

# A Funny Thing Happened on the Way to the National Cabinet—Out Goes Good Policy, One, Two, Three\*

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**Abstract** This article outlines the impact of the pressures caused by the current pandemic ‘crisis’ on the nation’s governance arrangements with particular reference to intergovernmental relations and their existing institutions and arrangements. Attention is given to the new institutional arrangements that have been developed to replace the Council of Australian Government (COAG) and related advisory bodies by the National Cabinet and other new processes. The issue is whether these new arrangements, announced as the pandemic crisis unfolded, have given further impetus to ‘executive federalism’ and increased executive dominance within each jurisdiction. It is argued that the nature and extent of these new arrangements have been further amplified by the recently completed review of the COAG superstructure and ministerial councils. These changes may be extensive, but have not altered the fundamental intergovernmental processes and politics that have long dominated Australia’s federalism.

## INTRODUCTION

Discussion of intergovernmental relations usually focuses on the growing centralisation of power and the Commonwealth’s increasing dominance over the states—so called ‘coercive federalism’. At the same time, there have been attempts by successive different Commonwealth governments at ‘collaborative’ or

‘cooperative’ federalism through their various ‘new federalism’ initiatives.<sup>1</sup> Also important, though sometimes overlooked, has been the continuing development of ‘executive federalism’. This concept highlights how interactions between governments in federations are inevitable and necessary, and are mostly conducted by members of the executive branches—Prime Ministers, Premiers, Ministers, public servants and their departments. They work through various constitutionally prescribed intergovernmental institutions like the Inter-State Commission<sup>2</sup> and other institutions established by agreement between governments like the Loans Council, Premiers’ Conference, intergovernmental ministerial councils, forums and officials’ meetings, ad hoc advisory bodies and numerous other informal arrangements.<sup>3</sup> Executive dominance of Parliament in Westminster democracies, and especially in Australia, makes this seemingly inevitable and understandable. However, Parliament has not been totally excluded from these interactions as federal-state agreements often require supporting legislation, Opposition controlled upper houses can block progress, and parliamentary committees can probe.<sup>4</sup> Concomitant with executive dominance of federal-state relations and Parliament, has been the increasing centralisation of decision and administrative power in the hands of leaders across jurisdictions—labelled ‘leader-centred politics’<sup>5</sup>—as testified by the expansion of their departments and personal staffs in all federal, state and territory governments.<sup>6</sup>

This article outlines the impact of the pressures caused by the current pandemic ‘crisis’ on the nation’s governance, with particular reference to intergovernmental relations and its existing institutions and arrangements. Attention is given to the new institutional arrangements that have been developed to replace the Council of Australian Government (COAG) and related advisory bodies by the National Cabinet

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<sup>1</sup> Brian Galligan, ‘Federalism and Policymaking’, in Andrew Hede and Scott Prasser, (eds.), *Policy-Making in Volatile Times*. Sydney: Hale and Iremonger, 1993, pp. 175-192.

<sup>2</sup> Sections 101-103 of the Australian Constitution.

<sup>3</sup> Campbell Sharman, ‘Executive Federalism’, in Brian Galligan, Owen Hughes, and Cliff Walsh, (eds.), *Intergovernmental Relations and Public Policy*. Sydney: Allen and Unwin, 1991, pp. 23-38.

<sup>4</sup> Campbell Sharman, ‘Parliaments and Commonwealth-State Relations’, in John Nethercote, (ed.), *Parliament and Bureaucracy*, Hale & Iremonger, Sydney, 1982, pp. 280-90.

<sup>5</sup> Paul Strangio, Paul ‘t hart, and James Walter, *The Pivot of Power: Australian Prime Ministers and Political Leaderships 1949-2016*. Melbourne: The Miegunysh Press, 2017, p.5.

<sup>6</sup> Marija Tafлага, ‘Executive Government’, in Peter Chen et al. (eds.), *Australian Politics and Policy*. Sydney: Sydney University Press, 2<sup>nd</sup> edition, 2019, pp. 53-69.

and other new institutions and processes. The issue is whether these new arrangements, announced as the pandemic crisis unfolded, have given further impetus to 'executive federalism' and increased executive dominance within each jurisdiction. It is argued that the nature and extent of these new arrangements have been further amplified by the recently completed review of the COAG superstructure and ministerial councils. It is argued that these changes may be extensive, and have gone further than when Australia faced previous crises, but they have not altered the fundamental intergovernmental processes and politics that have long dominated Australia's federalism.

