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# Private Actors & Crisis

Scrutinising the National Covid-19  
Commission Advisory Board

5 August 2020 | Elizabeth Hicks

Produced in collaboration with **COVID-DEM**



# Summary

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## Key Points

This Policy Brief makes the following central points:

- (a) Times of crisis pose risks of executive expansion. When monitoring those risks, observers must consider the broader arrangements that shape how that executive power is wielded. This includes the relationship between private parties, private industry and the executive.
- (b) The National Covid-19 Commission Advisory Board (NCC) advises the government on Australia's longer-term economic recovery. It comprises commissioners and members of working groups from the private sector, who are personally selected and appointed by the Prime Minister's office. On 27 July 2020, the Prime Minister announced that the NCC would work 'within' government, forming part of Cabinet deliberative processes.
- (c) Several features of the NCC are of concern, including: a lack of any legislative underpinning and clear, independent appointment process typically expected of publicly-funded bodies; opaque operations; little legal clarity whether it can form 'part of' cabinet and rely on cabinet confidentiality; and the absence of a duty to publicly disclose conflicts of interest.

## Recommendations

This Policy Brief makes five recommendations, several of which have been adopted, with permission, from a [statement](#) released by the Centre for Public Integrity:

- (a) **Enabling legislation:** Enabling legislation should be tabled before Parliament, establishing the NCC as an independent body, external to Cabinet, that is subject to integrity and transparency safeguards like other commissions.
- (b) **Oversight mechanisms:** Accountability measures should include a parliamentary oversight committee, review of the NCC's role and operations after the first year of operation, and regular reporting including a government duty to publish its response to recommendations.
- (c) **Transparency:** Measures to achieve transparency regarding the NCC's routine operations, including a requirement that the NCC publish a register of meetings, processes for soliciting proposals, the identity of its membership and any advice to Cabinet.
- (d) **Conflict of interest register:** A conflict of interest disclosure register should be established, maintained by all members of the NCC, as well as by members of associated taskforces and advisory bodies. The register should be published on the Department of Prime Minister and Cabinet's website, along with processes for managing conflicts of interest in the work and advice of the Commission and an active register of recusals from meetings.
- (e) **Independent appointment process:** A fair and open system for the appointment of Commissioners, and members of its taskforces should be set up, via legislation. The NCC must also have broader representation of Australian society and economic stakeholders, including representatives of groups most impacted and at risk during the economic recovery.

# Private Actors & Crisis

## Scrutinising the National Covid-19 Commission Advisory Board

### 1. Introduction

The Covid-19 pandemic has been accompanied by an expansion of executive power in many states.

Executive expansion may produce additional challenges for democracies when it collides with longer-standing problems of regulatory capture and clientelism: the tendency of regulatory agencies – or governments – to become dominated by the interests of a particular industry or group of private actors.

In this regard, the National Covid-19 Commission Advisory Board (NCC) warrants scrutiny. The NCC presents a case study of the particular risks that executive power allied with vested interests poses during times of crisis. This brief provides an overview of the NCC as well as specific problems entailed by its appointment process, composition, lack of transparency and lack of legislative underpinning.

### 2. The NCC

The NCC is an advisory body to Federal government, operating within the Department of Prime Minister and Cabinet. Established on March 25 at the beginning of the pandemic, the initial function of the NCC — previously the National Covid-19 Coordination Commission — was to secure supply chains of medical equipment. The NCC later evolved into an advisory body to Cabinet

regarding Australia’s longer-term economic recovery. On 27 July 2020 the Commission was renamed as the National Covid-19 Commission Advisory Board, and expanded and repurposed to support the government’s ‘JobMaker’ plan.

The Prime Minister has stated that this shift means that the Board will “work within government” and form part of Cabinet deliberative processes, rather than as an external agency. If the NCC were to form part of Cabinet, it could potentially claim Cabinet confidentiality with respect to its advice. Six additional members from the private sector were also invited to join.

Three taskforces are also attached to the NCC. Those three working groups consider manufacturing, charity and philanthropy and industrial relations. The three taskforces emerged over time and comprise members who are not necessarily official commissioners of the NCC. Their function appears to be to advise the NCC, which in turn advises Cabinet. Upon questioning by the Senate Select Committee on Covid-19, commissioners acknowledged that the process through which the taskforces and the NCC form advice and deliver this to Cabinet is “opaque”.

