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Faultlines of Federation: Australia's Intergovernmental Cooperation and Human Rights during the Pandemic

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**FAULTLINES OF FEDERATION:
AUSTRALIA'S INTERGOVERNMENTAL
COOPERATION AND HUMAN RIGHTS
DURING THE PANDEMIC**

GUZYAL HILL, JOHN GARRICK
AND NAT BARTON*

Abstract

The COVID-19 pandemic has challenged previously understood boundaries between jurisdictions and the balance of power between national, state and territory governments in Australia. The crisis served as a catalyst for long called for—yet unexpected—reform of the peak intergovernmental body, the Council of Australian Governments ('COAG') which was replaced by the National Cabinet to ensure coordinated intergovernmental responses. This article examines whether the new National Cabinet has emerged as an effective institution of intergovernmental cooperation in Australia's federalist structure. Is it capable of protecting human rights? Three main areas of rights protection were examined including health, work and rights of residents in aged care.

The National Cabinet has been effective in providing decisive responses to contain and suppress COVID-19. However, second-wave outbreaks, particularly in Victoria, have revealed fault lines in the system. Within the three areas of rights protection examined we found that intergovernmental cooperation through the National Cabinet was most effective when there was a clear delineation of responsibility between the levels of government. However, the protection of aged care residents in particular has revealed serious systemic deficiencies leading to blame-shifting between the levels of government over the boundaries of responsibility.

As an institution of intergovernmental cooperation, the National Cabinet offers some advantages over the COAG. Frequent internet meetings of the National Cabinet have alleviated some criticisms that haunted COAG as being ineffective and overburdened with unnecessary procedure. Further, the heightened attention of the mass media has somewhat countered complaints about opaque

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decision-making and lack of accountability. Conversely, some fault lines begin to emerge around states acting in self-interested ways—hard-line border closures damaging both economic interests and individuals’ freedom of movement. There are also indicators of centralisation with the emerging National Cabinet structure containing potential for power to shift from states and territories—which currently hold most of the constitutional powers relating to emergencies—to the Commonwealth. The National Cabinet served as a political and symbolic tribune for the Prime Minister rather than premiers and chief ministers. Whether the National Cabinet can overcome these fault lines remains to be seen. At least we note some positive signs that cooperative approaches are possible and effective when most needed.

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I. INTRODUCTION

The COVID-19 pandemic has challenged previously understood boundaries between jurisdictions and the balance of power between national, state and territory governments in Australia. The crisis was a catalyst for long called for—yet unexpected—reform of the peak intergovernmental body, the Council of Australian Governments (‘COAG’) which was supplanted by the new National Cabinet to ensure a coordinated intergovernmental

response to the pandemic.¹ This article examines whether the National Cabinet has emerged as an effective institution of intergovernmental cooperation in Australia's federalist structure and whether it protects human rights in the process.

In the pandemic context, 'cooperative federalism' has the advantage of fast collective national action. At the same time, the states and territories have exercised power over their individual jurisdictions, such as implementing hard border closures and restrictions on movement. The monumental demands of the COVID-19 pandemic have put the National Cabinet to extreme tests to balance priorities in ensuring national health, effective economic management *and* the protection of individual rights. This article is structured in two main parts. The first part examines the COAG and the transition to the National Cabinet. The second part explores how the National Cabinet has attempted to foster intergovernmental cooperation and protect human rights during the crisis in three main areas: health care, economic aid and the protection of the most vulnerable population in aged care facilities. The examination reveals fault lines in the effectiveness of national action as balancing the protection of the rights to health, individual rights to work and social security have proved problematic. Intergovernmental cooperation for protecting residents of many aged care facilities was found to be seriously lacking.

II. COOPERATIVE FEDERALISM DURING THE EMERGENCY: THEORETICAL PERSPECTIVES

With the benefit of hindsight, the Australian federation has been able to respond to the pandemic emergency through 'collaborative' or 'cooperative federalism.' This is characterised by jurisdictions cooperating to reach common goals.² For this reason, we draw on cooperative federalism theory for our research framework.³ This theory acknowledges the need to find a balance

1. Andrew Lynch, *COVID-19 and Federalism: Seeding chaos or a more effective response*, YOUTUBE (July 24, 2020), <https://www.youtube.com/watch?v=BzJEljVmy-8&feature=youtu.be>.

2. Martin Painter, *The Council of Australian Governments and Intergovernmental Relations: A Case of Cooperative Federalism*, 26 PUBLIUS: THE J. OF FEDERALISM (1996); Cheryl Saunders, *Cooperative Arrangements in Comparative Perspective*, in THE FUTURE OF AUSTRALIAN FEDERALISM: COMPARATIVE AND INTERDISCIPLINARY PERSPECTIVES (Gabrielle Appleby, et al. eds., 2012); see generally JOHN WANNA ET AL., COMMON CAUSE: STRENGTHENING AUSTRALIA'S COOPERATIVE FEDERALISM (2009).

3. See generally Anne Twomey, *Federalism and the Use of Cooperative Mechanisms*

within the federal/state system that enables effective yet sufficiently accountable and transparent decision-making during an emergency.⁴ Cooperative federalism theory includes being open to insights offered by critical perspectives. Cooperation across jurisdictions has not been antithetical to the provisions of the *Australian Constitution* with Deane J stating, such cooperation has been a “positive objective of the *Constitution*”⁵ allowing for “structural integration”⁶ between the levels of government. ‘Cooperation’ is not a sterile rational exercise in a laboratory setting. Rather, it is best understood as a policy-development ‘dance’ consisting of “seemingly random movements rather than choreographed order.”⁷

As the circumstances of the pandemic were, and continue to be, extraordinary, the theory of cooperative federalism is supplemented by the public policy theory of policymaking at times of crises developed by Wenzelburger et al. who argue that policy decisions at times of crises are mostly influenced by the following factors: “uncertainty, ambiguity, complexity and urgency.”⁸ Uncertainty and ambiguity prevent policymakers from “calculating the associated risks and probabilities.”⁹ Complexity means that crises “unsettle long-held beliefs and disturb routines taken for granted during normal times without replacing them with something new.”¹⁰ Urgency or “time compression is a defining element of crisis: the threat is here, it is real, and it must be dealt with as soon as possible.”¹¹

to Improve Infrastructure Provision in Australia, 2 Pub. Pol’y 211 (2007); Brian R. Opeskin, *Mechanisms for Intergovernmental Relations in Federations*, 53 Int’l Soc. Sci. J. 129, 135 (2001); Hagen Henry, *Basics and New Features of Cooperative Law – The Case of Public International Cooperative Law and the Harmonisation of Cooperative Laws*, 17 UNIFORM L. REV. 197 (2012).

4. Davia Cox Downey & William M. Myers, *Federalism, Intergovernmental Relationships, and Emergency Response: A Comparison of Australia and the United States*, 50 THE AMERICAN REVIEW OF PUBLIC ADMINISTRATION 526–535 (2020).

5. *R v Duncan, Ex parte Austl Iron & Steel Pty Ltd* [1983] 158 CLR 535, 589 (Austl.) at [7]

6. *Id.* at 557–58.

7. Catherine Althaus et al., THE AUSTRALIAN POLICY HANDBOOK, 41 (ALLEN & UNWIN, 2012)

8. Georg Wenzelburger et al., *Policy Theories in Hard Times? Assessing the Explanatory Power of Policy Theories in the Context of Crisis*, 19 PUB. ORG. REV. 97, 97 (2019).

9. *Id.* at 99.

10. Peter Starke et al., THE WELFARE STATE AS CRISIS MANAGER: EXPLAINING THE DIVERSITY OF POLICY RESPONSES TO ECONOMIC CRISIS 1, 5 (2013).

11. Arjen Boin et al., *Crisis Management in Political Systems: Five Leadership Challenges*, in THE POLITICS OF CRISIS MANAGEMENT: PUBLIC LEADERSHIP UNDER PRESSURE, 3.

During the pandemic, cooperation has not always been equal. At times, individual jurisdictions have been affected differently, such as the ‘second wave’ of the pandemic leading to a ‘stage-four’ lockdown in Victoria when no other state faced such a deep second wave.¹² Some borders were shut tightly; others were not.¹³ Thus, cooperation has been characterised by complexity, contested choices, unexpected events and the competing roles played by the actors of the day.¹⁴ The centralization tendencies of Australian federalism became more evident¹⁵ due to the vertical fiscal imbalance and constitutional powers accorded to the Commonwealth Government. As Phillimore and Arklay stated: “State governments are part of a federation in which the Commonwealth Government is fiscally dominant and has greatly expanded its policy ambition and reach over the past century.”¹⁶ Cooperation must consider the rights and relative powers and resources of the participants (i.e., of the Commonwealth, states and territories). Cooperation must also consider the widening scope of issues of national concern. The so-called bright-line delineation between the powers of the states and the Commonwealth has become more blurred.

III. THE PAST: THE COUNCIL OF AUSTRALIAN GOVERNMENTS

To adequately analyze the impact of the new National Cabinet, the COAG—its immediately preceding structure—must first be briefly considered. The *Australian Constitution* did not directly provide for the institution of intergovernmental cooperation.¹⁷ The only ministerial council mentioned in the *Australian Constitution* is the Federal Executive Council, which, in accordance with section 62, is “to advise the Governor-General

12. Elise Kinsella and Erin Handley, ‘Melbourne’s coronavirus restrictions roadmap: The five steps from Stage 4 lockdown to “COVID normal”’ *ABC News*, Online, Sept 6, 2020, updated Oct. 1, 2020, <https://www.abc.net.au/news/2020-09-06/coronavirus-explainer-melbourne-roadmap-easing-restrictions/12634506>.

13. *Ibid.*

14. See Meredith Edwards, *The Policy Making Process*, in GOVERNMENT, POLITICS, POWER AND POLICY IN AUSTRALIA 417, 424–25 (John Warhurst ed. 2002).

15. See generally John Phillimore & Allan Fenna, *Intergovernmental Councils and Centralization in Australian Federalism*, in 27 REGIONAL AND FEDERAL STUDIES 597 (2017).

16. John Phillimore & Tracey Arklay, *Policy and Policy Analysis in Australian States*, in POLICY ANALYSIS IN AUSTRALIA 87 (Brian Head & Kate Crowley eds. 2015), 87.