### **IMPACTS OF CRISES – CATALYSTS FOR ACTION AND 'REFORM'**

Australia, like most of the world, is in the grip of a pandemic triggered by the highly contagious coronavirus (COVID-19). We have been told that the pandemic poses the greatest threat to our health since the 1919 Spanish Flu. Although it has caused adverse impacts on the Australian economy, unprecedented since the Great Depression of the 1930s, it has not to date caused loss of life anything like as predicted,<sup>7</sup> or compared to the Spanish Flu, when it was estimated that some 12-15,000 Australians died and 40 per cent of the population were infected.

Nevertheless, the pandemic from the outset has created a sense of 'crisis', which McConnell defines as:

... extraordinary episodes which disturb and threaten established patterns of working and dominant assumptions about the way aspects of society operate. They can threaten lives, property, markets, infrastructure, public services, policy agendas, political careers and even governing paradigms. Such threats, combined with high uncertainty place enormous pressure and responsibility on crisis managers.<sup>8</sup>

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<sup>7</sup> Initial predictions were that 100,000 would die from the virus. As at 20 October 2020, there were 27,371 cases and 904 deaths. Of these 816 were in Victoria. Ninety-three percent of related deaths were of people over the age of 70. Some 682 deaths were those were in aged care facilities of which 652 were in Victoria.

<sup>8</sup> Allan McConnell, 'Success? Failure? Something In-Between? A Framework for Evaluating Crisis Management', *Policy and Society* 30 2011, pp. 63-76.

Crisis situations can produce a number of policy, administrative and political responses from governments that are often unprecedented—constitutionally, ideologically and in terms of costs. They can change, for a time, what governments do, and just as importantly, what they are expected to do, sometimes forcing governments to act contrary to their ideological dispositions and past records. They can also alter how governments operate and especially their choice of policy tools, often meaning more stick and less carrot.<sup>9</sup>

It is not unusual, depending on the length and severity of a crisis, for new institutional arrangements to be created. These can initially be regarded as temporary, but in the aftermath of a crisis, they may become permanent and be grafted onto the existing government architecture or lead to wholesale renovation to serve the new functions of the state that developed during the crisis and are now deemed necessary to continue.

Sometimes crises can accelerate change for a variety of reasons. The need for urgent and authoritative decision making and the importance of maintaining public morale may intensify existing long-term trends in government noted above, such as increasing executive power, leader domination, the erosion of parliamentary scrutiny and less government consultation and openness.

Crises can further stress a nation's policy and administrative capacities that may already had been under question.<sup>10</sup> This is a particular concern in countries where the institutional structures are thinner and constitutional frameworks less secure. The result is often chaos and collapse.

Positive developments can also result from a crisis. Previously resisted 'reforms' may at last be implemented where the crisis has bred cooperation across the partisan and, in federal systems, the intergovernmental divide.<sup>11</sup> An incumbent government or leader can gain status and authority in a crisis through on their performance, thus encouraging shelved reforms to be revived. The opportunity for astute leaders with

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<sup>9</sup> Christopher Hood, *The Tools Of Government*. London: Macmillan, 1983.

<sup>10</sup> James Walter *et al.*, 'Policy Capacity in Disruptive Times', *Australian Journal of Political Science*, 55(1) 2019, pp. 72-85.

<sup>11</sup> For a definition of genuine 'reform' see Gary Banks, *Successful Reform: Past Lessons, Future Challenges*. Canberra: Productivity Commission, Commonwealth of Australia, 2011, pp. 1-17 and especially p. 5.

clear policy and political agendas is too good to miss,<sup>12</sup> although it requires considerable political skills to exploit the situation and achieve success.

