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Entrenching "Cooperative Federalism": Is it Time to Formalise COAG's place in the Australian Federation?

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Abstract

The purpose of this article is to assess the desirability and feasibility of any point of convergence between Australia's formal constitutional arrangements and COAG. Although several commentators have suggested that this must be the logical endpoint to the sub-constitutional reform which is currently in train, there is ambiguity about much of the detail of such an argument. We consider precisely how constitutional recognition of intergovernmental co-operation might look – whether it should be of COAG itself (and what difficulties this might introduce in turn) or whether an appropriately facilitative change can be cast in more generalist terms. Of either option it must be asked to what extent it would properly address the concerns that many have expressed about the place of COAG and IGAs in our political system. Given the obstacles to constitutional change, it must be seriously considered whether many of those concerns could be met through reform remaining at the sub-constitutional level. Additionally, an awareness of what might be risked through formal constitutional recognition of a body that certainly enjoys the benefits of adaptability should not be lost sight of.

For the present, the sub-constitutional federal arrangements will undoubtedly continue to change rapidly as governments grapple with shared problems in key policy areas such as health, natural resources and education. Others have concluded that no factor has determined the contours of Australian federalism more than the need for pragmatic solutions to policy problems and that these, rather than any overarching constitutional theory of the federal state, continue to drive reform. Nevertheless, as under-theorized and as reactive as these developments are, they only increase the desirability of formal constitutional amendment which is reflective of the reality of Australian federalism today. This is not merely for show or

neatness – but rather to recognize that government is found under the Constitution, not apart from or alongside it. The point at which convergence is to occur between the product of political reform on the one hand and constitutional law on the other is surely contestable. It may be some time off yet. But it continues to be foreshadowed and as the need for it is only likely to grow stronger, it is best to be prepared. This article is our contribution to that effort.

ENTRENCHING 'COOPERATIVE FEDERALISM': IS IT TIME TO FORMALISE COAG'S PLACE IN THE AUSTRALIAN FEDERATION?

PAUL KILDEA* AND ANDREW LYNCH**

I INTRODUCTION

Literature on the necessity for reform of Australia's federal division of government continues to blossom, reflecting the assessment of a leading expert in the area that the system is now at a 'cross-road' between delivering a vibrant and beneficial federalism to the Australian public or 'merely a mask for the effective centralisation of power'.[1] Although the solutions advanced by many commentators towards ensuring the first of these outcomes over the second are many and various, it is notable that none looks exclusively to constitutional amendment as the silver bullet of reform. The notorious difficulty of attaining a successful referendum result – particularly on federal issues which have traditionally been amongst the most contentious proposals – plus also the difficulty of encapsulating all that might be done in the way of federal reform within a single suite of proposed amendments, has ensured that sub-constitutional institutions and mechanisms have been looked to as a simpler, more effective way to achieve change.

At this level of political, financial and administrative processes, reform is not being discussed in a prospective or theoretical sense, but is in fact already occurring to a very significant degree.[2] The creation of the Council of Australian Governments (COAG) – comprising the Commonwealth, State and Territory governments and additionally the President of the Australian Local Government Association – in 1992 was a major development in co-operative intergovernmental decision-making in this country. As we canvas in this article, the importance of COAG has certainly waxed and waned over the last 18 years and its operation is not an unalloyed success. Nevertheless, and particularly under the Rudd Labor government, COAG assumed a fundamental importance as an institutional structure through which the Australian governments may address shared problems and collaborative solutions.

While COAG is a clear demonstration of how much can be done through the commitment of its constituent governments, constitutional considerations cannot be evaded and continue to intrude upon public reflection and debate in the area. This is so in two respects. First, we argue that the need for a body such as COAG is created

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1 Cheryl Saunders, 'Foreword' (2008) 31(2) *UNSW Law Journal* 387-92, 392.

2 As Painter wrote of Australian federalism: 'constitutional reform fails, but constitutional evolution proceeds apace': Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (Cambridge University Press, 1998) 189; See also, Gareth Griffith, 'Managerial Federalism – COAG and the States', (Briefing Paper No 10/09, Parliamentary Library Research Service, Parliament of NSW, 2009) 17.

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by the Commonwealth Constitution and remains guided by the constraints it has imposed upon the powers and capacities of the respective governments acting in isolation. In essence, COAG is a response to the federal system established by the Constitution as it now operates in a modern, integrated society in an increasingly globalised world at the start of the 21st century. The consequence of this view is that COAG, despite its tenuous status as a major mechanism of governance, is not an ephemeral. It, or something very much like it, will surely be a part of the landscape of Australian federalism from here on. As Voltaire said of God, if COAG did not exist, we would have to invent it.

Second, and by implication, there would appear to be definite limits and drawbacks to what may be accomplished through co-operation alone. If the Australian federation has indeed reached a cross-road, it would seem appropriate that any reforms undertaken be structural and long-term in nature. Anything less might be seen as mere 'tweaking' and 'tinkering'.[3] For instance, it is widely agreed that COAG would be more effective if its processes were more formalised and less reliant on inter-jurisdictional goodwill. Even when COAG is very active, as it has been in recent years, concerns are prompted by the apparent dominance of the Commonwealth in setting the agenda according to its priorities rather than those which the States and others present may share between them. The view of COAG as an engine-room of co-operation *per se* is seen by others as a worrisome feature since it risks neutralising the benefit of diversity which inheres in a federation. More concerning still, is the 'democratic deficit' which attends the development of policy between executive governments through the intergovernmental agreements (IGAs) reached at COAG meetings and the extent to which these and accompanying legislation may obscure the transparency so vital for State legislatures to hold their governments to account. Warnings as to the precarious state of the doctrine of responsible government can, from time to time, be overly alarmist in tone, but it is indisputable that an institutional structure such as COAG further facilitates the concentration of power in the Executive and its avoidance of parliamentary controls which has been generally observed as a phenomenon in Westminster systems in recent years. Finally, there must come a point where the disjunct between the content of constitutional instruments and the way in which power and responsibilities are exercised in practice is suboptimal, if not completely untenable. The Commonwealth Constitution is already a highly enigmatic document, silent on the most basic and central elements of government. This cannot justify the creation of a still wider gulf between image and reality on these matters, nor is such a state of affairs harmless. A citizenry befuddled by the civics of their polity, unable through no fault of their own to discern the constitutional authority for the powerful institutions which govern them, diminishes our democracy. All these considerations but perhaps especially the last, offer compelling reasons to better anchor the evolving sophistication of sub-constitutional federalism in Australian constitutional law and practice.

The primary purpose of this article is to assess the desirability and feasibility of any point of convergence between Australia's formal constitutional arrangements and COAG. Although several commentators have suggested that this must be the logical endpoint to the sub-constitutional reform which is currently in train, there is

[3] Kenneth Wiltshire, 'Australian Federalism: The Business Perspective' (2008) 31(2) *University of New South Wales Law Journal* 583, 615.

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ambiguity about much of the detail of such an argument. We consider precisely how constitutional recognition of intergovernmental co-operation might look – whether it should be of COAG itself (and what difficulties this might introduce in turn) or whether an appropriately facilitative change can be cast in more generalist terms. Of either option it must be asked to what extent it would properly address the concerns that many have expressed about the place of COAG and IGAs in our political system. Given the obstacles to constitutional change, it must be seriously considered whether many of those concerns could be met through reform remaining at the sub-constitutional level. Additionally, an awareness of what might be risked through formal constitutional recognition of a body that certainly enjoys the benefits of adaptability should not be lost sight of.

