Assessing the Performance of Australian Federalism in Responding to the Pandemic

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This article provides a comprehensive evaluation of the federalism-implicated aspects of Australia’s response to the COVID-19 pandemic. The article’s research question is: to what extent was Australia’s federal structure responsible for the relative successes and failures of the national pandemic response? The method chosen to answer this question is largely theoretical, supplemented by aspects of institutional and policy analysis. That is to say, the inquiry identifies what were widely considered to be important policies, and considers the extent to which the formulation and implementation of those policies was furthered or hindered by the institutions and relations forming Australia’s federal structure. Five policy areas are considered, namely: the National Cabinet; social distancing and related policies; international travel and quarantine; interstate travel; and cities and local government. The conclusions reached are that a number of policy responses achieved federalism’s objectives of enhancing local decision-making power, increasing state and federal cooperation, and cabining policy failure. While Australia’s was not an unmitigated success story, on the whole the pandemic galvanized and reinvigorated Australia’s federal structure and institutions.

The story of Australian federalism has traditionally been dominated by design deficiencies, decay and the apparently inexorable concentration of power in the federal government. It came as something of a surprise, then, that Australia’s initial response to the COVID-19 pandemic was celebrated as a federalism success story. Politicians, academics, and media commentators all argued that Australia’s federal division of power was crucial to the success of the nation’s early response to the pandemic. That enthusiasm was somewhat muted by the realities of the “second wave” of infections. At that point, some of the same people who had previously championed the federal response began to suggest that, in fact, the federal structure had contributed to national failures in quarantine and economic recovery. Whether one is a proponent or a critic of the federally structured response to the pandemic in Australia, it is now common ground that federalism
This article seeks to provide an evaluation of the federalism-implicated aspects of Australia’s response to the pandemic. In particular, we consider the extent to which Australia’s federal structure was responsible for the relative successes and failures of Australia’s major pandemic-response policies up to December 31, 2020.

The method of analysis is largely by institutional and policy analysis. That is to say, the inquiry identifies the major policy responses to the pandemic and considers the extent to which the formulation and implementation of those policies was furthered by the institutions and relations forming Australia’s federal structure. The article proceeds in five parts, each considering an aspect of Australia’s federal response to the pandemic. The five parts are: the National Cabinet; social distancing and related policies; international travel and quarantine; interstate travel; and cities and local government. We assess these major federalism-implicated policy responses to the pandemic and measure the extent to which each of them produced the benefits or detriments commonly associated with federalism. Some of the claimed benefits include prioritizing local knowledge in policy formulation, maximizing political responsiveness, and cabining policy failures. Some of the alleged detriments include confusion and costs due to policy non-uniformity and delay in policy coordination involving multiple actors. The pandemic response provides a timely opportunity to assess the current health of Australian federalism. The article offers insights to both Australian and comparative audiences, at once enriching the local debate and adding an illuminating case study to comparative discussions about federalism in times of crisis. The principal contribution of this article is to contribute to the general and recurring scholarly debate about the advantages and disadvantages of a federal structure by examining the operation of federalism in a crisis situation, with an eye to focusing on the Australian experience.

We reach several conclusions about the performance of Australian federalism in responding to COVID-19. On the one hand, there were a number of policy areas in which the Australian federal government effectively cooperated and coordinated with the states, mainly through the National Cabinet. This allowed policy formulation and adaption at state level, based on the different impact of the pandemic on local communities. On the other hand, we also identify failures in Australia’s pandemic response in areas such as state border closures, where federal cooperation was not pursued at all, or was pursued too late. The unilateral actions of the states in this regard created some of the common problems of non-uniformity, including delays in policy coordination, confusion, and costs. In conclusion, we consider that Australia’s federal structure has responded relatively well under the strain of the pandemic and, as a result, has reinvigorated academic and public interest in Australian federalism.
National Cabinet

While Australia’s federal structure has been credited with producing some successes in the pandemic response (Tulich, Rizzi, and McGaughey 2020), this was not destined to be the case. The early Australian response to the pandemic was characterized by conflicting messages from the leadership of state and federal governments (Doherty 2020). This was epitomized when, at a time that social distancing was already being seriously debated in a number of states, the Prime Minister insisted he would attend a stadium sports game, before reluctantly canceling (SBS News 2020). It was thus possible that Australia’s federal structure might have resulted in an uncooperative, politicized, and inefficient response to the pandemic, as occurred in the United States (see further Murphy 2020). Thankfully, Australia’s federal and state institutions began to work together more harmoniously as the threat of the pandemic became more immediate. The most celebrated way in which this occurred was the creation of the National Cabinet.

The Establishment of, and Precursors to, the National Cabinet

The concept of a “cabinet” is well known in Westminster parliamentary systems. It typically consists of the highest level of government officials and its function is to set government policy on the most pressing or important issues. That is what the federal and state cabinets do in Australia. On 15 March 2020, Australia was introduced to a new species of “cabinet.” The “National Cabinet” met for the first time on that day to respond to the then emerging threat of the pandemic. While Australia has had ad hoc cabinets before, most famously the War Cabinet during the Second World War, the National Cabinet was unique because it straddled the federal divide. It is comprised of the Premiers and Chief Ministers of each Australian state (and territory) as well as the Prime Minister.

