

Monday 30 October 2011

Green Paper
Department of Justice
Reply Paid 87276
MELBOURNE VIC 8060

By email to: greenpaper@justice.vic.gov.au

Dr Michael Eburn
Senior Fellow

**Fenner School of Environment and Society &
ANU College of Law**

+61 2 6125 6424
michael.eburn@anu.edu.au

Canberra ACT 0200 Australia
www.anu.edu.au

CRICOS Provider No. 00120C

Dear Sir/Madam

**RE REFORMING VICTORIA'S EMERGENCY MANAGEMENT ARRANGEMENTS:
TOWARDS A MORE DISASTER RESILIENT AND SAFER VICTORIA –
WHO IS IN CHARGE?**

This submission is made in response to the Department of Justice Green Paper '*Towards a More Disaster Resilient and Safer Victoria*'. This submission will focus on the issue of governance arrangements when responding to emergencies. This submission addresses proposals six, seven, eight and nine in the Green Paper.

Contents

Summary	1
The Emergency Management Act 1986 (Vic)	2
Command and control.....	4
Coordination	4
Who is in charge? The role of the Emergency Response Coordinators.....	5
Recommendation 1 – adopt option nine and a graded scale of emergency declaration.....	10
Who is in charge? Levels of control and the chain of command	11
Why the police?	14
Recommendation 2 – adopt option six and eliminate the legislated response coordination role from Victoria's emergency management arrangements.....	15
A new model for Victoria.....	15
Recommendation 3 – legislative changes to implement the new model.....	18
Option seven, extend the responsibility of the Fire Services Commissioner.....	19
Option eight, include an operations function in an umbrella body to be governed by a single emergency services board.	20
Recommendation 4 – options seven and eight should <i>not</i> be adopted.....	21
Conclusion	21

Summary

The 2009 Bushfires Royal Commission noted that '[t]here was no single agency or individual in control of the emergency response on 7 February'.¹ Although Victoria's emergency management arrangements were revised after the 2009 fires, with the intention of providing 'clear and unambiguous command and control of, preparedness for, and response to, level 3 bushfires', it remains the case that the emergency management

¹ Teague, B, Mcleod R and Pascoe S., *2009 Victorian Bushfires Royal Commission: Final Report* (2010, Melbourne), Volume II, p 75.

arrangements as set out in the *Emergency Management Act 1986 (Vic)*², the State Emergency Response Plan and the Emergency Management Manual Victoria (EMMV)³ still allow for ambiguous command and control, and transfer of control responsibilities without clear, specified triggers,. These new arrangements would only apply 'if specified 'triggers' ... occur'.

This submission will show how the legislation, State Emergency Response Plan and the Australian Inter-service Incident Management System (AllMS) anticipate an incident will be managed from local to State level. Analysing the provisions will demonstrate that large scale operations may be compromised and that Chief Officers, and others in the 'chain of command', do not have clear instructions as to their roles and duties when managing a major emergency.

This submission endorses options six and nine set out in the Green Paper; they are:

Option 6 Eliminate the legislated response coordination role from Victoria's emergency management arrangements.⁴

and

Option 9 Introduce a graded scale of emergency declaration that triggers movement to a higher tier of control [and] provides direction to agencies to scale-up their level of response...⁵

It is submitted that options seven and eight should not be adopted. Those options are:

Option 7 Extend the ... responsibility of the Fire Services Commissioner to encompass response to all major natural hazards ... consideration would also need to be given to assigning overall responsibility for response to other kinds of hazards, such as outbreaks of disease or terrorist attacks. ... emergency service organisations could retain their day to day command structures and roles. Specialist agencies could also continue to be the controllers for relevant hazards.⁶

and

Option 8 Include an operations function in an umbrella body (to be governed by a single emergency services board (option 3⁷)).⁸

The Emergency Management Act 1986 (Vic)

The Green Paper says:

The foundations of Victoria's emergency management arrangements are in the *Emergency Management Act 1986 (the Act)* ... the Act provides Victoria with the legislative basis for an 'all hazards, all agencies' approach to emergency management.⁹

² At the time of writing the Parliament has passed the *Emergency Management Legislation Amendment Act 2011 (Vic)* but the Act is yet to receive Royal Assent or commence operations. Notwithstanding this, all references to the Act in this submission are to the 1986 as amended by the 2011 Act.

³ At the time of writing the EMMV has not been amended to reflect changes brought in by the *Emergency Management Legislation Amendment Act 2011 (Vic)* but where appropriate necessary changes have been made in this discussion on the assumption that the EMMV will be amended in due course.

⁴ Department of Justice, *Green Paper: Towards a More Disaster Resilient and Safer Victoria* (2011, Government of Victoria, Melbourne) p 26.

⁵ Ibid.

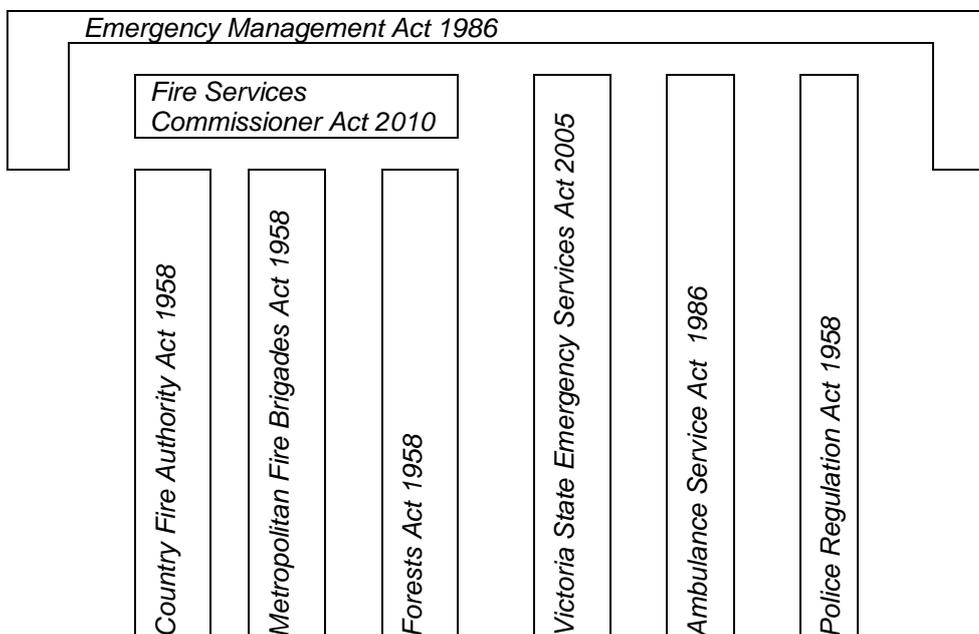
⁶ Ibid.

⁷ Ibid, p 20.

⁸ Ibid.

⁹ Ibid, p 4.

This is the incorrect metaphor. The *Emergency Management Act 1986* is not the ‘foundation’ of Victoria’s emergency management arrangements, rather it is the capstone that sits above, and tries to bring together the various components of the emergency response sector. The better way to view the Act is shown below.



On this model the Act is not the foundation, supporting the emergency services, but the capstone sitting above the various agencies to tie their actions together during a major incident, but leaving them much to their own field in day to day operations.

Response depends on their being established emergency services that are capable of responding to sudden onset emergencies. The Acts, shown above,¹⁰ establish the emergency services and identify their functions and responsibilities. The emergency services could respond to any event, even without the *Emergency Management Act 1986*. On the other hand if the only legislation in place was the *Emergency Management Act* then, absent specific legislation creating the emergency services, there would be no-one to respond.

The house fire, road accident or storm is not an emergency for the emergency services, for them it is a routine operation that is managed by them, in accordance with their legislative mandate, in cooperation with other services. The emergency management arrangements envisaged in the Act and translated through State Emergency Response Plan do not come into play unless the event exceeds the normal capacity of the services. It is therefore, the emergency services and, as shown above, the Acts that govern them, that are the foundation of, or supporting pillars for, Victoria’s emergency response arrangements.

Although the legislation for each emergency service sets out their functions, State Emergency Response Plan does provide detail on how an emergency, regardless of its scale,¹¹ should be managed. The organising principle of State Emergency Response Plan is that for each event a single agency will be appointed as the control agency.¹² The plan identifies which agency is the control agency for particular hazards so that, for example, in the event of a fire the control agency will be the Metropolitan Fire Brigade, the Country Fire Authority or the Department of Sustainability and Environment (depending on the fire’s

¹⁰ *Ambulance Services Act 1986; Country Fire Authority Act 1958; Forest Act 1958; Metropolitan Fire Brigades Act 1958 and Victoria State Emergency Service Act 2005.*

¹¹ Office of the Emergency Services Commissioner, *Emergency Management Manual Victoria* (October 2010, Melbourne) p 3.2.