For the present, the sub-constitutional federal arrangements will undoubtedly continue to change rapidly as governments grapple with shared problems in key policy areas such as health, natural resources and education. Hollander and Patapan have concluded that no factor has determined the contours of Australian federalism more than the need for pragmatic solutions to policy problems and that these, rather than any overarching constitutional theory of the federal state, continue to drive reform.[4] Nevertheless, as under-theorised and as reactive as these developments are, they only increase the desirability of formal constitutional amendment which is reflective of the reality of Australian federalism today. This is not merely for show or neatness – but rather to recognise that government is found *under* the Constitution, not apart from or alongside it. The point at which convergence is to occur between the product of political reform on the one hand and constitutional law on the other is surely contestable. It may be some time off yet. But it continues to be foreshadowed and as the need for it is only likely to grow stronger, it is best to be prepared. This article is our contribution to that effort.

II THE CONSTITUTIONAL NECESSITY OF INTERGOVERNMENTAL RELATIONS

The absence from the Constitution of a federal cooperative body, such as we now have in COAG, is curious when one considers the nature of the federation that it establishes. It is fundamentally concurrent in nature, meaning that a large number of powers and responsibilities in the federation are held simultaneously by both the Commonwealth and the States.[5] This ensures that neither tier of government may act substantially independently of the other. In particular, the Commonwealth, despite its contemporary dominance, not infrequently requires State assistance to overcome some deficiency in its own power or expertise. But, while the Constitution thus renders government interaction a clear necessity, it is almost completely silent on the on formal mechanisms through which Commonwealth and State interaction might be facilitated.[6] This leaves an obvious lacuna in the Australian political system that has

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4 Robyn Hollander and Haig Patapan, 'Pragmatic Federalism' (2007) 66(3) *Australian Journal of Public Administration* 280.

5 For example, section 51. For a detailed discussion of concurrent elements in Australia's federation, see Brian Galligan, *A Federal Republic* (Cambridge University Press, 1995) 199-203.

6 Geoff M Anderson, 'The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism' (2008) 31(2) *University of New South Wales Law Journal* 493, 495; Anne Tiernan, 'The Council for the Australian Federation: A New Structure of Australian Federalism' (2008) 67(2) *Australian Journal of Public*

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been filled through creative institutional design of the sort that led to the establishment of COAG in 1992.

The Constitution's silence on formal intergovernmental machinery has been seen by some scholars as evidence of the framers' intention to create a coordinate federal system.[7] Indeed, the notion that the Australian federal system was premised upon a coordinate division of government responsibilities and powers was the dominant view for much of the 20th century.[8] According to this perspective, the national and State governments are 'each, within a sphere, co-ordinate and independent'[9] of each other. The difficulty of reconciling the purity of this vision with the reality of Australian federalism is accommodated either through acknowledgment of intergovernmental overlap as an occasional inevitability[10] or by stressing coordinacy as essentially a state of grace from which the Australian federation has long since fallen.[11]

Professor Brian Galligan comprehensively dismantled this view of the Australian federation in his 1995 book, *A Federal Republic*.[12] Galligan argued that the coordinate orthodoxy was misconceived, both deficient as a matter of federal theory and unsupported by clear constitutional text and subsequent practice. He pointed to the concurrent nature of the bulk of the Commonwealth's legislative powers, as set out in section 51 of the Constitution, and distinguished them from the 'the handful of exclusive powers in section 52…and section 90'.[13] He acknowledged that, under section 109, Commonwealth laws enjoy supremacy over those of the States to the extent the latter are directly or indirectly inconsistent with the former, but argued that this did not negate concurrency as 'the essential design principle of the Australian Constitution'.[14] Nor did the Constitution's allocation of financial powers upset this view. Certainly, the combined effect of the Commonwealth's relevant powers in this area – notably, the grants power (section 96), general taxation power (section 51(ii)), exclusive power to levy excise tax (section 90) and section 109 – produce a 'concurrency' that is weighted in its favour, as is apparent from the heightened vertical fiscal imbalance that has long been a feature of our federation. But even this dysfunctional fiscal concurrency serves to support Galligan's rejection of coordinate federalism as the underpinning theory of the Australian polity[15] – after all, a coordinate system would entail each tier of government having 'under its own independent control financial resources sufficient to perform its exclusive functions'.[16] Indeed, it is hard to deny that Australia's long-standing vertical fiscal

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Administration 122, 122; Federal-State Relations Committee, Parliament of Victoria, *Report on Australian Federalism: the Role of the States* (1998) 1.32-1.53.

7 See for example, John Wanna, John Phillimore, Alan Fenna and Jeffrey Harwood, 'Common Cause – Strengthening Australia's Cooperative Federalism' (Final Report to the Council for the Australian Federation, May 2009) 11.

8 Galligan, above n 5, 192.

9 Kenneth C Wheare, *Federal Government* (Oxford University Press, 4th ed, 1946) 10.

10 Ibid.

11 See for example, Russell Mathews, 'Innovations and Developments in Australian Federalism' (1977) 7(3) *Publius: The Journal of Federalism* 9, 12.

12 Galligan, above n 5, 199-203.

13 Ibid 199.

14 Ibid.

15 Ibid 200-01. On the effect of the grants power on Australian federalism, see Alan Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31(2) *UNSW Law Journal* 509.

16 Wheare, above n 9, 93 quoted in Galligan, above n 5, 195.

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imbalance is largely the result of the Constitution's failure to secure separate revenue streams for both levels of government as emphasised by coordinate theory.

Galligan's discrediting of coordinacy profoundly destabilised many of the assumptions underlying conversations about 'ideal' divisions of role and responsibilities. It exposed coordinate federalism not as some lost arcadia but as a flatly erroneous mischaracterisation of the federal system, thus seriously undermining the strength of calls to cleanly redraw the division of responsibilities between Commonwealth and State governments. On the other hand, Galligan's assertion of a concurrent theory of Australian federalism served as a launching pad for a reinvigorated study of subconstitutional intergovernmental relations – offering, as he saw it, 'enormous scope for improving the working of the federal system'.[17] He argued that the consequence of concurrency was not chaotic inefficiency, but simply a need for the creation of 'an adequate system of intergovernmental arrangements and procedures for coordinating policy action'.[18]

Since the earliest days of federation, intergovernmental cooperation has, of course, taken place,[19] reflecting Zines' argument that the new constitutional arrangements were appreciated by contemporaries in light of the substantial experience of such interactions over the colonial era.[20] In the latter half of the 20th century, the need for government interaction was only exacerbated by the rise of the administrative and regulatory state in responding to complex policy problems in a highly interlinked modern society.[21] Although ad hoc arrangements often succeeded in producing good outcomes, the sporadic and precarious character of intergovernmental relations was nevertheless manifest. A view began to emerge that intergovernmental collaboration would be best pursued within a clear and ongoing institutional framework, both to reduce the risk of piecemeal and sporadic cooperative efforts, and to promote 'best practice' in the construction of complex cooperative schemes. We see the seeds of this in the series of Special Premiers' Conferences (SPCs) held between 1990-1992 which, despite their focus on financial rather than policy issues, proved to be an antecedent to COAG. We might also view this development as a positive response to the apparent assumption of the Constitution's framers that Australian governments would develop means of communication and coordination of their powers for the national benefit. It was in this context that the creation of COAG in the early 1990s, despite its complications and disappointments, was welcomed as a major enhancement of the federal system.

