# **Tinpot 2020**

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*If Governments can lock-in nearly everyone in a State on the pretext of a pizza, should they be given more emergency powers?*

## 1. Introduction

Tinpot concerned Governments’ use and abuse of powers in emergencies, spurred on by politically motivated fear-mongering, notably in the 2019-20 bushfires and 2020 Covid pandemic.[[1]](#endnote-1)

The bushfires saw calls for Federal declaration of a ‘climate emergency’, supported with fabrications and falsehoods including from ABC’s Media Watch. No thought was given to what might result from such a declaration.[[2]](#endnote-2)

The Prime Minister, lambasted for not being sufficiently responsive and overtly emotional, indicated a desire for powers to unilaterally declare a national emergency and determine Commonwealth responses. Another wish was for a Commonwealth emergency agency in the Home Affairs portfolio. He established a Royal Commission to examine the bushfires, disaster responses and his wishes.[[3]](#endnote-3)

An interim report by the Commission confirmed what should have been known – legal powers of the Commonwealth, and its Government, are limited in relation to emergencies. The better view is: the Commonwealth can defend its own (valid) laws, assets, assist the States on request, and address threats to institutions established by the Constitution. The scale of a disaster, or threats to people or property do not of themselves create a justification for Commonwealth action.[[4]](#endnote-4)

Meanwhile, the Covid pandemic occurred. The responses entailed abuse of State emergency powers by Premiers, Ministers and officials. They likely set benchmarks for behaviour their Commonwealth counterparts will emulate if they can declare their own ‘emergencies’.[[5]](#endnote-5)

The Royal Commission’s report covers many topics. This note is limited to the Commission’s recommendation re declarations of a national emergency – which curiously extend beyond matters examined by the Commission and are not limited to those arising from a natural disaster.[[6]](#endnote-6)

As ever, corrections would be welcomed.

## 2. Royal Commission argument

The Royal Commission’s report argued natural disasters are likely to become more frequent and larger scale – with the likelihood of some being consecutive and compounding:

*‘Australia’s disaster outlook is alarming. States and territories alone may not be able to respond effectively (to)….catastrophic disasters.’*

It gave an example of a cyclone hitting the Gold Coast also affecting northern NSW. It said risks to Australia extend beyond natural disaster and into matters like pandemics, cyber-attacks, terrorism and war. It argued the potential for such events should be factored into disaster planning. Among the reasons is that the same agencies may need to respond to any of these.

The report recognised States are responsible for responding to natural disasters, but said the Australian Government has a role – primarily to support the States. Moreover, the Government:

*‘…has unique capabilities, and is able to take a broader view of the national consequences of extreme to catastrophic disasters.’*

The report said an Australian Government declaration of a state of national emergency would:

*‘signal to communities the severity of a disaster early, act as a marshalling call for the early provision of Australian Government assistance when requested, facilitate coordination with state and territory emergency management frameworks.’*

Already there are mechanisms, in legislation, for the Commonwealth (Executive) Government to declare ‘emergency’ in some circumstances other than natural disasters. For example, the Prime Minister can declare an event a terrorist action and:

*‘…the Governor-General can declare a human biosecurity emergency if …. a human disease is posing a severe and immediate threat… on a nationally significant scale. The declaration must also be necessary to prevent or control the entry into, or the emergence, establishment or spread of, the listed human disease in, Australia.’*

However, there is no Commonwealth legislation for a national emergency declaration in the event of a natural disaster. The Royal Commission thought there should be such legislation. While it said such a declaration should normally occur with State consent, it argued new legislation:

*‘should also provide a clear mechanism to support the Australian Government to act unilaterally in a limited set of circumstances – such as where a state or territory government cannot take actions to save lives or property, including, for example, where an executive government of a state or territory is incapacitated……. ’*

The report considered the Government’s proposal for States to refer relevant powers to the Commonwealth. It thought that process too cumbersome. It argued referral is irrelevant as there is a Constitutional basis for legislation enabling an emergency declaration. This is because the Constitution allocated sources of power to the Commonwealth which:

*‘…are extensive and should cover the circumstances where the Australian Government needs to act with respect to a national emergency without a request from a state or territory. ….. the Australian Government could introduce legislation that would allow it to take action in circumstances where a natural disaster (whether bushfire, cyclone, flood or another natural disaster) impacts upon, for example, the following subject matter: • trade and commerce with other countries’ etc’.[[7]](#endnote-7)*

