are not directly applicable. However, the arguments in favour of armed humanitarian intervention support an argument that could justify the delivery of post-disaster assistance when the affected state refuses, or is unable, to provide for the affected population. It is suggested that the arguments against armed humanitarian intervention do not conclusively deny the

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108 *Nicaragua v United States of America* [1986] ICJ Reports 14, 124–125.

109 Alexander Ruck Keene, 'Humanitarian Intervention' (2001) 151 *New Law Journal* 1096,; Gary Klintworth, *'The Right to Intervene' in the Domestic Affairs of States* (Strategic and Defence Studies Centre, Canberra, 1991) 12; contra Thomas M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press, Cambridge, 2002) 12; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, Oxford, 2001) 48–52; Mohammad Taghi Karoubi, *Just or unjust war?: International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century* (Ashgate Aldershot, 2004) 230.

110 *Charter of the United Nations* art 2(4).

right to provide post-disaster humanitarian assistance in the circumstances being discussed.

Arguments in favour of a right of armed humanitarian intervention

Klintworth quotes the former United Nations Secretary-General Javier Perez de Cuellar as saying that the idea of armed humanitarian intervention was:

> … revolutionary because it challenges the sanctity of what had hitherto been a fundamental principle of international law — that states could not interfere in the internal affairs of other states.[111]

Klintworth argues that the concept is not as revolutionary as it appeared to the Secretary-General.[112] He cites action by the world community to outlaw slavery, and later to impose sanctions on South Africa in response to the policy of apartheid, as demonstrating that the international community can and does impose 'limits to the discretion of states to do as they please within their own territory'.[113] These actions, he argues, show that there have already been accepted challenges to the 'fundamental principle'[114] of non-intervention, hence his conclusion that taking the next step, armed intervention, is not a revolution, rather a further development of accepted principle.

In Klintworth's view, articles 2(4) and 2(7) of the United Nations Charter have been read narrowly to put sovereign independence as the prime consideration but

> … if these articles are read broadly, to take account of the purposes of the UN ... then the Charter prohibitions against the use of force and intervention in the internal affairs of a state are not the blanket bans that they first appear.[115]

This is because:

> If amongst the purposes of the UN, there is a duty — a higher purpose — to save future generations from the scourge of war and to protect and promote human rights, to uphold justice, in addition to solving conflict by peaceful means, then,

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111 Gary Klintworth, *'The Right to Intervene' in the Domestic Affairs of States* (Strategic and Defence Studies Centre, Canberra, 1991) 1.

112 Ibid.

113 Ibid.

114 Ibid.

115 Ibid 2.

> arguably, force can be used to achieve certain objectives that are consistent with these purposes.[116]

Tesón is a leading advocate for a right of humanitarian intervention vested in the liberal democracies of the world. He defines humanitarian intervention as:

> Proportionate help, including forcible help, provided by governments (individually or in alliances) to individuals in another state who are victims of severe tyranny (denial of human rights by their own government) or anarchy (denial of human rights by collapse of social order).[117]

Tesón adopts the view that humanitarian intervention is not contrary to article 2(4) of the United Nations Charter, as it is not against the territorial integrity of the state, does not aim to affect political independence and is consistent with the purposes of the United Nations, one of those purposes being to advance human rights.[118] He concludes that humanitarian intervention (which in his view includes a variety of actions ranging from soft pressure, discussions, recommendations and the like,[119] to the use of armed force) is justified to free people from tyranny, but that there is a high 'bar' that must be cleared before armed forces can be legitimately deployed, and 'in general, only severe cases of anarchy or tyranny qualify for humanitarian intervention'.[120]

The North Atlantic Treaty Organization (NATO) asserted that its 1999 aerial bombardment of Kosovo was required 'to halt the humanitarian catastrophe that was then unfolding …'.[121] NATO asserted that notwithstanding the prohibition on the use of force contained in the Charter of the United Nations its action was justified by an overriding obligation to protect human rights.[122] This precedent does not however establish that such actions are legal under international law.

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116 Ibid 12.

117 Fernando R Téson, *Humanitarian Intervention: An Inquiry into law and morality* (3rd ed, Transnational Publishers, Ardsley, 2005) 6.

118 Ibid 194. See also Alexander Ruck Keene, 'Humanitarian Intervention' (2001) 151 *New Law Journal* 1096.

119 Fernando R Téson, *Humanitarian Intervention: An Inquiry into Law and Morality* (3rd ed, Transnational Publishers, Ardsley, 2005) 173.

120 Ibid 157.

121 NATO, *The Kosovo Air Campaign* <http://www.nato.int/issues/kosovo_air/index.html> at 14 February 2009.

122 Ronald C Santopadre, 'Deterioration of Limits on the Use of Force and its Perils: A Rejection of the Kosovo Precedent' (2003) 18 *St John's Journal of Legal Commentary* 369, 373; 379–382.

Commentators generally agree that the action was contrary to international law, even if it was morally justified.[123] Serbia and Montenegro brought actions against members of NATO in the International Court of Justice to argue that the use of force was contrary to international law, but the question was not resolved as the Court found that it did not have jurisdiction to hear the complaint.[124] The use of force by NATO, even if justified by humanitarian need, has not established that such intervention is lawful under international law.[125]

Arguments against a right of armed humanitarian intervention

The overwhelming weight of opinion on the use of armed force to intervene to protect human rights is that such an action, when taken unilaterally, that is without the endorsement of the Security Council, is contrary to international law. On this side of the debate, Beigbeder writing in 1991 argued that developments in international law, including the actions of the allied forces in the first Gulf War, represented a 'desirable, progressive recognition of an international right and duty of humanitarian assistance', but the right of affected populations to receive assistance had not yet coalesced into a right of intervention.[126]

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123 Vladimir-Djuro Degan, 'Humanitarian Intervention (NATO action against the Federal Republic of Yugoslavia in 1999)' in Lal Chand Vohrah, et al. (eds) *Man's Inhumanity to Man: Essays in International Law in Honour of Antonio Cassese* (Kluwer International, The Hague, 2003) 233, 238; Albrecht Randelzhofer, 'Commentary on Art 2(4)' in Bruno Simma (ed) *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, Oxford, 2002) 112, 131–132; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International law* (Oxford University Press, Oxford, 2001); Thomas M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press, Cambridge, 2002) 171–172

124 *Legality of Use of Force (Yugoslavia v United States of America); (Serbia and Montenegro v Belgium) (Serbia and Montenegro v Canada) (Serbia and Montenegro v France) (Serbia and Montenegro v Germany) (Serbia and Montenegro v Italy) (Serbia and Montenegro v Netherlands) (Serbia and Montenegro v Portugal) (Yugoslavia v Spain) (Serbia and Montenegro v United Kingdom)* (1999) ICJ Reports 124.

125 Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Sydney, 2006) 570–573.

126 Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance* (Marinus Nijhoff, Dordrecht, 1991) 409.

Chesterman[127] argues against holding there is a right of humanitarian intervention. His argument however distinguishes between humanitarian intervention and humanitarian assistance. He states:

> … the doctrine of humanitarian intervention as considered here concerns the threat or use of *force* - over the 1990s the term has sometimes been used to refer to less-intrusive actions, as the provision of food, medicine and shelter. The term 'humanitarian *assistance*' will be used for such non-forcible actions.[128]

Chesterman's conclusion is that humanitarian intervention (as distinct from humanitarian assistance) is illegal but tolerated, but he does not make a definitive conclusion on the legality of humanitarian assistance.

In essence the 'pro-intervention' argument rests on giving literal effect to the various provisions of the United Nations Charter that:

1. identify the promotion and encouragement of human rights[129] as one of the purposes and principles of the United Nations, equal to the maintenance of international peace and security;[130]

2. limit the prohibition on the use of force only when it is 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'[131] so that the use of force that is not aimed at integrity or independence or is consistent with the purposes of the United Nations is not necessarily condemned; and

3. recognise that how a state deals with its own population is no longer a matter that is 'essentially within the domestic jurisdiction of any state'.[132]

The 'anti-intervention' argument on the other hand:

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127 Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and international law* (Oxford University Press, Oxford, 2001).
128 Ibid 3.
129 *Charter of the United Nations* art 1(3).
130 Ibid art (1)(1).
131 Ibid art 2(4).
132 Ibid art 2(7).

1. gives primacy to the United Nations objective of maintaining 'international peace and security'[133] over and above maintaining human rights;[134]

2. looks beyond the express words of article 2(4) to argue that the purpose, intention and meaning of the article was to restrict, not open the door to, a use of force. [135] On this view 'the use of military force is **strictly, completely, and absolutely prohibited** by the Charter. Such a prohibition includes the so-called "humanitarian intervention" …'.[136] (Emphasis added).

This analysis does not give a conclusive answer to the question being discussed here, which is whether truly humanitarian assistance,[137] delivered without the use of armed force and without the consent of the affected state, is contrary to the Charter. The commentators cited do not directly address this issue. Chesterman, a leading critic against the notion of a right of humanitarian intervention, distinguished that from 'humanitarian assistance', that is '… less-intrusive actions, the provision of food, medicine and shelter.'[138] Chesterman's arguments against a right of intervention do not deal with the legal status of the delivery of humanitarian assistance. Tesón, who supports humanitarian intervention, including the use of armed force, also fails to deal with intervention in the case of a natural disaster. [139]

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133 Ibid art 1(1).

134 Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International law* (Oxford University Press, Oxford, 2001) 45, 222.

135 Albrecht Randelzhofer, 'Commentary on Art 2(4)' in Bruno Simma (ed) *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, Oxford, 2002) 112, 123; Ian Brownlie, *International Law and the Use of Force* (Oxford University Press, Oxford, 1963 (Reprinted 2002)) 342; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, Oxford, 2001) 49.

136 Alain Pellet, 'The Charter of the United Nations: A Commentary of Bruno Simma's Commentary' (2003–2004) 25 *Michigan Journal of International Law* 135, 149.

137 Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International law* (Oxford University Press, Oxford, 2001) 3.

138 Ibid 41.

139 Fernando R Téson, *Humanitarian Intervention: An Inquiry into Law and Morality* (3rd ed, Transnational Publishers, Ardsley, 2005) 8.

The question whether truly humanitarian assistance,[140] delivered without the use of armed force and without the consent of the affected state, is contrary to the Charter is left unresolved by the debate on armed humanitarian intervention. With that debate giving the relevant background, the question is considered in the discussion below.

Scenario 1 — Humanitarian assistance

Having set the background, it is now possible to consider the scenarios identified at the start of the previous section. The first scenario is an assisting state seeking to deliver aid to a disaster-affected community without the consent of the affected state. In the context of Australia, this might occur if the Australian government is aware that a community in the affected state is suffering from the effects of a disaster, but where the government of that affected state has refused to allow aid or aid workers to assist.

This situation arose in 2008 when Cyclone Nargis devastated Burma leaving at least 22 000 people dead and many in desperate need.[141] The Burmese Government was subject to criticism for refusing access to the affected population by states and non-government organisations that were ready and willing to assist, of being generally slow to respond and finally only allowing a limited number of agencies to assist. [142] There was, at the time, significant public demand that the countries of the world act to force humanitarian assistance into Burma.[143]

Putting aside the practical difficulties that would be involved in responding, uninvited, to a disaster, it is possible to consider whether such action would be a breach of international law. This scenario has parallels with claims that states

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140 Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International law* (Oxford University Press, Oxford, 2001) 3.

141 *Cyclone dead tops 22,000* (2008) Sydney Morning Herald <http://www.smh.com.au/news/world/toll-could-top-60000/2008/05/07/1209839683545.html> at 7 May 2008.

142 Ibid.

143 Gareth Evans, *Facing Up to Our Responsibilities* (2008) The Guardian <http://www.guardian.co.uk/commentisfree/2008/may/12/facinguptoourresponsbilities> at 15 February 2009; M Bernard Kouchner, *Burma — Article by M. Bernard Kouchner, Minister of Foreign and European Affairs* (2008) Le Monde <http://www.ambafrance-uk.org/Bernard-Kouchner-on-Burma-disaster.html> at 15 February 2009.

should be able to respond, with force, to protect people in other countries from human rights abuses. In the scenario considered here, the threat to human rights comes not from internal acts of aggression, but from a failure to assist the affected community, whether or not that failure arises from a lack of competence, resources or a conscious decision to leave the disaster-affected community to its fate.

The emerging concept in this area of international law is the concept of the 'Responsibility to Protect'.[144] International law recognises that the primary obligation to manage the response to emergencies lies with the affected state, but to say that the affected state has the primary role in responding to emergencies does not mean that it is the only authority with an interest in how the emergency is managed.

Higher moral demands mean that the international community will be concerned with how a state responds to an emergency. Apart from the humanitarian impulse, there is a legitimate concern with internationally recognised human rights. Key rights that can be affected by disasters include the right to 'life',[145] 'economic, social and cultural rights',[146] and the 'right to a standard of living adequate for … health and well-being … including food, clothing, housing and medical care …'.[147]

The *Universal Declaration of Human Rights*[148] does not create international legal obligations. What does bind the community of states are the treaties that give effect to the Declaration. These include the International Covenant on Civil and

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144 The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001).

145 *Universal Declaration of Human Rights*, GA Res 217(III), 3rd sess, 183rd plen mtg, UN Doc A/RES/217(III) (1948).

146 Ibid art 22.

147 Ibid art 25.

148 Ibid.

Political Rights[149] and the International Covenant on Economic, Social and Cultural Rights.[150] These conventions reflect the fact that:

> … states, sharing a common civilization and ideas about the limits of government and the freedom of the individual in society, have entered into a system of binding mutual guarantees of specific human rights and freedoms…[151]

The Covenant on Civil and Political Rights states that everyone has the right to life.[152] The International Covenant on Economic, Social and Cultural Rights affirms a right to work in safe conditions, [153] the right to social security,[154] an obligation to protect the family and to provide special protection for new mothers and children,[155] and states that it is 'the right of everyone to [enjoy] an adequate standard of living for himself and his family, including adequate food, clothing and housing'.[156]

A natural disaster can have an impact upon these rights by causing death, dislocation, destruction of homes and livelihoods and the spread of disease. Where this happens and the affected population is not provided adequate assistance by their own government, then the affected state is not abiding by its obligations. In terms of the Covenant on Economic, Social and Cultural rights that is an obligation to '… take steps, individually and through international assistance …'[157] to allow the population to realise their rights. Under the Covenant on Civil and Political Rights the parties have agreed '… to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present

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149 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976).

150 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, (entered into force 3 January 1976).

151 G I A D Draper, 'Humanitarian Law and Human Rights' (1979) 193 *Act Juridica* in Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, Oxford University Press, New York, 2008) 398.

152 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 6 (entered into force 23 March 1976).

153 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 7(ii)(b) (entered into force 3 January 1976).

154 Ibid art 9.

155 Ibid art 10.

156 Ibid art 11.

157 Ibid art 2(1).

Covenant…'.[158] A state fails in its international obligations if it fails to adequately provide for the health and well being of its citizens following a natural disaster.

The international community has recognised that there is a shared 'Responsibility to Protect' people affected by conflict and disasters. That responsibility may, in extreme circumstances, be exercised without the consent of the affected state. The International Commission on Intervention and State Sovereignty has argued that international intervention may be justified where there are

> … overwhelming natural or environmental catastrophes, where the State concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.[159]

To argue, however, that a state has failed in its responsibility and that the international community can take on its secondary responsibility is no simple matter.

The International Commission found that for intervention to be justified '… there must be serious and irreparable harm occurring to human beings, or imminently likely to occur'.[160] The commission identified two criteria:

> - large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
> - large scale ethnic cleansing, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.
>
> If either or both of these conditions are satisfied, it is our view that the 'just cause' component of the decision to intervene is amply satisfied.[161]

In the context under discussion, the second criteria, '[l]arge scale ethnic cleansing',[162] will not be relevant. The first criteria, where a natural disaster creates a '[l]arge scale loss of life, actual or apprehended … ' and the affected

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158 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 2(1) (entered into force 23 March 1976).

159 The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001) [4.20]).

160 Ibid.

161 Ibid.

162 Ibid.

state does not respond due to '… state neglect or inability to act, or a failed state situation…'[163] may be relevant. In those circumstances the International Commission concluded that overriding state sovereignty can be justified.

The United Nations General Assembly did not go as far as the International Commission. The General Assembly limited its endorsement of the Responsibility to Protect to cases where the affected population was subject to 'genocide, war crimes, ethnic cleansing and crimes against humanity',[164] but the pressure remains on the international community to uphold the principle that affected populations have a right to relief following a disaster,[165] and it is probable that the claim that there is a right to intervene during natural disasters will continue to be made.

Accepting the concept of the 'Responsibility to Protect' and that primary responsibility lies with the affected state, actions to set aside that primary responsibility and exercise the international community's secondary responsibility could only be justified in the most extreme circumstances. The mere presence of a natural hazard (earthquake, flood, storm, fire and so on) would not be sufficient. The hazard must have an impact upon the affected community in a significant way such that there is, or is threatened, massive loss of life or threat to health; the government of the affected state must be unwilling or unable to respond to that event and the delivery of aid or assistance must be truly humanitarian, that is based solely on the needs of the population.

Intervention in these circumstances could also be justified by reference the principle of necessity. The International Law Commission's *Articles on State Responsibility* say:

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163 Ibid 33.

164 *2005 World Summit Outcome*, GA Res 1/60, UN GAOR, 60th sess, 8th plen mtg, UN Doc A/RES/60/1 (2005).

165 *The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response* (2004 ed, The Sphere Project, Geneva, 2004) 16–18; International Federation of Red Cross and Red Crescent Societies *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief* (International Federation of Red Cross and Red Crescent Societies, Geneva, 1995) [1] <http://www.ifrc.org/publicat/conduct/code.asp> at 7 February 2008; Rohan J Hardcastle and Adrian T Chua, 'Humanitarian assistance: towards a right of access to victims of natural disasters' (1998) 325 *International Review of the Red Cross* 589.

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.[166]

Where a state sought to rely on necessity to justify providing post-disaster assistance without the consent of the affected government, it would need to identify what essential interest it was seeking to protect. Crawford, in his commentary to the International Law Commission's articles, states:

> The extent to which a given interest is 'essential' depends on all the circumstances, and cannot be prejudged. **It extends to particular interests** of the State and its people, as well as **of the international community as a whole**.[167] (Emphasis added).

The community as a whole has an interest in the preservation of the human rights of a disaster-affected population, and ensuring the peaceful continuity of a disaster-affected state. Human rights obligations are obligations *erga omnes,* that is, owed to all, and all states have the right to seek to protect the human rights of all people.[168] It must follow that the preservation of the human rights of people affected by a disaster is a matter of essential interest to the international community.

This needs to be balanced against the threat to the affected state's essential interests.[169] A state that has aid delivered to its population without its consent would have various interests compromised. These are its interests in determining who is to enter the country, its interests in protecting its territory from incursion

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166 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002) 178.

167 Ibid 183.

168 Giorgio Gaja, 'Is a State specially affected when its nationals' human rights are infringed?' in Lal Chand Vohrah, et al. (eds) *Man's Inhumanity to Man: Essays in International Law in Honour of Antonio Cassese* (Kluwer International, The Hague, 2003) 372, 375.

169 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002) 178.

by foreign aircraft, ships and land transport and its interest in asserting its own sovereignty. Where the aid is being delivered is purely humanitarian and is delivered solely on the basis of need, and without political objectives of 'regime change', then it is not an 'unlawful intervention, or as in any other way contrary to international law'.[170] Acting contrary to regulatory instruments, even international ones such as the International Civil Aviation Convention[171] which recognises the need for permission before flying over the airspace of a state, may infringe the state's essential interests, but when balanced against the need to provide aid, could be justified in sufficiently extreme circumstances.

This section started with the proposition, generally accepted in the international community, that where a natural disaster occurs, international assistance may only be delivered at the request of, or with the consent of the government of the affected State. It has been argued that in limited extreme circumstances, where a population is affected by the event and there is severe loss of life or threat to life, then another state may be justified, or at least not in breach of international law, if it deploys unarmed emergency relief workers into the affected state to provide humanitarian assistance. The argument is largely hypothetical. This discussion is trying to identify the relevant law that applies to Australia, in the absence of armed conflict (that is when international humanitarian law does not apply), and therefore analysing the situation where the assisting state wants to deploy *unarmed* resources into the affected state. If the government of the affected state really does not want international disaster relief to enter their national territory, they may well choose to resist with normal border protection forces. It is unlikely that an assisting state would actually want to deploy unarmed resources if that level of resistance was to be encountered, and if it was actually willing to force the issue, then the discussion moves from the subject area of this thesis into the area of armed, forcible or military humanitarian intervention.

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170 *Nicaragua v United States of America* [1986] ICJ Reports 14, 124.

171 *Convention on International Civil Aviation*, opened for signature 7 December 1944, [1957] ATS 5, (entered into force 4 April 1947).

Regardless of the position in international law, persons entering the affected state without permission may well find themselves in breach of that state's domestic laws and subject to arrest and prosecution for unlawful entry into the affected state's territory. If the assisting state's actions are truly consistent with international law, then there would be diplomatic pressure to protect the aid personnel but that is still exposing those individuals to a serious risk to their liberty and well-being. It is unlikely that an assisting state would want to provide disaster assistance to an affected population in the face of serious objections by the affected state.

The discussion, above, leads to the conclusion that the provision of relief to a population that is seriously affected by a natural disaster may, in extreme circumstances, be justified even when aid is expressly refused by the government of the affected state. Practically, however, delivering aid without consent is unlikely to occur. Australia (or any other intervening state) would need to be prepared to risk exposing its humanitarian workforce to legal action, and possible arrest, in the affected state. The only time delivering aid without consent would be workable is if it is clear that the affected state's objections are in form only, and that the affected state neither can, nor intends to, enforce its objections.

The issue of whether aid can be delivered in the absence of consent, but also in the absence of objections, is the subject of the next scenario.

Scenario 2 — Intervention by necessity

The second hypothetical scenario is similar to the first. In this scenario the assisting state seeks to deploy aid and aid workers into the affected state where, as a result of the disaster, there is no effective government of the affected state or that government cannot be contacted. This situation is relevant to Australia, as such an event may arise in the South Pacific region. Tuvalu is only 5 metres high

at its highest point,[172] so it is conceivable a significant tsunami, cyclone or similar event could well devastate its infrastructure and effective government.

In 2002 a cyclone in the Solomon Islands left the island of Tikopia without external contact.[173] The Royal Australian Air Force (with the consent of the government of the Solomon Islands) flew over the island to determine whether or not there were survivors.[174] Had that cyclone impacted upon the capital, Honiara, it may have been impossible to contact what was left of the government to gain permission to enter the territory to provide relief assistance. If that were the case, Australia may want to respond by sending its navy, police or air-force to determine whether there were survivors and to provide urgent assistance.

This situation would not apply to a state seeking to provide assistance to Australia, as the sheer size of the Australian land mass and the distribution of the population will mean that there will always be some representative of Australia who could give permission for international assistance.

The Queen may appoint an administrator to exercise the functions and powers of the Governor-General.[175] By convention the person appointed administrator is the most senior state governor, but each governor holds a 'dormant' commission as administrator, so that they may exercise the executive power of the Commonwealth and perform the Governor-General's other duties in the event of the death or absence of the Governor-General.[176] It is unlikely that an event would kill the Governor-General and all of the state governors, but even if it did the lieutenant governors of the states would be able to take on the role of governor and then as administrator and then exercise the executive power of the

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172 *The World Factbook: Tuvalu* Central Intelligence Agency <https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html> at 16 January 2006.

173 *No word from Pacific island hit by cyclone* (2002) ABC News Online <http://www.abc.net.au/news/newsitems/200212/s755052.htm> at 16 January 2007

174 *Solomons to ask Australia to survey cyclone-hit island* (2002) ABC News Online <http://www.abc.net.au/news/newsitems/200212/s755252.htm> at 16 January 2007.

175 *Australian Constitution* s 4.

176 Deirdre McKeown, *Research Note no. 10 2003-04: Frequently Asked Questions About the Office of Governor-General* (2003) Parliament of Australia, Parliamentary Library <http://www.aph.gov.au/library/pubs/rn/2003-04/04rn10.htm> at 13 March 2009.

Commonwealth.[177] The administrator could appoint people as ministers to replace any that were killed or incapacitated and that would allow the government to continue, and provide a contact for offers of assistance.

Where the Governor-General has died or is not able to fulfil his or her duties, the administrator may only take on the administration of the Commonwealth at the request of the Prime Minister or, if the Prime Minister is also dead or incapacitated, at the request of 'the Deputy Prime Minister or the next most Senior Minister of State for the Commonwealth who is in Australia and available to make such a request'.[178] If there were no ministers of state for the Commonwealth available, the Queen herself could appoint a person administrator or even Governor-General or as the ultimate holder of the executive power[179] make a request for international assistance.

Even without a Governor-General and federal parliament, the sheer size of Australia would mean that although Canberra was devastated, there would still be governments operating in the states and public sector employees still able to go about their business. The Commonwealth public sector could still function under existing legislation, so that customs and immigration procedures could still be followed and the Australian Defence Force could still act to restrict access to Australian territory. Australia's overseas representatives would still hold their authority to represent Australia's interest. All of this would mean that there will always be some representative of Australia that could give permission to an assisting state to enter Australia to provide disaster assistance.

Even a country like Tuvalu is likely to have international representatives that could speak on behalf of the state if it were devastated by a disaster, and who could give permission for an assisting state to respond.

It follows that a situation where an assisting state would seek to provide assistance to the affected state, but cannot contact any official from the affected state to

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177 *Australian Constitution* s 61.

178 'Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia' (2008) S179 *Commonwealth of Australia Gazette* 9 September 2008.

179 *Australian Constitution* s 61.

obtain permission is extremely unlikely. Notwithstanding this, an argument can be made that *if* that situation arose, entering the territory of the affected state to deliver humanitarian assistance would not be a breach of international law.

The argument, based on necessity, has an analogy with domestic laws. Under Anglo-Australian law a person's body is inviolate and a person cannot be subject to medical treatment, even where that treatment is in the person's best interests, unless he or she has consented. There is, however, an exception to that rule based on the doctrine of necessity. This exception is required to ensure that people who need medical treatment but who cannot give consent, because they are too young, not mentally competent or too badly injured, can still receive the treatment they require. The doctrine was explained by Lord Goff in *In Re F*. He said:

> … to fall within the principle [of necessity], not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted person, but also (2) the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person.
>
> … as a general rule, if the above criteria are fulfilled, interference with the assisted person's person or property (as the case may be) will not be unlawful. [180]

The principle of necessity is also part of international law[181] and the essential elements of the principle were discussed in the previous section.[182] In that discussion it was argued that protecting a disaster-affected population could meet the test of protecting an essential interest of the intervening state.

Staying with the example of the Solomon Islands, a report prepared by the Australian Strategic Policy Institute identified a number of key Australian interests that would be affected if the Solomon Islands were allowed to 'fail' as a result of military instability and civil unrest. Similar interests would also be exposed if the Solomon Islands were left devastated by a natural disaster. The interests involved would include the following:

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180 *In Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 75.

181 Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, Cambridge, 2004); James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002) 178–186.

182 See p 101, and following, above.

- Australia's interest in preventing the Solomon Islands from becoming 'a Petri dish in which transnational and non-state security threats can develop and breed'.[183] Where effective government was destroyed criminal elements may operate in areas of 'drug smuggling, gun-running, identity fraud and people smuggling, for example.'[184] This would be even more attractive for a population if they were left devastated and forgotten after a disaster and needed to undertake some economic activity to survive.
- Devastation by a natural hazard event would lead to social and economic collapse that in turn could lead to violence and crime and 'there would be a high likelihood that such problems would prove contagious to other countries in the region'.[185]
- The collapse of a state would deprive Australia of 'business and investment opportunities which … are potentially valuable'.[186]
- Failing to go to the aid of a Pacific Island State, such as the Solomon Islands, would affect Australia's international standing.

> Other countries, including major allies and friends, expect Australia to take a leading role in this part of the world, and judge us in part on how well we discharge what they tend to see as our responsibilities here.[187]

Australia would be expected to take the lead, and would be judged by its performance, in a transnational Pacific rescue operation.

Necessity can be relied upon to justify an action that where the action:

> (a) is the only way for the state to safeguard an essential interest against a grave and imminent peril; and

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183 Dr Elsina Wainwright, *Our Failing Neighbour: Australia and the Future of Solomon Islands* (Australian Strategic Policy Institute, Canberra, 2003) 13.
184 Ibid 14.
185 Ibid.
186 Ibid.
187 Ibid 14–15.

(b) does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole. [188]

The essential interests of Australia as the assisting state have been identified. Where there is no way to communicate with the affected population or the government of the affected state, due to the disruption caused by the disaster, responding defence or emergency service personnel to conduct a search and rescue mission would be the only way to protect those interests.

Where the objective is to save the affected population and restore working government there is no significant risk to the essential interest of the affected state. Deploying defence and emergency services to help a government get re-established and to provide aid to the community is not a significant threat to the interests that the state may have in protecting its territorial and sovereign integrity, and may even enhance that state's interest.

It follows that Australia could rely on the principle of necessity to justify sending, for example, a warship into a foreign port or an aircraft over foreign airspace to provide humanitarian assistance to an affected population and to establish communications with whatever government there may be following a natural disaster.

In conclusion, despite the assertion that post-disaster humanitarian aid can only be delivered with the consent of, or at the request of, the government of the affected state, it is argued here that where the government has ceased to function or cannot be contacted, it would be consistent with international law for a friendly nation to deploy humanitarian aid, including aid delivered by the state's naval and military forces, provided the aid is delivered in accordance with humanitarian principles and the actions are limited to acting in the best interests of the state and its affected population. Once a working government could be re-established, the

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[188] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002) 178.

responsibility for managing the disaster response would again revert to that government.

Scenario 3 — Intervention to protect one's own state from the effects of the disaster

In this scenario the assisting state wants to deploy assets to protect itself from the effects of the disaster. This situation may arise if Australia wants to provide relief to an affected community to stop refugee flows into its own territory.[189] A similar argument would arise where two countries share a land border and a wild fire may be threatening to burn from one country to another. In that case the assisting state may reasonably think that if it can fight the fire on the affected state's territory it will be able to stop it before it spreads onto its own territory where fire-fighting operations will be more complex. This scenario has limited or no application for an island like Australia, but for the sake of completeness the argument will be developed here.

The difference between this scenario and the first hypothetical scenario of intervention to provide humanitarian relief is motivation. In the first scenario, the assisting state claims to be acting out of purely humanitarian concern for the affected population, whereas in this scenario the concern is to protect the assisting state's interests. Notwithstanding this difference, assuming that the aid that is delivered is appropriate and delivered in accordance with humanitarian principles of neutrality, impartiality and humanity, then there should be no significant difference in legal conclusion. If the intention of the assisting state is to provide genuine assistance to the affected community (and not just ensure the affected population does not cross a national border) then its motive is not relevant.[190] Chesterman argues that 'mixed motives' take an action outside the scope of

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189 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549 (First National Security Statement to the Australian Parliament, Kevin Rudd, Prime Minister) 12555.

190 See also Fernando R Téson, *Humanitarian Intervention: An Inquiry into Law and Morality* (3rd ed, Transnational Publishers, Ardsley, 2005).

humanitarian intervention,[191] but does not explain why action, to be considered humanitarian, must be undertaken solely out of humanitarian concern.

If the assisting state were to deploy resources into the affected state to control a flood or to fight a fire that was threatening the population or vital assets in the affected state, the same principles should apply. The International Law Commission's articles on necessity,[192] in essence provide that an action by a state is justified if it is the only way to safeguard an essential interest of the state, and does not impair another state's essential interest.[193] Provided the intervention is reasonable and limited to doing only that which is necessary to control the spread of the hazard, this would also be justified by necessity.

Brownlie refers to the principle that a state can take action within the territory of another state as a 'special case of necessity'. He states:

> Some instances may be considered in which serious danger to the territory of a state arises otherwise than as a result of a use of armed force. Thus if state B controls the upper, and State A the lower reaches of a river, and reservoirs on the territory of state B are threatened by natural forces, or the territorial authorities negligently or wantonly loose quantities of water, causing a threat of floods to state A, the latter would seem to be justified in taking preventive action on the territory of state B. Such action should be immediately reported to the Security Council, its particular purpose made known to the government of state B, and the situation must be such that previous complaint to the local authorities would not have provided an adequate or timely remedy.[194]

Seamone argues that there is a rule of customary international law that requires states to at least inform their neighbours of potential transboundary threats; that is to warn their neighbour if they are aware of a hazard in their territory that may flow across the boundary and impact upon their neighbour.[195] Further, he argues, governments have established standards to deal with some transboundary hazards

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191 Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, Oxford, 2001) 69–79.

192 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002) 178; See also p 98, above.

193 Ibid 178.

194 Ian Brownlie, *International Law and the Use of Force* (Oxford University Press, Oxford, 1963 (Reprinted 2002)) 376.

195 E Evan R Seamone, 'When Wishing on a star just won't do: the legal basis for international cooperation in the mitigation of asteroid impacts and similar transboundary disasters' (2002) 87 (3) *Iowa Law Review* 1091, 1132.

such as fires, oil spills and nuclear accidents,[196] and that there is at least an argument that states have an obligation to cooperate to prevent or mitigate catastrophic transboundary events.[197] If this is correct, that is if there is a duty to cooperate over significant transboundary hazards, then it follows that where an assisting state moves into an affected state to contain a hazard, the fact that the affected state is at least under a duty to cooperate means that any infringement of the affected state's sovereign rights by the unauthorised crossing is justified. If, in effect, the affected state refuses to do what the state is required to do, then it is easier to argue that there is no serious threat to any that state's essential interests and so the requirements of necessity are met and the intervention is justified.

To conclude this discussion, it is at least arguable that Australia sending personnel into an affected state to deal with a hazard before its effects have an impact upon Australia can be justified, again by reference to the notion of necessity. Here again, in avoiding the prohibition on the use of armed force and dealing with matters not the subject of this thesis (such as armed humanitarian intervention and armed self-defence), the assumption must be that the resources to be deployed are unarmed, that is there is no use of 'force' as defined in the Charter of the United Nations[198] and discussed in detail, above.[199]

Once again, political reality needs to be addressed. If the affected state really does not want the assisting state's help, and is prepared to resist by force, or to arrest any incoming aid workers, then the issue of deployment is unlikely to arise. In effect this will only be an issue where the affected state, if it objects, is not really interested in or able to enforce its objections. Further, as an island nation, the situation is unlikely to arise where Australia has to take action on another country's territory to protect itself from a hazard, or any other state feels it has to take action on Australian territory to protect itself from some hazard. The legal

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196 E Evan R Seamone, 'The Duty to "Expect the Unexpected": Mitigating Extreme Natural Threats to the Global Commons Such as Asteroid and Comet Impacts with the Earth' (2003) 41(3) *Columbia Journal of Transnational Law* 735, 774.

197 E Evan R Seamone, 'When Wishing on a star just won't do: the legal basis for international cooperation in the mitigation of asteroid impacts and similar transboundary disasters' (2002) 87(3) *Iowa Law Review* 1091, 1126.

198 *Charter of the United Nations* art 2(4).

199 See p 86, and following, above.

position may be as argued here, but it is unlikely to be relevant to an island nation such as Australia.

Scenario 4 — Intervention under the auspices of the United Nations

Intervention in matters that fall essentially within the domestic jurisdiction of a state is prohibited,[200] as is the use, or threat, of force,[201] unless such actions are authorised by the Security Council.[202] The Security Council can, however, authorise intervention up to and including the use of force, if that intervention is required in order to deal with a threat to international peace and security.[203] Provisions authorising the application of sanctions or the '… complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'[204] and the use of armed force[205] would not appear to be relevant to the delivery of humanitarian assistance. As the International Court of Justice stated:

> … the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*.[206]

The United Nations did, however, endorse military action to facilitate the delivery of humanitarian aid in Somalia in 1992. In that instance conflict in Somalia was providing a substantial barrier to the delivery of aid. The objective of this resolution was to ensure that humanitarian aid could be delivered to the people suffering in Somalia. At that time, the international community was in Somalia attempting to deliver aid but was being frustrated by violence directed toward United Nations and non-government organisation personnel, and the theft of aid supplies. Somalia had no government and was the subject of great internal

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200 *Charter of the United Nations* art 2(7).
201 Ibid art 2(4).
202 Ibid Chapter VII.
203 Ibid arts 39, 41 and 42.
204 Ibid art 41.
205 Ibid art 42.
206 *Nicaragua v United States of America* [1986] ICJ Reports 14 [268].

violence. To call upon Chapter VII, however, there had to be a threat to international peace and security.

Only two speakers on the motion to authorise Chapter VII action specifically addressed the question of how the situation in Somalia represented a threat to *international* peace and security. The representative from Cape Verde argued that the situation in Somalia had '… an international dimension — in view of the fact that, because of its repercussions on neighbouring States, it is imperilling the stability and security of the whole region'.[207]

The representative from Morocco submitted that the situation posed:

> …. a real threat for the Horn of Africa, a region already suffering from famine, civil wars and massive refugee flows. Hence it is also a threat to international peace and security. [208]

The Security Council determined that:

> … the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.[209]

The Security Council authorised '… the Secretary-General and Member States … to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations …'.[210]

The situation in Somalia was described as 'unique',[211] 'exceptional'[212] 'unprecedented'[213] and 'extraordinary'.[214] It was a situation not only of extreme human suffering, but also violent action by warlords frustrating international efforts to deliver aid as well as threatening international aid workers and United

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207 *Provisional Verbatim Record of the Three Thousand One Hundred and Forty Fifth-Meeting*, Security Council, 19, UN Doc S/PV.3145 (1992).

208 Ibid 44.

209 *Security Council resolution 794 (1992) [on measures to establish a secure environment for humanitarian relief operations in Somalia]*, SC Res 794, UN SCOR 3145th mtg, UN Doc S/RES/794 (1992).

210 Ibid [10] (emphasis supplied).

211 *Provisional verbatim record of the three thousand one hundred and forty fifth meeting*, Security Council, 7, UN Doc S/PV.3145 (1992).

212 Ibid 12; 46.

213 Ibid 30; 44.

214 Ibid 40.

Nations staff. The armed forces were not deployed to deliver aid, but to provide a secure environment so that humanitarian workers could deliver the aid.

It is possible that a situation similar to that in Somalia could again arise following a natural disaster. If the impact of the disaster was so significant that effective government was lost, and people were subject to violence either by opportunistic 'warlords' or just by fellow humans forced to resort to violence to secure what they need to survive, then there could again be a threat to international peace and security. In that case the Security Council could again take action under Chapter VII to secure a response to the humanitarian crises.

As with the other scenarios considered here, there is legal power to deliver aid without the consent of the affected state, but again the circumstances where that could be justified will be rare. In 2008 there were calls for the Security Council to authorise intervention to allow the international community to deliver humanitarian aid to Burma following Cyclone Nargis[215] and the reported death of over 22 000 people.[216] Notwithstanding the death toll and the difficulties in getting aid to the affected population, the matter was not put before the Security Council for a decision under Chapter VII.

CONCLUSION ON THE RIGHT TO PROVIDE AID

In this chapter the starting proposition was that the international community cannot deliver aid to an affected state, except with the consent of the government of the affected state. This is a generally accepted proposition that gives effect to the proposition that international law is based on the sovereign equality of states and the primary responsibility for managing a crisis rests with the government of

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215 Gareth Evans, *Facing Up to Our Responsibilities* (2008) The Guardian <http://www.guardian.co.uk/commentisfree/2008/may/12/facinguptoourresponsbilities> at 15 February 2009; M. Bernard Kouchner, *Burma — Article by M. Bernard Kouchner, Minister of Foreign and European Affairs* (2008) Le Monde <http://www.ambafrance-uk.org/Bernard-Kouchner-on-Burma-disaster.html> at 15 February 2009.

216 *Cyclone Dead Tops 22,000* (2008) Sydney Morning Herald <http://www.smh.com.au/news/world/toll-could-top-60000/2008/05/07/1209839683545.html> at 7 May 2008; See also the discussion on p 38, above.

the affected state. It would be an affront to sovereign and territorial integrity to provide assistance without a request, or at least consent, for that action.

That proposition has been tested here. It was noted that under international law there are two key provisions that have an impact upon the delivery of aid; one is the prohibition on the use of force, and the second is the prohibition on intervention in matters that are essentially within the domestic jurisdiction of states.[217] In considering whether it is accurate to say that aid can ***never*** be given without consent, four scenarios were suggested. It is argued that, in fact, uninvited aid to a disaster-affected community could be given where:

1. There was a compelling humanitarian need — this drew on arguments that support armed humanitarian intervention. To keep the focus of this thesis on disaster response in the absence of armed conflict, the assumption had to be that interveners would not be armed and would not therefore be using 'force'.[218] As discussed above, 'force' in article 2(4) of the United Nations Charter means 'armed force' or 'armed attack', so the use of unarmed responders, whether civilian aid workers or even unarmed soldiers, to provide assistance after a disaster would not be an example of an unlawful use of force.[219] In these circumstances it was argued that the delivery of truly needed, urgent humanitarian aid would not be an unlawful interference in the domestic affairs of the state, but would be a breach of territorial sovereignty that could, however, be justified if the need was great enough.

2. There was a humanitarian need and no effective government or no way to contact the government to get consent — this scenario identified that necessity is part of international law. Under these provisions it must be lawful to provide aid that is required, and in the best interests of the recipients.

3. There was a need to protect the intervening state from the effect of the disaster — again necessity suggests such a right and this is supported by commentators

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217 *Charter of the United Nations* arts 2(4) and 2(7).

218 And not therefore acting contrary to art 2(4) of the UN Charter.

219 See the discussion on page 83 and following, above.

and developing international obligations on countries to cooperate to deal with transborder disasters.

4. There was action by the Security Council under Chapter VII — the action of the Security Council in responding to the humanitarian crisis in Somalia in 1993 shows that a humanitarian crisis *can* be a threat to international peace and security, but there the crisis was coupled with lawlessness and violence. While it may be that such a situation could arise again, it is unlikely from a sudden onset natural disaster.

It is argued, therefore, that in some extreme circumstances, an assisting state could deliver aid to an affected population without the consent of the affected state, but the circumstances where this might happen are rare to the point of being almost unimaginable. Although the delivery of aid, or an emergency response, without the consent of the affected state is theoretically justifiable, it is unlikely to happen.

The most likely situation where aid might be delivered without the consent of the affected government will arise in the South Pacific, where a small island state may well be overcome by a disaster (a tsunami or a cyclone) and resources from a neighbour such as Australia may be despatched to fly over, or sail into, the territory to commence assistance and to deliver aid to the affected population and restore the capacity of the local government to re-establish itself. Even this situation will be unlikely, because even if the government located in the affected state cannot be contacted, they are likely to have foreign missions that can give the necessary permission.

The result is that for all practical purposes international law requires that post-disaster aid can only be delivered with the consent of, or at the request of, the government of the affected state. The next section considers whether an affected state is obliged to seek, or accept assistance.

A RIGHT TO HUMANITARIAN ASSISTANCE?

It has been concluded that states do not have an obligation to provide assistance to other states nor, except in the very limited and unlikely circumstances discussed above, do they have a right to provide assistance to a disaster-affected state, except with the permission of that affected state. This section will now consider whether or not the affected population has a right to receive assistance, and whether the affected state has an obligation to accept aid that may be offered.

Hardcastle and Chua argue that the international community should recognise that there is a right to humanitarian assistance. They say:

> The right to humanitarian assistance is not only consistent with the existing body of international human rights law, it is necessary to give effect to the fundamental human rights to life, food, clothing and shelter. … satisfaction of these fundamental rights entails that the victims have a right to receive humanitarian aid from external sources. This in turn imposes on the State the correlative obligation to allow prompt outside access to the victims. This does no more than to fulfil the obligation on every State to secure 'universal respect for, and observance of' the most fundamental of human rights — the right to life.[220]

Fisher believes that it is:

> … arguable that existing human rights instruments imply a right to assistance in situations of crisis and a certain obligation on states to seek international support if their own means are insufficient to address humanitarian needs.[221]

A right to access affected populations to provide assistance

If affected populations have a right to be assisted, it does not necessarily follow that anyone has a right to provide that assistance. It has been argued above that, except with some very limited and largely theoretical exceptions, states do not have the right to deliver post-disaster assistance. Some non-government organisations argue that they have a right to access affected populations regardless

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220 Rohan J Hardcastle and Adrian T Chua, 'Humanitarian assistance: towards a right of access to victims of natural disasters' (1998) 325 *International Review of the Red Cross* 589.

