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COAG

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by Lynsey Blayden

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COAG

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CONTENTS

SUMMARY.....	i
1. Introduction.....	1
PART ONE	
2. COAG.....	3
a. Members.....	5
b. Meetings.....	6
c. Meeting agendas.....	6
d. COAG communiqués.....	7
3. The Council for the Australian Federation (CAF).....	8
4. COAG Councils & other modes of intergovernmental relations.....	9
a. Reform of the former Ministerial Council system.....	10
b. New Council system.....	11
c. Standing Councils.....	14
i) Role and administration of Standing Councils.....	14
ii) List of Standing Councils.....	15
d. Select Councils.....	16
i) Role and administration of Select Councils.....	16
ii) List of Select Councils.....	17
e. Legislative and Governance Fora.....	18
f. Working Groups.....	19
g. Business Advisory Forum.....	19
h. Senior Officials Groups/Advisory Councils & the bureaucracy.....	20
i. Secretariats.....	22
j. Participation by NSW in COAG Councils.....	23
5. The COAG National Reform Agenda.....	25
a. 2006 – the foundations of a new approach.....	25
b. Scope of the first Rudd Government's agenda.....	26
c. Current Reform Agenda.....	29
6. Implementation of national reform.....	31
7. Intergovernmental Agreement on Federal Financial Relations.....	32
a. Former funding arrangements.....	32
b. Reforms of the first Rudd Government.....	35
c. Terms of the IGA on Federal Financial Relations.....	36

i) Specific Purpose Payments under the IGA	37
ii) National Agreements	38
iii) National Partnership payments	42
iv) General revenue payments and the GST	43
d. Issues with the IGA on Federal Financial Relations	45
8. Measuring Progress: The COAG Reform Council.....	47

PART TWO

9. COAG & Federalism.....	50
a. Commonwealth/State financial relations and vertical fiscal imbalance	52
b. Division of powers.....	53
c. Lack of a constitutional mechanism for intergovernmental relations....	54
10. COAG & the practice of intergovernmental relations in Australia.....	55
a. Lack of transparency in intergovernmental relations.....	56
b. Accountability – COAG, intergovernmental relations and Parliaments	58
c. Commonwealth's dominance of COAG	65
d. Lack of institutional structures and systems	68
e. COAG & the consequences of co-operative schemes.....	73
11. Conclusion	76

SUMMARY

In 2006, the Council of Australian Governments (COAG) adopted a new national reform agenda and established the COAG Reform Council, developments which were later used as a foundation for the first Rudd Government's reforms to intergovernmental relations in Australia. These reforms used COAG as their focus and established a revised federal financial relations scheme and a broader reform agenda. They also gave the COAG Reform Council an expanded role in measuring the progress of reform across all jurisdictions and reporting its findings to COAG.

The apparatus of COAG and intergovernmental relations now encompasses an extensive system of COAG Councils and other fora, as well as less visible forms of collaboration, which take place between the agencies and officers of all levels of government. This structure is largely focussed on developing and implementing the COAG reform agenda, which covers a wide range of policy fields, including education, skills and training, health, housing and homelessness, the environment and regulatory reform. This policy agenda is underpinned by the revised financial framework that is embodied in the Intergovernmental Agreement on Federal Financial Relations.

The reforms to COAG and its processes instituted by the first Rudd Government have changed the character of COAG, arguably transforming it from a leaders' summit to a central institution of government. This new significance of COAG has given rise to renewed concerns relating to the lack of permanency, transparency and accountability in intergovernmental relations.

This paper provides an overview of the operation of COAG, and other aspects of intergovernmental relations in Australia. A two-part approach has been taken. Part One provides a 'bare bones' overview of the framework of COAG and its reform agenda. Its aim is to provide a kind of 'mud map' to enable relatively easy navigation of the labyrinthine structure of COAG, its associated Councils and its current reform agenda. Much of the information contained in the first part is taken from COAG-related websites. In an attempt to make this map clear, commentary and critique has been left to Part Two of the paper, to the extent that this is possible.

COAG is something of an atypical body or institution, neither constitutional nor statutory in origin or nature. It is more amorphous, an administrative creation of executive will, resistant to neat description or characterisation. It is something of a moveable feast, constantly changing and adapting to political and other circumstances. Any description of it can therefore only hope to capture its working at a particular point in time. It is this task that Part One of this paper has set itself, relying solely on publicly available material.

Part Two provides an overview of some of the current evaluations of COAG, in light of its apparent transformation, and also some of the suggestions for reform that have been put forward. Part Two does not attempt to cover all of the relevant issues that are identified in the literature about federalism and intergovernmental relations. Its aim is rather to canvass some of these issues

in a broad way while focussing primarily on COAG. Discussed in Part Two are the following issues with COAG and the practice of intergovernmental relations in Australia:

- Lack of transparency in intergovernmental relations;
- Accountability – COAG, intergovernmental relations and Parliaments;
- Commonwealth's dominance of COAG;
- Lack of institutional structures and systems; and
- COAG & the consequences of intergovernmental relations.

Many of the problems associated with intergovernmental relations in Australia can be traced back to the features of Australia's federal structure, which continues to influence and shape the ways in which governments transact their affairs. The continuing relevance of the issues discussed in Part Two of this paper suggest the need for considered evaluation of Australian federalism in the twenty-first century, what it is, what it does, what it should do and where it is going.

1. INTRODUCTION

In recent times it seems that there has been a growing acceptance that an ever wider range of policy challenges require a nationally coordinated response. For example, much of the discussion of policy that presently takes place in the public domain is focussed on big-ticket reforms such as the implementation of the National Disability Insurance Scheme (the NDIS or “[DisabilityCare](#)”) and the Commonwealth Government’s reform of education funding, usually referred to as the “Gonski” reform. The delivery of such national initiatives requires intergovernmental cooperation. As the principal forum for intergovernmental relations in Australia, the Council of Australian Governments, or COAG, has accordingly attained a new significance. Some have even suggested that, as a consequence of this significance, it has transformed from a mere leaders’ forum into a powerful institution of executive government.¹ In addition to its far-reaching reform agenda, it now has a system for the reporting of performance on the progress of the implementation of reforms, along with a revised scheme for the funding of those reforms. This transformation has given rise to observations regarding the need to make some changes to COAG’s role and processes, to better equip it to fulfil the role it has assumed.

The first Rudd Government attempted to improve the workings of the federation by reforming COAG and its processes. It is arguable, though, that this attempt to strengthen COAG to facilitate more effective intergovernmental collaboration has been undermined by the complex forces at play within Australia’s federal structure. For example, while cooperation has been achieved across a diverse range of fields, the Commonwealth tends to dominate collaborative policy efforts, largely, but not only, as a result of its superior fiscal power. The Commonwealth’s dominance of COAG, which extends to its control of when and how often COAG meets, as well as meeting agendas, was noted by Barry O’Farrell in February 2011, prior to the election of his Government in NSW. He also spoke of an “unconsidered slide towards a coercive centralism”, and warned against allowing COAG “to become a fourth arm of government.”²

Claims that Australia’s federal system is dysfunctional continue to be made. The results of the most recent survey of Australian Constitutional Values, conducted by Newspoll for Griffith University (Centre for Governance & Public Policy, and Griffith Law School) and the University of New South Wales (Gilbert + Tobin Centre of Public Law) suggest that there has been an increase in public dissatisfaction with the federal system. The survey found that 66% of respondents “do not believe that federal and state governments are working well together”.³ Further, it was found that “[s]ince 2008 there has been an 8%

¹ P McClintock, “[Renewing the mandate: COAG and its reform agenda in 2011](#)”, Speech to the Committee for the Economic Development of Australia (Sydney, 9 February 2011).

² NSW Parliamentary Library Research Service, [Key Issues and Regional Profiles for the 55th Parliament](#), Background Paper No 2/2011, 8.

³ A J Brown, “[Political investment needed in federal reform: National survey results](#)”, Griffith University media release (17 October 2012), [Australian Constitutional Values Survey](#).

fall in confidence in intergovernmental collaboration, and a similar 8% rise in those believing the federal system as a whole is not working overall"; the survey also recorded "a huge 21% fall in confidence in the federal level of government as the most effective at its job."⁴

Reform of the federation is once again on the agenda in the current federal election campaign. In his budget reply speech, Tony Abbott said that "the blame game between the Commonwealth and the states that Kevin Rudd promised to end has become worse than ever." He pledged:

Within two years of a change of government, working with the states, the coalition will produce a white paper on COAG reform, and the responsibilities of different governments, to ensure that, as far as possible, the states are sovereign in their own sphere.

The objective will be to reduce and end, as far as possible, the waste, duplication and second-guessing between different levels of government that has resulted, for instance, in the Commonwealth employing 6,000 health bureaucrats even though it does not run a single hospital.⁵

This paper provides an overview of the operation of COAG, and other aspects of intergovernmental relations in Australia. A two-part approach has been taken. Part One provides a 'bare bones' overview of the framework of COAG and its reform agenda. Its aim is to provide a kind of 'mud map' to enable relatively easy navigation of the labyrinthine structure of COAG, its associated Councils and its current reform agenda. Much of the information contained in the first part is taken from COAG-related websites. In an attempt to make this map clear, commentary and critique has been left to Part Two of the paper, to the extent that this is possible.

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[Results Release 1](#), (17 November 2012).

⁴ Ibid.

⁵ T Abbott, Parliament of Australia, House of Representatives, *Hansard* (16 May 2013) 88-93, 92.

PART ONE – THE FRAMEWORK

2. COAG

COAG was set up in 1992 to facilitate cooperation between the Commonwealth and State and Territory Governments on issues of national importance. It grew out of the Special Premiers' Conferences, which had been initiated by the Hawke Government, following recognition that there was a need for "a new initiative in intergovernmental relations."⁶ The first meeting of COAG was held in Perth on 7 December 1992.

In the intervening two decades, the importance of COAG has waxed and waned.⁷ In recent years, however, COAG has assumed a new significance in the landscape of intergovernmental relations in Australia.⁸ In the lead up to the 2007 election, Kevin Rudd's campaign platform had included a commitment to renewed cooperation between the Commonwealth and the States and Territories.⁹ In power, Rudd declared his intention to make COAG the "workhorse of the nation".¹⁰ Almost immediately¹¹, he set about reforming the framework of intergovernmental relations in Australia, with the aim of increasing collaboration between Commonwealth and State Governments in the delivery of nationally significant reform, using COAG as the "vehicle" for this new approach.¹² These developments occurred at a time when Mr Rudd's party was also in government in every State and Territory.

McQuestin summarises the focus of the first Rudd Government's reforms as follows:

Rudd's reforms targeted the main apparatus of intergovernmental relations by focusing on three broad areas:

- a new flexible and accountable financial framework for Commonwealth-state transfers;
- procedural modifications to COAG and its decision-making structures; and

⁶ M Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (1998), 36.

⁷ P Kildea and A Lynch, "Entrenching 'cooperative federalism': Is it time to formalise COAG's place in the Australian Federation?" (2011) 39(1) *Federal Law Review* 103-129, 103.

⁸ This is acknowledged by the "[COAG's National Reform Agenda](#)" webpage on the [COAG website](#), which states that "[s]ince December 2007, COAG has grown and has taken on an important new role."

⁹ G Anderson, "Whither the Federation? Federalism under Rudd", (2010) 5(1) *Public Policy*, 1-22

¹⁰ P Karvelas, "Rudd harnesses COAG 'workhorse'", *The Australian* (21 December 2007), 1.

¹¹ A meeting of COAG was held on 20 December 2007 (see [communiqué](#)).

¹² A Fenna and G Anderson, "The Rudd reforms and the future of Australian federalism" in G Appleby, N Aroney and T John (eds) *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (2012) 393-413, 397.

- expansion of the role and function of the COAG Reform Council to provide transparency through reporting.

The first was to place financial transfers on a more sustainable footing, the second was to facilitate progress and the third was to support the implementation of the broad ranging, and comprehensive sectoral reform agenda.¹³

COAG is now situated at the centre of an ambitious national reform agenda. It is also the apex of a vast structure dedicated to facilitating intergovernmental collaboration. It is a forum where the leaders of Commonwealth, State and Territory Governments meet and agree, or disagree, on the nationwide implementation of reforms in a sweeping range of policy areas, from competition policy and initiatives aimed at reducing red tape, to social policy in areas like health, education and disability reform, as well as policies relating to matters such as organised crime. Where consensus is reached at COAG, it is usually reflected in an intergovernmental agreement, which is a document setting out the terms of the agreement, the implementation of which is often the responsibility of more than one level of government. Progress on the implementation of these reforms is tracked against identified indicators by the COAG Reform Council, which reports periodically to COAG.

The leviathan nature of COAG's reform agenda has attracted criticism centred around whether or not it is possible for COAG to deliver on its many commitments; there is debate, too, about the way this agenda facilitates the Commonwealth's encroachment on fields of responsibility that were formerly the sole preserve of the States. The scope of COAG's agenda is problematic from other perspectives. For example, on one analysis, COAG's status as a final decision making body in relation to such a broad array of policy matters means that it no longer functions as simply a leaders' forum, resembling instead a powerful institution of executive government.¹⁴ As the former Chairman of the COAG Reform Council, Paul McClintock, said in a 2011 address:

The role of COAG has changed profoundly over the past two decades. When I observed it closely in the early 2000s it was an occasional summit meeting of domestic political leadership. There has, of course, been the perennial issue of Commonwealth-State funding agreements, but the complexity of these has increased over time. From the early 1990s there was the focus on competition reforms, including early steps on water and energy reform. By 2006, however, the COAG reform agenda had expanded considerably, culminating in the then National Reform Agenda.

The Rudd government took this to a new level, and decided that COAG would take on the paramount leadership role in the federation, including detailed

¹³ M McQuestin "Federalism under the Rudd and Gillard Governments" in P Kildea, A Lynch and G Williams (eds) *Tomorrow's Federation* (2012) 6-25, 12.

¹⁴ McClintock, above n 1, 1. See also P Kildea, "Making Room for Democracy in Intergovernmental Relations" in P Kildea, A Lynch and G Williams (eds), *Tomorrow's Federation* (2012) 73-91, 74, P O'Meara and A Faithfull, "Increasing Accountability at the Heart of the Federation" in P Kildea, A Lynch and G Williams (eds), *Tomorrow's Federation* (2012), 92-112, 92.

oversight of the implementation of federally agreed programs. An ambitious forward program of reform – the COAG reform agenda - was developed. The high point of this process was the Intergovernmental Agreement of Federal Financial Relations, or IGA, which from January 2009 changed the way the financial affairs of the commonwealth and states were conducted.¹⁵

O'Meara and Faithfull have also observed:

COAG has evolved to become a body that negotiates major policy reform, oversees intergovernmental bodies and arrangements that implement such reform, and develops and agrees to strategic, intergovernmental responses to key issues impacting the nation.¹⁶

In comparing COAG to Cabinet, they further stated:

Whereas Cabinet brings together Ministers of a sovereign government under the leadership of a first minister, COAG brings together first ministers of the Australian federation – leaders of sovereign governments with their own philosophies, political affiliations, mandates and priorities, in addition to a representative of local government. It also brings together in the same forum access to all of the levers – funding, legislation, regulation and service delivery – across all policy domains, spanning Commonwealth, state and local government responsibilities. In many cases, this can mean COAG is better placed to pursue more substantial and effective reform than that initiated by Commonwealth or state Cabinets. This unique breadth of influence not only illustrates the great untapped potential that COAG holds but also affirms its role as the institutional heart of the federation.¹⁷

However, COAG remains a largely informal body that is not governed by legislation and has no real legal status. Its ostensible growth in power and reach, in the absence of an attendant progression in its governance arrangements, has given rise to a number of concerns amongst some commentators regarding efficiency, transparency and accountability-related issues. These concerns are outlined in Part Two of this paper.

The [COAG website](#) is a rich source of information about COAG and what it does. Much of the information in Part One of this paper has been taken from this and related websites. Links have been provided where relevant.

a. Members

The members of COAG are the Prime Minister, the first ministers (ie the Premiers and Chief Ministers) of each State and Territory and the President of the Australian Local Government Association.

Between December 2007 and April 2009, the Commonwealth, State and Territory Treasurers also attended COAG meetings. Treasurers now attend

¹⁵ Ibid (McClintock), 2.

¹⁶ O'Meara and Faithfull, above n 14, 94-95.

¹⁷ Ibid, 95.

meetings of the Standing Council on Federal Financial Relations instead. Further information regarding this and other COAG Councils is provided below at section 4 of this paper.

b. Meetings

There are no requirements as to where and how often COAG is to meet. The timing and frequency of meetings appears to be a matter largely determined by the Prime Minister, “after seeking the views of other first ministers.”¹⁸

Under the first Prime Ministership of Kevin Rudd COAG had met nine times by the end of his second year in office.¹⁹ By comparison, COAG met twice during the first two years of John Howard’s Prime Ministership and fourteen times in total during the 11 years of his Government.²⁰ It also met only once in 2010, twice in 2011 and three times in 2012. Its most recent meeting took place on 19 April 2013.

Meetings are frequently held in Canberra, but they can be held in State and Territory capitals from time to time. During the time that Kevin Rudd was the Prime Minister, for example, meetings were held in Melbourne, Sydney, Adelaide, Perth, Hobart and Brisbane.

c. Meeting agendas

According to the “Protocols for Council of Australian Governments and Senior Officials Meetings”, which is annexed to the [2011 report](#) of the Senate Select Committee on the Reform of the Australian Federation:

A draft agenda for COAG meetings will be prepared by the Commonwealth and circulated to other COAG members at the Officials-level as soon as possible. The Commonwealth will seek to consult with jurisdictions in the preparation of the COAG agenda early in its development.

The draft agenda may also be considered at the final Senior Officials meeting/videoconference prior to the COAG meeting.²¹

The “Protocols” document further indicates that other jurisdictions and the Australian Local Government Association “will have the opportunity to propose items for both COAG and Senior Officials meetings” and sets out criteria for determining whether an issue should be included on the agenda, as well as a structure for the agenda.²² However, it seems that the agenda for a given

¹⁸ Ibid, 96.

¹⁹ Fenna and Anderson, above n 12, 397.

²⁰ Ibid.

²¹ Department of Prime Minister and Cabinet, “Protocols for Council of Australian Governments and Senior Officials Meetings”, appendix 3, Senate Select Committee on the Reform of the Australian Federation, [Report: Australia’s Federation: an agenda for reform](#) (June 2011), 137.

²² Ibid, 137-8.

meeting of COAG is usually ultimately determined by the Commonwealth.²³

d. COAG communiqués

Following a meeting of COAG, a communiqué containing the public record of the meeting is released. These communiqués do not reflect the entire record of meetings, in the way that minutes might, for example. Rather, they contain a series of high-level statements outlining the outcomes of the meeting, and resemble media releases to a certain extent. They can therefore seem somewhat opaque to readers who might be attempting to gain a deeper understanding of what may have transpired at COAG in relation to a particular policy issue. Agenda papers and other documents prepared for consideration by COAG are not routinely made public.

According to the “Protocols for Council of Australian Governments and Senior Officials Meetings”, referred to above:

The preparation of the communiqué, to be released at the conclusion of a COAG meeting, is a joint activity between all COAG members. COAG meeting communiqués will be as short as practicable, compelling and written in action-oriented plain English that will resonate with the Australian community. Matters of detail may be better addressed through the record of the meeting.

The Protocols document further states that communiqués are prepared in advance of the meeting, so COAG is able to agree their public release at the meeting:

A draft communiqué will be prepared by [the Department of Prime Minister and Cabinet] and provided to the States and Territories and [Australian Association of Local Governments] as soon as possible in the lead-up to the COAG meeting. A communiqué drafting session to which representatives of all COAG members are invited may be organised by [the Department of Prime Minister and Cabinet] in the week leading up to the COAG meeting.

The Protocols document further indicates that there will be a communiqué drafting session held the day before a COAG meeting, and at the conclusion of a COAG meeting “representatives of all COAG members are to clear the communiqué before it is released publicly” by the Department of Prime Minister and Cabinet.²⁴ Communiqués for all meetings that took place between December 2007 and December 2012 are available [here](#) on the [COAG website](#). Outcomes of earlier COAG and Special Premiers’ Conference (the predecessor of COAG) meetings are available [here](#).

The Protocols document also provides guidance for the preparation of records of COAG meetings, which presumably reflect what took place at COAG in greater detail than communiqués. Once finalised, these are circulated to

²³ O’Meara and Faithfull, above n 14, 96; Kildea and Lynch, above n 7, 113.

²⁴ Senate Select Committee on the Reform of the Australian Federation, above n 21, 139.