¹² *Ibid*, p 3.5.

location); the control agency in the event of an earthquake, flood, storm or tsunami is the Victoria State Emergency Service.¹³

Added to those instruments is the Australian Inter-service Incident Management System (AIIMS) which has been adopted by the fire and emergency services and which they apply when responding to any event, ranging from a localised incident to a major and significant state wide emergency. AIIMS is designed to facilitate the management of any event from localised to catastrophic. AIIMS envisages that for any incident there is one person who has overall control of the response and who is identified as the incident controller. The Incident Controller has to consider three functional areas; logistics, operations and planning.¹⁴ For small events, the incident controller may undertake all the functions under AIIMS. As the event is 'scaled up' those functional areas can be delegated so that there are functional leaders reporting to the incident controller, who retains overall control of the response to the incident, is responsible for formulating the objectives to be met and for communicating those objectives to the various people involved in the response.¹⁵

Command and control

The State Emergency Response Plan and AIIMS distinguish between command, control and coordination. The agency that is in control is responsible for 'the overall direction of response activities in an emergency ... [and has] the responsibility for tasking other agencies in accordance with the needs of the situation. Control relates to situations and operates horizontally across agencies.'¹⁶

The control agency is supported by other agencies and may assign to those agencies necessary tasks. Having been assigned a task it is up to the support agency to perform that task. The support agency remains in command of its own personnel and other resources

Command involves the direction of personnel and resources of an agency in the performance of that organisation's role and tasks ... Command relates to agencies and operates vertically within an agency.

The term 'chain of command' refers to the organisational hierarchy of an agency. It is the identifiable line up and down the hierarchy from any individual to and from their supervisor and subordinates. The chain of command identifies people or positions with accountability...¹⁷

Coordination

The other vital function is coordination.

Co-ordination involves the bringing together of agencies and resources to ensure effective response to and recovery from emergencies. The main functions of co-ordination are:

- to ensure effective control has been established and maintained in response to an emergency
- ensuring effective information sharing, and
- the systematic acquisition and allocation of resources in accordance with the requirements imposed by emergencies...

Victoria Police has the responsibility ... for emergency response co-ordination at municipal, regional and state level for most emergencies. Emergency Response Coordinators are responsible for ensuring the co-ordination of the activities of agencies having roles or responsibilities in response to emergencies, with the exception of emergencies involving defence force ships or aircraft.

¹³ Ibid, p 7.3.

¹⁴ Australian Fire and Emergency Services Authorities Council (AFAC) *The Australian Inter-service Incident Management System* (3rd ed, 2005, Melbourne) pp 14-15 identifies these three functional areas, logistics, planning and operations. The fourth, public information has been added in a 2011 Revision of the 3rd ed. A 4th ed is currently being prepared that, if adopted, will add information, investigations and intelligence and bring AIIMS in line with incident management systems used by police and to increase the adoption, across the emergency services, of a single incident management system.

¹⁵ See also Office of the Emergency Services Commissioner, above n 11, pp 3.9-3.13.

¹⁶ Ibid, p 3.5.

¹⁷ Ibid, p 3.6.

... in some extreme circumstances ... control of all resources during an emergency [is] to be under the direction of the relevant emergency response coordinator (municipal, regional or State).¹⁸

Who is in charge? The role of the Emergency Response Coordinators.

The State Emergency Response Plan says that a 'single agency must be appointed as the control agency at each emergency'.¹⁹

Apart from the control agency there is provision for emergency response coordinators. The State Emergency Response Plan says that there should be a field emergency response coordinator who is responsible for ensuring that control agencies are in place, have established an IMT and that resources are being allocated on a priority basis.²⁰ There is no statutory basis for the appointment of a field emergency response coordinator.

The *Emergency Management Act 1986* (Vic) provides for the appointment of police officers as municipal and regional (but not field) emergency response coordinators.²¹ The State Emergency Response Coordinator is the Chief Commissioner of Victoria Police.²² Notwithstanding the use of the words 'coordination' and 'coordinator', an emergency response coordinator has what can only be described as control responsibilities.²³

An emergency response coordinator may give '... directions concerning the allocation of resources ... to all relevant agencies having roles or responsibilities in relation to the response...'²⁴ The section is not limited to giving directions to support agencies about the resources they are to make available to the incident controller or the control agency. The power is to direct *any* agency that has a role in the response; that must include the control agency. Further it is a power to direct how resources are to be allocated which could include whether teams are to be responded to sector A or B or what resources may be made available to other incidents.

The role of an emergency response coordinator is further clarified in the State Emergency Response Plan. Consistent with the above analysis, the State Emergency Response Plan says:

Section 13(2) of the *Emergency Management Act 1986* provides, in some extreme circumstances, for control of all resources during an emergency to be under the direction of the relevant emergency response coordinator (municipal, regional or State). This would include the situation where the control agency has failed or is incapable of properly managing the emergency response.²⁵

According to the State Emergency Response Plan:

- The incident controller takes overall responsibility for the management of all response activities to respond to the emergency – but it is the emergency response coordinator who is to *ensure* that the control agency, and therefore the controller, has established effective control;
- The incident controller is to notify support agencies – but it is the emergency response coordinator who is to *ensure* that the incident controller has notified support agencies and they are responding to an emergency;
- The incident controller is to form and lead an incident or emergency management team – but it is the emergency response coordinator who is to *ensure* that an Emergency Management Team has been formed;
- The incident controller must undertake initial and ongoing assessments of the emergency, apply resources as necessary and develop an Incident Action Plan setting out incident management

¹⁸ Ibid, pp 3.20-3.21.

¹⁹ Ibid, p 3.5

²⁰ Ibid, pp 3.21-3.22.

²¹ *Emergency Management Act 1986* (Vic) s 13.

²² Ibid, ss 5 and 11.

²³ Office of the Emergency Services Commissioner, above n 11, p 3.20.

²⁴ *Emergency Management Act 1986* (Vic) s 13.

²⁵ Office of the Emergency Services Commissioner, above n 11, p 3.21.

objectives and strategies – but it is the emergency response coordinator who is to *ensure* that there here is effective co-ordination of resources and services and that resources are allocated on a priority basis;

- The incident controller develops strategies to provide community information and community warnings and, if required, issue timely information and warnings to the community and support agencies – but it is the emergency response coordinator who is to *ensure* that timely information and warnings are provided to the community and support agencies by the control agency.²⁶

Further it is the emergency response coordinator who is 'in the event of uncertainty, [to] determine which agency is to perform its statutory response role within a region or other specified area, where more than one agency is empowered to perform that role'.²⁷ That is not limited to deciding, in the event of uncertainty, who is to act as the control agency.²⁸ The provision is broader than that and is inconsistent with the role of the incident controller tasking agencies that are empowered to perform support functions. It is the incident controller, not the police emergency response coordinator, who, in all cases, should determine whether it is the CFA or SES that is to perform an assigned task that both are lawfully empowered to undertake.²⁹

Even at State level, ultimate control is not clear. The Fire Services Commissioner 'has the overall control of response activities in relation to a major fire'³⁰ but he or she is subject to direction from State Coordinator of Emergency Response. The State Coordinator may direct the Fire Service Commissioner and the chief fire officers of the fire agencies, to exercise control powers at any fire.³¹ In the event that the Fire Services Commissioner is unavailable to perform the control function it is, ultimately, up to the State Coordinator to appoint a fire service chief officer to exercise control³² but again subject to the direction of the State Coordinator.³³ In an emergency other than a fire, if there is disagreement between the various response agencies regarding the 'priority of the responsibilities of those agencies' the State Coordinator 'may determine the priority of the response roles of the agencies'.³⁴

It may be argued that the emergency response coordinator's role only comes into play during an emergency (as opposed to a 'lesser-order event'³⁵); that 'during 'routine' operations and times of high operational activity where the trigger points for the level 3 command and control arrangements are not met'³⁶ normal agency procedures for command and control would remain in place. The EMMV distinguishes an emergency from a lesser-order event on the basis, inter alia, that emergencies:

- Are not part of day-to-day experience and are outside normal life expectations;
- Require a response for which normal local resources may be inadequate;
- Have complex needs in dealing with them; and/or
- Overwhelm normal prudent protective measures.³⁷

These points of distinction, between an 'emergency' and a 'lesser-order event' are not reflected in the Act. The Act says:

Emergency means an emergency due to the actual or imminent occurrence of an event which in any way endangers or threatens to endanger the safety or health of any person in Victoria or which destroys or damages, or threatens to destroy or damage, any property in Victoria or endangers or threatens to endanger the environment or an element of the environment in Victoria including, without limiting the generality of the foregoing-

²⁶ Ibid, pp 3.9-3.10; 3.21.

²⁷ Ibid, p 3.21.