17. Leslie Zines, ‘Changing Attitudes to Federalism and its Purpose’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 86, 86. See also Brian Galligan and Cliff Walsh, ‘Australian Federalism: Yes or No?’ in Greg Craven (ed) *Australian Federalism: Towards the Second Century* (1992) 193, 195–6.

in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.”¹⁸ The COAG was established in May 1992 as a forum within which to debate and coordinate activities between the three tiers of the Australian Government: the Federal Government, the governments of the states and territories, and the local government¹⁹.

The sole purpose of the COAG was to promote intergovernmental cooperation and national reforms. The “nation’s peak intergovernmental body”²⁰ (as it has been called) is a revival of the 1855 Federal Council of Australasia.²¹ The *Federal Council Act* has been repealed by section 7 of the *Australian Constitution*.²² The members of the COAG were the Prime Minister, Premiers of States, Chief Ministers of Territories and the President of the Australian Local Government Association. The COAG operated “as a forum for high level discussion of matters of strategic national importance that can only be solved by cooperation and collaboration.”²³

In terms of COAG reforms, one of the most prolific areas involving the COAG was the creation of a seamless national economy and single Australian market.²⁴ In November 2008, twenty-seven areas of regulatory reform were prioritized—and together with eight further competitive reforms—were reflected in the preparation of the National Partnership Agreement to

18. The Federal Executive Council consists of all current and former Commonwealth Ministers and Assistant Ministers and performs the functions similar to those performed by the Privy Council in the United Kingdom. *Federal Executive Council*, PARLIAMENT OF AUSTRALIA, https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter2/Federal_Executive_Council (last visited Feb. 5, 2021).

19. COAG, BEST PRACTICE REGULATION: A guide for Ministerial Councils and National Standard Setting Bodies, (2014), <https://www.pmc.gov.au/resource-centre/regulation/best-practice-regulation-guide-ministerial-councils-and-national-standard-setting-bodies>.

20. Glyn Davis & Helen Silver, *Intergovernmental Relations and the Role of Senior Officials: Two Case Studies and Some Lessons Learned*, 74 AUSTL. J. OF P. ADMIN. 467, 467 (2015).

21. Stuart B Kaye, *Forgotten Source: the Legislative Legacy of the Federal Council of Australasia* NewcLawRw (1996) <http://classic.austlii.edu.au/au/journals/NewcLawRw/1996/5.pdf>.

22. *Australian Constitution* s 7.

23. Austl. Gov’t, Dep’t of the Prime Minister and Cabinet, 5 Reform of the Federation White Paper 1, 3 (2015).

24. See generally COAG Reform Council, *Seamless National Economy: Report on Performance 2011-2012* (2012).

Deliver a Seamless National Economy, ratified in February 2009.²⁵ The reform agenda was highly ambitious. The Chairman of the COAG Reform Council, McClintock remarked, “collectively, [these reforms] have huge potential to boost our economic output and our competitive advantage regionally and globally.”²⁶ Chairman McClintock highlighted the importance of these reforms, saying, “given the now urgent and sustained attention needed on productivity, the COAG reform agenda is more important than ever.”²⁷ In 2014, the COAG Reform Council was disbanded.²⁸

The COAG, as a structure for intergovernmental cooperation had, at times, limitations—in terms of adherence to democratic values, transparency and accountability—with the forum closed to anyone except the executive government.²⁹ Saunders and Foster referred to the COAG as the institution fostering centralization.³⁰ The COAG has been viewed as promoting executive federalism and supporting centralization within the federation.³¹ Griffith stressed the managerial function of the COAG as a body, criticizing its pragmatic character and indifferent attitude to the proper distribution of powers within a federal structure.³² It has also been criticized for being “overloaded and ineffective.”³³ There has been some criticism in the literature about how decisions have been made in the COAG,³⁴ particularly the centralism trend and the powers of the Legislature being absorbed by the Executive.

25. Council of Australian Governments, *National Partnership Agreement to deliver a Seamless National Economy* (2009) https://www.federalfinancialrelations.gov.au/content/npa/other/national-partnership/past/seamless_national_economy_NP.pdf.

26. Paul McClintock, *COAG's Reform Agenda, the Seamless National Economy and Accountability for Outcomes*, 72 AUSTL. J. OF PUB. ADMIN. 66, 66 (2013).

27. *Id.*

28. COUNCIL OF AUSTRALIAN GOVERNMENTS, *Announcements*, May 29, 2000 <https://www.coag.gov.au/>.

29. PARLIAMENT OF AUSTRALIA, SENATE SELECT COMM. ON THE REFORM OF THE AUSTRALIAN FEDERATION, *AUSTRALIA'S FEDERATION: AN AGENDA FOR REFORM 1*, 8 (2011), https://www.aph.gov.au/~media/wopapub/senate/committee/reffed_ctte/reffed/report/report_pdf.ashx.

30. Cheryl Saunders & Michelle Foster, *The Australian Federation: A Story of the Centralization of Power*, in *FEDERALISM AND LEGAL UNIFICATION* 87 (2014).

31. Geoff Anderson, *The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism*, 31 U.N.S.W.L.J. 493, 506 (2008).

32. GARETH GRIFFITH, *MANAGERIAL FEDERALISM - COAG AND THE STATES*, at i (2009).

33. John Phillimore, *Understanding Intergovernmental Relations: Key Features and Trends*, Oct. 10, 2013, 77(3) *Australian Journal of Public Administration*, Online, <https://onlinelibrary.wiley.com/doi/pdf/10.1111/1467-8500.12025>.

34. See Gianluca Veronesi et al., *Governance, Transparency and Alignment in the Council of Australian Governments (COAG) 2011 National Health Reform Agreement*, 38 AUSTL. HEALTH REV. 288 (2014); see generally JENNIFER MENZIES, *EXECUTIVE FEDERALISM AND ACCOUNTABILITY—A WORKABLE SYSTEM*, COAG REFORM COUNCIL (2012), https://webarchive.nla.gov.au/awa/20140212124111/http://www.coagreformcouncil.gov.au/sites/default/files/files/excellence/events/Think_piece_Menzies_2012.pdf.

Additionally, the COAG was criticized³⁵ for not being a permanent body and depending too heavily on the government of the day. COAG supporters have countered these criticisms by claiming that “COAG decisions are commonly the result of long-term debate and consultation, including through policy communities and networks.”³⁶

Although the role of the COAG and the COAG Reform Agenda has been contested, it is evident that it has nonetheless played an important role. There were strong arguments for improving the COAG’s structures, mechanisms of decision-making, and representation. Tiernan, among others, stressed the importance of the forum as a venue for the equal exchange of ideas, rather than one in which the negotiating environment “entirely favours the Commonwealth.”³⁷ Others have agreed with the criticism of the COAG’s centralization tendencies,³⁸ asserting the need for the states and territories to “develop and coordinate their policy positions on a range of issues independently of the Commonwealth.”³⁹ The main problem was that the institutional architecture necessary to facilitate the objective of independence was basically non-existent.⁴⁰ Further, as Tiernan argued, there is considerable value in including scholars in national policymaking and raising the reform agenda to “be more ambitious, rigorous, and inclusive.”⁴¹ Borthwick analyzed the situation as follows: “key areas of split responsibility, including health, education and transport, account for large chunks of GDP The most likely prospect is that we will continue to muddle through.”⁴²

Borthwick’s qualified observation offered one avenue to stop “muddling through,” introducing a new architecture to support cooperative federalism.⁴³ Saunders and Crommelin also proposed

35. See, e.g., GRIFFITH, *supra* note 22; Veronesi et al., *supra* note 24.

36. Menzies, *supra* note 24.

37. Anne Tiernan, *Reforming Australia's Federal Framework: Priorities and Prospects*, 74 AUSTL. J. PUB. ADMIN. 398, 403 (2015).

38. See Mark Kenneth Bruerton, COAG, *Democracy and the Australian Constitution: You Can Choose Two* (Jan. 2016) (unpublished Ph.D. thesis, University of Adelaide) (on file with author); GRIFFITH, *supra* note 22; *Contra* Adrian Kay, *Separating Sovereignty and Sharing Problems: Australian Federalism and the European Union*, 74 AUSTL. J. P. ADMIN. 406 (2015).

39. Parliament of Austl., Senate Select Comm. on the Reform of the Austl. Fed'n, *Australia's Federation: An Agenda for Reform* 1, 8 (2011), https://www.aph.gov.au/~media/wopapub/senate/committee/reffed_ctte/reffed/report/report_pdf.ashx.

40. *Ibid* at 3.48 (p51)

41. Tiernan, *supra* note 27, at 403.

42. David Borthwick, *Trends Towards Centralised Government in Australia: What are the Implications for the Delivery of Programmes and Services?* 14 PUB. ADMIN. TODAY 38 (2008).

43. See Parliament of Austl., *supra* note 29, at 36.

new forms of intergovernmental institutions, suggesting that the Federal Council and the Federation Commission could be revived.⁴⁴ Anderson proposed a National Cooperation Commission.⁴⁵ The point is that any architecture should include a national forum for discussion and decision-making such as that proposed in the final report of the Australia 2020 Summit. This involved the COAG, the Integrated Planning Framework, the Federalism Commission and the Constitutional Convention.⁴⁶ These suggestions were not implemented.⁴⁷ The criticisms of the COAG can be summarised under the following four categories: (1) institution fostering centralization, (2) overburdened and ineffective processes, (3) absence of transparency and accountability and (4) exclusivity in decision-making about significant, strategic national directions. Whether the National Cabinet escapes these criticisms is examined in Sections IV and V.

IV. TRANSITION FROM THE COAG TO THE NATIONAL CABINET: THE EMERGENCIES OF 2020

Although the formation of the National Cabinet occurred due to COVID-19, the preceding bushfire emergencies should not be disregarded. The actions of the Commonwealth were widely criticised during and post-bushfires.⁴⁸ The bushfires of late 2019 to early 2020 were unprecedented, affecting all states: burning “bushland in Queensland, New South Wales, Victoria, South Australia, Western Australia and Tasmania.”⁴⁹ Historically, the powers for working with natural emergencies within the

44. Cheryl Saunders & Michael Crommelin, *Reforming Australian Federal Democracy*, 74 MEANJIN 1 (2015), <https://meanjin.com.au/essays/reforming-australian-federal-democracy/>.

45. Anderson, *supra* note 21, at 494.

46. See generally DEP'T OF THE PRIME MINISTER AND CABINET, AUSTRALIA 2020 SUMMIT: FINAL REPORT, <https://apo.org.au/sites/default/files/resource-files/2008-06/apo-nid15061.pdf>.