The report noted the response to the Global Financial Crisis demonstrated another source of power:

*‘Section 61, in conjunction with the incidental power, has been relied upon for the purpose of enacting legislation…… to encompass the inherent authority derived from the character and status of the Commonwealth as a national government.’*

It suggested the criteria for a declaration of emergency should include:

*‘• a natural disaster (or compounding disasters) is having, or is likely have, a national impact because of its scale or consequence*

*• the natural disaster (or compounding disasters) has the potential to overwhelm or exhaust the affected state or territory’s capacity to respond and recover, or*

*• given the nature or complexity of the natural disaster (or compounding disasters) Australian Government assistance should be provided in the national interest.’*

The report said the ability of the Government to take unilateral action should be more limited:

*‘The intervention of Australian Government resources, such as the ADF, in response to a disaster and without a request from a state, is truly exceptional. It is, from a principled perspective, at odds with the division of responsibilities between the Australian Government and the states ….. and our long-established use of the ADF in Australia.’*

The report said the threshold for the Government taking unilateral action should recognise:

*‘• there is significant risk to lives or property*

*• the affected state or territory cannot take action*

*• a request for assistance will not be forthcoming before lives or property are lost, and*

*• it is necessary to take action in the national interest.’*

The Commission recommended:

*‘5.1 The Australian Government should make provision, in legislation, for a declaration of a state of national emergency. The declaration should include the following components:*

*(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.’*

For completeness, the Commission also recommended greater formal involvement of the Commonwealth in natural disaster preparation and responses, whether or not there is a declared national emergency. Among the actions would be creation of a new ‘entity’ and an increase in the scope of the Department of Home Affairs which has a division titled ‘Emergency Management Australia’. The effect would be two Commonwealth entities: one for disaster recovery; the other for emergency responses:

*‘3.5 The Australian Government should establish a standing entity that will enhance national natural disaster resilience and recovery, focused on long-term disaster risk reduction.*

*3.6 The Australian Government should enhance national preparedness for, and response to, natural disasters, building on the responsibilities of Emergency Management Australia, to include facilitating resource sharing decisions of governments and stress testing national disaster plans.’*

Given the functions of ‘Emergency Management Australia’, presumably its Department - Home Affairs - would advise the Prime Minister on whether to declare a national emergency. It may also be that Department will guide and direct Commonwealth ‘responses’ in a natural disaster, including deployment of Defence and Defence Reserve capabilities.

## 3. Government response

The Government indicated it accepted all recommendations of the Commission. However, this was not the case. For example, it did not agree with creating the air tanker fleet recommended by the Commission, saying this is a job for the States.[[8]](#endnote-8)

More significantly, the Commonwealth emergency services Minister reportedly said the Government will assist in every natural disaster e.g. whatever the size. This conflicts with a fundamental tenet of the Royal Commission – of a Government role only in natural disasters of national significance.[[9]](#endnote-9)

## 4. Comments

The argument of the report for a Prime Minister declaration of emergency could be summarised as:

a. A role for the Commonwealth arises from States being unable to cope;

b. That role should be initiated and exercised by the Prime Minister;

c. The role includes declaring a national emergency to signal to the community the gravity of the situation etc;

d. Such a declaration should depend on the size of the disaster;

e. Other elements of the role need to be defined;

f. At times that role should be initiated without the consent of relevant States;

g. The Government should legislate for that role;

h. Referral of powers is not necessary for that legislation.

There are problems with every step of this argument.

### a. States unable to cope?

The claim that States are unable to cope (a) above, does not logically lead to a Commonwealth responsibility. Rather, it should lead to States allocating more attention and resources to planning, preparedness and responses to natural disasters. For example, to reverse or mitigate State decisions on land use in cyclone, flood and bushfire prone areas that amplify natural disasters.

The claim also flies in the face of practice. The Commonwealth is responsible for quarantine. However, in the pandemic ‘emergency’, the Government delegated exercise of that function, and costs, to the States. Worse, it abdicated its responsibility by apparently not checking on the performance of States. The results were disastrous in the Ruby Princess and Melbourne quarantine matters.

A precondition for any further Commonwealth Government role should be satisfaction that it is competently fulfilling its current responsibilities. This matter was overlooked by the Commission.

