

Tasmanian Government Submission

Review of the operation of the National Emergency
Declaration Act 2020

March 2021



Tasmanian
Government

Contents

1. INTRODUCTION	3
2. DECLARATION OF NATIONAL EMERGENCY WITHOUT STATE OR TERRITORY CONSULTATION.....	3
3. DECLARATION OF A NATIONAL EMERGENCY IN CONSULTATION WITH STATES AND TERRITORIES	4
4. CONSEQUENCES OF AMENDMENTS TO OTHER NATIONAL EMERGENCY LAW	5
5. VARIANCE OF A NATIONAL EMERGENCY DECLARATION.....	5



I. Introduction

The Tasmanian Government acknowledges the swift action taken by the Commonwealth Government to introduce the NED Act in response to Recommendation 5.1 of the Royal Commission into National Natural Disaster Arrangements (the Royal Commission). The Tasmanian Government also recognises the value of a legal framework for the declaration of a national emergency in effectively supporting states to respond to emergencies and natural disasters.

However, as stated in our response to the Royal Commission, the Tasmanian Government does not support the Commonwealth having power to declare a national emergency without the agreement of, or consultation with, states and territories. Indeed, the Royal Commission's report reconfirms the importance of states and territories retaining responsibility for emergency response and recovery, in recognition of their knowledge of local communities, demographics and resources, and the prevailing view that community-led response and recovery is a foundational principle of the disaster management system¹.

Tasmania notes that several plans exist under the Australian Government Crisis Management Framework to deal with domestic natural disasters, including the:

- National Catastrophic Disaster Plan (NATCATDISPLAN);
- Australian Government Disaster Response Plan (COMDISPLAN);
- Domestic Response Plan for Mass Casualty Incidents of National Consequence (AUSTRAMAPLAN);
- Australian Contingency Plan for Radioactive Space Re-entry Debris (AUSPRÉDPLAN);
- Defence Assistance to the Civil Community (DACC Policy and Manual); and
- Disaster Recovery Funding Arrangements (DRFA).

We consider that these and other existing plans provide the opportunity for a collaborative, bottom-up approach to the management of disasters at a time and stage that is appropriate. We also note that, in response to Royal Commission recommendation 3.3, the COMDISPLAN was recently reviewed to broaden the criteria under which a request for assistance can be made, which provides additional flexibility for states and territories to activate assistance measures when required. Tasmania is also participating in the reform of the DRFA, which will review how these assistance measures are activated and implemented during future emergencies.

2. Declaration of national emergency without state or territory consultation

Noting that the circumstances that would trigger a national emergency declaration would be exceptional, the Tasmanian Government opposes any unilateral decision, declaration or action that affects Tasmania, or its interests, without prior consultation.

The rationale provided in the Revised Explanatory Memorandum is that forgoing consultation with states and territories is by exception, and considered in circumstances in which an emergency is likely to, or has

¹ Final Report of the Royal Commission into National Natural Disasters – *Local knowledge and the principle of subsidiarity*

caused, nationally significant harm in an Australian offshore area. This is not effectively communicated in the NED Act, and as such, the power may be misused.

To ensure the parameters of a unilateral national emergency declaration are effectively communicated, Tasmania proposes the inclusion in any subsequent rules or regulations under the NED Act a notification process for states and territories. This ensures that the legal and practical consequences of such a declaration can be appropriately managed. The rules or regulations should, at minimum, include the following:

- a) detailed triggers for the declaration, to ensure the circumstances or events under which such a declaration would be made are limited and justified;
- b) the information in the explanatory memorandum detailing circumstances where it is not practicable for states and territories to request that a declaration be made, including disruption of the telecommunications network, incapacitation as a result of an emergency, or due to the exigent nature of an emergency;
- c) appropriate lead time for notifying affected states and territories of an impending national emergency declaration, so that state and territory government agencies can pre-position themselves to make the necessary arrangements, including a review of state laws and arrangements that may be impacted by the declaration as relevant to the particular emergency (for example, counter-terrorism arrangements if the emergency is terror-related);
- d) The roles and responsibilities of the Commonwealth and state / territory governments if such a declaration is made – including clarification in relation to which ‘other’ parties may be called upon by the Prime Minister to provide information to assist in preparing for, responding to or recovering from the emergency. This is particularly important given the likely limited resources available during an active emergency response operation.