47. *Ibid.*

48. See Alan Weedon, *Scott Morrison criticised for running 'absolutely obscene' political ads during bushfires*, ABC NEWS (Jan. 4, 2020, 10:28 AM), <https://www.abc.net.au/news/2020-01-05/scott-morrison-criticised-for-political-ads-during-bushfires/11841458>; see also Calla Wahlquist, *Bushfire grants not enough and take too long to approve, St Vincent de Paul Society says*, GUARDIAN (May 14, 2020), <https://www.theguardian.com/australia-news/2020/may/15/bushfire-grants-not-enough-and-take-too-long-to-approve-st-vincent-de-paul-society-says>.

49. David Bowman & Ross Bradstock, *Australia needs a national fire inquiry - these are the 3 key areas it should deliver in*, THE CONVERSATION (Jan. 22, 2020, 2:04 PM), <https://theconversation.com/australia-needs-a-national-fire-inquiry-these-are-the-3-key-areas-it-should-deliver-in-130374>.

jurisdictions have been in the remit of the states and territories.⁵⁰ Therefore, the Federal Government has not had a direct role in firefighting per se. For example, there has been no civil national emergency response team.⁵¹ The Federal Government supports the various jurisdictions in these circumstances through *additional funding* for fire extinguishing and recovery.⁵² It has also deployed Australian Defence Force personnel and the national aviation program.⁵³ However, in this case, the extraordinary step was taken of deploying “3,000 Australian Defence Force reservists and mobilising navy ships and military bases to aid the emergency response.”⁵⁴ However, against the unprecedented scale and ferocity of the fires, this step was insufficient. More will be demanded from the Federal Government in the future: “Future disaster management will require Australia to step up.”⁵⁵ As a step towards addressing issues of the national architecture for a national response, the Federal Government released the terms of reference for the Royal Commission into National Natural Disaster Arrangements on February, 20 2020.⁵⁶ The national inquiry focused on three main areas: (1) “improving natural disaster management coordination across all levels of government,” (2) “improving Australia’s preparedness, resilience and response to natural disasters across all levels of government,” and (3) “the legal framework for the Commonwealth’s involvement in responding to national emergencies and how this works with state and territory legal frameworks.”⁵⁷ While resolution for challenges in these areas is sought on a national level, the vehicle for this discussion was another Royal Commission.

50. Jade Gailberger, *Emergency declaration powers to be rushed through parliament ahead of bushfire season*, NCA NEWSWIRE (Nov. 13, 2020, 4:14 PM) <https://www.news.com.au/technology/environment/climate-change/emergency-declaration-powers-to-be-rushed-through-parliament-ahead-of-bushfire-season/news-story/14eee18d09f74e1e86467208c450155f>.

51. *Royal Commission into National Disaster Arrangements* (Final Report, Oct. 28, 2020) <https://naturaldisaster.royalcommission.gov.au/system/files/2020-11/Royal%20Commission%20into%20National%20Natural%20Disaster%20Arrangements%20-%20Report%20%20%5Baccessible%5D.pdf>.

52. *Ibid.*

53. *Ibid.*

54. Dale Dominey-Howes, *Australia can expect far more fire catastrophes. A proper disaster plan is worth paying for*, THE CONVERSATION (Jan. 6, 2020, 1:54 PM), <https://theconversation.com/australia-can-expect-far-more-fire-catastrophes-a-proper-disaster-plan-is-worth-paying-for-129326>.

55. *Id.*

56. Media Release, Prime Minister of Austl., National Royal Commission into Black Summer bushfires established (Feb. 20, 2020), <https://www.pm.gov.au/media/national-royal-commission-black-summer-bushfires-established>.

57. *Id.*

The COVID-19 emergency almost served as a chance for rehabilitation from the failure of handling the bushfire emergency. As for the response to COVID-19 events, the Australian federation has probably responded appropriately with almost no blame-shifting and governments working in a crisis regime on both levels making decisions in the conditions of uncertainty, ambiguity, complexity and urgency.⁵⁸ The formation of the National Cabinet was announced by the Prime Minister on March 13, 2020, following a meeting of the COAG.⁵⁹ The new body, the National Cabinet, was established to respond to COVID-19 challenges.⁶⁰ It comprised State Premiers and Territory Chief Ministers, “to lead the national response at a government level.”⁶¹ The establishment of the National Cabinet was accompanied by partnership agreements on the COAG level. On March 13th, the COAG adopted a National Partnership on COVID-19 Response⁶² and a National Partnership of Disaster Risk Reduction.⁶³ A National COVID-19 Coordination Commission was established to “coordinate advice to the Australian Government on actions to anticipate and mitigate the economic and social effects of the global coronavirus pandemic.”⁶⁴ It was formed to address Australia’s response to the pandemic.⁶⁵ In the early stages of the pandemic, the National Cabinet met weekly.⁶⁶ The primary bodies advising the National Cabinet have been the Australian Health Protection Principal Committee (‘AHPPC’), which comprises the Chief Medical Officers from each of the states and territories and

58. Wenzelburger, *supra* note 7, at 97.

59. Media Release, Prime Minister of Austl. et al., Advice on Coronavirus (Mar. 13, 2020), <https://www.pm.gov.au/media/advice-coronavirus>.

60. Parliament of Australia, ‘Transcript of press conference with premiers and chief ministers (Transcript, Mar. 13, 2020) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F7243290%22>.

61. Media Release, Prime Minister of Austl. et al., National Covid-19 Commission Advisory Board: Terms of Reference (Mar. 13, 2020) <https://pmc.gov.au/nccc/terms-reference>.

62. See Agreement on a National Partnership on COVID-19 Response, Austl. Cap. Terr.-Commonwealth of Austl.-N.S.W.-N. Terr.-Queensl.-S. Austl.-Tas.-Vict.-W. Austl., Mar. 13, 2020, Council of Austl. Gov’ts [hereinafter COVID-19 Response], <https://www.coag.gov.au/sites/default/files/communique/covid19-mpa.pdf>.

63. See Agreement on a National Partnership on Disaster Risk Reduction, Austl. Cap. Terr.-Commonwealth of Austl.-N.S.W.-N. Terr.-Queensl.-S. Austl.-Tas.-Vict.-W. Austl., Mar. 13, 2020, Council of Austl. Gov’ts, <https://www.coag.gov.au/sites/default/files/communique/national-partnership-agreement-disaster-risk-reduction.pdf>.

64. Media Release, Prime Minister of Austl., National COVID-19 Coordination Commission (Mar. 25, 2020), <https://www.pm.gov.au/media/national-covid-19-coordination-commission>.

65. Media Release, Prime Minister of Austl. et al., National COVID-19 Commission Advisory Board: Terms of Reference (Mar. 13, 2020) <https://pmc.gov.au/nccc/terms-reference>.

66. See Prime Minister of Austl., *supra* note 43.

their advisers,⁶⁷ and the National Coordination Mechanism established by the Department of Home Affairs. This Mechanism applies to all jurisdictions, industry and key stakeholders to ensure a consistent approach to managing the impact of COVID-19 beyond the immediate health issues.⁶⁸ It has brought together crisis planners from many Australian government agencies, including Home Affairs and the Australian Defence Force.⁶⁹ The National Cabinet is the peak body in Australia to suppress the spread of COVID-19 and to restore the economy afterwards.⁷⁰ Federalism is about intergovernmental coordination and the states retaining primary responsibility for most service delivery.⁷¹

Early indications are that the National Cabinet may continue permanently after the pandemic is over, effectively replacing the COAG. On 14 April 2020, Prime Minister Morrison was reported saying, “The processes we’ve established for the National Cabinet may prove to be a better way for our federal system to work in the future, but this will be a matter for another time.”⁷² He also noted that, “[t]he national cabinet process has removed the political boundaries that can hamper COAG.”⁷³ Rushing into an expedient model may not necessarily produce the best long-term outcomes. For example, much more will need to be judiciously considered as the implications are relevant to funding, standing, ad-hoc ministerial councils, intergovernmental agreements and the role of local government.

“Sometimes, [it appears that] areas in need of reform only become obvious at a crisis point.”⁷⁴ The crisis of COVID-19 and other national emergencies have become simultaneous crisis points that have sharpened the need to think about the federal machinery for reforms. The obvious drawback of acting in crisis-

67. Jennifer Menzies, *Explainer: What is the National Cabinet and is it democratic?* THE GUARDIAN (Mar. 31 2020), <https://www.griffith.edu.au/griffith-business-school/new-thinking-for-the-new-economy/blog/what-is-the-national-cabinet-and-is-it-democratic>.

68. Prime Minister of Austl., *supra* note 47.

69. Karen Elphick, *Australian COVID-19 response management arrangements: A quick guide*, L. & BILLS DIG. SEC., Apr. 2020, at 10.

70. COVID-19 Response, *supra* note 45.

71. GARY BANKS ET AL., AUSTRALIA'S FEDERAL CONTEXT, *in* BENCHMARKING IN FEDERAL SYSTEMS, ROUNDTABLE PROCEEDINGS 187, 187 (Alan Fenna & Felix Knüpling eds., 2010).

72. *PM Weighs Permanent National Cabinet*, THE CANBERRA TIMES (Apr. 14, 2020), <https://www.canberratimes.com.au/story/6721545/pm-weighs-permanent-national-cabinet/?cs=14231>.

73. *PM Weighs Permanent National Cabinet*, THE CANBERRA TIMES (Apr. 14, 2020), <https://www.canberratimes.com.au/story/6721545/pm-weighs-permanent-national-cabinet/?cs=14231>.

74. Laura Barnett, *The Process of Law Reform: Conditions for Success*, 39 FED. L. REV. 161, 193 (2011).

mode is the inability to assess and contemplate the benefits provided by alternative development models proposed in various reports of Royal Commissions and the range of suggestions offered by the various interest groups, researchers and practitioners.