221 David Fisher, 'Domestic regulation of international humanitarian relief in disasters and armed conflict: a comparative analysis' (2007) 866 *International Review of the Red Cross* 345, 349.

of the wishes of the affected government,[222] but these arguments are not generally accepted. According to Fisher the law is 'fragmented',[223] and Hardcastle and Chua recognise that their claim that international human rights law should impose a right to receive humanitarian assistance, 'the scope and content of this right [to post disaster humanitarian aid] in customary international law remains uncertain'.[224]

Beigbeder asks:

> … do NGOs and their volunteers have a duty and a right to give assistance to those in need in foreign countries, without regard to national borders and national sovereignty requirements?

He answers that question in the negative.[225]

Bannon argues that a right to access disaster-affected populations and provide assistance is consistent with human rights instruments, but:

> … the existence of the right to humanitarian assistance cannot be supported simply by finding consistency with rights prescribed in the various instruments, such as the right to food, shelter, medical assistance and other aspects associated with humanitarian assistance. It must also be considered in the context of the obligations on States Parties and others to directly provide the assistance required.[226]

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222 In particular Médecins Sans Frontières, Aide Médicale Internationale and Médecins du Monde; Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance* (Marinus Nijhoff, Dordrecht, 1991); Rony Brauman, 'The Médecins sans Frontières Experience' in K M Cahill (ed) *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 202.

223 David Fisher, 'Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis' (2007) 866 *International Review of the Red Cross* 345, 370.

224 Rohan J Hardcastle and Adrian T Chua, 'Humanitarian assistance: towards a right of access to victims of natural disasters' (1998) 325 *International Review of the Red Cross* 589.

225 Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance* (Marinus Nijhoff, Dordrecht, 1991) 387.

226 Victoria Bannon, *Rethinking Legal Mechanisms for Access and Facilitation of International Disaster Response in Cases of Natural Disaster* (Master of Laws thesis, University of Melbourne, 2004) 59.

When considering those obligations, Bannon found that the claimed right of non-government organisations to deliver assistance 'has not been adopted as law'.[227]

United Nations General Assembly Resolution 43/131 urged member states to facilitate access by non-government organisations to affected populations,[228] but calling upon states to facilitate the humanitarian work does not imply a right, vested in those organisations, to provide assistance without the consent of the affected state.

A right to offer assistance

The non-government sector rightly asserts that even in the absence of a right to access affected populations, they have a right and duty to offer assistance and that states should accept that assistance, if the consequences of a natural disaster mean that they are unable to adequately provide for their own population.[229]

The Institute of International Law argues that 'The victims of disaster are entitled to request and receive humanitarian assistance'[230] and, further

> States and organizations have the right to offer humanitarian assistance to the affected State. Such an offer shall not be considered unlawful interference in the internal affairs of the affected State, to the extent that it has an exclusively humanitarian character.[231]

The *Guiding Principles on Internal Displacement*, which apply to the provision of aid to internally displaced persons, which includes people forced from their homes as a result of 'natural or human-made disasters' provide that:

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227 Ibid 77.

228 *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations*, GA Res 43/131, UN GAOR 43rd sess, 75th plen mtg, arts 4 and 5, UN Doc A/RES/43/131 (1988).

229 United Nations Office for the Coordination of Humanitarian Affairs. *Guiding Principles on Internal Displacement* (1998) ReliefWeb [2] <http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html> at 18 October 2007; Victoria Bannon, *Rethinking Legal Mechanisms for Access and Facilitation of International Disaster Response in Cases of Natural Disaster* (Master of Laws thesis, University of Melbourne, 2004).

230 *Humanitarian Assistance* (2003) Resolution of the Institute of International Law [II(1)] <http://www.idi-iil.org/idiE/resolutionsE/2003_bru_03_en.PDF> at 6 May 2009.

231 Ibid [IV(1)].

> International humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance. [232]

Even though these principles refer to a 'right' it is a right to make an offer, rather than a right to provide assistance. The provision of humanitarian assistance requires the consent of the affected government, even if consent 'shall not be arbitrarily withheld'.

An obligation to accept assistance

The *Guiding Principles on Internal Displacement* appear to impose an obligation on affected states to facilitate access to affected populations. They state that affected authorities:

> … shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.[233]

Further:

> All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and access to internally displaced persons to assist in their return or resettlement and reintegration.[234]

This language is reminiscent of that used in the Fourth Geneva Convention[235] that imposes obligations on warring parties to allow humanitarian organisations to access and protect a civilian population affected by armed conflict.

The definition of 'internally displaced person'[236] is not limited to those displaced by violence, and includes persons displaced from their home or normal residence

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232 United Nations Office for the Coordination of Humanitarian Affairs. *Guiding Principles on Internal Displacement* (1998) ReliefWeb [30] <http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html> at 18 October 2007.

233 Ibid [25].

234 Ibid [30].

235 *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288, (entered into force 21 October 1950).

due to disasters. It does not, however, include people whose home has been destroyed, or who are left without food or water, but who have not been 'obliged to flee or leave their homes or place of habitual residence'.[237]

The Conference of the Red Cross (made up of representatives of all countries that have adopted the Geneva Conventions dealing with the laws of war[238]) has asserted that:

> All authorities in disaster areas should facilitate disaster relief activities by impartial international humanitarian organisations for the benefit of civilian populations.[239]

The Sphere Project Humanitarian Charter states that affected governments, and others, have a 'duty not to withhold or frustrate the provision of life-saving assistance'.[240]

As suggested above,[241] fundamental human rights, including the 'right to life',[242] and 'food, clothing, housing and medical care …'[243], may be involved in a serious disaster so that a state that fails to provide for its population and fails to accept assistance when circumstances are beyond its capacity breaches its international obligations under human rights law. Providing truly humanitarian assistance is, in the opinion of the International Court of Justice, neither unlawful intervention or in any other way a breach of international law.[244] It follows that although non-

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236 United Nations Office for the Coordination of Humanitarian Affairs. *Guiding Principles on Internal Displacement* (1998) ReliefWeb [2] <http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html> at 18 October 2007.

237 Ibid.

238 And from 2006 the Geneva Conventions enjoy universal acceptance having been endorsed by all 194 Nations; see International Committee of the Red Cross, *The Geneva Conventions: the core of international humanitarian law* <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions> at 20 January 2008.

239 *Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations*, Resolution XXVI, XXIst International Conference of the Red Cross, (1969) art 6.

240 *The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response* (2004 ed, The Sphere Project, Geneva, 2004) [1.1].

241 See p 97, and following, above.

242 *Universal Declaration of Human Rights*, GA Res 217(III), 3rd sess, 183rd plen mtg, UN Doc A/RES/217(III) (1948).

243 Ibid art 25.

244 *Nicaragua v United States of America* [1986] ICJ Reports 14 124-125.

government organisations may not have a clear legal right to demand access to affected populations they clearly have the right and power to offer their assistance.

Whether or not the obligations upon a state to accept offered assistance can be said to then give rise to a right vested in non-government organisations to access the affected population is less clear. It has been argued that states do not generally enjoy such a right, but that is in part because states are bound by international legal instruments such as the Charter of the United Nations, whereas non-government organisations are not. Some non-government organisations do assert a right to access affected populations but, as has been shown above, even though some commentators argue that a right of access could or should be inferred from human rights law, that has not yet been adopted as a legal right; all that can be argued for is that the non-government humanitarian community has the right to offer assistance, and national governments should not lightly refuse those offers.

CONCLUSION

At the end of this chapter, the conclusions that may be drawn are:

1. International law does not require states to come to the aid of other states. States do assist disaster-affected states for reasons of humanity and for political reasons, but not because such a response is required as a matter of international law.

2. For nearly all practical purposes, post-disaster assistance may only be given with the consent of the government of the affected state. There are arguments that could be used to justify the delivery of humanitarian aid in the absence of permission of the affected states,[245] but it has to be conceded that the circumstances in which this could be justified would be rare. With no land boundaries with other states, the only conceivable situation where Australia may seek to provide post-disaster assistance

[245] These were the delivery of humanitarian assistance meet a dire and unmet need, intervention by necessity when the affected state could not be contacted; intervention to protect one's own state from the effects of the disaster and intervention under the auspices of the United Nations Security Council.

without first getting permission from the affected state would be where a disaster struck a neighbouring Pacific island nation, and it was impossible to contact the relevant authorities. It has been argued that, in those circumstances, sending the Navy or the Air Force into that state's sea or air space, to determine if there are survivors and to provide emergency humanitarian assistance, would not be a breach of international law.

3. The non-government sector asserts that affected populations have a right to receive humanitarian aid, and that right is supported by human rights instruments[246] but that right, and the right of non-government organisations to offer that assistance, has not yet created a right in non-government organisations to actually enter countries without permission.

From the perspective of Australia and international disaster response, it follows that Australia is not required to offer disaster assistance to an affected state but may do so. The question of what aid to offer, and whether to offer aid directly (in terms of deploying personnel from Australia) or indirectly through funding relief organisation, is a matter for Australia. Whether to accept Australian assistance is a matter for the affected state. Although there are theoretical cases where the delivery of aid without consent may be justified they are so unlikely that it is appropriate for Australia to consider that disaster relief can only be provided at the request, or with the consent of, the affected state.

Equally the question of accepting aid is also a matter for the Australian authorities. Australia is not legally required to accept aid or to facilitate access to an affected population, but the Australian government would need to be mindful that if a population was seriously affected and could not be adequately relieved by Australian resources, failure to accept international assistance may lead to breaches of various human rights obligations.

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[246] See p 97, and following, above.

The next chapter will consider particular international obligations that Australia has accepted and consider what impact they have upon Australia's rights and obligations in this area.

CHAPTER FOUR
AUSTRALIA'S SPECIFIC INTERNATIONAL OBLIGATIONS

In Chapter Three the rights and obligations established by universally applicable international law were discussed. This chapter will consider specific international obligations that Australia has accepted through treaties, agreements of less than treaty status and the adoption of international guidelines. In analysing these international instruments, reference will be made to the problems of international disaster response identified in Chapter Two.

Initiation and termination of international disaster response

Australia has entered into an agreement with Indonesia on Security Cooperation.[1] Pursuant to this agreement the two countries agree to cooperate in a number of areas including defence,[2] law enforcement,[3] counter-terrorism[4] and emergency response.[5]

With respect to emergency response the countries agree to cooperate in 'facilitating effective and rapid coordination of responses and relief measures in the event of a natural disaster or other such emergency'.[6] This treaty confirms that the responsibility for managing the response to the disaster rests with the requesting state.[7] As an example of international cooperation, Indonesia sent disaster victim identification experts to Australia to assist with the identification of victims of the 2009 Victorian bushfires. According to press reports, this

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1 *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, opened for signature 13 November 2006, [2008] ATS 3, (entered into force 7 February 2008).
2 Ibid [1]–[3].
3 Ibid [4]–[7].
4 Ibid [8]–[11].
5 Ibid [18]–[19].
6 Ibid [18].
7 Ibid.

response was delivered after a request from Australia.[8] The extent to which this treaty facilitated either the request or the arrival of the police is unclear.

The Framework for Security Cooperation[9] appears to be the only treaty that Australia has entered into committing itself to cooperate in the event of a broad range of emergencies. Australia has, however, undertaken international obligations with respect to particular types of emergencies. Australia is party to conventions relating to the rescue of astronauts[10] and persons travelling on civil aviation.[11] These conventions require Australia to provide assistance to foreign nationals in the event of accidents or emergencies on Australian territory, but do not require Australia to respond to an incident on the territory of another state, although they do require action on the 'high seas or in any other place not under the jurisdiction of any State'.[12]

The *International Convention on Maritime Search and Rescue*[13] provides that Australia should cooperate in managing search and rescue missions[14] for people in distress at sea. Under the convention, states should enter into agreements with their neighbours as to when, and on what terms, foreign search and rescue teams will be allowed to enter their territorial waters.[15] States are required to establish a Rescue Coordination Centre that is authorised to:

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8 Tom Allard, *Indonesians fly in to help identify bodies* (2009) Sydney Morning Herald <http://www.smh.com.au/national/indonesians-fly-in-to-help-identify-bodies-20090215-887w.html> at 19 February 2009. See also Victoria Police, *New South Wales and Australian Federal Police to bolster bushfire response*, <http://www.police.vic.gov.au/content.asp?Document_ID=19541> at 19 February 2009.

9 *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, opened for signature 13 November 2006, [2008] ATS 3, (entered into force 7 February 2008).

10 *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, opened for signature 22 April 1968, [1986] ATS 8, (entered into force 3 December 1968).

11 *Convention on International Civil Aviation*, opened for signature 7 December 1944, [1957] ATS 5, (entered into force 4 April 1947).

12 *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, opened for signature 22 April 1968, [1986] ATS 8,[1] (entered into force 3 December 1968).

13 *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, [1986] ATS 29, (entered into force 22 June 1985).

14 Ibid [3.1.1].

15 Ibid [3.1.5].

- request international assistance from another rescue coordination centre;
- grant permission for foreign search and rescue teams to enter their territorial waters; and
- 'make the necessary arrangements with the appropriate customs, immigration or other authorities with a view to expediting such entry'.[16]

A rescue coordination centre is required to provide assistance to another rescue coordination centre, when asked for that assistance.[17] Australia's Rescue Coordination Centre is managed by the Australian Maritime Safety Authority in Canberra.[18]

Australia is party to the convention on providing and receiving international assistance in the event of a nuclear accident.[19] The convention says that any state that needs assistance to deal with a nuclear accident may call for that assistance,[20] specifying the assistance required.[21] A party receiving such a request must then consider whether or not it is able to assist.[22]

The convention deals with many of the issues identified by the International Red Cross which were discussed in Chapter Two, such as who remains in control of managing the response,[23] who, on behalf of each member state, is authorised to request assistance,[24] costs,[25] and the immunities and privileges to be provided to supporting states[26] (in particular the requesting state is required to provide legal immunity from civil and criminal actions and tax exemptions.[27]) The convention

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16 Ibid [3.1.6].
17 Ibid [3.1.7].
18 Australian Maritime Safety Authority, *Search and Rescue* <http://www.amsa.gov.au/Search%5Fand%5FRescue/> at 13 May 2008.
19 *Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*, opened for signature 26 September 1986, [1987] ATS 15, (entered into force 26 February 1987).
20 Ibid [2(1)].
21 Ibid [2(2)].
22 Ibid [2(3)].
23 Ibid [3].
24 Ibid [4].
25 Ibid [7].
26 Ibid [8].
27 Ibid [8(2)].

provides that the termination of assistance may be done 'at any time' but only after 'appropriate consultations and notification in writing'.[28] Naturally this broad reaching treaty has only a limited scope of operation being limited to nuclear accidents.

Goods and equipment

Australia is party to the *International Convention on the Simplification and Harmonization of Customs Procedures*.[29] Annexe J5 of that convention provides for special procedures to be applied to the importation of relief consignments. Relief consignments are

> - goods, including vehicles and other means of transport, foodstuffs, medicaments, clothing, blankets, tents, prefabricated houses, water purifying and water storage items, or other goods of prime necessity, forwarded as aid to those affected by disaster; and
>
> - all equipment, vehicles and other means of transport, specially trained animals, provisions, supplies, personal effects and other goods for disaster relief personnel in order to perform their duties and to support them in living and working in the territory of the disaster throughout the duration of their mission.[30]

Where a relief consignment is to be imported, the affected state should have in place procedures to allow for simplified documentation and should provide that the inspection of the imported relief consignment will take place only in exceptional circumstances. Where an inspection is required, provision should be made to allow it to take place away from the normal customs office and outside normal office hours.[31] Relief consignments should be admitted duty and tax free.[32]

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28 Ibid [11].

29 *International Convention on the Simplification and Harmonization of Customs Procedures*, opened for signature 18 May 1973, [1975] ATS 12, (entered into force 25 September 1974) as amended by the *Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures of 18 May 1973*, opened for signature 26 June 1999, [2006] ATS 22, (entered into force 3 February 2006).

30 *International Convention on the Simplification and Harmonization of Customs Procedures*, opened for signature 18 May 1973, [1975] ATS 12, Annex J5 Definitions (entered into force 25 September 1974).

31 Ibid Annex J5(3).

32 Ibid Annex J5(6).

The nuclear accidents treaty, [33] prima facie, also deals with the import of goods and equipment. It provides that the affected state is to allow the assisting state to import their equipment duty free.[34] In ratifying this treaty, however, Australia declared that it would not be bound by that particular obligation.[35] Australia is bound by the provisions that require it to ensure the return of such equipment,[36] and to facilitate the transit of equipment involved in responding to a request for assistance.[37]

Pursuant to the *Convention on the Facilitation of International Maritime Traffic*[38] Australia has agreed to facilitate the 'arrival and departure of vessels engaged in natural disaster relief work'[39] and 'the entry and clearance of person and cargo arriving' in those vessels.[40] Similar provisions are found in annex 9 to the *Civil Aviation Convention*[41] relating to the entry, departure and transit of relief flights and the early entry clearance for people and goods arriving on relief flights.[42]

Personnel, transport and movement around the disaster area and operational matters

Australia is not party to any treaties that are specifically designed to apply to disaster relief and that deal with the recognition of personnel and their professional qualifications, transport and movement around a disaster area or operational matters, such as establishing an office, opening bank accounts and employing staff.

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33 *Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*, opened for signature 26 September 1986, [1987] ATS 15, [8(3)] (entered into force 26 February 1987).

34 Ibid [8(3)].

35 Ibid [8.9] see also *Treaties Database* Department of Foreign Affairs and Trade <http://www.dfat.gov.au/treaties/index.html> at 21 February 2008.

36 Ibid [8(4)].

37 Ibid [9].

38 *Convention on Facilitation of International Maritime Traffic*, opened for signature 9 April 1965, [1986] ATS 12, (entered into force 5 March 1967).

39 Ibid [5.11].

40 Ibid [5.12].

41 *Convention on International Civil Aviation*, opened for signature 7 December 1944, [1957] ATS 5, (entered into force 4 April 1947).

42 Ibid Annex 9 quoted in David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 43.

Quality and accountability

Australia is not party to any treaties dealing with the quality and accountability of aid. It has, however, as part of its *Humanitarian Action Policy*,[43] adopted the *Principles and Good Practice of Humanitarian Donorship*.[44] This policy relates to Australia sending, not receiving, aid. The normal practice is for Australia to provide aid by providing funding to 'multilateral or nongovernment organisations'.[45] In this role of 'donor' (rather than 'actor') Australia seeks to ensure that aid is delivered in a way that is culturally sensitive, delivered on the basis of needs alone, supports recovery and long term development, recognises and supports the role of the United Nations and the Red Cross and limits the use of military assets.[46] This is generally done by AusAID recognising and accrediting the Australian non-government organisations it will fund, which are termed AusAID's 'Emergency Cooperation Agreement Partners'.[47] The process of accreditation and its role in facilitating the delivery of Australian assistance to affected states is discussed in detail in Chapter Seven.

Coordination of international responders

By adopting the *Principles of Good Humanitarian Donorship*,[48] Australia is committed to supporting and promoting '… the central and unique role of the United Nations in providing leadership and coordination of international humanitarian action …'.[49]

Notwithstanding this commitment, the conventions discussed above[50] confirm that when it comes to providing international assistance, it is the host country or the

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43 AusAID, *Humanitarian Action Policy* (Australian Government, Canberra, 2005) 3; 13–14.

44 Good Humanitarian Donorship, *Principles and Good Practice of Humanitarian Donorship* <http://www.goodhumanitariandonorship.org/> at 25 February 2008.

45 AusAID, *Humanitarian Action Policy* (Australian Government, Canberra, 2005) 11.

46 Good Humanitarian Donorship, *Principles and Good Practice of Humanitarian Donorship* <http://www.goodhumanitariandonorship.org/> at 25 February 2008.

47 AusAID, *Responding to Emergencies* <http://www.ausaid.gov.au/human/emergencies.cfm> at 20 January 2008.

48 Good Humanitarian Donorship, *Principles and Good Practice of Humanitarian Donorship* <http://www.goodhumanitariandonorship.org/> at 25 February 2008.

49 Ibid [10].

50 *Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*, opened for signature 26 September 1986, [1987] ATS 15, (entered into force 26 February

country with the allocated responsibility for managing the response that must coordinate international responders that provide relevant assistance.

The United Nations and its specialised agencies

The Charter of the United Nations provides that the organisation will have, within the territory of member states, the necessary legal capacity as well as the necessary 'privileges and immunities' in order to allow it to perform its functions.[51] Article 105(3) provides that '[t]he General Assembly may … propose conventions to the Members of the United Nations' for the purpose of giving effect to the need for legal status, privileges and immunities. In 1946 the General Assembly proposed a *Convention on Privileges and Immunities of the United Nations*[52] that was subsequently adopted by Australia, with effect from 2 March 1949.[53] A similar convention has also been accepted for the specialised agencies of the United Nations.[54] Legislation has been passed to give effect to these conventions in Australian law.[55]

These conventions provide that the United Nations and its specialised agencies shall have 'juridical personality'; that is, the power to enter contracts, acquire and dispose of property and institute legal proceedings.[56] The United Nations is free to

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1987); *Convention on International Civil Aviation*, opened for signature 7 December 1944, [1957] ATS 5, (entered into force 4 April 1947); *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, [1986] ATS 29, (entered into force 22 June 1985); *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, opened for signature 22 April 1968, [1986] ATS 8, (entered into force 3 December 1968)and *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, opened for signature 13 November 2006, [2008] ATS 3, (entered into force 7 February 2008).

51 *Charter of the United Nations* arts 104 and 105(1).

52 *Resolution relating to the adoption of the General Convention on Privileges and Immunities of the United Nations, and Text of the Convention*, GA Res 22(1), UN GAOR 1st sess, 31st plen mtg, UN Doc 22(1) (1946).

53 *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, [1949] ATS 3, (entered into force 17 September 1946).

54 *Convention on the Privileges and Immunities of the Specialized Agencies*, opened for signature 21 November 1947, [1988] ATS 41, (entered into force 10 February 1949); see also *Charter of the United Nations* arts 57 and 63.

55 *International Organisations (Privileges and Immunities) Act 1963* (Cth) and *United Nations (Privileges and Immunities) Regulations 1986* (Cth).

56 *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, [1949] ATS 3, art I (entered into force 17 September 1946); *Convention on the Privileges and Immunities of the Specialized Agencies*, opened for

move money about without regard to local currency regulations,[57] is exempt from local taxes and is able to import material free of duty and restrictions.

The privileges and immunities apply to the United Nations, United Nations officials, representatives of member states on United Nations business and to 'Experts on Missions for the United Nations'.[58] United Nations officials may be issued with a '*laissez-passer*', which is to be recognised as a valid travel document. However, the use of the *laissez-passer* does not exempt a United Nations official from visa requirements.[59] Similar provisions apply to the specialised agencies.[60]

It follows that problems dealing with legal personality (setting up an office, operating bank accounts and so on), issues of importing equipment duty free and generally being able to operate without hindrance during disaster relief operations are not going to be applicable to the United Nations or its specialised agencies. As a result, and consistent with its lead role in coordinating international disaster response, the United Nations can be a key player in responding to international emergencies. Further the United Nations can engage personnel from other organisations to perform their tasks as experts on mission, thereby extending the rights and privileges of the United Nations to those experts. This means that where agencies are acting at the request of and under the direction of the United Nations, the various legal privileges accorded to the United Nations and its specialised agencies can be extended to the personnel of those agencies.

From Australia's perspective, this means that if international disaster assistance was required in Australia it would be easy to direct the request for assistance to the United Nations and then allow those organisations acting on behalf of the United Nations to enter Australia subject to the provisions of the conventions and

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signature 21 November 1947, [1988] ATS 41, art II (entered into force 10 February 1949).

57 *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, [1949] ATS 3, art II(5) (entered into force 17 September 1946).

58 Ibid art VI.

59 Ibid art VII (24) and (25).

60 *Convention on the Privileges and Immunities of the Specialized Agencies*, opened for signature 21 November 1947, [1988] ATS 41, (entered into force 10 February 1949).

Australia's enacting legislation.[61] Equally it would resolve many of the difficulties by channelling all aid from Australia through the United Nations. As discussed in Chapter Two, above, however, much international aid is sent through bilateral or regional arrangements, rather than through the United Nations. States want to form and maintain bilateral and regional relationships and many NGOs, who are committed to retaining their independence from all forms of government, prefer to act on their own mission rather than as part of a United Nations response.

While the deployment of all international aid through the United Nations may resolve some issues, it is not likely to occur in either the short or the long term.

Military and civil defence assets

Military forces can play a key role in international disaster relief, particularly due to their capacity to respond quickly, with a clearly defined command structure and with heavy logistics capability. The use of military forces may be problematic particularly where a humanitarian crisis is triggered by armed conflict. There the use of military forces to deliver humanitarian aid can send mixed and confusing messages. Where NGOs depend on militaries to deliver relief supplies and humanitarian workers, their claim to, and appearance of, independence from government can be threatened.[62]

Oslo Guidelines

Australia is committed to upholding and applying the 'the 1994 Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief', known as the 'Oslo Guidelines'.[63]

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61 *International Organisations (Privileges and Immunities) Act 1963* (Cth); *United Nations (Privileges and Immunities) Regulations 1986* (Cth).

62 Kevin M Cahill, *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 6.

63 *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief — Oslo Guidelines (Updated November 2006; Revision 1.1 November 2007).* United Nations Office for the Coordination of Humanitarian Affairs <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1084542> at 25 February 2008.

There is no doubt, however, that when it comes to delivering international aid, Australia relies on its military forces to provide a prompt response. The military have been used to provide logistic support in terms of transporting relief supplies and relief workers, as well as providing direct assistance in the form of medical and reconstruction teams, delivering clean water and undertaking evacuations.[64] In the last five years, the Australian Defence Force has taken part in overseas natural disaster relief in Iran, Niue, Vanuatu,[65] Sumatra,[66] Pakistan[67] and the Solomon Islands.[68]

Civil defence involves:

> … the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities ***or disasters*** and also to provide the conditions necessary for its survival. These tasks are:
>
> (a) warning;
>
> (b) evacuation;
>
> (c) management of shelters;
>
> (d) management of blackout measures;
>
> (e) rescue;
>
> (f) medical services, including first aid, and religious assistance;
>
> (g) fire-fighting;
>
> (h) detection and marking of danger areas;
>
> (i) decontamination and similar protective measures;

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64 Department of Defence, *Operation Sumatra Assist <http://www.defence.gov.au/optsunamiassist/default.htm> at 25 February 2008*; Department of Defence, *Op Papua New Guinea Assist* <http://www.defence.gov.au/oppngassist/gallery.htm> at 25 February 2008; Department of Defence, *Australian Defence Chief Fosters Bilateral Regional Relationships* <http://www.defence.gov.au/media/2000/113050600.doc> at 25 February 2008.

65 Australian Defence Force, *Defence Annual Report 2003–2004* (Commonwealth of Australia, Canberra, 2004) 85.

66 Australian Defence Force, *Defence Annual Report 2004–2005* (Commonwealth of Australia, Canberra, 2005) 149.

67 Australian Defence Force, *Defence Annual Report 2005–2006* (Commonwealth of Australia, Canberra, 2006) 95.

68 Australian Defence Force, *Defence Annual Report 2006–2007* (Commonwealth of Australia, Canberra, 2007) 57.

(j) provision of emergency accommodation and supplies;

(k) emergency assistance in the restoration and maintenance of order in distressed areas;

(l) emergency repair of indispensable public utilities;

(m) emergency disposal of the dead;

(n) assistance in the preservation of objects essential for survival;

(o) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization.[69] (Emphasis added).

Civil defence is not limited to defending the population from the effects of war or war-like hostilities, nor is it an exclusively military task. A civil defence organisation is an organisation that performs a civil defence task, rather than a particular type of organisation (government or non-government, military or civilian). In Australia, civil defence tasks are not the primary responsibility of the military, but are carried out by civilian organisations, such as the various state and territory fire brigades, ambulance services, State Emergency Service[70] and the police. Civil defence assets have been deployed overseas to assist in fire-fighting operations and following natural disasters such as the 2004 Boxing Day tsunami.[71] Visiting fire-fighters have come to Australia to assist in dealing with summer bush

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69 *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288, (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* opened for signature 8 June 1977, 1125 UNTS 4, (entered into force 7 December 1978).

70 In New South Wales, the SES was formed in 1955 but was known as 'Civil Defence' until at least 1972; New South Wales State Emergency Service, *The SES Story* <<http://www.ses.nsw.gov.au/topics/2027.html> > at 25 February 2008.

71 New South Wales Rural Fire Service, *NSW Firefighting Force Heading for USA* (2002) <http://www.rfs.nsw.gov.au/dsp_more_info.cfm?CON_ID=1497&CAT_ID=601> at 2 November 2005; New South Wales Fire Brigades, *South-East Asian Tsunami: NSWFB Deployment*, (2002) <http://www.nswfb.nsw.gov.au/incidents/history/tsunami04/index.php> at 2 November 2005; Ambulance Service of New South Wales, *Specialist skills in disaster situations* (2002) <http://www.asnsw.health.nsw.gov.au/what/countdisaster.html> at 16 December 2005.

fires.[72] As these are civil defence assets, it follows that the deployment of these services is covered by the Oslo Guidelines.

The most significant part of the Oslo Guidelines is the provision that military and civil defence assets should be used to deliver humanitarian assistance as a last resort, that is 'only where there is no comparable civilian alternative and only the use of military or civil defence assets can meet a critical humanitarian need'.[73] As noted, however, in Australia civil defence assets are largely civilian (as opposed to military) and the restriction on their use may be unnecessary. The Oslo Guidelines do provide that on a case by case basis, civil defence assets may be deployed when they are '… civilian in nature and respecting humanitarian principles' as they can provide '… advantages in terms of speed, specialisation, efficiency and effectiveness, especially in the early phase of relief response'.[74]

Arguably organisations such as the metropolitan or urban fire brigades, State Emergency Service or Rural or Country Fire Service are civilian in nature and provide a civil protection service, so their deployment will be acceptable providing they adhere to the humanitarian principles of humanity, impartiality, neutrality and independence.[75]

The exact implications of these non-binding guidelines are not clear. What they do make clear is that non-government organisations should not use military or

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72 *NZ firefighters welcomed in Victoria* (2009) The Australian <http://www.theaustralian.news.com.au/story/0,25197,25057405-5006785,00.html> at 19 February 2009; *US sending firefighters to Victoria* (2009) HeraldSun.com.au <http://www.news.com.au/heraldsun/story/0,21985,25053188-5005961,00.html> at 19 February 2009; *Wildfire Arrangement between the Department of the Interior and the Department of Agriculture of the United States of America and the Australian Participating Agencies* (2002).

73 *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief — Oslo Guidelines (Updated November 2006; Revision 1.1 November 2007).* United Nations Office for the Coordination of Humanitarian Affairs [5] <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1084542> at 25 February 2008.

74 Ibid.

75 Good Humanitarian Donorship, *Principles and Good Practice of Humanitarian Donorship* [2] <http://www.goodhumanitariandonorship.org/> at 25 February 2008; *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 46th sess, 78th plen mtg, UN Doc A/RES/46/182 (1991).

civil defence assets to deliver their programs, unless there is no alternative. However, the use of these assets may well be appropriate at an inter-government level, where one government assists the government of the affected state by deploying their own state resources.

Status of forces agreements

To facilitate the deployment of military forces, Australia has entered into status of forces agreements with six countries.[76] These deal with issues such as rights of entry, status of personnel, recognition of qualifications and the importation of equipment. All but one of these agreements are bilateral, that is they apply when Australian forces are visiting overseas, and when the foreign forces are visiting Australia. The agreement with the United States only deals with United States' forces in Australia.

These agreements have reasonably common provisions that deal with some of the issues raised by the International Red Cross.[77] The presence of these agreements would make it easier to rely on the defence forces to provide post-disaster

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76 *Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America concerning the Status of United States Forces in Australia, and Protocol* opened for signature 9 May 1963, [1963] ATS 10, (entered into force 9 May 1963); *Five Power Defence Arrangements: Exchange of Notes constituting an Agreement between the Government of Australia and the Government of Malaysia regarding External Defence and Exchange of Notes constituting an Agreement between the Government of Australia and the Government of the Republic of Singapore regarding External Defence* opened for signature 1 December 1971, [1971] ATS 21, (entered into force 1 November 1971 (Retrospective)); *Agreement between Australia and Papua New Guinea regarding the Status of Forces of each State in the Territory of the other State, and Agreed Minute*, opened for signature 26 January 1977, [1977] ATS 6, (entered into force 26 January 1977); *Exchange of Notes constituting a Status of Forces Agreement between the Government of Australia and the Government of the Republic of Singapore*, opened for signature 10 February 1988, [1988] ATS 6, (entered into force 10 February 1988); *Agreement between the Government of Australia and the Government of Malaysia concerning the Status of Forces*, opened for signature 3 February 1997, [1999] ATS 14, (entered into force 22 July 1999); *Agreement between Australia and the Kyrgyz Republic on the Status of Australian Forces in the Kyrgyz Republic* opened for signature 9 July 2002, [2002] ATS 14 (entered into force 9 July 2002); *Agreement Between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces*, opened for signature 29 October 1998, [2005] ATS 12, (entered into force 27 May 2005); and *Agreement between the Government of Australia and the Government of the Republic of the Philippines Concerning the Status of Visiting Forces of each State in the Territory of the other State*, opened for signature 31 May 2007, [2007] ATNIF 14, (not yet in force).

77 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

assistance. In particular, the status of forces agreements allow for the visiting defence forces to import their vehicles and equipment duty free, provide a formula for the settlement of any claims that may be made for damage or harm caused by the visiting forces, ensures that vehicles owned and operated by the visiting forces may be driven in the host country, removes the requirement for members of the visiting force to obtain a local drivers licence, provides that members of visiting forces entering the country do not need passports or visas, but need only produce their official identification and travelling orders, and they allow visiting forces to fly aircraft, or sail ships, into Australia without the normal fees and costs associated with landing or port charges. It would be relatively easy, therefore, for Australia to deploy the Australian Defence Force to another country, or to accept aid from the defence force of a country, where Australia has a standing status of forces agreement.

The status of forces agreements do not provide for recognition of foreign qualifications, such as medical licensing. It is appropriate that visiting forces bring with them, as part of their force, doctors who are to provide medical services to the visiting force. Such a doctor is part of the defence force performing his or her duties under the orders of that defence force; what is not provided for in the agreement is a recognition that would allow the doctor to provide medical services to the civilian population, for example following a disaster. That issue will be discussed in more detail in the next chapter where specific Australian legislative responses to these issues will be identified.

Agreements of less than treaty status

Australia and some Australian agencies have entered into international agreements that are of less than treaty status.

The FRANZ Agreement

The most important from the Commonwealth's point of view is the *Joint Statement on Disaster Relief Cooperation in the South Pacific*, known as the

FRANZ Agreement.[78] This statement was made by the representatives of France, New Zealand and Australia and commits the three nations to '… maintain pragmatic, flexible arrangements to allow for a speedy response' to a natural disaster. It was further agreed that '… the three countries should exchange information to ensure the best use of their assets and other resources for relief operations after cyclones and other natural disasters in the region'. This simple agreement appears to have been quite influential. It receives specific mention in the Commonwealth's plan for overseas assistance[79] and is well regarded by the relevant Ministers for Foreign Affairs.[80]

Despite its influence, the agreement does no more than commit the three nations to cooperate and coordinate their international response, in order to avoid duplication and the most efficient use of their respective resources.

Inter-agency agreements

Apart from treaties and the FRANZ agreement entered into by or on behalf of the Commonwealth, various state fire fighting agencies have also entered into agreements to facilitate the delivery of, and receipt of assistance during a major fire event.[81]

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78 *Joint Statement on Disaster Relief Cooperation in the South Pacific*, Wellington, 22 December 1992.

79 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002) [5.10.1].

80 See The Hon Alexander Downer, *Australian responses to global challenges: A Speech to the French Institute of International Relations* Australian Minister for Foreign Affairs <http://www.foreignminister.gov.au/speeches/2005/050201_french_institute_of_international_relations.html> at 12 May 2008 and *French Foreign Policy: International crises and issues*, France-Diplomatie <http://www.diplomatie.gouv.fr/en/ministry_158/activities-and-budget_2105/report-on-the-year-2004_2118/french-foreign-policy_2121/international-crises-and-issues_1742.html#sommaire_9> at 12 May 2008.

81 See for example *International Agreement between the US Department of the Interior, Bureau of Land Management, US Department of Agriculture, Forest Service for the National Multi Agency Coordination Group for and on behalf of the Government of the United States of America and the Secretary of the Department of Natural Resources & Environment for itself and as agent of the Crown in the Right of Each Australian State and Territory and the Crown in Right of New Zealand* (2000) reproduced in Rick Sneeuwjagt, *Review of the Australia-New Zealand Fire Fighting Deployment to the United States of America, August-September 2000*, (Department of Conservation and Land Management, Perth, 2000) ; *Wildfire Arrangement between the Department of the*

Taking one agency agreement as a model, [82] the agreement addresses some of the common problems, in particular it sets out that the receiving agency is to meet the costs of an international deployment,[83] is to be the deemed employer of incoming fire fighters[84] and is to ensure that the incoming fire fighters are indemnified against any legal claim arising from their deployment.[85] This agreement is entered into by the fire fighting agencies or the states, rather than the Federal Government. The Australian parties do not, therefore, control the customs barrier. They cannot commit Australia to allow the visiting fire-fighters to enter the country or to bring their equipment. What the parties undertake to do is use their best endeavours to obtain the necessary visas and customs clearance.[86] The agreement, and its supporting operating plan, indicates how the various agencies are to request, and meet requests for, assistance.[87]

This agreement is comprehensive but is limited in its operation to joint fire fighting operations. It is not intended to apply during other emergencies such as floods, storms or tsunami and does not bind the Commonwealth to facilitate the arrival of the emergency workers.

International urban search and rescue guidelines

The United Nations Office for the Coordination of Humanitarian Affairs, via its International Search and Rescue Advisory Group (INSARAG), has developed international guidelines to facilitate the deployment of urban search and rescue teams; that is specialised teams and their associated equipment including specially trained dogs, that '…respond to carry out search and rescue activities in collapsed structures'.[88] Urban search and rescue teams provide a specialised form of

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Interior and the Department of Agriculture of the United States of America and the Australian Participating Agencies (2002).

82 *Wildfire Arrangement between the Department of the Interior and the Department of Agriculture of the United States of America and the Australian Participating Agencies* (2002).

83 Ibid [IV].

84 Ibid [VIII].

85 Ibid. [V].

86 Ibid [VI].

87 Ibid [VII].

88 United Nations Office for the Coordination of Humanitarian Affairs, *INSARAG Guidelines and Methodology* (United Nations, Geneva, 2007) 19.

international disaster assistance, a response that is not devoted to long-term recovery, but the prompt rescue of people affected by earthquake or other incident that has caused the collapse of a building.

A significant event in the development of an international urban search and rescue capability was a United Nations General Assembly resolution.[89] Although not binding, this resolution urged states to cooperate on the development of procedures to facilitate the development and deployment of urban search and rescue teams. Australia is providing urban search and rescue capabilities in accordance with the International Search And Rescue Advisory Group[90] guidelines, but this is not supported by any treaty or international convention.

The International Search and Rescue Advisory Group guidelines are by far the most comprehensive guidelines to facilitate international disaster response. They provide that a state should, well in advance of the need for international assistance, ensure that they have in place a national focal point to serve as the point of contact for international deployment, have in place a system to make a formal request for international assistance, put in place procedures to ensure that incoming teams receive appropriate visas as well as permission to bring their communications and medical equipment, medical drugs and rescue dogs. Countries developing procedures in accordance with the guidelines must have procedures in place to ensure the security of the incoming teams and their equipment and provide necessary logistic support including interpreters, guides, fuel, transport, water, maps and so on.[91] There is, however, no Australian legislation to give effect to these requirements so Australia has not yet developed the legal regime that would allow urban search and rescue teams to rapidly deploy into Australia.

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89 *Strengthening the Effectiveness and Coordination of International Urban Search and Rescue Assistance*, GA Res 57/150, UN GAOR 57th sess , 75th plen mtg, UN Doc A/RES/57/150 (2003).

90 Emergency Management Australia, *Urban Search and Rescue* <http://www.ema.gov.au/agd/EMA/emaInternet.nsf/Page/USAR> at 9 March 2009.

91 United Nations Office for the Coordination of Humanitarian Affairs, *INSARAG Guidelines and Methodology* (United Nations, Geneva, 2007).

Adopting such broad and comprehensive procedures would go a long way to facilitating international disaster assistance, but these guidelines are not applicable to all emergencies; that is they do not represent an 'all hazards' approach to disaster management. They are limited to specialised teams providing a specialised service in the event of building collapse. While the teams themselves are likely to be resourceful and could provide useful assistance in many disasters, the guidelines and the law developed to support them is clearly aimed at one type of response, to one type of incident.

CONCLUSION

Australia has entered into a number of agreements that have an impact upon its ability to manage an international response to a disaster either in or by Australia. The agreements are however ad hoc, rather than of general application. Australia has a commitment to work with Indonesia, but not other countries in the region. There are specific agreements or arrangements to deal with particular disasters like fires or structural collapse but not an approach that deals with all hazards.

Status of forces agreements with Malaysia, Singapore, New Zealand, the United States, Papua New Guinea and the Kyrgyz Republic[92] might facilitate the use of the military as a prime response organisation when it comes to delivering or receiving foreign disaster relief. It should be noted, however, that these agreements are not intended to apply in these circumstances, they do not clarify how the foreign forces would or could interact with Australian emergency services, for example how they would coordinate their efforts or how or to what extent foreign military forces could provide assistance to civil agencies. There are no provisions to allowing visiting medical staff to provide treatment and care to people other than members of their own forces.

Apart from these foreign militaries, Australia has entered into treaties that will facilitate the delivery of aid by the United Nations. Through these conventions,

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92 A seventh agreement, with the Philippines, has been made but is not yet in force: .*Agreement between the Government of Australia and the Government of the Republic of the Philippines Concerning the Status of Visiting Forces of each State in the Territory of the other State*, opened for signature 31 May 2007, [2007] ATNIF 14, (not yet in force).

Australia and other countries recognise the legal status and personality of the United Nations and its specialised agencies.[93]

In broad terms, apart from its obligations as a good international citizen and neighbour, Australia has not entered treaties that have an impact upon its choice to offer post-disaster assistance, or treaties that will facilitate the delivery of post-disaster relief by Australia, or the acceptance of such aid should a disaster occur in Australia.

The agreements that have been identified do not go a long way to dealing with the issues identified by the International Red Cross and discussed in Chapter Two but they do provide some evidence that the problems are recognised in Australia and can be dealt with to some degree.

In Chapter Five, Australian domestic law, both federal and state, will be reviewed to determine how Australia gives effect to these obligations when it comes to preparing to send and receive international assistance in the event of a catastrophic disaster.

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93 *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, [1949] ATS 3, (entered into force 17 September 1946); *Convention on the Privileges and Immunities of the Specialized Agencies*, opened for signature 21 November 1947, [1988] ATS 41, (entered into force 10 February 1949).

CHAPTER FIVE
AUSTRALIA'S EMERGENCY MANAGEMENT ARRANGEMENTS

This thesis has identified the common problems that have been encountered with the international response to disasters, as well as identifying relevant international law that applies to Australia and has an impact upon Australia's ability and willingness to accept or send international disaster assistance. It has been noted that there is little international law that has direct bearing or application in this area. It is not international law, but domestic law that will have the greatest impact upon Australia's ability to send and receive international disaster assistance.

This chapter reviews Australia's emergency management arrangements to identify the respective roles of the Commonwealth and of the states and territories. This analysis necessarily involves identifying and considering the law that applies to a purely domestic emergency as well as a disaster requiring an international response, whether Australia is the assisting or the affected state. It is argued that the Commonwealth should pass comprehensive emergency legislation that would enhance Australia's ability to deal with a catastrophic disaster and in particular a disaster that required international assistance.

Having identified Australia's emergency management arrangements, Chapters Six and Seven will benchmark those arrangements against the IDRL Guidelines to identify areas where Australian legal arrangements do not adequately deal with the issues raised by an international disaster response.

With the basis for Commonwealth legislation, and the need for such legislation established, a model Act that could be adopted by the Commonwealth to resolve at least some of the issues identified in this thesis is proposed in Chapter Eight.

