'Left and right of arc': the legal position of the Australian Defence Force in domestic disaster response using the 2009 'Black Saturday' Victorian bushfires as a case study.

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Introduction

> Use of the military other than for external defence, is a critical and controversial issue in the political life of a country and the civil liberties of its citizens... Given that there must be a permanent Defence Force, it is critical that it be employed only for *proper purposes* and that it be subject to *proper control* (emphasis added).[1]

Although concerns, such as those raised by Justice Hope, have traditionally focused on using the Australian Defence Force (ADF) in situations where operations may impact on civil liberties,[2] ADF involvement in disaster response has received no similar attention. Although disaster response is not an activity associated with infringements on civil liberties, and emergency services are seen as having a 'protective' function, they do exercise this protective function for the greater good, not necessarily for that of the individual. Emergency services actually have great latitude as concerns individual rights; for example, fire brigades can lawfully damage, destroy, or enter property. Further, disaster response is not the sole realm of emergency services. In recent history, the ADF has operated in this 'space' regularly. When parts of the Australian community are devastated the ADF is there, supporting the community, alongside state-based emergency services.[3]

It is therefore perplexing that, compared to other activities,[4] ADF participation in disaster response lacks specific regulation beyond a sole Departmental policy that does not clearly regulate the activities that ADF personnel may undertake. In lieu, domestic civil and criminal laws of general application, which do not contemplate the use of the ADF in this way, fill the void. Consequently, the 'left and right of arc'[5] applicable to ADF disaster response activities is not well defined. This paper explores that 'left and right of arc' from a legal perspective using the Victorian 'Black Saturday' bushfires as a case study.

Commonwealth authority in domestic disaster response – where does the ADF fit?

The simplistic answer is that the ADF fits wherever the Commonwealth government decides. As an apolitical tool of the government, use of the ADF is not limited to the 'naval and military defence of the Commonwealth and of the several States'.[6] Provided Commonwealth authority exists to undertake a particular action then any available means may be used to implement that action, including the ADF.[7] Understanding the ADF's 'left and right of arc' thus requires an understanding of two factors: the

1. Justice Hope, 'Protective Security Review' (Parliamentary Paper No. 397, Parliamentary Library, Parliament of Australia, 1979), 142 (quoting Edmund Burke, *Works* (Rivingt on, 1815), volume V, 17).
2. And indeed, Justice Hope's comment referred primarily to the use of ADF resources for protecting Commonwealth interests or states from domestic violence, following the 'Siege of Bowral' in 1974.
3. ADF involvement in disaster response can be traced back at least as far as the Hobart fires (1967) and Cyclone Tracy (1974) and has been seen more recently in response to the Victorian 'Black Saturday' bushfires (2009), the Queensland floods and Cyclone Yasi (2011).
4. For example: war and war-like operations are governed by the laws of war, as translated into domestic laws; border protection activities are guided by customs, immigration and fisheries laws; and counter-terrorism or domestic violence operations are regulated by *Defence Act 1903* Pt IIIAAA.
5. The phrase 'left and right of arc' is used within the ADF to describe to the permissible area (or 'arc of fire') within which a soldier, sailor or airman may direct fire from his/her weapon. The phrase has idiomatically come to also refer more broadly to the direction that a commander gives to a subordinate in order to guide the manner in which the subordinate undertakes duties or tasks. Thus, the phrase idiomatically refers to the freedoms and limitations that apply to the conduct of a certain duty or task.
6. *Constitution* s 51(vi).
7. For example: for example Operation RESOLUTE, in which ADF assets support and enforce fisheries, customs and immigrations laws through the North-West maritime approaches; Operation OUTREACH, in which ADF assets supported the Northern Territory Emergency Response (also known as the 'NT intervention'); or the 'Army Aboriginal Community Assistance Program' in which the Army provided construction, health and training support to Indigenous communities across the country.