V. THE PRESENT: THE NATIONAL CABINET

On May 29, 2020, the Prime Minister announced that the National Cabinet would replace the COAG (with the COAG abolished) and meetings after the COVID-19 period would be held online monthly, with one annual meeting in person.⁷⁵ The Prime Minister explained that once a year the National Cabinet would meet with treasurers as well as the Australian Local Government Association in a new council that would focus on federation reform.⁷⁶ The establishment of the National Cabinet was widely accepted as a positive change.⁷⁷

The name of the body sounded familiar and did not ring any alarm bells. The National Cabinet has been described as “the COAG by another name.”⁷⁸ This is not strictly correct as the COAG involved representatives of three levels of government, including the President of the Australian Local Government Association.⁷⁹ The National Cabinet represents the national, state and territory governments. Even though the National Cabinet is called a ‘cabinet,’ it is technically an “intergovernmental forum that has taken on a leadership role during the COVID-19 crisis.”⁸⁰ It is not a cabinet in the widely understood use of the term because it is not a meeting of senior members of the government discussing relevant issues pertaining to war; it is a meeting of the Prime

75. Media Release, Prime Minister of Austl et al, “Update following National Cabinet Meeting (May 29, 2020) <https://www.pm.gov.au/media/update-following-national-cabinet-meeting>.

76. Judy Skatssoon, *Councils sidelined as COAG abolished*, GOVERNMENT NEWS (May 29, 2020), <https://www.governmentnews.com.au/councils-fear-being-sidelined-as-coag-abolished/>.

77. Harry Guinness, *Opinion: Aussies support the national cabinet, but they are hungry for ambitious reform*, THE MANDARIN (July 22, 2020), <https://www.themandarin.com.au/136372-opinion-aussies-support-the-national-cabinet-but-they-are-hungry-for-ambitious-reform/>.

78. Menzies, *supra* note 49.

79. Council of Australian Governments, ‘About COAG’ (Web Page, May 29, 2020) <https://www.coag.gov.au/about-coag>.

80. Jennifer Menzies, *Explainer: what is the national cabinet and is it democratic?* THE CONVERSATION (Mar. 31, 2020 1:34 PM AEDT) <https://theconversation.com/explainer-what-is-the-national-cabinet-and-is-it-democratic-135036>.

Minister and State Premiers and Chief Ministers and advisors.⁸¹ Nor can it be construed as a government of ‘national unity’ cabinet because the Federal Opposition is not part of it.⁸² Another distinction between a war cabinet and the National Cabinet is the fact that Australia is not in a state of war, although the response to the pandemic is sometimes called a “war.”⁸³ There is no significant increase in production in factories or mines as occurred during World War II; rather, there is a shrinking of the economy and employment opportunities.⁸⁴ Business closures, self-isolation and social distancing cannot be compared to living under enemy occupation.⁸⁵

The National Cabinet does not have the status of a federal cabinet meeting. Whilst there may be the appearance of collective responsibility and cabinet confidentiality, these do not translate to ‘cabinet solidarity.’⁸⁶ The new National Cabinet depends on political cooperation. For example, by early September Victoria, the Australian Capital Territory, and New South Wales had broken away from each other over the extent of lockdowns and border closures.⁸⁷ The states have retained their sovereign power,⁸⁸ but have entered into a collective decision-making forum that has enabled them to make decisions in their own best interests.⁸⁹ There is no obligation for members of the National Cabinet to publicly support all government decisions made in the Cabinet.⁹⁰

81. Campbell Rhodes, *War and Unity: How Australia governs during a crisis*, MUSEUM OF AUSTRALIAN DEMOCRACY AT OLD PARLIAMENT HOUSE (Mar. 27, 2020), <https://www.moadoph.gov.au/blog/war-and-unity-how-australia-governs-during-a-crisis/#>.

82. *Id.*

83. David Hunter, *Coronavirus: If we are in a war against COVID-19 then we need to know where the enemy is*, THE CONVERSATION (Apr. 2, 2020), <https://theconversation.com/coronavirus-if-we-are-in-a-war-against-covid-19-then-we-need-to-know-where-the-enemy-is-135274>.

84. Arne Kislenko, *Comparing COVID-19 to past world war efforts is premature and presumptuous*, THE CONVERSATION (July 12, 2020), <https://theconversation.com/comparing-covid-19-to-past-world-war-efforts-is-premature-and-presumptuous-140701>.

85. Arne Kislenko, *Comparing COVID-19 to past world war efforts is premature and presumptuous*, THE CONVERSATION (July 12, 2020), <https://theconversation.com/comparing-covid-19-to-past-world-war-efforts-is-premature-and-presumptuous-140701>.

86. Ben Reilly, *COVID-19 and Federalism: Seeding chaos or a more effective response*, YOUTUBE (July 29, 2020), <https://www.youtube.com/watch?v=BzJEljVmy-8&feature=youtu.be>.

87. Rebecca Storen and Nikki Corrigan, COVID-19: a chronology of state and territory government announcements (up until June 30, 2020) (Working Paper, Oct. 22, 2020) https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2021/Chronologies/COVID-19StateTerritoryGovernmentAnnouncements.

88. Anne Twomey, *The States, the Commonwealth and the Crown—The battle for sovereignty*, Parliament of Austl. (Jan., 2008), <https://www.aph.gov.au/senate/~/~/~link.aspx?id=76D508CC96314F19A371171C7A270930&z=z>.

89. Elphick, *supra* note 51.

90. Reilly, *supra* note 88.

Cabinet ministers can dissociate themselves from or repudiate the decisions of their Cabinet colleagues,⁹¹ and the National Partnership on COVID-19 Response Agreement states that the parties “do not intend any of the provisions of this Agreement to be legally enforceable.”⁹² At the National Cabinet, all jurisdictions have equal representation.⁹³ The basis for decision-making is consensus and compromise.⁹⁴ Each state’s differences and diversity are recognised, but the Commonwealth plays the lead role.⁹⁵

Notwithstanding the equal representation, centralization tendencies in Australian federalism became prominent during this emergency, with the Prime Minister presiding over National Cabinet decision-making.⁹⁶ In this way, the Prime Minister’s role could be described as more presidential, being more “focused on one person rather than the performance of Parliament as a whole.”⁹⁷ At the same time, Liberal and Labor State Premiers have been given a larger platform with more authority, while the Federal Opposition Leader has been left “struggling . . . [to find] a meaningful role in the crisis.”⁹⁸

The National Cabinet was established so that technical and political issues could be addressed as they emerged, with the capacity to meet multiple times each day if necessary.⁹⁹ Information and intelligence can be shared instantly, discussed, and tested before a final decision is made.¹⁰⁰ Modelling, research, and data are pooled and a coordinated response is made.¹⁰¹ This does not mean that all states are obliged to implement the same regulations, nor are they required to implement them at the same time.¹⁰² Each state is entitled to assess its own particular

91. *See id.*

92. COVID-19 Response, *supra* note 45, at § 46.

93. Menzies, *supra* note 69.

94. Menzies, *supra* note 69.

95. Menzies, *supra* note 69.

96. Tamara Tulich, Ben Reilly and Sarah Murray, ‘*The National Cabinet: Presidentialised Politics, Power-sharing and a Deficit in Transparency*’, AUSPUBLAW (Oct. 23, 2020), <https://auspublaw.org/2020/10/the-national-cabinet-presidentialised-politics-power-sharing-and-a-deficit-in-transparency/>.

97. Paul Kelly, *National Cabinet Usurps COAG Role*, THE AUSTRALIAN (Apr. 8, 2020), 1:00 AM, <https://www.theaustralian.com.au/commentary/national-cabinet-usurps-coag-role/news-story/9f5c3b391af8141643c76b82931e17a7>.

98. Paul Kelly, *National Cabinet Usurps COAG Role*, THE AUSTRALIAN (Apr. 8, 2020), 1:00 AM, <https://www.theaustralian.com.au/commentary/national-cabinet-usurps-coag-role/news-story/9f5c3b391af8141643c76b82931e17a7>.

99. *See* Elphick, *supra* note 51.

100. Jennifer Menzies, *Explainer: what is the national cabinet and is it democratic?* THE CONVERSATION (Mar 31, 2020, 1.34 PM AEDT) <https://theconversation.com/explainer-what-is-the-national-cabinet-and-is-it-democratic-135036>.

101. *See id.*

102. *See* COVID-19 Response, *supra* note 45, at §§ 15–18.

circumstances and act accordingly.¹⁰³ For example, some states and territories moved earlier to introduce restrictions such as border closures, school attendance, travel restrictions, pub closures, restaurant closures, funeral attendance limits, church attendance limits, personal gathering limits, and if necessary, lockdowns.¹⁰⁴ The meeting agenda at the National Cabinet has included Australia's economic recovery, COVID-19 health responses, aged care responses, and the Victorian outbreak.¹⁰⁵ Generally speaking, the media statement of August 21, 2020, reflects a cooperative approach by members.

However, there are tensions within the National Cabinet. Queensland, for example, declared the Australian Capital Territory a "hotspot"¹⁰⁶ although the ACT had not recorded a COVID-19 case in more than a day.¹⁰⁷ At the August 21, 2020, National Cabinet meeting, it was agreed that the AHPPC be instructed to "develop a common understanding to define a hotspot and consider movement restrictions relating to a hotspot."¹⁰⁸ At the same meeting, the National Cabinet was unable to reach a consensus on how to manage internal borders¹⁰⁹ despite calls from Qantas to ensure "domestic border closures [to] be based on facts, medical advice and defined national standards, not politics"¹¹⁰ and farmers who were not able to access properties and livestock held in other states.¹¹¹ The best that could be achieved was commencement of discussions on an Agricultural Workers Code, and the National Cabinet "agreed [to] further work be[ing] undertaken by [State

103. Jennifer Menzies, *Explainer: what is the national cabinet and is it democratic?* THE CONVERSATION (Mar. 31, 2020, 1:34 PM AEDT) <https://theconversation.com/explainer-what-is-the-national-cabinet-and-is-it-democratic-135036>.

104. Menzies, *supra* note 69.

105. Media Statement, Prime Minister of Austl., National Cabinet (Aug. 21, 2020), <https://www.pm.gov.au/media/national-cabinet-0>.

106. *COVID-19 Hotspots*, QUEENSL. GOVT, <https://www.qld.gov.au/health/conditions/health-alerts/coronavirus-covid-19/current-status/hotspots-covid-19> (last visited Feb. 6, 2021).

107. *COVID-19: ACT Records No New Cases on Sunday*, THE CANBERRA TIMES (Aug. 9, 2020, 1:00 PM), <https://www.canberratimes.com.au/story/6870549/act-free-of-active-coronavirus-cases-as-travel-warning-remains-for-sydney-newcastle/>.

108. Prime Minister of Australia, *supra* note 77.

109. *Id.*

110. Chris Chamberlin, *Qantas CEO Calls Out "politics" on Domestic Border Closures*, EXECUTIVE TRAVELLER (Aug. 20, 2020), <https://www.executivetraveller.com/news/qantas-domestic-border-closures>.