The National Cabinet’s mixed composition raised questions about whether it was properly described as a “cabinet” at all. Certainly, the body is styled as a “cabinet” and is asserted to attract the protections of cabinet confidentiality that are afforded to deliberations of traditional cabinets (Department of Prime Minister and Cabinet 2020). However, the body does not function as a “cabinet” in the traditional sense because its members are not responsible to a single parliament but rather eight separate parliaments, thus fracturing the fundamental concepts of collective cabinet responsibility and cabinet solidarity. In reality, then, the National Cabinet appears closer to an intergovernmental forum than an entity capable of making decisions that are binding, either on its members or otherwise.

A clear-sighted appreciation of the National Cabinet as an informal policymaking forum leads to the question of why it was needed at all when such a body already existed, in what was known as the Council of Australian Governments.
(COAG). Established in 1992, COAG had essentially the same composition as the National Cabinet (although it also included the President of the Australian Local Government Association) and the same remit—to address matters of national significance requiring a coordinated response from federal and state governments. The widely recognized limitations of COAG, however, were that it met only twice a year and dealt with out-of-session issues through a protracted process of negotiating formal intergovernmental agreements and settling on the wording of joint “communiqués.” The somewhat cumbersome nature of COAG did not recommend itself for adaptation to the demanding circumstances of the pandemic, and it was for this reason that the National Cabinet was formed. Tellingly, COAG was subsequently disbanded on 29 May 2020 by an agreement reached by the National Cabinet (Morrison 2020b).

The Functioning of the National Cabinet

Initially, the purpose of the National Cabinet appeared to be to ensure that all Australian governments were making and coordinating decisions based upon the same medical advice. To that effect, and given the rapidly evolving nature of such advice, the National Cabinet met regularly and received advice from a committee of federal and state chief health officers. Typically, the National Cabinet would endorse or make in-principle decisions on the basis of that advice, with the legislative implementation of those decisions to be worked out by the respective state parliaments. The National Cabinet’s focus in its regular meetings was on issues that involved all of the jurisdictions, such as suppression of the virus, international and interstate travel and trade, personal protective equipment stocks and supply chains, and the like.

The success of the National Cabinet, confirmed by the fact it replaced COAG, was considered by many to be a result of its practicality, problem-solving focus, emphasis on bipartisanship, and agility (Tulich, Reilly, and Murray 2020). This last factor was decisive in distinguishing the National Cabinet from its predecessor, COAG. Where COAG had only met biannually, the National Cabinet met as regularly as was necessary, sometimes as often as daily. The fact that it started as a purely virtual forum added to its agility and responsiveness. More substantively, the success of the National Cabinet can be attributed to its character as an example of what is known in Australia as “cooperative federalism.”

Cooperative Federalism

Cooperative federalism involves multiple states working together to achieve a common goal, usually also with the cooperation of the federal government (French 2018b). Cooperative federalism has always been necessary in Australia because the Constitution allocates certain powers exclusively to the federal government,
designates other powers as concurrent (i.e. able to be exercised by both the federal and state governments), and leaves yet further powers unallocated and thus by default in the realm of the states. The constitutional division of powers meant that the pandemic was not a problem the federal government (or any of the states) could address on their own. The pandemic engages many areas of human activity across state lines, such as health and education (primarily state concerns) as well as aged care, immigration, and the economy (primarily federal concerns). Cooperation was thus required. That is exactly what occurred in the National Cabinet although, as will now be explained, it occurred almost exclusively at an executive level rather than by a process of legislation, which is how many cooperative federal schemes have previously operated in Australia.

**Executive Federalism**

The National Cabinet was established relatively promptly, essentially by a memorandum of understanding. It did not require, for example, the passage of detailed mirror legislative regimes in all of the states. This allowed the National Cabinet to harness a certain level of goodwill and pragmatism at the highest levels of the executive of each jurisdiction and largely avoid the obstacles of party politics, both at the national and state levels. In fact, it was reported as running effectively at least in part due to the respectful interpersonal relations of its geographically and political diverse membership (Coorey 2020). In these respects, the National Cabinet is a paradigmatic example of the potential efficacy and flexibility of “executive federalism” (Wilkins 2020). This mode of federal cooperation can be contrasted with constitutional or legislative cooperative schemes. In the former, all states must agree to refer lawmaking power to the federal government on a particular issue—such as terrorism, which is now a matter of federal legislative power after a referral from all the states (French 2003). Legislative cooperation requires each of the eight state (and territory) parliaments to pass mirror legislation. This can be extremely difficult (often impossible), and can take years of negotiations, due to differences in the policy and legislative agendas of state parliaments dominated by opposing political parties.

There have been instances of less than perfect cooperation at the National Cabinet and other aspects of its functioning have met with criticism. In particular, there have been criticisms of the lack of transparency in the decision-making process and calls to lift the veil of cabinet confidentiality (Tulich, Reilly, and Murray 2020). On the whole, however, the National Cabinet has widely been praised as an effective federal innovation (see, e.g., Burton 2020; Saunders 2020b) and one that exhibits the ability of a century-old federal structure to produce novel means of coordinating the national response to a complex and urgent challenge.
Social Distancing and Related Policies

Apart from its success in facilitating coordination and cooperation, many of the policies and strategies agreed upon by the National Cabinet left room for adaption and amendment by the states at the point of implementation. This was especially the case in regard to social distancing and related policies. Indeed, one of the first decisions of the National Cabinet was to endorse the necessity of social distancing policies (although without agreement as to their details) (Morrison 2020a). As might be expected, the different states with their differing infection levels, risk appetites, industries, economies, and socio-political priorities produced a diversity of social distancing and related policies. The way in which these policies have been formulated, emulated, amended, and abandoned by the states has, for the most part, been a story of the success of politically accountable and responsive federalism. The dynamic by which this occurred fits well within the orthodox Australian understanding of “competitive federalism.” Less traditionally, but no less usefully, the same dynamics display what has elsewhere been described as “laboratory federalism” (as discussed below). Each of these characterizations is explored below, with a final note of caution in regard to the continued centralizing influence of the vertical fiscal imbalance that exists in Australia. Before engaging in that analysis, however, it is useful to illustrate some of the policy diversity supporting the analysis.

