Catastrophic Loss and the Law: A Comparison between 2009 Victorian Black Saturday Fires and 2011 Queensland Floods and Cyclone Yasi

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Abstract

This article explores insurability relating to loss occasioned by catastrophic events in Australia in the context of the current legal regulatory regime. The analysis includes two case studies, in which we juxtapose the Victorian Black Saturday fires in February 2009 with the Queensland flooding and Cyclone Yasi (December 2010 – February 2011). We argue that the different responses to, and economic losses stemming from, these events illustrate the urgent need for a national regulatory and insurance regime for the prevention and alleviation of disasters and the management of their consequences.

I DEFINING A CATASTROPHE

The Council of Australian Governments has used the term 'catastrophic loss' in reference to losses occasioned by such natural disasters as bushfires, cyclones, storms, floods earthquakes and landslides.[1] In insurance law, the term 'catastrophe' has the industry specific meaning of an infrequent occurrence of a natural or man-made disaster resulting in a disproportionately high number of insurance losses.[2] A catastrophic event can either be one single event or a multitude of smaller events. In the latter case it is usual for insurance cover[3] to contain an 'hours clause'

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[1] Insurance Council of Australia and Council of Australian Governments, 'Natural Disasters in Australia: Reforming Mitigation, Relief and Recovery Arrangements', August 2002, vii; Karl Sullivan, 'Policy Implications of Future Increases in Extreme Weather Events due to Climate Change' (2008) 23 *The Australian Journal of Emergency Management* 37, 37.

[2] Ibid.

[3] *Insurance Contracts Regulations 1985* (Cth) reg 29C(1) specifies that 'prescribed contracts' include:
(a) home building insurance contracts …;
(b) home contents insurance …;
(c) insurance contracts that combine home building insurance and home contents insurance;

which renders a similar pattern of events occurring within a certain defined period (usually 72 hours) as part of the same overall occurrence.[4] In economic terms, a catastrophic loss or 'natural disaster can be defined as a natural event that causes a perturbation to the functioning of the economic system with significant economic impact on assets, production factors, output, employment or consumption.'[5]

Apart from natural disasters caused by *vis major*,[6] catastrophic losses and injuries tend to attract tortious liability and the potential for significant insurance payouts.[7] Australia has always been a land of extreme weather

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(d) contracts that provide insurance cover (whether or not the cover is limited or restricted in any way) in respect of destruction of or damage to a strata title residence;
(e) contracts that provide insurance cover (whether or not the cover is limited or restricted in any way) in respect of the loss of the equipment, stock, inventory or premises of a small business;
(f) contracts that provide insurance cover (whether or not the cover is limited or restricted in any way) in respect of damage to the equipment, stock, inventory or premises of a small business.

[4] *Under the Insurance Contracts Regulations 1985* (Cth) reg 29D, for the purpose of prescribed contracts, 'flood' is defined' as 'the covering of normally dry land by water that has escaped or been released from the normal confines of any of the following:
(a) a lake (whether or not it has been altered or modified);
(b) a river (whether or not it has been altered or modified);
(c) a creek (whether or not it has been altered or modified);
(d) another natural watercourse (whether or not it has been altered or modified);
(e) a reservoir;
(f) a canal;
(g) a dam.
A typical 'hours clause' in respect of flood would read: with respect to the perils of flood, any and all losses from this cause within a seventy two (72) hour period shall be deemed to be one loss in-so-far as the limit of liability and deductible provisions of this contract are concerned.

[5] Stephane Hallegatte and Valentin Przyluski, 'The Economics of Natural Disaster Concepts and Methods' (Policy Research Working Paper No 5507, The World Bank, December 2010) 1, 2.

[6] The term 'vis major', or 'act of God' refers to natural events outside of human control: sudden floods, earthquakes, cyclone or tsunami, for which no party can be held responsible.

[7] See for example, *Mercieca v SPI Electricity Pty Ltd*; *SPI Electricity & Ors v Eagle Travel Tower Services Pty Ltd & Ors* [2012] VSC 204. In this case the Supreme Court of Victoria approved a settlement of $32.85 million dollars in a class action by 25 victims of the Beechworth area bushfire on 7 February 2009 (the bushfires, which raged through South-Eastern Victoria on that day, are collectively referred to as the 'Black Saturday',) and the providers of electricity to the Beechworth area (the Beechworth fire started within a few meters of electricity pole). The Settlement Sum represented 45% of the estimated total loss $73 million suffered across the entire class of claimants (at [22]). Other settlements of class actions relating to bushfires included *Thomas v Powercor* [2011] VSC 614; *Powercor Australia Limited v Thomas* [2012] VSCA 87 (Horsham bushfire: the settlement included payment of 55% of each claimant's losses, together with penalty interest from the date of issue of the proceeding plus party-party costs) and *Perry v Powercor* [2012] VSC 113 (Coleraine bushfire: settlement involving the payment of 55% of each claimant's losses, together with penalty interest from the date of issue of the proceeding plus party-party costs).

events, especially fire, floods and cyclones. With the population growth and rapid urbanisation, severe events, which in the past merely affected the natural environment, involve human loss and destroy extensive personal property and public infrastructure. For example, in Victoria, the Black Thursday fires of 6 February 1851, which spread over approximately 5,000,000 hectares resulted in 12 fatalities (one million sheep and thousands of cattle perished). In the Black Friday fires of 13 January 1939, which burnt 2,000,000 hectares of land, 71 people died and some 1,300 homes and 69 sawmills were destroyed. Only 70 years later, in the 7 February 2009 Black Saturday fires, which burnt 450,000 hectares in more or less the same area as the 1939 fire, 173 people died as a result of the fires, while 2,030 houses and more than 3,500 structures were destroyed.[8]

In recent years, different parts of Australia have experienced large scale natural disasters resulting in billions of dollars of losses to the economy. For example, the risk modeling firm, EQECAT,[9] (Insurance Day Boardroom Briefing, 2011), estimated that the cost of floods and Cyclone Yasi in Queensland (December 2010- January 2011) amounted to $7.3 billion in overall losses with $2.37 billion in insured losses. EQECAT suggested that there was a further $2 billion insurance losses arising from Cyclone Yasi which has subsequently been branded the costliest South Pacific cyclone in 2011.[10]

The insured losses from Black Saturday in Victoria during February 2009 exceeded $1.07 billion and total economic loss is estimated to be approximately $4 billion.[11] Significantly, the greatest proportion of the losses sustained were uninsured losses indicating the real problem of inadequate insurance in Australia.[12]

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[8] Victoria, *Royal Commission into the Victorian Bushfires of 2009*, Final Report (Summary) (2010) 1; 1939 Disasters: 1939 Fires, 1939 Natural Disasters, 1939 California Tropical Storm, Black Friday, 1939 St Louis Smog, 1939 Erzincan Earthquake (2010, General Books LLC).