### b. Prime Minister’s call?

The Commonwealth’s quarantine failures in the pandemic were due to the Government. The Government seems reluctant to seek advice or authority from the Parliament on its activities – a characteristic it shares with State counterparts. Yet even in the limited after-the-fact Parliamentary scrutiny proceedings – by a Senate Select Covid Committee – very serious concerns have been raised about infringements of fundamental democratic and legal precepts.[[10]](#endnote-10)

Governments have sought to arrogate power – from Parliaments - by forming a ‘national cabinet’ that quickly, and enduringly, descended into a rabble of grandstanding Premiers seemingly intent on avoiding any demonstration of the legality of their actions.

The present Conservative Commonwealth Government has some form in regard to abuse of Executive powers. Any idea of expanding those powers needs to be assessed in reference to this.

This is particularly the case for emergencies for two reasons.

First, powers would be exercisable by the Prime Minister on declaration of an emergency. Were such declaration to be made by the Prime Minister, this would be a case of self-declaration of jurisdiction. This is problematic in principle, with a better approach being declaration made by a party other than that given power to take actions.

At the least, any declaration should of extremely short duration unless specifically extended by Parliament. This implies Parliament should be recalled immediately on a declaration to consider whether it is justified. This was not addressed by the Royal Commission – even though the issue was canvassed in a submission to the Senate’s Covid Committee in May.[[11]](#endnote-11)

Second, while the report provided three examples of declaration of an event creating powers for the Executive – by the Governor General, by the Prime Minister and by a Minister – it gave no reason for preferring the Prime Minister to make the declaration of a national emergency.

The Constitution has the Governor General making the most significant national declarations e.g. of war. This reflects the idea that under the Constitution, the Governor General, rather than the Prime Minister, is the Executive authority - the ‘Prime Minister’ is not recognised by the Constitution.

A clue to the Commission’s thinking may be in an article by former Defence Secretary Mr Paul Barratt AO. He claims the Governor General’s role in declaration of war has effectively been usurped by the Government via s.8 of the Defence Act. The Commission may have thought that a good, practical precedent. However, as it involves illegality by leadership it clearly is not. In that context is it worth noting the Commission was chaired by a former Chief of Defence Force?

### c. A signal to the community?

The argument that declaration of national emergency would provide a signal to ‘the community’ about the disaster is not credible.

‘The community’ directly affected by a natural disaster, for example a cyclone or bushfire, would hardly need a Commonwealth Government declaration to be aware of their situation.

Signalling to the ‘wider community’ – all Australians – is equally unnecessary. The media would be informing the community without a Commonwealth Government declaration – which, incidentally would need to be conveyed by the same media.

Signalling to Commonwealth agencies should be unnecessary. Most such agencies, Departments, could be advised to prepare for responses by their Ministers.

The point of a signal therefore appears to be political. It is to engender support for the Government, and to continue an ongoing feeling of crisis and acceptance of otherwise objectionable actions. That the proposal is for it to be done by a political actor – the Prime Minister, rather than say the Governor General – confirms this.

Worse, the ‘signalling’ argument is potentially dangerous as: the intrusion of potential for political point-scoring undermines the significance of a declaration of a national emergency; it may provide a pretext for more substantive grabs for, and illegal exercise of, power by the Government.

### d. Size of the disaster?

The Commission’s reference to the size of the disaster, and number of people affected, while apparently appealing is not consistent with the reasoning and criteria proposed – which is to deal with matters beyond the capability of States.

It may be that a disaster beyond a particular size may be too great for a State. However, given the disparities between the States – Tasmania has less than 10% of the population of Sydney in NSW - there cannot be an Australia-wide disaster size for Commonwealth intervention.

The idea that intervention might be justified by the number of people or economic impact leads to a conclusion that the Commonwealth’s primary interest would be in natural disasters affecting metropolitan areas. Such a conclusion conflicts with other proposed considerations such as direct impacts of a disaster across State borders.

Size as a reason for Commonwealth involvement is not consistent with the Constitution. The Commonwealth is not the jurisdiction of ‘big-things’ or even ‘the economy’. Rather it is the jurisdiction of national things largely as set out in the Constitution.[[12]](#endnote-12)

It is worth noting at least one expert regarded the bushfires to the end of 2019 as not being sufficient to constitute a national emergency.[[13]](#endnote-13)

The Commission cited the Rudd Government’s response to the Global Financial Crises as indicating scale to be a factor in Commonwealth involvement in an emergency. However, its depiction appears wrong.

