

**NSW PARLIAMENTARY LIBRARY  
RESEARCH SERVICE**



**Managerial Federalism -  
COAG and the States**

by

**Gareth Griffith**

**Briefing Paper No 10/09**

## RELATED PUBLICATIONS

- Sovereign States and National Power: Transition in Federal State Finance, Briefing Paper No 14/2006 by John Wilkinson
- Horizontal Fiscal Equalisation, Briefing Paper No 21/2003 by John Wilkinson
- Federal-State Financial Relations: After the GST, Briefing Paper No 14/2000 by John Wilkinson

**ISSN 1325-5142**

**ISBN 978-0-7313-1858-2**

December 2009

© 2009

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent from the Librarian, New South Wales Parliamentary Library, other than by Members of the New South Wales Parliament in the course of their official duties.

# **Managerial Federalism - COAG and the States**

by

**Gareth Griffith**

## **NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE**

Stewart Smith (BSc (Hons), MELGL), Acting Manager  
(02) 9230 2798

Gareth Griffith (BSc (Econ) (Hons), LLB (Hons), PhD),  
Senior Research Officer, Politics & Government /  
Law.....(02) 9230 2356

Jason Arditi, (BA, LLB) Research Officer, Law..... (02) 9230 2768

Holly Park (BSc, LLB) (Hons), Research Officer,  
Environment / Planning .....(02) 9230 3085

John Wilkinson (MA, PhD), Research Officer, Economics.....(02) 9230 2006

**Should Members or their staff require further information about this publication please contact the author.**

Information about Research Publications can be found on the Internet at:

[www.parliament.nsw.gov.au/WEB\\_FEED/PHWebContent.nsf/PHPages/LibraryPublications](http://www.parliament.nsw.gov.au/WEB_FEED/PHWebContent.nsf/PHPages/LibraryPublications)

**Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.**

## CONTENTS

|   |           |
|---|-----------|
| <b>SUMMARY</b> .....  | <b>i</b>  |
| <b>1. INTRODUCTION</b> .....  | <b>1</b>  |
| <b>2. DEFINING AUSTRALIAN FEDERALISM</b> .....  | <b>1</b>  |
| <b>3. INSTITUTIONS OF HORIZONTAL COOPERATION</b> .....  | <b>4</b>  |
| 3.1 Leaders' Forum .....  | 4         |
| 3.2 Council for the Australian Federation .....   | 5         |
| <b>4. INSTITUTIONS OF VERTICAL COOPERATION</b> .....  | <b>6</b>  |
| 4.1 Inter-State Commission.....   | 6         |
| 4.2 Council of Australian Governments (COAG).....   | 7         |
| 4.3 Ministerial Councils .....  | 9         |
| 4.4 COAG Working Groups and the National Health and Hospitals Reform<br>Commission .....                  | 12        |
| 4.5 COAG Reform Council.....  | 14        |
| 4.6 Comments.....   | 16        |
| <b>5. COAG AND FEDERAL FINANCIAL RELATIONS</b> .....  | <b>18</b> |
| 5.1 Overview .....  | 18        |
| 5.2 GST payments .....  | 18        |
| 5.3 Ministerial Council for Federal Financial Relations.....  | 19        |
| 5.4 2008 Intergovernmental Agreement on Federal Financial Relations.                                      | 20        |
| 5.5 National SPP Payments.....  | 21        |
| 5.6 National Agreements.....  | 22        |
| 5.7 National Partnership Payments.....  | 23        |
| 5.8 National Partnership Agreements .....   | 24        |
| 5.9 Nation Building and Jobs Plan .....   | 25        |
| 5.10 Comments.....  | 28        |
| <b>6. SELECTED INTERGOVERNMENTAL AGREEMENTS</b> .....   | <b>29</b> |
| 6.1 Intergovernmental agreements in outline .....   | 29        |
| 6.2 Case study – the National Water Initiative Agreement and the Murray-<br>Darling Basin Agreement ..... | 30        |
| 6.3 Case study – the Health Professions Agreement.....  | 32        |
| 6.4 Comments.....   | 35        |
| <b>7 CONCLUSION</b> .....   | <b>36</b> |



## SUMMARY

This briefing paper looks at the intergovernmental mechanisms by which federalism operates in Australia, notably the Council of Australian Governments (COAG).

In reality there are many issues at play here and countervailing forces at work. Taking a broad view, what seems to be developing is a form of federalism that is regulatory, conditional and prescriptive in nature, at least in the formulation of performance goals and reporting requirements.

***Managerial federalism:*** The paper starts by characterising the COAG process as a form of ‘managerial federalism’. This is defined to be administrative in its mode of operation, pragmatic in orientation, concerned with the effective and rational management of human and other resources, and rich in policy goals and objectives. The States play a creative and proactive part but are, to a substantial degree, service providers whose performance is subject to continuous scrutiny and oversight. Typically, the financially dominant Commonwealth Government plays the manager’s role. [2]

***Council of the Australian Federation:*** In a report prepared by John Wanna and others for the Council of the Australian Federation (CAF) in May 2009 titled, *Common Cause: Strengthening Australia’s Cooperative Federalism*, it was explained that cooperative federalism can operate either horizontally, by the States and Territories acting together without reference to the Commonwealth, or vertically, in those policy areas where the Commonwealth involvement is required. The main institution of ‘horizontal cooperation’ is CAF, established in 2006. CAF’s website includes a report card on its activities. [3.2]

***COAG:*** The main institution of ‘vertical cooperation’ is COAG, established in 1992. The landmarks in COAG’s history include the National Competition Policy, agreed to in April 1995. The terrorist attacks in the United States in September 2001, followed by the Bali bombings in 2002, acted as a spur to the COAG process, as the Howard Government sought to involve the States in a national counter-terrorism strategy. In 2006 COAG agreed to a new National Reform Agenda which merged human capital and regulation as priority areas for reform alongside competition. Then in 2008 the new [Intergovernmental Agreement on Federal Financial Relations](#) placed financial issues firmly at the centre of the COAG stage. This development received added impetus from the Global Financial Crisis, with the announcement in February 2009, following a Special COAG meeting, of the [Nation Building and Jobs Plan](#) to introduce education and housing programs and support major infrastructure investments. [4.2]

The COAG reform process is based primarily on intergovernmental agreements, signed by all heads of government. These agreements signify the commitment of jurisdictions to implement decisions that have been either reached or confirmed by COAG. In many instances, agreements have been the precursor to the passage of legislation. Sometimes this has been Commonwealth legislation, while on other occasions joint Commonwealth and State and Territory legislation has been enacted. [4.2]

**Ministerial Councils:** The COAG process is assisted by a range of institutional structures, including (as at October 2009) 31 ministerial councils, plus another three 'ministerial fora', which comprise councils with ministerial representatives from only two, three or four jurisdictions. The 31 ministerial councils illustrate the range of policy areas which, to some degree, are no longer exclusive to single jurisdictions but are, rather, the subject of a national cooperative strategy. [4.3]

**COAG Working Groups:** At its 20 December 2007 meeting, COAG established seven working groups. Each was to be overseen by a Commonwealth Minister, with deputies at a senior departmental level, nominated by the States and Territories. These groups also include senior officials from all jurisdictions. [4.4]

**COAG Reform Council:** In 2006 a new National Reform Agenda was agreed to by COAG, including the creation of a non-statutory body called the COAG Reform Council. The Council, which was established in April 2007, reports to the Prime Minister as Chair of COAG. The Council's stated aims are to strengthen accountability for the achievement of results through independent and evidenced-based monitoring, assessment and reporting of the performance of all governments. [4.5]

**Fiscal federalism:** The fiscal reality underlying Australian federalism is the financial power of the Commonwealth over the States, a phenomenon that goes by the name of 'vertical fiscal imbalance'. Currently, the Commonwealth provides three broad types of payments to the States: National Specific Purpose Payments (SPPs); three types of National Partnership payments – project payments, facilitation payments and reward payments; and general revenue assistance, consisting mainly of GST payments. [5.1]

**Intergovernmental Agreement on Federal Financial Relations:** The current arrangements are based on the [Intergovernmental Agreement on Federal Financial Relations](#), which came into effect on 1 January 2009. The Commonwealth Government's 2009-10 [Budget Paper No 3](#) commented that a 'new federal financial framework' was in place, one that would provide a 'robust foundation for collaboration between the Commonwealth and the States'. It went on to say:

The framework commenced on 1 January 2009 and involves a significant rationalisation of the number of payments made to the States, while increasing the overall quantum of payments. The framework provides clearer specification of the roles and responsibilities of each level of government, so that the appropriate government is accountable to the community. [5.4]

However, while the National Specific Purpose Payments do provide the States with greater financial flexibility, the comment is made by Anne Twomey that the National Partnership Payments seem to point back towards the micro-management of the federal reform agenda by the Commonwealth, where payments may be withheld or reduced if the States fail to meet agreed conditions or benchmarks. [5.10]



**Case studies:** The case studies that presented do not claim to be representative of COAG agreements generally. They do, however, present contrasting examples of more 'centralist' and 'federalist' models respectively: the National Water Initiative Agreement and the Murray-Darling Basin Agreement concentrate power in the hands of Commonwealth statutory authorities; while the Health Professions Agreement establishes a cross-jurisdictional Ministerial Council as the peak administrative body. **[6.2 and 6.3]**

**Concluding comments:** For all participating governments, the COAG process offers important opportunities to engage in national or other intergovernmental projects, with a view to achieving better standards and regulations, greater uniformity and the more efficient delivery of services and infrastructure. The new system is all about performance reporting by governments, a system founded on accountability and designed to achieve transparency. All of which appears to be as sensible as it is desirable, and consistent with popular recognition of the need for structural reform of Australia's federal system. **[4.6]**

For the States, these developments present concerns as well as opportunities. It can be argued that, for the Parliaments of the States, they represent a weakening of control over major areas of constitutional jurisdiction. It may be that, under the managerial model of federalism that is now emerging, based largely on cross-jurisdictional decision making bodies, traditional constitutional relationships are rendered less robust.

For the State Executives and bureaucracies, on the other hand, the advent of managerial federalism can be painted in a more positive light, as presenting new challenges and avenues of intergovernmental cooperation, in the myriad of committees and other institutional structures established by this process, or else at the peak meetings of Ministerial Councils or at COAG itself. As the establishment of the Council of the Australian Federation and other developments show, the COAG process is not the whole story of present day Australian federalism. It is however the leading player in that story. **[7]**



---

## 1. INTRODUCTION

This briefing paper looks at the intergovernmental mechanisms by which federalism operates in Australia, notably the Council of Australian Governments (COAG). More particularly, the paper considers the agreed outcomes produced by these mechanisms, with a view to highlighting the distinctive roles and responsibilities of the States.

The paper starts by characterising the COAG process as a form of ‘managerial federalism’. Presented next is an overview of the key institutions of ‘horizontal’ and ‘vertical cooperation’. The arrangements arising from this structural framework are complex, legally and administratively, as are the implications for the States. A later section of the paper looks at the key issue of federal financial relations and the role played by COAG in this context. Selected intergovernmental agreements are also outlined. The focus of the paper is not conceptual therefore, looking at the big ideas behind federalism; nor, yet, is it normative, mapping future directions for Australian federalism. Rather, the empirical emphasis is very much on the administrative and legal nuts and bolts of the present intergovernmental arrangements.

## 2. DEFINING AUSTRALIAN FEDERALISM

While the focus of the paper is neither conceptual nor normative, it remains the case that empirical analysis cannot operate free of such considerations. The literature on Australian federalism is crowded with terminology that seeks to conceptualise the relationship between the Commonwealth and the States. These conceptual descriptions include ‘new federalism’, ‘cooperative federalism’, ‘collaborative federalism’,<sup>1</sup> ‘executive federalism’,<sup>2</sup> ‘regulatory federalism’, ‘pragmatic federalism’,<sup>3</sup> and, in something of a variation, ‘cooperative centralism’.<sup>4</sup> Each of these descriptive formulations embodies certain theoretical assumptions about the nature of the Australian federation at any given historical moment.

