Contents

[Summary 2](#_Toc115358070)

[1. Introduction 3](#_Toc115358071)

[2. The appointments 4](#_Toc115358072)

[3. Solicitor General’s opinion 5](#_Toc115358073)

[3.1 Sections 5](#_Toc115358074)

[3.2 Conventions 6](#_Toc115358075)

[3.3 Responsible government 6](#_Toc115358076)

[4. Commentary 7](#_Toc115358077)

[4.1 Overview 7](#_Toc115358078)

[4.2 Further issues 8](#_Toc115358079)

[5. Heresies? 10](#_Toc115358080)

[5.1 Paradox 10](#_Toc115358081)

[5.2 A limited question? 11](#_Toc115358082)

[5.3 Relevance of responsible government 11](#_Toc115358083)

[5.4 Advocatus diaboli 12](#_Toc115358084)

[5.5 Parliament’s power over Executive Government 13](#_Toc115358085)

[5.6 Identification of every Minister? 14](#_Toc115358086)

[5.7 Prime Ministerial responsibility 15](#_Toc115358087)

[5.8 Exercise of power 17](#_Toc115358088)

[5.9 Summary of arguments 17](#_Toc115358089)

[5.10 Split in the High Court – implications 18](#_Toc115358090)

[6. Conclusions 19](#_Toc115358091)

[6.1 Validity of appointments 19](#_Toc115358092)

[6.2 A problem? 19](#_Toc115358093)

[6.3 Real problems 20](#_Toc115358094)

[6.4 Finally 21](#_Toc115358095)

## Summary

This is an article about former Prime Minister Morrison secretly hoarding Ministerial positions. And how, in August and September 2022, his successor Mr Albanese and many Australian commentators ‘went over the top’ personalising and politicising the controversy – obscuring, inadvertently or otherwise, a major issue.

Mr Albanese sought the Solicitor General’s opinion on appointments of Morrison to Ministerial positions. The Solicitor General opined they were valid despite their secrecy undermining responsible government.

Another inquiry into the controversy has been announced, headed by a former High Court justice. Among its curios, it is seeking public submissions on matters which the public unlikely has knowledge or informed views. This article supports such a submission.

Many of the opinions shouted from the commentariat are superficial and specious. Few noticed the paradox of the Solicitor General’s opinion - adherence to the Constitution can undermine its purpose of representative and responsible federal government.

Contrary to commentary, the appointments did not centralise power, nor directly threaten democracy. Further, there are at least four reasons they may not have directly undermined responsible government: a. Parliament’s power over the Government was unaffected; b. There was no interruption to Parliament’s oversight of the Government; c. Very strong perceptions of Prime Ministerial responsibility for every Ministry; d. Mr Morrison’s position as Minister would have become evident immediately on any attempt to so act.

While they remained secret, the appointments led to a mismatch between supposed and actual legal power. Morrison’s actual power was greater than known. The mismatch was merely hypothetical - remaining *only* until that power was exercised. Such circumstances do not lend themselves to abuse of power.

Yet secrecy about who holds which powers gives rise to another possibility of mismatch between supposed and actual legal power. If there is uncertainty about who holds what powers, some may claim to have powers greater than the law allows. A Minister – and Government and officials - may bluff about their capabilities and unlawfully coerce the public. That – the opposite to Mr Morrison’s situation - is a very serious concern.

The problem with secrecy about Ministerial powers is the same as with national emergency legislation. It adds to the conditions and precedents in which a Prime Minister – or Premier, or official - less well intentioned than Mr Morrison or Albanese can, by bluffing, seek to subvert Australia’s system of government.

Examples of such bluffing exist. They include: Government responses to fearmongering and real emergencies; Commonwealth spending. Twomey refers to Commonwealth Ministers bluffing about spending powers as ‘Constitutional risk’ - seeding democratic decay. Parliament has aided and abetted that decay, including by unanimous acquiescence to lowering controls over the Prime Minister, Ministers and the Government.

Better views recently expressed in the High Court suggest very strong opposition to anything that may weaken representative and responsible government – even hypothetically.

For those reasons any secrecy about Ministerial powers should be regarded as tinpot illegality. Among the implications: Government should publish legal advice on which its decisions, including for spending, are based.

The commentary to date speaks of emotive animus against Mr Morrison – a dangerous place to start public policy formulation. The term ‘tinpot’ may have been borrowed from the jadebeagle’s admonitions of what is done in the name of emergencies. Given the above, and the breadth of derogations from our system of government – hidden by a farcical focus on Mr Morrison - they should follow the beagle and update the terminology to ‘tipfire’.Tinpot: Tipfire c

*There are plenty of ‘h’ words. Happily, heresy is not the only one raised in this article.*

## 1. Introduction

It’s weird. It’s over the top. And its tinpot?

And that’s just the Prime Minister’s – Mr Anthony Albanese’s - reaction to his predecessor hoarding Ministerial positions.[[1]](#footnote-1)

In the best tinpot tradition, at the end of a well-earned holiday.[[2]](#footnote-2)

His predecessor, Mr Morrison, from March 2020 apparently acted like a bower bird – liberally collecting trinkets of blue.[[3]](#footnote-3)

Mr Morrison’s reaction to harangues about not hose-holding was not merely to set up a royal commission enabling him to claim more power. He also acquired Ministries without telling anyone – other than the Governor General and some in his own Department.[[4]](#footnote-4)

Other reactions – including the Solicitor General’s opinion and most subsequent commentary – are similarly weird.

Also odd is a formal inquiry into the matter, given the Solicitor General already suggested rectification of the supposed problem - by simple legislation. Terms of reference require the inquiry have regard to the Solicitor General’s opinion yet review all matters the opinion touched on.

It is taking public submissions despite the general public having little understanding of the issues of this particular case. Hopefully, at least some submissions will avoid raking over old coals and not portray the events as some sort of aberration attributable to unique personality traits. Some might even get to the real point: it is entirely consistent with increasing secrecy by Governments and their officials which, supported with fearmongering by political operatives, increases their ability to exercise power without regard to the law and unrestrained by Parliament, the courts and the electorate. Which the beagle will put forward.[[5]](#footnote-5)

## 2. The appointments

On 15 April 2021 the Governor General appointed Prime Minister Morrison to administer the Department of Industry, Science and Energy and Resources. The Ministers for the Department were unaffected. Mr Morrison continued to administer the Department of Prime Minister and Cabinet.[[6]](#footnote-6)

The appointment was not publicised. It is said to have been secret from other Ministers and unknown to some public servants and even ‘spies’.[[7]](#footnote-7)

It was not the first such unpublicised appointment. In March 2020, he was appointed to administer the Department of Health. The relevant Minister - Mr Hunt - knew of that, as revealed in a recent book – Plagued - by Mr Benson and Mr Chambers:

*‘Mr Hunt had, at that stage, sweeping powers to pretty well order anything. A clause in the Biosecurity Act was activated that gave the health minister almost dictatorial status. Mr Morrison, Mr Hunt and then Attorney-General Christian Porter thought swearing in Mr Morrison as another health minister was 'an elegant solution' to one minister having too much power.’[[8]](#footnote-8)*

The Industry etc. Department appointment was detected in a 2022 court action challenging Mr Morrison’s ‘over-ruling’ the Minister for Industry etc. about off-shore gas drilling. He claimed this was the only action he took in administering that and other Departments in like circumstances.[[9]](#footnote-9)

With several appointments becoming known, on 14 August 2022 current Prime Minister Mr Albanese sought an opinion from the Solicitor General on validity. On August 22, the Solicitor General provided the opinion. The Prime Minister’s Department published it a day later.[[10]](#footnote-10)

The opinion was to the effect the Industry etc. appointment was valid. However, it claimed the appointment’s secrecy undermined the system of responsible government. It argued the system should be buttressed by legislation requiring publication of appointments.

The opinion noted similar circumstance appointments of Mr Morrison to administer the Department of Health (14 March 2020) and Department of Finance (20 March 2020). It did not note similar appointments to administer the Treasury and Department of Home Affairs (6 May 2021).