Policy Diversity

The diversity of social distancing and related policies of the states can be illustrated by taking stock of the position in early July 2020, after the first wave of infections had subsided in most states. At that time, New South Wales allowed twenty-person outdoor gatherings and permitted pubs to hold up to 300 persons in an indoor space. In the neighboring Australian Capital Territory, 100 person outdoor gatherings were permitted and pubs were allowed to have 100 people in an indoor space. The infection levels were not markedly different between the two jurisdictions, but each was obviously making different political compromises in terms of public enjoyment, economic recovery, and risk of virus spread. By contrast, Victoria was at the highest level of social restrictions of any jurisdiction due to a second wave of the virus (see more about this below).

Other telling policy differences apparent over the course of the pandemic related to the activities that were either permitted or prohibited. Some states permitted beach swimming and fishing; others did not. Some states permitted team sports; others did not. Some states permitted regional travel; others did not. Some states mandated masks; others did not. One state imposed a curfew; others did not. The point to be made is that the pandemic revealed starkly different preferences in
different parts of the country, which preferences were not solely attributable to the infection levels (as indicated by the contrast between New South Wales and the Australian Capital Territory above). This might seem obvious to students of federalism, as federalism is often celebrated as a constitutional structure facilitating the coexistence of regional differences within a single nation. However, recent Australian scholarship has emphasized the homogeneity of Australia’s sub-national jurisdictions and even doubted their continued utility as separate entities (Brown 2008). The National Cabinet’s model of leaving policy detail to the states revealed differing preferences and allowed these preferences to be factored into policy formulation, with the result that the policies produced reflected more closely the preferences of the people affected (Saunders 2020a, 3).

Political Accountability and Responsiveness
A related and important benefit of the state-by-state formulation of social distancing and related policies was that it maintained clear lines of political accountability to the executive of the particular state formulating the detail of those policies. This, in turn, ensured a degree of political responsiveness. So, for example, when Victoria implemented a prohibition on travel to see intimate partners there was an immediate public backlash (Maiden 2020). Unable to blame the policy on the national government (or the National Cabinet), and unwilling to face the political cost of adhering to the policy, the State government promptly rescinded the policy. These publicly prompted policy revisions also occurred in respect of certain professional services, such as hairdressers and real-estate inspections which had initially been limited or banned during social distancing.

Perhaps the most visible sign of the increased political accountability and responsiveness of state governments during the pandemic was the phenomenon of the daily press conference. Daily press conferences by state leaders had not been a fixture of Australia’s political life prior to the pandemic. To the contrary, Australian press conferences of state leaders are typically highly orchestrated affairs designed to advance government messaging rather than offer true accountability. That changed during the pandemic. In Victoria, for example, the Premier (the highest elected state official) held 120 consecutive daily press conferences, which often went for hours and involved largely unrestricted questioning from the media. The Premier’s conduct during these press conferences was widely seen to involve a genuine attempt to explain and justify, day-by-day, the severe restrictions imposed on his constituency. Undoubtedly, these conferences demonstrated greater sensitivity to the demands of the local citizenry than did the less substantial federal press conferences held by the Prime Minister.
Competitive and Laboratory Federalism

It is also worth noting that political responsiveness and accountability was sharpened by a dynamic of competitive federalism, a mode of federal relations that can coexist with cooperation (Zines 2003, 96; French 2018a). The label “competitive federalism” describes the idea that the multiple jurisdictions in a federal structure will compete for excellence in regulation or the provision of services so as to attract a mobile citizenry (Aroney 2016, 3). That is exactly what occurred during the pandemic in the formulation, amendment, and abandonment of social distancing and related policies.

When residents of one state saw that a neighboring state was taking a very different, perhaps less restrictive, approach to social distancing, it became incumbent on the government of the former to clearly justify its decisions, including with reference to data, medical advice, counterfactuals, and why what it was doing was necessarily different to what other states were doing. While “exit”—the most drastic mode of political accountability in a competitive federation (Epstein 1992)—was not always feasible during the pandemic, other modes of accountability were, such as public comment, media coverage, and elections. Australia had three sub-national elections during the pandemic in 2020, all of which were dominated by assessment of the pandemic response.

There was also another federal phenomenon on display in the field of social distancing and related policies: “laboratory federalism.” This description of federal relations was made famous by U.S. Supreme Court Justice Louis Brandeis in New State Ice Co v Liebmann, 285 U.S. 262 (1932), when he wrote that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” In Australia, Brendan Lim (2014, 524) has described the practice of laboratory federalism as founded upon the belief that: “sub-national experimentation with a range of candidate policies will enable the feedback and institutional learning that is necessary to identify the more successful policies.”

This practice of sub-national experimentation was on display during the pandemic in the formulation of various social distancing and related policies. Perhaps the most contentious example was the mandatory use of masks, which was initially adopted by Victoria, proved effective, and then was emulated by various other states. By contrast, one of the more extreme measures introduced by Victoria—a curfew—proved to be highly contentious, including resulting in protests and significant litigation in Loielo v Giles VSC 722 (2 December 2020). Tellingly, after having observed the curfew’s operation in Victoria and the arguably limited public health benefits flowing from it, no other Australian state chose to impose a curfew throughout 2020 and Victoria abandoned it. The curfew thus
illustrates the way in which laboratory federalism cabins, or limits, the effects of policy failure.