A recent entry into this field is the term ‘conditional federalism’, coined by Geoff Anderson, Lecturer in the School of Political and International Studies at Flinders

---

<sup>1</sup> M Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s*, Cambridge University Press 1998.

<sup>2</sup> C Sharman, ‘Executive Federalism’ in B Galligan and O Hughes (eds), *Intergovernmental Relations and Public Policy*, Allen and Unwin, 1991.

<sup>3</sup> R Hollander and H Patapan, ‘Pragmatic federalism: Australian federalism from Hawke to Howard’ (2007) 66(3) *The Australian Journal of Public Administration* 280.

<sup>4</sup> *NSW v Commonwealth* (2006) 229 CLR 1, per Kirby J at 225 [543]. In a strictly constitutional law context, Kirby J commented on what he called ‘optional or “opportunistic federalism” in which the federal Parliament may enact laws in almost every sphere of what has hitherto been a State field of lawmaking by the simple expedient (as in this case) of enacting a law on the chosen subject matter whilst applying it to corporations, their officers, agents, representatives, employees, consumers, contractors, providers and others having some postulated connection with the corporation.’

University, to describe the form of federalism that is emerging under the COAG process. Anderson comments in this respect that current developments reflect two underlying assumptions: first, an acceptance that federalism is embedded in Australia's constitutional order and 'perhaps even a willingness to accept that it provides an important diffusion of power within the national governmental system, as well as a means of encouraging policy diversity and facilitating regional balance across the continent'; and, secondly, an assumption that federalism is 'inherently inefficient'. The COAG process can be seen as an attempt to confront and overcome this concern. Anderson writes:

The result is growing support for a modern form of the federation which might be described as 'conditional federalism'. 'Conditional' in the sense that it should be maintained as a system of government so long as it meets the conditions necessary for an efficient national economy; also, because its operation should be regulated by 'conditions' imposed by the central government.<sup>5</sup>

Not everyone would agree that Australia's federalism is 'inherently inefficient', still less that its continued existence depends on a raw calculation of economic performance. As explained by Anne Twomey and Glen Withers in their 2007 report [Australia's Federal Future](#), commissioned by the [Council for the Australian Federation](#) (CAF), federalism operates by a combination of competition and cooperation between its constituent parts, by what might be called a mix of diversity and uniformity.<sup>6</sup> The theory is that differences can be accommodated, as can sameness, depending on the creatively and pragmatically appropriate approach to any particular issue. In practice, of course, complexities and difficulties arise, but then the same applies to all forms of government. Clearly, the contrary idea that inefficiencies and complications would be somehow swept away by the adoption of a unitary system of government is profoundly misguided. Politics is always messy; administration is forever frustrating; the devil is invariably in the detail.

As for Australian federalism, Twomey writes that the most common complaints:

concern duplication, excessive bureaucracy and administration, buck-passing and cost-shifting. The most common suggestions for reform include the reallocation of powers and functions between the Commonwealth and the States, the reform of Commonwealth-State financial relations and the improvement of intergovernmental processes.<sup>7</sup>

Jonathan Pincus, speaking on the same subject, comments that 'Critics easily see

---

<sup>5</sup> G Anderson, 'The Council of Australian Governments: a new institution of governance for Australia's conditional federalism' (2008) 31(2) *UNSW Law Journal* 493 at 494.

<sup>6</sup> A Twomey and G Withers, [Federalist Paper 1 – Australia's Federal Future](#), Council for the Australian Federation, April 2007, p 15.

<sup>7</sup> A Twomey, 'Reforming Australia's federal system' (2008) 36 *Federal Law Review* 57 at 58.

---

the costs, but tend to ignore or dismiss the benefits'.<sup>8</sup> Federations are complex by design, politically in order to achieve a division or distribution of power and the checks and balances that accompany this. As Justice Callinan observed in the *Work Choices Case*, 'It may...perhaps be argued that despite their faults, federations are the least undemocratic of all forms of government'.<sup>9</sup> Nor are the advantages limited to the political sphere. From an economic perspective, the Commonwealth Government's 2009-10 [Budget Paper No 3](#) acknowledged that federalism can provide 'significant benefits not available under other systems'. More cautiously, the coda was added:

Federations work best when the roles and responsibilities of each jurisdiction are clear and good public accountability mechanisms allow the community to hold the appropriate level of government to account for the quality and efficiency of the services delivered and outcomes achieved.<sup>10</sup>

Behind this statement lie the reforms introduced by the 2008 [Intergovernmental Agreement on Federal Financial Relations](#), which is discussed in later sections of this paper. A major impetus informing the Agreement was the reduction of the amount of micro-management undertaken by the Commonwealth, associated with the traditional system of tied grants to the States. The Commonwealth Government's 2009-10 [Budget Paper No 3](#) commented in this respect:

In Australia over the past few decades, the proliferation of small payments to the States, and the increasing Commonwealth prescription accompanying these payments, have been a source of increasingly blurred roles and responsibilities, duplication and overlap, high administration costs and cost shifting. The new federal financial framework brings greater clarity to the roles and responsibilities of the Commonwealth and the States. A reinvigorated and cooperative COAG is advancing this modern federalism agenda.<sup>11</sup>

In reality there are many issues at play here and countervailing forces at work. Taking a broad view, what seems to be developing is a form of federalism that is regulatory, conditional and prescriptive in nature, at least in the formulation of performance goals and reporting requirements. Accountability and auditing related conditions are a common feature of the intergovernmental agreements arrived at through the COAG process. If COAG is the key intergovernmental institutional player in this scheme, responsibility and accountability are the guiding concepts. Drawing these observations together, what has emerged over the past decade or so, its trajectory steepening over the last few years, is a form of 'managerial

---

<sup>8</sup> J Pincus, [Commonwealth-State Financial Relations: The Case for Competitive Federalism](#), Australian Senate Publications, 14 August 2009, p 10.

<sup>9</sup> (2006) 229 CLR 1 at 320.

<sup>10</sup> Commonwealth Government, *Budget Paper No 3: Australia's Federal Relations, 2009-10*, 12 May 2009, p 7.

<sup>11</sup> *Budget Paper No 3: Australia's Federal Relations, 2009-10*, n 10, p 7.

federalism', which is administrative in its mode of operation, pragmatic in orientation, concerned with the effective and rational management of human and other resources, rich in policy goals and objectives, in which the States play a creative and proactive part but are, to a substantial degree, service providers whose performance is subject to continuous scrutiny and oversight. Typically, the financially dominant Commonwealth Government plays the manager's role, as controlling as it can be empowering. The constitutional implications are many and varied, not least for the Parliaments of the States.

### 3. INSTITUTIONS OF HORIZONTAL COOPERATION

#### 3.1 Leaders' Forum

In a report prepared by John Wanna and others for the Council of the Australian Federation (CAF) in May 2009 titled, [\*Common Cause: Strengthening Australia's Cooperative Federalism\*](#), it was explained that cooperative federalism can operate either horizontally, by the States and Territories acting together without reference to the Commonwealth, or vertically, in those policy areas where the Commonwealth involvement is required.<sup>12</sup> The establishment of the Council for the Australian Federation in 2006 gives institutional expression to the horizontal model, the basic idea of which was expressed in 1997 by John Bannon, the then Premier of South Australia. He was reflecting on an earlier Special Premiers Conference, held in November 1991, which the Commonwealth did not attend. For Bannon, the landmark meeting demonstrated

that there were things the States could actually do together that did not always need the Commonwealth and could be very productive in terms of federal and State national activities.<sup>13</sup>

This insight resulted initially in the establishment in July 1994 of the Leaders' Forum, a meeting of State and Territory heads of government.<sup>14</sup> Anne Tiernan comments that Leaders' Forums were 'usually held prior to scheduled COAG meetings'. She continues:

COAG met only four times between 1996 and 2001, meaning there were few opportunities to convene the Leaders' Forum. Though COAG met more frequently in the latter years of the Howard government, there was growing dissatisfaction with the forum.<sup>15</sup>

---

<sup>12</sup> J Wanna, J Phillimore, A Fenna and J Harwood, *Common Cause: Strengthening Australia's Cooperative Federalism*, CAF, May 2009, Chapter 3.

<sup>13</sup> Parliament of Victoria, Federal-State Relations Committee, *Australian Federalism: The Role of the States*, October 1998, p 57. Quoted is John Bannon's evidence to the Committee.

<sup>14</sup> Parliament of Victoria, Federal-State Relations Committee, n 13, p 61.

<sup>15</sup> A Tiernan, 'The Council for the Australian Federation: A New Structure of Australian Federalism' (June 2008) 67(2) *The Australian Journal of Public Administration* 122, p 123.

### 3.2 Council for the Australian Federation

From this dissatisfaction, and with a growing recognition by State leaders of a need for a counterweight to Commonwealth dominance of the intergovernmental policy process, there developed the idea of a more robust institutional forum for State and Territory leaders. The result was the establishment of CAF, consisting of the Premiers and Chief Ministers of the States and Territories. Reflecting on this development, Wanna et al state:

The need for such a body had been identified on a number of occasions, and similar institutions exist in Canada (Council of the Federation) and the USA (National Governors Association). While the Leaders Forums set up during the early 1990s were influential, they were dominated by the agenda of the Special Premiers' Conferences (later COAG), had no formal bureaucratic support, and eventually became restricted to relatively brief tactical meetings between leaders immediately prior to COAG meetings. By contrast, CAF provides a regular opportunity for State and Territory leaders to discuss matters related not only to COAG but, just as importantly, to horizontal, cross-jurisdictional issues in which the Commonwealth may have a minor role or even no role.<sup>16</sup>

CAF's objectives are to:<sup>17</sup>

- provide leadership on and promote innovative solutions to matters important to Australians;
- promote constructive engagement with the Commonwealth Government and Parliament on matters of national interest;
- promote and communicate to the Australian people the benefits of Australia's federal system in providing diversity of policy options;
- complement the work of the Council of Australian Governments (COAG) and facilitate COAG-based agreements with the Commonwealth by working towards a common position among the States and Territories;
- reach collaborative agreement on cross-jurisdictional issues where a Commonwealth imprimatur is unnecessary

CAF's website includes a report card on its activities. For example, in respect to the reduction of red tape and the harmonisation of regulation across borders, it is said that CAF has been instrumental in progressing several initiatives that have now been taken up by the COAG Business Regulation and Competition Working Group. According to CAF, its achievements in these areas include:

- an agreement for a uniform approach to product safety by cutting red tape from 1 July 2008;
- the signing of a declaration to remove impediments to the movement of

---

<sup>16</sup> Wanna et al, n 12, p 13.

<sup>17</sup> CAF [website](#).

skilled workers within Australia, allowing electricians, plumbers, carpenters, joiners and bricklayers, refrigeration and air-conditioning mechanics, and motor mechanics to operate across all jurisdictions;

- an intergovernmental agreement, committing to the harmonisation of key areas of workers compensation and occupational health and safety schemes at the October 2006 meeting; and
- CAF has also agreed to harmonise daylight savings from April 2008 in Victoria, New South Wales, South Australia, Tasmania and the Australian Capital Territory.

A similar report card on CAF is presented in Wanna et al, who conclude:

Successful horizontal cooperation is not only about harmonisation. It also improves policy development and innovation by facilitating the exchange of ideas and 'what works best' by jurisdictions working on similar policy problems. It can also play an important secondary role by providing a regular forum for States and Territories to share, collaborate and cooperate. This forum of equals leads to the further development of collaborative cultures throughout States and Territories.<sup>18</sup>

#### **4. INSTITUTIONS OF VERTICAL COOPERATION**

##### **4.1 Inter-State Commission**

The Australian Constitution is federal in nature. As such, it promotes difference and invites cooperation. By section 101 of the Constitution, for example, the establishment of an Inter-State Commission was envisaged for the purpose of administering and adjudicating on matters relating to interstate trade. The Founding Fathers had railways and rivers flowing through two or more States very much in mind in this context, although it was decided not to limit the jurisdiction of the proposed Inter-State Commission to these matters.<sup>19</sup> In fact, the Commission has only existed intermittently and not at all since 1989 when its functions were transferred to the Commonwealth's Industry Commission.<sup>20</sup>

While the Inter-State Commission was intended to facilitate federal-State cooperation, its control was in fact exclusively in the hands of the Commonwealth Government. In evidence to the Victorian Federal-State Relations Committee, Cheryl Saunders asked 'Is there anything we can learn from the collapse of the

---

<sup>18</sup> Wanna et al, n 12, p 14.

