



THE LAW SOCIETY
OF NEW SOUTH WALES

5 September 2024

Mr Clayton Barr MP, Chair
Joint Select Committee on the NSW Reconstruction Authority
Parliament of NSW
Parliament House
Macquarie Street
Sydney NSW 2000

By e-mail: nswreconstructionauthority@parliament.nsw.gov.au

Dear Mr Barr,

Review of the *NSW Reconstruction Authority Act 2022* – Question on Notice and Supplementary Questions

Thank you for the opportunity to provide responses to the question taken on notice by the Law Society during the hearing of the Joint Select Committee on the NSW Reconstruction Authority on 16 August 2024, as well as to the supplementary questions provided to the Law Society subsequent to the hearing. The Law Society's Public Law Committee has contributed to this submission.

Question on Notice

Question: Other submissions to this Committee have noted that the meaning of "disaster" under section 6 of the Act is unclear. Would you agree with that and, if so, what amendments would you make?

Response: 'Disaster' is defined under s 6 of the *NSW Reconstruction Authority Act 2022* (NSW) (**Act**) as follows:

- In this Act, *disaster* includes the following—
- (a) natural disasters, including, for example, bushfires, coastal hazards, cyclones, earthquakes, floods, heatwaves, landslides, severe thunderstorms, tornadoes and tsunamis,
 - (b) hazards caused by natural disasters including air pollution, water and soil contamination and water insecurity,
 - (c) other emergencies in relation to which the Minister has requested assistance from the Authority,
 - (d) other emergencies in relation to which—
 - (i) a public authority, including a Minister other than the Minister administering this Act, has requested assistance from the Authority, and
 - (ii) the Authority has agreed to provide assistance,
 - (e) events, incidents or matters, or classes of events, incidents or matters, prescribed by the regulations.

We note that this definition is broad and open-ended. Given the breadth of powers and responsibilities allocated under the Act with regard to the central concept of ‘disaster’, we suggest that a tighter definition would be helpful. One option would be to amend the introductory wording to the effect that it becomes less open. For example:

In this Act, **disaster** means an event causing significant disruption to the functioning of a community that exceeds its capacity to respond using existing resources. It includes the following –

...

Further, it would be helpful to consider how the current drafting, and any amendments, interact with the definition of ‘emergency’ under s 4 of the *State Emergency and Rescue Management Act 1989* (NSW).

Supplementary Questions

Question 1: *The Law Society’s submission raises concerns about the safeguards to the Minister’s declaration power under sections 39(2), 40(2) and 41(2) of the Act.*

- a) *How could these safeguards be strictly defined to ensure the Minister’s powers are exercised appropriately and transparently?*

The Law Society’s submission highlighted concerns about the breadth of Ministerial powers, not only to declare projects and areas, but also to issue orders specifying that other Acts or statutory instruments do not apply in relation to such declared projects or areas.¹ The scope of other laws that may be excluded, the circumstances in which they may be excluded, and the period for which they may be excluded, are undefined. Such exercises of ministerial power may have serious and lasting consequences for potentially large numbers of NSW residents and businesses.

We note that under s 92 of the Act, a decision made by the Minister or Authority under the Act is not an administratively reviewable decision under the *Administrative Decisions Review Act 1997* (NSW). Even if such a decision were reviewable, this may not function as an appropriate safeguard given the breadth of the powers in question.

Primary Object

We suggest that the primary object of the Act as set out under s 3 could be amended to include a provision to the following effect:

- (c) co-ordination and prioritisation of projects and funding to maximise the effectiveness of government support across the State in relation to (a) and (b).

Sub-sections 39(2)(c) and 40(2)(c) could then be replaced with a requirement that the Minister is satisfied that the declaration is necessary in accordance with the primary object of the Act. Section 41(2)(c) could also be amended as follows:

- (c) the Minister is satisfied the declaration is necessary to help prevent, or mitigate against, potential disasters for a community **in accordance with the primary object of the Act**.

Definitions

As our submission noted, ‘declared project’, ‘reconstruction area’ and ‘disaster prevention area’, which are key terms throughout the Act, are not substantively defined.

The wording of s 39(1) suggests that a ‘declared project’ is limited to a ‘project for proposed development’. However, other provisions in the Act refer to ‘declared project’ and

¹ See *NSW Reconstruction Authority Act 2022* (NSW), ss 39(4), 40(3), 41(4). Note also ss 68-70 which provide alternative power for the Minister in ‘exceptional circumstances’.

'development' as if they were separate concepts: See, for example, the definitions of 'prescribed decision' and 'prescribed process' in s 42. In our view, the scope of a project that may be declared by the Minister under s 39 needs clarification. A definition could draw on the definition of 'development' contained in the *Environmental Planning and Assessment Act 1979* (NSW), to the extent applicable, with the addition of any other relevant work, such as remediation of land and closing of access points.

In the interests of transparency, and to enable local communities to prepare for developments, any order made under s 39(1) should not only describe the land to which a declared project relates, as required under sub-section (3), but should also be required to provide a reasonably detailed description of the nature, scope and purpose of the project.