“COAG members” but are not posted on the COAG website.²⁵

3. THE COUNCIL FOR THE AUSTRALIAN FEDERATION (CAF)

The Council for the Australian Federation, or CAF, is an additional forum for intergovernmental relations, set up by State and Territory first ministers in 2006.²⁶ It is distinguished from COAG in that the Commonwealth does not participate in it. Menzies writes that CAF was “established as a counterbalance to the centralising power of the federal government and to improve the operation of the federation.”²⁷

The CAF Secretariat is currently located in Melbourne. Unlike the COAG Secretariat, which is located within the Department of Prime Minister and Cabinet, the CAF Secretariat is funded by all States and Territories and rotates between jurisdictions.²⁸

CAF has played a role in national reform as an additional setting for developing policy, including policy on “climate change, improving the federation and national regulatory reform.”²⁹ According to Jennifer Menzies, it has also performed the function of supporting COAG by providing a forum within which the ground could be prepared for COAG’s big-ticket reforms.³⁰ Menzies writes that “to a large extent, it was the institutional support from CAF which made the vast Rudd agenda workable.” She explains:

Before each COAG meeting state and territory first ministers and senior officials embarked on a number of teleconferences. The pattern was for the senior officials to initiate discussions and then the first ministers would talk to refine their position or to identify differences. As a senior official said, these meetings ‘provided the fora in which state leaders discussed, debated, developed and understood the position of each jurisdiction’.³¹

Menzies notes, for example, that during the health reform negotiations of 2009-10, CAF “played an important role in identifying common ground” between the sub-national jurisdictions.³² Menzies further explains how CAF was able to aid the COAG process:

The pre-COAG CAF processes meant most of the groundwork around complex negotiations was undertaken before the meeting. This freed up the Prime

²⁵ Ibid, 140.

²⁶ CAF [website](#). For an account of the formation and role of CAF, see J Menzies, “The Council for the Australian Federation and the Ties that Bind” in P Kildea, A Lynch and G Williams (eds) *Tomorrow’s Federation* (2012), 53-72.

²⁷ J Menzies, “The Council for the Australian Federation and the Ties that Bind” in P Kildea, A Lynch and G Williams (eds) *Tomorrow’s Federation* (2012), 53-72, 64.

²⁸ [Contacts webpage](#), CAF [website](#).

²⁹ Menzies, above n 27, 61.

³⁰ Ibid, 65.

³¹ Ibid.

³² Ibid.

Minister and first ministers at the COAG meeting to focus their energies on matters of difference. The work that CAF had done beforehand supported this decision-making by presenting the Prime Minister with one bargaining position from the states. It reduced the need for multilateral negotiations across a range of complex issues and allowed for progress to be made on such a large agenda.³³

However, Menzies goes on to comment that that the “cooperative federalism agenda of the Rudd government diminished CAF’s role to one of brokering agreements before COAG”, and that the volume of work involved “subsumed the policy capacity of the states and territories into the COAG agenda”. For Menzies, this led to a “loss of CAF’s capacity to undertake independent policy work.”³⁴ She observes:

The challenge for CAF is to find its feet amongst the changing cycles of federalism. The organisation had a strong and clear imperative with respect to the more coercive policies of the Howard government but then struggled to define its role in a more cooperative phase.³⁵

Despite this, CAF continues to meet, usually just prior to COAG. The most recent meeting of CAF was held on 15 April 2013. Past meeting dates, and information regarding outcomes of some, although not all, meetings, are available [here](#).

Further information about CAF is available on its [website](#). Information about CAF’s policy work is available on the ‘Policy Innovation’ [webpage](#). The website also provides access to a range of publications, including the papers in CAF’s *Federalist Paper* series, which it established to “create debate.”³⁶ There are four papers in this series, published between 2007 and 2011 (see this [webpage](#); links to each paper are provided below):

- [Federalist Paper 1: Australia's Federal Future](#)
- [Federalist Paper 2: The Future of Schooling in Australia](#)
- [Federalist Paper 3: Common Cause: Strengthening Cooperative Federalism](#)
- [Federalist Paper 4: Report on Intergovernmental Institutions](#)

4. COAG COUNCILS & OTHER MODES OF INTERGOVERNMENTAL RELATIONS

COAG is supported in the implementation of its reform agenda by a number of other entities. These include Standing Councils, Select Councils, Legislative

³³ Ibid.

³⁴ Ibid, 70.

³⁵ Ibid.

³⁶ Ibid, 63.

and Governance Fora and a “vast supporting bureaucracy.”³⁷

COAG Standing Councils, Select Councils and Legislative and Governance Fora now fulfil the role of what used to be called Ministerial Councils. These Councils provide forums for the relevant Ministers from the Commonwealth, States, Territories, and sometimes New Zealand, to meet and pursue reforms within the jurisdiction of the particular Council. The work of each Council is overseen by COAG.

[The COAG Council Handbook: A Guide for the Best-Practice Operations for COAG Council Secretariats](#) (COAG Council Handbook) describes the role of these Councils as follows:

COAG uses Councils as vehicles for driving its reform agenda and co-operative federalism. Councils develop and coordinate policy, problem-solve and provide a ministerial forum for joint action by jurisdictions within the Federation.

Only significant intergovernmental reform work should be progressed through the Council System, with all other work delegated to Senior Officials level.³⁸

a. Reform of the former Ministerial Council system

[Briefing Paper 10/09](#) outlines the role played by the former Ministerial Councils (or 'Mincos') in supporting COAG.³⁹ There were formerly more than 40 Ministerial Councils and other "ministerial fora" (councils with ministerial representatives from only a select number of jurisdictions, rather than all jurisdictions).⁴⁰

By 2009, concerns were expressed about the speed of progress being made on COAG's reform agenda. There were calls from some quarters for the rationalisation of not only the agenda, but also the number of Ministerial Councils, which, according to the former Victorian Premier Steve Bracks, operated as “blocks to reform.”⁴¹ As noted in [Briefing Paper 10/09](#), at its meeting on [2 July 2009](#), COAG resolved to appoint Dr Allan Hawke to lead a review of the system of Ministerial Councils "to ensure the ongoing effectiveness of these arrangements."⁴² Dr Hawke's report has not been publicly released, but his findings were considered by COAG at its 19-20 April 2010 meeting. The [Communiqué](#) for this meeting indicates that, after consideration of the review's findings, "COAG has accepted the need to effect

³⁷ P Kildea, above n 14, 75.

³⁸ [The COAG Council Handbook: A Guide for the Best-Practice Operations for COAG Council Secretariats](#), p 5.

³⁹ G Griffith, [Managerial Federalism – COAG and the States](#), NSW Parliamentary Library Research Service, Briefing Paper 10/09, 9-12.

⁴⁰ Senate Select Committee on the Reform of the Australian Federation, above n 21, 43.

⁴¹ A Hepworth and M Ludlow, “Call for new federal-state reform pact”, *Australian Financial Review* 1 September 2009, 1.

⁴² COAG Communiqué, [2 July 2009](#).

fundamental reform to the Ministerial Council system by March 2011."⁴³

b. New Council system

The [Communiqué](#) for the April 2010 meeting of COAG indicated that it had agreed in principle to a rationalisation of the Ministerial Councils to eleven or fewer councils. These Councils would oversee "key areas of ongoing importance to both the Commonwealth and the States, including health, education and training, community services, infrastructure, police and emergency services and financial relations." Finally, the Communiqué stated that "COAG will also convene from time to time Select Councils of Ministers when it requires advice on particular matters within specific timeframes."

At its meeting on 13 February 2011, COAG agreed to a "comprehensive reform plan for a new system of Ministerial Councils."⁴⁴ The [Communiqué](#) from the 13 February meeting states:

These changes will see a fundamental shift towards a council system focussed on strategic national priorities and new ways for COAG and its councils to identify and address issues of national significance.

COAG has effectively halved the number of Ministerial councils from over 40 to 23. This will see COAG focus on reforms of critical national importance through:

- a more agile and responsive system based on policy development through Standing Councils and flexibility to respond to critical and complex issues through time-limited subject-matter specific Select Councils;
- policy oversight of National Agreements and National Partnership Agreements;
- a system more focussed on implementation; and
- a tighter relationship between COAG and its Councils.⁴⁵

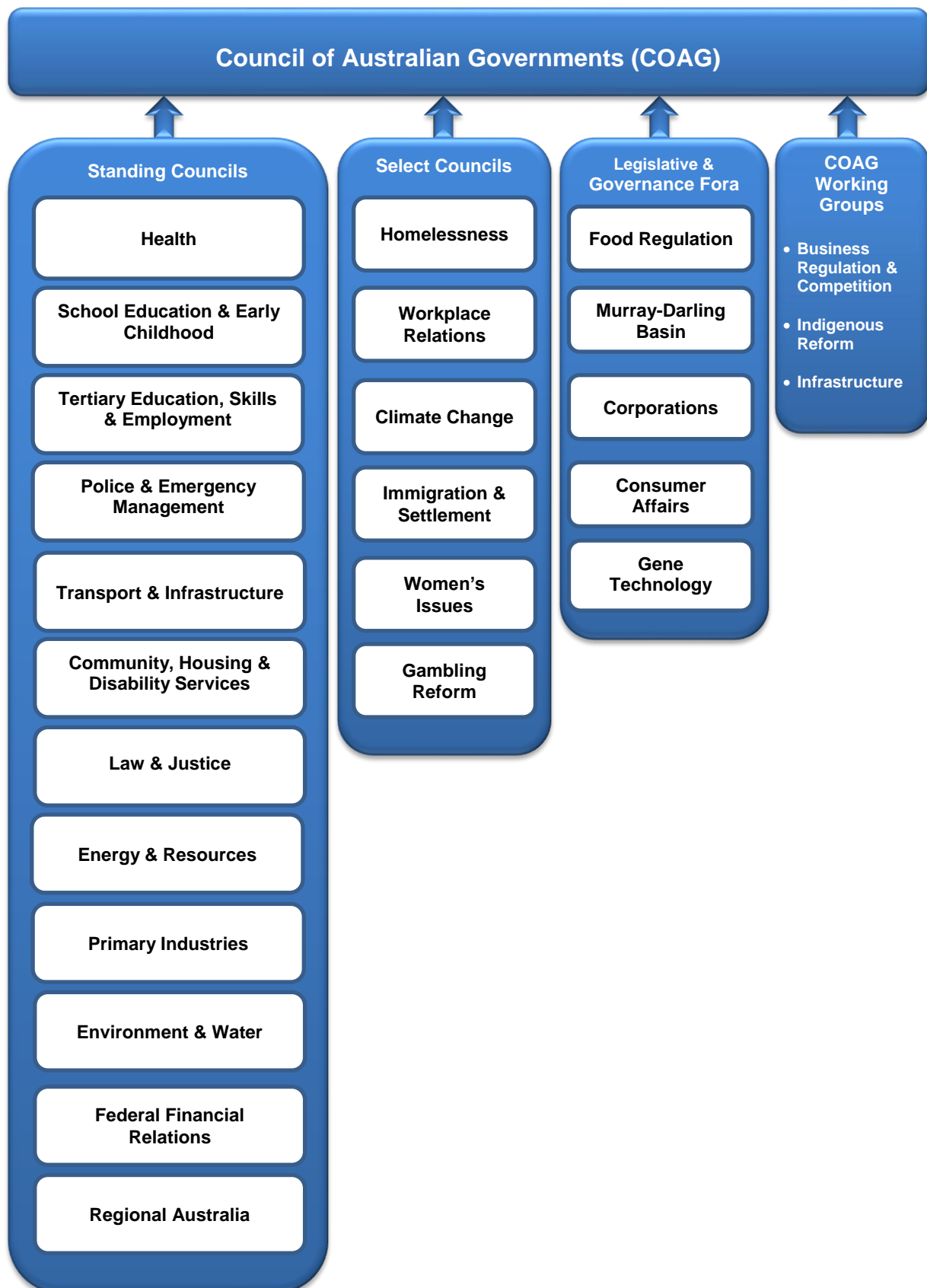
The diagram on the next page shows the structure of the new system of COAG Councils. It is adapted from the diagram included in '[Attachment C](#)' to the Communiqué for the 13 February 2011 meeting of COAG. The diagram therefore represents the structure of the COAG Council System at the time of its reform. Note that not all Select Councils listed within it are currently in operation. A new Standing Council, dedicated to Disability Reform, has also been established.⁴⁶ Further details regarding the current status of Councils and Working Groups, are provided below, where possible.

⁴³ COAG Communiqué, [19-20 April 2010](#).

⁴⁴ COAG Communiqué, [13 February 2011](#).

⁴⁵ COAG Communiqué, [13 February 2011](#).

⁴⁶ See COAG Communiqué, [7 December 2012](#).



'Attachment C' to the [Communiqué](#) for the meeting of 13 February 2011 explained that Standing Councils, which, as their name suggests are ongoing in nature, would address "enduring issues of national significance" while Select Councils, which would be established for limited time periods, would address "critical and complex issues". The Ministerial and Legislative Governance Fora were established to "manage ongoing legislative and governance functions" that are outside the scope of the Standing Councils.

Attachment C said of the new Council system that:

This new system provides a clear role for Ministers from all jurisdictions to support COAG in tackling 21st century policy challenges. There will be sustained collaborative effort on the long-term reform agenda while allowing for the flexibility needed to address more urgent challenges.

The new arrangements strengthen policy oversight of National Agreements and National Partnership Agreements, which govern the financial relationships between the Commonwealth and States and Territories and ensure performance and delivery. There will also be greater emphasis on implementation and a tighter relationship between COAG and its Councils.

As the diagram on the previous page suggests, each Council seems to be ultimately answerable to COAG.

The [COAG Council Handbook](#), issued following the reform of the Council structure is a useful source of information about the role and administration of each type of Council. It states that COAG must agree to the terms of reference for each Council, which determines the scope of a Council's work. Councils must also provide an annual report to COAG outlining their actions and decisions.⁴⁷ Appendix 4 to the Handbook sets out the timeframes by which Councils must produce these reports; it further requires Councils to release communiqués within one week of the conclusion of their meetings.⁴⁸

According to the Handbook, Councils must also undertake reviews, at three year intervals, of: their structures (including secretariat arrangements); number of meetings; costs; implementation of decisions; objectives and performance; relations with other COAG and other Councils and also areas of possible overlap; and sub-committees and working parties, to ensure that they only exist where they are essential.⁴⁹

The Handbook contains further guidance about Councils generally, for example, regarding their membership and meetings. It states that, while Councils will generally be comprised of representatives from each Australian jurisdiction, they may also require the attendance of representatives from the Australian Local Government Association and New Zealand (with the exception of the Standing Council on Federal Financial Relations, and also the Fora, where

⁴⁷ [The COAG Council Handbook](#), above n 38, 5.

⁴⁸ Ibid.

⁴⁹ Ibid, 5-6.

membership is determined by the relevant governing instrument).⁵⁰

The question of when and how often it will meet is left to the discretion of each Council.⁵¹ The Handbook states:

In making decisions about frequency of meetings, Councils should prioritise the achievement of COAG tasks over other work undertaken by the Council, and consider how often they must meet to achieve their priorities and responsibilities.

Councils are also to determine whether their members need to have face to face meetings or whether they can meet via COAG's secure TelePresence network, which enables video conferencing.⁵² Appendix 3 to the [COAG Council Handbook](#) contains further information about the TelePresence facility.⁵³

On the subject of Council operations, the Handbook specifies:

Councils should establish effective operational arrangements to ensure they achieve their priorities and responsibilities. Councils will generally be supported by a Senior Officials Group and may set up other sub-groups.⁵⁴

The Handbook also stipulates, in relation to the Ministers that are members of Councils that they:

. . . must ensure they are in a position to represent their governments at meetings and to ensure that objectives are met and implementation is followed through. This is of particular importance where resolutions require commitment, especially financial commitment from respective governments.⁵⁵

The following pages provide some further, more detailed, information specific to each type of COAG Council. Most of the information below is taken directly from the [COAG Council Handbook](#). Links, where available, are also provided to the website of each Council or Forum.

c. Standing Councils

i) Role and administration of Standing Councils

The [COAG Council Handbook](#) states that the purpose of Standing Councils is to:

- achieve COAG's strategic themes by pursuing and monitoring priority issues of national significance which require sustained, collaborative effort; and

⁵⁰ Ibid, 6.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid, 24-25.

⁵⁴ Ibid, 8.

⁵⁵ Ibid, 6.

- address key areas of shared Commonwealth, State and Territory responsibility and/or funding.⁵⁶

Pages 10-11 of the Handbook outline the work of Standing Councils as follows:

Standing Councils will undertake high-level policy reform and reform generally in line with one or more of COAG's strategic themes. They will ensure issues relevant to multiple policy areas, such as Indigenous disadvantage, will be considered in all work. Councils will also perform collective responsibilities of Ministers, as set out in legislation and intergovernmental agreements.

According to the Handbook, Standing Councils are to be “tasked by COAG with five to seven issues or reforms” to pursue. Standing Councils are only to be responsible for reforms which are of national significance, are consistent with COAG’s strategic themes (which are discussed below in the section of this paper on the COAG reform agenda), and “warrant oversight by First Ministers”. The Handbook stresses that:

. . . only significant intergovernmental reform work should be progressed through the COAG System, with all other work delegated to Senior Officials' level. All work progressed by Standing Councils must meet the criteria of achieving COAG's strategic themes and addressing key areas of shared Commonwealth, State and Territory responsibility and funding.

'[Attachment C](#)' to the Communiqué for the 13 February 2011 meeting of COAG stated that, in addition to progressing reform of national significance consistent with COAG’s strategic themes, “Standing Councils will also undertake legislative and governance functions relevant to their scope.”

In terms of the administration of Standing Councils, the Handbook states that they should have either a permanent or rotating Chair, to be either determined by the Council, or approved by COAG at the time of the establishment of the Council. Decisions of Councils are to be made by consensus (except where statutory instruments specify other voting rules in relation to certain matters). Each Standing Council is to determine its own secretariat arrangements. As noted above, Standing Councils must provide certain reports regarding their activities to COAG. The timeframes within which such reports must be provided are set out in Appendix 4 to the Handbook.⁵⁷

Information about the membership, Terms of Reference, reform priorities and meeting and secretariat arrangements of each Council is generally available on the Council’s website. Communiqués for the meetings of each Council are also available.

ii) List of Standing Councils

The following list of Standing Councils was obtained from this [webpage](#) of the

⁵⁶ Ibid, 10.

⁵⁷ Ibid, 21.

[COAG website](#). The links provided are to the website of each Council, where available.

- [Community and Disability Services](#)
- Disability Reform
- [Energy and Resources](#)
- [Environment and Water](#)
- [Federal Financial Relations](#)
- [Health](#)
- [Law and Justice](#)
- [Police and Emergency Management](#)
- [Primary Industries](#)
- [Regional Australia](#)
- [School Education and Early Childhood](#)
- [Tertiary Education, Skills and Employment](#)
- [Transport and Infrastructure](#)

d. Select Councils

i) Role and administration of Select Councils

Select Councils also play an important role in implementing COAG reforms. However, unlike Standing Councils, which have ongoing responsibilities, Select Councils are generally given specified time periods within which to complete the tasks they are charged with, and therefore only exist for limited periods (which can be of varying lengths).

In relation to Select Councils, '[Attachment C](#)' explained:

Select Councils will be established, where First Ministers propose, to work on specific reform tasks of critical national importance that are of sufficient importance to warrant Ministers' direct attention.

Pages 11 and 12 of the [COAG Council Handbook](#) contain guidance relevant to Select Councils.

The Handbook states that, in addition to the identification of a matter of critical national importance that requires “a sustained, collaborative effort” to be addressed, the following are also preconditions for the establishment of a Select

Council:

- there is shared Commonwealth, State and Territory responsibility;
- work is unable to be undertaken by another body, such as a taskforce, working group or group of Officials; and
- a specific time duration within which to achieve its reform tasks.

The Handbook again provides guidance regarding the establishment, role and functions of Select Councils. It states that, to be set up, they must be proposed by a First Minister and agreed to by COAG. Any First Minister can propose the creation of a Council to COAG. The Handbook suggests that, if a First Minister would like to make such a proposal, their Department should advise the Commonwealth-State Relations Secretariat, which is based in the Department of Prime Minister and Cabinet. The Handbook states that it is intended that the overall number of Select Councils will remain small.

The duration of a Select Council's existence is to be set by COAG when the Council's terms of reference are agreed to. According to the Handbook, "[i]t is expected that Councils may operate for periods ranging from six months to several years." Chairing, membership and secretariat arrangements for Select Councils are to be determined by COAG on a case by case basis. Select Councils are to report to COAG at least biannually (see Appendix 4 to the Handbook, which contains timeframes for reporting which are specific to Select Councils).⁵⁸

Where available, the websites for Select Councils (see links below) provide guidance as to the specific nature of the types of reforms that the Council was set up to progress. The "Disability Reform" or NDIS Select Council, for example, was established in response to the 2011 Productivity Commission report which recommended the adoption of a National Disability Insurance Scheme (see Disability Reform link in list below). This particular Select Council has now come to an end, and a Standing Council has been established in its place.⁵⁹

ii) List of Select Councils

Due to their impermanent nature, any list of COAG Select Councils is subject to change. This list of Select Councils was taken from this [webpage](#) of the [COAG website](#); however, it should be noted that it may no longer accurately reflect the current status of these Councils. For example, the work of some of the Councils referred to within it may now have been completed, although there has been no decision from COAG as yet as to whether the Councils will be disbanded or continue a new phase of work with different terms of reference:

⁵⁸ Ibid, 12 and 21 (Appendix 4).

⁵⁹ See COAG Communiqué, [7 December 2012](#).