**Federal Fiscal Incentives**

Australia suffers from a vertical fiscal imbalance whereby the federal government has greater revenue raising capacity than the states. As we will explain, the centralizing force of the vertical fiscal imbalance was on display during the pandemic, although not to the same extent or to the same effect as is sometimes the case. The imbalance is rooted in the Constitution, resulting from a complex series of design faults relating to revenue raising powers that are beyond the scope of this article (see further Saunders 2002). The bottom line is that the federal government can wield considerable influence in fields outside of federal legislative power by deploying its excess revenue in grants to the states, which grants are conditional upon the states doing certain things deemed desirable to the federal government (McLeish 2018). This mode of exercising federal control over what would otherwise be state responsibilities was on show in the pandemic in relation to school closures.

In the early stages of the pandemic, education was a particular site of “federal tension” (Bateman and Stone 2020). While the National Cabinet made an in-principle decision preferring that schools remain open for in-person education, this soon dissolved under local pressures in each of the states. Some states maintained face to face schooling for almost the entire pandemic while other states imposed various differing levels of mandatory remote education. There was little that the federal government could do to directly enforce its preference for schools remaining open, as education is a state constitutional responsibility. Accordingly, the federal government sought to act indirectly, using fiscal carrots and sticks. It threatened to withdraw federal funding to certain schools that remained closed while, at the same time, offering priority funding to certain schools that re-opened for in-person learning (Tehan 2020). Ultimately, the states were relatively steadfast in their school closures despite the federal incentives. This experience might thus suggest that federal fiscal incentives can only go so far in an area where states are firm in their policy commitments. Nevertheless, the example serves as a reminder of the continued centralizing threat posed by the vertical fiscal imbalance.

**International Travel and Quarantine**

Arguably the most fraught subject of federal relations during the pandemic has been restrictions on travel. This section discusses restrictions on international travel (the following section then turns to consider interstate travel). In contrast to the advantages that have flown from the federal structure in other areas of the pandemic response, it is at least arguable that the somewhat unclear division of
federal responsibilities in the area of international travel and quarantine has hampered the pandemic response in these areas, or at least obscured the lines of political accountability.

**International Travel**

Since the early stages of the pandemic, the federal government has adopted a hard stance toward international travel. It did so through the mechanism of a declaration of a state of emergency under the *Biosecurity Act 2015* (Cth), which then enlivened executive powers to make delegated legislation imposing such restrictions as were required to protect the health of Australians and prevent the spread of COVID-19 (Rizzi and Tulich 2021, 2; Twomey 2020, 1). It was in the exercise of such extended powers that the Minister of Health issued an overseas travel ban starting on 20 March 2020 (Rizzi and Tulich 2021, 2; Hicks 2021, 1). On the one hand, this travel ban has meant that foreign nationals cannot enter the country, while the entry of Australian citizens, permanent residents, and some temporary visa holders has been subject to caps (see more below), quarantine requirements, and strict testing. On the other hand, Australian citizens and permanent residents need to seek authorization to leave the country (see, e.g., *Baker v Commissioner of the Australian Border Force* [2020] FCA 836). Exceptions apply in both cases, for instance on compassionate grounds. The power to seal international borders is seen as a constitutionally recognized federal power, an expression of the federal jurisdiction over a number of subject matters, including trade and commerce with other countries (s 51(i)), quarantine (s 51(ix)), immigration and emigration (s 51(xxvii)), and external affairs (s 51(xxix)).

The travel ban has been crucial to the successful containment of the pandemic in Australia, although it should be acknowledged that the result has been to leave many Australians “stranded abroad” (Hicks 2021). Quite surprisingly, given Australia’s history as a modern migrant nation, it has also proved to be very popular, with a poll conducted in December 2020 revealing that 83% of Australians supported border closures (IPSOS 2020). At the time of writing (April 2021), the travel ban is still in place, although it was recently mitigated by the introduction of the so-called “Trans-Tasman bubble” between Australia and New Zealand, which commenced on 19 April 2021.

**Quarantine**

The power to make laws with respect to “quarantine” is conferred on federal parliament by s 51(ix) of the Australian Constitution. In reliance on this power, the federal parliament passed the *Quarantine Act 1908* (Cth) and, much later, the *Biosecurity Act 2015* (Cth). This power, however, is now accepted to be what is known as a “concurrent” power, that is, one that does not necessarily exclude state
legislative activity in the same area (Ex parte Nelson [No 1] (1928), 217, 249; Gerner v Victoria (2020), [16]). Early in Australia’s history, states exercised considerable responsibility in the field of quarantine in cooperation with federal authorities. Over the course of the 20th century that slowly changed as federal authorities took over various quarantine stations (Twomey 2021, 254–5). However, with the success of mass immunization programs, the federal government eventually closed all human quarantine facilities. As a result, while each state had its own quarantine legislation, the practical responsibility for quarantine was understood to lie with the federal government, although there was little infrastructure in place.