[9] Insurance Day Boardroom Briefing and EQECAT, *The Five Largest Natural Catastrophes in the First Six Months of 2011* <http://www.eqecat.com/pdfs/insurance-day-briefing-catastrophe-risk-management-uncertainty-2011-09.pdf>.

[10] EQECAT, 'Webinar: 2011 Pacific Typhoon Season Recap' (2 February 2012) <http://www.eqecat.com/events/2011-pacific-typhoon-season-recap/>.

[11] Royal Commission into the Victorian Bushfires of 2009, above n 8.

[12] Insurance Council of Australia, *Insurance Council of Australia Historical and Current Data Statistics* (25 March 2011), <http://www.insurancecouncil.com.au/IndustryStatisticsData/CatastropheDisasterStatistics/tabid/1572/Default.aspx>. It has been suggested that overall the majority of losses occurring after a natural disaster are not covered by insurance. For example after the Brisbane Flooding in 1974 approximately 61.9% of the damage was not met by insurance: See JRG Butler and DP Doessel, 'Who Bears the Cost of Natural Disasters? An Australian Case Study' (1980) 4 *Disasters* 187, 192; The Institute of Actuaries of Australia has

Catastrophic natural events directly and indirectly affect the whole of society. Their consequences can be analysed in humanitarian, medical, economic, actuarial or sociological terms. However, it is also important to examine the way that catastrophic losses are currently regulated by statute, common law, insurance regimes, disaster relief schemes and taxation. The article compares the regulatory responses to the Black Saturday Victorian bushfires of 2009 and the Queensland floods and Cyclone Yasi of 2011, in the context of the existing federal and state regulatory natural disaster relief regimes and makes recommendations for their more effective operation and necessary reform.

II BROAD COMMONWEALTH CONSTITUTIONAL POWER TO DEAL WITH CATASTROPHIC EVENTS

Australia is a federation whereby the federal government can only exercise powers that are conferred upon it either under the *Australian Constitution*, such as the power to impose taxation under s 55, or by way of referral from the states under special constitutional arrangements.[13] Amongst the powers specifically enumerated in the *Constitution* that enable the Commonwealth to legislate with respect to certain subject matters over which the states also have legislative authority is s 51(xiv). It grants the Federal Parliament the power to legislate in the area of insurance, other than state insurance.[14] Pursuant to s 51(xiv), the Commonwealth Parliament enacted the *Insurance Contracts Act 1984* (Cth), which governs all insurance and indemnity contracts in Australia (except those listed in s 9 of the Act);[15] insurance brokers are regulated

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suggested that commonly 50% of losses from a disaster will be borne by someone other than an insurer: See Institute of Insurance Actuaries of Australia, Submission to Garnaut Climate Review, *Garnaut Climate Change Review*, 3 March 2011, 1, 2 – 6. It has been suggested that the actual losses can represent on average up to three times the insured losses for hailstorm and bushfire, up to five times for tropical cyclones and up to ten times greater for floods: See Michael Wilkins, 'The Need of a Multi-Level Approach to Climate Change- An Australian Insurance Perspective' (2010) 35 *The Geneva Papers: The International Association for the Study of Insurance Economics* 336, 338.

[13] *Australian Constitution* s 51(xxxviii); *Australia Act 1986* (Cth).

[14] *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1; *Attorney-General (Vic) v Andrews (Optus case)* (2007) 230 CLR 369.

[15] By virtue of s 9, the *Insurance Contracts Act 1984* (Cth) 'does not apply to or in relation to contracts and proposed contracts-

(a) of reinsurance;

(b) of insurance entered into, or proposed to be entered into, by a registered health benefits organization, as an insurer, in respect of its business as a registered organization within the meaning of Part VI of the *National Health Act 1953*;

(c) of insurance entered into, or proposed to be entered into, by a friendly society or by the Export Finance and Insurance Corporation;

(d) to or in relation to which the *Marine Insurance Act 1909* applies; or under special provisions relating to insurance of the *Corporations Act 2001* (Cth).[16] Insurance companies have prudential and regulatory obligations imposed upon them under the *Insurance Act 1973* (Cth).

III STATE AND TERRITORY REGIMES IN RELATION TO CATASTROPHIC EVENTS

Each Australian state and territory has a discrete statutory regime dealing with planning for, management of and response to natural disasters including relief for the victims of catastrophic events.[17]

The terms 'disaster' and 'emergency' refer to similar catastrophic events, but are somewhat differently defined, with the emphasis on the immanency or actuality in the notion of emergency. In the Northern Territory, Queensland and Western Australia the term disaster is employed whereas in the Australian Capital Territory, New South Wales, South Australia, Tasmania and Victoria the term emergency is employed.[18] Although none of the state legislation refers to catastrophe or catastrophic losses, these are encompassed within the existing terminology and often employed in official documentation of an event.

The current system is predicated upon the provision of disaster relief *after* the event rather than the provision of resources to mitigate the

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(e) entered into or proposed to be entered into for the purposes of a law
(including a law of a State or Territory) that relates to-
workers' compensation; or
Compensation for the death of a person, or for injury to a person, arising out of the use of a motor vehicle.
(2) This Act does not apply to or in relation to contracts and proposed contracts of insurance entered into, or proposed to be entered into, in the course of State insurance or Northern Territory insurance, including contracts and proposed contracts entered into, or proposed to be entered into, by-
(a) a State or the Northern Territory; and
(b) some other insurer, as joint insurers.'

[16] *Corporations Act 2001* (Cth) ss 985A-D.

[17] *Emergency Management Act 2004* (SA); *Emergency Services Funding Act 1998* (SA); *Emergency Management Act 2006* (Tas); *Emergencies Act 2004* (ACT); *Disasters Act 1982* (NT); *Disaster Management Act 2003* (Qld); *State Emergency Service Act 1989* (NSW); *State Emergency and Rescue Management Act 1989* (NSW); *Emergency Management Act 1986* (Vic); *Victoria State Emergency Service Act 2005* (Vic); *Emergency Management Act 2005* (WA); *Fire and Emergency Services Authority of Western Australia Act 1998 (WA); Emergency Services Levy Act 2002* (WA).

[18] *Disaster: Disaster Act 1982* (NT) s 4; *Disaster Management Act 2003* (Qld) s 13 (1); *Emergency Management Act 2005* (WA) s 3; *Emergency: Emergencies Act 2004* (ACT) s 4; *State Emergency and Rescue Management Act 1989* (NSW) s 4; *Emergency Management Act 2004* (SA) s 3; *Emergency Management Act 2006* (Tas) s 3; *Emergency Management Act 1986* (Vic) s 4.

catastrophic harms in the first place.[19] The Council of Australian Governments ('COAG') at its meeting of 13 February 2011 considered that investment in preparatory measures should ultimately reduce the overall losses from natural disasters.[20] The emphasis on the aftermath as opposed to prevention and mitigation is one of the major problems of the disparate Australian regulatory regimes.