- [Climate Change](#)
- [Disability Reform](#) (expired on 31 December 2012)
- [Gambling Reform](#)
- [Housing and Homelessness](#)
- Immigration and Settlement (this Council does not have a website, but this is the [communiqué](#) for its second meeting on 7 August 2012).
- [Women's Issues](#)
- [Workplace Relations](#)

e. Legislative and Governance Fora

'[Attachment C](#)' explained that:

A small number of Ministerial Legislative and Governance Fora will be established in specific areas to manage ongoing legislative and governance functions where they are outside the scope of Standing Councils. Five Legislative and Governance Fora will cover the following areas: food regulation; gene technology; corporations; consumer affairs; and the Murray-Darling Basin.

The Ministerial Legislative and Governance Fora will also oversight significant collective responsibilities for ministers where they are set out in relevant legislation, intergovernmental agreements and treaties that are outside the scope of Standing Councils.

Below is a list of current Legislative and Governance Fora, with links to their websites:

- [Consumer Affairs](#)
- [Corporations](#)
- [Food Regulation](#)
- [Gene Technology](#)
- [Murray-Darling Basin](#)

The [COAG Council Handbook](#) contains information about these Fora on page 12. It indicates that they have been set up in circumstances where "Commonwealth, State and Territory Ministers have significant collective responsibilities under governing instruments, such as legislation and intergovernmental agreements" and also these responsibilities are outside the scope of the Standing Councils.

The work of each Forum is limited to the performance of "collective Ministerial

responsibilities set out in instruments such as intergovernmental agreements and legislation." These Fora are not to "develop new policy or reform proposals" unless such work would be directly related to the responsibilities that they have under the legislation or intergovernmental agreement that is relevant to them.

f. Working Groups

The [2011 report](#) of the Senate Select Committee on the Reform of the Australian Federation says that the Business Regulation and Competition, Infrastructure and Indigenous Reform Working Groups were the only three that remained of the original seven established by the Rudd Government in 2007.⁶⁰ The report says of the other working groups that:

The remainder were disbanded when their planning task was completed, and responsibility for monitoring the implementation of those plans now falls to the COAG Reform Council . . . Of the three operating working groups, the Infrastructure working group is expected to be wound up in the next year or two, the Business Regulation and Competition Working Group is being reassessed in 2012 and the Indigenous Reform working group is ongoing.⁶¹

One of the documents made public following the meeting of COAG on 19 April 2013 was a [Response to the \[COAG Reform Council\] Report on Seamless National Economy](#), which said of this National Partnership (the SNE NP) and the Business Regulation and Competition Working Group that:

COAG notes the completion of the SNE NP at end of December 2012 and that the Business Regulation and Competition Working Group (BRCWG) also ceased at this time. COAG acknowledges the role the BRCWG has played in overseeing the implementation of the SNE NP reforms between 2008 and 2012, and thanks past and current members of the BRCWG for their contributions.

g. Business Advisory Forum

The first meeting of the Business Advisory Forum to COAG was convened by the then Prime Minister on 12 April 2012. The meeting of the Forum was chaired by the Prime Minister and attended by the other members of COAG, as well as CEOs and representatives from peak business bodies.⁶² Further information about the forum is available on this [webpage](#). At its own meeting the following day COAG agreed six reform priorities aimed at facilitating growth in national productivity. It agreed the establishment of a cross-jurisdictional taskforce to "develop the policy and timetable for this ambitious new reform agenda." The Taskforce was to be chaired by the Secretary of the Commonwealth Department of Finance and Deregulation and to include:

⁶⁰ Senate Select Committee on the Reform of the Australian Federation, above n 21, 42.

⁶¹ Ibid.

⁶² Prime Minister's media release, "[Council of Australian Governments Business Advisory Forum Communique](#)" (12 April 2012).

. . . a senior Commonwealth Treasury official and Deputy Secretary representatives from both First Ministers and Treasury departments in the States and Territories, reporting to COAG through First Ministers' Senior Officials (see COAG [communiqué](#), 13 April 2012).

The [communiqué](#) from the meeting of 13 April 2012 further indicated that:

COAG noted the existing work on future regulation and competition reform, undertaken by the Business Regulation and Competition Working Group and the Standing Council on Federal Financial Relations, and asked the Taskforce to provide advice on the merit of these proposals in the context of a focused productivity-enhancing reform agenda. COAG agreed that the Business Regulation and Competition Working Group would see the completion of the existing Seamless National Economy reforms by the end of 2012 but would not continue beyond this, being replaced by the Taskforce.

A second meeting of the Business Advisory Forum was held on 6 December 2012 (see Business Advisory Forum [communiqué](#)). At the COAG meeting of 19 April 2013 (see [communiqué](#)), the Taskforce provided this [report](#) to COAG. The report states that the six reform priority areas for improving productivity are:

- national environmental reform;
- reforms to lift regulatory performance;
- reforms to reduce red tape, including initiatives to reduce the reporting burden on business and specific measures to address the concerns of small business;
- rationalisation of carbon reduction and energy efficiency schemes;
- energy market reform; and
- reforms to improve development assessment processes for low impact development and to streamline approvals for major projects.

The report provides an update on the progress to date on each of these areas of reform.

h. Senior Officials Groups/Advisory Councils & the bureaucracy

COAG and its Councils are supported by groups comprised of senior public service officials (usually the Directors General, Secretaries or Chief Executives of the agencies administered by the Minister or Ministers who are members of the relevant Council). Details of these Senior Officials and Advisory Groups can be harder to find than information about the COAG Councils that they support.

A case in point is the group generally called COAG Senior Officials, which supports COAG itself. This [internal training document](#), produced by the Queensland Treasury in 2009, summarises the composition and work of the COAG Senior Officials Group as follows:

- Comprises of Directors-General's of Premier's Departments and Chaired by Secretary of PM&C.
- A process body to work through issues and help frame the COAG agenda.
- Is the fine detail to the broad COAG brush.

The "Protocols for Council of Australian Governments and Senior Officials Meetings", which is annexed to the [2011 report](#) of the Senate Select Committee on the Reform of the Australian Federation, states:

By preference, Senior Officials will, meet on an as needed basis to support COAG members in their work. Where possible, these meetings will be conducted via videoconferencing to minimise the imposition on participants. There will be at least one videoconference and/or meeting prior to each COAG meeting.

If possible, the final Senior Officials meeting/videoconference prior to a COAG meeting will be held at least 10 to 12 days before a COAG meeting. This will best assist the briefing process for COAG members.⁶³

COAG Senior Officials therefore fulfil an important function. They are, in effect, the conduit between COAG and the bureaucracies of each sub-national jurisdiction.

The other Senior Officials and Advisory Groups, including the Heads of Treasuries, or "HoTs" group, perform similar functions in relation to their corresponding COAG Councils. Information is available regarding some of these groups on the websites of respective Councils (see links above), with the amount of detail available varying from one group to another.

In relation to Officials Groups, the [COAG Council Handbook](#) states:

Senior Officials Groups will generally develop and progress issues for upcoming Council meetings. Items of a procedural and technical nature should be delegated to officials to determine, or be dealt with out-of-session.⁶⁴

It further provides that:

Officials should develop issues for the consideration of Ministers. Officials should meet a minimum of three weeks prior to Council meetings, to allow proper consideration of the issues. Agenda-setting processes should be commenced sufficiently ahead of the proposed Officials meeting to ensure that final agenda and papers are circulated in a timely manner.⁶⁵

It should be acknowledged that agency officials of various ranks across all jurisdictions undertake significant work, including negotiation with counterparts

⁶³ Senate Select Committee on the Reform of the Australian Federation, above n 21, 137.

⁶⁴ [The COAG Council Handbook](#), above n 38, 7.

⁶⁵ Ibid, 17.

from other jurisdictions, prior to agreements reached by COAG. Agency officials also play a role in preparing papers for COAG, COAG Councils and Senior Officials meetings. They also brief their own Ministers regarding agenda items prior to Council meetings, and, where necessary, liaise with officials from agencies within their own jurisdiction where agenda items might have implications for other portfolios.

As Harwood and Phillimore state in their study on [*The Effects of COAG's Reform Agenda on Central Agencies*](#):

Central⁶⁶ and line⁶⁷ agency officials regularly liaise with one another through formal gatherings, such as COAG working groups and sub-groups, senior officials meetings, Heads of Treasuries meetings and meetings of ministerial councils, and through informal channels, such as by telephone and emails.⁶⁸

Premier's Departments in most jurisdictions also have branches or units dedicated to intergovernmental relations.⁶⁹ According to the [organisation chart](#) on its website, the NSW Department of Premier and Cabinet, for example, has a "National Reform and Intergovernmental Strategy Branch." There is likewise a Commonwealth-State Relations Secretariat within the Department of Prime Minister and Cabinet. Treasury Departments also commonly have sections responsible for intergovernmental relations, among them the Fiscal and Economic Directorate of the NSW Treasury (see [here](#)).

i. Secretariats

COAG and most of its Councils are supported by some kind of secretariat arrangements. The Secretariat for COAG is located within the Commonwealth-State Relations Secretariat of the Department of Prime Minister and Cabinet (see contact details [here](#)). Page 13 of the [COAG Council Handbook](#) says that the Commonwealth State-Relations Secretariat "is the central point of contact for submitting work to COAG."

The same page of the Handbook also indicates that questions relating to the staffing and location of secretariats for COAG Councils are to be determined by each Council in accordance with its own needs.

Section 2 of the Handbook, entitled "Best-Practice Secretariat Operations", sets out "some general principles that govern how secretariats should best operate and support their Council strategically." These principles include, but are not limited to:

⁶⁶ Premiers and Treasury Departments.

⁶⁷ Other agencies, for example Health Departments.

⁶⁸ J Harwood and J Phillimore, [*The Effects of COAG's National Reform Agenda on Central Agencies*](#), the Australia and New Zealand School of Government and the John Curtin Institute of Public Policy (2012), 41.

⁶⁹ See *Ibid* for details.

- Effective governance – secretariats should have strong governance systems and a good understanding of their stakeholder base and the issues managed by their Councils.
- Transparency and accountability – Councils are accountable to COAG. Secretariats need to communicate clearly decisions and outcomes. It is essential that secretariats employ strong stakeholder communication strategies so outcomes are transparent.
- . . .
- Coordination capacity – secretariats should be the primary coordination point for their Councils. It is essential that secretariats employ effective coordination strategies, particularly in relation to the priority tasks for their Councils.
- Fairness – secretariats should be fair and impartial towards all member jurisdictions, regardless of secretariat location . . .⁷⁰

j. Participation by NSW in COAG Councils

Premier's Memorandum [M2012-05 Council of Australian Governments - New Council System](#), issued on 2 May 2012, sets out protocols for the engagement of State Ministers and agencies with the COAG Council system.

The Memorandum states:

It is essential that Ministers attending Council meetings or providing a response on Council matters are in a position to properly reflect the interests and views of the NSW Government. Ministers should decline to consider matters unless adequate notice of them has been given beforehand.

The Memorandum contains guidance as to the kinds of matters that require consideration by either Cabinet or the Premier, prior to a Minister giving representations in relation to them on behalf of NSW:

The following matters should come before Cabinet, unless the Premier specially approves otherwise:

- Intergovernmental agreements to which NSW would potentially be a signatory;
- Significant policy/funding decisions to be made by the Ministerial Council that have implications for NSW; and
- Agenda items to be put forward from NSW relating to the above.

It directs that copies of Council agendas, papers and briefing notes should be forwarded to the Director General of the Department of Premier and Cabinet upon their receipt by the relevant Minister or agency, and also that "results of Council meetings should . . . be reported to the Department of Premier and

⁷⁰ [The COAG Council Handbook](#), above n 38, 14.

Cabinet at the earliest opportunity."

Where Council determinations have implications for more than one Ministerial portfolio, or a Council's areas of responsibility are such that more than one NSW Minister is required to be a member of it, the Memo directs Ministers and agencies to ensure that the position of NSW has been coordinated prior to Council meetings:

A coordinated NSW position should be developed in consultation with all relevant agencies prior to a Minister or Ministers taking part in Council determinations. New Councils will be expected to deal with a range of matters that may involve more than one portfolio. Council Ministers and relevant agencies are required to liaise, as necessary, with other relevant Ministers and portfolios to ensure a coordinated NSW approach to policy development and response to matters considered by the Council.

Coordinating Ministers have been appointed where Councils have more than one Minister from NSW as a member. The Memorandum describes the role of the coordinating Minister as follows:

The coordinating Minister will ensure a single NSW point of contact relating to Council business. However, it is not the function of a coordinating Minister to represent NSW on all matters before the Council or take a lead role on matters not within their portfolio. Ministers, as joint members of a Council, should consult one another concerning items on the agenda, or items that are to be proposed for the agenda, and clearly identify the relevant lead agency for each matter before the Council.

For any Council matters that may affect more than one portfolio, the lead agency is responsible for ensuring that coordinated advice is provided.

Where more than one Minister is a member of a Council, the Ministers involved should consult one another concerning items on the agenda to determine which Minister will speak or vote on a relevant item on behalf of NSW.

The Memorandum also contains a link to a [list](#) which indicates the Ministers who represent NSW on each Council, and, where more than one Minister, shows which Minister is the coordinating Minister for that Council.

On the practical question of funding arrangements for Council operations, the Memorandum states that, where there is more than one agency involved in the work of a Council, funding, "including any secretariat funding, should be apportioned between participating agencies as agreed by member NSW Ministers."

In relation Ministers who are not a member of a Council, the Memorandum states that they may provide any suggestions that they have for areas that might be suitable for COAG attention to the Premier, who might in turn "propose the matter for COAG consideration."

5. THE COAG NATIONAL REFORM AGENDA

The current COAG agenda has been described by Geoff Gallop, a former Deputy Chairman of the COAG Reform Council, as “certainly the most ambitious and far-reaching in agenda in its history.”⁷¹ The [COAG website](#) states that:

COAG is currently pursuing a reform agenda aimed at improving economic and social participation, strengthening the national economy, creating a more sustainable and liveable Australia, delivering better health services and closing the gap in Indigenous disadvantage.

This section provides a brief account of the background to the development of the current reform agenda.

a. 2006 – the foundations of a new approach

Prior to 2006, COAG had facilitated significant national reforms in areas such as competition policy and gun control. At its February 2006 meeting, COAG agreed a new ‘National Reform Agenda’, “to help underpin Australia’s future prosperity”.⁷² The Agenda was comprised of three streams: human capital; competition and regulatory reform.⁷³ The human capital stream encompassed issues related to the health system and the delivery of all stages of education, from early childhood to vocational training. The February 2006 [communiqué](#) said of each stream that:

- **Human Capital:** This stream focussed on outcomes needed to increase workforce participation and productivity. The [communiqué](#) noted that policies “to improve health and education outcomes, and encourage and support work, are closely inter-related.” COAG agreed therefore that “all governments would commit to reform across health, education and training and encouraging and supporting work.”
- **Competition:** This stream was intended to be “a substantial addition to, and continuation of, the highly successful National Competition Policy reforms. It will further boost competition, productivity and the efficient functioning of markets.” The reforms that were the focus of this stream were “initiatives in the areas of transport, energy, infrastructure regulation and planning and climate change technological innovation and adaptation.”
- **Reducing the regulatory burden:** In relation to this stream, the [communiqué](#) noted that “COAG agreed that effective regulation is essential to ensure markets operate efficiently and fairly, to protect consumers and the environment and to enforce corporate governance standards. However, the benefits from each regulation must not be offset by unduly high compliance and

⁷¹ G Gallop, “The COAG Reform Council: A View from the Inside” in P Kildea, A Lynch and G Williams (eds) *Tomorrow’s Federation: Reforming Australian Government* (2012) 43-52, 44.

⁷² COAG Communiqué, [10 February 2006](#).

⁷³ Ibid.

implementation costs." COAG therefore agreed that governments would, among other things, implement measures aimed at the reducing compliance costs and enhancing regulatory consistency across jurisdictions.

In the [communiqué](#) for its July 2006 meeting, COAG set out the work that had been undertaken towards the development of this Reform Agenda. It stated:

In moving forward, COAG has tasked officials with completing specific reform proposals for its consideration at its next meeting. These reform proposals will include, as necessary and appropriate, agreed policy directions, outcomes and commitments, multilateral and jurisdictional specific actions, progress measures and milestones.

That communiqué also referred to the agreement that had been met in regard to the establishment of the COAG Reform Council, a body that would undertake "an independent assessment of the relative costs and benefits of each of the reform proposals" (see below for information regarding the role of the COAG Reform Council). It may be seen from this that in the 2006 National Reform Agenda lay the seeds of COAG's current suite of reforms, as well as the first steps towards its current focus on fostering accountability by ensuring that reforms are targeting measurable outcomes.

b. Scope of the first Rudd Government's agenda

Before becoming Prime Minister in November 2007, Kevin Rudd had campaigned on the need to reform the way federalism was operating in Australia. Upon his election, he continued work on the National Reform Agenda and instituted a range of additional reforms, using COAG as the vehicle for them.⁷⁴ The new Government acted almost immediately in relation to this, holding a meeting on 20 December 2007, at which, Anderson says:

The Prime Minister moved quickly . . . to change the dynamics of traditional intergovernmental relations by establishing a series of working parties charged with developing strategies and plans for implementing the government's election policy commitments. Each working party was chaired by a Commonwealth Minister with senior state or territory officials acting as their deputy, a procedure which the COAG Communiqué, in a masterful piece of understatement described as a 'break with previous practice'.⁷⁵

The [communiqué](#) for the 20 December meeting indicated that, in a climate in which the Commonwealth and all States and Territories had governments of the same political stripe:

COAG recognised that there was a unique opportunity for Commonwealth-State cooperation, to end the blame game and buck passing, and to take major steps forward for the Australian community.

⁷⁴ Fenna and Anderson, above n 12, 397, McQuestin, above n 13, 17.

⁷⁵ Anderson, above n 9, 7.

COAG agreed to a new model of cooperation underpinned by more effective working arrangements. COAG identified seven areas for its 2008 work agenda:

- health and ageing;
- the productivity agenda – including education, skills, training and early childhood;
- climate change and water;
- infrastructure;
- business regulation and competition;
- housing; and
- Indigenous reform.

There was a working group for each of the above reform priorities. As the communiqué and its attachments show, each working group was given a set of objectives and an “indicative forward work plan”. By the March 2008 meeting of COAG, the planned reforms in each of these areas had begun to take further shape (see [communiqué](#)). Underpinning these reforms was the Intergovernmental Agreement for Federal Financial Relations, which represented a restructuring of the way in which the Commonwealth distributed funding to the States and Territories. An overview of the Intergovernmental Agreement and the reforms it brought about is provided below in section 7.

A key aspect of the reformed financial framework was a shift to a new system of agreements which reflected the objectives and desired outcomes of each reform, as stated by the March communiqué:

The new agreements will focus on agreed outputs and outcomes, providing greater flexibility for jurisdictions to allocate resources to areas where they will produce the best outcomes for the community.

This new approach was designed to increase accountability and ‘end the blame game’ between the Commonwealth and sub-national governments.

An expanded role for the COAG Reform Council was also agreed at the March 2008 meeting. The Council was to monitor the implementation of national reforms and check progress against agreed milestones and outcomes.⁷⁶ The role of the COAG Reform Council is outlined further below.

McClintock has summarised the reform agenda that emerged throughout 2008 in the following terms:

The current COAG reform agenda was articulated by COAG throughout 2008. COAG committed to an agenda that would address the challenges of boosting

⁷⁶ COAG Communiqué, [26 March 2008](#), see ‘[attachment C](#)’ in particular.

productivity, increasing workforce participation and mobility, and delivering better services to the community. COAG also agreed that its agenda would contribute to the broader goals of social inclusion, closing the gap on Indigenous disadvantage, and environmental sustainability.⁷⁷

However the number of Commonwealth-State agreements, and the reforms being progressed through COAG quickly burgeoned. It would appear that this increase in the number of matters being addressed through COAG was driven, at least in part, by the onset of the global financial crisis in 2008. The first Rudd Government used the COAG process to aid in the implementation of its response to “ensure rapid delivery of economic stimulus measures to support employment and growth and to foster a more resilient Australia”.⁷⁸

The scope of the reform agenda, and the complexity of reform agreements in areas like health care began to attract comment and criticism. McQuestin writes that:

In late 2010 there was a chorus of calls from premiers, business groups and commentators for a more streamlined, prioritised and manageable COAG agenda that would allow progress.⁷⁹

As McQuestin notes, shortly before the February 2011 meeting of COAG, Rudd’s successor as Prime Minister, Julia Gillard, published an opinion piece in the *Australian Financial Review* in which she flagged the need to rationalise and focus COAG’s reform agenda:

With the National Competition Policy process of the early 1990s, COAG made a brilliant start but since 1996, COAG has gone from pillar to post — ignored and underutilised for years at a stretch, then frantically overworked.

Neither approach did the cause of federal-state relations any good.

Today it is clear that COAG needs a fundamental revitalisation if it is to perform the job the country so strongly needs it to do.

There is a lot of work ahead if COAG is to simplify its agenda and recapture its original vision, a job made more imperative as genuine structural challenges bear down on us: challenges such as health, ports, and vocational education.