Commonwealth's authority to respond to disasters; and the Commonwealth's intent as to the use of the ADF in furtherance of its authority.

a) Commonwealth authority

The *Constitution* contains no head of legislative power that could support general Commonwealth disaster response legislation at least as concerns the states.[8] Although a 'mish-mash' of powers under s 51 could support Commonwealth legislative involvement in some disaster response areas,[9] they do not provide authority to legislate broadly for disaster response across all hazards. To do so the Commonwealth could rely on the 'external affairs' power,[10] a referral of power from one or more states under Constitution s 51 (xxxvi), or some aspect of disaster response being incidental to the government's executive authority (and therefore within *Constitution* s 51 (xxxix)). To date, no state has made any such referral and the Commonwealth has not sought to rely on the 'external affairs' power for this purpose.

The Commonwealth must therefore rely on a form of executive power – which has unclear limits. Although 'executive power' is not defined (or even described) in the *Constitution* and clear judicial definition has proved elusive, it is likely that the Commonwealth relies on prerogative power (a form of executive power representing the residue of the monarch's unique powers, privileges and immunities such as the power to enter treaties and declare war) for its involvement in disaster response.[11]

The common law has long recognised a prerogative power to 'protect the state in time of war or emergency, or to keep the peace', which can be exercised such that public safety may trump common law rights and interests, such as freedom of speech or movement.[12] Further, a body, established and conferred with functions, impliedly has an 'ancillary power' to protect itself in order to perform its functions.[13] The current disaster response framework (in which Commonwealth physical assistance is preceded by a request from the affected state or territory, and is only provided in circumstances where resources of the state or territory are unable to cope) appears to be broadly consistent with this prerogative power.[14] However, the limits of the prerogative (and therefore Commonwealth authority) in this area are unclear, particularly in light of *Pape*[15] in which the majority recognised the existence of:

a. executive power that allows the government to respond to crises like 'states of emergency' or 'natural disasters' (without further explanation);[16] and

b. a category of executive authority, implied from the existence of the Commonwealth and its character as a polity – that is, a sort of 'nationhood' power.[17]

Irrespective of whether the prerogative or the 'nationhood' power is the source of authority there is no legal controversy in the Commonwealth using the ADF to give effect to its executive authority.

b) The ADF's role

In the absence of specific legislative authority underpinning ADF involvement in disaster response[18] two policies guide the ADF's disaster response activities:

a. Defence White Paper 2009 – Defending Australia in the Asia Pacific Century: Force 2030; and

b. Defence Instruction (General) OPERATIONS 5-1 Defence Assistance to the Civil Community – policy and procedures (DI(G) OPS 5-1).

8. The situation is, of course, different for the Territories for which the Commonwealth has more extensive legislative powers under *Constitution* s 122.
9. For example: quarantine(s 51(ix)), astronomical and meteorological observations (s 51(viii)), lighthouses, lightships, beacons and buoys (s 51(vii)), and postal, telegraphic, telephonic and other like services(s 51(v)).
10. Noting that the 'external affairs' power allows the Parliament to legislate to give effect to treaties entered into by the executive regardless of whether the subject matter of the treaty is of an 'external' nature or would normally fall within the enumerated legislative heads of power. See: R v Burgess; Ex Parte Henry (1936) 55 CLR 608; *R v Sharkey* (1949) 79 CLR 121; *New South Wales v Commonwealth* (1976) 135 CLR 337; *Koowarta v Bjelke-Petersen* (1983-84) 153 CLR 168; *Commonwealth v Tasmania* (1984-85) 158 CLR 1; *Polyukhovic v Commonwealth* (1991) 172 CLR 501; *Horta v Commonwealth* (1994) 68 ALJR 620.
11. Anne Twomey, 'Pushing the boundaries of executive power – Pape, the prerogative and nationhood powers' 34 *Melbourne University Law Review* 313, 316. See also: *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 126 (French CJ) ('*Pape*').
12. Michael Eburn, *Emergency Law* (The Federation Press, 3rd Edition, 2010), 101; Twomey, above n 11, 325-6. See also Burmah Oil Co (*Burma Trading) Ltd v Lord Advocate* [1965] AC 75; and *R v Kidman* (1915) 20 CLR 425, 440 (Isaacs J)6.
13. Twomey, above n 11, 333.
14. Simply put, it is intrinsically within the Commonwealth's interest as a polity to ensure the continued stable functioning of each state or territory. Therefore, if a state or territory indicates that it lacks the resources to cope with a disaster (and thus implicitly indicates that there may be, if the disaster is not appropriately addressed, a risk to its continued stable functioning) the Commonwealth has a clear self-protection interest in assisting that state or territory.
15. (2009) 238 CLR 1.
16. Ibid, [232] (Gummow, Crennan and Bell JJ).
17. (2009) 238 CLR 1.
18. With the exception of Defence Act 1903 s 50D, which allows the Governor General to order ADF reservists to render compulsory service in certain circumstances including situations involving "civil aid, humanitarian assistance, medical or civil emergency or disaster relief" either domestically or abroad.