111. *See generally* Lucy Barbour & Jess Davis, *Service NSW Tells Farmers to Put Sheep on Planes to Get Around Border Restrictions*, ABC RURAL (Aug. 20, 2020, 1:07 AM), <https://www.abc.net.au/news/rural/2020-08-20/farmers-told-to-fly-livestock-to-avoid-covid-19-restrictions/12574610>.

and Territory] Agriculture Ministers so that a paper could be considered by [the] National Cabinet at its next meeting.”¹¹²

On June 12, 2020, the National Cabinet announced six initial priority areas of reform, and the formation of six National Cabinet Reform Committees: rural and regional Australia, skills, energy, infrastructure and transport, population and migration, and health.¹¹³ In addition, the Council on Federal Financial Relations announced its intention to progress tax, deregulation, and housing reforms.¹¹⁴ The initial focus would be on deregulation.¹¹⁵ Other taskforces would continue to work on women’s safety and Indigenous affairs.¹¹⁶ The objective of this reform work is to ensure that the Australian community is responsive to issues confronting the community and the economy.¹¹⁷

On June 26, 2020, the National Cabinet agreed that a review of the former COAG Councils and Ministerial Forums should be undertaken by September 2020.¹¹⁸ The review is required to make recommendations that streamline the structure, scope, and reporting arrangements of the various councils and forums.¹¹⁹ The aim is to progress defined federal relation priorities that are outside the National Cabinet Reform Committee Agenda and rationalize and reset the work that is essential and brought before the National Federation Reform Council.¹²⁰

The Commonwealth may well achieve greater power in the years ahead because of its control over funding. The vertical fiscal imbalance, derived principally from income tax revenue and Goods and Services Tax, creates this scenario.¹²¹ The Commonwealth can and has threatened to withdraw funding if states do not comply

112. Prime Minister of Australia, *supra* note 77.

113. Prime Minister of Australia, Update on Coronavirus Measures (Media Statement, June 12, 2020), available at <https://www.pm.gov.au/media/update-coronavirus-measures-12june20>.

114. *Id.*

115. *Id.*

116. *Id.*

117. See Media Statement, Prime Minister of Austl., Update on Coronavirus Measures (June 12, 2020), <https://www.pm.gov.au/media/update-coronavirus-measures-12june20>.

118. See Media Statement, Prime Minister of Austl., National Cabinet Statement (June 26, 2020) <https://www.pm.gov.au/media/national-cabinet-statement-0>.

119. *Id.*

120. *Effective Commonwealth-State Relations*, AUSTRALIAN GOVERNMENT, DEPARTMENT OF THE PRIME MINISTER & CABINET, <https://www.pmc.gov.au/domestic-policy/effective-commonwealth-state-relations#:~:text=We%20support%20the%20development%20of,that%20are%20of%20national%20significance> (last visited Feb. 6, 2021).

121. *Vertical Fiscal Imbalance (VFI) and access to a growth tax* (May 29, 2020) <https://www.lgaq.asn.au/news/article/969/vertical-fiscal-imbalance-vfi-and-access-to-a-growth-tax>.

with federal policies.¹²² For example, funding for universities would be withheld if a state accepted international students but kept its borders closed for Australians.¹²³

Frequent internet meetings of the National Cabinet have alleviated some criticisms that haunted COAG as being overburdened with unnecessary procedure.¹²⁴ Further, the heightened attention of the mass media has somewhat countered complaints about opaque decision-making and lack of accountability.¹²⁵ Conversely, some fault lines begin to emerge around states acting in self-interested ways—hard-line border closures damaging both economic interests and individuals' freedom of movement.¹²⁶ There are also indicators of centralization with the emerging National Cabinet structure containing potential for power to shift from states and territories—which currently hold most of the constitutional powers relating to emergencies—to the Commonwealth.¹²⁷ The Commonwealth is increasingly assuming a lead role in addressing coordinated health responses, socio-economic inequality, drought, bushfires, ageing and suicide.¹²⁸ Such a shift would, in part, depend on the Commonwealth's commitment to the National Cabinet and the reform agenda foreshadowed, and the states' responses to that agenda.¹²⁹

122. Scott Bennett and Richard Webb, 'Specific purpose payments and the Australian federal system' (Research Paper no. 17 2007-08, Politics and Public Administration Section and Economics Section, Parliament of Australia) https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP0708/08rp17.

123. Paul Karp, *Australia to Allow International University Students to Return Before All State Borders Open*, THE GUARDIAN (July 6, 2020, 11:09 PM), <https://www.theguardian.com/australia-news/2020/jul/07/australia-to-allow-international-university-students-to-return-before-all-state-borders-open>.

124. Peter Conran, 'Review of COAG Councils and Ministerial Forums' (Final Report to National Cabinet, Oct. 2020) <https://www.pmc.gov.au/sites/default/files/final-report-review-coag-councils-ministerial-forums.pdf>.

125. Paul Kelly, 'National Cabinet usurps COAG role' *The Australian* (online, Apr. 8, 2020) <https://www.theaustralian.com.au/commentary/national-cabinet-usurps-coag-role/news-story/9f5c3b391af8141643c76b82931e17a7>.

126. Natalie Oliveri, Queensland relaxes hardline border to include northern NSW town (9News, Sep. 4, 2020 10:20 AM) <https://www.9news.com.au/national/coronavirus-border-closures-queensland-relaxes-hardline-border-to-include-northern-nsw-town-moree/72ca5cf2-f49c-4aa6-be30-25aae61b37e2>.

127. Eric L Windholz, 'Governing in a pandemic: from parliamentary sovereignty to autocratic technocracy' (2020) *The Theory and Practice of Legislation* <https://www.tandfonline.com/doi/full/10.1080/20508840.2020.1796047>.

128. Lesley Russell, 'The national cabinet's in and COAG's out. It's a fresh chance to put health issues on the agenda, but there are risks' *The Conversation* (online, June 10, 2020) <https://theconversation.com/the-national-cabinets-in-and-coags-out-its-a-fresh-chance-to-put-health-issues-on-the-agenda-but-there-are-risks-140165>.

129. Lesley Russell, *The national cabinet's in and COAG's out. It's a fresh chance to put health issues on the agenda, but there are risks*, THE CONVERSATION (June 10, 2020),

VI. FEDERAL COOPERATION DURING THE CRISIS
REGARDING HUMAN RIGHTS PROTECTION

The national cabinet has been much more important politically and symbolically for the prime minister than for the premiers. It has enabled the prime minister to (selectively) assert his political relevance at a time when many of the most important decisions and actions that affect citizens during the pandemic fall constitutionally to the states and territories.¹³⁰

The emergency caused by the COVID-19 pandemic also caused “a crisis in the economy.”¹³¹ Therefore, areas of federal cooperation required to expand covered not only health care but economic relief to businesses and individuals.¹³² It became vital to protect the rapidly expanding ranks of the unemployed and the most vulnerable population in the aged care system. The effectiveness of the responses and the protection of basic human rights depended on prompt action and coordinated efforts among the national, state and territory governments.¹³³ Accountability, effectiveness and transparency of the various programs and regulations announced by the National Cabinet have largely been through “public press conferences.”¹³⁴ The heads of jurisdictions have been judged on the promptness and efficacy of their action.¹³⁵ Whilst the importance of a free press to the functioning of National Cabinet cannot be

<https://theconversation.com/the-national-cabinets-in-and-coags-out-its-a-fresh-chance-to-put-health-issues-on-the-agenda-but-there-are-risks-140165>.

130. Narelle Miragliotta et al., *Will national cabinet change federal-state dynamics?*, THE CONVERSATION (Sept. 3, 2020), <https://theconversation.com/will-national-cabinet-change-federal-state-dynamics-145443>.

131. Scott Morrison, Prime Minister of Austl., Press Conference: Australian Parliament House, ACT (March 25, 2020), available at <https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-250320>.

132. JOHN DALEY ET AL., GRATTAN INSTITUTE, THE RECOVERY BOOK: WHAT AUSTRALIAN GOVERNMENTS SHOULD DO NOW, <https://grattan.edu.au/wp-content/uploads/2020/06/Grattan-Institute-Recovery-Book.pdf>.

133. Eric L Windholz, ‘Governing in a pandemic: from parliamentary sovereignty to autocratic technocracy’ (2020) *The Theory and Practice of Legislation* <https://www.tandfonline.com/doi/full/10.1080/20508840.2020.1796047>.

134. Stephen Long, *Government’s coronavirus response slammed for ‘alarming lack of oversight’ by retired judge*, ABC NEWS (June 3, 2020) <https://www.abc.net.au/news/2020-06-03/coronavirus-commission-concerns-former-judge-royal-commissioner/12284458>.

135. See Giliberto Capano et al., *Mobilizing Policy (In)Capacity to Fight COVID-19: Understanding Variations in State Responses*, 39 *Responses’ Policy and Society* 285, 286–87 (2020).

understated, the right to health, the right to work, the right to just and favourable working conditions and the right to social security are actually contained in the *International Covenant on Economic, Social and Cultural Rights*, (entered into force January 3, 1976) (the Covenant).¹³⁶ These rights are protected by Article 25(1) of the *Universal Declaration of Human Rights* adopted and proclaimed by General Assembly resolution 217 A(III) of December 10, 1948.¹³⁷

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

While the *Universal Declaration of Human Rights* is not legally binding, the Covenant is.¹³⁸ Australia ratified the Covenant on December 10, 1975.¹³⁹

A. Health Care

Effective intergovernmental cooperation on health care directly affects the right to health contained in Article 12(1) of the Covenant.¹⁴⁰ The signing of the COVID-19 National Response (‘the Agreement’) by all states and territories was a vital step in helping the Australian health system respond effectively and promptly to COVID-19.¹⁴¹ The Agreement reaffirmed that responsibility for health is shared between the Commonwealth and the states.¹⁴² The states remain “system managers for public hospitals and will remain responsible for their infrastructure, operation, delivery of services and performance.”¹⁴³ The Commonwealth has lead responsibility for general practice and primary health

136. *International Covenant on Economic, Social and Cultural Rights* (entered into force Jan. 3, 1976) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

137. *Universal Declaration of Human Rights* Resolution 217 A(III) (signed and entered into force Dec. 4, 1948).

138. Australian Human Rights Commission, *Human Rights explained: Fact sheet 5: The International Bill of Rights* <https://humanrights.gov.au/our-work/education/human-rights-explained-fact-sheet-5the-international-bill-rights>.

