# Australian Federalism after the Covid-19 pandemic

*by Andrea Dolcetti and Lucia Scaffardi*[*1]

**Abstract:** *Il federalismo australiano dopo la pandemia di Covid-19* – The Covid-19 pandemic has been, among other things, a stress-test for the resilience of legal systems all over the world. Despite their differences, the ways in which liberal democracies responded to the recent pandemic share two salient features. First, institutional responses to the pandemic put pressure on the theory and practice of our fundamental rights and freedoms. Secondly, they highlighted the significance of the relationship between different levels of government, especially in federal states. This paper discusses the latter issue in the Australian context, where in responding to the pandemic, a new ad hoc intergovernmental forum, the National Cabinet, was created. An analysis of the role played by the National Cabinet during and after the pandemic will be used to reflect upon the federal structure of the Australian Commonwealth, in light of the idea of cooperative federalism; the principle of the separation/division of power(s); and the distinction between the 'form of state' and the 'form of government'.

**Keywords:** Australian federalism; Covid-19; Rights; Levels of government; National Cabinet.



## 1. Introduction

This article stems from the desire to investigate how the decentralization of power and responsibilities in federal states has worked in the face of the recent COVID-19 pandemic. In examining this issue, it is crucial to consider whether, and to what extent, the relationship between central power and decentralized bodies has been able to sustain the pressure exerted by the exceptional pandemic situation. There are cases – and Australia appears to be one of them – in which the decentralization of power has represented an added value, which has helped authorities to successfully manage the social health emergency associated with the pandemic. For the purposes of our discussion, it is useful to begin with an overview of Australian federalism, focusing attention on the notion of cooperative federalism (section 2 of the article). In this context, we will consider the Council of Australian Governments as an example of co-operative intergovernmental decision-making. Section 3 will then provide a reconstruction the events that characterized the pandemic period; paying particular attention to the

*1 This article is the outcome of a joint effort by the two authors, who have discussed and revised the work in a continuous dialogue. It should be noted, however, that sections 1 and 2 of the article have been mainly written by Andrea Dolcetti, while sections 3 and 4 have been mainly written by Lucia Scaffardi.

*DPCE online*
ISSN: 2037-6677

establishment of an ad hoc body, the National Cabinet, which provides a new forum for intergovernmental co-operation. We will highlight how the National Cabinet has been praised by several commentators as an effective and efficient solution to tackle the co-ordination problems created by the pandemic, but it has also been criticised for its potential lack of transparency and accountability. In the fourth and final section, we will reflect on the way in which Australian federalism has withstood the impact of Covid-19, considering not simply the "acute" period, but also the long-term consequences of the strategies put in place to respond to the emergency. Interestingly, the post-pandemic federal-state balance has implications for both the form of state and the form of government. We will also suggest that the Australian case can teach us an important lesson on the principle of separation of powers.

## 2. The Australian Commonwealth: federation, constitutional framework, and co-operative federalism

The Commonwealth of Australia is a federation comprising six states – New South Wales, Victoria, Queensland, South Australia, Tasmania, and Western Australia – and ten federal territories, the most important of which are the Australian Capital Territory and the Northern Territory[2]. Power is shared amongst seven autonomous governments – six state governments, plus the Federal government[3]. Legislative, judicial and executive powers are divided between the federal and the state level[4]. However, even though the Australian Constitution specifies the powers vested in the Commonwealth, the powers at the federal and state level are not perfectly separate[5].



The nature and structure of the Australian federal system can only be understood in light of its constitutional history. For this reason, the next sub-section (2.1) will remind the reader of some landmark events in the process that led to the formation of the Commonwealth of Australia. This will help us contextualize the constitutional framework which underpins Australian federalism. For the purposes of this article, in explaining this framework, we will focus attention on the key constitutional provisions that define the structure of the Australian federal system (2.2) and on the role of

[2] The Australian Capital Territory, the Northern Territory, and the Jervis Bay Territory are internal territories, i.e. they are on the Australian mainland. The remaining seven territories are external: the Ashmore and Cartier Islands, the Australian Antarctic Territory, Christmas Island, the Cocos (Keeling) Islands, the Coral Sea Islands, Heard Island and McDonald Islands, and Norfolk Island.

[3] The governments of the Territories are not autonomous; from a legal point of view, they could be abolished by the Federal Parliament. S 122 of the Constitution confers plenary powers on the Commonwealth in relation to the Territories. See S. Joseph, M. Castan, *Federal Constitutional Law*, Sydney, 5th edition, 2019, 14.

[4] Each state and internal territory – except the Jervis Bay Territory – has its own legislature, but the Federal Parliament can override territorial legislation.

[5] This is evidenced, amongst other things, by the content of s 109 of Constitution: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. The existence of this provision and the extensive jurisprudence on s 109 demonstrate that the legislative powers of the States and the Commonwealth can, and often do, overlap.

the High Court of Australia in interpreting and upholding the federal principle (2.3). Against this background, the final sub-section (2.4) will discuss the co-operative dimension of Australian federalism.

## 2.1 The federation process

Australia has one of the oldest federations in the world. As a result of a number of intercolonial conferences held in the second half of the 19th century, the British colonies of New South Wales, Victoria, Queensland, South Australia, Tasmania, and Western Australia united in the Commonwealth of Australia, which was officially proclaimed in Centennial Park, Sydney, on 1st January 1901[6]. This defining moment in Australian history resulted from the individual development of those six colonies, in terms of population, economy, and institutions. This organic growth, combined with the recognition of shared interests and concerns, provided strong practical reasons for the colonies to federate[7]. Among these practical reasons, issues of common defence, commerce, communications, immigration, and transport were of key importance[8].

On 7th February 1788, the colony of New South Wales was formally proclaimed. As the first colony to be settled, it initially covered the whole eastern half of the continent. In 1823, the *New South Wales Act 1823* (UK) separated Van Diemen's land from New South Wales as its own colony[9]. Governments were established in Western Australia (1829) and South Australia (1834). The Colony of Victoria was established in 1851, by carving out of the southeastern part of the Colony of New South Wales. By 1856, responsible government had been achieved in New South Wales, Victoria, Tasmania and South Australia. In 1859, Queensland was separated from New South Wales and a responsible government established. Responsible government in Western Australia was established in 1890[10].



[6] Following on from the federation process, the first federal election took place on 29th and 30th March of the same year; and the Parliament of the Commonwealth of Australia was officially opened on 9th May 1901 in Melbourne. In 1927, the Commonwealth Parliament relocated to what is now the Old Parliament House (formerly, the Provisional Parliament House), in Canberra. In 1988, the Parliament of Australia moved to Parliament House, Canberra, which is its current meeting place. Parliament House was opened by Queen Elizabeth II on 9th May 1988, on the anniversary of the opening of both the first Federal Parliament in Melbourne, and of Provisional Parliament House in Canberra.

[7] It should be noted, however, that the process of federation was also driven by "philosophical" reasons. On this point, see G. Appleby, N. Aroney, T. John, *Australian federalism: past, present, and future tense*, in G. Appleby, N. Aroney, T. John (Eds), *The Future of Australian Federalism - Comparative and Interdisciplinary Perspectives*, Cambridge, 2012, 1. Also, towards the end of the 19th century an Australian national identify was emerging. For instance, in 1899, soldiers from different colonies sent to South Africa to fight in the Boer War served together as Australians.

