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Pandemic Policy-Making in Australia's Federal System

An ANZSOG Teaching Case by Professor Alan Fenna

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Introduction

On 25 January 2020, a traveller arriving in Melbourne from China was diagnosed with the “novel coronavirus” that had originated in Wuhan. On 30 January, the World Health Organization (WHO) declared the new virus “a public health emergency of international concern”. On 1 March, the first Australian death from COVID-19 occurred, and on the 11th the WHO declared it a pandemic. By the middle of the month, the number of Australian cases was doubling every three days. Australia and the world were facing the greatest infectious disease crisis since the Spanish Flu almost exactly a century earlier.

How well would Australia cope, and, in particular, how well would Australian federalism cope? This was no idle question given that doubts and dysfunctions seemed to have plagued Australia's federal system for decades. Indeed, Australia was lurching directly from one crisis to another as the horrific 2019–2020 bushfire season found emergency management in the federation wanting in a variety of ways (RCNND 2020). An early verdict on the handling of the pandemic overseas, meanwhile, was damning: “The response of governments to COVID-19 represents the greatest political failure of Western democracies since the Second World War” (Horton 2021, 184). Opinions on whether Australian federalism was well-prepared in its division of responsibilities and intergovernmental arrangements for such a crisis, meanwhile, were mixed. Some feared Australia's “patchwork” of laws would not be up to the task (Howse

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2004), while others were confident that the system provides a desirable level of “flexibility and choice” allowing a suitably calibrated response (Bennett, Carney, and Bailey 2012)

1. Who Should Do What?

In a federal system such as Australia’s, the question when such a crisis hits is not just what should be done, but who should do it? One of the main ‘what’ questions was how drastic the response should be. The main ‘who’ question was whether the Commonwealth or the States should take the lead and how closely they should work together. Australian federalism was designed on the basis of a division of powers where the two levels of government would operate in a “distinct and co-ordinate” fashion, keeping to their respective spheres of responsibility (Wheare 1963, 2). However, it rapidly evolved away from that “co-ordinate” model to one characterised by overlap and entanglement, with a rather more promiscuous arrangement of roles and responsibilities.

1.1 The Commonwealth

The Constitution gives the Commonwealth explicit constitutional authority over ‘quarantine’ and a broad ‘external affairs’ power that expands its effective jurisdiction in regard to anything over which it has signed an international agreement. Furthermore, it has deep pockets and other resources such as the personnel, equipment and command structure of the Australian Defence Force (ADF). In addition, if the disease was world-wide, then it would certainly have clear national dimensions. The Commonwealth had recently passed the *Biosecurity Act 2015*, which claims sweeping control powers in the event of an emergency such as this (Lee et al. 2018, 171). And, on top of all that, the Prime Minister, Scott Morrison, had made clear his views in the wake of the 2019–2020 bushfires that the Commonwealth should assume a more active role in emergency management.

1.2 The States (and Territories)

It is the States, though, that operate the public hospitals, the government school systems, and the police and emergency services agencies. They also have primary jurisdiction over public health, as well as criminal and civil law; they license and regulate the operation of the thousands of businesses, facilities and services that are potential sites of contagion; and they provide thousands more public amenities of their own — libraries, schools, hospitals, parks, and so — that likewise present risks. The States each have their respective public health and emergency management Acts and have always shouldered the main responsibility for emergency management.

1.3 The Two Together

The States, then, have a practical primacy in regard to emergency management with the Commonwealth playing a secondary, but potentially important — and potentially expanded — role (Carayannopoulos 2018, 55–60; Lee et al. 2018). Depending on the nature of the disaster or emergency, this in turn may well place a premium on cooperation and coordination between the two levels of government, as the OECD (2020) has emphasised.

Governments working together can be necessary or desirable anywhere from the street level to the highest level. Reflecting this need, a range of protocols and arrangements have been established under the aegis of the Council of Australian Governments (COAG) over the past two decades, many of them formalised in intergovernmental agreements. In early 2019, for instance, the Commonwealth and the States and Territories signed the Intergovernmental Agreement on Biosecurity clarifying the respective roles of the two levels of government in respect of plant and animal pest and disease threats. These agreements identified the Commonwealth’s role as providing coordination and material support where necessary.

