# A Storm-Walking Profession:
# Natural Disaster Lawyering for the 21st Century

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**Abstract**

This thesis asks whether making an Emergency Declaration during natural disasters, contained in the *National Emergency Declaration Act 2020* (Cth) (NEDA) is fit for purpose for dealing with increasing numbers of natural disasters owing to climate change. The NEDA will be analysed in the context of the law reform recommendations it was enacted to address, made by the Australian 2020 Royal Commission into National Natural Disaster Arrangements (Royal Commission).

Chapter 1 outlines the principles of Australian statutory construction, and an Australian form of law reform research that utilises findings of Royal Commissions to discuss the operation of law. Chapter 2, outlines two law reform criteria from the Royal Commission, that will be used to assess if the NEDA is fit for purpose. This chapter concludes the NEDA meets the first criteria, as it applies to scientific projections of Australia's natural disaster risk outlook. Whether the NEDA's operation meets the second criteria and is a suitable response to this outlook is discussed in subsequent chapters.

Chapter 3 analyses two main powers in the NEDA, the Declaration Power and Red-Tape Power (ss 11-15), which operate to vitiate legislative decision-making. Chapter 4 analyses how the NEDA operates to vitiate decision-making under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Both of these chapters show the NEDA operates in a manner that treats natural disasters as disruptions to the function of law, and fails to enable legislative responses to natural disasters as the Royal Commission recommended.

Chapter 5 discusses two responses to the missed law reform opportunity the NEDA represents to respond effectively to Australia's natural disaster risk

outlook. The first, is the NEDA could contain additional provisions to guide legislative decision-making during natural disasters. The second, is to describe this area as Storm Law, and the profession as a Storm-Walking Profession.

**Word Count:** 29,801

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**Acknowledgments**: The author would like to thank Professor Elizabeth Fisher for her support while this thesis has been written, as well as staff at St Antony's College for their support during the revision process. The author would also like to thank her parents, Anna and Rob, without whose support this thesis would not have been written.

# Table of Abbreviations

| | |
|---|---|
| AIA | *Acts Interpretation Act 1901* (Cth) |
| ALJ | Alternative Law Journal |
| AJEM | Australian Journal of Emergency Management |
| BJC | The British Journal of Criminology |
| CLR | Commonwealth Law Reports |
| EPBCA | *Environment Protection and Biodiversity Conservation Act 1999* (Cth) |
| EPLJ | Environment and Planning Law Journal |
| FCR | Federal Court Reports |
| LGERA | Local Government and Environmental Reports of Australia |
| LSJ | Law Society Journal |
| JEL | Journal of Environmental Law |
| JLME | The Journal of Law, Medicine and Ethics |
| NEDA | *National Emergency Declaration Act 2020* (Cth) |
| NSWCA | New South Wales Court of Appeal |
| NTSC | Northern Territory Supreme Court |
| RCA | *Royal Commissions Act 1902* (Cth) |
| RECIEL | Review of European, Comparative and International Environmental Law |
| TEL | Transnational Environmental Law |
| UQLJ | University of Queensland Law Journal |

# Table of Cases


| | |
|---|---|
| *Alcan (NT) Alumina Pty Ltd v Commission of Territory Revenue (NT)* (2009) 239 CLR 27 | 33 |
| *Australian Brumby Alliance v Parks Victoria Inc* (2020) 277 FCR 559 | 93-94 |
| *Australian Rail, Tram and Busy Industry Union v Busways Northern Beaches Pty Ltd (No 2)* (2022) 291 FCR 93 | 34 |
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| *Greylag Goose Leasing 1410 Designated Activity Company v P.T. Gardua Indonesia Ltd* [2023] NSWCA 134 | 23 |
| *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 | 33 |
| *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 | 33-34 |
| *Save the Ridge Inc v Commonwealth* (2005) 147 FCR 97 | 94 |
| *Williamson v Commonwealth* [2023] NTSC 56 | 23 |

# Table of Legislation


| | |
|---|---|
| *Acts Interpretation Act 1901* (Cth) | 18, 20, 22, 28-29, 34-35 |
| *Biosecurity Act 2015* (Cth) | 62 |
| *Disaster Management Act 2003* (Qld) | 32 |
| *Emergency Management Act 2013* (NT) | 32 |
| *Environment Protection and Biodiversity Conservation Act 1999* (Cth) | 16, 28, 36, 51, 80-86, 88-105, 107, 110, 121-122 |
| *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Compilation No. 54. | 96 |
| Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) | 11, 26, 42, 44, 69, 75, 109 |
| Explanatory Memorandum, National Scheme for Institutional Child Sexual Abuse Bill 2018 (Cth) | 22 |
| *Foreign State Immunities Act 1985* (Cth) | 23 |
| *Legislation Act 2003* (Cth) | 35 |
| *National Emergency Declaration Act 2020* (Cth) | 9, 11-19, 23-24, 26-33, 35-39, 42-46, 49-50, 53-56, 64-82, 84, 86, 92-93, 95-98, 100-111, 117, 119-122 |
| *National Emergency Declaration Regulations 2020* (Cth) | 66 |
| *National Emergency Declaration (Consequential Amendments) Act 2020* (Cth) | 36, 82, 96 |
| *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) | 22 |
| *Royal Commissions Act 1902* (Cth) | 20-21 |

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|---|---|
| Commonwealth Letters Patent, 20 February 2020 | 10, 11, 20-21, 24, 25, 35, 59-60, 75, 81, 83, 85 |
| Amendment to Commonwealth Letters Patent, 23 July 2020 | 24 |
| Royal Commission into National Natural Disaster Arrangements, 'Interim Observations' (Commonwealth of Australia, August 2020) | 47 |
| Royal Commission into National Natural Disaster Arrangements, 'Final Report' (Commonwealth of Australia, October 2020) | 9, 10-11, 14, 18-20, 22-24, 26-29, 38-42, 46-49, 52, 55, 61-64, 74-75, 81, 87-91, 98-99, 102-103, 107, 111, 114, 119-120, 122 |

# Introduction

This thesis asks whether Australia's Federal Legislative response of making an Emergency Declaration during natural disasters, contained in the National Emergency Declaration Act 2020 (Cth) (NEDA) is fit for purpose for dealing with increasing numbers of natural disasters owing to climate change. This thesis will consider the NEDA in the context of the process that generated it, the Royal Commission into National Natural Disaster Arrangements (Royal Commission). The Royal Commission was an inquiry called by the Australian Federal Government in response to the Black Summer Bushfires in 2019-2020 in Australia. Through this analysis, this thesis will demonstrate the powers enlivened when an Emergency Declaration is made under the NEDA are insufficient in their current form to dealing with the increasing volume and scale of natural disasters. The problems with this Act highlight the need for the legal profession to consider new ways in which legislation such as the NEDA, and by extension the area of Disaster Law, can operate so that they are laws that facilitate adaptation to climate change.

The scientific context of this thesis is that we are living in the time of 'compounding and cascading'[1] natural disasters, driven by human-induced climate change resulting in increasing instability of global and local weather

[1] This is a scientific description that refers to the increasing volume and scale of impact of repeated natural disasters. It is also used frequently by the Royal Commission in its Final Report. See IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1-34 (Summary for Policymakers), 14 [B.2]. See also Royal Commission into National Natural Disaster Arrangements, 'Report' (Commonwealth of Australia, October 2020) (Final Report), 5 'consecutive and compounding'.

patterns.[2] These impacts have resulted in irreparable damage to ecosystems,[3] and are having fundamental impacts on human societies and how people live their lives.[4] An example is the Black Summer Bushfires, which occurred in 2019-2020 across Australia. This fire season stretched from July 2019 to March 2020, and resulted in approximately three billion animals dying, over 3,000 Australian homes being destroyed and the deaths of 33 people.[5] Some communities impacted by the fires also experienced hailstorms and floods during this period.[6] Shortly after this, the Covid-19 pandemic affected Australia as well as people around the world.[7]

In response to the Black Summer Bushfires, and in the face of needing to reform Australia's Federal response to natural disasters, the Australian Federal Government created the Royal Commission. This Royal Commission was tasked with considering how the Australian Federal Government could best respond to natural disasters,[8] in circumstances where Australia's disaster outlook is 'alarming'[9] and where the Black Summer Bushfires demonstrated the legal mechanisms the Federal Government was utilising may no longer be adequate in responding to this future.[10] The Royal Commission made many recommendations, including recommendation 5.1 which suggested legislating a

[2] Summary for Policymakers (n 1) 12-13 [B.1]-[B.1.1], [B.1.3], 14-18 [B.2]-[B3.1].
[3] Ibid 5 [A.2.3].
[4] Summary for Policymakers (n 1) 5 [A.2]-[A.2.2]; 'Annual Report: UNEP in 2022' (United Nations Environment Programme 6 February 2023) 2.
[5] Final Report (n 1) 5.
[6] Ibid.
[7] Ibid.
[8] Commonwealth Letters Patent, 20 February 2020 (Terms of Reference) 2(c).
[9] Final Report (n 1) 6.
[10] Ibid 5-6.

national Emergency Declaration mechanism.[11] The Australian Federal Government responded to this recommendation by enacting the NEDA.[12]

This thesis will outline the Royal Commission's recommendation to create the NEDA and what it considered the Act should achieve, contrasting this with the contents of the NEDA. This analysis is situated within an Australian area of legal scholarship, which utilises the Final Reports of Royal Commissions to discuss law reform.[13] In Australia, Royal Commissions are highly regarded and their recommendations are utilised by Australian legal scholars to identify serious areas of concern within Australian law that need rectification.[14] The observations and recommendations of Royal Commissions are discussed in the context of relevant Australian legislation, and used to assess whether this legislation suitably responds to the issues the Royal Commission identified.[15]

The Royal Commission the subject of this paper was concerned with improving how Australia's Federal Government responds to natural disasters from a legislative perspective.[16] This thesis will utilise the contents of the Royal Commission's Final Report to discuss whether the subsequently enacted NEDA is fit for purpose in addressing two issues the Royal Commission identified. First,

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[11] Ibid 149.
[12] Commonwealth, *Parliamentary Debates,* House of Representatives, 3 December 2020, 10419 (Christian Porter, Attorney-General) (Second Reading Speech); Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 3 [2].
[13] Ayse D Sezgin and Ashleigh Best, 'Re-imagining International Law's Environment: An Ecological Critique of International Food Law and International Disaster Law' (2022) 23 Melb J Int'l L 23, 59-60; Yee-Fui Ng, 'In the Moonlight? The Country and Accountability of Government Corporations in Australia' (2019) 43 Melb U L Rev 303, 305-8.
[14] Lachlan Peake, 'Testing the Regulator's Priorities: To Sanction Wrongdoers or Compensate Victims?' (2020) 39(2) UQLJ 277, 277-78.
[15] Peake (n 14) 285-86; Nicole Rogers, *Law, Climate Emergency and the Australian Megafires* (Routledge 2022) 83-85.
[16] Terms of Reference (n 8) 2(c).

whether the NEDA applies to the scientifically projected scale and length of natural disasters Australia will experience as a result of climate change. Second, whether the operation of the NEDA by creating exceptions to legislation is an appropriate response to Australia's natural disaster risk outlook.

This thesis is also being written in a context where analysis of legislation such as the NEDA is undertaken by legal scholars working in the field of Disaster Law, a developing area of law that discusses how law responds to different forms of disaster including natural disasters.[17] Disaster Law is a unique field that requires thorough consideration by legal scholars given the changed scientific facts and circumstances of our environment that are being created by climate change.[18] It is also a field that is often written in response to specific disasters and how law responds during such disasters, such as the 2019-2020 Black Summer Bushfires.[19] Natural disasters can be human, ecological and societal tragedies, and it is important to understand that this context is unlike other areas of law that relate to the environment.[20] It is also unlike climate change law, because it is not concerned with mitigation of green-house gas emissions over

[17] Daniel Farber, 'Disaster Law in the Anthropocene' in Jacqueline Peel and David Fisher (eds), The Role of International Environmental Law in Disaster Risk Reduction (Brill 2016) 51-54; Jocelyn Stacey, 'Vulnerability, Canadian Disaster Law, and the Beast' (2018) 55 Alta L Rev 853, 855.

[18] Farber, Disaster Law in the Anthropocene (n 17) 64; Rhys Carvosso, 'The reactive model of disaster regulation in international law and its shortcomings' (2021) 34 LJIL 957, 975-76; Jacqueline Peel and David Fisher 'International Law at the Intersection of Environmental Protection and Disaster Risk Reduction' in Jacqueline Peel and David Fisher (eds) *The Role of International Law in Disaster Risk Reduction* (BRILL 2016) 1-2; Daniel Farber, and Lisa Grow, 'Foreword: Current Trends in Disaster Law and Policy', in Susan S. Kuo, John Travis Marshall and Ryan Rowberry (eds), *The Cambridge Handbook of Disaster Law and Policy* (Cambridge University Press 2022) xxv.

[19] Rosemary Lyster, 'Climate Disaster Law: does it hold the key to dealing with bushfires?' (2020) 64 LSJ 68, 68; Ashleigh Best, 'The legal status of animals: a source of their disaster vulnerability' (2021) 36(3) AJEM 63, 63-4.

[20] Robert Verchick, *Facing Catastrophe: Environmental Action for a Post-Katrina World* (Harvard University Press 2012) 2-3. See also Nicola Pain, 'Property rights and climate change' (2021) 29 APLJ 296, 310.

the long term, but looking at what occurs during the short and medium term during and after a natural disaster.[21] From a climate change lawyer's perspective, this is an area of law concerned with adaptation.[22]

The urgency and importance of undertaking further work in this field is outlined by the Black Summer Bushfires, as well as the recent fires in Canada, France, Greece, Spain, Chile, Hawaii, and now the start of the Bushfire season in Australia at the time of writing.[23] The volume and scale of these disasters shows this is a problem that is not going away. For lawyers, it is necessary at this juncture to evaluate the forms of legal responses that legislation provides to these natural disasters, and whether they are appropriate for these changed facts and circumstances. While this research is Australia specific, the discussions of how emergency legislation applies to natural disasters increasing in scale and frequency contains lessons with global application.

This thesis concludes the NEDA as a legislative framework for adaptation to Australia's future of increasing natural disasters is not fit for purpose. This is because the NEDA replicates traditional understandings of natural disasters in Disaster Law, as unknowable entities that disrupt the function of the law.[24] The

[21] Verchick (n 20) 2-3; Peel and Fisher (n 18) 2.
[22] Fabrice G Renaud, Karen Sudmeier-Rieux and Marison Estrella, 'The relevance of ecosystems in disaster risk reduction' in Fabrice G Renaud, Karen Sudmeier-Rieux and Marison Estrella (eds) *The Role of Ecosystems in Disaster Risk Reduction* (United Nations University Press 2013), 15.
[23] SRobert Levy '2023 Fire Season in the Northern Hemisphere' (3 October 2023) <https://earthobservatory.nasa.gov/images/event/151148/2023-fire-season-in-the-northern-hemisphere> accessed 5 November 2023; Harrison Tippet 'Emergency services across Australia brace for bushfire season as El Nino approaches' (5 November 2023) <https://www.abc.net.au/news/2023-11-05/dry-summer-bushfire-risk-emergency-services-el-nino/103063574> accessed 6 November 2023.
[24] Lisa G Sun 'Climate Change and the Narrative of Disaster' in Jacqueline Peel and David Fisher (eds), *The Role of International Environmental Law in Disaster Risk Reduction* (BRILL 2016) 30;

Royal Commission identified that traditional ways of approaching natural disasters were not fit for purpose in responding to future projections of the volume and scale of natural disasters in Australia.[25] As such, the Royal Commission highlights there is a need to reconceive how natural disasters are responded to where they occur more frequently and for extended periods of time. This thesis proposes two responses to this problem. The first, is by suggesting several amendments to the NEDA which would create a medium-term framework for decision-making during long term natural disasters. The second, in response to the Commission's suggestion that Australian's engage in 'Big Country Thinking'[26] is to suggest that 'Disaster Law' may need to be renamed 'Storm Law' and the legal profession should consider itself a Storm-Walking Profession. Such conceptions could permit the profession to approach natural disasters beyond the acute phase of those disasters, as well as foster understandings that responding to natural disasters will be an ongoing project for the legal profession this century.

This thesis will begin in Chapter 1 with a methodological discussion. First, it will outline an area of Australian legal scholarship where scholars utilise the Final Reports and Recommendations of Royal Commissions to discuss the operation of legislation in Australia. Second, it will outline the principles of statutory construction in Australia that will be used to analyse the NEDA. Third, it will outline the structure of this analysis, demonstrating how discussing the NEDA in the context of the Royal Commission's Recommendations and Final Report,

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Farber, 'Disaster Law in the Anthropocene' (n 17) 56; W John Hopkins, 'The First Victim – Administrative Law and Natural Disasters' (2016) NZ L Rev 189, 193-4.
[25] Final Report (n 1) 5-7.
[26] Ibid 25 [47].

will allow for a detailed examination of the outcomes of utilising the NEDA to respond to cascading and compounding natural disasters.

The first part of this analysis is contained in Chapter 2, which outlines two key criteria the Royal Commission considered important when recommending the NEDA as a law reform. These key points which will act as criteria in this thesis for assessing whether the NEDA is fit for purpose. The first is whether the NEDA responds to the science of Australia's natural disaster outlook, that of the increasing volume and scale of natural disasters. The second is whether traditional approaches to natural disasters as entities that disrupt the function of law are useful in this new factual context. This Chapter outlines how the NEDA defines natural disasters, and the length of time an Emergency Declaration applies to a natural disaster. It finds the NEDA does satisfy the first of the reform criteria, as it does apply to the scientific projections of Australia's natural disaster risk outlook. However, it discusses this is only part of the legal response required to Australia's disaster outlook according to the Royal Commission. The Royal Commission was concerned that in the process of reforming the law, natural disasters should no longer be regarded as 'unprecedented'. This invites discussion of whether treating natural disasters in a traditional manner as entities that disrupt the function of law is appropriate given Australia's natural disaster risk outlook. Whether the NEDA operates as a non-traditional legislative response to natural disasters, as the Royal Commission recommended, will be considered in Chapters 3 and 4 of this thesis.

The second part of the analysis is contained in Chapter 3, which considers the operation of two key powers in the NEDA during natural disasters and how these operate loosen frameworks of legislated administrative decision-making during natural disasters. This will be discussed in the context of the Royal Commission's recommendation 5.1, which conceived the NEDA as a mechanism that enabled legal responses to natural disasters. In this Chapter, it will be shown the key powers contained in ss 11 and 15 of the NEDA operate together in the opposite manner in which the Royal Commission intended, instead operating to vitiate existing legal frameworks of administrative decision-making.

The third part of the analysis is contained in Chapter 4, which considers how the NEDA operates to affect decision-making in other areas of legislation. One such area is protection of wildlife from actions of Commonwealth agencies that could cause the environment significant harm under the *Environment Protection and Biodiversity Conservation Act 1996* (Cth) (EPBCA). How the operation of s 11 of the NEDA in conjunction with s 28 of the EPBCA operate to vitiate these protections will be contrasted with the Royal Commission's recommendations the EPBCA could be utilised as enable decision-making during natural disasters that promotes wildlife conservation. This discussion will illustrate that beyond the use of emergency powers contained in the NEDA, this legislation also operates to vitiate the operation of other legislation during natural disasters.

In Chapter 5, the fourth part of the analysis will discuss how the NEDA represents a missed law reform opportunity, and potential responses to the NEDA not being an appropriate mechanism in its current form for adapting to

Australia's future cascading and compounding natural disasters. This is a gap that Disaster Law scholars have begun to identify[27] and one that needs to be filled in order to adequately respond to the natural disaster outlook of Australia, and the rest of the world. This 'no-analogue legal future'[28] of increasing climate disasters needs a response from the legal profession.

This thesis suggests two manners in which to respond to this problem. The first, is by suggesting several amendments to the NEDA to create a medium-term framework for decision-making during natural disasters that occur over long time periods. The second, generated as a response to the Royal Commission's suggestion we engage in 'Big-Country Thinking' with respect to responding to natural disasters is to describe this area of law as 'Storm Law' and to consider the profession a 'Storm-Walking Profession'. This chapter will conclude with a discussion of how this expression encompasses active engagement with ever changing and evolving climate disasters of our future. It also demonstrates a clear need for further research about how the legal profession can best respond to adapt to our future of climate disaster, in order to preserve the rule of law.