THE ROLE OF THE COMMONWEALTH

It is generally argued that managing a counter-disaster response is a matter for the Australian states and territories.[1] The Commonwealth takes no direct management responsibility but assists the states and territories by making available, on request, Commonwealth assets (most often personnel and equipment from the Australian Defence Forces)[2] and making funds available to individuals and to the states and territories where the cost of responding to the disaster exceeds prescribed thresholds.[3]

This description reflects current practice but may represent an oversimplified view of the constitutional provisions. A report prepared by the Commonwealth Auditor-General started with the proposition that it is 'the States [that] have constitutional responsibility for the protection of life and property in Australia',[4] but there can be no doubt that the Commonwealth also has responsibilities in these areas. The Commonwealth has the responsibility for managing the disaster response in Australia's non-self-governing territories.[5] The Commonwealth also has responsibilities to protect life and property across Australia,[6] and this is

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1 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002) [1.1]; Senate Standing Committee on Industry Science Technology Transport Communications and Infrastructure, *Disaster Management* (Commonwealth of Australia, Canberra, 1994) Chapter 1; Australian National Audit Office, *Commonwealth Emergency Management Arrangements* (Commonwealth of Australia, Canberra, 2000) Chapter 2; Emergency Management Australia, *Emergency Management* <http://www.ema.gov.au/agd/EMA/emaInternet.nsf/Page/Emergency_Management> at 28 March 2008.

2 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002).

3 Council of Australian Governments, *Natural Disasters in Australia: Reforming mitigation, relief and recovery arrangements* (Commonwealth of Australia, Canberra, 2002) Section 6; Emergency Management Australia, *NDRRA Funding Assistance* <http://www.ema.gov.au/agd/EMA/emaInternet.nsf/Page/Communities_Natural_Disasters_NDRRA_NDRRA_Funding_Assistance> at 24 June 2008.

4 Australian National Audit Office, *Commonwealth Emergency Management Arrangements* (Commonwealth of Australia, Canberra, 2000) 39.

5 Christmas Island; Cocos (Keeling) Islands; Jervis Bay; Ashmore & Cartier Islands and the Coral Sea Islands; Attorney-General's Department, *Territories of Australia* <http://www.ag.gov.au/www/agd/agd.nsf/page/Territories_of_Australia> at 28 March 2008.

6 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549 (First National Security Statement to the Australian Parliament, Kevin Rudd, Prime Minister) 12549.

reflected in the Commonwealth's involvement in health, social security, defence, national security and anti-terrorism.

The Auditor-General recognised the Commonwealth's responsibility to respond to a national emergency. A national emergency need not be limited to those 'involving a defence crisis or the external affairs power'.[7] There could be national emergencies such as a meteor strike, nuclear accident, or any disaster that is so large as to be Commonwealth in nature. Where a disaster warrants international assistance, it will be of particular interest to the Commonwealth Government. It is the nation state of Australia that has legal personality and is the subject of international law,[8] and under the Australian Constitution it is the Commonwealth that has the responsibility for managing Australia's 'external affairs'[9] and its relationships '… with the islands of the Pacific'.[10]

Australia's legal personality in international law and external affairs

The primary subjects of international law are nation states[11] (as opposed to, in the Australian context, the various states and territories). Under international law only Australia has legal personality to make claims regarding breaches of international law, to enter into treaties and to enjoy various privileges and immunities from the laws of other states.[12]

As discussed in Chapter Three, there are issues of international law raised by international disaster response. First there are the human rights obligations upon states to protect and advance the human rights of their citizens. Human rights obligations that flow from '… the principles and rules concerning the basic rights of the human person' or '… are conferred by international instruments of a

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7 Australian National Audit Office, *Commonwealth Emergency Management Arrangements* (Commonwealth of Australia, Canberra, 2000) 40.

8 Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Sydney, 2006) 144.

9 *Australian Constitution* s 51(xxix).

10 Ibid s 51(xxx).

11 Ian Brownlie, *Principles of Public International Law* (6 ed, Oxford University Press, Oxford, 2003) 58.

12 Ibid 57.

universal or quasi-universal character'[13] are owed to the 'international community as a whole'[14] (that is they are obligations '*erga omnes*'[15]). These obligations include the obligation to protect fundamental rights, such as the right to life and those derived from universal instruments including the Universal Declaration of Human Rights[16] and the International Covenant on Civil and Political Rights.[17] Where obligations are owed *erga omnes*, another state, such as Australia, has a legal interest[18] to ensure that the human rights of people affected by disasters in other states are sufficiently protected and advanced. Equally where a disaster occurs on Australian territory, Australia has an obligation to the international community to ensure that the rights of people affected by that disaster are protected and advanced, and that the affected population is assisted.

United Nations resolutions (again discussed in some detail in Chapter Three) encourage nations to cooperate in disaster response. It is Australia, and not its states and territories, that is a member of the United Nations and therefore party to these resolutions and the obligations upon members of the United Nations to work together, cooperatively, to solve '…international problems of an economic, social, cultural, or humanitarian character'.[19]

Where national agencies, and this includes agencies of state governments and other organisations acting on behalf of the nation state, act contrary to international law, then the responsibility for those actions lies with the state.[20] While breaches of international law are not to be expected when organisations are

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13 *Barcelona Traction, Light and Power Company (Belgium v Spain)* (1970) ICJ Reports 3, [34].

14 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002) 79.

15 *Barcelona Traction, Light and Power Company (Belgium v Spain)* (1970) ICJ Reports 3, [33].

16 *Universal Declaration of Human Rights*, GA Res 217(III), 3rd sess, 183rd plen mtg, UN Doc A/RES/217(III) (1948).

17 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976).

18 Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, Sydney, 2006) 893.

19 *Charter of the United Nations* art 1(3).

20 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002) 97-98.

responding to provide international disaster assistance, it is possible that there may be infringement of national sovereignty, or some failure to comply with obligations under international law. In that case, Australia, as an assisting state, may be faced with responsibility under international law. Where a breach occurs on Australian territory, then it is the Australian government that will have standing to seek any remedy allowed by international law.

Australia's legal personality in international law demonstrates that the Commonwealth has a clear interest in managing Australia's response to an overseas disaster, and the international response to a disaster on Australian territory.

It follows that the provision of international disaster assistance, either to, or by, Australia falls squarely into the rubric of Australia's 'external affairs' ensuring that the Commonwealth has clear legislative authority in this area.[21]

Relations of the Commonwealth with the islands of the Pacific.

Australia's intention is to provide disaster assistance anywhere in the world but its focus or priority is to its Pacific neighbours.[22] Maintaining these relationships and providing assistance to these neighbouring states also falls squarely within the Commonwealth's constitutional powers.[23]

Other Commonwealth interests

The Commonwealth also has legislative responsibility for a number of areas of domestic law that will be relevant in a disaster and, in particular, a disaster involving an international response. The Commonwealth manages Australia's international border so has legislative responsibility in the areas of customs and quarantine, international trade and commerce, the operation of foreign

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21 *Australian Constitution* s 51(xxix).

22 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002) [1.4]; AusAID, *Humanitarian Action Policy* (Australian Government, Canberra, 2005) 4.

23 *Australian Constitution* s 51(xxx).

corporations in Australia, external affairs, taxation, postal and telegraphic communications, the naval and military defence of the nation (which is relevant to the use of the defence force in disaster response), borrowing money on the credit of the Commonwealth, insurance, the payment of social security benefits[24] and other powers that may become relevant depending on the needs created by the disaster.

This discussion shows that the Commonwealth does have constitutional responsibilities that will be affected by a catastrophic disaster either in Australia or overseas. As the Commonwealth interests are involved the Commonwealth requires the necessary authority and power to appropriately respond to a disaster that impacts upon those interests.

MANAGING A DOMESTIC EVENT — THE NEED FOR EMERGENCY POWERS

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. Such action must be justified by law, whether that law is provided in statute or common law. 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. For instance, he may need to authorise the entry to any land, building or structure, or cause any road or public place to be closed or to pull down, cut or remove fences, or pull down or remove buildings that may be unsafe, or burn, plough or clear firebreaks on any land, or take possession or control of any vehicles or equipment that may be necessary.[25]

Powers of this sort are provided for in state and territory legislation, discussed in detail below, as it is the state and territories that will take the primary role of managing the disaster site. The Commonwealth, however, may also require 'emergency powers'.

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[24] Ibid s 51.

[25] H P Lee, *Emergency Powers* (Law Book Company, Sydney, 1984) 171–172.

Government departments and authorities are bound by legislation to exercise various powers and perform their statutory functions.[26] How they exercise those powers and perform those functions may have an impact upon the disaster response, for example a requirement by a government department that people provide particular documentation in order to access a benefit may be appropriate in normal times, but not in a disaster when people cannot access their homes or their homes and personal papers have been lost.

Following the devastation of Burma by Cyclone Nargis in 2008, there were demands by the international community that the Burmese government should waive visa and customs requirements to allow international aid agencies to access to the affected population.[27] If a similar situation were to occur in Australia, without specific legislative authority, it would be difficult, if not impossible for the minister to simply 'waive' the application of the relevant legislation.

> When a major disaster occurs in which Commonwealth assistance is sought, legislation is necessary to permit the setting aside of current Commonwealth procedures during the period of the emergency. … Without emergency powers legislation to provide for the suspension of certain Acts and regulations during the currency of an emergency contravention of the law may occur.[28]

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. [29]

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26 Ibid 171.

27 Aung Hla Tun, *Burma cyclone death toll may top 100,000: US Diplomat* (2008) National Post <http://www.nationalpost.com/nationalpost/story.html?id=499011> at 11 June 2008; Reuters, *Burma cyclone deaths may top 100,000* (2008) The Age <http://www.theage.com.au/news/world/burma-cyclone-deaths-may-top-100000/2008/05/08/1210131102642.html> at 11 June 2008; Anne Penketh and Pete Pattisson, *Burma generals agree to UN aid for cyclone victims* (2008) The Independent <http://www.independent.co.uk/news/world/asia/burma-generals-agree-to-un-aid-for-cyclone-victims-831034.html> at 11 June 2008.

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

29 New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) [4.12].

The Commonwealth Parliament has the power to make laws with respect to the matters listed in section 51 of the Constitution. This power includes the power to make laws with respect to how those subject areas will be dealt with in an emergency. The parliament could provide that the Minister for Immigration may waive visa requirements in an emergency as an exercise of the legislative power with respect to aliens and immigration;[30] the Commonwealth has the power to make laws with respect to various social security benefits[31] so the Commonwealth may make laws with respect to how those benefits will be delivered during an emergency. Federal agencies have offices and staff and provide services around the nation. Their staff and buildings will be affected by catastrophic events and the agencies need to plan how they will deal with the disruption and damage caused by a natural hazard. Many agencies, such as Centrelink, the Department of Finance, the Australian Defence Force and the Department of Health and Aging, will have particular roles to play during a disaster.[32] They will need to respond to the disaster to ensure that federal services are maintained and people who need and are eligible for Commonwealth assistance can receive it. It follows that the Commonwealth has constitutional authority to legislate for the emergency response by Commonwealth agencies and to legislate how the Commonwealth will respond to disasters. It also follows that the parliament could include provisions in specific legislation to allow a minister to make particular decisions that are necessary in an emergency and, as the table below shows, there are examples where this has been done.

In the table below, the first column identifies the relevant minister who is authorised to determine if an emergency or disaster exists, and the second column identifies the relevant legislative provision. This list is necessarily incomplete, identifying only those provisions that appear relevant to a natural disaster. There

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30 *Australian Constitution* s 51(xix) and (xxvii).

31 Ibid ss 51(xxiii) and (xxiv).

32 Emergency Management Australia, *Emergency Management; Involvement of Specific Australian Government Agencies* <http://www.ema.gov.au/agd/ema/emaInternet.nsf/Page/RWP544D45FFDB1AFDC1CA256C4800156F4D?OpenDocument> at 9 March 2009.

are others dealing with law enforcement emergencies and there may be other provisions where the key word ‘disaster’ or ‘emergency’ is not used.

Minister for[33]	***Acting under this Act and section***
Broadband, Communications and the Digital Economy	*Radiocommunications Act 1992* (Cth) s 219, Declaration of period of emergency.
Families, Housing, Community Services and Indigenous Affairs	*Social Security Act 1991* (Cth) s 36, declaration of a ‘major disaster’.
Health and Ageing	*Gene Technology Act 2000* (Cth) s 72B, emergency dealing determination.
	National Health Act 1953 (Cth) s 86E ‘Minister may determine certain persons to be special evidentiary categories … (b) persons requiring drugs or medicinal preparations in an emergency.’
	Therapeutic Goods Act 1989 (Cth) s18A, exemption because of emergency.
Health and Ageing with regard to human quarantine, otherwise the Minister for Agriculture, Fisheries and Forestry	*Quarantine Act 1908* (Cth) s 12A, minister may take quarantine measures in an emergency.
Infrastructure, Transport, Regional Development and Local Government	*Airports Act 1996* (Cth) s 250, access to airports for defence-related purposes and for emergency or disaster relief.
	Sydney Airport Curfew Act 1995 (Cth) s 18 and *Adelaide Airport Curfew Act 2000* (Cth) s 16, dispensation by the minister in emergencies.
Prime Minister	*Privacy Act 1988* (Cth) s 80J, declaration of emergency — events of national significance; and s 80K, declaration of emergency — events outside Australia.
Prime Minister, the Attorney General and/ or the Minister for Defence	*Defence Act 1903* (Cth) pt IIIAAA, use of the defence force to protect the Commonwealth interests and assist the states.
Resources, Energy and Tourism	*Liquid Fuel Emergency Act 1984* (Cth) s 16, Declaration of national liquid fuel emergency.

In the event of a national disaster that required incoming international aid agencies to access Sydney airport without charge and outside the curfew times

[33] *Administrative Arrangements Order 2008* (Cth).

and to bring in urgently required medications based on genetically modified organisms, there would need to be four separate determinations that an 'emergency' existed:

1) The Minister for Health and Aging would make an 'emergency dealing determination' to allow emergency dealing with a genetically modified organism[34] and
2) grant an exemption to allow the use of the medicaments that have not gone through the normal registration process.[35]
3) The Minister for Infrastructure, Transport, Regional Development and Local Government would give an airport operator notice to require them to give priority access to the airport for relief flights[36] but if, and only if, the defence force is involved in the response to the hazard event, so before the minister could give that notice;
4) the Prime Minister, the Attorney General or the Minister for Defence would need to authorise the use of the defence force in the response.[37]

Because the incoming aircraft is involved in an emergency response it would not be required to comply with the Sydney Airport Curfew, that is, it could land or take off outside the hours of 6am to 11pm.[38]

There would need to be further, separate determinations, to ensure social security payments to the affected population,[39] to allow people to obtain necessary medication without being able to prove their identity with their Medicare card,[40] to allow government agencies to share information so that people can be located and the missing and dead identified [41]and to ensure fuel reserves are maintained for the emergency operations.[42] There would also need action by the Minister for

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34 *Gene Technology Act 2000* (Cth) s 72B.
35 *Therapeutic Goods Act 1989* (Cth) s 18A.
36 *Airports Act 1996* (Cth) s 250.
37 *Defence Act 1903* (Cth) pt IIIA.
38 *Sydney Airport Curfew Act 1995* (Cth) ss 6, 18, 19.
39 *Social Security Act 1991* (Cth) s 36.
40 *National Health Act 1953* (Cth) s 86E.
41 *Privacy Act 1988* (Cth) s 80J.
42 *Liquid Fuel Emergency Act 1984* (Cth) s 16.

Immigration to allow foreign aid workers to enter the country and then further action at the state level to facilitate the recognition of professional qualifications.

It is the case that there is no legal provision to allow a single agency, minister or the Prime Minister to take on the coordination of the Commonwealth response and exercise relevant ministerial powers or even to make a single declaration of a national emergency that would activate all the relevant Commonwealth emergency provisions.

Where compliance with legislative requirements was too burdensome, or legislation did not adequately provide the power required to respond to an emergency, a minister may attempt to modify or waive compliance on the basis of the prerogative power of the Crown,[43] discussed below, but the extent of, and even the existence of that power in a peace time emergency, is not clear.

The executive power of the Commonwealth

When an emergency strikes, the government may wish to exercise emergency or abnormal powers, that is, to take action not generally authorised by law.[44] This may include a power to commandeer private assets, to waive or vary legislative requirements, for example to waive visa requirements or to allow foreign professionals to practice their profession without obtaining local qualifications or endorsement. The executive may seek to restrain the movement of people or goods, to effectively cordon off areas and stop people either entering or leaving the prescribed area, or to require people to evacuate the disaster area.

Without specific legislation granting the necessary powers, the Commonwealth government would need to rely on non-statutory powers such as the prerogative

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43 State Governor's also enjoy the right to exercise the prerogative powers of the Crown with respect to each state. H P Lee, *Emergency Powers* (Law Book Company, Sydney, 1984) 39-44.

44 New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) Chapter II.

power of the Crown, now encompassed in the phrase 'the Executive power of the Commonwealth'.[45] The executive power of the Commonwealth:

> … enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibilities vested in it by the Constitution. It includes the prerogative powers of the Crown, that is the powers accorded to the Crown by common law.[46]

There is debate about the source and meaning of 'the executive power of the Commonwealth'.[47] On one view it is derived from the prerogative powers of the English monarch '… which, according to subsequent doctrine, was frozen in 1689 [though it] can be abrogated by statute'.[48] An alternative view, espoused by French J in *Ruddock v Vadarlis*,[49] is that the executive power of the Commonwealth is derived from the agreement that lead to the creation of the Commonwealth and is to be '… ascertained from within the *Constitution* itself and that it is not subject to the common law limitations upon the royal prerogative'.[50] Even so, French J described the common law prerogative power as providing the 'historical antecedents'[51] to the Commonwealth executive power and conceded that the executive power '… may derive some of its content by reference to the royal prerogative…' even if it '… is subject … to the limitations as to subject matter that flow directly from the Constitution'.[52] On either view, the executive power '… *includes* the prerogative powers of the Crown…'[53]

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45 *Australian Constitution* s 61.

46 *Barton v The Commonwealth* (1974) 131 CLR 477, 498 (Mason J).

47 *Australian Constitution* s 61.

48 Robin Creyke, 'Executive Power — New Wine in Old Bottles' (2003) 31 *Federal Law Review* i, iii.

49 *Ruddock v Vadarlis* (2001) 110 FCR 491.

50 Ibid 540 (French J); see also Bradley Selway, 'All at Sea — Constitutional Assumptions and the Executive Power of the Commonwealth' (2003) 31 *Federal Law Review* 495, 497.

51 *Ruddock v Vadarlis* (2001) 110 FCR 491, 538 (French J).

52 Ibid 540 (French J).

53 *Barton v The Commonwealth* (1974) 131 CLR 477, 498 (Mason J) (emphasis added). See also *Ruddock v Vadarlis* (2001) 110 FCR 491, [9] (Black CJ); H. E. Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, Sydney, 1984) 392, 403, 419 and 420; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 232 (Williams J); George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 425-6; 430; Bradley Selway, 'All at Sea — Constitutional Assumptions and the Executive Power of the Commonwealth' (2003) 31 *Federal Law Review* 495, 497; 503; 505; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, The Federation Press,

The scope of the prerogative power is uncertain[54] and resists being defined as a list or powers or subject areas.[55] The prerogative power has included a power vested in the Crown to respond to emergencies, that are '… a national emergency, [where there is] an urgent necessity for taking extreme steps for the protection of the Realm'.[56] Lee, in his review of emergency powers, said:

> … a special or emergency prerogative lies dormant in the fabric of executive powers. Such a prerogative awaits activation in the face of extreme necessity. The submission in this work is that the Commonwealth possesses a prerogative power to requisition a subjects' property … Another assertion … is that a case can be made for an extraordinary prerogative which extends to the assumption of legislative power when the legislative arm of government is paralysed.[57]

Renfree states:

> A prerogative of the Crown regarding the preservation of the public safety was early recognized by the common law. It was described by the maxim *salus populi suprema lex*.[58]
>
> The prerogative of the Crown in the exercise of the *suprema potestas* arises from a general principle that in time of emergency the law arms Crown and subject alike with the right of intervening, and sets public safety above private right.
>
> Apart from natural disasters and political crises, there are two main crises that may confront a nation — attack from abroad and domestic violence within.[59]

Having identified natural disasters as a possible emergency, Renfree discusses only the examples of violent attacks. The case law on this subject, however, leaves open the possibility that the Commonwealth Executive, that is the

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Sydney, 2006) 522; 526; H. P. Lee, *Emergency Powers* (Law Book Company, Sydney, 1984) 67.

54 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 99 (Lord Reid), 145 (Lord Pearce); H E Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, Sydney, 1984) 389, 394; New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) [4.37]–[4.41].

55 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, The Federation Press, Sydney, 2006) 523; 525; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 114 (Viscount Radcliffe).

56 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 136 (Lord Hodson).

57 H P Lee, *Emergency Powers* (Law Book Company, Sydney, 1984) 322.

58 The Latin phrase '*salus populi est suprema lex*' is translated as 'the welfare of the people, or of the public, is supreme law': *Latin for Lawyers* (Sweet and Maxwell, London, 1915) 241.

59 H E Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, Sydney, 1984) 466 see also George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 425.

Governor-General, the Prime Minister and Cabinet and the public service,[60] retain necessary powers to respond to national natural disasters despite no specific grant of legislative power in this area.

The basis of the war prerogative is the obligation on the government to defend itself and the fundamental structures of the society, that is, it is to defend the system of constitutional government established in Australia and to keep the population safe. A war or civil violence that aims to usurp the government and the constitutional order is a direct threat to the national polity and may be resisted by the national government.[61] A natural disaster, even a catastrophic disaster, does not pose the same threat to the underlying basis of government, but it can pose a significant threat to the government's ability to function:

> The Parliament of the Commonwealth and the other constitutional organs of the Commonwealth cannot perform their functions unless the people of the Commonwealth are preserved **in safety and security**.[62] (Emphasis added).

The government is not only authorised to protect itself, but also the population. It is the Crown's '…right and duty to protect its realm and citizens in times of war **and peril**'.[63] (Emphasis added).

Viscount Radcliffe thought the emergency prerogative need not be limited to the outbreak of war. He said:

> There is no need to say that the imminence or outbreak of war was the only circumstance in which the prerogative could be invoked. Riot, pestilence and conflagration might well be other circumstances…[64]

Ensuring the safety and security of the citizens could extend to ensuring their security from catastrophic natural hazards as well as from war. 'Peril' means 'risk, jeopardy, danger'.[65] A catastrophic disaster will expose the Commonwealth and its citizens to jeopardy and danger. It follows that the case law identifies that the

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60 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, The Federation Press, Sydney, 2006) 520.

61 *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

62 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 142 (Latham CJ).

63 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 143 (Lord Pearce).

64 *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 115 (Viscount Radcliffe).

65 *The Shorter Oxford English Dictionary* (Oxford University Press, Oxford, 1973) 1555.

source of the prerogative power is to protect the political entity and its citizens from threat and danger, and is not expressly limited to the dangers posed by enemies in war. It must also follow, as a matter of practical reality, that when an overwhelming disaster strikes a state, regardless of its cause, the executive government must have power to respond to that disaster.

The Commonwealth executive power also includes powers implied by the standing of the government as a national government.[66]

> … s.61 [of the Constitution] does confer on the Executive Government power "to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation" … **It invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit.**[67] (Emphasis added).

The need for national action in the face of a disaster that requires coordinated national assets or has affects across more than one state and/or territory suggests that the Commonwealth would, by virtue of its position as the national government, have the necessary power under section 61 of the Constitution to move into areas normally the responsibility of the states, and in extreme cases could exercise legislative authority[68] if required. This authority could allow the government to waive compliance or suspend the operation of the legislation if that was required to meet the urgency of the situation.

History shows that the Commonwealth can exercise such power. In 1974 the Director-General of the Commonwealth's Natural Disasters Organisation (now Emergency Management Australia) was appointed to take supreme command of recovery operations following the devastation of Darwin by Cyclone Tracey. The appointment of the Commonwealth officer as supreme commander was 'because

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66 *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ); George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 427; 430-431; Bradley Selway, 'All at Sea - Constitutional Assumptions and the Executive Power of the Commonwealth' (2003) 31 *Federal Law Review* 495, 505; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, The Federation Press, Sydney, 2006) 534.

67 *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J).

68 H P Lee, *Emergency Powers* (Law Book Company, Sydney, 1984) 322.

the situation in Darwin was a **national disaster of major dimensions'**.[69] In the absence of any particular constitutional head of power, any power of the Commonwealth to manage 'a national disaster of major dimensions' must be an exercise of the executive or prerogative power of the Commonwealth.[70]

Is there a need for Commonwealth legislation?

If the analysis, above, is correct then, even without a specific head of legislative power, the Commonwealth executive could exercise necessary emergency powers where required. The extent of that authority is, however, unclear. Whether it could extend to waiving compliance with legislation is also unclear. The Crown cannot exercise a prerogative power where the parliament has passed legislation curtailing that power or setting out who is to exercise various powers. It is arguable that if the legislature does not provide emergency powers in an Act, such as the *Migration Act*, there can be no prerogative power to suspend or vary the Act to deal with an emergency, for if such a power were intended it would have been provided for by the legislature. In that case there can be no room left for the executive to act relying on an undefined prerogative power.[71] In Lord Atkinson's words:

> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. … I should prefer to say that when such a

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69 Alan Stretton, *Darwin Disaster: Cyclone Tracy. Report by Director-General Natural Disasters Organisation on the Darwin Relief Operations 25 December 1974–3 January 1975* (Commonwealth of Australia, Canberra, 1975) [8] (emphasis added).

70 *Australian Constitution* s 61. Though in the case of Cyclone Tracy, the Government could have relied on its power to make laws with respect to territories (*Australian Constitution* s 122) as the Northern Territory was not a self-governing territory but was administered by the Commonwealth Government. That was not, however (according to Major General Stretton) the basis of his appointment. Alan Stretton, *Darwin Disaster: Cyclone Tracy. Report by Director-General Natural Disasters Organisation on the Darwin Relief Operations 25 December 1974 - 3 January 1975* (Commonwealth of Australia, Canberra, 1975) [8]; see also Alan Stretton, *The Furious Days: The Relief of Darwin* (Collins, Sydney, 1976) and Alan Stretton, *Soldier in a Storm: An Autobiography* (Collins, Sydney, 1978). See also H P Lee, *Emergency Powers* (Law Book Company, Sydney, 1984) 322.

71 *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; H. E. Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, Sydney, 1984) 397ff; *Ruddock v Vadarlis* (2001) 110 FCR 491.

> statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions and that its prerogative power to do that thing is in abeyance.[72]

In *Ruddock v Vadarlis*,[73] Black CJ endorsed this view when he cited *Attorney-General v De Keyser's Royal Hotel Ltd* as support for the proposition that:

> … the relationship between a statute and the prerogative is that where a statute, expressly or by necessary implication, purports to regulate wholly the area of a particular prerogative power or right, the exercise of the power or right is governed by the provisions of the statute, which are to prevail in that respect: …. The principle is one of parliamentary sovereignty.[74]

Where a government purports to rely on the prerogative power, there may be challenges as to whether the power existed and whether it has been displaced by legislation.[75] Leaving the matter up to a court to determine when and how the Commonwealth may act in an emergency would not be appropriate when such powers are required as a matter of urgency. The better solution would be to enact legislation, before disaster strikes, to ensure that the necessary emergency powers are in place, with clear criteria for when they may be used.

Having established that the executive power of the Commonwealth includes an undefined power to respond to truly national disasters then the Commonwealth will also have legislative power in this area. Placitum 51(xxxix) of the *Australian Constitution* provides that the legislative power of the Commonwealth extends to making laws with respect to:

> Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.[76]

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72 *Attorney General v De Keyser's Royal Hotel* [1920] AC 508, 539.
73 *Ruddock v Vadarlis* (2001) 110 FCR 491.
74 Ibid 501 (Black CJ).
75 As was the case in *Ruddock v Vadarlis* (2001) 110 FCR 491.
76 *Australian Constitution* s 51(xxxix).

The executive power is vested in the executive government, so making laws incidental to the exercise of that executive power would be a valid exercise of Commonwealth legislative power.[77]

Commonwealth legislation should achieve two objectives. It should define Commonwealth powers that may be exercised in an emergency and it should identify a single coordinating individual or body to make decisions and take action on behalf of the Commonwealth.

The need for pre-existing legal arrangements was the subject of comment by Major-General Alan Stretton who, following Cyclone Tracy's devastation of Darwin in 1974, commandeered property, and restricted the movement of people all without clear legal authority.[78] Notwithstanding his ability to rely on *de facto* authority and goodwill, he recommended that legal authority was required to allow the coordinator to operate in a disaster.[79]

H P Lee argues that '… emergency provisions should be embodied in legislation which makes their existence conspicuous'.[80] He notes that following the bombing of the Hilton Hotel in 1978 the then Leader of the Opposition (and later, Governor-General) Mr Hayden argued for Commonwealth emergency legislation:

> … not so much in order to confer sweeping new powers but rather to circumscribe, confine and define their exercise, and to remove some of the extraordinary uncertainties which now prevail.[81]

The New Zealand Law Commission recommended against relying on non-statutory authority to manage disaster response because it is 'vague and ill defined'[82] and is not subject to scrutiny. The commission argued it is better to

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77 *Davis v Commonwealth* (1988) 166 CLR 79; See also *Ruddock v Vadarlis* (2001) 110 FCR 491.

78 Alan Stretton, *The Furious Days: The Relief of Darwin* (Collins, Sydney, 1976) 80.

79 Alan Stretton, *Soldier in a Storm: An Autobiography* (Collins, Sydney, 1978) 285.

80 H P Lee, *Emergency Powers* (Law Book Company, Sydney, 1984) 193.

81 Ibid 192.

82 New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) [1.29].

plan for the possible eventualities and to define in statute, before a disaster strikes, what the scope of necessary emergency powers will be.[83]

The Strategic Policy Institute found that:

> 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.[84]

There is, therefore, strong support, dating back to at least 1974, for the idea that the Commonwealth should have in place emergency legislation to define the powers that the Commonwealth government may exercise in times of emergency. Comprehensive emergency management legislation should facilitate decision-making by a single person or authority that is vested with all the powers of the Commonwealth. As the law currently stands, there are provisions in various Acts for the relevant minister to make a declaration that an 'emergency' exists. Without a single, coordinating authority, each minister must make their declaration rather than a single declaration of a national emergency being sufficient to activate all the emergency provisions.

Despite these calls for legislative reform, and notwithstanding the Commonwealth could pass comprehensive emergency management legislation, it has chosen not to do so. The Commonwealth's emergency management arrangements are the creation of executive arrangements and are not supported by legislation. The Commonwealth's emergency management arrangements are discussed in detail, below.

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83 Ibid.

84 David Templeman and Anthony Bergin, *Taking a punch: Building a more resilient Australia*, (Australian Strategic Policy Institute, Canberra, 2008) 7.

COMMONWEALTH EMERGENCY MANAGEMENT ARRANGEMENTS

The Commonwealth arrangements envisage that the management of an emergency on Australian territory, regardless of its scale, will be a matter for state and territory authorities.[85] The Commonwealth's role is to provide Commonwealth resources, primarily the military, to assist the state agencies. The Commonwealth can also take on a role coordinating offers of, or requests for, international assistance.[86] The policy and plans do not envisage a role for the Commonwealth in managing a response that because of its significant impact, size or impact on Commonwealth interests could be described as a national disaster or emergency.

Emergency Management Australia

The principal Commonwealth disaster planning, management and response agency is Emergency Management Australia, an administrative unit within the Attorney-General's department. Emergency Management Australia assists in maintaining Commonwealth disaster response plans and coordinating the response of the Commonwealth Government and its agencies to any hazard event. In particular this means coordinating the response of Commonwealth assets (for example the Department of Defence), in response to requests from the state or territories for assistance.[87]

The Commonwealth Government Disaster Response Plan (COMDISPLAN)

An incident that occurs within a state or territory is to be managed by the state or territory government and emergency services in accordance with their legislation and policy. When the effects of the incident are beyond the capacity of the state or

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85 *Commonwealth Emergency Management Policy Statement*, Emergency Management Australia <http://www.ema.gov.au/agd/ema/emaInternet.nsf/Page/RWP11A286E12CB5FCA3CA256C480004F92F?OpenDocument> at 29 May 2008; Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002) [1.1] and [1.3].

86 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002) [4.12] and [4.13].

87 Emergency Management Australia, *This is EMA* (Commonwealth of Australia, Canberra, 2008).

territory to manage, or where resources from the Commonwealth are required, a request is made to the Commonwealth for assistance. The process of the request is set out in COMDISPLAN. Each state and territory has a nominated officer who is authorised to contact Emergency Management Australia seeking Commonwealth assistance. The request is passed to the Attorney-General for approval; if approved it is then passed to the relevant Commonwealth agency for ministerial approval and to provide the required assistance.[88] Where the resources required to meet the needs of the affected jurisdiction cannot be located in Australia, Emergency Management Australia will liaise with the state or territory government and the Department of Foreign Affairs and Trade to seek assistance from overseas.[89]

Emergency Management Australia is responsible for recording offers of assistance from overseas, passing those offers to the affected jurisdiction and advising those making the offer whether their assistance is required.[90]

Where international assistance is forthcoming (whether as a result of a request from Australia or spontaneous donations or the arrival of international organisations) the Department of Foreign Affairs and Trade and Emergency Management Australia will put in place necessary arrangements to receive the international assistance and work with the state or territory to move the assistance to the area of need.[91]

The AUSASSISTPLAN

The key policy document on providing assistance to disaster-affected countries is the AUSASSISTPLAN[92] managed by the Australian Agency for International Development, known as AusAID. Although AusAID is the agency responsible for the delivery of international disaster assistance, that assistance is usually managed

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88 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002) [4.1].

89 Ibid [4.13].

90 Ibid [4.12] and Annex D.

91 Ibid [4.14 and Annex E.

92 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002).

by Emergency Management Australia as the agent for AusAID.[93] The AUSASSISTPLAN is concerned with requests for Commonwealth assistance. It does not apply to requests directed to Australian-based non-government organisations[94] nor, presumably, to requests directed directly to state agencies.

The Commonwealth Counter-Disaster Task Force

The Commonwealth's peak disaster response body is the Commonwealth Counter-Disaster Task Force.[95] This is:

> … a senior interdepartmental committee, chaired by the Department of the Prime Minister and Cabinet, comprised of representatives of Australian Government departments and agencies with a significant role to play in the provision of disaster relief or rehabilitation assistance.[96]

The role of the Counter-Disaster Task Force is to:

a. provide necessary policy advice on issues referred to it by the Director General, Emergency Management Australia (DGEMA); and

b. assume coordination of Commonwealth assistance for rehabilitation and to recommend any special intergovernmental arrangements which may be required to assist longer-term recovery.[97]

The task force may be activated during disaster response and recovery operations to 'support of EMA activities'.[98]

The task force has no legislative basis, and could not authorise government departments to exercise emergency powers that are not provided in legislation or authorise departments or ministers to waive compliance with the law.

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93 Ibid [1.2] and [1.3].

94 Ibid [3.1].

95 Emergency Management Australia, *Australian Emergency Management Arrangements* (6th ed, Commonwealth of Australia, Canberra, 2000) 6.

96 Emergency Management Australia, *Australian Government Emergency Management Committees and Organisations* <http://www.ema.gov.au/agd/ema/emaInternet.nsf/Page/RWP3A99D5A22013AA3CCA256C4B001A18F9?OpenDocument> at 23 June 2008.

97 Ibid. It should be noted that the reference to the task force's role is different on the EMA website to the role described in the Australian Emergency Manuals Series. The version on the website is assumed to reflect current practice rather than the version published in 2000.

98 Ibid.

The National Emergency Protocol

The Council of Australian Governments recognises that there can be a national emergency and this is reflected in the National Emergency Protocol. The Prime Minister, the premiers and chief ministers of affected states and territories may agree that there is a 'national emergency'. The protocol states:

> … This may include responding to natural or human-caused threats such as a disease outbreak, severe weather or environmental emergency. In deciding whether a national emergency exists, factors which may be considered include:
>
> • the size, severity or nature of the emergency;
>
> • the threat or perceived threat to public safety and/or security;
>
> • the contribution of multiple jurisdictions to managing the emergency;
>
> • the impact on multiple jurisdictions; and
>
> • the impact on industry of national importance. [99]

The protocol provides that there will be ongoing communication between the Commonwealth and the affected state/territory. There is to be consultation between the levels of government to ensure 'appropriate, nationally-consistent … accurate and timely information is provided to the public' and that such information will 'build and maintain public confidence in the ability of authorities to cooperate to prevent and/or manage the emergency'.[100]

The Commonwealth commits itself to establishing a 'national call centre' within an hour of the declaration of a national emergency. Exactly what the call centre will do is not spelled out, other than it is 'to serve as a first point of contact for the public in a national emergency'.[101] Apart from these comments on communication, the plan does not provide for any further role for the Commonwealth, leaving the management of the response to the Australian states and territories.

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[99] Council of Australian Governments, *National Emergency Protocol* (Council of Australian Governments, Canberra, 2006) [4.1].

[100] Ibid.

[101] Ibid [7.1].

It is interesting to compare this limited role of the Commonwealth to its 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'.[102] The factors that are taken into consideration in determining whether a terrorist event is a 'national terrorist situation' are similar to those factors involved in declaring a 'national emergency'. They are the:

- scale and nature of the incident, including the use of CBR[103] and nuclear materials;
- involvement of multiple jurisdictions;
- involvement of Australian Government interests;
- significance of the threat;
- impact of a threat involving civil aviation or maritime operations;
- involvement of critical infrastructure; and
- involvement of foreign or international interests.[104]

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'.[105] This may require the Commonwealth to determine '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'.[106]

A similar Commonwealth response would be appropriate following a national, natural disaster.[107] There is nothing inherent in terrorism that brings it within the Commonwealth sphere or when it comes to response and recovery, sets it aside

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102 *National Counter-Terrorism Plan* (2nd ed, Commonwealth of Australia, Canberra, 2005) [85].

103 'CBR' means 'chemical, biological and radiological'; Ibid [56].

104 Ibid [86].

105 Ibid [86].

106 Ibid.

107 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> at 10 March 2009.

from natural disasters.[108] 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, but it has chosen not to.

The National Security Adviser and other changes announced in December 2008

The Smith Review of Homeland and Border security[109] considered Australia's ability to respond to a number of different threats, including natural disasters. The review found that:

> While crisis management by the Commonwealth has generally been done well 'on the day', the current hazard-specific approach and the absence of consistent national arrangements for handling significant crises exposes the Government to several areas of vulnerability.[110]

The review recommended various steps to improve the Commonwealth's response to all hazards, not just terrorism or natural disasters.

In December 2008 the Prime Minister delivered a national security statement to the Parliament. The security statement continued to focus on terrorism and threats caused by the movement of people following natural disasters overseas, rather than responding to disasters.[111] The Prime Minister said national security means:

> Freedom from attack or the threat of attack, the maintenance of our territorial integrity, the maintenance of our political sovereignty, the preservation of our hard won freedoms and the maintenance of our fundamental capacity to advance economic prosperity for all Australians. [112]

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

109 Ric Smith, *Summary and Conclusions: Report of the Review of Homeland and Border Security*, Prime Minister of Australia <http://www.pm.gov.au/docs/20081204_review_homeland_security.rtf> at 6 March 2009. The complete report has not been made publically available.

110 Ibid 2.

111 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549, 12555 and 12557 (First National Security Statement to the Australian Parliament, Kevin Rudd, Prime Minister).

112 Ibid 12550.

A natural disaster can impact upon the right to exercise freedoms and 'advance economic prosperity', but is clearly not the focus of the government's response to the Smith Review.

In response to the Smith Review's recommendations, the Prime Minister announced the creation of the position of National Security Adviser. The National Security Adviser's role is to enhance government cooperation by establishing a 'new level of leadership, direction and coordination'[113] among the existing agencies. The National Security Adviser is to 'complement the roles and responsibilities of the current heads of agencies by enhancing whole-of-government coordination'.[114] Specifically the adviser is to develop executive training, a coordinated budget process and an evaluation mechanism to evaluate the government's response against whole of government priorities. With this list of responsibilities it is not clear what role the adviser will play during an actual response to a disaster.

Other Prime Ministerial announcements included an expanded role for the National Security Committee of Cabinet and the Secretaries Committee on National Security. The National Security Committee of Cabinet is chaired by the Prime Minister and is the 'main vehicle for coordinating the Government's efforts' with respect to counter-terrorism. The Secretaries Committee is

> the peak inter-departmental committee which considers national security policy and operational matters of an ongoing nature, in addition to all matters to be put before the National Security Committee of Cabinet'.[115]

These committees have been focused on responding to terrorism rather than natural disasters,[116] and their role in responding to natural disasters is unclear.

Notwithstanding the broad range of Commonwealth agencies involved, there is still no equivalent of the Principal Federal Official or Federal Coordinating

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113 Ibid 12559.
114 Ibid.
115 Ibid 12560.
116 Attorney-General's Department, *Counter-Terrorism Committees*, <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP6F6F82CE6A34F30BCA2571FE00074E1F> at 10 March 2009.

Officer of the United States[117] to manage and coordinate the Commonwealth response. The role of the National Security Adviser is to advise the government on policy response. What his or her role will be in the actually response to a disaster is not clear. 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 Commonwealth resources[118] to a disaster response and cannot direct any of the Commonwealth agencies on how they are to respond to a catastrophic disaster.

There is also room for uncertainty in the structure of the Attorney-General's Department. Within that department is the Secretary to the Department, the National Security Adviser and the Director of Emergency Management Australia. There are two relevant ministers; the Minister for Home Affairs and the Attorney-General.[119] 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.[120] The provisions in place in the United States are discussed in detail, below.

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

118 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002).

119 Attorney-General's Department, *Attorney-General's Department Organisation Chart — 2 March 2009*, Safeguarding Australia <http://www.safeguardingaustralia.org.au/files/February2009/AGD_org_chart_2March2009.pdf> at 10 March 2009.

120 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.

Another result from the response to the Smith Review has been to break up Emergency Management Australia. Under the new structure the training and education role will be moved to the National Security Capability Development Division of the Attorney-General's department. Without the education and training responsibilities, the response role of Emergency Management Australia will be expanded to include the response to terrorism, pandemics, the management of the National Security Hotline and protective security.[121]

In a response to these changes Bergin and Templeman report that:

> Our approach to catastrophic disasters is inadequate. It's not clear which commonwealth agency or federal official will be in charge. There are no clear national guidelines to assess what capabilities the states need to be prepared. This was pointed out seven months ago to the Rudd Government in a commissioned report on our homeland security arrangements by a former secretary of the Defence Department, Ric Smith. He concluded that we needed a more integrated approach to emergency management to deal with the fundamental gap in our national emergency planning to respond to catastrophic disasters.[122]

Further, although welcoming the changing role for Emergency Management Australia, Bergin and Templeman warn that it may focus more on terrorism and external threats rather than the threat posed by natural hazards. They say:

> In going down this path we should be mindful, however, of the significant problems faced by the US Federal Emergency Management Agency in co-ordinating the response to Hurricane Katrina. FEMA's ineptitude was in part due to its integration into the Department of Homeland Security with a focus primarily on counter-terrorism.[123]

What effect the changes announced in December 2008 will have on Australia's emergency management arrangements is yet to be seen, but there is evidence, mostly from the United States and discussed below, that without legislative mandate there will still be room for confusion and duplication when the Commonwealth responds to a catastrophic natural disaster.

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121 Attorney-General's Department, *Attorney-General's Department Organisation Chart — 2 March 2009*, Safeguarding Australia <http://www.safeguardingaustralia.org.au/files/February2009/AGD_org_chart_2March2009.pdf> at 10 March 2009.

122 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> at 10 March 2009.

123 Ibid.

STATE AND TERRITORY ARRANGEMENTS

The Australian states and territories have the primary responsibility for managing the response to any natural disaster, but they do not have responsibility for managing Australia's international borders or foreign relations. Accordingly the ability of the states to have in place laws to manage the receipt of international assistance, whether from other governments or non-government organisations will be seriously limited.

The arrangements for disaster response are relatively similar across the Australian jurisdictions. Each state[124] has detailed disaster management legislation[125] that provides for disaster planning at state, regional and local level.[126] When events require a coordinated and ongoing response, there is provision for a declaration of a state of alert, emergency or disaster (the terms vary across jurisdictions). Once a formal declaration has been made, the functions and powers to be exercised by the emergency controllers charged with the responsibility of managing the response to a disaster are set out.

When an emergency reaches the level of a state of disaster or emergency, a whole of government approach is required. The states and territories deal with the issue of managing the whole of government response, ensuring an appropriate delivery of government functions and exercising extraordinary emergency powers by providing specific authority to either the minister or the counter-disaster controller to direct government agencies on how they are to perform their tasks. In Victoria the minister may even suspend the operation of legislation during a disaster. The relevant state and territory provisions will now be examined, and how the legislative scheme might be used to facilitate an international disaster response will be considered. The purpose of identifying the various approaches of the

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124 For the sake of convenience, the term 'state' will be used to include the Australian Capital Territory and the Northern Territory.

