



Law Council
OF AUSTRALIA

Legal Practice Section

30 April 2020

Royal Commission into National Natural
Disaster Arrangements
Locked Bag 2000
MANUKA ACT 2603

By email: rcnda.enquiries@royalcommission.gov.au

Dear Sir/Madam

**SUBMISSION TO THE ROYAL COMMISSION INTO NATIONAL NATURAL DISASTER
ARRANGEMENTS**

The Law Council of Australia is grateful for the opportunity to make a submission in relation to the Royal Commission into the National Natural Disaster Arrangements.

Please find attached the Law Council's submission which has been prepared by the Australian Environment & Planning Law Group of its Legal Practice Section.

The Law Council would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact AEPLG Chair, Robyn Glindemann on [REDACTED] or at (T) [REDACTED].

Yours sincerely

[REDACTED]

Margery Nicoll
Acting Chief Executive Officer



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Table of Contents

About the Law Council of Australia	3
About the Section	4
Acknowledgement	4
Climate Change	Error! Bookmark not defined.
Land Use Policy	Error! Bookmark not defined.
Facilitating Evacuation	Error! Bookmark not defined.

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12-month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

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- Dr Jacoba Brasch QC, President-elect
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The Secretariat serves the Law Council nationally and is based in Canberra.

About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities.
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Ms Maureen Peatman, Chair
- Mr Michael James, Deputy Chair
- Mr Geoff Provis, Treasurer
- Ms Tanya Berlis
- Mr Mark Cerche
- Ms Peggy Cheong
- Mr Philip Jackson SC
- Dr Leonie Kelleher OAM
- Ms Christine Smyth

Acknowledgement

This submission has been prepared by the Australian Environment & Planning Law Group (**AEPLG**), which is a committee of the Legal Practice Section of the Law Council of Australia.

1. The Australian Environment & Planning Law Group (**AEPLG**) of the Law Council's Legal Practice Section welcomes the opportunity to make this submission to the Royal Commission into National Natural Disaster Arrangements, also known as the Bushfires Royal Commission (**RC**).
2. The AEPLG's thoughts are with those who lost homes or loved ones. It extends its deepest condolences and pays respect to everybody directly and indirectly affected, including fire fighters and emergency services workers.
3. The AEPLG notes, with concern that this is not the first such Royal Commission in this area undertaken, being preceded by the 2009 Victorian Bushfires Royal Commission, the report for which was released in July 2010.
4. This RC is also preceded by many inquiries. The 2010 Senate Select Committee on Agricultural and Related Industries Inquiry into Bushfires in Australia¹ noted that since 1939 there had been at least 18 major bushfire inquiries in Australia, including state and federal parliamentary committee inquiries, Council of Australian Governments (**COAG**) reports, coronial inquiries and Royal Commissions. It listed those as:
 - 1939 (Victoria): Report of the Royal Commission to inquire into the causes of and measures taken to prevent the bush fires of January, 1939. L.E.B. Stretton.
 - 1961 (Western Australia): Report of the Royal Commission appointed to enquire into and report upon the bush fires of December 1960 and January, February and March 1961, Western Australia. G.J. Rodger.
 - 1967 (Tasmania): The bush fire disaster of 7th February, 1967: report and summary of evidence. D.M. Chambers and C.G. Brettingham-Moore.
 - 1977 (Victoria): Report of the Board of Inquiry into the occurrence of bush and grass fires in Victoria. E. Barber.
 - 1984 (Victoria): Report of the Bushfire Review Committee on bushfire preparedness in Victoria, Australia, following the Ash Wednesday fires 16 February 1983. S.I. Miller et. al.
 - 1984 (national): 'Bushfires and the Australian environment', Report by the House of Representatives Standing Committee on Environment and Conservation. P. Milton, Chair.
 - 1994 (NSW): Report of the Select Committee on Bushfires, Parliament of New South Wales, Legislative Assembly.
 - 1996 (NSW): Recommendations from the New South Wales Inquiry into 1993/94 Fires, NSW State Coroner's Office. J.W. Hiatt.
 - 2001 (NSW): Recommendations from the Inquiry into the Fire at Mt Ku-Ring-Gai Chase National Park, NSW State Coroner's Office. J. Stevenson.
 - 2002 (Victoria): Report of the Investigation and Inquests into a Wildfire and the Deaths of Five Firefighters at Linton on 2 December 1998. State Coroner's Office, Victoria. G. Johnstone.
 - 2002 (NSW): Report on the Inquiry into the 2001/2002 Bushfires, Joint Select Committee on Bushfires, Parliament of New South Wales, Legislative Assembly. J. Price, Chair.