²⁸ Ibid, p 3.5

²⁹ *Country Fire Authority Act 1958 (Vic)* s 20A: *Victoria State Emergency Service Act 2005 (Vic)* s 5(c).

³⁰ *Emergency Management Act 1986 (Vic)* s 16.

³¹ Ibid, s 16B.

³² Ibid, s 16A.

³³ Ibid, s 16B.

³⁴ Ibid, s 17.

³⁵ Office of the Emergency Services Commissioner, above n 11, p 1.4.

³⁶ Teague et al, above n 1.

³⁷ Office of the Emergency Services Commissioner, above n 11, pp 1.3-1.4.

- (a) an earthquake, flood, wind-storm or other natural event; and
- (b) a fire; and
- (c) an explosion; and
- (d) a road accident or any other accident; and
- (e) a plague or an epidemic or contamination; and
- (f) a warlike act, or act of terrorism whether directed at Victoria or a part of Victoria or at any other State or Territory of the Commonwealth; and
- (g) a hi-jack, siege or riot; and
- (h) a disruption to an essential service;³⁸

The definition starts with 'Emergency means an emergency ...' and is therefore circular. Putting the circularity to one side, there is nothing to distinguish an emergency from a 'lesser-order event'.

An event that threatens even one person's safety, or any property, is an emergency. The reference to 'a fire' or 'a road or any other accident' describes the sort of event that is not outside the day-to-day experience of the emergency services or the community at large, requires a response for which local resources are adequate and does not overwhelm local resources; even so it is still an emergency within the meaning of the Act. Despite the use of the terms 'lesser-order event' and 'emergency' in the EMMV, there is in law no such distinction. Everything, from a single vehicle accident to a catastrophic bush fire falls within the definition of an emergency. Because all these events are emergencies, a police officer could (and arguably should) assume the role of field and then municipal emergency response coordinator.

If the emergency response coordinator is to ensure that the tasks allocated to the incident controller are done, then the incident controller must be subject to the direction and control of the coordinator otherwise there is no way the coordinator can *ensure* that these tasks are done. Despite assertions to the contrary it is police who are or may choose to be, in 'control', over any emergency response. This is inconsistent with State Emergency Response Plan and inconsistent with the principles set out in AIIMS.

Even if it is accepted that there is a difference between a 'lesser-order event' and an 'emergency' and that the response coordinator role is only required in an emergency, without a definition of these terms or a trigger to indicate when the response has moved from event to an emergency here is room for confusion and disagreement. The municipal emergency response coordinator may form the view that there is an emergency and seek to exercise his or her powers³⁹ whilst the control agency incident controller is of the view that there is a lesser order event and that none of the characteristics of an emergency, as described in the EMMV,⁴⁰ apply. Without a clear trigger as to when police should take control it could lead to confusion as to who is exercising control over any particular incident particularly if the response coordinator is taking steps to ensure that things are done but does not make it clear that he or she is intending to take control over the allocation of resources in accordance with the Act.

These provisions are also inconsistent with provisions in the fire services legislation which provide that police are required to recognize the authority of the incident controller and to assist the controller to enforce his or her directions.⁴¹ The various police officers appointed as emergency response coordinators are entitled to direct the various incident controllers and even take control of the resources allocated to the event.

The discussion above demonstrates that even with the post 2009 reforms, it remains the case that there is no 'clear and unambiguous command and control' arrangements in place and, further, that there are no clear triggers as to when officers, and in particular, police officers appointed as municipal, regional or the State Coordinator should, or may, exercise their powers to direct agencies⁴² or to, in effect, exercise control.

³⁸ *Emergency Management Act 1986* (Vic) s 4.

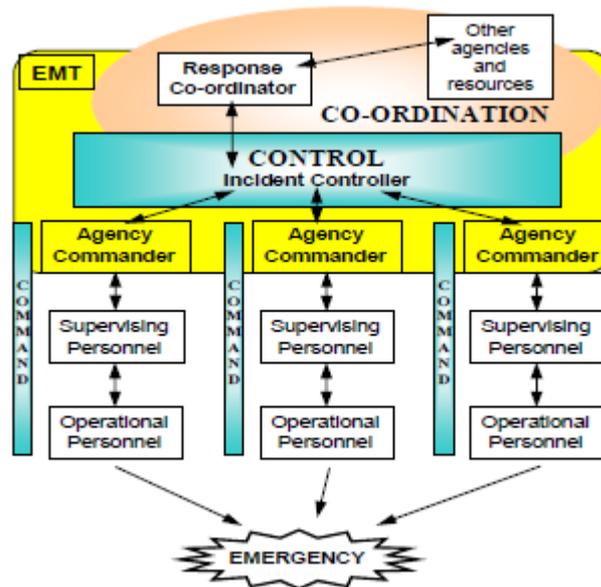
³⁹ *Ibid*, s 13.

⁴⁰ Office of the Emergency Services Commissioner, above n 11. pp 1.3-1.4

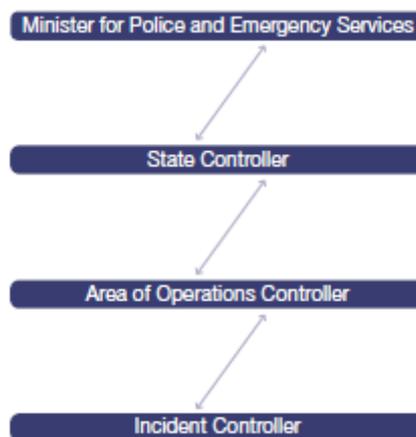
⁴¹ *Metropolitan Fire Brigades Act 1958* (Vic) s 61; *Country Fire Authority Act 1958* (Vic) 31;

⁴² *Emergency Management Act 1986* (Vic) s 13.

The simple, intended relationship between command, control and coordination is shown in the diagram, below.⁴³



The 2009 Bushfires Royal Commission accepted that new arrangements would provide for a single line of control for level 3, ie major complex events, that would look like this:⁴⁴



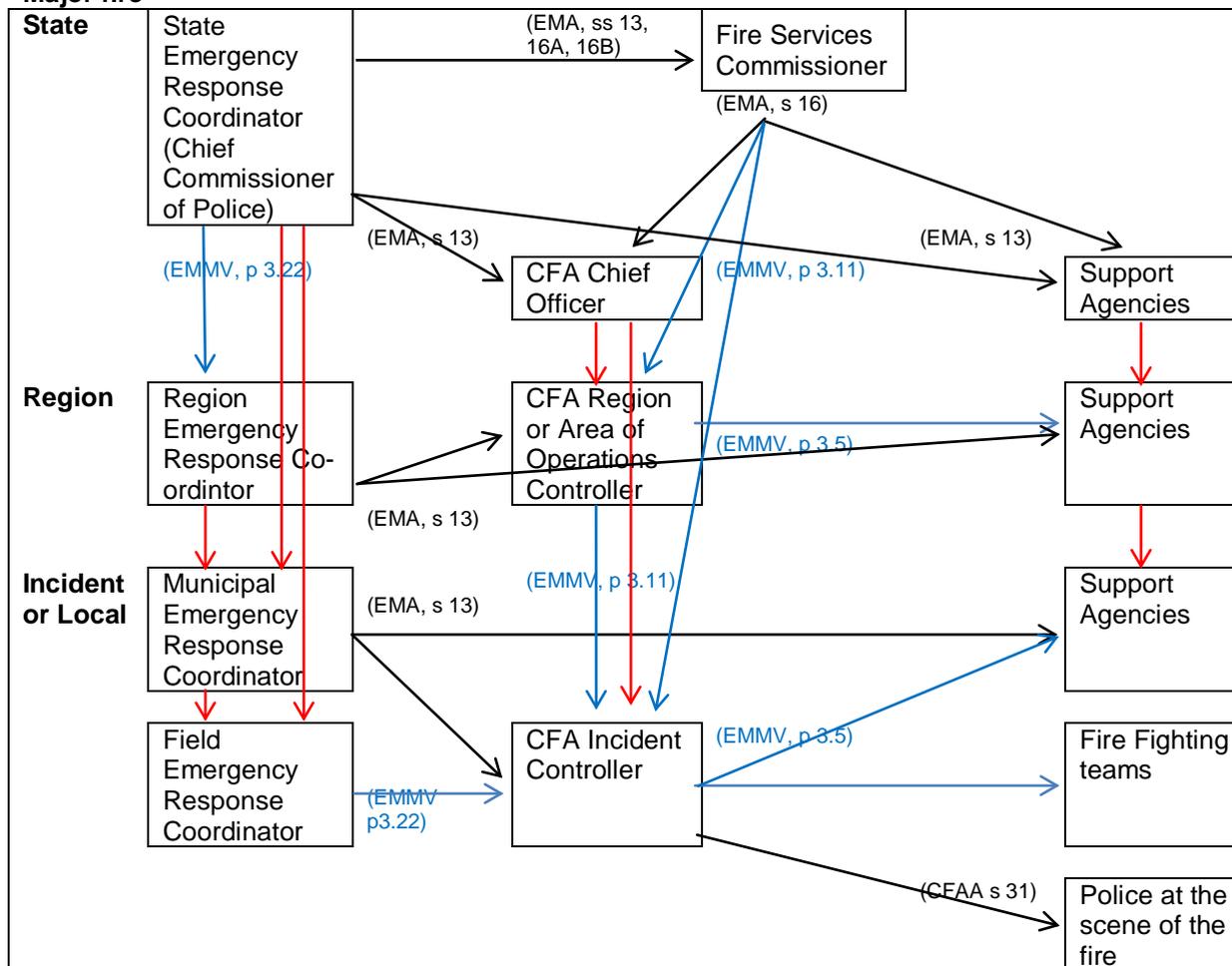
The reality looks somewhat different. The complexity of Victoria’s arrangements, when it comes to the control of the response to a fire that is under the initial control of the CFA but which affects the whole state, is shown below. The lines represent a power to direct that some action be taken in response to the emergency. The authority for that power is also shown, where:

EMA = *Emergency Management Act 1986 (Vic)*;
 CFAA = *Country Fire Authority Act 1958 (Vic)*; and
 EMMV = *Emergency Management Manual Victoria, Part 3, State Emergency Response Plan.*

⁴³ Office of the Emergency Services Commissioner, above n 11, p. 3.3.
⁴⁴ Teague et al, above n 1, Volume II, p 77.

Lines shown in black represent statutory authority; lines shown in blue represent authority under the State Emergency Response Plan and lines in red show agency chain of command.

Major fire



If the incident was not a major fire, then the Chief Officer of the relevant fire agency would sit where the Fire Service Commissioner sits in the above diagram, unless the State Coordinator required the Fire Service Commissioner to take control of the situation.⁴⁵ A similar diagram could also be drawn for response to an emergency other than a fire except that in most cases it would be the SES that would be the control agency (but not universally, there are other agencies that have control responsibilities⁴⁶ for other emergencies).

The line of control or command between the emergency response coordinators is not clear. Under the Act, once an event crosses a municipal boundary, it is the regional emergency response coordinator who is authorised to give ‘directions concerning the allocation of resources in responding to that emergency’, and once the matter affects more than one region it is the State Coordinator that is empowered to give directions.⁴⁷ On its literal reading, the Act leaves no role for the lower level emergency response coordinators once the higher level has been activated. It could be inferred however, that the field, municipal and regional emergency response coordinators are expected to continue to function subject to the directions of the higher level coordinator. This is expressly stated in the outline of responsibilities for

⁴⁵ Emergency Management Act 1986 (Vic) s 16B.
⁴⁶ Office of the Emergency Services Commissioner, above n 11. pp 7.1-7.4.
⁴⁷ Emergency Management Act 1986 (Vic) s 13(2).

regional emergency response coordinators⁴⁸, but not for other levels and it is not expressly stated in Act.⁴⁹ In any event as police officers they will be subject to the police chain of command.⁵⁰

What is clear is that, despite the claim that the incident is to be managed by the control agency with the control agency's incident controller responsible for setting the priorities for the response to the incident, the incident controller is in fact subject to multiple sources of direction and control. An incident controller, trained in AIIMS and the principle that the control agency is primarily in control of the response may well be surprised by that reality.

The position in Victoria can be compared to the position in New South Wales. The New South Wales emergency management arrangements are based on a similar model however in New South Wales an event is only an emergency if it requires 'a significant and co-ordinated response'.⁵¹ A routine event, although an emergency for the people affected, is not an emergency if it is managed by a single agency or requires a routine, practiced, multi-agency response (for example where the local SES calls on the local RFS to assist with the response to storm damage). These events remain under the control of the nominated combat agency.

In New South Wales Police are appointed as the Local Emergency Operations Controller (LEOCON), the District Emergency Operations Controller (DEOCON) and the State Emergency Operations Controller (SEOCON). The first thing to note is the title of these positions refers to 'controller' not coordinator, which more accurately reflects their position and authority. The LEOCON *can* exercise control over the entire emergency response if, and only if:

- (a) the State Emergency Operations Controller is satisfied that it is necessary to do so in the particular circumstances of the case, and
- (b) the combat agency has requested or agreed to the Local Emergency Operations Controller assuming that responsibility or, in the case of any disagreement on the matter, the Minister has directed the Local Emergency Operations Controller to do so.⁵²

Similar provisions exist to determine when the DEOCON and SEOCON may take ultimate control of emergency operations.⁵³

The New South Wales provisions ensure that the identification of the controller is clear. The pre-nominated combat agency is to exercise control unless there is an emergency (which is distinguished from a routine event) and the preconditions have been met for control to be moved to the Emergency Operations Controller. Where control is to be transferred there is a clear process that involves both the SEOCON and the combat agency. There could be no confusion between the incident controller and the LEOCON as to who is in control of the event and the time of transfer of control will be clearly defined. Such clarity is missing from the Victorian arrangements and could lead to confusion and duplication of responsibilities.

Recommendation 1 – adopt option nine and a graded scale of emergency declaration

One option to achieve clarity as to 'who is in charge' would be to adopt a process similar to that adopted in New South Wales. Another way to achieve clarity would be to adopt Option 9 and have a 'graded scale of emergency declaration that triggers movement to a higher tier of control [and] provides direction to agencies to scale-up their level of response'.⁵⁴ If that option were adopted, consideration would have to be given as to who would make the relevant declaration. A number of jurisdictions have formal, graded emergency declarations:

⁴⁸ Office of the Emergency Services Commissioner, above n 11, pp 3.22.

⁴⁹ Compare *Emergency Management Act 1986* (Vic) s 13(2) with *State Emergency and Rescue Management Act 1989* (NSW) ss 25(5) and 31(5).

⁵⁰ *Police Regulation Act 1958* (Vic) ss 5 and 69(d).

⁵¹ *State Emergency and Rescue Management Act 1989* (NSW) s 4.

⁵² *Ibid*, s 31(1B).

⁵³ *Ibid*, ss 25(1B) and 19(1B).

⁵⁴ Department of Justice, above n 4, p 26.

- In the ACT the Minister can declare a state of alert; the Chief Minister can declare a state of emergency.⁵⁵
- In the Northern Territory the Minister may declare a state of emergency; the Administrator may declare a state of Disaster.⁵⁶
- In Queensland an event can be declared a disaster but the declaration may be made at district or State levels. A district disaster coordinator may, with the approval of the Minister, 'declare a disaster situation for the district, or a part of it...' 'The Minister and the Premier may declare a disaster situation for the State, or a part of the State...'⁵⁷
- In South Australia the State Coordinator can declare an incident to be a major incident or a major emergency; the Governor can declare a state of Disaster.⁵⁸
- In Western Australia a hazard management agency can declare that an incident is an 'emergency situation'. The Minister may declare a state of emergency for the whole, or part of, the State.⁵⁹

The process of disaster declaration is rarely used. There was a reluctance to declare an emergency during the 2003 Canberra fires⁶⁰ and no serious consideration was given to declaring a disaster in the 2009 Victorian fires.⁶¹ It may be that this type of reluctance will still occur even with a graded scale.

An alternative approach is to make a public declaration of a state of alert or a state of emergency when certain triggers are met (analogous to the fire services 'advice', 'watch and act' and 'emergency' warnings⁶²). On this model, for example, when an event reaches level two⁶³ a state of alert would be declared. When classified as a level three⁶⁴ a state of emergency would be declared.

Regardless of how the levels of emergency are declared, at each level there should be necessary, prescribed steps to identify who is the control agency, at what level control should be exercised, trigger warnings to the community and activate relevant committees and response and recovery plans. The Minister could retain the current power to declare a state of disaster if and when required.⁶⁵ It can be noted that a similar model has been adopted in Western Australia,⁶⁶ but as noted in the Keelty review of the 2011 Perth Fires, not with resounding success.⁶⁷

Who is in charge? Levels of control and the chain of command

The discussion, above, relates to the lack of clarity between roles across the range of 'control'. There is also room for confusion up and down the chain of command. State Emergency Response Plan and AIIMS assume that a person will be appointed as the Incident Controller to manage the response to the incident. There should be only one incident controller but that fails to identify what is to happen if there are multiple incidents and what is the role of those higher up the 'chain of command'. These difficulties were apparent in the response to the 2009 Victorian bushfires.⁶⁸

In reviewing changes to Victoria's emergency management arrangements that were implemented during the period of the Commission, the Commissioners noted:

⁵⁵ *Emergency Management Act 2004* (ACT) ss 151 and 156.