[8] For example, the colonies initially built railways using different gauges; this made it challenging to transport people and goods across the continent.

[9] 'Van Diemen's land' was the colonial name of the island of Tasmania.

[10] The idea of responsible government refers to the accountability of the Executive to Parliament. This is a key constitutional principle in the Westminster system of government, which Australia inherited from the United Kingdom. The principle of

*DPCE online*
ISSN: 2037-6677

Intercolonial conferences provided regular occasions for the colonies to discuss mutual concerns. From 1860 and 1900, eighty-three intercolonial conferences took place. In 1883, an intercolonial convention held in Sydney proposed the establishment of a Federal Council of Australasia[11]. On 6th February 1890 delegates from each of the colonial parliaments and the New Zealand Parliament met at the Australasian Federation Conference in Melbourne. The conference called for a national convention to draft a constitution for a Commonwealth of Australia. The first National Australasian Convention (1891) was held in Sydney in March and April; and it was attended by delegates from each of the colonies and the New Zealand Parliament. The second National Australasian Convention (1897 – 1898) met in Adelaide, Sydney and Melbourne, and agreed to the constitution. Referendums were held in New South Wales, Victoria, South Australia, and Tasmania to approve the constitution – unfortunately, New South Wales did not approve it. After a secret premiers' meeting which agreed to several changes to the constitution, between April and July 1899, referendums took place in South Australia, New South Wales, Victoria and Tasmania – with a majority approving the bill. In September 1899, Queensland agreed to the proposed constitution.

The Commonwealth of Australia was created by the enactment of the *Commonwealth of Australia Constitution Act 1900* (Imp). After being passed by the British Parliament on 5th July 1900, and assented by Queen Victoria on 9th July 1900, the Act came into force on 1st January 1901. On 31st July of the same year, Western Australia approved the Constitution in a referendum with an overwhelming majority.



## 2.2 Federalism and the Australian Constitution

From a legal point of view, the validity of the Australian Constitution stemmed from an exercise of British sovereignty. From a political perspective, however, the enactment of the *Commonwealth of Australia Constitution Act 1900* (Imp) resulted from a process that included negotiations amongst the Colonies, and between the Colonies and the United Kingdom. History shows that "[the] framers of the Constitution were mainly concerned with the financial and trade issues arising from Federation, and how best to weight the interests of the small states against those of the more populous states in the new Federal Parliament"[12]. This is

responsible government embraces individual ministerial accountability and collective executive accountability. The former refers to the duty of each government minister to be personally responsible for activities conducted by themselves and by any government departments which they administer, while collective executive accountability is the accountability of the Executive as a collective body to Parliament.

[11] It was suggested that the Federal Council of Australasia would have authority to legislative over a variety of matters, including relations with Pacific islands; prevention of the influx of criminals; fisheries beyond territorial limits; enforcement of court judgments beyond colonial boundaries; enforcement of criminal process beyond colonial boundaries; other matters including defence, quarantine, patents weights and measures; recognition of marriage and divorce beyond colonial boundaries.

[12] G. Williams, S. Brennan, A. Lynch, *Blackshield and Williams Australian Constitutional Law and Theory – Commentary and Materials*, Sydney, 7th edition, 2018, 107.

reflected in the text of the Constitution. For both legal and cultural reasons, the framing of the Australian Constitution was "influenced primarily by the structure and principles of British government, filtered through Australian colonial experience"[13]. The Australian Constitution was also inspired by the federal systems in the US, Canada, Switzerland, and Germany. The US system was so influential that "the Australians (..) adopted parts of the structure and even the text of the United States Constitution, thereby laying the foundations for the emergence of an Australian doctrine of the separation of power"[14].

The Australian Constitution established two levels of government, dividing law-making powers between the state and federal governments. Most of the powers enjoyed by the Commonwealth can be found in section 51 of the Constitution, which identifies 39 areas in which the federal Parliament may make laws, including trade and commerce, taxation, immigration and emigration, and external affairs. These law-making powers are held concurrently with the states, with a possible conflict to be solved according to section 109. The Constitution also grants the Commonwealth Parliament a small number of exclusive legislative powers – for example, in relation to federal departments and places acquired by the Commonwealth for a public purpose (section 52); and in relation to customs, excise and bounties (section 90).

The powers of the states are not enumerated in the Constitution. In light of their plenary power, states can legislate with respect to any matter (excluding, of course, the matters over which the Commonwealth has exclusive power). State and territory governments are responsible for making laws in any area not assigned to the Federal government, for example, in relation to hospitals, schools, emergency services, and public transport[15]. In assessing the federal-state balance, it should be noted that over time the scope of Commonwealth law-making power has gradually increased, thanks to some High Court decisions on the interpretation of section 51 of the Constitution.



The Constitution also established the Federal Parliament (Chapter I), comprising the House of Representatives (Part III) and the Senate (Part II). The House of Representatives currently has 150 members, each representing an Australian electorate. The Senate consists of 76 Members – 12 from each state and two from each territory.

## 2.3 The federal principle in the jurisprudence of the High Court of Australia

[13] C. Saunders, *The Constitution of Australia – A Contextual Analysis*, Oxford, 2011, 15.
[14] *Ibid.*, 16. There are of course several important differences between the Australian and the US Constitution – most notably, that the former lacks a bill of rights. This is perhaps not too surprising, considering the sensibility of the time and the influence of UK constitutionalism.
[15] There is also a third level of government, local government, which is not mentioned in the Constitution. Local governments, established in each state by a Local Government Act, are authorised to make and enforce by-laws that relate to local needs (e.g., in relation to parks, community centres, or libraries).

*DPCE online*
ISSN: 2037-6677

The Australian Constitution and Australian federalism are inseparable. This is clearly demonstrated by the crucial role played by the High Court of Australia in the implementation of the federal principle – understood as a principle guiding both constitutional design and constitutional interpretation[16]. Initially, the Court supported the notion that the federation was a compact between the peoples of the states with two doctrines (which are now rejected): the reserve powers doctrine and the immunity of government instrumentalities.

The reserved powers doctrine was a principle developed by the inaugural High Court of Australia that emphasized the context of the Constitution. In doing so, the Court used federalism (understood as a compact between self-governing states) to interpret the Constitution in a restrictive way. More precisely, the Court interpreted the constitutional provisions granting legislative power to the Commonwealth as to ensure that states could preserve their sphere of legislative authority. This approach became particularly notable in cases where the Commonwealth power had an interstate element (e.g., in relation to trade and commerce). The High Court also developed a doctrine of immunity of government instrumentalities (taking inspiration from the US jurisprudence governing intergovernmental immunity), arguing that neither the Commonwealth nor state governments could be affected by the laws of the other[17].

A new phase started with the landmark judgment in the Engineers' case[18]. This is one of the most important cases ever decided by the High Court of Australia, which rejects the doctrines of implied intergovernmental immunities and reserved state powers.



The third, and current, phase "has seen the emergence of a modified doctrine of intergovernmental immunities, operating primarily as an implied limitation on both the Commonwealth and states' powers to enact legislation binding upon each other"[19]. This phase is characterized by an interpretative approach that existed alongside the approach followed by the High Court in the *Engineers'* case. The use of the idea of federalism as a constitutional interpretative principle is one of the key factors that define and influence the federal-state balance.