Of course, crises can also generate the complete opposite—discord, suspicion, blame allocation, and lack of cooperation—whereby the institutional and partisan barriers are raised rather than lowered. Despite the veneer of unity and the temporary suppression of partisanship at the height of a crisis, partisanship may soon reassert itself in various degrees as the pandemic crisis moves through a cycle of alarm to management to its eventual conclusion. Governments and leaders remain acutely aware how their actions during a crisis can redeem their fortunes or destroy their prospects. Previous governments' experiences concerning crisis situations will be considered in this context. For instance, the Rudd Labor Government's response to the GFC in 2008 was particularly important for the Morrison Coalition Government. While the Rudd Government proclaimed its very active Keynesian fiscal stimulus package saved Australia from recession, other assessments are far less sanguine. As Garnett and Lewis concluded:

The GFC certainly caused a revival of Keynesian sentiment throughout the world, and Australia was no exception. In all probability, the stimulus package did have some short-run effect in preventing unemployment rising ... but much of the spending was wasteful and could have damaged long-term economic growth.<sup>13</sup>

Others were even more critical of particular programs that the Rudd Government initiated during this period,<sup>14</sup> like the Building Education Revolution (BER).<sup>15</sup> Leaders will also reflect on their own experiences.<sup>16</sup> Other programs and past personal

<sup>12</sup> For example, see Sarah Jones, 'Industry Chiefs Urge PM Not to Let COVID Reform Chance Pass By'. *The Australian*, 13 August 2020.

<sup>13</sup> Anne Garnett and Phil Lewis, 'The Economy', in Chris Aulich and Mark Evans (eds.), *The Rudd Government: Australian Commonwealth Administration 2007-2010*. Canberra: ANU Press, p. 214.

<sup>14</sup> Tony Makin and John Humphreys, 'Reviewing the Review of the Fiscal "Stimulus" Program', in Scott Prasser and Helen Tracey (eds.), *Royal Commissions and Public Inquiries: Practice and Potential*. Ballarat: Connor Court, 2014, pp. 248-261.

<sup>15</sup> This was a massive school building program that cost \$16.2 billion, was slow in being implemented and regarded as having minimal impact on stimulating the economy.

<sup>16</sup> Prime Minister Morrison was criticised for some of his actions during the 2019-20 bushfires. See, for example, Nikki Savva, 'Morrison Snaps Out of His Slumber to Avoid Another Hawaii Moment'. *The Australian*, 18 March 2020.

experiences will both figure in their actions. In addition, imminent elections will intensify the focus by elected officials on election issues at the expense of the policy, the evidence, or notions of cooperation, especially in the public sphere.<sup>17</sup>

## WHAT AUSTRALIAN COMMONWEALTH AND STATE GOVERNMENTS DID

As the pandemic crisis was beginning in March this year, the Commonwealth, with state and territory approval, activated a number of stand-by existing crisis health mechanisms like the National Coordination Mechanism<sup>18</sup> (NCC) and the Australian Health Protection Principals' Committee (AHPPC).<sup>19</sup> It needs to be appreciated that an extensive and long standing legislative and institutional framework existed concerning such health emergencies prior to the pandemic erupting.<sup>20</sup> COAG had been party to these and had also adopted in 2011 the *National Strategy for Disaster Resilience* to coordinate intergovernmental policies to crises and all governments had contributed to the *National Disaster Risk Reduction Framework* (2018). The new Commonwealth *Biosecurity Act*, which covered quarantine issues, was seen to greatly expand Commonwealth power to the limits of its constitutionality.<sup>21</sup>

Most importantly, following agreement at the scheduled Council of Australian Governments' (COAG) first ministers' meeting in March,<sup>22</sup> Prime Minister Morrison announced the formation of the National Cabinet. Oddly, this was not mentioned in the COAG Communique.<sup>23</sup> The National Cabinet consists of the same First Ministers

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<sup>17</sup> At the time of the pandemic began in March 2020 impending elections were due in the Northern Territory (August 2020), Queensland (October 2020), the Australian Capital Territory (October 2020) and Western Australia (March 2021). To date, the incumbent governments in the Northern Territory, the Australian Capital Territory and Queensland have been returned to office, with the Labor Government in Queensland making its response to the pandemic, especially concerning its border closures, a major part of its winning election strategy.

<sup>18</sup> NCC coordinates the cross jurisdictional response to non-health aspects of the pandemic—an emergency services response.

<sup>19</sup> This consists of the Commonwealth Chief Medical Officer and all State and Territory Chief Health Officers and operates in times of emergencies.

<sup>20</sup> This included the *National Health Security Act 2007* (Cth), *Biosecurity Act 2015* (Cth) and Australian Health Management Plan for Pandemic Influenza (2014).

<sup>21</sup> H.P. Lee, Michael Adams and Colin Campbell, *Emergency Powers in Australia*. Cambridge: Cambridge University Press, 2018, p. 170.

