

THE DEFENCE ACT 1903 (CTH): A GUIDE FOR RESPONDING TO AUSTRALIA'S LARGE-SCALE DOMESTIC EMERGENCIES

ZOE LIPPIS*

Drawing upon the Australian 2019–20 bushfire season and the COVID-19 pandemic, this article examines case studies highlighting the legislative impact of the increased domestic deployment of the Australian Defence Force ('ADF'). Leveraging comparable provisions from an analogous statutory regime, namely pt IIIAAA of the Defence Act 1903 (Cth), it considers how existing legislative provisions can provide guidance for the development of a statutory framework to govern future deployment of the ADF in response to Australia's large-scale domestic emergencies.

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* BA, LLB (Hons), GDLP (UTAS), LLM (ANU), MStratSec (UNSW). Major, Australian Army Legal Corps ('AALC'). This article was prepared as part of the inaugural Paul Muggleton Scholarship, honouring Colonel Paul Muggleton and his significant contribution to the field of military law. The author expresses gratitude to the AALC for sponsoring the scholarship, along with Professor Bruce Oswald CSC and Professor Robert McLaughlin for their invaluable guidance.

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I INTRODUCTION

Encapsulating the tension between the civil–military divide,¹ the domestic utilisation of the Australian Defence Force (‘ADF’) has been a ‘critical and controversial issue’ since Federation.² With increased calls for the domestic deployment of the ADF, as a result of regional instability, terrorism, and natural disasters, debate has been reignited regarding the use of the military for

¹ Michael Head, ‘The Military Call-Out Legislation: Some Legal and Constitutional Questions’ (2001) 29(2) *Federal Law Review* 273 (‘The Military Call-Out Legislation’). The division of power between the military and domestic law enforcement agencies was enshrined in the *Constitution* upon Federation in 1901. With military power conferred upon the Commonwealth by virtue of ss 51(vi), 69 and 114 of the *Constitution*, power over domestic law and order was vested within the residual powers of the states: Head, ‘The Military Call-Out Legislation’ (n 1) 274. See also Margaret White, ‘The Executive and the Military’ (2005) 28(2) *University of New South Wales Law Journal* 438, 438.

² Justice Robert Hope, Parliament of Australia, *Protective Security Review* (Parliamentary Paper No 397, 15 May 1979) 142 [10.10]. As part of this review, Justice Hope noted that

[u]se 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.

purposes outside their traditional external defence role.³ The catastrophic bushfire season of summer 2019–20 reinstated the domestic utilisation of the ADF on the national political agenda.⁴ As the Morrison government unilaterally mobilised the military to provide support to civilian agencies,⁵ scrutiny of the military's internal role intensified. Furthermore, the arrival of the COVID-19 pandemic on Australian shores in January 2020⁶ prompted additional questions surrounding the ADF's domestic role. For the second time in 2020, ADF members were deployed across Australia, this time to assist civilian agencies as they battled an insurmountable global public health emergency.⁷

Drawing upon these case studies, this article will examine the impact of legislation upon the increased domestic deployment of the ADF. Leveraging upon comparable provisions from an analogous statutory regime, namely pt IIIAAA of the *Defence Act 1903* (Cth) ('*Defence Act*'),⁸ it will consider how existing legislative provisions provide guidance for the development of a statutory framework to govern future internal deployment of the ADF during large-scale domestic emergencies.

The article will commence by examining, in Part II, the ADF's recent role in response to domestic crises, most particularly the Australian 2019–20 bushfire season and the COVID-19 pandemic. It will proceed in Part III to consider the existing legal basis for the domestic deployment of the military for disaster relief activities, including the Defence Assistance to the Civil Community ('DACC') policy framework. Following an analysis of the benefits of a legislative regime to govern ADF domestic operations, the article will examine in Part IV how pt IIIAAA of the *Defence Act* can provide guidance for the creation of a comparable Commonwealth legal framework for the domestic deployment of the ADF during large-scale disaster relief activities. The final section of the

³ See generally Penny Saultry and Damian Copeland, 'Domestic Legal Framework for Operations' in Robin Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 2019) 161.

⁴ See Anthony Gray, 'The Australian Government's Use of the Military in an Emergency and the Constitution' (2021) 44(1) *University of New South Wales Law Journal* 357, 358.

⁵ Scott Morrison, Linda Reynolds and David Littleproud, 'Bushfire Relief and Recovery' (Media Release, 4 January 2020) <<https://www.pm.gov.au/media/bushfire-relief-and-recovery>>, archived at <<https://perma.cc/46D-RPGN>>.

⁶ Greg Hunt, 'First Confirmed Case of Novel Coronavirus in Australia' (Media Release, 25 January 2020) <<https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/first-confirmed-case-of-novel-coronavirus-in-australia>>.

⁷ Linda Reynolds, 'Expansion of ADF Support to COVID-19 Assist' (Media Release, 1 April 2020) <<https://www.minister.defence.gov.au/minister/lreynolds/media-releases/expansion-adf-support-covid-1-assist>>.

⁸ *Defence Act 1903* (Cth) pt IIIAAA ('*Defence Act*').

article, Part V, will recommend legislative provisions for inclusion within a new statutory regime, based upon an analysis of analogous provisions within pt IIIAAA. It will propose that while the DACC policy regime has served Australia well to date, the anticipated increase in requests for ADF domestic assistance warrants serious consideration as to whether a legislative framework is required to underpin such operations in the future. The article will conclude by proposing that existing provisions of the *Defence Act* provide significant guidance for the development of a Commonwealth statutory regime to govern future ADF assistance during large-scale domestic emergencies.

II THE ROLE OF THE ADF IN DOMESTIC DISASTER RELIEF

The role of the ADF in domestic disaster relief has remained largely uncontroversial to date, with the Commonwealth and the states and territories deriving mutual benefit from the provision of military aid during times of national emergencies.⁹ With the ADF demonstrating their ability to provide assistance during Australia's time of need, it is unsurprising that the ADF has become the Commonwealth government's go-to agency to assist states and territories in resolving domestic disasters.¹⁰ As will be explored below, it is anticipated that requests for ADF assistance in responding to domestic disasters will continue to increase in the coming decades, with the frequency, intensity and severity of national disasters expected to rise.¹¹ This predicted tempo change for domestic operations presents an opportune time to assess whether amendments should be made to strengthen the current DACC regime.

Currently, the legal basis for DACC operations is primarily derived from the Commonwealth's executive power and articulated in Commonwealth government internal policy.¹² In the absence of an overarching legislative framework, ADF members completing DACC activities must comply with both Commonwealth law and the jurisdictional laws of the individual states and territories where they are operating.¹³ The ensuing legal lacuna attracts a multitude of complexities.¹⁴ Furthermore, ADF members assisting emergency services during domestic disaster relief activities do not have powers beyond

⁹ Saultry and Copeland (n 3) 162, discussing *Constitution* s 61.

¹⁰ See Ian McPhee, Auditor-General (Cth), *Emergency Defence Assistance to the Civil Community* (Audit Report No 24 2013–14, 16 April 2014) 11–12 [3]–[4].

¹¹ *Ibid* 33 [1.13].

¹² See below Parts III(A)–(B).

¹³ Saultry and Copeland (n 3) 164.

¹⁴ *Ibid* 161.

those of a normal citizen¹⁵ and consequently lack the privileges and immunities of their state and territory emergency service counterparts.¹⁶ With this in mind, the time has come to consider how the current DACC policy framework can be improved in light of the anticipated increase in domestic utilisation of the ADF, including the development of an explicit legislative framework to underpin such operations. Several recent case studies demonstrate the rationale behind translating current DACC policy into a statutory regime.

A *The Australian 2019–20 Bushfire Season*

The Australian 2019–20 bushfire season menaced the nation with widespread damage and destruction, presenting a formidable and unrelenting challenge for the highly skilled and experienced state and territory emergency service agencies on the ground.¹⁷ Referred to colloquially as the Black Summer bushfires, the catastrophic event marked the arrival of a new era in Australia's security policy. Outside of more traditional domestic threats, the bushfires demonstrated that large-scale natural disasters, including droughts, floods, cyclones, bushfires, and other severe weather events, present a new challenge for the protection of Australia's national interests.¹⁸

While it has traditionally been the role of the states and territories to respond to emergencies within their jurisdictions, the devastating loss of life,

¹⁵ Replacement Explanatory Memorandum, Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020 (Cth) [2]–[3] ('Defence Bill Replacement Explanatory Memorandum 2020'). See also David Letts, 'Sending In the Military: First Let's Get Some Legal Issues Straightened Out', *The Canberra Times* (online, 8 January 2020) <<https://www.canberratimes.com.au/story/6570161/sending-in-the-military-first-lets-get-some-legal-issues-straightened-out>>, archived at <<https://perma.cc/Q5RJ-4YP4>> ('Sending In the Military'). As Commonwealth officials, ADF members are precluded from special appointment under state or territory laws and, therefore, in the absence of applicable Commonwealth law, may only exercise powers of an ordinary citizen.

¹⁶ *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 200–1 [7.73]–[7.79] ('*Royal Commission Report*').

¹⁷ *Royal Commission into National Natural Disaster Arrangements* (Interim Observations, 31 August 2020) 4–5 [7]–[9], 11 [54] ('*Royal Commission Interim Observations*').

¹⁸ Robert Glasser, *Preparing for the Era of Disasters* (Australian Strategic Policy Institute Special Report, March 2019) 4 <<https://www.aspi.org.au/report/preparing-era-disasters>>. Such challenges include: increased pressure upon Australia's emergency services agencies, diminished community resilience, increased loss of life, heightened economic costs: at 4; and reduced food, water and energy security: at 8, quoting Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (Report, 2018) 10 [B.5.6] <<https://www.ipcc.ch/sr15>>, archived at <<https://perma.cc/E6DG-9A7T>>.

property, and wildlife caused by the bushfires prompted a re-examination of the roles, responsibilities and powers of the Commonwealth on the one hand, and the states and territories on the other, in responding to large-scale disaster events.¹⁹ The intensity and severity of the Black Summer bushfires demonstrated the need for the states and territories to consider supplementary assistance from the Commonwealth, most particularly through the domestic deployment of the ADF.²⁰

1 *Operation Bushfire Assist 2019–20*

Representing the ‘largest mobilisation of the ADF for domestic disaster relief in Australia’s history’,²¹ Operation Bushfire Assist involved the deployment of more than 8,000 ADF personnel in support of emergency relief, response, and recovery activities arising from the Black Summer bushfires.²² Commencing on 31 December 2019,²³ the operation augmented existing local support activities and signified the most substantial, deliberate, and formalised internal deployment of the ADF since Federation.²⁴ Labelled by Prime Minister Morrison as a change in Commonwealth force posture from ‘respond to

¹⁹ See, eg, Anthony Bergin and David Templeman, ‘National Bushfires Emergency? Let’s Have a National Response’, *Australian Strategic Policy Institute* (Web Page, 6 January 2020) <<https://www.aspi.org.au/opinion/national-bushfires-emergency-lets-have-national-response>> (‘National Bushfires Emergency’).

²⁰ *Royal Commission Interim Observations* (n 17) 4–5 [7]–[9], 11 [54]. The 2019–20 Australian bushfire season resulted in the loss of 33 lives, the destruction of over 3,000 homes and buildings, and the incineration of between 24 and 40 million hectares: at 5 [7]–[8]. It also resulted in the emission of 434 million tonnes of carbon dioxide, a populational impact upon 11.3 million Australians affected by smoke, and the death of over one billion animals: Joel Werner and Suzannah Lyons, ‘The Size of Australia’s Bushfire Crisis Captured in Five Big Numbers’, *ABC News* (Web Page, 5 March 2020) <<https://www.abc.net.au/news/science/2020-0-05/bushfire-crisis-five-big-numbers/12007716>>, archived at <<https://perma.cc/C2DP-XYWK>>.

²¹ Scott Morrison and Linda Reynolds, ‘Operation Bushfire Assist Concludes’ (Media Release, 26 March 2020) <<https://www.pm.gov.au/media/operation-bushfire-assist-concludes>>, archived at <<https://perma.cc/7CTX-SUWB>>. This included 2,500 ADF Reservists and an additional 500 partner force personnel: Department of Defence, *Defence Annual Report 2019–20* (Report, 2020) 5 <https://www.defence.gov.au/annualreports/1–20/DAR_2019–20_Complete.pdf>, archived at <<https://perma.cc/HU4U-LM2N>>.

²² *Royal Commission Interim Observations* (n 17) 11 [54].

²³ Morrison and Reynolds, ‘Operation Bushfire Assist Concludes’ (n 21).

²⁴ See *ibid*; *Royal Commission Interim Observations* (n 17) 11 [54]; Scott Morrison, ‘Address to National Press Club’ (Speech, National Press Club, 29 January 2020) <<https://www.pm.gov.au/media/address-national-press-club>>, archived at <<https://perma.cc/8V3-PGD4>>. See generally *Royal Commission Report* (n 16) 189–90 [7.17]–[7.23].

request' to 'move forward and integrate',²⁵ the operation unified Navy, Army and Air Force resources, utilising 'boots on the ground ... planes in the sky ... [and] ships at sea'.²⁶ Drawn from multiple force elements,²⁷ ADF members were deployed throughout Australia to provide state- and territory-based emergency services with planning, engineering, medical, reconnaissance and logistic support.²⁸ Military assistance was also provided by several partner nations.²⁹

The ADF can provide domestic support to the states and territories through several different frameworks, including the DACC and Defence Force Aid to the Civil Authority ('DFACA').³⁰ As will be considered in greater detail below,³¹ the overarching framework for ADF assistance during Operation Bushfire

²⁵ Scott Morrison and Linda Reynolds, 'Transcript of Press Conference' (Speech, Australian Parliament House, 4 January 2020) ('Press Conference, 4 January 2020') <<https://www.pm.gov.au/media/press-conference-australian-parliament-house>>, archived at <<https://perma.cc/K52C-72KD>>.

²⁶ Ibid. Utilisation of dedicated ADF capabilities during Operation Bushfire Assist included specialist naval assets (such as HMAS Adelaide, HMAS Choules and MV Sycamore) and air support capabilities (including CH-47F Chinooks, MRH-90 Taipans, MH-60R Seahawks and EC-135 helicopters, P-8A Poseidon, C-17A Globemasters, C-130J Hercules and C-27J Spartans aircraft, and unmanned aerial systems): Department of Defence, 'Operation Bushfire Assist 2019–2020' (Press Release, 8 January 2020) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F7128653%22;src1=sm1>>, archived at <<https://perma.cc/2XNP-5P5M>> ('Press Release, 8 January 2020').

²⁷ Department of Defence, 'Operation Bushfire Assist 2019–2020' (Press Release, 13 March 2020) <<https://news.defence.gov.au/national/operation-bushfire-assist-201-2020>> ('Press Release, 13 March 2020'). Force elements deployed as part of Operation Bushfire Assist included: the 1st Brigade (Northern Territory and South Australia), the 3rd Brigade (Queensland), the 4th Brigade (Victoria), the 5th Brigade (New South Wales), the 6th Brigade (headquartered in New South Wales), the 7th Brigade (Queensland), the 9th Brigade (South Australia and Tasmania), and the 17th Brigade (headquartered in New South Wales): 'Assistance from the Australian Defence Force Factsheet', *National Bushfire Recovery Agency* (Web Page, 20 February 2020) <<https://www.bushfirerecovery.gov.au/news/defence-action/assistance-factsheet>>; Department of Defence, 'Press Release, 8 January 2020' (n 26).

²⁸ 'Operation Bushfire Assist', *National Bushfire Recovery Agency* (Web Page, 28 January 2020) <<https://www.bushfirerecovery.gov.au/news/operation-bushfire-assist>>. Under the command of Major General Justin Ellwood, three Joint Task Forces ('JTFs') were established in support of Operation Bushfire Assist, namely JTF 646 (servicing Victoria), JTF 1110 (servicing New South Wales and the Australian Capital Territory), and JTF 1111 (servicing South Australia and Tasmania).

²⁹ Partner nations who provided military support during Operation Bushfire Assist included: Canada, Fiji, Indonesia, Japan, New Zealand, Papua New Guinea, Singapore and the United States: Department of Defence, 'Press Release, 13 March 2020' (n 27); *Royal Commission Interim Observations* (n 17) 11 [54].

³⁰ Department of Defence, *Defence Assistance to the Civil Community Manual* (3rd ed, 17 August 2020) pt B 1-1 [1.1], 6-1 [6.2] ('DACC Manual').

³¹ See below Parts III(A)–(B).

Assist was the DACC policy framework. This framework provides mechanisms for the ADF to assist state and territory governments when their own resources are insufficient or overwhelmed.³² The DACC policy construct has worked successfully for several decades, enabling local military commanders to flexibly deploy their troops and assets during emergencies within their region. The utilisation of the DACC framework during Operation Bushfire Assist was unique for several reasons.