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17 Galligan, above n 5, 189.

18 Ibid 201. It should be noted that recognition of concurrent federal design is distinct from, and falls short of, an attempt to more qualitatively portray the Constitution as premised upon intergovernmental 'cooperation': see Andrew Lynch and George Williams, 'Beyond a Federal Structure: Is a Constitutional Commitment to a Federal Relationship Possible?' (2008) 31(2) *University of New South Wales Law Journal* 395, 405.

19 S.R. Davis, 'Cooperative federalism in retrospect' (1952) 5(19) *Historical Studies: Australia and New Zealand* 212. The first intergovernmental agreement, for example, was the 1914 River Murray Waters Agreement, negotiated by the Commonwealth, New South Wales, South Australia and Victoria, and implemented by legislation in each jurisdiction in 1915.

20 Leslie Zines, 'Changing Attitudes to Federalism and its Purpose' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 86, 99.

21 Wanna et al, above n 7, 9, 12.

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III THE CREATION AND EVOLUTION OF COAG

The definitive account of COAG's emergence from the collaborative engagement prompted by Prime Minister Hawke's 1990 call for a 'New Federalism' is found in Martin Painter's seminal study of the period.[22] It is not our intention to replicate Painter's detailed account, but it is useful to briefly acknowledge his identification of the conflicting objectives with which the Commonwealth and the States approached the enhancement of intergovernmental relations at this time, as these remain highly relevant to a contemporary appraisal of COAG's operation and impact upon Australian federalism.

As Painter makes clear, the genesis of COAG depended heavily upon a confluence of opportunity and personality.[23] The Hawke government was keen to continue its agenda of microeconomic liberalisation through the elimination of inefficiencies embedded in public enterprises managed by the States and excessive regulatory overlap, duplication and border costs. Hawke decided that these objectives could only optimally be met by working cooperatively with the States rather than exerting Commonwealth dominance. If nothing else, uncertainty over the extent of Commonwealth power ensured the desirability of persevering with reform as a cooperative endeavour; there was also the positive political capital to be gained from such an approach when contrasted with the oppositional forces whipped up by a Commonwealth takeover.[24] From the States' point of view, the possibility that the Commonwealth would test the reach of its power constituted a persistent and underlying threat.[25] In any event, it would have been hard for State Premiers to resist Hawke's call for a new spirit of intergovernmental cooperation. Premiers Nick Greiner (New South Wales) and John Bannon (South Australia), in particular, proved to be thoughtful enthusiasts for federal reform who were pivotal in maintaining momentum when the process threatened to derail at early stages.

The existence, then, of not one but two reform agendas existing in symbiosis – microeconomic reform and a recalibration of the Australian federal system – created a problematic tension. In holding out the latter as a means of primarily driving the former, Hawke had not banked on just how hard the States were prepared to push on federal reform. In particular, the States insisted strongly on real movement on fiscal federalism reform and the alleviation of vertical fiscal imbalance, and these became the rocks upon which the nascent institutions of intergovernmental collaboration came repeatedly close to wreckage. Almost before the 'New Federalism' got off the ground, the States were provoked into hostility by a reduction in the size of general-revenue grants issued by the Commonwealth, while the latter increased its grip on State economies through greater use of special-purpose payments.

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22 Painter above n 2.

23 Further, a necessary precondition was greater executive coordination within the Australian Commonwealth and State governments through the development in preceding years of stronger central agencies: Glyn Davis, 'Carving Out Policy Space for State Government in a Federation: The Role of Coordination' (Fall, 1998) *Publius* 147; Martin Painter, 'Multi-level Governance and the Emergence of Collaborative Federal Institutions in Australia' (2001) 29(2) *Policy & Politics* 137, 143-44.

24 Painter, above n 2, 35.

25 Ibid 32.

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The States' aspiration for greater financial independence underpinned their firm preference for a model of 'competitive federalism' defined by 'an arm's length, balanced relationship of mutual respect'.[26] The Commonwealth, however, was contemplating something very different. As Painter recounts, it 'had in mind a centrally managed, collaborative model'.[27] Under this model, the Commonwealth envisaged being able to do three things: 'assert its role in achieving national, uniform outcomes in key areas of policy; ...consign the States to the role of faithful agents in the performance of proscribed tasks; and...overcome resistance and obstruction by diminishing their power and discretion'.[28]

These contrasting views of the direction in which collaborative federalism was headed expose the underlying tensions, discussed in the next Part, between the development of an enhanced 'system of interlocking executive federalism'[29] and the importance of preserving democratic accountability and transparency of government decision-making. In their efforts to resist the managerialist model of collaboration which the Commonwealth so strongly favoured, the States often asserted concerns about accountability and transparency – usually at meetings from which the Commonwealth was absent. The most significant of those, at least in demonstrating the determination of the States to maintain momentum, was the November 1991 Special Premiers' Conference. That meeting generated four guiding principles for a reallocation of roles and responsibilities within the federation.[30] The first three recognised collaboration in the 'national interest'; the value of subsidiarity; and the importance of 'structural efficiency' in the public sector, including Commonwealth-State divisions of functions. The final principle stressed accountability and transparency – with its chief target being to lift the fog cast by vertical fiscal imbalance.

The SPC meeting in November 1991 also laid the groundwork for the creation of COAG, which was to occur six months later. At the November meeting, State and Territory leaders committed to the creation of a 'Council of the Federation' as a structure through which the collaborative reform of Australia's federal arrangements could continue. Paul Keating, who replaced Hawke as Prime Minister in December of that year, did not agree to Commonwealth involvement in the Council as it was initially devised. But, at a meeting with heads of government in May 1992, Keating and the Premiers reached consensus on the creation of COAG in its stead. The Commonwealth was to permanently chair the new body. It was also agreed that it meet at least annually with the aim of increasing cooperation between Australian governments in the national interest, and to continue the work of the SPCs on the national economy and structural reform of government functions and relationships.[31]

Ironically, the solidifying of a permanent institution through which Federal-State relations could be managed provided the impetus for creation of another. The States and Territories took to meeting twice yearly at Leaders' Forums in order to exchange information and experience, while also developing consensus on their shared interests

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26 Ibid 12. For more general discussion of modes of intergovernmental interaction, see Painter, above n 23, 138-140.