<sup>22</sup> COAG has operated since 1992, when it replaced the Premiers' Conference and other bodies.

<sup>23</sup> Meeting of the Council of Australian Governments, *Communique*, Sydney, 13 March 2020.

(Prime Minister, Premiers, and First Ministers) who are members of COAG, though without the local government representatives. The inaugural meeting of the National Cabinet was held just two days after COAG. According to the Prime Minister, the National Cabinet's role was 'to get a coordinated response across the country to the many issues that relate to the management of the coronavirus'. It was needed because the virus 'requires responses from all governments ... And it is important we act ... closely together to ensure there's consistency of response'.<sup>24</sup> As Morrison said:

... what we are doing here through this National Cabinet is ensuring that we're getting a genuinely national response. That we're getting a consistent response ... to reassure everybody is working together to keep you safe and to try to disrupt your daily life as little as necessary.<sup>25</sup>

This seemed an important and bold step, although not without precedents on a smaller scale. During the Great Depression of the 1930s the regular Premiers' Conference developed the Premiers' Plan to provide a national approach to tackle the economic crisis.<sup>26</sup> During World War Two, although Australian attempts to form a national government similar to that in the United Kingdom failed, an Advisory War Council, with senior government and opposition members was established in 1940 and met until 1945.<sup>27</sup>

Morrison initially presented the National Cabinet as a temporary body, supplementing but not supplanting COAG and its numerous ministerial councils. Nor was it meant to bypass Commonwealth or state Parliaments. 'I would consider Parliament essential', said Morrison.<sup>28</sup> The formation of the National Cabinet was widely applauded as an example of 'cooperative federalism' and a breakthrough in the normal fractious nature of federal-state relations.<sup>29</sup> The National Cabinet was not seen to override State governments in the exercise of their constitutional and

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<sup>24</sup> Scott Morrison PM, *Press Conference*, 13 March 2020.

<sup>25</sup> Morrison, *Press Conference*.

<sup>26</sup> Bernie Schedvin, *Australia and the Great Depression: A Study of Economic Development and Policy in the 1920s and 1930s*. Sydney: Sydney University Press, 1970.

<sup>27</sup> Geoffrey Bolton, '1939-51', in Frank Crowley (ed.), *A New History of Australia*. Melbourne: Heinemann, 1974, p. 461.

<sup>28</sup> Bolton, '1939-51', p. 461.

<sup>29</sup> Tom Burton, 'National Cabinet Creates New Federalism Model'. *Australian Financial Review*, 18 March 2020.

localised responses to the pandemic, but merely to help coordinate these within an overarching whole of government framework—though exactly what this was to mean in practice was unclear. Existing parts of the COAG system—the Health Council of federal and state health Ministers, the Australian Health Protection Principal Committee (AHPPC) of federal and state chief health officers and the National Crisis Committee (NCC)—were key parts of the process. A new body was the National Coordination Mechanism (NCM), created to coordinate all non-health government responses—public safety, education, banking, food, and so forth.

However, although some saw it as just COAG under a new banner, from the outset Morrison sought to elevate the National Council’s status and authority to something different. It would, stressed Morrison, meet weekly (COAG’s First Ministers met twice a year), and have the ‘status of a Cabinet meeting’ with the same confidentiality and freedom of information protections and protocols as the federal Cabinet.<sup>30</sup> What this meant in practice was unclear. Early on, Professor Anne Twomey raised concerns, arguing that the National Cabinet could not be seen as a ‘cabinet’ in the Westminster sense of collective or individual ministerial responsibility and accountability, as its members ‘are not collectively responsible to one parliament’.<sup>31</sup>

Also created at this time was a National COVID-19 Coordination Commission, involving senior public servants and external members, to coordinate advice to the Australian Government on actions to anticipate and mitigate the economic and social effects of the pandemic. It would undergo further changes in subsequent months.<sup>32</sup>

## HOW DID IT GO?

The new National Cabinet and other mechanisms seemed to work. All the leaders had a seat at the table, were part of the ongoing national decision-making process and had their profiles raised. Meetings were frequent (13 over four weeks during March-April), and at first, there were few public disagreements. Morrison, in particular as chair, had his authority enhanced and was seen to be involved, attentive,

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<sup>30</sup> Burton, ‘National Cabinet Creates New Federalism Model’.

<sup>31</sup> Burton, ‘National Cabinet Creates New Federalism Model’.