To begin with, COAG needs to move to a more rational and streamlined focus. It must deal with only major strategic issues facing the country, and only issues that lie at the intersection of state and federal relations. To achieve this focus, I am proposing four key themes to guide the COAG agenda.⁸⁰

⁷⁷ P McClintock, “[The COAG reform agenda: How are governments performing so far?](#)” speech to the Committee for Economic Development of Australia (21 September 2010).

⁷⁸ COAG Communiqué, [5 February 2009](#). See also the communiqué from the special meeting of COAG held on [29 November 2008](#).

⁷⁹ McQuestin, above n 13, 22.

⁸⁰ J Gillard, “Four themes for a better COAG” *Australian Financial Review* (8 February 2011) 63.

After outlining what these were to be, the Prime Minister added:

As part of this streamlined agenda, I first want ministers to focus on urgent and strategic issues, devolving more work to ministerial councils for resolution.

This will allow COAG to drive urgent, large-scale reform without getting bogged down in some of the detailed discussions that can sometimes mean agenda items limp along from COAG meeting to COAG meeting, never really jumping off the page and into the real world.

Ministerial councils will also have to learn to resolve issues among themselves, rather than taking the easy option of referring them up to COAG at the first sign of disagreement.

COAG needs to reinvigorate the federal financial framework agreed in 2007, with a renewed focus on accountability. That means a focus on results, and a focus on incentives.⁸¹

c. Current Reform Agenda

As outlined at the outset of this paper, it is difficult to explain aspects of COAG and its processes precisely or specifically. Work on COAG reforms is progressing all the time. Priorities change with shifting circumstances, new agreements are negotiated at meetings of COAG and new Councils or other entities established. This makes it difficult to paint an accurate point in time picture of the work that COAG currently has underway. Added to this is the sheer scale of the work program, which, despite the 2011 efforts to contain it, remains very large, along with some of the transparency issues which are outlined in Part Two of this paper. What is provided in this section, therefore, is a broad overview of the reform agenda, and details of where to find further information regarding specific reforms.

The [“COAG’s Reform Agenda” webpage](#) states that:

COAG has committed to an unprecedented program of reform built on one vision: improving the wellbeing of all Australians, now and into the future.

Since December 2007, COAG has grown and has taken on an important new role. Australian governments realised that the challenges they faced – including the need to raise productivity and our standard of living, prepare for a quickly expanding ageing population, secure water supplies, educate our people and build a low carbon future – were so complex that they could only be met by all governments working together.

COAG recognises that the Australian people want to see governments working together to ensure that the Australia of 10, 20 or 50 years’ time has adequately addressed the issues that will impact on the quality of life of our children and their children.

⁸¹ Ibid.

After noting COAG's key commitments to making federalism work, the collaborative federalism embodied in the new federal financial relations framework and the oversight of reform progress by an independent umpire, the COAG Reform Council, the reform agenda webpage explains that COAG's current agenda is centred on "five themes of strategic importance." These themes were agreed by COAG at its meeting of 13 February 2011 (see communiqué). They are:

1. [a long-term strategy for economic and social participation](#);
2. [a national economy driven by our competitive advantages](#);
3. [a more sustainable and liveable Australia](#);
4. [better health services and a more sustainable health system for all Australians](#); and
5. [Closing the Gap on Indigenous disadvantage](#).

The reform agenda webpage also contains a series of links to the various policy areas in which reform is currently being pursued through the COAG process. These include:

- [Early Childhood](#);
- [Schools and Education](#);
- [Health and Aging](#);
- [Skills and Training](#);
- [Housing and Homelessness](#);
- [Disability Care and Support](#);
- [A Seamless National Economy](#);
- [Infrastructure and Transport](#);
- [Water, Climate Change and the Environment](#);
- [National Security and Community Safety](#); and
- [Closing the Gap on Indigenous Disadvantage](#).

These links provide a wealth of information about the wide range of initiatives that either have already been implemented or are underway or proposed in each area. Links to the many current and previous National Partnerships and Agreements, via which the reforms in each of these areas are being implemented, are also provided. Links to the outcomes of COAG meetings at which decisions have been made about each area of reform are also available.

Perhaps a more useful source is the [Standing Council on Federal Financial Relations website](#), which sets out links to Agreements as well as to implementation plans for each jurisdiction where relevant, and gives indications of the start and end dates for the Agreements (see for example this [webpage](#) for education Agreements and Plans).

Even a cursory reading of the above list of reform areas demonstrates the enormous scope of the work of COAG. Reforms either currently being driven, or already delivered, through the COAG process include the Murray-Darling Basin Plan, the Australian Consumer Law, the new Personal Property Securities regime and health initiatives such as [Medicare Locals](#), the NDIS or “[DisabilityCare](#)”, and the [National Education Reform Agreement](#), developed following the [Review of Funding for Schooling](#), undertaken by a panel chaired by David Gonski (see COAG [communiqué](#), 19 April 2013, and also the Better Schools for Australia [website](#)).

6. IMPLEMENTATION OF NATIONAL REFORM

The of mechanisms that are used to implement national reform can take a range of forms, as described by Saunders:

A cooperative arrangement is evidenced by an intergovernmental agreement, which may take a variety of forms but is typically not assumed to create legal relations so that, again typically, it is not enforceable at law. Alternatively, or in addition, cooperation may take the form of a grant of funds by the Commonwealth to a state pursuant to section 96 of the Constitution, which may be subject to more or less detailed conditions. Any one of these techniques, and in some cases, all three, may be associated with a fourth: schemes designed to achieve a greater or lesser degree of harmonisation of policy and law.⁸²

In a paper published in 2012, the current Chief Justice of the High Court of Australia, Robert French, identified the following “techniques of cooperative federalism directed to national or uniform regulation”:

1. Intergovernmental agreements providing for:
 - (a) uniform legislation enacted separately by each participating polity; or
 - (b) enactment by one unit in the federation of a standard law which can then be adopted by other parties to the intergovernmental agreement.
2. The referral of state legislative powers authorising Commonwealth law-making under section 51(xxxvii) [the referral power of the Constitution] on a particular topic or according to the text of a proposed Bill.
3. Executive cooperation by way of intergovernmental agreements.⁸³

⁸² C Saunders, “Cooperative arrangements in comparative perspective” in G Appleby, N Aroney and T John (eds) *The Future of Australian Federalism* (2012) 414-431, 417-418.

⁸³ R French, “The incredible shrinking federation: voyage to a singular state?” in G Appleby, N Aroney and T John (eds) *The Future of Australian Federalism* (2012) 39-66, 47-48.

As Kildea notes, “perhaps the most important activity in which the various Ministers and officials are involved is the negotiation and formation of intergovernmental agreements”.⁸⁴ Although they might require jurisdictions to pass legislation to give effect to the various commitments they contain, these agreements themselves have no legal effect.⁸⁵ They are simply a reflection of the actions that the executive of each participating jurisdiction has agreed to undertake. Many of these actions are administrative in nature, meaning that the terms of such agreements are rarely subjected to parliamentary scrutiny.

7. INTERGOVERNMENTAL AGREEMENT ON FEDERAL FINANCIAL RELATIONS

The delivery of COAG reforms is facilitated by the [Intergovernmental Agreement on Federal Financial Relations](#) (IGA on Federal Financial Relations) (for schedules to the IGA, see [here](#)).⁸⁶ The IGA on Federal Financial Relations was agreed by COAG on 29 November 2008 (see this [communiqué](#) from the relevant meeting). The IGA is an agreement between all jurisdictions on how the Commonwealth is to provide funding to the States and Territories. It was “designed to focus the efforts of relevant governments on the achievement of agreed high level policy outcomes.”⁸⁷ [“COAG’s Reform Agenda” webpage](#) summarises the further aims of the IGA as follows:

The [IGA on Federal Financial Relations] aims to enhance collaborative federalism by reducing the previous complexity of the Commonwealth’s financial relations with the States and the Territories, promoting greater flexibility in service delivery, and enhancing public accountability for achieving outcomes.

Information about the IGA is available on the website of the [Standing Council on Federal Financial Relations](#), which oversees the operation of the IGA (see the Council’s [terms of reference](#)). It is chaired by the Commonwealth Treasurer, and its members are the Treasurers of each sub-national jurisdiction.

Amongst the information available on the Standing Council’s website is this [‘toolkit for drafters of new agreements’](#). This is comprised of several useful documents, including [A Short Guide to the Intergovernmental Agreement on Federal Financial Relations and the Financial Relations Framework](#).

An analysis of the intricacies of the vexed history of federal financial relations is beyond the scope of this paper. What follows in this section is instead an overview of the IGA and some of the background to its implementation.

a. Former funding arrangements

Prior to the commencement of the IGA on Federal Financial Relations, the

⁸⁴ Kildea, above n 14, 75.

⁸⁵ Saunders, above n 82, 41; *ibid*.

⁸⁶ Gallop, above n 71, 44.

⁸⁷ O’Meara and Faithfull, above n 14, 99.

Commonwealth provided funding to the States and Territories through either general purpose grants or specific purpose payments (SPPs) (or “tied grants”). As Twomey and Withers stated:

These payments are tied to conditions imposed by the Commonwealth. In this way the Commonwealth can dictate aspects of state policy.⁸⁸

Such payments are generally made by the Commonwealth under its “grants power”, section 96 of the *Commonwealth Constitution* (the Constitution). While the Commonwealth has employed tied grants to provide funding to the States since the 1920s, their use became more ubiquitous from the 1960s onwards.⁸⁹ By the 2006-07 financial year, the Commonwealth was providing funds to the States under at least 90 separate SPPs, and the amount paid under these agreements “amounted to approximately 42 per cent of the total payments made by the Commonwealth to the States.”⁹⁰

The Commonwealth’s employment of SPPs as a means of funding the States had long been controversial. Twomey and Withers quote the following observation by Access Economics, which summarises some concerns that had been raised in relation to the use of SPPs:

[SPPs] often impose excessively detailed and distorting conditions on how the States exercise even their (constitutionally) exclusive functions. As a result, tied grants can be costly intrusions into State functions and responsibilities, resulting in overlap, duplication and other inefficiencies.⁹¹

Prior to the 2007 election, then Opposition Leader Kevin Rudd established an “ALP Advisory Group”, comprised of academics with relevant expertise, and charged it with the development of a “new framework for Commonwealth-state relations that would ‘reduce inefficiency, duplication, and the opportunity for blame shifting and cost shifting.’”⁹² As McQuestin writes, the Advisory Group was specifically asked to consider reform options for SPPs, amongst a range of other matters.⁹³

In July 2007, the Advisory Group produced a discussion paper entitled *A Framework Guide to the Future Development of Specific Purpose Payments*

⁸⁸ A Twomey and G Withers, report to the Council of Australian Federation, *Federalist Paper I: Australia’s Federal Future* (April 2007), 35.

⁸⁹ M Keating, G Anderson, M Edwards and G Williams, ALP Advisory Group, *A Framework Guide to the Future Development of Specific Purpose Payments (SPPs)* (July 2007), 1.

⁹⁰ Twomey and Withers, above n 88, 47 and 35.

⁹¹ Access Economics, ‘The Cost of Federalism’ in Business Council of Australia, *Reshaping Australia’s Federation – A New Contract for Federal-State Relations* (2006), Appendix 2, 18, as cited by Twomey and Withers, *Ibid*, 48.

⁹² K Rudd and B McMullan, ‘High-Level Advisory Group on Federal-State Relations (Media Statement, 18 May 2007) <http://pandora.nla.gov/pan/22093/20071124-0102/www.alp.org.au/media/0507/msfsrloo180.html> as quoted and cited by McQuestin, above n 13, 12.

⁹³ McQuestin, above n 13, 12, see also Keating et al, above n 89, I (terms of reference).

(SPPs). This paper noted:

SPPs have a long history in Australia, and since the 1960s they have become a very significant source of funding. This development of the Commonwealth's role in areas such as education, health, and transport, which account for more than three quarters of total SPPs, is for the most part accepted by the States. Certainly the States have become dependent on the funds that are provided through SPPs . . .

It seems most likely therefore that SPPs will continue, but there are a number of problems that need to be addressed if SPPs are to be more effective in achieving their legitimate purpose of achieving what are genuinely national objectives.⁹⁴

The Advisory Group paper then listed the problems that had been identified with the former system of SPPs, including:

- a lack of clarity regarding which level of government was responsible for what;
- an attendant lack of accountability;
- blame shifting as well as cost shifting;
- inefficiencies; and
- administrative duplication.⁹⁵

It also noted that there had been a recent “proliferation of small SPPs, that have no obvious national purpose and which seem principally designed to give Federal members of parliament a local political advantage.”⁹⁶

The Advisory Group paper explained that the “overriding objective” of reforming the payment system “must be to enhance and support co-operative federalism”, adding:

In their modern form, SPPs have come to represent the practical expression of Federalism. SPPs are a legitimate means of achieving a genuine national purpose, but they should be directed to that national purpose and based on a genuine national partnership built between the Commonwealth and the States. Unfortunately under the current government SPPs have frequently been the mechanism for Coercive Federalism with the Commonwealth dictating conditions to the States. Often these conditions have nothing to do with the objectives of the program (eg industrial relations conditions on program funding), or they seek to dictate delivery processes where there is no need for national uniformity and

⁹⁴ Keating et al, above n 89, 1-2.

⁹⁵ Ibid, 2.

⁹⁶ Ibid.

where diversity and experimentation might better achieve the programs objectives.⁹⁷

The paper proposed a principled reform of the payment system, to rationalise the number of SPPs and ensure that the Commonwealth was only “involved in those issues that were traditionally managed by the States where Commonwealth-State inter-action is necessary to enhance efficiency, equity and/or access or . . . basic rights and heritage.”⁹⁸ It concluded that:

For those areas where it is agreed that shared responsibility between the Commonwealth and the States should continue, the aim should be to identify and agree on the respective roles of each level of government. Collaborative federalism should then be founded on a partnership between the Commonwealth and the States, where there is proper consultation on program objectives and information demands. The States would then have considerable discretion and more flexibility as to how they achieve those objectives, having regard to their particular local circumstances.⁹⁹

b. Reforms of the first Rudd Government

As noted, the IGA on Federal Financial Relations was agreed by COAG in November 2008, following a series of negotiations between the Commonwealth and the States and Territories. The key elements of the agreement had been signalled at the March 2008 meeting of COAG. The [communiqué](#) for that meeting advised that:

The new financial framework will result in a significant rationalisation of SPPs, primarily through combining many into a smaller number of new national SPP agreements, with a reduction in total Commonwealth funding for these activities. This reform will see a reduction from the current 92 SPPs to five or six new national agreements for delivery of core government services – health, affordable housing, early childhood and schools, vocational education and training, and disability services.

These reforms will clarify roles and responsibilities, reduce duplication and waste and enhance the accountability to the community. The objectives and outcomes for each of the new agreements will replace input controls in current agreements.

The new agreements will focus on agreed outputs and outcomes, providing greater flexibility for jurisdictions to allocate resources to areas where they will produce the best outcomes for the community.

New NP arrangements will provide incentives for reform, or for funding for specific projects, in areas of joint responsibility, such as transport, regulation, environment, water and early childhood.

⁹⁷ Ibid.

⁹⁸ Ibid, 3-4.

⁹⁹ Ibid, 9.

For all new arrangements, a new performance and assessment framework will be developed to support public reporting against performance measures and milestones.¹⁰⁰

Former West Australian Premier and Deputy Chairman of the COAG Reform Council, Geoff Gallop, said of the IGA:

The intergovernmental agreement incorporates a number of key features, or principles of federal financial relations. These include: a simplification of the financial arrangements between the Commonwealth and the states; an outcomes-based approach to service delivery commitments; a clearer articulation of the roles and responsibilities of the two levels of government; incentives for reform; and performance reporting and accountability.¹⁰¹

The [IGA on Federal Financial Relations](#) commenced on 1 January 2009 and is open ended.¹⁰² It has been amended 3 times to date (for example to reflect the agreement reached in relation to national health reform in 2011).¹⁰³

c. Terms of the IGA on Federal Financial Relations

Clause 5 of the IGA states that the objective of the agreement is “the improvement of the well-being of all Australians”, which is to be achieved through:

- (a) collaborative working arrangements, including clearly defined roles and responsibilities and fair and sustainable financial arrangements, to facilitate a focus by the Parties on long term policy development and enhanced government service delivery;
- (b) enhanced public accountability through simpler, standardised and more transparent performance reporting by all jurisdictions, with a focus on the achievement of outcomes, efficient service delivery and timely public reporting;
- (c) reduced administration and compliance overheads;
- (d) stronger incentives to implement economic and social reforms;
- (e) the on-going provision of Goods and Services Tax (GST) payments to the States and Territories equivalent to the revenue received from the GST; and
- (f) the equalisation of fiscal capacities between States and Territories.¹⁰⁴

Clause 8 of the IGA on Federal Financial Relations states that the intention

¹⁰⁰ COAG Communiqué, [26 March 2008](#).

¹⁰¹ Gallop, above n 71, 44. See also McQuestin, above n 13, 14-15.

¹⁰² [Intergovernmental Agreement on Federal Financial Relations](#), clause 4.

¹⁰³ COAG Reform Council, *COAG Reform Agenda: Report on progress 2012*, report to COAG (28 September 2012), 12 (see [here](#) for access to the report).

¹⁰⁴ Senate Select Committee on the Reform of the Australian Federation, above n 21, 60, [Intergovernmental Agreement on Federal Financial Relations](#), clause 19(b).

behind the agreement is:

. . . to improve the well-being of all Australians through improvements in the quality, efficiency and effectiveness of government service delivery by:

- (a) reducing Commonwealth prescriptions on service delivery by the States and Territories;
- (b) clarifying the roles and responsibilities of the Parties in the delivery of government services that are the subject of National Agreements set out in schedules to [the IGA]; and
- (c) enhancing accountability to the public for the outcomes of achieved or outputs delivered under National Agreements or National Partnerships.

The IGA on Federal Financial Relations is supported by the [Federal Financial Relations Act 2009 \(Cth\)](#). This Standing Council on Federal Financial Relations [website](#) explains:

The Act provides a standing appropriation for the Commonwealth to make ongoing financial contributions to the States through four National Specific Purpose Payments and National Health Reform funding, and for the Treasurer to determine GST payments to the States. The Act also provides for the Treasurer, through a written determination, to credit amounts to the COAG Reform Fund for the purpose of making grants of National Partnership payments and general revenue assistance to the States.

The website goes on to comment:

For the first time in decades, the complexity of all the Commonwealth's financial relations with the States is contained in one piece of legislation. This improves the public transparency of these payments and the ability of the Parliament to scrutinise the payment arrangements.

For Professor Saunders, on the other hand, analysis of the actual agreements reached under the revised Federal Financial Agreement framework “suggests that they will further transfer authority from parliaments to governments acting pursuant to agreements, ‘implementation plans’ and one-line appropriations.”¹⁰⁵

i) Specific Purpose Payments under the IGA

One feature of the IGA on Federal Financial Relations was the rationalisation of the number of SPPs from over 90 to just five, “to be spent in the key service delivery sectors”.¹⁰⁶

Gallop explains that the focus on outcomes, which is one principle underpinning the IGA on Federal Financial Relations, has:

¹⁰⁵ Saunders, above n 82, 422.

¹⁰⁶ COAG Communiqué, [29 November 2008](#).

. . . involved a major change in the way Commonwealth payments are made in these service areas. In particular, the number of national specific purpose payments has been consolidated to five and there has been a move away from prescriptions on service delivery with financial and other input controls. Instead, the five national [SPPs] – as provided for in the intergovernmental agreement and the *Federal Financial Relations Act 2009* (Cth) – are ongoing contributions from the Commonwealth to the states and territories to be spent on the key service delivery areas. The states and territories are required to spend each SPP in the relevant service sector, but they have full budget flexibility to allocate funds within that sector as they see fit to achieve the agreed objectives of that sector.¹⁰⁷

The SPP [webpage](#) on the [website](#) of the Standing Council on Federal Financial Relations states that these SPPs allow the Commonwealth to support the efforts of the States “in delivering services in the major service delivery sectors”.

There are currently four SPPs:

- National Schools SPP;
- National Skills and Workforce Development SPP;
- National Disability Services SPP; and
- National Affordable Housing SPP.

The webpage explains that:

The National SPPs are distributed among the States in accordance with population shares based on the Australian Statistician's determination of States' population shares as at 31 December of that year. In recognition that an immediate shift to equal per capita shares may have implications for State allocations, an equal per capita distribution is being phased in over five years from 2009-10.

States and Territories are required to spend the funding received in accordance with these SPPs in the service sector to which the agreement pertains.¹⁰⁸

The fifth SPP, that regarding National Healthcare, was replaced in July 2012 by the [National Health Reform Agreement](#).¹⁰⁹

ii) National Agreements

The SPPs are supplemented by National Agreements. These National Agreements can be found on this [webpage](#) on the [website](#) of the Standing Council on Federal Financial Relations.

¹⁰⁷ Gallop, above n 71, 45.

¹⁰⁸ See [National SPPs webpage](#) on the [Standing Council on Federal Financial Relations website](#).