[27] Carvosso (n 18) 975; Farber, 'Disaster Law in the Anthropocene' (n 17) 58.
[28] Anastasia Telesetsky, 'Conclusion' in David D Caron, Michael J Kelly and Anastasia Telesetsky (eds) *The International Law of Disaster Relief* (Cambridge University Press 2014), 361.

# Chapter 1 Method

This thesis approaches the question of whether the NEDA is fit for purpose for dealing with increasing numbers of natural disasters owing to climate change, by comparing the contents of the NEDA with the law reform recommendations in the Royal Commission's Final Report. This is consistent with a particularly Australian law reform system, where the Final Reports of Royal Commissions result in the enactment of legislation, are used by Australian Courts to interpret said legislation and are also used by Australian legal scholars to assess the success of legislative law reform. The questions that arise from the recommendations of each Royal Commission are necessarily unique to its subject matter. This thesis will use the Royal Commission's Final Report to consider whether the law reform it generated, the NEDA, is fit for purpose in the context of Australia's natural disaster risk outlook.

This Chapter will explain two arms of the analysis undertaken in this thesis. The first, is an explanation of why the Final Report of the Royal Commission can be used to evaluate whether the NEDA is fit for purpose. This is owing to several factors, which are: the function of Royal Commissions in Australian legal culture, that Australian Federal Governments frequently enact legislation on the recommendation of Royal Commissions and the fact that the *Acts Interpretation Act 1901* (Cth) (AIA) permits the use of Royal Commission Final Reports by Australian Courts when interpreting the contents of legislation. Taken together, these factors demonstrate the existence of an Australian system of law reform centred around Royal Commissions and their recommendations. In this context, Australian legal scholars use the Final Reports of Royal Commissions to discuss law reform, as is done in this thesis. The approach this

thesis takes to summarising different aspects of the Royal Commission's Final Report, and the benefits of this detailed approach, will also be outlined.

The second, is an outline of Australian Federal Statutory Interpretation principles, which will be used to interpret the operation of the NEDA. This section will show that the NEDA is worthy of independent study as a stand-alone piece of legislation the Commonwealth relies on during natural disasters. It will also explain the use of two key terms 'enabling' and 'vitiating' throughout this thesis, which are drawn from Disaster Law scholarship, and describe whether legislation provides a framework for decision-making as well as where an Emergency Declaration removes the legislative infrastructure of decision-making.

## 1.1 Australian Law Reform Research

Utilising the contents of the Royal Commission's Final Report to evaluate whether the NEDA is fit for purpose as a legislative mechanism responding to Australia's natural disaster risk outlook is in line with a particularly Australian form of Law Reform Research. This section of the thesis will outline the system of law reform regarding Royal Commissions in Australia, and discuss the particular manner in which the Royal Commission's Final Report will be analysed in this thesis. First, it will outline how Royal Commissions are formed and that their Final Reports can result in the enactment of legislation. Second, it will outline how the Final Reports of Royal Commissions can also be utilised by the profession to interpret the Federal legislation. Third, it will provide an overview of the Royal Commission that is discussed in this thesis, including details of its task and of it as an institution. Finally, it will discuss the approach taken to utilising the Final

Report of the Royal Commission in this thesis, with reference to the particular area of Australian law reform scholarship this thesis is situated in.

### *Australian Royal Commissions and Law Reform*

The Law Reform that can be generated by Australian Royal Commissions, and the value of the Reports that Royal Commissions produce, can only be understood in the context of how the Australian legal profession regards and utilises the products of Royal Commissions. In this section, first there will be an outline of the role of Royal Commissions in Australia and how legislation is enacted in response to them. Then, there will be a description of how the AIA permits Reports of Royal Commissions to be used to interpret legislation. This together, demonstrates an Australian system of law reform of which Royal Commission Reports are a critical component.

Royal Commissions are a law reform institution that is a significant element of public life in Australia.[29] Federal Commissions are established under s 1A of the *Royal Commission Act 1902* (Cth), and are governed by their Terms of Reference which specifies the length of the Commission and the matters into which it inquires.[30] Royal Commissions respond to their Terms of Reference by providing their findings in the form of a Report to the Governor-General of Australia.[31] Royal Commissions in Australia can be considered an accountability mechanism, utilised when there is a lack of public confidence in Government to

[29] Dominique Hogan-Doran, 'Lessons for Government from Recent Royal Commissions and Public Inquiries' (Law Society of New South Wales Government Solicitor's Conference, Sydney, September 2019) 3 [2].
[30] *Royal Commissions Act 1902* (Cth) (RCA) s 1A; Terms of Reference (n 8) 2-4.
[31] Kenneth Hayne, 'On Royal Commissions' (Constitutional Law Conference, Melbourne, July 2019), 3; RCA (n 30) s 1A.

resolve a controversial matter.[32] They are staffed by senior legal professionals, including former High Court Judges acting as Commissioners and Kings Counsel who work as Counsel Assisting the Commission appearing in public hearings to question witnesses and tender evidence.[33] As such, as an institution Royal Commissions are regarded with high levels of respect by a broad cross section of Australian society.

One of the key features of Royal Commissions that ensures their success in exploring the facts and circumstances that may give rise to a need for law reform are their evidence gathering powers. Royal Commissions have statutory evidence gathering powers including the power to summon witnesses and take evidence,[34] and to issue search and arrest warrants.[35] Royal Commissions are also not typically bound by the rules of evidence.[36] As such, Royal Commissions have vast powers to receive evidence to fulfil their task as outlined in their Terms of Reference. These powers give Royal Commissions the capacity to illuminate serious issues within the law, as well as suggest solutions to these problems. The impartiality and independence of Commissions, given they are statutory bodies independent of government, also means that their findings and recommendations are taken seriously by the Australian legal profession.[37]

[32] Hayne (n 31) 4; Hogan-Doran (n 29) 3 [4].
[33] See generally Hogan-Doran (n 29).
[34] RCA (n 30) s 2.
[35] Ibid ss 4, 6B.
[36] Hogan-Doran (n 29) 9 [26].
[37] Marcia Neave, 'Victoria's Response to the Royal Commission into Family Violence: Where Are We Now?' (2019) 44(1) Alternative LJ 3, 3; Matthew Groves, 'A man for all seasons? The fair minded observer and royal commissioners' (2016) 23 AJ Admin L 201, 201-202.

Royal Commissions in Australia are called frequently at a Federal level, and often lead to law reform. Between 2013-2023, ten Royal Commissions have been called at a Federal level in Australia on topics including Aged Care Quality and Safety, Misconduct in Banking and Financial Services and Defence and Veteran Suicide.[38] Many Royal Commissions, although not all, have led to law reform in Australia. One recent example is the Royal Commission into Institutional Child Sexual Abuse, which resulted in the creation of a National Redress Scheme for Institutional Child Sexual Abuse under the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth).[39] However, the Final Reports of Royal Commissions do not just result in the enactment of legislation but can also be used to interpret the content of legislation itself.

The rules of statutory construction in Australia permit the use of Final Reports of Royal Commissions to interpret the meaning of legislation. The AIA is a key source of Federal statutory construction rules in Australia.[40] Section 15AB of the AIA states that extrinsic materials may be utilised to assist in interpretation of Federal legislation in certain circumstances. This includes the reports of law reform bodies, specifically:[41]

[38] Australian Parliament House, 'Royal Commissions and Commissions of Inquiry' (28 October 2021) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/royalcommissions> accessed 16 December 2023.
[39] Commonwealth Department of Social Services, 'About the National Redress Scheme' <https://www.nationalredress.gov.au/about/about-scheme> accessed 16 December 2023; Explanatory Memorandum, *National Scheme for Institutional Child Sexual Abuse Bill 2018* (Cth) 7.
[40] AIA s 1A.
[41] Ibid s 15AB(2)(b).

> Any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted.

This subsection underlies the fact that the Australian parliament considers the Reports of Royal Commissions to be valuable resources for understanding and interpreting the content of Australian law. Courts have, for example, used the Report of an Australian Law Reform Commission to interpret legislation, where the report's recommendations were adopted by the Federal Government and resulted in the enactment of the *Foreign State Immunities Act 1985* (Cth).[42]

It is clear that the role of Royal Commissions is to provide recommendations on the basis of broadly gathered evidence, with the view of addressing serious issues with Australian law. The significance of the Final Reports of Royal Commissions is evident in the existence of s 15AB(2)(b), which states Reports of Royal Commissions can be utilised to understand the content of legislation. In this context, the Royal Commission discussed in this thesis provides valuable insight into the reasons the NEDA was enacted, and whether it is fit for purpose in responding to the issues the Royal Commission recommended it address.

[42] *Williamson v Commonwealth* [2023] NTSC 56 [39]. See also *Greylag Goose Leasing 1410 Designated Activity Company v P.T. Gardua Indonesia Ltd* [2023] NSWCA 134 [20]-[22] (Bell CJ, Meagher and Kirk JJA agreeing).

### *The Final Report as a resource to evaluate the NEDA*

To understand how the Final Report of the Royal Commission can be used as a scholarly resource, it is necessary to understand the Royal Commission itself as an institution. As such, this section will cover the following. First, it will outline the task of the Royal Commission under its Terms of Reference and the features of its work as an institution. And second, it will outline the manner in which the Final Report will be analysed during this thesis, in the context of Australian scholarship on Royal Commission and law reform.

The Royal Commission analysed in this thesis was established on 20 February 2020, and as required to provide a report to the Governor-General of Australia by 28 October 2020.[43] The Commissioners were Air Chief Marshal Mark Biskin (AC), the Honourable Dr Annabelle Bennett AC SC, and Professor Andrew Macintosh, with Senior Counsel Assisting being Dominique Hogan-Doran SC, and Andrew Tokley KC. The Royal Commission was required by its Terms of Reference to undertake three tasks along with one incidental task. The first two were to consider: the responsibilities and co-ordination issues between all levels of government in Australia regarding natural disasters, and the benefits of having nationally consistent standards of accountability for different levels of government.[44] The third task, and the incidental task, was concerned with the law reform that is the subject of this thesis. These tasks were the following:[45]

[43] Amendment to Commonwealth Letters Patent, 23 July 2020, 1-2.
[44] Terms of Reference (n 8) 2(a)-(b).
[45] Ibid 2(c).

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

(i) Thresholds for, and any obstacles to, State or Territory requests for Commonwealth assistance;

(ii) whether the Commonwealth Government should have the power to declare a state of national emergency;

(iii) how any such national declaration would interact with State and Territory emergency management frameworks;

(iv) whether, in the circumstance of such a national declaration, the Commonwealth Government should have clearer authority to take action (including, but without limitation, through the deployment of the Australian Defence Force) in the national interest.

(d) any relevant matter reasonably incidental to a matter referred to in paragraphs (a) to (c).

In fulfilling its Terms of Reference, the Royal Commission received 1,750 public submissions, 80,000 pages of tendered evidence and heard from 270

witnesses.[46] The Royal Commission stated its approach to its recommendations was to 'inform the development of a national approach' to natural disasters in Australia,[47] and produced a range of documents including four background papers, four issue papers, as well as an Interim and Final Report. The Final Report, and the recommendations it contains, is the material that will be used in this thesis.

There is a clear relationship between the Royal Commission's Final Report, which in recommendation 5.1 suggested the enactment of a legislated Emergency Declaration mechanism, and the enactment of the NEDA. This is because in the NEDA's Explanatory Memorandum, recommendation 5.1 is extracted in full,[48] and in the first sentence of the Attorney-General's Second Reading Speech, Mr Porter stated that the purpose of the NEDA is to enact the recommendation of the Commission.[49] In this manner, the enactment of the NEDA can be considered a result of the Royal Commission's law reform process. It is this process, and its culmination in the enactment of legislation, that attracts the interest of Australian legal scholars.

Australian legal scholars utilise the products of Royal Commissions, such as their Final Reports, as a resource to understand the basis for law reform. This method of considering findings and recommendations of Royal Commissions and how governments have chosen to implement them is an Australian form of law reform research. This scholarship often describes the nature of legislation and

[46] Final Report (n 1) 6.
[47] Ibid.
[48] Explanatory Memorandum (n 12) 3 [2].
[49] Second Reading Speech (n 12) 10419.

how it operates.[50] These descriptions are undertaken in the context of findings of Royal Commissions and the basis for the law reform recommendations that it has made.[51] These reform recommendations are then used to evaluate the results of legislative reform.

Australian scholars utilise Royal Commissions to establish an evidentiary basis for discussing the facts and circumstances that a legal framework is operating in.[52] The findings and recommendations of Royal Commissions are also used to consider the basis on which the law could be reformed, and to discuss the benefits and disadvantages of implementing such changes.[53] Indeed, Australian legal scholars have utilised the Royal Commission the subject of this thesis in these ways.[54] Necessarily, the products of Royal Commissions are utilised differently by legal scholars depending on the nature of questions they are asking about the law and how the Royal Commission can assist their understanding of it.

The method this thesis will take to utilising the Royal Commission's main product, the Final Report, is focussed on how the Royal Commission assists in understanding whether the NEDA is fit for purpose in responding to Australia's natural disaster risk outlook. As such, it will focus on three specific aspects of the

[50] Ng (n 13) 308-13; See also Peake (n 14) 277-78
[51] Ng (n 13) 305-8; Peake (n 14), 279-280; Rogers (n 15) 83-85; Elizabeth Fisher, 'Thinking Collectively: Law and Scholarship in Precarious Times' (2020) 32 JEL 339, 340-42.
[52] Ng (n 13) 305; Fisher, Thinking Collectively (n 51) 341.
[53] Peake (n 14) 279, 283; Katie Wright, Shurlee Swain and Kathleen McPhillips, 'The Australian Royal Commission into Institutional Reponses to Child Sexual Abuse' (2017) 74 Child Abuse & Neglect 1, 6-7; Penny Crofts, 'Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability' (2020) 42 Sydney L Rev 395, 395-8, 422.
[54] Lyster (n 19) 68-69. See also Rogers (n 15) 83-85; Anne Twomey, 'The Prerogative and the Courts in Australia' (2021) 3 Journal of Commonwealth Law 55, 67, 71-73.

Royal Commission's report. The first, is how the Royal Commission defined the problem it was seeking to address, that is natural disasters, in its Introduction and Chapter 2. The second, is the Royal Commission's consideration of whether an Emergency Declaration mechanism should be legislated, contained in Chapter 5 and its recommendation 5.1. The third, is the Royal Commission's consideration of how other legislation would operate during natural disasters, including the EPBCA, contained in Chapter 16, and whether this consistent with recommendation 5.1.

The approach this thesis takes to the evidentiary basis of the Royal Commission's recommendations, as well as the recommendations themselves, is highly detailed. This is necessary to clearly utilise the Final Report as a resource for to understanding the issues the NEDA was intended to address. The value of Royal Commissions is that they have the capacity to look broadly at law reform issues, in a way that purely doctrinal analysis of the NEDA could not. Indeed, on its own, a doctrinal analysis of the NEDA would yield a consideration of the utilisation of broad emergency powers but would not address the climate context that the Royal Commission responded to, which is that we are living in a time of cascading and compounding disasters.

It should be noted, this thesis does not utilise the Royal Commission's Final Report to interpret specific provisions of the NEDA. However, s 15AB of the AIA is a powerful indicator that scholars can regard the Royal Commission's Final Report as a valuable resource to understand the reasons why the NEDA was enacted and whether it is fit for purpose in as a response to the issues it was

designed to address. This is because the AIA permits the utilisation of the reports of Royal Commissions in doctrinal reasoning by the profession and Australian courts, when assistance is required in understanding the content of legislation. It follows this thesis is utilising the Final Report to understand the factual circumstances surrounding the enactment of the NEDA, as well as the problems it was designed to rectify.

In undertaking this analysis, this thesis will be situated within the law reform literature concerning the implementation of recommendations of Royal Commissions as well as the field of Disaster Law. Indeed, Australian scholars have already begun to utilise the products of the Royal Commission to ask questions regarding Disaster Law. This includes using the factual findings and recommendations of the Royal Commission as bases on which to put broader discussions of Australian and international disaster law,[55] or to posit the existence of a new category of Climate Disaster Law.[56] No scholars have yet considered whether making an Emergency Declaration under the NEDA is a fit for purpose response to Australia's natural disaster risk outlook, and as such whether one of the main law reforms the Royal Commission recommended was successfully implemented. This thesis will do so, by analysing the operation of the NEDA through the Australian principles of statutory interpretation.

[55] Rogers (n 15) 15, 85-89; Sezgin and Best (n 13) 57-60.
[56] Lyster (n 19) 68-69. See also Twomey (n 54) 67, 73-4; Reece Walters, 'Ecocide, Climate Criminals and the Politics of Bushfires' (2023) 63 BJC 283, 286-88, 294-95.

## 1.2 The NEDA and Australian Statutory Interpretation

The NEDA is the primary piece of co-ordination legislation that the Australian Federal Government will utilise during a natural disaster, and as such it is critical to assess whether its operation is fit for purpose as a response to Australia's natural disaster risk outlook. This section of the method will first explain why the NEDA is a critical piece of legislation to study. Secondly, it will outline the principles of Australian Statutory Interpretation that will be utilised throughout this thesis to analyse the operation of the NEDA, and other relevant legislation. Thirdly, it will outline two key terms 'enabling' and 'vitiating' throughout this thesis to discuss different legislative structures that either provide or do not provide a structure for decision-making during natural disasters.

### *Why study the NEDA?*

The NEDA as a piece of law reform enacted to respond to Australia's natural disaster risk outlook of increasing volume and scale of natural disasters is valuable to study for several reasons. First, the NEDA is the main piece legislation that the Australian Federal Government will rely upon during natural disasters when emergency powers need to be utilised. This is significant in the context that legislation in Australia is a significant form of law, which is regarded as authoritative and worthy of independent study.[57] The increasing volume and scale of natural disasters Australia will experience is a new set of facts and circumstances that laws such as the NEDA have not been applied to before. As such, at this juncture, it is important to assess how laws such as the NEDA apply

[57] See generally Ng (n 13); Elizabeth Fisher, 'Climate Change and Statutory Construction: Administrative Law Expertise and 'New' Emergencies' (2023) 27 The Edinburgh Law Review 322, 323.

during repeated natural disasters and whether this is a response that solves or creates legal problems. This is particularly the case where the NEDA was enacted in response to a Royal Commission that identified new legal responses were required in the face of Australia's natural disaster risk outlook.

Second, analysing the NEDA will bridge a gap in the disaster law literature, which has identified that Disaster Laws in their current form do not adequately respond to climate change. The NEDA, as a piece of legislation that was enacted to respond to the long-term projections of Australia's natural disaster risk outlook.[58] There is no literature that has comprehensively analysed such legislation, and considered the application of the NEDA to natural disasters that occur over many months such as the Black Summer Bushfires.[59] This thesis will analyse three aspects of the NEDA's operation: the scope of natural disasters it applies to, the operation of its key powers and effects on other Federal legislation in Australia. This analysis will provide an example to other scholars of how to evaluate whether legislation in other jurisdictions is fit for purpose as a response to that countries' natural disaster risk outlook.

This thesis analyses the NEDA on its own as a response to natural disasters in Australia for two reasons. The first is because the NEDA operates as a stand-alone piece of legislation to be utilised by the Federal Government once a natural disaster in Australia becomes of such a scale that an Emergency Declaration is required to be made. This means the NEDA has specific

[58] Second Reading Speech (n 12) 10419.
[59] See also Phillipa C McCormack and others, 'An Anatomy of Australia's Legal Framework for Bushfire' (2022) 46(1) Melb U L Rev 156, 211-212.

application, such as when a Bushfire is burning across two states simultaneously, which State and Territory emergency legislation in Australia do not. [60] As such, it is necessary to consider its operation independently from other Emergency Declaration legislation in Australia, as it applies to a class of problem they do not apply to.

The second reason why the NEDA is analysed on its own in this thesis, is because it was enacted to fill a specific pre-existing gap in Australia's Federal Legal Framework. The Royal Commission recommended the enactment of Federal emergency legislation, in the context that Australia did not have such a mechanism prior to 2020. The NEDA was enacted on its own by the Australian Federal government in order to fill this gap. As such, it was enacted as a stand-alone solution to a specific set of problems. This necessarily means the NEDA should be analysed independently of other Federal legislation, and emergency management policies, in order to assess whether on its own and in its current form, it fulfilled the law reform objectives it was recommended to achieve.