¹ Senate Select Committee on Agricultural and Related Industries, *Inquiry into the incidence and severity of bushfires across Australia*, 13 August 2010.

- 2003 (ACT): Inquiry into the Operational Response to the January 2003 Bushfires in the ACT. R.N. McLeod.
 - 2003 (Victoria): Report of the Inquiry into the 2002–2003 Victorian Bushfires. B. Esplin et al.
 - 2003 (national): 'A Nation Charred: Inquiry into the Recent Australian Bushfires', House of Representatives Select Committee on the Recent Australian Bushfires. G. Nairn, Chair.
 - 2004 (national): Council of Australian Governments National Inquiry into Bushfire Mitigation and Management. S. Ellis et al.
 - 2006 (ACT): Inquests and Inquiry into Four Deaths and Four Fires between 8 and 18 January 2003. M. Doogan, ACT Coroner.
 - 2008 (Victoria) 'Report on the Impact of Public Land Management Practices on Bushfires in Victoria', Victorian Parliamentary Environment and Natural Resources Committee. J. Pandazopoulos, Chair.
 - 2009 (Victoria): 2009 Victorian Bushfires Royal Commission Interim Report. B. Teague et al.
 - 2009 (Victoria): 2009 Victorian Bushfires Royal Commission Interim Report 2: Priorities for building in bushfire prone areas. B. Teague et al.
 - 2010 (Victoria): Victorian Bushfires Royal Commission Final Report. B. Teague et al.²
5. Since that time, multiple further inquiries have been undertaken. Earlier this year, two Australian Parliament Inquiries involving fire responses were underway - by the Senate Standing Committee on Rural and Regional Affairs and Transport,³ and House of Representatives' Standing Committee on the Environment and Energy.⁴
 6. The current RC now supersedes the House of Representatives Standing Committee inquiry, and appears to run concurrently with a New South Wales independent bushfire inquiry.⁵
 7. The AEPLG surmises that, given the plethora of recommendations that has arisen from such voluminous inquiries and commissions, not all will have been effectively implemented, despite significant time and cost invested to complete each inquiry.
 8. The AEPLG believes that undertaking further inquiries without addressing the underlying issue fuelling this growing crisis – climate change – is costly and likely ineffective.
 9. The AEPLG makes the following brief comments and observations following the elements of the Terms of Reference.

(a) *the responsibilities of, and coordination between, the Commonwealth and State, Territory and local Governments relating to preparedness for,*

² Ibid, Ch 2, [2.2].

³ Senate Standing Committee on Rural and Regional Affairs and Transport, [Inquiry into the Federal Government's response to the drought, and the adequacy and appropriateness of policies and measures to support farmers, regional communities and the Australian economy](#) (referred by the Senate for inquiry and report by 30 June 2020;

⁴ House of Representatives' Standing Committee on the Environment and Energy, *Inquiry into the efficacy of past and current vegetation and land management policy, practice and legislation and their effect on the intensity and frequency of bushfires and subsequent risk to property, life and the environment*. This inquiry was wound up on 26 February 2020 to make room for the RC.

⁵ New South Wales Parliament, 'independent expert inquiry into the 2019-20 bushfire season' ([online](#)).

response to, resilience to, and recovery from, natural disasters, and what should be done to improve these arrangements, including with respect to resource sharing;

10. The Australian Government has plans in place such as the Australian Government Disaster Response Plan (**COMDISPLAN**) and the Australian Government Overseas Disaster Assistance Plan (**AUSASSISTPLAN**) to manage national and international emergency and disaster situations. However, state and territory fire and emergency services organisations have shouldered the bulk of the responsibility for administering fire and emergency service management; initially communicating among themselves and, more recently, through the Australasian Fire and Emergency Service Authorities Council (**AFAC**) National Resource Sharing Centre.