⁵⁶ *Disasters Act* (NT) ss 39 and 35.

⁵⁷ *Disaster Management 2003* (Qld) ss 64 and 69.

⁵⁸ *Emergency Management Act 2004* (SA) ss 22-24.

⁵⁹ *Emergency Management Act 2005* (WA) ss 50 and 56.

⁶⁰ Doogan M, *The Canberra Firestorm: Inquests and Inquiry into Four Deaths and Four Fires Between 8 and 18 January 2003* (2006, ACT Coroners Court), p. 345.

⁶¹ Teague et al, above n 1, Volume II, p 86.

⁶² Country Fire Authority, *Understanding bushfire warnings*, <http://www.cfa.vic.gov.au/incidents/understand_warnings.htm> accessed 29 October 2011.

⁶³ AFAC, above n 14, p 17.

⁶⁴ *Ibid*, p 20.

⁶⁵ *Emergency Management Act 1986* (Vic) s 23.

⁶⁶ *State Emergency Management Plan For Bushfire (Westplan - Bushfire)* (December 2010), ¶4.3.1.

⁶⁷ Keelty, M., *A Shared Responsibility: The Report of the Perth Hills Bushfire February 2011 Review* (2011, Perth) pp 94-101.

⁶⁸ Teague et al, above n 1, Volume II, pp 75-84.

The new arrangements provide for three levels of control for emergency management during a level 3 bushfire—State, Area of Operations, and Incident—and detail the roles, responsibilities and reporting arrangements for each tier. A ‘Controller’ is appointed at each tier to provide leadership and management; this is consistent with the approach adopted by AIIMS.

With respect to the Commissioners, whether those arrangements are consistent with AIIMS is unclear. AIIMS provides a scalable response management system ranging from a level 1 incident (that is an incident that can be managed by local and initial response resources) to a level 3 incident (that is an event characterised by degrees of complexity, risk and geography).⁶⁹ In either case there is an ‘incident controller’ appointed to manage the response to the incident. AIIMS does not envisage multiple controllers at each level, rather AIIMS envisages higher level coordination, rather than control.⁷⁰

Control is to be exercised by the incident controller but neither AIIMS nor the State Emergency Response Plan define ‘incident’ in a useful way. AIIMS says that an incident is ‘any unplanned event requiring emergency intervention’⁷¹ but that would include everything from a fallen tree to a catastrophic fire. The EMMV says ‘The word incident has the same meaning as *emergency*’.⁷² ‘Emergency’ is defined in the Act⁷³ and the definition is reproduced, above.⁷⁴

When a storm hits several towns, and each town’s SES unit responds, is that multiple incidents or a single incident? It could be interpreted as either but with significant differences. If they are several incidents there would be several incident controllers. A regional controller may also be appointed but his or her role is unclear; does the regional coordinator provide coordination and support in order to provide guidance to incident controllers and to facilitate the delivery of resources, particular resources from within the same agency (so, for example, arranging for ‘out of area teams’ or equipment to come from other SES regions) or do they exercise actual control.

If we assume that the storm that has impacted upon a region has caused storm damage (trees down, roofs damaged) and flooding, it is possible, and consistent with State Emergency Response Plan to see them all as separate incidents. The resulting structure could be as complex as shown below:

⁶⁹ AFAC, above n 14, pp 15; 20.

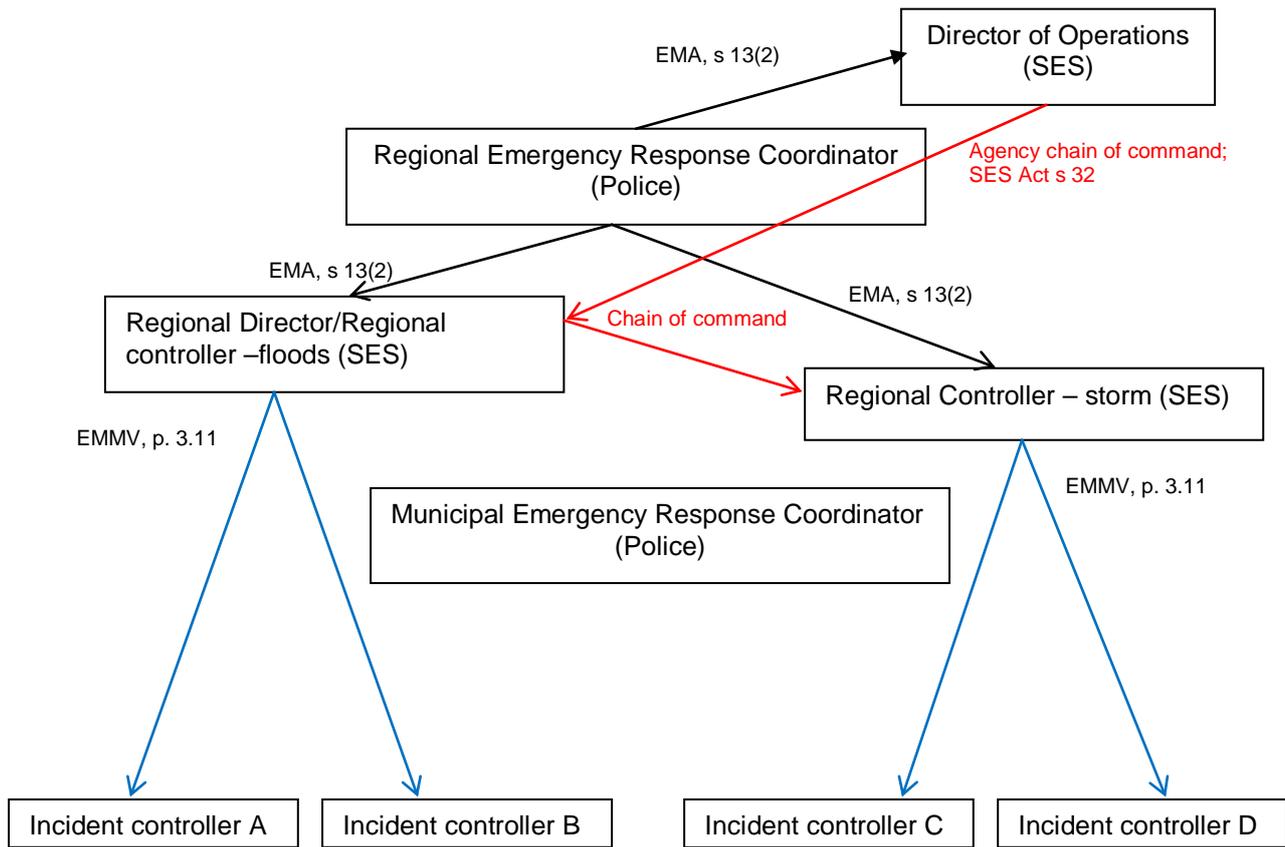
⁷⁰ *Ibid*, p iv.

⁷¹ *Ibid*, p 91.

⁷² Office of the Emergency Services Commissioner, above n 11. p 8.73 (emphasis in original).

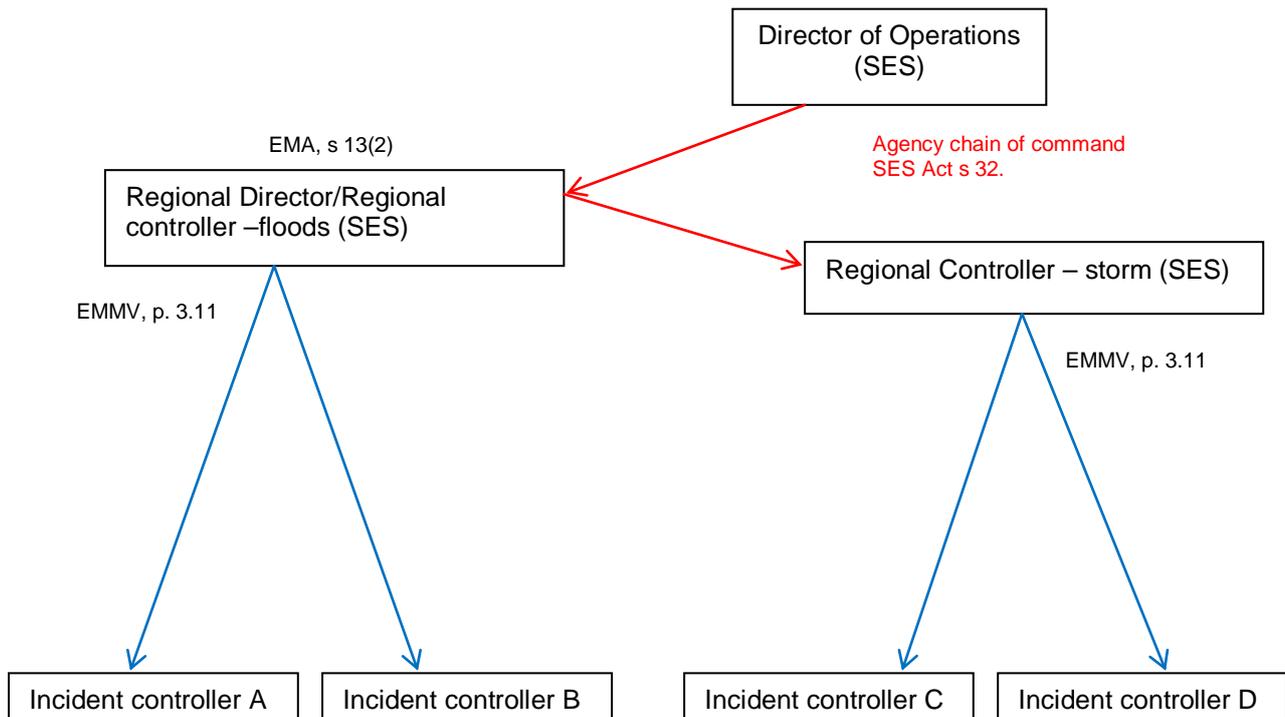
⁷³ *Emergency Management Act 1986 (Vic)* s 4.

