

The Commonwealth response to Cyclone Tracy: implications for future disasters.

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Introduction

Cyclone Tracy was a disaster on a scale unparalleled in Australian history. It caused millions of dollars in damage and destroyed most of Darwin (Chamberlain, Doube, Milne, Rolls & Western 1981, 97). It also exposed inadequacies in Commonwealth responses to disasters of its magnitude (Robertson 1999, 55).

Of Darwin's population of 45,000, over 30,000 people were subject to an evacuation overseen by the Natural Disasters Organisation (NDO), a Commonwealth body whose powers were poorly defined at the time of the cyclone (Jones 2010, 223). Even now, there remains significant confusion about the Commonwealth's role in disaster relief. No legislation exists that immediately addresses this issue (*Emergency Management Australia* 2011). Additionally, while there are disaster plans in place outlining how organisations relate to one another, these are unenforceable (*Australian Government Disaster Response Plan* 2008). They also place most responsibility for disaster relief with the states (*Australian Government Disaster Response Plan* 2008).

This paper will review the government response to Cyclone Tracy and determine the legal authority behind the Commonwealth's actions. In doing this, sources of Commonwealth power will be outlined, and their scopes and implications identified for application to future disasters.

The events of Cyclone Tracy

By international standards, Cyclone Tracy was comparatively small. Until 2008, it held the record for smallest cyclone area, with gale force winds extending only 50km from its centre (*Hurricane Research Division-Frequently Asked Questions* 2009). Despite this, its effect on Darwin was devastating.

The first signs of the cyclone's imminence were detected by satellite almost a week prior to its landfall (Wilkie & Neal 1976, 474). Darwin had been threatened by Cyclone Selma weeks earlier, but had escaped unscathed, leading the population to assume that Cyclone Tracy would be similarly uneventful (Phelts 1999, 45). However, on the afternoon of Christmas Eve, high winds, storm clouds and rain were reported (Cyclone Tracy Exhibition 2007). The cyclone itself hit Darwin at about 2am on Christmas Day (Cyclone Tracy Exhibition 2007).

By the following morning, the majority of Darwin had been destroyed. Although it had survived major cyclones in 1897 and 1937, the city was unprepared for an incident of this magnitude (*Cyclone Tracy Exhibition* 2007). Most houses were built in the tropical style and were vulnerable to cyclones. Electrical services and running water had been disabled (*Cyclone Tracy Exhibition* 2007), while communications between Darwin and other parts of the country had been severed (Robertson 1999, 55). No-one took charge of the situation until 6.20am, when Major General Stretton, then head of the NDO, was notified (Robertson 1999, 55). The NDO had been created only a few months prior to Cyclone Tracy, as a response to catastrophic flooding in Brisbane that highlighted the Queensland State government's inability to cope with the demands of a major emergency (Dwyer 2006, 41). Similar events had occurred in 1967, when major fires devastated Hobart, overwhelming the Tasmanian government (Jones 2010, 222).

Once notified, Major General Stretton travelled to Darwin, where the decision was quickly made to place him in command, answerable only to the Prime Minister. Despite Major General's obvious military background, this was not a military endeavour (Robertson 1999, 56). Military personnel were deployed, but forbidden from carrying weapons (Head 2001, 273). Meanwhile; local officials were largely unsuccessful in organising themselves. There was no organised response to the disaster, and all the decisions were made by persons other than the local Northern Territory authorities (Jones 2010, 223). The next day, it was determined that Darwin was capable of supporting less than a quarter of its population, so the decision was made to evacuate, with residents leaving the city in military and civilian aircraft as well as by road (Jones 2010, 223). By 31 December, Darwin's population had been reduced to 10,500, and the emergency was declared over (Robertson 1999, 58).

In the aftermath of the cyclone, it became apparent that Darwin needed extensive rebuilding. The Commonwealth established the Darwin Reconstruction Commission, which was tasked with the responsibility of reconstructing the city in fewer than five years. This was in fact accomplished in fewer than three years. Nevertheless, the Commonwealth government was criticised for using the opportunity to re-create Darwin according to its own designs (*1975 Cabinet Records- Selected Documents* 1975).



December 1974: Darwin, NT. An injured survivor of Cyclone Tracy stands in front of the wreckage of a building in Darwin.

The historical context in which these criticisms were made is important. The Prime Minister of the time, Gough Whitlam, was seeking to expand the role of Federal government into areas traditionally controlled by the States, such as education, through Specific Purpose Payments—packets of Commonwealth funding tied to purposes determined by the Commonwealth (Dwyer 2006, 43). Unlike other Commonwealth funding arrangements such as the normal s96 process, Specific Purpose Payments needed to be routed through State parliaments for approval. The Whitlam government made more extensive use of these Payments than any earlier government, paving the way for future governments to expand Commonwealth influence into areas such as health and education (Dwyer 2006, 43).