The legislation regulating the outcomes and processes for recovery in the aftermath of catastrophic events tends to adopt the terminology of disaster or emergency. Although states and territories regulate catastrophic events or emergencies within their jurisdictions; in certain circumstances the federal government can provide additional assistance. Emergency Management Australia ('EMA'), a division of the National Security and Criminal Justice Group within Commonwealth Attorney-General's Department is responsible for disaster-related matters.[21] EMA is responsible to the Attorney-General for the coordination of physical emergency and disaster assistance provided by the Australian Government at the formal request from a state or territory. Such requests are made when a state or territory government and its commercial resources are unable to cope with an emergency or disaster. The Australian Government Disaster Response Plan formally outlines the mechanism under which the Australian Government can assist states in the aftermath of an emergency. There is no legislative guidance which governs the provision of physical assistance to the states although the Australian Government Disaster Response Plan provides some assistance to Emergency Management Australia in facilitating this. Essentially the Director-General of EMA, after obtaining approval from the Attorney-General, can call on the resources of any other Australian Government department or agency, and can request assistance from other states or territories. Both Victoria and Queensland requested and received assistance from the Australian Defence Forces.[22] Several organisations and welfare agencies were also asked to provide assistance with rescue operations and post-disaster care, but this was often done on ad hoc basis and in un-coordinated manner.[23] The Royal Commission Report into the Victorian Bushfires recommended that in order to provide effective and targeted response to catastrophic events, states should ensure that an up-

[19] Mortimer et al, *Sharing Risk: Financing Australia's Disaster Resilience* (Australasian Strategic Policy Institute, 2011) 1-24.
[20] Council of Australian Government, *Council of Australian Governments Meeting Communiqué* (13 February 2011), <http://www.coag.gov.au/>.
[21] Victoria, Royal Commission into the Victorian Bushfires 2009, *Interim Report* (2009) [11.1].
[22] In Victoria, members of the Defense Forces were deployed in the aftermath of the fires; in Queensland, they helped with evacuations.
[23] *Queensland Floods Commission of Inquiry Interim Report*, Chapter 5 Emergency Response, <http://www.floodcommission.qld.gov.au>.

dated information regarding preparedness and availability of pertinent resources and services in local areas is on hand at all times.[24]

Disaster relief programs which are managed by states and territories[25] tend to be established for specific events. Thus in Queensland, disasters within the meaning of the *Disaster Management Act 2003* (Qld) s 13(1), for which state relief programs have been established include: Natural Disaster Relief for Primary Producers and Small Business Scheme (2006) in the wake of Tropical Cyclone Larry and Tropical Cyclone Monica; Special Disaster Flood Assistance Scheme (2008); Special Disaster Flood Assistance Scheme (2009) in the wake of tropical Cyclone Charlotte and tropical Cyclone Ellie.[26]

States and territories also operate state and community emergency services funds, which support such organisations as country fire services, state emergency services, surf life saving associations and volunteer marine rescue. These funds can be used 'for any purpose for, or relating to, the prevention of circumstances in which emergency services are likely to be required'.[27] They are supported partly by the subsidies from the Treasury and partly by compulsory levies that must be paid for land;[28] special levies imposed on granting and renewal of motor vehicle and vessel registration; and/or home and property insurance.

The Victorian government has enacted the *Fire Services Property Levy Act 2012* (Vic) ('*FSPLA*') as part of its implementation of the Victorian Bushfires Royal Commission recommendations. Under the *FSPLA*, a property based levy ('an annual charge payable by the owner of leviable land')[29] will commence on 1 July 2013, and fund the Metropolitan Fire and Emergency Services Board (MFB) and the Country Fire Authority (CFA).[30] By virtue of s 9, the Fire Services Property Levy will apply to all real property (land and buildings)[31] and will include a fixed

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[24] Victoria, Royal Commission into the Victorian Bushfires 2009, *Interim Report* (2009), Recommendation 11.1.

[25] See *Emergencies Act 2004* (ACT) s 181; *Emergency Management Act 2004* (SA) s 37; *Community Welfare Act 1987* (NSW) s 39; *Collections Act 1966* (Qld) s 35B, s 35C.

[26] *Rural and Regional Adjustment Regulation 2000* (Qld), in force on 7 August 2009.

[27] *Emergency Services Funding Act 1998* (SA) s 28; *Emergency Services Funding Act 1998* (SA); *Victoria State Emergency Service Act 2005* (Vic).

[28] *Emergency Services Levy Act 2002* (WA).

[29] *Fire Services Property Levy Act 2012* (Vic) s 7.

[30] The Fire Services Property Levy replaces the existing insurance-based funding model and includes abolition of the associated GST and stamp duty costs that were imposed on the insurance based levy.

[31] *Fire Services Property Levy Act 2012* (Vic), s 10 provides for exemptions, including State owned land (Crown land; or unleased/unlicensed public body land; Commonwealth land; 'any parcel of land that has been allocated an exempt land use classification'; or 'any other land exempted by the regulations'.

component as well as a variable charge assessed on the capital improved value of the property. Levy rates will be determined in accordance with statutory criteria (ss 11–17), depending on the location of the property, its classification and valuation.[32] Collection of the levy will be undertaken by councils through rates notices.[33] The Commissioner of State Revenue will administer the scheme.[34]

In New South Wales, 73.7 percent of the budget for the state fire services is collected from insurance premiums.[35] However, in New South Wales there is currently a review in process (consultations and public submissions were being received until 31 October 2012), determining if the mechanism currently used in NSW for collecting the fire services levy is the most efficient and equitable means of funding the state fire and emergency services.[36]

IV RECENT CATASTROPHIC EVENTS IN VICTORIA AND QUEENSLAND

The recent catastrophic events in Victoria and Queensland were different in nature (numbers of killed and injured, property loss and geographical scale), yet both were major natural disasters and the analysis of differences in approach of the respective governments to the problem of relief and reconstruction reveals a number of weaknesses in the existing regulatory regimes and the effectiveness of their responsiveness.

A *Black Saturday, 7 February 2009*

On the 7 and 8 of February 2009, more than 78 communities across Victoria were devastated and 173 people died and 414 were injured in the worst natural disaster in Australia's history. On 8 February, the Victorian Government in partnership with the Federal Government and Australian Red Cross established the 2009 Victorian Bushfire Appeal Trust Account. This was established under s 19 of the *Financial Management Act 1994* (Vic) ('Victorian Bushfire Appeal Fund'). The initial emergency payments from the Appeal Fund were distributed within days of the bushfires to help the affected individuals and communities in towns and suburbs affected by the Victorian bushfires. By 1 October 2009, a total fund of $386 million (including interest and other funding paid direct to the trust account) had been raised, $321 million of which was distributed

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[32] A discount of $50.00 off the relevant total levy amount will be available to the Department of Veterans Affairs gold card holders, their widows and widowers, and the Pensioner Concession Card holders. *Fire Services Property Levy Act 2012* (Vic), s 29.