## 2.4 The co-operative dimension of Australian federalism

[16] At the same time, "(..) it is important not to see the judiciary as the only influence in determining the nature of [Australia's] federal society", as suggested in L. Zines, *What the Courts have done to Australian Federalism*, Papers on Parliament No. 13, Canberra, 1991.

[17] See, in particular: *D'Emden v Pedder* [1904] HCA 1; *Deakin v Webb Alfred Deakin v Thomas Prout Webb (Commissioner of Taxes)* [1904] HCA 57; and *Federated Amalgamated Government Railway & Tramway Service Association v NSW Rail Traffic Employees Association* [1906] HCA 94. This doctrine has some limitations, as Prof. Twomey explains in A. Twomey, *Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind one another*, 31 in *Fed. L. Rev.* 3, 507-539 (2003).

[18] *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* [1920] HCA 54.

[19] G. Appleby, N. Aroney, T. John, *Australian federalism: past, present, and future tense*, quot., 6.

The vertical separation of powers between the federal level and the state level is a defining feature of a federal state. Indeed, the way in which the powers enjoyed by the constitutional units of a given federation interact with each other provides insights into the nature of that federation. In this context, it is crucial to consider the constitutional design that underpins the allocation and scope of these powers as well as the de facto exercise of these powers. Broadly speaking, federal and state powers can be exercised in a competitive or in a co-operative way. These two situations are commonly described in terms of 'competitive federalism' and 'cooperative federalism' respectively. From a normative perspective, it can be asked which kind of federalism – cooperative or competitive – would be more desirable, in general and for a specific federation.

The expression 'cooperative federalism' is usually used to refer to "an attribute of a federation whereby its components governments routinely engage in co-operative action with a view to achieving common objectives"[20]. On the other hand, the idea of competitive federalism is associated with an institutional arrangement that creates an environment in which the different federal units and levels of governments compete in wielding and exercising power.

The Commonwealth of Australia, like many other federal systems, can accommodate both forms of federalism[21]. However, it has been convincingly argued that "the agreements reached between the colonial delegates about the distribution of powers between the Commonwealth and the States not only allowed for the possibility of co-operative action in the years ahead, but created the occasions fir its necessity."[22] So, we can accept the proposition that co-operative federalism in Australia is to a certain extent inevitable. Having said that, it is crucial to clarify the conditions under which cooperative federalism would be beneficial and desirable. In the words of an authoritative commentator: "Given the size of Australia's population and the globalization, not only of trade and commerce, but also of issues such as crime, terrorism, racial and other discrimination, climate change, environmental protection, and biosecurity, the balance would seem to favour co-operative federalism. There can, however, be too much of a good thing. Too much co-operative federalism may gradually transform the country into something that, while in form a federation, is in substance a unitary State."[23] Furthermore, it is not clear whether co-operative federalism should be



[20] R. French, *Co-Operative Federalism*, in C. Saunders, A. Stone (Eds), *The Oxford Handbook of the Australian Constitution*, Oxford, 2018, 808.
[21] The Australian federal system also includes elements of 'coercive federalism' – "most prominently the use of tied grants by the fiscally dominant Commonwealth". See G. Appleby, N. Aroney, T. John, *Australian federalism: past, present, and future tense*, quot., 8. Some commentators defend the view that Australian federalism is "concurrent": see, e.g., J. Brumby, B. Galligan, *The Federalism Debate*, in 74 *Aus. J. of Pub. Adm.* 1, 82-92 (2015). See, also: A. Zimmermann, L. Finlay, *Reforming federalism: a proposal for strengthening the Australian federation*, 37 *Monash Univ. L. Rev.* 2, 190-231 (2011). On fiscal federalism, see K. Wiltshire, *Australian federalism: the business perspective*, 31 in *Univ. of New South Wales L. J.* 2, 583-616 (2008); and A. Twomey, *The future of Australian federalism: following the money*, 24 *Australasian Parliam. Rev.* 2, 11-22 (2009).
[22] R. French, *Co-Operative Federalism*, in C. Saunders, A. Stone (Eds), *The Oxford Handbook of the Australian Constitution*, quot., 812.
[23] *Ibid.*, 815.

*DPCE online*
ISSN: 2037-6677

understood as a matter of fact or as a matter of law. On this point, Professor Twomey has noted that "(..) a question arises as to whether there should be inserted in the Constitution some recognition of the importance of co-operative federalism in addition to practical measures to facilitate that co-operation. In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*, Deane J described Commonwealth-state co-operation as 'a positive objective of the Constitution'. However, in *Re Wakim; Ex parte McNally*, McHugh J noted that 'co-operative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power.'"[24]

Leaving aside the issue of whether co-operative federalism is best understood as a constitutional principle (or a principle guiding constitutional interpretation), there are a number of ways in which co-operative federalism can be practised consistently with the Australian Constitution. Most importantly: intergovernmental executive agreements[25]; the referral of state legislative powers authorizing Commonwealth law-making under Section 51(xxxvii)[26]; and administrative co-operation by way of intergovernmental agreements which may or may not be supported by legislation[27] From 1992 to 2020, the most significant political mechanism for the practice of co-operative federalism was the Council of Australian Governments (COAG). The members of the COAG included the Prime Minister, state and Territory Premiers and Chief Ministers, and the President of the Australian Local Government Association.

Over time COAG became the "central forum for the formulation of policy responses to some of the nation's most pressing problems, including health care, water management, and microeconomics reform."[28] The development of COAG has been welcomed as a pragmatic response to the need for intergovernmental cooperation, but it has also generated concerns in relation to its legal status, its centralising tendencies, and the democratic deficit associated with its decision-making process.[29] This last point is particularly important. Does an organ like COAG – because of its design, function, and actual practice – inevitably marginalise Parliaments? Although intergovernmental cooperation has a key role to play in the context of co-operative federalism, it is crucial to consider how all the powers under the Constitution can and should contribute to a healthy cooperation between the Commonwealth and the states.



[24] A. Twomey, *Reforming Australia's Federal System*, in 36 *Fed. L. Rev.* 1, 57-81 (2008).
[25] These agreements can bring about uniform legislation enacted separately by each participating polity; or enactment by one unit in the federation of a standard law then adopted by other parties.
[26] Section 51(xxxvii) of the Constitution (the so-called 'referral power') empowers the Commonwealth Parliament to legislate with respect to matters within the remit of the states, upon their referral by a state. On the relationship between the referral power and federalism, see: N. Moses, *Re-evaluating the role of the referral power in Australian federalism: A tool of last resort ?*, 50 *Univ. of West. Aust. L. Rev.* 1, 1-45 (2023).
[27] See R. French, *The incredible shrinking federation: voyage to a singular state?*, in G. Appleby, N. Aroney, T. John (Eds), *The Future of Australian Federalism - Comparative and Interdisciplinary Perspectives*, quot., 47-48.
[28] P. Kildea, A. Lynch, *Entrenching 'Cooperative Federalism': is it time to formalise COAG's place in the Australian Federation ?*, in 39 *Fed. L. Rev.* 1, 112 (2011).
[29] See *ibid.*, 112-120.

To tackle this issue, it might be helpful to reflect on the way in which Australian federalism responded to the pandemic. This will allow us to gain a better understanding of the Australian federal system and offer some general considerations on the future of cooperative federalism in Australia.[30]

## 3. Multilevel Relations in the face of the Covid-19 Pandemic: A Long-Lasting Solution?

The first Covid-19 case in Australia was registered in January 2020, rapidly escalating into a significant wave of cases, mainly concentrated in March-April 2020[31]. Notwithstanding the recrudescence of the pandemic in July-August 2020, the available data[32] show the efficacy of the Australian federal system's management of the health emergency crisis, demonstrated by the low death rate and relatively small number of reported cases.