⁷⁴ See p 6, above.



Assume that 'Incident Controller A' fails to issue a warning to the community of the impending flood and lives are lost. Who was in charge? The regional emergency response coordinator has statutory authority but the Director of Operations is responsible for the response by the SES⁷⁵ and has chain of command authority. If the coordination role was removed from the statute the result would be:

⁷⁵ Victoria State Emergency Service Act 2005 (Vic) s 32.



Even on this model however the question of ‘who is in charge’ remains. Is it the Director of Operations or one of the controllers? Following the 2009 bushfires, the Chief Officer of the Country Fire Authority was criticized for not taking a hands on role in the leadership of the response to the fires. He claimed to have left operational matters to the State Coordinator and State Duty Officer who in turn left executive decisions to the appointed incident controllers. The chain of command continued to operate however and ultimately responsibility for the response of the agencies rested with their chief officers.⁷⁶ On this view the incident controller is not in charge as he or she is always subject to supervision with the result that responsibility rests with the Chief Officer for every response from the routine to the extreme; in each case they could review the performance of their delegates and take action if not satisfied objectives are being met. Such a burden would be impossible to manage and does not allow delegation and low level control. This issue would be resolved by the adoption of the recommended model, discussed below.⁷⁷

Why the police?

The coordination role assigned to police under the Victorian arrangements is inconsistent with the concept of the control agency, and ‘control’ as expressed in the State Emergency Response Plan and in AIIMS. It is also not obvious that the police will necessarily ensure a better response than the fire agencies, the SES or, in Victoria, the Emergency Services Commissioner or the Fire Services Commissioner. It is not clear why, or when police should take control of an emergency or incident or why it is believed that the police would do a better job of managing the response to storms, floods or fires than the specialised emergency service.

In 2003 concern that the police would take legal control of the response to the bushfires threatening Canberra inhibited the declaration of an emergency.⁷⁸ During the 2009 Black Saturday fires there was criticism that the Chief Commissioner of Victoria Police failed to take a more active role in the management of the response, given her role as Deputy Coordinator in Chief of Emergency Management and State Coordinator of DISPLAN.⁷⁹ The Victorian Bushfires Royal Commission, although critical of her approach to

⁷⁶ Teague et al above n 1, volume II, p 80.

⁷⁷ See p 15, below.

⁷⁸ Doogan, above n 60.

⁷⁹ *Emergency Management Act 1986* (Vic) ss 5(2) and 11

emergency coordination, did not make any finding to the effect that her personal attention to the role would have made any difference to the outcomes on the day.⁸⁰

Coordination is intended as function of emergency management. Under the State Emergency Response Plan the concept of control 'carries with it the responsibility for tasking other agencies in accordance with the needs of the situation'.⁸¹ In a significant response, the incident controller may appoint a logistics officer who is tasked to 'support control of the incident through the procurement and maintenance of human and physical resources, facilities, services and materials' and to 'facilitate effective liaison and cooperation with all relevant persons'.⁸² These are coordination roles but where further coordination support, outside the incident management team is required, that role could be filled by a member of the control agency, a municipal emergency resource officer⁸³ or a person from another agency that is providing support (so, for example, the CFA incident controller could appoint an officer from the SES to act as coordinator).

This remains true at State level where asking the Chief Commissioner of Police to take on the role of State Coordinator may be unnecessary or unhelpful if police are heavily committed in their other roles in law enforcement, assisting the coroner, traffic management and the like. The Australian Capital Territory has moved away from automatically appointing a police officer, or anyone, to the position of emergency controller.⁸⁴ The selection of an emergency controller depends on the nature of the emergency and allows the Minister to nominate the best person for the job at the time. This model allows for flexibility and recognising that the very nature of disasters means that preconceived ideas of who should be 'in control' may not be applicable when the actual disaster strikes.

Recommendation 2 – adopt option six and eliminate the legislated response coordination role from Victoria’s emergency management arrangements.

It is submitted that the discussion above has demonstrated the legislated coordination role in fact carries control responsibilities. As such it is inconsistent with the concept of the control agency, can lead to confusion as to who is in charge, both across the span of control and up and down the chain of command and there is no convincing evidence that appointing police as coordination officers will, or does, enhance the response to the emergency. The concept of 'control' includes a requirement to coordinate with support agencies and so the coordination role should be seen as part of the control function, to be exercised by the control agencies and relying on the best person or organisation to do the task, which will vary from emergency to emergency.

A new model for Victoria.

The principle should be that the person in control should be clearly identified. AIIMS provides a model that could be adopted at all levels. Under the AIIMS model the incident controller is in charge of the response but there is only one incident controller. If a region level controller takes over as incident controller, local level controllers would become the equivalent of division or sector commanders. There is no possibility for more than one incident controller. This is not the position under the Victorian State Disaster Response Plan.

Given the Victorian definition of emergency it is suggested that the term 'incident controller' should be replaced by the term 'Emergency Controller',⁸⁵ and other roles replaced by the term 'commander'. There should only ever be one Emergency Controller. On this model if we assume that there is a widespread storm the unit controller for the SES would start as the 'Emergency Controller'. The Region Director would take on the role Region Commander and could activate a regional headquarters to supervise, provide advice and assistance to the Emergency Controller but the Emergency Controller would remain in charge of

⁸⁰ Teague et al, above n 1, Volume II, p 84.

⁸¹ Office of the Emergency Services Commissioner, above n 11. p 3.5.

⁸² AFAC, above n 14, p 62.

⁸³ *Emergency Management Act 1986* (Vic) s 21

⁸⁴ *Emergencies Act 2004* (ACT) ss 150A and 159.

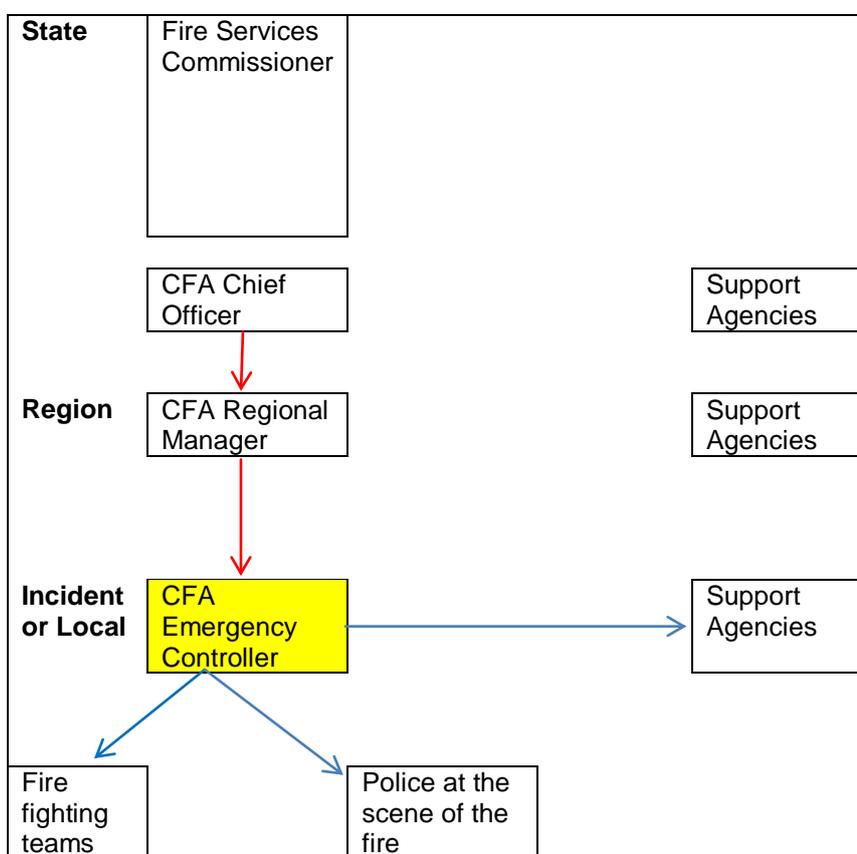
⁸⁵ And it is noted that the 2011 amendments to the *Emergency Management Act* have adopted the term Emergency Response Coordinator for police officers appointed under s 13.

the response. When it appears that many units are responding, across towns but within a region, the Region Director would formally take on the role of Emergency Controller, and he or she would then manage the response directing the local unit commanders.