[33] *Fire Services Property Levy Act 2012* (Vic) s 1; Division 2.

[34] *Fire Services Property Levy Act 2012* (Vic) s 42; Part IV.

[35] *State Emergency Services Act 1989* (NSW) s 24F(2)(c).

[36] See New South Wales Treasury and Ministry for Police and Emergency Services, Funding Our Emergency Services Discussion Paper (2012).

through the Victorian Department of Human Services, under the oversight of an independent advisory panel.

Payments from the Victorian Bushfire Fund were made to all eligible people irrespective of whether or not they had insurance.[37] Approximately one third of the houses destroyed in the Victorian bushfires were not insured.[38] People who took out property insurance (typically building or contents cover) that included fire as a defined event were not disadvantaged, in the sense that they did not receive a lower amount for taking steps to reduce their loss; however, they did not appear to have had any advantage over those who were not insured.

B *Queensland Flooding and Cyclone Yasi, November 2010 – March 2011*

Between December 2010 and January 2011, several rivers burst their banks in south eastern and central Queensland causing devastating riverine flooding and also flash flooding over more than half of the state; 37 people perished and many more were injured.[39] In the aftermath of Cyclone Yasi, which struck Northern Queensland, more than 78 percent of the state was declared a disaster affected zone as a result of flooding and the cyclone.[40] More than 2.5 million Queenslanders were affected by these events. As of March 2012, according to the Insurance Council of Australia, insurers received 58,665 claims for losses resulting from the riverine floods and a further 73,250 claims from damage caused by Cyclone Yasi.[41] The riverine floods have resulted in insurance claims which are currently in excess of $2.37 billion. The Commonwealth Government has provided assistance amounting to almost $460 million in grants for damages caused by the flooding in Queensland.[42]

In March 2011, Northern Queensland sustained further losses of almost $2 billion caused by Cyclone Yasi. It should be noted, however, that Northern Queensland is particularly prone to cyclones. For example, on 4 March 1899, Cyclone Mahina killed at least 410 people in Bathurst Bay, while a cyclone killed 99 people in this area in March 1934.

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[37] Rachel Anne Carter, 'Risk and the Decision to Insure in Australia: The Black Saturday Fires' (Paper presented at Disasters and Sociolegal Studies Workshop, Onati, Spain, July 2011) 1, 20.

[38] Institute of Insurance Actuaries of Australia, above n 12, 6.

[39] Queensland Reconstruction Authority, *Operation Queenslander: The State Community, Economic and Environmental Recovery and Reconstruction Plan* 2011 – 2013 (March 2011) <http://www.qldreconstruction.org.au/u/lib/State-Plan-QRA.pdf>

[40] Queensland Government, *Three Quarters of Queensland Disaster Declared* (2011), http://statements.qld.gov.au/Statement/Id/73255 .

[41] Insurance Council of Australia, above n 12.

[42] Queensland Government, *Cyclone Yasi* (10 March 2011), <http://www.qld.gov.au/cyclone/index.html>.

More than a year after the floods, in 2012, Queensland was still in the process of distributing some of the funding from the Premier's Disaster Relief Appeal. Initially this money (a grant of $1000), was used to assist anyone claiming to be affected by floods in the purchases of necessary items;[43] then individuals and small businesses could apply for assistance in the second round if their property was totally annihilated or where their property was rendered uninhabitable. In the third round of relief funding the Queensland Government was accepting applications for assistance to repair properties, which suffered structural damage.[44] The Victorian Government failed to differentiate between the insured and uninsured claimants; in Queensland, those who were insured had their relief payments reduced creating a perception that spending money on taking out a disaster insurance cover may not necessarily be of great benefit to the insured. While in Victoria, the introduction of the virtually universal Fire Services Property Levy (see above), has rendered moot the question of how to fairly compensate insured and non-insured people who had suffered loss by fire and there is still a need for a principle that would balance the humanitarian responses through relief funds and the encouragements of property owners to take out private insurance against loss caused by natural disasters.

As a general rule, declarations of state of disaster/emergency in a state or territory are accompanied by governmental relief schemes created to help the affected individuals and businesses. Levels and terms of assistance vary with the severity of the disaster and the number of recipients. The Commonwealth Government will step in to assist the state and territory disaster relief schemes once certain set thresholds for loss is reached.[45]

[43] The term 'necessary items' referred to items for which an individual would need for everyday survival but which were damaged or destroyed due to the flooding. This was designed to allow people to buy items in the interim whilst there was a determination on the availability of longer term recovery measures. The necessary items for which the grant was envisioned to cover included emergency food and clothing, essential items of furniture and personal effects which are important to the daily life of the individual: See Queensland Reconstruction Authority, above n 39.

[44] Ibid.

[45] Under the National Disaster Relief and Recovery Arrangements there is a risk sharing agreement between the Commonwealth and each of the state governments whereby should the expenditure of a particular state exceed the first threshold amount then the Commonwealth Government will provide assistance. There is then a secondary threshold amount whereby once this is reached then the Commonwealth Government will contribute to 75% of the funding of that state's expenditure on natural disasters above the threshold. The threshold for the current year (2012 – 2013) for the National Disaster Relief and Recovery Arrangements operation is set out in the table below:

State	State Revenue	1st Threshold Amount	2nd Threshold Amount
NSW	$60,514,000,000	$136,156,500	$238,273,875
VIC	$46,027,000,000	$103,560,750	$181,231,313
QLD	$41,957,000,000	$94,403,250	$165,205,688

However, the issue is one of state responsibility. Both Victoria and Queensland had a dedicated relief funds set up to assist victims of Black Saturday fires and those who suffered flooding and Cyclone Yasi respectively. Yet, the outcomes have been different.

To facilitate relatively speedy (material and emotional) recovery of the affected individuals and businesses, in the aftermath of the Black Saturday, the Victorian government facilitated the provision of a number of essential services and assisted with the financial cost of basic infrastructure in the most affected areas. Though helpful in the immediate recovery phase, the scheme has not been very effective in the medium term with many individuals and businesses struggling to recover economically from the disaster. For example, in October 2010, many under-insured individuals and families were still living in caravans, shipping containers and other temporary accommodation. The government provided an additional $15.69 million to assist these people move into more permanent forms of housing.[46] To date, $279 million of the 2009 Victorian Bushfire Relief Fund has been paid to individuals and small businesses representing more than 25,000 grants. It has been noted that '[t]he Fund is now fully committed with around $311 million assisting affected individuals and families and around $81 million committed to community identified initiatives.'[47]

The Queensland relief fund was set up to provide assistance to some 78 percent of the state of Queensland which was affected by cyclone damage, wind damage and the flooding caused by the 59 rivers which broke their banks.[48] On 29 December 2010, the former Premier of Queensland, Anna Bligh, created the Premier's Disaster Relief Fund. Initially the fund was set up primarily with the objective of assisting those who had suffered losses from the flooding but it was subsequently extended to cover victims of Cyclone Yasi. The Queensland Government committed $11 million in funding to assist individuals and small

WA	$23,668,000,000	$52,253,000	$93,192,750
SA	$15,016,000,000	$33,786,000	$59,125,500
TAS	$4,768,000,000	$10,728,000	$18,774,000
NT	$4,722,000,000	$10,624,500	$18,592,875
ACT	$3,881,000,000	$8,732,250	$15,281,438

See Attorney General's Department, *Australian Emergency Management: Natural Disaster Relief and Recovery Arrangement Guidelines- NDRRA State and Territory Thresholds* (14 October 2012), <http://www.em.gov.au>.