This success invited an analysis of how the federal structure and the cooperation between the Commonwealth, states and Territories contributed to this result. For the purposes of this paper, it is particularly important to ask whether the solutions adopted in times of emergency have affected – temporarily or permanently – the form of state as well as the form of government, with particular regard to the relationship between legislative and executive powers. To formulate this kind of considerations, it seems fundamental to retrace (in a necessarily concise way) the main existent or newly adopted legislations and policies intended to increase and facilitate the multi-level cooperation and intergovernmental relations.



First of all, it is worth noticing that Australia – both at federal and states levels[33] – is provided with specific legislations facing emergency situations such as natural or health disasters, the *Biosecurity Act* of 2015[34]

[30] According to Alan Fenna, "[t]he first two decades of the twenty-first century have been tumultuous ones for Australian federalism, fluctuating between conflict and cooperation, centralisation and state assertion. This was driven by the intersection between partisan changes and alignments on the one hand, and external forces and events on the other. Prominent among the latter were terrorism; global competitiveness pressures; the global financial crisis; climate change; and the COVID-19 pandemic." See A. Fenna, *The revival of Australian federalism? Trends and developments in Commonwealth–state relations*, in A. Podger, H. Chan, T Su, J. Wanna (Eds), *Dilemmas in Public Management in Greater China and Australia - Rising Tensions but Common Challenges*, Canberra, 2023,125. It is true that several factual factors have recently tested Australian federalism. However, the impact of the COVID-19 pandemic appears to be particularly significant, as demonstrated by the fact that it triggered the creation of a new organ for intergovernmental cooperation – the National Cabinet.

[31] For a more detailed analysis of the data regarding the Covid-19 pandemic in Australia, the mortality rates and the number of infected people, see John Hopkins University Coronavirus Center, *Mortality Analysis*, available at the link: https://coronavirus.jhu.edu/data/mortality.

[32] See, for instance, the data collected by the WHO and available at the link: https://data.who.int/dashboards/covid19/deaths?m49=036&n=o.

[33] Public Health Acts adopted by states and Territories, for example, establish the possibility to declare a state of public health emergency, thus allowing the adoption of specific restrictive measures.

[34] Biosecurity Act 2015, No. 61, 2015 and subsequent modifications. It is important to note that "Chapter 2 deals with managing risks to human health. That Chapter mainly

being one of the most relevant examples[35]. This Act regulates the competencies and management of human biosecurity emergencies and attributes to the federal Health Minister special powers to counter the expansion of diseases and pests, by relying on the key evaluations of the Commonwealth Chief Medical Officer (CMO). In this legislation, similarly to emergency provisions adopted in other legal systems or fields, the margins of actions recognized to the national executive are significant, marking an expansion of federal control[36]; consequently, it comes with no surprise that the Act and the connected powers "have been exercised sparingly and only in relation to matters generally outside the states' areas of primary responsibility or control"[37]. In fact, after the first Covid-19 case was detected in January 2020 and the declaration of the coronavirus as communicable disease with pandemic potential, the Biosecurity Act provisions were applied by federal government mainly with reference to national border control decisions (affecting, for instance, returning citizens and access to the national territory), tracing apps, essential goods distribution, financial assistance measures[38]. As a consequence, considering the attribution to the states level of public health management competences, Australian states and Territories were provided with the power to adopt social distancing decisions, policies concerning specific social activities, *inter-states* travels, curfews and obligation to wear masks, education[39].

deals with diseases (listed human diseases) that are listed in a legislative instrument. The main method of managing risks to human health is by imposing a human biosecurity control order on an individual who may have a listed human disease. However, Chapter 2 also includes requirements in relation to persons entering or leaving Australian territory, and rules relating to managing deceased individuals", at https://www.legislation.gov.au/C2015A00061/latest/text.

[35] Other legislative measures and policies relevant in the field of emergency management could be identified in the previous National Health Security Act (2007), the Australian Health Management Plan for Pandemic Influenza, the National Strategy for Disaster Resilience, the National Disaster Risk Reduction Framework. For an in-depth analysis of these measures, see L.P. Vanoni, *"Never let a good crisis go to waste". Il principio della separazione dei poteri prima e dopo la pandemia*, Torino, 2023.

[36] N. Aroney, M. Boyce, *The Australian Federal Response to the Covid-19 Crisis. Momentary Success or Enduring Reform?*, in N. Steytler (ed), *Comparative Federalism and Covid-19. Combating the Pandemic*, London, 2022, 301, recalling S. Brenker, *An executive grab for power during Covid-19?*, in *Aust. Pub. L. Online*, 13 May 2020.

[37] N. Aroney, M. Boyce, *The Australian Federal Response to the Covid-19 Crisis*, quot., 301.

[38] For a vast analysis of the federal intervention and actions, see Aroney, Boyce, *The Australian Federal Response to the Covid-19 Crisis*, quot.; L.P. Vanoni, *"Never let a good crisis go to waste"*, quot.; S. Bateman, A. Stone, *Australia. Covid-19 and Constitutional Law*, in J.M. Serna de la Garza (ed), *Covid-19 and Constitutional Law*, Mexico City, 2020; J.R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, in *The J. of Federalism*, 4, 627-649 (2021); P. de Biase, S. Dougherty, *Federalism and Public Health Decentralisation in the Time of COVID-19*, OECD Working Papers on Fiscal Federalism, No. 33, 2021.

[39] On the measures adopted at the decentralized level, see A. Twomey, *Multi-Level Government and Covid-19: Australia as a case study*, in *Melbourne Forum on Constitution-Building*, 2020, at https://law.unimelb.edu.au/__data/assets/pdf_file/0003/3473832/MF20-Web3-Aust-ATwomey-FINAL.pdf; B. Bennet, I. Freckelton (Eds), *Pandemics, Public Health Emergencies and Government Powers*, Sidney, 2021; A. Fenna, *Australian federalism and*

Notwithstanding the importance of such a division of competencies and powers of intervention, the unprecedented pressure posed by the Covid-19 pandemic clearly revealed all the limits and inadequacies of a rigid separation between central and states governments, thus requiring the federalist structure to reinforce multi-level dialogue and cooperation as well as to innovate and evolve its functioning. Although – as it will be underlined later in this section – failures and inefficiency could be detected, what seems to be interesting in the Australian case-study is the prompt inter-institutional answer elaborated during the first Covid-19 wave, determining a significant change both in the Australian federalism and the cooperation mechanisms.

In fact, the abovementioned COAG and its bureaucratic-led process showed, since the beginning of the pandemic, its limits: this body appeared inadequate to ensure flexibility and rapid answers, essential in the pandemic context; COAG "met only twice a year and delt with out-of-session issues through a protracted process of negotiating formal intergovernmental agreements and settling on the wording of joint *communiqués*"[40], consequently being uncapable of adapting to an emergency and delicate situation imposing a different way to establish inter-governmental dialogue and decisions. For these reasons, after having agreed on the adoption of the National Partnership on Covid-19 Response (NPCR)[41], the COAG was initially complemented – and subsequently substituted[42] – by a new, different and innovative body: the National Cabinet (NC), established on 15 March 2020.