<sup>32</sup> In July 2020, the Commission was renamed to the National COVID-19 Commission Advisory Board to better reflect its advisory nature.

energetic, engaged and in charge of the nation's response to the pandemic—unlike the way he was criticised during the earlier bushfires.<sup>33</sup> All leaders' poll ratings rose, which was important for those facing forthcoming elections in 2020 (ACT, Northern Territory and Queensland). Morrison sought to maintain maximum public harmony, and to avoid appearing to dominate meetings or to criticise state leaders—even when there were obvious departures from National Council decisions on matters like school openings and border closures. Bipartisanship reigned supreme—it was the 'policy not the politics' that counted, Morrison said.<sup>34</sup> When federal Education Minister Dan Tehan vented public frustration at the Victorian Government's school closure, he was forced by Morrison to apologise to Premier Andrews.<sup>35</sup> Political and policy responsibility seemed unified as never before. National Cabinet seemed like 'unprecedented co-operation between federal, state and territory governments, resulting in 'major COVID-19 reforms, including economic and relief measures, implementation of social and border restrictions, and collaboration on education, health and aged care settings'.<sup>36</sup>

This apparent success soon began rumours that 'Morrison plans to vest National Cabinet with a longer run responsibility'.<sup>37</sup> Morrison himself suggested the National Cabinet 'may prove to be a better way for our federal system to work in the future.'<sup>38</sup> Key commentators like Paul Kelly predicted that 'an attempt will be made to institutionalise the national cabinet and keep it going'.<sup>39</sup>

Others were more sanguine, noting that despite the outward manifestations of cooperation and bipartisanship there were, as noted, federal-state disagreements about school openings and border closures, as well as some disparities between advice from the AHPPC and responses of State medical officers who were members of

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<sup>33</sup> Olivia Caisley, 'Scott Morrison Takes a Bushfire Hit' *The Australian*, 17 February 2020.

<sup>34</sup> Scott Morrison, quoted in *The Australian*, 15 April 2020.

<sup>35</sup> Dan Tehan MP, 'Classrooms Must Reopen Now to Avoid Education Divide'. *Sydney Morning Herald*, 28 April 2020; 'Dan Tehan Admits He "Overstepped the Mark" in Attack on Daniel Andrews over School Closures'. *ABC News*, 3 May 2020.

<sup>36</sup> Geoff Chambers and Paige Taylor, 'COVID-19 Crisis Cabinet to Outlive Pandemic and Replace COAG'. *The Australian*, 15 April 2020.

<sup>37</sup> Paul Kelly, 'National Cabinet Usurps COAG Role'. *The Australian*, 8 April 2020.

<sup>38</sup> Chambers and Taylor, 'COVID-19 Crisis Cabinet'.

<sup>39</sup> Paul Kelly, 'Politics and the Pandemic'. Address to Sydney Institute, 6 May 2020.

that Committee.<sup>40</sup> The usual federal-state buck-passing over accountability reasserted itself concerning responsibility for the inappropriate disembarkation of passengers from the *Ruby Princess* liner in Sydney. This was only resolved by the report of the Special Commission of Inquiry appointed by the New South Wales Government, which found NSW Health at fault.<sup>41</sup> Similar disputes developed over responsibility for aged care in Victoria and the availability of Defence Force staff to the Victorian Government for hotel quarantining. The latter issue also attracted a government appointed public inquiry—the Board of Inquiry into the COVID-19 Quarantine Program.<sup>42</sup>

## WHAT HAPPENED NEXT?

On 29 May, Morrison announced that the National Cabinet had decided that it would continue as a permanent body. This meant the ‘cessation of the COAG model ...COAG is no more’ and ‘will be replaced by a completely new system’ of intergovernmental relations.<sup>43</sup> As before, the National Cabinet would operate ‘under Federal Cabinet rules’, including the security of documents, process and procedure’, or, as the Prime Minister put it, ‘like a fair dinkum Cabinet’.<sup>44</sup> National Cabinet was deemed by the First Ministers as a ‘more effective body for taking decisions in the national interest than COAG’.<sup>45</sup> Morrison condemned COAG as meeting too irregularly and then too briefly, claimed ministerial councils and forums had mushroomed in numbers and ever expanding agendas, and the whole system was too bureaucratised and formal with its committees of public servants. He was adamant that this new system would ‘involve less paperwork, streamline those endless meetings’ of COAG, would have a

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<sup>40</sup> Jennifer Hewett, ‘National Cabinet Shows Multiple Failings’. *Australian Financial Review*, 23 March 2020.