Mr Morrison sought to explain acquisition of Ministries by referring to: potential for Ministers to be incapacitated in the pandemic which started in February 2020; ‘god-like’ powers given to the Health Minister; a need for him to act across several portfolios due to ‘national cabinet’; his being held responsible for everything.

He sought to explain the secrecy by referring to a desire to avoid panic.[[11]](#footnote-11)

Some of his colleagues were reportedly unimpressed. A former Home Affairs Minister, Ms Andrews, publicly called on him to resign from Parliament because of a breach of ‘trust’.[[12]](#footnote-12)

On 26 August, Prime Minister Albanese announced an inquiry into the facts and implications of, and processes involved in, the appointments. It is to report to his office by 25 November.[[13]](#footnote-13)

## 3. Solicitor General’s opinion

The Solicitor General’s opinion turned on interpretation of Constitution sections 62, 64 and 65.

### 3.1 Sections

Section 62 has the Governor General swearing in individuals to the Federal Executive Council. These people become Ministers.

Section 64 has the Governor General appointing individuals to administer Departments. The people must (already) be Ministers. Among implications: the Governor General creates Departments and assigns administration – e.g., powers granted by legislation – among Departments and offices.

Among other implications of s.64: a single Minister can administer several Departments; a single Department can be administered by several Ministers.[[14]](#footnote-14)

Section 65 allows the Governor General to direct Ministers to hold a particular office. One effect is to differentiate Ministers. Another effect: such direction has implications for which Departments are administered by which Ministers.

Offices can differ from Departments. A single Department can support several offices. Similarly, a single Department can support Ministerial responsibilities arising from various legislation.[[15]](#footnote-15)

The Constitution does not specify Ministers, Departments or offices. An implication: the number and identity of Ministers, Departments and Offices - and assignment of administration among Ministers - is determined by the Governor General.[[16]](#footnote-16)

The Solicitor General opined Mr Morrison’s appointment to administer the Industry etc. Department was in line with the requirements of Constitution sections 62, 64 and 65. Mr Morrison had already been sworn-in to the Federal Executive Council and could administer any Department without needing to be sworn-in again. He could administer several Departments at once.

### 3.2 Conventions

The Solicitor General also mentioned conventions. Conventions are non-binding practices, not mentioned in the Constitution, that facilitate predictable processes of government. A breach of a convention is not of itself illegal – probably subject to a caveat about responsible government outlined below.

Among conventions relevant to Ministerial appointments: the Governor General follows the advice of the Prime Minister. This was adhered to.[[17]](#footnote-17)

Whether there is a convention of formally publishing details of every appointment and assignation under sections 62, 64 and 65 is debatable. There is a practice of the Prime Minister’s Department publishing a list of Ministers and a list of Departments. There is a practice of the Department publishing a list matching Ministers and offices. All lists need to be consulted by those seeking to ascertain who has formal authority for what – there is no single document for that.[[18]](#footnote-18)

The Solicitor General noted an issue with the Morrison appointments was some of his matches with Departments were not listed. However, in his view this did not invalidate the appointments. In his view, Ministerial appointments take effect when made rather than when published.

### 3.3 Responsible government

Responsible government means the Executive – Government, Ministers – can be controlled by and are answerable to Parliament and through it to the electorate.[[19]](#footnote-19)

One convention of responsible government is: either House of Parliament can call on a Minister to answer questions. Even if not (properly) answered, this informs the public in a way which can influence elections - said to be the principal constraint on lawful Executive activity.[[20]](#footnote-20)

The Solicitor General argued a Minister has authority and therefore responsibility to Parliament from the time of appointment, which may be exercised by inaction as well as action. Yet Parliament would not be able to call that Minister to account if it was unaware of those powers.

Notwithstanding any such undermining, the opinion was: the appointments were valid when made.

## 4. Commentary

### 4.1 Overview

Commentary generally accepted the Solicitor General’s opinion. The short time frames involved suggest most were reactions without analysis.[[21]](#footnote-21)

In the absence of a rational explanation about Mr Morrison taking on Ministries and then keeping that secret, much media commentary speculated about motives – stoked by Prime Minister Albanese. Even normally sensible columnists got caught up in a polemic pile-on - an apparent contest for hyperbole.

Professor Hocking – documenter of aspects of analyst of the 1975 dismissal of the Whitlam Government by Governor General Kerr - regarded Mr Morrison’s behaviour as an *‘unprecedented trashing of democracy’*. She cited former Prime Minister Turnbull who regarded it as *‘sinister’*. Among her concerns: Mr Morrison was appointed to Ministries that already had a Minister, and did not identify himself as Minister during question time:

*‘If ‘responsible government’ is to mean anything at all, you cannot have a second ‘Minister’ appointed in secret, who can at any point step in and over-ride the decision of the first, and only publicly acknowledged, Minister.’[[22]](#footnote-22)*

Professor Maddox apparently considered Mr Morrison to be in breach of conventions of responsible government. He argued such conventions are vital and prior to the law. However, conventions have been confused in Australia by Kerr’s 1975 claim responsible government requires the Prime Minister to secure supply or advise an election. He concluded with:

*‘if the powerholders exercise self-restraint, the written constitution is unnecessary, and if they do not, no written constitution will check them’.[[23]](#footnote-23)*

Ms Grattan repeated the Solicitor General’s assertions:

*“To the extent that the public and the Parliament are not informed of appointments ….. the principles of responsible government are fundamentally undermined.”[[24]](#footnote-24)*

Mr Waterford, Canberra Times, suggested one motivation was to forestall a ‘coup’ – Mr Morrison wanted to prevent the possibility of Coalition Ministers replacing him as Prime Minister. He did not explain the apparent irrationality of such a motivation - the changes had no effect on Mr Morrison’s ability to advise the Governor General to dismiss plotting Ministers etc.[[25]](#footnote-25)

Ms Jones of Independent Australia condemned much of the media for being *‘slow out of the blocks’* on the story – and argued the authors of Plagued should have released the story prior to the 2022 election. She claimed:

*‘The Australian public recognised immediately the unprecedented, yet likely legal, threat Morrison’s actions potentially posed to our democracy.’[[26]](#footnote-26)*

Evidence of such recognition was not provided.

Several other articles made ‘threat to democracy’ claims, also without indicating what the threat might be.

### 4.2 Further issues

At least two commentators suggested the secret Ministries are far less serious threats to democracy than Governments’ deliberate misrepresentations of Australia’s system of government – national cabinet and Health legislation being examples.

#### 4.2.1 National cabinet

Professor Beck Fenwick, ANU Centre for Federalism etc., implied the secret Ministries episode was triggered by ongoing abuse of Mr Morrison. The abuse was misplaced, because he was blamed for matters which are the responsibility of States rather than the Commonwealth. Among examples, the 2019-20 bushfires.[[27]](#footnote-27)

She raised a concern about Executive Federalism - tension between Parliamentary and Federal institutions. She said national cabinet - a secret process by which Commonwealth and State Governments effectively by-pass their Parliaments and give States national powers – undermines responsible government.

She is not alone in having concerns about national cabinet. Other concerns include how its existence engendered autocratic behaviours – including by unelected officials – during the pandemic. An October 2020 public law article presciently observed national cabinet, rather than just being a successor to the Council of Australian Governments, led to greater personalisation of politics:

*‘an increasing focus on politicians as individuals rather than leaders of a collective executive; a similar focus on the role of the majority leader rather than the Parliament; …relentless media focus on the leaders of the major parties to the exclusion of almost all others’.*[[28]](#footnote-28)

This was referred to as ‘presidentialisation’ - national cabinet portrayed like a meeting of the United States President and State governors.

Yet in Australia, participants in national cabinet are not directly elected to office. Among the results are: less relevance of Parliament; Government as a whole – rather than individual Ministers (other than Prime Ministers) - arrogating power; increasing gulf between Government and the people.