### 3. Legal Basis & Appointment

Controversially, the NCC lacked terms of reference in its initial form. These were later introduced in early May — more than a month after the

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Commission was established and accreted new functions.

The NCC also lacks a legislative underpinning, established as an exercise of non-statutory executive power. Its members appear to have been appointed by the Prime Minister personally, with the criteria for appointment unclear. Responses obtained by the Senate Select Committee on Covid-19 suggest appointments were determined through informal “discussion” between the Prime Minister’s office and prospective commissioners.

Independent appointments and a legislative underpinning are typically expected of publicly funded agencies. Given that the NCC was not established via legislation, it is unclear whether the ordinary obligations that govern commissions apply. The Prime Minister’s announcement that the NCC will “form part of Cabinet deliberative processes” further clouds this question.

media in late May that was prepared by the manufacturing taskforce recommended significant investment into gas infrastructure, including the construction of a \$6bn trans-Australian pipeline.

Notably, the report did not address alternatives to gas-driven recovery nor analysis that demand for gas has consistently fallen over recent years. This has led to an oversupply of gas, with leading Australian gas companies writing down assets. The report also didn’t address analysis that gas will not be competitive with renewable alternatives over the coming decades. According to the Australian Energy Market Operator, the competitiveness of gas as a future investment will depend upon it settling at \$6 a gigajoule, which is not considered likely.

Several of the NCC’s commissioners — as well as members of its manufacturing taskforce — have links to the gas industry, including the NCC’s Chairman. According to the Senate Select

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## The composition of the NCC, as well as that of its manufacturing taskforce, has attracted a perception that it is affected by conflicts of interest.

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The NCC has accreted significant power in advising the Department of Prime Minister and Cabinet on spending potentially billions of dollars of public money. Civil society groups, members of parliament and retired judges have expressed concern regarding the lack of proper governance structures. As the Australia Institute noted, the “rationale for a recovery planning body operating outside of normal democratic and public policy processes remains incredibly unclear”.

### 4. Composition & Conflict of Interest

The composition of the NCC, as well as that of its manufacturing taskforce, has attracted a perception that it is affected by conflicts of interest. At an early stage the NCC championed gas as central to Australia’s economic recovery from Covid-19 related recession, particularly in relation to manufacturing. A report leaked to the

Committee on Covid-19, five members of the manufacturing taskforce had direct financial or commercial interests in the development of the infrastructure proposed in the leaked report.

While industry advice and business expertise has a legitimate role to play in guiding Australia’s economic recovery, commissioners with connections to the gas and fossil fuel industries are overrepresented within the NCC. The six commissioners who joined in July introduced some diversity to the NCC, bringing experience from the hospitality and agriculture industries.

However, given the NCC’s early focus on energy and manufacturing, its lack of diversity with respect to energy alternatives has not been addressed. Advisory bodies reflecting specific expertise may advise executive departments. The purpose of these bodies, however, is to be representative across a particular policy community.

While commissioners must declare any conflicts of interest, these declarations are made privately and are not disclosed to the public. With the exception of the Chairman, members of taskforces are not required to provide statements regarding their conflicts of interest at all.

Multiple sources have exerted pressure upon the NCC to publish its conflict of interest declarations, including the Senate Select Committee on Covid-19 and the Centre for Public Integrity. The Department of Prime Minister and Cabinet has defended its decision to refuse to release conflict of interest declarations due to concerns for the commissioners' privacy.

## 5. Transparency & Cabinet Deliberations

The NCC has been challenged for its lack of transparency. It has refused to publish its conflict of interest register on the grounds that it contains “sensitive personal information”. The NCC does not disclose the details of its daily operations, nor the process through which advice is formed and delivered. While the NCC is subject to the Freedom of Information regime, it has relied heavily on public interest conditional exemptions.

The executive's move to redesign the NCC as part of Cabinet is also cause for concern. This may allow the NCC to potentially rely upon Cabinet confidentiality and claim the Cabinet exemption for Freedom of Information requests. It is part of a concerning trend of the executive creating new governance structures — and claiming that they form part of Cabinet — in a way that seems intended to extend the immunities and privileges enjoyed by the Cabinet to those structures.

Public interest groups are currently challenging whether ‘National Cabinet’ can form part of

federal Cabinet, including as a subcommittee. Legal advice has indicated that the federal Cabinet and its committees and subcommittees must be comprised of federal government ministers. Similar criticism could be directed at the NCC, as it is comprised of private individuals rather than federal government ministers.