(b) Australia's arrangements for improving resilience and adapting to changing climatic conditions, what actions should be taken to mitigate the impacts of natural disasters, and whether accountability for natural disaster risk management, preparedness, resilience and recovery should be enhanced, including through a nationally consistent accountability and reporting framework and national standards;

11. Given the increased intensity and likelihood of bushfires, how the nation designs and builds communities is critical to protecting life, homes and businesses. In Victoria, land-use planning regulations provide a logical and consistent basis to guide and influence built-form outcomes. The AEPLG believes that it is time to review bushfire planning controls and mechanisms by which communities in high risk bushfire areas are planned and developed long term.

12. The AEPLG notes the 2009 Victorian Royal Commission reports called for approved standards for personal bushfire shelters. The AEPLG considers this to be a practical proactive measure that could be integrated as a compulsory requirement for those living within high risk bushfire areas, particularly those with homes that do not conform to current bushfire standards. Local authorities could utilise such standards to develop community bushfire shelters in particularly high-risk areas. Work needs to be promptly undertaken to develop the standard, establish neighbourhood 'safe zones' and educate local communities to the same.

(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.

13. In January 2020, following the advice of the Minister for Police and Emergency Services, the Victorian Premier Daniel Andrews enacted his power under subsection 23(1) of the *Emergency Management Act 1986* (Vic) (**EMA**) to declare a state of disaster for most of eastern Victoria. It was the first time these powers, introduced following the Black Saturday bushfires in 2009, had been applied. Under the EMA, the Premier is empowered to take possession and make use of any person's property to respond to the disaster, control movement in and out of the disaster area and compel the evacuation of persons from the disaster area, or any part of it. A similar declaration was made in New South Wales.

14. The AEPLG is concerned as to the implications of a national emergency versus individual state declarations. Given the vastness of the Australian country, declaring any 'national emergency' may dilute the urgency of individual state or territory circumstances, given that, even in the latest bushfire event, much of the country was not bushfire affected.

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

15. Research undertaken in the wake of the Victorian Black Saturday bushfires revealed residents' serious lack of accountability for self-preservation. One-quarter of those affected by the Black Saturday fires intended to wait and see what the fires were like, or until they were directly threatened, before deciding to stay or go.⁶ Half of those who left considered themselves to have left 'late' or 'very late' and one-third of those who stayed to defend ultimately left during the fire. The study reported that half of those who intended to leave safely, endangered themselves by leaving late.⁷

16. This research suggests that many residents are either unaware as to the meaning of relevant government fire danger ratings or simply choose to ignore them, rendering this device inefficient. If citizens will not leave voluntarily in catastrophic conditions, this may call for consideration of mandatory evacuation measures, which are consistent with human rights principles of reasonableness, necessity and proportionality.

17. Recognising that such measures sit with State, Territory and local governments, and should be developed at that level in close consultation with the community and relevant experts, including from the legal profession, any such measures for more firmly assisting early evacuation should have regard to:

- the need for safeguards, and the provision of critical resources, advice and support to affected persons particularly in areas with elderly or infirm populations, or in poorer socio-economic areas where residents may lack the means to safely relocate themselves;
- whether there are alternative effective means of pursuing vigorous and persistent efforts to persuade reluctant citizens to leave; and
- measures adopted (and lessons learned) with respect to similar measures adopted internationally and domestically. For example, in the United States of America, many states have criminalised non-compliance with evacuation orders in a state of emergency in the wake of Hurricane Katrina.⁸ More recently, there will be lessons emerging with respect to the design and implementation of public orders made to restrict people's gatherings and movements with respect to COVID-19.⁹

(e) the findings and recommendations (including any assessment of the adequacy and extent of their implementation) of other reports and inquiries that you consider relevant, including any available State or Territory inquiries relating to the 2019-2020 bushfire season, to avoid duplication wherever possible.

⁶ Joshua Whittaker, 'Ten years after the Black Saturday fires, what have we learnt from post-fire research?', *Australian Journal of Emergency Management*, April 2019 edition.