[46] Australian Red Cross and Victorian Bushfire Appeal Fund, 'December 2010 Progress Report' (Report, Department of Sustainability and Environment, 26 November 2010) 12 – 16.

[47] Victorian Bushfire Appeal Fund, *Fund Payments* (2011), State Government of Victoria <http://www.dhs.vic.gov.au/bushfireappeal/Fund-Payments>.

[48] Queensland Reconstruction Authority, above n 39.

businesses under the Relief Fund, while the Premier's Disaster Relief Fund has received donations totaling $245,199,989.[49] The damage bill of just under $10 billion arising from the cumulative effects of the flooding and Cyclone Yasi has meant that the Premier's Disaster Relief Fund has failed to provide adequate funding to assist even with the recovery phase.

It is still is too early to predict how long individuals and businesses in Queensland will take to recover from the floods and damage caused by Cyclone Yasi. The magnitude of damage occasioned by the flooding appears to have exceeded the property destruction brought about by the Black Saturday fires in monetary terms.

In comparing the individual response to the relief provided in the aftermath of Black Saturday, many of the victims who received assistance were grateful for this generosity, and overwhelmed by the community support. In the aftermath of the Queensland flooding and Cyclone Yasi although the beneficiaries of the relief funds were also grateful for the assistance, as evidenced on 'talk-back' radio and victim bloggers online, however, overall there was a greater psychological shift towards a strong feeling of entitlement to full relief.[50] Many believed that they had a right to receive large amounts of money to cover their loss through funds raised by the state and the people who were unaffected. Although people were very generous in their donations to the Queensland Disaster Relief Appeal, there is a risk that if a saturation point were to be reached, Australians may be less willing and/or less able to provide the same levels of generosity in future.[51]

C *A Taxation Response to Catastrophic Events*

The economically crippling damage from the flooding and Cyclone Yasi led to the imposition of a temporary flood and cyclone levy upon all Australian taxpayers pursuant to the Commonwealth's taxation power. Schedule 1 to the *Income Tax Rates Amendment (Temporary Flood and Cyclone Reconstruction) Levy Act 2011* (Cth) provided that Australian taxpayers have to pay extra income tax during the 2011-12 financial year

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[49] Queensland Government 'Premier's Disaster Relief Appeal Major Donations' (11 April 2011), <http://www.thepremier.qld.gov.au/initiatives/disaster_recovery/donations.aspx>.

[50] Carter, 'Risk and the Decision to Insure in Australia: The Black Saturday Fires' above n 37; Mortimer et al, above n 19; Bergin et al, Deciding Just Who Picks Up the Tab After a Catastrophe, *The Australian* (online) 12 February 2011, Public commentary, 'Flood Insurance must be made Assessable to All, The Australian (online) 13 January 2011, <http://www.theaustralian.com.au/opinion/flood-insurance-must-be-accessible-to-all/story-e6frg6zo-1225986572360>.

[51] Rachel Anne Carter, 'Mitigating Future Disasters in Australia – the Role of Government, Insurers & the People' (Forthcoming, 2012) 1, 29-31; Chris Latham et al, 'Natural Disasters in Australia: Issues of Funding and Insurance' (Paper presented at Institute of Actuaries of Australian 17th General Insurance Seminar, Gold Coast, 7-10 November 2010) 17.

at the rate of 0.5 percent if a taxpayer's taxable income for the 2011-12 year[52] 'exceeds $50,000 but does not exceed $100,000' and 1 percent if it exceeds $100,000.[53] Regrettably, the legislation which was rushed through the Parliament, does not include any mechanisms to ensure transparency and accountability for the way in which taxpayers' money will be spent. There are no criteria provided for the level, allocation and the distribution of the funds. Apart from the general concept of 'reconstruction', the legislation does not articulate any specific objectives. It is therefore unclear whether funds from the levy will be solely expended on rebuilding the necessary public infrastructure and assisting communities as a whole, or whether a proportion of the tax monies will be handed to private individuals to help with rebuilding of their personal properties.[54]

In order to retain the support for the levy, particularly for those Australians who do not live in or near flood or cyclone affected areas, it will also be necessary to design effective measures to ensure that in the future catastrophic damage from natural disasters is significantly minimised. Australian taxpayers would probably also welcome the establishment of an independent inspectorate to determine whether the levy-based scheme is operating with due levels of transparency and accountability and to ensure that the funds collected are appropriately allocated. In September 2012, having abolished the fire services levy on insurance,[55] the Victorian Government established the office of Fire Services Levy Monitor and appointed Professor Allan Fels to oversee the transition to the new fire services property levy and 'directly administer new, supplementary consumer protection laws which seek to ensure that property owners are not mislead or price exploited during or after transition.'[56] Likewise, Council of Australian Governments has suggested creating an Australian Government Reconstruction Inspectorate to 'strengthen accountability and rigour in the use of substantial public funding to be committed to the rebuilding.'[57] It would be prudent to extend the powers of such Inspectorate to ensure rigorous accountability for monies appropriated under the Temporary Flood and Cyclone Levy.