¹⁰⁹ Ibid.

Gallop explains that:

The National Agreements are the agreements made in respect of the six service delivery areas where both the Commonwealth and the states and territories have responsibilities: education, skills, healthcare, disability, affordable housing and Indigenous reform. The focus on outcomes (as opposed to inputs) is an organising principle of the National Agreements. Governments have agreed a set of objectives, outcomes, outputs and performance indicators for which they will be held publicly accountable.¹¹⁰

There remains a National Agreement for Healthcare, even though the SPP itself has been replaced by the National Healthcare Reform Agreement. The National Agreement for National Indigenous Reform is perhaps better known by its 'Closing the Gap' title. There is no SPP for this National Agreement, "as funding associated with the other National Agreements (in the areas of health, education, disability, housing, and vocational education and training) is required to be implemented consistently" with the Closing the Gap agreement.¹¹¹

The list below provides links to each agreement:

- [National Healthcare Agreement](#)
- [National Education Agreement](#)
- [National Agreement for Skills and Workforce Development](#)
- [National Disability Agreement](#)
- [National Affordable Housing Agreement](#)
- [National Indigenous Reform Agreement \(Closing the Gap\)](#)

As may be seen from this [webpage](#) on the [website](#) of the Standing Council on Federal Financial Relations, each of these agreements has been renewed in the past year. There is also a new [National Education Reform Agreement](#), which at this stage has only been signed by the Commonwealth, NSW, the ACT and South Australia (see this [webpage](#)). Clause 14 of the National Education Reform Agreement provides that it is intended to supersede the National Education Agreement:

14. If a State or Territory signs this Agreement prior to 1 January 2014, on 1 January 2014 it will cease to be a Party to the *National Education Agreement* and the following National Partnership Agreements:

- a. Rewards for Great Teachers; and
- b. Low Socio-Economic Status School Communities.

¹¹⁰ Gallop, above n 71, 44.

¹¹¹ Ibid, 45 (footnote 4).

The National Agreements [webpage](#) states that:

National Agreements define the objectives, outcomes, outputs and performance indicators, and clarify the roles and responsibilities that will guide the Commonwealth and the States in the delivery of services across a particular sector.

For example, the current [National Education Agreement](#) states its **objectives** as follows:

9. Through this Agreement, the Parties commit to the objective that all Australian school students acquire the knowledge and skills to participate effectively in society and employment in a globalised economy.

10. This objective will also be pursued through the *National Declaration on Educational Goals for Young Australians* and supported by SCSEEC Indigenous Education policy directions and action plans.

11. All aspects of this Agreement contribute to, or measure progress towards, the objective.

The desired **outcomes** of the agreement are specified in clause 12:

12. The Agreement will contribute to the following outcomes: (a) all children are engaged in and benefiting from schooling; (b) young people are meeting basic literacy and numeracy standards, and overall levels of literacy and numeracy achievement are improving; (c) Australian students excel by international standards; (d) schooling promotes the social inclusion and reduces the educational disadvantage of children, especially Indigenous children; and (e) young people make a successful transition from school to work and further study

The **measurable targets that COAG has agreed** must be met to achieve these objectives and outcomes are:

13. COAG has agreed to the following targets, which are critical to the achievement of the objective and outcomes above:

(a) Lift the Year 12 or equivalent or Certificate II attainment rate to 90 per cent by 2015;

(b) Lift the Year 12 or equivalent or Certificate III attainment rate to 90 per cent by 2020;

(c) Halve the gap for Indigenous students in reading, writing and numeracy by 2018; and

(d) At least halve the gap for Indigenous students in Year 12 or equivalent attainment rates by 2020.

In relation to outputs, the introductory clauses of the Agreement note that:

14. This Agreement will contribute to a range of outputs which support achievement of the agreed outcomes for schooling. Outputs include student enrolments disaggregated by school sector and Indigenous status.

Clause 17 of the National Education Agreement sets the **shared roles of the Commonwealth, States and Territories**. These include:

(a) jointly responsible for developing, progressing and reviewing the national objectives and outcomes for schooling;

(b) jointly responsible for funding school education to enable improved performance in the nationally agreed outcomes and to achieve national objectives;

...

(d) responsible for working together to develop evidence to support the achievement of the national objectives and outcomes, and to promote its application to policy and practice;

(e) jointly responsible for designing the funding mechanism by which the Commonwealth allocates funds to States and Territories to support improved service delivery and reform;

...

(h) responsible for the development and maintenance of a National Curriculum and for participating in the work of the national education authority that manages national curriculum, assessment and data management, analysis and reporting; and

(i) jointly responsible for a nationally consistent system of teaching standards.

Clause 18 of the National Education Agreement goes on to provide that the **roles of the Commonwealth** are:

(a) allocating funding to States and Territories to support improved service delivery and reform to meet nationally agreed outcomes and to achieve the national objective, including for students with particular needs;

(b) ensuring that the funding arrangements for non-government school systems and schools are consistent with, and support the responsibilities of the States and Territories in respect of regulation, educational quality, performance and reporting on educational outcomes;

(c) higher education policy, including its impact on pre-service and post-graduate teacher education and teacher supply through setting higher education national priorities, and its funding of universities; Intergovernmental Agreement on Federal Financial Relations;

(d) investing in actions to secure nationally agreed policy priorities, in consultation with States and Territories; and

(e) ensuring that funding agreements between the Commonwealth and non-government authorities will include a provision that the non-government school sector will work with Governments within each state or territory to ensure their participation in relevant aspects of this agreement.

Clause 19 of the National Education Agreement completes this overview of the role of the various levels of government by providing that the **role of States and Territories** includes:

- (a) ensuring that all school aged children are given the opportunity to enrol in a safe and supportive school that provides a quality education, including where students have particular needs. States and Territories are also responsible for ensuring that children of compulsory school-age attend school and therefore are responsible for
 - (i) developing policy;
 - (ii) delivering services;
 - (iii) monitoring and reviewing performance of individual schools; and
 - (iv) regulating schools; so as to work towards national objectives and achievement of outcomes compatible with local circumstances and priorities;
- (b) ensuring that schools provide clear performance reporting to parents, carers and to their local communities;
- (c) the regulatory framework for all schools, including registration and accreditation, educational quality and their performance in educational outcomes, in monitoring and reviewing performance of school systems;
- (d) the employment conditions of teachers in the government school sector, and its impact on teacher supply;
- (e) implementing the National Curriculum . . .

iii) National Partnership payments

The IGA on Federal Financial Relations also established National Partnership payments (or NPs), which were “to support the delivery of specified outputs or projects, to facilitate reforms or to reward those jurisdictions that deliver on nationally significant reforms.”¹¹²

The [webpage](#) on National Partnerships on the [website](#) of the Standing Council on Federal Financial Relations notes that NPs “may include Implementation Plans which outline the specific performance benchmarks which may, when attained by a State, trigger a payment from the Commonwealth.” Implementation Plans are “usually bilateral agreements between the

¹¹² [Intergovernmental Agreement on Federal Financial Relations](#), clause 19(d). See also this [webpage](#) on the [website](#) of the Standing Council on Federal Financial Relations.

Commonwealth and one state or territory which are negotiated between the state or territory portfolio Minister and the Commonwealth portfolio Minister.”¹¹³

The homepage of the [website](#) of the Standing Council on Federal Financial Relations further explains the categories of National Partnership payments:

Each National Partnership payment is supported by a National Partnership agreement which defines the mutually agreed objectives, outputs and performance benchmarks or milestones.

As part of the Heads of Treasuries Review of National Agreements, National Partnerships and Implementation Plans, a new form of National Partnership agreement called a Project Agreement will be used to implement projects that are considered low value or low risk.

National Partnership project payments are a financial contribution to the States to deliver specific projects, including improving the quality or quantity of service delivery, or projects that support national objectives.

The Government also recognises the need to support States to undertake priority reforms. Consequently, in areas that are a national priority - for example, implementing the seamless national economy - National Partnership facilitation payments may be paid to the States in advance of progressing or achieving nationally significant reform, in recognition of administrative and other costs of initiating those reforms or pursuing continuous improvement in service delivery.

National Partnership reward payments are provided to States that deliver nationally significant reform. Reward payments are structured in a way that encourages achievement of ambitious performance benchmarks detailed in a National Partnership agreement. Reward payments are contingent on the achievement of performance benchmarks, with achievement for each jurisdiction assessed by the independent [COAG Reform Council](#).

According to the COAG Reform Council (CRC), as of September 2012, there were 59 “currently active” National Partnerships.¹¹⁴ The proliferation of these kinds of agreements, which are typically more prescriptive than SPPs, has caused concern in some quarters about their capacity to undermine the objectives of the IGA on Federal Financial Relations (discussed below at part d. of this section).

iv) General revenue payments and the GST

As noted, the Commonwealth also provides funding to the States and Territories via general revenue payments. This funding is “untied”, meaning that the States and Territories can spend it on any purpose.¹¹⁵

¹¹³ Commonwealth Parliament, Joint Committee of Public Accounts and Audit, [Report 427 – Inquiry into National Funding Agreements](#) (November 2011), 35.

¹¹⁴ COAG Reform Council, above n 103, 10.

¹¹⁵ Joint Committee of Public Accounts and Audit, above n 113, 7.

The revenue raised by the GST is returned to the States and Territories in the form of these general revenue payments.¹¹⁶ As noted above, clause 5(f) of the IGA on Federal Financial Relations indicates that one of the objectives of the agreement is the equalisation of fiscal capacities between States and Territories.

As the Commonwealth Parliament's Joint Committee of Public Accounts and Audit explained in its 2011 [Report 427 – Inquiry into National Funding Agreements](#):

The amount of GST payable to the states and territories is determined by the Commonwealth Treasurer. The Commonwealth Grants Commission makes recommendations to the Treasurer on the distribution of the GST in accordance with the principles of Horizontal Fiscal Equalisation . . .¹¹⁷

The [Commonwealth Grants Commission](#) defines Horizontal Fiscal Equalisation or HFE as:

State governments should receive funding from the pool of GST revenue such that, after allowing for material factors affecting revenues and expenditures, each would have the fiscal capacity to provide services and the associated infrastructure at the same standard, if each made the same effort to raise revenue from its own sources and operated at the same level of efficiency.¹¹⁸

HFE is a long-standing practice in Australia. The rationale underpinning it has been explained as follows:

Since 1910, the Australian Government has provided some form of financial support for fiscally weaker States. The view was taken that, unless some type of intervention occurred, the Federation would be unsustainable. Less endowed States with weaker financial positions would have had to reduce services and/or raise additional revenue. To enable the poorer (and smaller) States to provide services to their residents at anything close to the same standard, it was recognised that a mechanism was required to adjust their fiscal capacities through special grants.¹¹⁹

The practice is controversial, as the strong or improved economic performance of a jurisdiction can lead to proposed or actual reduction in the share of GST revenue it receives, as is currently the case with Western Australia.¹²⁰

On 30 March 2011, the Commonwealth Government commissioned a review of the system by which the GST is distributed amongst the jurisdictions.¹²¹ A

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ [Commonwealth Grants Commission website, fiscal equalisation key information webpage](#).

¹¹⁹ N Greiner, J Brumby and B Carter, GST Distribution Review, [First Interim Report](#) (March 2012), xi.

¹²⁰ Ibid, see also Western Australia, [2012-2013 Budget Fact Sheet: Western Australia's GST Revenue](#).

¹²¹ [GST Distribution Review website](#).

panel comprised of John Brumby, Bruce Carter and Nick Greiner was appointed to:

...consider whether the current approach to distributing the GST... would ensure that Australia is best placed to respond to the expected significant structural changes in the economy and would maintain public confidence in the financial relations within the Federation.¹²²

The panel stressed in its First Interim Report that the Review was “not a debate about whether HFE should continue”, but that there was room for the improvement of the process by which GST was redistributed, “however sound the underlying principles.”¹²³ The Review published three reports, a [First Interim Report](#) (March 2012), a [Second Interim Report](#) (June 2012) and a [Final Report](#), which was released publicly on 30 November 2012.

The COAG communiqué for the [7 December 2012](#) meeting indicated:

COAG discussed the Report of the GST Distribution Review and requested that it be considered by Treasurers with a report back to COAG by the Commonwealth Treasurer in 2013.

d. Issues with the IGA on Federal Financial Relations

The IGA is generally recognised as a “significant reform”.¹²⁴ However, a number of concerns have been raised about whether the principles of the IGA on Federal Financial Relations have been applied in practice.

For example, questions have been raised about whether the targets contained within the agreements are measurable, and also in relation to the quality of the data provided; the size of the administrative burden that collecting data and providing it to the CRC places on agencies is another source of concern.¹²⁵ It should be noted, however, that in its [2012 Progress Report](#), the CRC stated that while data quality issues remained, work has been done to address these issues, and the revised National Agreements, signed by COAG in 2012, contained “significantly improved performance reporting frameworks.”¹²⁶ A further field of discussion regarding the IGA on Federal Financial Relations relates to whether Commonwealth and State and Territory officials are really committed to the principles of the IGA, or whether some effort is required to bring about cultural change.¹²⁷

¹²² Greiner, Brumby and Carter, above n 119, 1.

¹²³ Ibid, vii.

¹²⁴ See for example Joint Committee of Public Accounts and Audit, above n 113, 11-12.

¹²⁵ Ibid, 30-32 and section 4.

¹²⁶ See COAG Reform Council, above n 103, 36. See from 31 for analysis of performance reporting issues. See also Joint Committee of Public Accounts and Audit, above n 113, from 58 for an overview of steps that have been taken to improve the performance reporting framework.

¹²⁷ McQuestin, above n 13, 19-20; O’Meara and Faithfull, above n 14, 100-101; and Joint Committee of Public Accounts and Audit, above n 113, 47-48.

Other concerns that have been raised are connected with the kind of long-standing issues identified with the funding arrangements existing prior to the implementation of the IGA on Federal Financial Relations. For instance, several observers have commented that National Partnerships, or NPs, which have proliferated in number, provide the Commonwealth with a “backdoor” opportunity to continue its former practice of placing prescriptive conditions on the funding it provides to the States and Territories.¹²⁸ This concern has been noted by COAG, as indicated by the communiqué for its [July 2012](#) meeting:

COAG discussed ongoing concerns about the proliferation of National Agreements, National Partnership Agreements and Project Agreements. COAG is committed to ensuring that only matters of truly national significance will be progressed as new multilateral National Partnership Agreements, with consideration of existing or alternative funding mechanisms before any new funding agreements are entered into. To support this, the working group which will consider expiring agreements will also consider and recommend measures to streamline the development and administration of selected funding agreements, for reporting to COAG at its December 2012 meeting.

The Joint Committee of Public Accounts and Audit’s Inquiry into National Funding Agreements also received submissions suggesting that the Implementation Plans for funding agreements were another area in which “reassertion of Commonwealth control over funding was evident”, and that, contrary to the principles of the IGA on Federal Financial Relations, Implementation Plans “were often prescriptive and focused on inputs rather than outcomes.”¹²⁹ A further criticism that has been expressed regarding the arrangements made under the IGA on Federal Financial Relations is that the National Agreements and National Partnerships do not adequately define the roles of the respective levels of government.¹³⁰ The clarification of the roles of the respective governments in cooperative arrangements “was a key element of Rudd’s federalism.”¹³¹ Again, it should be noted that in its [2012 Progress Report](#), the COAG Reform Council (CRC) found that roles and responsibilities were generally clearly defined in agreements, although it noted in relation to National Agreements that “[i]n making this assessment” it was “not assessing the policy merits of the specified responsibilities, just whether they are clearly defined.”¹³²

A lack of clarity regarding which level of government has responsibility for what can lead to gaps in accountability. This was observed by Chief Justice French in his 2012 paper, in which he noted that the outcomes of cooperation between

¹²⁸ Fenna and Anderson, above n 12, 400; Joint Committee of Public Accounts and Audit, above n 113, 17, 33-34; COAG Reform Council, above n 103, 14-17; Senate Select Committee on the Reform of the Australian Federation, above n 21, 69; and Gallop, above n 71, 45.

¹²⁹ Joint Committee of Public Accounts and Audit, above n 113, 18 and 35.

¹³⁰ Ibid, 17, 32-34; P McClintock, above n 1, cited by O’Meara and Faithfull, above n 14, 103-4.

¹³¹ McQuestin, above n 13, 15.

¹³² COAG Reform Council, above n 103, 22.

the Commonwealth, States and Territories can “diffuse accountability.”¹³³ By way of example, his paper contains the following quote from a 2008 article in the *Canberra Times* on the Murray-Darling Basin Water Agreement:

Who’s in charge and who will we hang if it doesn’t work out? Who’s actually deciding things?¹³⁴

Concerns relating to issues of accountability and the conditional provision of funding are matters connected to the structure of Australia’s federal system of government, which are outlined in Part Two of this paper. The Senate Select Committee noted in its [2011 report](#), while the “existing mechanisms”, including the IGA on Federal Financial Relations, had “improved fiscal arrangements, ultimately . . . they do not address the underlying fiscal imbalance itself.”¹³⁵

8. MEASURING PROGRESS: THE COAG REFORM COUNCIL

The COAG Reform Council or CRC is an independent body which has the task of overseeing the progress being made towards the implementation of reforms by each jurisdiction. At its March 2008 meeting, COAG agreed “a new and expanded role for the CRC” which included:

. . . that, when requested by COAG, the CRC will report to the Prime Minister:

- on a case by case basis on the publication of performance information for all jurisdictions against national SPPs outcomes and progress measures;
- production of an analytic overview of performance information for each SPP, noting that the CRC would draw on a range of sources, including existing subject experts;
- the independent assessment of whether predetermined milestones and performance benchmarks have been achieved before an incentive payment to reward nationally-significant reforms under NP payments is made;
- through the assessment and reporting process, highlighting examples of good practice and performance, although not extending to a policy-advising role; and
- monitoring the aggregate pace of activity in progressing COAG’s agreed reform agenda.¹³⁶

¹³³ French, above n 83, 65.

¹³⁴ Ibid, 63.

¹³⁵ Senate Select Committee on the Reform of the Australian Federation, above n 21, 69. For further consideration and analysis of the issues connected with the IGA on Federal Financial Relations see Joint Committee of Public Accounts and Audit, above n 113, and also the Commonwealth Government’s response to this report: Australian Government, [Response to the Joint Committee of Public Accounts and Audit Report No 427 Inquiry into National Funding Agreements](#) (August 2012). Also see COAG Reform Council, above n 103, which provides a review of how well governments are upholding the major principles (see p 6) of the Intergovernmental Agreement on Federal Financial Relations, as identified by the COAG Reform Council.

¹³⁶ COAG Communiqué, [26 March 2008](#), [attachment C](#).

COAG also agreed that the CRC would continue with the reporting responsibilities conferred upon it in relation to the initial National Reform Agenda in 2007, and also undertake other tasks referred to it unanimously by COAG.¹³⁷ One noteworthy feature of the establishment of the CRC is “the absence of parliamentary involvement in the constitution of such an apparently significant body”, which Saunders describes as “extraordinary.”¹³⁸ The CRC is not accountable to the Commonwealth Parliament, and there is no requirement that its reports be tabled.¹³⁹

The [“COAG’s Reform Agenda” webpage](#) describes the role of the CRC as follows:

The COAG Reform Council is an independent umpire, funded by all jurisdictions, that reports regularly and publicly on the performance of the Commonwealth, States and Territories in achieving the agreed outcomes and performance benchmarks specified in National Agreements and some National Partnership agreements. The Council also reports on the aggregate pace of activity in progressing COAG’s agreed reform agenda. In doing so, it ensures governments are held accountable for the commitments they make through COAG. We can then know whether COAG’s investments are delivering real and improved services to the Australian community.

Gallop says of the CRC that at “the heart of the Council’s role is the bringing to life of one of COAG’s key principles articulated in the [IGA on Federal Financial Relations] – to enhance the accountability of governments through public monitoring and reporting.”¹⁴⁰ As noted, the CRC is independent of all governments, and reports directly to COAG.¹⁴¹ However, as Saunders notes, the CRC’s:

. . . function of monitoring progress within intergovernmental goals can hardly substitute for the accountability of governments to parliaments and hence to the people that Australian model of representative democracy and responsible government assumes.¹⁴²

A good source of information regarding the CRC is its [website](#), which provides access to information about its functions and also to its publications, including its reports to COAG regarding progress in each reform area, and its reports on the progress of the reform agenda as a whole, the most recent of which was published in 2012. The [2012 Progress Report](#) provides the following overview of progress on COAG reforms:

Progress is being made but change is not easy and it can take longer than expected

¹³⁷ Ibid.

¹³⁸ Saunders, above n 82, 422.

¹³⁹ Joint Committee of Public Accounts and Audit, above n 113, 93.

¹⁴⁰ Gallop, above n 71, 46.

¹⁴¹ Senate Select Committee on the Reform of the Australian Federation, above n 21, 42.

¹⁴² Saunders, above n 82, 422.