At the start of the pandemic, the federal government appeared to be taking on quarantine responsibility, including the establishment of human quarantine facilities in Christmas Island and the Northern Territory for people returning from Wuhan and for those on board of the Diamond Princess cruise ship in Japan (Twomey 2021, 255). But when at the end of March 2020 the National Cabinet agreed upon compulsory hotel quarantine for all returning travelers, it was the states that became responsible for the management of quarantine. In managing the compulsory hotel quarantine scheme, states received some limited assistance from the federal government, mainly through the use of defence forces (Twomey 2020, 2). On the whole, however, the federal government can be seen to have abdicated its constitutional responsibility in this area, in what will be described further below as a failure of Australian federalism.

Failures of Federalism Regarding International Travel and Quarantine

Australia’s willingness to receive, and its process for quarantining, international travelers during the pandemic was problematic both as a matter of public policy and legality. On the one hand, Australia placed relatively strict quotas, or “flight caps,” on the number of persons permitted to arrive in the country from abroad. There was a public health motivation for these quotas, however they have been criticized as insufficiently sensitive to the interests of Australians stranded abroad. The flight caps were the subject of an unsuccessful challenge in the domestic courts (LibertyWorks Inc v Commonwealth of Australia [2021] FCAFC 90) and are now the subject of a complaint to the United Nations Human Rights Committee, apparently on the basis of the right not to be arbitrarily deprived of the ability to return to one’s country (Hicks 2021, 1). On the other hand, those international returnees that have been allowed into the country have been subjected to a variety of quarantine processes depending on the state to which they returned. Some of these processes, particularly the hotel quarantine arrangement in Victoria, proved to be seriously deficient and resulted in new strands of COVID-19 arriving from abroad and being transmitted into the local community. Both the controversy
surrounding the flight caps and the hotel quarantine failings, and the blurred lines of political accountability for them, have federal dimensions.

Turning first to international travel, the setting and adjustment of incoming flight caps during the pandemic was, at law, a matter purely for the federal government. It was achieved by delegated legislation by the Health Minister pursuant to the power in s 51(2) of the *Biosecurity Act 2015* (Cth), which in turn, rests on the federal powers to make laws with respect to quarantine and with respect to immigration and emigration in s 51(ix) and (xxvii) of the Constitution. In practice, however, it is the states which receive these international arrivals, and thus the flight caps were set with state input at meetings of the National Cabinet. The complexities of this process were lost on many of the critics of flight caps, who for the most part blamed the federal government for the perceived injustice of “stranding” Australians abroad for considerable periods of time. The lack of clear lines of accountability on this issue was due to the opaque decision-making process adopted by the National Cabinet, and the claims of cabinet confidentiality (*Hicks 2021*).

Conversely, in the case of quarantine failures it is primarily the states that have borne the blame, yet this arguably represents a perversion of the proper allocation of constitutional responsibilities. As Twomey has explained, the federal government progressively took over the running of quarantine facilities from the states over the course of the twentieth century. These facilities were then closed after the success of mass immunizations (*Twomey 2021*, 255). The result was that, by the time the pandemic arrived in 2020, Australia had no large-scale human quarantine facility of any sort. After an initial period in which arrivals were asked to “self-isolate”—that is, quarantine at their own home—it became apparent that a more rigorous quarantine system needed to be established. The solution devised was to convert hotels into quarantine facilities where people would be forced to isolate (usually for fourteen days). In a decision reached at a meeting of the National Cabinet, the states ultimately took responsibility for managing the operation of hotel quarantine.

Yet there are reasons to think that hotel quarantine should have been a federal responsibility. As a matter of constitutional text and structure, the federal powers of quarantine and immigration and emigration in s 51(xi) and (xxvii) of the Constitution anticipate that the federal government would orchestrate responses to national threats like pandemics. Further, as a matter of historical practice, the federal government assumed primary responsibility for human quarantine from the states over the course of the 20th century. As *Twomey (2021)* notes, the states only stepped into the breach to operate hotel quarantine because of federal “lack of capacity and competence” (256).

COVID-19 is not the first pandemic to have caused tensions between the states and federal government over the operation and control of travel and human
quarantine arrangements. Influenza outbreaks in the 20th century resulted in tussles between the various governments, which include some states seizing interstate trains and others refusing to let federal troops land at state quarantine stations (Moloney and Moloney 2020, 672). For the future, it is hoped that the federal government will act upon the recommendations of its own review into hotel quarantine, including a recommendation to consider the creation of a national facility for human quarantine (Australian Government Department of Health 2020, 4). This would correct the present distortion of the constitutional allocation of responsibilities in this area.

**Interstate Travel**

In addition to travel into Australia, there has been considerable federal tension in relation to control of, and restrictions upon, travel within Australia. This section provides an overview of the constitutional setting in which interstate travel occurs in Australia and illustrates the pandemic restrictions by reference to a significant case decided by the nation’s apex court.

**The Constitutional Setting**

Because in the Australian federal system public health is a subject matter of state responsibility, state governments have issued declarations of states of emergency under their public health laws and/or emergency legislation (Rizzi and Tulich 2021, 2). Consequently, in addition to the overseas travel ban imposed by the federal government and sketched above, since March 2020 state governments have imposed various limitations on the interstate movement of people to protect public health. Such restrictions have been periodically updated to reflect the changing pattern of the pandemic at state level. Among other things, limitations to the interstate movement of people have included border passes, identification screening but also an outright closure of internal borders, although most limitations have allowed for exceptions for specific categories of travelers and/or for compassionate reasons. Unlike the highly popular international travel ban, interstate travel bans have proved to be controversial, with interesting implications from a federalism standpoint. Although domestic/state border closures fall under the jurisdiction of state governments, the federal government has generally disapproved of them, alleging that such measures were not supported by public health advice, and had potentially damaging effects for the economy (Bateman and Stone 2020, 227; Twomey 2020, 4).