125 *Emergencies Act 2004* (ACT); *State Emergency and Rescue Management Act 1989* (NSW); *Disasters Act 1982* (NT); *Disaster Management Act 2003* (Qld); *Emergency Management Act 2004* (SA); *Emergency Management Act 2006* (Tas); *Emergency Management Act 1986* (Vic); *Emergency Management Act 2005* (WA).

126 With the exception of the *Emergencies Act 2004* (ACT) as the Australian Capital Territory is too small to have various levels of government.

Australian states and territories is to determine if they can provide the basis for a scheme that could be adopted for Commonwealth purposes, to be discussed in Chapter Eight.

The Australian Capital Territory

The territory controller can direct 'the head of an entity to undertake response or recovery operations'.[127] The term 'entity' 'includes an unincorporated body and a person (including a person occupying a position)'.[128] This definition is not exhaustive, so an entity would also include an incorporated body and a government statutory authority. This is a very broad power allowing the controller to direct anyone, not just government agencies, to be involved in response or recovery operations.

The territory legislation is the only counter-disaster legislation that makes specific reference to international cooperation. It provides that international disaster responders may exercise the functions of the local emergency services and must cooperate with, and make their resources available to, the local services.[129] Where international assistance is provided in accordance with a pre-existing 'cooperative agreement' overseas professional qualifications will be recognised in the territory without further need for certification or registration.[130]

New South Wales

In New South Wales, during a 'state of emergency' the relevant minister may allocate any government resources to the emergency response and may direct any government department to do, or refrain from doing, anything and to exercise or not exercise any function under that department's legislation.[131]

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127 Ibid s 162.
128 *Legislation Act 2001* (ACT) Dictionary.
129 *Emergencies Act 2004* (ACT) 2004 (ACT) s 64.
130 Ibid s 180.
131 *State Emergency and Rescue Management Act 1989* (NSW) s 36.

The Northern Territory

The Northern Territory controller is given very broad powers to manage the effects of a disaster. The controller is to control and direct counter-disaster operations[132] and has 'such powers as are necessary to carry out his functions.'[133] During a declared disaster[134] or emergency,[135] the territory controller enjoys whatever power is required to give effect to the territory's counter-disaster plans and, where the plan is silent, whatever power is required to give effect to his or her own decisions.[136] Presumably this would include a power to direct government agencies to do, or refrain from doing, various tasks where required to advance the aims of the counter-disaster operations.

Queensland

The chair of the State Disaster Management Group or a district disaster coordinator can give directions about how powers under another Act are to be exercised during a 'disaster situation'.[137] Such a direction may only be given where it is necessary 'for effective management of the disaster for which the disaster situation is declared.'[138]

The chair of the State Disaster Management Group or a district disaster coordinator may appoint people who have the 'the necessary expertise or experience' to exercise 'rescue powers'. Rescue powers include taking measures to reduce the risk of death or injury and any other activity that is required to help the injured and protect people and property from danger.[139]

The relevance of this provision in the context of international disaster assistance is that the relevant controller can authorise foreign aid workers, for example urban

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132 *Disasters Act 1982* (NT) s 12.
133 *Disasters Act 1982* (NT) s 13.
134 *Disasters Act 1982* (NT) s 35.
135 *Disasters Act 1982* (NT) s 40.
136 *Disasters Act 1982* (NT) ss 36 and 40.
137 *Disaster Management Act 2003* (Qld) s 9. 'Disaster situation' means where a state of disaster has been formally declared under s 64(1) or s 69; see Sch 2 (Dictionary).
138 *Disaster Management Act 2003* (Qld) s 9(4)(b).
139 *Disaster Management Act 2003* (Qld) s 110.

search and rescue teams,[140] to enjoy legal rights and protections that are applicable to local rescue workers. This is an example where legal authority could be rapidly extended to incoming foreign emergency workers who are working in coordination with, or as part of, the state's response to the disaster.

South Australia

The state coordinator must, during a major incident,[141] a major emergency[142] or a disaster,[143] '… cause such response and recovery operations to be carried out as he or she thinks appropriate'.[144] In conducting these operations, the controller may 'make use of the gratuitous services of any person'.[145] In the context of international assistance that allows the controller to take advantage of offers of help from foreign organisations provided that help is gratuitous'.

Tasmania

The state controller, during an emergency is to 'direct the use of resources for emergency management as he or she considers appropriate'.[146] This would allow the controller to take effective control of all resources, which could include the resources provided by international actors.

The state controller may authorise people to exercise various emergency powers[147] including the power to enter premises, to 'excavate land, construct earthworks, erect temporary barriers and other structures and modify or mend any existing structure' conduct medical examinations and decontamination procedures and to dispose of human or animal bodies.[148] These provisions are, again, to be of most use if and when urban search and rescue teams are required in Tasmania, as they could be appointed as authorised officers[149] and then authorised to exercise

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140 Discussed in Chapter Four, above.
141 *Emergency Management Act 2004* (SA) s 22.
142 *Emergency Management Act 2004* (SA) s 23.
143 *Emergency Management Act 2004* (SA) s 24.
144 *Emergency Management Act 2004* (SA) s 25.
145 *Emergency Management Act 2004* (SA) s 25(2)(k).
146 *Emergency Management Act 2006* (Tas) s 11.
147 *Emergency Management Act 2006* (Tas) ss 31, 40, 41 and Sch 1.
148 *Emergency Management Act 2006* (Tas) Sch 1.
149 *Emergency Management Act 2006* (Tas) s 31.

the emergency powers that were needed to allow them to meet their particular task objectives.

The state controller is required to consider whether Commonwealth or inter-state resources are required to combat an emergency[150] and if they are, 'to request those resources'.[151] Determining whether there is a need for, and requesting, international assistance is not specifically mentioned, but it can be inferred that the state controller would have the authority to consider this and to call for such assistance if it was required.

Victoria

In Victoria the Minister for Police and Emergency Services is coordinator in chief.[152] During a declared disaster, the minister may direct a government agency to do, or not do, anything and to exercise, or not exercise, any function or power. The minister may also suspend any Act or regulation where compliance with that law would 'inhibit response to or recovery from the disaster'.[153]

Western Australia

During a declared state of emergency, the State Emergency Coordinator is to take on the task of coordinating the response of all government agencies.[154] To this end the coordinator can 'direct any public authority to do or refrain from doing any act, or to perform or refrain from performing any function'.[155]

Where authorised by the state emergency management policy, the State Emergency Management Committee or the State Disaster Council, the coordinator may

(a) liaise with the Australian Government and other persons, in or outside the State; and

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150 *Emergency Management Act 2006* (Tas) s 11.
151 *Emergency Management Act 2006* (Tas) s 11(c).
152 *Emergency Management Act 1986* (Vic) s 5.
153 *Emergency Management Act 1986* (Vic) s 24(2).
154 *Emergency Management Act 2005* (WA) s 74(1).
155 *Emergency Management Act 2005* (WA) s 74(2)(a).

(b) enter into agreements and arrangements with those persons, to assist the State to manage emergencies.[156]

Persons outside the state would include persons and organisations from outside Australia. This subsection[157] would allow the coordinator to enter into agreements both before and during an emergency. The section allows the coordinator and the Western Australian emergency management arrangements to bypass the Commonwealth and the provisions of COMDISPLAN by entering into direct agreements with interstate and international organisations.

Where international assistance is received, the State Emergency Coordinator could appoint incoming team members as authorised officers.[158] Authorised officers are given extensive emergency powers including the power to demand identification of people,[159] direct the evacuation of people and animals or restrict the movement out of a disaster area,[160] and take control of private property.[161] This would extend to incoming aid workers the powers and privileges of the domestic emergency services.

INTERNATIONAL EXAMPLES

Legislative examples from Canada and the United States will serve as useful examples because, like Australia, they are federated states where the primary responsibility for disaster management is vested in the states.

Disaster management legislation — Canada

Canada is, physically, the second largest nation in the world. It is a federation with 10 provinces and a national legislature based in Ottawa. Canada has a highly concentrated population of about 33 million, with 90% of the population living

156 *Emergency Management Act 2005* (WA) s 11(3).
157 *Emergency Management Act 2005* (WA) s 11(3)(b).
158 *Emergency Management Act 2005* (WA) s 61.
159 *Emergency Management Act 2005* (WA) s 66.
160 *Emergency Management Act 2005* (WA) s 67.
161 *Emergency Management Act 2005* (WA) s 69; see also s 75.

within 160 kilometres of the border with the United States. [162] This highly concentrated population is similar to Australia where 75% of the population live in the south east corner between Melbourne and Brisbane.[163]

Constitutional considerations

Canada has a written constitution set out in the *Constitution Act 1867* (Imp) and the *Constitution Act 1982*.[164]

The Canadian constitution lists the areas of legislative power for the national and provincial governments. The provincial legislatures are given exclusive legislative power in 15 specified areas.[165] The national legislature is granted the residual legislative power, that is, the power to make law on any subject matter not specifically reserved to the provinces. The national legislature is also granted exclusive power to make law with respect to thirty enumerated subject areas.[166] There is no specific grant of legislative power in the area of disaster or emergency management, but the federal legislature has the power to make laws for the 'peace order and good government' of Canada as a whole.[167] This broad provision includes the power to make laws to deal with a national emergency.

The Canadian constitution, like the Australian constitution, vests the executive power of the national government in the Queen.[168] This executive power includes the traditional prerogative powers of the monarch,[169] including an emergency

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162 *The World Factbook: Canada* Central Intelligence Agency <https://www.cia.gov/library/publications/the-world-factbook/print/ca.html> at 16 September 2008.

163 Department of Infrastructure Transport Regional Development and Local Government, *The East Coast Transport Corridor*. <http://www.infrastructure.gov.au/rail/trains/high_speed/study/corridor.aspx> at 16 September 2008.

164 *Constitution Act 1982* (being Sch B to the *Canada Act 1982* (UK) cl 11) s 52.

165 *Constitution Act 1867* (Imp) s 92.

166 *Constitution Act 1867* (Imp) s 91.

167 *Constitution Act 1867* (Imp) s 91; see also *Fort Frances Pulp and Power Co v Manitoba Free Press* [1923] AC 695, in J D Whyte, W R Lederman and D F Bur, *Canadian Constitutional Law* (Butterworths, Toronto, 1992) 7-32 see also *Reference Re Anti-Inflation Act* (1976) 68 DLR (3d) 452 in J D Whyte, W R Lederman and D F Bur, *Canadian Constitutional Law* (Butterworths, Toronto, 1992) 7-106 and commentary at 7-35.

168 *Constitution Act 1867* (Imp) s 9; *Australian Constitution* s 61.

169 Patrick Monahan, *Constitutional Law* (2nd ed, Irwin Law, Toronto, 2002) 62.

prerogative that is 'the right in an emergency to take actions that are necessary in order to defend the sovereignty of the country'.[170] The use of the executive power to manage emergencies is now governed by the *Emergencies Act* RSC 1985, c 22 (4th Supp).[171]

The provinces have a legislative power to deal with emergencies occurring within their own borders, in order to ensure the delivery of provincial services and the continuation of the provincial government. Provincial governments also have the exclusive power to make laws dealing with 'Property and Civil Rights in the Province'[172] which will include rights such as the right to 'life, liberty and the security of the person'.

Despite the aim of the Canadian constitution to distribute legislative power between the national and provincial legislatures, there is room for significant overlap.[173] Where there is an inconsistency between federal and provincial law, the courts have held that even without a specific Constitutional provision,[174] the federal law is to prevail.[175] Further, where there is a national emergency, the federal legislature, relying on the residual power to make laws for the peace, order and good government of Canada, can make laws dealing with any subject matter including those matters otherwise within the exclusive jurisdiction of the provinces.[176]

Where the national legislature purports to rely on the emergency power to legislate in areas that are normally within the exclusive power of the provinces, they should make it clear that they are relying on the emergency power. Beetz J said:

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170 Ibid 63.
171 Ibid.
172 *Constitution Act 1867* (Imp) s 92(13).
173 Patrick Monahan, *Constitutional Law* (2nd ed, Irwin Law, Toronto, 2002) 107–108.
174 Such as *Australian Constitution* s 109.
175 Patrick Monahan, *Constitutional Law* (2nd ed, Irwin Law, Toronto, 2002) 127–128.
176 Ibid 261; H Marx, 'The Apprehended Insurrection of October 1970 and the Judicial Function' (1972) *University of British Columbia Law Review* 55 in J D Whyte, W R Lederman and D F Bur, *Canadian Constitutional Law* (Butterworths, Toronto, 1992) 7-36; *Reference Re Anti-Inflation Act* (1976) 68 DLR (3d) 452 in J D Whyte, W R Lederman and D F Bur, *Canadian Constitutional Law* (Butterworths, Toronto, 1992) 7-96 and 7-107.

> What is required from Parliament when it purports to exercise its extraordinary emergency power in any situation where a dispute could arise as to the existence of the emergency and as to the constitutional foundation of its action, is an indication, I would even say a proclamation, in the title, the preamble or the text of the instrument, which cannot possibly leave any doubt that, given the nature of the crisis, Parliament in fact purports to act on the basis of that power.[177]

It follows that if a disaster occurs within the boundaries of a province and is managed by the provincial government, relevant provincial law would apply. Where the effect of the disaster impacts upon the rights of people outside the province or involves the federal government, or constitutes a national emergency,[178] there is room for federal law to apply.

The Emergencies Act and the Emergency Management Act

The Canadian parliament has passed two complimentary pieces of emergency management legislation; they are the *Emergencies Act 1985* and the *Emergency Management Act 2007*.

The 1985 Act defines a national emergency as:

> … an urgent and critical situation of a temporary nature that
>
> (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
>
> (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada
>
> and that cannot be effectively dealt with under any other law of Canada.[179]

The Act provides for four types of national emergency. They are:

- a public welfare emergency;[180]
- a public order emergency;[181]
- an international emergency;[182] and

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177 *Reference Re Anti-Inflation Act* (1976) 68 DLR (3d) 452 in J D Whyte, W R Lederman and D F Bur, *Canadian Constitutional Law* (Butterworths, Toronto, 1992) 7-108.

178 Patrick Monahan, *Constitutional Law* (2nd ed, Irwin Law, Toronto, 2002) 257.

179 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 3.

180 *Emergencies Act* RSC 1985, c 22 (4th Supp), ss 5–15.

181 *Emergencies Act* RSC 1985, c 22 (4th Supp), ss 16–26.

- a war emergency.[183]

An international emergency involves 'acts of intimidation or coercion or the real or imminent use of serious force or violence',[184]and so is not relevant to natural disasters requiring international assistance. A 'public order emergency' and a 'war emergency' are also emergencies caused by armed conflict or other violence, and are not relevant to the issue of disaster relief where the disaster is a sudden onset natural disaster in the absence of armed conflict.[185]

In the context of this thesis, only a public welfare emergency is relevant. A public welfare emergency is:

> … an emergency that is caused by a real or imminent
>
> (*a*) fire, flood, drought, storm, earthquake or other natural phenomenon,
>
> (*b*) disease in human beings, animals or plants, or
>
> (*c*) accident or pollution
>
> and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.[186]

The Act empowers the Governor in Council (that is the Governor acting on the advice of the Cabinet[187]) to issue a de ``claration of a public welfare emergency[188] and to make orders to deal with the emergency. The orders may:

- restrict travel to or from the area affected by the emergency;
- direct the evacuation of people or property and make arrangements for the care of evacuated people and property;
- requisition or authorise the use or disposal of private property;
- require people to provide essential services as part of the response to, and recovery from, the emergency;
- regulate the distribution and availability of 'essential goods, services and resources';
- authorise emergency payments;

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182 *Emergencies Act* RSC 1985, c 22 (4th Supp), ss 27–36.
183 *Emergencies Act* RSC 1985, c 22 (4th Supp), ss 37–45.
184 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 27.
185 Defined in Chapter One, above.
186 *Emergencies Act* RSC 1985, c 22 (4th Supp), s5.
187 Patrick Monahan, *Constitutional Law* (2nd ed, Irwin Law, Toronto, 2002) 61; 64–67.
188 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 6.

- authorise the establishment of emergency medical facilities and shelters;
- authorise the assessment of damage and the repair of such damage;
- authorise assessment of environmental damage and remediation; and
- create criminal offences for failure to comply with orders made in response to the emergency.[189]

Orders made by the Governor must not 'unduly' impede the ability of a provincial government to respond to the disaster, and must be aimed at achieving a coordinated response with the provincial authorities.[190] To this end the Governor must consult with the lieutenant-governor of each province that is affected by the disaster before making a declaration of a national emergency.[191] Where the effects of the disaster are principally in one province, a declaration of a national emergency cannot be made unless the lieutenant-governor has 'indicated … that the emergency exceeds the capacity or authority of the province to deal with it'.[192]

The initial proclamation remains in force for not more than ninety days,[193] but it may be extended. There may be more than one extension, but in each case the declaration cannot be extended for more than ninety days.[194]

The process of making a declaration or orders under the Act is subject to parliamentary review. Each time that a declaration is made, continued or amended,[195] a 'motion for confirmation of the declaration' must be put before both Houses of Parliament.[196] If either House (that is the House of Commons or the Senate) does not support the confirmation motion, then the declaration is deemed to be revoked.[197] Even if a declaration is confirmed it may subsequently be revoked by the parliament.[198] Every order or regulation made by the Governor

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189 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 8(1).
190 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 9.
191 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 14(1).
192 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 14(2).
193 *Emergencies Act* RSC 1985, c 22 (4th Supp), 7(2).
194 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 12(1).
195 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 13(1).
196 *Emergencies Act* RSC 1985, c 22 (4th Supp), ss 7(1) 12(4) 13(2) 58, 59 and 60.
197 *Emergencies Act* RSC 1985, c 22 (4th Supp), ss 58(7) 60(6).
198 *Emergencies Act* RSC 1985, c 22 (4th Supp), ss 11and 59.

to deal with the emergency must also be laid before parliament[199] or, in some cases, the Parliamentary Review Committee,[200] and may be revoked.[201]

A multi-party Parliamentary Review Committee is established. This committee operates during the period of the emergency and is to review 'the exercise of powers and the performance of duties and functions pursuant to a declaration of emergency'.[202] After the emergency has ended, an inquiry must be held looking into 'the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency'.[203] The report of the enquiry must be tabled before the parliament within one year of the revocation or lapsing of the emergency declaration.[204]

This process of requiring confirmation by the parliament, and reserving to the parliament the right to revoke a declaration, ensures that the action by the executive arm of government (that is, the Governor in Council) is subject to review by the legislative arm (that is, the parliament) which can revoke the declaration if they are not satisfied that the circumstances justify the making of the declaration. This type of oversight ensures that the Act and a declaration of emergency cannot be used by a government to extend its powers inappropriately. It is consistent with the recommendations made in New Zealand that either parliamentary or judicial oversight is required to ensure that the emergency provisions are not over used or abused.[205] The ability of parliament to review and revoke a declaration is particularly important when the Canadian courts have indicated that they will give great latitude to declarations of emergency so that it is hard, if not impossible, to seek judicial review on the question of whether an

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199 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 61(1).
200 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 61(2).
201 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 61(3)–61(8).
202 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 62.
203 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 63(1).
204 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 63(2).
205 New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) [1.38]–[1.40]. See also H P Lee, *Emergency Powers* (Law Book Company, Sydney, 1984) 193–194.

emergency exists or whether the steps taken to deal with the emergency are justified by the circumstances.[206]

The *Emergencies Act 1985* is complemented by the *Emergency Management Act 2007*. This latter Act sets out the obligations of the Minister of Public Safety and Emergency Preparedness to exercise leadership in the area of emergency management.[207] The minister's responsibilities including ensuring that there are policies and plans in place to ensure an adequate and timely emergency response.[208] The minister is to coordinate the response by the Canadian government to an actual emergency,[209] and to participate in 'international emergency management activities'.[210]

All ministers are charged with the responsibility of ensuring that their departments have emergency management plans in place that include consideration of how their department will ensure business continuity and support the provincial and local authorities in their emergency management responsibilities.[211]

Disaster management legislation — United States of America

The United States, like Australia and Canada, is also a federated state where the principle obligation for disaster management lies with the state governments, but the federal government recognises a significant role in assisting the states and can take an active role in the management of a disaster that, because of its scale, becomes a disaster of national proportions.

Constitutional considerations

As with Canada and Australia, the United States has a written constitution that sets out the legislative power of the federal and state governments. There is no

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206 Patrick Monahan, *Constitutional Law* (2nd ed, Irwin Law, Toronto, 2002) 258; J D Whyte, W R Lederman and D F Bur, *Canadian Constitutional Law* (Butterworths, Toronto, 1992) 7-28 – 7-39.

207 *Emergency Management Act* SC 2007, c15, s 3.

208 *Emergencies Act* RSC 1985, c 22 (4th Supp) s 4.

209 *Emergencies Act* RSC 1985, c 22 (4th Supp) s 4(1)(e).

210 *Emergencies Act* RSC 1985, c 22 (4th Supp) s 4(1)(k).

211 *Emergencies Act* RSC 1985, c 22 (4th Supp) s 6.

specific power to legislate for 'disasters' or 'emergencies'. As with the Australian Federal Government[212] there is an 'incidental' power to:

> … make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.'[213]

In Canada the residual legislative power is vested in the federal government; that is, if the subject matter is not exclusively vested in the states, then it is a matter of federal jurisdiction. In Australia and the United States, the federal legislatures have limited legislative powers with the residual power vested in the states.[214]

The executive power of the United States is vested in the President.[215] The President is also commander-in-chief of the military and naval forces of the United States, as well as of the state militias when they are engaged in the service of the United States.[216]

The Robert T Stafford Disaster Relief and Emergency Assistance Act and the Homeland Security Act.

The principal item of Federal legislation is the *Robert T Stafford Disaster Relief and Emergency Assistance Act* ('the *Stafford Act*').

The *Stafford Act* is intended to enhance assistance that is delivered to state and local governments by the federal government, rather than to allow the federal government to take charge of the disaster response.[217] The Act is fundamentally concerned with the expenditure of federal funds to assist state and local governments with disaster preparation.[218] The concern of this thesis is in the area of response to, rather than preparation for, a major disaster, but in this area, too, the *Stafford Act* has significant provisions.

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212 *Australian Constitution* s 51(xxxix).

213 *United States Constitution*, art 8.

214 In the United States this is confirmed by the tenth amendment to the Constitution which says 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people'.

215 *United States Constitution* art II(1).

216 *United States Constitution* art II(2).

217 *Robert T Stafford Disaster Relief and Emergency Assistance Act* 42 USC 5121-5207 § 101.

218 Ibid §§201 and 202; *United States Constitution* art I(8).

First, the Act provides that *any* federal agency that is 'charged with the administration of a Federal assistance program' may waive compliance with administrative requirements that would normally apply, but that would 'otherwise prevent the giving of assistance under such programs if the inability to meet such conditions is a result of the major disaster'.[219]

Where the President of the United States declares that there is an emergency or a major disaster (both terms are defined in the Act) then he or she is to appoint a Federal Coordinating Officer who is to undertake a needs assessment of the area affected by the event, establish field offices and take on the role of coordinating the response by federal agencies and non-government organisations, such as the American Red Cross and the Salvation Army, where they agree to operate under the Coordinating Officer's direction.[220]

The federal government is to establish 'Emergency Response Teams', made up of federal government employees, who may be deployed to assist the coordinating officer.[221] A federal agency operating under the Act may engage temporary employees, seek expert advice and consulting services, and enter contracts to hire equipment, obtain supplies and resources, undertake travel and the like without compliance with normal procedures that apply when creating jobs, appointing staff and entering contracts.[222]

Consistent with the international standards of humanity and impartiality, the Act requires that federal disaster assistance is provided in '… an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status'.[223]

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219 *Robert T Stafford Disaster Relief and Emergency Assistance Act* 42 USC 5121-5207 § 301.

220 *Robert T Stafford Disaster Relief and Emergency Assistance Act* 42 USC 5121-5207 § 302.

221 *Robert T Stafford Disaster Relief and Emergency Assistance Act* 42 USC 5121-5207 § 303.

222 *Robert T Stafford Disaster Relief and Emergency Assistance Act* 42 USC 5121-5207 § 306.

223 *Robert T Stafford Disaster Relief and Emergency Assistance Act* 42 USC 5121-5207 § 308.

Once a major disaster has been declared, the President may direct federal agencies, including the Department of Defence, to undertake emergency relief work by lending or otherwise making available federal resources, making available medicine, medical equipment, food and other necessary supplies and undertaking emergency relief work such as clearing debris, search and rescue, providing medical or education services, providing technical advice, and public warnings and other urgent activities.[224] The federal government may also contribute to private and government agencies to help them provide these services. Where the Department of Defence (that is the military forces) are engaged in emergency relief work, their commitment is not to exceed 10 days.[225]

In order to facilitate recovery the federal government may authorise the repair of its own facilities, state and local government infrastructure and assets of not-for-profit organisations, without the need for the normal processes required to authorise this expenditure.[226]

In terms of international disaster assistance, the only reference appears to be in Title VI Emergency Preparedness where it is said that the Director of the Federal Emergency Management Agency '… shall give all practicable assistance to States in arranging, through the Department of State, mutual emergency preparedness aid between the States and neighbouring countries'.[227]

The *Stafford Act* is supported and supplemented by the *Homeland Security Act* 6 USC 311-321j. This Act establishes the Federal Emergency Management Authority.[228] The 'Primary mission' of the Federal Emergency Management Agency is to:

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224 *Robert T Stafford Disaster Relief and Emergency Assistance Act* 42 USC 5121-5207 § 403.

225 *Robert T Stafford Disaster Relief and Emergency Assistance Act* 42 USC 5121-5207 § 403(c)(1).

226 *Robert T Stafford Disaster Relief and Emergency Assistance Act* 42 USC 5121-5207 §§ 405 and 406.

227 *Robert T Stafford Disaster Relief and Emergency Assistance Act* 42 USC 5121-5207 § 612. 'The term "neighboring countries" includes Canada and Mexico.' § 602(8).

228 *Homeland Security Act* 6 USC 311-321j § 503(a).

> … reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.[229]

The agency is directed to undertake a number of specific activities to achieve this overarching mission. One of the activities is to '… partner with State, local, and tribal governments and emergency response providers, with other Federal agencies, with the private sector, and with nongovernmental organizations' to develop a disaster response capability.[230] From the perspective of international disaster response it is noted that this activity does not include partnering with the agencies of other countries, even though the United States shares a land border with Canada and with Mexico. The agency is to:

> … coordinate with the Commandant of the Coast Guard, the Director of Customs and Border Protection, the Director of Immigration and Customs Enforcement, the National Operations Center, and other agencies and offices in the Department to take full advantage of the substantial range of resources in the Department;[231]

There is no requirement or specific authority to require or allow the Federal Emergency Management Authority to coordinate with these agencies to facilitate the receipt of international disaster assistance should that be required.

Notwithstanding what appears to be comprehensive legislation allowing the President and the Federal Emergency Management Agency to plan for and respond to natural disasters, there are problems with the United States model. In particular it has been argued that as the Federal Emergency Management Agency is part of the larger Department of Homeland Security there is no clear line of authority to the President as the role of the Department and the Agency, and their respective heads, is not clearly defined.[232] Equally problematic is the requirement

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229 *Homeland Security Act* 6 USC 311-321j § 503(b)(1); see also § 504(b).

230 *Homeland Security Act* 6 USC 311-321j § 503(b)(2)(B).

231 *Homeland Security Act* 6 USC 311-321j § 503(b)(2)(F). The department is the Department of Homeland Security.

232 Christine E Wormuth and Anne Witkowsky, *Managing the Next Domestic Catastrophe: Ready (or Not)?* (Center for Strategic and International Studies, Washington DC, 2008) vii; 21-28.

that there be a Federal Coordinating Officer[233] who reports to the Administrator of the Federal Emergency Management Agency and, at the same time, a Principal Federal Officer who reports to the Secretary of Homeland Security.[234]

It can be seen that similar criticism can be made of Australian arrangements. As noted above, under current arrangements there will be a National Security Adviser reporting directly to the Prime Minister[235] and the Director of Emergency Management Australia reporting to the Minister for Home Affairs and the Attorney General[236] as well as the Secretary of the Department.

CONCLUSION

This chapter has identified that the Commonwealth has significant interest and legislative power that is relevant when a disaster calls for an international response. This is the case whether Australia is the affected or assisting state. Notwithstanding this legislative power, the Commonwealth has not legislated in this area. It has been argued that legislation is required to allow the Commonwealth government to exercise necessary emergency powers should a catastrophic disaster occur and to clarify the roles and reporting lines for Commonwealth agencies.

In making the argument that legislation is required examples of legislation from the Australian states and territories, as well as from Canada and the United States, have been given. These examples have identified the emergency powers that are required to deal with an emergency and how they can be incorporated into legislation. Although this thesis is concerned with international disaster response

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233 *Robert T Stafford Disaster Relief and Emergency Assistance Act* 42 USC 5121-5207 § 302.

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

235 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549 (First National Security Statement to the Australian Parliament, Kevin Rudd, Prime Minister) 12559.

236 Attorney-General's Department, *Attorney-General's Department Organisation Chart — 2 March 2009*, Safeguarding Australia <http://www.safeguardingaustralia.org.au/files/February2009/AGD_org_chart_2March2009.pdf> at 10 March 2009.

arrangements, this analysis has necessarily identified issues and shortcomings in Australia's preparedness for dealing with purely domestic disasters.

The next two chapters will return to the issue of international disaster response by benchmarking the arrangements that have been identified here against the IDRL Guidelines. The IDRL Guidelines were published to assist states to identify where their legal preparations for international disaster response may be deficient given the world community's experience of sending and receiving assistance. Chapter Six will benchmark Australian law from the perspective of Australia as the affected state that is to receive international assistance, whereas Chapter Seven will consider Australian law from the perspective of Australia as the assisting state, sending aid to an affected state. Undertaking this analysis will identify particular gaps in Australian law that will need to be addressed in the model legislation developed in Chapter Eight.

CHAPTER SIX
INTERNATIONAL DISASTER RESPONSE — AUSTRALIA AS THE AFFECTED STATE

It should be recalled that the International Disaster Response Law desk study[1] identified the common problems with international disaster assistance, and how those problems might be avoided by having in place domestic laws that meet the recommendations set out in the IDRL Guidelines. The desk study was discussed in detail in Chapter Two. Following the publication of the desk study the International Federation of Red Cross and Red Crescent Societies developed,[2] and then adopted,[3] the IDRL Guidelines. The guidelines are not a binding legal instrument, but a tool that can be used to evaluate domestic legal arrangements to identify whether domestic laws will facilitate the receipt of international assistance should that be required.

Having identified Australia's emergency management arrangements it is possible to benchmark Australia's legal position against the IDRL Guidelines. This analysis identifies areas where Australian law is inadequate to deal with a catastrophic disaster that will require international assistance and identifies issues that should be dealt with in Commonwealth legislation. This Chapter considers Australia's position as the disaster-affected state receiving international assistance. Chapter Seven considers Australia's position as the assisting state sending international assistance to another state. Chapter Eight proposes a model Act that could be adopted by the Commonwealth to deal with the deficiencies in Australian counter-disaster arrangements that are identified.

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1 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

2 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

3 *Adoption of the Guidelines for the Domestic Facilitations and Regulation of International Disaster Relief and Initial Recovery Assistance*, Resolution 4, 30th International Conference of the Red Cross and Red Crescent, Document Number 30IC/07/R4 (2007).

AUSTRALIA'S LEGAL POSITION MEASURED AGAINST THE IDRL GUIDELINES

The IDRL Guidelines are set out in the Appendix. The analysis that follows considers the IDRL Guidelines that are relevant to Australia as an affected state. The headings and paragraph titles are those used in the IDRL Guidelines.

Introduction

Guideline 1: Purpose and scope and

Guideline 2: Definitions

These introductory provisions do not make relevant recommendations and are not discussed further.

Part I: Core responsibilities

Guideline 3: Responsibilities of affected States

Australia acknowledges that the primary responsibility for disaster response rests with the Australian states and territories.[4] Australia reserves to itself the right to 'coordinate, regulate and monitor disaster relief and recovery assistance provided … on [its] territory'.[5]

As was shown in Chapter Five, all the states and territories have in place detailed legislative schemes to put in place a coordinator to manage the response to a disaster within their territory. International agencies that are willing to provide post-disaster assistance would be expected to work with the coordinating authorities, and make their services available as part of the overall disaster response.

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4 *Commonwealth Emergency Management Policy Statement*, Emergency Management Australia <http://www.ema.gov.au/agd/ema/emaInternet.nsf/Page/RWP11A286E12CB5FCA3CA256C480004F92F?OpenDocument> at 29 May 2008; International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [3.1].

5 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [3.3].

There is no provision for the coordination of international responders at a national level. The Commonwealth's role under COMDISPLAN is to serve as the focal point for offers of international assistance. The Commonwealth will make requests for international assistance[6] and will forward offers of help to the relevant state authorities,[7] but has no formal role in coordinating the response where the disaster has an impact across jurisdictions. Accordingly it may be that an offer to help would have to be passed to two disaster-affected states, the offer may be accepted in one state and rejected in the other, or different agencies may end up doing the same job in different jurisdictions.

Guideline 4: Responsibilities of assisting actors and

Guideline 5: Additional responsibilities of all states

These guidelines are discussed in the next chapter when considering Australia's legal position as an assisting state.

Guideline 6: Responsibilities concerning diversion and the intended use of resources

Australia as a recipient of international assistance could be expected to '… cooperate to prevent unlawful diversion, misappropriation, or fraud …'[8] and to use received funds for the purpose for which they were intended[9] and in compliance with Australian law.

Whether the fraud or misappropriation takes place in Australia or overseas, Australia would be expected to apply relevant Australian law. Where the impropriety occurs overseas, Australia could be expected to cooperate by providing relevant evidence, assisting with the investigation and extradition of alleged offenders. Where the fraud or impropriety occurs in Australia then any

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6 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002) [4.13].

7 Ibid [4.12].

8 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [6.1].

9 Ibid [6.2].

person involved would be subject to Australian criminal, trade practices or other law.

Detailing all the relevant legal provisions, including provisions in state law and the Commonwealth *Criminal Code*[10] that may be involved, as well as treaties for international law enforcement cooperation and extradition is beyond the scope of this thesis. Equally, provisions dealing with anti-fraud measures are to be found in criminal and trade practices legislation rather than counter-disaster measures, so will not be explored further here.

Part II: Early warning and preparedness

Guideline 7: Early warning

Given Australia's geographic isolation and the fact that there is no land border with any other country, there is little risk of a hazard that develops on Australian territory spreading to even our nearest neighbour, so the need to 'minimize transboundary effects' will not be considered further.

Warning other states and the United Nations of an emerging disaster on Australian territory could 'maximise the effectiveness of any international assistance that may be required'[11] by giving assisting states and organisations timely warning about the need for assistance and the type of assistance that may be required.

Australia has no clear law or policy that would facilitate this type of early warning. COMDISPLAN[12] is predicated upon the Commonwealth receiving a request for assistance from an affected state and the Commonwealth agencies, consulting and agreeing with the states, before making a request for international assistance. This process depends on the event occurring and the response being managed by the states, until it is agreed that the resources required to meet the

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10 *Criminal Code Act 1995* (Cth).

11 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

12 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002).

disaster are not available in Australia.[13] There is nothing in COMDISPLAN to facilitate a 'pre-warning' that a hazard is emerging that may require international assistance.[14]

There is no Commonwealth counter-disaster legislation that would empower the Commonwealth to make such a warning on its own accord. Equally state and territory legislation does not address this issue. That does not mean, however, that either the Commonwealth or the states could not pre-warn potential assisting states or the United Nations. The Commonwealth, as part of its normal diplomatic relations, in the exercise of its constitutional role in managing Australia's 'external affairs'[15] maintains relationships with other states that involve cooperation and information sharing. The Australian states also have relationships with international counterparts[16] that will encourage information sharing and pre-warning that assistance may be required.

The absence of any specific provision to authorise a pre-warning that assistance may be required means however that there is no clear 'trigger' of when, to whom and how that warning may be given. There is no formal process of cooperation between the states and the Commonwealth to ensure that if a state counter-disaster agency foresees that international assistance will be required, that can be conveyed to, and acted upon, by the Commonwealth. It may be imagined that the normal process of government cooperation will work in these circumstances; however, the circumstances being contemplated are the presence of a disaster of significant and catastrophic proportion that overwhelms the capacity of the affected state or states. Relying on the normal processes of government to operate in such a situation may not be consistent with appropriate risk and hazard management.

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13 Ibid [4.13.1].

14 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [7.1].

15 *Australian Constitution* s 51(xxix).

16 See for example, *Wildfire Arrangement between the Department of the Interior and the Department of Agriculture of the United States of America and the Australian Participating Agencies* (2002).

Guideline 8: Legal policy and institutional frameworks

The review of state emergency arrangements in Chapter Five, above, demonstrates that the Australian states and territories are taking active steps to develop '… comprehensive legal, policy, and institutional frameworks and planning for disaster prevention, mitigation, preparedness, relief and recovery'.[17]

To that extent, they are taking the 'necessary steps' to achieve objectives that are consistent with the IDRL Guidelines,[18] save that, with the exception of the Australian Capital Territory, the state laws do not address the issue of international assistance.[19]

At the Commonwealth level, Australia's legal preparedness is particularly weak. It is clear from the analysis of the Commonwealth's emergency management arrangements, above, that Australia as a nation state does not have 'comprehensive legal, policy, and institutional frameworks' in place.[20] There is no clear legal mechanism to manage the Commonwealth's response or define the Commonwealth's role in the management of a catastrophic disaster.

The 'initiation, facilitation, transit and regulation of international disaster relief and initial recovery assistance'[21] rates barely a mention in Australian law and policy. The initiation of international assistance is limited to the Commonwealth passing on such a request if it concurs with state agencies that such assistance is required. There is no role in COMDISPLAN for the United Nations or specific provisions for requesting assistance through the offices of the United Nations.

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17 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [8.1].

18 Ibid [8.3].

19 *Emergencies Act 2004* (ACT) ss 64 and 180.

20 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [8.1].

21 Ibid [8.2].

There is no clear agency or 'national focal point'[22] with responsibility for managing the Commonwealth's disaster response, let alone the international response to a disaster in Australia. There are at least eleven Commonwealth government departments or agencies (including AusAID and EMA) that have emergency management roles.[23] As noted above, notwithstanding this broad range of agencies involved, there is no equivalent of the Principal Federal Official and Federal Coordinating Officer of the United States[24] to manage and coordinate the Commonwealth response.

The Commonwealth does seek to 'empower communities to enhance their own safety and resilience'[25] principally through grants designed to support programs that advance these aims (such as the Safer Communities Awards**,** Natural Disaster Mitigation Program, Bushfire Mitigation Program and National Emergency Volunteer Support Fund), and by funding research on programs that can enhance community resilience.[26]

The Commonwealth does not specifically encourage states to 'take the necessary steps … to implement the Guidelines',[27] but it does encourage and require state and territory governments to take responsibility for emergency management

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22 Ibid [8.1].

23 Emergency Management Australia, *Australian Emergency Management Arrangements* (6th ed, Commonwealth of Australia, Canberra, 2000) 6–7; 11–16. In 2000, the relevant Commonwealth agencies and departments were the Commonwealth Counter-Disaster Task Force; Emergency Management Australia; Department of Finance and Administration; Department of Family and Community Services and Centrelink; Department of Health and Aged Care; Agriculture, Fisheries and Forestry — Australia, Australian Defence Force, Australian Geological Survey Organisation, Bureau of Meteorology; Australian Maritime Safety Authority and Australian Agency for International Development (AusAID).

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

25 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [8.1].

26 Emergency Management Australia, *Funded Programs* <http://www.ema.gov.au/www/emaweb/emaweb.nsf/Page/FundingandGrants_FundedPrograms_FundedPrograms> at 13 March 2009.

27 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [8.3].

within their jurisdiction and therefore it will be the states and territories that are responsible for the relevant law that deals with the matters raised in the guidelines. Encouragement of the states and territories comes in the form of financial assistance, the offer of Commonwealth assistance when requested[28] and the provision of training to state officials.

The role of the Red Cross

The guidelines give particular emphasis to the role of the Red Cross in domestic emergency management arrangements.[29] In the Australian context that could be seen as promoting the role of the Red Cross above its role in Australia's emergency management arrangements. With respect to 'the auxiliary role of their National Red Cross or Red Crescent Society',[30] the Commonwealth and state laws do not give Australian Red Cross any particular or special standing. Taking New South Wales as an example, the Red Cross is given specific functions under the New South Wales Disaster plan, but so are at least 15 other non-government organisations.[31] The Red Cross and other non-government organisations which may be incorporated in the concept of 'domestic civil society'[32] play an important but not an exclusive or special role in Australia's emergency management arrangements.

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28 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002).

29 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [3.1], [8.1] and [9.1].

30 Ibid [8.1].

31 State Emergency Management Committee, *New South Wales State Disaster Plan (DISPLAN)* (Government of New South Wales, Sydney, 2005). Some of the NGOs, beside Australian Red Cross, listed are Anglicare; Australian Volunteer Coast Guard Association; Federation of NSW Bushwalking Clubs; Citizens Radio Emergency Service Teams (CREST); Civil Air Patrol; Inland Waterways Rescue Group; Rescue from Heights and Depths Group; Royal Flying Doctor Service of Australia (NSW Section); Royal Society for the Prevention of Cruelty to Animals; Royal Volunteer Coastal Patrol; Salvation Army; Seventh Day Adventist Church; St John Ambulance Australia; Volunteer Marine Rescue Council of NSW; and Wireless Institute Civil Emergency Network (WICEN).

32 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [3.1].

There is no reason in Australian society to privilege the Red Cross over the many other humanitarian organisations that offer the support to the state counter-disaster agencies. The emphasis of the role of the Red Cross is a reflection of the fact that the IDRL Guidelines are a Red Cross document rather than justified by humanitarian need. These provisions within the guidelines do not identify any special role for the Red Cross but appear to assume, based on the federation's own guiding documents,[33] that such a role or status exists.

Guideline 9: Regional and international support for domestic capacity

This guideline is discussed in Chapter Seven, below, when considering Australia's legal position as an assisting state.

*Part III: Initiation and term*ination of international disaster relief and initial *recovery assistance.*

Guideline 10: Initiation

The delivery of international post-disaster assistance can be delayed due to 'procedural ambiguities frequently found in domestic legislation and policy on the initiation of international disaster assistance'.[34] Such ambiguities continue to exist in Australian law.

An incident that occurs within a state or territory is to be managed by the state or territory government and emergency services in accordance with their legislation and policy. When the effects of the incident are beyond the capacity of the state or territory to manage, or where resources from the Commonwealth are required, a request is made to the Commonwealth for assistance. The process of the request is set out in COMDISPLAN. Each state and territory has a nominated officer who is authorised to contact Emergency Management Australia seeking Commonwealth assistance. The request is passed to the Attorney-General for approval, if

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33 International Federation of Red Cross and Red Crescent Societies, *Who we are: the International Red Cross and Red Crescent Movement* <http://www.ifrc.org/who/movement.asp?navid=03_08> at 12 August 2008.

34 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 89.

approved it is then passed to the relevant Commonwealth agency for ministerial approval and to provide the required assistance.[35]

The only relevant assessment to be undertaken before international aid is sought is an assessment that whatever resources requested by a state or territory are not available in Australia.[36] The various state Acts and counter-disaster plans are silent on the questions of what criteria will be used to determine if and when international assistance will be requested. There is no provision in Australian law for joint Australian/UN needs assessment.[37]

COMDISPLAN and state plans are silent on how requests for international assistance should be made, and to whom. It has been noted that Australia and the individual states and territories are free to seek assistance from other nation states and their agencies as they see fit.

Arrangements have been made with fire-fighting agencies in the United States, Canada and New Zealand and fire-fighters have been brought into Australia to provide international assistance to Australia's domestic fire-fighting agencies without first activating COMDISPLAN.[38] Legislation in Western Australia[39] and the Australian Capital Territory[40] envisage agreements being made between the state and international organisations, while the Northern Territory Counter Disaster plan provides for agreements with organisations from outside the territory, which could include those based overseas.[41] These agreements can be

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35 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002) [4.1].

36 Ibid.

37 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [8.2].

38 These agreements were discussed in Chapter Four, above.

39 In Western Australia the Act provides for agreements with persons outside the State, which could include persons or organisations outside Australia; *Emergency Management Act 2005* (WA) s 11(3).