<sup>19</sup> J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, p 895.

<sup>20</sup> For an historical and legal commentary see – *Final Report of the Constitutional Commission, Volume 2*, 1988, pp 838-845; M Coper, 'The second coming of the fourth arm: the role and functions of the Inter-State Commission' (1989) 63 *Australian Law Journal* 731. The Inter-State Commission first operated from 1913 to 1920 and, afterwards, from 1983 to 1989. For a more recent commentary see – DJ Cremean, 'The Inter-State Commission: rethinking the Wheat case' (2009) 83 *Australian Law Journal* 765.



Inter-State Commission’? To which she answered:

One thing that we might learn from the collapse of the Inter-State Commission is that the Inter-State Commission was established purely as a Commonwealth body. If you look at sections 101 to 104 [of the Commonwealth Constitution], appointments to the Commission were purely by the Commonwealth Government. The Commission was to be established by Commonwealth legislation. If you were to have a body that supervised the operations of the federation in any of those ways, should that body be more of an intergovernmental body, with the appointments shared within the Commonwealth and the States with responsibility and accountability in relation to that body also shared between the levels of government.<sup>21</sup>

#### 4.2 Council of Australian Governments (COAG)

If the Inter-State Commission was not the institutional answer to cooperative Commonwealth-State relations, its demise suggested that an alternative was required. In 1992 COAG was formally constituted, institutionalising what had been a series of ad hoc Special Premiers’ Conferences that began in October 1990.<sup>22</sup> The initial driving force behind this change was the launch of Prime Minister Bob Hawke’s ‘new federalism’ initiative aimed at achieving microeconomic reform through national cooperation.<sup>23</sup> In the event, it was under Paul Keating’s Prime Ministership that COAG was established; largely it is suggested to facilitate the introduction of the National Competition Policy (NCP).<sup>24</sup>

At the Heads of Government Meeting on 11 May 1992 it was agreed that COAG would have the following role:

- Increase co-operation among governments in the national interest;
- Pursue reforms that aim to achieve an integrated, efficient national economy and single national market;
- Continue the structural reform of government and review of relationships among governments; and
- Consider other intergovernmental or whole-of-government issues.<sup>25</sup>

---

<sup>21</sup> Parliament of Victoria, Federal-State Relations Committee, n 13, pp 19-20.

<sup>22</sup> A Parkin and G Anderson, ‘The Howard Government, regulatory federalism and the transformation of Commonwealth-State relations’ (2008) 42(2) *Australian Journal of Political Science* 295 at 302.

<sup>23</sup> Twomey and Withers, n 6, p 28.

<sup>24</sup> R Hollander and H Patapan, ‘Pragmatic federalism: Australian federalism from Hawke to Howard’ (2007) 66(3) *The Australian Journal of Public Administration* 280 at 286.

<sup>25</sup> Parliament of Victoria, Federal-State Relations Committee, n 13, p 59. In one respect COAG’s agenda was less broad than that of the Special Premiers Conferences: ‘The Special Premiers Conferences had treated reform of Commonwealth-State fiscal relations and role and responsibilities as a single issue. Under Keating’s chairmanship they became separated and devolution of fiscal responsibility from the Commonwealth to the States was taken off the agenda’.

The [current formulation](#) of COAG's role reads as follows:

- to increase cooperation among governments in the national interest;
- to facilitate cooperation among governments on reforms to achieve an integrated, efficient national economy and single national market;
- to continue structural reform of government and review of relationships among governments consistent with the national interest;
- to oversee the work of the National Counter-Terrorism Committee, which reports to COAG on the level of national counter-terrorism preparedness and capability; and
- to consult on major issues by agreement such as:-
  - major whole-of-government issues arising from Ministerial Council deliberations, and
  - major initiatives of one government which impact on other governments.

The COAG reform process is based primarily on intergovernmental agreements, signed by all heads of government. These agreements signify the commitment of jurisdictions to implement decisions that have been either reached or confirmed by COAG. In many instances, agreements have been the precursor to the passage of legislation. Sometimes this has been Commonwealth legislation, while on other occasions joint Commonwealth and State and Territory legislation has been enacted.

The landmarks in COAG's history include the National Competition Policy, agreed to in April 1995.<sup>26</sup> Its purpose was to facilitate microeconomic reform by creating and extending national competition markets for goods and services. An independence body, the National Competition Council, was established to monitor, assess and report on the progress of the reform agenda.<sup>27</sup> The terrorist attacks in the United States in September 2001, followed by the Bali bombings in 2002, acted as a spur to the COAG process, as the Howard Government sought to involve the States in a national counter-terrorism strategy.

In 2006 COAG agreed to a new National Reform Agenda which merged human capital and regulation as priority areas for reform alongside competition.<sup>28</sup> Then in 2008 the new [Intergovernmental Agreement on Federal Financial Relations](#) placed financial issues firmly at the centre of the COAG stage. This development received added impetus from the Global Financial Crisis, with the announcement in February 2009, following a Special CAOG meeting, of the [Nation Building and Jobs](#)

---

<sup>26</sup> Twomey and Withers, n 6, p 29. The NCP is discussed in greater detail at page 25 of the report.

<sup>27</sup> Among the impacts of the NCP was the 'transformation – via privatisation, corporatisation, disaggregation and other structural changes – of the big State-owned utilities. The NCP also reached into the State management of a host of other areas' - Parkin and Anderson, n 22, pp 301-302.

<sup>28</sup> Anderson, n 5, p 500. For a commentary on this see – C Walsh, 'The economics of federalism and federal reform' (2008) 31(2) *UNSW Law Journal* 553 at 577.

---

[Plan](#) to introduce education and housing programs and support major infrastructure investments.

Commenting in 2008 on the COAG process, Parkin and Anderson stated:

The COAG process has become very active over the past 5 years or so, addressing a number of crucial national issues – including counter-terrorism measures, a national water trading and management system, and a national energy regulation system –for which significant progress depends on collaborative Commonwealth-State action.<sup>29</sup>

The central role played by COAG continues under the Rudd Government, as indicated by the fact that it will have met four times in 2008 and 2009, compared to twice in 1994, 2002 and 2005-2007, and once in all other years since 1992. The Commonwealth Government's [2008-09 Budget Paper No 3](#) noted the blurred roles and accountability deficiencies in the Australian federal system before going on to say:

Accordingly, one of the [Rudd] Government's first actions after coming to office was to convene a COAG meeting. COAG is the peak intergovernmental forum in Australia, comprising the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association. For the first time in more than a decade, the Commonwealth and State Treasurers attended the December 2007 COAG meeting and will continue to attend COAG meetings, in recognition of the importance of the new framework for federal financial relations to underpin the COAG reform agenda.

Updating its commitment to COAG's reform agenda, the Commonwealth Government's 2009-10 [Budget Paper No 3](#) commented:

Through COAG, the Commonwealth and the States are implementing an ambitious reform agenda, focusing on the areas of health and ageing, education, skills and workforce development, housing, disability services, climate change and water, infrastructure, business regulation and competition, and Indigenous reform.<sup>30</sup>

### 4.3 Ministerial Councils

The use of ministerial councils as joint-decision making forums is a longstanding feature of the Australian political landscape. By the early 1990s there were over 40 ministerial councils based mostly on formal intergovernmental agreements. Stephen Jones writes that:

One of the key elements of the COAG arrangements was the reduction and

---

<sup>29</sup> Parkin and Anderson, n 22, p 302.

<sup>30</sup> *Budget Paper No 3: Australia's Federal Relations, 2009-10*, n 10, p 17.

streamlining of intergovernmental ministerial councils. This was seen as an effective means of reworking federalism and improving coordination and cooperation in policy-making across interrelated portfolios in the national context.<sup>31</sup>

According to the [Commonwealth-State Ministerial Councils Compendium](#), published by COAG in October 2009:

For the purposes of this Compendium, a Ministerial Council is defined as a formal meeting of Ministers of the Crown from more than four jurisdictions, usually including the Commonwealth, the States and Territories of the Australian Federation, which meets on a regular basis. The role of Ministerial Councils is to facilitate consultation and cooperation between governments, to develop policy jointly, and to take action in the resolution of issues which arise between governments in the Australian Federation. Ministers carry the authority of their governments and those Ministers convened as a Ministerial Council may, where appropriate, determine to finality all matters in their field of concern.<sup>32</sup>

Elsewhere it is said that the role of Ministerial Councils is to initiate, develop and monitor policy reform jointly in specific policy areas, and take joint action in the resolution of issues that arise between governments. In particular, Ministerial Councils develop policy reforms for consideration by COAG, and oversee the implementation of policy reforms agreed by COAG.<sup>33</sup>

COAG has developed a set of protocols for the operation of ministerial councils, the current version of which is found in the October 2009 Compendium under the heading 'General principles for the operation of ministerial councils'. It is stated that:

Council agendas should focus on items of strategic national significance. Items should only be included on the Agenda where there is:

- referral by COAG;
- legislative requirements;
- interest or potential interest for all jurisdictions;
- seen to be a benefit in sharing information, innovations and experience;
- a need to resolve areas of disagreement on key issues of Australia-wide

---

<sup>31</sup> S Jones, 'Cooperative federalism? The case of the Ministerial Council on Education, Employment, Training and Youth Affairs' (2008) 67(2) *The Australian Journal of Public Administration* 161 at 163.

<sup>32</sup> Note that 'Ministerial Councils may include representatives of the Australian Local Government Association and the governments of New Zealand and Papua New Guinea (or other regional governments) by invitation. New Zealand has full membership and voting rights in Ministerial Councils in relation to any decision involving the Trans-Tasman Mutual Recognition Arrangement' - [Commonwealth-State Ministerial Councils Compendium](#).

<sup>33</sup> COAG website, 'Ministerial Councils' - [http://www.coag.gov.au/ministerial\\_councils/index.cfm](http://www.coag.gov.au/ministerial_councils/index.cfm)

concern; or

- a need to ensure effective Ministerial control and accountability to Ministers at a national level of key activities and matters subject to funding agreements.

The October 2009 Compendium lists 31 ministerial councils,<sup>34</sup> plus another three 'ministerial fora', which comprise councils with ministerial representatives from only two, three or four jurisdictions.<sup>35</sup> The 31 ministerial councils illustrate the range of policy areas which, to some degree, are no longer exclusive to single jurisdictions but are, rather, the subject of a national cooperative strategy. They are as follows:

- Ministerial Council for Aboriginal and Torres Strait Islander Affairs
- Ministerial Council on the Administration of Justice
- Ministerial Council of Attorneys-General
- Ministerial Council for Federal Financial Relations
- Commonwealth, State, Territory and New Zealand Ministers' Conference on the Status of Women
- Ministerial Council on Consumer Affairs
- Cultural Ministers Council
- Ministerial Council on Drug Strategy
- Ministerial Council on Education, early Childhood Development and Youth Affairs
- Ministerial Council on Energy
- Environment Protection and Heritage Council
- Ministerial Council on Gambling
- Gene technology Ministerial Council
- Health, Ageing, Community and Disability Services Ministerial Council
- Australia and New Zealand Food Regulation Ministerial Council
- Housing Ministers' Conference
- Ministerial Council on Immigration and Multicultural Affairs
- Ministerial Council on International Trade
- Local Government and Planning Ministerial Council
- Ministerial Council on Mineral and Petroleum Resources
- Natural Resource Management Ministerial Council
- Online and Communications Council
- Primary Industries Ministerial Council
- Australian Procurement and Construction Council
- Regional Development Council
- Small Business Ministerial Council
- Sport and Recreation Ministerial Council
- Ministerial Council for Tertiary Education and Employment

<sup>34</sup> Three ministerial councils include subordinate bodies. For example, the Ministerial Council of Attorneys-General comprises: (a) the Standing Committee of Attorneys-General; and (b) the Ministerial Council for Corporations.