The wording of s 40 suggests that a 'reconstruction area' is intended to be much wider than a part of NSW that has been identified as requiring reconstruction, or assistance to recover from a disaster. The intended scope of the term is unclear and may be unintentionally broad, particularly with the inclusion of the words 'indirectly affected by disaster', 'potential disaster' and 'betterment of the community'. We suggest deleting those words and providing a definition that more clearly and narrowly reflects the intended scope.

The purpose of 'disaster prevention area' is also unclear. It appears that the only practical difference from 'reconstruction area' is that a disaster has not yet occurred to that area, but is anticipated. The wording in s 41(2)(c) could arguably apply to the whole of NSW. We query whether any order for a declared project in this category should be confined to works that are necessary for the protection of life and property from a forecasted imminent disaster. This is likely to be significantly different from the kinds of works required after a disaster has actually affected the area, which would then fall under s 40.

Exclusion of other laws

Our primary submission suggested that ss 39(4), 40(3) and 41(4), which empower the Minister to specify that an Act or a statutory instrument does not apply in relation to the declared project or area, should be deleted.

In place of those provisions, we suggest that the legislation could anticipate and specify where exclusion of specific laws may be necessary and proportionate. To achieve this may require the following steps:

- An audit of relevant existing NSW legislation to identify specific provisions that have the potential to hinder the State's prevention, preparedness, adaptation, recovery and/or reconstruction efforts;
- An understanding of the circumstances in which the hindrance may be unacceptable;
- An assessment of the potential impact and reasonably expected benefits of excluding these laws and whether their exclusion in the defined circumstances would likely be necessary and proportionate;
- An assessment of the extent to which parameters can be put in place for the exclusions, including the length of time the exclusions may reasonably be needed to remain in place; and
- An assessment of whether, to allow for exclusion of laws in the defined circumstances, specific amendments to those laws need to be contained within the relevant laws themselves, or, alternatively, whether a Ministerial power under the Act is required.

We submit that the Authority is best placed to carry out this work, having already dealt with numerous disasters and recovery activities in its first 18 months, and with the benefit and experience of its staff and advisory board and the other agencies with whom it consults.

In the event that specific legislation is identified that may require a Ministerial order for its exclusion, this could be achieved by amending ss 39(4), 40(3) and 41(4) so that the power to make such orders is also limited to the matters set out in a Schedule to the Act, which defines:

- The specific provision of each Act or statutory instrument;
- The circumstances in which its exclusion under a Ministerial order is permitted; and
- A sunset provision for each type of order, including, where appropriate, any means to extend the period of the exclusion.

We note also that Part 6 of the Act (*Declared projects, reconstruction areas and disaster prevention areas*) applies 'despite another Act or law' under s 44(1). This provision should also be deleted and, if a need is identified by a similar process as is suggested above, replaced with specific provisions for the exclusion of specified laws.

Care will need to be taken with respect to future laws that are made by the Parliament that may need to be excluded, or that may override an intended exclusion under the Act. Identification of these issues will be somewhat easier if the potential exclusions are sufficiently specified in the Act, as suggested above.

If ss 39(4), 40(3) and 41(4) are retained, we submit that it should be expressly provided that any declaration which specifies that an Act or instrument does not apply shall be subject to the tabling and disallowance requirements applied to statutory rules under Part 6 of the *Interpretation Act 1987* (NSW).

(b) The Authority has published protocols which gives guidance on how it intends to exercise its powers and associated functions. Are you aware of these protocols? If so, could you comment on whether they provide any additional safeguards to the broad powers under the Act?

The Law Society is not in a position to comment on the administrative arrangements described in the protocols.

However, we note, with regard to the status of the protocols, that there is no provision for the making of such protocols under the Act and, while they may be a valuable administrative tool, the protocols are merely guidelines. The protocols apply to Authority staff and, expressly, not to Minister(s) and, under s 9 of the Act, the Authority is 'subject to the control and direction of the Minister in the exercise of the Authority's functions'. The Act will override the protocols to the extent of any inconsistency. As such, they would appear to provide very limited additional safeguards to the concerns we have identified.

Question 2: *How could the NSW Reconstruction Authority's powers be better aligned with relevant Commonwealth laws, to ensure a coordinated disaster management approach across different levels of government?*

As outlined in our submission, the Law Society is mindful of the importance of co-ordination with the Commonwealth, as well as with other jurisdictions which may be affected by disasters that also affect NSW. In addition to co-ordination, we acknowledge the importance of sharing knowledge and resources. We understand that, at a practical level, co-ordination is managed through the Commonwealth's National Emergency Management Agency. With regard to any legislative co-ordination that may be identified as necessary, we suggest that the Minister could initiate a discussion at a National Emergency Management Ministers meeting.

In terms of the Act, consideration should be given to including an express requirement that the Authority must consider the application of Commonwealth laws before making a recommendation to the Minister under ss 39, 40 and 41.

Thank you again for the opportunity to contribute to this inquiry. Questions at first instance may be directed to [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

Yours sincerely,

[REDACTED]
Brett McGrath
President