The immediate rationale for national cabinet – to deal with national crises – has long passed, if it ever existed. Yet the meetings continue, with all their defects not least of which are exclusion of the Commonwealth Opposition Leader – once Mr Albanese, now the Coalition’s Mr Dutton. And a false and probably illegal claim of confidentiality which reflects badly on the new Prime Minister.[[29]](#footnote-29)

It seemed Professor Beck Fenwick was criticising Mr Morrison for being a weak yet inventive leader grasping at straws to remain popular. Until an extraordinary claim: rather than national cabinet being the forum for collaboration between the Prime Minister and Premiers, it is almost a fraud:

*‘Mr Morrison ….. created the national cabinet as a mechanism to bring attention to the fact that*[*the Commonwealth had no power over the states*](https://www.canberratimes.com.au/story/7328096/)*in terms of steering the federation's pandemic responses.’*[[30]](#footnote-30)

That claim is in direct conflict with the book that started the controversy – Plagued says the motive for national cabinet was to maximise Commonwealth-State Government coordination during the pandemic, without becoming bogged down by bureaucratic agendas. Further, it originated from an idea of the Western Australian Premier.[[31]](#footnote-31)

Unfortunately, the link provided for the claim seems to sheds little light on Mr Morrison’s intentions for national cabinet. The article’s dog-whistle was also unhelpful in that regard.[[32]](#footnote-32)

#### 4.2.2 Health emergency legislation

University of NSW law Professor Williams’s speculated Mr Morrison was concerned the Health Act granted the relevant Minister *‘god-like*’ powers which needed to be curtailed. He pointed out Morrison becoming a sort of secret Health Minister was not the right way to address this.

In fact, it doesn’t address it at all – it merely makes a new god. That is so obvious as to render a motive of curtailing god-like powers implausible.[[33]](#footnote-33)

God-like powers? Professor Williams referred to the Act, passed in 2015 which, he said, grants the Minister almost dictatorial powers after a public health emergency declaration by the Governor General. While the duration of an initial declaration is limited, the Governor General can extend it as they see fit – about which it is worth remembers the Governor General acts on the advice of the Prime Minister.

Parliament is precluded from effective control over those powers because of a non-disallowance clause in the legislation. The Senate cannot disallow – revoke – any declaration or consequent action by the Minister. The Senate, of course, had agreed to that in passing the legislation.

Rather than Mr Morrison also acquiring those powers, Williams argued the indicated approach is to amend the legislation, to at least remove the non-disallowance provisions.

Williams’ article did not mention more draconian and autocratic State legislation which, except in the case of NSW, had officials rather than Ministers making ‘dictatorial’ decisions, without effective oversight by parliaments. Nor did he say whether the Commonwealth Minister’s god-like powers could overrule the States and their officials – in a previous article he implied it could not. If the Minister is a god, it would seem a lesser one.[[34]](#footnote-34)

Nor did Williams’ article refer to Commonwealth national emergency legislation with a similar non-disallowance clause. It was passed unanimously by the Senate in late 2020 – despite non-disallowance clauses being severely criticised by a Senate committee just nine days earlier.[[35]](#footnote-35)

Nonetheless, the above does point to a motive for Mr Morrison’s secrecy. Making public an assertion of god-like powers outside the control of Parliament could give rise to questions about the merit – if not validity – of both the Health Act and the national emergency legislation. If Australia’s political commentariat could see beyond its tired personal prejudices it might have noticed that.

Then the commentariat could also have noticed the lame acquiescence of other Parliamentarians in enacting god-like powers of which they now complain.

## 5. Heresies?

The orthodoxy is: Mr Morrison had done something terribly wrong, but not illegal. In my view, heresies are more plausible.

### 5.1 Paradox

When considered against a central purpose of the Constitution - to establish a system of representative and responsible government - the Solicitor General’s opinion presents a paradox. The appointments:

* were Constitutionally valid; yet
* were antithetical to the purpose of the Constitution.

The Solicitor General’s opinion holds that conformance with the Constitution can undermine the purpose of the Constitution. That apparent paradox calls into question both assertions.

### 5.2 A limited question?

One attempt to resolve the paradox is an argument the Solicitor General’s opinion was narrow – it dealt only with the appointment to administer the Industry etc. Department, not all appointments. Yet there is no evidence of differences among appointments. Presumably the Solicitor General would say all were valid. [[36]](#footnote-36)

A similar argument - the appointments resulted in an accumulation of too much power in the hands of one person – is weak. There is no bar on the number of appointments a Minister can hold. Also, power had accumulated before the appointments - due to decisions by Parliament.

If the paradox is not resolvable by such arguments, the Solicitor General’s opinion is questionable. One question is whether the opinion was wrong in its interpretation of the Constitutional relevance of responsible government.

### 5.3 Relevance of responsible government

In recent years, the High Court made repeated statements of the Constitutional relevance of representative and responsible government. Some statements were in the context of case arguments about freedom of political communication implied from a central purpose of the Constitution – to establish a system of representative and responsible government.

The Constitution includes requirements - for at least political communication – that are:

*‘necessary for the effective operation of that system of representative and responsible government’*.[[37]](#footnote-37)

Representative government means Parliament is answerable to the people at elections.

Responsible government means the Executive – Government, Ministers – can be constrained by and is directly answerable to Parliament, and through it, indirectly to the electorate. Parliament can legislate to constrain the Government.[[38]](#footnote-38)

One aspect of responsible government is a convention that either Parliamentary House can question a Minister. Even if a Minister does not (properly) answer, responses inform the public in a way which can influence elections - said to be the principal constraint on lawful Executive activity.

Other conventions relating to responsible government include the leader of the Executive – the Governor General - follows the advice of the Prime Minister. That presupposes another convention: for there to be a Prime Minister – appointed by the Governor General on cognisance of having support of the majority of the House of Representatives.[[39]](#footnote-39)

Another convention relating to Government: the Prime Minister forms a Cabinet, comprising several Ministers. Cabinet is based on ‘solidarity’. It collectively makes and takes responsibility for decisions on some matters. Each member of Cabinet is bound by, and publicly supports, the decisions. Reasons for Cabinet decisions, and any disagreements, are kept confidential.[[40]](#footnote-40)

Many refer to such conventions as being ‘Westminster’ – based on practices at Westminster, the home of the United Kingdom Parliament and Government. Some caution is warranted in simply assuming United Kingdom practices can or should apply in Australia.[[41]](#footnote-41)

The freedom of political communication cases seem relevant to the controversy over the Morrison appointments for two further reasons. One is the essence of that controversy is an absence of political communication – the appointments were secret.

Another reason is the cases concern the validity of legislation creating a burden on, or barrier to, political communication. If legislation – Parliament’s will - can be invalidated for that reason, actions of the Executive Government should also be able to be overruled for similar reasons. Indeed, Executive actions kept secret from Parliament should be particularly susceptible to being declared invalid.[[42]](#footnote-42)

### 5.4 Advocatus diaboli

The Solicitor General’s argument about the breach of responsible government was: responsible government entails Ministers being answerable to Parliament for administration of Departments.

A Minister must be known to Parliament to answer to it. Parliament would not know to pose questions to, or as a last resort pass a motion of no-confidence in, an unknown Minister.

However, that argument is simplistic when considered in light of conventions and Parliamentary practice. There are at least four problems with its representation of Mr Morrison as breaching responsible government:

1. the source of Parliament’s power over the Government – ability to legislate – was unaffected;
2. there was no gap in Parliament’s ability to oversee the Government. At all times, the identity of a Minister administering each Department was known;
3. there are very strong perceptions of Prime Ministerial responsibility for every Ministry;
4. the identity of a person who holds power will become known, at the latest, immediately there is any attempt to exercise that power.

Some issues arising from each are outlined in the next sections.

### 5.5 Parliament’s power over Executive Government

Among the reasons for Parliament to be able to control the Executive Government is prevention of centralisation of power. The issue is not centralisation of power within the Executive Government – how much power a particular Minister, or Prime Minister, might hold – but constraints on the Executive as a whole.