<sup>35</sup> These are: Great Barrier Reef Ministerial Council; Murray-Darling Basin Ministerial Council; and Wet Tropics Ministerial Council.

- Tourism Ministerial Council
- Australian Transport Council
- Workplace Relations Ministerial Council

COAG's [Communique](#) of 2 July 2009 foreshadowed a review of Ministerial Councils, in order to ensure their 'ongoing effectiveness'. COAG agreed that Dr Allan Hawke will lead a review of Ministerial Councils. He is due to report to COAG in November 2009.

#### **4.4 COAG Working Groups and the National Health and Hospitals Reform Commission**

At its 20 December 2007 meeting, shortly after the election of the Rudd Government, COAG established seven working groups. Each was to be overseen by a Commonwealth Minister, with deputies at a senior departmental level, nominated by the States and Territories.<sup>36</sup> These groups also include senior officials from all jurisdictions. The seven working groups are as follows:

- Working Group on Health and Ageing
- Working Group on the Productivity Agenda Education, Skills, Training and Early Childhood Development
- Working Group on Climate Change and Water
- Infrastructure Working Group
- Business Regulation and Competition Working Group
- Housing Working Group
- Working Group on Indigenous Reform.

To take the example of the Working Group on Health and Ageing, this was tasked with developing implementation plans in respect to such specific Commonwealth Government election commitments as tackling elective surgery waiting times and investing in public dental programs.

The same COAG [Communique](#) of 20 December 2007 announced the establishment of the [National Health and Hospitals Reform Commission](#). The Commission reports directly to the Commonwealth Minister for Health and Ageing, and, through her to the Prime Minister, and to COAG and the Australian Health Ministers' Conference. This last body is established under the Health, Community and Disability Services Ministerial Council, noted above.<sup>37</sup> Providing administrative support to the Australian Health Ministers' Conference is the [Australian Health Ministers' Advisory Council](#), which in turn is served by six principal committees, again headed by high-level departmental officials from the participating jurisdictions. These principal committees are as follows:

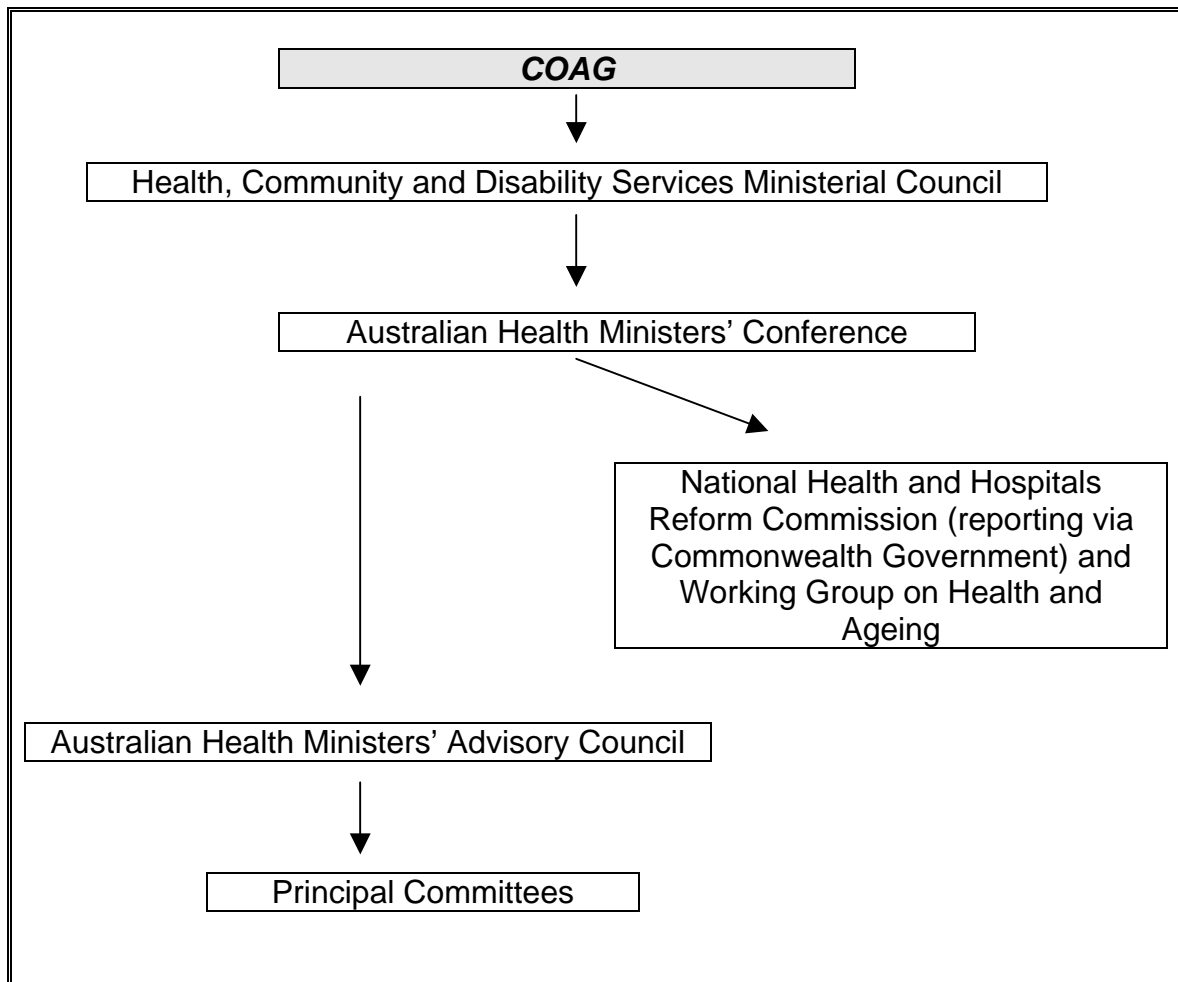
---

<sup>36</sup> These groups also include senior officials from all jurisdictions and a nominee of the Australian Local Government Association is included in the working groups on climate change, infrastructure and housing.

<sup>37</sup> Membership of this Ministerial Council is as follows: all members of the Australian Health Ministers' Conference; the Ministerial Conference on Ageing; and the Community and Disability Service Ministers' Conference.

- Australian Health Protection Principal Committee
- Australian Population Health Development Principal Committee
- Clinical, Technical and Ethical Principal Committee
- Health Policy Priorities Principal Committee
- Health Workforce Principal Committee
- National E-Health Information Principal Committee.

These arrangements refer only to the health limb of COAG’s Health, Community and Disability Services Ministerial Council. To offer some indication of the administrative complexity involved, they can be set out in the form of an organisational chart:



Each of the principal committees has a number of subcommittees and task forces reporting to them. Even then, of course, this only represents the tip of an enormous iceberg of advisory boards and committees in health care, operating separately or in conjunction under the auspices of the Commonwealth, State and Territory health departments.<sup>38</sup> Take, for example, the field of health information where the

<sup>38</sup> A list of national advisory committees in health and aged care is set out at - <http://www.ahpi.health.usyd.edu.au/news/advisorycommittees.pdf> The list includes: the National Preventative Health Taskforce; the National Primary Health Care Strategy



National Public Health Partnership is supported by the National Health Information Group, which is itself serviced by a sub-committee called the National Public Health Information Working Group. The primary role of this Working Group is to develop and implement the National Public Health Information Plan. The Working Group includes representatives with public health expertise from:

- Commonwealth Department of Health and Ageing
- State and Territory Health Departments
- Australian Institute of Health and Welfare
- Australian Bureau of Statistics.<sup>39</sup>

#### 4.5 COAG Reform Council

In 2006, spurred on by the Victorian Premier Steve Bracks,<sup>40</sup> a new National Reform Agenda was agreed to by COAG, including the creation of a non-statutory body called the COAG Reform Council. The Council, which was established in April 2007, reports to the Prime Minister as Chair of COAG.<sup>41</sup> The Council's stated aims are to strengthen accountability for the achievement of results through independent and evidenced-based monitoring, assessment and reporting of the performance of all governments. To assist it in achieving these objectives, the Productivity Commission will report to COAG every two or three years on the economic impacts of the COAG's reform agenda.

In keeping with the expanded role formulated for the COAG Reform Council by COAG in March 2008,<sup>42</sup> its [website](#) defines its specific roles as follows:

- publish performance data and to compare the performance of governments against the outcomes governments have agreed to achieve under the National Agreements in healthcare, education, skills and workforce development, disability services, affordable housing, and overcoming Indigenous disadvantage.
- independently assess whether milestones and performance benchmarks have been achieved by governments, under various National Partnerships, before an incentive payment is made to reward nationally significant reforms or service delivery improvements (the council is responsible for assessments under six National Partnerships in the health and education sectors; and under the *National Partnership Agreement to Deliver a Seamless National Economy*, which includes 36 streams of business regulation and competition reform).

---

Reference Group; the National Advisory Council on Mental Health; the Pharmaceutical Industry Working Group; and the Cognate Committee on Organ and Tissue Donation and Transplantation.

<sup>39</sup> Australian Institute of Health and Welfare [website](#).

<sup>40</sup> Twomey and Withers, n 6, p 29.

<sup>41</sup> *Budget Paper No 3: Australia's Federal Relations, 2009-10*, p 11.

<sup>42</sup> [Attachment C](#) to COAG March 2008 Communique.



- 
- assess performance of the Commonwealth and the Basin States under Water Management Partnerships as part of the reforms under the *Agreement on Murray-Darling Basin Reform*.
  - advise COAG on the aggregate pace of activity in progressing COAG's reform agenda.
  - advise COAG on options to improve COAG's performance reporting framework.

The COAG Reform Council is supported by a secretariat located in Sydney and jointly funded by the Commonwealth and the States and Territories. However, the exact arrangements are not spelled out on the website, in terms of the proportion paid by each jurisdiction. On the transparency front, the Council is to present an annual report to COAG, which is to be made public, as are the Productivity Commission reports to COAG.<sup>43</sup> The Council's [first report](#) was delivered in March 2008, its [second report](#) in March 2009. According to the 2009 report:

Over the past year, the COAG Reform Council has focused on monitoring progress against milestones agreed by COAG in 2007 for seven areas of competition and regulatory reform. As was the case with the last report, this report provides a snapshot of progress against the seven reforms as well as following up on implementation of the Council's recommendations in its 2008 Report.

The seven areas of competition and regulatory reform reported on are as follows:

- Electricity Smart Meters;
- National Energy Market Reforms;
- Transport Pricing Reforms and Research Agenda;
- National Rail Safety Reforms;
- National System of Trade Measurement;
- Building Regulation Reform; and
- Infrastructure Regulation.

Provided in the report is: (a) an assessment regarding the timeliness of reform against the timetable or deadline for each reform; (b) an assessment of whether the approach being taken in implementing reforms is consistent with COAG's objectives in agreeing to each reform; and (c) a clear statement where the Council considers an initiative is completed or has previously been agreed by COAG to be complete. In the conclusion to the report, the COAG Reform Council commented that, overall, it was 'pleased with progress in the majority of reform areas, particularly the small number of reforms identified as 'stalled' in 2008'. It went on to say:

Encouragingly there are no reforms considered 'not consistent', and only a

---

<sup>43</sup> N Ray, Executive Director, Fiscal Group, Commonwealth Treasury, 'Reforming financial relations – improving the quality and effectiveness of government service', [Keynote Address to the Intergovernmental Relations 2009 Conference](#). The report of the COAG Reform Council are available on its [website](#).

small number marked 'unclear.' Where the COAG Reform Council is particularly concerned about progress, the Council has sought COAG's imprimatur to add momentum to reform in these areas. Progress in the National Energy Market, National System of Trade Measurement and Improvements to the Building Code of Australia are generally on track, and the Council is satisfied reforms are developing in line with COAG's objectives.