As a matter of constitutional law, border closures are in tension with (albeit not necessarily in contravention of) the guarantee of interstate trade and travel provided for in s 92 of the Australian Constitution, which mandates that “trade, commerce, and intercourse among the States, whether by means of internal
carriage or ocean navigation, shall be absolutely free.” As we will see below, however, while the constitutional text seems to grant unrestricted interstate movement by using the expression “absolutely free”, the High Court of Australia (“HCA”) has clarified that this guarantee can be justifiably limited, as it was in the pandemic (Aroney and Boyce 2020, 26).

The Palmer Case

The political but especially constitutional tensions implicated in interstate border closures were on display in the case of Palmer v. Western Australia, HCA 5 (2021) decided by the HCA, which provides a vivid study in the compromise at the heart of any federation between individual rights (particularly rights of movement), state rights of self-government, and federal interests in economic unity. The case, initiated by the Australian businessman and mining magnate Clive Palmer, focused in particular on the Western Australia border closure—the Quarantine (Closing the Border) Directions (WA)—which was issued as effective from 15 March 2020 pursuant to a delegated power under the Emergency Management Act 2005 (WA). Palmer alleged that the border closure breached s 92 of the Constitution, detrimentally affecting his business interests and his freedom of movement. The federal government initially intervened in the case in support of Mr Palmer, before increasing infection rates made border closures look more prudent, at which time it withdrew from the case fearing that its intervention would be damaging for the federal government within the state of Western Australia (Twomey 2020, 5).

Before reaching the HCA, the case was decided by the Federal Court, Palmer v State of Western Australia (No 3) FCA 1220 (25 August 2020), which held that the border restrictions introduced by the government of Western Australia were justifiable and had proved to be effective in reducing the probability of importing the infection into Western Australia from other regions. The Federal Court also concluded that other measures (such as mandatory hotel quarantine or hot spot approaches as used by other states) would not be equally effective (Aroney and Boyce 2020, 28). Such findings were based on the uncertainties on the level of risk and the grave outcomes which might result from community transmission (Palmer, para 81). The Federal Court, however, offered no consideration of the economic, social, and other impact of border closures (Aroney and Boyce 2020, 28).

In a decision issued on 6 November 2020, the HCA endorsed the findings of the Federal Court, and concluded that the measures taken by the government of Western Australia did not offend s 92. The HCA built on its previous landmark decision on s 92 (Cole v Whitfield of 1988), which distinguished between the “trade and commerce” and the “intercourse” limbs of s 92 and clarified that the guarantees entrenched in s 92 should not be understood as precluding all exercises of legislative power which would impose any barrier on interstate trade or
commerce or intercourse (Palmer, para 29). Cole also clarified that the “trade and commerce” limb should be construed as freedom from discriminatory burdens having a protectionist effect: therefore, if a law does not have a protectionist purpose, it may be valid if other conditions are met (Palmer, paras 30 and 32). As for the “intercourse” limb, the Cole court regarded it as extending to a guarantee of personal freedom to cross state boundaries without burden, hindrance, or restriction (Palmer, para 33).

Although the border closure implemented in Western Australia prevented interstate movement, it applied to an emergency area subject to an emergency declaration, and was not directed to the Western Australian border and movement across it. As such, it might apply to all persons outside the emergency area who sought to enter the area, and did not discriminate against interstate movement, since such restrictions were directed to the protection of the health of the people of Western Australia (Palmer, paras 71–74). The HCA further found that the law restricting the movement of persons into a state to prevent persons infected with COVID-19 from bringing the disease into the community was proportionate during an emergency such as an epidemic (Palmer, para 77). The findings of the Federal Court were thus confirmed by the HCA, which concluded that the severity of the restrictions was necessary to protect the health and life of the people of Western Australia (Palmer, para 81).

There is no doubt that the decision by most states to close domestic borders has been key in managing the pandemic. From a federalism perspective, interstate travel restrictions and border closures can also be seen as expressing a subsidiarity-based approach to the pandemic, and illustrate that, in the Australian case, cooperation is not pursued at all costs, and states retain a basic prerogative to close their borders if that is a proportionate response to a particular threat. However, while fostering subsidiarity, such policies may have a detrimental effect on other, equally important, federalism-based values such as solidarity. In conclusion, then, state-imposed interstate travel restrictions in Australia illustrate both an advantage of a federal system, in the sense of permitting subsidiarity-based approaches to combatting the virus, but also a disadvantage in the sense of weakening solidarity. In any event, internal border closures might offer some interesting insights for a comparative analysis with similar decisions made in other federal and supra-national systems.

Local Governments and the Pandemic

Australia is a very large island-continent where its population of 25 million people is mainly concentrated in urban/metropolitan areas, leaving most of the rural territory sparsely—if at all—populated. Therefore, one of the problems that has emerged in the Australian context as a consequence of the COVID-19 pandemic
pertained to the dramatically different impact of the infections in the urban as opposed to the rural and more remote regions, which have been left almost untouched by the virus. From a federalism perspective, this raises the issue of the involvement of local governments and cities in the management of the pandemic-related health crisis. In this section, we will briefly illustrate the role of local governments in the Australian federal system and the part they played in the management of the pandemic, using Melbourne as a case study.