First, the Commonwealth had previously only provided ADF DACC assistance to the states and territories when responding to a request from a particular jurisdiction.³³ The Black Summer bushfires demonstrated a marked departure from this previous convention. The Commonwealth government informed affected states and territories of their intention to deploy the ADF but did not await a formal request for assistance before doing so.³⁴ As identified by Prime Minister Scott Morrison, the deployment of the ADF without a state or territory request placed the Commonwealth government into a constitutional grey zone, pushing legal limits to their very edge.³⁵ Secondly, the Black Summer bushfires constituted the first time in Australia's history that ADF reserve members had been compulsorily called out pursuant to s 28 of the

³² *DACC Manual* (n 30) pt B 1-1 [1.1]. The DACC policy framework is traditionally used to respond to requests for assistance during natural disasters or significant domestic events: Norman Charles Laing, 'Call-Out the Guards: Why Australia Should No Longer Fear the Deployment of Australian Troops on Home Soil' (2005) 28(2) *University of New South Wales Law Journal* 507, 517. Conversely, the DFACA legislative framework only applies in the event of domestic violence or threat thereof, such as a terrorist attack or hostage situation: *Defence Act* (n 8) ss 33–6. DACC is distinguished from DFACA on the basis that it does not include an express authority to use physical force against the civil community: *DACC Manual* (n 30) pt A 1-1 [1.1]. By contrast, DFACA may expressly authorise such action in limited circumstances: *Defence Act* (n 8) s 51N.

³³ See *Constitution* s 119.

³⁴ Morrison, 'Address to National Press Club' (n 24). From a practical perspective, this involved the ADF being deployed to integrate with state emergency services agencies based upon the initiative of the Commonwealth alone and without a specific request for assistance from the states and territories. This approach received some public criticism, most particularly from New South Wales Rural Fire Service Commissioner Shane Fitzsimmons, who advised that he was only made aware of the military deployment following media reports: Joshua McDonald, 'Australian Bushfires: A Government in Disarray' (online, 13 January 2020) *The Diplomat* <<https://thediplomat.com/2020/01/australian-bushfires-a-government-in-disarray>>, archived at <<https://perma.cc/Y6D-HMCJ>>.

³⁵ Interview with Scott Morrison, Prime Minister (David Speers, ABC Insiders, 12 January 2020) <<https://www.pm.gov.au/media/interview-david-speers-insiders>>, archived at <<https://perma.cc/R6RW-2XZQ>> ('Interview with Scott Morrison (Insiders)').

Defence Act.³⁶ The first utilisation of s 28 occurred in November 2019, as part of preliminary planning activities for the bushfire season.³⁷ Under the authority of the Governor-General, acting on the advice of the Minister for Defence, the call-out order required Army Reserve members from Forces Command to render continuous full-time service, along with their full-time counterparts, to provide civil aid, humanitarian assistance and emergency disaster relief to bushfire-ravaged communities.³⁸

Given the significant and wide-ranging effects of the Black Summer bushfires, combined with the unique aspects of the supporting DACC arrangements, the lessons learnt from the natural disaster presented an opportunity for the Commonwealth to consider how the ADF, as a federal agency, could most effectively assist the states and territories in responding to national emergencies in the future. This matter was explored as part of the Royal Commission arising from the 2019–20 bushfire season.

2 *Royal Commission into National Natural Disaster Arrangements*

Prime Minister Morrison announced the Royal Commission into National Natural Disaster Arrangements ('Royal Commission') on 20 February 2020.³⁹ Recognising that 'the Black Summer bushfires presented new challenges for all levels of government', the priority of the Royal Commission was to determine how the Commonwealth government could assist states and territories in protecting against, and responding to, future national emergencies.⁴⁰ As part of

³⁶ Morrison and Reynolds, 'Press Conference, 4 January 2020' (n 25) (Linda Reynolds); Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 15 of 2020–21, 6 October 2020) 6. The *Defence Act* (n 8) provides that the Governor-General may call out 'some or all of the Reserves for service', both within and outside Australia, for circumstances including war, peacekeeping, national security, civil aid, humanitarian assistance and disaster relief: at ss 28(1), (3).

³⁷ David Hurley, Governor-General, *Order to Call Out the Australian Defence Force Reserves* (28 November 2019); Morrison and Reynolds, 'Press Conference, 4 January 2020' (n 25) (Linda Reynolds).

³⁸ David Hurley, Governor-General, *Order to Call Out the Australian Defence Force Reserves* (4 January 2020). The compulsory call-out order was revoked by the Governor-General with effect from 7 February 2020: Governor-General, *Revocation of Order to Call Out the Australian Defence Force Reserves* (26 January 2020).

³⁹ Scott Morrison, 'National Royal Commission into Black Summer Bushfires Established' (Media Release, 20 February 2020) <<https://www.pm.gov.au/media/national-royal-commission-black-summer-bushfires-established>>, archived at <<https://perma.cc/ND3-TS2E>>. See generally *Royal Commissions Act 1902* (Cth) s 1A.

⁴⁰ Morrison, 'National Royal Commission into Black Summer Bushfires Established' (n 39). Holistically, the Royal Commission was designed to consider several major issues in Commonwealth natural disaster management, including: the implementation of

the examination of Commonwealth emergency management powers, the Royal Commission was asked to consider

whether changes are needed to Australia's legal framework for the involvement of the Commonwealth in responding to national emergencies, including ... whether ... 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 ...⁴¹

Despite the Royal Commission identifying several issues surrounding the ADF's domestic deployment, most particularly the legal protections for ADF members,⁴² it was ultimately determined that the DACC process did not require a specified legislative framework, with preference for the flexibility afforded by existing arrangements.⁴³ However, before such matters could be further explored, the next crisis arrived on Australian soil. The cessation of Operation Bushfire Assist on 26 March 2020⁴⁴ brought new challenges for the Commonwealth government. Military forces were quickly reconfigured to again assist the states and territories, this time in combating a deadly public health emergency.⁴⁵

B The COVID-19 Pandemic

In March 2020, the ADF quickly regrouped to support Australia's response to an international emergency of unprecedented proportions, namely the

improvements to natural disaster management coordination and preparedness; improvements to Australia's resilience and response to natural disasters across all levels of government (local, state and national); and the specific legal framework that enables the Commonwealth to declare and respond to a national emergency, including the role of the ADF.

⁴¹ Letters Patent for the Royal Commission into National Natural Disaster Arrangements (20 February 2020) ('Letters Patent for the Royal Commission').

⁴² *Royal Commission Report* (n 16) 186 [7.5], 200–1 [7.73]–[7.79].

⁴³ *Ibid* 199–200 [7.65]–[7.68]. Issues identified by the Royal Commission regarding the internal deployment of the ADF included: understanding of ADF capacity and capabilities; the threshold for seeking ADF assistance; the procedure for requesting assistance; functions the ADF could perform; limits upon ADF authorities; and privileges and immunities for ADF members: *Royal Commission Interim Observations* (n 17) 11–12 [56]–[59].

⁴⁴ Morrison and Reynolds, 'Operation Bushfire Assist Concludes' (n 21).

⁴⁵ Scott Morrison, 'Transcript of Press Conference' (Speech, Australian Parliament House, 27 March 2020) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F7268032%22>>, archived at <<https://perma.cc/2FNE-3HEG>>.

COVID-19 pandemic.⁴⁶ Unlike previous public health emergencies, such as Severe Acute Respiratory Syndrome ('SARS') in 2003, Middle East Respiratory Syndrome Coronavirus ('MERS') in 2012, or Ebola Virus Disease ('EVD') in 2014–16,⁴⁷ Australia was severely impacted by the COVID-19 outbreak (occurring in the immediate aftermath of the deadly bushfire season).

COVID-19 is a highly infectious respiratory illness resulting from a new strain of the coronavirus.⁴⁸ Announced as a pandemic by the World Health Organization ('WHO') on 11 March 2020,⁴⁹ symptoms of the virus include fever, coughing, sore throat, fatigue, shortness of breath, and mild to severe respiratory infection.⁵⁰ The virus is known to most seriously impact people who are elderly, immunosuppressed, or suffering from an underlying medical condition.⁵¹ As infection rates soared, countries across the globe turned

⁴⁶ Linda Reynolds, 'Defence Provides Additional Assistance in Response to COVID-19' (Media Release, 23 March 2020) <<https://www.minister.defence.gov.au/minister/lreynolds/media-releases/defence-provides-additional-assistance-response-covid-19>>. See generally Carl Bildt, 'New Systems Needed to Stop the Spread of the Next Pandemic', *The Strategist* (Web Page, 26 March 2020) <<https://www.aspistrategist.org.au/new-systems-needed-to-stop-the-spread-of-the-next-pandemic>>, archived at <<https://perma.cc/R79Z-ZB3T>>; Rod Lyon, 'Geopolitics in the Time of Corona', *The Strategist* (Web Page, 1 April 2020) <<https://www.aspistrategist.org.au/geopolitics-in-the-time-of-corona>>, archived at <<https://perma.cc/TDS-YQSB>>.

⁴⁷ Bildt (n 46). SARS, MERS and EVD are examples of global health emergencies over the past two decades that have required a multilateral response to resolve. MERS and SARS are both alternative strains of coronavirus: Nicola Petrosillo et al, 'COVID-19, SARS and MERS: Are They Closely Related?' (2020) 26(6) *Clinical Microbiology and Infection* 729, 729–30.

⁴⁸ 'Coronavirus Disease (COVID-19)', *World Health Organization* (Web Page) <<https://www.who.int/health-topics/coronavirus>>, archived at <<https://perma.cc/B5PA-3NYL>>. The COVID-19 strain of the coronavirus was first reported in Wuhan, China in December 2019: Erin Handley, 'From Wuhan to Australia: A Timeline of Key Events in the Spread of the Deadly Coronavirus', *ABC News* (Web Page, 6 April 2020) <<https://www.abc.net.au/news/2020-04-06/coronavirus-timeline-from-wuhan-china-to-global-crisis/11903298?nw=0&r=HtmlFragment>>, archived at <<https://perma.cc/9S2B-Q744>>.

⁴⁹ Tedros Adhanom Ghebreyesus, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19' (Speech, World Health Organization, 11 March 2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>>, archived at <<https://perma.cc/868L-QNM3>>. Pandemic is defined as '(of a disease) prevalent throughout an entire country or continent, or the whole world': *Macquarie Dictionary* (online at 25 August 2021) 'pandemic' (def 1).

⁵⁰ 'COVID-19 Disease, Symptoms and Variants', *Department of Health (Cth)* (Web Page, 23 December 2021) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19>>.

⁵¹ *Ibid.*

to their respective militaries to provide additional support.⁵² Australia was no exception.

1 *Operation COVID-19 Assist*

As Prime Minister Morrison declared war against the pandemic,⁵³ the ADF were again mobilised as part of Australia's response to a domestic crisis.⁵⁴ Leveraging the successful delivery of support for Operation Bushfire Assist, the military was engaged to provide DACC assistance, this time at the request of the states and territories.⁵⁵ On 9 March 2020, a COVID-19 taskforce was established to coordinate the ADF's internal response to the pandemic, including the provision of support through Emergency Management Australia ('EMA').⁵⁶ As the full extent of the pandemic continued to unfold, the number

⁵² Countries such as France, Israel, Italy, Spain, Switzerland, the United Kingdom and the United States deployed their armed forces to assist national health services in response to the pandemic: Tania Laïci, 'The Role of Armed Forces in the Fight against Coronavirus' (Research Paper PE 649.401, European Parliamentary Research Service, European Parliament, April 2020) 3–8 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649401/EPRS_BRI\(2020\)649401_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649401/EPRS_BRI(2020)649401_EN.pdf)>, archived at <<https://perma.cc/VF9S-LLX9>>.

⁵³ Interview with Scott Morrison (Tara Brown, 60 Minutes, 22 March 2020) <<https://www.pm.gov.au/media/interview-tara-brown-6-minutes>>, archived at <<https://perma.cc/739V-MJT4>>. Prime Minister Morrison stated that 'we are in a war against this virus and all Australians are enlisted to do the right thing'.

⁵⁴ Alexey D Muraviev, 'In the War against Coronavirus, We Need the Military to Play a Much Bigger Role', *The Conversation* (Web Page, 24 March 2020) <<https://theconversation.com/in-the-war-against-coronavirus-we-need-the-military-to-play-a-much-bigger-role-134149>>, archived at <<https://perma.cc/R68-BNGU>>.

⁵⁵ See, eg, Linda Reynolds, 'ADF Support to Victoria' (Media Release, 11 August 2020) <<https://www.minister.defence.gov.au/minister/lreynolds/statements/adf-support-victoria>>. The states traditionally have constitutional responsibility for public health emergencies: Hoong Phun (HP) Lee et al, *Emergency Powers in Australia* (Cambridge University Press, 2nd ed, 2019) 202, quoting Christopher Reynolds, 'Public Health and the Australian Constitution' (1995) 19(3) *Australian Journal of Public Health* 243, 243.

⁵⁶ 'COVID-19 Australian Government Roles and Responsibilities: An Overview' (Research Paper Series 2019–20, Parliamentary Library, Parliament of Australia, 19 May 2020) 9–10 <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/COVID19AustralianGovernmentRoles>, archived at <<https://perma.cc/6E4-STW5>>. For example, on 17 March 2020, the Minister for Defence announced that approximately a dozen ADF personnel would be deployed under DACC arrangements following a request from the Victorian government for assistance in the production, maintenance and warehousing of personal protective equipment ('PPE') for healthcare workers treating infected patients: see Linda Reynolds and Karen Andrews, 'Increasing Domestic Manufacturing during COVID-19' (Joint Media Release, 17 March 2020) <<https://www.minister.defence.gov.au/minister/lreynolds/media-releases/increasing-domestic-manufacturing-during-covid-19>>.

of ADF members deployed in response to the crisis increased significantly.⁵⁷ On 1 April 2020, Defence Minister Linda Reynolds announced that the ADF would be expanding its domestic support arrangements through the establishment of Operation COVID-19 Assist.⁵⁸ Comprising seven state- and territory-based task groups, the role of the operation was to coordinate and deliver customised ADF support to civilian health and law enforcement agencies.⁵⁹

At its peak, several thousand ADF personnel were deployed in support of Operation COVID-19 Assist.⁶⁰ The role of each task group varied depending upon individual jurisdictional requirements. Tasks performed by the military included: planning; contact tracing; health, logistic and personnel support; repatriation; cybersecurity; and assistance to law enforcement agencies as part of quarantine and isolation compliance activities for international arrivals, border control, and protection of vulnerable communities.⁶¹

⁵⁷ Muraviev (n 54).

⁵⁸ Reynolds, 'Expansion of ADF Support to COVID-19 Assist' (n 7).

⁵⁹ Ibid. The Chief of the Defence Force ('CDF'), General Angus Campbell, declared that there was no higher priority for the ADF, with the military 'ready, willing and able to assist where required'.

⁶⁰ See RMIT ABC Fact Check, 'How Is the Australian Defence Force Assisting States during COVID-19?', *ABC News* (Web Page, 12 August 2020) <<https://www.abc.net.au/news/2020-08-12/fact-check-defence-force-coronavirus-fact-file-hotel-quarantine/12522492?nw=0&r=HtmlFragment>>, archived at <<https://perma.cc/MG4K-BYQ5>>.

⁶¹ 'Daily Update: Defence Response to COVID-19', *Defence News* (Web Page, 21 April 2020) <<https://news.defence.gov.au/national/daily-update-defence-response-covid-19>> ('Defence Response to COVID-19'); Reynolds, 'Defence Provides Additional Assistance in Response to COVID-19' (n 46); Linda Reynolds, 'Supporting Cyber Health during COVID-19' (Media Release, 21 April 2020) <<https://www.minister.defence.gov.au/minister/lreynolds/media-releases/supporting-cyber-health-during-covid-19>>. Response planning provided by the ADF included support to EMA as part of the National Communicable Disease Incidence of National Significance Plan and the embedment of ADF and Defence public service personnel within Commonwealth agencies, including Services Australia and the Department of Home Affairs: 'Defence Response to COVID-19' (n 61). Logistical support included the supply of clinical, epidemiological and specialist support to the Department of Health (Cth), engineering support for the commercial production of surgical face masks and PPE, and the provision of movement support to the Department of Foreign Affairs and Trade ('DFAT') and Australian Border Force ('ABF'): 'Defence Response to COVID-19' (n 61); Reynolds, 'Defence Provides Additional Assistance in Response to COVID-19' (n 46). Repatriation support included assistance in coordinating the return of Australian nationals from overseas to Christmas Island, Howard Springs and Australian capital cities: see 'Defence Response to COVID-19' (n 61); Reynolds, 'Defence Provides Additional Assistance in Response to COVID-19' (n 46). Cybersecurity operations included support from the Australian Signals Directorate ('ASD'), through the Australian Cyber Security Centre ('ACSC'), to protect agencies (including the Department of Health (Cth)) from malicious cyber activities: Reynolds, 'Supporting Cyber Health during COVID-19' (n 61).