The 2009 report continued:

The Council is concerned about progress in implementing the following reforms and milestones as agreed by COAG:

- A commitment by all jurisdictions to a staged 'national' roll-out for smart meters, which is yet to be achieved;
- The passing of many key deadlines under the rail safety reform stream, particularly on passage of model rail safety legislation which has a cascading effect and has delayed other initiatives; and
- The delay in the Commonwealth passing legislation which establishes common principles and binding time limits for the National Access Regime.

#### 4.6 Comments

As discussed in more detail in the next section of the paper, legally and administratively the COAG process involves complex arrangements, founded on intergovernmental agreements and delivered by new legislative initiatives and bureaucratic structures. In many respects these are positive developments. For all participating governments, the COAG process offers important opportunities to engage in national or other intergovernmental projects, with a view to achieving better standards and regulations, greater uniformity and the more efficient delivery of services and infrastructure. The new system is all about performance reporting by governments, a system founded on accountability and designed to achieve transparency. All of which appears to be as sensible as it is desirable, and consistent with popular recognition of the need for structural reform of Australia's federal system.<sup>44</sup>

However, certain issues do arise, some decidedly practical in nature, others more constitutional in focus, to do with democratic accountability and with the federal balance of powers under the Australian Constitution. On the practical front, while performance reporting is all very well in theory, in fact it can prove a formidable challenge, as 'outcome/output measures of service delivery are difficult to define, measure and enforce in a robust way'.<sup>45</sup> Several questions also remain to be answered about how the non-statutory COAG Reform Council is to operate, whether for example 'it will be empowered to recommend the withholding of

---

<sup>44</sup> AJ Brown, 'Public opinion and reform of Australia's federal system' (2009) 4(1) *Public Policy* 30.

<sup>45</sup> V Koutsogeorgopoulou quoted in R Webb, [COAG Reform Bill 2008](#), Commonwealth Parliamentary Library, Bills Digest No 54, 2008-09, p 5.

---

National Partnership reward payments for a State if it fails to implement reform – as was the case with the National Competition Council'.<sup>46</sup> For all the talk of performance reporting and the like, it seems enough fuzziness remains at this peak operational level to accommodate the political imperatives of compromise and negotiation.

In respect to democratic accountability, it is the case that COAG and the Ministerial Councils and other organisations that operate under its auspices are non-parliamentary bodies. They embody executive and bureaucratic processes, managed and guided by officials, by which deep inroads can be made into the constitutional jurisdictions of the States. Whereas the public services of the States may be augmented by their participation in COAG and other federal projects, the same cannot be said of their representative institutions. The fruits of intergovernmental agreements, in the form of proposed legislation, are presented to State Parliaments for approval but only after the details have been agreed to. While State Parliaments are not powerless to amend or reject these agreements, it is fair to say that for practical purposes their powers are constrained. It might also be said that, if accountability is a guiding concept of the COAG process, its application tends to be more at the executive than parliamentary level, at least as far as the States are concerned.

Admittedly, the revised financial arrangements under the *Federal Financial Relations Act 2009* (Cth) may assist the Commonwealth Parliament to better scrutinise the payments to the States.<sup>47</sup> It is also the case Ministerial Councils and other forms of cooperative arrangements between the Commonwealth and the States pre-date the advent of COAG. What is new is the integrated and systematic nature of the current reform agenda and the level of Commonwealth oversight of its application. In terms of strict constitutional law, nothing is altered; in terms of public administration, it seems that profound change is being worked in the actual operation of Australian federalism and, practically speaking, in the status of the States as separate and distinct political entities.

---

<sup>46</sup> R Webb, n 45, p 13.

<sup>47</sup> For a commentary on the Commonwealth Parliament's supervision of appropriations see – G Appleby, 'There must be limits: the Commonwealth's spending power' (2009) 37(1) *Federal Law Review* 93–132. See also *Pape v Commissioner of Taxation* (2009) 257 ALR 1. Chief Justice French commented (at 21 [65]): 'The Senate Standing Committee on Finance and Public Administration reported in 2007 that the great majority of Commonwealth funds are now provided by means of special appropriations. In 2002-03 they represented more than 80% of all appropriations drawings for the year. Professor Lindell in a submission to the Committee described "the modern reality...that Parliament is gradually losing control over the expenditure of public funds. Appropriations are increasingly permanent rather than annual and they are also framed in exceedingly broad terms"'.

## 5. COAG AND FEDERAL FINANCIAL RELATIONS

### 5.1 Overview

The fiscal reality underlying Australian federalism is the financial power of the Commonwealth over the States, a phenomenon that goes by the name of 'vertical fiscal imbalance'.<sup>48</sup> After the introduction of uniform income taxation in 1942, the capacity of all States to raise revenue fell far short of their expenditures. The reverse was true of the Commonwealth, with the result that large payments have been made each year since then from the Commonwealth to the States, amounting to \$91.9 billion in 2009-10.

Currently, the Commonwealth provides three broad types of payments to the States:

- National Specific Purpose Payments (SPPs);
- three types of National Partnership payments – project payments, facilitation payments and reward payments; and
- general revenue assistance, consisting mainly of GST payments.

For 2009-10, these payments can be broken down as follows: National SPPs of \$25.8 billion; National Partnership payments of \$24.3 billion; and GST revenue of \$41.8 billion.<sup>49</sup>

### 5.2 GST payments

The introduction of the GST heralded reform of the structure and institutions of financial federalism. In addition to sponsoring a review of State taxes, the main component of the 1999 [\*Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations\*](#) provided for the distribution of GST revenue through untied grants based on the principle of horizontal fiscal equalisation.<sup>50</sup>

However, the methodology used by the Commonwealth Grants Commission to achieve this end has remained controversial. It is the source of considerable unease in some States, not least in NSW. The point is made in the 2006 Warren report, which was commissioned by the NSW Treasurer:

While the goods and services tax (GST) is a growth tax and will provide

---

<sup>48</sup> This refers to the level of imbalance between expenditure responsibilities and taxation powers. In 1909-10, as federation neared its first decade, State and Local Governments raised 78% of taxation revenues, compared to the Commonwealth's 22%; in 2004-05 the figures were 18% and 82% respectively. N Warren, [\*Benchmarking Australia's Intergovernmental Fiscal Arrangements: Final Report\*](#), NSW Government, May 2006, p 17.

<sup>49</sup> *Budget Paper No 3: Australia's Federal Relations, 2009-10*, n 10, pp 21-23.

<sup>50</sup> J Wilkinson, *Horizontal Fiscal Equalization*, NSW Parliamentary Library Research Service Briefing Paper No 21/2003.

---

increased revenue to State governments, it is not a tax over which they have any substantial control. Its proceeds are distributed according to equalisation principles and highly complex methodologies applied by the Commonwealth Grants Commission, which provides advice to the Commonwealth Treasurer affecting the distribution of GST revenue. The Treasurer is ultimately responsible for deciding States' share of GST revenue. The process involves large financial transfers from donor States to recipient States, and directly impacts on the range and quality of services that the States are able to provide.<sup>51</sup>

The same report commented:

GST revenue grants are subject to high level equalization and are therefore not distributed among the States according to where the revenue is raised, resulting in a large redistribution between States.<sup>52</sup>

### 5.3 Ministerial Council for Federal Financial Relations

Institutionally, the major reform arising from the 1999 intergovernmental agreement was the disbandment of Premiers' Conferences and the establishment of the Ministerial Council for Commonwealth-State Financial Relations (the Annual Treasurers' Conference). As originally formulated, its functions included the oversight (in coordination with a GST Administration Sub-Committee)<sup>53</sup> of the operation of the GST and considering on-going reform of Commonwealth-State financial relations. According to the 1999 intergovernmental agreement:

- The Treasurer of the Commonwealth will convene the Ministerial Council in consultation with the other members of the Council not less than once each financial year. If the Commonwealth Treasurer receives a request from a member of the Council, he will consult with the other members concerning convening a meeting. The Treasurer of the Commonwealth will be the chair of the Council. The Council may also conduct its business by correspondence.
- All questions arising in the Ministerial Council will be determined by unanimous agreement unless otherwise specified in this Agreement.
- While it is envisaged that the Ministerial Council will take decisions on most business arising from the operation of this Agreement, major issues will be referred by the Ministerial Council to Heads of Government for

---

<sup>51</sup> Warren report, n 48, p xx.

<sup>52</sup> Warren report, n 48, p 134.

<sup>53</sup> The role of this sub-committee is set out in COAG's, [Definitions and Institutional Arrangements](#), para A22-A27. Basically, it monitors the operation and administration of the GST and makes recommendations to the Ministerial Council for Federal Financial Relations on changes to the GST and its administration. The sub-committee is comprised of Treasury officials from all the Australian jurisdictions, as well as representatives from the Australian Taxation Office as required. It is chaired by the Commonwealth Treasury.

consideration, including under the auspices of the Council of Australian Governments.<sup>54</sup>

With the signing of the new [Intergovernmental Agreement on Federal Financial Relations](#) on 29 November 2008, this Ministerial Council was renamed the [Ministerial Council for Federal Financial Relations](#). Its current functions and mode of procedure are set in the [Commonwealth-State Ministerial Councils Compendium](#), published by COAG in October 2009. An added function is the development and oversight of the new National Performance Reporting System. Meetings of the Council are to be convened by the Federal Treasurer at least once a year and these are to be preceded by a meeting of Treasury officials from all Australian jurisdictions. The GST Administration Sub-Committee remains in place.

#### 5.4 2008 Intergovernmental Agreement on Federal Financial Relations

The [Intergovernmental Agreement on Federal Financial Relations](#), which came into effect on 1 January 2009, heralded a new framework for Commonwealth-State financial relations:

A key feature of the new framework is the centralised payment arrangements which will simplify payments to the States, aid transparency and improve the States' budget processes. Previously, payments to the States were provided by Commonwealth portfolio departments to the relevant state agencies, and each payment has its own payment and administrative arrangements. Under the new arrangements all payments are centrally processed by the Commonwealth Treasury and paid direct to each state treasury. State treasuries will be responsible for distributing the funding within their jurisdiction. For the first time in decades the complexity of the Commonwealth's financial relations with the States will come under the umbrella of just one piece of legislation, the *Federal Financial Relations Act 2009*.<sup>55</sup>

On the same theme, the Commonwealth Government's 2009-10 [Budget Paper No 3](#) commented that a 'new federal financial framework' was in place, one that would provide a 'robust foundation for collaboration between the Commonwealth and the States'. It went on to say:

The framework commenced on 1 January 2009 and involves a significant rationalisation of the number of payments made to the States, while increasing the overall quantum of payments. The framework provides clearer specification of the roles and responsibilities of each level of government, so that the appropriate government is accountable to the community.<sup>56</sup>

---

<sup>54</sup> [Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations](#), page 8, paras 43-45.

<sup>55</sup> [Ministerial Council for Federal Financial Relations](#) website.

<sup>56</sup> *Budget Paper No 3: Australia's Federal Relations, 2009-10*, n 10, p 1.