139. Australian Human Rights Commission, *International Covenant on Economic, Social and Cultural Rights – Human rights at your fingertips* <https://humanrights.gov.au/our-work/commission-general/international-covenant-economic-social-and-cultural-rights-human-rights>.

140. CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health (Art. 12) (Aug. 11, 2000) <https://www.refworld.org/pdfid/4538838d0.pdf>.

141. See COVID-19 Response, *supra* note 45.

142. *Id.* at 16.

143. *Id.* at 16(a).

care, including the primary health networks and aged care.¹⁴⁴ It will also continue to support private health services through the Medicare Benefits Schedule, the Pharmaceutical Benefits Scheme and the Private Health Insurance Rebate.¹⁴⁵ The signing of the Agreement acknowledges that all governments have a shared responsibility to integrate and provide services to improve health outcomes for all Australians.¹⁴⁶ All governments acknowledge the *inter-operability* of the health system as well as their shared commitment to areas such as aged care and disability services.¹⁴⁷

The Agreement explains that there will be three sets of payments made by the Commonwealth to the states: (1) Upfront Advance Payment to ensure the timely availability of funds,¹⁴⁸ (2) Hospital Service Payment whereby the Commonwealth will provide 50% of the costs of the diagnosis and treatment of COVID-19 as well as suspected cases¹⁴⁹ and (3) State Public Health Payments for the management of the outbreak.¹⁵⁰ This is in addition to public funding provided through the National Health Reform Agreement once in operation.¹⁵¹ Commonwealth funding thus looms large in achieving intergovernmental cooperation.

The protection of the right to health has been highlighted by significant failures in the Victorian system, particularly regarding the use of poorly trained security guards to serve in “quarantine hotels,” which led to a second-wave outbreak of COVID-19 in that state.¹⁵² This breakdown in Victoria generated a significant and disproportional financial burden on the Federal Government with Federal treasurer Josh Frydenberg revealing that in the final three months of 2020, approximately half of all the JobKeeper recipients were expected to be living in Victoria.¹⁵³ The health

144. Austl. Government, Dept of Health, ‘Purpose, Scope and Context of the Framework’ (Apr. 2013) <https://www1.health.gov.au/internet/publications/publishing.nsf/Content/NPHC-Strategic-Framework~purpose>.

145. *Id.* at 16(b).

146. *National Partnership on COVID-19 Response 2020* (Cth) s 16(c) <https://www.coag.gov.au/sites/default/files/communique/covid19-mpa.pdf>.

147. *Id.* at 16(c).

148. *Id.* at 20(a).

149. *Id.* at 20(b).

150. *Id.* at 20(c).

151. *Id.* at 20(c).

152. *Poorly trained security at hotel quarantine blamed for covid-19 outbreak* (News.com.au Aug. 4, 2020 10:46 AM) <https://www.news.com.au/travel/travel-updates/health-safety/poorly-trained-security-guards-at-hotel-quarantine-blamed-for-covid19-outbreak/news-story/276a9943237517d261e2cd1bb08a0ad0>.

153. Stephanie Dalzell, *Government ‘favourably disposed’ to extending JobSeeker in coronavirus economy, Treasurer Josh Frydenberg confirms*, ABC NEWS (July 20, 2020), <https://www.abc.net.au/news/2020-07-26/josh-frydenberg-in-favour-of-extending-jobseeker-coronavirus/12492944>.

sector and the right to health became the first priority for the National Cabinet,¹⁵⁴ but balancing health and the nation's budget has strained goodwill and political fault lines—as the next section shows.

B. Economic Stimulus and Unemployment Payments

The right to “just and favourable conditions of work” is contained in Article 7 of the Covenant and the right to social security is contained in Article 9.¹⁵⁵ The legislation providing for COVID-19 response payments was introduced and passed by the Parliament on March 23, 2020 as the *Coronavirus Economic Response Package Omnibus Bill 2020* (Cth).¹⁵⁶

Once quarantine and travel restrictions were announced, up to one million Australians lost their jobs entirely and went on JobSeeker payments, and more than five million went on to the JobKeeper payment.¹⁵⁷ Jobs were lost in all states and territories with the biggest losses occurring in the most populous states of New South Wales and Victoria. Treasury figures of August 2020 show about half of the 1.3 million people who lost their jobs had returned to work. Almost 700,000 jobs have been restored, and more than 315,000 people have returned to work in New South Wales; the figures also show that the national effective unemployment rate fell from 14.9% in April to 9.9% in July.¹⁵⁸

While these figures indicate that the JobSeeker¹⁵⁹ and JobKeeper¹⁶⁰ programs have been relatively effective, concerns remain that any winding back of payments before the end of 2020

154. Treasurer lashes Victorian government for ‘biggest public policy failure in living memory’ *SBS News* (online, Aug. 31 2020) <https://www.sbs.com.au/news/treasurer-lashes-victorian-government-for-biggest-public-policy-failure-in-living-memory>.

155. *International Covenant on Economic, Social and Cultural Rights* (Adopted and open for signature, ratification and accession by General Assembly resolution 2200A (XXI) of Dec. 16, 1966, entry into force Jan. 3, 1976, in accordance with article 27) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

156. Michael Klapdor, *COVID-19 economic response—Social security measures part 2: \$750 lump sum payments*, PARLIAMENT OF AUSTRALIA (Mar. 23, 2020), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/March/Coronavirus_lump-sum_payments.

157. Michael Janda, *Almost a million Australians out of work due to coronavirus; RBA tips economy to take 10pc hit*, ABC NEWS (May 5, 2020), <https://www.abc.net.au/news/2020-05-05/almost-one-million-australians-lose-jobs-due-to-coronavirus/12215494>.

158. David Crowe, *Treasury data gives Frydenberg ‘cause for optimism*, SYDNEY MORNING HERALD (Aug. 23, 2020), <https://www.smh.com.au/politics/federal/treasury-data-gives-frydenberg-cause-for-optimism-20200823-p55ogw.html>.

159. *Social Security Act 1991* (Cth) s 23. (Austl.).

160. *Fair Work Act 2009* (Cth) ss 789GA-789GZB (Austl.).

could undermine economic recovery.¹⁶¹ The Grattan Institute submits that between 430,000 and 510,000 Australians will find jobs over the next two years if governments spend at least another \$70 to \$90 billion on top of the \$160 billion already announced.¹⁶² This extra spending on social housing and ‘shovel-ready’ maintenance and infrastructure projects is predicted to bring unemployment below 5% by the middle of 2022 and avoid the fiscal cliff.¹⁶³ Without any additional support, it is predicted that unemployment will remain much higher for much longer.¹⁶⁴ The Grattan Institute also recommends JobKeeper should be expanded to include university staff, casual workers and temporary migrants and extended beyond September 2020 for businesses that are still in strife.¹⁶⁵ A \$750 stimulus payment was announced on 12 March 2020 as part of the Federal Government’s response.¹⁶⁶ The majority of the 6.6 million beneficiaries were pensioners and other concession card holders, including veterans.¹⁶⁷ On March 22, 2020, a second package of measures was announced that included another \$750 payment to five million eligible concession card holders to be paid in July 2020.¹⁶⁸

The programs have drawbacks. The extent of casual and subcontract underemployment has largely been ignored. Significantly, the JobKeeper program does not cover casual employees who have worked for less than 12 months with the same employer. University students and others who take casual employment in bars and restaurants and other precarious forms of casual and temporary employment are not eligible. They are exposed to severe economic hardship during lockdowns and other restrictions imposed to suppress the spread of COVID-19.¹⁶⁹ In addition, the government’s assertion that “we will get through this together” has been tested, and a mechanism for oversight and

161. See Daley, *supra* note 133.

162. *Id.*, 28.

163. *Id.*, 32-33.

164. *Id.*

165. *Id.*, 44.

166. Brett Worthington, ‘Billions of dollars pumped into coronavirus-hit economy in bid to stave off recession, Scott Morrison announces’ (Mar. 12, 2020) *ABC News* <https://www.abc.net.au/news/2020-03-12/federal-government-coronavirus-economic-stimulus/12042972>.

167. *Id.*

168. Stephanie Borys, ‘Another coronavirus Economic Support Payment is on the way—will you have an extra \$750 in your account soon?’ (July 13, 2020) *ABC News* <https://www.abc.net.au/news/2020-07-13/coronavirus-economic-support-payment-round-two-explained/12447358>

169. Evidence to Public Accounts and Estimates Committee, Parliament of Victoria, Melbourne, May 18, 2020 (Molly Willmont, President, National Union of Students), https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Report/PAEC_59-07_Vic_Gov_response_COVID-19_Interim_report.pdf.

analysis by the Parliament appears to be lacking.¹⁷⁰ A \$60-billion mistake by Treasury was not noticed by the Parliament but was revealed by the government itself and was uncovered by the Australian Taxation Office because there was an error in the estimates of the number of people likely to access the JobKeeper scheme.¹⁷¹ Treasury found only 3 million of the estimated 6.5 million people enrolled in the scheme, and they expected this figure to rise to 3.5 million people.¹⁷² The estimated cost dropped from \$130 billion to \$70 billion.¹⁷³

Joint efforts between the Commonwealth and the states and territories to restore the economy and create jobs have been challenging but cooperative. The shared responsibility included economic stimulus from the Commonwealth and support for rent from the States and Territories. For example, the Victorian Government's Economic Survival Package, which included rent relief for commercial tenants with an annual turnover below \$50 million who experienced a 30% reduction in turnover, was positively received by the business community.¹⁷⁴ Revealing another system fault line, as some retailers were national retailers with a turnover exceeding \$50 million they were excluded from accessing rent relief.¹⁷⁵ Such a fault line generates political blame-shifting between a federal coalition government and a state labor government as to the boundaries of fiscal responsibility.

170. See Long, *supra* note 90.

171. John Kehoe, JobKeeper error sparks fight over \$60b (May 22, 2020) *Financial Review* <https://www.afr.com/policy/tax-and-super/after-60b-jobkeeper-error-discovered-20200522-p54vkm>

172. John Kehoe, *\$60b JobKeeper error caused by pandemic fears*, FINANCIAL REVIEW (May 25, 2020), <https://www.afr.com/policy/economy/what-caused-the-60b-jobkeeper-blunder-20200522-p54vkm#:~:text=The%20ATO%20did%20not%20cause,track%20for%20a%20cost%20blowout>.