It was stressed by the Minister for Defence, during all stages of the operation, that the DACC policy framework did not permit ADF members to use coercive powers at any time.⁶² Similarly to Operation Bushfire Assist, the role of the ADF was to support civilian agencies — rather than perform their role for them⁶³ — noting that deployed ADF members did not have powers beyond those of a normal citizen. This repeated disclaimer amplified concerns raised by the terms of reference for the Royal Commission. These concerns centred upon the absence of an express Commonwealth legal framework for the domestic deployment of ADF members in response to national emergencies.⁶⁴ Inquiries into the management of the pandemic also touched upon these issues.

2 *Select Committee on COVID-19*

An inquiry into the Australian government's response to the COVID-19 pandemic was initiated on 8 April 2020.⁶⁵ The inquiry was conducted through the establishment of the Select Committee on COVID-19 ('Select Committee').⁶⁶ As part of matters related to the Government's response to the pandemic, the Select Committee was instructed to examine the role of the ADF in domestic disaster relief.⁶⁷ The increased frequency and intensity of large-scale domestic emergencies, as evidenced by the catastrophic impacts of both the Black Summer bushfires and the COVID-19 pandemic, had resulted in

⁶² Linda Reynolds, 'Defence Support to Mandatory Quarantine Measures Commences' (Media Release, 29 March 2020) <<https://www.minister.defence.gov.au/minister/lreynolds/media-releases/defence-support-mandatory-quarantine-measures-commences>>. These powers remained with state and territory law enforcement agencies: 'A Message from Lieutenant General John Frewen', *Defence News* (Web Page, 31 March 2020) <<https://news.defence.gov.au/national/message-lieutenant-general-john-frewen>>.

⁶³ 'A Message from Lieutenant General John Frewen' (n 62).

⁶⁴ Letters Patent for the Royal Commission (n 41) 2.

⁶⁵ Commonwealth, *Parliamentary Debates*, Senate, 8 April 2020, 1903 (Katy Gallagher).

⁶⁶ Senator Katy Gallagher was appointed as Chair of the Select Committee on COVID-19, with the final report required on or before 30 June 2022: Parliament of Australia, *Journals of the Senate* (Senate Journal No 48, 8 April 2020) 1580, 1584 <https://parlinfo.aph.gov.au/parlInfo/download/chamber/journals/1e0f2e7c-6a9-426e-81ee-20d05ca814ae/toc_pdf/sen-jn.pdf;fileType=application/pdf>, archived at <<https://perma.cc/NZR-T5J7>>; 'Committee Membership', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/Committee_Membership>, archived at <<https://perma.cc/SZ8-PZBZ>>.

⁶⁷ See Select Committee on COVID-19, Parliament of Australia, 'Terms of Reference' (Web Page, 8 April 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Terms_of_Reference>, archived at <<https://perma.cc/SVC-BKGZ>>; Select Committee on COVID-19, Parliament of Australia, *Select Committee on COVID-19 First Interim Report* (Report, December 2020) 3 [1.9].

heightened calls for the Commonwealth to rethink its response to national disasters. The *2020 Defence Strategic Update* also specifically noted the need to enhance the ADF's 'capacity to support civil authorities in response to natural disasters and crises,'⁶⁸ including pandemics, bushfires, floods, and cyclones.⁶⁹ A key consideration of the Commonwealth's ongoing strategic rethink, including the Select Committee's work into COVID-19, is whether the existing arrangements for the internal deployment of the ADF are adequate. Exploration of this question requires closer examination of the current DACC policy framework.

III DEFENCE ASSISTANCE TO THE CIVIL COMMUNITY FRAMEWORK

Enshrined within the constitutional division of powers, the states are vested with residual powers for disaster response and recovery within their jurisdictions,⁷⁰ including the protection of life, property and the environment.⁷¹ Conversely, during emergencies within Australia, the Commonwealth is vested with national leadership powers, including nationwide response coordination and the provision of resources and financial assistance.⁷² As a matter of constitutional convention, Commonwealth assistance is often provided through the domestic deployment of the ADF following a request for assistance from a state or territory government.⁷³ While the ADF performs this domestic role without specific personnel, capability or budgetary allocation, the policy framework for DACC assistance is well established and has been

⁶⁸ Department of Defence, *2020 Defence Strategic Update* (Report, 1 July 2020) 25 [2.13].

⁶⁹ *Ibid* 34 [3.3].

⁷⁰ In *R v Sharkey* (1949) 79 CLR 121, Dixon J noted: '[t]he maintenance of order in a State is primarily the concern of the State, for which the police powers of the State are ordinarily adequate': at 151, quoting John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 964 § 467. The Commonwealth is vested with constitutional legislative powers for internal and offshore Australian territories, however: *R v Sharkey* (n 70) 152–3 (Dixon J). See generally White (n 1) 439–40; Lee et al (n 55) 227–30.

⁷¹ McPhee (n 10) 11 [2].

⁷² Michael Eburn, *Emergency Law* (Federation Press, 4th ed, 2013) 223. Financial assistance is provided through the Natural Disaster Relief and Recovery Financial Arrangements.

⁷³ McPhee (n 10) 11 [3]. Requests by states and territories for Commonwealth assistance during natural disaster relief and recovery operations usually relate to non-financial assistance, including planning, surveillance, mapping, resources and the provision of additional personnel: Emergency Management Australia, Department of Home Affairs, *COMDISPLAN 2020: Australian Government Disaster Response Plan* (December 2020) 4 [1.2.1] ('COMDISPLAN').

successfully employed for a number of years. The legal basis for the Commonwealth's utilisation of the ADF for DACC activities warrants further consideration below.

A Legal Basis for DACC

The *Constitution* does not contain a dedicated head of power that enables the Commonwealth government to unilaterally declare a state of emergency or invoke disaster response powers.⁷⁴ Instead, domestic disaster relief and recovery are deemed to fall within the residual constitutional powers of the states as they relate to the maintenance of internal law and order, including authority over police and emergency services.⁷⁵ This has resulted in the Commonwealth relying upon several different grounds for emergency response authority, including the DACC policy framework.

First, the executive power, as contained in s 61 of the *Constitution*, has been relied upon as the legal basis for Commonwealth DACC powers.⁷⁶ Whilst the scope of the power has escaped exhaustive definition,⁷⁷ s 61 broadly permits the Governor-General, as the representative of the Crown, to exercise powers to execute and maintain the *Constitution* and the laws of the Commonwealth.⁷⁸ The executive power in s 61 can also be read in conjunction with s 68 of the

⁷⁴ Eburn, *Emergency Law* (n 72) 223; Michael Head, *Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt* (Routledge, 2016) 202 ('*Emergency Powers in Theory and Practice*'); Gray (n 4) 359, citing Justice François Kunc, 'Current Issues' (2020) 94(3) *Australian Law Journal* 167, 168. It has been noted that the executive cannot rely upon a "constitutionalised" framework for emergency powers: Lee et al (n 55) 7. Justice Heydon of the High Court of Australia has warned of the dangers of the executive arm of the Commonwealth being allowed unconstrained power to declare a state of emergency: *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 193 [551] ('*Pape*').

⁷⁵ Michael Eburn, Cameron Moore and Andrew Gissing, *The Potential Role of the Commonwealth in Responding to Catastrophic Disasters* (Report No 530, 6 May 2019) 5 <<https://www.bnhcrc.com.au/publications/biblio/bnh-6395>>, archived at <<https://perma.cc/7TGC-GL44>>; White (n 1) 439.

⁷⁶ White (n 1) 440. In the first decades of the 21st century, the Commonwealth government relied upon the executive power to domestically deploy the ADF, including in response to domestic attacks and the prevention of offshore arrivals: Head, *Emergency Powers in Theory and Practice* (n 74) 201.

⁷⁷ *Davis v Commonwealth* (1988) 166 CLR 79, 92 (Mason CJ, Deane and Gaudron JJ), 107 (Brennan J) ('*Davis*'); *Victoria v Commonwealth* (1975) 134 CLR 338, 396–8 (Mason J) ('*AAP Case*').

⁷⁸ Section 61 of the *Constitution* states:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

See also *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J) ('*Barton*').

Constitution. Section 68 vests command of naval and military forces in the Governor-General as the Crown's representative.⁷⁹ The conjunctive reading of these two provisions has been interpreted as enabling the Commonwealth to also legislate in relation to the internal deployment of the military.⁸⁰ Additionally, the executive power is also viewed as encapsulating the Crown's common law prerogative powers.⁸¹ The command power is said to be drawn from the prerogative powers, including the war and public emergency prerogatives.⁸² The extent of these prerogative powers remains controversial.⁸³ They are also linked to, but distinctly different from, the separate Crown prerogative concerning government, command and disposition of the forces relating to maintenance of civil control over the military.⁸⁴

Secondly, the broader legislative powers of the Commonwealth Parliament, as contained within s 51 of the *Constitution*, have been suggested as an additional legal basis for the Commonwealth's DACC operations.⁸⁵ Such

⁷⁹ Section 68 of the *Constitution* states: "The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative."

⁸⁰ HP Lee, *Emergency Powers* (Law Book, 1984) 206. Lee proposes that the combined reading of ss 61 and 68 of the *Constitution* provides the power to permit the provision of unilateral aid from the military, without a request from a state or territory.

⁸¹ *Barton* (n 78) 498 (Mason J). See also Lee (n 80) 322. Prerogative powers are the powers granted to the Crown by virtue of the common law: see, eg, *Barton* (n 78) 498 (Mason J). Whilst the specific limits of the prerogative powers remain unclear, Gummow, Crennan and Bell JJ in *Pape* (n 74) identified that the executive power permits the Commonwealth to respond during states of emergency and natural disasters: at 89 [233]. See also *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 538–9 [42] (French CJ); *Pape* (n 74) 56–64 [114]–[134] (French CJ); *R v Kidman* (1915) 20 CLR 425, 440 (Isaacs J); *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 136 (Lord Hodson), quoting *Crown of Leon (Owners) v Lords Commissioners of the Admiralty* [1921] 1 KB 595, 604 (Earl of Reading CJ); *Chandler v DPP* [1964] AC 763, 800 (Lord Hodson).

⁸² Rob McLaughlin, "The Impact of the "Civilianisation" of Military Administrative Law on the "Command Power" in Alison Duxbury and Matthew Groves (eds), *Military Justice in the Modern Age* (Cambridge University Press, 2016) 130, 135. While the war prerogative is centred upon defence against external threats, the internal security prerogative is focused upon the more controversial powers associated with the suppression of riots and civil unrest: at 136. In contrast, the governance, command and disposition of the forces prerogative is centred upon powers to protect the realm from the operation of undisciplined military forces within internal borders.

⁸³ *Ibid* 135.

⁸⁴ *Ibid*.

⁸⁵ Janine Fetchik, "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' (2012) 27(2) *Australian Journal of Emergency Management* 31, 32. See Raspal Khosa, *Australian Defence Almanac: 2010–2011* (Australian Strategic Policy Institute Report, June 2010) 3 <https://ad-aspi.s3.ap-southeast-2.amazonaws.com/import/4_12_35_PM_Aust_

powers include the external affairs power,⁸⁶ the defence power,⁸⁷ the inherent nationhood power,⁸⁸ the incidental power,⁸⁹ and the referral of power from the states to the Commonwealth.⁹⁰ To date, the Commonwealth has not been called upon to articulate the specific legal basis for its role in domestic disaster relief, including utilisation of the ADF through DACC arrangements. The provision of such support has remained largely uncontroversial given the reciprocal benefit to the Commonwealth and the states and territories alike.⁹¹

The lack of a definitive constitutional basis for the Commonwealth's emergency management powers does come at a cost, however. The division of power at Federation, combined with the continued absence of a Commonwealth emergency management legislative framework, has forced the Commonwealth to rely upon the legal arrangements of individual states and territories when conducting DACC operations. Each state and territory has a comprehensive statutory regime to address emergency and disaster management requirements in its respective jurisdiction.⁹² As such, ADF members conducting such activities are required to comply with both Commonwealth law and the jurisdictional laws of the state or territory where they are operating, noting they do not have powers beyond those of a normal citizen.⁹³ The variation between state and territory statutory frameworks attracts a myriad of legal complexities.⁹⁴

Defence_Almanac_201-11.pdf?VersionId=k1DRzDZos5s2ZN5.uKqyY9uLILQ6fs4V>, archived at <<https://perma.cc/V5MH-2P4H>>.

⁸⁶ *Constitution* s 51(xxix).

⁸⁷ *Ibid* s 51(vi). For further discussion on the executive, defence and inherent nationhood powers, see Gray (n 4) 366–81.

⁸⁸ See *Pape* (n 74). See also Anne Twomey, 'Pushing the Boundaries of Executive Power: *Pape*, the Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne University Law Review* 313.

⁸⁹ *Constitution* s 51(xxxix).

⁹⁰ *Ibid* s 51(xxxvii). While this power has not been used to date as a basis for Commonwealth assistance during disaster relief activities, the referral of state power has been observed in analogous areas such as counterterrorism laws: Justice Robert S French, 'The Referral of State Powers' (2003) 31(1) *University of Western Australia Law Review* 19, 29. An examination of these additional powers is beyond the scope of this article.

⁹¹ Saultry and Copeland (n 3) 166.

⁹² Eburn, *Emergency Law* (n 72) 156. Such powers include declaring a state of emergency, disaster response and recovery, and retention of control over emergency services agencies: *Emergencies Act 2004* (ACT); *State Emergency and Rescue Management Act 1989* (NSW); *Emergency Management Act 2013* (NT); *Disaster Management Act 2003* (Qld); *Emergency Management Act 2004* (SA); *Emergency Management Act 2006* (Tas); *Emergency Management Act 1986* (Vic); *Emergency Management Act 2005* (WA).

⁹³ See above nn 13, 15 and accompanying text.

⁹⁴ Saultry and Copeland (n 3) 161.

Broadly speaking, DACC is defined as the utilisation of the ADF fortasks which are normally the responsibility of the civil community, including state and territory governments, law enforcement agencies and private organisations.⁹⁵

The framework is enacted when the resources of these bodies are, or will likely become, exhausted or inadequate, or cannot be mobilised in sufficient time.⁹⁶ The DACC policy framework has predominantly been employed in response to natural disasters, but can also include search and rescue operations and support to civil events.⁹⁷ Examples of DACC operations span from historical cases, including the Hunter Valley floods (1955),⁹⁸ the Hobart bushfires (1967), Cyclone Tracy (1974),⁹⁹ and the Newcastle earthquake (1989),¹⁰⁰ to more recent examples, such as the Victorian ‘Black Saturday’ bushfires (2009), the Queensland floods (2011), Cyclone Yasi (2011),¹⁰¹ the Townsville floods (2019),¹⁰² the Black Summer bushfires (2019–20),¹⁰³ and the COVID-19 pandemic (2020–21).¹⁰⁴ DACC activities are also governed by Department of Defence internal policy.¹⁰⁵

⁹⁵ Peter Dennis et al, *The Oxford Companion to Australian Military History* (Oxford University Press, 2nd ed, 2008) 178. Academically and internationally, DACC is also referred to as Military Aid to the Civil Community (‘MACC’). For further information on MACC, see *A Dictionary of Law Enforcement* (online at 26 August 2021) ‘Military Aid to the Civil Community (MACC)’; Michael Head, *Calling Out the Troops: The Australian Military and Civil Unrest* (Federation Press, 2009) 7.

⁹⁶ *DACC Manual* (n 30) pt B 2-1 [2.4].

⁹⁷ Eburn, *Emergency Law* (n 72) 228, citing Head, *Calling Out the Troops: The Australian Military and Civil Unrest* (n 95) 7.

⁹⁸ Steven Bullard, *In Their Time of Need: Australia’s Overseas Emergency Relief Operations, 1918–2006*, ed David Horner (Cambridge University Press, 2017) 505.

⁹⁹ Fetchik (n 85) 31 n 3. For example, in the aftermath of Cyclone Tracy (1974), the deployment of ADF members involved restoration of public order and the provision of essential services, akin to the imposition of martial law in some aspects: Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 75.

¹⁰⁰ PJ Barrett, Auditor-General (Cth), *Commonwealth Emergency Management Arrangements* (Audit Report No 41 1999–2000, 28 April 2000) 143 [5].

¹⁰¹ Fetchik (n 85) 31 n 3. The Victorian Black Saturday bushfires involved the deployment of over 1,250 ADF personnel, during a seven-week period, to assist civilian agencies in the wake of the fatal bushfire season: McPhee (n 10) 15 [13].

¹⁰² Iain S MacKenzie, Inspector-General Emergency Management (Qld), *2019 Monsoon Trough Rainfall and Flood Review* (Report No 3 2018–19, 17 June 2019) 121 <<https://www.igem.qld.gov.au/sites/default/files/201-12/IGEM%20MTRF%20Review.pdf>>, archived at <<https://perma.cc/FS6G-8WZ6>>.

¹⁰³ See above Part II(A)(1).

¹⁰⁴ See above Part II(B)(1).

¹⁰⁵ Department of Defence, *Defence Assistance to the Civil Community Policy* (17 August 2020) 1 [1.1]–[1.2] (‘DACC Policy’).