27 Painter, above n 2, 12.

28 Ibid 16.

29 Ibid 25.

30 Special Premiers' Conference, 'Communiqué' 21-22 November 1991.

31 Heads of Government Meeting, 'Communiqué' 11 May 1992.

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so as to strengthen their hand in negotiations with the Commonwealth at COAG.[32] Importantly, the Forums (which would eventually give rise to the Council of the Australian Federation in 2006)[33] also provided the States and Territories with a secure platform from which to expressly maintain their favoured vision of federal reform, with its emphasis on diversity, competition and accountability.[34]

Although Keating did not enjoy an easy relationship with the States and Territories, COAG had numerous successes during his tenure, most prominently the implementation of the National Competition Policy and the mutual recognition scheme. Painter explains Keating's embrace of COAG as a political necessity to put something in the space that Hawke had created for formal relations between the Commonwealth and States.[35] We might also extend that explanation to the Howard government's eventual acceptance of COAG despite an initial aversion to it upon succeeding Labor in office in 1996.[36] Although Howard initially took steps to diminish the bureaucratic base which supported COAG, the later period of the coalition's 11 years in power, saw fresh challenges bring about a revival of COAG's institutional importance. One of those challenges, which could not have been anticipated in the 1990s, was the need for a whole of government approach, encompassing the States and Territories, in responding to the threat of terrorism. Constitutional limitations on the Commonwealth necessitated a referral of legislative power to support the first tranche of Commonwealth anti-terrorism laws, with complementary State and Territory legislation being actively sought to sustain extended detention schemes in 2005.[37] More broadly, the 2002-03 Intergenerational Report provided the impetus for the Commonwealth to work with the States on a new National Reform Agenda, endorsed by COAG in 2006, to enhance the resource of human capital upon which future national productivity depends. As core areas of State control – education and health – were pivotal to this enterprise, and some States, but especially Victoria, had already taken a lead role in responding to the challenge of an ageing population, it was clear that serious reform would necessarily be collaborative in nature.[38]

In this way, COAG evolved to form a central hub for federal governance despite the reservations of the Commonwealth. However, some questioned whether COAG permitted collaboration on equal terms. Anderson, for example, has characterised COAG under Howard as an instrument of 'cooperative centralism',[39] saying that the Commonwealth's domination of the agenda and greater resources ensured that the new executive federalism was skewed strongly in its favour. This theme will be explored more fully in Part IV but at this point it is important to note that contemporary accounts of the rise of 'regulatory federalism' in the early 1990s

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32 Federal-State Relations Committee, above n 6, 3.42.

33 Peter Carroll and Brian Head, 'Regulatory Reform and the Management of Intergovernmental Relations in Australia' (2010) 45(3) *Australian Journal of Political Science* 407, 414-15.

34 Painter, above n 2, 54.

35 Painter, above n 2, 43.

36 Brian Galligan and John SF Wright, 'Australian Federalism: A Prospective Assessment' (2002) 32 *Publius* 147, 153.

37 Council of Australian Governments, 'Communiqué' 27 September 2005.

38 Anderson, above n 6, 500-501; Rod Glover, 'Collaborative Federalism: Getting More from the Competition of Ideas' (April 2006) *Public Administration Today* 4; Roger Wilkins, 'A New Era in Commonwealth-State Relations?' (April 2006) *Public Administration Today* 8.

39 Anderson, above n 6, 498.

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confirm that the seeds of centralism and the strengthening of executive power were embedded right from the start. Once the Commonwealth overwhelmed the States' vision for a looser cooperative relationship and saw off their demands for substantial fiscal reform, it was difficult to see how, if it was to continue to exist, COAG could *not* result in a Commonwealth-led move to executive federalism.

COAG's role in federal governance was only enhanced under the Rudd Labor government. Prime Minister Kevin Rudd wasted little time in designating COAG as the 'workhorse' of federal reform.[40] At the first meeting he chaired in December 2007, it was decided that COAG would meet four times the following year and at the first of those, seven newly established working groups overseen by a Commonwealth Minister would report back on 'implementation plans for the major Commonwealth election commitments' in specific areas.[41] By late 2008, COAG had negotiated a new Intergovernmental Agreement on Federal Financial Relations, perhaps 'the most significant reform of Australia's federal financial relations in decades'.[42] The Agreement rationalised the number of specific purpose payment grants to five,[43] and tied these to outcomes-focused National Agreements on healthcare, education, skills and workforce development, disability services and affordable housing.[44] Additionally, the performance of all governments in their achievement of the mutually-agreed outcomes and performance benchmarks in each National Agreement was to be monitored and assessed by the COAG Reform Council (CRC) and reported publicly on an annual basis.[45] All this was a substantial extension upon the 2006 National Reform Agenda, no small development itself, which was maintained and subsumed in the new program put in place by the 2008 Agreement.[46]

The intergovernmental agreement on Federal Financial Relations became effective on 1 January 2009 so it remains early days yet, but it is clear that a vast and highly integrative architecture for collaborative federalism has been constructed under the auspices of COAG. What is striking about this agenda is the comprehensive nature of the issues that COAG aims to address – these are not finite goals but ongoing ones. The intergovernmental agreement on Federal Financial Relations represents nothing less than a long-term commitment by Australian governments to collaborative federalism in major policy areas. That commitment is also to a particular modus operandi which some have described as 'managerial federalism':

> With the financially dominant Commonwealth taking the central managing role, tasks and responsibilities are devolved to the States often on the condition that they

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40 Patricia Karvelas, 'Rudd harnesses COAG "workhorse"', *The Australian* (online), 21 December 2007 http://www.theaustralian.com.au/news/nation/rudd-harnesses-coag-workhorse/story-e6frg6nf-1111115166921.

41 Council of Australian Governments, 'Communiqué' 20 December 2007.

42 Council of Australian Governments, 'Communiqué' 29 November 2008

43 A rationalisation which had been long hoped for by the States: Fenna, above n 15, 527.

44 A sixth National Agreement on indigenous reform was also made but this was not supported by a SPP.

45 The CRC is independent of the individual governments and reports directly to COAG on progress under the National Agreements as well also on the National Partnership payments scheme which funds specific projects connected to the National Agreements.

46 Carroll and Head, above n 33, 416-20.

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> account for progress made in the achievement of outcomes agreed to through the COAG process.[47]

It is hard not to see the Agreement and the changes it implements as the fulfilment of Painter's early prediction that the changes of the early 1990s might usher in a sophisticated form of executive federalism.

The rapid rise of COAG as a governance institution, with the shared commitments and overlapping accountabilities it has brought in train constitutes a remarkable development in Australian federalism.[48] While the growing formalism of Commonwealth-State interaction might be welcomed by some as promoting more efficient outcomes, the next Part aims to consider the drawbacks and unease which have been identified in respect of the new collaborative federalism and also its tenuous place in our constitutional firmament. In light of the ambitious and substantial reform agenda which the Rudd government has agreed with the States and Territories and which is managed through COAG and evaluated through the COAG Reform Council, it may be seen as quite unsatisfactory that all this enjoys no secure constitutional foothold.

IV THE CONCERNS ABOUT COAG

In the sections above, we have sought to demonstrate that Australia's constitutional structure, while necessitating intergovernmental cooperation, does little to facilitate it. We have also described how the relative constitutional silence in this area has led to the development of sub-constitutional mechanisms, of which COAG is the most important. Indeed, almost twenty years after its formation, COAG is now a central hub for the formulation of policy responses to some of the nation's most pressing problems, including health care, water management, and microeconomic reform. However, its growing influence has been accompanied by increasing concerns about its operation. In particular, critics have pointed to three aspects of COAG that continue to be problematic: first, uncertainty surrounding its legal status and operation; second, its tendency to centralise policy control at the expense of diversity; and, third, the 'democratic deficit' associated with its model of executive decision-making.

A *Uncertainty about Legal Status and Operation*

COAG has no formal status under Australian law. It was established by agreement between the Prime Minister, Premiers and Chief Ministers in 1992 but enjoys legal recognition neither in the Constitution nor by statute. While this has not prevented COAG playing an influential policy role from time to time, its existence necessarily remains tenuous. The uncertain legal status of COAG is augmented by the fact that, almost twenty years after its formation, its basic structure and processes remain undefined and largely subject to Prime Ministerial discretion. In practice, this means that COAG relies substantially on inter-jurisdictional goodwill for its effectiveness, and remains vulnerable to being ignored altogether by the Commonwealth.