Another aspect of the levy was noted by the Queensland Premier, Anna Bligh, who expressed concerns that it will reinforce the public's reliance

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52 *Income Tax (Transitional Provisions) Act 1997* (Cth) ss 4-10.
53 *Tax Laws Amendment (Temporary Food Reconstruction Levy) Act 2011* (Cth).
54 Rachel Carter, Submission No 1 to Senate Economics References Committee, Parliament of Australia, *Inquiry into the State Governments Insurance and the Flood Levy*, 13 April 2011.
55 *Fire Services Property Levy Act 2012* (Vic) s 1.
56 Department of Treasury and Finance, Fire Services Property Levy: Consumer Protection. <http://www.dtf.vic.gov.au/>.
57 Council of Australian Government, above n 20.

on government grants in preference to private insurance.[58] Yet, according to the Premier, while the levy may raise sufficient funds to assist people 'whose lives would otherwise be in desperate circumstances….it will not compensate fully for adequate and comprehensive insurance'.[59]

While it is equitable and humane to provide additional moneys to those who are economically disadvantaged and unable to purchase adequate insurance, a system, universal, property-based levy that provides discounts and concessions to pensioners and veterans accords better with the principles of personal responsibility and the fair distribution of resources[60] than the relatively indiscriminate distributions of funds collected by the wider community in the wake of a disaster is the preferred approach. However, the problem of setting the level of a property-based levy at an adequate level to cover all natural disasters is still to be solved.[61] As a result, some segments of the public, although well able to afford the premiums, deliberately did not insure or continue to under-insure their properties.[62]

V THE INSURANCE RESPONSE TO CATASTROPHIC LOSS IN VICTORIA AND QUEENSLAND

Private insurance against catastrophic harms (loss of resources, function, plant, equipment, cash-flow, etc) for personal or business property is available to individuals and businesses regardless of their size. Under the existing insurance industry regulatory regime, insurers act as commercial entities; given the commercial nature of insurance products, insurers have the right to decline certain risks. Insurance companies commonly issue insurance policies where the losses are occasioned by such weather hazards as hail, fire, storm, cyclones, floods & storm-water inundation. However, in practice where the risks from weather related hazards are not actuarially sound they may be excluded.[63]

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[58] Queensland Government, 'Disaster Relief Fund: Brisbane City Council Flood Safety Benchmarks, Flooding in Far North Queensland, Wivenhoe Dam and Water Rebates' (Press Release, 8 March 2011).
[59] Ibid.
[60] National Disaster Insurance Review (Treasury), Parliament of Australia, *Inquiry into Flood Insurance and Related Matters* (2011) Pivotal Recommendation 3.
[61] Paul K Freeman and Kathryn Scott, 'Comparative Analysis of Large Scale Catastrophic Compensation Schemes' in OECD, *Policy Issues in Insurance: Catastrophic Risks and Insurance* (OECD, Paris, 2005) 185, 193 – 194; Working Party of Senior Budget Officials, 'Budgeting for Disaster', Public Governance and Territorial Development Directorate: Public Governance Committee, 6 August 2009 (GOV/PGC/SBO (2009)9/FINAL) 1, 7-8.
[62] Carter, 'Mitigating Future Disasters in Australia', above n 51, 34-35.
[63] D Derrington & R S Astton, *The Law of Liability Insurance* (Lexis Nexis Australia, 2005) 811.

Generally, in areas prone to adverse weather events, obtaining meaningful insurance cover may be prohibitively expensive.[64] In areas of Queensland at risk of flooding or cyclones, property owners have not been able to get affordable insurance coverage for losses arising from these events. Currently the insurance penetration rate for flood cover is approximately 54 percent of property insurance products (for those who acquire household building insurance cover); this means that a significant proportion (46 percent) of properties have no flood cover.[65] Risk exposure and a lack of adequate mapping are cited as key factors in insurer making overly conservative estimates and in a low penetration rate as an adjunct to standard household building insurance cover. There are a number of properties for which flood cover is potentially available, but at a prohibitive price. The Insurance Council of Australia has called upon the Commonwealth Government to intervene and provide subsidies to assist with the cost of insurance.[66]

The system, as it currently operates, enables insurers to have a great amount of autonomy to accept or decline a risk; and under the *Insurance Contracts Act 1984* (Cth), s 75(1), they are only required to provide a reason for refusal to accept an offer to enter a contract of insurance, cancel an existing contract or refuse to renew one, or

> by reason of some special risk relating to the insured or to the subject-matter of the contract, offers insurance cover to the insured on terms that are less advantageous to the insured than the terms that the insurer would otherwise offer,

if 'the insured so requests in *writing* given to the insurer'. This process presupposes a much greater level of knowledge about insurance law than most people have.

Moreover, under the discretionary power to define risks, including 'special risks', many insurers did include floods within the latter category. As a result, after the Queensland Floods of 2010-2011, it became clear that due to lack of a statutorily entrenched definition of 'flood', the insureds found that while some properties were covered against the risk of floods, others, unbeknown to them, were not.

This loophole was, at least partially remedied by the *Insurance Contracts Act 1984* (Cth), s 37B, which reads:

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[64] Stephen Warwick, 'Impact of the Australian/ New Zealand Catastrophes- the Market's Reaction and Lessons Learned for the Reinsurance Industry' (Paper presented at 9th Conference on Catastrophe Insurance in Asia, Beijing, China 9 June 2011).
[65] Insurance Council of Australia, Submission No.1 to Treasury, *National Disaster Insurance Review*, 14 July 2011, 2.
[66] Ibid 9; Insurance Council of Australia, *Response to 2011 Natural Disaster Insurance Review*, (Australia, July 2011) 4-7.

> 'Flood' means the covering of normally dry land by water that has escaped or been released from the normal confines of:
>
> (a) Any lake, or any river, creek or other natural watercourse, whether or not altered or modified; or
>
> (b) Any reservoir, canal or dam.

Most properties in Australia are not located in an area which is particularly susceptible to losses occasioned by weather related disasters. Therefore, for the vast majority of property holders, insurance is readily available. However, seven percent of privately owned property is situated in extreme flood risk areas and therefore, under s 75, the insurers have the right to refuse the owners/occupiers of these properties flood cover. The Insurance Council of Australia has emphasised that

> the first problem, to be solved by the government and the community, is to reduce the extent of exposed property from the current 7 [percent] to 0 [percent] or as low as possible.[67]

Furthermore, coverage for bushfire, storms and flash flooding are often included in ordinary household building and contents insurance policies. In some policies where a risk, such as riverine flooding, is not automatically covered under a standard form cover; it is possible to purchase an additional product to cover for damage to property arising from these risks. The Insurance Council of Australia has estimated that:

> There are 169,620 residential properties representing approximately 2.4% of Australia's 7.1 million households susceptible to riverine flooding in the 1 in 100 year zone which means that there is a 1% chance of being flooded each year. These properties are concentrated in Queensland (36%) and Victoria (25%).[68]

Given that the average loss per house resulting from flood damage is $3,900 compared to an average loss of several hundred dollars for other areas (which are exposed to different events), it is hardly surprising that the insurance industry has difficulties in providing coverage in these areas.[69] For some individuals and businesses that live and/or operate in high risk areas, insurance is a priority for which they are willing to pay regardless of the cost. There are also individuals, particularly those who have suffered losses from a natural disaster, who consider insurance an economic necessity, even if they can ill afford it. However, a high proportion of people who live in riverine flood, fire, and cyclone prone

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[67] Ibid.

[68] Insurance Council of Australia, 'Insurance Council of Australia Response to the Report to the Council of Australian Governments on Natural Disasters in Australia' (March 2006) 1, 5.