B *The DACC Manual*

Replacing the previous *Defence Instruction (General) OPS 05-1: Defence Assistance to the Civil Community*,¹⁰⁶ the current DACC policy framework is contained within the *Defence Assistance to the Civil Community Manual ('DACC Manual')*.¹⁰⁷ The *DACC Manual* provides policy guidance to assist authorised Defence decision-makers in assessing the parameters for accepting or rejecting a DACC request, and the provision of DACC assistance.¹⁰⁸ The policy provides two mechanisms for states and territories to make a request for assistance. First, requests can be made to local Unit Commanders or the Senior ADF Officer ('SADFO') in location.¹⁰⁹ Secondly, requests can be made through EMA,¹¹⁰ operated by the Department of Home Affairs. The *DACC Manual* defines two types of DACC assistance: emergency (DACC categories 1-3) and non-emergency (DACC categories 4-6).¹¹¹ The emergency DACC categories relate most closely to large-scale domestic emergency activities which will form

¹⁰⁶ McPhee (n 10) 28 [1.4].

¹⁰⁷ *DACC Manual* (n 30).

¹⁰⁸ McPhee (n 10) 18 [19]. As demonstrated during Operation Bushfire Assist, the DACC policy framework can be employed concurrently with legislative provisions of the *Defence Act* (n 8), such as s 28, which enables the compulsory call-out of ADF Reserve members.

¹⁰⁹ *DACC Manual* (n 30) pt B 1-1 [4.1]. The definitions section of the *DACC Manual*, as contained in Annex 1A, defines, at 1A-5, 'Unit Commander' as:

[A]n officer appointed as the commander of an ADF unit, ship, base, joint unit and joint support force, manager of a Defence Estate and Infrastructure Group ... business unit, Base Manager ... or a Defence Science and Technology Group ... laboratory ...

A SADFO is defined in the same section as:

[A] senior military officer of a Defence base or bases. In cases where the base supports predominately one Service, the relevant Service Chief will appoint the SADFO. Where there is more even representation from different Services on the base, the appointment will be made in consultation between the relevant Service Chiefs. The SADFO will, in addition to their primary operational or capability support role, be responsible for coordinating and leading designated whole of base matters.

¹¹⁰ *Ibid* pt A 4-1 [4.4]. EMA is responsible for coordinating Commonwealth non-financial assistance in response to state and territory requests during times of emergency or disaster, including the enactment of the *COMDISPLAN* (n 73): at 14. The *COMDISPLAN* (n 73) outlines EMA's coordination role, including the requirement for the states and territories to have exhausted government, local and commercial means before requesting assistance from the Commonwealth: at 14-15.

¹¹¹ There are three non-emergency assistance categories. Category 4 relates to local non-emergency assistance of a minor nature, Category 5 relates to significant non-emergency assistance, and Category 6 relates to law enforcement assistance: *DACC Manual* (n 30) pt A 2-1-2-2 [2.4]. Non-emergency assistance applies to situations where ADF assistance has been sought, but where human life and widespread damage or loss of property are not threatened: see at pt A 1A-4.

the focus of this article. The *DACC Manual* defines DACC emergency assistance in the following terms:

Assistance which is immediate, urgent and for the purpose of responding to or mitigating an emergency. State and territory governments have primary responsibility for the protection of life, property and the environment; this includes coordinating and planning an emergency response or recovery within their individual jurisdictions. Where the scale of the emergency or disaster exceeds or exhausts the response capacity and capabilities of the state or territory (government, community and/or commercial) or where resources cannot be mobilised in sufficient time, they may seek Australian Government non-financial assistance, including from Defence.¹¹²

Emergency DACC activities are subcategorised depending upon type, duration, and authorisation level required for the provision of ADF assistance. Category 1 relates to local emergency assistance, Category 2 relates to significant emergency assistance, and Category 3 relates to emergency recovery assistance.¹¹³ The overarching national plan for DACC emergency assistance is Concept Plan ('CONPLAN') Charlemagne, which builds upon administrative guidance in the *DACC Manual*.¹¹⁴ ADF assistance during emergency DACC operations may include: airlift capabilities for equipment and personnel; engineering, logistics, communication, health and psychological support; search and rescue; surveillance and reconnaissance; and the utilisation of military equipment, facilities and personnel.¹¹⁵

The Auditor-General, as part of the 2013–14 Performance Audit into Emergency DACC activities, concluded that the existing DACC policy framework was generally effective, most particularly in relation to coordination between the ADF and the states and territories when responding to requests for assistance.¹¹⁶ The Auditor-General also noted an increase in DACC requests in

¹¹² Ibid pt A 1A-3. The 2017 manual states that DACC should generally be considered the exception rather than the norm as Defence resources should primarily be used for Defence purposes alone: Department of Defence, *Defence Assistance to the Civil Community Manual* (2nd ed, 16 November 2017) 1–2 [1.8]. Whether this statement is still accurate, given the recent increase in DACC requests, remains to be seen.

¹¹³ *DACC Manual* (n 30) pt A 2-1 [2.4].

¹¹⁴ Ibid pt B 2-2 [2.12]. CONPLAN Charlemagne is supplemented by jurisdiction-specific planning material that outlines procedures for emergency DACC activities within specific areas, based upon individual threat and environmental analysis: McPhee (n 10) 59–60 [3.4]–[3.7], 61 [3.9].

¹¹⁵ McPhee (n 10) 12 [4].

¹¹⁶ Ibid 15 [14]. The Auditor-General's report noted that improvements in ADF DACC procedures could be implemented in relation to task recordkeeping, post-activity reviews and cost recovery procedures: at 16–18 [14]–[18].

the preceding years.¹¹⁷ This increase was attributed to several factors, including: the frequency, duration and intensity of extreme weather events; growth in vulnerable population centres; a reduction per capita in emergency service personnel and volunteers; and increased political and community expectations regarding the utilisation of the ADF for disaster relief and recovery.¹¹⁸ Such requests are expected to grow even further in the future based upon recent disaster events, with the Black Summer bushfires and the COVID-19 pandemic but two examples of this emerging phenomenon.

As a result of the anticipated increase in ADF domestic support requests, debate has re-emerged regarding the transitioning role of the ADF in the domestic disaster relief domain. Central to this debate is whether a legislative framework should be developed to underpin ADF DACC activities.¹¹⁹ However, prior to this discussion, the many benefits of the existing DACC policy framework must be acknowledged, with the system weathering scrutiny time and time again as the ADF has repeatedly been deployed to assist during Australia's hour of need.

As identified by the Royal Commission, the current non-statutory DACC framework enables the ADF to be deployed with a level of flexibility and agility that can be tailored to the task at hand, thus allowing the requisite elasticity to adapt to future threats as they emerge.¹²⁰ As raised by the Department of Defence as part of its submission to the Commission, there are risks which must be considered as part of developing a DACC legislative framework and such risks must be balanced against the benefits to be gained from potential enactment of DACC statutory regime.¹²¹ Whilst analysis of such risks warrants deeper consideration beyond the scope of this article, they should be noted for completeness nonetheless. From a constitutional perspective, such risks may include possible extinguishment of current prerogative and executive powers which underpin the DACC framework. Furthermore, from an operational perspective, the creation of a prescriptive legislative framework may restrain,

¹¹⁷ See *ibid* 32 [1.12].

¹¹⁸ *Ibid* 33 [1.13].

¹¹⁹ Fetchik (n 85) 31, quoting Hope (n 2) 142 [10.10]. For example, Fetchik (n 85) argues that the current absence of a legal framework for regulating DACC activities has resulted in the application of civil and criminal laws which are not fit for purpose as they do not contemplate application to ADF members: at 31.

¹²⁰ *Royal Commission Report* (n 16) 199–200 [7.67]–[7.68].

¹²¹ *Ibid* 199 [7.66].

rather than empower, ADF assistance with domestic disaster relief, undermining the adaptiveness and flexibility of the current DACC system.¹²²

Acknowledging the strengths of retaining the existing DACC policy framework and the legal ambiguity that this allows, the potential benefits of legislative enactment of DACC provisions will be examined further below as a statutory mechanism to assist and facilitate the evolving domestic role of the ADF.

C *The Transitioning Role of the ADF in the Domestic Disaster Era*

The utilisation of the military for operations other than external defence has remained a controversial issue since Federation.¹²³ Traditionally, the role of the ADF was constitutionally confined to providing defence against external threats.¹²⁴ However, as explored above, the employment of the ADF has slowly evolved beyond war-fighting efforts abroad to humanitarian assistance and disaster relief at home.¹²⁵ With a proven track record, the ADF has become the Commonwealth's response agency during times of domestic adversity.¹²⁶ Professionally equipped and trained, the ADF has demonstrated that they are force postured for swift deployment in times of need.¹²⁷ However, debate continues regarding whether domestic disaster relief should fall within the remit of the ADF¹²⁸ and whether, by extension, a new legal framework

¹²² Ibid 199 [7.67]. The Royal Commission noted:

Legislation typically provides greater certainty of authority — necessarily however, in its prescriptiveness, legislation generally limits flexibility. In the context of DACC, legislated arrangements are likely to limit flexibility and agility in response — and it is these characteristics of DACC assistance that are most valuable in responding to natural disasters.

¹²³ See Hope (n 2) 142 [10.10].

¹²⁴ *Constitution* s 51(vi); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 194 (Dixon J), 259 (Fullagar J) ('*Communist Party Case*').

¹²⁵ Richard G Fox and Jodie E Lydeker, 'The Militarisation of Australia's Federal Criminal Justice System' (2008) 32(5) *Criminal Law Journal* 287, 289–90; Alan Dupont, 'Transformation or Stagnation: Rethinking Australia's Defence' (Working Paper No 374, Strategic and Defence Studies Centre, Australian National University, May 2003) 14; Anthony Bergin and David Templeman, 'Defence Forces Can Play a Broader Role in Disaster Management', *The Strategist* (Web Page, 19 November 2019) <<https://www.aspi.org.au/opinion/defence-forces-can-play-broader-role-disaster-management>>.

¹²⁶ McPhee (n 10) 12 [4], 5 [13].

¹²⁷ See Reynolds, 'Expansion of ADF Support to COVID-19 Assist' (n 7).

¹²⁸ David Letts and Rob McLaughlin, 'Call-Out Powers for the Australian Defence Force in an Age of Terrorism: Some Legal Implications' [2016] (85) *Australian Institute of Administrative Law Forum* 63, 63.

formalising such arrangements should be enacted to remediate the current legal risks that have been identified in relation to such operations.

On one side of the debate, there is strong opposition against changes to the ADF's domestic role. Opponents argue that the core function of the ADF, namely high-end war-fighting, cannot be performed by any other agency.¹²⁹ Calling upon the ADF to carry out the duties of other organisations detracts from the military's primary role and their preparedness to provide Australia's national defence.¹³⁰ They propose that the ADF does not present a cost-effective solution for domestic disaster relief due to the specialised nature of ADF personnel and equipment when compared with civilian agencies.¹³¹ They warn that, in the absence of additional funding, the ADF should be wary of their budget and resources being allocated to domestic disaster relief.¹³² Therefore, opponents argue for the maintenance of the status quo and do not support the expansion of the DACC policy framework into a formalised legal regime. They believe that a more rigid approach risks jeopardising the ADF's current ability to control its contributions to DACC activities, most particularly to the

¹²⁹ Marcus Hellyer, 'Fighting Fires Is Not the Australian Defence Force's Job', *The Strategist* (Web Page, 17 December 2019) <<https://www.aspistrategist.org.au/fighting-fires-is-not-the-australian-defence-forces-job>>, archived at <<https://perma.cc/D7SP-7D5E>>. For commentary opposing the expansion of the ADF's domestic role, see, eg, Siobhan Heanue, 'Putting Troops on the Frontline of Pandemics, Natural Disasters Means Less Time to Train for War', *ABC News* (Web Page, 27 August 2020) <<https://www.abc.net.au/news/202-0-27/troops-on-pandemic-bushfire-frontline-cant-train-for-war/12593126>>, archived at <<https://perma.cc/3EDR-Z9SW>>. Cf Peter Jennings, 'Increasing Defence's Role in Disaster Response Is Essential but Costly', *The Strategist* (Web Page, 1 February 2020) <<https://www.aspistrategist.org.au/increasing-defences-role-in-disaster-response-is-essential-but-costly>>, archived at <<https://perma.cc/X82V-Y9B4>>; Michael Shoebridge, 'The Australian Defence Force Must Find a New Balance', *The Strategist* (Web Page, 23 March 2020) <<https://www.aspistrategist.org.au/the-australian-defence-force-must-find-a-new-balance>>, archived at <<https://perma.cc/5NRM-HQE8>>.

¹³⁰ Heanue (n 129). Cf Shoebridge, 'The Australian Defence Force Must Find a New Balance' (n 129).

¹³¹ Hellyer, 'Fighting Fires Is Not the Australian Defence Force's Job' (n 129). For example, an ADF member assisting during the bushfire season possesses the generic qualifications of a soldier, sailor or air service member, along with the specialist capabilities of their employment category, such as an engineer, mechanic or arms corps member. Opponents argue that obtaining these qualifications, and maintaining them, comes at a considerable cost to the Commonwealth. They propose that consideration should instead be given to investing greater resources into state- and territory-based firefighting agencies, including voluntary organisations that already possess firefighting expertise, rather than diverting the ADF from their specialist defence role. Suggestions have also been made to dedicate ADF Reserve members to domestic disaster relief operations, including the Army's 2nd Division: Heanue (n 129).

¹³² Jennings (n 129).

detriment of their core external defence priorities.¹³³ However, despite opposition, recent case studies have demonstrated that a transition in the ADF's domestic role is already underway.¹³⁴ There is now a clear expectation, from the Commonwealth government and the Australian people alike, that the ADF will be there to provide domestic assistance whenever it is required.

Advocates in support of the ADF's expanded domestic role observe that the remit of the ADF has extended beyond external defence alone.¹³⁵ They note that the military's role now includes greater support for national security closer to home.¹³⁶ This is particularly so given the vast capability, capacity and personnel that can be provided by the ADF in response to internal incidents.¹³⁷ Advocates propose that the personnel numbers within the military, combined with its Reservist force, far exceed those of domestic emergency service agencies and thus should be reconfigured to establish a dedicated domestic disaster response command.¹³⁸ Such a command could also perform a coordination function as

¹³³ Heanue (n 129). Part of this strategy should include communicating limitations upon the ADF's contribution to disaster relief, including geographical dispersal of assets, maintenance schedules, and the inability to pre-position high readiness equipment and personnel.

¹³⁴ Morrison, 'Address to National Press Club' (n 24). During his address to the National Press Club, Prime Minister Morrison acknowledged the impact of such actions upon Defence capability, command, training, and deployment activities, noting that the exploration of the expansion of the ADF's role was not put forward lightly. In recent decades, this expansion has been noticed by the High Court in the peacekeeping and maritime domains: *Thomas v Mowbray* (2007) 233 CLR 307, 391–2 [239] (Kirby J); *Li v Rankin* (1978) 141 CLR 182, 192 (Barwick CJ).

¹³⁵ For commentary supporting the expansion of the ADF's domestic role, see, eg, Jennings (n 129); Paul Barnes, 'Bold Decision Puts ADF Specialists to Work', *The Sydney Morning Herald* (online, 6 January 2020) <<https://www.smh.com.au/national/bold-decision-puts-adf-specialists-to-work-2020010-p530yo.html>>, archived at <<https://perma.cc/5RBD-2K5C>>.

¹³⁶ See, eg, Marcus Hellyer, 'The Australian Defence Force's Domestic Role (Part 1): How Much Does It Do?', *The Strategist* (Web Page, 13 February 2020) <<https://www.aspistrategist.org.au/the-australian-defence-forces-domestic-role-part--how-much-does-it-do>>, archived at <<https://perma.cc/N2PH-7ZWC>>.

¹³⁷ John Sutton, 'The Increasing Convergence of the Role and Function of the ADF and Civil Police' [2017] (202) *Australian Defence Force Journal* 37, 39. Furthermore, Sutton notes that the ADF has a strong history of compliance with strategic and political direction: at 39, citing Head, *Calling Out the Troops: The Australian Military and Civil Unrest* (n 95) 140.

¹³⁸ See Jennings (n 129). As proposed by Jennings, this model would not be dissimilar to a Special Operations Command. This would resemble the United States National Guard and Coast Guard, which provide a whole-of-government response to domestic emergencies, in addition to terrorist attacks and civil disobedience: see Barnes (n 135). Shoebridge notes that any changes would require careful consideration to avoid duplication between civil emergency agencies and Defence assets and capabilities: Michael Shoebridge, 'Defence Minister's Strategic Reassessment Must Take Fires and Floods into Account', *The Strategist* (Web Page,

part of the Commonwealth's contribution to disaster response. They submit that the ADF may incorporate dual-use capabilities within its force composition to enable the provision of concurrent aid to both mission sets.¹³⁹ Supporters of this approach acknowledge the significant budgetary and personnel expenditure this course of action could impose but justify the impost based upon the broader utilisation avenues presented by dual-purpose technology and dual-trained personnel.¹⁴⁰

Whilst supporting the transitioning role of the ADF, advocates for the expansion of the military's domestic role acknowledge that military deployment within Australia must be in strict compliance with constitutional limitations upon Commonwealth powers.¹⁴¹ Therefore, commentators in support of expansion of the ADF's domestic role encourage formalisation of the DACC model through legislation.¹⁴² Whilst it is not proposed that such a framework would cure current constitutional limitations upon Commonwealth disaster relief powers, it may enable a more legally permissive environment for such operations and enhance current arrangements under the existing DACC policy framework. The legal basis for the enactment of statutory provisions could be twofold: first, through reliance upon the Commonwealth's executive powers, as explored above;¹⁴³ secondly, through the transfer of residual state powers to the Commonwealth to enable federal emergency response powers during national emergencies.¹⁴⁴ Whilst this approach does not require constitutional amendment, it would involve careful negotiation between the states and the Commonwealth prior to successful implementation. This is because the powers for domestic emergency response are currently vested in the states alone, by virtue of residual constitutional powers.