### *Analysing the NEDA*

The operation of the NEDA will be analysed during this thesis utilising the principles of Australian Statutory construction, and compared to the recommendations of the Royal Commission to discuss whether the NEDA's operation is fit for purpose. This section outlines the principles of Australian Federal Statutory interpretation that will be used to analyse the operation of the NEDA, and other legislation discussed in this thesis. These rules are particularly

[60] McCormack and others (n 59) 211-212. Examples include *Disaster Management Act 2003* (Qld); *Emergency Management Act 2013* (NT).

relevant because at time of writing there is no case law regarding the operation of the NEDA. It also outlines two key terms that will be used in this thesis to contrast the approaches of the Royal Commission and the NEDA as a response to natural disasters. These terms 'enabling' and 'vitiating' are drawn from the Disaster Law literature, and describe different legislative structures that promote and remove frameworks for decision-making during natural disasters.

The NEDA's operation, as well as other legislation, will be analysed during this thesis utilising the principles of statutory interpretation in Australia. The current favoured approach to statutory construction begins in Australian law with an assessment of the statute's 'clear meaning'.[61] This meaning should be understood in light of the purpose of the statute, which can be ascertained by looking at the language, objects and structure of the statute.[62] As was stated by the plurality of the High Court in *Project Blue Sky*:[63]

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and the purpose of all of the provisions of the statute. The meaning of the provision must be determined by reference to the language of the instrument viewed as a whole.

[61] *Alcan (NT) Alumina Pty Ltd v Commission of Territory Revenue (NT)* (2009) 239 CLR 27, 46-7 [47] (French CJ).
[62] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69]. See also *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).
[63] *Project Blue Sky* (n 62) 381 [69].

Each word in a provision is to be interpreted to have its own meaning, and the contents of statutes are to be interpreted as operating harmoniously unless there is contrary intention in the statute.[64] As such, interpretations of particular provisions need to be made in the context of the statute as a whole.[65] Where a term is ambiguous, recourse can be had to extrinsic materials in order to understand the purpose for which they were enacted.[66] Decisions regarding the meaning of a statute are of assistance when construing legislation, but should not be substituted for the contents of the statute.[67]

These common law rules are also supplemented by the AIA, which as previously noted acts as a manual or guide for the Australian legal profession when interpreting federal legislation. The AIA contains a number of general rules regarding statutory interpretation, that apply unless the legislation being analysed demonstrates a contrary intention.[68] This includes that interpretation of a statute that is favoured under the AIA is the one best achieving the Act's purpose or object.[69] The AIA also outlines that extrinsic material may be used to assist in ascertaining the meaning of a provision where it is ambiguous or obscure.[70] Other relevant rules in the AIA include that examples of the operation of a provision are not exhaustive of the manner in which a provision can apply,[71] that references to Governor General's and Ministers refer to the relevant persons at

[64] Ibid 381-2 [70].
[65] *Project Blue Sky* (n 62) 381-2 [70]; *Australian Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd* (2022) 291 FCR 93, 106 [60] (Snaden J, Bromberg and Wheelahan JJ agreeing).
[66] *RTBU v Busways* (n 65) 106-7 [61].
[67] *Friends of Leadbeater's Possum Inc v Vicforests (No 4)* (2020) 244 LGERA 92 (*Friends of Leadbeater's Possum*), 411.
[68] AIA (n 40) s 1A, Part 5.
[69] Ibid s 15AA.
[70] Ibid s 15AB(1)(b)(i).
[71] Ibid s 15AD.

the time appointed to these roles.[72] These rules of interpretation apply to statutes and also to the Royal Commission's Terms of Reference, which is an 'instrument' under the AIA.[73]

The above does not provide an exhaustive overview of the rules of Federal Statutory Interpretation in Australia, but rather outlines the current approach to statutory interpretation that will be followed when analysing the contents of the NEDA and other relevant legislation during this thesis. This purposive approach will be particularly relied on with respect to the NEDA as, at time of writing, there is no case law regarding its operation.

It is also necessary to briefly comment regarding the sections of the NEDA that will be analysed. In Chapter 2, there will be an analysis of the kind of natural disasters the NEDA applies to, considering the definition of 'nationally significant harm' under s 10 as well as the length of a disaster that an Emergency Declaration under the NEDA can apply to under s 11. The provisions determine the scope of the NEDA's application, and will be used to assess the first criteria of whether the NEDA is fit for purpose by applying to the science of Australia's natural disaster risk outlook.

The second criteria, whether the NEDA's operation is fit for purpose, will be analysed by considering two different manners in which the legislation functions. In Chapter 3, the two key powers in the NEDA, referred to as the

[72] Ibid ss 16A, 19.
[73] AIA (n 40) s 46(1); *Legislation Act 2003* (Cth) s 13(1).

Declaration Power (s 11) and the Red-Tape Power (s 15) will be analysed to determine the main function of the legislation. These are powers around which the function of the NEDA turns, and analysing their operation provides key insight into how the NEDA as a whole functions. In Chapter 4, the interaction between the NEDA when an Emergency Declaration is in force and the EPBCA will be analysed. The NEDA's interaction with other legislation beyond key powers within the NEDA is a significant aspect of its function,[74] and another manner in which the NEDA's operation can be analysed to see whether it is fit for purpose. The interaction between the NEDA and EPBCA has been specifically selected because environmental law and disaster law have a 'porous'[75] relationship and issues in one discipline can inform discussion of the other.[76] As such, studying the effect of the NEDA on Australia's main Federal Environmental Protection Legislation, the EPBCA, allows this thesis to draw on issues identified by environmental scholars, and apply them to the disaster law issues being analysed in this thesis.

Finally, in addition to the rules of statutory interpretation, two terms drawn from the Disaster Law literature will be used in this thesis to describe different legislative approaches to decision-making during natural disasters. These terms are 'enabling' and 'vitiating', and will be used to describe different approaches between the Royal Commission and the NEDA regarding legal responses to natural disasters. Specifically, the term 'enabling' will refer to the creation of legislative structures that facilitate responses to natural disasters. An example of

[74] See *National Emergency Declaration (Consequential Amendments) Act 2020* (Cth).
[75] Sun, Narrative of Disaster (n 24) 27.
[76] Ibid 44-45.

such legislative structures could be that during a natural disaster there is a different set of legislative criteria for decision-making, which results in a different standard of care for first responders.[77] This legislation provides a decision maker with a framework for making decisions during emergencies. The term 'vitiating' will refer to provisions of legislation that permit the removal of legislative frameworks in their response to natural disasters. This word describes the traditional response of law to natural disasters, which is to regard them as disruptions to the function of law.[78] An example of vitiating legislation is removal of the requirement that a Minister consider certain information before making a decision.[79]

The combination of utilising the principles of Australian statutory interpretation to analyse the NEDA and other legislation, as well as the terms 'enabling' and 'vitiating' to discuss different forms of legislative approach to natural disasters, will provide the basis for assessing in this thesis whether the NEDA is fit for purpose as a response to the science of Australia's natural disaster risk outlook.

[77] Susan E Sherman, 'Special Focus Considerations in a Nuclear Detonation' (2011) 5(1) Disaster Medicine and Public Health Preparedness 65, 66.
[78] Farber, 'Disaster Law in the Anthropocene' (n 17) 56; Sun, Narrative of Disaster (n 24) 30.
[79] Hopkins (n 24) 195, 197-8.

## Chapter 2: The Future of Natural Disasters

The NEDA's application to natural disasters and implications of this for responding to a time of cascading and compounding disasters can be assessed against two key points in the Royal Commission's Final Report. The Royal Commission was firstly concerned that there be a legislated Emergency Declaration mechanism which could respond to the new facts and circumstances presented to it by scientists who have evidence before the Commission. Secondly, the Royal Commission was concerned that traditional notions of natural disasters may need to be reconsidered in order to respond to this science. This Chapter will outline these two key points as the basis for assessing whether the NEDA is fit for purpose in responding to scientific projections regarding natural disasters in Australia.

This Chapter will proceed in three parts. Firstly, it will outline the Royal Commission's summary of the science relating to projections of frequency and volume of natural disasters in Australia. Secondly, it will outline the NEDA's application to natural disasters that cause 'nationally significant harm' under ss 10 and 11, defining natural disasters by the harm they cause rather than the form of disaster they take. It will also outline how the NEDA's Emergency Declarations operate over time periods of three months, with the possibility of repeated extensions. This, it will be argued, does satisfy the first of the Royal Commission's criteria, and demonstrates the NEDA is fit for purpose in so far as it applies to scientific projections regarding natural disasters.

Thirdly, there will be a discussion of the fact that the Royal Commission identified there was also need for conceptual reconsideration of how natural disasters are approached. Namely, that they should no longer be regarded as

‘unprecedented’. This, it will be argued, also invites consideration as to whether traditional notions of natural disasters in the law are an appropriate response to the science of Australia’s natural disaster risk outlook. This is because the concept of ‘unprecedented’ disasters relates to traditional legal responses to natural disasters, which treat them as unknowable events that disrupt the function of law. This discussion will provide the basis for the second criterion on which the NEDA will be assessed in Chapters 3 and 4 of this thesis. That is, whether the operation of the NEDA is an appropriate response to a time of cascading and compounding natural disasters.

## 2.1 The Science of Australia’s Natural Disaster Outlook

The Royal Commission made recommendation 5.1, that Emergency Declaration legislation be enacted, on the basis of the scientific evidence that was presented to it. This section summarises that science, drawing on the contents of Chapter 2 of the Final Report which detailed the natural disaster risks Australia is projected to experience as a result of climate change. It also provides a simplified definition of Australia’s projected natural disaster risk, that will be utilised to discuss whether the NEDA is fit for purpose throughout the next four chapters of this thesis.

The Royal Commission described Australia’s natural disaster risk profile as one that is being significantly increased by climate change. While noting that Australia has a naturally variable climate, and is prone to natural disasters,[80] the Royal Commission outlined that the science demonstrates climate change is increasing the volume and scale of natural disasters in Australia.[81] This was in

[80] Final Report (n 1) 56.
[81] Ibid 57 [2.18].

part illustrated by the volume of significant weather events that occurred while the Royal Commission was running. These included below average rainfall, flash flooding, a severe dust storm, strong cold fronts causing damaging winds and daily maximum temperatures being exceeded.[82] The Royal Commission also noted that Australia now experiences cascading and compounding natural disasters, with each new disaster increasing the damage done by previous events.[83]

The Royal Commission discussed the evidence provided to it by the Commonwealth Scientific and Industrial Research Organisation, Australia's Federal science agency, regarding Australia's natural disaster risk profile in the coming century. This evidence demonstrated that Australia's climate variability is increasing owing to climate change, which will result in increasing volumes and sizes of natural disasters.[84] The Royal Commission also outlined how some risks associated with specific weather events are projected to increase over the course of this century:

- Increasing intensity of tropical cyclones, which will shift poleward (South) in Australia;[85]
- Increased intensity of extreme rainfall events, potentially leading to increases in flooding;[86]
- Heatwaves increasing in intensity, duration and frequency;[87]

[82] Ibid 56-7 [2.13].
[83] Ibid 57 [2.15].
[84] Ibid 57 [2.18].
[85] Ibid 62 [2.38]-[2.39].
[86] Ibid 62 [2.40]-[2.41].
[87] Ibid 63 [2.49].

- Increase in dangerous fire weather and reduction of time between 'catastrophic bushfire events'.[88]

The Royal Commission noted that the Black Summer Bushfires give an example of this increasing level of risk, specifically with reference to Pyrocumulonimbus events during the 2019-2020 bushfires. A Pyrocumulonimbus is a bushfire that generates its own thunderstorm weather system, and is also known as a firestorm.[89] These storms create extreme weather patterns, including tornadoes and destructive winds.[90] Pyrocumulonimbus can also spread fire embers 100 kilometers before a fire front and create lightning storms that start new fires.[91] During the Black Summer Bushfires, there were twenty of these events, which is almost double the number of firestorms recorded in Australia over the past thirty years.[92] What this example provides is a demonstration of increase in volume and intensity of one form of natural disaster risk. What the science demonstrates is that this increase in risk will occur across multiple forms of natural disaster in Australia.

This thesis is concerned with Australia's natural disaster risk outlook as it is projected by climate science. As has been discussed above, these risks are forecast to increase in volume and intensity in the coming decades. These risks will also result in natural disasters of different kinds occurring closely together. For simplicity, when this thesis refers to Australia's natural disaster risk outlook,

[88] Ibid 63 [2.51].
[89] Ibid 58 [2.23].
[90] Ibid 64 [2.58].
[91] Ibid 64-5 [2.58].
[92] Ibid 59 [2.24].

or cascading and compounding natural disasters, the following will be meant: an increase in six-month extreme weather events. Over this six month time period, there could be bushfire, flooding and cyclone events which together constitute an ongoing emergency. The above definitions are based on the science that was presented before the Royal Commission, and the science on the basis of which the NEDA was enacted.[93] Whether the NEDA defines natural disasters in a manner that captures Australia's natural disaster risk, is the first step in determining whether it is fit for purpose in responding to this problem.

## 2.2 The NEDA: Applying to the Problem?

The NEDA was enacted on the basis that it would be of benefit to have a Federal legislated Emergency Declaration mechanism in the face of the science regarding natural disaster risk in Australia. This section outlines how the NEDA defines natural disasters. It specifically focusses on what constitutes a natural disaster under the NEDA by analysing the definition of 'nationally significant harm' in s 10, as well as the length of time for which an Emergency Declaration applies under s 11. Taken together, these analyses show that the scope of the NEDA is such that it applies to the scientific projections of Australia's natural disaster risk. To undertake this analysis, it is necessary to first consider the objects and purpose of the NEDA.

The NEDA is a short piece of legislation which contains the power for the Governor General of Australia to make a declaration of emergency.[94] The NEDA

[93] Explanatory Memorandum (n 12) 2-3.
[94] *National Emergency Declaration Act 2020* (Cth) (NEDA) ss 3(2), 11.

has two objects: to 'recognise and enhance' the capacity of the Commonwealth when dealing with emergencies that cause 'nationally significant harm' and to create a mechanism that enables an Emergency Declaration to be made.[95] As such, how the NEDA defines what a disaster or emergency is, as well as the length of time for which the NEDA's main function operates, is key to understanding the scope of its application.

The NEDA does not contain a specific definition of disaster, and instead defines the disaster by the type of harm that it creates. This is referred to as a 'nationally significant harm' which is one of the four criterion that must be satisfied in order for an Emergency Declaration to be made under s 11 of the Act.[96] The term is defined under s 10 of the NEDA:[97]

> *nationally significant harm* means harm that -
>
> (a) has a significant national impact because of its scale or consequences; and
>
> (b) is any of the following:
>
> (i) Harm to the life or health (including mental health) of an individual or group of individuals;
>
> (ii) Harm to the life or health of animals or plants;
>
> (iii) Damage to property, including infrastructure;
>
> (iv) Harm to the environment;
>
> (v) Disruption to an essential service.

[95] Ibid s 3.
[96] Ibid s 11(1)(b).
[97] Ibid s 10 (definition 'nationally significant harm').

This definition contains what Disaster Law scholars describe as an ‘all-hazards approach’.[98] That is, legislative frameworks that respond to many different forms of disasters.[99] As such, the NEDA is not exclusively concerned with what a natural disaster is. This is reflected in the Explanatory Memorandum which envisages the application of the NEDA as an ‘all hazards’ approach, where the NEDA will not just apply to natural disasters, but also to events such as pandemics and nuclear explosions.[100] Nevertheless, the NEDA will be the Federal Legislation used to make an Emergency Declaration during a natural disasters,[101] and as such it is important to consider how it applies specifically to natural disasters.

The term ‘nationally significant harm’ in the NEDA applies to natural disasters on the basis of the harm they create rather than the form of natural disaster itself. Provided a natural disaster or a grouping of natural disasters causes ‘a significant national impact’ and causes one form of harm such as harm to life, this will satisfy the definition contained in s 10. This definition could be satisfied by events such as the Black Summer Bushfires, as well as extreme flooding events, a large cyclone or major storm event. In addition, the definition of ‘nationally significant harm’ can also apply to clusters of extreme weather events. For example, there could be a nationally significant harm if a series of fires occurring in New South Wales and a Tropical Storm in Queensland occurring at the same time resulted in ‘damage to property’ in both States and caused ‘a

[98] Stacey, Disaster Law and the Beast (17) 854-55.
[99] Ibid.
[100] Explanatory Memorandum (n 12) 4 [5]; Second Reading Speech (n 12) 10419.
[101] Ibid.

significant national impact'. This directly responds to the science discussed by the Royal Commission, which outlined that Australia is projected to experience natural disasters of different forms in rapid succession.

In addition, an Emergency Declaration made under s 11 of the NEDA can be made for a diverse range of timeframes, consistent with the science regarding the variable length of Australia's natural disasters. Specifically, an Emergency Declaration can be made under s 11 for a maximum of three months, with the possibility of repeated renewal. [102] Each renewal of an Emergency Declaration can occur for a further maximum of three months.[103] The Royal Commission outlined that natural disasters will increase in intensity and length over the coming century in Australia. While the time period of three months might be regarded as short term in the context of an event like the Black Summer Bushfires which ran for seven months, at a minimum the NEDA responds to the scientific projections of variable natural disasters by creating a framework that has the potential to operate across long time frames if required.

On its face, therefore, the NEDA does respond to the scientific projections of Australia's natural disaster risk by properly applying to the projected volume and the length of natural disaster events. However, the Royal Commission was not simply concerned with creating an Emergency Declaration mechanism that applied to this problem. It also questioned if current conceptions of natural disasters are suitable for the new normal of cascading and compounding natural

[102] NEDA (n 94) ss 11(5)(b), 12(4).
[103] Ibid s 12(4).

disasters. In this context, the question of whether the NEDA's operation is a suitable response to Australia's natural disaster risk projections, is the question that will concern the rest of this thesis.

## 2.3 The New Normal: Is a conceptual change necessary?

The Royal Commission was concerned that Australia's new natural disaster risk outlook required Australian society to think about natural disasters differently. This is the second key point in the Royal Commission's Final Report, and the context in which the NEDA was enacted. This section will first discuss why the Royal Commission considered it was necessary to move beyond traditional notions of natural disasters, specifically that they no longer be regarded as 'unprecedented'. Second, it will discuss how the Royal Commission's observations invite consideration of whether traditional notions of natural disasters in the law are an appropriate response to the science of Australia's natural disaster risk outlook. This is because the concept of 'unprecedented' disasters relates to traditional legal responses to natural disasters, which treat them as unknowable events that disrupt the function of law. Thirdly, this Chapter will outline how this discussion will provide the context for the analysis undertaken in the Chapters 3 and 4 of this thesis, regarding whether the operation of the NEDA is fit for purpose in responding to Australia's natural disaster risk outlook.

### *Unprecedented as the New Normal*

One of the key themes of the Royal Commissions' Final Report is that there is a need to move beyond regarding natural disasters as 'unprecedented' in Australia.

This section will outline the Royal Commission's commentary on why it is no longer suitable to regard natural disasters such as the Black Summer Bushfires as 'unprecedented'. It will also discuss how the Royal Commission thought the term 'natural disaster' in itself could be unhelpful, and prevent an effective responses to Australia's natural disaster risk outlook.

The Royal Commission opens its Final Report with a discussion of the term 'unprecedented' and how this is a concept the Royal Commission sought to move away from when responding to Australia's natural disaster risk outlook. The Final Report opens with the sentence 'Unprecedented is a word used all too often to describe natural disasters'.[104] The Royal Commission outlined what had occurred during the 2019-2020 Black Summer Bushfires, and then stated that 'what was unprecedented is now our future.'[105] When considering how best to prepare for the future, the Royal Commission also commented that 'Unprecedented is not a reason to be unprepared. We need to be prepared for the future'.[106]

The term 'unprecedented' was also in other Royal Commission documents, and in other parts of the Final Report. For example, it was used in the Interim Observations of the Royal Commission, where on the first page it was noted that 'The 2019-2020 bushfires and the conditions leading up to them were unprecedented. They are no longer unprecedented.'[107] Further, the word

[104] Ibid 5.
[105] Ibid 5-6.
[106] Ibid 7.
[107] Royal Commission into National Natural Disaster Arrangements, 'Interim Observations' (Commonwealth of Australia, August 2020), 4 [6].