ADF Staff assisting in the bushfire recovery.

White Paper. The most recent White Paper (2009) characterises the ADF's role in disaster response as an element of national security. This is demonstrated by disaster response tasks falling within Defence's highest strategic priority (deter and defeat armed attacks on Australia):[19]

> The ADF will also need to be able to respond to an increasingly complex *domestic security environment*, in which the lines between traditional concepts of external and domestic security are increasingly blurred. In this context, the ADF has to be able to contribute to the deterrence and defeat of attacks by non-state actors... and to support civil authorities in relation to *domestic security and emergency response tasks* (emphasis added).[20]

This is further illustrated by the White Paper's commentary on national security:

> Of course, our national security involves many concerns other than those involving the use of armed force. The security of our community, our nation's economy and the integrity of our environment can all be threatened by illegal activities (such as people smuggling, illegal fishing and the drug trade), by pandemic disease outbreaks and by quarantine breaches. Natural disasters such as cyclones, earthquakes, floods and bushfires can also threaten the security and safety of the Australian people.
>
> The ADF and other agencies of Defence have significant capabilities that can be used to support domestic security, border protection, counter-terrorism, emergency response and disaster recovery. Defence support to these contingencies is available under either the 'Defence Assistance to the Civil Community' mechanism, or as 'Defence Force Aid to the Civilian Authority', as provided under Part IIIAAA of the *Defence Act, 1903*. Defence's vital role in supporting domestic security and emergency response efforts will continue, and Defence will continue to support these areas of Commonwealth responsibility.[21]

This is a significant shift in policy. The previous White Paper (2000) included disaster response tasks within the fourth (of four) strategic tasks: peacetime national tasks (including coastal surveillance, emergency management and other ad hoc support to wider community needs), not as a 'national security' priority.[22] However, just as the Commonwealth's executive authority in the disaster response field has unclear limits, so does 'national security' as a concept from which to guide ADF involvement in this area. It is thus even more perplexing that ADF disaster response activities are not more clearly regulated.

19. Australian Government Department of Defence, *Defending Australia in the Asia Pacific Century: Force 2030 (Defence White Paper 2009) (2009)* 13.
20. Ibid 54.
21. Ibid 24.
22. Australian Government Department of Defence, *Defence 2000: Our Future Defence Force (Defence White Paper 2000)* (2000) xi-xii.

DI(G) OPS 5-1. 'Defence Assistance to the Civil Community' (DACC) is the mechanism by which Defence translates the higher-level (White Paper) policy relating to disaster response into action. DI(G) OPS 5-1 establishes the DACC framework and reaffirms the government position that emergency response is the responsibility of the states and territories but adds that using Defence resources is a last resort.[23]

In practice, state and territory emergency managers have two ways of accessing ADF disaster response resources. A request can be made directly to a local Commander or through Emergency Management Australia. The latter method will likely result in the *Australian Government Disaster Plan* (COMDISPLAN) being activated and this makes the full range of Commonwealth physical assistance resources available – not just the ADF.