The High Court in Pape considered the Commonwealth Government fiscal stimulus for that crisis. A majority held its payments were valid because of the ‘nationhood’ power which arose only because the crisis was a global event, affected everywhere in Australia and only the Commonwealth had instruments readily available to mitigate its impact. The criteria stated by the Court were the matter needs to arise because of the character of the Commonwealth, and the Commonwealth is uniquely able to deal with the issue – it is a matter of need rather than size or convenience for Commonwealth involvement.[[14]](#endnote-14)

Pape appears to have little relevance to most natural disasters – bushfires, cyclones – etc. which are sub-national events, usually affecting only a very small part of Australia, its people and economy – and for which the Commonwealth does not have unique capabilities. This is acknowledged in a separate part of the Commission’s report by reference to Commonwealth disaster payments to individuals needing to be made through the States. There is no apparent reason for – and plenty of reasons against – setting a different threshold for a Commonwealth ‘national emergency’ declaration than for payments to individuals affected.

Reference to size of the disaster appears to be part of a fishing expedition by the Commission to find

reasons for a pre-determined answer for more Commonwealth involvement.

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### e. Other elements of the role?

While the Commission may have focussed on responses to disasters such as rebuilding and repairing civilian assets, removal of people from harm, provision of supplies and the clearing of debris, elements of the proposed Commonwealth role remain undefined.

Some of those elements could involve destruction of personal property and deprivation of personal liberty including by the use of force.

The potential for this can be seen in State responses to the 2019-20 bushfires and the pandemic.

In the bushfires State authorities ordered destruction of some property, closures of roads and utilities, evacuation of property etc, and later prevention of looting. This is not to say such actions were unnecessary in the circumstances, rather it is to note that emergency actions can have adverse consequences for particular individuals and may require use of force to back them up.

In the pandemic, deprivation of liberty appeared to be a first, and in some cases only, response of State Governments. Some of these responses were at the least contentious and without apparent health policy reason. These has been no demonstration of the legality of such actions apart from the border closure of Western Australia for July.

The politicisation and ‘strong arm’ panic of some State ‘emergency’ measures - most recently restricting funerals to 100 persons while allowing 50,000 to attend a football match in Queensland, and the closing down of South Australia ostensibly because of a single ‘lie’ about a pizza – has gone beyond pathetic into dangerous practice. These are yet more evidence of more power leading to less common sense and more dangerous reactions of Governments and some of their officials in Australia.[[15]](#endnote-15)

The eagerness of several State Governments to use Commonwealth Defence Force assets and personnel in potentially extra-legal adventures, such as border closures, should be a great concern. The personnel were not merely involved in administrative or medical activities but in measures including ‘crowd control’ which conceivably could require the use of force. As such, it has extended to use of the army as a (supplement to) domestic police force.

### f. Without consent of the States?

The discussion in the report of the importance of State consent to a declaration of national emergency was not matched by the recommendations in two fundamental respects.

First, the report referred to relevant circumstances hinging on significant risks to lives or property and the State Government being incapacitated, the logic being that incapacitation precludes the State giving consent to a Commonwealth declaration. However, the recommendation merely referred to: ‘*clearly defined and limited circumstances’* which may not be interpreted as requiring State incapacitation.

There are other problems with this leg of the argument. The term ‘Significant risk to lives or property’ is too vague to be of use. For example: what is meant by the term property? How much property needs to be endangered? What type of property - in the 2019-20 bushfires a substantial amount of property damage was to fences?

Second, the formulation is seen as nonsensical when it is recognised that a truly national event is likely to extend beyond the borders of one, probably several, States. For example, the Global Financial Crisis affected all States, and the relevant payments were valid without consent of the States.

What if only some States consent?

What of a national emergency affecting only one State? If only one State is affected by the natural disaster, the formulation is not that of a national emergency, in the sense of scale, but the effective absence of a Government. Legislation for this is not needed, and an attempted formulation of principles beyond what is already Constitutional doctrine looks infeasible.

The discussion in the report and the recommendation failed to recognise these matters.

### g. Is legislation needed?

The case for legislation is far from clear. The report cites Constitution s.61 as providing scope for the Government to take action necessary to defend Commonwealth laws, property and Australia’s system of government. However, that section is operative without legislation. As is the nationhood power used in the Global Financial Crisis.