Mr Morrison’s argument about concern with the power held by the Health Minister is, at best, a red herring. Such an argument does not lead to a conclusion that power should be shared among Ministers. Rather the argument is for greater Parliamentary control of that power – and of Ministers.

While the ability of Parliament to ask questions of a Minister is seen as a control mechanism, the source of that power is not merely convention. It arises from the ability of Parliament to legislate. Legislation – supply and Appropriation - is necessary for the Government to function. Other legislation can constrain Executive activity whether arising from powers granted by Parliament or prerogatives.[[43]](#footnote-43)

Failure to advise Parliament of Mr Morrison holding a number of Ministries did not alter the legal or practical ability of Parliament to control the Executive, and specifically Mr Morrison.

Indeed, some legislation signalled Parliament’s apathy towards control over the Government in relation to the pandemic. For example, the Health Act noted by Professor Williams in section 4.2.2 (above) shows a lack of interest of Parliament in the exercise of emergency – ‘god-like’ – powers.

That cavalier attitude of Parliament abdicating its responsibility to oversee Government use of extraordinary emergency powers was reinforced in late 2020 by Parliament allowing Prime Ministers – then Mr Morrison, now Mr Albanese - to effectively declare a national emergency. Like the Health Act, that legislation precludes the Senate from disallowing such a declaration – merely allowing a Senate Committee to prepare a report on the emergency within a year of the declaration – with no consequence of such report.[[44]](#footnote-44)

### 5.6 Identification of every Minister?

Cabinet and other Ministers collectively are referred to as the Government. There is no convention for a Government to include specific Ministries, except perhaps Treasury and Attorney General.[[45]](#footnote-45)

Nor is there a convention requiring dispersal of Executive power among a minimum number of different people. Nor are there conventions of a person being limited to a maximum number of Ministries, or a Department having only one Minister.[[46]](#footnote-46)

Indeed, there is a practice – held to be Constitutionally valid – of more than one Minister being responsible for administering a Department. At present there are six Ministers administering the Department of the Prime Minister and Cabinet. Two of those Ministers also administer other Departments.[[47]](#footnote-47)

A 1997 article by Lipton referred to two types of Ministerial responsibility: of the Government as a whole; of Ministers individually.[[48]](#footnote-48)

The former relates to Cabinet responsibility. The logic of Cabinet conventions e.g., solidarity, implies the Prime Minister is answerable to Parliament for decisions by Cabinet, even if formal legal power lies with a particular Minister.[[49]](#footnote-49)

A House of Representatives practice document put the latter - individual Ministerial responsibility to Parliament - as not being merely ‘fictional’. Examples of responsibilities imposed on Ministers, other than administration of Departments, include codes of conduct.[[50]](#footnote-50)

The practice document has Parliament’s role being to ‘*expose and demean’* . The Prime Minister decides on sanctions.[[51]](#footnote-51)

The basis for Prime Minister enforcement of Ministerial responsibility is the power to effectively appoint and dismiss Ministers. As the Prime Minister holds that position only on support of the House of Representatives, the source of authority is that House rather than Parliament as a whole.

Cabinet solidarity, and practices such as a Minister with a seat in one House being represented by another member of the Government in the other House, call into question arguments that every person with administrative powers must directly answer to the House of Representatives for all their administration. As against this, many Ministerial powers arise from legislation - in those respects answering to both Houses is necessary.[[52]](#footnote-52)

Comments by High Court Chief Justice Gleeson in 2001 suggested Parliament needs to know all Ministers and all their administrative powers. That is consistent with the practice document.[[53]](#footnote-53)

However, at that time Justices Hayne and Gummow said responsible government is secured by the requirement of Ministers to be members of Parliament.[[54]](#footnote-54)

Whether there is a convention of formally publishing all details of every appointment and assignation under Constitution sections 62, 64 and 65 is debatable. There is a practice of the Prime Minister’s Department publishing a list of Ministers and a list of Departments. There is a practice of the Department publishing a list matching Ministers and offices. All lists need to be consulted by those seeking to ascertain who is responsible for what – there is no single document for that.[[55]](#footnote-55)

One issue with the Morrison appointments is some of his matches with Departments were not listed. That is presumed, rather than proven, unique.

### 5.7 Prime Ministerial responsibility

Among the reasons for the perception of Prime Ministerial responsibility for Government decisions and behaviour is they can effectively remove powers from any Minister. This can be done by recommending to the Governor General : dismissal from the Executive Council; reassignment to another Department; reassignment of part of the Minister’s Department to another Department. Such responsibility is enforced by questioning in Parliament about any portfolio.[[56]](#footnote-56)

In the case of Mr Morrison, the public perception of Prime Ministerial responsibility was particularly strong. After the 2019 election, there was a tinpot misrepresentation of his responsibilities by political partisans and parts of the media.[[57]](#footnote-57)

Non-Government members of Parliament and parts of the media consistently and loudly portrayed Morrison as being to blame for the (in)actions of other Ministers - and even for State and local governments on matters for which the Commonwealth lacks authority. So ubiquitous was the practice of blaming Mr Morrison, the part of his explanation for accumulating Ministries – he was being blamed for every problem – attracted some sympathy and no demur.[[58]](#footnote-58)

The lack of demur – in fact clamouring for Mr Morrison to have limitless responsibility *and therefore to exercise more power whether or not he was legally able to* - was most apparent in commentary and ‘debates’ about national emergency legislation that was his response to being blamed for the 2019-20 bushfires.

The danger of such clamour, and that legislation, is a Prime Minister can effectively arrogate power by bluffing. That appeared to be the case in military deployments – which many called for ‘boots on the ground’ to deal with civil matters like repairs to infrastructure and moving livestock although lacking apparent legal basis.[[59]](#footnote-59)

That incidentally rebuts the current claim Mr Morrison’s accumulation of Ministries centralised legal power. Such power was already centralised by the convention of being able to effectively summon and dismiss Ministers.

A Prime Minister who wants a certain decision does not need to have administrative power over the relevant Department. Rather, they can (threaten to) instal a Parliamentarian who will exercise power in the requisite way. Such a process, and Prime Ministerial influence, will be at least as secret as the present controversy.

To the extent power has been unduly centralised in practice, significant blame rests with those who continuously castigated Mr Morrison for matters he was legally unable to influence. The 2022 election campaign made evident such calls for Prime Ministers to disregard the law were not limited to Mr Morrison. The principal criticism of Opposition leader Mr Albanese was he did not give sufficient confidence of being able to personally ‘run the country’.[[60]](#footnote-60)

### 5.8 Exercise of power

The identity of a person who holds a power will become known – at the latest - on any attempt to positively exercise that power. The (supposed) single instance of Mr Morrison exercising authority in the Industry etc. Department led to his hitherto secret power - arising from the position of administering the Department - becoming known.

The Solicitor General’s argument of the Prime Minister bearing responsibility for inaction as a secret Minister misplaced. At all times, including while appointments remained unknown, a Minister – and through them Prime Minister Morrison – could have been held to political account for failure to perform duties. There also is the possibility of legal accountability through administrative law.

The Solicitor General’s argument assumes the appointments were valid from when made. Unfortunately, that is both trivial and circular. It is trivial because the appointments had no effect, in the circumstances, unless and until Mr Morrison made a decision as a Minister (outside Cabinet). It is circular because it presumes appointments can be made that undermine responsible government – with that undermining ceasing immediately when Mr Morrison, as a Minister, made a decision.

The argument appears to be an artefact to preserve the status quo – the validity of the appointments and of any decisions Mr Morrison made consequent to them.

### 5.9 Summary of arguments

Given the above, the Solicitor General’s views on the need for Parliament to know the identity of particular Ministers are underdeveloped.

Parliament eschewed its responsibility for control over the matters most likely to give rise to threats to democracy – ‘emergencies’.

To hold the Government and Ministers to account, Parliament has at least an equal need to know of the activities as the identities of every Minister for every Department and legislative function.