With a transition in the ADF's domestic role clearly afoot, the establishment of a legislative framework to underpin the internal deployment of the ADF for domestic disaster relief warrants further consideration, notwithstanding the

11 February 2020) <<https://www.aspistrategist.org.au/defence-ministers-strategic-reassessment-must-take-fires-and-floods-into-account>>, archived at <<https://perma.cc/Q9LA-UYP2>> ('Defence Minister's Strategic Reassessment').

¹³⁹ Barnes (n 135).

¹⁴⁰ See Jennings (n 129). See also Shoebridge, 'Defence Minister's Strategic Reassessment' (n 138).

¹⁴¹ See Elizabeth Ward, 'Call Out the Troops: An Examination of the Legal Basis for Australian Defence Force Involvement in "Non-Defence" Matters' (Research Paper No 8 1997-98, Parliamentary Library, Parliament of Australia, 24 November 1997) 2.

¹⁴² See Saultry and Copeland (n 3) 171.

¹⁴³ See above Part III(A).

¹⁴⁴ Scott Morrison, 'Press Conference' (Speech, Australian Parliament House, 12 January 2020) <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-1>>, archived at <<https://perma.cc/P66H-K6GR>>.

benefits of the current system explored above.¹⁴⁵ A statutory framework would provide a clearer legal basis for ADF domestic operations when compared with existing DACC policy and constitutional arrangements. This is particularly important given the anticipated increase in requests for ADF domestic assistance in the future.¹⁴⁶ As the Commonwealth continues to explore such issues as part of ongoing inquiries into the military's domestic role, the lessons learnt from the legislative enactment of analogous defence powers, namely pt IIIAAA of the *Defence Act*, provide considerable guidance for the development of a DACC statutory regime.

IV THE *DEFENCE ACT 1903* (CTH) PT IIIAAA

Part IIIAAA of the *Defence Act* contains a comprehensive legislative regime for the domestic deployment of the ADF to provide protection against internal threats, most particularly terrorism.¹⁴⁷ The statutory evolution of pt IIIAAA has been drawn from constitutional provisions conceived at Federation, and has been transformed through the utilisation of the defence power,¹⁴⁸ culminating in the enactment of legislative provisions on the eve of the 2000 Sydney Olympic Games. The key stages of pt IIIAAA's development are outlined below.

A *Section 119 of the Constitution*

Pursuant to s 119 of the *Constitution*, '[t]he Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'. Conversely, s 114 of the *Constitution* precludes a state from raising or maintaining any naval or military force 'without the consent of the Parliament of the Commonwealth'. These provisions encapsulate the division of power at Federation. While the responsibility to maintain internal law and order was vested in the states, protection from

¹⁴⁵ See generally Saultry and Copeland (n 3) 171. By way of example, civilian emergency service agencies possess a wide range of powers and legal protections, as articulated in state and territory legislation, to assist in the completion of their duties: see, eg, *Emergency Management Act 2013* (Vic) ss 18, 75. In contrast, ADF members, when providing DACC assistance, do not possess powers beyond those of an ordinary citizen: Defence Bill Replacement Explanatory Memorandum 2020 (n 15) [2]–[3]. See also Letts, 'Sending In the Military' (n 15).

¹⁴⁶ Saultry and Copeland (n 3) 171. As explored above, the legal risks that have been identified in relation to ADF domestic operations include reliance upon a suite of state, territory and Commonwealth laws when conducting such operations: see above Part III(A).

¹⁴⁷ *Defence Act* (n 8) pt IIIAAA.

¹⁴⁸ *Constitution* s 51(vi).

external threats was conferred upon the Commonwealth.¹⁴⁹ During the Convention Debates of the 1890s, s 119 was inserted into the draft *Constitution* to enable the Commonwealth to mobilise the military in the event of domestic violence.¹⁵⁰ Whilst undefined by the *Constitution*, the term ‘domestic violence’ is derived from art IV § 4 of the *United States Constitution*,¹⁵¹ where ‘domestic violence’ is understood as ‘local uprisings, insurrections or internal unrest within a state.’¹⁵² The legislative practicalities for the mobilisation of the ADF in response to domestic violence are enabled by the defence power and contained within the *Defence Act*.

B *The Defence Power*

Created pursuant to the defence power,¹⁵³ the *Defence Act* provides the Defence Minister with ‘general control and administration of the Defence Force,’¹⁵⁴ with command of the ADF vested in the Chief of the Defence Force (‘CDF’).¹⁵⁵ At the inception of the *Defence Act*, minimal attention was paid to the inclusion of legislative provisions in support of Commonwealth powers contained in s 119 of the *Constitution*.¹⁵⁶ However, the internal mobilisation of the ADF in 1978, which followed the bombing outside the Sydney Hilton Hotel during the Commonwealth Heads of Government Regional Meeting, amplified the importance of a legislative framework in support of ADF domestic security

¹⁴⁹ White (n 1) 439.

¹⁵⁰ See Head, ‘The Military Call-Out Legislation’ (n 1) 281. Since Federation, state governments have requested Commonwealth assistance in response to internal violence on six occasions. Such requests related to instances of anticipated strikes, riots, disturbances, and violence. The Commonwealth declined the requests for assistance on all six occasions, determining that the state governments could resolve the threat themselves. Only one application was formally made pursuant to s 119 of the *Constitution*, namely a request by Queensland in 1912. Unsurprisingly, the operation of this constitutional provision remains somewhat elusive.

¹⁵¹ Michael Head, ‘Calling Out the Troops: Disturbing Trends and Unanswered Questions’ (2005) 28(2) *University of New South Wales Law Journal* 479, 481.

¹⁵² Peta Stephenson, ‘Fertile Ground for Federalism? Internal Security, the States and Section 119 of the *Constitution*’ (2015) 43(2) *Federal Law Review* 289, 298. For further guidance on the meaning of ‘domestic violence’, see also Head, *Calling Out the Troops: The Australian Military and Civil Unrest* (n 95) 9, 16.

¹⁵³ *Constitution* s 51(vi). The defence power provides the Commonwealth Parliament with the power to legislate, for the peace, order and good governance of Australia, in relation to the ADF.

¹⁵⁴ *Defence Act* (n 8) s 8(1).

¹⁵⁵ *Ibid* s 9(1).

¹⁵⁶ See Commonwealth, *Parliamentary Debates*, House of Representatives, 16 July 1903, 2269 (John Forrest, Minister of Defence).

powers.¹⁵⁷ In the subsequent *Protective Security Review* in response to the bombing, it was Justice Hope's recommendation that a statutory basis for ADF domestic security operations be enacted, in addition to the constitutional powers contained in s 119.¹⁵⁸ This chain of events is not dissimilar to current inquiries into the ADF's role in domestic disaster relief following the Black Summer bushfires and COVID-19 pandemic.

It was not until the eve of the Sydney Olympic Games that a legislative framework for the domestic deployment of the ADF for internal security operations came to fruition.¹⁵⁹ Colloquially known as DFACA, pt IIIAAA was inserted into the *Defence Act* to detail the legislative arrangements to call out the ADF in response to domestic violence.¹⁶⁰ In contrast to the current DACC framework, pt IIIAAA was designed to include a detailed regime for the internal deployment of the ADF founded upon statute rather than policy.¹⁶¹ Since its inception, pt IIIAAA has evolved through three statutory iterations in 2000, 2006, and 2018, respectively.¹⁶²

C *The Defence Act 1903 (Cth) pt IIIAAA*

The lead-up to the Sydney Olympic Games provided the Commonwealth government with the impetus to solidify s 119 constitutional powers within a statutory framework.¹⁶³ Clarifying and codifying extraordinary military powers, the Defence Legislation Amendment (Aid to Civilian Authorities)

¹⁵⁷ Moore (n 99) 171, citing Hope (n 2) 175 [10.103]–[10.104]. In the early hours of 13 February 1978, an explosion occurred outside the Sydney Hilton Hotel where leaders of foreign governments had gathered for the Commonwealth Heads of Government Regional Meeting: Michael Head and Scott Mann, *Domestic Deployment of the Armed Forces: Military Powers, Law and Human Rights* (Ashgate, 2009) 140. Resulting in two tragic deaths, the attack prompted the Commonwealth, without any precise legal or constitutional basis, to deploy the ADF to provide security while the delegation was relocated to Bowral.

¹⁵⁸ Hope (n 2) 175 [10.103]–[10.104].

¹⁵⁹ *Defence Act* (n 8) pt IIIAAA, as at 14 September 2000.

¹⁶⁰ Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000 (Cth) 2 ('Defence Bill Explanatory Memorandum 2000'), quoted in Letts and McLaughlin (n 128) 69.

¹⁶¹ Laing (n 32) 508.

¹⁶² *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* (Cth) ('*Defence Legislation Amendment Act 2000*'); *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth) ('*Defence Legislation Amendment Act 2006*'); *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth) ('*Defence Amendment Act 2018*').

¹⁶³ Laing (n 32) 512; Simon Bronitt and Dale Stephens, "Flying under the Radar" — The Use of Lethal Force against Hijacked Aircraft' (2007) 7(2) *Oxford University Commonwealth Law Journal* 265, 266, citing PJ Barrett, Auditor-General (Cth), *Commonwealth Agencies' Security Preparations for the Sydney 2000 Olympic Games* (Audit Report No 5, 24 August 1998).

Bill 2000 (Cth) was introduced into Parliament on 28 June 2000.¹⁶⁴ With bipartisan support and minimal debate,¹⁶⁵ Royal Assent was received mere days before the Olympics commenced.¹⁶⁶ The new regime replaced s 51 of the *Defence Act* with 27 new sections (ss 51–51Y).¹⁶⁷ As provided by the Explanatory Memorandum:

This Bill will add new provisions to the *Defence Act 1903* to enable the utilisation of the Defence Force in assisting the civilian authorities to protect Commonwealth interests and States and Territories against domestic violence. ... The Bill provides for the specific powers that the Defence Force has under the new scheme. There are powers relating to the recapture of premises ... freeing hostages, detaining persons, evacuating persons, [and] searching and seizing any dangerous things. ... The Bill will also consequentially amend other Defence legislation to accommodate the new scheme of utilising the Defence Force.¹⁶⁸

In 2006, further amendments to pt IIIAAA occurred in the lead-up to the 2006 Melbourne Commonwealth Games and following the creation of Maritime Border Command.¹⁶⁹ Building upon the land-centric provisions contained within the 2000 iteration of the Act, the *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2006* (Cth) expanded ADF call-out powers to both the maritime and air domains.¹⁷⁰ The amendments also rectified shortfalls identified within the original pt IIIAAA provisions.¹⁷¹

¹⁶⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2000, 18409 (Sharman Stone).

¹⁶⁵ See Laing (n 32) 513.

¹⁶⁶ *Defence Legislation Amendment Act 2000* (n 162) 1. Royal Assent was received on 12 September 2000. Whilst a call-out order was not utilised for the Sydney Olympics, the passage of the *Defence Legislation Amendment Act 2000* (n 162) provided the legal basis for Operation Gold, namely the preparatory deployment of 4,000 ADF members to assist civil authorities in bomb disposal, search and rescue, and venue security during the Olympic Games: Laing (n 32) 511.

¹⁶⁷ Letts and McLaughlin (n 128) 69, citing *Defence Legislation Amendment Act 2000* (n 162).

¹⁶⁸ Defence Bill Explanatory Memorandum 2000 (n 160) 2.

¹⁶⁹ Moore (n 99) 172. The Maritime Border Command (previously the Joint Offshore Protection Command and prior to that the Border Protection Command) was created in 2005 and falls within the remit of the ABF: James Goldrick, 'Getting Our Maritime Security Effort Right', *The Interpreter* (Web Page, 10 April 2018) <<https://www.lowyinstitute.org/the-interpreter/getting-our-maritime-security-effort-right>>, archived at <<https://perma.cc/5JYW-NHRT>>.

¹⁷⁰ *Defence Legislation Amendment Act 2006* (n 162); Revised Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 (Cth) 2. See also Commonwealth, *Parliamentary Debates*, Senate, 7 December 2005, 25–7 (Helen Coonan).

¹⁷¹ Letts and McLaughlin (n 128) 72, citing *Defence Legislation Amendment Act 2006* (n 162). See Commonwealth, *Parliamentary Debates*, Senate, 7 December 2005, 25 (Helen Coonan).

The most significant amendments to pt IIIAAA occurred in 2018 following the Review of Defence Support to National Counter-Terrorism Arrangements.¹⁷² The Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth) was introduced into Parliament on 28 June 2018¹⁷³ and with bipartisan support received quick passage.¹⁷⁴ With a six-month delay in enactment, the new provisions came into effect on 10 June 2019.¹⁷⁵ The most recent amendments to pt IIIAAA further reflect the anticipated increase in requests for the internal deployment of the ADF. With 'domestic violence' inclusive of terrorist attacks, the rise in global terrorism over recent decades prompted the Commonwealth government to enact an even more comprehensive legislative framework to combat violent attacks within Australia.¹⁷⁶ Fortunately, a call-out pursuant to pt IIIAAA has not been executed to date.

These amendments to pt IIIAAA have created the following benefits. First, the enactment of a legislative framework pursuant to pt IIIAAA removed constitutional ambiguity regarding the Commonwealth's utilisation of emergency powers domestically.¹⁷⁷ As explored above,¹⁷⁸ internal security operations prior to 2000 relied upon the ill-defined powers in s 119 of the *Constitution*. The enactment of pt IIIAAA removed the legal uncertainty associated with such powers and provided a statutory basis for DFACA call-out operations.¹⁷⁹ Secondly, pt IIIAAA demonstrates how the creation of Commonwealth disaster management legislation could mitigate the current

¹⁷² Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 43 2018–19, 13 November 2018) 37.

¹⁷³ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 6746 (Christian Porter); Interview with Marise Payne and Christian Porter (Doorstop Interview, 28 June 2018) <<https://www.minister.defence.gov.au/minister/marise-payne/transcripts/doorstop-introduction-defence-amendment-call-out-australian>>.

¹⁷⁴ See Michael Head, 'Another Expansion of Military Call Out Powers in Australia: Some Critical Legal, Constitutional and Political Questions' [2019] (5) *University of New South Wales Law Journal Forum* 1, 4 ('Another Expansion of Military Call Out Powers in Australia').

¹⁷⁵ *Defence Amendment Act 2018* (n 162) s 2(1). The Act received Royal Assent on 10 December 2018: at s 1. A six-month delay in enactment was included to enable the ADF adequate time to prepare for the legislative changes at the tactical, operational, and strategic level.

¹⁷⁶ Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth) 2–3 [2]–[4] ('Defence Bill Explanatory Memorandum 2018').

¹⁷⁷ See Head, 'Another Expansion of Military Call Out Powers in Australia' (n 174) 5.

¹⁷⁸ See above Parts III(A)–(B).

¹⁷⁹ *Defence Act* (n 8) s 30.

legal risks associated with DACC operations.¹⁸⁰ As explored above,¹⁸¹ the absence of a clear statutory framework for ADF members providing DACC support has resulted in the requirement to navigate a suite of Commonwealth, state and territory laws when completing such operations.¹⁸² This approach incorporates inherent legal risks which may jeopardise operational requirements and fail to provide ADF members with adequate legal authorities or protections. As identified by the outcomes of the Royal Commission, confusion continues to exist amongst stakeholders in relation to the role, functions, capabilities of, and constraints upon the roles that can be performed by, the ADF during domestic disaster relief activities.¹⁸³ Part IIIAAA demonstrates how the creation of a singular compliance framework could assist in alleviating these current deficiencies.

For example, div 2 of pt IIIAAA includes a comprehensive regime in relation to command and control arrangements for the ADF during DFACA activities. The legislation creates a centralised process for civilian law enforcement agencies to request assistance at the tactical level.¹⁸⁴ The statutory articulation of these procedures has not only streamlined and centralised requests for assistance,¹⁸⁵ but has also enabled the development of supporting policy arrangements, including standardised request forms and procedures, to make it easier for requests to be immediately actioned. Part IIIAAA also creates a legislative basis for command arrangements during DFACA operations by ensuring that ADF members remain subject to military command at all times while assisting their civilian law enforcement counterparts.¹⁸⁶

Furthermore, pt IIIAAA demonstrates how the statutory articulation of permissive powers for ADF members when performing domestic activities can further legitimise the legal basis for military operations. One of the most extraordinary aspects of pt IIIAAA is the inclusion of powers for ADF members to use reasonable and necessary force, when required, within Australia.¹⁸⁷ These powers are included in the pt IIIAAA legal framework as it is reasonably foreseen that they may be required to provide protection against domestic violence.