DI(G) OPS 5-1 does not provide authority for Commanders to make offers of assistance. Whether this is related to perceived limits on Commonwealth authority is unclear. It is also unclear whether the Commonwealth could direct ADF resources to respond in the absence of a request. Furthermore, DI(G) OPS 5-1 does not provide any clear guidance about specific tasks that ADF members may be permitted to undertake whilst engaged in DACC activities.

The ADF in the context of the Victorian bushfires

The ADF's involvement in the 'Black Saturday' (7 February 2009) bushfires in Victoria (known as Operation VIC FIRES ASSIST) started at 6.19am on 8 February 2009[24] with the establishment of a Joint Taskforce (JTF 662).[25] JTF 662 was staffed primarily by reservists belonging to Victoria's 4th Brigade[26] and had approximately 450 personnel operating in nine locations within 48 hours of its establishment.[27]

In totality, Operation VIC FIRES ASSIST involved approximately 800 personnel (at any one time) and included a wide range of tasks.[28]

The legal danger is that in the intensity of an emergency, with lives at risk, ADF members will not hesitate to do whatever they can to help.[29] This is risky because action undertaken in response to an emergency may interfere with people's rights, for example: entering, damaging or destroying property or closing roads.

Each state and territory has legislative arrangements establishing various emergency service agencies and empowering such agencies to lawfully take action that could otherwise constitute a tort or crime.[30] However, none specifically contemplates the possibility that ADF personnel will be used to augment emergency services. Therefore, ADF personnel have no more power or authority when assisting emergency services than any member of the public. But, unlike a private person, ADF personnel do not qualify for protection against civil liability under 'Good Samaritan' legislation because assistance rendered by ADF members (in that capacity) occurs in the course of paid duty.[31] Therefore an ADF member (or the Commonwealth as the 'employer'),[32] if subject to a civil suit arising from disaster response activities, may (in the absence of any other legislative protection) only be able to rely upon common law defences, such as 'necessity'. Further, some actions may give rise to criminal liability.

In South Australia, Queensland, the Northern Territory and the Australian Capital Territory powers exist in some circumstances for some emergency officials to direct a person to assist during an emergency.[33] People complying with these directions are exempted from liability in most circumstances.[34]

The *Country Fire Authority Act 1958* (Vic) (CFA Act), which provided the source of authority for Country

23. The phrase 'left and right of arc' is used within the ADF to describe to the permissible area (or 'arc of fire') within which a soldier, sailor or airman may direct fire from his/her weapon. The phrase has idiomatically come to also refer more broadly to the direction that a commander gives to a subordinate in order to guide the manner in which the subordinate undertakes duties or tasks. Thus, the phrase idiomatically refers to the freedoms and limitations that apply to the conduct of a certain duty or task.
24. Victoria, 2009 Victorian Bushfires Royal Commission, *Interim Report* (2009) Chapter 11, 284.
25. Defence Reserves Association, 'Joint Task Force 662 – Operation VIC FIRES ASSIST' *The Australian Reservist* (2009) 16, 16.
26. All reservists who were part of JTF 662 rendered service voluntarily, that is, they were not 'called out' compulsorily by the Governor General.
27. Defence Reserves Association, above n 26, 16.
28. For further details about the ADF's activities contributing to the emergency response to the Black Saturday fires see: Australian Government Department of Defence, *Defence Annual Report 2008-09* (Volume 1) (2009), 135-137.
29. For an illustrative example see the comments of Sapper Brooke Bishop in Defence Reserves Association, above, n 26, 17.
30. For discussion as to why such legislation is important, see: Eburn, above n 12, 100-102.
31. *Civil Law (Wrongs) Act 2002* (ACT) s 5; Civil Liability Act 2002 (NSW) part 2; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 8; *Law Reform Act 1995* (QLD) part 5; Civil Liability Act 1936 (SA) s 74; *Wrongs Act 1958* (Vic) s 31B; *Civil Liability Act 2002* (WA) part 1D.
32. The term 'employer' is used in the absence of a more suitable term, noting that ADF members serve 'at the pleasure of the Crown' and therefore the relationship between an ADF member and the Commonwealth is not one that can be described as employer/employee. See Defence (Personnel) Regulations 2002 reg 117.
33. *Emergency Act 2004* (ACT), ss 34, 150C, 160A; *Fire and Emergency Services Act 2005* (SA) ss 42, 97, 118; *Emergency Management Act 2004* (SA) s 25; *Disaster Management Act 2003* (Qld) ss 77, 107, 112; *Public Safety Preservation Act 1986* (Qld) s 8; *Disaster Act 1982* (NT) s 37.
34. *Emergency Act 2004* (ACT), s 198; *Fire and Emergency Services Act 2005* (SA) s 127; *Emergency Management Act 2004* (SA) s 32; *Disaster Management Act 2003* (Qld) s 144; *Public Safety Preservation Act 1986* (Qld) s 47; *Disaster Act 1982* (NT) s 42.