Of paramount importance is to avoid a practice of Ministers bluffing about their powers – making decisions they are not lawfully allowed to make, particularly in the expectation they will not be challenged. This practice – of Ministers pretending to have powers they lack – is the opposite to Mr Morrison’s situation of not disclosing powers he had.

Whether or not Parliament needs to know the identity of every Minister, it has a compelling need to know the legal advice on which those Ministers rely to make/not make decisions. Yet the commentators do not mention that or Governments denying Parliament that essential information.

### 5.10 Split in the High Court – implications

There is a divergence of opinions about the implied freedom of political communication in the High Court. Justices take different views of what information can be denied to the electorate by legislation. The divergence has implications for information that needs to be publicly available – of which the identity of all persons administering Departments is one possibility.

The leading case is Lange v. ABC (1997) in which a unanimous decision posed two tests: does legislation burden freedom of political communication; if so, is it reasonably appropriate to serve a legitimate end in a manner compatible with representative and responsible government?

At present, a majority of the Court reformulates the latter test into two parts: is the purpose of the legislation legitimate; if so, is the legislation reasonably suitable, necessary and adequate for that purpose?[[61]](#footnote-61)

While this reformulation may seem arcane, it has resulted in different interpretations – ‘minimalist’ and ‘maximalist’ – of what needs to be available to the public to support representative and responsible government. This is illustrated in two recent cases.

Libertyworks (2020) concerned Commonwealth legislation supposedly aimed at exposing foreign influence – Foreign Influence Transparency scheme. The stated purpose of the scheme is: *‘to provide the public with visibility of the nature, level and extent of foreign influence on Australia's government and politics’*. It requires registration of foreign political organisations conducting communications activities – such as conferences - in Australia. A publicly available list is available on a website. Yet the website does not disclose all registration information. Rather the legislation has some information in another, secret, register held by the Secretary of the Attorney General’s Department.[[62]](#footnote-62)

All members of the Court agreed: the scheme burdens freedom of communication; the claimed purpose – to allow the public to recognise foreign influencers – is legitimate. A majority – five of seven justices - found the registers to be suitable, necessary and adequate.

However, justices Gordon and Gagelar dissented, taking issue with the secret register. Legislation allowing information to be held only by the Secretary pointed to an illegitimate purpose. The secret information/register *‘does nothing to reduce the risk of undisclosed influence, in fact it can only do the opposite.’*[[63]](#footnote-63)

FarmTransparency (2022) concerned NSW legislation making it a criminal offence to possess or publish a record of an activity acquired from a device knowingly installed in premises without permission of the premises’ owner – like a secret surveillance camera from which footage led to this case.

Unlike similar legislation, a public interest exemption is not available. All members of the court agreed the legislation burdens freedom of political communication – animal cruelty being a matter of political interest. The majority, four of seven justices, held the purpose of the legislation - protection of certain private property from unlawful interference, e.g., trespass – was legitimate and the way in which this was sought was suitable, necessary and adequate.

Again, justices Gordon and Gagelar disagreed. They were joined by new justice Gleeson. Justice Gordon ‘read down’ the legislation to be inapplicable to *‘innocent third parties’* not involved in trespass. Justices Gagelar (and Gleeson) took a more expansive view rejecting the provisions entirely. He noted the absence of a public interest exemption. In his view Constitutional freedom of political communication curtails legislative objectives and the common law. The information in question was ‘true’ – a video record of events:

*‘ the cost … on the communication and receipt of information about political and governmental concern is more than can be warranted for every activity which might be shown by visual record to have occurred on private property’.*

To summarise, at least in relation to the implied Constitutional freedom of political communication to support representative and responsible government, there is a divergence of opinion on the present High Court about the extent to which the public’s right to information can be reduced by Parliament. The minority view is compelling – e.g., secrecy is inconsistent with making information available to the public, it can impede freedom of political communication and representative and responsible government.[[64]](#footnote-64)

An implication is a minority on the Court - correctly - values the public’s right to information significantly more highly than the majority. That suggests at least the minority would take a substantially sterner view than the Solicitor General of Mr Morrison’s secret Ministries. It is possible, maybe probable, they would find any practice that diminished responsible government by restricting the flow of information about Ministerial responsibilities illegal.

## 6. Conclusions

### 6.1 Validity of appointments

The Solicitor General’s opined the appointments were valid from the time they were made. The reason given was: explicit Constitutional processes for appointments were followed.

In my view that is not reconcilable with a view the arrangements undermined responsible government.

In my view, responsible government requires Parliament to know the identity of every Minister matched with their powers including the power to administer Departments. That did not occur. Until those identities and powers were publicly matched, the Constitution was breached.

### 6.2 A problem?

Yet the problems identified by Mr Albanese and most commentators with Mr Morrison’s appointment are at best hypothetical. Their claims lack practical relevance and are fatuous.

The claims involve a hysterical beat-up, full of inconsistencies and misapprehensions of the tinpot kind commentators pretend to admonish.

### 6.3 Real problems

Worse, the shrieks about Mr Morrison hide the real and present threat to democracy. That threat is the unauthorised – illegal – exercise of power by Commonwealth Ministers.

The real problem arising from uncertainty as to who has particular Ministerial powers is that a Minister may bluff – falsely and publicly claim - they have legal powers.

The threat is not, as claimed, a secret sharing of non-exercised powers. Nor is it that one Minister can reverse the decision of another – the fact of conventions about the Prime Minster and about Cabinet shows such an argument to be stupid. Just as pointless are claims conventions are more important than the Constitution – implying the latter is merely symbolic and can be dispensed with. Such arguments suggest an underlying jealousy of the former Prime Minister – that he ‘outsmarted’ others in processes of government.

History demonstrates bluffing to be the principal threat to democracy – with examples of Governments and institutions overthrown by those falsely claiming to have power.

Bluffing is more than a theoretical possibility in Australia - there were examples impacting the operation of democracy and the lives of citizens during the pandemic – including bluffs by the police, unelected State officials and Premiers.

Commonwealth Ministers also continue to bluff. Among recent examples are bluffs that Ministers have powers to spend on infrastructure projects like commuter car parks. Such bluffing has become institutionalised – almost a ‘convention’ of the Commonwealth Government. Twomey claimed: Ministers think they have unfettered discretion to act as they please and:

*‘The primary focus of the Commonwealth Government, however, has been on managing ‘constitutional risk’, rather than strict compliance with the rule of law. It involves evaluating the risk that someone who has standing to do so will challenge the making of the grant in court, resulting in it being struck down’.*

*‘there is no disciplined checking that any of the actual grants made under those programs fall within the scope of the relevant head of power. The consequence is large-scale unlawful spending by the Commonwealth Government. The ‘constitutional risk’ is again low because no one is likely to check the conformity between actual spending and constitutional authority to do so.’*

Further:

*‘This is what the decay of democracy looks and smells like. It is by no means full-blown decay. Australia is still one of the most law-abiding and democratic countries in the world. But when the rule of law is disregarded because it is inconvenient, when governments calculate how they should behave according to what they can get away with, when public servants facilitate such action rather than insisting upon the application of the law, and when power is seen as giving immunity from the application of rules and impunity from the legal consequences, then the rot in the democratic system has begun and will spread unless action is taken to stop it.’[[65]](#footnote-65)*

Yet spending is not the only bluff. Emergency legislation – including for Health and national emergencies at the Commonwealth level – create conditions in which Ministers and officials can purport to exercise powers they lack – and bluff the public. Which they have done.[[66]](#footnote-66)

The failure to publish all Solicitor General opinions aids and abets such bluffing. It would be interesting to know what advice the Solicitor General – or any other unelected Commonwealth official - gave on the appointments and secrecy while Mr Morrison was in office.