173. Katharine Murphy, *JobKeeper to cost \$60bn less than originally forecast due to 'reporting error'*, THE GUARDIAN (May 22, 2020), <https://www.theguardian.com/australia-news/2020/may/22/jobkeeper-to-cost-60bn-less-than-originally-forecast-due-to-reporting-error>.

174. Premier of Victoria, Daniel Andrews, Supporting Tenants and Landlords Through Coronavirus (Apr. 15, 2020) (Media Release) <https://www.premier.vic.gov.au/supporting-tenants-and-landlords-through-coronavirus/>

175. Evidence to Public Accounts and Estimates Committee, Parliament of Victoria, Melbourne, May 14, 2020 (Paul Zahra, Chief Executive Officer, Australian Retailers Association) 84, https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Report/PAEC_59-07_Vic_Gov_response_COVID-19_Interim_report.pdf.

*C. Protection of the Rights of the
Most Vulnerable Population in Aged Care*

On July 1, 2019, a single Charter of Aged Care Rights (the Charter) came into effect.¹⁷⁶ The Charter lists the main rights of all consumers of aged care services regardless of the type.¹⁷⁷ The Charter lists such rights as the right to “safe and high quality care,” to “be treated with dignity and respect,” to “live without abuse and neglect,” and to “have control over and make choices about my care, and personal and social life, including where the choices involve personal risk.”¹⁷⁸ These rights came into jeopardy during the pandemic, and intergovernmental cooperation widely held to be less effective in this area compared to the right to health and the right to work examined in the previous sections.

The Commonwealth government assumed overall responsibility for the aged care sector in 2011, with full funding and policy responsibility transferring from the states and territories.¹⁷⁹ Any aged care provider receiving a Commonwealth subsidy must abide by the Aged Care Quality Standards and demonstrate a commitment to continuous improvement in the quality of care.¹⁸⁰ The principles established by the then Prime Minister Robert Menzies, in 1954, remain intact in 2020.¹⁸¹ Commonwealth-funded aged care services are provided to those who both want them and have been assessed as needing them.¹⁸² Most services are delivered by non-government providers such as private-for-profit, religious and charitable organisations. Residential aged care, home care and home support are all funded by the Commonwealth.¹⁸³ Some of these services are also

176. *Charter of Aged Care Rights*, AUSTRALIAN GOVERNMENT, AGED CARE QUALITY & SAFETY COMM., <https://www.agedcarequality.gov.au/consumers/consumer-rights> (last visited Feb. 6, 2021).

177. *Id.*

178. *Charter of Aged Care Rights*, AUSTRALIAN GOVERNMENT, AGED CARE QUALITY & SAFETY COMM., <https://www.agedcarequality.gov.au/consumers/consumer-rights> (last visited Feb. 6, 2021).

179. Agreement on National Health Care Reform, AUSTRALIAN COMMONWEALTH OF AUSTRALIA-N.S.W.-N. TERR.-QUEENSLAND-S. AUSTRALIA-TAS.-VICT.-WEST AUSTRALIA, July 1, 2011, Council of Australian Governments, https://www.federalfinancialrelations.gov.au/content/npa/health/_archive/national-agreement.pdf.

180. *Aged Care Act 1997* (Cth) s 54(1).

181. See generally DAVID CULLEN, HISTORICAL PERSPECTIVES: THE EVOLUTION OF THE AUSTRALIAN GOVERNMENT'S INVOLVEMENT IN SUPPORTING THE NEEDS OF OLDER PEOPLE (2003).

182. See generally DAVID CULLEN, HISTORICAL PERSPECTIVES: THE EVOLUTION OF THE AUSTRALIAN GOVERNMENT'S INVOLVEMENT IN SUPPORTING THE NEEDS OF OLDER PEOPLE (2003).

183. ROYAL COMMISSION INTO AGED CARE QUALITY AND SAFETY, 1 INTERIM REPORT: NEGLIGENCE 1, 45 (2019), 43 <https://agedcare.royalcommission.gov.au/sites/default/files/2020-02/interim-report-volume-1.pdf>.

funded directly by state, territory and local governments and/or delivered by them.¹⁸⁴ The Commonwealth and state and territory governments jointly administer and fund the Transition Care and Multi-Purpose Service (MPS) programs.¹⁸⁵

The Commonwealth has funded beds, provided medical and pharmaceutical benefits and set standards in aged care that it can enforce.¹⁸⁶ The Commonwealth can withdraw funding and rescind accreditation.¹⁸⁷ In 2019–20, for example, prior to the COVID-19 pandemic, Treasury predicted that aged care funding as a proportion of all spending by the Commonwealth would total 4.18%. This was a rise from 3.93% in 2017–18.¹⁸⁸ The Commonwealth can withdraw funding for individual providers through the regulator if standards of care are not met.¹⁸⁹

The current COVID-19 Emergency Plan¹⁹⁰ states: “[t]he Australian Government will . . . be responsible for residential aged care facilities; working with other healthcare providers to set standards to promote the safety and security of people in aged care and other institutional settings; and establishing and maintaining infection control guidelines, healthcare safety and quality standards.”¹⁹¹ State and territory governments are responsible for “the operational aspects of public health responses.”¹⁹² States are responsible for contact tracing, social distancing measures and “the management of cases” as well as maintaining public health services, hospitals and laboratories.¹⁹³

184. ROYAL COMM. INTO AGED CARE QUALITY AND SAFETY, 1 INTERIM REPORT: NEGLECT 1, 45 (2019), <https://agedcare.royalcommission.gov.au/sites/default/files/2020-02/interim-report-volume-1.pdf>.

185. AUSTRALIAN GOV'T, PRODUCTIVITY COMM., Report on Government Services 2020 (Jan. 23, 2020), <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/aged-care-services/rogs-2020-partf-section14.pdf>.

186. ROYAL COMM. INTO AGED CARE QUALITY AND SAFETY, 1 INTERIM REPORT: NEGLECT 1, 45 (2019), <https://agedcare.royalcommission.gov.au/sites/default/files/2020-02/interim-report-volume-1.pdf>.

187. Josh Gordon, *Fact check: Did the Government cut \$1.2 billion from aged care funding*, ABC NEWS (Nov. 16, 2018), <https://www.abc.net.au/news/2018-10-16/fact-check-did-the-government-cut-aged-care-funding/10363758>.

188. Josh Gordon, *Fact check: Did the Government cut \$1.2 billion from aged care funding*, ABC NEWS (Nov. 16, 2018), <https://www.abc.net.au/news/2018-10-16/fact-check-did-the-government-cut-aged-care-funding/10363758>.

189. David Campbell, *Bill Shorten says aged care is a Federal Government responsibility. Is he correct?*, ABC NEWS (Aug. 15, 2020) <https://www.abc.net.au/news/2020-08-15/fact-check-is-aged-care-a-federal-government-responsibility/12553808>.

190. *Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)*, AUSTRALIAN GOV'T, DEPT OF HEALTH (Apr. 23, 2020), <https://www.health.gov.au/resources/publications/australian-health-sector-emergency-response-plan-for-novel-coronavirus-covid-19>.

191. *Id.*

192. *Id.*

193. *Id.*

In addition, states will “establish systems to promote the safety and security of people in . . . aged care, prisons, schools and other institutions.”¹⁹⁴

Despite the COVID-19 Emergency Plan and Response Agreement, there have been serious problems with aged care management. Residents have been starving and suffering from malnutrition; staff underpaid (and underqualified); the workforce casualised.¹⁹⁵ Whilst the health systems are run by state governments, aged care is managed by the Commonwealth.¹⁹⁶ States have often carefully guarded their hospitals and are reluctant to accept the transfer of frail elderly residents from aged care facilities when infected with COVID-19 unless a prior agreement has been made.¹⁹⁷ Further complicating the situation, when there is a COVID-19 outbreak, nearly all staff may be sent home to self-isolate until the outcome of their test is known.¹⁹⁸ Aged care facilities are thus left critically short of staff and residents can suffer appallingly if the provider has not made appropriate contingency arrangements. Fault lines are clear enough here and represent a sure-fire recipe for the ensuing blame-shifting in this bleak terrain.

Most residences are in fact not run by state governments.¹⁹⁹ In Victoria 800 aged care facilities have 56,000 beds; of these, 622 facilities are privately run and regulated by the Commonwealth; 178 are run by the Victorian Government.²⁰⁰ About 10% of all aged

194. *Id.*

195. ROYAL COMM. INTO AGED CARE QUALITY AND SAFETY, 2 INTERIM REPORT: NEGLECT 1, 22 (2019), https://agedcare.royalcommission.gov.au/sites/default/files/2019-12/interim-report-volume-2_0.pdf.

196. ROYAL COMM. INTO AGED CARE QUALITY AND SAFETY, 1 INTERIM REPORT: NEGLECT 1, 45 (2019), <https://agedcare.royalcommission.gov.au/sites/default/files/2020-02/interim-report-volume-1.pdf>.

197. Tracey Burton, *Residential aged care homes are homes, not hospitals*, SYDNEY MORNING HERALD (July 29, 2020), <https://www.smh.com.au/national/residential-aged-care-homes-are-homes-not-hospitals-20200728-p55g79.html>.

198. *Providing aged care services during COVID-19*, AUSTL. GOV'T DEP'T OF HEALTH (Aug. 31, 2020), <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-advice-for-the-health-and-aged-care-sector/providing-aged-care-services-during-covid-19#managing-covid19-in-residential-aged-care>; Australian Government, *Managing COVID-19 in residential aged care* (Web Page, Aug. 31, 2020) <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-advice-for-the-health-and-aged-care-sector/providing-aged-care-services-during-covid-19#managing-covid19-in-residential-aged-care>.

199. ROYAL COMM. INTO AGED CARE QUALITY AND SAFETY, 1 INTERIM REPORT: NEGLECT 1, 45 (2019), <https://agedcare.royalcommission.gov.au/sites/default/files/2020-02/interim-report-volume-1.pdf>.