40 The ACT legislation specifically refers to assistance from overseas agencies; *Emergencies Act 2004* (ACT) ss 64 and 180.

41 Northern Territory Emergency Services, *Northern Territory All Hazards Emergency Management Arrangements* (Northern Territory Counter Disaster Council, Darwin, 2007) [17].

made and acted upon without specific reference to the Commonwealth or COMDISPLAN.

Apart from no single point of contact for facilitating international assistance, there is no clear criterion on when international assistance should be sought. No state or territory counter disaster plan specifically addresses the need for international assistance; instead, each assumes that Commonwealth and inter-state assistance alone will be sufficient.[42] There is no right in COMDISPLAN for states and territories to request international assistance. COMDISPLAN is activated when an affected jurisdiction requests Commonwealth assistance. Such a request can be made where '… the total resources (government, community and commercial) of an affected State cannot reasonably cope with the needs of the situation'.[43] The request becomes a request for international assistance when Emergency Management Australia, the Department of Foreign Affairs and Trade and the affected jurisdiction accept that international assistance is required.[44] If a state wanted to request international assistance, but the Commonwealth took the view that the necessary assets were available in Australia, then it would be open to the Commonwealth to refuse to make the international request, and equally open to the affected jurisdiction to make the request without reference to the Commonwealth. If states and territories choose to direct their requests for international assistance through Emergency Management Australia it is more a product of the goodwill between the agencies,[45] rather than any legal requirement.

Under the International Search and Rescue Advisory Group guidelines for urban search and rescue, participating countries are required to establish procedures for

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42 Ibid [5]; *Emergency Management Manual Victoria* (State of Victoria, Melbourne, 2007) [1.12], [3.1], [3.4] and Appendix 4; State Emergency Management Committee, *New South Wales State Disaster Plan (DISPLAN)* (Government of New South Wales, Sydney, 2005) [113(a)], [309] and [510]; State Counter Disaster Organisation, *Queensland State Counter Disaster Plan* (Queensland Government, Brisbane, 2001) Part 1 [3], Part 3 [5], [31] and [32]; Tasmanian State Emergency Service, *Tasmanian Emergency Management Plan (Interim Edition)* (5 ed, State of Tasmania, Hobart, 2005) [4.14].

43 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002) [1.1].

44 Ibid [4.13].

45 David Templeman and Anthony Bergin, *Taking a punch: Building a more resilient Australia*, (Australian Strategic Policy Institute, Canberra, 2008) 7.

requesting international assistance.[46] Neither COMDISPLAN nor the operating procedures for the National Emergency Management Coordination Centre[47] make particular mention of urban search and rescue or how international teams will be called upon if required.

Who the Commonwealth would approach, if asked to find international assistance, is not set out in legislation or COMDISPLAN. Presumably the Commonwealth officers would call upon agencies that they know can meet the needs of the affected state or can call upon the offices of the United Nations to assist if the disaster was of such a scale that widespread assistance, rather than particular skills or equipment, were needed. As discussed in Chapter Four, Australia does have status of forces agreements that might make it easier for Australia to seek assistance from the militaries of those countries.[48] Australia has also agreed to cooperate with Indonesia,[49] France and New Zealand[50] on disaster response which may encourage the Commonwealth to seek assistance from those countries if they could provide the necessary resources. This was evidenced in 2009 when in response to the Victorian fires New Zealand fire-fighters and Indonesian Disaster

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46 United Nations Office for the Coordination of Humanitarian Affairs, *INSARAG Guidelines and Methodology* (United Nations, Geneva, 2007) [D2.1(3)].

47 Emergency Management Australia, *National Emergency Management Coordination Centre (NEMCC) Standard Operating Procedures (SOPS)* (Commonwealth of Australia, Canberra, 2002).

48 *Agreement between Australia and Papua New Guinea regarding the Status of Forces of each State in the Territory of the other State, and Agreed Minute*, opened for signature 26 January 1977, [1977] ATS 6, (entered into force 26 January 1977); *Agreement between Australia and the Kyrgyz Republic on the Status of Australian Forces in the Kyrgyz Republic* opened for signature 9 July 2002, [2002] ATS 14 (entered into force 9 July 2002); *Agreement between the Government of Australia and the Government of Malaysia concerning the Status of Forces*, opened for signature 3 February 1997, [1999] ATS 14, (entered into force 22 July 1999); *Agreement Between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces*, opened for signature 29 October 1998, [2005] ATS 12, (entered into force 27 May 2005); *Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America concerning the Status of United States Forces in Australia, and Protocol* opened for signature 9 May 1963, [1963] ATS 10, (entered into force 9 May 1963).

49 *Agreement between Australia and the Republic of Indonesia on the Framework for Security Cooperation*, opened for signature 13 November 2006, [2008] ATS 3, (entered into force 7 February 2008).

50 *Joint Statement on Disaster Relief Cooperation in the South Pacific*, Wellington, 22 December 1992,

Victim Identification experts were sent to assist with the response and recovery efforts in Victoria.

Without legislative backing, non-government organisations are not obliged to direct requests for, or offers of, assistance through Emergency Management Australia or to otherwise comply with COMDISPLAN. COMDISPLAN is the plan for how the Commonwealth will respond to an emergency, not a plan for the delivery of all assistance to Australia. From the perspective of the International Red Cross

> … both common practice and the Movement's governing regulations establish that the various components of the Movement may provide support to the National Red Cross or Red Crescent Society in an affected state when that society requests it (or if it accepts an offer of such support), without a separate approval from the government.[51]

Australian Red Cross is involved in Australia's counter disaster arrangements as a participating or supporting organisation.[52] Where the Red Cross Movement was finding itself unable to meet the obligations it has agreed to undertake it could look to parts of the movement from overseas to provide further assistance. Other organisations with international connections, such as St John Ambulance Australia and the Salvation Army, would be in a similar position and they, too, could call upon overseas branches of their organisation to provide further personnel and resources to meet their state counter-disaster obligations.

This review indicates that, although COMDISPLAN envisages that requests for international assistance will be channelled through a single contact point, namely Emergency Management Australia, the reality is that international assistance can

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51 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 92.

52 Tasmanian State Emergency Service, *Tasmanian Emergency Management Plan (Interim Edition)* (5 ed, State of Tasmania, Hobart, 2005) Part 3 Organisational Roles; State Counter Disaster Organisation, *Queensland State Counter Disaster Plan* (Queensland Government, Brisbane, 2001) 23, 47; State Emergency Management Committee, *New South Wales State Disaster Plan (DISPLAN)* (Government of New South Wales, Sydney, 2005) 16, 22, 24, 31; Northern Territory Emergency Services, *Northern Territory All Hazards Emergency Management Arrangements* (Northern Territory Counter Disaster Council, Darwin, 2007) [47], Annex A-2; Annex B-10, Annex B-13; *Emergency Management Manual Victoria* (State of Victoria, Melbourne, 2007) 5-9; 5-10; 5-19; 5-20; 5-21; 5-22; 5-26.

be arranged through a number of channels opening the door for confusion and duplication.

Guideline 11: Initiation of military relief

Australian law, being largely silent on when and how international assistance will be requested, is also silent on the question of if, and when, assistance from foreign militaries will be accepted.

Australia has no standing agreements with foreign forces to deal with the issues of '… the duration of deployment, whether they … may be armed, the use of their national uniforms, and mechanisms for cooperation with civilian actors'.[53] The status of forces agreements discussed above would make it easier to deal with issues such as the right of foreign forces to enter Australia without a visa but these agreements are silent on the role that international forces may play in domestic disaster relief and their cooperation with state agencies. Issues such as whether medical staff from foreign forces could provide medical care to Australian civilians or engineers could provide professional services are not dealt with in any status of forces agreements or in the *Defence (Visiting Forces) Act 1963* (Cth).

Guideline 12: Termination

The only relevant provision in Australian law and policy provides that prior to the departure of international relief teams '… EMA will liaise with State authorities to arrange debriefing'.[54]

Part IV: Eligibility for legal facilities

Guideline 13: Facilities for assisting states

There are no specific provisions in Australian law to grant legal facilities to assisting states that would allow them to provide post-disaster assistance to Australia.[55]

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53 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [11].

54 Emergency Management Australia, *Commonwealth Government Disaster Response Plan (COMDISPLAN)* (Commonwealth of Australia, Canberra, 2002) Appendix E [11].

Guideline 14: Facilities for assisting humanitarian organisations

There is no provision in Australian law that identifies 'criteria for assisting humanitarian organisations'[56] to determine which, or what types of, organisations will be permitted to provide post-disaster relief to Australia. There is therefore no requirement that organisations seeking to operate in Australia demonstrate a 'willingness and capacity'[57] to act in accordance with the humanitarian principles of neutrality, humanity and impartiality.

A key recommendation is that criteria for eligibility for access to legal facilities to allow incoming relief organisations to operate in Australia should be determined in advance.[58] Again Australia has no process where organisations that wish to provide assistance can be 'pre-registered' or 'pre-approved' for entry into Australia. It may be that, given Australia is predominately self-sufficient in its disaster management, pre-approval may be unnecessary, but the other suggested procedures could have application. There are relevant treaties, such as the *ASEAN Agreement on Disaster Management and Emergency Response*[59] or the *Framework Convention on Civil Defence Assistance*[60] that could be used as a model, or which Australia could adopt, in order to facilitate the receipt of international assistance should that be required. Equally Australia could, but has not, adopted a policy that reflects Australia's own policy on sending aid,[61] and require incoming humanitarian organisations to commit themselves to the Red Cross Code of Conduct[62] and where applicable, the Sphere Minimum Standards.[63]

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55 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [13].

56 Ibid [14.2].

57 Ibid.

58 Ibid [14.4].

59 *ASEAN Agreement on Disaster Management and Emergency Response* opened for signature 26 July 2005(not yet in force).

60 *Framework Convention on Civil Defence Assistance*, opened for signature 22 May 2000, 2172 UNTS, (entered into force 23 September 2001).

61 AusAID, *Humanitarian Action Policy* (Australian Government, Canberra, 2005); AusAid, *Base AusAID NGO Accreditation Criteria Table — May 2008* <http://www.ausaid.gov.au/ngos/pdfs/criteria_table_base.pdf> at 19 July 2008.

62 International Federation of Red Cross and Red Crescent Societies *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental*

Guideline 15: Facilities for other assisting actors

There are no specific provisions in Australian law to grant legal facilities to other assisting actors such as private corporations.[64]

Part V: Legal facilities for entry and operations

Guideline 16: Personnel

Visas

COMDISPLAN assumes that all incoming relief personnel will need to comply with normal entry requirements, and therefore must have appropriate visas for entry into Australia. Persons travelling on New Zealand passports are permitted to enter Australia without obtaining a visa prior to their departure for Australia and are granted a 'special category visa' on the presentation of their New Zealand passport.[65]

For citizens of other countries, there are a great number of different types of visas that may be granted to allow people to travel to and remain in Australia.[66] For the purpose of facilitating the receipt of international disaster assistance, the minister may grant a 'Special Purpose Visa'.[67]

A number of special purpose visas have been granted. Members (including civilian members) of the armed forces of countries where Australia has a status of forces agreement, members of the armed forces of the Asia-Pacific region and of the Commonwealth, and members of foreign navies have, as a class, been granted special purpose visas.[68] Members of these forces may enter Australia without an individually issued visa provided they carry their identity papers and movement

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Organisations (NGOs) in Disaster Relief (International Federation of Red Cross and Red Crescent Societies, Geneva, 1995).

63 *The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response* (2004 ed, The Sphere Project, Geneva, 2004).

64 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [15].

65 *Migration Act 1958* (Cth) ss 32 and 42(2A).

66 *Migration Act 1958* (Cth) s 29.

67 *Migration Act 1958* (Cth) s 33.

68 *Migration Regulations 1994* (Cth) cl 2.40.

orders and in the case of navy crews, provided the ship on which they travel has appropriate authority to enter Australia.[69]

To facilitate international assistance, the minister could declare, in writing, that a person or a class of people are taken to have been granted a special purpose visa.[70] This would allow the minister to grant a special purpose visa to named members of an international assistance team or to people that fall within a descriptive class, for example people travelling with endorsement from the United Nations as part of the international assistance team provided by a particular country or non-government organisation.

Without a special purpose visa, aid workers coming to Australia to provide post-disaster assistance would be required to comply with normal migration requirements and to obtain, before they travel, an appropriate visa to allow travel to, and entry into, Australia. There are a number of visas that individuals could apply for, depending on their circumstances. Identifying what visa is required or what visa the applicant would be eligible for is a matter of specialist knowledge and would depend on the circumstances in each case, so cannot be explored in detail here. It is clear, however, that the process could take some time and would need to be completed before arrival.

Recognition of professional qualifications

The recognition of professional qualifications would generally be a matter for state law, rather than Commonwealth law. Legislation in the Australian Capital Territory provides that where foreign assistance is provided in accordance with a cooperative agreement, overseas professional qualifications will be recognised in the territory without further need for certification or registration.[71]

Other states and territories do not have such far reaching legislation. Where a person requires a licence to perform a particular trade or profession, reference would need to be made to each relevant state or territory Act to determine if and

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69 *Migration Regulations 1994* (Cth) cl 1.03.
70 *Migration Act 1958* (Cth) s 33(2).
71 *Emergencies Act 2004* (ACT) s 180.

when foreign professionals could practise that trade or profession even in the face of a disaster.

It is beyond the scope of this thesis to identify the procedures that could be used to facilitate the provision of post-disaster assistance by all manner of relevant trades and professional workers. In order to identify the complexity that may arise, the following discussion will consider whether or not overseas medical practitioners could be allowed to practise medicine in the post-disaster situation.

Medical practitioners

Medical practitioners must be registered in the state or territory in which they wish to practise their profession. If an incoming doctor is registered in one Australian state or territory, then he or she will be able to work in all other Australian jurisdictions; that is once registered in one jurisdiction, he or she can practise in all.[72] This also applies to an incoming doctor registered in New Zealand.[73] This right to practise across jurisdictions is not however automatic; it requires registered professionals to notify the registration authorities in each jurisdiction in which they wish to practise and then become registered in that jurisdiction.[74] This process takes time.

It is anticipated that in July 2010 there will be a national registration scheme that will mean a doctor is registered once only and then allowed to practice across Australia. [75] Once in effect, this scheme would remove some of the difficulties identified here, as a doctor would be registered under the national, rather than different state registration schemes. This scheme may have implications for medical practitioners but not other professionals requiring local registration. For those professionals, for example accountants, engineers, nurses, paramedics, occupational therapists, the sort of issues described, below, would continue to apply and so are still worth identifying.

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72 *Mutual Recognition Act 1992* (Cth).

73 *Trans-Tasman Mutual Recognition Act 1997* (Cth).

74 *Mutual Recognition Act 1992* (Cth) ss 17 and 19.

75 Health Workforce Australia, *National Registration and Accreditation Scheme* <http://www.nhwt.gov.au/natreg.asp> at 29 January 2009.

The current process requires that a professional is actually registered in one jurisdiction before they can rely on the mutual recognition principles to obtain registration in another jurisdiction. In the case of New South Wales, for example, the mutual recognition principles would apply and would allow an incoming doctor who was given conditional registration[76] to seek equivalent registration in, say, Victoria. The mutual recognition principles[77] would not, however, apply if the requirements for registration were dispensed with, so, for example a doctor who is allowed to practise in the Australian Capital Territory on the basis of being exempt from the need to register[78] could not rely on the mutual recognition principles to seek registration in another state or territory as they are not in registered in territory.[79]

Special event provisions have been enacted to allow overseas registered medical practitioners to practice at proclaimed special events such as the Olympic Games. These Acts allow a doctor who is a member of a team or delegation that is travelling to Australia to take part in the proclaimed special event, to provide medical services to the other members of the team or delegation.[80] As the right to practise is limited to a right to provide medical care to members of the doctor's own team or delegation, these Acts would have little practical use in a post-disaster situation even if such a situation could be declared a 'special event' within the meaning of the Act.

Given that a medical practitioner registered in one jurisdiction can seek registration in another, it is now appropriate to consider how an incoming medical practitioner might be registered in each of the Australian jurisdictions. As with the

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76 *Medical Practice Act 1992* (NSW) s 7.

77 *Mutual Recognition Act 1992* (Cth) s 17; *Trans-Tasman Mutual Recognition Act 1997* (Cth) s 16.

78 *Emergencies Act 2004* (ACT) s 180.

79 *Mutual Recognition Act 1992* (Cth) ss 17 and 19; *Trans-Tasman Mutual Recognition Act 1997* (Cth) ss 16 and 18.

80 *Health Professionals (Special Events Exemption) Act 1997* (NSW); *Health Practitioners (Special Events Exemptions) Act 1998* (Qld); *Health Professionals (Special Events Exemptions) Act 2000* (ACT); *Health Professionals (Special Events Exemptions) Act 2000* (SA); *Health Professionals (Special Events Exemption) Act 1998* (Tas); *Health Practitioners (Special Events Exemption) Act 1999* (Vic); *Health Professionals (Special Events Exemption) Act 2000* (WA).

discussion on the state emergencies legislation, how these provisions might be used to facilitate the receipt of international assistance is identified. The discussion identifies the approaches adopted by the Australian states and territories to see if they can provide the basis for a scheme that could be adopted for Commonwealth purposes and for all professionals, not just medical practitioners. These recommendations are discussed in Chapter Eight.

The Australian Capital Territory

Where international assistance is being provided to the territory under a 'cooperative agreement', professional qualifications are accepted without the need for further certification or registration.[81] This would apply to a health professional who was deployed as part of a disaster response team that was operating in accordance with a pre-existing agreement.

Where the *Emergencies Act* does not apply, the Minister for Health[82] may waive registration requirements for incoming health professionals if in the minister's opinion, it is 'in the public interest to do so'.[83]

New South Wales, Northern Territory, Queensland and Tasmania

New South Wales legislation provides that:

> The giving or performance of any medical or surgical advice, service, attendance or operation by a recognised foreign practitioner in an emergency … has the same legal effect as if the person had been registered under this Act at that time.[84]

On its face this would appear to allow a foreign doctor, deployed as part of an international response team, to practise in New South Wales. Unfortunately the term 'recognised foreign practitioner' is defined as a medical practitioner from

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81 *Emergencies Act 2004* (ACT) s 180.

82 *Administrative Arrangements 2008 (No 1)* (ACT).

83 *Health Professionals Act 2004* (ACT) s 130. The term 'health professional' includes a chiropractor, a dental hygienist, a dental prosthetist, a dental technician, a dental therapist, a dentist, an enrolled nurse, a medical practitioner, a medical radiation scientist, a midwife, a nurse, an optometrist, an osteopath, a pharmacist, a physiotherapist, a podiatrist, a psychologist and a veterinary surgeon; *Health Professionals Act 2004* (ACT) s 14.

84 *Medical Practice Act 1992* (NSW) s 112.

New Zealand or another Australian State or Territory[85] and so will not cover international doctors generally. A similar provision applies in Queensland, again limited to interstate rather than foreign doctors .[86]

In New South Wales, the Northern Territory, Queensland and Tasmania, an overseas trained doctor who has not meet the standard criteria for registration (that is having completed an approved degree or otherwise demonstrated their competence by having passed the Australian Medical Council examinations[87]) may be conditionally registered if his or her registration 'is in the public interest'.[88]

The registration board in each state may think it is in the public interest to provide conditional registration to doctors who are coming to Australia as part of an international disaster response effort.

In New South Wales the Minister for Emergency Services[89] may direct a government department, which would include the Medical Board, [90] to act under its legislation. In Queensland, the chair of the State Disaster Management Group or a district disaster coordinator can give directions about how powers under another Act are to be exercised.[91] In these states it follows that during a declared disaster a direction could be given to the relevant medical registration board to accept that there was an area where the public interest would be served by say, registering medical practitioners who were travelling with a foreign aid contingent to allow them to practise medicine.

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85 Ibid.

86 *Medical Practitioners Registration Act 2001* (Qld) s 270.

87 See *Medical Practice Act 1992* (NSW) s 4; *Medical Practitioners Registration Act 1996* (Tas) ss 3 and 19.

88 *Medical Practice Act 1992* (NSW) s 7(1)(G); *Health Practitioners Act 2004* (NT) s 20(4); *Medical Practitioners Registration Act 2001* (Qld) s 137 and *Medical Practitioners Registration Act 1996* (Tas) s 21(2)(f).

89 Parliamentary Counsels Office, *Table of Public Acts* NSW Legislation <http://www.legislation.nsw.gov.au/lif/publicac.pdf> at 23 June 2008, 56.

90 *State Emergency and Rescue Management Act 1989* (NSW) s 3; which defines a government agency to include 'a public authority, being a body (whether incorporated or not) established by or under an Act for a public purpose'. It is submitted that the Medical Board would meet this definition.

91 *Disaster Management Act 2003* (Qld) s 9. 'Disaster situation' means where a state of disaster has been formally declared under s 64(1) or s 69; see Sch 2 (Dictionary).

South Australia

It is an offence for a person who is not a registered medical practitioner to provide medical treatment in South Australia.[92] The Governor may make a proclamation exempting a person from that offence, in effect allowing him or her to practise medicine if, in the Governor's opinion 'good reason exists for doing so in the particular circumstances of the case'.[93] The exemption may be subject to conditions[94] which could limit the time or physical location in which an incoming foreign doctor was allowed to practise.

Victoria

The Victorian provisions apply to all health practitioners, not just medical practitioners. Under these general provisions, a foreign health practitioner can be registered if the relevant health registration board:[95]

> … is satisfied that, in order to meet an identified need for a health practitioner, it is necessary for a person having qualifications and training in the nature of the applicant's to practise as a health practitioner in Victoria.[96]

Further, in Victoria, the Minister for Police and Emergency Services[97] as coordinator in chief[98] may waive the requirement for registration if compliance by

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92 *Medical Practice Act 2004* (SA) s 43.

93 *Medical Practice Act 2004* (SA) s 43(4).

94 *Medical Practice Act 2004* (SA) s 43(5).

95 That is '(a) the Chinese Medicine Registration Board of Victoria established under pt 6 of the *Chinese Medicine Registration Act 2000* (Vic); (b) the Chiropractors Registration Board of Victoria established under pt 6 of the *Chiropractors Registration Act 1996* (Vic); (c) the Dental Practice Board of Victoria established under pt 6 of the *Dental Practice Act 1999* (Vic); (d) the Medical Practitioners Board of Victoria established under pt 6 of the *Medical Practice Act 1994* (Vic); (e) the Medical Radiation Practitioners Board of Victoria established under section 165 of … [the *Health Professions Registration Act 2005* (Vic)]; (f) the Nurses Board of Victoria established under pt 6 of the *Nurses Act 1993* (Vic); (g) the Optometrists Registration Board of Victoria established under pt 6 of the *Optometrists Registration Act 1996* (Vic); (h) the Osteopaths Registration Board of Victoria established under pt 6 of the *Osteopaths Registration Act 1996* (Vic); (i) the Pharmacy Board of Victoria established under pt 7 of the *Pharmacy Practice Act 2004* (Vic); (j) the Physiotherapists Registration Board of Victoria established under Part 6 of the *Physiotherapists Registration Act 1998* (Vic); (k) the Podiatrists Registration Board of Victoria established under Part 6 of the *Podiatrists Registration Act 1997* (Vic); (l) the Psychologists Registration Board of Victoria established under pt 6 of the *Psychologists Registration Act 2000* (Vic). *Health Professions Registration Act 2005* (Vic) Sch 1.

96 Ibid s 7(1)(c).

97 John Brumby, *Administration of Acts — General Order*, Department of Premier and Cabinet

the Medical Board with the *Health Professions Registration Act* would hinder the counter-disaster operations.[99]

Western Australia

In Western Australia a person may be registered where

> … registration of the applicant would enable an unmet area of need to be met and the applicant has suitable qualifications and experience to practise medicine in that area of need;[100]

The term 'unmet area of need' means 'an area of need determined by the Minister'.[101] Again a catastrophic disaster that exceeds the capacity of the Australian and interstate agencies would, by definition, create an 'unmet area of need'. During a declared state of emergency, the state emergency coordinator can 'direct any public authority to do or refrain from doing any act, or to perform or refrain from performing any function'.[102] The definition of 'public body' would not include the Minister for Health[103] so the coordinator could direct the registration board to register incoming health professionals, but only after the Minister for Health has declared the existence of an 'unmet area of need'.

Conclusion with respect the recognition of foreign medical qualifications

Incoming medical practitioners may well face considerable hurdles, as may the disaster-affected states, in getting qualifications recognised. There would need to be consensus between the Minister for Health and the Minister in charge of the counter-disaster operations that the incoming doctors were required in the public interest or to meet an unmet need and that the proposed doctors were suitably qualified to warrant their registration. Once registered in one jurisdiction the doctor would need to register in other jurisdictions if their practice were to take them across state boundaries.

<http://www.dpc.vic.gov.au/CA256D800027B102/Lookup/GeneralOrderSupplement8August2007/$file/General%20Order%208%20August%202007.pdf> at 23 June 2008.

98 *Emergency Management Act 1986* (Vic) s 5.

99 Ibid s 24(2).

100 *Medical Practitioners Act 2008* (WA) s 34(2)(4).

101 That is the Minister for Health.

102 *Emergency Management Act 2005* (WA) s 74(2)(a).

103 Ibid s 3.

The review of the legislative schemes indicates that the barriers to registration could be met but there can be no doubt that complying with these provisions may cause a delay in the critical first hours of the disaster. The Australian Capital Territory has the clearest legislation providing that foreign qualifications are to be recognised provided the aid is delivered under a cooperative agreement.

It has also been shown that in most state and territories, someone, either the minister or the counter-disaster controller has the power to direct various authorities to do or refrain from doing certain things. It has been argued that in some cases this would allow the person acting under the state counter-disaster legislation to direct the agency acting under the relevant health or medical registration legislation to register incoming doctors to allow them to practise their profession in Australia. While the law can be interpreted as enabling such as direction, it is possible that such a direction would be resisted. Health registration boards are established to ensure the protection of the community by ensuring only competent practitioners are registered. To this end procedures are in place to accredit training programs and to test the skills of foreign trained doctors. Health registration boards are likely to resist being told by the Police Commissioner or the Minister for Police and Emergency Services that certain people are to be registered as health professionals even if the need, following a catastrophic disaster, is dire. In some cases, where the board is subject to the direction and control of the relevant minister (that is the Minister for Health), the minister cannot direct the board to register particular people. The minister's role is limited to giving directions as to policy and procedure not on particular applications.[104] Boards are not likely to be familiar with, or willing to allow a non-medical authority to direct who is to be registered as a medical practitioner.

The difficulties that have been raised for incoming doctors are likely to be met by all incoming trade and professional workers. What is required is a single authority that, as in the Australian Capital Territory, can give blanket exemptions once it is

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[104] *Medical Practitioners Act 2008* (WA) s 14; *Medical Practitioners Registration Act 2001* (Qld) s 36

determined that such aid is required. A suggested model of how this could be achieved will be discussed in Chapter Eight.

Guideline 17: Goods and equipment

Australian law and policy goes some way to meeting the recommendations with respect to the importation of relief goods.[105]

Quarantine

The Australian Quarantine and Inspection Service ('Quarantine'), in collaboration with Emergency Management Australia, has produced guidelines for urban search and rescue taskforces entering or re-entering Australia.[106] These guidelines explain the quarantine requirements with particular regard to the equipment a search and rescue team is likely to carry, but do not make special provision for quarantine clearance. For example the guidelines confirm that Quarantine would require 48 hours' notice, and an application in writing, before permission could be given for an urban search and rescue team to arrive at an air or seaport that is not proclaimed as a first port of entry.[107] This means that urban search and rescue teams would have to arrive at an international airport and then travel to the scene of a disaster rather than arrive at the airport closest to the scene. Teams may import 'human therapeutics' (that is, 'commercially prepared and packaged capsules tablets, vials for injection, liquid, powder, ointments, etc'[108]), but only for personal use by members of the team.[109] They do not cover therapeutic drugs that the team may wish to use in the course of treating people as part of their rescue mission.[110]

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105 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [17.1] and [17.2].

106 Australian Quarantine and Inspection Service, *Australian Quarantine Guidelines: Urban Search & Rescue Taskforces Entering or Re-entering Australia* (Commonwealth of Australia, Canberra, 2005).

107 Ibid 12.

108 Ibid 6.

109 Ibid 33.

110 The INSARAG guidelines provide that a Urban Search and Rescue team should include medical, nursing and paramedic members who are able to '… provide advanced life support for the team (including dogs) other assigned personnel and victims encountered.

A critical part of an urban search and rescue team is rescue dogs that are trained to detect trapped people. Under Australian quarantine arrangements, dogs must be vaccinated and given other veterinary treatment up to 12 months before coming to Australia[111] and the dog must serve the prescribed quarantine period. The period of quarantine varies from no quarantine for dogs brought from New Zealand[112] to 120 days for dogs from South Africa.[113] It could be expected that urban search and rescue dogs will be given the best veterinary health care, and so could comply with the requirements regarding vaccination; however requiring the dogs from countries other than New Zealand to spend between 30 and 120 days in quarantine would ensure that they would not be able to contribute to a rescue mission in the immediate aftermath of an earthquake or building collapse.

The quarantine guidelines do not represent special procedures or rules, they simply provide guidance for incoming urban search and rescue teams to prepare for the necessary quarantine inspections and therefore facilitate the granting of import clearance. While that is important and would help speed up the process by ensuring that the teams are prepared for quarantine inspection and can assist the inspectors, it again shows that Australia does not anticipate that any special rules or provisions will apply to incoming rescuers.

Customs

As was discussed in Chapter Four, Australia is a signatory to the *International Convention on the Simplification and Harmonization of Customs Procedures*,[114]

Confined space medical operations. Basic veterinary care [and] Camp hygiene'. United Nations Office for the Coordination of Humanitarian Affairs, *INSARAG Guidelines and Methodology* (United Nations, Geneva, 2007) 95.

111 Australian Quarantine and Inspection Service, *Australian Quarantine Guidelines: Urban Search & Rescue Taskforces Entering or Re-entering Australia* (Commonwealth of Australia, Canberra, 2005) 26–28.

112 Which explains how dogs were brought to Australia from New Zealand to assist with the response to the 2009 Victorian bushfires; *NZ firefighters welcomed in Victoria* (2009) The Australian <http://www.theaustralian.news.com.au/story/0,25197,25057405-5006785,00.html> at 19 February 2009.

113 Australian Quarantine and Inspection Service, *Bringing Cats and Dogs and Other Pets to Australia: Country Categories* <http://www.daff.gov.au/aqis/cat-dogs/countries> at 20 February 2009.

114 *International Convention on the Simplification and Harmonization of Customs Procedures*, opened for signature 18 May 1973, 950 UNTS, (entered into force 25 September 1974).

the *Convention on the Facilitation of International Maritime Traffic*[115] and the *Chicago Convention on Civil Aviation*.[116] These conventions impose obligations on Australia to facilitate the importation of relief consignments. Such consignments are to be imported 'duty free'. For the purposes of the *Customs Act 1901* (Cth) goods that are 'reasonably required for disaster relief'[117] are 'special clearance goods'[118] and subject to special procedures. First the importer may seek permission to import the goods at any time that includes before they arrive in Australia.[119] Permission may be granted subject to conditions.[120] Secondly, provision is made to allow importers to obtain permission to deliver imported goods outside business hours where the relevant goods are 'perishable food'.[121] Those provisions do not apply to disaster relief consignments that are not 'perishable food'.[122]

Guidelines to facilitate the customs clearance of equipment imported by an incoming urban search and rescue team were drafted in 2005,[123] but have never been adopted or implemented.[124] Even if they were adopted, the guidelines would not apply to other incoming aid such as medical teams, reconstruction teams or disaster assessment teams. As with the quarantine guidelines, the draft customs guidelines are to assist incoming and outgoing aid teams to comply with customs requirements but make it clear that there will be no special dispensation or relaxation of customs rules.

In the absence of specific legislative provisions, there is no power vested in the minister to waive or relax customs procedures to facilitate the receipt of

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115 *Convention on Facilitation of International Maritime Traffic*, opened for signature 9 April 1965, [1986] ATS 12, (entered into force 5 March 1967).

116 *Convention on International Civil Aviation*, opened for signature 7 December 1944, [1957] ATS 5, (entered into force 4 April 1947).

117 *Customs Act 1901* (Cth) s 70.

118 *Customs Act 1901* (Cth).

119 *Customs Act 1901* (Cth) s 70(2).

120 *Customs Act 1901* (Cth) s 70(5).

121 *Customs Act 1901* (Cth) ss 70(1)(c) and 70(3).

122 *Customs Act 1901* (Cth) ss 70(1)(a) and 70(3).

123 Australian Customs Service, *Customs Guidelines and Recommendations for Emergency Management Australia and Urban Search and Rescue Teams* (Commonwealth of Australia, Canberra, 2005).

124 Customs Policy Division, Personal Communication, 11 May 2008.

international post-disaster assistance. The minister may give binding directions to the Customs Service 'with respect to the general policy to be pursued in relation to the administration of the Australian Customs Service',[125] but that would not extend to being able to direct the Customs Service to waive or ignore provisions of the relevant 'law of Customs'.[126] It has been noted that in some state legislation the relevant minister or counter-disaster controller has the power to order a government department to exercise, or not exercise certain powers[127] and in Victoria the minister may suspend the operation of Acts or Regulations that are creating an impediment to disaster relief.[128] Without a similar provision in Commonwealth law, it can be expected that Customs, Immigration and the Australian Quarantine and Inspection Service will continue to apply the law set out in their governing legislation without the power to make special provision to waive requirements that are imposed by the legislation and subordinate regulations.

Guideline 18: Special goods and equipment

The first recommendation is that affected states should recognise and permit the operation of foreign registered vehicles. That is not a significant issue in Australia where, given the absence of international land borders, no one can drive into Australia in any event. Assisting organisations may want to bring vehicles into Australia by plane or boat, and then they may be subject to the normal rules regarding the importation of motor vehicles. To import the vehicle duty free the importer needs

> …. one of the following:
>
> a Carnet De Passages en Douanes issued by an overseas organisation which has a reciprocal arrangement with the Australian Automobile Association, or

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125 *Customs Administration Act 1985* (Cth) s 4A.

126 Ibid s 3; *Customs Act 1901* (Cth) s 4B.

127 *State Emergency and Rescue Management Act 1989* (NSW) s 36; *Disaster Management Act 2003* (Qld) s 9(4)(b); *Emergency Management Act 2005* (WA) s 74(2)(a).

128 *Emergency Management Act 1986* (Vic) s 24(2).

> a cash or bank security, equal to the amount of duty and GST [Goods and Services Tax] and, where applicable, LCT [Luxury Car Tax] otherwise payable.[129]

Registration of vehicles is a matter of the Australian states and territories, but generally speaking they will recognise foreign driver licenses[130] and registration.[131]

With respect to radio communications, the Australian Communications and Media Authority can exempt emergency organisations, from various provisions of the *Radiocommunications Act 1992* (Cth) that would otherwise require them to have a licence and meet certain standards.[132] How far that exemption can be taken and whether it extends to devices such as telephones, satellite phones and satellite data communication is beyond the scope of this thesis as telecommunications law is a large and specialised field. What can be observed is that Australia is not a signatory to the *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations*[133] and no Australian disaster or emergency management legislation makes particular mention of the emergency use of telecommunications devices.

Medicines that are to be imported into Australia must generally be registered or listed with the Therapeutic Goods Administration.[134] The requirements for registration can be waived by the minister in order to allow therapeutic goods to be imported so that they be 'made available urgently in Australia in order to deal with an actual threat to public health caused by an emergency that has occurred'.[135] The exemption may be granted subject to conditions and the goods

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129 Australian Customs Service, *Importing a motor vehicle* <http://www.customs.gov.au/site/page.cfm?u=4371> at 26 August 2008.

130 See, for example, *Road Transport (Driver Licensing) Regulation 1999* (NSW) s 55.

131 See, for example, *Road Transport (Vehicle Registration) Regulation 2007* (NSW) Sch 1.

132 *Radiocommunications Act 1992* (Cth) s 27.

133 *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations*, opened for signature 18 June 1998, UNTS 2296 (entered into force 8 January 2005); *List of Signatories to The Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations* ReliefWeb, <http://www.reliefweb.int/telecoms/tampere/signatories.html>at 26 August 2008.

134 *Therapeutic Goods Act 1989* (Cth).

135 *Therapeutic Goods Act 1989* (Cth) s 18A.

imported must still meet Australian standards[136] and unused goods must be disposed of.[137]

Guideline 19: Transport

The guidelines provide that affected states should facilitate air, sea and land transport of relief supplies. As noted above, Australia is a signatory to international conventions[138] that impose obligations on Australia to facilitate the importation of relief consignments. Such consignments are to be imported 'duty free'.

The *Airports Act* allows the Minister to direct the operator of an airport to provide airport services for 'defence-related purposes'.[139] Regrettably the definition of a 'defence related purpose' includes 'the management of an emergency or a disaster (whether natural or otherwise), where that management involves the Australian Defence Force.'[140] It follows that the minister cannot make such a direction to facilitate the arrival of an aircraft operated by an international or domestic organisation, unless and until the Australian Defence Force is involved in the counter-disaster operation. This would appear to be contrary to the Oslo Guidelines[141] and Guideline 11[142] restricting the use of military assets to a last resort, after civilian alternatives have been considered.

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136 *Therapeutic Goods Act 1989* (Cth) s 30F.

137 *Therapeutic Goods Act 1989* (Cth) s 30G.

138 *International Convention on the Simplification and Harmonization of Customs Procedures*, opened for signature 18 May 1973, 950 UNTS, (entered into force 25 September 1974); *Convention on Facilitation of International Maritime Traffic*, opened for signature 9 April 1965, [1986] ATS 12, (entered into force 5 March 1967); *Convention on International Civil Aviation*, opened for signature 7 December 1944, [1957] ATS 5, (entered into force 4 April 1947).

139 *Airports Act 1996* (Cth) s 250.

140 *Airports Act 1996* (Cth) s 250.

141 *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief — Oslo Guidelines (Updated November 2006; Revision 1.1 November 2007).* United Nations Office for the Coordination of Humanitarian Affairs <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1084542> at 25 February 2008.

142 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [11].

Generally speaking, movement around Australia by people lawfully entitled to be in Australia is unrestricted. Emergency or disaster legislation does not need to grant any right to an individual or group to gain access to a disaster-affected area or to seek assistance in obtaining transport. If an agency charged with managing a response to a disaster wanted to provide transport assistance to an international aid organisation it could do so as part of their management of the response, but there is no legal obligation to do so.

Emergency legislation does grant to relevant disaster managers the power to exclude people from disaster sites or declared emergency areas.[143] The effect of this is that incoming international aid workers could expect to have free access to an area around a disaster site, but may find access to the areas of most need restricted by the orders of the relevant counter-disaster controller. To avoid this situation, international aid workers would need to ensure that they were working in cooperation with, and with the permission of, the relevant controller and had the necessary permission to enter the area. Where no order for evacuation or exclusion has been made, then the normal right of free passage would allow anyone to enter the disaster zone as needed.

Guideline 20: Temporary domestic legal status and

Guideline 21:Taxation

It will be assumed that assistance is being provided by organisations that are formally established in another country and wish to operate in Australia as part of a disaster relief effort. The discussion will not cover unincorporated associations such as a group of volunteers who, hearing of a disaster, make their own way to Australia to provide whatever assistance that they can.

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143 *Emergencies Act 2004* (ACT) s 163; *State Emergency and Rescue Management Act 1989* (NSW) s 37; *Disasters Act 1982* (NT) s 37; *Disaster Management Act 2003* (Qld) s 77; *Emergency Management Act 2004* (SA) s 25; *Emergency Management Act 2006* (Tas) ss 40, 41 and Sch 1; *Emergency Management Act 1986* (Vic) s 24; *Emergency Management Act 2005* (WA) s 67.

It is also assumed that foreign agencies seeking to come into Australia to provide post-disaster assistance are charitable in nature, and will be accepted by the Australian authorities as a charity[144] rather than as a for-profit corporation.

The Commonwealth has the legislative power to make laws with respect to 'foreign corporations'.[145] Under Commonwealth law, a foreign corporation can generally carry on business in Australia without the need to reincorporate,[146] but must go through a registration processes with the Australian Securities and Investment Commission.[147]

In order to register, the appropriate application must be lodged along with documents confirming the status of the corporation in its home country[148] and identifying the name of a local agent.[149] The registered foreign corporation would then need to comply with the legal obligations to maintain accounts and file annual returns.

Once registered a foreign corporation obtains legal status; it can sue and be sued,[150] hold property (including land[151]) and enter into contracts. Once registered the corporation would be entitled to open a bank account and enter into contracts of employment, subject to the normal provisions of Australian law.

Once registered a foreign not-for-profit aid agency may wish to seek tax exemptions. This would require a further process of endorsement with the Australian Taxation Office that the agency is a charity.[152] Endorsement is also

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144 Gino Dal Pont, *Charity Law in Australian and New Zealand* (Oxford University Press, Melbourne, 2000).

145 *Australian Constitution* s 51(xx).

146 H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (11th ed, Lexis/Nexis Butterworths, Sydney, 2003) 142.

147 *Corporations Act 2001* (Cth) pt 5B.2 Div 2.

148 *Corporations Act 2001* (Cth) pt 5B.2 Div 2.

149 *Corporations Act 2001* (Cth) s 601CF.

150 Australian Securities and Investment Commission, *Foreign Companies* <http://www.asic.gov.au/asic/asic.nsf/byheadline/Foreign+Companies?opendocument> at 20 June 2008.

151 *Corporations Act 2001* (Cth) s 601CY.

152 Australian Taxation Office, *Is your organisation income tax exempt?: Endorsement* <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/8555.htm&page=2&pc=&mnu=28532&mfp=001/004&st=&cy=> at 20 June 2008.

required if the entity were to be accepted as a 'deductible gift recipient' that could then receive tax deductible donations from Australian taxpayers.[153]

Quality and accountability

There are no provisions in Australian law that would specifically deal with the quality and accountability of foreign aid providers in Australia. As COMDISPLAN and the State Disaster Plans are generally silent on the need for international disaster assistance, there is no requirement that incoming aid agencies be committed to compliance with accountability standards such as the Red Cross Code of Conduct,[154] the Sphere Standards[155] or the Humanitarian Accountability Project Standard.[156] In the absence of any pre-registration or declared standard, ensuring that incoming aid is of sufficient quality and that aid providers will be accountable will depend on the skill and judgment of those managing the request for aid.

Incoming aid agencies may be held accountable by the normal standards of Australian law. They would be required to comply with regulatory provisions such as the *Corporations Act*[157] and Australian taxation law. They would be expected to meet standards with respect to any particular work they undertake and to comply with laws relating to employment, anti-discrimination, occupational health and safety, financial disclosure, the provision of goods and services in a good and workmanlike manner and so on. Failure by aid agencies operating in Australia to comply with Australian laws could see them subject to the normal legal recourse including criminal prosecutions and/or civil suits.

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153 Australian Taxation Office, *Tax deductible donations* <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/66281.htm&mnu=28533&mfp=001/004> at 20 June 2008.

154 International Federation of Red Cross and Red Crescent Societies *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief* (International Federation of Red Cross and Red Crescent Societies, Geneva, 1995).

155 *The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response* (2004 ed, The Sphere Project, Geneva, 2004).

156 *HAP 2007 Standard in Humanitarian Accountability and Quality Management* (Humanitarian Accountability Partnership — International, Geneva, 2007).

157 *Corporations Act 2001* (Cth).

The exceptions to these general principles will apply when the foreign agency is working as part of and at the direction of the emergency controller in charge of managing the response to a catastrophic disaster. Each state and territory has legislation to provide some limited legal protection to people acting under the authority of the controller or pursuant to the terms of the Act.[158] In some cases the legislation sets up a bar to any claim for compensation,[159] in others it redirects the claim, making it clear that it is the state or the Crown that is liable for the negligence or improper conduct of an emergency worker or organisation taking part in counter-disaster operations.[160]

Victoria has the most limited immunity clause, providing protection only to volunteer emergency workers,[161] which could include international volunteers acting on behalf of agencies with authority under the state disaster plan,[162] but would not extend to paid staff, or international agencies acting on their own initiative.

Guideline 22: Security

Guideline 23: Extended hours; and

Guideline 24: Costs.

There is nothing in Australia's emergency management arrangements that deal with these issues for the receipt of assistance. It could be expected that security will be dealt with in accordance with Australian law so that state police services, supported by the Commonwealth, [163] will attempt to ensure that disaster sites are kept secure and the law protecting individuals and property will be enforced.