[69] Australian Securities and Investments Commission, Report 54: *Getting Home Insurance Right- A Report on Home Building Underinsurance* (September 2005).

areas either are too poor to buy insurance; or are not aware of the relevant risks and therefore do not purchase the relevant insurance product; or though able to afford an adequate policy, deliberately decide to under-insure, thus creating what is known as 'insurance gaps'.[70]

A strictly commercial, market-based insurance industry institutionally entrenches the system whereby coverage for catastrophic losses occasioned by natural disasters either is not available or can be only obtained at prohibitive cost.[71] The Federal Parliament's Senate Economics References Committee has reviewed parts of the insurance regime in Australia and recommended that there should be greater transparency and accountability. Essentially, it was determined that currently there are many measures which prevent a full and frank analysis of the insurance obtained and attribution of responsibility for decisions about the acquisition of insurance policies. Further, the Committee recommended that there should be greater clarity over what is cost effective and when a state should be required to obtain insurance coverage (or reinsurance coverage), placing emphasis on insurance as the preferred economic protectorate.[72]

VI Difference in Funding the Damage – Juxtaposing the Black Saturday Fires with the Queensland Floods

The economics of disaster have operated differently in relation to losses arising from the Black Saturday fires and the loss occasioned by the Queensland floods and Cyclone Yasi. In Victoria, the cost of rebuilding was borne by insurers (for insured losses) or managed funds including a state commercial insurance policy (under VMIA for public assets), the government through disaster relief, and the public through benevolent donations. In Queensland the reconstruction will be paid for, at least partially, by all Australian taxpayers under a specific purpose taxation levy.

The major reason for this difference lay in the fact that at the time of Black Saturday, (like New South Wales, South Australia and Western Australia within their respective jurisdictions), Victoria had state-based commercial insurance policy issued by the Victorian Managed Insurance Authority ('VMIA') with the backing of significant amounts of re-insurance to cover losses of public assets, facilities and infrastructure.

[70] Institute of Insurance Actuaries of Australia, above n 12, 2 – 3, 6.
[71] Carter, Submission No1, above n 54.
[72] Senate Economics References Committee, *The Asset Insurance Arrangement of Australian State Governments*, Parliament of Australia, Canberra, 2011, Recommendations 1 and 4.

VMIA is a captive insurer who is accountable to the Minister of Finance of Victoria yet it provides insurance for 4,000 Victorians representing in excess of $100 billion in insured assets. Despite being a 'captive insurer' under the scrutiny of Treasury in Victoria, they operate in a similar manner to a commercial insurer and offer policies on a commercial and competitive basis, otherwise operating in the same manner as a traditional insurance corporation.

Since the Black Saturday disaster, VMIA has extended its coverage to public roads and bridges, which may be damaged by either catastrophic fire or flood. Currently Victorian state assets are insured for damage up to a maximum of $108 billion.[73] In the 2009-2010 financial year the Victorian Government 'paid an annual insurance premium of $36.2 million'[74] to VMIA in return for coverage of $108 billion with Victoria required to pay an excess of $50 million for each event.[75] Victoria, and other states with significant re-insurance policies protecting their state based assets and infrastructure, have decided that it is sound economics to ensure stability through insurance coverage against potential catastrophic losses. Although the premium charged by insurers and re-insurers may be sizeable, the better view is that insurers are more skilled in commercialising the insurance product and more likely to ultimately absorb the risk of losses sustained from catastrophic events.

In contrast, the Queensland Government also has a 'captive insurer' through the Queensland Government Insurance Fund ('QGIF').[76] However, the QGIF decided some years ago that commercial insurance was too expensive and adopted a policy of self-insurance without any additional commercially acquired reinsurance backing.[77] The Queensland Government received its last quote for commercial reinsurance in 2004 through AON Benfield for 'insurance of up to $500 million in damages was available, with a $20 million excess payable on each event for a $6.4 million premium.'[78] Notably, although the government declined to pay for this coverage and chose instead the self-insurance option, the proposed level of coverage would not have been a sufficient economic buffer for all of the losses arising out of the 2010-2011 flooding. The main difference between the approaches of this captive insurer was that

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[73] Victorian Managed Insurance Authority, *Dealing with Emergencies* (April 2011) <http://www.dse.vic.gov.au>; Evidence to Senate Economics References Committee, Parliament of Australia, Canberra, 13 May 2011, (Stephen Joseph Marshall, Victorian Managed Insurance Authority).
[74] Senate Economics References Committee, above n 72, 11.
[75] Ibid.
[76] Queensland Government Insurance Fund, *Operational Structure*, (2011), <http://www.qgif.qld.gov.au/contents/operational_structure.shtml>.
[77] Evidence to House of Representatives Standing Committee on Economics, Parliament of Australia, Canberra, 16 February 2011 (Gerard Patrick Bradley, Queensland Treasury).
[78] Senate Economics References Committee, above n 72, 28.

> [i]n the absence of reinsurance, it appears that the QGIF had negligible net reserves to meet any significant net claims such as those which arose from the 2011 natural disasters, after allowing for its current fund reserves which essentially only covered its current outstanding liabilities, prior to the 2011 natural disasters.[79]

The policy was influenced by the fiscal agreement with the Commonwealth Government involving the following two tiers of thresholds and reimbursements. Under the National Disaster Relief and Recovery Arrangements (NDRRA), once the Queensland Government's spent in excess of $83,268,000 on natural disaster relief and recovery in 2010/2011 financial year it qualified for 50 percent reimbursement from the Commonwealth Government, which happened prior to the December 2010-February 2011 flooding and the cumulative damage caused by Cyclone Yasi.[80]

The flooding and damage sustained after Cyclone Yasi was such that Queensland also exceeded the second threshold amount of $145,026,250 for payments made on disaster relief and recovery – this meant that the Commonwealth Government was required under the NDRRA to reimburse Queensland for 75 percent of their expenditure leaving the state only responsible to fund 25 percent of the natural disaster relief funding.[81] These economic arrangements proved to be totally inadequate in the face of losses brought about by the 2011 floods and Cyclone Yasi. Importantly, even before these catastrophes, the Queensland Government Insurance Fund already had problems with repaying debts relating to prior disasters; therefore it was inevitable that its insurance model would fail.

When questioned in the aftermath of the catastrophe, the Queensland Government publicly admitted to regarding the cost of re-insurance as being politically 'not good value for money'.[82] Queensland, due to its vast landmass and geographic position, is highly susceptible to damage through cyclones and floods; consequently, insurance premiums to cover these contingencies are naturally priced higher than, for example in Victoria, which, though it has a much higher exposure to loss from bushfires, is less exposed to other risks. However in comparing the quote for insurance provided to Queensland in 2004 (when its government last

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[79] Evidence to Senate Economics References Committee on Temporary Flood and Cyclone Reconstruction Levy, Parliament of Australia, Canberra, 6 May 2012 (John Tsoutoutis).