2. Who Did What?

How the different powers and roles and responsibilities of the two levels of government actually function, and how well cooperative arrangements actually work, only become clear on the day.

2.1 Commonwealth Actions

By 20 January 2020, the Commonwealth had added the novel coronavirus as a listed human disease under the Biosecurity Act and initiated screening measures for arrivals from China.

The Commonwealth began tightening Australia's borders, beginning on 1 February with a restriction on foreign nationals arriving from China. On 27 February the *Australian Health Sector Response Plan for Novel Coronavirus* was activated. Invoking its powers under the *Biosecurity Act 2015*, the Commonwealth declared a "human biosecurity emergency" on 18 March and then closed the country's borders to non-residents and declared that "all travellers arriving in Australia will be required to undertake their mandatory 14-day self-isolation at designated facilities". Other pandemic responsibilities were also attended to, such as ensuring the National Medical Stockpile (ANAO 2020).

Battling the virus was not, however, the only challenge. There was then the problem that the cure — drastic lockdown measures — would inevitably create its own policy disaster for Australia's governments. Views, of course, differed as to the relative priority that should be attached to protecting public health and keeping the economy going. Some argued that the resulting economic hardship was making the cure worse than the disease. Macroeconomic responsibility lies with the Commonwealth, and in accordance with that the Commonwealth announced a series of expensive measures to maintain jobs. Chief among these was the announcement on 30 March that \$130bn had been allocated for the new "JobKeeper" subsidy program that would keep employees on the payroll at public expense (PM and Treasurer 2020; Bishop and Day 2020).

2.2 State Actions

While the Commonwealth took responsibility for closing the border and keeping the economy going, it was the States who led the way in implementing the key control and lockdown measures. All except New South Wales promptly declared a "state of emergency" as provided for in their Public Health Acts. Victoria, for instance, declared a "state of emergency" on 16 March 2020 — two days before the Commonwealth did (McLean and Huf 2020). This was the first time such powers had been invoked. Declaration of an emergency then conferred powers on the respective governments to issue control orders as they saw fit.

Using their control powers, States moved quickly to reduce opportunities for transmission through various "social distancing" measures, including a moratorium on school attendance. Led by Western Australia on 5 April 2020, they also took the radical, though not unprecedented, step of imposing border restrictions to protect their populations from inter-State transmission. At the same time, they also embarked on contact-tracing as a crucial component of the strategy to manage community transmission.

2.3 Joint Action

While the two levels of government were taking their own actions, much of that occurred in the context of intensified high-level coordination. The Council of Australian Governments (COAG) — as the periodic meetings of Australia's heads of government have been known since the early 1990s — met on 13 March 2020, as the first wave was building. COAG announced the *National Partnership Agreement on COVID-19*, which provided Commonwealth support for management of the crisis. More importantly, perhaps, the meeting was immediately followed by the prime minister's announcement that a new cabinet-style meeting of the heads of government, styled "National Cabinet", would swing into action.

From that point on, much of what the respective governments did was presented as the outcome of a collective decision-making process, one informed by expert advice from the Commonwealth and State and Territory Chief Medical Officers operating as the Australian Health Protection Principal Committee. Respective roles and responsibilities were affirmed in such documents as the *Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19)*, published in the early stages of the pandemic. National Cabinet was welcomed by the States as a much more collegial form of decision-making than they had enjoyed under previous arrangements (e.g., Victoria 2020).

3. What Could Possibly Go Wrong? Frictions and failures

Australia's handling of the pandemic was in many ways an instance of that under-recognised phenomenon, *policy success* (on which, see Luetjens, Mintrom, and 't Hart 2019). At 907, total deaths in 2020 were extremely low by international standards, and governments received much praised for the way they responded — both individually and collectively. However, even the greatest policy successes have their blemishes.