‘unprecedented’ was used by scientists describing the weather events that occurred during the Bushfires,[108] and the emergency response that was required to the fires.[109] As such, ‘unprecedented’ was a word frequently reached for during the Royal Commission to describe the unforeseen scale of the Black Summer Bushfires and the response that was required to them.

That the Royal Commission opened its Final Report with the term ‘unprecedented’ and sought to distance its work from this concept in its Foreword means it is deserving of attention. Specifically, the Royal Commission was arguing that to create effective responses to Australia’s natural disaster risk outlook, this was a term and concept that needs to be moved away from. As such, it can be viewed as a point of departure of the Royal Commission’s Final Report, which sought to plan for Australia’s climate future by moving away from past conceptions that natural disasters such as the 2019-2020 Black Summer Bushfires cannot happen.

In this context, the Royal Commission was concerned with the term ‘natural disaster’ itself, making this observation: [110]

> The expression ‘natural disaster’ is something of a misnomer, in part because some naturally-occurring hazards (such as fires and earthquakes) may only turn into a disaster because of what humans do and fail to do. The expression ‘natural disaster’, while common and used

[108] Final Report (n 1) 59 [2.24].
[109] Ibid 154 [6.8], 95 [3.116].
[110] Ibid 20 [7].

> in this report, should not be taken to suggest that there is nothing we can do.

This quote indicates the Royal Commission wanted appropriate action to be taken in response to Australia's natural disaster outlook, in spite of the fact the problem might be considered overwhelming and unable to be effectively approached. This is not a specific recommendation that the Royal Commission made, but rather reflects its overall approach to its work. Specifically, that the 2019-2020 Black Summer Bushfires should mark a turning point beyond which there could be no more avoidance of the fact we live in a time of cascading and compounding disasters.

The need for a new approach to natural disasters was articulated by the Royal Commission throughout its Final Report. This thesis is specifically concerned with how this new approach manifested in recommendation 5.1, and whether this was subsequently reflected in the NEDA. Prior to engaging in this analysis, however, it is necessary to consider how natural disasters traditionally function in the law. As will be seen below, there is a striking parallel between regarding natural disasters as 'unprecedented' and natural disasters operating as disruptors to the function of law.

### *Beyond Natural Disasters as Disruptors of Law*

The Royal Commission's Final Report invites consideration of whether traditional conceptions of natural disasters as disruptions to the function of law need to re-thought in light of Australia's natural disaster risk outlook. This is because the

way in which natural disasters are defined determines the legal response to the problems they create.[111] In this section, first there will be an outline of the focus of Disaster Law scholars on acute forms of disasters and how these function as disruptors of the law. Secondly, there will be a discussion of how the Royal Commission's second criteria for law reform presents an opportunity for Disaster law scholars to think about natural disasters differently. And thirdly, there will be an outline of how this second criteria of the Royal Commission will be applied to consider the NEDA's operation, and whether this is fit for purpose.

Disaster Law scholars are preoccupied with how to define natural disasters,[112] however the vast focus of their work is on acute or 'sudden-onset' natural disasters.[113] These forms of disasters occur in the short term, and their effects are extreme. Examples of this in the literature are works discussing Hurricane Katrina,[114] the Fort Murray Wildfire in Alberta, Canada[115] and the Black Summer Bushfires.[116] This scholarship is focussed on the effects of one particular acute disaster on a legal system.[117] Some scholars are addressing the issue of 'slow-onset' disasters, such as a droughts, however compared to sudden-onset disasters the literature is limited. [118] It has, however, not escaped scholars that by focussing on short term disasters there is a failure to grapple

[111] Sun, Narrative of Disaster (n 24) 29.
[112] See Sun, Narrative of Disaster (n 24) 29-33; Farber, 'Disaster Law in the Anthropocene' (n 17) 51-54. See also Peel and Fisher (n 18) 10-14.
[113] Farber, 'Disaster Law in the Anthropocene' (n 17) 51; Stacey, Disaster Law and the Beast (n 17) 855; Peel and Fisher (n 18) 7-8.
[114] Verchick (n 20) 2-4.
[115] Stacey, Disaster Law and the Beast (n 17) 857-58.
[116] Lyster (n 19) 68; see also Best (n 19), 63-64 drawing on a combination of natural disasters.
[117] See generally Lyster (n 19); Hopkins (n 24).
[118] Robert Verchick, and Paul Rink, 'Disaster' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021) 816; Ryan B Stoa, 'Droughts, Floods, and Wildfires: Paleo Perspectives on Disaster Law in the Anthropocene' (2015) 27(3) Geo Int'l Envtl L Rev 393, 414-420.

with the cumulative and ongoing disasters we will be facing owing to climate change.[119] As such, there is a gap in the literature with respect to the best legal mechanisms to utilise in the face of increasing volume and scale of natural disasters.

The literature on sudden-onset natural disasters draws repeated attention to the function of disasters as disruptions of the law. This is most frequently explored through consideration of how the rule of law functions during a natural disaster.[120] Examples of this include the use of emergency powers in the immediate aftermath of an earthquake, or the application of the EPBCA to protect animal species during the Black Summer Bushfires.[121] The operation of natural disasters as disruptions is not limited to public law, as in other areas of law natural disasters have been referred to as 'Acts of God' and operate to 'excuse (people) from responsibility of fulfilling a contract or to escape tort liability for consequences of a natural event'.[122] While Disaster Law is a field of research that is only about 40 years old,[123] in considering the nature and form of natural disasters in the law it draws on an old literature in relation to the laws of emergency and states of exception that will be explored in more detail in the next chapter.

[119] Peel and Fisher (n 18) 1-3; Farber, 'Disaster Law in the Anthropocene' (n 17) 71-72; Farber and Grow (n 18) xxv.
[120] This thesis does not define what constitutes the rule of law, instead relying on disaster law scholars discussion of the rule of law specifically in relation to emergency declarations, where there are less checks and balances on administrative decision-making, leading to potential executive overreach and lack of legislative frameworks for decision-making during natural disasters. See Hopkins (n 24) 197-98; Adam Wagner, 'Emergency State' (Penguin Random House 2022) 143-47.
[121] Hopkins (n 24) 206-07; Best (n 19) 66.
[122] Sun, Narrative of Disaster (n 24) 30; see also Carvosso (n 18) 974.
[123] Peel and Fisher (n 18) 4, 12.

In this context, the second key criteria in the Royal Commission's Final Report provides a useful addition to Disaster Law scholarly debate, as it posits the question of whether the way natural disasters are conceived as disruptions is preventing an appropriate response to Australia's natural disaster risk outlook. In the Royal Commission's rejection of the concept of 'unprecedented' natural disasters, Disaster Law scholars may be able to take lessons regarding how they describe natural disasters. Specifically, natural disasters have been described as 'moments of rupture'[124] and the cumulative natural disaster crises occurring between 2019-2020 in Australia as 'unprecedented'[125] by scholars. A rupture or an unprecedented event is uncomfortable to think about, however Disaster Law scholars need to engage with such problems in seeking to address issues such as climate change.[126]

The term 'unprecedented' also has a meaning that directly relates to how natural disasters traditionally operate in the law. The term 'unprecedented' was only defined in one of the legal dictionaries in the Bodleian Library in English. [127] By contrast, the term 'precedent' is defined in all of these volumes.[128] From a common lawyer's perspective, precedent informs the very foundations of creation

[124] Raven Cretney and Sylvia Nissen, 'Emergent Spaces of Emergency Claims: Possibilities and Contestation in a National Climate Emergency Declaration' (2022) 54(5) *Antipode* 1566, 1569.
[125] Robyn Bartel and Jennifer Carter, 'Introduction to the Handbook on Space, Place and Law' in Robyn Bartel and Jennifer Carter (eds) *Handbook on Space, Place and Law* (Edward Elgar Publishing 2021) xx.
[126] Duncan French, David Dawson and Nima Golijani-Moghaddam, 'Environmental Legal Research is Changing: Alternating Tenor/Terror of Scholarship, Despair and Self Care' (2022) 35(1) JEL 139, 146-48.
[127] Bryan Garner, *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 1772.
[128] *Australian Law Dictionary* (3rd edn, Oxford University Press 2017) 685-86; *The Dictionary of Canadian Law* (3 rd edn, Thomason Carswell 2004) 972; Brian Hunt, *Murdoch's Dictionary of Irish Law* (5 edn, Tottel Publishing 2008) 928; Robyn Lewis, *Geiriadur Newydd Y Gyfraith The New Legal Dictionary* (Gomer 2003), 678-79; Brian Garner, *Garner's Dictionary of Legal Useage* (3rd edn, Oxford University Press 2011) 696; Garner, Black's Law Dictionary (n 127) 1366-67.

of law. A legal problem with a precedent provides a sense of security and comfort, that a concept has already been recognised and that a way forward to solving a legal problem is likely clearer. By contrast, an unprecedented event realistically exists outside the matrix of a common lawyer's legal understanding. This is reflected in the definition of 'unprecedented' offered in Black's Legal Dictionary, as 'Never before known; not having the support, justification, or sanction of an earlier example. cf. precedented.' [129] As such, describing natural disasters as 'unprecedented', means they are beyond the knowledge of law. In this context, the Royal Commission's rejection of the term 'unprecedented', can be read as an invitation to common lawyers to reject that natural disasters are entities beyond the operation of law.

Disaster law scholars are very engaged with how social definitions and understandings of disasters can influence how societies respond to them.[130] Indeed it is a focus of the discipline that the manner in which natural disasters are defined informs the solutions that are created in response to them.[131] As such, it is worth considering whether traditional notions of natural disasters as 'unprecedented', which disrupt the operation of the law, are fit for purpose when creating legislation such as the NEDA in response to increasing volumes and scales of natural disasters. As will be seen, the Royal Commission recommended legislation that contained a non-traditional mechanism in response to natural disasters, one that enabled legislative responses to natural disasters.

[129] Garner, Black's Law Dictionary (n 127) 1772.
[130] French, Dawson and Golijani-Moghaddam (n 126) 148-49; Louis J Kotze, 'Reflections on the Rule of Law in a Time of Socio-ecological Crisis' (2019) 31 JEL 367, 368. See also Ben Richardson *Time and Environmental Law* (Cambridge University Press 2017) 7.
[131] Sun, Narrative of Disaster (n 24) 29.

The next three chapters of this thesis will consider how the NEDA operates and whether this is a suitable mechanism for responding to Australia's future of cascading and compounding natural disasters. Specifically, it will discuss how the Royal Commission recommended a non-traditional mechanism for responding to natural disasters. It will then consider whether the NEDA's operation reflects this recommendation. In this chapter, it has been shown that the NEDA does apply to the new facts and circumstances of Australia's natural disaster risk outlook. However, to fully answer the question of whether the NEDA is fit for purpose, it is necessary to consider its operation.

# Chapter 3 The NEDA: A Suitable Model for Disaster Law?

The first step in analysing whether the NEDA's operation is fit for purpose is to consider whether its key powers operate as a traditional mechanism in disaster law that vitiate the operation of law. In this section, the law reform intent contained in the Royal Commission's Final Report to create enabling Emergency Declaration legislation will be contrasted with the operation of the two key powers in the NEDA, which together vitiate administrative aspects of decision-making during natural disasters. This analysis will show that implications of utilising vitiating legislation such as the NEDA in the face of Australia's natural disaster risk outlook are significant and could have implications for the rule of law.

Firstly, this chapter will discuss features of traditional Emergency Declaration legislation focussing on how they create states of exception, that generate more issues the longer they operate. Secondly, it will outline how the Emergency Declaration mechanism recommended by the Royal Commission in Chapter 5 of the Final Report, does not operate like a traditional Emergency Declaration. Instead, it was envisaged to enable processes and systems that would help the Australian government respond to natural disasters. Thirdly, it will contrast this with the operation of two key powers in the NEDA, the Declaration Power (s 11) and Red-Tape Power (s 15), which together vitiate administrative safeguards on decision-making during natural disasters. In this manner, these powers in the NEDA represent a missed law reform opportunity, as they replicate traditional models of natural disasters in law.

The consequences of utilising the NEDA during natural disasters which science predicts will occur over six-month time periods, specifically how it

loosens the hold of the law on legislative decision-making, could be profound. The discussion in this chapter will outline some of these potential consequences, concluding that in their current form the NEDA's key powers are not fit for purpose as a response to Australia's natural disaster risk outlook.

## 3.1 The Traditional Emergency Declaration Model

The traditional model of Emergency Declaration legislation as vitiating legislation that disrupts the function of law attracts significant concern from scholars. In this section, there will be an outline of the main concerns scholars have with the utilisation of Emergency Declarations, as well as a discussion of how when Emergency Declaration mechanisms can be useful or beneficial to support the rule of law during natural disasters.

Emergency declarations attract significant concern in legal scholarship owing to their capacity to alter the balance of power within governments.[132] Fundamentally, an Emergency Declaration is a significant vesting of power within the executive branch, for the purposes of taking often extraordinary measures with little parliamentary or judicial oversight. Concerns about utilising such mechanisms are old, having been present since the time of John Locke, and focus on the scope of such declarations and the length of their operation. [133] The application of these concerns to Emergency Declarations made during natural disasters is still in its early stages. Indeed, there do not appear to be any articles discussing the implications of repeated utilisation of Emergency Declarations in the context of cascading and compounding natural disasters.[134] However the

[132] Kotze (n 130) 367-68; Stacey, Disaster Law and the Beast (n 17) 862-63.
[133] Stacey, Disaster Law and the Beast (n 17) 862-63.
[134] Legislated Emergency Declarations are distinct from 'Declarations of Climate Emergency', the latter being symbolic political declarations of intent by organisations to reduce emissions in the face of climate change (Jocelyn Stacey 'The Public Law Paradoxes of Climate Emergency

broader literature, particularly papers considering the recent Covid-19 pandemic, provides insights into issues that could arise if Emergency Declarations are used repeatedly in response to Australia's natural disaster risk outlook.

In the short term, Emergency Declaration legislation can create a series of exceptions to and within legal systems. The effect of this legislation can be that exceptions become the rules.[135] This can result in unusual governance structures, reducing transparency of government decision-making.[136] The utilisation of exceptional powers during emergencies can also result in extreme measures being taken by the executive with little parliamentary oversight. For example, in Australia during the Covid-19 pandemic citizens were barred from returning to the country for lengthy periods of time, resulting in breach of their human rights.[137] In addition to the risk of overreach, there is a risk of confusion regarding the application of laws to ordinary people. In circumstances where rules are changed frequently and applied inappropriately, such as the Covid-19 restrictions in the United Kingdom, citizens may be less supportive of the rule of law because the law's application appears to be arbitrary and unreasonable. [138]

In the longer term, the continuation of an Emergency Declaration can give rise to a range of problems. This can cause governance issues, where governments become used to holding exceptional powers and do not wish to

Declarations' (2022) 11(2) TEL 291, 292-93; Fisher, Climate Change and Statutory Construction (n 57) 324-5).

[135] Wagner (n 120), 1, 85-89.

[136] Janina Boughey, 'Executive power in emergencies: Where is the accountability?' (2020) 45(3) ALJ 168, 169.

[137] Olivera Simic, and Kim Rubenstein, 'The challenge of 'COVID-19' free Australia: international travel restrictions and stranded citizens' (2022) 27(5) The International Journal of Human Rights 830, 832, 839-40.

[138] Wagner (n 120) 143-47.

relinquish them.[139] The length of time for which an Emergency Declaration continues can also result in fatigue in society with respect to compliance, such that the Emergency Declaration is no longer effective. [140] In addition, having multiple states of emergency in response to different events could result in confusion regarding prioritisation and responsibility, for individuals, communities and governments.[141]

Despite these risks, Emergency Declarations are a necessary part of emergency management and governance. Emergency declarations provide an overlay that can enable a broad range of powers to be used, including release of emergency funding,[142] and for first responders to a crisis, Emergency Declarations can provide clarity regarding the powers that they have to respond to an acute phase of an emergency. [143] Indeed, loosening of governance structures may be required to respond to a disaster in a timely manner.[144] However, scholars have stressed that such powers should only be utilised where appropriate to mitigate a disaster's effects.[145]

Given Australia and the globe will be experiencing increasingly frequent natural disasters, it is likely that Emergency Declarations will be utilised more often. The form of Emergency Declaration legislation that is utilised to respond to

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[139] Elmien Du Plessis and others 'After the COVID-19 state of disaster in South Africa' (2022) 6 Nature Human Behaviour 901, 901.
[140] Rebecca Haffajee, Wendy E. Parmet and Michelle M Mello, 'What is a Public Health "Emergency"?' (2014) 371(11) N Engl J Med 986, 988. See also Gregory Sunshine and others, 'Emergency Declarations for Public Health Issues: Expanding Our Definition of Emergency' (2019) 47(2) JLME 95, 97.
[141] Lucy H McHugh, Maria C Lemos and Tiffany H Morrison 'Risk? Crisis? Emergency? Implications of the new climate emergency framing for governance and policy' (2020) 12(6) WIREs Climate Change 1, 7-9.
[142] Sunshine and others (n 140) 96-97.
[143] Sherman (n 77) 66-67; Robert H Jerry, 'COVID-19: responsibility and accountability in a world of rationing' (2020) 7(1) JLB 1, 12.
[144] Boughey (n 136) 174.
[145] Sunshine and others (n 140) 98.

such disasters is significant to consider, particularly given the consequences of using them over lengthy timeframes can be profound for the rule of law. The Royal Commission was aware of these issues when it recommended the enactment of Emergency Declaration legislation. However, this was not legislation that traditionally replicated old ideas of disasters as disrupting the function of law, but rather envisaged legislation that would support the rule of law.

## 3.2 Emergency Declarations as an Enabling Response

The Royal Commission recommended a non-traditional legislated Emergency Declaration mechanism to fill a gap in Australian Federal Law regarding co-ordination during natural disasters. This section first discusses the tasks given to the Royal Commission in relation to Emergency Declaration legislation under its Terms of Reference. Second, it describes the Royal Commission's recommendation to legislate a non-traditional Emergency Declaration mechanism, and the key reasons why it did so. Taken together this demonstrates the Royal Commission recommended an Emergency Declaration legislation that enabled responses to natural disasters.

### *The Task*

The Royal Commission's task regarding Australia's national legal framework was to determine whether an Emergency Declaration was an appropriate tool to use in response to natural disasters and how it would operate. The Terms of Reference stated the Royal Commission was required to consider:[146]

[146] Terms of Reference (n 8) 2(c).

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

(i) thresholds for, and any obstacles to, State or Territory requests for Commonwealth assistance;

(ii) whether the Commonwealth Government should have the power to declare a state of national emergency;

(iii) how any such national declaration would interact with State and Territory emergency management frameworks;

(iv) whether, in the circumstances of such a national declaration, the Commonwealth Government should have clearer authority to take action (including, but without limitation, through the deployment of the Australian Defence Force) in the national interest.

Traditionally responsibility for emergency management has been the province of States and Territories, and the Australian government would rely on its prerogative powers and policy frameworks to provide additional assistance during natural disasters.[147] In this context, the Royal Commission was asked to consider what the legislative backbone of a Federal response to natural disasters could be, while respecting the autonomy of States and Territories.

The Terms of Reference are quite prescriptive regarding the scope of the Royal Commission's task, focussing the Royal Commission's attention onto Emergency Declarations as the key legislative mechanism that could be used during natural disasters. The Royal Commission's Terms of Reference did not

[147] Twomey (n 54) 56, 73-77.

encourage consideration of what kind of legislation would be most ideal to respond to natural disasters, nor whether a legislated Emergency Declaration mechanism would be enough on its own to respond to natural disasters. Within these limitations, the Royal Commission approached its task flexibly, ultimately recommending a legislative mechanism that would enable responses to natural disasters.

***Response and Recommendation***

The Royal Commission's response to Term of Reference (c) was to recommend legislating an Emergency Declaration mechanism that would enable a range of responses to natural disasters. This section will first outline the key reasons the Royal Commission made Recommendation 5.1. Specifically, it will focus on the existing policy and legislative framework the Commission felt justified this recommendation, and the broad set of co-ordination issues the Commission considered needed to be responded to. Second, it will outline the content of recommendation 5.1 and the key features of this recommendation which indicate the Royal Commission recommended enactment of a non-traditional Emergency Declaration mechanism.