---

Part of the impetus behind the new federal financial relations is to provide the States with:

greater flexibility to direct resources to areas where they will produce the best results in each State. In the Intergovernmental Agreement, the Commonwealth has committed to move away from prescriptions on service delivery in the form of financial or other input controls which inhibit state service delivery and priority setting. Rather than dictating how things should be done, the new framework focuses on the achievement of mutually agreed outcomes, providing the States with increased flexibility in the way they deliver services to the Australian people.<sup>57</sup>

### 5.5 National SPP Payments

A major component of the 2008 COAG Intergovernmental Agreement on Federal Financial Relations was its rationalisation of specific purpose payments made by the Commonwealth to the States under section 96 of the Australian Constitution. Before the latest reforms more than 90 different payments for specific purposes were made, each with its own negotiating, administrative and monitoring processes. The proliferation of these payments since the 1970s was said to be a source of ‘increasingly blurred roles and responsibilities, duplication and overlap, higher administration costs and cost-shifting’.<sup>58</sup>

Under the new funding framework there are five National SPPs:

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

These new arrangements were intended to provide the States with greater financial control and flexibility in the implementation of policy objectives. It is said in this respect:

In the Intergovernmental Agreement, the Commonwealth has committed to move away from prescriptions on service delivery in the form of financial or other input controls which inhibit state service delivery and priority setting. Rather than dictating how things should be done, the new framework focuses on the achievement of mutually agreed outcomes, providing the States with increased flexibility in the way they deliver services to the

---

<sup>57</sup> Commonwealth Government, *Budget Paper No 3: Australia's Federal Relations, 2009-10*, 12 May 2009, p 11.

<sup>58</sup> Commonwealth Government, *Budget Paper No 3: Australia's Federal Relations, 2008-09*, 13 May 2008, pp 12-13.



Australian people.<sup>59</sup>

Significantly, the provision of funding under National SPPs is not contingent on achieving specific outcomes or the performance benchmarks set out in National Agreements (see below). The one requirement is that the States must expend funding in the relevant sector - for example, the States are required to spend the National Healthcare SPP in the healthcare sector.<sup>60</sup> Subject to that requirement, they have budget flexibility to allocate funds within that sector in a way that ensures they achieve mutually agreed objectives:

To demonstrate compliance, each State Treasurer will provide a report to the Ministerial Council for Federal Financial Relations within six months of the end of every financial year, detailing how much funding was spent in the relevant sector and, if required, provide a detailed explanation for any discrepancy with the amounts provided by the Commonwealth.<sup>61</sup>

## 5.6 National Agreements

The National SPPs operate in conjunction with COAG's reform agenda for key social policy sectors, as set out in six National Agreements:

- National Healthcare Agreement;
- National Education Agreement;
- National Agreement for Skills and Workforce Development;
- National Disability Agreement; the National Affordable Housing Agreement;
- National Indigenous Reform Agreement.

But note that not all National SPPs are associated with a National Agreement. For example, there is no National SPP associated with the National Indigenous Reform Agreement. Note, too, that the National Agreements are not funding agreements. Rather, they contain agreed objectives, outcomes, outputs and performance indicators, and clarify the roles and responsibilities that guide the Commonwealth and the States in the delivery of services across the relevant policy areas. For example, the [National Healthcare Agreement](#) sets out the areas of responsibility for the Commonwealth, including access to private medical care and pharmaceuticals, the areas of responsibility for the States and Territories, including community health and ambulance services, and areas of shared Commonwealth/State or Territory responsibility, including public hospitals and mental health services. The Agreement's long-term objectives are set out in broad terms, such as – 'Prevention: Australians are born and remain healthy'. Relevant outcomes, progress measures and outputs are defined as follows:

---

<sup>59</sup> *Budget Paper No 3: Australia's Federal Relations, 2009-10*, n 10, p 11.

<sup>60</sup> The *Federal Financial Relations Act 2009* (Cth) stipulates that specific National SPPs can only be spent on the relevant policy area, for example healthcare (s 10(5)).

<sup>61</sup> *Budget Paper No 3: Australia's Federal Relations, 2009-10*, n 10, p 167.



| Outcome   | Progress Measure  | Output   |
|---|---|--|
| <b>Prevention</b>   |   |  |
| <p>Children are born and remain healthy.</p> <p>Australians have access to the support, care and education they need to make healthy choices.</p> <p>Australians manage the key risk factors that contribute to ill health.</p> | <p>Proportion of babies born of low birth weight.</p> <p>Incidence/prevalence of important preventable diseases.</p> <p>Risk factor prevalence.</p> | <p>Immunisation rates for vaccines in the national schedule.</p> <p>Cancer screening rates (breast, cervical, bowel).</p> <p>Proportion of children with 4<sup>th</sup> year developmental health check.</p> |

Performance reporting and public accountability measures in respect to National Agreements are set out under Schedules A-E to the *Intergovernmental Agreement on Federal Financial Relations*. Publication of the relevant data is a matter for the COAG Reform Council, which will include information about the contribution of various jurisdictions to achieving performance benchmarks. The Commonwealth Budget Papers note in this respect that the performance of each jurisdiction is subject to independent assessment by the COAG Reform Council, in keeping with the expanded role formulated for the Council by COAG in March 2008.<sup>62</sup>

## 5.7 National Partnership Payments

A new category of payments was created in 2008, known as National Partnership Payments. There are three types of these payments, as follows:

- National Partnership **Project** payments, which assist States to deliver specific infrastructure and other projects.<sup>63</sup>
- National Partnership **Facilitation** payments, which are intended to assist States to lift standards of service delivery in emerging areas of national priority; and
- National Partnership **Incentive** payments, which will be used to ‘reward States that deliver reform progress or continuous improvement in service delivery’.<sup>64</sup> These payments were initially called ‘reward’ payments,<sup>65</sup> a word that may subsequently have been judged too pejorative.

According to the Commonwealth Budget Papers, the COAG Reform Council:

will assess achievement against the performance benchmarks and will make a recommendation as to whether they have been met. The relevant

<sup>62</sup> [Attachment C](#) to COAG March 2008 Communique.

<sup>63</sup> Some payments for specific purposes under the previous federal financial arrangements have become National Partnership project payments.

<sup>64</sup> *Budget Paper No 3: Australia’s Federal Relations, 2009-10*, n 10, p 26.

<sup>65</sup> *Budget Paper No 3: Australia’s Federal Relations, 2008-09*, n 58, p 17.

Commonwealth minister will make a determination as to whether the incentive payment will be made.<sup>66</sup>

The [COAG Reform Fund Act 2008](#) (Cth) was passed to channel National Partnership payments to the States, along with payments from three 'nation building' funds: the Building Australia Fund; the Education Investment Fund; and the Health and Hospitals Fund.<sup>67</sup> The intention was that these capital investment funds were to be 'financed largely from future budget surpluses'.<sup>68</sup>

## 5.8 National Partnership Agreements

In association with the above developments, as part of the federal financial reform package agreed by COAG in November 2008, agreement was reached on several National Partnership Agreements. These set out COAG's reform agendas on a broad range of issues, including the key intergovernmental areas of:

- health and health workforce reform;
- 'smarter schools' initiatives;
- social housing;
- indigenous economic participation and related matters;
- homelessness; and
- seamless national economy.<sup>69</sup>

Unlike the National Agreements (discussed above), the National Partnership Agreements are financial in nature. For example, Part 5 of the agreement to [Deliver a Seamless National Economy](#) sets out the relevant financial arrangements, including the making of a \$100 million facilitation payment in 2008-09 and 'reward' payments of \$200 and \$250 million in 2011-12 and 2012-2013 respectively.<sup>70</sup> This agreement, which embodies the micro-economic reform agenda agreed to by COAG in March 2008, endorses the use of 'facilitation' and 'reward' payments to:

deliver more consistent regulation across jurisdictions and address unnecessary or poorly designed regulation, to reduce excessive compliance costs on business, restrictions on competition and distortions in the allocation of resources in the economy.

Twenty-seven deregulation priorities were agreed to by COAG in March 2008 and eight competition priorities in July 2008. As well as setting out financial

---

<sup>66</sup> *Budget Paper No 3: Australia's Federal Relations, 2009-10*, n 10, p 26.

<sup>67</sup> For a commentary on this see R Webb, [COAG Reform Bill 2008](#), Commonwealth Parliamentary Library, Bills Digest No 54, 2008-09.

<sup>68</sup> *Budget Paper No 3: Australia's Federal Relations, 2008-09*, n 58, p 18.

<sup>69</sup> *Budget Paper No 3: Australia's Federal Relations, 2009-10*, n 10, p 26.

<sup>70</sup> These financial arrangements are confirmed in *Budget Paper No 3: Australia's Federal Relations, 2009-10*, n 10, p 98.

arrangements, the National Partnership Agreement to [Deliver a Seamless National Economy](#) includes an implementation plan and a list of the respective roles and responsibilities of the Commonwealth, State and Territory governments. For example, the States and Territories agreed to work with the Commonwealth to implement 'uniform occupational health and safety laws'. This and other related reforms is directed by the COAG Business Regulation and Competition Working Group, on which NSW and other jurisdictions have high level public service representation. On 14 September 2009, then Minister for Finance, Infrastructure, Regulatory Reform and Ports and Waterways, Joe Tripodi, stated that:

The implementation timetable for national uniformity of occupational health and safety laws has been brought forward one year to 2011. At the May 2009 Workplace Relations Ministers Council teleconference the Council agreed to a framework for uniform workplace safety laws across jurisdictions.<sup>71</sup>

Mr Tripodi outlined the work of the COAG Business Regulation and Competition Working Group, in such areas as developing a national system for the recognition of trade licences. He also noted that the regulation of the legal profession has been added to the Working Group's reform agenda.

## 5.9 Nation Building and Jobs Plan

Following a Special CAOG meeting in February 2009, in direct response to the global financial crisis, the [Nation Building and Jobs Plan](#) was announced, specifically to introduce education and housing programs and support major infrastructure investments. To implement the Plan, the Commonwealth passed several pieces of legislation, notably the *Appropriation (Nation Building and Jobs) Act (No 2) 2008-09* (Cth). The Plan, which had an estimated cost of \$42 billion over four years, had ten elements:

- Building the Education Revolution;
- 20 000 social and defence homes;
- energy efficient homes;
- small business and general business tax breaks;
- black spots, boom gates and community infrastructure;
- tax bonus payment for working Australians;
- single-income family bonus payment;
- farmer's hardship bonus payment;
- back to school bonus payment; and
- training and learning bonus payment.<sup>72</sup>

<sup>71</sup> NSW Legislative Council General Purpose Standing Committee No 1, *Estimates Hearings*, 14 September 2009, pp 15-16. The revised implementation plan can be accessed at - [http://www.coag.gov.au/intergov\\_agreements/federal\\_financial\\_relations/docs/national\\_partnership/seamless\\_national\\_economy\\_implementation\\_plan.rtf](http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/seamless_national_economy_implementation_plan.rtf)

<sup>72</sup> For a commentary see R Webb, C Dow and M Thomas, *Appropriation (Nation Building*

In respect to these initiatives, various conditions, commitments, timeframes, consequences of non-compliance and reporting arrangements were agreed to by COAG. Further to this, the [National Partnership Agreement on the Nation Building and Jobs Plan](#) sets out, for the Commonwealth and the States, certain performance benchmarks and indicators, including 'report on expenditure and output benchmarks'. These are elaborated upon in the Schedules to the Plan. Under Schedule A, provision is made for an Oversight Group within the Department of the Prime Minister and Cabinet chaired by a 'Coordinator General'. The Oversight Group is to report to COAG on the progress of implementation and, in consultation with relevant agencies, is empowered to recommend to COAG 'possible interventions to prevent and address concerns with project slippage, cost overruns and project delivery'. Provision is also made for a National Coordinator for each major infrastructure project, with responsibility 'for ensuring that milestones are achieved and any implementation issues are addressed as a matter of urgency'. It is envisaged that further monitoring arrangements will be established in the States.

Note in this respect that in NSW the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009* established the position of Infrastructure Co-ordinator General. By s 5 of the Act the legislation applies only to projects funded by the Commonwealth under the Nation Building and Jobs Plan. Section 6(3)(a) provides:

The Co-ordinator General has the following functions:

(a) to plan and oversee a program for the delivery of infrastructure projects within timeframes required for Commonwealth funding.

Once the designated projects have been completed, the legislation will be repealed. Under Part 5 of the Act, the Infrastructure Co-ordinator General is granted powers to expedite relevant projects, notably the power to declare a project exempt from planning legislation, or 'development control legislation' as it is termed.