[80] Attorney General's Department, Australian Emergency Management: Natural Disaster Relief and Recovery Arrangement Guidelines- NDRRA State and Territory Thresholds (14 October 2012), <http://www.em.gov.au>.

[81] Queensland Government, *Disaster Finance Arrangements* (April 2011) <http://www.disaster.qld.gov.au/support>.

[82] Evidence to House of Representatives Standing Committee on Economics, Parliament of Australia, Canberra, 16 February 2011 (Gerard Patrick Bradley, Queensland Treasury).

undertook such an activity) and the current price paid for commercial re-insurance by VMIA particularly through Swiss RE, it does not appear that there is an extravagant price difference between the cost of the two policies. Although the Queensland policy cost is more expensive, the multiplicity of risks to which that state is subject provides actuarial justification for the amounts charged. Nevertheless, the total loss sustained from the cyclone and the flooding damage has far exceeded any amount that the Queensland Government would have paid in premiums for re-insurance coverage. Having investigated its re-insurance options subsequent to the disaster, the Queensland Government decided not to secure adequate levels of insurance cover to mitigate against potential future catastrophic losses (presumably, hoping to rely again on the Commonwealth tax payer funded bail-out). Furthermore, prior to the flooding and Cyclone Yasi, the Queensland Government Insurance Fund had an existing $685.5 million in insurance liabilities. Given this precarious financial situation there was an imminent need for external financial backing from the Commonwealth. If however Queensland had taken out reinsurance coverage from the commercial market rather than relying upon a financially inadequate portfolio of assets,[83] a substantial amount of the coverage would have significantly contributed towards funding the rebuilding phase. In analysing this situation from socio-economic perspective, the failure to obtain a commercial reinsurance policy by the Queensland Government meant that instead of creating a long term disaster prevention and response paradigm based on socially and economically responsible criteria, it simply focused upon the immediate cost to the state.[84]

Currently, there are no formal requirements for the states and territories to have mandatory insurance or re-insurance backing. However, in the wake of the 2011 catastrophic events, the states and territories have been made accountable for their decisions about insurance for state based assets and infrastructure to the National Disaster Relief and Recovery Arrangements Directorate.[85] Essentially this new regime will scrutinise and endeavor to eradicate significant differences between governments regarding the levels of insurability. Scrutiny by the National Disaster Relief and Recovery Arrangements Directorate is likely to make governmental decisions more transparent. Under the arrangements, the Commonwealth

[83] The inadequacy of the portfolio can be seen in the sense that prior to the Queensland floods, the assets in the portfolio held by Queensland (as their self-insurance safeguard) were already allocated to recovery from other events. Thus there were debts of $685.5 million without sufficient financial assets to aid in recovering from such losses. See Senate Economic References Committee, above n 72, 10-11.
[84] Ibid 32.
[85] Attorney General's Department 'Natural Disaster Relief and Recovery Arrangements Determination 2011' (2011) Parliament of Australia, <http://www.ag.gov.au>.

Attorney-General is also involved in objectively assessing the effectiveness of the respective state and territory decisions relating to their disaster resilience and recovery mechanisms. If it is considered that its protection against catastrophic losses would otherwise be inadequate, the Attorney-General has the power to intervene and to ensure that a state or territory obtains sufficient re-insurance. Commonwealth disaster assistance may be withdrawn or refused to a state or territory, which does not comply with these scrutiny requirements. The new regime can potentially create a uniform set of standards for implementation of state-based insurance as a mechanism for post-disaster recovery.

However, now that the National Disaster Relief and Recovery Arrangements Directorate has been established and the temporary tax levy has been imposed, it would be of long-term benefit to all Australia as a nation, if the levy were properly re-drafted and re-enacted as a permanent tax to fund a national insurance scheme providing a safety-net against *catastrophic loss* occasioned by disastrous events (natural or man-made) and to enable the Directorate to develop permanent cadre with expertise in alleviation of catastrophic events and management of consequences, should a disaster occur.

VII A Satisfactory Regime for Dealing with Catastrophic Losses?

The exploration of the experience of Black Saturday as compared with that of the Queensland flooding and Cyclone Yasi has elucidated some of the problems, which are inherent within the current regulatory responses to catastrophic events in Australia. In particular, governments should not focus exclusively on the ex post facto responses to a catastrophic event. The system should entrench such concepts as mitigation and precautionary long-term measures, including making individuals and organisations recognise (and act on) the moral hazard of failing to take adequate insurance. The analysis of the two catastrophic events has also demonstrated that under the Victorian regime losses were dealt with in a more efficient and socially responsible manner than under the Queensland scheme.

On a whole the present system works reasonably well in dealing with relatively small scale and predictable emergencies and disasters; however significant problems arise in the event of a catastrophe. Although major catastrophes of the kind analysed in this article tend to recur every 30 or 40 years, each time they occur the loss of life and damage to property is exponentially greater than previously.

Australia is a vast country and subject to a number of different catastrophic events, some of which, like flooding in the flood-prone areas, are un-insurable at affordable rates. From the perspective of equity and national economy, a model based on the principle of cross subsidization across all states and territories is the way to go.

The analysis has also demonstrated an urgent need for harmonization of law in this area. The work on reforming and coordinating disaster management throughout Australia was started by the Ministerial Council for Police and Emergency Management in 2008. In 2009 COAG agreed to adopt a 'whole-of-nation resilience-based approach to disaster management'.[86] In 2011, COAG published the *National Strategy for Disaster Resilience* document[87] which proposes several national strategies and collaborative projects aimed at enhancing 'Australia's capacity to withstand and recover from emergencies and disasters'[88] by providing 'high-level guidance on disaster management to federal, state, territory and local governments, business and community leaders and the not-for-profit sector'.[89] The *National Strategy for Disaster Resilience* document refers to the importance of educating individuals and businesses about insurance, insurance products, their coverage and exclusion policies. The National Strategy for Disaster Resilience is an ambitious document which seeks to create a basis upon which different sectors and different governments can combine their efforts to create more resilient communities throughout Australia. Problematically, the document does not include any specific measures for the implementation of its objectives.[90] These measures would have to (1) define the concepts of shared responsibility and levels of responsibility, and (2) translate them into a structure with clearly delineated hierarchy of responsibility and accountability.

The Commonwealth Government has the constitutional power to adopt a national strategy for catastrophic events. A more uniform approach would enable all stakeholders - the Australian community, state and territory governments, insurers, disaster response agencies and medical and social services - to be aware of the risks from and responses to catastrophic events.

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[86] Victorian Government, *National Strategy for Disaster Resilience,* <http://www.dpc.vic.gov.au>.
[87] Queensland Government, *National Strategy for Disaster Resilience* <www.qld.gov.au/emergency/news/features/disasterrel.html>.
[88] Ibid.
[89] Ibid.
[90] Emergency Management Australia, *National Strategy for Disaster Resilience* (2011, Commonwealth).