Fire Authority (CFA) members to fight many of the Black Saturday bushfires,[35] does not establish a similar power (nor does any other Victorian emergency legislation), however it does allow CFA members[36] to control and direct:

> [A]ny persons who *voluntarily place their services at his disposal* either individually or as members of any fire fighting organization (whether established by or for the purposes of a statutory authority or body corporate or not) *whilst they remain present at the scene of the fire* (emphasis added).[37]

Where a person complies 'with any direction given under this Act' he or she is not liable for any thing that is done, or omitted, in good faith compliance with the direction.[38]

So how, if at all, do these provisions apply to ADF personnel assisting Victoria's emergency services, specifically when that assistance could otherwise be characterised as a crime or tort? To illustrate the point, consider the following fictional scenario:

a. A section of ADF personnel belonging to a JTF assisting an emergency service response to a significant bushfire in regional Victoria have been tasked to construct a firebreak through a specific area several kilometres from the fire front.

b. Doing so would require the personnel to enter private property and would likely result in damage to that property.

c. The personnel nevertheless undertake the task, believing that this measure may help to control the fire and ultimately save lives.

d. The wind changes and as a consequence the firebreak is unnecessary.

The CFA Act clearly indicates that the holder of a statutory function under that Act cannot be held liable for exercising that function (and this is generally true of other similar emergency services legislation across the country).[39] However, it is unclear whether the same exemption from liability would extend to ADF personnel. It is even less clear what, if any, action an ADF member engaged in such a task could take to prevent a potentially stressed resident or community member from interfering with the task.

In respect of the CFA Act, the phrases *'voluntarily places their services at his disposal'* and *'whilst they remain present at the scene of the fire'* are critical although neither have been judicially considered.

In relation to the first phrase, it is relevant that ADF personnel always remain subject to the command and control of their military chain of command while participating in DACC tasks.[40] This, of course, differentiates ADF personnel from a private person, who is directed by an incident controller or brigade captain. The provision does not, on its face, contemplate giving direction to groups of organised individuals, such as units or sections of ADF personnel. Whether this means, however, that ADF personnel *cannot* 'voluntarily place their services' at the disposal of a CFA member is not clear. Further, if an ADF member(s) could do so, the effect, if any, that this would have on the authority of the chain of command is similarly unclear. In relation to the second phrase, there is no guidance as to how proximate a person must be to be considered "at the scene". Noting that some activities – such as constructing firebreaks, blocking roads, or evacuating people – may take place several kilometres from the fire front, there is doubt whether directions to undertake these types of activities would even fall within the authority of this provision.

A further issue concerns the capacity of fire victims to make insurance claims for damage caused by ADF personnel. Under the CFA Act, damage caused by an officer exercising functions under the Act in response to a fire is, for insurance purposes, considered to have been done by the fire.[41] This provision does not specifically extend to a person who volunteers to assist and who places themselves under the control and direction of a CFA member. In other states and territories, where there is a legislated 'requirement to assist', the law provides that the actions of a person assisting are deemed to be the actions of the emergency service. In the absence of a similar provision, policy holders in Victoria may have difficulty claiming on their policy on the basis that damage done by the ADF may not be deemed to be damage done by fire.