Beyond that, there are Commonwealth Ministerial ‘responsibilities’ and titles inconsistent with the Constitution. For example, Ministerial titles include ‘cities’, ‘energy’, ‘education’, ‘regions’, ‘women’, ‘arts’, ‘water’, ‘homelessness’, ‘housing’ etc. matters not allocated to the Commonwealth legislature, let along Executive, by the Constitution. The only purpose of such titles is to establish conditions where some bluffing is acceptable, even expected, to curry favour with sections of the community.[[67]](#footnote-67)

### 6.4 Finally

The point being made by most critics of the secret Morrison appointments is that his Ministerial titles did not match his powers. Exactly that point should lead to condemnation of many current Ministerial titles. Another H word comes to mind in most of the commentary to date.

Rather than it being ‘too slow out of the blocks’ commentary has far outstripped analytical capabilities. It has been way too fast.

The inquiry into the controversy would do well to quickly dispense with the ignorance and hypocrisy on display and get to the real and serious issues exposed:

* probable misunderstanding of the Constitutional significance of responsible government;
* Governments and Ministers bluffing about powers they do not legally possess;
* Government legal authorities aiding and abetting that by not publishing their advice;
* Governments furthering bluffing by Ministerial titles designed to mislead the public;
* Parliament taking a cavalier attitude to its responsibility of oversee Government.

This partisan inspired beat-up is weird and over the top. It speaks of emotive animus towards Mr Morrison – a dangerous starting point for serious public policy discussions. It is lighting yet another tip fire. The word tinpot, is apposite.

J Austen

29 September 2022

1. Hoard: <https://dictionary.cambridge.org/dictionary/english/hoard> [↑](#footnote-ref-1)
2. Readers may recall a cavalcade of political stars taking holidays during the 2019-20 bushfires – not just the Prime Minister, but those with actual responsibilities for emergency management <https://www.thejadebeagle.com/tinpot.html>. Recent holidays: <https://www.dailymail.co.uk/news/article-11111447/Shirtless-Anthony-Albanese-spotted-swimming-Broome-holiday.html>; Opposition Leader Mr Dutton had already been on holidays <https://www.news.com.au/travel/travel-updates/travel-stories/peter-dutton-holidaying-in-us-as-colleagues-blast-albo-for-ukraine-visit/news-story/f26d4282141802151df84d9487ad4a30>

 [↑](#footnote-ref-2)
3. <https://verdemode.com/bowerbirds-and-blue/> [↑](#footnote-ref-3)
4. Bluff: <https://www.thejadebeagle.com/tinpot-2020.html> ‘Probably’, as the Department advised the Prime Minister did not need to take an oath of office in relation to the Health appointment.

 [↑](#footnote-ref-4)
5. Terms of reference: Inquiry to be led by the Hon. Virginia Bell AC. During her time on the High Court, the Court considered a number of freedom of political expression cases probably relevant to some of the issues. In these cases, she made joint judgements with other members of the Court, notably Kiefel and Keane: Unions NSW - <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2013/58.html>; McCloy - <https://eresources.hcourt.gov.au/downloadPdf/2015/HCA/34>; Banjeri - <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2019/23.html?context=1;query=banerji;mask_path=%C2%A0>; Clubb - <https://eresources.hcourt.gov.au/downloadPdf/2019/HCA/11>. See section 5.3 of this article. Other recently retired justices include the Hon. Kenneth Hayne AC and the Hon. Gordon Nettle AC. High Court justice: <http://classic.austlii.edu.au/au/journals/NSWBarAssocNews/2009/29.pdf> [↑](#footnote-ref-5)
6. Other Ministers: Senator Duniam, Mr Porter, Ms Landry: <https://www.minister.industry.gov.au/ministers/archive> [↑](#footnote-ref-6)
7. <https://www.canberratimes.com.au/story/7862308/kennedy-pezzullo-unaware-of-morrisons-secret-ministries/>; spies: <https://thenewdaily.com.au/news/politics/australian-politics/2022/08/17/scott-morrison-secret-portfolio/> [↑](#footnote-ref-7)
8. <https://www.dailymail.co.uk/news/article-11122293/Plagued-book-reveals-Scott-Morrison-fell-power-Covid-pandemic.html> [↑](#footnote-ref-8)
9. <https://www.theaustralian.com.au/nation/politics/asset-energy-in-push-to-overturn-block-on-pep11-gas-exploration-permit/news-story/b576535fe9912d032a633bc74ed1de00> [↑](#footnote-ref-9)
10. <https://www.pmc.gov.au/sites/default/files/sg-no-12-of-2022.pdf>. The file name implies this was the twelfth opinion from the Solicitor General in 2022. The eleven (?) other opinions have not been published. <https://theconversation.com/view-from-the-hill-morrisons-passion-for-control-trashed-conventions-and-accountability-188747> [↑](#footnote-ref-10)
11. At the time, Australia had globally notorious episodes of ‘panicdemic’ from naked fearmongering on the ABC through applause for lock-downs, discrimination and even vigilante action against ‘other people’, to toilet paper shortages e.g. <https://www.abs.gov.au/articles/impact-lockdowns-household-consumption-insights-alternative-data-sources> [↑](#footnote-ref-11)
12. <https://www.southcoastregister.com.au/story/7862842/betrayal-of-trust-karen-andrews-tells-morrison-to-resign-from-parliament/> [↑](#footnote-ref-12)
13. <https://www.ag.gov.au/about-us/publications/inquiry-multiple-ministerial-appointments> [↑](#footnote-ref-13)
14. In 2001, the High Court unanimously held a Minister can administer several Departments and a Department (and legislation) can be administered by several Ministers – Re Patterson; ex parte Taylor <https://jade.io/article/68286>

 [↑](#footnote-ref-14)
15. Current administrative orders list 16 Departments, of which one – Veterans Affairs – is part of another (Defence) portfolio. <https://www.pmc.gov.au/sites/default/files/publications/administrative-arrangements-order-23-June-2022.pdf> [↑](#footnote-ref-15)
16. However, legislation may limit the number of Ministers or it may delegate powers to a Minister with a specific title e.g., Prime Minister

At present legislation limits the Ministry to 30 different individuals and to 12 Parliamentary Secretaries. <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter2/The_Ministry> The Albanese Labor Government – like its Morrison Coalition predecessor - is using the full quota allowed. It has 23 Cabinet Ministers, 7 Outer Ministers and 12 Parliamentary Secretaries. Its total representation in Parliament is 103 out of 227 seats; 77/151 members of the House of Representatives, 26/76 Senators. [↑](#footnote-ref-16)
17. Presupposing another convention: for there to be a Prime Minister – appointed by the Governor General on cognisance of having support of the majority of the House of Representatives. Curiously, the Solicitor General’s advice is the Governor General must follow the advice of the Prime Minister in relation to appointment of Ministers, except the Prime Minister. Whose advice does he follow in that?

 [↑](#footnote-ref-17)
18. <https://www.pm.gov.au/media/albanese-government-full-ministry>; <https://www.pmc.gov.au/who-we-are/ministers> [↑](#footnote-ref-18)
19. In McCLoy, High Court justice Gagelar explored responsible and representative government: *‘Electoral choice thereby constitutes the principal constraint on the …… lawful exercise by Ministers and officers within their departments of the executive power of the Commonwealth.’* Note this relates to lawful Executive activity. <https://www.hcourt.gov.au/cases/case_s211-2014>.