- COAG has agreed to a diverse and ambitious set of reforms which span a range of economic, social and environmental challenges.
- 50% of the 30 key reforms we assessed are on track; 40% are likely to be delayed.
- A number of reforms have proved very complex to achieve – especially those aimed at creating a seamless national economy and closing the gap in Indigenous disadvantage.
- Two reforms are at risk of not being achieved: nationally consistent occupational health and safety laws and competition reforms in the energy sector.¹⁴³

The difficulty of the CRC's task is recognised by Fenna, who writes:

Translating the complex, contested, qualitative world of public policy into agreed-upon and meaningful quantitative indicators is difficult. Ensuring that those indicators are accurately linked to output-outcome causalities that are often unclear is more challenging still. And finally, doing that across levels of government in a federal system in a way that will promote learning and increase accountability makes it all a decidedly ambitious, if not herculean task.¹⁴⁴

At its March 2008 meeting, COAG also agreed that the Productivity Commission would assist the CRC with its role by reporting “to COAG on the economic impacts and benefits of COAG's agreed reform agenda every two to three years.”¹⁴⁵ The first of these reports was published by the Productivity Commission in May 2012.¹⁴⁶

¹⁴³ COAG Reform Council, above n 103, ix.

¹⁴⁴ A Fenna, “Adaptation and Reform in Australian Federalism” in P Kildea, A Lynch and G Williams (eds), *Tomorrow's Federation* (2012), 26-42, 42.

¹⁴⁵ COAG Communiqué, [26 March 2008](#), [attachment C](#).

¹⁴⁶ See this Productivity Commission [webpage](#) for access to this Report.

PART TWO – ISSUES

9. COAG & FEDERALISM

COAG is a product of the federal nature of Australia's system of government, some say a necessary one.¹⁴⁷ Its every action is shaped by the features of this system. While it is far from the only forum in which the Commonwealth, States and Territories interact, it is the most visible. COAG can be said to be emblematic of contemporary federal-state relations in Australia. It follows, therefore, that criticisms currently made in the public arena of COAG tend also to be aimed at Australia's federal system generally.

Such criticism has come from many quarters over recent months, including:

- In April 2013, Paul McClintock, former chair of the COAG Reform Council wrote that, while the IGA on Federal Financial Relations represented a “radical, progressive approach and is seen internationally as best practice”, in fact the model was undermined at an early stage. He also expressed the opinion that “[w]e are without a coherent view of federalism, and health and education policies, housing and indigenous programs, even tax policy, make little sense if you have no idea how different levels of government will work together to deliver them”, and called for a policy on federalism from both major parties. In a subsequent radio interview, McClintock elaborated on these matters, describing COAG as dysfunctional and noting, among other things, the absence of a public debate on the respective role of governments and the seemingly increasing trend of centralisation of money and power in Canberra.¹⁴⁸
- In a speech to the National Press Club in April 2013, the President of the Business Council of Australia, Tony Shepherd, said that COAG needed to be abolished. According to the *Australian Financial Review*, Mr Shepherd said “COAG is not working and an imbalance in the financial relationship between federal and state governments needed to be addressed.”¹⁴⁹
- In April 2013, *The Australian* reported that the Queensland Premier, Campbell Newman, had described COAG as a “dysfunctional farce”, and had “criticised the overlapping roles of the commonwealth and states in education, health, workplace relations and the environment as inefficient, confusing and a waste of taxpayer money.” *The Australian* reported that “Mr Newman said the commonwealth had gradually encroached into areas of state responsibility – set out by the Constitution – in the past few decades

¹⁴⁷ See for instance Kildea and Lynch, above n 7, 104.

¹⁴⁸ P McClintock, “More theatre than substance at COAG”, *Australian Financial Review* (17 April 2013), 47; F Kelly interview with P McClintock, “PM makes final pitch at COAG for school funding reform”, ABC Radio National, Breakfast (18 April 2012) (audio available [here](#)).

¹⁴⁹ L Tingle, “BCA wants brave politicians” *Australian Financial Review* (18 April 2013), 8.

and that it was time Canberra ‘retreated’ in the interests of good governance.”¹⁵⁰

- In February 2013, former NSW Premier Nick Greiner warned that COAG was “grossly overburdened” and said that “there needed to be fewer issues on the COAG agenda to achieve meaningful reform.” In addition, Mr Greiner is quoted as stating that there were two interrelated problems with current arrangements in Australia, one relating to the need to improve the governance of the federal system, the other to the public finance crisis facing the states.¹⁵¹
- The following day, the *Sydney Morning Herald* reported that another former NSW Premier, now Senator and Foreign Minister, Bob Carr had “called for an overhaul of state-federal relations, saying the states should be given more power and the Council of Australian Governments should be radically changed.” Senator Carr was quoted as stating “Let’s get serious, let’s strip the COAG agenda right back”.¹⁵²

This paper is not the place to canvass the debate about federalism, which is vast, complex and perennial.¹⁵³ As such, it does not attempt to discuss the various theories and modes of federalism, of which there is an “alphabet”¹⁵⁴, nor does it seek to compare the Australian arrangements for intergovernmental relations to those of analogous federalisms. Nevertheless, several features of Australian federalism are of crucial influence in shaping not only COAG as an institution, but also its reforms, the way in which these are delivered and also the power dynamics that find their expression within the forum:

¹⁵⁰ M McKenna, “‘Spell out power divide’ Federal bullying must end: Newman” *The Australian* (13 April 2013), 1.

¹⁵¹ M Whitbourn and M Dunckley, “COAG in trouble even without Gonski: Greiner” *Australian Financial Review* (26 February 2013), 7.

¹⁵² J Swan and M Taflaga, “[Time for a COAG overhaul, says Carr](#)” *Sydney Morning Herald* (27 February 2013).

¹⁵³ There is an extensive literature on federalism. Relevant works include, but are not limited to: P Kildea, A Lynch and G Williams (eds), *Tomorrow’s Federation* (2012); G Appleby, N Aroney and T John (eds), *The Future of Australian Federalism* (2012); L Zines, *The High Court and the Constitution* (5th ed, 2008), H P Lee and G Winterton (eds), *Australian Constitutional Landmarks* (2003); B Galligan, *A Federal Republic: Australia’s Constitutional System of Government* (1995); M Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (1998); B Galligan (ed), *Australian Federalism* (1989); G Sawer, *Modern Federalism* (1976); G Sawer, *Australian Federalism in the Courts* (1967); Proceedings of the Australian Constitutional Convention 1973; Proceedings 1975; Proceedings 1976; Proceedings 1978; Proceedings 1983; and Proceedings 1985; Final Report of the Constitutional Commission (1988); Senate Select Committee on the Reform of the Australian Federation, [Report: Australia’s Federation: an agenda for reform](#) (June 2011); and Commonwealth Parliament, Joint Committee of Public Accounts and Audit, [Report 427 – Inquiry into National Funding Agreements](#) (November 2011).

¹⁵⁴ M Haward, “Federalism” in R Smith, A Vromen and I Cook (eds) *Contemporary Politics in Australia* (2012) 271-281, 274.

- the financial arrangements – specifically the high degree of vertical fiscal imbalance;
- the division of powers between the Commonwealth and the States; and
- the lack of mechanism in the *Australian Constitution* (Constitution) to facilitate intergovernmental relations.

a. Commonwealth/State financial relations and vertical fiscal imbalance

One of the most prominent features in the landscape of Australia's federation is the high degree of vertical fiscal imbalance (VFI). By this it is meant that the Commonwealth collects more revenue than it needs for its own purposes, while the States, which have traditionally retained responsibility for some of the most expensive services, such as hospital care and school education, are not able to raise enough to deliver those services without financial assistance from the Commonwealth.

It is enough to say here that the level of VFI in Australia is problematic for a multitude of reasons, many of which are set out by Twomey and Withers in [*Federalist Paper I: Australia's Federal Future*](#). They include the reliance of the States upon property and transaction taxes, "which can be seen as taxes on mobility, activity and flexibility and are classified by economists as relatively inefficient taxes."¹⁵⁵ VFI also has consequences for accountability in government. This is at least in part attributable to the fact that there are no clear lines, in the traditional sense, between the raising of revenue and its expenditure.¹⁵⁶ Twomey and Withers state:

Australia's fiscal arrangements also mean that areas where there are major expenditure roles for both levels of government (such as health and education) are more common in Australia than in most other federal nations.¹⁵⁷

They go on to comment in relation to a table in their paper which shows national/state shares in health outlays across selected federations that:

Australia stands out in the mix of responsibilities across levels of government, with all the concomitant problems of incentives for cost-shifting between jurisdictions and lack of transparency and accountability to the public – problems with which Australians are familiar.¹⁵⁸

Their reliance upon Commonwealth funding means that the States are more receptive to the Commonwealth's interference in policy than they might

¹⁵⁵ Twomey and Withers, above n 88, 38. See also Senate Select Committee on the Reform of the Australian Federation, above n 21, Chapter 4: Vertical fiscal imbalance, which refers to the problems associated with an excessive degree of vertical fiscal imbalance.

¹⁵⁶ See L Zines, "Changing Attitudes to Federalism" in R French, G Lindell and C Saunders (eds) *Reflections on the Australian Constitution* (2003) 86-104, 101-102.

¹⁵⁷ Twomey and Withers, above n 88, 39.

¹⁵⁸ Ibid.

otherwise be. As Galligan has observed:

Money talks politically and buys policy influence. In recent decades, Commonwealth dominance had ratcheted up several notches, with disregard for federal parameters becoming more brazen among Commonwealth leaders.¹⁵⁹

b. Division of powers

The powers of the Commonwealth Parliament are delineated by the Constitution, predominantly by section 51. The Constitution does not attempt to similarly specify the powers of the States. The assumption was that, while the Commonwealth had only the powers ascribed to it by the Constitution, the State Parliaments would retain broad or plenary powers, subject to those limitations found in the Commonwealth Constitution. Except where the Constitution provides otherwise, as in section 90 in relation to the power to impose customs and excise duties, the powers of the Commonwealth Parliament are not exclusive to it, but are held concurrently with the States. Section 109 is an attempt to prevent the different levels of government from enacting laws which are in conflict. It provides that where there are inconsistent Commonwealth and State laws, the law of the State is invalid to the extent that it is inconsistent with that of the Commonwealth.

Notwithstanding the intentions of the framers¹⁶⁰, power has become increasingly concentrated at the centre of the federation. A number of influences on this trend can be identified, including: the High Court's interpretation of the Constitution in a series of decisions¹⁶¹; the financial superiority of the Commonwealth; the Commonwealth's inventive use of all of its powers, including its executive power and its fiscal powers like section 96 of the Constitution; and changing perceptions regarding which issues are of "national concern" and which can be addressed locally.¹⁶² The Commonwealth is now involved in the development and regulation of policy that would have seemed beyond its sphere at the time of federation, for example in relation to tertiary and school education. Indeed, it even seems as though there is now a public expectation that the Commonwealth will lead, or at least participate in, most important policy initiatives, whether they relate to one of its enumerated powers or not.

One consequence viewed in the context of Australia's constitutional framework, is that it can be difficult to discern precisely which level of government is responsible for what. As one commentator colourfully put it, the division of power and responsibility between governments in Australia resembles

¹⁵⁹ B Galligan, "Fiscal Federalism: Then and Now", G Appleby, N Aroney and T John (eds) *The Future of Australian Federalism* (2012) 320-338, 322.

¹⁶⁰ T Blackshield and G Williams, *Australian Constitutional Law and Theory* (5th ed, 2010), 200.

¹⁶¹ See, for example, B Galligan, *A Federal Republic: Australia's Constitutional System of Government* (1995), 170-179.

¹⁶² Zines, above n 156, 88.

“scrambled eggs” rather than “a neatly layered cake.”¹⁶³ This has flow-on consequences, not only for efficient service delivery, but also for fiscal and political accountability.

c. Lack of a constitutional mechanism for intergovernmental relations

The Constitution does not create a structure or mechanism to facilitate interaction and cooperation between the levels of government on matters of mutual responsibility or interest.

The only provision in the Constitution that specifically contemplates the need for such arrangements is section 101, which allows for the establishment of an Inter-State Commission. However, this body was not intended to have general jurisdiction over all aspects of interstate relations. Rather, its scope was to be limited to powers deemed necessary by the Commonwealth Parliament for it to ensure the execution and maintenance of the provisions in the Constitution concerning interstate trade and commerce. Such a Commission has been established by the Commonwealth Parliament on two occasions, but did not survive for very long on either, being first an early casualty of the High Court’s then fledgling separation of powers jurisprudence, and later, apparently succumbing to the political circumstances of the time.¹⁶⁴

In the time since Federation, the Commonwealth, States and Territories have developed their own mechanisms for interacting and working together. This has been necessary due to the considerable number of concurrent powers they share, and also the multitude of social and other changes that have occurred since federation, which have necessitated cooperation in ways that could not have been foreseen at the time. Martin Painter has explained:

The essential character of the division of functions in the Australian constitution is concurrence, that is, most of the functions are shared rather than being exclusive. But there are no constitutionalised mechanisms for pooling governments’ law-making or executive authority to deal with these shared functions. Practical exigencies in fulfilling constitutionally sanctioned functions bring governments together, but at the same time the Constitution sets them apart as distinct political entities. This is one reason for rich complexity of administrative and political machinery of intergovernmental relations.¹⁶⁵

Geoff Gallop has made a similar observation:

A dominant theme in Australia’s history is that intergovernmental cooperation is both necessary and desirable. Cooperation is necessary because of the nature of the division of responsibilities under the Commonwealth Constitution and the evolution of the revenue arrangements and roles and responsibilities of the levels

¹⁶³ C McGrath, “[Australia’s scrambled egg of government: who has environmental power?](#)” *The Conversation* (5 December 2012).

¹⁶⁴ See for example M Coper, “The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission” (1989) 63 *Australian Law Journal* 731-750.

¹⁶⁵ Painter, above n 6, 6-7.

of government since federation. However, cooperation is also desirable because it has the potential to provide a mechanism for bringing to bear a sense of national purpose, and the expertise and experience of governments in service delivery.¹⁶⁶

Since there is no constitutional or other formal provision for a body or forum to facilitate intergovernmental relations, the void has been filled by governments in an ad hoc fashion. This has enabled the evolution of a body such as COAG, which has been able to adapt to changing circumstances throughout its twenty year history. However, it also means that COAG, its Councils and other associated entities such as the CRC, are creatures of the executive, which exist beyond the scope of the normal checks on power found in the system of representative government that Australia has, and are therefore in a kind of governance vacuum. This of course gives rise to accountability questions. It can also be argued that the absence of an institutional structure, based on a principled approach to intergovernmental collaboration has consequences for the balance of power between the Commonwealth and the States, in the sense that the Commonwealth is able to use its more powerful position to dominate COAG and ensure that its policy preferences prevail over those of the States. These issues are discussed in more detail below.

10. COAG & THE PRACTICE OF INTERGOVERNMENTAL RELATIONS IN AUSTRALIA

In its [2011 report](#) on its inquiry into Australia's Federation, the Senate Select Committee said of COAG that:

Since its creation in 1992, COAG has been the peak intergovernmental forum in Australia . . . Over the years a wide range of issues has been discussed at COAG, including events such as the Bali bombings and the global financial crisis. All of these discussions have highlighted the need for effective intergovernmental operations and they have strengthened the role of COAG.¹⁶⁷

The Committee further said that COAG had “been largely successful in promoting national cooperation amongst governments”, saying that one of its most notable successes was the implementation of the National Competition Policy.¹⁶⁸ However, the Committee also noted that many of the submissions it had received referred to the need for reforms to be made to aspects of the COAG structure and practice.¹⁶⁹ While the problems that have been identified with COAG and the practice of intergovernmental relations, both in the submissions to the Senate inquiry and by other observers are many, they mostly seem to fall within broad, closely interlinked, categories, which include:

¹⁶⁶ Gallop, above n 71, 43.

¹⁶⁷ Senate Select Committee on the Reform of the Australian Federation, above n 21, 40.

¹⁶⁸ Ibid, 48.

¹⁶⁹ Ibid, 49.

- the lack of adequate governance, transparency and accountability measures, including a lack of scrutiny by parliaments in relation to intergovernmental processes; and
- the imbalance created by the Commonwealth's dominance of COAG.

a. Lack of transparency in intergovernmental relations

In its [2011 report](#), the Senate Select Committee on the Reform of the Australian Federation noted that there was “a need for greater transparency of COAG processes, particularly in areas such as the public availability of agendas prior to meetings and the publication of meeting schedules.”¹⁷⁰

In their 2011 article Kildea and Lynch say that:

The challenge of understanding COAG is made difficult for expert and lay person alike due to its failure to be adequately transparent . . . Little effort is made to provide the public with detailed information about meeting outcomes or the reasoning behind them. Nor are there any procedures in place to require governments to make available agreements or other documents for the scrutiny of Parliament.¹⁷¹

As noted by Kildea in a later paper, the proceedings of COAG and its Councils “occur behind closed doors”. He equates the communiqués of these bodies with “press releases”, noting that they contain “few details about meeting outcomes or the reason behind them.”¹⁷² For Kildea, this has consequences for the ability of citizens to participate in intergovernmental relations in Australia:

In a very basic sense, the closed nature of intergovernmental relations impacts on participation by making it difficult for interested parties to obtain accurate and timely information about the issues under discussion. As noted above, formal communiqués provide only a partial record of meetings, and rarely go into detail about the reasoning behind decisions that have been made. Based on these documents it will not always be easy for groups or citizens to discern if there have been developments that may be of interest to them. In some cases it can even prove difficult to maintain an awareness of which issues are the subject of discussion and negotiation in intergovernmental fora. As is well known, COAG agendas are generally finalised only days in advance of the meeting and are not released publicly. Media reports offer some guidance as to what will be discussed, but they generally focus only on the most politically contentious issues – such as health funding and hospitals reform . . .¹⁷³

In addition to the opacity of communiqués, agendas or agenda papers are not generally made publically available. While all intergovernmental agreements appear to be available on the [website](#) of the Standing Council on Federal Financial Relations, efforts to piece together current, up to date information

¹⁷⁰ Ibid, 51.

¹⁷¹ Kildea and Lynch, above n 7, 118.

¹⁷² Kildea, above n 14, 77.

¹⁷³ Kildea, above n 14, 80-81.

about a range of COAG-related matters can require what Kildea has described as “significant effort” and “intrepid research”.¹⁷⁴ He notes that amendments to the *Freedom of Information Act 1982* (Cth) have meant that documents relating to Commonwealth/State relations now fall within the “conditional exemption category”, which means that access to such documents must be provided on request, unless that is such access would “on balance be contrary to public interest”.¹⁷⁵ Gaining access to information in this way would require a person to have sufficient understanding of COAG and its processes to be able to frame an application for the information, something which is hard for those outside the bureaucracy working on intergovernmental relations to either acquire or maintain.

The “Protocols for Council of Australian Governments and Senior Officials Meetings” document, which is annexed to the [2011 report](#) of the Senate Select Committee on the Reform of the Australian Federation, provides further insight into why it might also be difficult to obtain COAG documents under access to information legislation. Under the heading “Status of COAG and Senior Officials Documents” it states:

Documents prepared for COAG and Senior Officials are COAG-in-confidence, unless otherwise agreed by COAG or Senior Officials. Documents should be tightly held and only distributed on a strictly need to know basis.

When there is an expectation that a document prepared for COAG or Senior Officials will be made public, all COAG members should be advised early in the preparation of the document. If a COAG member received a request for a document to be made public (either through a Freedom of Information request, a Royal Commission or some other avenue), all members of COAG will be consulted regarding the release of the document.¹⁷⁶

This lack of transparency has consequences for the accountability of COAG’s processes, in addition to those that it has for the capacity of members of the community to become engaged and/or participate in the decision-making that takes place at COAG and at its Councils.¹⁷⁷

In its [2011 report](#), the Senate Select Committee recommended that “agendas for COAG meetings be . . . made publicly available before meetings.”¹⁷⁸ It further recommended “that outcomes of COAG meetings be published in a more transparent manner than is currently the case with the communiqués.”¹⁷⁹

In its response to the Select Committee’s report, the Commonwealth Government stated:

¹⁷⁴ Ibid, 77-78.

¹⁷⁵ Ibid, 77, citing *Freedom of Information Act* (Cth), sections 11A, 11B, 26A and 47B.

¹⁷⁶ Senate Select Committee on the Reform of the Australian Federation, above n 21, 139.

¹⁷⁷ Kildea, above n 14, 80-82.

¹⁷⁸ Senate Select Committee on the Reform of the Australian Federation, above n 21, 53 (recommendation 6).

¹⁷⁹ Ibid, 53 (recommendation 7).