Described as an inter-governmental forum[43] or interjurisdictional body[44], the Cabinet marks a strong institutionalization of the cooperation



*the COVID-19 crisis*, in R. Chattopadhyay *et al.* (Eds), *Federalism and the Response to COVID-19. A Comparative Analysis*, London-New York, 2022, 20 ff.

[40] J.R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, quot., 630.

[41] "The NPCR, agreed to and signed by the Council of Australian Governments (COAG) in March 2020, and administered by the Administrator of the National Health Funding Pool (the Administrator) and the National Health Funding Body, is a collaborative initiative established between the Australian Commonwealth government and the state and territory governments to effectively manage the COVID–19 pandemic response", at https://www.aihw.gov.au/reports/health-welfare-expenditure/health-system-spending-on-the-response-to-covid-19/contents/government-spending.

[42] With a decision taken by the National Cabinet on 29 May 2020.

[43] Calls for a more "defined institutional architecture" emerged also in previous years and was characterizing also the COAG; on this point, see A. Fenna, *Australian federalism and the COVID-19 crisis*, cit., 20, recalling the considerations developed by the Department of the Prime Minister and Cabinet, *Reform of the Federation: Green Paper*, Canberra, 2015.

[44] T. Tulich, M. Rizzi, F. McGaughey, *Cooperative federalism, soft governance and hard laws in Australia' state of emergency*, in *VerfBlog*, 10 April 2020. Some authors initially considered the NC as a "special purpose COAG meeting", J. Warhust, *Grappling with the Realities of a National Cabinet*, in *The Canberra Times*, 25 March 2020. Wilkins described it as "COAG on steroids", in R. Wilkins, *Federalism and the COVID-19 crisis: An Australian perspective*, at https://www.forumfed.org/wp-content/uploads/2020/04/AustralianCOVID.pdf. Murphy and Arban described the

*DPCE online*
ISSN: 2037-6677

between Commonwealth, states and Territories, by proposing a smaller structure, if compared to the COAG: differently form the latter, the NC comprises the federal Prime Minister, the state Premiers as well as the Territory Chief Ministers, with the exclusion of the President of the Australian Local Government Association (ALGA)[45]. Despite its name, this body is not *per se* a Cabinet: first of all, it is very different from the War Cabinet, created during World War II, which included cross-party members of the Parliament, so that also the Oppositions were involved and represented[46]; moreover, it is not even a "Cabinet" intended as an institution expressing the executive government and composed of the government's ministers, thus representing the governing party; from a practical perspective, the meaning usually attributed to "Cabinet" institutions implies that "the prime minister or premier controls the membership and agenda of the cabinet, and determines the internal processes by which outcomes are resolved"[47]. This does not appear to be the case when talking about the NC: rather than being responsible collectively to one Parliament – as happens when referring to a *stricto sensu* federal or states' Cabinets in parliamentary systems –, the members of the newly created body are "individually responsible to separate parliaments. The principle of collective responsibility cannot apply in the usual way. Similarly, cabinet solidarity cannot be enforced, leading (..) to public dissention by members of the National Cabinet"[48]. As a consequence, the NC cannot be defined as an

NC as an "informal policy-making forum", J.R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, quot., 629.



[45] The NC was also advised by other bodies, such as the Australian Health Protection Principal Committee (AHPPC), including the States' and Territories' Chief Medical Officers, and the National Coordination Mechanism of the Department of Home Affairs.

[46] G. Hill, J. Garrick, N. Barton, *Faultlines of Federation: Australia's intergovernmental cooperation and human rights during the pandemic*, in 3 *J. of Transnat. L. and Pol.*, 119-150 (2021).

[47] J. Warhust, *Grappling with the Realities of a National Cabinet*, quot.

[48] T. Tulich, M. Rizzi, F. McGaughey, *Cooperative federalism, soft governance and hard laws in Australia' state of emergency*, quot.; on the secrecy of the Cabinet, see also A. Banfield, N. Church, *Next steps for National Cabinet*, Parliamentary Library Briefing Book, 2022, who tried to evaluate "whether the NC was legally under the 'Cabinet-in-Confidence' information security designation. At the heart of this query is the core constitutional convention of responsible government. The *Constitution* does not refer to 'Cabinet' or 'prime minister', but their existence is not in doubt. The Crown appoints ministers who are members of parliament, thus allowing direct engagement from other parliamentarians. Ministers, led by the prime minister, share in collaborative decision-making (collective ministerial responsibility). Individual ministers will have the confidence of the Parliament and be responsible for their department. Any allegations of incompetence or impropriety are to be appropriately investigated and dealt with and if the minister is found at fault, the convention requires them to resign. The Coalition Government believed steadfastly that National Cabinet was constitutionally a Cabinet and thus the convention of Cabinet confidentiality (collective ministerial responsibility) applied to its deliberations. Senator Patrick challenged this notion with a freedom of information (FOI) request for public access to certain National Cabinet documents. The Government argued that National Cabinet was a committee of Cabinet, and accordingly exempt from FOI requests. This claim of cabinet confidentiality was challenged and rejected by the Administrative Appeals Tribunal (AAT) on the grounds that the evidence was 'persuasively against the National Cabinet being a committee of the Cabinet within the meaning of the statutory expression' (par. 210). Indeed, Justice

"entity capable of making decisions that are binding, either on its members or otherwise"[49]. But this consideration – which is not only related to the name chosen or to formal characteristics but, more properly, to its functions and role – should not appear as diminishing the relevance of the NC. On the contrary, several Scholars exactly identified in this structure and absence of solidarity, the real strength of this body and the very roots of its success.

Arguably, states and Territories participating to the NC have maintained their sovereign powers: they only "entered into a collective decision-making forum that has enabled them to make decisions in their own best interests"[50]. This affirmation is reflected, first of all, in the possibility attributed to different government levels to dissent and promote unilateral actions, as clearly testified by several – yet limited – episodes in which some states and Territories decided to diverge and distance themselves to the position expressed by the Prime Minister and the Federal Government. For instance, on 22 March 2020, "the Premiers of New South Wales (NSW) and Victoria (Vic) and the Chief Minister of the Australian Capital Territory (ACT) broke ranks to unilaterally recommend that parents keep their school-aged children home from school and institute a range of lockdowns, while the Federal Government maintained that schools were safe to attend and should remain open"[51].

If the non-binding nature of decisions taken at the NC level, together with the informality that characterized the decision-making process, have not impeded tensions between different levels of government, these characteristics have also allowed the Cabinet to take effective, rapid and pragmatic solutions: "practicality, problem-solving focus, emphasis on bipartisanship and agility"[52] are considered the most relevant achievements of the newly established NC, allowing a working method based on consensus and what has been defined as "co-design of decisions"[53]. In other words, "While the decisions of the NC were made collectively, it was agreed that each jurisdiction would be free to implement those decisions in the way most appropriate for it. (..) The National Cabinet process respected that while goals, principles and standards may be agreed collectively at the National Cabinet level, it was up to each jurisdiction to give effect to them according to local circumstances"[54]. By doing this, the general decisions taken at the NC level were able to be implemented at the states' and Territories' levels by considering their specificities and peculiar situations: that represented a



White observed 'mere use of the name "National Cabinet" does not, of itself, have the effect of making a group of persons using the name "committee of the cabinet". Federal Cabinet committees derive their power and membership from the Cabinet. National Cabinet does not meet this threshold as only the prime minister is a member of the federal Cabinet".