Local Governments in General

The Australian Constitution does not specifically entrench local governments, which are thus established only under state law (Sansom 2009, 8). The Australian Capital Territory is an exception, since there is no local government and the territorial government undertakes also local/municipal functions (Sansom 2009, 12). Consequently, local governments lack constitutional self-determination and autonomy; they are subordinate institutions whose powers and responsibilities are dependent and derivative, and whose jurisdiction is determined by state legislation (Aroney and Boyce 2020, 6, 37).

In each state, local governments derive their powers mainly from the various Local Government Acts [which set the framework for the operation of local councils (Sansom 2009, 12)], but also from other state legislation dealing with specific areas of administration (Sansom 2009, 14). This is true also for metropolitan regions, which are managed mainly by state agencies (Sansom 2009, 8). As a result, Australian cities, even the largest metropolises in the country (Sydney, Melbourne, and Brisbane), are practically dominated by states, which exercise an almost absolute control over them (Hirschl 2020, 83). Some Australian states have passed city-specific legislation, such as the City of Sydney Act of 1988, the City of Melbourne Act of 2001, and the City of Brisbane Act of 2010 (Hirschl 2020, 84). Metropolitan regions are divided into several council areas, but this fragmentation limits local government potential to manage metropolitan planning (Sansom 2009, 18).

Policy areas of local interest like education, health, planning, land use and infrastructures are all under state control (Hirschl 2020, 83). In terms of financing, Australian local governments fund most of their expenditures through their own sources (Sansom 2009, 18). Yet, similarly to other federal systems, financial issues remain a contested aspect for a number of reasons, including the fact that small rural and remote councils have limited revenue raising capacity (Sansom 2009, 19–20). In summary, Australian local governments are subject to state control and supervision (Sansom 2009, 21), although local governments are increasingly carving for themselves direct relationships with the federal government (Sansom 2009, 22).
Local Governments and the Pandemic

Because local governments are “creatures of the states” their powers and responsibilities are limited to matters of local concern such as planning, road maintenance and waste management. Areas of broader significance such as hospitals and medical care are the responsibility of state governments (Aroney and Boyce 2020, 6). Consequently, local governments have limited capacity to develop policies in response to a pandemic (Aroney and Boyce 2020, 7).

Against this backdrop of almost complete state dominance over local governments, two aspects become relevant in analyzing the response of Australian federalism to the pandemic. First, the federal emergency response plan, Australian Health Sector Emergency Response Plan for Novel Coronavirus, envisaged a limited supportive role for local governments, whose responsibilities included tasks such as community leadership, representation of community interests in the planning process, informing the public on planning and responses taken, etc. (Aroney and Boyce 2020, 29–30). To this end, the state governments of New South Wales, Victoria, and Queensland prepared dedicated websites with information and guidance for local governments (Aroney and Boyce 2020, 30). Furthermore, local governments initiated measures to support local communities and businesses through relief from council rates, fees, and other taxes, and have engaged with states in developing and implementing coordinated government responses (Aroney and Boyce 2020, 7). At the same time, however, local governments have been excluded from representation at meetings of the National Cabinet (Aroney and Boyce 2020, 38; Twomey 2020, 4). Local governments, then, have not been involved at a leadership level during the pandemic but have played a limited role in implementing state laws and in giving effect to pandemic plans (Twomey 2020, 4).

Consequently, some of the measures taken at state level in response to lockdowns and state border closures have been contested as insufficiently flexible to take into account the different effects of the pandemic in different contexts (Aroney and Boyce 2020, 31). Questions have been raised about whether centralized decision-making at the state level has allowed sufficient flexibility for rural, remote, and sparsely populated areas where the incidence of the pandemic has been negligible (Aroney and Boyce 2020, 38). In Victoria, however, the situation has been quite unique, as the next section will illustrate.

The Melbourne and Victoria Case

Without doubt, the state of Victoria suffered the most in the pandemic. At the time of writing (April 2021), of a total of 29,405 COVID-19 cases in Australia, 20,485 have occurred in Victoria, and of 909 total deaths in Australia, 820 have happened in the state, mainly in age-care facilities. The second surge of infections
that started at the end of June 2020 had its epicenter in Melbourne, with dramatic consequences for its population and, by extension, for the whole state.

Initially, this second surge in cases was limited to “clusters” and “hotspots,” at which time the Victorian government tried to implement targeted local restrictions by “locking down” specific suburbs and even individual public housing towers. As soon as the infections spread out of the hotspots and became a broader city concern, the Victoria government declared a “state of disaster,” followed by the introduction of stringent (Stage 4) restrictions for metropolitan Melbourne, imposed under the *Victoria Public Health and Wellbeing Act 2008* (Vic). In addition to banning social visits, closing schools and universities, social distancing and mandatory face masks (among other things), the lockdown included a curfew (with limited exceptions) and a 5-km rule (later increased to 25 km), thus significantly limiting shopping and outdoor activities for Melburnians. In total, this “hard” lockdown lasted for 112 days. In regional Victoria, however, the impact of the infections was much less dramatic, so less restrictive measures were in place.

In addition to the hotel quarantine inquiry mentioned above, the dramatic events that unfolded in Melbourne and the restrictive measures put in place raised all sorts of federal and local tensions. The lockdown and other stringent restrictions implemented in metropolitan Melbourne (including the 5-km rule) succeeded in stopping Melburnians from traveling and affecting the rest of the state. At the same time, although the severity of such restrictions was considered necessary to curb the number of infections, it was also criticized (with protests taking place in the city at various moments), both for the severity of the measures and the duration of the lockdown, and for the economic impact on local businesses, already financially imperiled by previous restrictions in place since March 2020.