The Government does not support making the COAG agenda publicly available before meetings. The confidentiality of COAG proceedings promotes the open and frank exchange of ideas, and ultimately enhances the capacity of COAG members to reach agreement in addressing issues of strategic national importance. Notwithstanding the Government's position in this respect, it should be noted that COAG members can, and as a matter of course, do, publicly identify key items for discussion in advance of COAG meetings.¹⁸⁰

In relation to the publication of more transparent outcomes for COAG meetings, the response said that the recommendation was noted, but:

The COAG communiqué represents high-level outcomes of COAG meetings, as agreed by all COAG members. It is publicly released and published on the COAG website immediately following the conclusion of a COAG meeting. Intergovernmental agreements are published on the COAG website, and National Agreements, National Partnership Agreements and Implementation Plans are published on the Standing Council on Federal Financial Relations website.¹⁸¹

O'Meara and Faithfull suggest what would seem to be a compromise between these two views, which attempts to address both the need for more transparency, and also sufficient confidentiality to ensure the "frank exchange" of views:

That COAG Communiqués should better reflect progress achieved, agreement and disagreement (as appropriate) on all significant items, whilst allowing confidential discussion to remain as such. This will strengthen accountability and transparency to the public.¹⁸²

b. Accountability – COAG, intergovernmental relations and Parliaments

As discussed further below, COAG is not regulated by any formal structure. There is no provision for it in the Constitution, and no attempt has been made to formalise it in any way, for example by enacting legislation providing for its arrangements. It therefore exists beyond the scope of parliamentary oversight in a way that other institutions of executive government arguably do not. Even an executive institution such as Cabinet, which is generally not subject to statutory or other types of formal prescription, is accountable to Parliament through conventions of ministerial responsibility. While, obviously, the individual members of COAG remain accountable to the Parliaments in their own jurisdictions, the lines are blurred in relation to the collective accountability of COAG itself.¹⁸³

Kildea and others have also noted that the "fusion of federal and parliamentary modes of government" in Australia has given "rise to a system of 'executive

¹⁸⁰ Australian Government, [Response to the Senate Select Committee Report on the Reform of the Australian Federation, *Australia's Federation: An Agenda for Reform*](#) (November 2011), 5.

¹⁸¹ Ibid.

¹⁸² O'Meara and Faithfull, above n 14, 110.

¹⁸³ Kildea, above n 14, 77-78.

federalism' in which "the executive branch designs the organisational context of intergovernmental relations and is the dominant actor."¹⁸⁴ Anderson has written that COAG has "entrenched executive federalism" in several ways, including "by providing a rationale for a much more powerful role of central agencies in policy development across all levels of government" and also by encouraging the growth of "new bureaucratic networks across State borders."¹⁸⁵ According to the Commonwealth Parliament's Joint Committee of Public Account and Audit, in its [Report 427 – Inquiry into National Funding Agreements](#), "unlike the exposure of other government policies to parliament through legislation", agreements brokered in this sphere are subject to minimal "democratic accountability and parliamentary scrutiny."¹⁸⁶

One way in which these accountability issues with COAG and other intergovernmental relations fora in Australia have been described is in terms of a "democratic deficit".¹⁸⁷ This concept is explored by Kildea in a paper published in 2012, "Making Room for Democracy in Intergovernmental Relations."¹⁸⁸ He identifies the elements of the deficit as being, in his view;

- the lack of transparency in intergovernmental relations, not just at COAG, but also in relation to the "extensive negotiations involving senior officials and other bureaucratic actors" which occur prior to COAG and COAG Council meetings, all of which take place behind closed doors¹⁸⁹;
- the accountability problems associated not only with the marginalisation of Parliaments that tends to be the result of 'executive federalism', but also with the fact that, since the decisions made at COAG and in other forums are often collective "it can be difficult for citizens to know where to direct their blame or praise" for them, and potentially difficult for Oppositions to challenge governments regarding them, for instance where actions taken in an intergovernmental context have "been endorsed in another jurisdiction in which that same party holds government"¹⁹⁰; and
- the multiple barriers that the current practice of intergovernmental relations places in the way of participation by citizens in policy making, which include the "sidelining of Parliament".¹⁹¹

¹⁸⁴ Ibid, 76, quoting C Sharman, "Executive Federalism" in B Galligan, O Hughes and C Walsh (eds) *Intergovernmental Relations and Public Policy* (1991), 27, see also Saunders, above n 82, 416-417.

¹⁸⁵ G Anderson, "The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism" 31(2) (2008) *University of New South Wales Law Journal* 493-508, 505-506.

¹⁸⁶ Joint Committee of Public Accounts and Audit, above n 113, 70.

¹⁸⁷ Kildea, above n 14, 73.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid, 77.

¹⁹⁰ Ibid, 78-79.

¹⁹¹ Ibid, 83.

Kildea argues that while “[t]he challenge of reconciling the practice and institutions of intergovernmental relations with basic democratic values has long been a matter of concern in Australia”, governments have done “very little” to address this matter.¹⁹² He also suggests that the new pattern in which COAG now operates, where it appears to function as almost the final decision-making body in relation to policy on a vast range of issues, combined with what he considers are higher “public expectations of democratic practice”, has given “increased urgency” to the need to subject COAG to some kind of accountability measures.¹⁹³ One way in which Kildea suggests that the democratic deficit might be alleviated to some degree is the formalisation of “COAG’s status and operation.”¹⁹⁴ The concept of the institutionalisation of COAG, and ways this might be done, is outlined further below.

Kildea also analyses several ways in which the role of Parliament might be reinstated in the process. For example, he suggests that participants in COAG or its Councils should be required to report back to their respective Parliaments regarding what transpired at each COAG or Council meeting, and to table agendas, minutes and other relevant documents. He considers that the obligations that apply to Ministers in the ACT in relation to the tabling of intergovernmental agreements should apply to Ministers in other jurisdictions.¹⁹⁵

Ministers in the ACT were subject to requirements regarding the reporting of their intergovernmental activities to the Legislative Assembly from 1997. Initially these requirements were contained in the *Administration (Interstate Agreements) Act 1997*. However, this was repealed in 2005 and a set of administrative measures were put in place which required Ministers to table intergovernmental agreements in the Assembly as soon as practicable after they were signed, and the Chief Minister’s agency to “compile and maintain a list of current negotiations towards intergovernmental agreements that it is anticipated ministers will sign.” A current version of this list was to be tabled in the Assembly every six months.¹⁹⁶ As of 2013, however, tabling of agreements and information about them will not continue in the ACT. Instead, they will be publicised on the [website](#) of the ACT’s Chief Minister and Treasury Directorate.¹⁹⁷

Kildea then turns to a consideration of ways in which parliamentary committees might be able to provide some oversight of intergovernmental agreements. For example, he writes “[i]deally, parliamentary committees in each jurisdiction (Commonwealth and state) should review and report on laws giving effect to intergovernmental agreements.”¹⁹⁸ As possible models, he cites approaches

¹⁹² Ibid, 73.

¹⁹³ Ibid, 74.

¹⁹⁴ Ibid, 85-86.

¹⁹⁵ Ibid, 86.

¹⁹⁶ Australian Capital Territory, *Hansard*, Legislative Assembly ([20 October 2005](#)).

¹⁹⁷ Telephone advice from the Intergovernmental Relations Branch, ACT Chief Minister’s Directorate.

¹⁹⁸ Kildea, above n 14, 86.

taken in Western Australia, and previously in Queensland, which he says at least allow Parliaments to fulfil “an ‘after the fact’ scrutiny role”, as possible models.¹⁹⁹

In Western Australia, the Legislative Council has a Standing Committee on Uniform Legislation and Statutes Review. The Standing Orders of the Legislative Council provide that Bills seeking to give effect to either an intergovernmental agreement or a scheme of uniform laws can be referred to the Standing Committee either at the conclusion of the second reading speech of the member in charge, or following an order of the Council.²⁰⁰ Standing Orders in place since March 2012 state that the Committee “must now confine both its inquiry and report on a Bill to an investigation as to whether the Bill may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.”²⁰¹

The *Parliament of Queensland Act 2001* (Qld) formerly contained a provision which provided that “the area of responsibility about legal reform” of the then Law Justice and Safety Committee included “proposed national scheme legislation referred to the committee by the Assembly” (section 87(a)). This provision was repealed in 2011 when the committee system of the Queensland Parliament was reformed. However, Bills which implement national schemes may be still be considered by the relevant portfolio committee as part of the normal course of the oversight role played by these committees in Queensland’s unicameral Parliament. When reviewing Bills, portfolio committees are required to consider “the application of fundamental legislative principles to the legislation.”²⁰² These fundamental legislative principles are set out in the *Legislative Standards Act 1992* (Qld). One such principle is whether the Bill “has sufficient regard to the institution of Parliament”²⁰³ For an example of a committee’s consideration of a Bill implementing a national scheme in relation to this principle, see the Agriculture, Resources and Environment Committee’s report on the [Electronic Conveyancing National Law \(Queensland\) Bill 2012](#).²⁰⁴

Kildea also explores the idea of engaging Parliament more fully by having all intergovernmental agreements, not just those that require legislation, reviewed by a committee after they are signed. He notes that this has previously been recommended by the former House of Representatives Committee on Legal and Constitutional Affairs, but the proposal was rejected by the Commonwealth Government as it would encroach upon the capacity for governments to be flexible in their relations with each other. He notes that the flexibility issue is a

¹⁹⁹ Ibid, 86-87.

²⁰⁰ Parliament of Western Australia, [Standing Orders of The Legislative Council](#) (December 2011), standing order 126.

²⁰¹ Parliament of Western Australia, [website](#) of Legislative Council Standing Committee on Uniform Legislation and Statutes Review.

²⁰² *Parliament of Queensland Act 2001* (Qld), section 93(b).

²⁰³ *Legislative Standards Act 1992*, see sections 4(2) and 4(4).

²⁰⁴ See from 15 in particular.

valid one, acknowledging that it “would be problematic, for instance, if first ministers negotiated an agreement at COAG, only to have one or more parliamentary committees subsequently recommending the amendment of key terms” and also that there “is a clear tension here between democratic principles and considerations of flexibility and accountability.”²⁰⁵ In his view, the accountability benefits of allowing committees to scrutinise agreements after they had been entered into would outweigh any obstacles to flexibility this may present.²⁰⁶

Kildea goes on to examine the “even more ambitious reform” of implementing a practice in which intergovernmental agreements are considered by parliamentary committees while they are still in draft form.²⁰⁷ As Kildea notes, in its [2011 report](#), the Senate Select Committee on the Reform of Australia’s Federation recommended the establishment of a Joint Standing Committee of federal Parliament with a role of overseeing matters connected to the federation, including COAG.²⁰⁸ The Select Committee recommended that this new Committee should consider and review all proposed intergovernmental agreements, and also any legislation that was proposed as the basis of a referral of power to the Commonwealth by a State or States.²⁰⁹ In the event, the Commonwealth Government did not agree that intergovernmental agreements required the scrutiny of such a committee:

Intergovernmental agreements between the Commonwealth and state and territory governments are agreements between executive governments, often entered into by First Ministers. There already exist a number of mechanisms available to the Parliament to consider and review intergovernmental agreements, including through the consideration by the Senate’s legislation committees of estimates of proposed annual expenditure by government departments and authorities. A further formal referral process to the proposed Joint Standing Committee, should it be established, is not needed for the Parliament to exercise its review function.²¹⁰

Once again, Kildea acknowledges the limitations of the proposal for Committee scrutiny of intergovernmental agreements, including that “it is arguable that the introduction of this strong-form scrutiny across all jurisdictions would undermine the practical operation of intergovernmental relations.”²¹¹ He recognises that requiring Ministers to wait until parliamentary committees had undertaken full scrutiny of agreements before they were finalised could bring the

²⁰⁵ Kildea, above n 14, 87.

²⁰⁶ Ibid, 88.

²⁰⁷ Ibid, 88.

²⁰⁸ Senate Select Committee on the Reform of the Australian Federation, above n 21, 122 (recommendation 17).

²⁰⁹ Ibid, 37 (recommendations 2 and 3 – NB, these recommendations are incorrectly numbered as 6 and 7 on page 37). See also Kildea, above n 14, 88.

²¹⁰ Australian Government, Response to Senate Select Committee Report on the Reform of the Australian Federation, above n 180, 3.

²¹¹ Kildea, above n 14, 89.

intergovernmental relations process to a halt.²¹² He concludes that, while allowing committees to scrutinise agreements before they were signed “would strengthen parliamentary accountability” it is “doubtful that the democratic benefits of this type of parliamentary scrutiny would outweigh the potential damage to the workability of intergovernmental relations.”²¹³

For Jennifer Menzies, such difficulties with the parliamentary process help to explain why governments resort to executive federalism, which she writes has “served Australia well, particularly since the mid-1980s.”²¹⁴ Menzies adds:

Political leaders intuitively understand that our system of executive federalism works for our political and economic culture and the enormous transaction costs which would accrue through changing this model to increase Parliament’s role. As related earlier, Australian politicians are responsive to the need to be pragmatic and problem solving. They also understand there is a disconnect between the reality of the modern decision-making and Parliamentary processes. For example, the House of Representatives sits between 50 and 70 days a year. This sitting schedule, which is a left-over from the horse and buggy days, cannot produce timely outcomes to have a meaningful input to a global crisis.

As well, Parliaments are adversarial and divisive while executive federalism, at its best, is problem solving and consensual. Parliamentary scrutiny is about taking time, deferring decisions, local grandstanding, stalling and above all, embarrassing the government of the day. In today’s globalised economy, the opportunity costs for reducing our reliance on executive federalism and increasing the role of Parliamentary scrutiny remain too high for political leaders to seriously contemplate.²¹⁵

Menzies accepts the need for improved accountability and considers that reform of executive federalism to achieve this must be “two-pronged – to improve the structures and the operation of intergovernmental decision-making and to reform Parliament to allow it to take a meaningful role in scrutinising decisions and agreements.”²¹⁶ She suggests a further way for Parliaments to be involved in the process, appointment of a Minister for Intergovernmental Affairs at the Commonwealth level. Menzies says that this would “give an ongoing point of scrutiny within the Parliament” as:

The Minister could table and debate new agreements, answer questions and appear before Parliamentary scrutiny committees. With the increasing reliance on intergovernmental agreements, a Minister would raise the profile of this work within the Parliament and the community. A Minister for Intergovernmental

²¹² Ibid, 89.

²¹³ Ibid.

²¹⁴ J Menzies, “[Executive Federalism and Accountability – a workable system](#)”, paper for seminar on accountability for specific purpose payments, COAG Reform Council, 30 March 2012, 2.

²¹⁵ Ibid, 4.

²¹⁶ Ibid.

Relations would also remove some of the pressure from the Prime Minister and the limited attention he or she is able to give to these issues.²¹⁷

The need to somehow bring intergovernmental relations within the scope of Parliaments in Australia has been identified elsewhere. In [Report 427 – Inquiry into National Funding Agreements](#), the Joint Committee of Public Accounts and Audit noted the way in which funding agreements are negotiated through COAG “at an executive-to-executive level”, and that while this allowed agreements to be reached more swiftly, “it can be at the expense of transparency.”²¹⁸ The Committee considered that:

Transparency and accountability considerations within the new intergovernmental arrangements and wider COAG system are directly linked to the issue of parliamentary scrutiny.²¹⁹

The Joint Committee said that it had received several submissions from State governments, including that of NSW, which expressed a seemingly shared view that current levels of parliamentary scrutiny of funding under the IGA on Federal Financial Relations were sufficient.²²⁰ However, the Committee further noted that some academics that provided submissions to the Inquiry were “not as content with or supportive of the current level of Commonwealth Parliamentary scrutiny.” A key area of concern, for these submitters, was the “power of the Executive to negotiate and develop national funding agreements.”²²¹ For example, the Committee summarised the submission made by the Gilbert + Tobin Centre of Public Law at the University of New South Wales as follows:

The Centre of Public Law explained that funding agreements will not be subject to parliamentary scrutiny if they do not require legislative implementation and that even when this is needed the impact of parliamentary scrutiny is limited because the details of the agreement are presented ‘as a fait accompli’.

As mentioned earlier, the Centre of Public Law described the sidelining of parliaments in this process as a ‘democratic deficit’. The executive’s accountability to the legislature is weak, therefore, reducing the practice of ‘responsible government’ a cornerstone of Australia’s Westminster system. Further, valuable input from a variety of perspectives may not be capitalised and potential for improvements may be absent from the process.²²²

The Joint Committee expressed the view that “more can be done to facilitate parliamentary scrutiny of national funding agreements, in particular at the implementation stages.” Such scrutiny, it was argued, “will help ensure value for money is achieved for Australian taxpayers, and that a clearer picture of the

²¹⁷ Ibid, 5.

²¹⁸ Joint Committee of Public Accounts and Audit, above n 113, 70.

²¹⁹ Ibid, 78.

²²⁰ Ibid, 72-75 and 78-81.

²²¹ Ibid, 81.

²²² Ibid.

success or otherwise of the national funding agreements is obtained.”²²³ The Joint Committee’s report contained the following recommendations:

Recommendation 12

The Committee recommends that signed National Partnerships are tabled in Parliament, along with a complementary Ministerial Statement.

Recommendation 13

The Committee recommends that the Prime Minister deliver an annual Statement to the House:

- outlining the Commonwealth Government’s perspective on the contribution of national funding agreements to the improvement of the well-being of all Australians; and
- summarising the number of current, new, upcoming and expired National Agreements and National Partnerships.

The Committee also recommended that COAG Reform Council reports should be tabled in Parliament one month after they are submitted to COAG, and also that relevant Productivity Commission reports be tabled as soon as practical (recommendation 11). In its [response](#) to this recommendation, the Commonwealth Government stated:

The CRC releases publicly its NA performance and NP assessment reports, and Productivity Commission reports are already tabled in Parliament within 25 sitting days of being received by the Treasurer. However, in some instances neither the CRC nor COAG release certain reports. This occurs, for example, when the contents are commercial-in-confidence. Consequently, COAG reserves the right to withhold certain reports if there is a compelling reason to do so.²²⁴

The Commonwealth Government also indicated in its response that it did not agree with recommendation 12, as all “agreements under the [IGA on Federal Financial Relations] are available publicly on the website of the Standing Council on Federal Financial Relations.”²²⁵ In relation to recommendation 13, the Government said it considered that “the recommendation’s objective is delivered through other existing avenues.”²²⁶

c. Commonwealth’s dominance of COAG

Commentators have observed that the Commonwealth tends to dominate COAG’s operation in certain ways. For example, O’Meara and Faithfull note:

²²³ Ibid, 93.

²²⁴ Australian Government, response to Joint Committee of Public Accounts and Audit Report 427, above n 135, 9.

²²⁵ Ibid.

²²⁶ Ibid, 10.

Despite the fact that first ministers come to COAG as equal partners in the federation, the operation of COAG (and VFI) gives the Prime Minister more power in practice. The Prime Minister is both Chair and the bank, which affects participants' behaviour and engagement. In addition, the Prime Minister determines the frequency and timing of COAG meetings, and sets the agenda, after seeking the views of other first ministers. The COAG Secretariat is funded by the Commonwealth and is a business unit of the Prime Minister's Department. Agenda papers are primarily authored by the Commonwealth, and are often circulated later than advised. These time constraints only allow minimal feedback from states and territories, which is not always incorporated. The flipside of this is that states seldom attempt to take the lead on drafting COAG agenda papers and too often allow the Commonwealth to determine the agenda. Such operational practices give the Prime Minister a significant tactical advantage in the COAG arena. Moreover, they can, on occasion, undermine good decision-making by first ministers.²²⁷

Kildea and Lynch, too, note that "the Commonwealth controls key aspects of the operation of COAG", including the agenda and matters such as the "frequency and timing of meetings." They note that "COAG's role in intergovernmental decision-making depends largely on the Commonwealth's commitment to it", and that some Prime Ministers have staged COAG meetings less frequently than others. They add that:

The Commonwealth's control of the timing of meetings is also significant, because this allows the Commonwealth to consult the States at a time that suits its own policy timetable, irrespective of the interests of the States. One recent example was the Rudd government's decision to give the States little more than a month to consider complex health and hospital reforms before being asked to give a firm commitment at COAG.²²⁸

They add that the Prime Minister's relative control of the items on the COAG agenda means in practice that:

. . . COAG meetings invariably address issues of interest to the national government. While this is perhaps inevitable, given COAG's focus on policy of national rather than local concern, and the Commonwealth's 'unique legitimacy' in invoking the national interest in pressing particular matters, it is surely regrettable that sometimes the Commonwealth will only finalise the COAG agenda just days before the meeting, thus giving the States minimal time to prepare.²²⁹

Shortly prior to the election of his Government in 2011, the NSW Premier Barry O'Farrell commented on the Commonwealth's dominance of COAG, including its control of when and how often it met, and also its control of the agenda. In terms of how these issues might be addressed, he stated "the Commonwealth should either commit to regular meetings, or provide the right for a majority of States to convene a meeting"; Mr O'Farrell was also of the view that "States and

²²⁷ O'Meara and Faithfull, above n 14, 96.

²²⁸ Kildea and Lynch, above n 7, 113.

²²⁹ Ibid, 113-114.