The Royal Commission situated its discussion of the need for Emergency Declaration Legislation in the context of Australia's long-term forecast of natural disasters.[148] Specifically, the Royal Commission noted that 'consecutive and compounding natural disasters' will require the Australian government to increasingly respond by providing assistance and support during natural disasters.[149] The Royal Commission noted this future will result in stretched

[148] Final Report (n 1) 136 [5.1]-[5.2].
[149] Ibid 137 [5.5].

emergency services responses and disasters that cross State and Territory boundaries, to 'catastrophic' effect.[150] From the Royal Commission's perspective, this required the Australian Government to have a more active role in responding and co-ordinating responses to disasters that are national in scope.[151]

The Royal Commission outlined the Federal legislative and policy frameworks in place in Australian in relation to natural disasters. The Royal Commission found deficiencies with respect to national co-ordination during disasters in a number of these frameworks, including the Australian Government Crisis Management Framework and the National Catastrophic Natural Disaster Plan (NCNDP). [152] For example the high thresholds for activation of the NCNDP meant it did not operate during the 2019-2020 Black Summer Bushfires.[153] The Royal Commission noted there was also lack of clarity over circumstances in which policies would apply to the extent that it was difficult for State or Territory governments to request assistance under them.[154] While the Royal Commission noted that certain Federal legislation permitted Emergency Declarations to be made in specific contexts,[155] the Royal Commission determined there was a legislative gap in relation to natural disaster co-ordination at a Federal level.

As such, the Royal Commission recommended this gap be filled with a legislative mechanism for declaring a state of emergency. The Royal Commission foresaw several benefits from this approach. The first was an Emergency Declaration would clearly articulate the serious nature of the disaster

[150] Ibid 137 [5.6]-[5.7].
[151] Ibid 138 [5.13].
[152] Ibid 139-40 [5.20].
[153] Ibid 139 [5.18].
[154] Ibid 139-40 [5.21].
[155] Ibid 140 [5.22], citing the *Biosecurity Act 2015* (Cth).

to the Australian public and enable the public service to focus its attention on the natural disaster.[156] The second was at various stages of disaster the Emergency Declaration would enable the Australian government to respond on a clear legislative basis. Such responses included providing defence and financial aid promptly, and clarifying when the Australian government can intervene in circumstances where States and Territories had not requested assistance.[157]

This reasoning is reflected in the three components of the only recommendation from Chapter 5, Recommendation 5.1, which stated Australian should have a Federal Legislative mechanism to declare a national emergency.[158] The Royal Commission recommended 'the declaration should include the following components':[159]

(1) The ability for the Australian Government to make a public declaration to communicate the seriousness of a natural disaster;
(2) Processes to mobilise and activate Australian Government agencies quickly to support states and territories to respond to and recover from a natural disaster; and
(3) The power to take action without a state or territory request for assistance in clearly defined and limited circumstances.

The Royal Commission envisaged parts of the framework would be modelled on existing legislation, such as legislation relating to terrorism and biosecurity emergencies including that which was used during the Covid-19 pandemic.[160]

[156] Ibid 140 [5.23]-[5.24].
[157] Ibid 140-41 [5.25].
[158] Ibid 149.
[159] Ibid.
[160] Ibid 146-47 [5.63].

However, the Royal Commission also specified that the powers enabled by the declaration should follow the three points outlined in the recommendation.[161] The Royal Commission also recommended the duration of the declaration be limited to 'the minimum period for which it is required.'[162] The Royal Commission was concerned the effectiveness of the declaration would be reduced if it was in place beyond an appropriate period, for example resulting in the signalling aspect of the declaration becoming obsolete or confusing.[163]

It is apparent that what the Royal Commission envisaged in response to Term of Reference (c) was a system that provided a number of different functions that did not exist in Australian Federal Legislation during the Black Summer Bushfires. While it did not specify exactly what these functions were, it clearly had the specific reform goal of creating processes that assist the Federal Government in clearly delineating when it was needed and could act to respond to natural disasters. The Royal Commission's Emergency Declaration legislation would have been a framework enabling a more effective Federal Government response to natural disasters. However, rather than implementing an enabling framework, the Federal Government enacted the NEDA which operates to vitiate the function of law.

## 3.3 NEDA as a Vitiating Response

The Federal Government responded to the Royal Commission's recommendation by enacting the NEDA, which operates to vitiate administrative safeguards on decision-making during natural disasters. This section of the thesis focusses on two key powers in the NEDA, which demonstrate how the NEDA operates as a

[161] Ibid 148 [5.72].
[162] Ibid 148 [5.71].
[163] Ibid.

vitiation mechanism. First, it will outline the key features of the NEDA, focussing on two powers: the Declaration Power (s 11) and the Red-Tape Power (s 15). The latter permits Ministers to suspend administrative requirements in legislation outside of the NEDA. This analysis will demonstrate that the NEDA does not implement recommendation 5.1 of the Royal Commission but instead operates as a traditional form of disaster legislation, which vitiates the function of law.

***Key Features***

The NEDA's operation as a vitiating mechanism is illustrated by considering the structure and function of the Act as a whole. This section will outline the objects and structure of the NEDA. In particular, it will discuss how the NEDA sought to achieve its objects of co-ordination and responses to natural disasters, by vitiating the contents of other legislation.

The NEDA's objects and the powers it preserves indicate it is legislation intended to operate as a Federal co-ordination mechanism during natural disasters. The NEDA contains two objects, the first of which states the Act's object is 'to recognise and enhance the role of the Commonwealth in preparing for, responding to and recovering from emergencies that cause, or are likely to cause, nationally significant harm'.[164] The second object states this will be achieved by allowing for Emergency Declarations to be made, which permit 'the Commonwealth to mobilise resources to prepare for, respond to and recover from such emergencies.[165] In addition, provisions in Part 1 of the Act preserve State and Territory law,[166] as well as Commonwealth executive powers in relation

[164] NEDA (n 94) s 3(1).
[165] Ibid s 3(2).
[166] Ibid s 9.

to natural disasters.[167] The language of the objects taken together with the preservation of other powers to address natural disasters by the NEDA, indicates the NEDA's purpose is to augment rather than detract from the Australia's Federal response to natural disasters, and that this is to be achieved by making an Emergency Declaration.

However, the NEDA's key powers ss 11 and 15, contained in Part 2 and Part 3 of the Act, seek to achieve these objectives by vitiating the contents of Australia's Federal Legislation. The Declaration Power under s 11 permits the making of an Emergency Declaration which, once made, permits Ministers to modify the contents of legislation using the Red-Tape Power under s 15. The laws that are capable of having aspects of their operation modified under s 15 are vast, such as a law that permits 'the reporting or notification of a matter to a Department'.[168] Beyond the 20 statutes currently excluded from the operation of s 15,[169] the rest of the Australian Federal Statute Book is capable of modification.

In addition, Part 4 of the NEDA contains an additional vitiating power. The Information Power in s 16 is a provision that facilitates sharing of information held by Commonwealth Departments with the Prime Minister in circumstances where doing so would normally be prevented by privacy laws.[170] In this manner, it vitiates privacy protections during natural disasters usually in place under Australian Federal law.

The NEDA also contains review and accountability provisions. These provisions outline circumstances where Ministers are required to report on the

[167] Ibid s 8.
[168] Ibid s 15(1)(j).
[169] NEDA (n 94) s 15(8); *National Emergency Declaration Regulations 2020* (Cth) r 5.
[170] NEDA (n 94) ss 16(2), (5).

exercise of powers under national emergency laws, and when the operation of the NEDA is to be reviewed.[171] However, these provisions are only enlivened after the operation of the powers in ss 11 and 15, or 16. As such, the whole of the NEDA can be described as legislation focussed on vitiation of existing legislation.

The reasons why the NEDA acts as a vitiating mechanism despite its objects focus on co-ordination of Australia's natural disaster response will be discussed at the end of this Chapter. In the next section, the operation of the NEDA as a vitiation mechanism will be further outlined by focussing on the Declaration Power and Red-Tape Power in more detail.

### *Key Powers*

The Declaration Power in s 11 and the Red-Tape Power contained in s 15 are the key powers contained in the NEDA. This section analyses how the combined operation of ss 11 and 15, vitiates decision-making in Australia's Federal legislation as a response to natural disasters.

#### *Declaration Power*

The first key power contained within the NEDA is the power under s 11 to make an Emergency Declaration. This power enables the rest of the Act's operation. Under s 11 the Governor-General of Australia has discretion to make an Emergency Declaration if the Prime Minister is satisfied of several criteria. These are, that:[172]

(a) An emergency has recently occurred, is occurring or is likely to occur (whether in or outside Australia); and

[171] Ibid ss 17-18.
[172] Ibid s 11(1).

(b) The emergency has caused, is causing or is likely to cause nationally significant harm in Australia or in an Australian offshore area; and

(c) Any of the following subparagraphs apply:

(i) The governments of each State and Territory in which the emergency has caused, is causing or is likely to cause nationally significant harm have requested, in writing, the making of the declaration;

(ii) Because of the emergency, it is not practicable for a request to be made under subparagraph (i);

(iii) The emergency has affected, is affecting or is likely to affect Commonwealth interests;

(iv) The making of the declaration is appropriate, having regard to the nature of the emergency and the nature and severity of the nationally significant harm; and

(d) For reasons relating to emergency management, it is desirable for the declaration to be made for the purposes of one or more national emergency laws.

The circumstances in which Emergency Declarations can be made under s 11 are vast. Many different types of harm could satisfy s 11(1)(b),[173] and Emergency Declarations can be made at a range of times under s 11(1)(a). In addition, the definition of 'national emergency laws' referred to in s 11(1)(d) includes ss 15 and 16 of the NEDA.[174] This means, that if it is desirable for the purposes of the NEDA to have a declaration in force, then s 11(1)(d) will be satisfied.

[173] See Chapter 2, page 44-45.
[174] NEDA (n 94) s 10 (definition 'national emergency law' (a)).

The Emergency Declaration must be in writing, specify the relevant emergency, the nature of the emergency, the circumstances that have given rise to it and the period of the declaration.[175] Beyond this the content of the Emergency Declaration is not prescribed, although a declaration can be in force to three months[176] with the possibility of repeated renewal.[177]

On its own, this power would not be a significant one. It enables a written document to be produced by the Governor-General on the advice of the Prime Minister. While it does fulfil the function of acting as a signal to the community about the seriousness of a natural disaster, it is really when it is paired with the Red-Tape Power contained in s 15 that the Declaration Power becomes significant. The Declaration Power becomes the enabler of a suite of powers that might be described as removing public law infrastructure of 'good decision-making' during a natural disaster.[178]

***Red-Tape Power***

The second key power in the NEDA is the Red-Tape Power in s 15, which is designed to vitiate decision-making in Australian legislation during a natural disaster. This is one of the NEDA's main purposes, as the Explanatory Memorandum explains, the Act was designed to 'empower ministers to suspend, vary or substitute 'red tape' requirements in legislation that they administer where this would benefit the public'.[179] Through this power, what the NEDA achieves is

[175] Ibid s 11(4).
[176] Ibid s 11(5).
[177] Ibid s 12(1),(4).
[178] Hopkins (n 24) 195-97.
[179] Explanatory Memorandum (n 12) 2 [3]; Hopkins (n 24) 195, 197-98.

that instead of implementing a framework for decision-making, it vitiates aspects of Australian Federal laws.

Section 15 permits 'responsible Ministers'[180] to modify administrative requirements of a broad range of Acts during a national emergency. Section 15 applies to any law of the Commonwealth that contains a provision which 'requires or permits any of the following matters':[181]

(a) the giving of information in writing

(b) the signature of a person

(c) the production of a document by a person

(d) the recording of information

(e) the retention of documents or information

(f) the witnessing of signatures

(g) the certification of matters by witnesses

(h) the verification of the identity of a person

(i) the attestation of documents

(j) the reporting or notification of a matter to a Department, agency or authority of the Commonwealth.

While an Emergency Declaration is in force the responsible Minister may by legislative instrument vary, suspend or substitute the relevant provisions.[182] These determinations cannot be made by unless the Minister is satisfied that the determination is in response to the emergency and will be of benefit to the public or a section of the public.[183] The determination can stay in force until the

[180] NEDA (n 94) s 15(9).
[181] Ibid s 15(1).
[182] Ibid s 15(2).
[183] Ibid s 15(4).

Emergency Declaration ceases to be in force.[184] Beyond the 20 Acts currently excluded from the operation of s 15,[185] any other legislation on the Australian statue book has the capacity to have elements of its operation suspended, from social security legislation, to tax law, to even laws regulating the miliary.

This is truly an extraordinary power. It enables a Minister to change the content of laws they are responsible for during a national emergency, without having to consult Parliament. While the matters that are being amended are largely administrative, the implications of this are broad. It could mean that a Minister has the capacity to suspend reporting or notification requirements under legislation for the duration of the Emergency Declaration, or to require information to be given only orally instead of in a written form. Broadly, it could be thought of as removing safeguards on decision-making under Australian Federal Legislation.

The combined use of the Declaration Power and Red-Tape Power has the capacity to suspend aspects of Australia's Federal Legislative system, and place it in a different legal state. This might be described as a state of exception, a traditional model of natural disasters in law that vitiates the operation of law.[186] Then, once the Emergency Declaration ends normal legal structures will resume their function. As such, the effect of the enactment of the NEDA is that Australia Federal law has two different states. During a disaster, the rules are vitiated, while during the 'normal' times, the rules are in place. This is, on its face, very different from the law reform recommendations of the Royal Commission,

[184] Ibid s 15(7), or can be varied s 15(6).
[185] Ibid s 15(8).
[186] Wagner (n 120) 85-89.

contained in recommendation 5.1. This difference will be explored in the next section, focussing on whether the key powers of the NEDA are fit for purpose as an operational response to Australia's natural disaster risk outlook.

## 3.4 NEDA as Traditional Disaster Model: fit for purpose?

The key powers within the NEDA represent a missed law reform opportunity, as they vitiate existing structures in Australian Federal Legislation, rather than enabling a framework of decision-making as per the Royal Commission's recommendation. In this section of the thesis, first there will be a discussion of the key differences between recommendation 5.1 of the Royal Commission and the key powers of s 11 and 15 in the NEDA. Second, there will be a discussion of the implications of utilising such powers during short term of natural disasters. Thirdly, there will be a discussion of the longer-term implications of utilising the Emergency Declaration model contained in the NEDA to respond to natural disasters of increasing volume and scale as is predicted as part of Australia's natural disaster outlook. These implications of damage to the rule of law, indicate that traditional legal mechanisms which treat natural disasters as disruptors to the function of law are not fit for purpose as a response to Australia's natural disaster outlook.

### *State of Vitiation*

The NEDA's key powers operate to vitiate decision-making in Australian Federal legislation, which results in a system that responds to natural disasters by loosening the hold of the law. This section will discuss how the NEDA's operation is different from the legislation the Royal Commission envisaged. First, it will discuss the apparent alignment between the NEDA's objectives and those contained in the Royal Commission's recommendation 5.1. Second, it will

discuss the difference in approach of the NEDA's key powers with the intent of the Royal Commission's recommendation.

There is an apparent alignment between the objects and content of the NEDA, and the Royal Commission's recommendation 5.1. The Royal Commission proposed an Emergency Declaration should achieve three goals. It should provide: a clear signal of the Commonwealth's involvement in a natural disaster, processes for the Australian government to become involvement in a natural disaster, and clarify the circumstances where the Australian government can become involved in natural disaster response. The NEDA does respond to these objectives: an Emergency Declaration made under the NEDA does provide a clear signal of the Commonwealth's engagement with a natural disaster. [187] The NEDA also does refer to the objective of improving the Commonwealth's capacity to respond to natural disasters,[188] and contains clear provisions which highlight when the Commonwealth will become involved in natural disasters.[189] As such, on its face, the NEDA does respond to the Royal Commission's recommendation 5.1.

However, the NEDA's Red-Tape Power in s 15 seeks to achieve these objectives by removing legislative safeguards on decision-making across Australia's Federal Legislation.[190] It is unclear why the Federal Government considered this would create processes and mechanisms that would facilitate a government wide response to a natural disaster. In his Second Reading speech, the Attorney-General Christian Porter stated the NEDA and its consequential

[187] NEDA (n 94) s 11(4).
[188] Ibid ss 3(1).
[189] Ibid ss 3(1), 11(1)(c).
[190] Ibid s 15.

amendments would facilitate co-ordination during natural disasters.[191] However, the key powers of the NEDA in ss 11 and 15, are silent on any form of co-ordination that the Act could facilitate.

By way of contrast, it is useful to consider the types of provisions the NEDA might contain if it were enabling legislative responses to natural disasters in the manner in the Royal Commission recommended. These could include obligations on Ministers and other government decision makers to abide by different criteria when making decisions during natural disasters. Alternatively, the NEDA could require Government Departments to systematically review their capabilities to enable better responses to natural disasters. While the Royal Commission recommended aspects of the Emergency Declaration legislation be modelled on other related legislation,[192] the Royal Commission did not envisage a framework which simply removed existing rules. Indeed, the Red-Tape Power under s 15 does not appear to have arisen from the Royal Commission's Final Report at all.

There are several reasons why the NEDA may have such a different character from what the Royal Commission recommended. The first is that the Australian Government felt an urgent need to enact the NEDA, and as a consequence did not take adequate time to consult the Final Report. The Royal Commission had a short term of reference so the Federal Government could act upon its recommendations by the subsequent bushfire season, and the Covid-19 pandemic was ongoing at the time the NEDA was enacted. Specifically, the Royal Commission handed down its Final Report on 28 October 2020, and the

[191] Second Reading Speech (n 12) 10419.
[192] Final Report (n 1) 146-47 [5.63].

NEDA was enacted on 16 December 2020.[193] As the enactment of Emergency Declaration legislation was one of the key three Terms of Reference, it is likely Australian Federal Government spent 2020 drafting the NEDA so it could be enacted shortly after the conclusion of the Commission. Just over six weeks would be a short time frame to draft such significant legislation. This could also explain why the Royal Commission's reasoning for recommending enabling Emergency Declaration legislation is extracted in the Explanatory Memorandum,[194] specifically in relation to national co-ordination and enabling mobilisation of the Australian government, but not present in the text of the NEDA itself.

A second reason for the divergence between the NEDA and the Royal Commission's recommendation 5.1, could be the Australian Government decided to the NEDA would not contain processes or legal tools outlining how to actively respond to natural disasters.[195] Instead, this could be left to policy and reliance on executive powers of the Australian Government. This is in keeping with the explicit preservation of executive powers of the Commonwealth to respond to national emergencies by the NEDA.[196] It is of note that recommendation 5.1 is broad and systemic, and it is possible the Australian Government decided that some of the functions the Royal Commission envisaged an Emergency Declaration could contain including processes for responding to natural disasters were instead best left to policy.

[193] Final Report (n 1) 3; NEDA (n 94) s 2.
[194] Explanatory Memorandum (n 12) 3 [2].
[195] Hogan-Doran (n 29) 30 [89]-[90].
[196] NEDA (n 94) s 8.

While the reasons for the deviation between the Royal Commission's recommendation and the NEDA are unclear, the result is that the key powers of the NEDA result in it operating as a traditional mechanism in Disaster Law that vitiates the operation of law during natural disasters.[197] This is opposite from what the Royal Commission sought to achieve when it made recommendation 5.1. Instead, the Royal Commission was eager to have a legislated Emergency Declaration that nationally co-ordinated the public service and private individuals, so that they might respond to it appropriately. However, the Australian Government instead enacted a traditional legal response to natural disasters in the NEDA. The next section will discuss the implications of utilising a vitiating mechanism such as the NEDA in the context of the science regarding Australia's natural disaster risk outlook.

### *Vitiation as a Response to Australia's Disaster Outlook*

When placed in the factual context of the science of Australia's natural disaster outlook, as well as the scholarly concerns of using Emergency Declarations over long time frames, it is evident that the NEDA is not fit for purpose. In this section, there will first be a discussion regarding how legislation such as the NEDA can be beneficial during the acute phase of an emergency. Second, there will be a discussion regarding the disadvantages of utilising a traditional disaster law mechanism such as the NEDA over longer timeframes such as six months. The NEDA's key powers in their current form, will not provide a framework for decision-making or enable government responses to natural disasters, which the literature indicates could create issues for the rule of law. This is of particular

[197] Hopkins (n 24) 193-4; See also Stacey, Disaster Law and the Beast (n 17) 862.

concern when the volume and scale of natural disasters in Australia is projected to increase with climate change.