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158 *Emergencies Act 2004* (ACT) s 198; *State Emergency and Rescue Management Act 1989* (NSW) s 41; *Disasters Act 1982* (NT) s 42; *Disaster Management Act 2003* (Qld) s 144; *Emergency Management Act 2004* (SA) s 32; *Emergency Management Act 2006* (Tas) ss 55 and 58; *Emergency Management Act 1986* (Vic) s 37 (though this section only applies to volunteer emergency workers, not paid staff); *Emergency Management Act 2005* (WA) s 100.

159 *Emergency Management Act 2005* (WA) s 100; *Disaster Management Act 2003* (Qld) s 144; *Disasters Act 1982* (NT) s 42; *State Emergency and Rescue Management Act 1989* (NSW) s 41.

160 *Emergency Management Act 2006* (Tas) ss 55 and 58; *Emergency Management Act 2004* (SA) s 32; *Emergencies Act 2004* (ACT) s 198.

161 *Emergency Management Act 1986* (Vic) s 37.

162 *Emergency Management Act 1986* (Vic) s 4.

163 *Defence Act 1903* (Cth) pt 3AAA.

Given the absence of discussion in Australia's emergency arrangements on receiving aid, apart from relevant customs law,[164] there is nothing in the relevant law and policy on extended hours of operation for Commonwealth agencies or how costs in individual cases will be met.

CONCLUSION

This review of the law in Australia has demonstrated that many problems identified by the International Red Cross would be encountered if a catastrophic disaster were to occur in Australia. When it comes to receiving international assistance Emergency Management Australia is intended to act as a single contact point, but that is not required by law, so that states and territories can and do arrange international assistance without reference to Emergency Management Australia.

By definition a catastrophic disaster will have an impact upon more than one jurisdiction or be otherwise of such significance as to take on national implications. Notwithstanding this, the presence of the eight Australian state and territory jurisdictions, as well as the Commonwealth, means that incoming aid agencies would need to negotiate a number of hurdles to obtain access to the disaster area within Australia.

An example of the legal complexity can be seen with the example of a foreign aid organisation that wants to establish a health service; it would need to:

- register with the Australian Securities and Investment Commission to establish its corporate headquarters;
- register with the tax office to ensure its charitable status for tax purposes;
- register its medical staff with the relevant state health registration authority to ensure that they can legally practise medicine; and

[164] *Customs Act 1901* (Cth) s 70(2).

- negotiate with the Department of Immigration and Citizenship to obtain appropriate visas for incoming relief workers and with Australian Customs with respect to bringing in drugs and their tools of trade.

All this would take significant time if the response required was the immediate establishment of emergency medical facilities to provide care to the injured, rather than long-term health services.

When it comes to providing assistance, foreign aid agencies will find it easiest to work if they operate in the Australian Capital Territory under a pre-existing cooperative agreement.[165]

What this analysis has shown is that Australia lacks 'comprehensive legal, policy, and institutional frameworks and planning for disaster prevention, mitigation, preparedness, relief and recovery'.[166] While Australian law has sufficient flexibility and discretion vested in relevant ministers to deal with many issues that may arise, there is no comprehensive Commonwealth emergency management legislation. The Commonwealth disaster plan envisages that the Commonwealth's role will be reactive, to provide support to the states, rather than take a significant leadership role. Australia's disaster arrangements are largely silent on when and how international assistance may be sought and the assumption in key planning documents and customs and immigration legislation is that the normal rules will continue to apply during a disaster.

This complex interplay of law, and the fact that the legal position is not integrated into a single piece of legislation, means there is ample room for complication, duplication and confusion at a time when such confusion must be avoided. The complexity of the Australian position also runs counter to provisions in the IDRL Guidelines. In particular it shows that Australian does not have a clearly defined 'national focal point to liaise between international and government actors at all

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165 *Emergencies Act 2004* (ACT) s 180.

166 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [8.1].

levels'[167] (though Emergency Management Australia could fill that role). Further, the complexity and the absence of reference to the Commonwealth's own response to a disaster means that Australia does not

> … make available to [potential] assisting actors adequate information about domestic laws and regulations of particular relevance to the entry and operations of disaster relief or initial recovery assistance.[168]

The next chapter will conduct a similar review of Australian law that would have an impact upon Australia's ability to send disaster assistance to an affected state. Most of the relevant law in this context will be the law of the receiving country but the chapter will identify where Australian law can operate to facilitate the receipt of Australian assistance by other nations.

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167 Ibid [8.2].
168 Ibid [10.3].

CHAPTER SEVEN
INTERNATIONAL DISASTER RESPONSE — AUSTRALIA AS THE ASSISTING STATE

Chapter Five identified Australia's emergency management arrangements and Chapter Six benchmarked those arrangements against the IDRL Guidelines to identify issues that were not adequately addressed by Australian law and that could impact upon Australia, if Australia was affected by a sudden onset natural disaster and required international assistance.

This chapter will conduct a similar benchmarking exercise to identify how Australian law addresses issues dealt with in the IDRL Guidelines that are relevant to the assisting state providing international disaster assistance. Most of the relevant law will be the law of the host or receiving country and it will be up to that country to determine issues regarding customs, quarantine, visas, the recognition of Australian qualifications and access to the disaster-affected area. Notwithstanding this, there is some Australian law and policy that will facilitate the delivery of aid from Australia to disaster-affected countries.

The key policy document on providing assistance to disaster-affected countries is the AUSASSISTPLAN[1] managed by the Australian Agency for International Development, known as AusAID.

AUSTRALIA'S LEGAL POSITION MEASURED AGAINST THE IDRL GUIDELINES

Introduction

Guideline 1: Purpose and scope and

Guideline 2: Definitions

These introductory provisions do not make relevant recommendations and are not discussed further.

[1] Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002).

Part I: Core responsibilities

Guideline 3: Responsibilities of affected states

This guideline was relevant in the context of Australia as the disaster-affected state and was discussed in Chapter Six, above.

Guideline 4: Responsibilities of assisting actors

Australian law and policy recognises that international aid cannot be delivered without the consent of the affected states.[2] As was noted in Chapter Three, a state could be justified in providing humanitarian assistance without a request from a foreign government, when it appears the consequence of the catastrophe is such that it is impossible to establish contact with the affected government. As previously discussed,[3] it has to be conceded that even with regard to low-lying Pacific Island states, the chances of there being no one to represent the government following a disaster, is unlikely. Even if the country itself is devastated there are likely to be ambassadors and representatives of the state who are not in the country at the time of the disaster and who could make the necessary request for assistance. The fact that such a situation is unlikely should not however put it outside the consideration of policy and legal development. Current Australian policy assumes that there will be an effective government to make a request and an operating Australian mission to receive the request and as all Australian post-disaster assistance will be provided following a request from the affected country directed to the Australian representative 'in country'.[4]

The AUSASSISTPLAN gives specific recognition to the principle that the domestic agency in charge of the response will set the priorities for Australian aid. AusAID will determine priorities, if and only if none are set by the receiving

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2 Ibid; AusAid, *Responding to Emergencies* <http://www.ausaid.gov.au/human/emergencies.cfm> at 20 January 2008.

3 See p 103, and following, above.

4 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002).

country.[5] In this way AusAID recognises the primary right of the affected country to manage the receipt of international assistance.

AusAID ensures that aid is delivered in a way that is accountable. Agencies must ensure that 'the effectiveness of the response to requests [is] … regularly assessed'.[6] Australian agencies must work together and 'the open sharing of accurate information and its consolidation in regular situation reports is to be a high priority',[7] thereby reducing duplication and inefficiency.

The priority of the Australian response is to 'alleviate distress or preserve life and property'.[8] These principles aim to ensure that aid is delivered in accordance with the principles of humanity and impartiality as the priority is not, for example, to save Australians, but to maximise the relief of suffering.

Notwithstanding the stated commitment to neutrality, other factors have influenced the Australian aid program. Australia has taken steps to ensure that foreign agencies that are suspected of being involved with international terrorism are not provided with relief funds even if they are using those funds to relieve suffering. During Australia's effort following the Yogyakarta earthquake in 2006, Australia's Foreign Minister, Alexander Downer, was reported as ordering '... Australian embassies to protest against the World Food Programme's decision to allow the Indonesian Mujahedeen Council to deliver 95 tonnes of food aid'.[9] The objection was not that the aid was being delivered in an inappropriate way or to people not in need, but to '… prevent the deeply conservative [Mujahedeen] Council from using the event as propaganda'.[10] Any organisation involved in disaster relief seeks to make sure that its presence in the area is recognised. This is essential to ensure that donors see that their money is being spent on aid, and to ensure the continued success of the operation and the survival of the

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5 Ibid [4.1(f)].
6 Ibid [4.1(e)].
7 Ibid.
8 Ibid [4.1(a)].
9 ABC Radio National 'Abu Bakar Bashir' *Breakfast*, 16 June 2006 <http://www.abc.net.au/rn/talks/brkfast/stories/s1664494.htm> at 16 June 2006.
10 Ibid.

organisation.[11] To say that this is 'propaganda' is a pejorative term. A protest that such an organisation wants its role to be known is a protest based on the political affiliation of the local agency involved in disaster relief and appears to be contrary to the principles of neutrality and humanity.

Guideline 5: Additional responsibilities of all states

The AUSASSISTPLAN and the process by which AusAID accredits non-government organisations that are to receive funding from the Commonwealth will ensure, to the greatest extent possible, that Australian aid is delivered by organisations that will respect the laws of the affected state, coordinate with domestic authorities, respect the dignity of disaster-affected persons[12] and provide aid on the basis of need alone and without regard to race, culture, religion, gender or for other prohibited purposes.[13]

Fisher has identified that no international accreditation exists for non-government organisations[14] so that when disaster strikes, any number of non-government organisations may appear at the disaster site promising to provide services that they are unable to provide, providing substandard services or providing assistance that is not in accordance with the international principles for example by tying the provision of assistance to proselytising missions.[15]

The evaluation of the international responses to the Rwanda genocide and the 2004 Boxing Day tsunami[16] suggested that access to disaster-affected

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11 Kofi N Awoonor, 'The Concerns of Recipient Nations' in K M Cahill (ed) *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 63, 77–78 Randolph C Kent, *Anatomy of Disaster Relief: The International Network in Action* (Pinter Publishers, London, 1987) 166.

12 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [4.1].

13 Ibid [4.2].

14 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 146.

15 Ibid 137–138. See also John Telford, John Cosgrave and Rachel Houghton, *Joint Evaluation of the international response to the Indian Ocean tsunami: Synthesis Report* (Tsunami Evaluation Coalition, London, 2006) 55–61.

16 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 148;

communities should be limited to non-government organisations that have adopted an international standard on service quality and accountability such as the Humanitarian Accountability Partnership (HAP) 2007 Standard[17] or the Red Cross Code of Conduct.[18] The Tsunami evaluation recommended that an international process of accreditation of non-government organisations was needed,[19] but failing that, donor countries should have in place a domestic accreditation process:

> … as a requirement for receiving funding. Any such accreditation system should include standards on how money is solicited and reallocated, and how and when appeals are launched and shut down.[20]

Australia, via AusAID, does have an accreditation process to ensure that non-government organisations that deliver aid in cooperation with or on behalf of the Australian government are committed to applying appropriate standards and ensuring that they are accountable for the work they do.[21]

Only accredited non-government organisations receive AusAID funding to conduct relief or development operations. To obtain AusAID accreditation, non-government organisations must commit themselves to the Australian Council for International Development (ACFID) Code of Conduct.[22] Where they are involved in operations involving humanitarian post-disaster relief, they must also commit themselves to adhering to the Red Cross Code of Conduct.[23] Organisations are

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John Telford, John Cosgrave and Rachel Houghton, *Joint Evaluation of the international response to the Indian Ocean tsunami: Synthesis Report* (Tsunami Evaluation Coalition, London, 2006) 120.

17 *HAP 2007 Standard in Humanitarian Accountability and Quality Management (*Humanitarian Accountability Partnership — International, Geneva, 2007).

18 International Federation of Red Cross and Red Crescent Societies *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief* (International Federation of Red Cross and Red Crescent Societies, Geneva, 1995).

19 John Telford, John Cosgrave and Rachel Houghton, *Joint Evaluation of the international response to the Indian Ocean tsunami: Synthesis Report* (Tsunami Evaluation Coalition, London, 2006) 120.

20 Ibid 124.

21 AusAID, *Accreditation Non-Government Organisations* <http://www.ausaid.gov.au/ngos/pdfs/accreditation_policy.pdf> at 19 July 2008.

22 Ibid 1.

23 Ibid 2; see also International Federation of Red Cross and Red Crescent Societies *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-*

also encouraged to 'familiarise themselves'[24] with the Sphere Project's Minimum Standards.[25] Although

> … there is currently no formal requirement for agencies to formally adopt Sphere, there is general agreement among humanitarian agencies on the core principles outlined in the document and a commitment to incorporate Sphere standards in agency policy and practice.[26]

The criteria for accreditation requires a non-government organisation to demonstrate its track record in managing development projects,[27] to demonstrate that it has a philosophy that is consistent with Australian policy that takes into account 'cross cutting issues such as gender, environment and human rights' and does not use funds for 'evangelical, welfare or partisan political purposes'.[28] Non-government organisations must demonstrate that they have in place processes to monitor their 'in country' activities and are able to rate and report on the effectiveness of their programmes.[29]

These provisions, in conjunction with a commitment to the Red Cross Code of Conduct, seek to ensure that Australian non-government organisations are not attempting to deliver projects that are beyond their capacity and that they have in place a process of self assessment and accountability to their recipient community to ensure that their projects are ethical and comply with the fundamental principles of 'humanity, neutrality, impartiality and independence'.[30]

There are some aspects of the accreditation standard that may be perceived to impinge on the neutrality and independence of non-government organisations. One criterion that must be met is that an organisation seeking accreditation must

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Governmental Organisations (NGOs) in Disaster Relief (International Federation of Red Cross and Red Crescent Societies, Geneva, 1995).

24 AusAID, *Accreditation Non-Government Organisations* <http://www.ausaid.gov.au/ngos/pdfs/accreditation_policy.pdf> at 19 July 2008, 2.

25 *The Sphere Project: Humanitarian Charter and Minimum Standards in Disaster Response* (2004 ed, The Sphere Project, Geneva, 2004).

26 AusAid, *Accreditation Non-Government Organisations*, 2 <http://www.ausaid.gov.au/ngos/pdfs/accreditation_policy.pdf> at 19 July 2008.

27 AusAid, *Base AusAID NGO Accreditation Criteria Table — May 2008*, [B1] <http://www.ausaid.gov.au/ngos/pdfs/criteria_table_base.pdf> at 19 July 2008.

28 Ibid [B2].

29 Ibid [B4].

30 *2005 World Summit Outcome*, GA Res 1/60, UN GAOR, 60th sess, 8th plen mtg, UN Doc A/RES/60/1 (2005).

show that it has the capacity to deliver aid projects that meet the contractual obligations to AusAID. Some of the suggested 'verifiers' that can be used to demonstrate this capacity are:

> Written policies and clauses in partnership agreements covering counter-terrorism …
>
> Evidence that the strategies identified in the Counter Terrorism Policy are being followed. …
>
> Evidence of appropriate checks in relation to employment/contracting of individuals.[31]

While these verifiers are not wholly objectionable, they could in some circumstances move a non-government organisation away from the principles of humanity, that is that aid should be delivered on the basis of need alone. As was noted in the discussion above, Australia has ruled out delivering aid via the Indonesian Mujahedeen Council for political reasons, rather than because it failed to demonstrate the aid being delivered was appropriate and needed. Requiring Australian non-government organisations operating in a foreign country to give effect to Australian policies on counter-terrorism may cause some foreign governments or non-government organisations themselves to feel they are compromised in their ability to provide humanitarian aid that is truly neutral and based on need alone.

Subject to this criticism, the process of accreditation does mean that a foreign government seeking international post-disaster assistance could have reasonable confidence that aid provided by Australia through an accredited non-government organisation will be appropriate and, more importantly, delivered in an appropriate and accountable way. This may help foreign governments, if faced with a flood of foreign non-government organisations wishing to access their disaster-affected population, to determine who should be given legal recognition and legal facilities to allow them to operate in their country. In effect, Australia has taken on the role before a disaster of assessing and accrediting potential

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[31] AusAid, *Base AusAID NGO Accreditation Criteria Table — May 2008*, [B3] <http://www.ausaid.gov.au/ngos/pdfs/criteria_table_base.pdf> at 19 July 2008.

disaster relief providers, so that the disaster-affected country does not need to do this after the event.

In summary, the Australian policy will go a long way in ensuring that aid delivered by accredited Australian non-government organisations is provided by quality organisations, and that the aid itself is likely to be high quality and the organisation will have processes in place to ensure that it is accountable to the donor (that is, the Australian Government), but also to the affected recipient community.

The guidelines identify a number of other objectives that should be met in delivering aid, including that aid is responsive to the needs of women and children and other particularly vulnerable groups, must be adequate in terms of quality, delivered in a culturally sensitive way, involve the local community, be delivered by competent operators in accordance with organisational capacity and seek to strengthen resilience and the local economy.[32] Many of these considerations do not receive explicit enunciation in Australian policy but generally speaking the commitment to the Code of Conduct,[33] the principles of Good Humanitarian donorship[34] and the criteria for accreditation[35] will '[t]o the greatest extent practicable'[36] ensure that Australian disaster relief meets these objectives particularly with respect to quality and accountability.

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32 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [4.3].

33 International Federation of Red Cross and Red Crescent Societies *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief* (International Federation of Red Cross and Red Crescent Societies, Geneva, 1995).

34 Good Humanitarian Donorship, *Principles and Good Practice of Humanitarian Donorship* <http://www.goodhumanitariandonorship.org/> at 25 February 2008. See AusAid, *Humanitarian Action Policy* (Commonwealth of Australia, Canberra, 2005).

35 AusAid, *Base AusAID NGO Accreditation Criteria Table — May 2008* <http://www.ausaid.gov.au/ngos/pdfs/criteria_table_base.pdf> at 19 July 2008.

36 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [4(3)].

Apart from funding non-government organisations, Australia may send aid in the form of military forces or domestic civil defence organisations[37] and, as discussed in Chapter Five, aid can be sent directly from state and territory governments. Notwithstanding the Commonwealth's responsibility for Australia's external affairs,[38] there is no relevant law or policy to ensure that aid that is sent by an organisation other than an AusAID accredited non-government organisation meets the principles set out in the guidelines. Organisations may be non-accredited non-government organisations or state or territory government instrumentalities. The AusAID process has no application or relevant to assistance that is provided, for example, by a state health department.

The next recommendation is that states should:

> … actively encourage members of the public interested in contributing to the international disaster relief or initial recovery to make financial donations where possible or otherwise donate only those types of relief goods expressly requested by the affected State.[39]

The Australian public are free to donate money or goods as they wish and to deliver those goods by any means they see fit. There would be practical and constitutional difficulties in trying to regulate such behaviour, but it would be possible for the Commonwealth to encourage such relief donations through the tax system and by establishing rules that encouraged community organisations to collect financial rather than in kind donations, for example by making cash donations tax deductible but not allow deductions for the value of 'in kind' donations.

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37 For example, state-based ambulance and fire services — see Ambulance Service of New South Wales, *Specialist skills in disaster situations* (2002) <http://www.asnsw.health.nsw.gov.au/what/countdisaster.html> at 16 December 2005; New South Wales Fire Brigades, *South-East Asian Tsunami: NSWFB Deployment*, (2002) <http://www.nswfb.nsw.gov.au/incidents/history/tsunami04/index.php> at 2 November 2005; New South Wales Rural Fire Service, *NSW Firefighting Force Heading for USA* (2002) <http://www.rfs.nsw.gov.au/dsp_more_info.cfm?CON_ID=1497&CAT_ID=601> at 2 November 2005.

38 *Australian Constitution* s 51(xxix).

39 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [5.2].

The Commonwealth could also establish an emergency fund, similar to the model of the United Nations Consolidated Appeals Process.[40] Under the consolidated appeals process, the Department of Humanitarian Affairs makes a single appeal for funding to meet the needs of the various United Nations and other participating agencies, rather than have each agency make their own appeal to the limited number of potential donors. The Commonwealth could establish a consolidated appeals process to be applied during declared overseas disasters whereby a single appeal would be used to fund the various aid programs. Such a system may well meet resistance from non-government organisations determined to maintain their independence but may be a tool to be used to advance this particular recommendation.

Guideline 6: Responsibilities concerning diversion and the intended use of resources

The process of accreditation for Australian non-government organisations ensures that the organisations have in place sufficient audit and accountability mechanisms so that aid is delivered in a way that is intended. This will benefit the Australian Government and members of the Australian public who wish to donate funds to relief appeals run by accredited non-government organisations.

The process of accreditation will act as a significant incentive for Australian non-government organisations to comply with domestic law and the Red Cross Code of Conduct[41] when operating 'in country', as failure to do so could lead to a loss of accreditation and access to AusAID funding. If a non-government organisation is granted necessary legal facilities and permission to operate in part because of their accreditation by the Australian government, loss of that status may make operating in country difficult or impossible. The process of accreditation could therefore be a significant motivator to ensure non-government organisations

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40 *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 46th sess, 78th plen mtg, UN Doc A/RES/46/182 (1991).

41 International Federation of Red Cross and Red Crescent Societies *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief* (International Federation of Red Cross and Red Crescent Societies, Geneva, 1995).

comply with their obligations both in Australian and in the country in which they are operating.

Non-government organisations that are not accredited and deliver an aid program outside the Australian government program would be subject to the normal criminal and civil law to make sure they are accountable to their donors. Organisations could expect to be prosecuted for fraud, obtaining benefits by deception[42] or engaging in misleading or deceptive conduct[43] if funds are not used in accordance with the terms of the appeal or fund raising process.

Part II: Early warning and preparedness

Guideline 7: Early warning

There are no formal processes in place for Australia to be warned of impending disasters that may lead to a call for Australian assistance. The AUSASSISTPLAN envisages that affected governments will approach Australian diplomatic missions after an event has occurred and the need for assistance has become apparent.[44] Notwithstanding this, 'EMA continuously monitors hazards and events in the Australian region of interest which may cause disasters'[45] and the AUSASSISTPLAN can be activated when 'it is apparent that Australian assistance may be required'.[46]

It is open to Emergency Management Australia, AusAID and the Australian government, generally, to obtain intelligence that assistance may be required by any number of normal diplomatic and intelligence gathering means. To that end Australia maintains diplomatic relations with the other nations of the world and the United Nations, and information regarding potential or pending disasters can be passed between nations using those traditional channels. How Australia manages those relations is outside the scope of this thesis. Looking at Australian law, there is, however, little that would address this issue.

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42 See for example the *Criminal Code Act 1995* (Cth) pt 7.3.

43 See for example the *Trade Practices Act 1974* (Cth) s 52.

44 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002) [3.3] and [5.1.2].

45 Ibid [5.2.1].

46 Ibid [5.2.2.]

With respect to warning other countries of hazards that they may face, the Bureau of Meteorology is required to make weather observations and predictions, and to make warnings with regard to extreme weather events.[47] The bureau, in conjunction with Geoscience Australia, operates the Joint Australian Tsunami Warning Centre[48] which cooperates with international tsunami warning systems such as the International Oceanographic Commission. The Bureau of Meteorology has a statutory obligation to cooperate with the 'meteorological service of any other country',[49] but the expected extent, or outcome, of that cooperation is not set out. It follows that Australia does cooperate with international agencies to provide an early warning system to identify hazards in Australia and overseas, but that cooperation is based largely on international and inter-agency relationships and perceived mutual obligation rather than any specific legal requirement.

Guideline 8: Legal policy and institutional frameworks

It was noted in Chapter Five, above, that Australia at the Commonwealth level does not have the recommended comprehensive legal and policy framework. This is true when considering Australia's position on receiving international aid, and also true when considering Australia's readiness to send aid. The AUSASSISTPLAN does provide many details of how the Commonwealth will respond to requests for assistance, but it is not comprehensive failing to deal with many issues identified as problematic in the delivery of international aid. From a domestic legal point of view one problematic area is that there is no clear provision to deal with the legal relationships between the Commonwealth, state and non-government organisations that are deployed as part of the Australian response. The Commonwealth says that the response is an Australian response and so all levels of government can be involved and this can involve state, territory and non-government organisations,[50] If staff from those organisations are deployed however, questions such as 'Who is liable for any misfeasance or

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47 *Meteorology Act 1955* (Cth) s 6.

48 Geoscience Australia and Bureau of Meteorology, *Joint Australian Tsunami Warning Centre*, Bureau of Meteorology <http://www.bom.gov.au/tsunami/> at 16 August 2008.

49 *Meteorology Act 1955* (Cth) s 6.

50 Emergency Management Australia, *National Emergency Management Coordination Centre (NEMCC) Standard Operating Procedures (SOPS)* (Commonwealth of Australia, Canberra, 2002) [11.5.1].

negligence?', 'Who will be responsible for the care of aid workers injured while on deployment?' and 'Do the staff represent their agency or the Commonwealth of Australia?' are not addressed.

Guideline 9: Regional and international support for domestic capacity

Donor states are urged to 'support developing States, domestic civil society actors and National Red Cross and Red Crescent Societies to build their capacities'[51] and to 'adequately implement legal, policy and institutional frameworks to facilitate international relief and initial recovery assistance'.[52] Although there are clear links between development and resilience[53] exploring appropriate delivery of development aid and Australia's legal regulation of the aid program generally speaking is beyond the scope of this thesis. This thesis is concerned with Australian law dealing with sending and receiving immediate post disaster assistance rather than more general development aid and so further consideration of this particular guideline will not take place here.

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51 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [9.1].

52 Ibid [9.2].

53 See for example, Ellen Johnson Sirleaf, 'From Disaster to Development' in K M Cahill (ed) *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 299, 300, 305; Kofi N Awoonor, 'The Concerns of Recipient Nations' in K M Cahill (ed) *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 63, 69; Larry Minear, 'Making the Humanitarian System Work Better' in K M Cahill (ed) *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 234, 247; Abdulahim A Farah, 'Responding to Emergencies: A View from Within' in K M Cahill (ed) *A Framework for Survival: Health, Human Rights, and Humanitarian Assistance in Conflicts and Disasters* (Basic Books and the Council on Foreign Relations, New York, 1993) 259, 260; Randolph C Kent, *Anatomy of Disaster Relief: The International Network in Action* (Pinter Publishers, London, 1987).

Part III: Initiation and termination of international disaster relief and initial recovery assistance

Guideline 10: Initiation

The AUSASSISTPLAN provides a clear process and point of contact for foreign states seeking Australian assistance. Australian diplomatic missions will receive and forward requests for Australian assistance and assist with the coordination of Australia's response 'in country'.[54] Although the Australian response may be made up of Commonwealth or non-government agencies, the responsibility for liaising with the disaster management agencies of the affected country lies with the Australian diplomatic mission and AusAID thereby ensuring there is no duplication between Australian responders[55] that respond as part of the Commonwealth's response.

As with receiving aid, the absence of a legislative obligation and the creation of working relationships between agencies mean that not all requests for Australian assistance either need to, or do go through, the AUSASSISTPLAN. The plan specifically provides that it is not to apply to 'search and rescue operations [or] emergency or medical evacuation outside disaster periods'[56] suggesting that assistance in these times is managed by other federal or state agencies. As was seen with respect to receiving international fire-fighting assistance, many of these relationships are established at state or territory level. Australia has sent fire-fighters from state agencies to assist their international counterparts based on agreements between agencies representing the United States and agencies representing the Australian states and territories rather than Australia as a nation state.[57]

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54 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002) [3.1]–[3.4], [5.9].

55 Ibid [4.1(d)].

56 Ibid [1.5].

57 Rick Sneeuwjagt, *Review of the Australia-New Zealand Fire Fighting Deployment to the United States of America, August-September 2000*, (Department of Conservation and Land Management, Perth, 2000) ;*International Agreement between the US Department of the Interior, Bureau of Land Management, US Department of Agriculture, Forest Service for the National Multi Agency Coordination Group for and on behalf of the Government*

Also, in parallel with the conclusions about receiving aid, Australian aid can be sent directly by non-government organisations to their counterparts in disaster-affected countries. For example, the Australian Red Cross can send aid to a member of the Red Cross Movement in another country without the need to involve the Australian government.[58] People may also form themselves into *ad hoc* non-government organisations and collect money or relief supplies or travel to the disaster-affected area on their own initiative. There is no need to wait for a request, or get permission from, the Australian government. Whether they are allowed into the disaster-affected country would be a matter for the affected country. Notwithstanding that such ad hoc groups operate without the sanction of the Australian government, Australia will still have diplomatic responsibility for people travelling, as it does for any Australian that chooses to travel overseas.

Guideline 11: Initiation of military relief

The decision to use the Australian Defence Force is made by the Director of Emergency Management Australia once the request for Australian assistance has been approved.[59]

There is nothing in the AUSASSISTPLAN or the in the Standard Operating Procedures of the National Emergency Management Coordinating Centre[60] that urge or require any agency to consider whether civilian alternatives are to be preferred or issues of the terms and length of the deployment, the use of uniforms and the like.[61]

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of the United States of America and the Secretary of the Department of Natural Resources & Environment for itself and as agent of the Crown in the Right of Each Australian State and Territory and the Crown in Right of New Zealand, 2000; *Wildfire Arrangement between the Department of the Interior and the Department of Agriculture of the United States of America and the Australian Participating Agencies* (2002).

58 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002) [3.2].

59 *Defence Instruction (General) OPS 01-3 Policy and Procedures for Department of Defence Response to Overseas Disasters*, 1993

60 Emergency Management Australia, *National Emergency Management Coordination Centre (NEMCC) Standard Operating Procedures (SOPS)* (Commonwealth of Australia, Canberra, 2002).

61 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial*

The National Emergency Management Coordinating Centre Standard (NEMCC) operating procedures say:

> In meeting requests for assistance from overseas countries, staff should keep in mind that it is an Australian response. The NEMCC can call on the full range of Commonwealth, State and Territory government and commercial resources to achieve the most effective and economical response.[62]

The implication is that, despite Australia's stated commitment to the Oslo Guidelines,[63] and the recommendation in the IDRL Guidelines,[64] the Australian military is just one Commonwealth asset that can and will be called upon as the need arises, without any provision saying that special consideration ought to be given to the use of the defence force or that the option of all civilian alternatives should be considered before the defence force is tasked to respond.

Despite the assertion that military forces should be used as a last result, the reality is that if Australia wants to provide an urgent, rapid response of people into a disaster-affected area, it must rely on the military to provide that capability. Emergency Management Australia points out:

> The ADF [Australian Defence Force] capacity for quick reaction, the special skills and training of its personnel and its capacity to be self supporting in a disaster environment, mean that there may be considerable reliance on the ADF during an Australian Government response to an overseas relief operation.[65]

Australia has not seriously considered, or developed, a civilian alternative that can match the capacity of the Australian Defence Force to quickly deploy large numbers of trained people who are capable of supporting themselves in the field

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Recovery Assistance (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [11].

62 Emergency Management Australia, *National Emergency Management Coordination Centre (NEMCC) Standard Operating Procedures (SOPS)* (Commonwealth of Australia, Canberra, 2002) [11.5.1].

63 *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief — Oslo Guidelines (Updated November 2006; Revision 1.1 November 2007).* United Nations Office for the Coordination of Humanitarian Affairs <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1084542> at 25 February 2008.

64 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

65 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002) [5.6.1].

and capable of delivering large payloads of relief supplies in heavy lift aircraft, ships and helicopters.

Guideline 12: Termination

The rapid termination of international assistance can leave the assisted state vulnerable and projects incomplete. As a result the guidelines recommend that the termination of assistance should be negotiated between the affected and the assisting state.[66]

The only reference to the termination of the Australian relief effort is in the AUSASSISTPLAN where it says '[a]t a time mutually agreed between AusAID, EMA and the HOM [Head of Mission], the response phase will be terminated ...'. There is no reference to their being mutual agreement or consultation with the government of the affected state. The AUSASSISTPLAN does recognise that the Australian response may continue as 'reconstruction tasks', and the responsibility for the management of those tasks moves from Emergency Management Australia to AusAID. In essence this is a shift from immediate disaster relief to longer term recovery operations, but the AUSASSISTPLAN does not address how or when that changeover is to be managed, how or when Australian resources will be withdrawn or the role of the affected government in that decision-making process.

Part IV: Eligibility for legal facilities

Guideline 13: Facilities for assisting states

There is no specific provision in Australian law to require that before Australian aid is delivered, Australia or Australian agencies are granted the legal facilities recommended in the guidelines.

Guideline 14: Facilities for assisting humanitarian organisations

Determining who is eligible for legal standing to operate within the disaster-affected state is a matter for that state. Australian law and policy imposes no

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66 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [12].

requirement that before Australian agencies will provide assistance, necessary legal standing must be granted to allow Australian's to operate in the affected country or to give legal recognition to Australian qualifications.

The most significant step taken by Australia is the process of accreditation of non-government organisations. Australian aid policy does not require that accredited non-government organisations are granted legal facilities, but a country seeking assistance from Australia could be confident that accredited non-government organisations will be creditable, competent and accountable. Accordingly an affected state that wanted to pre-determine the criteria to be met by agencies seeking legal facilities to operate in the affected country[67] could adopt, as one criteria, that a humanitarian organisation is accredited by AusAID. This policy would facilitate the delivery of Australian aid through AusAID's accredited partner organisations.

Guideline 15: Facilities for other assisting actors.

There is no specific provision in Australian law to require that before Australian aid is delivered by the Australian private sector, either on their own initiative or at the request of the Australian government, corporate entities are granted the legal facilities recommended in the guidelines.

Part V: Legal facilities for entry and operations

Guideline 16: Personnel

Visas

Australia recognises the need for relief workers to obtain the necessary permits and visas. Emergency Management Australia undertakes to provide instructions if visas are required, to obtain any necessary visa or permits,[68] and to attempt to gain

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67 Ibid [14.2].

68 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002) [6.3.2] and [6.3.3].

permission for people who do not hold valid passports to enter the disaster-affected country.[69]

Guideline 17: Goods and equipment

The AUSASSISTPLAN provides detailed instructions on the packaging of relief goods to ensure that aid delivered on behalf of Australia is appropriate, required, easily identified (in English) and usable. Relief goods from Australia must contain the words 'Gift of Australia', a unique request number,[70] a brief description of what is in the package, contact details of the intended recipient and special handling instructions.[71] Labels should be colour-coded in accordance with Red Cross recommendations,[72] and dangerous goods labelled in accordance with Australian and international transport requirements.[73] There is no requirement that the labelling be in the language of the affected state[74] or meet any other international standard.[75]

The Commonwealth will only transport relief supplies provided by non-government agencies where 'the need for the supplies and their suitability has been confirmed by the national disaster management agency of the affected country'.[76]

Emergency Management Australia agrees to assist agencies to obtain any necessary permission to export relief supplies from Australia,[77] and to facilitate

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69 Ibid [6.3].

70 Allocated by the National Emergency Coordination Centre.

71 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002) [6.5].

72 Ibid [6.5.2].

73 Ibid.

74 Ibid [6.5].

75 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [17.3].

76 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002) [5.1.4].

77 Ibid [6.7], [6.8] and [6.9].

obtaining the necessary permission required to land Australian aid in the affected country.[78]

Guideline 18: Special goods and equipment

The AUSASSISTPLAN does not require that affected countries recognise and accept the registration of Australian vehicles, boats or aircraft.

The plan does require that any special handling and storage instructions be marked on packages containing goods that require special handling, and this is likely to include medicines. The plan does not however specify the matters raised in the IDRL Guidelines[79] such as the need to ensure the goods are transported and maintained so as to preserve their quality, must have more than 12 months before their expiry date and must be labelled in the language of the recipient state.[80]

Guideline 19: Transport

The Commonwealth undertakes to transport essential personnel to the disaster-affected country, but only if their entry is pre-approved and confirmed that the transport of the personnel is take priority over transport of relief supplies. Where commercial transport for personnel is available, that is to be used in preference to transport designated for relief supplies.[81]

Australian policy assumes that the Commonwealth will transport stores to assist the affected government. Whether Australian relief supplies will be delivered to the national border or to the disaster site will depend upon the request received and the availability of logistic resources to transport the supplies.

Guideline 20: Temporary domestic legal status

One area of policy that may be relevant in this context is the process of accreditation of non-government organisations by AusAID discussed above. As

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78 Ibid [6.8] and [6.9].

79 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [18.3].

80 Ibid.

81 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002) [6.13].

part of the accreditation process, non-government organisations must show that they have a sound legal structure, in particular that they are incorporated entities '… with identified office holders, with a documented structure of responsibilities and appropriate systems to ensure accountability…'.[82] As was seen in the discussion in Chapter Six, institutions incorporated outside Australia can, with reasonable ease, register with the Australian Security and Investments Commission, in order to operate in Australia. It is likely that Australian organisations that have gone through the accreditation process in Australia and have an unambiguous legal structure will find it easier to be accepted in a foreign country, than an ad hoc non-government organisation that has sprung up in response to the particular crisis.

Guideline 21: Taxation

Guideline 22: Security; and

Guideline 23: Extended hours

These matters are not specifically addressed in Australian law and policy.

Guideline 24: Costs.

The costs of providing international assistance are met by the Australian Government as part of Australia's international aid program.[83]

CONCLUSION

This short chapter has reviewed Australian law and policy dealing with sending international disaster assistance. The chapter is necessarily short as the relevant law that facilitates the activities of international responders is, generally speaking, the law of the receiving country rather than the law of the sending country. Notwithstanding the limited scope for Australian law to govern operations

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82 AusAid, *Base AusAID NGO Accreditation Criteria Table — May 2008,* [A2] <http://www.ausaid.gov.au/ngos/pdfs/criteria_table_base.pdf> at 19 July 2008.

83 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002) [7.1.1]; Emergency Management Australia, *National Emergency Management Coordination Centre (NEMCC) Standard Operating Procedures (SOPS)* (Commonwealth of Australia, Canberra, 2002) [11.4.1].

overseas, it has been possible to benchmark Australian law and policy dealing with the dispatch of international disaster assistance against the IDRL Guidelines.[84]

What this analysis has shown is that, as was discovered when considering Australia as an aid recipient, Australia lacks a 'comprehensive legal, policy, and institutional frameworks and planning for [international] disaster … relief and recovery'.[85] Australia's response to international relief is managed under the AUSASSISTPLAN, which is not supported by legislation. There is no clear analysis of what the relationships are between the Commonwealth and state, territory and non-government agencies that may be asked to contribute to the plan. The plan fails to address many of the problems that are common with respect to international disaster response.

The Australian process of accrediting non-government organisations to deliver aid on behalf of Australia could go a long way to facilitating access by Australian humanitarian organisations. The process of accreditation ensures that Australian non-government organisations that access AusAID funding have quality assurance and accountability mechanisms in place. These accreditation provisions would give some confidence to receiving countries that Australian accredited non-government organisations are appropriate entities to allow into their country post-disaster and are appropriate entities to receive the necessary legal standing to operate in the disaster environment. AusAID accreditation is one clear criterion that an affected state could use to determine which Australian humanitarian organisations should be granted the recommended legal facilities to allow them to operate in the disaster-affected state.

Based on the findings so far, the next chapter will produce the recommendations of this thesis. By drawing on examples from the Australian States and Territories, Canada and the United States, discussed in Chapter Five, it is argued that

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84 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

85 Ibid [8.1].

Australia's legal preparedness to send and receive international disaster assistance, could be enhanced with the enactment of a Commonwealth disaster or emergency management Act.

CHAPTER EIGHT
RECOMMENDATIONS

This thesis has reviewed Australia's emergency management arrangements with a particular focus on issues relating to international disaster response. An international disaster response occurs if and when Australia receives assistance from another state or sends assistance to a disaster-affected state. Australia's legal arrangements for managing an international disaster response have been identified and benchmarked against the IDRL Guidelines[1] to identify gaps and deficiencies in Australia's legal preparedness.

Following on from this analysis, this chapter makes recommendations that would enhance Australia's legal preparedness to send and receive international disaster assistance. The essential components of the recommendations will be that the Commonwealth should pass a single piece of comprehensive disaster management legislation, and should adopt as a model agreement to be entered into by Australia and assisting non-government organisations, the model bilateral civil defence agreement published by the International Civil Defence Organisation.[2]

It has been argued, in Chapter Five, above, that notwithstanding the Commonwealth has no specific grant of legislative power to deal with a disaster or an emergency, such a power must exist. It was argued that the power of the Commonwealth exists as an exercise of the specific legislative powers granted to the Commonwealth Parliament,[3] so that the Commonwealth can pass legislation dealing with the areas of Commonwealth responsibility and how they are to be managed during an emergency. There is also an inherent power to deal with

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1 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

2 International Civil Defence Organisation, *Model Bilateral Agreement in the Matter of Civil Defence* (International Civil Defence Organisation, Geneva, 2002).

3 *Australian Constitution* s 51.

emergencies vested in the Crown as part of the prerogative power of the Crown and now incorporated into the Executive Power of the Commonwealth.[4]

This chapter draws on the experience of the Australian states and territories, as well as Canada and the United States,[5] to develop a model Commonwealth Act. The model Act, called the *Emergencies Act 20XX* (Cth), is set out below. The discussion that follows provides a detailed explanation, and justification of, the draft provisions.

As has been shown in the preceding chapters, Australia's domestic law is incomplete, as the role of the Commonwealth in responding to domestic disasters is not clearly identified and no specific Commonwealth agency or minister is charged with coordinating the Commonwealth response or with directing Commonwealth agencies in the time of disaster. Although this thesis is concerned with sending and receiving international disaster assistance, the model legislation that will be proposed will necessarily touch on these matters of purely domestic disaster management.

RECEIVING AID

Part one of the model Act is an introductory part. It contains relevant definitions and a clause providing that the Crown is bound by the Act. It is necessary to bind the Crown to ensure that the Act sets out and defines how the Commonwealth is to exercise emergency powers. This is consistent with the findings of the New Zealand Law Commission[6] that argued legislation should be enacted before a disaster to ensure that there are safeguards against abuse and to ensure that the appropriate powers are available to be used when required. The alternative is for governments to rely on non-statutory sources of power, such as the prerogative power of the Crown, necessity or martial law.[7] The scope and extent of those non-

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4 *Australian Constitution* s 61.

5 Discussed in detail in Chapter Five, above.

6 New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991).

7 Ibid [4.35].

statutory powers is uncertain and they do not provide sufficient safeguards against abuse and protection for the rights of citizens.[8]

It follows that legislation provides a better basis for action. In this case the legislation is intended to govern the power of the executive to act in an emergency. The executive power of the Commonwealth is vested in the Queen, but exercised via her representative, the Governor-General.[9] As discussed in Chapter Five, above, it is intended that this Act will govern the use of the prerogative power so it is necessary to bind the Crown rather than leaving it open to the Crown to rely on the older, non-statutory basis if and when it chooses to do so.[10]

Having a comprehensive Act that binds the Crown will ensure that not only are the rights of citizens protected but so are the rights of states, reflected in the 'negotiated federal compact'.[11] Legislation prescribing and limiting the use of the executive power will reassure the states that the Commonwealth will only act in a truly national emergency, in consultation with the states, and that the Act will not be used to further enhance Commonwealth legislative authority. Determining when and how the Commonwealth will act in an emergency, when negotiated in the calm before any actual emergency arises,[12] will help to ensure that political disputes will not disrupt or hinder the response that will be required if and when the emergency arises.

Section 3 is the definition section. The definition of 'national emergency' is taken from the Canadian legislation,[13] save that the word 'drought' has been removed. A drought is not a sudden onset emergency[14] and, although it may require special assistance and Commonwealth measures, it does not usually require urgent action,

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8 Ibid [4.51].

9 *Australian Constitution* s 61.

10 *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; *Ruddock v Vadarlis* (2001) 110 FCR 491.

11 *Ruddock v Vadarlis* (2001) 110 FCR 491, [183].

12 New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) [1.25]-[1.26].

13 *Emergencies Act* RSC 1985, c 22 (4th Supp), s 5.

14 As defined in Chapter Two, above.

nor is a drought an ‘urgent and critical situation of a temporary nature’ that requires emergency powers. Although responding to climate change or water issues may be urgent in the sense that action is required sooner rather than later, it is still action that can be taken over weeks rather than hours as would be the case during a sudden onset emergency. It may also be argued that in Australia, drought is a permanent rather than temporary situation.

‘State’ is defined to include the self-governing territories of the Northern Territory and the Australian Capital Territory, in order to avoid constant use of the term ‘state or territory’. It does not include the non-self governing territories such as Jervis Bay or Christmas Island,[15] as they are subject to Commonwealth administration and the Commonwealth is responsible for emergency management arrangements on those territories in any event.