Territories should play a role in [COAG's] direction with a majority of States being able to add agenda items."²³⁰

Similarly, O'Meara and Faithfull say that:

That the setting of COAG's agenda should be genuinely opened up to the states and territories and not simply a matter for the Prime Minister's consideration. The production of agenda papers in a timely manner should be common practice, rather than an aspiration, in order to support good decision-making.²³¹

They further consider that:

An independent secretariat (funded equally by all member jurisdictions) would ensure that COAG had strategic resources to fully engage all its members, to overcome many of the process and governance imbalances [identified by the authors in their paper] and to act more fully in the best interests of the nation.²³²

Kildea and Lynch also note that the fact that the Prime Minister's chairs all meetings of COAG, and the location of the COAG Secretariat in the Department of Prime Minister and Cabinet are issues that may require some thought in the context of the Commonwealth's dominance of COAG.²³³

In its [2011 report](#), the Senate Select Committee on the Reform of the Australian Federation made the following comments in relation to the matter of the COAG Secretariat:

An equally important reform is the need to locate the administration of COAG on a more independent foundation, placing it at arm's length from the Commonwealth Government. This is currently the case with staffing of the COAG Reform Council, which is 'located in Sydney and jointly funded by the Commonwealth and States and Territories.'

Australia's federation would operate more successfully if most states and territories could develop and coordinate their policy positions on a range of issues independently of the Commonwealth. Currently, the institutional architecture necessary to facilitate this objective is almost non-existent.²³⁴

The Committee noted that "some capacity" for this kind of coordination amongst the States already exists in the form of CAF. It considered that "the interests of closer federal state cooperation would be served if the states and territories were to meet more regularly through a more institutionalised CAF process", and it therefore recommended that the States and Territories "establish a stronger foundation for [CAF] by providing additional funding, formalising Council processes and ensuring that it meets more regularly than is currently the

²³⁰ NSW Parliamentary Library Research Service, above n 2, 8.

²³¹ O'Meara and Faithfull, above n 14, 110.

²³² Ibid, 111.

²³³ Kildea and Lynch, above n 7, 114.

²³⁴ Senate Select Committee on the Reform of the Australian Federation, above n 21, 50.

case.”²³⁵

The Senate Select Committee also recommended that “agendas for COAG meetings be developed jointly by Commonwealth and State and Territory Governments . . . and that the timing, chairing and hosting of COAG meetings be similarly shared.”²³⁶ However, in its [response](#) to this recommendation, the Commonwealth Government stated:

The Government does not support changing the current chairing arrangements for COAG meetings. The Prime Minister of the day has served as the Chair of COAG since its inception in 1992. The arrangement remains appropriate, given the leadership Australian expect the Prime Minister to the Federation. The current arrangement also reflects the fact that the Commonwealth is uniquely placed in the Federation to provide strategic direction and oversight on issues requiring inter-jurisdictional cooperation.²³⁷

d. Lack of institutional structures and systems

As noted, there is no reference in the Australian Constitution to a body such as COAG, nor is COAG governed by a statute or other type of formal regulation.²³⁸ COAG is entirely a creature of executive government, both at Commonwealth and State level. COAG and other apparatus for intergovernmental relations in Australia have been developed in an ad hoc manner, in response to the changing needs of governments over time.²³⁹

Given the role COAG now seems to have assumed within the government of the nation, it has been observed that it requires a more formal structure to be not only more accountable, but also better equipped to deliver its reform agenda. The basis of many of these observations seems to be that while COAG was simply a leaders’ forum that met occasionally to discuss a more limited range of national reforms, these problems of accountability and structure, while still present, were not so pronounced. It is argued that, if COAG is going to continue in its current form, it needs procedures and a structure to both regulate and fortify it, and also to redress the apparent power imbalance between the Commonwealth and States which manifests in its processes.

These themes can be identified in the text of a speech given by Paul McClintock to the Committee for the Economic Development of Australia in February 2011, in which he said that the “role of COAG has changed profoundly over the past two decades”, transforming from an occasional leaders summit to what he considered to be one of “the two most important executive governance structures we have in Australian national public life” (the other being the federal

²³⁵ Ibid, 50-53 (recommendation 8).

²³⁶ Ibid, 53 (recommendation 6).

²³⁷ Australian Government, Response to the Senate Select Committee Report on the Reform of the Australian Federation, above n 180, 5.

²³⁸ Kildea and Lynch, above n 7, 113.

²³⁹ Ibid, 105-112.

Cabinet).²⁴⁰ He spoke of the adoption of the IGA on Federal Financial Relations and said:

The scope of the COAG reform agenda that emerged from this period is remarkable, headed up by the six National Agreements covering health, education, skills, disability, housing and indigenous affairs. Under those six National Agreements were placed some complex and detailed National Partnerships, the most important of which relates to the Seamless National Economy . . . Other topics were added, including important agreements relating to water, and capital cities infrastructure. The oversight of all this is now the task of COAG – in addition to its ongoing role of looking at new policy challenges (like health) and managing the day to day business of the federation (like floods).

. . . COAG has turned itself from an occasional summit meeting to a key governance institution, but the implications of this change now need to be understood and addressed.²⁴¹

At a later point in his address he added that while “COAG is run appropriately for its old role of an occasional summit meeting”, if it was “to continue to oversee the breadth of the COAG reform agenda” it was necessary “to look at its effectiveness as a governance structure.” He went on to note:

The summit meeting model logically had no set timetable as the Commonwealth did not call a meeting unless it had something to solve. It was also logical that the Commonwealth set the agenda, and that no permanent resources were needed. It is, however, less clear to me that the governance model required by today’s COAG reform agenda has the same logic.²⁴²

Others have made similar observations.²⁴³ In his 2012 paper, Kildea wrote:

COAG is currently in the incongruous situation of exerting the power of a central institution of executive government, while possessing the governance structures of a mere meeting of leaders. This may have been suitable in its early years, but, especially since the initiation of the reform agenda, it is no longer appropriate.²⁴⁴

The need for a more formal, institutional structure for COAG was also recognised by the Senate Select Committee on the Reform of Australia’s Federation. In its [2011 report](#), it stated that:

²⁴⁰ McClintock, above n 1, see also Gallop, above n 71, 52, where Gallop endorses McClintock’s remarks.

²⁴¹ Ibid.

²⁴² Ibid; and P McClintock, “[Harnessing federalism – the missing key to successful reform](#)”, Sir Ronald Wilson Foundation lecture at the Crawford School of Public Policy, ANU, Canberra (19 November 2012), 10.

²⁴³ Kildea and Lynch, above n 7, 129; J Menzies, above n 214, 4; P O’Meara and A Faithfull, above n 14, 106; A Twomey, “Reforming Australia’s Federal System” 36(1) (2008) *Federal Law Review* 57-81, 76; and Dr Anne Twomey, *Submission* 32, pp 4-5, as cited by Senate Select Committee on the Reform of the Australian Federation, above n 21, 35-36.

²⁴⁴ Kildea, above n 14, 85.

... several reforms and improvements can be made to COAG and the Ministerial Councils which would enhance its efficiency, encourage greater transparency and strengthen COAG's institutional standing. These improvements would focus on three areas: agenda setting, accountability and administration.

State governments should have an equal stake with the Commonwealth in COAG. This could begin with a formal, transparent intergovernmental agreement to underpin COAG. For some years now, stakeholders, including the Business Council of Australia, have been arguing for a stronger institutional structure for COAG.²⁴⁵

Recommendation 5 of the Committee's report was that:

The committee recommends that COAG be strengthened through institutionalisation to ensure the Council's effective continuing operation and ability to promote improved mechanisms for managing federal state relations. The principles of transparency and joint ownership should be central to this institutionalisation.²⁴⁶

It should be noted that, in its [response](#) to the Select Committee's report, the Commonwealth Government indicated that it did not agree with this recommendation:

COAG's organisational arrangements and operations should maintain the strategic capacity of First Ministers, in particular to respond in a flexible and timely manner to current and emerging issues at the intersection of jurisdictional responsibilities.

Chairing COAG and bringing leadership to the Federation is an inherent aspect of the Prime Minister's role. The Department of the Prime Minister and Cabinet (PM&C) supports the Prime Minister in this role. The location of the COAG Secretariat in PM&C enhances the capacity of the Secretariat to provide strategic support to COAG, and to ensure the timely and successful preparation of agenda papers and other materials for COAG meetings.²⁴⁷

At least four potential ways that arrangements for COAG could be formalised have been suggested:

1. the negotiation of an intergovernmental agreement (IGA) setting out requirements for the governance of COAG;
2. establishing a complementary legislative regime for COAG;
3. entrenching COAG in the Constitution; and
4. including reference in the Constitution to cooperative federalism.

²⁴⁵ Senate Select Committee on the Reform of the Australian Federation, above n 21, 50.

²⁴⁶ Ibid, 53.

²⁴⁷ Australian Government, Response to the Senate Select Committee Report on the Reform of the Australian Federation, above n 180, 4.

It would be possible to design any of these options in a way that attempted to address the issues that have been highlighted above regarding transparency, accountability and balance.

Each of these options has advantages and disadvantages, which are explored by Kildea and Lynch in their 2011 article, "Entrenching 'Cooperative Federalism': Is it Time to Formalise COAG's Place in the Australian Federation". In relation to the possibility of resolving some of the issues with COAG by implementing an IGA, they consider that while (as the Select Committee also appeared to acknowledge), this might be a place to begin the formalisation of COAG's processes, such an approach would have certain limitations, including that "COAG's legal status would remain tenuous" and "governance arrangements and reporting requirements could be ignored with little or no legal consequence."²⁴⁸ They also note that an IGA "could not deliver the strong democratic legitimacy that comes with constitutional entrenchment."²⁴⁹

In relation to legislating for COAG, Kildea and Lynch say that this could be achieved if all jurisdictions passed complementary legislation which gave "recognition to the existence and role of COAG."²⁵⁰ They argue that such legislation could address a range of matters, including:

Membership, decision rules, frequency of meetings and agenda processes could all be detailed in legislation, as could reporting requirements designed improve accountability and transparency.²⁵¹

Kildea and Lynch say that while such legislation might constrain the flexibility of COAG "to a degree", its effects would not be as severe as they might be if provision were made for COAG in the Constitution. They also note that while the "democratic legitimacy" conferred on COAG by a legislative approach would not equate to that of an alteration to the Constitution, which would have to be approved by the people, the arrangements would nonetheless be subject to parliamentary approval. Legislation for COAG would also give it "a solid legal basis". Kildea and Lynch note that the statutory recognition option "presents itself as a feasible middle-ground: less risky and far more feasible than entrenchment, but more muscular than recognition by less formal means."²⁵² They further note that there would most likely be some difficulties associated with the implementation of legislation for COAG, including "the achievement of consensus across all nine jurisdictions with respect to any proposed complementary scheme" and also the need to accomplish "some attitudinal or cultural change to support the more collaborative model of COAG envisaged by the suggested reforms." They conclude such challenges "would not necessarily be insurmountable."²⁵³

²⁴⁸ Kildea and Lynch, above n 7, 121.

²⁴⁹ Ibid.

²⁵⁰ Ibid, 126.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid.

Kildea and Lynch also consider ways in which the Constitution could be amended to make some provision for intergovernmental relations. For example, they say this could be done by inserting provisions in the Constitution which either simply recognise “the existence of COAG as an institution of federal governance” or, in addition to recognising COAG, also making some specifications regarding “its core governance arrangements.”²⁵⁴ In their view, making some form of provision for COAG in the Constitution in this way would have a number of advantages, including the removal of the uncertainty surrounding its status, ensuring that “it would no longer be vulnerable to dissolution, but would instead exist as a permanent fixture of governance within the Australian federation.”²⁵⁵ Other benefits would flow from the referendum process itself, including an increased level of public understanding regarding the “position, purpose and decisions” of COAG, and also the conferral upon COAG of “a popular legitimacy that it presently lacks.” They state that:

Its existence would be seen to originate not in the agreement of first ministers, but rather in the exercise of popular sovereignty, thus enhancing COAG’s democratic credentials considerably.²⁵⁶

Some of the potential drawbacks of this approach, also considered by Kildea and Lynch, include that “it would potentially undermine the flexibility and responsiveness” that currently characterises COAG, and which has “enabled it to evolve in the manner that it has” and possibly render it “less able to respond to changing circumstances.”²⁵⁷ A further risk they identify is that “it would increase the power of the executive with uncertain effects”, and note that:

Without the incorporation of specific procedures enabling parliamentary oversight, there would be potential for constitutional recognition of COAG to enhance the already considerable position of the executive in Australia’s system of government.²⁵⁸

An alternative constitutional alteration would be to include reference to the concept of cooperative federalism in the Constitution. This could include either a narrower, more technical change to the Constitution, or a broader, principles-based change to the Constitution, or a combination of the two.²⁵⁹ The narrower category of change would simply make amendments to specific provisions of the Constitution designed to overcome the difficulties in relation to cross-vesting and the sharing of executive power which have arisen from certain decisions of

²⁵⁴ Ibid, 122.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid, 123.

²⁵⁸ Ibid.

²⁵⁹ A Twomey, “Federalism in Australia: gazing in the crystal ball of constitutional reform” in G Appleby, N Aroney and T John (eds) *The Future of Australian Federalism* (2012) 446-462, 458-461; Dr Anne Twomey, *Submission 32*, pp 4-5, as cited by Senate Select Committee on the Reform of the Australian Federation, above n 21, 35-36; Kildea and Lynch, above n 7, 126-129.

the High Court.²⁶⁰ The broader category would include some provision in the Constitution to “support intergovernmental cooperation.”²⁶¹ Twomey suggests a number of ways this might be done, for example by “inserting in any new or revised preamble a statement recognising the importance of cooperative federalism, so it would no longer be dismissed as a mere political slogan”, or by including a provision, similar to section 105A, which would “permit the making of agreements between the Commonwealth and the states concerning matters within their legislative, executive and judicial powers.”²⁶² Kildea and Lynch consider that reforms along lines such as these would assist and further legitimise the work of COAG, despite the fact that they “would not, in themselves, give COAG a more permanent legal status, reduce centralism or improve democratic accountability.”²⁶³ They indicate that constitutional amendments of this kind would “usefully supplement” the kind of statutory regime for COAG outlined above.²⁶⁴

On a practical note, it must be remembered that attempts to change the Constitution formally in the past have met with limited success. Any proposals requiring the amendment of the Constitution must therefore be considered in this light.

e. COAG & the consequences of co-operative schemes

COAG’s new significance as an institution for policy-making is made possible by a heavy emphasis on intergovernmental cooperation, which, as noted, usually takes the shape of an intergovernmental agreement of some kind. The scope of these agreements has, over time “become more pervasive and their design more complex.”²⁶⁵ While it is desirable in some senses, this increased level of intergovernmental cooperation has some broad-ranging consequences. Not least among these is the further centralisation of power.

Anderson has observed that COAG has become a means of facilitating what he describes as “cooperative centralism”:

. . . COAG, which began as a means for encouraging cooperative federalism, in fact ha[s] become a vehicle for what might be described as ‘cooperative centralism’. The momentum towards cooperative centralism was the result of the COAG process John Howard: the process was significantly more cooperative

²⁶⁰ Senate Select Committee on the Reform of the Australian Federation, above n 21, 29-30.

²⁶¹ Dr Anne Twomey, *Submission 32*, pp 4-5, as cited by *ibid*, 36.

²⁶² Twomey (2012), above n 259, 460. Note that Twomey, at 460-61, also refers to the possible removal of the provisions relating to the Inter-State Commission and the creation “of a new and independent body with the role of monitoring the implementation of agreements and adjudicating upon disputes between governments on the operation of intergovernmental agreements.”

²⁶³ Kildea and Lynch, above n 7, 128.

²⁶⁴ *Ibid*, 126.

²⁶⁵ Saunders, above n 82, 422.

under Kevin Rudd, however, there is little indication that the trend towards centralism will diminish.²⁶⁶

In his 2012 paper, the current Chief Justice of the High Court of Australia, Robert French, raised the question of “whether the trend to a variety of cooperative arrangements is driving Australia into a singular state: a federation in constitutional form, but a unitary state in political reality.”²⁶⁷ He went on to note:

The development of ‘cooperative federalism’ in Australia has been significant. There is an array of schemes in place, or contemplated, for overcoming the difficulties to which the division of legislative and financial powers gives rise in areas seen as requiring a national response. But that development does not seem to be informed by principles for determining which matters are best dealt with by a cooperative or multi-government approach and which are not. Nor are there in evidence principles for selecting the most appropriate cooperative mechanism. The identification and application of such principles is not straightforward. A conservative selection principle would favour a scheme which, while achieving desired efficiencies has the least impact on the distribution of federal power. On the other hand, the conservative principle may give rise to complexity. A principle of simplification and the location of accountability in one authority may be preferred.²⁶⁸

After detailing the history of intergovernmental cooperation on certain policy areas over time, Chief Justice French makes the following remarks about the centralising trend he has identified:

Cooperative federalism today is in part extra-constitutional. Driven by political imperatives, it yields results on a consensual basis, which go well beyond those achievable by the exercise of Commonwealth legislative power and the separate exercise by the states of those powers. In that sense, the cooperative federalism movement may be seen to overshadow expansive interpretations of Commonwealth power under the Constitution. And, in my opinion, although cooperative and thus respecting the formal constitutional position of the states, it contributes towards centralisation. For every topic which is treated as national becomes, potentially, a matter which, somewhere along the line, can be argued is best dealt with by national government.

Mixed jurisdictional cooperative schemes may appear to be fragile because they depend upon a consensus. But once in place, it is arguable, there is a ratchet effect. Once a topic has been designated as one of national significance, requiring a cooperative approach, it is difficult to imagine circumstances in which it becomes politically acceptable to the parties to go backwards and fragment responsibility for it. The pressure seems to be in one direction only.²⁶⁹

²⁶⁶ Anderson, above n 9, 9-10; G Anderson, “The Council of Australian Governments: A New Institution of Governance for Australia’s Conditional Federalism” 31(2) (2008) *University of New South Wales Law Journal* 493-508, 496.

²⁶⁷ French, above n 83, 41.

²⁶⁸ *Ibid*, 41-42.

²⁶⁹ *Ibid*, 63.

As discussed in relation to the IGA on Federal Financial Relations, Chief Justice French refers to the accountability issues that arise in connection with cooperative schemes. He suggests that the referral of powers by the States to the Commonwealth is one mechanism for intergovernmental cooperation in which legislative arrangements are simpler and lines of accountability are clearer.²⁷⁰ However, notes that, “in the application of this power, as in other areas of cooperative federalism, it would be desirable to have some kind of coherent and principled framework” to guide decisions about the use of the reference power, which might cover the type of reference to make in certain circumstances and perhaps include a classification of “the range of safeguards available to protect state interests, and therefore federalist principles where a reference is made”.²⁷¹ He also cautions:

Most people prefer to see cooperation between the components of a federation rather than conflict. But when the trend of cooperation is ultimately to centralise power, then the price of cooperation may ultimately involve a risk of losing some of the benefits of federation.²⁷²

Saunders has also written about the capacity of this increased degree of cooperation to fundamentally alter the shape of Australia’s federal system, and of the need for a more principled approach to be taken to it. She argues that intergovernmental cooperation in Australia has progressed “to a point that is beginning to alter the *de facto*, although not the *de jure*, design of the Australian federation.”²⁷³ In her view, the continued expansion of cooperation:

. . . has consequences for a range of key constitutional principles: accountability and transparency; the relationship between governments and parliaments; the rule of law; and of course, federalism itself.²⁷⁴

For Saunders, what is in fact emerging at the moment is “a new form of governance”, which not only affects these principles, but which has “institutions and practices [which] tend to be opaque.”²⁷⁵ Saunders notes “[t]here is advantage in now beginning to consider the framework of principle within which intergovernmental arrangements should operate.”²⁷⁶ After considering some comparable federations, she says:

. . . there should be a more formal, public and principled institutional framework for the ministerial council network, including COAG, that systemises the relationship between councils; provides guidance on design questions, including on voting rules; distinguishes between quasi-legislative and executive action;

²⁷⁰ French, above n 83, 49 and also 64. See also A Lynch, “The Reference Power: The Rise and Rise of a Placitum?” in P Kildea, A Lynch and G Williams (eds), *Tomorrow’s Federation* (2012) 193-209, for a further discussion of the use of the reference power.

²⁷¹ Ibid (French), 49.

²⁷² Ibid, 65.

²⁷³ Saunders, above n 82, 414.

²⁷⁴ Ibid.

²⁷⁵ Ibid, 424.

²⁷⁶ Ibid.

acknowledges and tackles the problem of political and legal accountability; and gives council activities an administrative support base that is not dependent upon one sphere of government.²⁷⁷

11. CONCLUSION

In their 2011 article, Kildea and Lynch wrote:

In essence, COAG is a response to the federal system established by the *Constitution* as it now operates in a modern, integrated society in an increasingly globalised world at the start of the 21st century. The consequence of this view is that COAG, despite its tenuous status as a major mechanism of governance, is not an ephemeron. It, or something very much like it, will surely be a part of the landscape of Australian federalism from here on. Just as Voltaire said of God: if COAG did not exist, we would have to invent it.²⁷⁸

Their assessment that COAG, or something close to it, is now a permanent feature of Australian federalism would seem to be incontestable, even if only from a purely pragmatic perspective. While this much appears to be settled, a range of questions remain. Some of these questions are specific to COAG and the practice of intergovernmental relations, for instance those relating to how it can be made more transparent and accountable, in keeping with our expectations about institutions of democratic government. Others are broader and relate to Australian federalism itself; what it is, what it does, what it should do and where it is going.

²⁷⁷ Ibid, 430.

²⁷⁸ Kildea and Lynch, above n 7, 129.