Ultimately, Darwin was rebuilt, but the trauma and social and political ramifications of Cyclone Tracy continue to this day.

The Commonwealth response

The Commonwealth response raises several important legal issues.

a. Northern Territory self-government

The Commonwealth has the power to make laws with regard to the Territories (*Commonwealth of Australia Constitution Act 1900* (Cth), s 122). The Northern Territory was granted self-government in 1978 (*Northern Territory (Self Government) Act 1978* (Cth)), four years after Cyclone Tracy. Thus, in 1974, the Territory was under the direct, legislative control of the Commonwealth. The Commonwealth could exercise full authority in Darwin in circumstances that would

not apply in any Australian State (*Commonwealth of Australia Constitution Act 1900* (Cth), s 122). Even now, while the Northern Territory has self-government, the Commonwealth could exercise legislative authority should it be required.

b. The Commonwealth Constitution and disaster response

There is no doubt, that, given s 122 of the Commonwealth Constitution and the absence of Territory self-government, the Commonwealth was able to take direct action in the Northern Territory in 1974. What is not so clear is whether they could take similar action in 2012, or in one of the Australian States.

The Commonwealth may only act when it is permitted to do so by the Commonwealth Constitution. In contrast, State constitutions include clauses authorising those States to make laws relating to their peace, order and good governance. This has been held to mean that they can legislate on any subject not explicitly covered by the Commonwealth Constitution (*Union Steamship Co Ltd v King* (1988) 166 CLR 1), making disaster relief a State responsibility.

Commonwealth heads of power are articulated primarily in s 51 of the Constitution. While there is nothing specifically authorising disaster relief, there are several sections which allow the Commonwealth to involve itself in the relief process.

A second potential head of power is the external affairs power (*Commonwealth of Australia Constitution Act 1900* (Cth), s 51(xxix)). Where the Australian government has entered into treaties, the external affairs power can be used to transform the obligations in these treaties into domestic law (*Commonwealth v Tasmania* (1983) 158

CLR 1). The *International Covenant on Economic, Social and Cultural Rights* contains rights to adequate food, clothing and housing, and requires governments party to the treaty to take steps to ensure that their citizens have access to those rights (*International Covenant on Economic, Social and Cultural Rights*). As the treaty was not ratified until 1975, the Commonwealth was not obliged to abide by it in 1974, but was obliged not to undermine it. Arguably, allowing Darwin to stay devastated without attempting to rebuild it would have demonstrated a blatant disregard for the provisions of the *Covenant*, and thus undermined it.

Another relevant head of power is the nationhood power. Section 51 (xxxix) grants the Commonwealth power over matters related to the role, operation and powers of government. Section 61 of the *Covenant* vests executive power in the Queen via her representative, the Governor-General. These sections have been held to grant the Commonwealth government, in particular the Executive, a wide range of powers associated with national, executive government (*Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 102). Potentially, this could include responding to natural disasters that occur on a scale necessitating a national response. *Pape*, discussed below, expands on this issue.

c. The role of defence

A general authority for the Commonwealth to deploy the defence force can be found in s 51(vi) of the Constitution. Specifically, the Commonwealth has the power to deploy forces within Australia in response to perceived threats against Commonwealth interests. It may protect itself from existential threats, even when those threats are not of a military nature (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1).

There is a perception that the use of the defence force in civilian settings should be tightly controlled (White 2005, 438). Thus, politicians are reluctant to order such deployments unless the existence of the Commonwealth is under threat. It is unlikely that a natural disaster could occur on this scale. Even the 2011 floods in Queensland had only a minor effect on the national economy, with the GDP falling by 0.4% (*Economic Impact of the Queensland Floods 2011*), and led to no civil disturbance or violence.

State governments may request military aid in dealing with disasters. The circumstances under which this can be requested are outlined in the *Defence Assistance to the Civil Community* guidelines. It is worth noting that they may have been invoked in the circumstances of Cyclone Tracy. However, the cyclone hit with very little warning, and in the immediate aftermath of the event there was no effective local government, so there would have been no-one capable of requesting military aid (Robertson 1999, 57).

d. Martial law

The status of the soldiers involved in disaster relief efforts is unclear. Major General Stretton made it clear during Cyclone Tracy that he was acting in his civilian capacity as director of the NDO (Head 2001, 273). His refusal to declare martial law actually earned him criticism from other military figures at the time (Head 2001, 273). Australia has no martial law tradition, so any declaration to that effect would have been controversial, especially given the lack of concrete legal authority to support it.



December, 1974. Darwin, NT. Then Prime Minister, Mr. Gough Whitlam, M.P. (first white car) inspects the wrecked suburb of Casuarina after Cyclone Tracy hit Darwin.