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47 Griffith, above n 2, 36.

48 Griffith says that while 'the COAG process is not the whole story of present day Australian federalism…[it] is however the leading player in that story': Ibid 37.

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The Commonwealth controls key aspects of the operation of COAG. It is the Prime Minister, for example, who determines the frequency and timing of meetings. As a result, COAG's role in intergovernmental decision-making depends largely on the Commonwealth's commitment to it. During the tenure of the Rudd government, COAG met roughly four times a year.[49] For most of its existence, however, meetings have been far less frequent. From 1992-2007, COAG met, on average, once a year, and many of these meetings lasted only a few hours.[50] During the 2010 federal election campaign, Opposition Leader Tony Abbott announced that he favoured reducing the number of annual meetings from four to two.[51] The Commonwealth's control of the timing of meetings is also significant, because this allows the Commonwealth to consult the States at a time that suits its own policy timetable, irrespective of the interests of the States. One recent example was the Rudd government's decision to give the States little more than a month to consider complex health and hospital reforms before being asked to give a firm commitment at COAG.

Another feature of COAG that favours the Commonwealth is the Prime Minister's control of the meeting agenda. The Prime Minister routinely invites input from the States on possible agenda items, but he or she alone settles the final agenda for each meeting and need do no more than consider suggestions from the States. In practice, this means that COAG meetings invariably address issues of interest to the national government. While this is perhaps inevitable given COAG's focus on policy of national rather than local concern, and the Commonwealth's 'unique legitimacy' in invoking the national interest in pressing particular matters,[52] it is surely regrettable that sometimes the Commonwealth will only finalise the COAG agenda just days before the meeting, thus giving the States minimal time to prepare.[53] There may also be something to be said in favour of loosening the extent of the Commonwealth's control over COAG through the occupancy by the Prime Minister of the chairpersons' role for all meetings, and the location of the Council's secretariat within the Department of the Prime Minister and Cabinet.

B *Centralising Force*

Another longstanding concern about COAG is that it encourages intergovernmental decision-making of a type that favours central control and policy uniformity, at the expense of devolution and diversity. The States have been highly attuned to this risk, with Jeff Kennett, Premier of Victoria, remarking as early as 1994 that:

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49 See Council of Australian Governments, *COAG Meeting Outcomes* (18 May 2010) < http://www.coag.gov.au/coag_meeting_outcomes/archive.cfm>.

50 In the period 1992-2007, COAG met once a year ten times, and twice a year five times; it did not meet at all in 1998: Ibid. On the brevity of meetings, see Business Council of Australia, *Reshaping Australia's Federation : A New Contract for Federal State Relations* (2006), 14.

51 Emma Rodgers, 'Abbott Takes Axe to Rudd "Bureaucracy"', *ABC Online*, 20 July 2010, <http://www.abc.net.au/news/stories/2010/07/20/2958718.htm>.

52 Painter, above n 2, 62, 89.

53 Peter Beattie, 'The Immediate Challenge Regarding COAG Reform' (2002) 61(4) *Australian Journal of Public Administration* 57, 59. It is perhaps noteworthy that the manner in which COAG meetings are organised would not meet the broad protocols in place for the operation of Ministerial Councils, which recognise the importance of responsible government, and in particular 'the responsibility of Ministers to ensure they are in a position to represent their governments appropriately at Council meetings': Department of the Prime Minister and Cabinet, *Commonwealth-State Ministerial Councils: A Compendium* (July 2010) 2.

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> I think we get rolled every time we go into COAG, whether we agree on something or not. It's the nature of the beast. While there is said to be discussion, invariably the Federal Government does what it wishes.[54]

This apparent tendency has led Anderson to claim much more recently that 'COAG, which began as a means for encouraging cooperative federalism, has in fact become a vehicle for what might be described as cooperative centralism'.[55] This is fostered, in part, by the Commonwealth's control of key aspects of COAG's operation, as outlined above.[56] Equally significant is that the very process of cooperation serves to undermine the States' distinctiveness. Much of the COAG work agenda focuses on achieving policy uniformity – for example, by developing national standards for business regulation, occupational health and safety, and the like – and thus reduces the scope for the States to engage in the 'competitive federalism' that can give rise to diversity and innovation. Additionally, the COAG process encourages the Commonwealth to view 'the States' as a plurality, further undermining their individuality. As was seen at the April 2010 meeting over reform of health funding arrangements, individual State Premiers may adopt a particular position which ensures they stand out, but the effect is likely to be only temporary. For while they resist the Commonwealth they are seeking to convince their counterparts to join them in doing so; and when they accede to the eventual agreement they are back in the fold. The only way to depart a COAG meeting not smothered by the fog of consensus is to stand resolutely outside it, as Premier Barnett did when Western Australia refused to surrender 30% of its GST revenue as a condition of the agreement on health reform. But not only is this degree of resistance rather rare, carrying as it does certain political risks for the individual in question, it is obviously an aberration from how COAG is supposed to operate and the outcomes it is established to achieve as a collaborative institution. In short, if the States are playing in the spirit of the cooperative game, then they do so at the risk of the game diminishing them and frustrating their hope for a more arms-length approach to federal collaboration.

A centralising tendency is also apparent in the bureaucratic structure that supports COAG. This vast network of working parties and committees, across both tiers of government, tends to take its direction from the centre.[57] This is not surprising given the Commonwealth's superior financial resources, especially in comparison to the smaller States, and the locating of the COAG secretariat within the Department of the Prime Minister and Cabinet. But it is nonetheless striking that COAG's collaborative imperative has progressed to such a point that Commonwealth Ministers now chair working parties comprised of both Federal *and State* bureaucrats.[58]

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54 Quoted in Painter, above n 2, 85.

55 Anderson, above n 6, 496.

56 Linda Botterill, 'Managing Intergovernmental Relations: COAG and the Ministerial Councils' (2005) Audit Discussion Paper, Democratic Audit of Australia, 2; Hollander and Patapan have noted the tendency for COAG's agenda to be dominated by issues on which the Commonwealth needs State cooperation – such as gun control, drugs, water and national security – while giving little space to discussion of State concerns: Hollander and Patapan, above n 4, 287. Also, Anderson has noted 'the elevation of COAG to a central role reflects the new Government's rhetoric of cooperative federalism; the underlying process, however, remains cooperative in the sense of implementing national objectives and the power of the central government to set those objectives is undiminished: Anderson, above n 6, 507.