The report suffers from a telling but fundamental misconception - that the Government makes legislation. Rather, Parliament makes legislation and the very rare international exceptions to this proved to be most unfortunate.[[16]](#endnote-16)

Also unfortunate for the report’s argument is its reference to the Commonwealth Biosecurity legislation (as authorising the Governor General to declare a state of emergency). Without necessarily calling such a Governor General’s declaration into question, there are questions about the extent to which the Commonwealth Government can then introduce related measures because of uncertainty about Constitutional support for that use of legislation.

The implication is: while much of the Biosecurity Act is clearly valid, it said to possibly include an exercise in bluffing – in making very broad legislation covering matters beyond Commonwealth power. Presumably any such extension beyond power is known, and there is a hope and expectation that actions will not be challenged.[[17]](#endnote-17)

### h. Referral of powers not necessary?

Referral of powers is not necessary provided the Commonwealth, and its Government, remain within the bounds of the Constitution.

However, by discussing referral of powers, the Commission overlooked the alternative means of providing the Commonwealth with additional powers – referendum. Given the implicit opinion about the popularity of this role for the Commonwealth, this is the obvious mechanism to test the public’s willingness for the Commonwealth to have and exercise these powers.

## 6. More generally

The above indicates the Royal Commission report did not provide a reasonable argument for additional powers for the Prime Minister to declare a national emergency and for the consequences thereof.

In that absence, legislation is at best problematic as: being unnecessary to extend Commonwealth power, it would provide an aura of respectability to, and perhaps bluff about, actions whose lawfulness could only be tested in high courts – testing of which is too costly for many individuals.

Yet, the Commission was disposed to accord with the Government’ wishes - about an emergency declaration - without adequate analysis. The disposition is most clearly shown by comments about Government legislation, and the proposal to sideline the Governor General to allow unilateral action by the Prime Minister.

The Commission’s report needs to be seen against a backdrop of other Executive Governments ‘initiatives’ and obsession with arbitrary exercise – abuse – of power for political purposes.

Abdication of Commonwealth quarantine responsibility in the Covid pandemic has been mentioned above. The lack of respect by State Governments for legality has been covered elsewhere. Also, of interest is the ever-expanding cavalcade of ‘threats’ perceived by the Department of Home Affairs.[[18]](#endnote-18)

However, the most important issue may be indicated by a Bill before the Parliament which supposedly aims to enhance preparedness of the Australian Defence Force and Defence Reserve to respond to emergencies. Mr Barratt argues the Bill – introduced some months before the Royal Commission’s report - sets up a system to effectively by-pass Constitutional constraints and enable the Government to direct defence forces to deal with undefined civil emergencies including by the use of force.[[19]](#endnote-19)

He cites as a precedent for ultra-Constitutional action the by-passing of the Governor General for what are effectively declarations of war – by Ministers and the Chief of the Defence Force.[[20]](#endnote-20)

The Royal Commission was aware of the Bill, however, its remarks on the proposed legislation were limited to the desirability of providing indemnities to Defence personnel engaged in emergencies and making it easier to call-out the Defence reserve. It ignored the issues identified by Mr Barratt.[[21]](#endnote-21)

The Prime Minister’s January wish could be interpreted as seeking power, and kudos, without taking on responsibility. This is consistent with the Government’s behaviour in the pandemic etc. Together with other circumstances, the appearance is of eagerness to establish some type of militia without putting such a major change directly to the people.

The Royal Commission report facilitates such tinpot behaviour by weak analysis and poor argument.

Rather than legislation, the only reasonable approach to deal with such wishes is to put proposals to a referendum. It would be foolish to adopt the Royal Commission’s proposals regarding a greater role for the Commonwealth, and especially any declaration of emergency, without asking Australians at a referendum.