Part two of the model Act contains provisions to allow a state of National Emergency to be declared either by the relevant minister or the Governor-General. The wording of sections 4 to 8 inclusive are based on the Canadian law,[16] with some significant changes.

First, sections 4 and 5 do not appear in the Canadian legislation. The minister should have a power to declare an emergency in urgent circumstances. By convention, the Governor-General acts on the advice of the Cabinet and it may take time to convene the Cabinet. In circumstances where the declaration is required urgently, but it is not practicable to arrange for the Governor-General to make the declaration, the minister may make the necessary declaration. A declaration by the minister remains in force for only seven days which should be sufficient time to allow, if required, for an appropriate declaration to be made by the Governor-General.

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15 Attorney-General’s Department, *Territories of Australia* <http://www.ag.gov.au/www/agd/agd.nsf/page/Territories_of_Australia> at 28 March 2008.

16 *Emergencies Act* RSC 1985, c 22 (4th Supp), ss 6 and 7.

The provision for expedited measures has a parallel in Part IIIAAA of the *Defence Act*.[17] Part IIIAAA deals with the use of the defence forces to protect national interests and the states and territories. Although the Governor-General, as custodian of the executive power of the Commonwealth and as Commander in Chief of the defence force,[18] is the appropriate person to issue the relevant orders, the Act provides that in urgent circumstances a call-out order may be made by the Prime Minister, by two 'authorising Ministers' or an 'authorising Minister and another Minister'.[19]

Northern Territory legislation also provides for an expedited or urgent disaster declaration. Under the Territory legislation, two ministers may declare a state of emergency if the administrator is absent or otherwise unable to perform his or her duties, or the office is vacant.[20]

It is consistent with these models that an appropriate minister should be able to make a declaration of a national emergency, in the event of a sudden onset natural disaster where emergency powers are required and where it is not practicable to wait until the Cabinet or Executive Council can be called to advise the Governor-General.

The procedures outlined in the model Act are not as extensive as those of the *Defence Act* as the *Defence Act* contemplates the use of force and restrictions on personal liberty that are not contemplated in the draft *Emergencies Act*. It has been noted, however,[21] that many of the impacts of a disaster will equal those of, for example, a terrorist action and the response may be similar. It may be prudent, if the Commonwealth were to truly adopt an all hazards approach to risk management, to consider whether the procedures for responding to a national emergency caused by violence should be provided for here, rather than in the *Defence Act*. That is the case in Canada[22] but the idea of a general act was rejected

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17 *Defence Act 1903* (Cth).
18 *Australian Constitution* ss 61 and 68.
19 *Defence Act 1903* (Cth) s 51CA.
20 *Disasters Act 1982* (NT) s 35.
21 See p 167, above.
22 *Emergencies Act* RSC 1985, c 22 (4th Supp), pts II, III and IV.

in New Zealand where the Law Commission argued for 'sectoral' legislation that is separate items of legislation to deal with different types of disasters.[23] Resolving the issue of whether the response to natural disasters should be equated with the response to terrorist or violent emergencies is beyond the scope of this thesis.

Section 8 outlines what must be included in a declaration. The drafting is based on the Canadian Act,[24] and is intended to apply to a declaration issued either by the minister or the Governor-General.

Section 9 provides that any declaration must be formally published. This is to ensure that citizens who may be subject to special regulations are aware that the Act has been invoked and of the powers that may be exercised in response to the emergency. This provision is consistent with the New Zealand recommendation[25] and Australian state and territory legislation.[26]

Section 10 empowers the Governor-General to make 'such orders or regulations as the Governor-General believes, on reasonable grounds, are necessary for dealing with the emergency'. This is intended to be a very broad power allowing the Governor-General to put in place whatever arrangements are required to deal with the national emergency.

In New Zealand, the Law Commission argued against such a broad power to make delegated legislation in an emergency. The commission argued that it is better to set out all necessary powers in the relevant legislation but they recognised that there may be circumstances where the best pre-planning will still not cover the situation that in fact arises. They accepted that in an extreme situation 'the whole

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23 New Zealand Law Commission, *First Report on Emergencies: Use of the armed forces* (Government of New Zealand, Wellington, 1990); New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991).

24 *Emergencies Act* RSC 1985, c 22 (4th Supp) s 6.

25 New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) [5.61].

26 *Emergencies Act 2004* (ACT) s 153; *State Emergency and Rescue Management Act 1989* (NSW) s 34; *Disaster Management Act 2003* (Qld) ss 65 and 70; *Emergency Management Act 2004* (SA) ss 23 and 24; *Emergency Management Act 1986* (Vic) s 23(4) and *Emergency Management Act 2005* (WA) s 60.

government of the country may have to be carried on under [emergency] authority',[27] and there was a need to provide a power to make delegated regulations to deal with these extreme situations.

The draft section is less restrictive than the Canadian section on which it is based.[28] The Canadian Act sets out a number of subject areas that may be subject to emergency regulation. These limit the Canadian Governor in Council to making regulations relating to

(a) the regulation or prohibition of travel to, from or within any specified area, where necessary for the protection of the health or safety of individuals;

(b) the evacuation of persons and the removal of personal property from any specified area and the making of arrangements for the adequate care and protection of the persons and property;

(c) the requisition, use or disposition of property;

(d) the authorization of or direction to any person, or any person of a class of persons, to render essential services of a type that that person, or a person of that class, is competent to provide and the provision of reasonable compensation in respect of services so rendered;

(e) the regulation of the distribution and availability of essential goods, services and resources;

(f) the authorization and making of emergency payments;

(g) the establishment of emergency shelters and hospitals;

(h) the assessment of damage to any works or undertakings and the repair, replacement or restoration thereof;

(i) the assessment of damage to the environment and the elimination or alleviation of the damage; and

(j) the imposition

(k) (i) on summary conviction, of a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both that fine and imprisonment, or

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27 New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) [5.79].

28 *Emergencies Act* RSC 1985, c 22 (4th Supp) s 8.

> (ii) on indictment, of a fine not exceeding five thousand dollars or imprisonment not exceeding five years or both that fine and imprisonment, for contravention of any order or regulation made under this section. [29]

Powers of this type are generally required to manage an incident or emergency and are to be exercised by incident controllers. All state and territory counter-disaster legislation has provisions to allow someone to make these sorts of orders if they are required.[30]

In the context of Australia, the states have comprehensive counter-disaster legislation setting out the powers to be exercised by relevant authorities, ministers and incident controllers. It is not intended that the Commonwealth will take on active coordination of the emergency response, and this Act will only apply in the most extreme and therefore unpredictable emergencies that constitute a national disaster. In these circumstances it is argued that the Canadian limitations would not be helpful and that this Act will apply in the very extreme circumstances envisaged by the New Zealand Law Commission. The Governor-General can only exercise these powers when a national emergency has been declared, the power to make regulations will be limited by the obligation to have regard to the counter-disaster operations that will be conducted by the states and will only operate in the area affected by the emergency, and both the regulations[31] and the declaration that a national emergency exists will be subject to parliamentary review. In these circumstances it is recommended that there is no fetter on the Governor-General's power, other than an opinion that the regulations are required to deal with the emergency.

Parts Three and Four are taken from the Canadian model and provide for the amendment and continuation of an emergency declaration and supervision by parliament. The powers granted in the emergency legislation are wide-reaching and are intended to be used when the response to an emergency cannot be adequately managed under other law. Regulations made under the Act may not be

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29 *Emergencies Act* RSC 1985, c 22 (4th Supp) s 8.

30 See for example *Emergencies Act 2004* (ACT) s 163; *State Emergency and Rescue Management Act 1989* (NSW) s 37 and *Emergency Management Act 1986* (Vic) s 24.

31 *Legislative Instruments Act 2003* (Cth).

subject to the normal process of development and consultation, and the risk of abuse[32] or unforeseen adverse consequences is real. Parliamentary review, ranging from the sort of scrutiny envisaged here to a simple obligation to table regulations made during an emergency, is included in the legislation from Canada, New Zealand and some Australian states.[33]

Part five establishes Emergency Management Australia as a statutory authority with clearly defined roles and responsibilities. Section 26(3) is modelled on the *Homeland Security Act*[34] and will ensure that the Director-General of Emergency Management Australia is the primary adviser to the Australian Government on emergency issues ensuring that there can be no conflict, as might now occur, between Emergency Management Australia, the National Security Adviser and the broader Attorney-General's Department.

The model Act empowers the Director-General, as the National Coordinator, to direct government departments and to waive requirements with other laws. The model section 29(3) is based on the Victorian provision.[35] Like that provision, it allows the National Coordinator to give direction to government departments but not necessarily ministers of the Crown. There would be political issues involved in allowing an appointed office holder to give directions to a minister to require the minister for example to declare that a situation constitutes an emergency.[36]

What is considered prudent is to distinguish between the office holder that can declare a state of emergency, in this case the Governor-General or the relevant minister, and the office holder who is then empowered to exercise the special

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32 New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991).

33 *Emergencies Act* RSC 1985, c 22 (4th Supp), pt VI; *Civil Defence Emergency Management Act 2002* (NZ) s 67; *Emergency Management Act 1986* (Vic) s 23(7); *Emergencies Act 2004* (ACT) ss 153 and 158; *Emergency Management Act 2004* (SA) s 24; *Emergency Management Act 2006* (Tas) s 63.

34 *Homeland Security Act* 6 USC 311-321j § 503(4).

35 *Emergency Management Act 1986* (Vic) s 24.

36 The requirement for multiple declarations was discussed in chapter seven, above.

powers necessary to respond to the emergency.[37] If they are the same, a declaration of a national emergency by the minister would empower the minister him or herself to take action and that may be a source of real or perceived conflict of interest. Accordingly it is recommended that it is the minister or Governor-General who must be satisfied that a national emergency exists, but it is the National Coordinator who is thereby empowered to Act. The power to make regulations is vested in the Governor-General so where the National Coordinator requires further legal authority, again he or she cannot grant that to him or herself, but must seek approval from the Governor-General. In this way the Governor-General and the coordinator serve as a check on each other.

Missing from the model Act is detailed consideration of the amount of political control that may be exercised over Emergency Management Australia and the Director-General. Traditionally an Act such as this would declare that a body such as Emergency Management Australia is to be subject to ministerial direction or must comply with rules, orders, standards or other formal directives issued by the relevant minister. The extent of political oversight and the extent to which the political organs of government should direct the general conduct of the organisation, and more importantly, the management of a response to a disaster would require political compromise. Considering and making recommendations on these points is beyond the scope of this thesis, but it should be noted that those issues would need to be considered before a final Act was passed into law.

All state counter-disaster legislation provides for some form of committee to assist in the development of state counter-disaster plans and to assist the controller or coordinator during a disaster. The committee, or committees, bring together stakeholders to develop counter disaster plans and can work together to coordinate the response of the agencies they represent.[38] A similar committee should exist at

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37 H P Lee, *Emergency Powers* (Law Book Company, Sydney, 1984) 192–193; New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991) [5.42].

38 *Emergencies Act 2004* (ACT) s 141 Emergency Management Committee and s 161 Management Executive for declared state of emergency; *State Emergency and Rescue Management Act 1989* (NSW) s 11 State Disasters Council and s 14 State Emergency Management Committee; *Disasters Act 1982* (NT) s 7 Counter Disaster Council; *Disaster*

the national level and this model Act has adopted the Counter Disaster Task Force that currently operates. Again it would be a matter for political decision whether that task force should be made up of ministers or departmental representatives, and whether its membership should be expanded to include not-for-profit and private sector representatives.[39]

Part six is the significant part for international disaster relief. This part provides details on who is authorised to make or receive requests for assistance.[40] The part makes it clear that a request can be made even in the absence of a declared national emergency to ensure that delays are not occasioned by waiting for a formal process.[41] The model Act provides for a process to determine who should receive legal facilities to operate in Australia by giving preference to those that have entered into a 'cooperative agreement'.[42]

A model agreement that could be used between Australia and other countries as well as with non-government organisations is set out as a schedule to the model Act. This agreement is derived from the model bilateral agreement published by the International Civil Defence Organisation, discussed in more detail below.[43] Again there are issues that would need to be considered before making these bilateral agreements, in particular issues as to which organisations or countries Australia would wish to accept assistance from. There is no provision in this

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Management Act 2003 (Qld) s 17 State Disaster Management Group; *Emergency Management Act 2004* (SA) s 6 State Emergency Management Committee; *Emergency Management Act 2006* (Tas) s 7 State Emergency Management Committee; *Emergency Management Act 1986* (Vic) s 8 Victoria Emergency Management Committee and *Emergency Management Act 2005* (WA) s 13 State Emergency Management Committee and s 26 State Emergency Coordination Group.

39 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549 (First National Security Statement to the Australian Parliament, Kevin Rudd, Prime Minister) 12560.

40 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [10].

41 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 90.

42 The terminology of 'cooperative agreement' comes from the *Emergencies Act 2004* (ACT) s 180.

43 International Civil Defence Organisation, *Model Bilateral Agreement in the Matter of Civil Defence* (International Civil Defence Organisation, Geneva, 2002).

model Act to define criteria such as that used by AusAID to accredit Australian non-government organisations,[44] but such criteria could be developed in time and with sufficient consultation.

The Act does provide for the recognition of foreign qualifications. Assuming the Commonwealth can pass this law relying on the executive power and the power of the Commonwealth to make laws with respect to external affairs,[45] then the recognition of these qualifications in accordance with a valid law of the Commonwealth will apply regardless of any inconsistent state law,[46] though the process would naturally be smoother with consultation with the states and, where necessary, complimentary supporting legislation.

Part seven contains provisions on compensation. These provide that assisting organisations will not be liable to the community for any default; rather the Crown will assume liability for any acts or omissions undertaken by agencies acting in good faith in furtherance of the Act. This provision is consistent with the provisions in state emergency management legislation and encourages volunteers and others to contribute to the counter-disaster effort. The difficulties that a potential claimant would face in making such a claim are not discussed here, but suffice to say this clause would go some way to meeting the concerns of donor nations and non-government organisations.[47]

Model bilateral agreement

The Act empowering various agencies, such as Emergency Management Australia, to undertake a controlling role in a disaster response and to waive compliance with laws designed to operate in a 'normal' environment, will not resolve all the legal issues that arise during a natural disaster.

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44 AusAid, *Base AusAID NGO Accreditation Criteria Table — May 2008* <http://www.ausaid.gov.au/ngos/pdfs/criteria_table_base.pdf> at 19 July 2008; AusAid, *Accreditation Non-Government Organisations* <http://www.ausaid.gov.au/ngos/pdfs/accreditation_policy.pdf> at 19 July 2008.

45 *Australian Constitution* s 51(xxix).

46 Ibid s 109.

47 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) 144–146.

Many of the issues relating to the granting of legal facilities, recognition of qualifications and entry of personnel depend on assisting organisations being identified and agreeing to comply with the requirements of the affected country. To deal with these issues, Australia could adopt the *Framework Convention on Civil Defence Assistance*[48] (or a regional convention in similar terms[49]) and encourage potential aid recipients and donors to do the same. Aid would then be provided in accordance with an overarching framework rather than a series of bilateral agreements.

The *Framework Convention on Civil Defence Assistance* deals with many issues dealt with in the IDRL Guidelines.[50] It confirms that assistance can only be provided at the request of or with the consent of the disaster-affected state.[51] That assistance must respect the sovereignty of the affected state but must not be viewed as interference in the internal affairs of the affected state.[52] Assistance must be provided without regard to race, language, gender and the like and in accordance with the principles of humanity, impartiality and solidarity.[53]

The convention further provides that an affected state must provide timely information regarding their needs and shall facilitate the entry of assisting civil defence units as well as all legal facilities necessary to allow them to operate in country.[54]

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48 *Framework Convention on Civil Defence Assistance*, opened for signature 22 May 2000, 2172 UNTS, (entered into force 23 September 2001).

49 For example, the *ASEAN Agreement on Disaster Management and Emergency Response*, opened for signature 26 July 2005 (not yet in force).

50 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

51 *Framework Convention on Civil Defence Assistance*, opened for signature 22 May 2000, 2172 UNTS, (entered into force 23 September 2001) art 3(a).

52 Ibid art 3(b); this is consistent with current international law — see *Nicaragua v United States of America* [1986] ICJ Reports 14.

53 Ibid art 3(c) and (d); See also *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 46th sess, 78th plen mtg, UN Doc A/RES/46/182 (1991) and AusAid, *Humanitarian Action Policy* (Commonwealth of Australia, Canberra, 2005).

54 Ibid art 4.

Requiring a country to do something, such as providing legal facilities, does not automatically modify domestic law to ensure that the obligations entered into are met. The convention, if adopted by Australia, would commit Australia to undertaking these tasks, but would not directly impact upon Australian law. Legislative and policy reform such as that already discussed would still be required. Further the framework convention is intended to be applied between states, and would have little application where it is intended to receive disaster assistance from, or provide disaster assistance through, non-government organisations.

Accordingly a more appropriate model, incorporated into the model Act, is to use bilateral agreements between Australia and assisting states and organisations to facilitate civil defence assistance following a natural disaster. The agreement, annexed to the model Act, is based on the model agreement prepared by the International Civil Defence organisation.[55]

The agreement, suitably amended, could also be used by Australia as a model for negotiation with other countries that seek Australian assistance and agencies endorsed by Australia could gain access to disaster-affected populations in the same terms. Australia could insist that it would not provide counter-disaster assistance, except where such an agreement has been entered into but such a policy may be unduly restrictive in a sudden onset emergency.

Giving effect to the agreement may require further legal amendment of Acts such as the *Customs Act*[56] or the *Migration Act*.[57] Analysis of that legislation is beyond the scope of this thesis, but it is clearly within the power of the Commonwealth to make whatever amendments are required.

The agreement set out in the schedule to the model Act contains a number of provisions to facilitate international disasters assistance.

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55 International Civil Defence Organisation, *Model Bilateral Agreement in the Matter of Civil Defence* (International Civil Defence Organisation, Geneva, 2002).

56 *Customs Act 1901* (Cth).

57 *Migration Act 1958* (Cth).

Clause 1 adopts the definition of civil defence from the First Optional Protocol to the Geneva Conventions dealing with the protection of victims to armed conflict.[58] Often civil defence is assumed to mean the defence of a population from the effects of war. The fact that the term is defined in Protocol I[59] does not mean, however, that civil defence is limited to those activities designed to protect the population from the effect of the war. Rather:

> Civil Defence means 'the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities *or disasters* …[60]

What follows is a list of activities including fire-fighting, rescue, the provision of medical services and many other activities that are provided as part of a civil society and which are required following a natural disaster. The importance of including a definition in the additional protocol is to ensure that in the event of an armed conflict the organisations that normally provide those services can continue to do so, unmolested by invading forces.[61] Civil defence services may be provided by any organisation and need not be limited to government services.

It follows that after a sudden onset natural disaster, what is required is 'civil defence' services and so the definition from the additional protocol is applicable even though what is being sought is assistance to deal with a disaster, not armed conflict.

In adopting the definition of civil defence from the first additional protocol, the reference to 'hostilities' has been removed as this agreement is not intended to apply during armed conflict. For the same reason reference to the 'management of

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58 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* opened for signature 8 June 1977, 1125 UNTS 4, (entered into force 7 December 1978) art 61(1).

59 Ibid.

60 Ibid art 61 (emphasis added).

61 Ibid art 62.

blackout measures'[62] has been deleted as this task will not be relevant to post-natural disaster assistance.

Clause 3 identifies a clear point of contact within Australia for making requests for international assistance.[63] Other states and assisting organisations will know that a request from Australia will be directed through Emergency Management Australia. This will distinguish requests from Australia from lower level requests for assistance such as those that may be arranged on an inter-agency basis.[64]

Clause 4 deals with issues of the entry of personnel.[65] It provides that incoming relief workers will not require visas and identifies the necessary identification that will be required. A person who ceases to be a member of the staff of the assisting party, or who is required by Australian law or the Australian authorities to leave Australia, must be removed by, and at the expense of, the assisting party.

Clause 6 confirms that personnel operating in Australia are bound by, and subject to, Australian law.

Clause 7 does not reflect any provision in the IDRL Guidelines, but is necessary as civil defence organisations, whether government or non-government, will usually be equipped with distinctive uniforms that also form part of their personal protective equipment and therefore they need to be able to wear them to identify and protect themselves.

Clause 15 provides for the resolution of disputes arising under the agreement. The Model Agreement prepared by the International Civil Defence Organisation has a dispute resolution clause that says:

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62 Ibid art 61(1)(d).

63 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [8(2)].

64 Discussed in chapters five and six, above.

65 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [16].

> All disputes relating to the interpretation or application of the present agreement are dealt with by means of negotiations between the contracted parties.[66]

The IDRL Guidelines[67] are silent on the issue of dispute resolution.

In Australia, with a well-established judiciary and respect for the rule of law, and where the issues that may arise cannot be accurately predicted, it is appropriate to allow the normal legal processes to apply. Accordingly the parties commit themselves to attempting to negotiate a solution to any dispute. There is also the power to turn to the courts for a definitive resolution. In this case, because the agreement is between the Commonwealth and the assisting state or organisation, the proposed Act is a Commonwealth Act and the arrangements are based on Commonwealth constitutional authority, the appropriate court is the Federal Court of Australia.[68]

Clauses 5, 8, 9, 10, 11, 12, 13 and 14 deal with other matters raised in the IDRL Guidelines, in particular with the duty free importation and export of relief goods,[69] the use of vehicles and aircraft,[70] coordination and the sovereign right of the affected state to coordinate the disaster relief effort,[71] security,[72] the use of telecommunications equipment,[73] the termination of the assistance mission[74] and costs.[75]

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66 International Civil Defence Organisation, *Model Bilateral Agreement in the Matter of Civil Defence* (International Civil Defence Organisation, Geneva, 2002) art 10.

67 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

68 Constituted by the *Federal Court of Australia Act 1976* (Cth).

69 Ibid [17].

70 Ibid [18(1)] and [19].

71 Ibid [3(3)].

72 Ibid [22]

73 Ibid [18(2)]

74 Ibid [12].

75 Ibid [24].

The proposed legislation and the IDRL Guidelines — matters dealt with

Legislation in the form suggested here would ensure that Australia was well equipped to receive international assistance should that be required. It would also enhance Australia's ability to respond domestically to disasters occurring within Australian territory.

With respect to the IDRL Guidelines,[76] the model legislation and associated model agreement deal with the responsibilities of Australia as an affected state and the responsibilities of incoming actors.[77] It provides for the establishment of necessary legal and policy frameworks.[78] It establishes processes for the initiation and termination of assistance, including assistance by foreign and domestic militaries.[79] It deals with the provision of necessary legal facilities to assisting states and organisations.[80] It makes provision for the arrival of personnel, goods and equipment, security and costs.[81]

The model Act does not specifically identify who may benefit from the Act, or who may enter into the bilateral agreements. Identifying who are appropriate aid providers would be a matter for policy debate and ultimate determination by the National Coordinator. There is no reason why, however, a private company or other appropriate entity could not enter into an agreement to provide assistance and therefore benefit from the terms of the Act and the agreement. Although not specifically stated, the model Act does therefore deal with the question of providing legal facilities for assisting actors other than states.[82]

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76 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

77 Ibid [3] and [4].

78 Ibid [8].

79 Ibid [10] to [12].

80 Ibid [13] and [14].

81 Ibid [16], [17], [18], [20], [22] and [24].

82 Ibid [15].

The proposed legislation and the IDRL Guidelines — matters not dealt with

The draft legislation does not deal with matters raised in the introductory parts of the IDRL Guidelines,[83] as these set out terms to aid in the interpretation of the IDRL Guidelines rather than being requirements or recommendations in themselves. The model Act and agreement do not deal with the responsibilities of states[84] as it is not up to Australia to try and impose obligations upon other countries. Further, the interpretation in the IDRL Guidelines as to what are the obligations upon states is a reflection of current international law rather than a requirement or recommendation requiring implementation.

Matters concerning the cooperation in ensuring aid money is not misappropriated or misapplied, issues of cooperation in early warning and developing regional disaster relief arrangements[85] are dealt with in other areas[86] of law rather than in an Act designed to facilitate response to an actual event, and so are not dealt with in this model legislation.

The model Act is silent on the issues of taxation.[87] Taxation law and exemption from goods and services tax is a significantly complex area beyond the scope of this thesis. Where an exemption from goods and services or other taxes is to be applied, it would be more appropriate to place that exemption in the relevant taxing Act.[88]

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83 Ibid [1] and [2].

84 Ibid [5].

85 Ibid [6], [7] and [9].

86 See the discussion in chapter seven.

87 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [21].

88 In particular, the *A New Tax System (Goods And Services Tax) Act 1999* (Cth) chpt 3 — The exemptions.

Matters of transport and extended hours[89] are not specifically dealt with in the Act but could be dealt with by the National Coordinator exercising his or her powers under section 29 of the model Act.

SENDING AID

Aid will travel to countries from Australia in many forms. Australia deploys human resources, usually but not exclusively from the defence forces, as well as providing money to local and foreign non-government organisations to allow them to provide post-disaster assistance. Aid also flows from the community without the direct involvement of the government when people chose to make their own donations to charities and relief appeals. Organisations can and do act independently of government to deliver aid or funding for aid.

There is therefore no clear policy that needs to be contained within Australian legislation. There is no overarching international legal convention that needs to be applied. As has been argued above, it is not the domestic law of the sending state or even international law that is critical in facilitating international disaster response, rather it is the domestic law of the receiving state.[90]

Australia could attempt to pass laws that require people who wish to donate aid funds, or who wish to travel to disaster-affected countries to provide aid, to act through government channels,[91] but this would be inconsistent with the general freedoms of the Australian population and would be unenforceable.

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89 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [19] and [23].

90 See p 15, above. See also David P Fidler, 'Disaster Relief and Governance After the Indian Ocean Tsunami: What Role for International Law?' (2005) 6 *Melbourne Journal of International Law* 458; David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

91 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007) [5(2)].

Australia is well prepared to send aid and has done so on numerous occasions without reported legal complications arising from its actions. Australian humanitarian policy reflects the principals that aid should only be sent at the request of the affected state and must be delivered in accordance with principles of humanity and neutrality.[92] The single most useful aspect of Australian law and policy when dealing with the delivery of aid is the process of accreditation of non-government organisations, so receiving countries can accept assistance from those organisations knowing that they meet publicly disclosed standards of professionalism and accountability. This process does not need further legislative backing. Accordingly there appears to be no need for further legislative reform in the area of sending international assistance from Australia.

The model Act and agreement are now set out in full. Reference is made to the relevant source (if any) that the clause was based on and the relevant provision of the IDRL Guidelines that the clause gives effect to.

[92] AusAid, *Humanitarian Action Policy* (Commonwealth of Australia, Canberra, 2005).

EMERGENCIES ACT

An Act to authorise the taking of special temporary measures to ensure safety and security during national emergencies, and to amend other Acts.

PREAMBLE

(*Emergencies Act* RSC 1985, c 22 (4th Supp), Preamble)

WHEREAS the safety and security of the individual, the protection of the values of the body politic and the preservation of the sovereignty, security and territorial integrity of the state are fundamental obligations of government;

AND WHEREAS the fulfilment of those obligations in Australia may be seriously threatened by a national emergency and, in order to ensure safety and security during such an emergency, the Governor-General should be authorised, subject to the supervision of Parliament, to take special temporary measures that may not be appropriate in normal times;

Part 1 — INTRODUCTORY

1. Short title

This Act may be cited as the *Emergencies Act*.

2. Act to bind Crown

This Act binds the Crown in all its capacities.

3. Interpretation

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 5)

In this Act

"***declaration of a national emergency***" means a proclamation issued pursuant to section 4 or section 6.

"***national emergency***" means an urgent and critical situation of a temporary nature that is caused by a real or imminent:

(a) fire, flood, storm, tsunami, earthquake or other natural phenomenon;

(b) disease in human beings, animals or plants; or

(c) accident or pollution;

and that results or may result in

(d) a danger to life or property;

(e) social disruption; or

(f) a breakdown in the flow of essential goods, services or resources;

and

(g) is of such proportions or nature as to exceed the capacity or authority of a State to deal with it; or

(h) seriously threatens the ability of the Government of Australia to preserve the sovereignty, security and territorial integrity of Australia;

and that cannot be effectively dealt with under any other law of Australia.

"***State***" includes the Australian Capital Territory and the Northern Territory.

Part 2 — DECLARATION OF A NATIONAL EMERGENCY

4. Declaration of a national emergency by the Minister

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 6).

(1) If there is an emergency which the Minister after considering the advice of the National Coordinator is satisfied:

(a) constitutes or is likely to constitute a National Emergency and necessitates the taking of special temporary measures for dealing with the emergency; and

(b) because a sudden and extraordinary emergency exists, it is not practicable for an order to be made pursuant to section 6; then

the Minister may declare a state of national emergency to exist in the whole or in any part or parts of Australia.

5. Effective date

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 7)

(1) A declaration of a national emergency under section 4 is effective on the day on which it is issued.

(2) A declaration of a national emergency under section 4 expires at the end of seven days unless the declaration is previously revoked or continued in accordance with this Act.

6. Declaration of a national emergency by the Governor-General

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 6)

(1) If there is an emergency which the Governor-General is satisfied

(a) constitutes or is likely to constitute a national emergency and necessitates the taking of special temporary measures for dealing with the emergency; and

(b) has been the subject of consultation required by section 15;

the Governor-General may, declare a state of national emergency to exist in the whole or in any part or parts of Australia.

7. Effective date

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 7)

(1) A declaration of a national emergency under section 6 is effective on the day on which it is issued, but a motion for confirmation of the declaration shall

be laid before each House of Parliament and be considered in accordance with section 20.

(2) A declaration of a national emergency under section 6 expires at the end of thirty days unless the declaration is previously revoked or continued in accordance with this Act.

8. Contents of a declaration of national emergency

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 6)

(1) A declaration of a national emergency shall specify:

(a) concisely the state of affairs constituting the emergency;

(b) the special temporary measures that may be necessary for dealing with the emergency; and

(c) if the direct effects of the emergency do not extend to the whole of Australia, the area of Australia to which the direct effects of the emergency extend.

9. Publication of a declaration of national emergency

(1) Where

(a) a national emergency is declared under section 4 or section 6;

(b) a declaration of national emergency is revoked under section 11 or section 12;

(c) a declaration of national emergency is continued under section 13; or

(d) a declaration of national emergency is amended under section 14;

the Minister shall forthwith cause to be published in the Government Gazette and in a newspaper published in the capital city of each State to which the declaration applies, a copy of the declaration or proclamation.

(2) Failure to comply with subsection (1) shall not render invalid any such declaration or proclamation.

10. Orders and regulations

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 8)

(1) While a declaration of a national emergency is in effect, the Governor-General may make such orders or regulations as the Governor-General believes, on reasonable grounds, are necessary for dealing with the emergency.

(2) Where a declaration of a national emergency specifies that the direct effects of the emergency extend only to a specified area of Australia, the power under subsection (1) to make orders and regulations, and any powers, duties or functions conferred or imposed by or pursuant to any such order or regulation, may be exercised or performed only with respect to that area.

(3) The power under subsection (1) to make orders and regulations, and any powers, duties or functions conferred or imposed by or pursuant to any such order or regulation:

(a) shall be exercised or performed:

(i) in a manner that will not unduly impair the ability of any State to take measures, under an Act of the legislature of the State, for dealing with an emergency in the State; and

(ii) with the view of achieving, to the extent possible, concerted action with each State with respect to which the power, duty or function is exercised or performed; and

(b) shall not be exercised or performed for the purpose of terminating a strike or lock-out or imposing a settlement in a labour dispute.

Part 3 — REVOCATION, CONTINUATION AND AMENDMENT OF DECLARATION

11. Revocation by Parliament

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 10)

Parliament may revoke a declaration of a national emergency in accordance with section 19 or 20.

12. Revocation by Governor-General

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 11)

The Governor-General may, by proclamation, revoke a declaration of a national emergency either generally or with respect to any area of Australia effective on such day as is specified in the proclamation.

13. Continuation by Governor-General

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 12)

(1) At any time before a declaration of a national emergency would otherwise expire, the Governor-General, after such consultation as is required by section 15, may, by proclamation, continue the declaration either generally or with respect to any area of Australia for such period, not exceeding thirty days, as is specified in the proclamation if the Governor-General believes, on reasonable grounds, that the emergency will continue to exist or that the direct effects of the emergency will continue to extend to that area, as the case may be.

(2) Before issuing a proclamation continuing a declaration of a national emergency, the Governor-General shall review all current orders and regulations made under section 9 to determine if the Governor-General believes, on reasonable grounds, that they continue to be necessary for dealing with the emergency and shall revoke or amend them to the extent that they do not so continue.

(3) A declaration of a national emergency may be continued more than once pursuant to subsection (1).

(4) A proclamation continuing a declaration of a national emergency is effective on the day on which it is issued, but a motion for confirmation of the proclamation shall be laid before each House of Parliament and be considered in accordance with section 60.

14. Amendment by Governor-General

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 13)

(1) Where the Governor-General

(a) has issued a declaration of a national emergency specifying that the direct effects of the emergency extend only to a specified area of Australia; and

(b) believes, on reasonable grounds, that the direct effects of the emergency have extended to any other area of Australia or to the rest of Australia;

the Governor-General, after such consultation as is required by section 15, may, by proclamation, amend the declaration to specify that other area as an area of Australia to which the direct effects of the emergency extend or to remove the existing specification, as the case may be.

(2) A proclamation amending a declaration of a national emergency is effective on the day on which it is issued, but a motion for confirmation of the proclamation shall be laid before each House of Parliament and be considered in accordance with section 60.

15. Consultation

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 14)

(1) Subject to subsection (2), before the Governor-General issues, continues or amends a declaration of a national emergency, the Premier or Chief Minister of each State in which the direct effects of the emergency occur shall be consulted with respect to the proposed action.

(2) The Governor-General may not issue a declaration of a national emergency where the direct effects of the emergency are confined to, or occur principally in, one State unless the Premier or Chief Minister has indicated to the Governor-General that the emergency exceeds the capacity or authority of the State to deal with it.

16. Effect of expiration of declaration

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 15)

(1) Where, pursuant to this Act, a declaration of a national emergency expires either generally or with respect to any area of Australia, all orders and regulations made pursuant to the declaration or all orders and regulations so made, to the extent that they apply with respect to that area, as the case may be, expire on the day on which the declaration expires.

(2) Where, pursuant to this Act, a declaration of a national emergency is revoked either generally or with respect to any area of Australia, all orders and regulations made pursuant to the declaration or all orders and regulations so made, to the extent that they apply with respect to that area, as the case may be, are revoked effective on the revocation of the declaration.

(3) Where, pursuant to this Act, a proclamation continuing a declaration of a national emergency either generally or with respect to any area of Australia is revoked after the time the declaration would, but for the

proclamation, have otherwise expired either generally or with respect to that area:

(a) the declaration and all orders and regulations made pursuant to the declaration; or

(b) the declaration and all orders and regulations made pursuant to the declaration to the extent that the declaration, orders and regulations apply with respect to that area;

as the case may be, are revoked effective on the revocation of the proclamation.

(4) Where, pursuant to this Act, a proclamation amending a declaration of a national emergency is revoked, all orders and regulations made pursuant to the amendment and all orders and regulations to the extent that they apply pursuant to the amendment are revoked effective on the revocation of the proclamation.

Part 4 — PARLIAMENTARY SUPERVISION

(*Emergencies Act* RSC 1985, c 22 (4th Supp) pt VI)

17. Definitions

In this Part:

"***Parliamentary Review Committee***" means the committee referred to in section 21(1);

"***sitting day***", in respect of a House of Parliament, means a day on which that House is sitting.

18. Tabling in Parliament

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 58)

(1) Subject to subsection (4), a motion for confirmation of a declaration of emergency, signed by the Minister together with an explanation of the

reasons for issuing the declaration and a report on any consultation with the Premiers of the States with respect to the declaration, shall be laid before each House of Parliament within seven sitting days after the declaration is issued.

(2) If a declaration of emergency is issued during a prorogation of Parliament or when either House of Parliament stands adjourned, Parliament or that House, as the case may be, shall be summoned forthwith to sit within seven days after the declaration is issued.

(3) If a declaration of emergency is issued at a time when the House of Representatives is dissolved, Parliament shall be summoned to sit at the earliest opportunity after the declaration is issued.

(4) Where Parliament or a House of Parliament is summoned to sit in accordance with subsection (2) or (3), the motion, explanation and report described in subsection (1) shall be laid before each House of Parliament or that House of Parliament, as the case may be, on the first sitting day after Parliament or that House is summoned.

(5) Where a motion is laid before a House of Parliament as provided in subsection (1) or (4), that House shall, on the sitting day next following the sitting day on which the motion was so laid, take up and consider the motion.

(6) A motion taken up and considered in accordance with subsection (5) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

(7) If a motion for confirmation of a declaration of emergency is negatived by either House of Parliament, the declaration, to the extent that it has not previously expired or been revoked, is revoked effective on the day

of the negative vote and no further action under this section need be taken in the other House with respect to the motion.

19. Motion for revocation

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 59)

(1) Where a motion, for the consideration of the Senate or the House of Representatives, to the effect that a declaration of national emergency be revoked either generally or with respect to any area of Australia, signed by not less than 10 members of the Senate or twenty members of the House of Representatives, as the case may be, is filed with the Speaker thereof, that House of Parliament shall take up and consider the motion within three sitting days after it is filed.

(2) A motion taken up and considered in accordance with subsection (1) shall be debated without interruption for not more than 10 hours and, on the expiration of the tenth hour or at such earlier time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

(3) If a motion debated in accordance with subsection (2) is adopted by the House, the declaration, to the extent that it has not previously expired or been revoked, is revoked in accordance with the motion, effective on the day specified in the motion, which day may not be earlier than the day of the vote adopting the motion.

20. Motion for confirmation of proclamation continuing a declaration

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 60)

(1) A motion for confirmation of a proclamation continuing a declaration of emergency and of any orders and regulations named in the motion pursuant to subsection (3), signed by the Minister, together with an explanation of the reasons for issuing the proclamation, a report on any

consultation with the Premiers of the States with respect to the proclamation and a report on the review of orders and regulations conducted before the issuing of the proclamation, shall be laid before each House of Parliament within seven sitting days after the proclamation is issued.

(2) A motion for confirmation of a proclamation amending a declaration of emergency, signed by the Minister, together with an explanation of the reasons for issuing the proclamation and a report on any consultation with the Premiers of the States with respect to the proclamation, shall be laid before each House of Parliament within seven sitting days after the proclamation is issued.

(3) A motion for confirmation of a proclamation continuing a declaration of emergency shall name the orders and regulations in force on the issuing of the proclamation that the Governor-General believed, on reasonable grounds, continued at that time to be necessary for dealing with the emergency.

(4) Where a motion is laid before a House of Parliament as provided in subsection (1) or (2), that House shall, on the sitting day next following the sitting day on which the motion was so laid, take up and consider the motion.

(5) A motion taken up and considered in accordance with subsection (4) shall be debated without interruption and, at such time as the House is ready for the question, the Speaker shall forthwith, without further debate or amendment, put every question necessary for the disposition of the motion.

(6) If a motion for confirmation of a proclamation is negatived by either House of Parliament, the proclamation, to the extent that it has not previously expired or been revoked, is revoked effective on the day of

the negative vote and no further action under this section need be taken in the other House with respect to the motion.

(7) If a motion for confirmation of a proclamation continuing a declaration of emergency is amended by either House of Parliament by the deletion therefrom of an order or regulation named in the motion pursuant to subsection (3), the order or regulation is revoked effective on the day on which the motion, as amended, is adopted.

21. Review by Parliamentary Review Committee

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 62)

(1) The exercise of powers and the performance of duties and functions pursuant to a declaration of emergency shall be reviewed by a committee of both Houses of Parliament designated or established for that purpose.

(2) The Parliamentary Review Committee shall include at least one member of the House of Representatives from each party that has a recognised membership of twelve or more persons in that House and at least one senator from each party in the Senate that is represented on the committee by a member of the House of Representatives.

(3) The Parliamentary Review Committee shall report or cause to be reported the results of its review under subsection (1) to each House of Parliament at least once every sixty days while the declaration of emergency is in effect and, in any case:

(a) within three sitting days after a motion for revocation of the declaration is filed under subsection 19(1);

(b) within seven sitting days after a proclamation continuing the declaration is issued; and

(c) within seven sitting days after the expiration of the declaration or the revocation of the declaration by the Governor-General.

22. Inquiry

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 63)

(1) The Governor-General shall, within 60 days after the expiration or revocation of a declaration of emergency, cause an inquiry to be held into the circumstances that led to the declaration being issued and the measures taken for dealing with the emergency.

(2) A report of an inquiry held pursuant to this section shall be laid before each House of Parliament within 360 days after the expiration or revocation of the declaration of emergency.

Part 5 — EMERGENCY MANAGEMENT AUSTRALIA

23. Establishment of Emergency Management Australia

(1) There is established by this Act an agency known as Emergency Management Australia.

(2) Emergency Management Australia is a body corporate with perpetual succession.

(3) Proceedings may be taken by or against Emergency Management Australia in its corporate name.

24. Agent of Crown

Emergency Management Australia is an agent of the Crown and enjoys the status, immunities and privileges of the Crown.

25. Functions of Emergency Management Australia

(Emergencies Management Act SC 2007, c 15 s 4; *This is EMA;*[93] *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [8.2])

(1) The functions of Emergency Management Australia are to:

(a) advise the Minister on all aspects of policy in relation to emergency management;

(b) provide national strategic leadership in the area of emergency management;

(c) develop intergovernmental and international partnerships to enhance Australia's emergency management capacity;

(d) develop community capacity and resilience to natural hazards;

(e) monitor potential, imminent and actual emergencies;

(f) manage, on behalf of the Australian government, the response to a national emergency;

(g) manage, on behalf of the Australian government, the response to requests from foreign countries for Australian assistance to deal with disasters occurring overseas;

(h) manage, on behalf of the Australian government, the response to requests by an Australian State or States for Commonwealth assistance in dealing with an emergency or disaster occurring within their State;

(i) coordinate the provision of assistance to a State or Territory in respect of a disaster or emergency other than the calling out of the Australian Defence Force in aid of the civil power under Part IIIAAA of the *Defence Act 1903*;

(j) participate in international emergency management activities;

(k) establish policies, programs and other measures respecting the preparation, maintenance, testing and implementation by Australian government agencies and departments of emergency management plans;

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93 Emergency Management Australia, *This is EMA* (Commonwealth of Australia, Canberra, 2008).

(l) provide advice to Australian government agencies and departments with respect to the preparation, maintenance, testing and implementation of emergency management plans;

(m) analyse and evaluate emergency management plans prepared by Australian government agencies and departments;

(n) coordinate the activities of Australian government agencies and departments relating to emergency management with those of the States and Territories;

(o) conduct research related to emergency management;

(p) such other functions that are given to by this or any other Act.

26. Director-General

(The Homeland Security Act 6 USC 311-321j §503(4))

(1) The Governor-General shall appoint a suitably qualified person to be the Director-General of Emergency Management Australia.

(2) The Director-General is responsible for the overall strategic direction and management of Emergency Management Australia.

(3) The Director-General is the principal advisor to the Governor-General, the Prime Minister and the Commonwealth Counter-Disaster Task Force for all matters relating to emergency management in Australia.

27. National Coordinator and Deputy

(Emergency Management Act 1986 (Vic) s 5)

(1) The Director-General is the National Coordinator of Emergency Management for the purposes of this Act.

(2) The National Coordinator shall appoint a Deputy National Coordinator of Emergency Management.

28. Delegation by National Coordinator

(Emergency Management Act 1986 (Vic) s 7)

The National Coordinator may, by instrument, delegate to the Deputy National Coordinator or any other person any power or function of the

National Coordinator under this Act or the regulations, except this power of delegation.

29. Powers and duties of National Coordinator

(Emergency Management Act 1986 (Vic) s 11)

(1) Subject to section 2, during a declared national emergency the National Coordinator is responsible for directing and coordinating the activities of all government agencies, and the allocation of all available resources of the Government, which the National Coordinator considers necessary or desirable for responding to the disaster.

(2) As far as practicable, National Coordinator must exercise the National Coordinator's functions in accordance with any relevant national emergency plan.