¹⁸⁰ See generally Saultry and Copeland (n 3) 171.

¹⁸¹ See above n 13 and accompanying text.

¹⁸² Saultry and Copeland (n 3) 164.

¹⁸³ See *Royal Commission Report* (n 16) 186 [7.2], 192 [7.29]; *Royal Commission Interim Observations* (n 17) 11–12 [56]–[58].

¹⁸⁴ *Defence Act* (n 8) ss 40(1)–(2).

¹⁸⁵ See Defence Bill Explanatory Memorandum 2018 (n 176) 2 [3].

¹⁸⁶ *Defence Act* (n 8) s 40(3).

¹⁸⁷ *Ibid* s 51N.

Currently, and as noted above, specific statutory powers for ADF DACC operations do not exist. As ADF DACC operations increasingly involve compliance and enforcement activities — as seen during Operation COVID-19 Assist during border, isolation and quarantine monitoring — specific legal powers to enable such activities are increasingly necessary. The adoption of a legislative framework for DACC, in line with the DFACA statutory model, would allow the ‘legal lacuna’ that currently surrounds such operations to similarly be resolved.¹⁸⁸ The inadequacies of current DACC arrangements are summarised below:

In the absence of counter-disaster legislation there is no process for a formal declaration of a disaster or emergency at the national level, and no clear authorisation to waive the application of the ‘normal’ law or to take extraordinary action that is warranted by the emergency. The Commonwealth may be forced to rely on the historical prerogative power of the Crown, now encompassed in the phrase ‘the Executive power of the Commonwealth’ and provided for in section 61 of the *Australian Constitution*.¹⁸⁹

As highlighted by the above passage, the reliance of DACC operations upon the Commonwealth’s broad and largely undefined executive powers continues to be problematic.¹⁹⁰ Similarly to s 119 of the *Constitution*, such powers attract constitutional uncertainty which may be improved, although not cured, through statutory clarity. After successfully traversing such issues in the counterterrorism domain prior to the Sydney Olympic Games, pt IIIAAA has demonstrated the benefits of a defined statutory regime and provides a compelling argument for the same methodology to be considered for future DACC activities. It is submitted that a similar crossroad has now been reached in relation to military domestic disaster relief operations. With the visible increase in ADF members on the streets — doorknocking homes, monitoring checkpoints and patrolling border crossings — a robust legal framework to underpin support operations to civilian emergency service agencies is more important than ever. Part IIIAAA provides an invaluable starting point for the statutory development of comparable provisions in the domestic disaster relief domain.¹⁹¹

¹⁸⁸ Head, *Emergency Powers in Theory and Practice* (n 74) 202.

¹⁸⁹ Michael Eburn, ‘Managing “Civil Contingencies” in Australia’ (2014) 18(2) *International Journal of Human Rights* 143, 149.

¹⁹⁰ *AAP Case* (n 77) 396–7 (Mason J); *Davis* (n 77) 92 (Mason CJ, Deane and Gaudron JJ).

¹⁹¹ Whilst providing a starting point for the development of a DACC statutory regime, it must be noted that several provisions from the *Defence Act* (n 8) pt IIIAAA are equally inapplicable to

V RECOMMENDATIONS

The development of pt IIIAAA demonstrates how existing statutory provisions of the *Defence Act* can provide guidance for the creation of an analogous legislative framework for ADF support to large-scale domestic emergencies. Similarly to pt IIIAAA, it is proposed that the *Defence Act* is the appropriate statute for the insertion of such provisions. The components of pt IIIAAA that are relevant to the development of a legislative framework for the utilisation of the ADF during domestic emergencies can be divided into five key areas:

- 1 Support request and delivery models;
- 2 Multi-jurisdictional and trans-boundary operations;
- 3 Proper purpose and duty-to-cooperate requirements;
- 4 Accountability, protections and immunities; and
- 5 Division of general and specific powers.

The comparative analysis will be twofold. First, an examination of comparable provisions from pt IIIAAA, through divisional and sectoral breakdown, will be conducted. Secondly, based upon the analogous provisions from pt IIIAAA, recommendations for draft legislative provisions for inclusion within a Commonwealth domestic disaster relief legal regime will be explored. Whilst pt IIIAAA is applicable to the land, sea, and air domains,¹⁹² this analysis will be confined to land-based powers only, in line with the land-centric focus of the Black Summer bushfires and the COVID-19 pandemic case studies.¹⁹³ Whilst recognising that some provisions of pt IIIAAA are not appropriate for transferral to the domestic disaster relief domain, such as lethal force powers,¹⁹⁴ it will be demonstrated that existing call-out provisions of the *Defence Act* provide significant guidance for the creation of a Commonwealth framework for the deployment of the ADF during large-scale domestic emergencies.

the development of a DACC legislative framework, including use-of-force provisions (s 51N), expedited orders or declarations (div 7), and powers in relation to declared infrastructure (div 5).

¹⁹² *Ibid* ss 30, 31 (definition of 'Australian offshore area').

¹⁹³ For an analysis of the COVID-19 pandemic in the maritime and air domains, see Natalie Klein, 'International Law Perspectives on Cruise Ships and COVID-19' (2020) 11(2) *Journal of International Humanitarian Legal Studies* 282; Stuart Kaye, 'Port Access and Assistance to Cruise Ships during the COVID-19 Pandemic' (2020) 94(6) *Australian Law Journal* 420; Roberto Cassar, 'Evolution or Devolution: Aviation Law and Practice after COVID-19' (2020) 45 (Special Issue) *Air and Space Law* 3.

¹⁹⁴ *Defence Act* (n 8) s 51N(3).

A Support Request and Delivery Models

The Black Summer bushfires and COVID-19 case studies demonstrate the potential variation in support request and delivery models that may be used to provide ADF assistance during domestic emergencies. Each model will require statutory articulation as part of the development of a legislative regime. Part IIIAAA offers guidance in this regard.

1 Comparable pt IIIAAA Provisions

Section 35 of pt IIIAAA provides that a state or territory government can apply to the Commonwealth for protection against domestic violence that is occurring, or is likely to occur, in their jurisdiction.¹⁹⁵ The Governor-General, acting upon the advice of the authorising Ministers,¹⁹⁶ will then consider whether the ADF should be called out to provide assistance,¹⁹⁷ based upon statutorily defined criteria.¹⁹⁸ This type of support is enacted through a State protection order.¹⁹⁹ State protection orders, albeit in relation to domestic violence, follow the traditional DACC support request and delivery model, whereby a state or territory requests Commonwealth assistance, through the appropriate delegate, and the Commonwealth delivers support through the provision of ADF personnel and equipment. This model is supported by the current DACC policy framework and highlights the similarity between DFACA and DACC support request models regarding domestic emergency situations.²⁰⁰ The COVID-19 case study is an example of this model in operation, with requests for medical, logistic, and planning assistance received by the Commonwealth from multiple jurisdictions and subsequently delivered by the ADF.²⁰¹

Furthermore, s 33 of pt IIIAAA enables the unilateral provision of Commonwealth assistance in the absence of a state or territory request.²⁰² The

¹⁹⁵ Ibid s 35(1)(a). Section 36 enables a contingent call-out of the ADF to protect states and territories. This type of order allows the ADF to be called out if specified circumstances are satisfied: at s 36(3)(a). See also Defence Bill Explanatory Memorandum 2018 (n 176) 44.

¹⁹⁶ The authorising Ministers are the Prime Minister, the Minister for Defence and the Attorney-General: *Defence Act* (n 8) s 31 (definition of 'authorising Ministers').

¹⁹⁷ Ibid s 35(1)(b)(i). See also Defence Bill Explanatory Memorandum 2018 (n 176) 42 [218].

¹⁹⁸ *Defence Act* (n 8) s 35(2). The criteria for a State protection order are: the nature of the domestic violence (s 35(2)(a)(i)); whether the utilisation of the ADF would enhance the jurisdiction's ability to provide protection against the domestic violence (s 35(2)(a)(ii)); and any other matters the authorising Ministers consider to be relevant (s 35(2)(b)).

¹⁹⁹ Ibid s 31 (definition of 'State protection order').

²⁰⁰ *DACC Policy* (n 105) 2 [1.9].

²⁰¹ See above nn 61–62 and accompanying text.

²⁰² *Defence Act* (n 8) s 33.

section provides that the Governor-General, acting on the advice of the authorising Ministers, may call out the ADF in the absence of a request from a state or territory if there is domestic violence that would, or would be likely to, affect Commonwealth interests.²⁰³ Commonwealth interests are not defined, but include the protection of: 'Commonwealth property or facilities; Commonwealth public officials; visiting foreign dignitaries or heads of state; and, major national events, including the Commonwealth Games or G20'.²⁰⁴ This type of support is enacted through a Commonwealth interests order.²⁰⁵ This model of unilateral support delivery is not currently supported by the DACC policy framework. The *DACC Manual* and DACC policy framework require that a request for assistance be received from a state or territory agency before support can be provided by the Commonwealth under the DACC framework.²⁰⁶ The Black Summer bushfires are an example of when this model has previously been employed, with the ADF unilaterally called out in the absence of a request from a state or territory.²⁰⁷ Jurisprudence affirming the authority of the Commonwealth to provide support without a request from a state or territory is also of assistance in this regard.²⁰⁸

Sections 33 and 35 of pt IIIAAA assist in the development of equivalent statutory provisions for the articulation of both the unilateral and traditional DACC support request and delivery models, as employed during the Black Summer bushfires and COVID-19 pandemic, respectively.

²⁰³ Ibid s 33(1)(a)(i). Section 34 enables a contingent call-out of the ADF to protect Commonwealth interests. This type of call-out order also permits the ADF to be called out if specified circumstances are satisfied: at s 34(3)(a). See also Defence Bill Explanatory Memorandum 2018 (n 176) 38 [190].

²⁰⁴ Addendum to the Explanatory Memorandum, Defence Amendment (Call Out of the Australian Defence Force) Bill 2018 (Cth) 2–3.

²⁰⁵ *Defence Act* (n 8) s 31 (definition of 'Commonwealth interests order').

²⁰⁶ *DACC Policy* (n 105) 2 [1.9]; *DACC Manual* (n 30) pt B 1-1 [1.4], 2-2–2-3 [2.7]–[2.15], 3-1–3-2 [3.3]–[3.6], 4-7 [4.4]–[4.6], 5-12–5-13 [5.4], 6-1–6-2 [6.5]–[6.8]. This does not preclude Commonwealth support through alternative mechanisms.

²⁰⁷ Interview with Scott Morrison (Insiders) (n 35). At the time, Prime Minister Morrison conceded that acting in the absence of a request from a state or territory placed the Commonwealth in a 'constitutional grey zone': Morrison, 'National Royal Commission into Black Summer Bushfires Established' (n 39).

²⁰⁸ Jurisprudence notes that such action may be permitted when the situation interferes with the operation of the Commonwealth government or the rights and privileges of Australian citizens: see, eg, *R v Sharkey* (n 70) 151 (Dixon J); *Communist Party Case* (n 124) 188 (Dixon J).

2 Recommendations

It is proposed that s 33(1)(a)(i) of the *Defence Act* can be used as the basis for developing a DACC provision to reflect the Commonwealth government's unilateral support delivery model, namely the provision of federal assistance through ADF call out without a request from a state or territory. Part IIIAAA limits the breadth of such a provision to protecting Commonwealth interests only.²⁰⁹ In the absence of a referral of powers from the states allowing Commonwealth assistance within a jurisdiction without a request, an equivalent DACC provision would also require a tangible link to the protection of Commonwealth interests to justify unilateral Commonwealth action. The guidance on the meaning of Commonwealth interests in pt IIIAAA would also be transferable to the new legislative regime.²¹⁰ Furthermore, s 35(1)(a) of the *Defence Act* reflects the traditional support request model where the delivery of support is contingent upon receipt of a request for assistance from a state or territory to enact call out of the ADF. Therefore, this provision can more readily be adopted for a DACC legislative framework without amendment to existing arrangements.

The creation of the abovementioned provisions will require legislative drafters for a Commonwealth disaster relief legal framework to determine the level of authorisation required to approve such orders, along with removal of references to 'domestic violence' and replacement with an alternative term, such as 'state of emergency' or 'national disaster'. The *National Emergency Declaration Act 2020* (Cth) provides significant guidance in this regard. The Act was passed following the outcomes of the Royal Commission,²¹¹ and details the process for the Governor-General, acting on the advice of the Prime Minister, to make a national emergency declaration if there is an emergency that has recently occurred, is occurring, or is likely to occur (both within and outside Australia), and the emergency has caused, is causing, or is likely to cause harm of national significance in Australia or the Australian offshore area.²¹² Once a national emergency declaration is in force, the Prime Minister may then require Commonwealth Department Secretaries, and other agencies, to provide

²⁰⁹ *Defence Act* (n 8) s 33(1)(a).

²¹⁰ See above n 204 and accompanying text.

²¹¹ Explanatory Memorandum, National Emergency Declaration Bill 2020 (Cth) 2 [1]; *Royal Commission Report* (n 16) 149.

²¹² *National Emergency Declaration Act 2020* (Cth) ss 11(1)(a)–(b) ('*National Emergency Declaration Act*'). Section 11(1)(c) proceeds to detail additional considerations for the making of the declaration, such as: whether the declaration has been sought by the government of a state or territory: at s 11(1)(c)(i); or whether for reasons of urgency a request has not been made: at s 11(1)(c)(ii).

information to aid preparations for responding to and recovering from an emergency, including modification of Commonwealth red tape requirements.²¹³ Similarly, equivalent state and territory emergency management legislation provides drafting guidance for defining a federal state of emergency.²¹⁴ Deconfliction between federal and state and territory state of emergency declarations will also need consideration. A perusal of jurisdictional statutes provides guidance on common features to be considered.²¹⁵ A non-exhaustive proposed definition for defining a ‘State of Emergency’ is outlined below.

Table 1: Proposed Definition — State of Emergency

Definition	
State of Emergency	An emergency that constitutes widespread and significant danger to: <ul style="list-style-type: none"> a) life (including illness or injury); or b) property; or c) the environment; and that is occurring, has occurred, or is likely to occur, within Australia.

With this definition in mind, draft provisions for inclusion in a Commonwealth framework to articulate a traditional DACC support request, modelled upon a State protection order, and a unilateral support request, modelled upon a Commonwealth interests order, are outlined below.

Table 2: Proposed Provisions — Traditional and Unilateral Support Models

Traditional support model	Unilateral support model

²¹³ *Ibid* s 4.

²¹⁴ *Emergencies Act 2004* (ACT) s 156; *State Emergency and Rescue Management Act 1989* (NSW) s 33; *Emergency Management Act 2013* (NT) s 19; *Disaster Management Act 2003* (Qld) s 69; *Emergency Management Act 2004* (SA) ss 22–4; *Emergency Management Act 2006* (Tas) s 42; *Emergency Management Act 1986* (Vic) s 23; *Emergency Management Act 2005* (WA) s 56.

²¹⁵ *Emergencies Act 2004* (ACT) s 4 (definition of ‘emergency’); *State Emergency and Rescue Management Act 1989* (NSW) s 33; *Emergency Management Act 2013* (NT) s 8 (definitions of ‘emergency’, ‘event’); *Disaster Management Act 2003* (Qld) s 69(b); *Emergency Management Act 2004* (SA) s 3 (definition of ‘emergency’); *Emergency Management Act 2006* (Tas) s 3 (definition of ‘emergency’); *Emergency Management Act 1986* (Vic) s 23(1); *Emergency Management Act 2005* (WA) s 56(2)(c).

<p>1) The Prime Minister may make an order to call out the Defence Force if:</p> <p>a) a state or territory government applies to the Commonwealth government for assistance in relation to a State of Emergency that is occurring, has occurred, or is likely to occur, in the state or territory.</p>	<p>1) The Prime Minister may make an order to call out the Defence Force if satisfied that:</p> <p>a) there is a State of Emergency that is occurring, has occurred, or is likely to occur, in Australia that would, or would be likely to, affect Commonwealth interests.</p>
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These draft provisions provide a starting point for the further development of legislative procedures for the provision of ADF assistance during large-scale domestic emergencies. Further statutory development would also be required to operationalise such provisions, including consideration of the criteria to be satisfied prior to ADF call-out, similarly to pt IIIAAA,²¹⁶ and the legal requirements for making, varying, and revoking such orders.²¹⁷

This analysis demonstrates how the existing provisions of the *Defence Act* can be utilised in the development of a new legislative framework to facilitate support request and delivery for domestic emergencies. Unlike the current DACC policy framework, the proposed draft provisions accommodate both the traditional DACC support model and the emerging unilateral support model utilised during COVID-19 and the Black Summer bushfires, respectively. The jurisdictional application of pt IIIAAA is also of assistance in developing legislation to combat national emergencies.