J Austen

22 November 2020

1. <https://www.thejadebeagle.com/its-all-about-climate-change.html> [↑](#endnote-ref-1)
2. <https://www.thejadebeagle.com/media-botch.html>

Except: <https://emergencylaw.wordpress.com/2019/12/25/what-is-a-national-emergency/> [↑](#endnote-ref-2)
3. <https://naturaldisaster.royalcommission.gov.au/> [↑](#endnote-ref-3)
4. <https://www.thejadebeagle.com/tinpot.html>

<https://www.thejadebeagle.com/tinpot-update.html> [↑](#endnote-ref-4)
5. <https://www.thejadebeagle.com/covid---may.html> [↑](#endnote-ref-5)
6. <https://www.thejadebeagle.com/covid---july-2020.html> [↑](#endnote-ref-6)
7. But see note xvi (below) for a contrary view. [↑](#endnote-ref-7)
8. <https://www.smh.com.au/politics/federal/national-emergency-laws-but-no-sovereign-aerial-firefighting-fleet-20201113-p56eev.html> [↑](#endnote-ref-8)
9. <https://www.abc.net.au/news/2020-11-13/government-response-bushfire-royal-commission-recommendations/12879862> [↑](#endnote-ref-9)
10. <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19>

For commentary on democratic and legal precepts see submission 310Centre for Comparative Constitutional Studies <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Submissions> Among other things it said in relation to the Commonwealth – whose actions are less controversial and consequential than those of the States:

*‘However, within a system of constitutional government, careful scrutiny and oversight must be guaranteed in relation to any significant shift in lawmaking authority from the Parliament to the Executive. Extensive use of delegated legislation marks such a shift. The COVID‐19 crisis has exposed substantial deficiencies in the existing mechanisms for parliamentary oversight of the conferral, nature, extent and exercise of delegated legislative authority….*

*The lack of clarity about the precise role of Commonwealth executive power within the Government’s COVID‐19 response is therefore troubling on a number of fronts. Opacity with respect to this issue makes it hard to understand whether some decisions have legislative support or not: and if not, why not. Those that do not have such legislative support are presumably reliant, at the Commonwealth level, on non‐statutory executive power. Questions as important as by what legal authority government action proceeds, in an emergency or otherwise, should not be left to unguided guesswork of this kind, least of all in a constitutional system committed to the primacy of Parliament.*

*We therefore urge the Committee to recommend that Parliament: • ensure that arrangements are put in place which would allow it to continue to discharge its constitutional functions in a time of emergency; • identify and rectify deficiencies exposed by the COVID-19 crisis in existing mechanisms for its oversight of the conferral, nature, extent and exercise of delegated legislative authority; • inquire into the use (if any) of non-statutory executive power in response to the COVID-19 process; and • in consultation with its State and Territory counterparts, develop a set of principles and practices applicable to the operation of the National Cabinet (by whatever name) in the aftermath of the COVID-19 crisis.’* [↑](#endnote-ref-10)
11. See note ix above. [↑](#endnote-ref-11)
12. <https://www.thejadebeagle.com/big-things.html> [↑](#endnote-ref-12)
13. <https://emergencylaw.wordpress.com/2019/12/25/what-is-a-national-emergency/> [↑](#endnote-ref-13)
14. <https://www.thejadebeagle.com/williams-case.html> [↑](#endnote-ref-14)
15. Qld: <https://www.news.com.au/finance/work/leaders/home-affairs-minister-peter-dutton-slams-qld-premier-annastacia-palaszczuk-over-origin-crowd/news-story/6525e0c507aa682934001928809a0aad>

SA: <https://www.abc.net.au/news/2020-11-20/how-a-lie-to-coronavirus-contact-tracers-sent-sa-into-lockdown/12904572> [↑](#endnote-ref-15)
16. See note v at <https://www.thejadebeagle.com/its-all-about-climate-change.html> [↑](#endnote-ref-16)
17. <https://auspublaw.org/2020/05/an-executive-grab-for-power-during-covid-19/> and <https://apo.org.au/sites/default/files/resource-files/2020-08/apo-nid307587.pdf> [↑](#endnote-ref-17)
18. <https://johnmenadue.com/paralysis-by-analysis-extravagance-clots-michael-pezzullos-security-sermon-canberra-times-nov-3/> [↑](#endnote-ref-18)
19. <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6594> [↑](#endnote-ref-19)
20. <https://johnmenadue.com/paul-barratt-defence-legislation-re-call-out-of-reserves-should-not-proceed/#disqus_thread>

Mr Barratt notes two distinct sets of circumstances under which the Defence Force can be called upon to assist States.

The first is to assist State law enforcement responsibilities – Aid to the Civil Power. It includes use of force against Australians within Australia. The Constitution sets out processes for activating this, there must be a state of “domestic violence” and the Commonwealth must have received a request for assistance. It is rarely used.