<sup>41</sup> Brett Walker SC, Chair, Special Commission of Inquiry into Ruby Princess, *Report*. Sydney: NSW Government, 2020.

<sup>42</sup> Established under Victoria’s new *Inquiries Act 2014*.

<sup>43</sup> Scott Morrison, PM, *Media Release*, 29 May 2020; see also Scott Morrison, PM, in Georgia Hitch ‘Scott Morrison Says National Cabinet Here to Stay’. *ABC News*, 29 May 2020

<sup>44</sup> Scott Morrison, PM, *Media Release*.

<sup>45</sup> Scott Morrison, PM, *Media Release*.

narrower agenda, have more practical focus in tackling job creation, and ‘ensure Australians get better government ... at a state and federal level’.<sup>46</sup>

The National Cabinet agreed to other changes. There would be a new body—the National Federation Reform Council (NFRC)—which Morrison explained ‘would change the way the Commonwealth and states and territories ... work together to address new areas of reform’.<sup>47</sup> As well, the existing Council on Federal Financial Relations (CFFR) of federal and state treasurers would ‘take responsibility for all funding agreements between the states and the Commonwealth’ that ‘will no longer be the province and domain of individual ministerial portfolios’.<sup>48</sup> This meant the existing range of ministerial councils and forums, covering areas from education to health and involving responsible federal and state Ministers, would ‘be consolidated and rationalised’ and have their roles ‘reset’.<sup>49</sup> The federal and state treasurers, explained Morrison, were ‘well placed’ to review issues in these agreements.

## ISSUES RAISED BY THE NEW ARRANGEMENTS

Consideration of the impact of these new arrangements can be viewed from different perspectives. Do they represent, as Morrison and his fellow First Ministers contended ‘a completely new system’ and a breakthrough in federal-state relations, resulting in more unified policy making? Alternatively, have these changes further entrenched ‘executive federalism’ and given more impetus to executive dominance and centralisation of power within each jurisdiction?

The processes and timeframes of how these extensive changes were made are an initial concern. They were rushed through during a crisis situation when attention was elsewhere. There was little prior discussion and consultation. They were presented as a *fait accompli*. Parliamentary approval was neither sought nor needed. Details about many of the new arrangements were missing. For instance, the membership and agenda of the National Federation Reform Council, supposedly pivotal to ‘address new areas of reform’, were vague and general. They were to be

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<sup>46</sup> Scott Morrison, quoted in Hitch, ‘Scott Morrison Says National Cabinet Here to Stay’.

<sup>47</sup> Morrison, *Media Release*.

<sup>48</sup> Morrison, *Interview*, 29 May 2020.

<sup>49</sup> Morrison, *Interview*, 29 May 2020.

determined by the National Cabinet and not open to wider debate. Nor was it clear how proposals to ‘reset’ and ‘consolidate’ COAG’s ministerial councils was to be done and by what criteria. The hastily announced review of these arrangements by an ‘eminent person’ took time and did not report till October. Further, is the Council on Federal Financial Relations, composed as it is of federal and state treasurers, really as ‘well placed’ as the Prime Minister contends to subsume the roles of ministerial councils and take over their complex national agreements? It seems a recipe for delay, confusion, and lack of accountability.

All this highlights how little forethought had been given to the changes and their implementation. It stands in stark contrast to the how the COAG arrangements they are replacing were established in 1992 only after considerable deliberation and consultation.<sup>50</sup> They were subsequently further refined, based on experience and practice. Indeed, the Review of COAG admitted that many worthwhile reforms had been achieved through COAG, there had been six different reviews of its processes and the last had resulted in rationalisation of ministerial councils to just twelve.<sup>51</sup> It is not clear what COAG’s problems really were. If, as the Prime Minister insinuates, COAG was where ‘good ideas went to die’, then the only ones to blame were the elected officials like him who attended. Similarly, the Review’s lament that there had been ‘little progress’ from all those earlier reviews raises the question of who exactly was responsible, except the participating governments and Ministers.