200. Erin Handley, *Why are there are more COVID-19 cases in private aged care than the public sector?*, ABC NEWS (Aug. 1, 2020), <https://www.abc.net.au/news/2020-08-01/why-more-covid-19-cases-in-private-aged-care-than-public-sector/12503212>.

care beds are publicly owned.²⁰¹ The Royal Commission into Aged Care has heard evidence of disagreements between the New South Wales and Federal governments adversely impacted the handling of the COVID-19 outbreak at Newmarch House in western Sydney: there was a stand-off about moving infectious residents to hospital because of the “precedent it would set.”²⁰² At Newmarch House, 19 residents died; two were admitted to hospital where they died.²⁰³

Further highlighting this system fault line, recriminations erupted between the Prime Minister and the Victorian Premier when Premier Andrews failed to act on medical advice that elective surgery should be cancelled during the pandemic so that more resources could be re-allocated to the state’s aged care sector, which was responsible for 769 of Victoria’s active COVID-19 cases.²⁰⁴ The Prime Minister explained that one-fifth of Victoria’s 430 aged care homes had been affected by the virus.²⁰⁵ Numbers are still climbing. The Premier is alleged to have said that he would not want his own mother to be in some of Victoria’s aged care homes.²⁰⁶

The Aged Care Quality and Safety Commission (‘ACQSC’) has issued notices to the largest COVID-19 clusters in Victorian aged care homes. All are at risk of losing federal funding if they do not agree to appoint an eligible adviser, cease admitting new residents and have daily meetings with the ACQSC until all positive cases are cleared. They must also provide written reports to the Commission and comply with all directions issued by Victorian health authorities.

In Victoria, Eastern Health was engaged to help with a COVID-19 cluster affecting 87 people in the Kirkbrae aged care home but was not given any guidance on what to do.²⁰⁷ Relatives expected that all aged residents at Kirkbrae would be moved to a

201. *Id.*

202. Ursula Malone, ‘Aged care home coronavirus response hurt by government disputes, royal commission hears’ (Aug. 10, 2020) *ABC News* <https://www.abc.net.au/news/2020-08-10/royal-commission-aged-care-examines-government-coronavirus-plan/12541246>

203. Sally Whyte, *Federal Minister intervened at Newmarch House amid coronavirus chaos*, FORBES ADVOC. (Aug. 12, [vocate.com.au/story/6873366/federal-minister-intervened-at-newmarch-house-amid-covid-19-chaos/?cs=17267](https://www.vocate.com.au/story/6873366/federal-minister-intervened-at-newmarch-house-amid-covid-19-chaos/?cs=17267)).

204. Charlie Coe & Charlie Moore, *Revealed: How Daniel Andrews was told by Australia’s top doctor to make a crucial decision as COVID-19 deaths soared in Melbourne last week but DIDN’T act—and the PM isn’t happy*, DAILY MAIL AUSTL. (July 29, 2020), <https://www.dailymail.co.uk/news/article-8568683/Daniel-Andrews-urged-make-crucial-decision-COVID-19-deaths-soared-failed-act.html>.

205. *Id.*

206. *Id.*

207. Nino Bucci, *Presbyterian Church describes ‘crazy’ evacuation at Kirkbrae aged care home after mounting coronavirus cases*, ABC NEWS (Aug. 1, 2020), <https://www.abc.net.au/news/2020-08-01/presbyterian-church-describes-crazy-aged-care-covid-evacuation/12512968>.

hospital, but only 29 of the home's 80 residents were moved and relatives have not been told where they have gone.²⁰⁸ It has been suggested by Dr Michael Wynne and Lynda Saltarelli that "[r]esponsibility for management, oversight and regulation should be transferred from the Commonwealth to the states and funded like health care."²⁰⁹

Following statements by the Royal Commission into Aged Care's Senior Counsel Assisting, Mr Peter Rozen QC, said "that neither the Commonwealth Department of Health nor the aged-care regulator developed a COVID-19 plan specifically for the aged-care sector,"²¹⁰ the National Cabinet quickly agreed on a preparedness plan at its August 21, 2020 meeting.

The National Cabinet endorsed the *Commonwealth State and Territory Plan to Boost Aged Care Preparedness for a Rapid Emergency Response to COVID-19*.²¹¹ The purpose of the plan is to strengthen aged care emergency response preparedness.²¹² It includes (1) ongoing assessment of the aged care providers' ability to respond to COVID-19 outbreaks, (2) an audit of state and territory emergency response capabilities and (3) additional face-to-face infection control training.²¹³ In addition, the National Cabinet endorsed the establishment of an Aged Care Health Emergency Response Operations Centre to boost the capacity to respond to outbreaks in residential care homes.²¹⁴ A time-limited AHPPC Aged Care Advisory Group has also been established, so that expertise about the aged care sector, infection control, emergency preparedness and public health responses can be brought together.²¹⁵ The Commonwealth agreed to provide \$171 million in additional support for these preparedness measures.²¹⁶

As of September 3, 2020, 481 people who had been admitted to Australian residential aged care because they could not live independently, died from COVID-19.²¹⁷ Seven of those who died

208. *Id.*

209. *Id.*

210. Ursula Malone, *Aged care home coronavirus response hurt by government disputes, royal commission hears*, ABC NEWS (Aug. 10, 2020), <https://www.abc.net.au/news/2020-08-10/royal-commission-aged-care-examines-government-coronavirus-plan/12541246>.

211. Prime Minister Parliament of Australia, *Media Statement*, NAT'L CABINET (Aug. 21, 2020), <https://www.pm.gov.au/media/national-cabinet-0>.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Jordan Hayne, *Prime Minister and Aged Care Minister apologise in Parliament over coronavirus response*, ABC NEWS (Aug. 24, 2020), <https://www.abc.net.au/news/2020-08-24/government-faces-question-time-pressure-aged-care-coronavirus/12589404>.

had been in home care, and 328 had been in residential care homes.²¹⁸ It was not until July 19, 2020 that the Victorian Government announced a range of new measures to minimize the spread of COVID-19 in the aged care sector in Victoria.²¹⁹ These measures included a program to minimize workforce sharing across aged care sites, infection control training for aged care workers, collaboration with the private sector to increase capacity and improved surveillance testing and contact tracing.²²⁰ In addition, a one-off \$1,500 payment was made to Victorian aged care workers who had been instructed to self-isolate or quarantine at home.²²¹ It is difficult to understand why these measures were not introduced before more than 500 aged care residents became infected with COVID-19 and the death toll continued to increase on a daily basis.

Unfortunately, it cannot be said that there was effective cooperation between all the states and the Commonwealth regarding the management of aged care. Different messaging contained in the Commonwealth and Victorian directives caused confusion for aged care centres and left families distraught. The interface between the acute care health system and aged care service providers was not discussed in Victoria - the question of whether aged care residents who tested positive for COVID-19 should be transferred to hospital was left undecided.²²²

In South Australia, a health protocol was agreed between the Commonwealth and the South Australian Government clarifying that all aged care residents with, or suspected to have, COVID-19 are to be transferred to a hospital, and the South Australian Health Department would bring in a team to help manage the outbreak.

Intergovernmental cooperation was clearly not effective for all states. The delineation of responsibility failed to consider vital links between Commonwealth-controlled aged care facilities and state-controlled hospitals. The interconnections and the lines of responsibility were not clear, and the lack of prompt action in some jurisdictions led to failures in protecting the rights and lives of

218. *Id.*

219. PARLIAMENT OF VICT., PUB. ACCOUNTS & ESTIMATES COMM., INQUIRY INTO THE VICTORIAN GOVERNMENT'S RESPONSE TO THE COVID-19 PANDEMIC, 31 https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Report/PAEC_59-07_Vic_Gov_response_COVID-19_Interim_report.pdf.

220. *Id.*

221. *Id.*

222. *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic Before the Public Accounts and Estimates Committee 2* (2020) (Statement of Patricia Sparrow, Chief Executive Officer, Aged and Community Services Australia).

many residents of aged care facilities. Further adding to the problems in aged care facilities in Victoria have been failed measures introduced by the Victorian Government on contact tracing, testing and quarantining.²²³ Fault lines have appeared in the National Cabinet and the 'blame game' has resumed: the Prime Minister has called the failures "unacceptable."²²⁴ The Treasurer has commented on the heavy economic price of Stage 4 restrictions and the lack of a need for the Premier Andrews' twelve-month extension of the emergency powers.²²⁵

VII. CONCLUSION

The emergencies of 2020 made reform essential, and changes had to be swift. The National Cabinet has supplanted the COAG; further reforms have been proposed to the ministerial councils and intergovernmental agreements necessary to support it. The National Cabinet has been an essential forum for intergovernmental cooperation during a crisis characterised by uncertainty, ambiguity, complexity and urgency.

The National Cabinet has been effective in providing timely, clear, sufficiently transparent and decisive responses to contain and suppress COVID-19. However, second-wave outbreaks, particularly in Victoria, have revealed fault lines in the system. Within the three main areas of rights protection examined in this article (health, work and protection of the most vulnerable aged care residents), it was found that intergovernmental cooperation through the National Cabinet was most effective when there was a clear delineation of responsibility between the levels of government. The protection of aged care residents has been the most poorly delineated of all. This has contributed to blame-shifting between the levels of government over the boundaries of responsibility and simmering tensions between Australia's second largest state and the Commonwealth does not auger well. As an institution of intergovernmental cooperation, the National Cabinet

223. Parliament of Victoria, Legislative Council Legal and Social Issues Committee, Inquiry into the Victorian Government's COVID-19 contact tracing system and testing regime, (Dec. 2020) https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_the_Victorian_Governments_COVID19_Contact_Tracing_System_and_Testing_Regime_report/LCLSIC_59-05_Vic_Gov_COVID-19_contact_tracing_testing.pdf

224. David Crowe, 'Scott Morrison turns fire on Victoria in aged care blame game', *The Sydney Morning Herald* (Aug. 25, 2020) available at <https://www.smh.com.au/politics/federal/morrison-turns-fire-on-victoria-in-aged-care-blame-game-20200825-p55p85.html>

225. David Crowe, *Scott Morrison turns fire on Victoria in aged care blame game*, SYDNEY MORNING HERALD (Aug. 25, 2020), <https://www.smh.com.au/politics/federal/morrison-turns-fire-on-victoria-in-aged-care-blame-game-20200825-p55p85.html>.

offers some advantages over the COAG in both efficiency and effectiveness in the context of dealing with immediate crises. The inherent constitutional power of the Commonwealth is reflected in the new National Cabinet with states and territories accepting the Prime Ministerial role of leading the Cabinet even though states have substantive constitutional powers to deal with the emergencies encountered in 2020. Heightened interest from national and local media outlets has increased the scrutiny of the National Cabinet's operations. Intensified media attention also highlights the fault lines that exist in the federation. Whether the new National Cabinet can overcome these fault lines in future remains to be seen. At least we note some signs that cooperative approaches are effective and possible when most needed.