Schedule B to the [National Partnership Agreement on the Nation Building and Jobs Plan](#) is headed 'Coordination and monitoring principles for additional funding to the States'. It provides:

This schedule establishes a framework under the new *Intergovernmental Agreement on Federal Financial Relations* to ensure the maximum additional benefit is derived from the new infrastructure and stimulus measures, and to assess whether the states have at least maintained their post-COAG expenditure effort during the period of increased Commonwealth expenditure.

---

*and Jobs) Act (No 2) 2008-09*, Commonwealth Parliamentary Library, Bills Digest No 97 2008-09. See also Commonwealth of Australia, The Senate, Standing Committee on Finance and Public Administration, [Nation Building and Jobs Plan – Inquiry into the provisions of the Appropriation \(Nation Building and Jobs\) Bill \(No 1\) 2008-09 and 5 related bills](#), February 2009.

---

Provision is made for the development and coordination of spending and output benchmarks, with Schedule B providing:

States will report every three months to Heads of Treasuries on activity undertaken in the previous three months against these benchmarks, such reports to be provided within six weeks of the end of the period to which the reports relate.

(a) Reporting is to cover expenditure in each of the relevant sectors over the designated three month reporting period and should include an explanation in respect of any expenditure that does not meet the agreed benchmark.

(b) Heads of Treasuries will collate the information and provide it to the Ministerial Council within two weeks of the reporting date.

Sanctions are also provided for under Schedule B, as follows:

Under the agreement, if a state's expenditure does not meet the benchmark, the Commonwealth will impose sanctions as follows:

(a) making the assessment public;

(b) requiring the state to return the shortfall in expenditure to the Commonwealth, noting that the Commonwealth will reallocate the amount to other states and/or use it for Commonwealth own-purpose programs;

(c) halting further funding for that state for the relevant initiative; or

(d) withdrawing an amount equivalent to the reduced effort from future Commonwealth payments to the state.

Schedule C deals specifically with the 'Social housing' component of the package. The respective roles and responsibilities of the Commonwealth and the States are set out. For example, the Commonwealth is to have responsibility for 'the management of an implementation plan with each jurisdiction', whereas the States are responsible for identifying social housing projects. Reporting requirements are set out as follows:

Each state will provide a report to the Commonwealth every three months detailing:

(a) the status and progress of each new social housing project within their jurisdiction that has been funded through the initiative;

(b) the location of dwellings that have been constructed or refurbished through the initiative and their availability for rental; and

(c) the tenant profile for each dwelling that is occupied following construction or refurbishment funded through the initiative.

Schedule D is headed 'Building the Education Revolution' and this requires the States to 'accept and adhere to the reporting requirements as outlined by the Commonwealth'. Various 'conditions' are set out to which the States must agree if they are to qualify for the additional expenditure. It is said that:

Bilateral agreements will be made by 13 February 2009 with each state and BGA that specify the conditions, commitment, timeframes, consequences of non-compliance and reporting arrangements.

Further to this, the Commonwealth released [Building the Education Revolution – Guidelines](#). Schedule A to this document is headed ‘reporting requirements’ and it sets out the obligations of all parties concerned, including the States and schools themselves. For the States, Territories and Block Grant Authorities, ongoing reporting involves the following required information:

- (a) project expenditure versus budgeted expenditure by milestone – include actual expenditure to date and forecast expenditure for all milestones;
- (b) administrative expenditure versus budget;
- (c) project schedule versus milestones, including construction commencement and completion. If work-steps such as planning approval are on the critical path, these should be reported on;
- (d) jobs supported on the school site by the project. This reporting should be specific to the project and should identify data for overall jobs involved in the project as well as target areas such as apprenticeships or traineeships;
- (e) issues of concern and an update on project risks using standardised risk descriptions to be provided. Estimated impact on project schedule, budget and job creation should be provided; and
- (f) post completion community access to the facility, including information on the range of groups using the facility and estimation of the number of hours and cost incurred by the community groups.

## 5.10 Comments

Arrangements of the kind discussed above are a paradigm of what this paper calls ‘managerial federalism’, where the financial power of the Commonwealth is used to guide and control the States toward what are considered to be non-ideological goals associated primarily with the effective management of resources. This is not to deny that the States remain significant players, in policy development as in other areas. Nor is to deny that the COAG process involves much needed and important reforms. It is only to state the obvious point that the underlying reality of Australian federalism remains the fiscal relationship between the Commonwealth and the States. This is the guiding hand behind reform, not constitutional change or ‘a reassessment of the functions and responsibilities of the different levels of government’.<sup>73</sup> Warning of the dangers involved in the States accepting the Commonwealth’s ‘benevolence’, Anne Twomey has commented that the National Partnership Payments:

appear likely to replicate some of the very problems that the new specific purpose payments were intended to do away with. For example, if a State is to accept funds from the Commonwealth to pay for computers for secondary school students, the State must then tie up a considerable portion of its budget to pay associated costs... This takes away the flexibility the State needs to apply its budget in the most efficient and appropriate manner.<sup>74</sup>

<sup>73</sup> A Twomey, ‘The future of Australian federalism – following the money’ (Spring 2009) 24(2) *Australasian Parliamentary Review* 11 at 22.

<sup>74</sup> Twomey, n 73, p21.

---

In effect, the National Partnership Payments seem to point back towards the micro-management of the federal reform agenda by the Commonwealth, where payments may be withheld or reduced if the States fail to meet agreed conditions or benchmarks. As Twomey stated, 'The democratic sanction of the electors is not the stick in this case – it is the Commonwealth's control of the money'.<sup>75</sup>

Of greatest interest perhaps are the issues the COAG related reforms omit to confront. In particular, the fundamental issues relating to vertical fiscal imbalance and horizontal fiscal equalization are not addressed. At the Commonwealth level at least, the reform of federal fiscal relations seems to have been predicated on the assumption that the federal financial system is structurally sound. It is on this dubious basis that the project of 'cooperative federalism' is undertaken, with the Commonwealth as its paymaster and managing agent.

## 6. SELECTED INTERGOVERNMENTAL AGREEMENTS

### 6.1 Intergovernmental agreements in outline

Typically, the decisions of COAG are reported in a communiqué, issued on the meeting date, and embodied in detail in the form of an intergovernmental agreement, signed by the heads of all participating jurisdictions. Most of these agreements require legislative action, at one or more level of government, with the COAG [website](#) reporting in this respect:

Where COAG has directed Ministerial Councils to carry forward issues on its behalf, there is an expectation that any substantive decisions requiring legislation will be enshrined in intergovernmental agreements. This provides members of COAG with an opportunity to review and scrutinise these ministerial decisions before signing and entering into an agreement at head of government level.

According to the same [website](#), there is no single template governing the form of an intergovernmental agreement, but typically agreements are composed of the following elements:

- recitals;
- definitions;
- objectives;
- institutional arrangements, if any;
- ministerial council(s) involvement and any voting arrangements;
- future legislative commitments, if any;
- financial arrangements, if appropriate;
- dispute resolution procedures;
- amendment or variation to the agreement provisions; and
- review provisions and/or a sunset clause, where appropriate.

---

<sup>75</sup> Twomey, n 73, p 21.



The website lists the current intergovernmental agreements arrived at through COAG, including the Intergovernmental Agreement on Federal Financial Relations, the Murray-Darling Basin Intergovernmental Agreement and the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety.

The two case studies that follow do not claim to be representative of COAG agreements generally. They do, however, present contrasting examples of more 'centralist' and 'federalist' models respectively, the first two concentrating power in the hands of Commonwealth statutory authorities, the last establishing a cross-jurisdictional ministerial council as the peak administrative body.

## **6.2 Case study – the National Water Initiative Agreement and the Murray-Darling Basin Agreement**

The [Intergovernmental Agreement on a National Water Initiative](#) was signed at the 25 June 2004 COAG meeting. The Tasmanian Government joined the Agreement in June 2005 and the Western Australia Government joined in April 2006. This Agreement operates in combination with the separate [Murray-Darling Basin Intergovernmental Agreement](#), agreed to between the Commonwealth and the Basin States in July 2008.<sup>76</sup>

### **6.2.1 National Water Initiative Agreement**

The 'preamble' to the National Water Initiative Agreement sets out the history of the water management reform process. The 'implementation' of the Agreement is then set out, in accordance with a detailed timetable found in Schedule A. The key elements of the Agreement are as follows:

- Water Access Entitlements and Planning Framework;
- Water Markets and Trading;
- Best Practice Water Pricing;
- Integrated Management of Water for Environmental and Other Public Benefit Outcomes;
- Water Resource Accounting;
- Urban Water Reform;
- Knowledge and Capacity Building; and
- Community Partnerships and Adjustment.

In respect to 'roles and responsibilities', the actual implementation of the terms of the Agreement within their respective jurisdictions is a matter for the States and Territories. For example, the arrangements for 'best practice water pricing' include a requirement for the States and Territories to:

to report independently, publicly, and on an annual basis, benchmarking of pricing and service quality for metropolitan, non-metropolitan and rural water delivery agencies. Such reports will be made on the basis of a

---

<sup>76</sup> The Basin States are NSW, Victoria, Queensland, South Australia and the ACT.



---

nationally consistent framework to be developed by the Parties by 2005, taking account of existing information collection including:

- (i) the major metropolitan inter-agency performance and benchmarking system managed by the Water Services Association of Australia;
- (ii) the non-major metropolitan inter-agency performance and benchmarking system managed by the Australian Water Association ; and
- (iii) the irrigation industry performance monitoring and benchmarking system, currently being managed by the Australian National Committee on Irrigation and Drainage.

Formally, overall oversight of the Agreement is in the hands of the Natural Resource Management Ministerial Council. However, it undertakes this work in consultation with the National Water Commission, which takes the leading role in monitoring implementation and developing a national set of performance indicators. As provided under section 7 of the [National Water Commission Act 2004](#) (Cth), the key role of this independent statutory body is to advise the Commonwealth Environment, Water, Heritage and the Arts Minister and COAG on the implementation of the National Water Initiative Agreement. The Commission may also advise the Minister on the Australian Water Fund. Of the Commission's seven members, the Commonwealth appoints four (including the Chair) and the States and Territories appoint three. The Commission's reporting obligations and its latest progress report to COAG can be accessed on its [website](#).

It is this Commonwealth body that is the main organizing and administrative force within the scheme. Basically, under the COAG Agreement the Commission operates as a national peak body for the accreditation of the States' National Water Initiative implementation plans. The Commission's [website](#) explains:

Each state and territory government is required to prepare a National Water Initiative (NWI) implementation plan. To date the Commission has accredited nine implementation plans.

### **6.2.2 Murray-Darling Basin Agreement**

This historic agreement, which was agreed to in the context of the National Water Initiative, was signed after prolonged negotiations between the Commonwealth and the Basin States. Under the Agreement, the Commonwealth and each Basin State will agree a Commonwealth-State Water Management Partnership (WMP) to implement water saving infrastructure projects, return water to the environment, and adapt to climate change in an environment of reduced water availability. Each WMP will be a public document containing the outcomes to be achieved, reform actions, timeframes and performance benchmarks. The COAG Reform Council is responsible for assessing the performance of the Commonwealth and the Basin States in relation to these WMPs.

As acknowledged in the 'preamble' to the Murray-Darling Agreement, the new arrangements build on 'a history of over 90 years of collaborative management' by the relevant Basin governments. The purpose of the new approach was to 'improve planning and management by addressing the Basin's water and other natural resources as a whole, in the context of a Federal-State partnership'.

Institutionally, what has emerged is a more centralised administrative model, which includes the referral of State powers to the Commonwealth further to section 51(xxxvii) of the Australian Constitution.