57 Anderson, above n 6, 505-06.

58 Anderson, ibid 507.

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It is also noteworthy that the expanded COAG work agenda has created an additional work burden for State government departments. State agencies have found themselves in the position of having to oversee the implementation of a wide variety of reforms across a range of portfolios. They have also had to become accustomed to new reporting requirements under the IGA on Federal Financial Relations which, among other things, have required the provision of extensive data to the COAG Reform Council. Inevitably, the challenge of developing, implementing and refining the reforms of recent years has sometimes involved the diversion of resources from other State priorities. By 2010, some agencies admitted to feeling 'reform fatigue'.[59]

The evolution of COAG into a centralising institution has prompted the States to take steps to help ward off the creeping Commonwealth influence. Foremost amongst them has been the formation of the Council of Australian Federation. Established in 2006, it acts as a forum for State and Territory leaders to communicate and collaborate with each other on matters of common concern. Its formation was prompted in large part by the centralist Howard government which presented the State and Territory governments with a 'common enemy'[60] – and the specific impetus was the Commonwealth's aggressive displacing of State industrial relations systems by its *Work Choices* legislation, and the defeat of the States' combined challenge to the constitutional validity of that law in the High Court. That the decision of a majority of the Court had a deeper significance for the balance of power in the federation was expressly recognised by the dissenting judgments issued by two of the Court's members and was certainly not lost on the States at the time. Since its establishment, CAF has provided these governments with an important forum for developing strategy in the lead-up to COAG meetings. In this sense, it is the clear successor to the Leaders' Forums which were formalised in 1994 as twice yearly meetings of the State and Territory leaders.[61]

A separate development has been the centralisation of policy-making *within* State bureaucracies, precipitated largely by the increasing influence of COAG. Previously, line agencies had been deeply involved in policy discussions with federal departments. In recent years, their role has been diminished as respective Departments of Premier and Cabinet have taken over in an attempt to create more streamlined and disciplined communication channels.[62] This development has given central agencies 'a much more powerful role…in policy development across all levels of government'.[63]

C *Democratic Deficit*

An ongoing concern about COAG is the extent to which its operation is consistent with basic democratic principles. As Director-General of the Cabinet Office in New South Wales in 2006, Roger Wilkins, now Secretary of the Commonwealth Attorney-

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59 Lyn Genoni (Department of the Premier and Cabinet, Western Australia), 'Challenges of Sustaining the COAG Reforms: A Perspective from the "Greta Garbo" State', (Paper presented at Intergovernmental Relations Conference, Canberra, 14 April 2010).

60 Tiernan, above n 6, 131.

61 Painter, above n 2, 51.

62 Botterill, above n 56, 195.

63 Anderson, above n 6, 506.

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General's Department, remarked in 2006 that COAG 'sidesteps, more or less completely, any sort of democratic scrutiny'.[64] Of concern here is COAG's propensity to marginalise parliaments and provide insufficient public detail about its decision-making processes.[65] Such concerns about a so-called 'democratic deficit' are longstanding in the field of intergovernmental relations. As early as 1977, the Coombs Royal Commission expressed misgivings about the tendency of cooperative arrangements to undermine responsible government[66] and, as noted above, matters of accountability and transparency were seen by the States and Territories to be important enough in 1991 to warrant their inclusion as one of the four principles to guide a review of federal roles and responsibilities.[67] Doubts as to COAG's democratic fidelity should therefore not be thought of as new, although they have arguably become more urgent with its growing influence and significance.

That COAG should operate in this fashion is a consequence of the fusion within Australia of federal and parliamentary systems of government. As Sharman explains:

> [W]hile federalism reflects the existence of multiple and autonomous agencies of government, parliamentary government integrates all the agencies of each government into a single hierarchy with the executive at its apex. Consequently, the relations between the component governments in the federation become the realm of executive action alone, and of the chief executive officer, premier or prime minister in particular.[68]

As the central organ in this network of intergovernmental relations, COAG is sometimes described as a mechanism of 'executive federalism'. This term, coined in the context of Canadian federal politics, describes the 'channelling of intergovernmental relations into transactions controlled by elected and appointed officials of the executive branch'.[69] The concept thus encompasses not only the capacity of first ministers to commit to policy positions, but also the communication and negotiations that take place between senior officials and other bureaucratic actors in the lead up to COAG meetings. Accountability problems arise due to the tendency for these negotiations and commitments to take place without adequate parliamentary or public scrutiny. The first opportunity for parliamentary scrutiny may not occur until an intergovernmental agreement is presented to parliament in the form of template

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64 Wilkins, above n 38, 12.

65 Botterill, above n 56, 2; Wilkins, above n 38, 12; Marian Sawer, Norman Abjorensen and Philip Larkin, *Australia: The State of Democracy* (Federation Press, 2009), 303.

66 Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 20; John Uhr, 'Parliament and the Political Management of Federalism' in Peter Carroll and Martin Painter (eds), *Microeconomic Reform and Federalism* (Federalism Research Centre, ANU, 1995) 267.

67 Painter, above n 2, 43; for a constitutional law perspective on accountability and transparency in intergovernmental relations, see Cheryl Saunders, 'Accountability and Access in Inter-government Affairs: A Legal Perspective' in Michael Wood, Christopher Williams and Campbell Sharman (eds), *Governing Federations: Constitution, Politics, Resources* (Hale & Iremonger, 1989), 123, 129 and Cheryl Saunders, 'Constitutional and Legal Aspects' in Brian Galligan, Owen Hughes and Cliff Walsh (eds), *Intergovernmental Relations and Public Policy* (Allen and Unwin, 1991) 39.

68 Campbell Sharman, 'Executive Federalism' in Brian Galligan, Owen Hughes and Cliff Walsh (eds) *Intergovernmental Relations and Public Policy* (Allen & Unwin, 1991) 23, 25.

69 Ibid 25.

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legislation that has already been agreed to by heads of government.[70] State Parliaments of course retain the capacity to amend or reject such legislation but this form of accountability is frequently too limited and belated to have any real effect. As Griffith notes, 'it is fair to say that for practical purposes their powers are constrained'.[71]

One reason for this is the composite nature of COAG, comprising representatives not only from multiple jurisdictions but, often, from both major parties as well. This complicates the response of State parliamentary representatives who otherwise might have mobilised in opposition to a COAG decision. State Opposition parties, for example, might feel hamstrung in their ability to criticise a COAG agreement where a given agreement has received the endorsement of another jurisdiction in which that same party holds government. In any event, an Opposition's critique will necessarily be diluted by the fact that responsibility for a COAG decision cannot be sheeted home to any one government, but instead resides with the composite body itself. Another practical source of constraint may arise where a State parliament balks at being seen to 'spoil' a national initiative. For a single parliament to significantly change, or oppose, a COAG-endorsed initiative could potentially risk derailing a national scheme built upon commitments from multiple jurisdictions. Here, again, we see how the composite nature of COAG imposes a limitation upon the traditional capacity of parliaments to fulfil their scrutiny role under a system of responsible government.

The democratic deficit is deepened further by the capacity for COAG to significantly avoid the scrutiny of both the public and non-government organisations. The sidelining of parliament described above has a lot to do with this – it weakens the capacity of the public to hold government to account through their parliamentary representatives, and the diminished role of parliamentary committees denies non-governmental organisations an important access point in terms of contributing to the policy process. However, the sheer complexity of COAG, and intergovernmental relations in general, also diminishes the ability of ordinary members of the public to hold their governments to account. It is not simply that unhappy members of the public, when faced with the composite nature of COAG, may be uncertain as to where to direct their criticism. It is also that the role and operation of COAG is so complex that it is difficult for ordinary citizens to understand and governments have done little to explain it.[72] Indeed, the overall network of 'executive federalism' is an especially challenging concept to come to grips with, especially when placed against the background of widespread ignorance about more straightforward institutions of government.[73] To say as much is not to denigrate the community's intelligence, but rather underlines the great difficulties facing members of the public who wish to hold their governments to account in a setting where more and more decisions about issues of national importance are being made around the COAG table. Public engagement in, and scrutiny of, government activities requires at least a basic understanding of the

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70 Sawer et al, above n 65, 304-05. In such cases, the intergovernmental agreement itself will not necessarily be placed before parliament.

