



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC:CBvk041223

4 December 2023

The Hon. Paul Scully MP
Minister for Planning and Public Spaces
52 Martin Place
Sydney NSW 2000

By online form

Dear Minister,

Aspects of Part 5 of the NSW Reconstruction Authority Act 2022 (NSW)

The Law Society of NSW writes to you in respect of the broad powers granted to the Minister for Planning and the NSW Reconstruction Authority (**Authority**) under the *NSW Reconstruction Authority Act 2022* (NSW) (**Act**). Our submission is informed by the Public Law Committee of the Law Society.

We acknowledge the necessity of the Act and the Authority, and the need for the Government to act quickly and effectively in preparing for, responding to, and rebuilding after, natural disasters. The NSW Reconstruction Authority has a critical and complex role to play in “disaster prevention, preparedness, recovery, reconstruction, and adaption to the effect of natural disasters in NSW.”¹ However, we are concerned that aspects of Part 5 of the Act are drafted in a way that is unnecessarily and disproportionately broad, and yet may be ineffective to “expedite decision-making processes...”² Despite the imperatives noted, as a rule of law matter, the powers of the Minister and the Authority should be subject to reasonable safeguards including clarity, transparency and proportionality.

1. Issues

Part 5 of the Act allows the Minister, by order published in the Gazette, to declare a project for proposed development a “declared project” (s 39), and to declare part of the State to be a “reconstruction area” (s 40) or “disaster prevention area” (s 41). None of these phrases are substantively defined terms within the Act.

The Act also provides the Minister with the power to specify that other Acts or statutory instruments do not apply in relation to the declared project, reconstruction area or disaster prevention area.³

¹ NSW Reconstruction Authority website: <https://www.nsw.gov.au/emergency/nsw-reconstruction-authority> and section 3 of the Act.

² New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 November 2022, 9197 (Anthony Roberts, Minister for Planning and Minister for Homes).

³ See *NSW Reconstruction Authority Act 2022* (NSW) ss 39(4), 40(3), s 41(4).

In our view, the scope of power afforded to the Minister in this regard is unnecessarily broad, and, from the perspective of better legislative drafting practices, requires clearer definition.

The safeguards prescribing the circumstances in which the Minister may make such declarations provided in ss 39(2), 40(2) and 41(2) are weak and uncertain. For example, many parts of the State may be directly or indirectly affected by disasters, which may potentially permit the Minister to make declarations under these powers over vast parts of NSW and to exclude the operation of an undefined scope of other laws, for unspecified periods.

Further, the powers may be used in relation to “potential disasters,” to improve an affected community’s “resilience” or for “the betterment of the community”⁴ – terms that are either broadly defined, or undefined, in the legislation.

We note also the unsatisfactory legislative process leading to the passage of the Act, which was introduced on 9 November 2022, passed both Houses by 17 November 2022, and received assent by 28 November 2022. There was no referral to a public inquiry or consultation process, and therefore very limited opportunity for public scrutiny.

2. Potential amendments

We suggest amendments to the Act to provide clarity and safeguards to the Minister’s powers. We suggest that the terms used in ss 39(2), 40(2) and 41(2) be more strictly defined, and the powers limited to those necessary for disaster prevention and relief.

We also suggest that ss 39(4), 40(3) and 41(4) be deleted. We understand that the establishment of a Reconstruction Authority in NSW was a response to recommendation 15 of the 2022 NSW Flood Inquiry, which recommended, among other things, that a NSW Reconstruction Authority be established and function under dedicated legislation “modelled on the Queensland Reconstruction Authority Act.”⁵ We note that in Queensland’s counterpart legislation, the Minister is not afforded the power to suspend the operation of any other legislation or statutory instruments pursuant to making a declaration in respect of a declared project or reconstruction area.⁶ While we agree that there is need to tailor the legislation to “account for the unique planning laws in New South Wales and to ensure that it operates cohesively in the New South Wales context”,⁷ we do not agree that the approach taken in ss 39(2), 40(2) and 41(2) is either necessary or proportionate.

In this regard, in addition to the unnecessarily broad scope of these subsections, we query the effectiveness of this approach to expedite decision-making by removing delay caused by statutory or regulatory barriers. Even if State legislation is suspended, there is relevant Commonwealth legislation that will continue to operate, including, in some instances, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Native Title Act 1993* (Cth). We suggest that a more effective approach would be to anticipate specific scenarios where legislative requirements might unacceptably hinder prevention, recovery, reconstruction and adaptation efforts, and to amend the relevant Acts or statutory instruments to create necessary and proportionate exemptions.⁸

⁴ See *NSW Reconstruction Authority Act 2022* (NSW) s 40(2)(c)(iii), s 41(2)(c)(iii).

⁵ *2022 Flood Inquiry Volume One: Summary report*, 29 July 2022, 25

⁶ Sections 42 and 43, *Queensland Reconstruction Authority Act 2011* (Qld)

⁷ Note 2 above, at 9196

⁸ We understand that, for example, an amendment was made to the *Residential Tenancies Regulation 2010* (NSW) via the *Residential Tenancies Amendment (Refuge or Crisis Accommodation Exemptions) Regulation 2015* to create an exemption to the provisions of the *Residential Tenancies Act 2010* (NSW) in relation to refuge or crisis accommodation provided by a prescribed authority, and for moveable dwellings in a caravan park under certain circumstances.

Further, s 41 should be amended to permit the Minister to make declarations “if satisfied that they are necessary for the preservation of life”. Sections 39, 40 and 41 should be amended to include clear time limits for the expiry of the order underlying declarations made under Part 5, and to provide for a renewal or extension process if necessary.

Finally, we suggest that this regulatory framework should be coordinated with relevant Commonwealth legislation. In addition to considering the interaction of Commonwealth legislation with the State-level scheme, State and Commonwealth Governments share responsibility in relation to disaster management, and both provide funding for related purposes (for example, bushfire recovery). There is also an interstate dimension to this issue that requires consideration, given that disasters do not observe State or Territory borders. We suggest that the National Cabinet may be the appropriate forum to facilitate a coordinated approach on these issues.

Thank you for your consideration. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, on victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,



Cassandra Banks
President

CC:

The Hon. Michael Daley MP, Attorney General

The Hon. Jihad Dib MP, Minister for Emergency Services