Then there remains the issue of how the new permanent National Cabinet, established as a Cabinet Office Policy Committee is going ‘under Federal Cabinet rules’ of confidentiality to act ‘like a fair dinkum Cabinet’ and be subject to Cabinet secrecy with the Prime Minister alone deciding what is to be released to the public. Also, how can ministerial accountability be practised? As former Western Australian Premier Colin Barnett said, the National Cabinet, unlike any other in a Westminster democracy, is a ‘cabinet without a parliament’.<sup>52</sup> Can First Ministers on their return to their own jurisdictions be held accountable to their Parliaments about the decisions made by National Cabinet? Indeed, can those First Ministers even discuss

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<sup>50</sup> Andrew Parkin, ‘COAG’, in Brian Galligan and Winsome Roberts (eds.), *The Oxford Companion to Australian Politics*. Oxford: Oxford University Press, 2007, pp. 108-110.

<sup>51</sup> *Review of COAG Councils and Ministerial Forums*—Report to National Council October 2020, pp. 11-14.

<sup>52</sup> Colin Barnett, ‘A Cabinet Without a Parliament, a Meeting With No Power’. *Australian Financial Review*, 1 June 2020.

those issues? The Prime Minister's response was not reassuring. His view was that the National Cabinet would have the 'same process' of confidentiality as federal and state cabinets: 'it's not a spectator sport. It's a serious policy deliberation between governments and by cabinet members within cabinets'.<sup>53</sup>

In summary, the new arrangements and the role of the National Cabinet involve several departures from the COAG system it has replaced, including:

- exclusion of local government from its membership<sup>54</sup>
- more frequent meetings
- a narrower focus on job creation
- Cabinet secrecy as a new restrictive operating element.

Moreover, some proposals outlined in the Review, like Ministers taking direct control of agendas, banning secretariats and meetings of officials to promote consensus decisions, and relying on informal meetings without minutes, seem decidedly amateurish.

This development has further eclipsed the role of Parliament. Indeed, since the pandemic crisis began, Parliaments have hardly figured in any discussions or debates about the strategies being pursued by their own governments, the powers they have evoked or the National Cabinet's decisions. There has been little oversight of the National Cabinet's actions. The Commonwealth Parliament only sat for 12 days from March to August. Its main role was to approve the Commonwealth's massive spending spree in a one day sitting. The special Senate Committee's oversight of the government's pandemic actions has been seen as 'disappointing',<sup>55</sup> given the lame answers provided by attending public servants. Some state upper houses committees have held useful probing inquiries, but sitting times have been limited and Ministers have evaded answering questions on key pandemic issues.<sup>56</sup> Bipartisanship may have

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<sup>53</sup> Morrison, *Interview*, 29 May 2020.

<sup>54</sup> Local government has gained a place on the NFRC.

<sup>55</sup> Margaret White, 'Government's Coronavirus Response Slammed for "Alarming Lack of Oversight" by Retired Judge'. *ABC News*, 3 June 2020.

<sup>56</sup> The Victorian Minister for Health, Ms Jenny Mikakos, in the Legislative Council on 4 August 2020, sought to avoid answering questions concerning the hotel quarantine scandal and the inquiry that had been appointed

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occurred for a time at the National Cabinet, but it has been missing across the jurisdictions, where there has been politics as usual.

Former Queensland Supreme Court Judge Margaret White, while acknowledging ‘this is an emergency and emergencies ... call for quick responses’, nevertheless complained that ‘we have seen very limited sittings of Parliament and we have next to no oversight except via public press conferences, of what decisions are being made by executive government’.<sup>57</sup> Significantly, executive governments everywhere have avoided recourse to Parliament for approval for their draconian measures by using legislation covering health issues. For instance, the Commonwealth relied on declarations issued by the Governor-General based on powers conferred on the Health Minister under the *Biosecurity Act 2015* (Cth). The New South Wales government issued numerous public health orders under the *Public Health Act 2010* (NSW). In Victoria, the State of Emergency was declared using never-before invoked powers under the *Public Health and Wellbeing Act 2008* (Vic). It is on the basis of advice from the Chief Health Officer that the Minister declares a State of Emergency. The test in Victoria will be when the six month legislative limit on the State of Emergency expires and whether the Andrews Government recalls Parliament for its renewal or tries some other subterfuge to bypass Parliament. Overall, concludes Professor John Warhurst, Parliaments across Australia have been ‘deemed surplus to requirements’.<sup>58</sup>

## CONCLUSIONS

The new intergovernmental institutional arrangements developed during the recent pandemic crisis to replace COAG have had several different impacts. At one level, they have further enhanced executive federalism, extended executive power and increased the role of First Ministers. Winding up some of the ministerial councils and national agreements has side-lined state Ministers, enhanced central agencies and further increased powers of the respective state and territory leaders. Parliament has

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because it was ‘part of that formal judicial process. We will not be providing a commentary while the Inquiry is ongoing’.