⁷ *Ibid.*

⁸ Such measures were adopted in the wake of Hurricane Katrina, where 42 per cent of residents reported that they did not have the means to safely evacuate: Brandon Curtis, 'Criminalizing Non-Evacuation Behavior: Unintended Consequences and Undesirable Results' (2015) 2:8 *Brigham University Law Review* 503.

⁹ E.g. under the *Public Health Act 2010* (NSW).

18. The AEPLG again reiterates concern as to the volume and frequency of inquiries into this area, the recommendations of which cannot all have been adequately implemented.
19. Furthermore, AEPLG raises its ongoing concerns regarding the Australian Government's insufficient response to the global climate change crisis, which is scientifically acknowledged to be one of the primary sources of the increased severity of bushfires internationally.¹⁰
- (f) ways in which Australia could achieve greater national coordination and accountability — through common national standards, rulemaking, reporting and data-sharing — with respect to key preparedness and resilience responsibilities, including for the following:**
- (i) land management, including hazard reduction measures;**
- (ii) wildlife management and species conservation, including biodiversity, habitat protection and restoration.**
20. Bushfires are an intrinsic part of Australia's natural environment. Ecosystems have evolved with fire; fires have long shaped Australia's landscape and biological diversity. Many of Australia's native plants are fire prone and very combustible, while numerous species depend on fire to regenerate. Indigenous Australians have long used fire as a land management tool, and it continues to be used to clear land and protect properties from intense, uncontrolled fires.
- (iii) land-use planning, zoning and development approval (including building standards), urban safety, construction of public infrastructure, and the incorporation of natural disaster considerations.**
21. Strategic planning and building regulations play critical roles in mitigation and adaptation. However, with most loss of life and economic damage occurring around the fringes of cities where homes are commonly in close proximity to flammable vegetation, it is time to evaluate whether even the most expert planning and highest standards of building construction will ever produce safe communities in such high risk conditions.
22. The AEPLG considers that land-use planning regulations can facilitate urban design and provide a logical and consistent basis to guide and influence built-form outcomes. Householder action (or inaction) to bushfire risk can strongly influence property design and the risks associated with it. It is internationally acknowledged that incorporating bushfire risk management parameters into land-use planning reduces risk to communities while enabling growth in medium-risk areas. In designing a national approach to bushfire management, the Australian Government should ensure that any new standards and obligations can be easily integrated with State and Territory land use planning policies and frameworks.
23. Bushfire planning provisions need to apply not only to new development, but must address dwellings and structures fortunate enough to survive previous bushfire seasons with new inbuilt accountabilities mandatory that they be upgraded to improve their defences. Whilst the more widespread application of new bushfire planning and building controls gradually reduces bushfire risks over time as settlements grow, urgent ways must be found to improve older building stock in existing settlements that were

¹⁰ Climate Council, 'This is not normal: Climate Change and Escalating Bushfire Risk' Briefing paper, 12 November 2019.

constructed prior to new regulations, but which are often at high risk to themselves and others.

24. The AEPLG considers that reform of current building standards is urgently required. Not only must a fireproof façade be mandated, but the foundations of homes vulnerable to ember attack, which is unavoidable in extreme bushfire situations, must also be addressed and involve potential overhaul of core construction to eliminate combustible materials. Attention is also needed to net vegetation provisions in bushfire reconstruction.

(j) Other relevant matters:

25. In the view of the AEPLG:

- It is well known that the frequency and severity of bushfires have increased significantly due to increased summer temperatures.¹¹ For example, what was once a 'once-in-20-years' extreme heat day is now projected to occur every two or three years. As a result of higher temperatures and insufficient rain, areas not normally prone to fire are now burning, irreversibly altering their natural ecosystems.
- The scope of the RC significantly omits the important role Australia must play in reducing global emissions to minimise the extent of climate change and its potential impacts on the Australian community. The AEPLG considers that the inquiry must consider the impact of climate change on Australian natural disasters and what can be done to reduce the impact, including meeting Australia's obligations under international climate agreements.

¹¹ See <https://climate.nasa.gov/effects/>