B *Multi-Jurisdictional and Trans-Boundary Operations*

The unique jurisdictional operation of pt IIIAAA provides invaluable insight into the development of a legislative framework for domestic disasters that traverse state and territory boundaries. In light of the rapidly evolving nature of modern terrorist attacks, the 2018 iteration of pt IIIAAA recognised that the Act required amendment to address domestic violence that may unexpectedly cross jurisdictional boundaries or occur in multiple jurisdictions simultaneously.²¹⁸ Several provisions were inserted into pt IIIAAA to overcome these challenges.

²¹⁶ *Defence Act* (n 8) ss 33(2), 34(2), 35(2), 36(2).

²¹⁷ *Ibid* s 37.

²¹⁸ Defence Bill Explanatory Memorandum 2018 (n 176) 2 [4], 37 [187], 53 [293].

1 *Comparable pt IIIAAA Provisions*

First, s 33(5) of pt IIIAAA provides the legislative parameters for authorising the operation of powers by the ADF in multiple jurisdictions concurrently.²¹⁹ The provision facilitates multi-jurisdictional authorisation by allowing a Commonwealth interests order to permit ADF operations in more than one state or territory where domestic violence that crosses jurisdictional boundaries is occurring or is likely to occur.²²⁰ The same provision does not exist in relation to State protection orders. This type of order requires each jurisdiction to individually request assistance on its own behalf.²²¹ It does not prevent multiple State protection orders operating concurrently, however.

Secondly, s 40(1)(a) provides that the ADF may be utilised to assist any state or territory that is specified in an order and any other jurisdiction where the ADF is operating in relation to the domestic violence, or threat thereof, specified in that call-out order.²²² This section recognises provisions within the Act that permit ADF trans-boundary operations beyond the jurisdiction named within an order, such as s 44(1).²²³ These provisions are designed to provide purposive authorisation to enable the ADF to respond to domestic violence that traverses jurisdictional boundaries, including within the Australian offshore area, by ensuring that the ADF is not arbitrarily stopped at a state or territory border when responding to domestic violence that crosses jurisdictional lines.²²⁴

The multi-jurisdictional and trans-boundary operation of pt IIIAAA presents an invaluable lesson that can assist in the development of a Commonwealth domestic disaster legal framework. As demonstrated by both

²¹⁹ *Defence Act* (n 8) s 33(5)(b)(iii). Section 33(5)(b)(iv) replicates this provision in relation to Commonwealth interest-contingent call-out orders.

²²⁰ Defence Bill Explanatory Memorandum 2018 (n 176) 37 [187]. Section 38(2) of the *Defence Act* (n 8) includes a requirement to consult with the state or territory named or affected by the call-out order. Subsection (3) provides that this requirement does not apply where, for reasons of urgency, it is impracticable to do so.

²²¹ *Defence Act* (n 8) s 35(1)(a). The Defence Bill Explanatory Memorandum 2018 (n 176) 42 [217] states:

This provision makes clear that a state or territory may only make an application in respect of violence that is occurring, or is likely to occur, within its own jurisdiction. A state or territory may not make an application on behalf of another state or territory, or make an application for protection against domestic violence that is occurring in another jurisdiction.

²²² *Defence Act* (n 8) s 40(1)(a)(i).

²²³ See *Defence Act* (n 8) ss 44 (div 3 powers), 51(5) (div 4 powers), 51K (div 5 powers). See also Defence Bill Explanatory Memorandum 2018 (n 176) 51 [280].

²²⁴ Defence Bill Explanatory Memorandum 2018 (n 176) 53 [293] (div 3 powers), 61 [340]–[341] (div 4 powers), 72 [403] (div 5 powers).

case studies,²²⁵ large-scale domestic emergencies are not confined to the boundaries of state and territory lines. The Black Summer bushfires traversed jurisdictional bounds at an alarming rate, with Queensland, New South Wales, the Australian Capital Territory and Victoria banding together, with the support of the ADF, to collectively respond to trans-boundary threats.²²⁶ Furthermore, the COVID-19 pandemic introduced an airborne virus with no jurisdictional bounds. The closing of state and territory borders presented unique challenges for all jurisdictions.²²⁷

2 Recommendations

In the event that a Commonwealth legal framework for large-scale domestic emergencies follows the same support request and delivery model as pt IIIAAA, namely Commonwealth interests and State protection orders, there is a strong argument for the inclusion of comparative multi-jurisdictional and trans-boundary response powers in the new statutory regime. Analogous to the modern terrorism threat, natural disasters and pandemics demonstrate the trans-boundary nature of large-scale emergencies. Such provisions, noting the assistance provided by pt IIIAAA in terms of legislative intent, would benefit from clearer articulation if adopted as part of a Commonwealth legal framework for the provision of ADF domestic disaster assistance.²²⁸ Simplified language for the proposed provisions is outlined below.

Table 3: Proposed Provisions — Multi-Jurisdictional and Trans-Boundary Operations

Multi-Jurisdictional Provision	Trans-Boundary Provision
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²²⁵ See above Parts II(A)–(B).

²²⁶ See *Royal Commission Report* (n 16) 165 [6.64]–[6.65], 189–90 [7.17]–[7.23].

²²⁷ By way of example, the closure of the New South Wales and Victoria border in July 2020 required ADF support to monitor over 55 border-crossing points pursuant to DACC policy guidance only and unaccompanied by enforcement powers: see Geoff Chambers and Adam Creighton, ‘Victoria: The Isolation State’, *The Australian* (Sydney, 7 July 2020) 2; Defence Bill Replacement Explanatory Memorandum 2020 (n 15) [2]–[3].

²²⁸ Unlike pt IIIAAA of the *Defence Act* (n 8), which has a more complex legal basis as a result of the division of powers in ss 114 and 119 of the *Constitution*, such difficulties may be avoided in relation to a national emergency regime.

An order may specify that it applies to more than one state or territory when a State of Emergency is occurring, has occurred, or is likely to occur that will affect Commonwealth interests in more than one jurisdiction.	An order may apply to a state or territory that is not named within the order if the powers are exercised for the purpose specified in the order, including protection of life, property or the environment.
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These draft provisions demonstrate how the existing provisions of pt IIIAAA, relating to incidents that traverse jurisdictional boundaries or occur across multiple jurisdictions simultaneously,²²⁹ provide guidance for a Commonwealth domestic disaster legal framework. As shown by the Black Summer bushfires and COVID-19 pandemic, natural disasters and public health emergencies do not adhere to jurisdictional confines. The supporting legal framework for large-scale domestic emergencies must therefore remain as fluid as the threat that is posed. A holistic Commonwealth framework to address future multi-jurisdictional and trans-boundary disasters, in line with the approach in pt IIIAAA, may present welcome statutory relief in an age where domestic emergencies cross jurisdictional borders with unwelcome ease. Complementary to these principles, pt IIIAAA also includes guidance on proper purpose²³⁰ and duty-to-cooperate requirements for ADF members conducting domestic operations.²³¹

C Proper Purpose and Duty-to-Cooperate Requirements

Part IIIAAA recognises that the states and territories retain responsibility for responding to domestic violence, including terrorism, within their jurisdictions and that the ADF must only be used in support of civilian agencies.²³² The principle of civilian agency primacy is equally applicable to the development of a national domestic disaster regime.

1 Comparable pt IIIAAA Provisions

First, s 39(2) of pt IIIAAA provides that the CDF must utilise the ADF in a reasonable and necessary manner that is consistent with the purpose specified in a call-out order. This includes compliance with any direction from the

²²⁹ *Defence Act* (n 8) ss 44, 51(5), 51K.

²³⁰ *Ibid* s 39(2).

²³¹ *Ibid* s 40(1)(a)(ii).

²³² Defence Bill Explanatory Memorandum 2018 (n 176) 51 [277].

Defence Minister in relation to such utilisation.²³³ The principal limitation upon the CDF is that the ADF is precluded from stopping or restricting any protest, dissent, assembly or industrial action, except in instances where there is a reasonable likelihood of death, serious injury to persons or serious damage to property.²³⁴ This prohibition provides a safeguard against encroachment upon civil liberties, including freedom of assembly and the right to peaceful protest.²³⁵ This aspect of the legislation is unique to pt IIIAAA, given the use-of-force powers permitted by the domestic violence regime.²³⁶

Secondly, s 40(1)(a)(ii) of pt IIIAAA imposes a requirement to assist and cooperate with civilian law enforcement agencies of the states and territories affected by a call-out order. The provision states that, as far as reasonably practicable, the CDF must ensure that the ADF cooperates with the civilian police force of the states and territories where they are operating.²³⁷ This includes the requirement for the utilisation of ADF members to be based upon a request from members of the civilian police force, wherever possible.²³⁸ Such requests should also be in writing, if reasonably practicable.²³⁹

These provisions are designed to ensure that the states and territories retain a degree of control over ADF members operating within their jurisdictions.²⁴⁰ This is achieved by striking a balance between the requirement for the ADF to respond to rapidly evolving threats and respecting the primacy of state and territory agencies.²⁴¹

²³³ *Defence Act* (n 8) s 39(3)(a).

²³⁴ *Ibid* s 39(3)(b).

²³⁵ Defence Bill Explanatory Memorandum 2018 (n 176) 51 [276].

²³⁶ *Defence Act* (n 8) s 46.

²³⁷ *Ibid*.

²³⁸ *Ibid* s 40(1)(b). The requirements in s 40 do not apply to the Australian offshore area, however: at s 40(1). The Commonwealth retains control of the Australian offshore area and thus does not have an obligation to cooperate with state or territory police forces in this regard: Defence Bill Explanatory Memorandum 2018 (n 176) 51 [279]. Furthermore, s 40(1)(b) of the *Defence Act* (n 8) includes an exemption from a police request for assistance in relation to airborne aircraft: see also Defence Bill Explanatory Memorandum 2018 (n 176) 52 [282]. This provision recognises that states and territories do not possess air domain capabilities and therefore rely upon the ADF for assistance. ADF members operating in the air domain are still required to assist and cooperate with their civilian law enforcement counterparts.

²³⁹ *Defence Act* (n 8) s 40(2). In accordance with sub-s (3), the CDF must always retain command of ADF members and is precluded from transferring command at any time.

²⁴⁰ Defence Bill Explanatory Memorandum 2018 (n 176) 52 [283]. See generally Fox and Lydeker (n 125) 301–2.

²⁴¹ Defence Bill Explanatory Memorandum 2018 (n 176) 52 [283].

2 *Recommendations*

Adapting the pt IIIAAA proper purpose and duty-to-cooperate provisions for a domestic disaster legislative regime is markedly easier to achieve, when compared to other provisions, given the transferability of the principles underpinning these sections. The only modification would involve removal of references to ‘the police force’ and expansion to include ‘emergency service agencies’ more generally. The proposed wording for the amended proper purpose and duty-to-cooperate provisions is contained below.

Table 4: Proposed Provisions — Proper Purpose and Duty-to-Cooperate Obligations

Proper Purpose Obligations	Duty-to-Cooperate Obligations
<p>1) The Chief of the Defence Force must:</p> <ul style="list-style-type: none"> a) utilise the Defence Force in a manner that is reasonable and necessary for the purpose specified in the call-out order; and b) comply with any direction that the Minister for Defence gives from time to time regarding the way the Defence Force is utilised. 	<p>1) In utilising the Defence Force under a call-out order, the Chief of the Defence Force must, as far as is reasonably practicable, ensure that the Defence Force:</p> <ul style="list-style-type: none"> a) cooperates with the emergency service agencies of those states and territories; and b) is not utilised for any particular task in any of those states and territories unless a member of an emergency service agency of that state or territory requests that the Defence Force be so utilised.

Recognising that the states and territories retain constitutional responsibility for emergencies within their jurisdictions, the imposition of proper purpose and duty-to-cooperate provisions within a federal disaster response framework will ensure that the states and territories have an appropriate level of control over operations within their boundaries, whilst equally empowering the ADF to respond to requests for assistance or to protect Commonwealth interests within the affected area. The enactment of such a provision may also encourage the states and territories to consider inserting an equivalent provision, regarding a duty to cooperate with the ADF when they are providing assistance, within their own statutory frameworks. The development of accountability, protection and immunity provisions is closely related to such arrangements.

D Accountability, Protections and Immunities

The lessons learnt from the accountability, protections and immunities provisions of pt IIIAAA, or lack thereof, provide varying levels of guidance for the development of a Commonwealth domestic disaster statutory framework. Whilst some existing provisions of the *Defence Act* may be directly transferable, the development of other provisions will require analysis of alternative statutory regimes.

1 Comparable pt IIIAAA Provisions

In terms of accountability, ADF members remain subject to both civilian law and their own internal discipline system.²⁴² Section 51Y(1)(a) of pt IIIAAA states that the applicable criminal law for ADF members operating during a call-out order is the substantive criminal law of the Jervis Bay Territory.²⁴³ Furthermore, s 51Y(3) grants the Commonwealth Director of Public Prosecutions exclusive prosecutorial responsibility for criminal acts done, or purported to be done, by ADF members operating under pt IIIAAA, whilst preserving the investigative powers of state and territory police.²⁴⁴ This provision is consistent with existing jurisprudence which suggests that ADF members may be subject to personal liability for conduct that is contrary to civilian criminal law.²⁴⁵

Section 51Y is of assistance in the development of a Commonwealth domestic disaster legal framework for two reasons. First, the section provides guidance on the implementation of a legal framework to clarify the criminal

²⁴² Hywel Evans and Andrew Williams, 'ADF Offensive Cyberspace Operations and Australian Domestic Law: Proprietary and Constitutional Implications' (2019) 47(4) *Federal Law Review* 606, 612, citing *Defence Force Discipline Act 1982* (Cth), *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518. See Bronitt and Stephens (n 163) 270. The ADF retains military law prosecution responsibility pursuant to the *Defence Force Discipline Act 1982* (Cth).

²⁴³ The provision further states that the substantive criminal law of the states and territories does not apply: *Defence Act* (n 8) s 51Y(1)(b).

²⁴⁴ The provision notes that the Act does not restrict or limit the investigative powers of a state or territory police force in relation to criminal acts done, or purported to be done, by ADF members operating in their jurisdiction under pt IIIAAA. See also Defence Bill Explanatory Memorandum 2018 (n 176) 84 [476].

²⁴⁵ See, eg, *Ridgeway v The Queen* (1995) 184 CLR 19, 73 (Gaudron J); *A v Hayden* (1984) 156 CLR 532, 540 (Gibbs CJ), 550 (Mason J), 562 (Murphy J), 573–4 (Wilson and Dawson JJ), 580 (Brennan J), 593 (Deane J); *Clough v Leahy* (1904) 2 CLR 139, 155–6 (Griffith CJ). As noted by Tindal CJ in his charge to the grand jury regarding the 1832 Bristol Riots, quoted in *R v Pinney* (1832) 5 C & P 254; 172 ER 962, 967 (Littledale J):

[T]he law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the ... same authority to preserve the peace of the King as any other subject.

law that is applicable to ADF members when providing DACC assistance. Currently, ADF members are subject to a myriad of laws when undertaking DACC operations, including a confusing mixture of state, territory and Commonwealth law.²⁴⁶ For example, during COVID-19 border enforcement operations, ADF members were required to operate across multiple jurisdictions concurrently.²⁴⁷ This exposed ADF members to criminal liability under Commonwealth law, service discipline law, the law of the jurisdiction they were operating within, and the law of the neighbouring jurisdiction. A legislative provision limiting the criminal law applicable to ADF members to that of one overarching jurisdiction, such as the Jervis Bay Territory, would provide clarity for ADF members conducting such operations.

Secondly, the political and legal sensitivities surrounding the domestic deployment of the ADF provide support for clearer legislative parameters to hold ADF members to account for criminal acts done, or alleged to be done, during domestic emergency operations. Similarly to call-out orders under pt IIIAAA, the internal utilisation of the ADF for domestic disaster relief has the potential to encroach upon the civil liberties of Australian citizens, by leading to, for example, restraints upon freedom of movement, searches of property and the forcible entry of premises. A singular compliance framework would ensure that ADF members can be properly trained on the applicable criminal law and held accountable for breaches that may occur during internal operations. This again demonstrates how leveraging existing provisions of pt IIIAAA may assist in developing a Commonwealth domestic disaster legal framework.

Conversely, the development of legal protections and immunities for ADF members during domestic operations is a matter that requires ongoing consideration. Current deficiencies within pt IIIAAA and broader provisions of the *Defence Act*, particularly s 123,²⁴⁸ have been identified as requiring

²⁴⁶ Saultry and Copeland (n 3) 164.

²⁴⁷ 'ADF to Leave State Borders and Help with Quarantine, Mathias Cormann Says', *ABC News* (Web Page, 25 September 2020) <<https://www.abc.net.au/news/202-0-25/states-borders-closed-coronavirus-lose-adf-help/12701584>>, archived at <<https://perma.cc/5X8X-BSKT>>.