 [↑](#footnote-ref-19)
20. In McCloy (note 19 above) Justice Gagelar went on to explain: ‘*The ever-present risk within the system of representative and responsible government…. is that communication of information which is either unfavourable or uninteresting to those currently in a position to exercise legislative or executive power will, through design or oversight, be impeded by legislative or executive action to an extent which impairs the making of an informed electoral choice and therefore undermines the constitutive and constraining effect of electoral choice.’* From that he concluded the Constitution implied freedom of political communication which *‘is defined by the need to preserve the integrity of both the system of representative and responsible government ….and the method of constitutional alteration…. The freedom implied "is limited to what is necessary for the effective operation of that system of representative and responsible government”* [↑](#footnote-ref-20)
21. <https://newsroom.unsw.edu.au/news/business-law/scott-morrisons-secret-appointments-legal-undermined-principles-government> [↑](#footnote-ref-21)
22. Compare this with note 14 (above): <https://johnmenadue.com/scott-morrisons-ministerial-fetish-an-unprecedented-trashing-of-our-democracy/> [↑](#footnote-ref-22)
23. <https://johnmenadue.com/graham-maddox-concerning-laws-and-conventions/> [↑](#footnote-ref-23)
24. <https://theconversation.com/word-from-the-hill-more-heat-piled-on-morrison-over-those-multiple-ministries-189244> [↑](#footnote-ref-24)
25. <https://johnmenadue.com/super-scott-and-the-coup-vaccine/> [↑](#footnote-ref-25)
26. [https://independentaustralia.net/politics/politics-display/journalists-slow-out-of-the-blocks-to-condemn-morrison-ministry-moves,16683](https://independentaustralia.net/politics/politics-display/journalists-slow-out-of-the-blocks-to-condemn-morrison-ministry-moves%2C16683) [↑](#footnote-ref-26)
27. <https://www.canberratimes.com.au/story/7875535/was-it-the-pm-or-federalism-that-undermined-the-principles-of-responsible-government/> [↑](#footnote-ref-27)
28. <https://www.auspublaw.org/blog/2020/10/the-national-cabinet-presidentialised-politics-power-sharing-and-a-deficit-in-transparency> and see https://theconversation.com/from-toby-tosspot-to-mr-harbourside-mansion-personal-insults-are-an-australian-tradition-98928 [↑](#footnote-ref-28)
29. Illegal: <https://theconversation.com/nowhere-to-hide-the-significance-of-national-cabinet-not-being-a-cabinet-165671> Reflects badly: when Opposition Leader, Mr Albanese urged release of national cabinet papers. Now as chair of national cabinet he apparently wants confidentiality: <https://www.theguardian.com/australia-news/2022/jun/17/anthony-albanese-backflips-on-national-cabinet-secrecy-and-refuses-to-say-why> [↑](#footnote-ref-29)
30. National cabinet’s stated purpose: <https://federation.gov.au/national-cabinet>

<https://www.canberratimes.com.au/story/7328096/the-pm-can-have-his-cake-and-eat-it-when-it-comes-to-vaccine-rollout/> [↑](#footnote-ref-30)
31. <https://www.panterapress.com.au/product/plagued/> [↑](#footnote-ref-31)
32. Dog whistling: the by-now formulaic refence to elite males: (National Cabinet) *‘…. has long been criticised by federal scholars as creating an undemocratic dynamic where critical decisions are made behind closed doors, by an elite group of mainly male actors’* underplayed the NSW and Queensland Premiers. The ‘performance’ of the last being as ‘controversial’ as that of female chief health officers of Queensland, South Australia and the Australian Capital Territory, and of several female senior Victorian health officials – re the Melbourne curfew extension and a comparison of Covid-19 with Captain Cook. Their decisions with far more impact than those of elected Governments were made behind closed doors and, in some cases, appear to be of dubious legality e.g. <https://www.thejadebeagle.com/covid---may.html>; <https://www.thejadebeagle.com/covid---july-2020.html>; <https://www.thejadebeagle.com/not-so-fast.html> [↑](#footnote-ref-32)
33. <https://www.theaustralian.com.au/commentary/emergency-powers-secret-ministries-avoid-scrutiny-of-parliament/news-story/5c8580593ff6319994d9625a3b0f8a99> [↑](#footnote-ref-33)
34. <https://www.thejadebeagle.com/not-so-fast.html> [↑](#footnote-ref-34)
35. <https://www.thejadebeagle.com/emergency-achieved.html> [↑](#footnote-ref-35)
36. <https://www.theaustralian.com.au/commentary/morrisons-power-grab-a-pandoras-box-for-democracy/news-story/810eb39cbb003bd2eb6561504fc4a45d> [↑](#footnote-ref-36)
37. In McCloy v NSW, 2014, High Court justice Gagelar explored representative and responsible government. He concluded the Constitution’s implied freedom of political communication *‘is defined by the need to preserve the integrity of both the system of representative and responsible government ….and the method of constitutional alteration…. The freedom implied "is limited to what is necessary for the effective operation of that system of representative and responsible government”* <https://www.hcourt.gov.au/cases/case_s211-2014>. [↑](#footnote-ref-37)
38. See note 37: *‘Electoral choice thereby constitutes the principal constraint on the …… lawful exercise by Ministers and officers within their departments of the executive power of the Commonwealth.’* Note this relates to lawful Executive activity. He explained: ‘*The ever-present risk within the system of representative and responsible government…. is that communication of information which is either unfavourable or uninteresting to those currently in a position to exercise legislative or executive power will, through design or oversight, be impeded by legislative or executive action to an extent which impairs the making of an informed electoral choice and therefore undermines the constitutive and constraining effect of electoral choice.’*

 [↑](#footnote-ref-38)
39. Curiously, the Solicitor General’s advice is the Governor General must follow the advice of the Prime Minister in relation to appointment of Ministers, except the Prime Minister. Whose advice does he follow in that appointment? Re the 1975 dismissal of the Whitlam Government, Governor General Kerr and High Court Chief Justice Barwick contended there was another convention: the Prime Minister must be able to secure ‘supply’ – Appropriation, and if unable to do so would need to advise for an election to be held. Appropriation involves legislation, and therefore approval of a Bill by both the House of Representatives and the Senate. At the time this raised different issues to the United Kingdom – Australian Senators are elected by the people of the States, while the United Kingdom Lords – the Upper House – were appointed by the Queen. The appointment meant Lords were not ‘representative’ leading to a convention they would not vote against Bills – i.e., public money needs to be controlled by elected Parliamentarians. While the Lords tried to upend this in 1909, they failed and the convention became legislated in 1911. In both Australia and the United Kingdom, ‘money bills’ are to originate in the Lower House and are not to be amended by the Upper House. Approval of the Upper House is not required in the latter for the Bill to become law: <https://publications.parliament.uk/pa/ld201011/ldselect/ldconst/97/9705.htm>; <https://whitlamdismissal.com/1975/11/10/barwick-advice-to-kerr.html>; <https://theconversation.com/masons-role-in-the-1975-dismissal-unprecedented-hardly-9174>

 [↑](#footnote-ref-39)
40. In October 2020, Mr Morrison referred to Cabinet as the primary decision-making body of government. Its principles are collective responsibility, solidarity, consultation, confidentiality and primacy of cabinet decisions: <https://www.pmc.gov.au/resource-centre/government/cabinet-handbook> Mr Morrison’s Government had 22-24 cabinet members and 6-8 outer Ministers and 12 Parliamentary Secretaries. <https://en.wikipedia.org/wiki/Second_Morrison_ministry> The governing parties had 77 seats in the House of Representatives and 30 Senators – a total of 107 members. [↑](#footnote-ref-40)
41. <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government>. Among reasons for caution is the Australian Commonwealth is not an antipodean version of the United Kingdom; in particular there are major differences in the powers of their Executive Governments, and the relation of Governments to Parliament. A central reason is the difference between the respective Parliaments Upper Houses: the Australian Senate is appointed by people of its States while until recently the House of Lords was largely appointed by the Monarch – see note 39 above. A consequence is the Australian Senate has greater and the Government lesser powers than their UK counterparts. [↑](#footnote-ref-41)
42. <https://www.auspublaw.org/blog/2022/09/high-court-upholds-validity-of-surveillance-devices-legislation-against-freedom-of-political-communication-challenge> [↑](#footnote-ref-42)
43. Prerogatives can be constrained, not expanded, by legislation. [↑](#footnote-ref-43)
44. <https://www.thejadebeagle.com/emergency-achieved.html> [↑](#footnote-ref-44)
45. <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter2/The_Ministry> [↑](#footnote-ref-45)
46. For maximum number of Ministers see note 15. The Whitlam Government at first had only two Ministers: <https://whitlamdismissal.com/government/the-first-whitlam-ministry> [↑](#footnote-ref-46)
47. An implication of the current Albanese Government’s 16 Departments and 30 Ministers (and 12 Parliamentary Secretaries) is several Departments have more than one Minister. Several Ministers appear to administer more than one Department – for example Senator Watt administers the Department of Agriculture, Fisheries and Forestry and Department of Home Affairs (location of the emergency management function). Re Patterson, ex parte Taylor note 13 (above) and <https://www.ags.gov.au/publications/litigation-notes/LitNote07.htm>; Department: <https://www.pmc.gov.au/who-we-are/minister>. [↑](#footnote-ref-47)
48. <http://classic.austlii.edu.au/au/journals/UQLawJl/1997/2.pdf> While the article concerned the latter, it noted discussion about individual responsibility usually considers issues about resignation or dismissal of Ministers. [↑](#footnote-ref-48)
49. Obvious problems with this include ascertaining what is and what is not a Cabinet decision, and Cabinet effectively usurping Parliament’s wishes – of delegating particular decisions to particular Ministers. [↑](#footnote-ref-49)
50. A House of Representative practice document puts it: *‘responsibility of ministers individually to parliament is not mere fiction. An individual can be disciplined whereas the whole cannot. The events of recent years show that a minister can become too great a burden to carry. The parliament’s role has been to expose and demean. Forced ministerial resignations and dismissals have been the decision of the prime minister not the parliament by its vote. I continue to believe that in the matter of ministerial responsibility, in the strict sense of actions done in his name for him or on his behalf in his role as a minister, his responsibility is to answer and explain*to*parliament for errors or misdeeds but there is no convention which would make him absolutely responsible so that he must answer*for*, that is, to be liable to censure for all actions done under his administration.’*