<sup>57</sup> White, ‘Government’s Coronavirus Response Slammed’.

<sup>58</sup> John Warhurst, ‘Parliament Has Been Deemed Surplus to Requirements’. *Canberra Times*, 23 July 2020.

been diminished by recent developments, but more significantly, it has been exposed to being impotent in holding executive government to account. It has raised real concerns about the value and constitutional standing of Parliament in the Australian Westminster model. That it took two executive appointed public inquiries to expose inept government decision-making and poor administration during the pandemic in New South Wales and Victoria underlines Parliament's inadequacies.

In terms of intergovernmental relations, while these new arrangements may have been motivated for the best of reasons to tackle the pandemic as quickly as possible, there remains a gnawing suspicion that expectations of their potential role and impact has been overplayed. They have not inaugurated a new era of cooperative or collaborative federalism as some hoped. As well, we should not ignore the politically expedient goals of all concerned. For Morrison, it was a means to redeem his Government's standing while possibly pursuing wider reforms, but it was not without risks. Initial federal-state cooperation can easily evaporate by states going their own way in selfish 'provincial parochialism',<sup>59</sup> showing up the limitations of Commonwealth powers and making the Morrison Government look weak and compromised. That increasingly seems to be the situation.

By contrast, the states and territories have had everything to gain and little to lose from participating in the new arrangements. The new arrangements were not binding and digression from decisions brought no penalties. Commonwealth funding flowed regardless of the decisions that the States took, whether or not they were in accord with the increasingly weak enunciations from the fortnightly National Cabinet meetings. This was most vividly seen in relation to border closures, where several states practised what Paul Kelly described as 'pandemic protectionism'<sup>60</sup> taking Australia back to the state sovereignty model of the 1890s when the colonies were unencumbered by the responsibilities or constraints of nationhood. It has made a mockery of yet another Commonwealth inspired 'new federalism', leaving its latest instigator, Prime Minister Morrison, looking increasingly a bystander like many of his predecessors, and his Treasurer the unwitting paymaster of wanton states.

Interestingly, at a time the Review of COAG Councils was advocating the reduction of the number of ministerial councils and forums and lamenting how previous attempts

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<sup>59</sup> Simon Benson, 'Premiers Put Selfish Political Goals Above Well Being of Others'. *The Australian*, 21 August 2020.

<sup>60</sup> Paul Kelly, 'Coronavirus: Fortress States Locking Out the National Interests'. *The Australian*, 19 August 2020.

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failed as new priorities too often led to the appointment of new bodies, the Royal Commission into National Disaster Arrangement report was released. It proposed a greater role for the Commonwealth in natural disaster management and a 'senior ministerial forum, supporting National Cabinet'.<sup>61</sup>

Australia may well be back to where it was during the 1919 Spanish Flu pandemic, when the Commonwealth brokered an agreement in November 1918 with the States for a national response. Within three months, these arrangements had broken down, provoking the Acting Prime Minister, William Watt to send the following urgent telegram to all state Premiers that effectively ended the agreement:

In consequence of the violation of control of influenza epidemic agreement of 27 November 1918, by states of New South Wales, Queensland, Western Australia, and Tasmania, Government of Commonwealth is unable to carry out arrangements voluntarily entered into by Commonwealth and states and gives formal and urgent notice that unless states have broken the agreement indicate by noon on Wednesday, fifth instant, their intention to abide by it and assist quarantine authorities of Commonwealth to operate it, Commonwealth Government will renounce agreement and revert to constitutional position it occupied before agreement was drawn.<sup>62</sup>

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<sup>61</sup> Royal Commission into National Disaster Arrangements, *Report*, 28 October 2020, p. 25.

<sup>62</sup> Quoted in Royal Commission on Constitution of the Commonwealth, *Report of proceedings and minutes of evidence*, November 1929, p. 169; see also Gordon Greenwood, *The Future of Australian Federalism*. St Lucia: University of Queensland Press, second edition, 1976, pp. 331-332.