[49] J.R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, quot., 629.

[50] G. Hill, J. Garrick, N. Barton, *Faultlines of Federation*, quot., 132.

[51] T. Tulich, M. Rizzi, F. McGaughey, *Cooperative federalism, soft governance and hard laws in Australia' state of emergency*, quot.

[52] J.R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, quot.

[53] This expression was underlined by A. Fenna, *Australian federalism and the COVID-19 crisis*, quot., 21, employing an expression already used by the Victorian government.

[54] A. Twomey, *Multi-Level Government and Covid-19*, quot., 3.

*DPCE online*
ISSN: 2037-6677

key aspect in delivering efficient and effective solutions, properly taking into account the different spread of the virus in the vast Australian country, where some more populous states have been characterized by a higher number of cases, while others by a very limited diffusion of Covid-19.

This flexibility and informal meetings, during which the inter-governmental dialogue aimed at establishing policy solutions to the health emergency, first, and subsequently the economic crisis, contributed for sure to the reinforcement of cooperative as well as executive federalism: on the one side, the vastity of the issues to be tackled during the pandemic and, consequently, the different competencies (at different governmental levels) involved, required a cooperation not only between states and Territories but also between the latter and the Commonwealth[55]; on the other hand, this cooperation was created only by engaging the highest levels of the executives, thus accomplishing an "executive federalism in a fresh and more dynamic guise"[56]. This aspect, as we will see later on, also represents a potential critical aspect, able to impact the form of government and the relationship between powers.

This unprecedented and innovative form of "loose coordination"[57], although mostly considered a success and a relevant institutional evolution, is not devoid of critiques and shortcomings: some commentators have cast doubt on the real efficacy of the decision-making process established, considered too bland and able to create confusion and inhomogeneity in terms of solutions and answers to broad and shared problems[58]. Moreover, the secrecy characterizing the NC works and debates opened the floor to a serious call for enhanced transparency and accountability[59] as well as the capability to treat equally all the NC's members, so that to avoid tensions or unbalances; this means also considering the different issues and voices deriving from all the states and Territories in defining the Cabinet's agenda[60].



The necessity to consider and properly face these challenges and potential critical aspects emerged as fundamental especially after the first acute emergency phase: in fact, on 29 May 2020 the Prime Minister announced the abolition of the COAG and the idea to confirm the NC on a stable basis as new inter-governmental body[61], to be accompanied by the

[55] More broadly, on the Australian federalism and its cooperative nature, M. Gobbo (ed.), *Costituzioni federali anglosassoni*, Torino, 1994; L. Scaffardi, *L'ordinamento australiano. Aspetti problematici*, Padova, 2000; G. Appleby, N. Aroney, T. John (Eds), *The Future of Australian Federalism*, Cambridge, 2012; C. Saunders, A. Stone (Eds), *The Oxford Handbook of Australian Constitutional Law*, Oxford, 2018.
[56] A. Fenna, *Australian federalism and the COVID-19 crisis*, quot., 21.
[57] *Ibid.*
[58] D. Crowe, *Morrison's 3-Step Roadmap to Recovery Is Merely a Menu for the States*, in *Sydney Morning Herald*, 8 May 2020.
[59] J. Ball, *Australia's Federation: post-pandemic playbook*, CEDA, 2020, 11. In these terms also Warhust, who underlined the lack of accountability of the NC, by underlining that "power has been centralized in a single untested institution" (J. Warhust, *Grappling with the Realities of a National Cabinet*, quot.).
[60] J. Ball, *Australia's Federation*, quot.
[61] It is worth noticing that a representative of Local Government is invited to meet with NC once a year.

creation of a National Federation Reform Council[62]. The latter body, comprising the NC, the federal, states' and Territories treasurers (sitting in the Council of Federal Financial Relations) and the ALGA, has the duty to promote actions in priority reforms areas (mainly synthesized in health, energy, infrastructure and transport, skills and rural and regional), established by five National Cabinet Reform Committees (made up of federal, states and Territories portfolio Ministers participate[63]). This major restructuration and institutionalization of the NC function and its role, more broadly, inside the Australian federal structure, was rooted on the idea that this body needed to evolve from a forum mainly answering to the Covid-19 health emergency, to a stable actor focusing and dealing with long-term issues[64]. Since then, indeed, the NC's priorities have been regularly reviewed and updated[65], identifying as key areas of intervention, for instance, the housing reforms, the fight against gender-based violence, the strengthen of the health system and the National Disability Insurance Scheme as well as the transition to new zero (decarbonization) and energy transformation[66].

Considering all the key areas touched by the NC actions and decision-making process, it comes with no surprise that the debate on the evolution and characteristics of such a relevant body intensified: in May 2022, for instance, Independent Senator Rex Patrick underlined the importance of ensuring that Federal-state government relations are transparent and accountable to Parliaments and the civil society[67], avoiding the erosion of "long-established principles of Ministerial responsibility"[68] and, more

[62] The National Federation Reform Council meets annualy and "provides an opportunity for leaders and treasurers across the Commonwealth and states and territories to focus on priority national federation issues", at https://federalfinancialrelations.gov.au/council-federal-financial-relations#:~:text=Treasurers%2C%20First%20Ministers%20and%20the,focus%20on%20national%20federation%20issues.

[63] For more details on composition and activities, see https://federation.gov.au/national-cabinet/national-cabinet-reform-committees.

[64] As recalled by A. Banfield, N. Church, *Next steps for National Cabinet*, quot., "ACT Chief Minister Andrew Barr expressed in March 2022 a widely-held sense that National Cabinet should change from its current 'crisis management arrangement' to a structure that 'leads to a more constructive Federation'".

[65] See at https://federation.gov.au/national-cabinet.

[66] Some authors, for instance, suggested that the NC represented the right place "to reach decisions on energy and perhaps climate policy", A. Pickford, *Australian Federalism and Energy Policy Post Covid-19: Lessons for Canada?*, in UOttawa, at https://www.uottawa.ca/about-us/positive-energy/news/australian-federalism-energy-policy-post-covid-19-lessons-canada.

[67] He also criticized the secrecy characterizing the NC works and decisions: "In fact most Federal-State bodies are now operating under a claimed cloak of absolute Cabinet secrecy. Information that was previously accessible under Freedom of Information and parliamentary processes is now denied. (..) The Prime Minister's attempt to shield National Cabinet decision-making from all scrutiny was emphatically rejected by Federal Court Judge Richard White in August 2021, and a subsequent Government Bill to enforce such secrecy was effectively rejected by the Senate. However politically-driven bureaucratic obstruction from the Department of the Prime Minister and Cabinet has continued", at https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F8579674%22.

[68] *Ibid.*

broadly, we can add, of the role of Parliament and legislative powers. As clearly highlighted by Banfield and Church[69], these considerations must lead to more comprehensive thoughts on the impact of executive federalism on separation of powers' principle and values: in federal systems "decision making tends to shift upwards toward national leaders, creating both advantages and risks. Benefits include quicker decisions as all the primary players are in a single room, while also allowing the smaller states and territories to have an equal voice at the table. However, executive federalism is not without shortcomings. For example, its decisions have been criticized as anti-democratic by operating outside the scrutiny of the Parliament and disregarding parliamentary and democratic processes"[70]. Similarly, to the critiques moved against the COAG, both bodies seemed to have surely "enabled significant intergovernmental cooperation, but was also the site of acrimonious disagreement and contributed to executive federalism in which democratic accountability and parliamentary responsibility are side-lined"[71].