## 6. Democratic Deliberation & the Climate Crisis

The NCC's advocacy for investment in fossil fuel infrastructure introduces an additional dimension to its governance problems.

The future of Australia's energy mix is increasingly controversial, particularly in the wake of Australia's recent bushfire crisis. While gas produces less emissions than oil or coal, recent studies have indicated that it could produce more emissions than previously assumed.

Developments in energy storage technologies over recent years have also made renewable energy sources increasingly reliable and a cheaper alternative to fossil fuels.

The competitiveness of renewable alternatives, coupled with a need to respond to the climate crisis, make decisions concerning the future of energy in Australia increasingly contentious. More than ever, Australia's response to the climate crisis invites democratic debate and transparency in decision-making. Decisions made now may lock Australia into infrastructure and economic path dependencies for decades to come. An overemphasis on investment in one industry could expose Australia to the risk of stranded assets.

The Covid-19 crisis has compounded an existing problem that the climate crisis posed for democratic institutions. Responding to the climate crisis requires long-term political commitments,

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with costs incurred in the short-term to achieve long-term benefit. However, the focus of governments — and political parties — tends to be tied to the electoral cycle.

That focus upon short-term electoral cycles is further aggravated by political party dependence upon private donors. The fossil fuel sector donated nearly \$1.9m to political campaigns before the 2019 Federal election. Donations by the sector to political parties have also doubled over the past four years.

The ability of social movements to drive large-scale structural change — such as that required to address the climate crisis — is tied to the ability of those movements to command social and political capital over the longer-term. That capital must bridge electoral cycles and challenge the dependence of political parties upon private sector donations across the political spectrum.

However, acute, short-term crises — such as that posed by the Covid-19 pandemic — create conditions where the platforms given to particular policy concerns are temporarily altered and distorted. While short-term crises can provide an opportunity for structural change, they can also disrupt and distract from political momentum.

The risks of executive power expansion attending the Covid-19 crisis must be considered in this light. With minds focussed on responding to the immediate crisis, less media and public attention is directed towards other pressing political and policy concerns.

This is true of the climate crisis, which opened 2020 as a key policy concern in Australia. With political capital, media focus and public attention diverted away from the climate crisis, executive decisions that may impact that crisis risk losing yet another important accountability mechanism.

## 7. Conclusion

The NCC offers lessons to consider when scrutinising the accretion of executive power during moments of crisis. Executive arrangements — including advisory bodies and decision-making structures — must be considered within the broader context in which executive power is wielded and shapes public life in a democracy.

In Australia, the relationship between executive decision-making, political parties and regulatory

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capture remains a challenge for democracy. Such challenges in turn colour the nature of novel advisory bodies and structures created to respond to moments of crisis. And although not immediate, the risks entailed within executive subversion of democratic deliberation reach far further than the life of the crisis itself.

After all, the political debate attending the climate crisis is one of longer-term cost weighed against short- and medium-term investment. Decisions reached by the executive now may affect the public for decades to come. This makes the case for broader, contextual scrutiny of executive arrangements established during the crisis all the more compelling.



## Fig 1 Accountability & Climate Crisis

The future of Australia's energy mix is increasingly controversial, particularly in the wake of Australia's recent bushfire crisis, which was the central policy concern at the start of 2020. More than ever, Australia's response to the climate crisis invites democratic debate and transparency in decision-making. With political capital, media focus and public attention diverted from the climate crisis to the pandemic, executive decisions that may impact that crisis risk losing yet another important accountability mechanism.



# References

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Note: A variety of references in this text are provided as hyperlinks within the text. This references section lists selected texts. A small number of these texts are not linked in the text but provide useful background reading.

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Governing During Crises is a research theme established by the School of Government at the University of Melbourne. The series seeks to develop our understanding of governing in the face of different types of crisis, at a time when Australia has recently faced the bushfire crisis, is currently addressing the COVID-19 pandemic, and faces even larger and longer-term challenges including climate change.

This Policy Brief series aims to distil academic research into policy analysis and clear recommendations, drawing on the cutting-edge research taking place at the School of Government and the University of Melbourne more broadly, as well as the School of Government's extensive global networks. Selected briefs will be produced in collaboration with the COVID-DEM project ([www.democratic-decay.org](http://www.democratic-decay.org)), which examines how the pandemic is affecting democracy in Australia and worldwide.



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