71 Griffith, above n 2, 17.

72 Sir Anthony Mason, 'The Constitution in Retrospect and Prospect' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution*, (Federation Press, 2003) 7, 18.

73 See, for example, the results of a nationwide survey on civics knowledge, published in *Whereas the People: Civics and Citizenship Education (Report of the Civics Expert Group)*, Canberra, 1994.

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purpose and operation of key institutions. Where that basic understanding does not exist, accountability necessarily suffers.

The challenge of understanding COAG is made difficult for expert and lay person alike due to its failure to be adequately transparent. Council deliberations occur behind closed doors, and its decisions are announced in a press release or communiqué with few details. Little effort is made to provide the public with detailed information about meeting outcomes or the reasoning behind them. Nor are there are any procedures in place to require governments to make available agreements or other documents for the scrutiny of parliament. The closed-door nature of COAG's activities has occasionally led members to adopt drastic measures – in October 2005, after COAG had given in-principle agreement to the provisions of proposed anti-terrorism legislation, the Chief Minister of the ACT, Jon Stanhope, posted a copy of the draft legislation on his website. Stanhope was criticised by Prime Minister John Howard for his actions, but in response he argued that the draft legislation warranted public scrutiny before he committed to it.[74]

It might be remarked at this point that, given COAG's obvious similarities to Cabinet, the private nature of its deliberations is only to be expected and is perhaps even facilitative of a frank exchange of views among First Ministers. However, the analogy with Cabinet breaks down for two reasons. First, the argument that Cabinet deliberations should remain secret rests, in part, on a defence of the principle of collective ministerial responsibility: that is, that ministers should have the opportunity to speak openly in Cabinet before a decision is made that they are bound to defend before the electorate.[75] In other words, Cabinet confidentiality operates in the service of responsible government. In the case of COAG, it is doubtful that a similar connection can be made. Indeed, to assert such a connection would be to argue that the conventions of responsible government extend to the existence of a duty upon First Ministers to publicly defend the decisions of COAG. Such an argument is not only dubious in principle, but is also not supported by practice, as most recently demonstrated when Premier Barnett refused to support the health reforms agreed on at COAG in 2010. Additionally, we might go further to argue that COAG secrecy actually undermines responsible government by limiting the capacity of individual parliaments to scrutinise its actions. A second reason the analogy breaks down is that Commonwealth and State Cabinet decisions remain subject to responsible government through the scrutiny of the relevant legislature. COAG decisions, on the other hand, are not similarly susceptible to parliamentary scrutiny. For the reasons outlined above, such scrutiny tends to be constrained, and belated. In this sense, the operation of COAG does not resemble Cabinet so much as it does international diplomacy. We are certainly not the first to observe similarities between the practices of executive federalism and diplomacy,[76] and it is notable that, more than twenty years ago and before the birth of COAG, Saunders complained that international treaties were subject to more scrutiny than intergovernmental agreements.[77] This remains the case today, with Commonwealth ratification of treaties being subject to review by the Joint

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74 Botterill, above n 56, 1.

75 *Egan v Chadwick* (1999) 46 NSWLR 563, 574.

76 See Anderson, above n 6, 504.

77 Cheryl Saunders, 'Accountability and Access in Inter-government Affairs: A Legal Perspective', above n 67, 129.

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Standing Committee on Treaties, while intergovernmental agreements face no such institutional review.

Concerns about the accountability and transparency of intergovernmental processes have received recent attention from the House Standing Committee on Legal and Constitutional Affairs. In 2008, it recommended the automatic referral of intergovernmental agreements to a parliamentary committee for scrutiny and report to the Commonwealth Parliament.[78] The Committee saw this reform as serving 'a public expectation of greater accessibility and accountability in our governance structures'.[79] An earlier Committee inquiry had recommended similar action, in addition to the circulation of draft intergovernmental agreements for public scrutiny and comment, and the augmentation of the COAG register of intergovernmental agreements to include all agreements requiring legislative implementation.[80] So far, the ACT is the only Australian jurisdiction to introduce reporting requirements in relation to intergovernmental agreements. Under rules in place since 2005, ACT Ministers are required, once every six months, to table in the Assembly a list of intergovernmental agreements under negotiation, and also to table the full text of any new agreement once it has been signed. In addition, departmental websites must maintain an up-to-date register of intergovernmental agreements.[81] An earlier, short-lived regime had required ACT Ministers to consult with parliamentary committees before committing to any intergovernmental agreements that were likely to require legislative enactment.[82]

V THE CONSTITUTION AND COAG: THE DESIRABILITY OF CONVERGENCE?

In our view, the factors outlined in Parts II, III and IV point to the need for the natural, 'pragmatic' evolution of COAG to be accompanied by reforms of a more structural nature. The case for such reforms would seem increasingly pressing; after all, it is likely that COAG's shortcomings – its uncertain status and operation, centralising force and democratic deficit – will only become more pronounced and intractable if we continue to allow sub-constitutional change to proceed apace.

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78 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Reforming our Constitution: A Roundtable Discussion*, Parliament of Australia, Canberra, 2008, 46.

79 Ibid. In its official response to this inquiry, the government indicated that it was 'not persuaded that automatic referral of intergovernmental agreements to a parliamentary committee is generally appropriate', but that it would consider questions of transparency and accountability 'as part of its broader consideration of federal arrangements': *Government Response to the House of Standing Committee on Legal and Constitutional Affairs Report, 'Reforming our Constitution: A Roundtable Discussion'* (27 May 2010) 1.

80 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems: Within Australia and Between Australia and New Zealand*, Parliament of Australia, Canberra, 2006, 171. In its official response, the government did not accept this recommendation, suggesting that 'in a practical sense, to give effect to the recommendation would be almost impossible': *Australian Government Response: House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Harmonisation of Legal Systems Within Australia and Between Australia and New Zealand'* (27 August 2008) 18-19.

81 Sawer et al, above n 65, 305; *Administration (Interstate Agreements) Repeal Act 2005* (ACT); Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 13 December 2005, 4719-22 (John Stanhope).

82 Sawer et al, ibid 305; *Administration (Interstate Agreements) Act 1997* (ACT).

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In advancing this structural reform, a key question is how formal and permanent it should be – and, in particular, whether it should be constitutional in nature. In this section, we consider the benefits and risks of progressing this type of structural reform in both constitutional and non-constitutional ways. We argue that, despite several clear benefits to providing constitutional recognition to COAG and its procedures, there are significant risks attached that suggest that statutory recognition may be more appropriate. This approach could usefully be accompanied by constitutional amendments aimed at better promoting cooperative federalism more broadly, thus bringing about some convergence between the constitutional and sub-constitutional spheres of Commonwealth-State relations.

A *Change without Convergence*

If it is apparent that certain aspects of Australia's sub-constitutional framework need deeper reform, it is also the case that much of that reform is achievable within that very framework, without resorting to constitutional change. In this respect, intergovernmental agreements present themselves as a possible vehicle. While not able to imbue COAG with the permanency of constitutional status, such agreements could nonetheless deliver significant benefits. A special IGA on COAG is one possible route of action and, depending on one's inclination this might be considered an end in itself or, alternatively, an incremental step on the way to constitutional change in the future.