First, the literature is clear that legislation such as the NEDA can be beneficial during acute moments of crisis. Such legislation can permit rapid decisions to be made, or act as a signal and trigger for activity by government, as the Royal Commission recommended. The NEDA permits a different state to be created, which can be thought of as changing government from a 'normal' state to a wartime like footing.[198] In periods such as those directly after a nuclear detonation societies need rapid response legal frameworks.[199] Such frameworks can provide certainty regarding for first responders regarding their duties in the field during a crisis.[200] They can also permit governments to move quickly without usual processes in order to respond to a rapidly evolving threat. An example of this swift action taken in Australia and around the world to prevent the spread of Covid-19 at the start of the pandemic.[201] Further, legislation such as the NEDA signals to the general public that the government is invoking a different state, providing guidance that different rules apply and the public is expected to follow them. However, beyond the most acute phase of a disaster, the literature shows that the utilisation of Emergency Declaration mechanisms becomes increasingly vexed.

The literature in relation to Emergency Declarations is clear the longer that such a declaration persists, more issues can ensue. These include confusion for

[198] Wagner (n 120) 4-5, 10-16; Stacey, Public Law Paradoxes (n 134) 295; Cretney and Nissen (n 124) 1568.
[199] Sherman (n 77) 65.
[200] Jerry (n 143) 12.
[201] Simic and Rubenstein (n 137) 832, 839-40.

citizens as to which rules apply and lack of compliance brought on by fatigue.[202] A relaxation of the rules of 'good decision-making'[203] such as that permitted in s 15 of the NEDA, can also mean that executive governments become used to holding extraordinary powers and can become lax in their decision-making, having serious implications for how societies are governed.[204]

These concerns are particularly pertinent in the context that the NEDA was enacted so it could respond to long term emergencies. This was evident in the comments of the Attorney-General, Christian Porter, who stated in his Second Reading Speech that the Covid-19 pandemic had demonstrated in Australia that there would be the need for the NEDA to operate over long timeframes.[205] Scholarship undertaken concerning the Covid-19 pandemic has demonstrated how easily rights and freedoms can be taken away when a state of emergency persists for long periods of time.[206] The Covid-19 pandemic has provided the legal profession with a warning regarding the dangers of repeatedly using vitiating legislation as an approach to emergencies, and has lessons for the application of vitiating legislation in the context of Australia's natural disaster risk outlook.

Looking toward the future, where Australia will experience natural disasters in increasing volume and scale, that the NEDA is Australia's main Federal legislative response to natural disasters is concerning. Based on current science, different parts of Australia could fall within the remit of the NEDA for long

[202] Wagner (n 120), 63-69, 143-47.
[203] Hopkins (n 24) 211.
[204] Du Plessis and others (n 139) 901; Jacqueline Lewis, 'The Executive's Power of the Purpose in National Emergency: The President's Plan to Poach Defence Funds to Build the Wall, 34(3) Geo Immigr LJ 825, 828-31.
[205] Second Reading Speech (n 12) 10420.
[206] Wagner (n 120) 85-89; Simic and Rubenstein (n 137) 832, 839-40.

periods of time, particularly given the projections on the increased length of time for bushfire seasons.[207] This could result in repeated loosening of the fabric of 'good decision-making' in Australia at a Federal level.[208] This is particularly so in the context that the NEDA does not contain separate sets of criteria for decision-making during natural disasters, and instead simply removes existing legislative structures across Australia's Federal Statute book. Indeed, the NEDA in its current form reduces Australia's legal response to natural disasters to a form of legal see-saw, where the options available for response are disaster or no disaster.[209]

The Royal Commission's law reform recommendation 5.1 can be seen as a more nuanced approach to how the law can respond to Australia's natural disaster risk outlook. The Royal Commission sought to create systems and processes to respond to natural disasters, which moved beyond traditional mechanisms of responding to natural disasters in the law. The NEDA, by contrast, in its current form replicates these traditional understandings through the combined operation of the key powers under ss 11 and 15. In this manner, and in the context of the literature regarding Emergency Declarations, the NEDA is evidently not fit for purpose as a response to Australia' natural disaster outlook. As such, this aspect of its operation might be regarded as a missed law reform opportunity arising out of the Royal Commission.

However, this is not the only way the NEDA responds to natural disasters. It also has the capacity to suspend entire sections of legislation, such as s 28 of

[207] Final Report (n 1) 63-4 [2.51]-[2.58].
[208] Hopkins (n 24) 211.
[209] Stacey, Disaster Law and the Beast (n 70) 862, citing *Kim Scheppele* 'Small Emergencies' (2006) 40(3) *Georgia Law Review* 835, 838, who describes this as a 'toggle switch'.

the EPBCA. In the next chapter, this separate manner in which the NEDA operates will be discussed, in the context that the Royal Commission recommended categories in the EPBCA be utilised during natural disasters to promote conservation of Australian flora and fauna. As will be seen, this other manner in which the NEDA operates may also be regarded as a missed law reform opportunity arising from the Royal Commission's recommendation that the NEDA enable responses to natural disasters.

# Chapter 4 Suspending Statutes: A suitable reach for the NEDA?

A second step in analysing whether the NEDA's operation is fit for purpose as a response to Australia's natural disaster risk outlook, is to consider its capacity to suspend whole sections of legislation, such as s 28 of the EPBCA, while an Emergency Declaration is in force. This was in direct contrast with recommendation 5.1 and a separate reform recommendation of the Royal Commission, recommendation 16.1, that the EPBCA be utilised during natural disasters to enable the conservation of wildlife. This Chapter will outline the vitiating interaction between the NEDA and the EPBCA, as another example of how the NEDA operates as a traditional mechanism in disaster law by vitiating the operation of law. It will also discuss how the Royal Commission's recommendations offer an alternate approach to this traditional model, and how the NEDA represents another missed law reform opportunity with respect to its interactions with the EPBCA.

This Chapter will proceed in three parts. First, it will discuss another of the Royal Commission's tasks, which concerned how to improve wildlife management and species conservation during natural disasters.[210] Specifically, it will discuss Chapter 16 of the Royal Commission's Final Report, which outlines how wildlife conservation can be better integrated into natural disaster response, and discusses how the EPBCA can be used as a tool for enabling responses to natural disasters. Second, this chapter will discuss how the NEDA interacts with the EPBCA to disrupt legislative structures supporting wildlife protection during

[210] Terms of Reference (n 8) 3(f)(ii).

natural disasters, by suspending s 28 of the EPBCA. This discussion will demonstrate how the NEDA facilitates a state of suspended responsibility in relation to environmental decision-making processes under the EPBCA. This aspect of the NEDA's operation was also made in response to recommendation 5.1.[211]

The third section of this Chapter will discuss how the operation of the NEDA with respect to the EBPCA is another manner in which the NEDA operates as a traditional mechanism of disaster law, by treating natural disasters as disruptions to the function of law. It will also discuss how vitiating aspects of the EPBCA during natural disasters will serve to undermine, rather than facilitate, the objects of the EPBCA. In the context of Australia's natural disaster risk outlook, this is a response that is not fit for purpose.

There are several reasons why it is helpful to analyse the operation of the EPBCA, and its interaction with the NEDA, during natural disasters. The first is that issues in environmental legal thinking can illuminate potential issues in disaster law.[212] While these two areas of scholarship are not the same, they contain interrelated complexities and both contemplate legal systems lack of capacity to deal with contiguous aspects of the natural world.[213] As such, considering the function of the EPBCA during natural disasters and the problems this generates, can potentially illuminate issues within disaster law, including

[211] Second Reading Speech (n 12) 10419; see also *National Emergency Declaration (Consequential Amendments) Act 2020* (Cth) n (74) Schedule 1.
[212] Verchick (n 20) 3; Sun, Narrative of Disaster (n 24) 44-45.
[213] Sezgin and Best (n 13) 56-59; Christine Willmore, 'Native good, non-native bad? Defining troublesome species' (2015) 17(2) Environmental Law Review 117, 123-24.

whether utilising traditional legal approaches to natural disasters are appropriate in the context of Australia's natural disaster risk outlook. This analysis will begin with an outline of the Royal Commission's task with respect to the EPBCA, and the reform recommendation it made.

## 4.1 EPBCA enabling Emergency Response for Wildlife

The Royal Commission was required by its Terms of Reference to consider how wildlife conservation during natural disasters could be improved. This section will outline the Royal Commission's discussion in Chapter 16 of policy and legal responses to the issue of wildlife conservation during natural disasters. Specifically, it will focus on the Royal Commission's recommendation that the EPBCA be utilised as a tool to enable wildlife conservation during natural disasters.

Before considering the Royal Commission's Task, it is necessary to make brief note of the concept of environmental protection. Environmental protection is a concept that creates various difficulties,[214] which centre around its application to certain aspects of ecosystems rather than viewing them as whole systems.[215] For example, often only charismatic species are listed under protection legislation, leaving less well known groups of organisms without protection. [216] This can mean that whole classes of species are protected, such as birds, while whole groups are ignored, such as invertebrates in the ocean.[217] Further, where

[214] Willmore (n 213) 123-24.
[215] Sezgin and Best (n 13) 46-47; Lynda M Warren, 'Species conservation – The chosen few' (2019) 21(2) Environmental Law Review 79, 81-82.
[216] Warren (n 215) 80-82.
[217] Ibid 82.

species are not yet described by science it can be difficult for such species to be protected under relevant legislation such as the EPBCA.[218]

Applying environmental protection to landscapes also creates various problems. While environmental protections might extend to one aspect of an ecosystem, they can fail to apply to other aspects of the environment, including down into the earth and up into the atmosphere.[219] The application of protection to species and landscapes will also become increasingly complex through this century, owing to climate change. For example, defining certain species as invasive and other species as protected can be unhelpful where climate change is altering ecological niches and the boundaries within which the 'invasive' species live.[220] In the long term, these fixed understandings of what should and shouldn't be protected will likely not be helpful where climate change is altering our natural environment rapidly.

It is helpful to understand these issues with the operation of environmental protection, and by extension the EPBCA, because this provides further context for the effect of the NEDA when it operates to suspend the EPBCA's function. It also provides context for the Royal Commission's discussion in Chapter 16 and its recommendation because despite the EPBCA's limitations, the Royal

[218] Sophie Lloyd, 'Reconsidering the Species-specific Approach: Insects and the Environment Protection and Biodiversity Conservation Act' (2020) 37 EPLJ 242, 253-54.
[219] Irus Braverman, 'Amphibious Legal Geographies: Toward Land-Sea Regimes' in Irus Braverman (ed), *Laws of the Sea: Interdisciplinary Currents* (1st edn Routledge 2022) 1, 1; Peter H Sand 'The discourse on 'protection of the atmosphere' in the International Law Commission' (2016) 26 RECIEL 201, 202; Richardson (n 130) 354.
[220] Willmore (n 213) 123-24; Sophie Whitehead, 'Rethinking threatened species legislation in the context of climate change' (2017) 34 EPLJ 94, 95.

Commission suggested reforms that would use the EPBCA as a tool to facilitate wildlife conservation during natural disasters in Australia.

***The Task***

The Royal Commission's Terms of Reference required it to have regard to several matters before it recommended Australia should have a legislated Emergency Declaration mechanism. This included whether improvements should be made to national coordination of wildlife conservation during natural disasters.[221] This task was outlined in the Terms of Reference as follows:[222]

> AND We direct you, for the purposes of your inquiry and recommendations, to have regard to the following matters:
>
> > (f) ways in which Australia could achieve greater national coordination and accountability – through common national standards, rule-making, reporting and data-sharing – with respect to key preparedness and resilience responsibilities, including for the following:
> >
> > …
> >
> > (ii) wildlife management and species conservation, including biodiversity, habitat protection and restoration;
> >
> > …

[221] Terms of Reference (n 8) 2-3(e)-(g).
[222] Ibid 3(f)(ii).

This task, as with that relating to the NEDA, is confined to considering whether existing frameworks regarding wildlife conservation should be improved or utilised during natural disasters. This meant that the Royal Commission was required to consider the operation of the EPBCA, and whether it could be used to enable better responses to natural disasters by the Australian Government. It is different from the Term of Reference concerning a legislated Emergency Declaration mechanism, however, as it was not one of the three main tasks the Royal Commission was required to undertake. Instead, the Royal Commission's conclusions regarding wildlife conservation legislation were an input into its three key recommendations, including the legislated Emergency Declaration mechanism.

In addition, the language of Term of Reference is flexible, and permitted the Royal Commission to think broadly about improving national co-ordination of wildlife conservation during a natural disaster. The Royal Commission took up this opportunity to consider both policy and legislative solutions to this problem. The next section will briefly outline the Royal Commission's policy recommendations, before moving to the Royal Commission's discussion of how the EPBCA could be used to enable wildlife conservation during natural disasters.

***Policy Recommendations – Improving Co-ordination***

The Royal Commission outlined two policy areas in need of improvement to ensure better national co-ordination regarding wildlife conservation during natural disasters. These were a need for integrating environmental protection into

emergency planning, and the need to improve data collection to enable wildlife conservation during natural disasters.

In discussing policy reforms necessary to promote wildlife conservation during natural disasters, the Royal Commission noted that Australian flora and fauna is unique on earth,[223] and that Australia's ecosystems sustained severe damage during the 2019-2020 Black Summer Bushfires.[224] In the context that the role of protecting the environment is separated across State, Territory and Federal Governments in Australia,[225] the Royal Commission identified a clear need to improve communication and co-ordination between all levels of government.

The Royal Commission commented that there were already frameworks in place in States, Territories and at a Federal level prior to the Black Summer Bushfires, and that these frameworks had been used successfully to protect ecosystems and species.[226] One such example was the protection of the Wollemi Pine in New South Wales. The Wollemi Pine is a critically endangered plant species in Australia that has not evolved since the Jurassic Period, and survives in a small stand in the wild of under 100 trees.[227] This site was successfully protected during the Black Summer Bushfires through a combination of efforts by scientists, firefighters and park rangers.[228]

[223] Final Report (n 1) 354 [16.5].
[224] Ibid 354 [16.11].
[225] Ibid 354 [16.9].
[226] Ibid 358-59 [Box 16.2]-[Box 16.3].
[227] Ibid 358 [Box 16.2].
[228] Ibid.

Despite such successes, the Royal Commission considered there was further room for policy improvement when co-ordinating responses to natural disasters for the purpose of protecting wildlife. The Royal Commission stated that access to relevant data about the location of species and ecosystems that needed to be protected was critical in facilitating responses during a natural disaster.[229] The Royal Commission also stated where environmental protection was not part of emergency planning, it should be integrated into existing emergency response systems.[230]

These policy recommendations illustrate that policies have a significant role to play during natural disasters, and that not all issues during natural disasters will require legal solutions. Nevertheless, the operation of the EPBCA was critical to the Royal Commission's recommendations regarding wildlife conservation, as will be seen below.

***Utilising the EPBCA***

The Royal Commission considered that the EPBCA could be used as a tool that would enable identification of conservation priorities during natural disasters. In this section, first there will be a discussion of how the Royal Commission used the categories of protected species and ecosystems in the EPBCA to discuss conservation priorities and provide context for its policy discussions. Second, there will be a discussion of how the EPBCA frames recommendation 16.1, which suggests improving data collection and sharing to facilitate wildlife conservation during natural disasters. Thirdly, the Royal Commission's

[229] Ibid 357 [16.20]-[16.22].
[230] Ibid.

suggestion that the EPBCA be used as a tool to enable wildlife conservation during natural disasters will be discussed.

When articulating the scale and level of damage that was caused to the environment in Australia during the Black Summer Bushfires, the Royal Commission relied on categories contained in the EPBCA.[231] This included noting the scale of damage to World Heritage properties, such as the fact that 82% of the Blue Mountains burnt in New South Wales.[232] The Royal Commission also utilised the EPBCA to describe the Bushfires impact on individual ecosystems and species, noting that 330 threatened species listed under the EPBCA were affected.[233] The Royal Commission further commented that more species may fall within the definitions contained in the EPBCA as a result of the Black Summer Bushfires.[234] In this manner, the categories under the EPBCA framed the Royal Commission's consideration of its response to Term of Reference 2(f), providing its factual context.

The Royal Commission also considered the categories under the EPBCA could be utilised to better identify species and ecosystems that should be protected during a natural disaster. The Royal Commission commented that there are various ways that information about ecosystems and species are collected in Australia, and that this is not always collated together in a useful and accessible format nationally.[235] The Royal Commission considered that decision

[231] Ibid 354-55 [16.11].
[232] Ibid 354 [16.11].
[233] Ibid 355 [16.13].
[234] Ibid.
[235] Ibid 361-62, [16.37]-[16.38], [16.45].

makers such as those making decisions under the EPBCA should have the most accurate scientific data possible, so that it can inform conservation of species and ecosystems.[236] As such, in order to enable wildlife conservation during natural disasters, decision makers needed to have the most accurate data in order to triage which species and systems require urgent intervention and protection.

As a result of the deficiencies the Royal Commission observed with respect to data collection and sharing regarding wildlife conservation, the Royal Commission made Recommendation 16.1, titled 'Environmental data':[237]

> Australian, state and territory governments should ensure greater consistency and collaboration in the collation, storage, access and provision of data on the distribution and conservation status of Australian flora and fauna.

This recommendation supports the use of the EPBCA as a tool to enable responses to natural disasters, by recommending improvements to data collection which would permit informed decisions being made during natural disasters regarding which species should be conserved. This is in the context the EPBCA would be one such decision-making framework. The Royal Commission did not make explicit findings regarding the EPBCA's value in its current form as such a framework as simultaneously with the Royal Commission a review into the

[236] Ibid 361 [16.36].
[237] Ibid 363 Recommendation 16.1.

operation of the EPBCA was being undertaken,[238] and the Royal Commission was explicit in not wishing to replicate the work of other inquiries.[239]

Nevertheless, the Royal Commission made a number of comments regarding the EPBCA and how it operated during the Black Summer Bushfires. The Royal Commission noted that species being listed under the EPBCA was not directly related to whether they would be impacted by natural disasters, but rather whether they were facing slow decline.[240] The Royal Commission also noted that there were two ways the EPBCA might apply during a natural disaster. These are if the natural disaster, such as a bushfire, it listed as a threat impacting on species,[241] or if the natural disaster falls within the definition of 'key threatening process'.[242] However, the first mechanism does not require implementation of any steps to mitigate the threat and the second has not yet been utilised.[243] In an oblique manner, the Royal Commission was pointing out serious issues with the current national framework in Australia for environmental protection. However, the Royal Commission still saw the EPBCA as a useful tool to be utilised during natural disasters and recommended improvements be made to systems that provide data into this framework.

The Royal Commission made its recommendations concerning wildlife conservation in the context of its recommendation that a legislated Emergency Declaration mechanism be enacted. Both recommendations can be seen as

[238] Ibid 363 [16.50].
[239] Ibid 51 [1.26].
[240] Ibid 363 [16.51]-[16.52].
[241] Ibid 363 [16.53].
[242] Ibid 364 [16.53].
[243] Ibid 363-64 [16.53].

enabling different legislative forms of responses to natural disasters, and operating in concert with one another to create systems and processes that better equip the Australian Federal Government to respond to natural disasters. Despite this, the NEDA operates to vitiate sections of the EPBCA during natural disasters. The manner in which the NEDA operates to vitiate infrastructure of environmental decision-making under s 28 of the EPBCA will be outlined below.

## 4.2 NEDA: Vitiating Environmental Decision-Making

Once an Emergency Declaration is made under the NEDA, it has the capacity to vitiate the operation of entire sections of legislation such as a prohibition on Commonwealth Government activities that harm the environment under s 28 of the EPBCA. This section will first briefly outline the operation of s 28 of the EPBCA. Second, it will discuss how when an Emergency Declaration is in force under the NEDA, s 28 of the EPBCA can be suspended and the results of this for wildlife conservation during natural disasters. As will be seen, the operation of the NEDA and EPBCA together vitiates existing legal structures during natural disasters, replicating traditional understandings of natural disasters as disruptors of the function of law.

The operation of s 28 of the EPBCA is designed to prevent harm to aspects of the Australian environment by Commonwealth Agencies. The section operates around a prohibition on certain activities in s 28(1), followed by a range of exemptions in ss 28(2)-(5).[244] The prohibition is on the Commonwealth or Commonwealth agencies engaging in activities that 'has, will have or are likely to

[244] Section 28(1) is a civil penalty provision, where the penalty for a Commonwealth agency that is an individual is 1,000 penalty units, and for a body corporate that is a Commonwealth agency is 10,000 penalty units.

have a significant impact on the environment.'[245] The EPBCA contains other sections which regulate actions undertaken on Commonwealth land and with respect to World Heritage Places under the EBPCA, where these involve the Commonwealth.[246] However, the prohibition in s 28 is specifically directed to protecting the Australian environment from actions by the Commonwealth, and as such is a significant part of the legal conservation infrastructure under the EPBCA. In order to understand the effect of the NEDA on s 28 of the EPBCA, it is necessary to consider its operation more closely.