It is possible that a court interpreting this provision of the CFA Act, may conclude that directions passed down the chain from an Incident Controller to an ADF Commander and then to ADF personnel on the ground provide a strong enough nexus to infer that the ADF personnel in question are acting under the direction of the CFA. However, as tasks are given more general descriptions and as ADF personnel operate further away from the incident command centre, and possibly exercise more initiative, it is conceivable that such a link with the CFA may become more tenuous.

Unfortunately, the Victorian Bushfires Royal Commission provided little commentary on ADF involvement in Black Saturday and there is even less

35. *Country Fire Authority Act 1958* (Vic) s 30.

36. Provided a delegation of this authority has been made by the Chief Officer in accordance with *Country Fire Authority Act 1958* (Vic) s 28(1).

37. *Country Fire Authority Act 1958* (Vic) s 30(b)(ii).

38. *Country Fire Authority Act 1958* (Vic) s 95(1).

39. *Country Fire Authority Act 1958* (Vic) s 92.

40. Attorney-General's Department (Cth), *Australian Government Disaster Response Plan (COMDISPLAN)* (2008), 13: deployed assets remain the responsibility of the parent agency; DI(G) OPS 5-1 (2004) 23.

41. *Country Fire Authority Act 1958* (Vic) s 93.

May 6, 2009: Long Gully, VIC. Black Saturday 100 days on. Long Gully Gerald Egan (77) in front of the burnt out remains of his family property.

commentary from the ADF (beyond describing its contribution in general terms and the achievements that this enabled). Although there is no evidence that any legal issues or controversies arose, it remains the case that there are some unresolved questions about the use of ADF personnel in responding to fires. It is also conceivable that other situations may raise similar questions – for example, roadblocks or land and personal searches.

Conclusion

Given the possibility that the ADF lack authority to undertake some 'augmentation' type tasks during disaster response activities, questions arise about the extent to which the common law or prerogative could support these tasks and ensure that the Commonwealth and ADF personnel avoid liability. Similar questions arose following the 'Siege of Bowral' in 1974 when the ADF was deployed to protect visiting heads of government from 'domestic violence' and to undertake Commonwealth 'self protection' tasks. In the context of the use of the ADF to protect the Commonwealth and the states and territories from acts of domestic violence and terrorism, these issues have been resolved by legislation,[42] and a clear 'left and right of arc' now exists.

However, the constitutional framework underpinning Commonwealth involvement in disaster relief is far less robust and a comprehensive legislative solution has not been established. Consequently, the Commonwealth's authority to respond to emergencies (short of catastrophic disasters or crises that seriously threaten the continued functioning of one or more state or territory) is not clear. This is particularly so noting the High Court's decision in Pape[43] in conjunction with the Commonwealth's characterisation of disaster relief as an element of *'national security'*. It is yet to be seen what, if any, impact these developments will have in the disaster response field.

Returning to the comments of Justice Hope, there is little doubt that using the ADF to respond to emergencies is a proper purpose. What appears lacking is proper control – not in the sense that ADF personnel may unduly infringe upon civil liberties per se, but rather the actions of ADF personnel could give rise to civil or criminal liability. Disaster response tasks can be physically risky. If the 'left and right of arc' is insufficiently clear such tasks may also be legally risky for ADF personnel and the Commonwealth.

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Waiver

The views and arguments in this *paper* are my own, rendered in a private academic capacity. This *paper* has not been written on behalf of the Australian Defence Force, the Royal Australian Air Force, or any other related person or organisation, and should not be taken as expressing any form of official view. Official publications referred to in this *paper* carry an "unclassified" security classification.

42. *See Defence Act 1903* (Cth) Part IIIAAA

43. (2009) 238 CLR 1.