In the example of a widespread storm given above,⁸⁶ the Director of Operations of the SES would be available in a consulting, advising and supervising role but without authority to direct the Emergency Controller. If the State Director was of the view that effective control was not established, or the event spread across more than one region, he or she could take on the role of Emergency Controller and the Region Director would return to a role of Region Commander, commanding region resources, but not being a controller.⁸⁷ On this model there would be, at any time, one and only one Emergency Controller so the identity of 'who is in charge' would be clear.

The model could be scaled up as follows, this time using the example of a fire managed by the Country Fire Authority. Consistent with the above diagrams, the blue lines represent recommended lines of control, whilst the red lines are the agency chain of command.

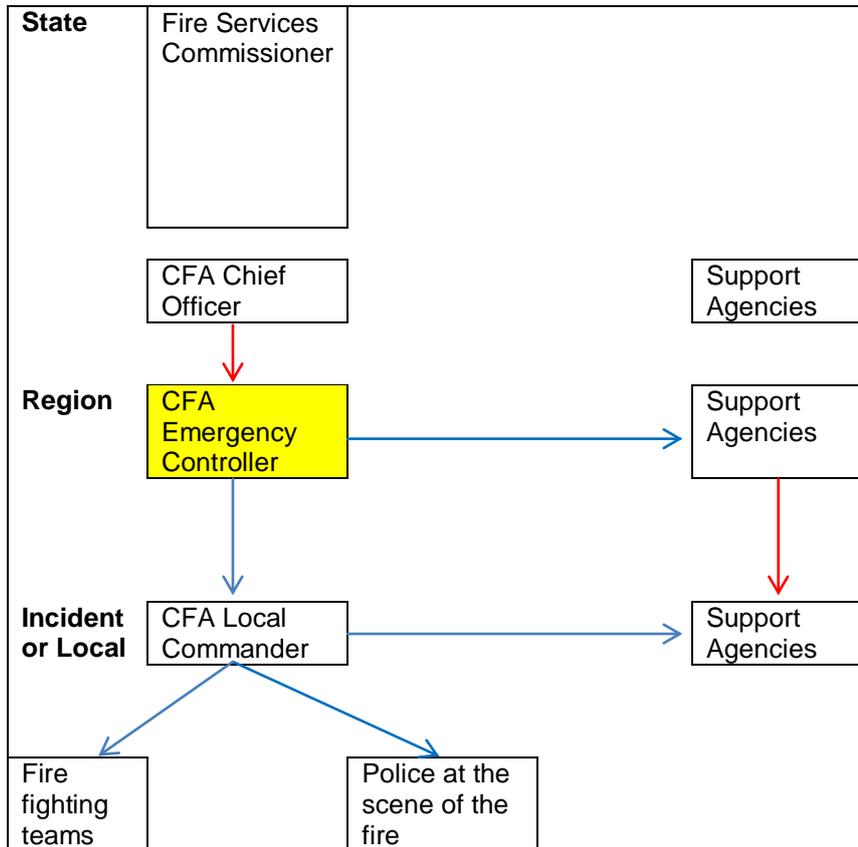
Local Event



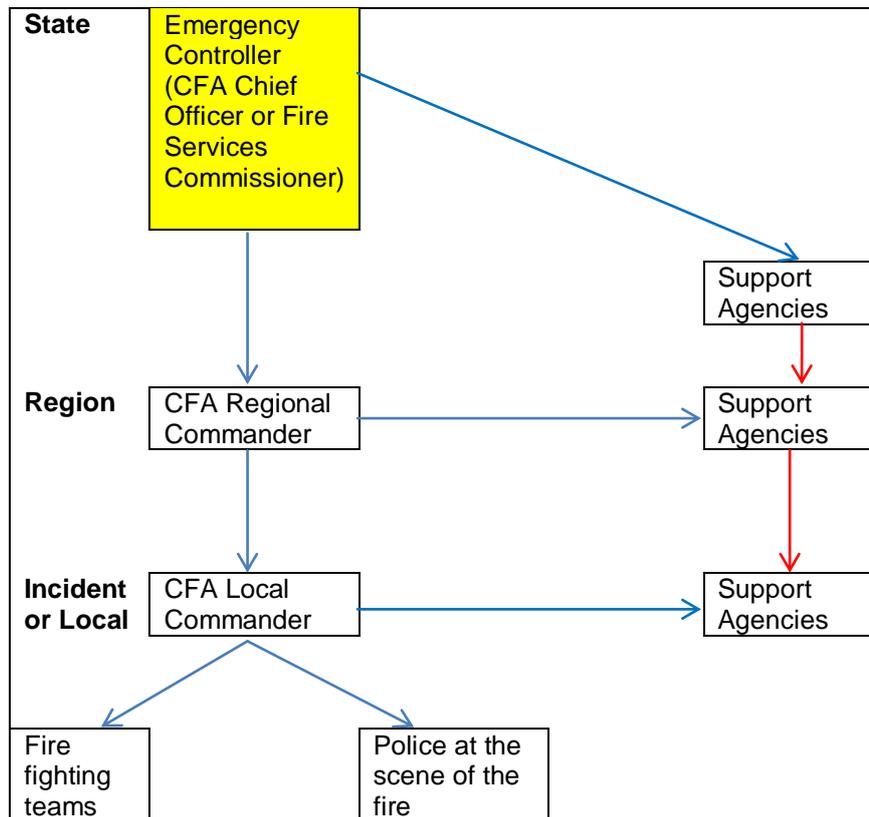
⁸⁶ See p 12, above.

⁸⁷ The model with appropriate titles, would apply to other emergencies.

Regional Event



State event



This model would remain ‘... a model of decentralised authority, power and discretion but [does not] ... suggest that the central commander (that is, the State Controller or Chief Officer) be divested of ultimate responsibility’.⁸⁸ ‘Control’ would be exercised at the lowest level possible but would not be exercised at multiple locations. Local and regional commanders would retain power to direct resources that are placed at their disposal, and subject to direction from the Emergency Controller, discretion as to how to complete their tasks. They would fill the same role as the commander of a ‘support agency’; they would be ‘in command’ of their resources and would be expected to manage those resources to complete their assigned tasks. Where the Emergency Controller is located at regional or local level, the agency chain of command would continue to operate as the regional Manager and ultimately the Chief Officer would be responsible for supervising, but not directing, the Emergency Controller. If not satisfied that sufficient control was being established they would not share control but would be able to step in and appoint someone else as, or take on the role of Emergency Controller.

Recommendation 3 – legislative changes to implement the new model

To achieve this clarity and to answer the question ‘who is in charge’ the following legislative provisions should be enacted;

- 1) The definition of emergency should be amended to give a point of distinction between a ‘lesser-order event’ or incident, when normal agency procedures apply, and an emergency. This would clarify when control was clearly vested in the control agency, or when emergency response coordinators were expected to become active.

It was noted, at the start of this submission, that Victoria’s emergency management arrangements and the *Emergency Management Act 1986* sit above, supported by, the pillars that are Victoria’s

⁸⁸ Teague et al, above n 1, pp 366-367.

emergency services. Even though 'Victoria's emergency management arrangements are in effect at all times and do not require specific, formal activation' they are generally subsumed by the emergency services legislation and the practiced response to lesser-order events. As such, there should be some clear process to indicate that an event has moved from a 'lesser-order event' to an emergency so that the broader emergency management arrangements are brought into play. This should not depend on a formal declaration of a state of disaster, which may not be required and may not be possible in a short time frame. This could be achieved by:

- a) Amending the definition of emergency so that it is distinguished from a lesser-order event (again a model based on the *State Emergency and Rescue Management Act 1989* (NSW)⁸⁹ could be adopted in Victoria); and/or
 - b) Requiring Emergency Controllers to formally declare whether a matter is a level 1, 2 or 3 incident with a corresponding obligation to advise others in the chain of command and across the emergency management sector.
- 2) The role of Emergency Controller should be set out in statute. The statute should establish the Emergency Controller's authority, and require all other agencies, including police, to respect the authority of the Emergency Controller and to give effect to his or her directions.
 - 3) Provisions should be enacted to allow the Chief Officer of the various emergency services to appoint, and remove, but not direct Emergency Controllers (this would be similar to the power of the Chief Commissioner of Police to appoint and remove constables of police,⁹⁰ but constables cannot be directed in how they perform their office of constable.⁹¹)
 - 4) Prescribed procedures should be in place to make it clear when a person has taken on the role of Emergency Controller and to ensure that 'Handover of control ... [is] formal in nature and the details of the handover must be noted.'⁹²

Option seven, extend the responsibility of the Fire Services Commissioner.