All these evaluations and questions regarding the consequences and impacts caused by the Covid-19 pandemic and the inter-governmental dialogue on both the form of state and of government, impose to further investigate the future actions as well as political and doctrinal debate on the NC and its functioning. In particular, the evolution of this body should be looked first of all with reference to the affirmation of a cooperative and executive federalism, questioning whether it would continue ensuring an efficient dialogue between different levels of government even in times not characterized by emergency crisis, by ensuring cooperation but also differentiation, without determining a strong centralization of powers in the hands of the Prime Minister – and, consequently, of the Commonwealth –; secondly, it should be assessed if and how the reliance on the NC would conduct to a more imbalanced powers in favor of the executives, excluding or limiting the relevance of the parliamentary debate and the accountability and transparency of governments' choices.



In conclusion, notwithstanding the difficulties emerged in certain areas of intervention, such as border control and quarantine measures, together with some moments of tension between the different government levels[72], the Australian federalism proved to be relatively well equipped to face emergencies and unpredictable crisis, being also able to transform its

[69] A. Banfield, N. Church, *Next steps for National Cabinet*, quot.

[70] Similarly, T. Tulich, M. Rizzi, F. McGaughey, *Cooperative federalism, soft governance and hard laws in Australia' state of emergency*, quot.; but also L.P. Vanoni, *"Never let a good crisis go to waste"*, quot.

[71] N. Aroney, M. Boyce, *The Australian Federal Response to the Covid-19 Crisis*, quot., 311. See also J. Menzies, *Explainer: What is the National Cabinet and is it democratic?*, in *The Guardian*, 31 March 2020.

[72] See on this point, R. Murphy, E. Arban, *Assessing the Performance of Australian Federalism in Responding to the Pandemic*, quot., for an analysis of the failure of Australian federalism, especially with reference to the management of international travels and quarantine measures. Moreover, the known case of the cruise ship Ruby Princess, showed administrative difficulties and inefficiencies, also due the sometimes difficult multi-level governance. Vanoni also underlines the differences and, in some cases, divergent policies and actions expressed by states and Territories, in contrast with the federal state position (L.P. Vanoni, *"Never let a good crisis go to waste"*, quot.).

instruments and institutions if necessary[73]. The creation of the NC clearly demonstrates the ability to establish a proficient multi-level cooperation that contributed to finding efficient and effective answers to a health and economic crisis. The decision to maintain this innovative and flexible "platform" and to confirm its utility in tackling different and evolving challenges, could mark an evolution of the form of state or, at least, a means to "oil the wheels of federal-state relations"[74]. In fact, "most of Australia's responses to the Covid-19 crisis took place in the context of a coordinated all-of-government approach, led by the Commonwealth but cooperatively agreed to by the states and territories within the newly developed NC process. While each jurisdiction exercised its constitutional powers independently and with important dimensions of diversity, this occurred withing an agreed framework"[75].

## 4. The Impact of the pandemic on Cooperative Federalism, Form of State, and Form of Government

In federal jurisdictions, the pandemic has offered an opportunity to consolidation existent or latent mechanisms of cooperative federalism[76]. This trend contrasts with the way in which states with a different form decentralization have responded to the Covid-19 emergency. For example, in Italy – a regional state – the central state (and, in particular, the executive power) took priority. Bodies that had previously performed poorly in terms of coordination, such as the state-Regions Committee, have fully demonstrated their incapacity to effectively manage the pandemic. The incapacity to act as an effective and efficient platform of dialogue between Regions and the central institutions of the state became particularly evident in the initial phase of the pandemic[77]; sadly, with severe consequences on public health.



[73] This evaluation on the efficiency of the Australian federalism is vastly shared: Fenna, Arban, Aaroney, Vanoni, Fenna (see previous footnotes) and C. Saunders, *A New Federalism? The Role and Future of the National Cabinet*, Governing During Crises, Policy Brief No. 2, 2020; D.C. Downey, W.M. Myers, *Federalism, Intergovernmental Relationships, and Emergency Response: A Comparison of Australia and the US*, in 50(6) *American Rev. of Pub. Adm.*, 526 ff. (2020).

[74] J. Warhust, *Grappling with the Realities of a National Cabinet*, quot.

[75] N. Aroney, M. Boyce, *The Australian Federal Response to the Covid-19 Crisis*, quot., 310. "Far from decentralized government being an impediment to high performance, in a large country with diverse conditions and dispersed populations, it appears to have contributed positively to Australia's high achievement", D. Cameron, *The relative performance of federal and non-federal countries during the pandemic*, Forum of Federations, no. 50, 2021, at http://www.forumfed.org/wp-content/uploads/2021/04/OPS50_Relative_Performance_During_the_Pandemic1.pdf.

[76] See on this point F. Palermo, *Il federalismo in emergenza ?*, in M. Lossani, A. Baglioni, A. Banfi, A. Boitani, D. Delli Gatti, P. Giarda, *Il federalismo alla luce della crisi sanitaria*, Laboratorio di Analisi Monetaria, Università Cattolica del Sacro Cuore, Milano, 2021; but also F. Palermo, *Is there a space for federalism in times of emergency?*, in *VerfBlog*, 13 May 2020.

[77] On the relationship between states and Regions during Covid-19, in Italian language: E. Catelani, *Centralità della Conferenza delle Regioni e delle province autonome durante*

In general, it appears that the emergency period has caused a significant centralization of power in the hands of the central state and, specifically, of the executives. However, federal states have demonstrated greater structural resilience and institutional robustness compared to unitary or regional states. This has proven to be true with reference to Australia, where its institutions have demonstrated to have greater capacity to adopt shared solutions or policies, while taking into account the peculiar conditions of specific territories, considering various determining factors (e.g., demographic, economic characteristics etc.). In this context and in order to reach this result, instruments of negotiation and dialogue between different levels of government have assumed central importance.

In normal times, negotiation is often seen as an important element but also as a procedure that can delay decision-making processes, being often cumbersome and sometimes the cause of political-social "frictions". However, during the Covid-19 period, characterized by the need for rapid decisions, this was not the case. On the contrary, the dialogue between levels of government and the adoption of shared responses in several federal states proved to be important allies, especially in systems where the division of powers would not allow the central federal state to manage alone the entire pandemic, but where centralizing tendencies proved nonetheless strong[78].

Negotiation and coordination have thus emerged as important instruments of political decision-making and emergency-management. It is clear that the effectiveness of such negotiation has depended (and will continue to depend) on the quality of the coordination bodies established between levels of government. In this respect, Australia has demonstrated the ability to adopt innovative and resilient solutions such as the National Cabinet. Certainly, the Australian example is not isolated and indeed finds common trends in some other forms of cooperative federalism, such as in Belgium[79].