The operation of s 28 of the EPBCA is focussed on prohibiting 'an action' by the Commonwealth or a Commonwealth agency, where this would cause 'significant impact' to the Australian environment. Whether s 28(1) of the EPBCA is engaged by an action[247] is a matter of complex statutory interpretation. While there are no cases specifically dealing with s 28(1) in its current form, other cases relating to different prohibitions in Part 3 of the EPBCA provide guidance to how it may apply. Specifically, these cases are focussed on whether the 'action' had a 'significant impact' on the environment. The approach to determining the nature of 'a significant impact' was outlined by Justice Mortimer in *Friends of Leadbeater's Possum Inc v Vicforests (No 4)*[248] as the following:[249]

[245] EPBCA s 28(1).
[246] Ibid ss 26, 27B and Division 2, Part 3, Chapter 2.
[247] Ibid ss 523, 524.
[248] *Friends of Leadbeater's Possum* (n 67).
[249] *Friends of Leadbeater's Possum* (n 67) 410 [1296] citing *Tasman Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* (2016) 215 LGERA 1, [240]. See also *Australian Brumby Alliance v Parks Victoria Inc* (2020) 277 FCR 559, 630 [227].

> It is not contentious that the approach to significant impact is correctly set out in *Booth v Bodsworth* (2001) 114 FCR 39; [2001] FCA 1454 at [99]-[100]. A significant impact is one which is important, or notable, or of consequence, having regard to its context and intensity… As a word of limitation, the purpose of the adjective 'significant' is to exclude impacts that are properly seen as minor or unlikely: *Krainiw v Brisbane City Council (No 2)* [2011] FCA 563 at [10] *Northern Inland Council* at [117]-[118].

Whether an action has a significant impact is a question of fact, that is determined on a case by case basis.[250] This is an inquiry that should be conducted in a 'sensible' and realistic manner.[251] It is beyond the scope of this paper to engage in depth with what might engage s 28(1). However, from the case of *Friends of Leadbeater's Possum Inc v Vicforests,* it is demonstrable that clearing habitat of a critically endangered animal such as the Leadbeater's Possum (*Gymnobelideus leadbeateri*) might fulfil this criteria, depending on the facts and circumstances of the relevant case. Relevant factors may include the availability of habitat, the distribution of the species across the Australian landscape and the categorisation of the species.[252] This demonstrates the operation of s 28(1) of the EPBCA serves to act as a barrier towards harm to the Australian environment, and requires a decision to be made by the Federal Government to determine whether an action is likely to cause 'significant harm' to the environment before proceeding with it. In this way, s 28 of the EPBCA can be

[250] *Friends of Leadbeater's* (n 67) 409 [1292]. See also *Save the Ridge Inc v Commonwealth* (2005) 147 FCR 97, 104 [17] (Black CJ), 113 [59] (Emmett J); *Brumby Alliance* (n 249) 631 [230].
[251] *Friends of Leadbeater's Possum* (n 67) 409 [1292].
[252] Ibid 412-13.

described as a critical piece of decision-making infrastructure regarding wildlife conservation in Australian Federal law. During a natural disaster, however, the NEDA operates to vitiate this infrastructure.

The operation of s 28 of the EPBCA can be affected once an Emergency Declaration is in force under the NEDA. The relationship between the two pieces legislation begins with the requirements for making an Emergency Declaration. The fourth criterion for an Emergency Declaration being made under the NEDA is whether it is 'desirable for the declaration to be made for the purposes of one or more national emergency laws.'[253] The term 'national emergency law' under the NEDA includes s 28 of the EPBCA. [254] As such, where it is necessary for the purposes of a national emergency law such as the EPBCA, an Emergency Declaration under the NEDA can be made.

Once an Emergency Declaration is made under s 11 of the NEDA, subsection s 28(3) of the EPBCA can be utilised, which allows the Federal Minister for the Environment to declare in writing that an action of the Commonwealth government falls outside the scope of s 28(1) of the EPBCA.[255] The Minister for the Environment may make this declaration when satisfied the action is in the interests of 'preventing, mitigating or dealing with a national emergency, including an emergency to which a national emergency declaration (within the meaning of the *National Emergency Declaration Act 2020*) relates.'[256]

[253] NEDA (n 94) s 11(1)(d).
[254] Ibid s 10(o).
[255] EPBCA (n 245) s 28(2)(c).
[256] Ibid s 28(3)(b).

As such, during a natural disaster where an Emergency Declaration was made under s 11 of the NEDA, the Minister for the Environment could authorise a range of exemptions under s 28(3) of the EPBCA. This could include exempting land clearing activities from the operation of s 28(1) of the EPBCA. The practical effect of this could be that the habitat of critically endangered species such as the Leadbeater's Possum could be removed in part or in whole during a natural disaster. One example might be where emergency management agencies remove native vegetation in order to create fire breaks before a fire front, in order to save human lives and property.

It is relevant to note that the exemption contained in s 28(3)(b), where a Minister for the Environment can exempt Commonwealth actions from the prohibition in s 28(1), existed in the EPBCA prior to the enactment of the NEDA. The older form of the provision s 28(3)(b) read the Minister could declare an exemption where satisfied the action would be in the interests of 'preventing, mitigating or dealing with a national emergency'.[257] This demonstrates that natural disasters acting as vitiating forces in law, and disrupting the function of law, existed in Australian legislation prior to the enactment of the NEDA. This linkage was simply made more explicit when the *National Emergency Declaration (Consequential Amendments) Act 2020* (Cth) amended the EPBCA in December 2020.[258] As such, this simply clarifies the prohibition in s 28(1) can be vitiated when an Emergency Declaration is in force under s 11 of the NEDA during a natural disaster.

[257] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Compilation No. 54.
[258] (n 74) Schedule 1 s 21.

The relationship between the EPBCA and the NEDA results in a key piece of decision-making infrastructure that promotes wildlife conservation under the EPBCA being suspended during a natural disaster. The practical effect of the NEDA's interaction with the EPBCA is that unique ecosystems and species, such as the Leadbeater's Possum, can be left unprotected from Commonwealth actions during natural disasters. The implications of the NEDA vitiating not only administrative checks on decision-making, but also significant decision-making infrastructure in other legislation during natural disasters and whether this is fit for purpose as a response to Australia's natural disaster risk outlook will be considered below.

## 4.3 NEDA's Suspension of Statutes: Fit for Purpose?

The operation of the NEDA to suspend a key piece of decision-making infrastructure under the EPBCA represents another missed law reform opportunity, where the NEDA works to vitiate rather than enable legislative responses to natural disasters. In this section, first there will be a discussion of key differences between the wildlife conservation reform recommendations of the Royal Commission, and the suspension of s 28 of the EPBCA while an Emergency Declaration is in force under the NEDA. Second, there will be a discussion of the implications of the NEDA suspending s 28 of the EPBCA in light of Australia's natural disaster risk outlook. As in the previous chapter, these implications include potential damage to the rule of law, and indicate that traditional models of natural disasters as disruptors of the function of law are not a fit for purpose response to Australia's natural disaster risk outlook.

***State of Vitiation***

The NEDA's interaction with the EPBCA can result in vitiating of environmental decision-making under s 28 of the EPBCA, demonstrating in another manner how the NEDA promotes a response to natural disasters that loosens the hold of the law. This section will discuss how the interaction between the NEDA and the EPBCA is different from the reform recommendations the Royal Commission made regarding wildlife conservation. First it will discuss how the Royal Commission sought to utilise categories under the EPBCA to enable evidence based environmental protection decisions to be made during natural disasters. Second, it will discuss how the NEDA and EPBCA combined instead operate to vitiate legislative frameworks in place concerning environmental decision-making during natural disasters. This is another manner in which the NEDA operates as a traditional mechanism in disaster law which vitiates the operation of law.

The Royal Commission's recommendations regarding the function of the EPBCA during natural disasters are less straightforward than with those in Chapter 5 concerning the NEDA, however they were still directed towards utilising the EPBCA to enable responses to natural disasters. The Royal Commission utilised the categories under the EPBCA to discuss the damage that had been caused to Australian ecosystems during the Bushfires,[259] and as such recognised the EPBCA as a classification tool to be used to assess the success of environmental protection measures during natural disasters. This was clear where the Royal Commission suggested that categories of risk under the EPBCA, such as critically endangered species, be used to identify conservation

[259] Final Report (n 1) 354-55 [16.11]. See also Sezgin and Best (n 13) 56-60; Best (n 19) 62-64.

priorities during natural disasters.[260] In this manner, the Royal Commission sought to utilise the EPBCA to enable responses to natural disasters, specifically to enable improvements to wildlife conservation during natural disasters. However, the Royal Commission also recognised that policy had a role in facilitating wildlife conservation during natural disasters, and made a recommendation that combined legal and policy responses.

The Royal Commission's reform recommendation 16.1 was creative because it utilised policy and legal tools to facilitate wildlife conservation during natural disasters. By recommending improving data sharing across Commonwealth, State and Territory governments, with the ultimate aim of informing decision makers during natural disasters about the status of wildlife and ecosystems that need protection during acute emergencies,[261] the Royal Commission suggested a way forward that would likely facilitate protection of wildlife and ecosystems during natural disasters. In doing so the Royal Commission acknowledged that policy and legal structures may be required to respond to natural disasters, and that these often work in conjunction.[262] By improving data collection regarding wildlife conservation, this could facilitate better decision-making under environmental legislation during natural disasters. However, what the Royal Commission did not recommend is that during a natural disaster environmental decision-making infrastructure be vitiated.

[260] Final Report (n 1) 361 [16.36].
[261] Ibid 363.
[262] Ibid 361 [16.36].

The interaction between the NEDA and the EPBCA, resulting in the vitiation of s 28(1) of the EPBCA while an Emergency Declaration is in force, is contrary to the Royal Commission's reform recommendations in Chapter 16. The suspension of the prohibition under s 28(1) of the EPBCA, where s 28(3) is operational, evidently does not go to protection of the environment during natural disasters. Rather, it provides Commonwealth agencies a manner in which to avoid liability for causing 'a significant impact' to species such as the Leadbeater's Possum during natural disasters. There are several points to be made regarding this discrepancy.

First, the use of categories under the EPBCA to facilitate environmental protection during natural disasters, and the operation of s 28(3) of the EPBCA are directed at different objectives. The latter is concerned with limiting the liability of Commonwealth agencies acting as first responders in crises, so that they may act quickly in the knowledge that they will not be held to a usual standard of care regarding protecting the environment.[263] The former is concerned with facilitating protection of species that are particularly in danger during natural disasters. Therefore, on its face the suspension of s 28(1) of the EPBCA during a natural disaster does not defeat the Royal Commission's recommendations.

However, on closer examination the vitiation of s 28(1) of the EPBCA by the NEDA is contrary to the Royal Commission's recommendation. This is because the vitiation of s 28(1) of the EPBCA does not create a different

[263] Sherman (n 77) 66-67.

decision-making structure in the EPBCA.[264] Rather, it operates to remove an existing framework for decision-making without providing another during a natural disaster. It is clear the Royal Commission's recommendation and discussion in Chapter 16 were not advocating for removal of infrastructure that supports wildlife conservation during natural disasters. Instead, it recommended utilising the EPBCA in conjunction with policy tools to enable wildlife conservation during natural disasters. In this manner, the vitiation of s 28(1) of the EPBCA by the NEDA is not facilitating the Royal Commission's reform recommendations.

The interaction between the NEDA and the EPBCA during natural disasters results in suspension of a key element of the decision-making framework regarding wildlife conservation at a Commonwealth level. In this manner, it represents another missed law reform opportunity arising out of the Royal Commission. This is because, this is another manner in which the NEDA operates as a traditional mechanism in disaster law, where it disrupts the function of law. Whether this is a response that is fit for purpose in response to Australia's natural disaster risk outlook, will be considered in the next section.

### *Vitiation as a Response to Australia's Disaster Outlook*

The NEDA's vitiation of decision-making under s 28 of the EPBCA, is another example of how it operates as a traditional mechanism in disaster law, disrupting the function of law. In order to consider whether this is fit for purpose, this section will discuss two points. The first, is that vitiating structures of decision-making can further exacerbate issues already relating to the relevant area of law. In the case of the EPBCA, this includes the fact that it is failing to halt endangered species

[264] Jerry (n 143) 12.

decline. The second, is that the literature shows the rule of law can be compromised when legislative decision-making such as that under s 28 of the EPBCA is suspended over longer periods of time. In the context of Australia's natural disaster risk outlook, where natural disasters will occur more frequently and for longer periods of time, the NEDA's suspension of s 28(1) of the EPBCA is arguably not fit for purpose.

In determining whether the NEDA is fit for purpose as a response to Australia's natural disaster risk outlook, one consideration is whether its operation supports the achievement of goals contained within the legislation it interacts with such as the EPBCA. The EPBCA can be thought of as an acute categorisation system, placing levels of alerts on species and ecological communities at particularly dangerous moments where failure to intervene will impact their survival or could result in their extinction. The literature notes that this form of legislation has a number of issues, including that climate change is moving climatic envelopes that species live within, and as such determining which species and areas require protection will become increasingly fraught. [265] Indeed, the Royal Commission noted that the EPBCA is currently failing to protect Australian native species from further decline.[266] As such, the EPBCA's goals are evidently species and ecosystem conservation and rehabilitation, even if it is currently not meeting these goals.

[265] Warren (n 215) 82; Willmore (n 213) 123-24; Whitehead (n 220) 95.
[266] Final Report (n 1) 363 [16.52].

The NEDA interacts with the EPBCA in such a manner as to disrupt its objectives, by allowing Commonwealth Government actions during natural disasters that would not otherwise be permitted under s 28(1) of the EPBCA. This could mean that during a natural disaster, the Minister for the Environment could exclude Commonwealth actions that result in the logging of habitat of the Leadbetter's Possum for the purposes of creating fire breaks between people's homes and a fire front. In this manner, the operation of the NEDA does not facilitate the protection of species or ecosystems during natural disasters. Instead, it vitiates protections contained in the EPBCA.

The effects of the NEDA on the EPBCA, are an example of what can occur where traditional understandings of natural disasters are a legal mechanism utilised during a natural disaster. Scholars assessed that the EPBCA did not effectively prevent damage to wildlife during the Black Summer Bushfires.[267] The Royal Commission also acknowledged that the EPBCA is not meeting its objectives, but noted it could be used as a categorisation tool to prevent further harm in future natural disasters.[268] In this context, where the EPBCA is not meeting its objectives, the NEDA then operates to vitiate an aspect of the EPBCA's operation during natural disasters. This demonstrates that applying traditional notions of natural disasters as disruptions of law can exacerbate difficulties created with the operation of legislation. [269] This is particularly the case where that legislation does not contain frameworks to respond to natural disasters. For example, the EPBCA does not contain a Part

[267] See generally Best (n 19).
[268] Final Report (n 1) 361 [16.36].
[269] Braverman (n 219) 1-3, at 3 citing John Gillis, *The Human Shore* (2nd edn, The University of Chicago Press 2015) 198.

outlining how to triage wildlife conservation efforts during natural disasters. The effect of the NEDA on Australian legislation will necessarily be on a case by case basis. However, what this demonstrates is flaws in the manner the NEDA responds to natural disasters in Australia. This was contrary to the Royal Commission's reform intentions with respect to both the NEDA itself, as well as its reform recommendations regarding using the EPBCA as a tool to enable wildlife conservation. Therefore, when considering whether the NEDA facilitates other legislation such as the EPBCA achieving its goals during a natural disaster, it is demonstrably not fit for purpose in this respect.

A second consideration regarding whether the NEDA is fit for purpose, is considering the impact of its vitiating interaction with the EPBCA during natural disasters that occur over longer time frames as projected by Australia's natural disaster risk outlook. While the Disaster Law literature notes that Emergency Declarations such as those made under the NEDA can be useful in short term circumstances, the benefits of utilising this as a tool are increasingly fraught the longer they are used for.[270] In the context where the NEDA has the capacity to suspend checks on different forms of decision-making, such as that under s 28 of the EPBCA, this could be very detrimental for longer term environmental protection in Australia.[271] To take the example of the Leadbeater's Possum, where prohibitions are removed from clearing of habitat for a six month period or for the length of the Black Summer Bushfires, this could result in vast amounts of habitat being cleared.

[270] Du Plessis and others (n 139) 901; Wagner (n 120) 63-70, 143-47.
[271] See also Hopkins (n 24) 195, 197-8.

The operation of the NEDA in its current form regarding the EPBCA, which removes decision-making infrastructure without providing an alternative or supplementary infrastructure, means that legislative decision makers will be left with a reduced framework for fulfilling their functions during natural disasters. This is also likely to occur more frequently in the context of Australia's natural disaster risk outlook. In this context, this aspect of the NEDA's operation in its current form is fit for purpose. It does not provide legislative decision makers with a nexus or framework for their decision-making over the length of a natural disaster, instead only suspending aspects of the existing framework they operate under.[272] Without provision of guidance regarding what to do with such emergency powers over longer periods, the Covid-19 pandemic demonstrates the consequences for the rule of law can be significant.[273] It is feasible and likely that Australia's natural disaster risk outlook could generate similar issues with respect to the operation of the NEDA and the EPBCA.

The proceeding two chapters demonstrate that the NEDA's operation is currently not fit for purpose with respect to responding to Australia's natural disaster risk outlook. The NEDA vitiates administrative checks on decision-making, and whole sections of legislation concerned with environmental decision-making. It operates in the opposite manner of what the Royal Commission recommended, which was systems and processes that enable legal responses to natural disasters. The Royal Commission advocated a law reform approach to

[272] Ibid.
[273] Wagner (n 120) 63-70, 143-47; Lewis, The Executive's Power (n 204) 828-31.

natural disasters that was creative and flexible, utilising tools that were available to assist decision makers in government to effectively respond to natural disasters. In the final chapter of this thesis, there will be a discussion of how to respond to this issue in a manner that is more fit for purpose. This includes suggestions regarding legislative frameworks for decision-making contained in the NEDA, as well as a suggestion that the way natural disasters are regarded by the legal profession needs to move beyond its traditional model.

# Chapter 5 A Storm-Walking Profession

The two aspects of the NEDA's operation discussed in this thesis are clearly not fit for purpose as an appropriate mechanism for responding to Australia's natural disaster risk outlook. This is because the NEDA operates as a traditional mechanism in Disaster Law, which regards a natural disaster as a disruption to the function of law. This chapter suggests two potential responses to this problem. The first, is that legislative structures could be added to the NEDA to ensure there is a medium-term framework for decision-making during long periods of natural disasters. The second, generated as a response to the Royal Commission's suggestion we engage in 'Big Country Thinking'[274] with respect to responding to natural disasters is to rename 'Disaster Law' as 'Storm Law' and consider the profession a 'Storm-Walking Profession'. These approaches could enable the law to respond in a manner that is more fit for purpose in the face of Australia's future of cascading and compounding natural disasters.

## 5.1 A legislative framework for decision-making

The issues the NEDA creates by vitiating existing legislation could be rectified by ensuring legislative decision makers have alternative frameworks for their decision-making during natural disasters. This section will make several suggestions regarding these alternative frameworks. First, it will outline key themes the literature suggests improves decision-making during emergencies. Second, it will discuss structures that could be inserted into the NEDA, and to a lesser extent the EPBCA, to provide legislative decision makers with guidance

[274] Final Report (n 1) 25 [47].

and certainty regarding how to exercise their powers during natural disasters that occur for long time periods such as the Black Summer Bushfires.

Broadly, the literature suggests the best manner in which to respond to natural disasters is to create alternative standards of decision-making for first responders to crises.[275] With respect to the rule of law during a natural disaster, it is possible to consider legislative decision makers as first responders. First responders do not just require exceptions that allow them to speed up administrative processes or bypass prohibitions. They require frameworks for decision-making that help them to make appropriate decisions during times of emergency, and make them in a manner that supports the function of legislation and the rule of law.[276] The ways in which the NEDA could be amended to make it more supportive of the rule of law are likely numerous, and the suggestions below are made in the light of issues identified in Chapters 3 and 4 of this thesis.