In respect to the institutional arrangements, the former Murray-Darling Basin Commission was, in the words of its final annual report, a 'unique organisation' linking the governments of the Commonwealth and all the Basin States. It comprised two Commissioners and two Deputy Commissioners from the Commonwealth and the governments of NSW, Victoria, Queensland and South Australia, plus one Commissioner representing the ACT. Provision was also made for the appointment by the Murray-Darling Basin Ministerial Council of an independent President.<sup>77</sup> Under the terms of the 1992 Murray-Darling Basin Agreement, as embodied in Commonwealth and State legislation, the Commission's annual reports were required to be tabled in all the Parliaments of the participating jurisdictions.<sup>78</sup>

Under the 2008 [Murray-Darling Basin Intergovernmental Agreement](#), the Murray-Darling Basin Commission was replaced by the new Murray-Darling Basin Authority. As established under Part 9 of the [Water Act 2007](#) (Cth), this body reports to the Commonwealth Minister for Climate Change and Water. Membership of the Authority is also a matter for the Commonwealth, although in acknowledgement of the federal principle the Agreement provides that 'the Commonwealth will consult with Basin States on the appointment of the Chair'. While the Commonwealth Minister is designated the 'decision-maker' for the Basin Plan, the Murray-Darling Basin Ministerial Council, which has one representative from all the participating jurisdictions, is declared to have an 'advisory role' only. The same applies to the Basin Officials Committee, comprised of officials from the six Basin governments and reporting to both the Murray-Darling Authority and the Ministerial Council in an advisory capacity. The administrative structure is set out in diagrammatic form in Schedule C to the Agreement.

A feature of the Agreement is the referral of relevant powers to the Commonwealth, as embodied in the further [Agreement on the Murray-Darling Basin – Referral](#). For NSW, this referral of power was achieved by the [Water \(Commonwealth Powers\) Act 2008](#) (NSW). Note that by this Act the appropriate NSW Minister is empowered to appoint a State representative to the advisory Basin Officials Committee. Provision is also made for the tabling in both Houses of the NSW Parliament of the annual reports of the Murray-Darling Basin Authority and of any amendments to the Murray-Darling Basin Agreement.<sup>79</sup>

### 6.3 Case study – the Health Professions Agreement

The [Intergovernmental Agreement for a National Registration and Accreditation](#)

---

<sup>77</sup> This was Ian Sinclair Murray-Darling Basin Commission, *Annual Report 2007-2008*, p 196.

<sup>78</sup> See for example the *Murray-Darling Basin Act 1992* (NSW), s 31.

<sup>79</sup> By amendment of the *Water Management Act 2000* (NSW).

---

[Scheme for the Health Professions](#) was signed at the 26 March 2008 COAG meeting.<sup>80</sup> The history of the Health Professions Agreement is set out in the 'preamble', which notes that in 2005 COAG asked the Productivity Commission to report on this issue. The Commission's Research Report, titled *Australia's Health Workforce*, was released in 2006. Its recommendation to establish a single national registration board and a single national accreditation board for the registration, education and training of health professionals was supported by COAG. As explained in the 'preamble' to the Health Professions Agreement, COAG agreed to establish by 1 July 2010:

a single national scheme, with a single national agency encompassing both the registration and accreditation functions. The national registration and accreditation scheme will consist of a Ministerial Council, an independent Australian Health Workforce Advisory Council, a national agency with an agency management committee, national profession-specific boards, committees of the boards, a national office to support the operations of the scheme, and at least one local presence in each State and Territory.

The 'objectives' of the national scheme, to be set out in the legislation, are defined as follows:

- (a) provide for the protection of the public by ensuring that only practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered;
- (b) facilitate workforce mobility across Australia and reduce red tape for practitioners;
- (c) facilitate the provision of high quality education and training and rigorous and responsive assessment of overseas-trained practitioners;
- (d) have regard to the public interest in promoting access to health services; and
- (e) have regard to the need to enable the continuous development of a flexible, responsive and sustainable Australian health workforce and enable innovation in education and service delivery.

In terms of 'implementation', it was agreed that Queensland would host the substantive legislation to give effect to the national scheme, subject to the approval of the Australian Health Ministers Conference. The Health Professions Agreement went on to say:

The State of Western Australia will, as soon as reasonably practicable, enact corresponding legislation, substantially similar to the agreed model, so as to permit the scheme to be established on 1 July 2010. The States of New South Wales, Victoria, South Australia and Tasmania and the Australian Capital Territory and the Northern Territory will, as soon as reasonably practicable following passage of the Queensland legislation, use

---

<sup>80</sup> This commentary draws on C Nesvadba and K Forrester, 'National regulation and accreditation of Australian health practitioner' (2009) 17 *Journal of Law and Medicine* 190-195.

their best endeavours to enact legislation in their jurisdictions applying the Queensland legislation as a law of those jurisdictions, so as to permit the scheme to be established on 1 July 2010.

Further provision is made for the operation of a statutory Ministerial Council, to be known as the Australian Health Workforce Ministerial Council, for reporting requirements, and for review of the scheme. Further, to ensure the maintenance of uniform standards and requirements, 'alteration of the scheme and amendments to the legislation' are to be agreed to by the Ministerial Council and brought, first, before the Queensland Parliament before the same amendments are passed in the other jurisdictions. Withdrawal from the scheme is designated 'a measure of last resort', requiring at least 12 months written notice. All parties must agree in writing if the scheme is to cease. As for funding, the Commonwealth agreed to make an initial contribution of \$19.8 million, but otherwise the plan is for the scheme to be self-funded in the longer term.

The template Queensland legislation is now in place - the *Health Practitioner Regulation (Administrative Arrangements) National Law Act 2008* (Qld) and the *Health Practitioner Regulation National Law Act 2009* (Qld). The administrative structure of the scheme, which is elaborated upon in Attachment A to the Health Professions Agreement, finds expression in the first of the Queensland Acts. The scheme operates under the auspices of the Australian Health Workforce Ministerial Council, which comprises all Health Ministers of the Commonwealth, States and Territories. This Ministerial Council is a statutory body, established under Part 2 of the [Health Practitioner Regulation \(Administrative Arrangements\) National Law Act 2008](#) (Qld). In addition to the Ministerial Council, the Act establishes subordinate administrative bodies, including under Part 3 the Australian Health Workforce Advisory Council, to act as an independent advisory body to the Ministerial Council. The Australian Health Practitioner Regulation Agency is established under Part 4 as an administrative body with oversight of the National Health Practitioner Boards, which are established under Part 5 of the legislation. There is to be one National Board for each of the 10 professions covered by the scheme from 1 July 2010.<sup>81</sup>

Adopting legislation has also been passed in NSW, in the form of the *Health Practitioner Regulation Act 2009* (NSW). Section 4 of that Act provides:

The Health Practitioner Regulation National Law, as in force from time to time, set out in the Schedule to the *Health Practitioner Regulation National Law Act 2009* of Queensland:

- (a) applies as a law of this jurisdiction, and
- (b) as so applying may be referred to as the *Health Practitioner Regulation National Law (NSW)*, and
- (c) so applies as if it were a part of this Act.

As explained in the Second Reading speech for the NSW Act, the introduction of

---

<sup>81</sup> From 1 July 2012 the scheme will be expanded to include Aboriginal and Torres Strait Islander health practitioners, Chinese medicine practitioners and medical radiation practitioners - Nesvadba and Forrester, n 80, p 192.

---

this scheme involved considerable negotiation. In particular, NSW has not adopted the National Complaints Model but has, instead, opted to retain a complaints handling system based on the Healthcare Complaints Commission.<sup>82</sup>

Inevitably, some issues do arise. As noted, to maintain uniformity of approach the legislative scheme can only be amended by agreement of the Ministerial Council. By section 245 of the [Health Practitioner Regulation National Law Act 2009](#) (Qld) the Ministerial Council, which is a statutory body, is also empowered to make regulations for the purposes of the legislative scheme. Parliamentary scrutiny of the regulations is also provided for, with section 246(1) confirming the power of a House of any of the participating Parliaments to disallow a regulation. However, by section 246(2) the regulation will only cease to have effect in that jurisdiction if the same regulation is disallowed 'in a majority of the participating jurisdictions'. It is an interesting example of an attempted accommodation between constitutional proprieties and federal realities. In effect, the power to make regulations is delegated to an inter-jurisdictional statutory body and its effective parliamentary oversight must also operate on an inter- or cross-jurisdictional basis.

#### 6.4 Comments

All three intergovernmental agreements considered above could be looked upon as examples of the positive outcomes achieved via the COAG process, where needful reforms that have been long considered have been finally introduced. While the influence of the financial power of the Commonwealth is not apparent on the face of these agreements, it is not to say that it was not at work behind the scenes. These agreements are not presented here as typical or representative but, rather, as indicative of the contrasting administrative strategies adopted in response to different issues.

The centralist strategy encapsulated in the Murray-Darling Basin Agreement can be understood in light of the effective management of what is an enormously complex and pressing issue. The Commonwealth in this context acts as the broker between State interests, operating above the fray as it were of particular jurisdictional claims. On the other hand, in the case of the Health Professions Agreement the clash of competing interests is less intense, thus allowing for a more 'federal' institutional structure. Indeed, as indicated by the NSW example, the scheme in place is not uniform in every respect. It does, however, provide for a national system of registration and accreditation for the health professions, thus providing for consistency in standards and greater workforce flexibility. Whatever the practical benefits, one upshot is that the scope for discretionary action by the States is reduced. Borrowing from Parkin and Anderson, it might be said that: 'Whatever their intrinsic merits...The effect has been to interpose national-level policy and program priorities into areas within State constitutional jurisdiction'.<sup>83</sup>

---

<sup>82</sup> [NSWPD](#), 28 October 2009, p 18872.

<sup>83</sup> Parkin and Anderson, n 22, pp 301-302.

## 7 CONCLUSION

The subject area covered in this paper is complex and multi-faceted. COAG agreements range across almost every economic, legal, social and environmental issue facing Australia today, from the reform of the criminal law to the regulation of food standards, from the management of the nation's scarce water resources to research on human embryos. Equally varied are the administrative and legal arrangements arising from this process.

By the use of the term 'managerial federalism', this paper has tried to encapsulate both the rationale behind these varied developments and the modus operandi involved in their application. There are of course many issues at play here and countervailing forces at work. The prevailing trends, however, point towards a pragmatic agenda guided by the idea of the rational management of human and other resources, in which the efficiencies of uniformity are maximised and the costs of duplication and the like are reduced or even eradicated. With the financially dominant Commonwealth taking the central managing role, tasks and responsibilities are devolved to the States often on the condition that they account for progress made in the achievement of outcomes agreed to through the COAG process. While the States contribute to policy development and other areas, in the overall scheme of things they seem to operate somewhat as 'line managers' in the delivery of services.

For the States, these developments present concerns as well as opportunities. It can be argued that, for the Parliaments of the States, they represent a weakening of control over major areas of constitutional jurisdiction. Indeed, a subtle re-working of the constitutional model of parliamentary government may be underway. In broad terms Australian federalism is founded on the idea that jurisdictional competencies are divided between the Commonwealth and the States and that, under this scheme, State governments and State government Ministers are to be held accountable to their respective State Parliaments for what is done within their jurisdictional areas of competence. It may be that, under the managerial model of federalism that is now emerging, based largely on cross-jurisdictional decision making bodies, these traditional constitutional relationships are rendered less robust.

Indeed, managerial federalism seems to be adding a more complex administrative dimension to the longstanding debate about the operation of responsible government in the States, that is, in circumstances where the States are not responsible for raising most of the funds they spend.<sup>84</sup> In fact, some developments – the greater flexibility permitted to the States under the new National SPP payments in particular – are designed to increase the accountability of the States for expenditure decisions. However, the extent to which such developments will have a positive impact on the working of parliamentary government at the State level remains to be seen.

For the State Executives and bureaucracies, on the other hand, the advent of managerial federalism can be painted in a more positive light, as presenting new

---

<sup>84</sup> *Final Report of the Constitutional Commission, Volume Two*, AGPS, 1988, p 826.

---

challenges and avenues for intergovernmental cooperation, in the myriad of committees and other institutional structures established by this process, or else at the peak meetings of Ministerial Councils or at COAG itself. As the establishment of the Council of the Australian Federation and other developments show, the COAG process is not the whole story of present day Australian federalism. It is however the leading player in that story.