*l'emergenza Covid-19? Più forma che sostanza*, in *Oss. sulle fonti*, Fasc. Spec., 501-515 (2020); B. Baldi, S. Profeti, *Le fatiche della collaborazione. Il rapporto stato-regioni in Italia ai tempi del Covid-19*, in *Riv. It. di Pol. Pubb.*, 3, 277-306 (2020); E. Longo, *Episodi e momenti di conflitto Stato-regioni nella gestione della epidemia da Covid-19*, in *Oss. sulle fonti*, 1, 377-407 (2020); in english: F. Palermo, *The impact of the pandemic on the Italian regional system: Centralizing or decentralizing effects?*, in R. Chattopadhyay *et al.* (Eds), *Federalism and the Response to COVID-19*, quot., 104-112; E. Alber, E. Arban, P. Colasante, A. Dirri, F. Palermo, *Facing the pandemic: Italy's functional 'health federalism' and dysfunctional cooperation*, in N. Steytler, *Comparative federalism and Covid-19*, quot., 15-32.

[78] L.P. Vanoni, *"Nevel let a good crisis go to waste"*, quot., 299 ff.

[79] In Belgium, the federal system has not previously institutionalized and formalized mechanisms for coordination between different levels of government. During the pandemic, nonetheless, there was an unprecedented participation of representatives from Communities and Regions in the National Security Council—a body with advisory functions on public safety, chaired by the Ministry of the Interior. This was a response to the perceived necessity for dialogue between different levels of government. Subsequently, this moment of coordination was shifted to the Concertation Committee, composed equally of representatives from the governments of Regions and Communities, as well as the central government. This shift highlights how a federal system traditionally defined as dual and competitive adapted during the pandemic to a more cooperative approach, thus involving the participation of sub-state entities in bodies where their involvement was previously not established, including regional authorities and Communities. This indicates a certain flexibility within the

In many federal systems the response to the pandemic has affected areas of political and legislative intervention traditionally managed by the states - such as public health, education, intrastate travel. In the Australian context, the National Cabinet and the dialogue thus established granted States an unprecedented level of bargaining power, that facilitated shared solutions. Nonetheless it is worth underlying that this cooperative dynamic and the decisions taken at the National Cabinet level encountered in various cases resistance from one or more states, that manifested disagreement against some Commonwealth Government initiatives, such as mandating the reopening of schools and setting timelines for reopening borders[80].

In order to properly assess the value of the cooperation afforded by the National Cabinet, two fundamental questions must be considered. First, what are the areas, or situations, in which the Commonwealth should have the authority to set aside cooperation to compel states to comply with its Decisions? Secondly, to what extent cooperative federalism should be led by executive action (even in the case of coordinated executive action between different levels of government)? The way in which we answer these questions is crucial in understanding and guiding the future of Australian federalism and, in particular, of cooperative federalism in Australia[81].

---

decentralization system, which was able to transform rapidly in this unprecedented situation—albeit not without moments of tension, stalemate, and coordination issues—into a more cooperative federalism. In this context, the federated entities recognized the centralizing tendencies in exchange for constant and, in several respects, innovative involvement, to ensure efficient and timely responses. For more details on the Belgian response of different governance levels' institutions to Covid-19, see P. Bursens, P. Popelier, P. Meier, *Belgium's response to Covid-19: how to manage a pandemic in a competitive federal system?*, in R. Chattopadhyay *et al.* (Eds), *Federalism and the Response to COVID-19*, quot., 39-49; P. Popelier, P. Bursens, *Managing the Covid-19 crisis in a divided Belgian federation: Cooperation against all odds*, in N. Steytler, *Comparative federalism and Covid-19*, quot., 88-105; Z. Desson, E. Weller, P. McMeekin, M. Ammi, *An analysis of the policy responses to the Covid-19 pandemic in France, Belgium and Canada*, in *Health Pol. and Techn.*, 9, 430-446 (2020); T. Moonen, *Questions of Constitutional Law in the Belgian fight against Covid-19*, in J. Serna de la Garza (ed.), *Covid-19 and Constitutional Law*, Mexico City, 2020, 123-130; in Italian: G. Milani, *L'emergenza sanitaria nel diritto pubblico comparator: la risposta del Belgio al Covid-19*, in *DPCE Online*, 2, 1671-1689 (2020). In this review: F. Gallarati, *La reazione alla pandemia di Covid-19 negli ordinamenti composti: una panoramica comparata*, 2, 1605-1633 (2021).

[80] Although a compromise was eventually reached on quarantine limits, which required greater Commonwealth support and longer lead times, Western Australian Premier Mark McGowan initially denounced what he called an "ambush" attempt by the Commonwealth Government to increase international arrivals. The Australian Prime Minister's famous remarks aimed at mitigating conflict are relevant here: "From time to time we disagree on this and that, but when we get into the room, we sort it out". At https://pmtranscripts.pmc.gov.au/release/transcript-43027, Press conference Prime Minister, 18 September 2020.

[81] For example, excessive control by the Commonwealth risks compromising the ability of states to function as governments (Austin v Commonwealth (2003))[81]. Nonetheless, we must remember that in many decentralized states, the taxation power attributed to the central level (i.e., the Australian Commonwealth) remains a wedge that the Constitution attributes to the central power, with all the consequent implications for this fragile balance (Clarke v Commissioner of Taxation (2009)).

*DPCE online*
ISSN: 2037-6677

A detailed discussion of the two abovementioned questions is beyond the scope of this paper. However, it is important to highlight how these issues – and, in general, the role played by the executive in relation to cooperative federalism in Australia – are relevant for considerations on both the form of state and the form of government. As underlined before, the pandemic showed a noticeable strengthening of executive powers, not only in the initial and dramatic phases of 2020. One may ask whether this trend, which is arguably a phenomenon broader than the response to a national emergency phase, should be questioned – despite the necessity and success of executive-driven coordination. This is because it might be desirable to create greater political, legal, and constitutional space for Parliaments.

The National Cabinet, previously described as a source of strong and effective answers in the pandemic experience could be seen as a political model closer to a presidential form of government rather than a parliamentary one, where executive powers (of both levels) emerged as key players. Certainly, the decisions made by the Prime Minister were more rapid compared to previous procedures, and led to the formation of a cross-party cabinet, capable of transcending the temporary divisions of parliamentary politics.

However, the National Cabinet, as a new intergovernmental body, has also shown a series of potential negative aspects, ranging from emerging concerns about potential transparency deficits and the accountability required to allow legislative (or legislative bodies') oversight of executive decisions and the inevitability growing of Commonwealth dominance.



So, in the end, also when talking about the National Cabinet and the relationship between different levels of government, we are speaking also (once again) about one of the basic principles of a constitutional democracy: the separation/division of power(s). This means that the success of the National Cabinet should be considered in relation to the cooperative dimension of the Australian federal system. As indicated at the beginning of the paper, this is not the only dimension of Australian federalism; and cooperative federalism itself has many aspects. Cooperation between different levels of government can certainly be beneficial, but it should be measured – in both quantity and quality – to ensure a healthy federal-state balance. In this context, it is important to consider the extent to which the pandemic (and other national emergencies) might be used to justify "extraordinary grab of powers"[82] by the executive. Despite the practical importance and constitutional necessity of cooperation, it is necessary to require organs like the National Cabinet to justify their authority and scope, especially with respect to the principles of r*esponsible government* and the *rule of law*. This is the lesson from Australia that can also be applied to other jurisdictions.

*Lucia Scaffardi*
Department of Law, Political and International Studies
University of Parma
Lucia.scaffardi@unipr.it

[82] L.P. Vanoni, *"Never let a good crisis go to waste"*, quot.

*Andrea Dolcetti*
Macquarie Law School
Australia
Andrea.dolcetti@mq.edu.au

*DPCE online*
ISSN: 2037-6677