(3) In addition to and without in any way limiting the generality of subsections (1) and (2), in a National Emergency the National Coordinator may —

(a) direct any government agency to do or refrain from doing any act, or to exercise or perform or refrain from exercising or performing any function, power, duty or responsibility; and

(b) if it appears to the National Coordinator that compliance by a government agency with an Act or subordinate instrument, which prescribes the functions powers duties and responsibilities of that agency, would inhibit response to or recovery from the disaster, declare that the operation of the whole or any part of that Act or subordinate instrument is suspended; and

(4) If a direction is given to a government agency under subsection (2)(a)—

(a) the government agency must comply with the direction; and

(b) the direction prevails over anything to the contrary in any Act or law.

(5) A declaration made under subsection (2)(b) has effect according to its tenor until a further declaration is made by the National Coordinator reviving the operation of the Act or subordinate instrument.

30. Use of the Australian Defence Force

(*Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [11])

(1) The National Coordinator may not direct the Australian Defence Force to take part in counter-disaster activities without the approval of the Chief of the Defence Force.

(2) The National Coordinator shall not request the Chief of the Defence Force to approve the use of Australian Defence Force resources, unless he or she is satisfied that no civilian resources are available to meet the needs created by the emergency.

31. National Coordinator to prepare COMDISPLAN

(Emergency Management Act 1986 (Vic) s 10)

(1) The National Coordinator must arrange for the preparation and review from time to time of a national emergency response plan, to be called COMDISPLAN, for the coordinated response to emergencies by all agencies having roles or responsibilities in relation to the response to emergencies.

(2) The National Coordinator must consult with the Commonwealth Counter-Disaster Task Force before arranging for the preparation and review of COMDISPLAN.

32. Commonwealth Counter-Disaster Task Force

(1) There is hereby established a council to be called the Commonwealth Counter-Disaster Task Force to:

(a) provide necessary policy advice on issues referred to it by the Director General;

(b) recommend any special intergovernmental arrangements which may be required to assist longer-term recovery.

(c) advise the National Coordinator on all matters, including the coordination of activities of government and non-government agencies, relating to the prevention of, response to and recovery from emergencies.

(2) The Task Force is to be chaired by a representative of the Department of the Prime Minister and Cabinet, and is comprised of representatives of Australian Government departments and agencies with a significant role to play in the provision of disaster relief or rehabilitation assistance as determined by the National Coordinator.

33. Committees established by National Coordinator

(Emergency Management Act 1986 (Vic) s 9)

The National Coordinator, after considering the advice of the Task Force may establish such committees as are necessary to ensure comprehensive and integrated emergency management.

Part 6 — INTERNATIONAL COOPERATION

34. Definitions for Part 6

In this part:

"***specialist***" means a person who has a skill appropriate for dealing with an aspect of an emergency (whether or not the skill is in a recognised field of expertise).

35. Request for international assistance

(Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [8] and [10])

(1) Where a National Emergency has been declared, the National Coordinator may, if he or she determines that the resources to meet the needs created by a National Emergency are not available in Australia, seek international assistance in accordance with this part.

(2) (a) The National Coordinator may seek international assistance at the request of a State where the State has sought Commonwealth Assistance and the National Coordinator, in consultation with the Premier of the affected State or States, has determined that the resources to meet the needs of the State or Territory are not available in Australia.

(b) Such a request may be made whether or not a national emergency has been declared.

(3) Before requesting international assistance under subsection (1) or (2) the National Coordinator must consult with the Department of Foreign Affairs and Trade and the Minister.

(4) A request for international assistance may be made to the United Nations Office for the Coordination of Humanitarian Affairs, any country or agency that the National Coordinator believes will be able to assist meet Australia's needs.

(5) Without limiting subsection (6) preference shall be given to requesting assistance from countries or agencies that have entered into a co-operative agreement in accordance with this part.

36. Cooperative arrangements with overseas agencies

(*Emergencies Act 2004* (ACT) s 176; *(Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [14])

(1) The Minister may enter into a written arrangement with the agency of a foreign country or any foreign corporation or non-government agency, (a ***cooperative arrangement***) to facilitate cooperation —

(a) in emergency management; or

(b) in the response to a national emergency

(2) As far as is practicable, a cooperative agreement shall be in the form set out in Schedule 1.

37. Recognition of foreign qualifications

(*Emergencies Act 2004* (ACT) s 180; *(Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [16(1)(c)])

(1) This section applies if:

(a) a specialist ordinarily resident in a foreign country undertakes activities in Australia under a cooperative arrangement; and

(b) the activities are activities that under a Commonwealth, State or Territory law may only be undertaken by a person who holds a qualification (the ***required qualification***); and

(c) the person holds a qualification recognised by the law of that foreign country as a requirement for undertaking the activities in that country.

(2) The person is taken to hold the required qualification for the purpose of any Australian State or Territory law regarding the undertaking the activities in Australia under the arrangement.

(3) In this section:

"***qualification***" includes—

(a) a degree, diploma, certificate or other award; and

(b) registration with or membership of an entity.

38. Recognition of foreign corporate status

(*Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [20])

(1) This section applies if an agency that is incorporated under the law of foreign country that undertakes activities in Australia under a cooperative arrangement.

(2) The agency is deemed to be a registered foreign corporation within the meaning of the *Corporations Act 2001* and shall be entitled to sue and be sued in its corporate name and may can hold property (including land) and enter into contracts.

39. Requests for Australian Assistance

(*Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [8(2)]

(1) The National Coordinator shall receive requests for Australian assistance following disasters or emergencies occurring in foreign countries.

(2) Where a request for Australian assistance is received the National Coordinator shall advise the Minister for Foreign Affairs and Trade of the request and advise the Minister for Foreign Affairs and Trade whether Australian resources exist to meet the request.

(3) The Minister for Foreign Affairs and Trade shall determine whether assistance will or will not be provided.

(4) Where the Minister for Foreign Affairs and Trade has determined that assistance will be provided the National Coordinator is responsible for directing and coordinating the activities of all agencies, and the allocation of all available resources of the Government, which the National Coordinator considers necessary or desirable for responding to the disaster.

Part 7 — COMPENSATION

40. Definitions

In this Part,

"***compensation***" means compensation under subsection 48(1);

"***Crown***" means Her Majesty in right of Australia;

41. Protection from personal liability

(*Emergencies Act* RSC 1985, c 22 (4th Supp) s 47)

(1) No action or other proceeding for damages lies or shall be instituted against a Minister, servant or agent of the Crown, including any person providing services pursuant to an order or regulation made under this Act, for or in respect of anything done or omitted to be done, or purported to be done or omitted to be done, in good faith under this Act or any proclamation, order or regulation issued or made thereunder.

(2) Subsection (1) does not relieve the Crown of liability for the acts or omissions described therein, and the Crown is liable under the *Crown Liability Act* or any other law as if that subsection had not been enacted.

SCHEDULE 1

[section 36]

MODEL CO-OPERATIVE AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND [THE ASSISTING PARTY] TO PROVIDE CIVIL DEFENCE ASSISTANCE TO AUSTRALIA IN THE EVENT OF A NATIONAL EMERGENCY

The Government of Australia and the [THE ASSISTING PARTY] agree as follows:

1. Definitions

"***Assistance***" means action undertaken by pursuant to this agreement for the benefit of Australia with the aim of mitigating the consequences of a national emergency.

"***Civil Defence***" means the performance of some or all of the undermentioned humanitarian tasks intended to protect the population against the dangers, and to help it to recover from the immediate effects, of disasters and also to provide the conditions necessary for its survival. These tasks are:

(a) warning;

(b) evacuation;

(c) management of shelters;

(d) [DELETED],

(e) rescue;

(f) medical services, including first aid, and religious assistance;

(g) fire-fighting;

(h) detection and marking of danger areas;

(i) decontamination and similar protective measures;

(j) provision of emergency accommodation and supplies;

(k) emergency assistance in the restoration and maintenance of order in distressed areas;

(l) emergency repair of indispensable public utilities;

(m) emergency disposal of the dead;

(n) assistance in the preservation of objects essential for survival;

(o) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organisation.

"***National Emergency***" has the same meaning as it has in the *Emergency Act 20XX* (Cth).

2. Objects

(*Model Bilateral Agreement in the Matter of Civil Defence,* art 2)

The present agreement defines the conditions under which [THE ASSISTING PARTY] offers, and Australia accepts, assistance in the matter of Civil Defence.

3. Methods of engagement

((*Model Bilateral Agreement in the Matter of Civil Defence,* art 4; *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [10(1)])

(1) Any request for assistance will be addressed to [THE ASSISTING PARTY] by Emergency Management Australia. It will define the nature and extent of the assistance requested, as well as the characteristics of the aid, which is being requested. [THE ASSISTING PARTY] will within the shortest possible time, analyse the request and inform Emergency Management Australia as to whether it is able to assist.

(2) [THE ASSISTING PARTY] can spontaneously put forward an offer of assistance to Emergency Management Australia which will, within the shortest possible time, analyse the offer and inform [THE ASSISTING PARTY] as to whether assistance is required and whether or not the offer is accepted.

(3) Emergency Management Australia can accept or refuse all, or part of, the offer put forward by [THE ASSISTING PARTY].

4. Entry into Australia

(*Model Bilateral Agreement in the Matter of Civil Defence*, art 5; *Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces*, art 6; *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [16])

(1) The Government of Australia agrees to limit to the indispensable minimum, formalities applicable to members of [THE ASSISTING PARTY] entering into Australia for the purpose of providing Civil Defence assistance in accordance with this agreement.

(2) Members of [THE ASSISTING PARTY] shall be exempt from any requirement to apply for a visa or entry permit on entering and departing Australia.

(3) The Australian Government shall permit members of [THE ASSISTING PARTY] to enter into or depart from Australia on official duty, on the basis of:

(a) a personal identity card issued by [THE ASSISTING PARTY] showing the full name, date of birth, official position and photograph;

(b) an individual or collective travel document issued by [THE ASSISTING PARTY] identifying the individual or group as a member or members of [THE ASSISTING PARTY] and authorising the travel; and

(c) if applicable, such documents as may be issued by the [THE ASSISTING PARTY] in satisfaction of the national health and quarantine requirements of Australia.

(5) Nothing in this agreement shall confer upon any member of [THE ASSISTING PARTY] any right to permanent residence or domicile in Australia.

(6) If any person, other than a national of, or a person otherwise entitled to remain in, Australia ceases to be a member of [THE ASSISTING PARTY], the Authorities of [THE ASSISTING PARTY] shall:

(a) promptly inform Emergency Management Australia giving such reasonable particulars as they may require;

(b) promptly take reasonable steps to effect the departure of that person from Australia, if so required by the Emergency Management Australia; and

(c) meet any reasonable costs incurred by Australia in removing that person from Australia.

(7) If the removal from Australia of a member of [THE ASSISTING PARTY] is:

(a) requested by Emergency Management Australia; or

(b) required by Australian law,

[THE ASSISTING PARTY] shall:

(c) promptly take reasonable steps to effect the departure of that person from Australia; and

(d) meet any reasonable costs incurred by Australia in removing that person from Australia.

(8) [THE ASSISTING PARTY] shall inform Emergency Management Australia, giving such reasonable particulars as may be required, of any members of [THE ASSISTING PARTY] who, after having been admitted into Australia, absent themselves for a period in excess of forty-eight hours, otherwise than on approved leave.

5. Import and export

(*Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces*, art 7; *Guidelines for the Domestic*

Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance [17])

(1) In this article

(a) "***Duty***" means a tax (including sales tax, customs duty, excise duty or excise equivalent duty and goods and services tax), fee, charge or levy imposed on the Import or Export of Goods by the Authorities of the Receiving State, except fees, charges or levies for services rendered;

(b) "***Export***" in relation to Goods, means the transportation of the Goods from the territory of Australia to a point outside the territory of Australia;

(c) "***Goods***" means any moveable tangible property, but does not include money; and

(d) "***Import***" in relation to Goods, means the transportation of the Goods to Australia from a point outside the territory of Australia.

(2) Goods belonging to [THE ASSISTING PARTY] or to members of [THE ASSISTING PARTY] may be imported into Australia Duty free.

(3) Goods which have been Imported free of Duty under paragraph (2) of this Article:

(a) may be Exported free of Duty; and

(b) may not be disposed of in Australia, whether by sale or otherwise, without the express approval of Emergency Management Australia.

(4) [THE ASSISTING PARTY] must not bring goods other than equipment and rescue materials necessary for the success of the assistance mission.

(8) The importation of narcotics into Australia in the case of medical emergency and the exportation of the unused quantity, are not considered as "importation" and "exportation" within the sense of existing international agreements covering narcotics or the *Customs Act* (Cth). Narcotics must only be imported to meet the needs of medical emergencies and must be used solely by qualified personnel. The [THE ASSISTING PARTY] must deliver to Australian Customs a declaration itemising the type and quantity of these drugs.

6. Respect for law

(*Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces*, art 2; *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [4])

(1) Except as otherwise provided in this agreement or by operation of law, members of [THE ASSISTING PARTY] shall be subject to Australian law while in Australian territory.

(2) [THE ASSISTING PARTY] shall take appropriate measures to ensure that members:

(a) respect Australian law; and

(b) abstain from any activity inconsistent with this agreement.

7. Wearing of uniforms

Members of the [THE ASSISTING PARTY] may wear their uniform, tabards or distinctive logo, if any, while in Australia.

8. Driving licences and official vehicles

(*Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces*, art 11; *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [16(1)(c)] and [18(1)]).

(1) For the purposes of this Article, the expression "Official Vehicle" means a vehicle, including a hired vehicle, which is exclusively in the service of [THE ASSISTING PARTY.

(2) Australia shall accept as valid, without a driving test or fee, the driving permit or licence issued by the country where a member of [THE ASSISTING PARTY] is ordinarily resident for the purpose of driving Official Vehicles in the course of his or her official duty.

(3) Official Vehicles of [THE ASSISTING PARTY], excluding vehicles hired in Australia, shall carry their registration number issued by the authorities of the country in which they are registered and a distinctive nationality mark but shall not be required to be registered in any Australian State or Territory.

9. The use of aircraft

((*Model Bilateral Agreement in the Matter of Civil Defence*, art 6; *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [18])

(1) Aircraft may be used to accomplish a requested assistance mission.

(2) The intention to use aircraft must be communicated immediately to Emergency Management Australia, with as precise an indication as possible as to the type and registration of aircraft, the composition of the team of persons on board, of equipment, time of take-off, the route to be taken, and the place of landing.

(3) [THE ASSISTING PARTY] will be exempt from payment of taxes and dues concerned with the flying over, landing, stationing and taking off of aircraft, and likewise are exempted from the payment of air navigation services.

10. Management coordination and maintenance

((*Model Bilateral Agreement in the Matter of Civil Defence*, art 7; *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [3])

(1) The coordination and management of operations carried out in accordance with this agreement are the responsibility of the incident controller as determined by relevant State, Territory or Commonwealth law.

(2) [THE ASSISTING PARTY] shall act in accordance with any direction or requirement imposed by the incident controller.

11. Security

(*Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces*, art 10; *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [22]).

(1) The Australian Government shall cooperate with [THE ASSISTING PARTY] to take such steps as may from time to time be necessary to ensure the security of:

(a) the installations, vessels, aircraft, materiel and official information of [THE ASSISTING PARTY]; and

(b) the members of [THE ASSISTING PARTY], and their property.

12. Communications

(*Agreement between the Government of Australia and the Government of New Zealand Concerning the Status of their Forces*, art 12; *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [18(2)]).

The members of [THE ASSISTING PARTY] may, in accordance with arrangements with Emergency Management Australia, operate communications systems for official communications. The operation of such systems shall not be exercised in a manner likely to interfere with communication systems licensed to operate in Australia.

13. Termination

(*Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [12]).

(1) The Civil Defence assistance mission may be terminated by either Australia or [THE ASSISTING PARTY] providing reasonable notice, in writing, that the mission is to be terminated.

(2) In determining what is reasonable, regard shall be had to;

(a) the needs of the community;

(b) whether the services being provided by [THE ASSISTING PARTY] can be provided by alternative providers;

(c) whether there has been misconduct, fraud or impropriety by [THE ASSISTING PARTY]; and

(d) whether a declaration of a national emergency remains in force and the terms of that declaration, if any.

14. Compensation and expenses

(*Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* [24]).

(1) The expenses related to assistance shall be met by [THE ASSISTING PARTY].

(2) Subject to article (3) below, Australia shall indemnify and hold safe [THE ASSISTING PARTY] for any claims for or in respect of anything done or

omitted to be done, or purported to be done or omitted to be done, in good faith under the *Emergency Act 20XX* (Cth) or this agreement.

(3) [THE ASSISTING PARTY] shall reimburse to the Government of Australia the value of any claim paid for damage that was caused intentionally, or through gross negligence, on the part of a member of [THE ASSISTING PARTY].

15. Resolution of disputes

Any disputes between the parties on the interpretation or application of this agreement shall be resolved by consultation and negotiation however the provision of Assistance and the interpretation of this agreement shall be subject to Australian law.

The Federal Court of Australia shall have jurisdiction to determine matters arising from this agreement or any assistance mission arising from this agreement.

16. Amendment

This agreement may be amended by mutual agreement of the parties in writing.

CONCLUSION

The model Act and its associated bilateral agreement that has been proposed deals, either specifically or by implication, with nearly all of the matters raised in the IDRL Guidelines and that are appropriate for a domestic legislature. It does not attempt to impose obligations upon other countries and does not deal with some matters that are more appropriately dealt with in specific areas of law, for example tax law and the law relating to the fraudulent use of funding. Where the Act does not specifically deal with matters, by establishing the role of the national coordinator and empowering the coordinator to direct government agencies and to waive compliance with law where that would otherwise hinder the disaster response, then a process to make the necessary adjustments is established. An Act such as this would ensure that Australian law would facilitate the delivery of international disaster assistance should that be required.

As a potential donor of disaster assistance Australia is already a significant donor and has in place good procedures to ensure the quality of Australian aid. It is argued here that further legislation in this area is not required. The model Act could however serve as a model for other countries and, more importantly, the model bilateral agreement could be used by Australia and Australian agencies as a model for agreements with the governments of disaster-affected States to ensure that Australian aid workers and relief efforts can proceed. It is of course up to the governments of affected countries to determine what best suits their needs and the terms and conditions upon which assistance will be accepted.

CHAPTER NINE
CONCLUSION

Australia has managed to deal with the various emergencies and disasters that have occurred without significant international assistance. Although 'crisis management' by the Commonwealth has generally been done well 'on the day',[1] there is no doubt that there are gaps in Australia's legal arrangements that will expose the Australian community to risk of sub-optimal disaster response in the event of a catastrophic disaster. The problems that occur in international disaster response are well known, identified and tend to recur, so Australia has the opportunity to adopt laws and policies that would facilitate international disaster response if an extremely unlikely, but devastating, natural disaster were to occur on Australian territory.

The International Red Cross and Red Crescent Movement has identified the common problems of international disaster response in their IDRL Desk Study,[2] and have provided states with a tool, in the form of the *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (the 'IDRL Guidelines').[3]

This thesis has reviewed the law that applies to, and in, Australia to identify how Australia's legal position meets the standards suggested in the IDRL Guidelines. The law that applies 'to' Australia is international law. That is international law of general application between states and specific convention law where Australia has voluntarily entered into international obligations relevant to disaster relief. The law that applies 'in' Australia is Commonwealth and state and territory law. A review of these provisions demonstrated that, at least the Commonwealth level, Australia is not adequately prepared to deal with a catastrophic disaster.

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1 Ric Smith, *Summary and Conclusions: Report of the Review of Homeland and Border Security*, Prime Minister of Australia <http://www.pm.gov.au/docs/20081204_review_homeland_security.rtf> at 6 March 2009, 2.

2 David Fisher, *Law and Legal Issues in International Disaster Response: A Desk Study* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007)

3 International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (International Federation of Red Cross and Red Crescent Societies, Geneva, 2007).

Australia lacks a 'comprehensive legal, policy, and institutional frameworks and planning for disaster prevention, mitigation, preparedness, relief and recovery'.[4] The Commonwealth disaster plan envisages that the Commonwealth's role will be reactive, to provide support to the states, rather than take a significant leadership role. Australia's disaster arrangements are largely silent on when and how international assistance may be sought, and the assumption in key planning documents and customs and immigration policy is that the normal rules will continue to apply during a disaster.

The review of Australian law and policy on sending disaster assistance showed similar weaknesses, in particular that disaster assistance can be sent from Australia without reference to the Commonwealth or the Commonwealth's overseas disaster assistance plan.[5] Notwithstanding this, the process of accreditation by AusAID of non-government organisations that can receive Australian disaster assistance funding will go a long way to meeting the objectives set out in the IDRL Guidelines and other reports on international disaster assistance.[6]

The recommendation from this thesis is that the Commonwealth should pass comprehensive counter-disaster legislation modelled on the legislation in the Australian states and territories, and in particular from Victoria and the Australian Capital Territory, and from overseas, in particular from Canada. Legislation could clarify the role of the Commonwealth and Commonwealth agencies and appoint a Commonwealth counter-disaster controller to manage the Commonwealth response to a catastrophic disaster. Sufficient safeguards can be established to ensure that emergency powers are only authorised when required and are subject to review by parliament. Pursuant to the legislation the Commonwealth should set out a standard form of agreement that can be entered into with assisting organisations (whether state-based or non-government organisations) that would allow them access to Australia and a disaster-affected population. A model

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4 Ibid [8.1].

5 Emergency Management Australia, *Australian Government Overseas Disaster Assistance Plan (AUSASSISTPLAN)* (Commonwealth of Australia, Canberra, 2002).

6 John Telford, John Cosgrave and Rachel Houghton, *Joint Evaluation of the international response to the Indian Ocean tsunami: Synthesis Report* (Tsunami Evaluation Coalition, London, 2006).

agreement, based on the model bilateral agreement prepared by the International Civil Defence Organisation[7] has been developed.

Many questions about a comprehensive *Emergency Act* are not dealt with here, as this thesis is concerned with international disaster response in the absence of armed conflict. The relationship between this sort of response, and the response to more traditional security threats, has not been canvassed. In developing legislation, the Commonwealth would need to consider whether it is better to have a single all-encompassing Act or whether it is better to follow the recommendation of the New Zealand Law Commission[8] and have 'sectoral legislation', that is a separate Act for each type of emergency. Due to the limitations inherent in this research project, and discussed in Chapter One, the recommendation here is for an Act that applies only during a natural disaster rather than civil unrest or violence.

The Act as drafted here does not deal with consequential amendments that may be required in other legislation, in particular in customs and migration law. The Act presented here will form the basis for discussion on the essential aspects of Commonwealth emergency law but again, given the limitations of this thesis, all the finer details to be incorporated into other, complimentary legislation, cannot and have not been developed.

Subject to these limitations and the limitations discussed in Chapter One it is intended that this thesis, and the model Commonwealth Act, may contribute to the debate on Australia's emergency preparations, and encourage the Commonwealth to look again at existing arrangements to ensure that Australia is legally prepared to deal with a catastrophic disaster. Failure to do so will mean that when disaster strikes, the community will not receive the optimal response that it is entitled to expect.

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7 International Civil Defence Organisation, *Model Bilateral Agreement in the Matter of Civil Defence* (International Civil Defence Organisation, Geneva, 2002).

8 New Zealand Law Commission, *First Report on Emergencies: Use of the armed forces* (Government of New Zealand, Wellington, 1990); New Zealand Law Commission, *Final Report on Emergencies* (Government of New Zealand, Wellington, 1991).

APPENDIX

THE INTERNATIONAL RED CROSS MOVEMENT'S IDRL GUIDELINES

Annex - Resolution 4

Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance

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Introduction

1. Purpose and scope

1. These Guidelines are non-binding. While it is hoped that States will make use of them to strengthen their laws, policies and/or procedures related to international disaster response, as appropriate, the Guidelines do not have a direct effect on any existing rights or obligations under domestic law.

2. They draw from many existing international instruments, including United Nations General Assembly Resolutions 46/182 of 1991 and 57/150 of 2002, the Measures to Expedite International Relief of 1977 and the Hyogo Framework for Action of 2005.

3. Their purpose is to contribute to national legal preparedness by providing guidance to States interested in improving their domestic legal, policy and institutional frameworks concerning international disaster relief and initial recovery assistance. While affirming the principal role of domestic authorities and actors, they recommend minimum legal facilities to be provided to assisting States and to assisting humanitarian organizations that are willing and able to comply with minimum standards of coordination, quality and accountability. It is hoped that the use of these Guidelines will enhance the quality and efficiency of international disaster relief and initial recovery assistance in order to better serve disaster-affected communities.

4. These Guidelines are not intended to apply to situations of armed conflict or to disasters that occur during armed conflicts, or to imply changes in any rules governing relief in those contexts. They are also not intended to recommend any changes to, or affect the meaning or implementation of, any existing international law or agreements, including but not limited to:
   a. International humanitarian, human rights and refugee law;
   b. The legal personality and status of States, inter-governmental organizations, the International Federation of Red Cross and Red Crescent Societies (International Federation) and the International Committee of the Red Cross (ICRC);
   c. International law related to privileges and immunities;
   d. The Statutes and regulations of the International Red Cross and Red Crescent Movement (Movement) and existing legal arrangements between the individual components of the Movement and States; and
   e. Existing agreements between States or between States and assisting actors.

2. Definitions

For the purposes of these Guidelines,

1. **"Disaster"** means a serious disruption of the functioning of society, which poses a significant, widespread threat to human life, health, property or the environment, whether arising from accident, nature or human activity, whether developing suddenly or as the result of long-term processes, but excluding armed conflict.
2. **"Disaster relief"** means goods and services provided to meet the immediate needs of disaster-affected communities.
3. **"Initial recovery assistance"** means goods and services intended to restore or improve the pre-disaster living conditions of disaster-affected communities, including initiatives to increase resilience and reduce risk, provided for an initial period of time, as determined by the affected State, after the immediate needs of disaster-affected communities have been met.
4. **"Goods"** means the supplies intended to be provided to disaster-affected communities for their relief or initial recovery.
5. **"Services"** means activities (such as rescue and medical care) undertaken by disaster-relief and initial-recovery personnel to assist disaster-affected communities.
6. **"Equipment"** means physical items, other than goods, that are necessary for disaster relief or initial recovery assistance, such as vehicles and radios.
7. **"Personnel"** means the staff and volunteers providing disaster relief or initial recovery assistance.
8. **"Affected State"** means the State upon whose territory persons or property are affected by a disaster.
9. **"Assisting State"** means a State providing disaster relief or initial recovery assistance, whether through civil or military components.
10. **"Originating State"** means the State from which disaster relief and initial recovery personnel, goods and equipment begin travel to the affected State.
11. **"Transit State"** means the State through whose territorial jurisdiction disaster relief or initial recovery assistance has received permission to pass on its way to or from the affected State in connection with disaster relief or initial recovery assistance.
12. **"Assisting humanitarian organization"** means a foreign, regional, inter-governmental or international non-profit entity whose mandate and activities are primarily focused on humanitarian relief, recovery or development.
13. **"Eligible assisting humanitarian organization"** means an assisting humanitarian organization determined to be eligible to receive legal

facilities pursuant to Part V by the originating, transit or affected State, as applicable.

14. **"Assisting actor"** means any assisting humanitarian organization, assisting State, foreign individual, foreign private company providing charitable relief or other foreign entity responding to a disaster on the territory of the affected State or sending in-kind or cash donations.

Part I: Core responsibilities

3. Responsibilities of affected States

1. Affected States have the primary responsibility to ensure disaster risk reduction, relief and recovery assistance in their territory. National Red Cross and Red Crescent Societies, as auxiliaries to the public authorities in the humanitarian field, and domestic civil society actors play a key supporting role at the domestic level.
2. If an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons.
3. Affected States have the sovereign right to coordinate, regulate and monitor disaster relief and recovery assistance provided by assisting actors on their territory, consistent with international law.

4. Responsibilities of assisting actors

1. Assisting actors and their personnel should abide by the laws of the affected State and applicable international law, coordinate with domestic authorities, and respect the human dignity of disaster-affected persons at all times.
2. Assisting actors should ensure that their disaster relief and initial recovery assistance are provided in accordance with the principles of humanity, neutrality and impartiality, and in particular that:
   a. Aid priorities are calculated on the basis of need alone;
   b. It is provided without any adverse distinction (such as in regards to nationality, race, ethnicity, religious beliefs, class, gender, disability, age and political opinions) to disaster-affected persons;
   c. It is provided without seeking to further a particular political or religious standpoint, intervene in the internal affairs of the affected State, or obtain commercial gain from charitable assistance;
   d. It is not used as a means to gather sensitive information of a political, economic or military nature that is irrelevant to disaster relief or initial recovery assistance.

3. To the greatest extent practicable, their disaster relief and initial recovery assistance should also be:

   a. Responsive to the special needs, if any, of women and particularly vulnerable groups, which may include children, displaced persons, the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses;
   b. Adequate for the needs of affected persons and consistent with any applicable international standards of quality;
   c. Coordinated with other relevant domestic and assisting actors;
   d. Provided and conducted in a manner that is sensitive to cultural, social and religious customs and traditions;
   e. Carried out with adequate involvement of affected persons, including women, youth and the elderly, in their design, implementation, monitoring and evaluation;
   f. Provided by competent and adequately trained personnel;
   g. Commensurate with their organizational capacities;
   h. Built upon and conducted in a manner that strengthens local disaster risk reduction, relief and recovery capacities and reduces future vulnerabilities to disasters;
   i. Carried out so as to minimize negative impacts on the local community, economy, job markets, development objectives and the environment; and
   j. Provided in a transparent manner, sharing appropriate information on activities and funding.

5. Additional responsibilities of all States

1. States providing funding to other assisting actors should encourage them to act in a manner consistent with the provisions of paragraph 4.
2. All States should actively encourage members of the public interested in contributing to international disaster relief or initial recovery to make financial donations where possible or otherwise donate only those types of relief goods expressly requested by the affected State.

6. Responsibilities concerning diversion and the intended use of resources

1. States and assisting humanitarian organizations should cooperate to prevent unlawful diversion, misappropriation, or fraud concerning disaster relief or initial recovery goods, equipment or resources and initiate proceedings as appropriate.
2. Affected States should use funds and relief goods donated to them, and which they have accepted in relation to a disaster, in a manner consistent with the expressed intent with which they were given.

Part II: Early warning and preparedness

7. Early warning

1. In order to minimize transboundary impacts and maximize the effectiveness of any international assistance that might be required, all States should have procedures in place to facilitate the expeditious sharing of information about disasters, including emerging hazards that are likely to cause disasters, with other States and assisting humanitarian organizations as appropriate, including the United Nations Emergency Relief Coordinator.

8. Legal, policy and institutional frameworks

1. As an essential element of a larger disaster risk reduction programme, States should adopt comprehensive legal, policy, and institutional frameworks and planning for disaster prevention, mitigation, preparedness, relief and recovery which take full account of the auxiliary role of their National Red Cross or Red Crescent Society, are inclusive of domestic civil society, and empower communities to enhance their own safety and resilience. States, with the support, as appropriate, of relevant regional and international organizations, should devote adequate resources to ensure the effectiveness of these frameworks.
2. These frameworks should also adequately address the initiation, facilitation, transit and regulation of international disaster relief and initial recovery assistance consistent with these Guidelines. They should allow for effective coordination of international disaster relief and initial recovery assistance, taking into account the role of the United Nations Emergency Relief Coordinator as central focal point with States and assisting humanitarian organizations concerning United Nations emergency relief operations. They should also clearly designate domestic governmental entities with responsibility and authority in these areas. Consideration should be given to establishing a national focal point to liaise between international and government actors at all levels.
3. Where necessary and appropriate, national governments should encourage other domestic actors with authority over areas of law or policy pertinent to international disaster relief or initial recovery assistance, such as provincial or local governments and private regulatory bodies, to take the necessary steps at their level to implement the Guidelines.

9. Regional and international support for domestic capacity

1. With a view to increasing resilience and reducing the need for international disaster relief and initial recovery assistance, the international community, including donors, regional and other relevant actors, should support developing States, domestic civil society actors and National Red Cross and

Red Crescent Societies to build their capacities to prevent, mitigate, prepare for and respond to disasters domestically.

2. The international community should also support developing States to build their capacity to adequately implement legal, policy and institutional frameworks to facilitate international relief and initial recovery assistance. This support should be provided to States in a coordinated manner by the relevant actors.

Part III: Initiation and termination of international disaster relief and initial recovery assistance

10. Initiation

1. Disaster relief or initial recovery assistance should be initiated only with the consent of the affected State and, in principle, on the basis of an appeal. The affected State should decide in a timely manner whether or not to request disaster relief or initial recovery assistance and communicate its decision promptly. In order to make this decision, the affected State should promptly assess needs. Consideration should be given to undertaking joint needs assessments with the United Nations and other assisting humanitarian organizations.
2. Requests and offers for assistance should be as specific as possible as to the types and amounts of goods as well as the services and expertise available or required, respectively. Affected States may also wish to indicate particular types of goods and services likely to be offered that are not needed.
3. Affected States should make available to assisting actors adequate information about domestic laws and regulations of particular relevance to the entry and operation of disaster relief or initial recovery assistance.

11. Initiation of military relief

Military assets should be deployed for disaster relief or initial recovery assistance only at the request or with the express consent of the affected State, after comparable civilian alternatives have been considered. Prior to any such deployment, terms and conditions (including such issues as the duration of deployment, whether they must be unarmed or may be armed, the use of their national uniforms, and mechanisms for cooperation with civilian actors) are to be agreed by the affected and assisting States.

12. Termination

When an affected State or an assisting actor wishes to terminate disaster relief or initial recovery assistance, it should provide appropriate

notification. Upon such notification, the affected State and the assisting actor should consult with each other, bearing in mind the impact of such termination on disaster affected communities.

Part IV: Eligibility for legal facilities

13. Facilities for assisting States

It is recommended that transit and affected States grant, at a minimum, the legal facilities described in Part V to assisting States with respect to their disaster relief or initial recovery assistance.

14. Facilities for assisting humanitarian organizations

1. Subject to existing international law, it is the prerogative of originating, transit and affected States to determine which assisting humanitarian organizations will be eligible to receive the legal facilities described in Part V with respect to their disaster relief or initial recovery assistance.
2. It is recommended that States establish criteria for assisting humanitarian organizations seeking eligibility for legal facilities. These criteria should include a showing by the organization of its willingness and capacity to act in accordance with the responsibilities described in paragraph 4 of these Guidelines.
3. Any additional requirements imposed on assisting humanitarian organizations should not unduly burden the provision of appropriate disaster relief and initial recovery assistance.
4. Determination of eligibility by the State granting the facilities should be possible in advance of a disaster, or as soon as possible after its onset. Applicable procedures and mechanisms should be as simple and expeditious as possible. They should be clearly described and information about them should be made freely available. They might include the use of a national roster, bilateral agreements or reliance upon international or regional systems of accreditation, if available.
5. Retention of the legal facilities in Part V should be made dependent on ongoing compliance with the provisions of subsection 2 of this paragraph. However, entitlement to legal facilities should not be changed arbitrarily, retroactively or without notice appropriate to the circumstances.

15. Facilities for other assisting actors

Affected States may also wish to extend, upon request, some of the legal facilities in Part V to assisting actors other than those covered by paragraphs 13 and 14, such as private companies providing charitable

relief, provided this does not negatively affect operations of assisting humanitarian organizations or assisting States. Any actor receiving such facilities should be required to abide, at a minimum, by the same conditions described in paragraph 14.

Part V: Legal facilities for entry and operations

It is recommended that States provide the legal facilities described in paragraphs 16-24 to assisting States and eligible assisting humanitarian organizations. It is understood that the granting of these facilities will be subject to the interests of national security, public order, public and environmental health, and public morals of the concerned affected, originating and transit States. Measures to protect such interests should be tailored to the exigencies of the specific disaster and be consistent with the humanitarian imperative of addressing the needs of affected communities.

Where specific facilities recommended here are within the competence of authorities other than the national government, the national government should, where possible and appropriate, encourage those authorities to provide the relevant facilities to assisting States and eligible assisting humanitarian organizations.

16. Personnel

1. With regard to disaster relief and initial recovery personnel of assisting States and eligible assisting humanitarian organizations, affected States should:

   a. Grant visas and any necessary work permits, ideally without cost, renewable within their territory, for the time necessary to carry out disaster relief or initial recovery activities;
   b. In disaster relief operations, waive or significantly expedite the provision of such visas and work permits;
   c. Establish expedited procedures for temporary recognition of professional qualifications of foreign medical personnel, architects, and engineers, driving licences and other types of licence and certificate that are necessary for the performance of disaster relief or initial recovery functions and that have been certified as genuine by the concerned assisting State or eligible assisting humanitarian organization, for the time necessary to carry out disaster relief or initial recovery activities;
   d. Facilitate freedom of access to and freedom of movement in and from the disaster affected area, bearing in mind the safety of disaster relief and initial recovery personnel.

2. Upon request, originating and transit States should likewise waive or promptly issue, ideally without cost, exit or transit visas, as appropriate, for the disaster relief and initial recovery personnel of eligible assisting humanitarian organizations.

3. Assisting States and eligible assisting humanitarian organizations should consider to what degree disaster relief and initial recovery objectives can be met through hiring local staff.

17. Goods and equipment

1. With regard to disaster relief and initial recovery goods and equipment exported or imported by, or on behalf of, assisting States and eligible assisting humanitarian organizations, originating, transit and affected States should:
   a. Exempt them from all customs duties, taxes, tariffs and governmental fees;
   b. Exempt them from all export, transit, and import restrictions;
   c. Simplify and minimize documentation requirements for export, transit and import;
   d. Permit re-exportation of any equipment or unused goods which the assisting State or assisting humanitarian organization owns and wishes to retain.

2. With regard to disaster relief goods and equipment only, originating, transit and affected States should additionally:
   a. Waive or reduce inspection requirements; where waiver is not possible, clear relief goods and equipment rapidly and as a matter of priority, through a pre-clearance process where feasible; and
   b. Arrange for inspection and release outside business hours and/or at a place other than a customs office, as necessary, to minimize delay, in accordance with the safety regulations of the affected State. Assisting States and eligible assisting humanitarian organizations should respect any routes and delivery points prescribed by the affected State.

3. In order to benefit from the above facilities, assisting States and assisting humanitarian organizations should, in accordance with agreed international standards, appropriately pack, classify and mark disaster relief and initial recovery goods and equipment, and include detailed manifests with each shipment. They should additionally inspect all such goods and equipment to ensure their quality, appropriateness for the needs in the affected State, and conformity with the national law of the affected State and international standards.

4. Assisting States and eligible assisting humanitarian organizations should assume responsibility for removing or disposing of any unwanted and unused disaster relief and initial recovery goods, particularly if they may pose a threat to human health or safety, or to the environment.

18. Special goods and equipment

In addition to the facilities described in paragraph 17:

1. Affected States should grant temporary recognition to foreign registration and plates with regard to vehicles imported by assisting States and eligible assisting humanitarian organizations or on their behalf in disaster relief and initial recovery assistance.

2. Affected States should waive or expedite the granting of any applicable licences and reduce any other barriers to the use, import or export of telecommunications and information technology equipment by assisting States and assisting humanitarian organizations, or on their behalf, in disaster relief and initial recovery assistance. Without discrimination against or negative impact to domestic relief actors, affected States should also grant (or, where appropriate, encourage other domestic actors to grant) assisting States and eligible assisting humanitarian organizations priority access to bandwidth, frequencies and satellite use for telecommunications and data transfer associated with disaster relief operations.

3. Originating, transit and affected States should reduce legal and administrative barriers to the exportation, transit, importation and re-exportation of medications and medical equipment by assisting States and eligible assisting humanitarian organizations, or on their behalf, in disaster relief and initial recovery assistance, to the extent consistent with public safety and international law. Assisting States and eligible assisting humanitarian organizations should take all reasonable steps to ensure the quality, appropriateness and safety of any such medications and equipment and in particular:

   a. Any medications they import should be approved for use in the originating and affected States;

   b. Medications they use in their own operations should be:

      i. transported and maintained in appropriate conditions to ensure their quality and;

      ii. guarded against misappropriation and abuse.

   c. Any medications they donate for use by others in the affected State should be:

      i. at least 12 months from their expiry date upon arrival, unless otherwise agreed by the receiving authorities;

      ii. transported and maintained in appropriate conditions to ensure their quality until they reach the affected State; and

      iii. appropriately labelled in a language understood in the affected State with the International Nonproprietary Name or generic name,

batch number, dosage form, strength, name of manufacturer, quantity in the container, storage conditions and expiry date.

4. Originating, transit and affected States should consider whether normal requirements regarding fumigation and prohibitions and restrictions on food imports and exports by assisting States and eligible assisting humanitarian organizations in disaster relief operations can be modified or reduced.

19. Transport

1. Originating, transit and affected States should grant, without undue delay, permission for the speedy passage of land, marine and air vehicles operated by an assisting State or eligible assisting humanitarian organization, or on its behalf, for the purpose of transporting disaster relief or initial recovery assistance and, ideally, waive applicable fees.
2. In particular, permission should be granted for overflight, landing and departure of aircraft. Such aircraft should also be authorized to operate within the territory of the affected State as required for the delivery of assistance.
3. Any applicable exit, transit and entry visas for the operating personnel of such transport vehicles should be promptly issued.

20. Temporary domestic legal status

1. Affected States should grant relevant entities of assisting States and eligible assisting humanitarian organizations, upon entry or as soon as possible thereafter, at least a temporary authorization to legally operate on their territory so as to enjoy the rights, *inter alia*, to open bank accounts, enter into contracts and leases, acquire and dispose of property and instigate legal proceedings, for the purpose of providing disaster relief and initial recovery assistance.
2. Assisting States and eligible assisting humanitarian organizations should also be granted the right to freely bring the necessary funds and currencies in or out of the country through legal means and to obtain legal exchange rates in connection with their disaster relief or initial recovery assistance.
3. Affected States should allow assisting States and eligible assisting humanitarian organizations to legally hire and terminate the contracts of local personnel.

21. Taxation

Affected States should provide exemptions to assisting States and eligible assisting humanitarian organizations from value-added and other taxes or duties directly associated with disaster relief and initial recovery assistance.

22. Security

Affected States should take appropriate measures to address the safety and security of disaster relief and initial recovery personnel of assisting States and eligible assisting humanitarian organizations and of the premises, facilities, means of transport, equipment and goods used in connection with their disaster relief or initial recovery assistance. Assisting States and assisting humanitarian organizations should also take appropriate steps in their own planning and operations to mitigate security risks.

23. Extended hours

Affected States should endeavour to ensure, when necessary, that State-operated offices and services essential to the timely delivery of international disaster relief function outside of normal business hours.

24. Costs

1. The costs of providing international disaster relief or initial recovery assistance pursuant to these Guidelines should normally be borne by the assisting State or assisting humanitarian organization. However, assisting States may agree in advance with the affected State for the reimbursement of certain costs and fees, or for the temporary loan of equipment.
2. Affected States should consider, when it is in their power and to the extent possible under the circumstances, providing certain services at reduced or no cost to assisting States and eligible assisting humanitarian organizations, which may include:
   a. In-country transport, including by national airlines;
   b. Use of buildings and land for office and warehouse space; and
   c. Use of cargo handling equipment and logistic support.

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ADDENDUM

This thesis has considered Australia's legal framework for dealing with an international response to a natural disaster in the absence of armed conflict. The reason for limiting the discussion to cases where there was no armed conflict was discussed in chapter one (pp 20-21).

In assessing Australia's legal position, Australian law and policy has been measured against the *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* adopted by the Red Cross/Red Crescent Movement. Those guidelines have restricted application. They

> … are not intended to apply to situations of armed conflict or disasters that occur during armed conflicts, or to imply changes in any rules governing relief in those contexts. They are also not intended to recommend any changes to, or affect the meaning or implementation of, any existing international law or agreements …[3]

Notwithstanding the limited scope of the thesis and the limited application of the guidelines, the thesis includes (at pp 90-96) a discussion on arguments for and against the right of the international community to intervene, with force, to prevent humanitarian crises and in particular, human caused humanitarian crises.

It is acknowledged that the international community has kept issues of disaster management distinct from international humanitarian law. International humanitarian law is governed by binding international conventions (in particular the 1945 Geneva Conventions and their Additional Protocols) and established customary international law.

The material dealing with the law of armed humanitarian intervention is not intended as a complete exposition of the law in this area. It is acknowledged that this is a highly contentious area of law and the links with IDRL should not be overemphasised. The issue of armed humanitarian intervention is raised simply to draw an argument by analogy, and to show that the arguments both for, and against armed intervention, do not conclusively determine whether or not there is a right to intervene to provide natural disaster relief in the absence of armed conflict and without the consent of the affected state. It is because this argument is unresolved that the thesis then goes on to explore the issue further.

Michael Eburn
13 August 2009.

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[3] International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (2007) [1.4].