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Legal and political developments since 1974

Since Cyclone Tracy, there have been several developments which could affect the form a Commonwealth response would take today. The justification for intervening in disasters has been clarified by a line of cases culminating in *Pape v Commissioner of Taxation* and legislation has been passed which authorises compulsory evacuations and grants powers to officials to control the movements of persons in disaster-affected areas. If an event such as Cyclone Tracy took place today, it is likely that the practical response would be similar to what happened in 1974, but it would be on much more solid legal ground.

a. *Pape v Commissioner of taxation*

One potential legal justification for Commonwealth involvement in disasters like Cyclone Tracy is the nationhood power. Because this power is not explicit, and has its roots in the equally undefined royal prerogative, a line of cases has developed in an attempt to clarify it.

The Constitution was created in the legal context of the day. In 1901, it was considered unnecessary to define the royal powers outlined in s 61. Because the Constitution was originally an expression of British imperial power, its descent from the British royal prerogative was clear (Kerr 2011, 26).

In 1994, Theophanous suggested that, rather than being authorised by imperial power, the power underlying the Constitution came from its democratic mandate (*Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 102). This decoupled the nationhood power from royal prerogative, requiring the courts to define the power (Kerr 2011, 26). *Vadarlis* concerned the power to deport aliens, traditionally part of the royal prerogative, and whether this could be justified under the nationhood power. Here, the court reaffirmed the *Theophanous* principle that the nationhood power was separate from the royal prerogative, stating that the nationhood power authorised the Commonwealth government to legislate on topics it should logically be able to as a national government (*Ruddock v Vadarlis* (2001) 110 FCR 491).

More recently, *Pape* concerned the legality of the stimulus package introduced in response to the Global Financial Crisis. It hinged directly to the Commonwealth's ability to respond to disasters, albeit not necessarily natural ones. *Pape* reaffirmed the nationhood description from *Vadarlis*, defining the power as covering subject matter suited to national government by its nature (*Pape v Commissioner of Taxation* [2009] HCA 23 [233]). The majority also noted that, like defence power, the nationhood power was elastic, and could expand in times of national emergency (Kerr 2011, 39). This could authorise the creation of national-level responses to natural disasters. Thus, it could now be used to justify executive actions such as those seen in *Vadarlis* and in the deployment of the NDO and the ADF after

Cyclone Tracy. The *Pape* decision was the first to mention disaster relief as part of the nationhood power, which will make it easier for future disaster relief efforts to stand up to scrutiny.

This being the case, *Pape's* implications are not totally settled. It was noted by the minority that 'emergency' was an extremely vague category of events, too broad to hang a major constitutional doctrine from (*Pape v Commissioner of Taxation* [2009] HCA 23 [347]). It would also be easy to distinguish other disasters from the Global Financial Crisis, which happened over several months and involved no physical danger to individuals or property. By comparison, Cyclone Tracy caused massive destruction in fewer than 24 hours. As uses of the nationhood power are asserted on a case-by-case basis, these factual differences are important (Kerr 2011, 39).

b. Compulsory evacuations

There was little need for compulsory evacuations in the aftermath of Cyclone Tracy. Most inhabitants of Darwin, when confronted with the reality of their situation, were ready to leave and did not need to be persuaded (Robertson 1999, 57). Nonetheless, when compulsory evacuations are necessary, legislation authorising them now exists. The powers and obligations of emergency services personnel differ between States, with whom legislative power resides. Rather than one overriding Commonwealth Act, there are a number of disparate State Acts, each granting different powers (Loh 2007, 5).

The relevant Northern Territory Acts are the *Fire and Emergency Act 1996* (NT), which authorises a nominated incident controller to order persons to vacate land (*Fire and Emergency Act 1996* (NT), s 20), and the *Disasters Act 1982* (NT). Unlike similar legislation elsewhere, the *Fire and Emergency Act* does not make ignoring such orders an offence. Thus, it is unclear what the consequences of doing so would be. It is also unclear whether persons other than the incident controller, such as soldiers or emergency services personnel, are able to order persons to leave areas (Loh 2007, 5). While the incident controller can delegate other persons to act for them, it does not authorise persons who are not the incident controller to take similar actions.

Conclusion

Disaster response management has traditionally been the responsibility of local and State governments. However, as events like Cyclone Tracy demonstrate, it is possible for natural disasters to overwhelm local and State governments, necessitating the involvement of the Commonwealth. When this happened in 1974, there was unclear and fragmented legal support for the actions taken by the Commonwealth.

Since that time, several changes have taken place. The power of the Commonwealth to intervene in national emergencies was increased in *Pape*. The nature of large-scale disaster relief is such that it would likely fall

within the scope of the nationhood power as defined by that case. The Commonwealth is also better placed to provide funds for reconstruction due to larger resources pool.

Nonetheless, despite these changes, disaster relief is still conceived of as primarily a State responsibility. While Australia is much closer to having a defined Commonwealth response to natural disasters than it was in 1974, there remain ambiguities as to what exactly could be done if Cyclone Tracy were to happen again.

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