[*https://www.aph.gov.au/About\_Parliament/House\_of\_Representatives/Powers\_practice\_and\_procedure/practice5/chapter2#ind*](https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/practice5/chapter2#ind) [↑](#footnote-ref-50)
51. That may be the case for the Commonwealth at present, however, other jurisdictions such as NSW have legislative provisions giving further consequences – through anti-corruption bodies - for certain Ministerial failures. [↑](#footnote-ref-51)
52. With the exception of actions that legislation regards as ‘non-disallowable’.

 [↑](#footnote-ref-52)
53. In re Patterson; ex parte Taylor (note 14 above): ‘…*. the concept of responsible government does not require that there be only one person answerable to Parliament for the administration of a Department….it is for the Minister and the Parliamentary Secretary to make their own arrangements as to the method by which the Department will be administered.  It is for Parliament to determine the procedures by which those two persons will answer for the conduct of such administration.’* [↑](#footnote-ref-53)
54. In re Patterson; ex parte Taylor (note 14 above) justices Gummow and Hayne noted that in responsible government one Minister could represent another and the concept is satisfied by Ministers being Parliamentarians: *‘There has developed a practice…, whereby a Minister is "represented" by another Minister in the chamber of which the first Minister is not a member. The central purpose of responsible government is secured by the requirement in s64 of the Constitution for administration of the departments of State by Ministers who are members of one or other Houses of the Parliament.’* [↑](#footnote-ref-54)
55. An implication of 16 Departments and 30 Ministers (and 12 Parliamentary Secretaries) – notes 11 and 12 (above) is several Departments have more than one Minister. Several Ministers appear to administer more than one Department – for example Senator Gallagher administers the Department of Finance and Department of Prime Minister and Cabinet (location of the ‘Womens’ function); <https://www.pm.gov.au/media/albanese-government-full-ministry>; <https://www.pmc.gov.au/who-we-are/ministers> [↑](#footnote-ref-55)
56. Hansard is full of such questions. A random example: on 4 February 2021 Prime Minister Morrison was asked about industrial relations and Bass Strait passenger equalisation – which were the responsibilities for the Minister for Industrial Relations and the Minister for Transport respectively <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/8f08edf4-8c55-4033-ab20-918ecad6739c/&sid=0000>. [↑](#footnote-ref-56)
57. <https://www.thejadebeagle.com/emergencies---tinpot-series.html> [↑](#footnote-ref-57)
58. The same sources later professed concerns about Prime Ministerial concentration of power when the secret appointments were revealed. For example: bushfires <https://www.theguardian.com/australia-news/2020/jan/03/where-the-bloody-hell-was-he-how-scott-morrison-spent-the-past-week-of-the-bushfire-crisis>; vaccines <https://www.theaustralian.com.au/nation/politics/criticism-of-scott-morrison-on-vaccines-borders-hysterical/news-story/595c8c7234c6c67bc4f80a6e4a50539c>; aged care: <https://www.theguardian.com/australia-news/2022/feb/08/scott-morrison-faces-question-time-grilling-over-government-response-to-covid-aged-care-crisis>; most policy related to the pandemic including actions of the States: <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024920/toc_pdf/Finalreport.pdf;fileType=application%2Fpdf>; [https://independentaustralia.net/politics/politics-display/flashback-2021-morrisons-handling-of-covid-19-a-series-of-failures,16576](https://independentaustralia.net/politics/politics-display/flashback-2021-morrisons-handling-of-covid-19-a-series-of-failures%2C16576); floods <https://www.theguardian.com/australia-news/commentisfree/2022/mar/22/the-floods-seamlessly-tied-together-all-of-scott-morrisons-biggest-failures-into-one-giant-catastrophe>. Same sources e.g. <https://www.theguardian.com/commentisfree/2022/aug/17/scott-morrisons-secret-ministries-undermine-public-trust-and-we-should-be-deeply-concerned>; <https://michaelwest.com.au/there-is-no-place-for-secret-ministers-in-australian-democracy/> [↑](#footnote-ref-58)
59. Bushfires: <https://www.thejadebeagle.com/tinpot-2020.html>

Generally: <https://www.afr.com/politics/federal/pm-seeks-the-credit-so-cops-the-blame-20220119-p59pk0>; <https://www.thechronicle.com.au/news/national/pure-scapegoating-media-blames-scott-morrison-for-floods/video/bac088cdb213ef62a8bda88d56f28d0a> The expectations of a Prime Minister being responsible for everything continued into the 2022 election campaign. There the current Prime Minister, Mr Albanese, was ridiculed for not knowing certain economic statistics, and details of every Labor policy, leading to suggestions he was not ‘up to running the country’. <https://www.news.com.au/national/federal-election/nonsense-anthony-albanese-and-ally-langdon-in-fiery-tv-clash/news-story/49ee44f7e5928d80f5b8f801ca337b71> [↑](#footnote-ref-59)
60. <https://www.thejadebeagle.com/emergency-achieved.html> Run the country: <https://www.9news.com.au/national/anthony-albanese-blanking-ndis-opposition-leader-federal-election-campaign/fe0b05d4-a65f-402d-b788-77b9c0ece012> [↑](#footnote-ref-60)
61. See, for example: <https://www.auspublaw.org/blog/2022/09/high-court-upholds-validity-of-surveillance-devices-legislation-against-freedom-of-political-communication-challenge> [↑](#footnote-ref-61)
62. <https://www.ag.gov.au/integrity/foreign-influence-transparency-scheme> [↑](#footnote-ref-62)
63. While justices Gagelar and Gordon did not use the third part of the test it could be assumed their view on that would have been: information held by the Secretary was kept secret from the public, hence the legislation could not be suitable, necessary or adequate to keep the public informed of foreign influence – the legislation went beyond its supposed legitimate purposes [↑](#footnote-ref-63)
64. <https://www.auspublaw.org/blog/2022/09/high-court-upholds-validity-of-surveillance-devices-legislation-against-freedom-of-political-communication-challenge> [↑](#footnote-ref-64)
65. <https://www.cjccl.ca/wp-content/uploads/2021/05/10-Twomey.pdf> [↑](#footnote-ref-65)
66. <https://www.thejadebeagle.com/covid---july-2020.html> [↑](#footnote-ref-66)
67. <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/parliamentary_handbook/current_ministry_list> [↑](#footnote-ref-67)