The other - Assistance to the Civil Community – is for assistance in emergency situations not requiring the use of force, such as the aftermath of extreme weather events. He notes:

*‘What is not clear, however, is why the existing arrangements (for the latter)…. which are of very long standing, require supplementation.’*

He argues Defence Reserve ‘capability’ is marginal as the main assets – aircraft, ships, trucks, special skills and preparedness – are not in the Reserve but in the permanent force. Moreover:

*Sending ADF members into dangerous situations for which they are neither trained nor equipped exposes them, and perhaps those they are meant to be assisting, to danger, and should be avoided except in extremis.*

With that background, he argues:

*More significantly, the way the Bill is framed calling out the Reserve in response to emergencies does not require a State request. The argument that a callout does not require State request is irrelevant as how can the CDF decide what assistance to render in the absence of a request from those whose responsibility it is, with a description of what is needed?*

And most significantly:

*The legislation is stated to facilitate call-out to deal with a “natural disaster or other emergency” – which includes “civil aid, humanitarian assistance, medical or civil emergency or disaster relief” and “warlike operations within Australia” and “matters involving Australia’s national security or affecting Australian defence interests”.*

Hence:

*The intent might be as limited as it is represented to be by Defence, but it might also be, or might over time become, a means of navigating a way around the requirements which the Constitution stipulates If this seems fanciful, consider the example of the creation of “Chief of the Defence Force Staff” that the Minister for Defence had administrative control over the CDFS and the Secretary.*

*In his Second Reading Speech on the Bill, Defence Minister Lance Barnard stated, “The Secretary and the Chief of Defence Force Staff would be concerned principally with important matters of defence policy and administration particularly those affecting the whole of the defence force, the aggregates and the common policies. Notwithstanding these reassuring words, s.8 is now used as a power to make war – instead of seeking the authority of the Governor-General to deploy the ADF into armed international conflict, in accordance with long-standing Constitutional practice, governments now just issue a direction under s.8 of the Defence Act. This is a rather significant evolution of “defence policy and administration”.*

Mr Barratt noted that practice in more depth in <https://johnmenadue.com/paul-barratt-its-too-easy-to-take-us-to-war/>. While formal allegations of serious criminality of SAS soldiers are topical today, it is worth recalling alleged behaviour of Defence’s political masters:

*‘… in order lawfully to deploy the ADF into armed conflict, the Government would be expected to first obtain the assent of the Governor-General. By convention, the Governor-General would be expected to give assent, but those same conventions allow the Governor-General to ask questions and seek assurances, especially about the legality of the action to which s/he is being asked to assent. While the Governor-General is not expected to refuse ministerial advice, the minister is under a duty to ensure that the Governor-General is not asked to act illegally….. Instead of adhering to this clear constitutional path, successive Governments appear to have relied upon section 8 of the*[*Defence Act 1903*](http://classic.austlii.edu.au/au/legis/cth/consol_act/da190356/)*, a provision which in its current form was introduced in 1975 to make clear that the Minister for Defence had “general control and administration” of the Defence Force and that both the Secretary and the newly created position of Chief of the Defence Force were subject to the Minister’s direction. Section 8 was never intended to create a new power to make war.*

*Reliance upon section 8 strips the checks and balances from the process for deciding matters of war and peace, a process that already places too much power in the hands of executive government. At least when the constitutional niceties are observed, the Governor-General is entitled to be assured that the proposed deployment is lawful. For example, the 2003 invasion of Iraq was condemned by most international lawyers and none of the few who argued that it was legal was prepared to argue that it would have succeeded in the International Court of Justice. It is noteworthy that on 21 March 2003, the day after the invasion, former Solicitor-General Gavan Griffiths QC*[*ridiculed the legal advic*](https://www.smh.com.au/opinion/this-war-is-illegal-howards-last-top-law-man-20030321-gdggwb.html)*e proffered by the Howard Government, advice which was written by two public servants without practising certificates rather than by the Solicitor-General on whom the government would normally rely. Did Prime Minister Howard refrain from approaching the Governor-General because he knew the lawfulness of the endeavour was dubious to say the least? Governor-General Hollingworth had, in fact, asked the then Attorney-General (Daryl Williams) about the legality of the mooted war, following which Prime Minister Howard withdrew an undertaking to take it before the Federal Executive Council “for noting.”* [↑](#endnote-ref-20)
21. Report sections 7.73 to 7.84. [↑](#endnote-ref-21)