²⁴⁸ Section 123 of the *Defence Act* (n 8) provides ADF members with immunities from certain state and territory laws. Such immunities are limited to permissions, licences and registration required either in the course of ADF members' duties (s 123(1)(b)) or for 'a vehicle, vessel, animal, firearm or other thing belonging to the Commonwealth' (s 123(1)(a)). Whilst acknowledging that this provision may provide limited immunities from particular state and territory laws, broader protections beyond the scope of s 123 are required for ADF members completing DACC activities.

reform.²⁴⁹ As part of these reforms, the *Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Act 2020* (Cth) ('*Defence Legislation Amendment Act 2020*') was passed on 18 December 2020.²⁵⁰ The Act provides limited legislative protections for ADF members during DACC operations. Schedule 2 of the Act provides immunities for ADF members, in certain cases, for good faith performance of their duties during DACC activities.²⁵¹ Whether these provisions provide ADF members with sufficient protection remains to be seen.

To date, the positive public reception of ADF members when completing such activities has shielded the issue from deeper analysis.²⁵² However, with the anticipated increase in requests for ADF assistance in response to domestic emergencies, it is necessary to consider what would happen if an erroneous act or omission were to occur.²⁵³ There are significant legal risks if ADF members are called upon to provide assistance without the reassurance of adequate legislative protections in return. Part IIIAAA includes minimal legal protections and immunities for ADF members, resulting in much weaker legislative safeguards when compared to other statutory frameworks involving the domestic employment of the ADF.²⁵⁴ The *Defence Legislation Amendment Act 2020* has demonstrated a positive step towards the provision of more permissive protections for ADF members but does not appear to go far enough. The lessons learnt from pt IIIAAA demonstrate that it may be necessary to look further afield to develop this aspect of a domestic disaster response regime.

²⁴⁹ The *Royal Commission Report* (n 16) has acknowledged this issue and the impact of the ADF's lack of privileges and immunities: at 200–1 [7.73]–[7.79]. See also *Royal Commission Interim Observations* (n 17) 12 [59].

²⁵⁰ *Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Act 2020* (Cth) s 2(1) ('*Defence Legislation Amendment Act 2020*').

²⁵¹ *Ibid* sch 2 item 4, inserting *Defence Act* (n 8) s 123AA.

²⁵² Saultry and Copeland (n 3) 166. See generally Ward (n 141) 2.

²⁵³ The *DACC Manual* (n 30) acknowledges that ADF members may be exposed to claims for loss or damage arising from their participation in DACC operations: see at pt B 5-14 [5.15]. Such operations regularly involve interacting with members of the public during potentially unsafe and dangerous circumstances, therefore increasing the potential for both criminal and civil action.

²⁵⁴ The *Defence Act* (n 8) s 51S(1) provides a good faith protection which preserves the defence of lawful authority when an ADF member fails to comply with an obligation under pt IIIAAA divs 3–6 but exercises their powers in good faith. This legal protection only attaches to minor or technical deficiencies performed in good faith: Defence Bill Explanatory Memorandum 2018 (n 176) 79 [446]. Section 51Z of the *Defence Act* (n 8) also includes the defence of superior orders for a criminal act done, or alleged to be done, by an ADF member when operating under pt IIIAAA.

2 Recommendations

In terms of the development of accountability provisions, it is recommended that the entirety of s 51Y of pt IIIAAA be replicated in a Commonwealth domestic disaster legal framework. In line with the extract above, it is proposed that s 51Y is directly transferable to a new statutory regime and would provide the required clarity regarding the criminal law applicable to ADF members during domestic disaster relief operations. This will in turn reduce some of the current legal confusion associated with such activities.

In relation to legal protections and immunities, it is recommended that statutory drafters look beyond current provisions within pt IIIAAA, and the broader *Defence Act*, to develop even stronger safeguards for ADF members. The *Maritime Powers Act 2013* (Cth) and the *Fisheries Management Act 1991* (Cth) offer guidance in this regard. Provisions within both Acts provide ADF members, when appointed as officers under the relevant statute, with complete protection from ‘an action, suit or proceeding’ for acts and omissions performed in good faith when exercising powers under the respective provisions.²⁵⁵ Similarly, legal protections and immunities for ADF members as part of a Commonwealth framework for domestic disaster relief should be more comprehensive than pt IIIAAA and s 123AA of the *Defence Act*, in line with the comparable complete immunity provisions outlined above. Leveraging these alternative statutes, proposed language for a protections and immunities provision within a Commonwealth domestic disaster statutory framework is outlined below.

Table 5: Proposed Provision — Protection from Suit

Protection from Suit

²⁵⁵ *Maritime Powers Act 2013* (Cth) s 107 (*‘Maritime Powers Act’*); *Fisheries Management Act 1991* (Cth) s 90 (*‘Fisheries Management Act’*). The *Maritime Powers Act* (n 255) s 107 states:

None of the following is liable to an action, suit or proceeding for or in relation to an act done, or omitted to be done, in good faith in the exercise or performance, or the purported exercise or performance, of a power or function under this Act: (a) an authorising officer; (b) a maritime officer; (c) a person assisting; (d) any other person acting under the direction or authority of a maritime officer.

The *Fisheries Management Act* (n 255) s 90 states:

An officer or a person assisting an officer in the exercise of powers under this Act or the regulations, is not liable to an action, suit or proceeding for or in respect of anything done in good faith or omitted to be done in good faith in the exercise or purported exercise of any power conferred by this Act or the regulations.

ADF members can be appointed authorised officers under both regimes: *Maritime Powers Act* (n 255) s 104(1)(a); *Fisheries Management Act* (n 255) ss 4 (definition of ‘officer’ para (c)), 83.

A Defence Member is not liable to an action, suit or proceeding for or in respect of an act done, or omitted to be done, in good faith in the exercise, or purported exercise, of a power conferred under this provision.

The inclusion of a ‘protection-from-suit’ provision will ensure adequate protections and immunities for ADF members when engaged in domestic disaster response activities. These safeguards will also bring legal protections for ADF members in line with those applicable to their civilian counterparts and other comparable statutory frameworks.²⁵⁶ Whilst the *Defence Legislation Amendment Act 2020* has attempted to bridge this gap, it does not include protection-from-suit immunities and remains confined to protection for duties conducted in good faith.²⁵⁷ Therefore, the new legislative provisions are likely to attract the same issues that have been identified within existing provisions of pt IIIAAA, most particularly s 51S(1).²⁵⁸

E Division of General and Specific Powers

Additionally, the *Defence Act* provides guidance in relation to the type, category and structure of powers that are required to develop a functional legislative framework for ADF assistance during domestic disasters. Noting that pt IIIAAA powers relate exclusively to responding to and ending domestic violence, the part provides broader guidance on the structural organisation of general and specific powers that could be included within a new regime.

1 Comparable pt IIIAAA Provisions

Part IIIAAA powers are contained within divs 3–5. Division 4 contains a wide-ranging array of authorities, which can best be categorised as general powers.²⁵⁹ Conversely, div 3 contains ‘high-end powers’, requiring ministerial authorisation, and provides an example of specific powers.²⁶⁰ Specific powers are conferred to resolve a particular type of emergency and require specific

²⁵⁶ For a comparable state law provision, see, eg, *Public Safety Preservation Act 1986* (Qld) s 47, which provides protection from liability for acts and omissions done ‘in good faith and without negligence.’

²⁵⁷ *Defence Legislation Amendment Act 2020* (n 250) sch 2 item 4, inserting *Defence Act* (n 8) s 123AA(1).

²⁵⁸ See above n 254 and accompanying text.

²⁵⁹ *Defence Act* (n 8) s 51D(2). These powers include the power to search, seize and detain: at ss 51D(2)(f)–(h).

²⁶⁰ *Defence Act* (n 8) ss 46(1)(a), (5)(a)–(d). These powers include: capturing or recapturing a location: at s 46(5)(a); and taking measures (including use of force) against an aircraft or vessel: at s 46(5)(d).

authorisation.²⁶¹ Specific powers are more purposive in nature as they are directed towards responding to a particular type of emergency.²⁶² Additionally, Part IIIAAA also adopts a tiered approach to the authorisation of statutory powers. Division 3 powers in s 46(5), which require specific ministerial authorisation prior to enactment, are an example of this tiered authorisation approach.²⁶³ This model enables authorisations to be tailored to specific operations, including the satisfaction of procedural conditions before powers can be exercised.²⁶⁴ The powers are focused upon preventing, ending and protecting against acts of violence.²⁶⁵ Such powers are generally reserved for special operations command and may include hostage recovery, siege resolution and hijacking response.²⁶⁶ Division 3 powers require specific ministerial authorisation, with the exception of sudden and extraordinary emergencies.²⁶⁷ Division 4 contains powers that may only be exercised within a declared specified area.²⁶⁸ These powers are generally reserved for assisting state and territory police through supplementation and augmentation. Such powers include the ability to: search premises, persons or means of transport;²⁶⁹ erect barriers and cordons;²⁷⁰ issue directions;²⁷¹ seize items;²⁷² and detain persons.²⁷³ Division 5 contains powers to protect declared infrastructure from a threat of damage or destruction that would directly or indirectly endanger life or cause serious injury to any person.²⁷⁴

²⁶¹ Lee et al (n 55) 170, 195, discussing *Disaster Management Act 2003* (Qld).

²⁶² Lee et al (n 55) 170.

²⁶³ *Ibid* ss 46(1)(a), (5).

²⁶⁴ See generally Lee et al (n 55) 196.

²⁶⁵ Defence Bill Explanatory Memorandum 2018 (n 176) 54 [297].

²⁶⁶ *Defence Act* (n 8) ss 46(5)(a)–(d), (7), (9).

²⁶⁷ *Ibid* ss 46(1)(a)–(b). Ministerial authorisation is provided by an authorising Minister under pt IIIAAA, namely the Prime Minister, Minister for Defence or Attorney-General: at s 31 (definition of ‘authorising Ministers’).

²⁶⁸ *Ibid* ss 43(1), 51.

²⁶⁹ *Ibid* ss 51A, 51D(2)(f)–(g).

²⁷⁰ *Ibid* s 51D(2)(a).

²⁷¹ *Ibid* ss 51D(2)(c)–(d), (f)–(g), (i)–(j).

²⁷² *Ibid* ss 51D(2)(h)(i), 3(c), 5(b).

²⁷³ *Ibid* ss 51D(2)(h)(ii), 3(d), 5(c).

²⁷⁴ *Ibid* s 51H. Based upon the concomitant risk to life, infrastructure that may be declared includes hospitals, power stations, water treatment plants and nuclear power stations: Defence Bill Explanatory Memorandum 2018 (n 176) 71 [398].

Part IIIAAA is composed of a combination of general and specific powers to assist in the resolution of domestic violence.²⁷⁵ General powers are conferred to deal with a broad array of possible emergencies and may be utilised following a declaration or proclamation.²⁷⁶ The broad ‘policing powers’ contained in div 4 of pt IIIAAA are an example of general powers.

2 Recommendations

The inclusion of general, specific, and tiered power authorisation in pt IIIAAA is valuable in the development of a Commonwealth framework for domestic disaster relief for several reasons. First, natural disasters, such as the Black Summer bushfires, demonstrate how general powers may be of benefit for ADF utilisation. Such operations may require a broad array of wide-ranging powers to enable general disaster response and recovery activities. Secondly, public health emergencies, such as the COVID-19 pandemic, demonstrate how specific powers may be required to enable explicit types of assistance by ADF members. Examples of possible general and specific powers that could be included in a Commonwealth domestic disaster relief regime are outlined below.

Table 6: Proposed Provisions — General and Specific Powers

Type	Description
General Powers (Natural Disasters)	1) Powers to enable: <ol style="list-style-type: none"> a) search; b) seizure; c) acquisition and control of resources; d) control of movement; e) entry, evacuation and exclusion from premises; f) issuing of directions; g) cordoning; and h) requests for assistance.²⁷⁷

²⁷⁵ This is not dissimilar to the structure of state and territory disaster response legislative powers: Lee et al (n 55) 195, citing *Emergency Management Act 2004* (SA) ss 22–4, *Emergency Management Act 1986* (Vic) ss 23(1), 36A, *Emergency Management Act 2005* (WA) ss 50, 56.

²⁷⁶ Lee et al (n 55) 170.

²⁷⁷ See generally Lee et al (n 55) 223–4, discussing *Public Safety Preservation Act 1986* (Qld) s 8; Eburn, *Emergency Law* (n 72) 152, discussing *Fire and Emergency Services Act 1998* (WA).

Specific Powers (Public Health Emergencies)	1) Powers to enable: <ol style="list-style-type: none"> a) quarantine; b) detention; c) cordoning; d) issuing of directions; and e) requirement to undergo medical testing, examination, observation and treatment.²⁷⁸
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The above table provides a non-exhaustive list of general and specific powers that could be utilised by ADF members under a Commonwealth domestic disaster relief legislative framework in response to a natural disaster or public health emergency. It demonstrates how the divisional construction of powers in pt IIIAAA can be of assistance in the development of a new statutory regime. Additional 'specific powers' could also be incorporated in such a scheme to address: environmental emergencies; chemical, biological, radiological and nuclear emergencies; biosecurity emergencies; and ad hoc emergencies.²⁷⁹ The adoption of a tiered authorisation approach for a Commonwealth disaster management legal framework is also a logical option. The invocation conditions for the various tiers of emergency powers could be linked to the commensurate invasiveness and breadth of such powers,²⁸⁰ thus providing an additional procedural safeguard during emergency operations.

This analysis demonstrates the immense lessons that can be learnt from pt IIIAAA in the development of an analogous legislative framework for ADF powers in response to large-scale domestic emergencies. The divisional and sectoral breakdown of the abovementioned provisions illustrates the transferable nature of comparable statutory provisions that can be adapted and amended, as required, to provide a starting point for a DACC legislative regime. It is further proposed that the inclusion of new provisions within the *Defence Act* could create greater simplicity for the introduction and implementation of DACC legislative arrangements, allowing comparison to be drawn with similar DFACA statutory powers whilst also articulating the distinct differences between the two regimes. This is of particular importance during concurrent DFACA and DACC operations.

²⁷⁸ Lee et al (n 55) 207, citing *Public Health Act 2010* (NSW) s 8(3), *Public Health Act 2005* (Qld) ch 8 pt 7, *South Australian Public Health Act 2011* (SA) s 90(3), *Public Health Act 1997* (Tas) s 16(2)(a), *Public Health and Wellbeing Act 2008* (Vic) ss 200(1)(a)–(d), *Public Health Act 2016* (WA) ss 184–5.

²⁷⁹ Lee et al (n 55) 199–217.

²⁸⁰ *Ibid* 196.

Furthermore, pt IIIAAA has illustrated the vast advantages to be gained from statutory articulation of ADF domestic powers, namely the provision of internal security pursuant to s 119 of the *Constitution*. The success of the DFACA legislative framework, most particularly in legitimising ADF internal powers and providing a statutory basis for ADF domestic operations, further validates the creation of an equivalent statutory regime for ADF DACC powers, particularly as the domestic employment of the ADF is expected to increase in the coming years.

VI CONCLUSION

The provision of military support following the catastrophic events of the Black Summer bushfires and the COVID-19 pandemic has demonstrated that the domestic role of the ADF is in a period of transition, with evolution from external defence offshore to greater internal defence.²⁸¹ Whilst existing constitutional and policy arrangements have served Australia well to date,²⁸² a legal lacuna continues to cloud DACC operations.²⁸³ This period of transition brings with it a strong argument for the development of a Commonwealth statutory framework to govern ADF assistance to domestic disaster relief. Coupled with the anticipated increase in future requests for ADF assistance in the face of the rising frequency and intensity of national emergencies, recent disaster events have highlighted the importance of developing a defined legal framework to underpin the evolution in the ADF's internal role.²⁸⁴

While the creation of new legislation is often fraught with difficulties, it has been proposed in this article that the Commonwealth government needs to look no further than the *Defence Act* for assistance in developing a new domestic disaster relief regime. Through the analysis of comparable internal security powers in pt IIIAAA, it has demonstrated that the existing provisions of the *Defence Act* provide significant guidance for the creation of a comparable Commonwealth statutory framework for the utilisation of the ADF during large-scale domestic emergencies.

Leveraging the analogous sections from pt IIIAAA, recommendations on draft legislative provisions for inclusion within a new statute have been proposed, including: support request and delivery models; multi-jurisdictional and trans-boundary provisions; and protections and immunities. This analysis

²⁸¹ See above Part III(C). See Fox and Lydeker (n 125) 287.

²⁸² McPhee (n 10) 15 [14].

²⁸³ Head, *Emergency Powers in Theory and Practice* (n 74) 202. See also Fetchik (n 85) 31–2.

²⁸⁴ Saultry and Copeland (n 3) 171.

has demonstrated that the *Defence Act* can provide a valuable starting point for a Commonwealth legal framework for the utilisation of the ADF during domestic disaster relief, with the enactment of such a regime providing a clearer legal basis for ADF internal operations as the military shifts focus from war-fighting efforts abroad to greater disaster response and recovery at home.