The Green Paper identifies option seven as

Extend the ... responsibility of the Fire Services Commissioner to encompass response to all major natural hazards ... consideration would also need to be given to assigning overall responsibility for response to other kinds of hazards, such as outbreaks of disease or terrorist attacks. ... emergency service organisations could retain their day to day command structures and roles. Specialist agencies could also continue to be the controllers for relevant hazards.⁹³

To extend the role of the Fire Services Commissioner to all hazards would be, in effect, to create an Emergency Services Commissioner. Of course Victoria already has an Emergency Services Commissioner⁹⁴ so if this were to be done both offices would need to be abolished and subsumed into one.

The problem however is that this adds another level of operational management. Each service has to respond to operations on a daily basis and practice working as a team and with their emergency service colleagues. To have the Emergency or Fire Services Commissioner take on ultimate control in the event of major fires would be remove the Chief Officers who have been managing the bulk of responses, and who has established relationships with officers up and down the chain of command, with a new controller at a time when familiarity is most required.

⁸⁹ *State Emergency and Rescue Management Act 1989* (NSW) s 4.

⁹⁰ *Police Regulation Act 1958* (Vic) ss 8, 8A and 68.

⁹¹ *Ibid*, s 11.

⁹² Office of the Emergency Services Commissioner, above n 11. p 3.5.

⁹³ *Ibid*.

⁹⁴ *Emergency Management Act 1986* (Vic) ss 21B to 21J.

If 'Specialist agencies [are to]... continue to be the controllers for relevant hazards'⁹⁵ it will be necessary to decide what is a 'specialist agency' and what is a 'relevant hazard'. The Department of Primary Industries may be the relevant specialist agency to manage an emergency involving exotic animal disease⁹⁶ but why is the CFA not the specialist agency best equipped to deal with a fire in rural Victoria?

The difficulty with the office of the Fire Services Commissioner is that it was created on the recommendation of the 2009 Bushfires Royal Commission that was focused on fires, not all hazards, and was looking at the response to *those* catastrophic fires, not all or even the majority of fires. If there were problems with coordination of the fire services that could have been addressed by other means such as allowing the Chief Officer of the Country Fire Authority to take overall control of rural firefighting,⁹⁷ but having created the office of the Fire Service Commissioner with an overarching coordination role, it has added another level of control that should not be extended.

Option eight, include an operations function in an umbrella body to be governed by a single emergency services board.

This option would also add another level to the normal operations of the emergency services. Each service, during routine operations that form the bulk of their work, has to manage their response, including coordinating with other services. To move that operational control to another level, that is from the CFA, the MFB, DSE or the SES to the 'umbrella organisation' would be to reproduce the confusion between the chain of command and control.

If further, and closer collaboration between the emergency services is required, a more appropriate model than yet another board would be to look at the model adopted by the Australian Defence Force (the ADF). The ADF is made up of the Australian Army, the Australian Navy and the Australian Air Force,⁹⁸ each of which is established by an Act of Parliament⁹⁹ and each of which is a specialised agency within the ADF. Each branch of the ADF has a Chief and there is also a Chief of the Defence Force. The Chief of the Defence Force is in command the Defence Force whilst the Chief of each service remains in command of that service.¹⁰⁰

A similar model may be appropriate for the emergency services (and is akin to the model in the ACT¹⁰¹) where a senior officer from one could be appointed as Chief of the Emergency Services to take overall command of the emergency services. The Chief would not assume operational control in an emergency (any more than the Chief of the ADF is in command during a battle in Iraq) but would ensure direction and coordination in training and resourcing to ensure that the services could operate as a cohesive whole when required.

Creating another board, and then transferring operational responsibility from an organisation that is responsible for operations most of the time, to an overarching body that is responsible for operations only some of the time would suggest moving control when it is most important that it remains within an institution with practised control and response arrangements.

Both option seven and eight beg the question of what is an emergency service? If emergency management is to be seen as a whole of government response then many agencies are, at times emergency services. DSE and Parks Victoria may not see themselves as emergency services but they have an emergency response role, but so do all the agencies assigned a role under the State Emergency Response Plan.¹⁰² If

⁹⁵ Department of Justice, above n 4, p 26.

⁹⁶ Office of the Emergency Services Commissioner, above n 11. p 7.2.

⁹⁷ See for example, *Rural Fires Act 1997* (NSW) s 44.

⁹⁸ Defence Act 1903 (Cth) s 30.

⁹⁹ *Defence Act 1903* (Cth) ss 31-32A; 34-50E (Army); *Naval Defence Act 1910* (Cth); *Air Force Act 1923* (Cth).

¹⁰⁰ Defence Act 1903 (Cth) s 9.

¹⁰¹ *Emergencies Act 2004* (ACT) and the creation of the role of Commissioner of Emergency Services with each service under the command of a chief officer.

¹⁰² Office of the Emergency Services Commissioner, above n 11. Part Seven.

the Fire Services Commissioner or a new board are to take control from the emergency services that would require some consideration of what is an emergency service. Rather all of government should see that responding to emergencies is a role for all agencies, not something to be left to the emergency services.

Victoria has extensive powers to ensure an all of government response in the event that the Premier declares a state of disaster¹⁰³ including a power, vested in the Minister, to 'direct any government agency to do or refrain from doing any act, or to exercise or perform or refrain from exercising or performing any function, power, duty or responsibility'¹⁰⁴ and a power to suspend any Act or regulating that is inhibiting the response to or recovery from the disaster.¹⁰⁵ This gives the Minister the necessary power, if required, to take steps if coordination or control is lacking, to give directions to the agencies as to who is to exercise control or take other steps to respond. As noted there has been a reluctance for governments to take steps to make disaster declarations, but the necessary powers are there to be exercised and can be exercised in response to a particular emergency.

Recommendation 4 – options seven and eight should *not* be adopted.

It is my submission that options seven and eight should not be adopted. The control agencies should be left to exercise control and coordination which they do effectively most of the time. When the states assets are being overwhelmed, and in the event that there is confusion, it is incumbent upon the Minister to ensure that effective arrangements are in place. Those circumstances constitute a disaster and the Minister should not be afraid to exercise his or her powers when they are required.

Conclusion

This submission has touched on only one aspect of Victoria's emergency management arrangements. It is known that emergency management extends across the whole range of activities to prevent, prepare for, respond to and recover from hazard events. This submission has addressed the question of 'Who is in charge?' only with respect to the response to emergencies.

It has been argued that Victoria's emergency management arrangements are unclear and inconsistent. Even with post Black Saturday changes, it remains the case that in the next major emergency there will be 'no single agency or individual in control of the emergency response'¹⁰⁶ or, if there is, it will be very difficult to identify who they are.

Whilst it is true that 'There is not and could not be a single organisation solely and totally responsible for dealing with all aspects of emergencies'¹⁰⁷ history has shown that there should be one organisation primarily responsible for the immediate, emergency response. 'When a natural disaster occurs, some person needs to be put in charge of the site to direct the counter-disaster operation'¹⁰⁸ and the extent and scope of their authority needs to be clear. That is not the case in Victoria.

¹⁰³ Emergency Managemetn Act 1986 (Vic) ss22-24.

¹⁰⁴ Ibid, s 24(2)(a).

¹⁰⁵ Ibid, s 24(2)(b).

¹⁰⁶ Teague et al, above n 1.

¹⁰⁷ Office of the Emergency Services Commissioner, above n 11. p 1.4.

¹⁰⁸ H P Lee, *Emergency Powers* (1984, Law Book Company, Sydney) 171–172.

The comments and model, above, are intended to assist the Department of Justice in its deliberations on how to reform Victoria's emergency management arrangements and move towards a more disaster resilient and safer Victoria. I thank the Department for the opportunity to contribute to the debate on this important issue.

Yours sincerely

A handwritten signature in black ink that reads "Michael Eburn". The signature is written in a cursive style with a large initial 'M'.

Dr Michael Eburn

BCom, LLB, BA(Hons), LLM, MPET, PhD.

Barrister (ACT)

Senior Fellow

ANU College of Law and

Fenner School of Environment and Society, ANU College of Medicine, Biology and Environment.