3. Declaration of a national emergency in consultation with states and territories

Tasmania is supportive of a national emergency declaration that has been determined through consultation with, or on request from, states and territories. We consider prior agreement to provide significant value in accelerating financial and non-financial assistance to Tasmania, particularly in the event state and local resources and capacity are depleted. We consider the National Cabinet, or similar consultative forum, be an appropriate mechanism for consultation on any national emergency declaration.

This would be consistent with existing national arrangements relating to specific emergencies such as terrorist incidents, whereby states and territories and the Commonwealth must consult and agree on the need to declare a National Terrorist Situation².

As noted above, the Tasmanian Government would recommend the establishment of rules, regulations or policy for such an occurrence, in consultation with states and territories.

² *National Counter-Terrorism Plan*



4. Consequences of amendments to national emergency law

The NED Act makes consequential amendments to other provisions which are considered 'national emergency laws'. These amendments are primarily to recognise the making of a national emergency declaration, however, in some instances, they have further significance.

The consequential amendments alter sections 28 and 158 of the *Environment Protection and Biodiversity Conservation Act 1999*. These sections deal with bilateral agreements between the Commonwealth and states and territories in regards to approval processes for activities that could significantly affect the environment, and outline relevant exemptions from those approval processes.

The amendments to these sections allow a national emergency declaration under the NED Act to be used as a basis for circumventing the relevant protections, if it is the Prime Minister's view that it is in the state's or nation's best interests. If a national emergency is declared in Tasmania without prior consultation and these powers are exercised, this could have significant and devastating impacts on Tasmania's natural heritage values. It is not in Tasmania's best interests for these decisions to be made without prior and appropriate consultation with the Government and relevant experts.

The amendment to Section 16(2)(b) of the *Liquid Fuel Emergency Act 1984* (LFEA) is also of significant concern to Tasmania. This amendment³ repeals an existing subsection that requires consultation with the relevant Energy Minister for a state or territory, and inserts a new subsection that allows for the Commonwealth to declare a national liquid fuel emergency, if a national emergency declaration has already been made.

The existing measures in the LFEA to allow for consultation with jurisdictions prior to declaring a national liquid fuel emergency reflect the seriousness of the decision. Any declaration or decision-making surrounding a liquid fuel emergency should be a matter of consultation and collaboration between all states and territories and the Commonwealth. We consider the existing LFEA consultation requirement as vital to ensure that Tasmanian needs are considered and addressed.

³ The amendment repeals the current provisions and replaces it with the following:

- (i) a national emergency declaration (within the meaning of the National Emergency Declaration Act 2020) is in force; or
- (ii) the Minister is satisfied that he or she has afforded the Energy Minister for each State, the Energy Minister for the Australian Capital Territory and the Energy Minister for the Northern Territory a reasonable opportunity to consult with the Minister concerning the shortage, or likelihood of a shortage, of liquid fuel.



5. Variance of a national emergency declaration

Noting that the Governor-General may extend the period of a national emergency declaration, it would be appropriate to include a clause in the NED Act that enables states and territories to initiate an amendment to, or a reduction in the duration of, a national emergency declaration. A three month declaration period (which is the maximum allowable at any one time under the NED Act) may not be appropriate if the impacts and severity of an emergency improve, and there needs to be a mechanism by which a declaration can be 'scaled back' if required.

6. Concurrent operation of State and Territory Laws

Clarity is also required in relation to the intersection between the NED Act and state legislation. While the NED Act does not exclude or limit the operations of a law of a state or territory that is capable of operating concurrently with it, it is unclear which legislation it may impact and what circumstances would make state legislation 'incompatible' with the NED Act.

For example, Tasmania's Emergency Management Act 2006 (the EM Act) provides for the Premier of Tasmania to declare a state of emergency, if they are satisfied that an emergency is likely to occur in all or part of the State. A State of Emergency was declared in Tasmania for the first time in March 2020 in response to the global Coronavirus pandemic, during which time the State Controller was delegated powers under Schedule 2 of the EM Act to coordinate response and recovery operations. It is unclear how a national declaration would apply in practical terms, if a state of emergency initiated under state legislation is already in effect.





Department of Premier and Cabinet

www.dpac.tas.gov.au