The first way the NEDA could be amended to better respond to Australia's natural disaster outlook, is to insert a different decision-making framework into the NEDA. The literature is clear that extraordinary powers that are created by Emergency Declarations create risks for the rule of law because their nature is often broad in order to respond flexibly to an emergency.[277] However, responding flexibly does not preclude a legislative matrix from providing a guide to Minister regarding exercising the powers under the NEDA.[278] As such, the following features could be included in the NEDA to provide decision-makers with more guidance when making decisions during natural disasters:

[275] Sherman (n 77) 66-67; Jerry (n 143) 12.
[276] Sherman (n 77) 66-67; Boughey (n 136) 169-70.
[277] Kotze (n 130) 367-68.
[278] Wagner (n 120) 85-89.

- An additional section could be inserted into the NEDA, which contains principles of decision-making that Ministers need to consider when an Emergency Declaration is in force.
- Additional requirements on Ministers to justify why an emergency declaration is required beyond a certain time period of could be inserted. The test contained in the NEDA for extending an Emergency Declaration at present is substantively the same as the one for making an Emergency Declaration.[279] This could operate as a rachet mechanism over time, where the longer the Emergency Declaration persists the higher the test for its renewal.
- A section could be included requiring Ministers to create guides of best practice under various legislation they are responsible for regarding decision-making during natural disasters.[280]

These suggestions are directed towards providing clarity to decision makers regarding how best to make decisions during natural disasters. They are also directed towards requiring clear justification for extending the length of an Emergency Declaration, providing an indication to decision makers that such extensions are serious matters that requiring additional justification. This could also help decision makers to view Emergency Declarations as a tool to be utilised in limited circumstances, rather than a convenient manner in which to suspend certain inconvenient 'red-tape' requirements during natural disasters.[281]

[279] NEDA (n 94) ss 11-12.
[280] Sunshine and others (n 140) 97.
[281] Hopkins (n 24) 195, 197-98; Explanatory Memorandum (n 12) 2 [3].

In addition, the analysis of the interaction between the NEDA and the EPBCA suggests that legislative amendments to legislation beyond the NEDA may also be desirable to provide decision-makers with a legislative framework for decision-making during natural disasters. For example, this could include a provision that contains principles the Minister for the Environment should take into consideration when making decisions under the EPBCA during a natural disaster.[282] Such a provision could balance the need for the EPBCA to contain provisions that respond to acute phases of emergencies, with the need for decision-making under the EPBCA to meet the Act's objectives, even during a natural disaster.

Further research evidently needs to be undertaken on the form of legislative amendments that could be inserted into the NEDA to better protect the rule of law during natural disasters. This is particularly critical given Australia's natural disaster risk outlook, where natural disasters such as the Black Summer Bushfires will become more frequent and there will be more call for utilisation of legislation such as the NEDA. However, the above suggestions could turn the NEDA into legislation that enables responses to natural disasters, as the Royal Commission recommended it should.

In addition to utilising the NEDA to enable responses to natural disasters, the Royal Commission also suggested the manner in which natural disasters are defined needs to change to effectively respond to Australia's natural disaster risk outlook. The next section of this thesis will suggest one manner this might be

[282] Best (n 19) 63.

done, by suggesting this area of law be called ‘Storm Law’ and the profession be described as a ‘Storm-Walking Profession.’

## 5.2 A Storm-Walking Profession

Another response to the failures of the NEDA to provide an appropriate response to Australia’s natural disaster risk outlook, is to ask whether the way that natural disasters are conceived in the law needs to change. The manner in which a problem is conceived begins with how it is described.[283] As such, this final section will consider the benefits of renaming this area of law Storm Law, and describing the legal profession as a ‘Storm-Walking Profession’. This section will proceed by considering three points. First, it will discuss how disaster law scholars describe natural disasters as ‘unprecedented’, and the limitations this can place on crafting appropriate legal responses to natural disasters. Second, it will discuss whether it would be beneficial to rename ‘Disaster Law’, and instead describe this area as ‘Storm Law’. Third, it will discuss whether the profession also should change the way that it views itself, and regard itself as a Storm-Walking Profession. The changes suggested below are made in response to the Royal Commission’s comment that ‘Big Country Thinking’[284] is required when confronting Australia’s natural disaster risk outlook.

In making these suggestions, this thesis is part of a wave of Australian legal scholarship responding to the Black Summer Bushfires, which is describing legal problems and suggesting solutions to these problems for the first time.

[283] Sun, Narrative of Disaster (n 24) 29.
[284] Final Report (n 1) 25 [47].

Examples include an attempt to comprehensively describe Australian laws that respond to bushfires as an 'Anatomy of Bushfire'[285], suggesting the new category of Climate Disaster Law,[286] and describing laws applying to internal forced displacement as a result of the Bushfires.[287] Therefore, while the suggestions below are novel, they can be seen as another attempt to grapple with how Australian law might best respond to the changed facts and circumstances of Australia's natural disaster risk outlook. This section begins this process by considering limitations on how the law currently conceives natural disasters.

First, it has been recognised by Disaster Law scholars that the manner in which natural disasters are conceived determines legal solutions created to respond to them.[288] The literature reflects the fact that the scale of natural disaster such as the Black Summer Bushfires are difficult for the human mind to conceive. When describing the 2004 South East Asian Tsunami, which resulted in the death of 150,000 people, Daniel Farber states it was 'almost beyond imagination, involving energy equivalent to twenty-three thousand Hiroshima bombs.'[289] In addition, disaster law scholars have described natural disasters as 'moments of rupture'[290] and the cumulative crises resulting globally from natural disasters between 2019-2020 as 'unprecedented'[291] by scholars. As such, disaster law scholars have a tendency to describe natural disasters as the inconceivable, or the unimaginable. This is a problem, because if the problems

[285] McCormack and others (n 59) 159.
[286] Lyster (n 19) 68-69.
[287] Jane McAdam, 'Exploring the Legal Basis in Australia for Evacuations from Disasters: Avoiding Arbitrary Displacement' (2022) 45(4) UNSW Law Journal 1329, 1331-32.
[288] Sun, Narrative of Disaster (n 24) 29.
[289] Farber, 'Disaster Law in the Anthropocene' (n 17) 56.
[290] Cretney and Nissen (n 124) 1569.
[291] Bartel and Carter (n 125) xx. See also Richardson (n 130) 353.

that natural disasters create in the law are not possible to be conceived, a solution to it cannot be crafted.

In circumstances where the damage that climate change is causing is becoming more apparent to human beings,[292] it is necessary for lawyers to grapple with the question of whether legal conceptions of the natural world are contributing to the damage being caused by climate change.[293] Thinking about Australia's natural disaster risk outlook is uncomfortable and frightening.[294] Scholars have recommended that as a profession we need to develop a way of approaching legal problems that allow us to confront the issue of natural disasters in a way that ensures they are not ignored.[295] This is particularly the case where we are utilising language of 'emergency' and 'disaster' that has particular legal meanings,[296] which may not be appropriate to deal with the new legal issues that Australia's natural disaster risk outlook creates.

One solution to this problem may be to describe natural disasters as 'storms', with this area being described as 'Storm Law' rather than 'Disaster Law'. This is because the term 'storm' is a flexible word that can encompass many different types of natural disasters, and because it is a term that in English is associated with responding effectively to the problems it creates. This next section will briefly discuss the definitions of 'storm' contained in the Macquarie and Oxford English Dictionaries, in order to illustrate the diversity of ways in

[292] French, Dawson and Golijani-Moghaddam (n 126) 140.
[293] Sezgin and Best (n 13) 60-61; Richardson (n 130) 3.
[294] French, Dawson and Golijani-Moghaddam (n 126) 147-148.
[295] Ibid.
[296] Hopkins (n 24) 192; Stacey, Public Law Paradoxes (n 134) 292.

which ‘storms’ can be considered.[297] In engaging in this discussion, it is important to note that Disaster law scholars have identified how natural disasters are conceived has a social and cultural element, which feeds into its legal definition.[298] The Royal Commission also identified that the term ‘natural disaster’ was unhelpful in the context that it implied ‘there is nothing we can do’ to respond to Australia’s natural disaster outlook.[299] As such, describing this area as ‘Storm Law’ may help craft enabling responses to natural disasters for several reasons.

The first reason is that the term ‘Storm’ as a noun is versatile and that can apply to various forms of natural disasters. This is evident from the definition of ‘storm’ in the Macquarie English Dictionary, which defines ‘storm’ in various ways including:[300]

> 1a. A disturbance of the normal condition of the atmosphere, manifesting itself by winds of unusual force or direction, often accompanied by rain, snow, hail, thunder and lightning, or flying sand or dust.
>
> 6. A violent disturbance of affairs, as a civil, political, social or domestic commotion.

[297] *Australian Guide to Legal Citation* (4th edn, Melbourne University Law Review Association and Melbourne Journal of International Law 2018), 28 [rule 1.9.1].
[298] French, Dawson and Golijani-Moghaddam (n 126) 148-49; Lisa G Sun, ‘Disaster Mythology and the Law’ (2011) 96(5) Cornell L Rev 1131, 1135; Richardson (n 130) 41-2.
[299] Final Report (n 1) 20 [7].
[300] *Macquarie Dictionary* (7th edn, Macquarie Dictionary Publishers, 2017), 1475 (definition ‘storm’).

8. (used impersonally) to blow with unusual force, or to rain, snow, hail etc. especially with violence: *it stormed all day.*

In the Oxford English Dictionary, 'storm' is also defined in many ways, including the following:[301]

1 The atmospheric disturbance, and related uses.

A violent disturbance of the atmosphere, manifested by high winds, often accompanied by heavy falls of rain, hail, or snow, by thunder and lightning, and at sea by turbulence of the waves.

3 figurative and in a figurative context.

A violent disturbance of affairs whether civil, political, social or domestic; commotion, sedition, tumult. More definitely storm of rebellion, storm of state, storm of strife, storm of war, etc. Frequently in to weather the storm.

The manner in which the term Storm is conceived in English relates to various forms of disturbance, both atmospheric and otherwise. It can encompass a range of weather variations, including fires which were described as 'firestorms' during the Black Summer Bushfires.[302] It is a form of catch all term in relation to alterations to the planet's climate, and would allow for integrated thinking with

[301] Oxford English Dictionary Online <www-oed-com.ezproxy-prd.bodleian.ox.ac.uk/view/Entry/190960? rskey=Oekyr5&result=1&isAdvanced=false#eid> (accessed 14 July 2023), (definition 'storm').
[302] See for example, Greg Mullins, *Firestorm* (Viking, 2021).

respect to different forms of natural disasters in the law.[303] In addition, it is also a concept that incorporates ideas of human conflict and disruption, which will be exacerbated by increasing volumes of natural disasters owing to climate change.[304]

In addition, there is no definition of 'Storm' in the legal dictionaries in the Bodleian library.[305] This means the term 'storm' is not yet a term of art, and can be utilised without being weighed down by a pre-existing legal conceptual framework. The purpose of these comments is not to engage in the complex discussion of the nature of 'storm' as an idea in the English language, but to illustrate that it is a word with a diverse range of meanings that may be useful when seeking to legally conceive and respond to the volume and scale of natural disasters that will occur on the basis of Australia's natural disaster risk outlook .

The second reason the term 'Storm' may be helpful in crafting enabling responses to natural disasters, is because the term 'Storm' is associated with specific ideas of how to approach a problem, as in the phrase 'to weather the storm'.[306] Applying this to natural disasters, it allows for lawyers to think about a legal system that would weather the natural disasters exacerbated by climate change rather than suspend the existing system when it is triggered.[307] This is the opposite of how a lawyer might approach an 'unprecedented' disaster which

[303] Stoa (n 118) 432 discussing the integration of flood, drought and fire law; Sand (n 219) 202; Braverman (n 219) 1.
[304] Macquarie Dictionary (n 300) 1475 (definition 'storm 4a'); Cretney and Nissen (n 124) 1568.
[305] See fn 128.
[306] Oxford English Dictionary (n 301) (figurative definition 'storm').
[307] Telesetsky (n 28) 365.

is difficult to imagine.[308] As discussed in Chapter 2, for a common lawyer a legal issue without precedent is a problem that exists outside a legal matrix, and is to an extent unknowable.[309] Describing the nature of the problem as one that can be withstood and handled, may be a way for the legal profession to moving forward with respect to the law regarding natural disasters.

It follows from this discussion that the legal profession may also need to change the way it conceives its role in relation to natural disasters. The current conception of natural disasters as unprecedented disruptors of law may create an impression that the legal profession has no work to do during natural disasters.[310] However, the legal issues, particularly with respect to the rule of law that arise during natural disasters as a result of legislation such as the NEDA demonstrate that there is a need for the legal profession to be actively involved in providing advice during natural disasters. It is arguable there is also a need for the legal profession to be involved in the development of law in this area.

One way to enable the legal profession to more clearly see it has a role to play in the law applying to natural disasters, is to describe the legal profession as a 'Storm-Walking Profession'. The Royal Commission identified that traditional notions of natural disasters need to be moved away from. This also provides an indication that the profession may need to change its perception of itself in responding to these problems.[311] Describing the profession as a 'Storm-Walking Profession' could assist lawyers to see more clearly the role of law during natural

[308] Farber, 'Disaster Law in the Anthropocene' (n 17) 56.
[309] See page 53.
[310] Sezgin and Best (n 13) 60-61; Stacey, Disaster Law and the Beast (n 17) 886-87.
[311] French, Dawson and Golijani-Moghaddam (n 126) 147-48.

disasters, and the necessity of having legislative frameworks in place beyond traditional conceptions of natural disasters in the law. Specifically, it could allow the legal profession to understand that the new normal it is now operating in, in Australia and overseas, where natural disasters will occur more frequently and in rapid succession may require a new type of lawyering in order to effectively respond to the problems it creates.

The type of lawyering that will be required of a Storm-Walking Profession in light of Australia's natural disaster risk outlook will require further research. However, what this term does is emphasise that the issues that natural disasters will give rise to, as their timeframes increase, will require repeated attention and consideration. This is particularly in the context that the default response of law is to treat such problems as disasters, which result in loosening of the hold of the law rather than strengthening it. Describing the legal profession in this way also acknowledges the fact that in their daily practice lawyers assist their clients with various forms of disaster – personal, professional, commercial and governmental. Walking through these storms is part of normal practise, and as such the use of the term 'Storm-Walking Profession' describes aspects of the legal profession's work as it currently operates. However, it hopefully might also give the profession the confidence to create new responses to the rule of law issues that will arise with increasing volumes of natural disasters through climate change. As the science and events around the globe have demonstrated in recent years, this is not a problem that is going away.

# Conclusion

This thesis has demonstrated that Australia's Federal Legislative response of making an Emergency Declaration during natural disasters, contained in the NEDA, in its present form is not fit for purpose for dealing with increasing numbers of natural disasters owing to climate change. This thesis took two law reform recommendations from the Royal Commission's Final Report and used them as criteria to assess whether the NEDA is fit for purpose. The first criteria, that the NEDA apply to the scientific projection of Australia's natural disaster outlook, is satisfied. However, the second criteria, that the NEDA operate in a manner that is an appropriate response to the scientific reality of cascading and compounding natural disasters, is not satisfied at this stage. In demonstrating that the NEDA is not fit for purpose with respect to this second criteria, this thesis has shown a need to move beyond traditional conceptions of natural disasters as vitiating forces in law.

It is clear that the NEDA satisfies the first criteria, as it is capable of responding to a diverse range of disasters that occur over long timeframes. In Chapter 2 of its Final Report, the Royal Commission outlined the science regarding Australia's natural disaster risk outlook, which shows that in Australia natural disasters will occur over longer timeframes and with increasing frequency. It was shown that the NEDA's 'all hazards approach' to defining disasters, by focussing on the harm that a disaster creates rather than its form, responds to this scientific context. This is because the definition of 'nationally significant harm' can include natural disasters of different forms, such as fires and cyclones, either occurring at the same time or one after the other. The capacity within the NEDA of extending its operation repeatedly, at three month intervals, through repeated

use of Emergency Declarations also shows that the NEDA can apply to natural disasters that occur for long periods of time. This includes the Black Summer Bushfires, which occurred from July 2019 to March 2020.

The second criteria for determining whether the NEDA is fit for purpose, namely by considering different aspects of its operation, was explored across the rest of the thesis. In the context that frequent natural disasters are Australia's new normal, the Royal Commission identified that the way in which natural disasters are thought about needs to move on from being 'unprecedented'.[312] This invited consideration of whether traditional notions of natural disasters in law, as disruptions to the function of law, were an appropriate response to Australia's natural disaster risk outlook. This thesis considered two aspects of the NEDA's operation, to discern if it operated as a traditional mechanism, and if so, whether this was an appropriate response to the science of Australia's natural disaster outlook.

In Chapter 3, the operation of two key powers in the NEDA, the Declaration Power and Red Tape Powers in ss 11 and 15, were analysed demonstrating they operate to vitiate legislative decision-making during natural disasters. This was discussed in the context of the Royal Commission's recommendation 5.1, which suggested that a non-traditional Emergency Declaration legislative mechanism be enacted. The Royal Commission recommended that the Emergency Declaration legislation operate to enable responses to natural disasters, including triggering systems and processes

[312] Final Report (n 1) 5-7.

across the Commonwealth Government to respond to natural disasters. However, analysis of ss 11 and 15 of the NEDA demonstrated that the primary function of the NEDA is to vitiate legislative decision-making. The Disaster Law literature is clear that the longer an Emergency Declaration is in force, the more that utilisation of powers that vitiate legislation can be detrimental to the functioning of government during natural disasters and by extension the rule of law. In the context of increasing volume and scale of natural disasters in Australia, the way in which this aspect of the NEDA operates was found to not be fit for purpose.

In Chapter 4, the interaction between the NEDA and the EPBCA was analysed, demonstrating that the NEDA also operates to suspend the legislative infrastructure of environmental decision-making during natural disasters. This was discussed in the context that the Royal Commission recommended improvements to the way that data on endangered wildlife is collected and distributed, so that decision makers under legislation such as the EPBCA could make informed decisions triaging wildlife conservation priorities for emergency services during natural disasters. The operation of the NEDA in conjunction with the EPBCA, however, can result in the vitiation of the prohibition contained in s 28(1) of the EPBCA on actions of Commonwealth agencies that could cause ‘significant harm’ to the environment. As such, during a natural disaster, the operation of the NEDA could suspend environmental protections regarding endangered species such as the Leadbeater’s Possum, allowing for the clearing of its habitat. This contradicted the Royal Commission’s reform intention to utilise the EPBCA as a tool to classify which species and ecological communities

require assistance during natural disasters. In the context that the NEDA does not assist the EPBCA to achieve its goals during a natural disaster, but instead actively vitiates them, this aspect of the NEDA's operation was also found to not be fit for purpose.

In Chapter 5, potential responses to the NEDA's operation not being fit for purpose as a response to Australia's natural disaster risk outlook were discussed. The first solutions were legislative, and included inserting provisions outlining principles to guide of decision-making under the NEDA while an Emergency Declaration is in force. This could prevent decision makers from being without a framework for their decision making during longer term natural disasters, thus protecting the rule of law. Further research will be needed to determine the form that such provisions should take.

A second response, based on need Disaster Law Scholars have identified for creative approaches to our 'no-analog legal future'[313], is to rename the area of 'Disaster Law' as 'Storm Law' and describe the legal profession as a 'Storm-Walking Profession'. The Royal Commission identified that the way natural disasters are conceived is limiting the capacity of Australian society to effectively respond to them.[314] In this context, it is important for lawyers to consider whether the way current legal frameworks are defined is resulting in a failure to adequately respond to climate change. As such, it may be suitable to describe law relating to natural disasters as 'Storm Law' rather than 'Disaster Law'. The

[313] Telesetsky (n 28) 361.
[314] Final Report (n 1) 20 [7]; See also Sun, Narrative of Disaster (n 24) 29.

name ‘Storm Law’ is capable of encompassing many forms of natural disaster.. This term could also allow the legal profession to consider that it can ‘weather the storm’, in relation to protecting the rule of law, that climate change will likely create. By describing the area of Disaster Law in this way, and the profession as a Storm-Walking Profession, this could enable more effective legal responses to Australia’s natural disaster risk outlook of the 21st Century.

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tary_Library/Browse_by_Topic/law/royalcommissions> accessed 16 December 2023

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