3.1 Friction

National Cabinet represented a significant exercise in cooperative federalism and put a reassuringly collaborative gloss on the process. There were, nonetheless, areas of tension between the Commonwealth and the States. Pervasive was the tension between the State focus on containing the virus and the Commonwealth's focus on minimising the economic and fiscal damage. The Commonwealth was consistently less enthusiastic about imposition of restrictions and consistently more enthusiastic about their relaxation than the States.

One point of contention was schools, with the Commonwealth seeking to bribe the private schools to maintain business as usual and, unsuccessfully, applying rhetorical pressure on the States to do likewise with the public system (Karp 2020; Murphy 2020). Another conflict was over border closures. The Commonwealth deplored them and joined a High Court challenge (though eventually withdrawing), while the States remained adamant. Border closures were challenged as being in violation of S.96 of the Constitution, but found by the High Court to be a valid exception.

While Australian federalism is often seen as highly centralised (Fenna 2019; Saunders 2013; Wanna 2020), and while National Cabinet issued collective decisions, the States maintained a high degree of autonomy in deciding what containment steps to take and when it was safe to ease them. This was particularly the case for the latter: while the Commonwealth *Biosecurity Act* claims the power to impose restrictions, it cannot force their removal. For some commentators, National Cabinet's "roadmap" out of the pandemic was being treated far too much like exactly that, a mere roadmap, leading to a frustrating "confusion" about what was happening where (e.g., Crowe 2020).

3.2 Failures

By the end of 2020, it was looking very much like Australia had successfully protected itself from the pandemic and performed very well by comparison with Europe or North America. However, it would have done even better had it not been for three notable lapses.

One was the failure to stop infected passengers from the Ruby Princess cruise ship disembarking in Sydney. Another was the failure to ensure tight quarantining of potentially infected arrivals in Victoria — a catastrophic error that gave rise to the severe second wave (CHQI 2020, 12). And another was the failure to stop the spread of the virus within and from aged-care facilities in Victoria. All have been the subject of official inquiries. To what extent was Australia's system of divided jurisdiction to blame?

All three of these mishaps were potentially the consequence of coordination failure. Cruise ships dock in State-controlled ports and their passengers disembark into territory regulated by State health laws, but at the same time, those passengers are also crossing Australia's external border, unambiguously a Commonwealth responsibility. Quarantine, meanwhile, is one of the Commonwealth's enumerated powers — but it is a concurrent, not an exclusive, one, and thus it is not clearly the responsibility of either level of government specifically. Finally, aged care has grown to be a Commonwealth responsibility (though it is not constitutionally) while the hospital system to which its infections spread in Victoria is State-managed.

As far as the Ruby Princess is concerned, responsibility for the errors was largely sheeted home to the relevant NSW agencies rather than to any coordination gaps (SCIRP 2020). As far as the quarantine débâcle in Victoria is concerned, that was attributed to poor preparation, decision-making and management within the State government (CHQI 2020, 15, 19). Some commentators have seen it as a failure of federalism nonetheless in that quarantine is a Commonwealth enumerated power, and thus it is a Commonwealth responsibility and should not have been left to the

States. Responsibilities and rules governing quarantine had been identified in the H1N1 pandemic review as requiring clarification (DHA 2011, 40). As far as the aged-care disaster is concerned, it does seem that the problem arose in part because of poor administrative coordination between Commonwealth and State authorities (RCACQS 2020).

4. Conclusion

Federalism undoubtedly complicates policy making, but whether that leads to suboptimal outcomes depends on a variety of factors including the way the division of powers has evolved and become embedded; the quality of intergovernmental arrangements and processes; ideology and partisanship; and the nature of the issues being faced. Federalism also has potential advantages, including local decision-making calibrated to local conditions and preferences; the quarantining of policy errors to one jurisdiction; and learning from others. The COVID-19 pandemic of 2020–21 seemed to show that Australian federalism is alive and well and capable of providing effective and efficient responses to at least certain kinds of challenges. It also prompted a shake-up in the way Australia's heads of government work together, with the Prime Minister declaring that National Cabinet would replace COAG permanently and claiming that this would be a "congestion busting" move for intergovernmental policy making more generally (PM 2020).

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