



GRATA FUND

Submission to the Inquiry into the Appointment of the Former Prime Minister to
Administer Multiple Departments

7 October 2022



*Grata Fund is a partner of the University of New South Wales
Faculty of Law and Justice.*



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The Hon Virginia Bell AC
Ministries Inquiry
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email only: submissions@ministriesinquiry.gov.au

Dear Ms Bell

Submission to the Inquiry into the Appointment of the Former Prime Minister to Administer Multiple Departments

Grata Fund welcomes the opportunity to make a submission to the Inquiry into the Appointment of the Former Prime Minister to Administer Multiple Departments (**the Inquiry**).

About Grata Fund

Grata Fund is Australia's first specialist non-profit public interest litigation incubator and funder. Grata Fund develops, funds, and builds sophisticated campaign architecture around high impact, strategic litigation brought by people and communities in Australia. We focus on communities, cases and campaigns that have the potential to break systemic gridlocks across human rights, climate justice and democratic freedoms. Grata Fund is a charity based at the University of New South Wales (UNSW) Faculty of Law and Justice.

Since 2016, we have supported strategic public interest litigation and developed broader advocacy projects that seek to protect democratic freedoms, including in relation to freedom of information and the voting rights of prisoners. Grata Fund strongly advocates for government transparency in order to better uphold responsible government and democracy in Australia.

Summary of Grata Fund's position on the appointments

The secret ministerial appointments have significantly undermined the accountability and transparency of government. In the context of diminishing public



confidence in government, action must be taken to reduce unnecessary government secrecy and to strengthen the democratic system.

Grata Fund recommends that:

1. The convention of publishing ministerial appointments be codified in an amendment to the *Ministers of State Act 1952* (Cth); and
2. Any ministerial appointments not published in the Government Gazette be brought within the remit of the National Anti-Corruption Commission currently proposed in the National Anti-Corruption Commission Bill 2022 (Cth).

Submission on Term of Reference (b)(iv): Secret ministerial appointments undermine the public's confidence in government

According to the Museum of Australian Democracy's 2018 research, satisfaction in democracy has more than halved in the last decade and public confidence in government is declining.¹ This research projects that if current trends continue, by 2025, fewer than 10 per cent of Australians will trust their government.² Australia has reached a tipping point and government agencies need to take action to promote transparency and rebuild public confidence in government.

In this context, the Hon Scott Morrison MP's secret ministerial appointments sent a bleak message to the Australian public about the future of government accountability and transparency. Grata Fund echoes Professor Anne Twomey's view that the public has an expectation of transparency and, in the absence of such transparency in ministerial appointments, the public may perceive that ministers can appoint themselves to multiple portfolios and exercise significant power in secret without the level of public scrutiny otherwise expected in Australia's system of responsible government.³

When Mr Morrison was secretly appointed as Minister for the Department of Industry, Science, Energy and Resources in April 2021, he exercised his new ministerial powers to overrule the existing Minister's assessment of an offshore gas exploration permit renewal application. There was no way for the public to hold Mr Morrison accountable for decisions he made in the Industry, Science, Energy and Resources portfolio because they did not know that he had been appointed to

¹ Gerry Stoker, Mark Evans and Max Halupka, *Democracy in Australia: Democratic decline and renewal* (Report No. 1, December 2018), 9.

² Ibid 5.

³ Professor Anne Twomey, 'Explainer: Scott Morrison was sworn in to several portfolios other than prime minister during the pandemic. How can this be done?' (Online, The Conversation, 15 August 2022) <<https://theconversation.com/explainer-scott-morrison-was-sworn-in-to-several-portfolios-other-than-prime-minister-during-the-pandemic-how-can-this-be-done-188718>>.



administer it. Therefore, although the secret ministerial appointments were not found to be illegal per se, they diminished confidence in government by undermining the public's ability to scrutinise government decision-making.