Two cases were brought to court challenging the legality of such measures. The first challenge was brought to the HCA by a hotel owner against the Victorian government direction to limit the movement of individuals to 25 km from their homes (*Gerner v Victoria*, HCA 48 [10 December 2020]). The plaintiff’s argument focused on an implied freedom of movement within a state contained in the Australian Constitution, which the Victorian direction allegedly infringed upon. The HCA, however, dismissed the case (*Rizzi and Tulich 2021*, 5). The second case, *Loielo v Giles*, VSC 722 (2 November 2020), was brought in the Victorian Supreme Court by a café owner in Melbourne challenging the curfew as breaching the *Charter of Human Rights and Responsibilities Act 2006* (Vic) with regard to the freedom of movement and liberty (*Rizzi and Tulich 2021*, 5). The Court dismissed the claim, holding that—while significantly restricting individual rights—the measures taken by the Victorian government were proportionate to the protection of public health (*Rizzi and Tulich 2021*, 5). As was the case in most other countries in the world, policy measures were required to balance health protection and other values such as economic viability.
Finally, there were federal issues engaged by the numerous fatalities that occurred in Victorian nursing homes. In Australia, aged-care facilities are normally considered a federal responsibility. While the Constitution does not explicitly allocate any “aged care” power to the federal government, it does assign as exclusively federal the powers over pensions to the aged and sick, and the federal government has also used its financial powers to fund and regulate aged-care facilities (Twomey 2020, 5; Aroney and Boyce 2020, 22). States, on the other hand, are responsible for public health and hospitals, as already noted. When nursing homes became infection clusters, the issue arose as to whether residents should be moved to hospitals or within such facilities, and which level of government would be in charge. Ultimately, the federal government and the Victorian government established the Victorian Aged Care Responsibility Centre to help coordinate action during the crisis (Aroney and Boyce 2020, 22–23; Twomey 2020, 5) in yet another, albeit belated, show of cooperative federalism.

In concluding our present discussion of local governments it is clear that, on the one hand, the role of local governments in Australia during the pandemic demonstrates a disadvantage common to federal systems, in that local governments play key roles in administering policy and sometimes making policy, but they are entirely creatures of state governments and lack adequate representation in policy processes of other government levels. At the same time, the virtue of local government flexibility was on display in this case, especially in that Melbourne was the hardest hit of any locality and was able to impose more stringent restrictions than were imposed in other areas.

Conclusion

Apart from an initial period between 1901 and 1920 in which the federal structure was zealously, or over-zealously, enforced by the High Court, the dominant narrative in Australian federalism studies has been that of the apparently inexorable concentration of power in the federal government (Gibbs 1994; Fenna 2007b, 2019; French 2012). This is what makes so surprising the partial federalism success story of the pandemic response—Australian federalism was thought to be dead or dying until the pandemic revealed federalism to be in reasonably good health.

The analysis conducted in this article has shown the many areas of pandemic policy in which the Australian federal government effectively cooperated and coordinated with the states, mainly through the National Cabinet. This allowed policy formulation and adaption at state level, based on the different impact of the pandemic on local communities. Such flexible cooperation has maximized political responsiveness and limited the effects of policy failures (such as the Victoria’s bungled hotel quarantine program). This is where subsidiarity has come into the picture. In particular, we illustrated how, in the Australian case, subsidiarity has
come to the fore both in the relationships between the federal government and the
governments of the states and, especially during the second wave of infections,
between the states and the local level of government, particularly with the different
responses implemented in Metropolitan Melbourne and regional Victoria.

In conclusion, however, it should be noted that there have also been failures in
the federalism-implicated aspects of Australia’s pandemic response. In some policy
areas, such as state border closures, cooperation was not pursued at all, or was
pursued too late. The unilateral actions of the states in this regard created some of
the common problems of non-uniformity, including delays in policy coordination,
confusion, and costs. This draws attention to another problem typical of federal
systems: how to reconcile subsidiarity with other federal-based values such as the
intrinsic solidarity that should inform relationships among the various states (at
horizontal level) and the states and the federal government (at vertical level).
Finally, it should also be pointed out how the success of the Australian story has
come at the great price of isolating itself internationally (Rizzi and Tulich 2021, 5).
Nevertheless, on a balanced analysis, Australia’s federal structure provided the
flexibility required to curb the pandemic. It remains to be seen whether the tighter
federal bonds formed during the pandemic will endure through the difficult
processes of vaccine rollout and economic recovery.

Notes

We would like to thank John Dinan, Cheryl Saunders, and Scott Stephenson for their
helpful comments and constructive criticisms of various earlier drafts of this piece. All views
and errors remain our own. J.R.M. would like to acknowledge the funding he receives for
his doctoral study from the Australian Postgraduate Award. E.A. gratefully acknowledges the
support of the Australian Government through the Australian Research Council (ARC)
Laureate Program “Balancing diversity and social cohesion in democratic constitutions.”
1. Australia’s sub-national polities include both states and internal territories. While there are
important constitutional differences between states and territories, those differences will
not be further explored in this article, which will refer simply to “states” for convenience.
2. https://www.legislation.gov.au/Details/C2020C00127/Download.
3. Date taken from the Australian Government Department of Health, as of 11 April 2021,
https://www.health.gov.au/sites/default/files/documents/2021/04/coronavirus-covid-19-
at-a-glance-11-april-2021_0.pdf.
4. https://www.legislation.vic.gov.au/in-force/acts/public-health-and-wellbeing-act-2008/043.
5. https://www.legislation.vic.gov.au/in-force/acts/public-health-and-wellbeing-act-2008/043.

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