Submission on Term of Reference (b)(iii): Secret ministerial appointments make it impossible for Parliament to hold the Executive Government to account

From March 2020, Mr Morrison was secretly appointed to administer five Commonwealth departments without informing Parliament or the public. These secret appointments were problematic because they breached constitutional conventions which enable Parliament to hold the Executive Government to account. Constitutional experts have observed that the continuous breach of conventions can have a more significant impact on the public than the breach of the Constitution itself.⁴

Normally, when ministers are appointed to administer Commonwealth departments under section 64 of the Constitution, convention requires that the appointments be published in the Government Gazette. This convention ensures the appointed ministers can be held accountable to Parliament, and ultimately, to the public. When ministerial appointments are not published, Parliament cannot hold ministers to account for the administration of their departments as Parliament does not know which ministers are responsible for which department.⁵ As the Solicitor-General identified in his advice to the Prime Minister, the failure to follow the convention of publishing appointment decisions “fundamentally undermined” the doctrine of responsible government.⁶ Responsible government is a core element of Australian democracy because it ensures that the Executive Government is accountable to the public via the doctrine of representative government. The secret appointments therefore exposed a deficiency in the law which fails to uphold the democratic principles of open government.

Term of Reference (d): Recommendations on procedural or legislative changes which would provide greater transparency and accountability

Recommendation: The Australian Government should introduce a statutory requirement that ministerial appointments under section 64 of the Constitution be published

⁴ Sarah Josephy, Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook Co, 2019) 9 [1.25].

⁵ Solicitor-General Stephen Donaghue KC, ‘In the matter of the validity of the appointment of Mr Morrison to administer the Department of Industry, Science, Energy and Resources (Opinion)’, (SG No. 12 of 2022), 22 August 2022, 3 [8].

⁶ Ibid 23 [46].



There should be no doubt in the mind of Parliament or the public about who ministers are and what responsibilities they hold. Grata Fund recommends that Parliament amend the *Ministers of State Act 1952* (Cth) to require that all ministerial appointments made under section 64 of the Constitution be published in the Government Gazette.⁷

The codification of this procedure will close the loophole which allowed Mr Morrison to be appointed secretly without any legal obligation being breached. It will ensure that the practice of gazetting appointments is formalised and that appointments to administer departments are consistently reported. This could also provide an avenue for investigation and enforcement if future breaches occur.

Recommendation: The National Anti-Corruption Commission should have jurisdiction to consider secret ministerial appointments and have powers to investigate

Grata Fund sees the proposed introduction of the National Anti-Corruption Commission (**the NACC**) currently before Parliament as another opportunity to introduce the statutory requirement for publication outlined above. Secret ministerial appointments undermine the accountability of public administration, which is a key objective that the NACC should promote.⁸

Grata Fund welcomes the suite of investigative powers proposed in National Anti-Corruption Commission Bill 2022 (Cth) (**the Bill**) to allow for the effective investigation of corrupt conduct. However, the proposed scope of the NACC's jurisdiction may not currently include secret ministerial appointments even though this practice poses a clear risk to responsible government and public confidence in government.⁹

The definition of 'corrupt conduct' outlined in clause 8 of the Bill requires impropriety, abuse of office or deliberate dishonesty to be present in the relevant conduct in order for the conduct to be subject to the NACC's investigative powers. These characteristics may be absent in certain cases of secret ministerial appointments, creating ambiguity about whether this conduct would be within the jurisdiction of the NACC. Grata Fund sees the secrecy of appointments as a threat to accountability even though there may be no ill intent or personal gain involved.

⁷ Solicitor-General Stephen Donaghue KC (n 1) [54]; Luke Beck, 'Parliament must act to ensure Australia never has 'secret ministers' again.' *The Conversation* (Online, 17 August 2022) <<https://theconversation.com/parliament-must-act-to-ensure-australia-never-has-secret-ministers-again-188884>>.

⁸ Transparency International Australia, 'A fit for purpose National Integrity Commission' (Position Paper, August 2020), 2.

⁹ See National Anti-Corruption Commission Bill 2022 (Cth) Pt 6, Div 2; Pt 7.



To overcome this, the proposed definition of 'corrupt conduct' in clause 8 should be expanded to include secret ministerial appointments in a separate subsection. In this subsection, 'secret ministerial appointments' should be further defined to mean, for the avoidance of doubt, ministerial appointments that are not published in the Government Gazette. This will make it clear on the face of the legislation that secret ministerial appointments fall within the jurisdiction of the NACC and it will deter politicians from engaging in this practice.

Taking these actions will send a strong message to the public that the Executive Government is accountable to Parliament and to the Australian public, and will not be allowed to compromise that accountability through secrecy. Grata Fund sees this as a positive step towards rebuilding confidence in public administration and protecting Australia's future as a transparent, democratic state.

Please do not hesitate to contact Courtney Law at info@gratafund.org.au should you wish to discuss our submission.

Yours sincerely

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