One of the priorities for an IGA on COAG would be formalising its governance arrangements.[83] Such an agreement might commit the parties to a regular schedule of meetings (eg. twice a year), to the sharing of hosting duties, and the establishment of a process giving States and Territories greater input into the setting of meeting agendas. It could also establish an independent secretariat, and formalise the role and functions of the COAG Reform Council to a greater extent than is already the case. In addition to these matters of detail, the IGA could set down principles and protocols to guide parties in advancing collaborative action. A related reform which could be undertaken without statutory or constitutional change would be to clarify the relationship between COAG and the various Ministerial Councils. COAG members, for example, might adopt a statement of guidelines setting out the respective responsibilities of these bodies. Such a statement might emphasise COAG's strategic role, while emphasising the role of Ministerial Councils in matters of policy detail, and encouraging greater engagement with the community.

It is conceivable that some of the concerns regarding accountability and transparency could also be addressed by intergovernmental agreement, albeit one requiring legislative implementation in each jurisdiction. Such an agreement might set down guidelines for enhancing the degree of scrutiny given to IGAs in State parliaments. Depending on how prescriptive the parties wanted to be, the Agreement could require merely that IGAs be tabled in those parliaments, or it might also necessitate that all COAG decisions be considered by parliamentary committees as a matter of course. Dedicated parliamentary committees might even be established for this purpose. Similarly, commitments could be made to improve the transparency of the COAG

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[83] Here we draw on a proposal put forward by Wanna et al, above n 7, 15-16.

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process. One rather simple step the Commonwealth could take in this regard is the publication of a register of intergovernmental agreements negotiated by COAG, something that could easily be incorporated into the COAG website and updated as required.

Such changes by intergovernmental agreement would amount to a substantial improvement on the existing state of affairs. If parties honoured the enshrined obligations and arrangements, COAG's operation could potentially be markedly different from the present, with more scope for the States to influence the agenda and timing of meetings, and more stringent reporting requirements. On the other hand, COAG's legal status would remain tenuous. Protected only by agreement, it would still be vulnerable to being ignored. Similarly, governance arrangements and reporting requirements could be disregarded with little or no legal consequence. An IGA, moreover, could not deliver the strong democratic legitimacy that comes with constitutional entrenchment. It would constitute an arrangement negotiated between leaders of jurisdictions, but would lack the requisite connection with citizens that is associated with responsible government and required for an institutional body of COAG's standing.

Nonetheless, pursuing these sorts of reforms through intergovernmental agreement might be seen as an interim step towards stronger, constitutional change. We turn now to consider the various merits and risks that might flow from such an approach.

B *Change with Convergence*

1 *Constitutional Recognition of COAG*

Any proposal to provide constitutional recognition to COAG would need to be handled carefully.[84] It is likely that any new provisions inserted into the Commonwealth Constitution for this purpose would be longstanding, and they would be, of course, open to judicial interpretation. We suggest that constitutional recognition could take one of two forms: first, the insertion of a provision that merely recognises the existence of COAG as an institution of federal governance; and secondly, the insertion of a provision that, in addition to recognising COAG's existence, also specifies its core governance arrangements. While both approaches would deliver significant benefits, their effectiveness in addressing COAG's shortcomings is uncertain, and they would entail not inconsiderable risks. In light of this, a more desirable approach would be to forego constitutional change and provide recognition to COAG via statutory means instead.

Despite the assessment of some commentators that COAG's lack of constitutional status is 'not of concern',[85] one can readily identify several benefits to giving it a firm constitutional foundation. First, in decisively removing the uncertainty that currently

[84] We acknowledge that obtaining voter approval of this change at a referendum, pursuant to section 128, would pose its own practical difficulties. In this paper, however, we choose to focus on questions surrounding the desirability of this reform. On the challenges of amending the text of the *Constitution* under section 128, see George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

[85] Carney, above n 66, 2006, 23; Mason, above n 72, 18.

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attaches to COAG's legal status, it would no longer be vulnerable to dissolution but would instead exist as a permanent fixture of governance within the Australian federation. Second, the conferral of constitutional status would bring other improvements in standing. The appearance of COAG in the text of the Constitution would establish it as an organ of central importance in the federation. Its entrenchment would not only secure relative permanence, but would also signal its relevance to good governance in Australia. Constitutional recognition would also improve COAG's standing by establishing its status as an independent body, thus countering its existing reputation as a creature of the Commonwealth. Thirdly, the successful referendum process required to bring about constitutional recognition would secure COAG a popular legitimacy that it presently lacks. Its existence would be seen to originate not in the agreement of first ministers, but rather in the exercise of popular sovereignty, thus enhancing COAG's democratic credentials considerably. Fourthly, and following on from the last point, the entrenchment of COAG in the Constitution would open up possibilities for improved citizen knowledge of it. Currently, its existence and operation is not well understood by the public, something that is a matter of concern given its influential role in policy development in major areas. The referendum process itself would serve to improve citizen understanding of the role of COAG but, more importantly, its enhanced profile would conceivably raise awareness as to its position, purpose and decisions. Lastly, the entrenchment of COAG would arguably bring Australia's constitutional arrangements into alignment with both the practice of intergovernmental relations in recent decades, as well as the institutional realities of a federal system defined by a concurrent sharing of responsibilities.

It might also be possible to take the additional step of recognising COAG's governance arrangements in the Constitution. One approach would be to insert an amendment providing that those arrangements must be specified in legislation, thus leaving the details to Parliament. However, an argument can be made for entrenching some of COAG's core rules and procedures, such as the composition of its membership, and its decision-making rules. While such matters have remained stable over COAG's existence, entrenchment would protect them against future alteration arising from political expediency. Beyond these basic matters, it would also be possible to articulate procedures aimed at improving the democratic accountability of the body. The constitutional text could specify, for example, that all COAG decisions and agreements be reported to all interested parliaments or that they be brought to the attention of a specially constituted parliamentary committee at the Commonwealth and State/Territory levels.

However, the constitutional entrenchment of COAG and its core governance arrangements would also carry significant risks. First of all, it would potentially undermine the flexibility and responsiveness that characterises COAG in its current form and that has enabled it to evolve in the manner that it has. It is not possible to foresee the shape of intergovernmental relations in the future, but it is conceivable that the permanency and stability that constitutional recognition brings may also render COAG less able to respond to changing circumstances. For example, if COAG wished, in the future, to broaden its membership to a wider range of actors, or to reach some decisions by majority vote, such alterations would be extremely difficult if the Constitution specified otherwise. Such scenarios might be avoided by ensuring that the entrenched provisions were carefully drafted, but there is always potential for

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scenarios to arise that even the wisest of drafters could not have foreseen. Were such inflexibility to stand in the way of good collaborative outcomes, it is likely that COAG's relevance would gradually diminish.

A second risk associated with entrenching COAG is that it would enhance the power of the executive, with uncertain effects. Given the centrality of responsible government in the Australian constitutional system, great caution would need to be taken in conferring constitutional status on such an executive-based body. Without the incorporation of specific procedures enabling parliamentary oversight, there would be potential for constitutional recognition of COAG to enhance the already considerable position of the executive in Australia's system of government. Above, we mooted the possibility of inserting into the Constitution certain procedures aimed at improving COAG's democratic accountability. Whatever approach is taken, it is important to recognise that entrenchment would seem to carry both risk and promise when it comes to preserving responsible government.

A third danger lies in the fact that constitutional recognition may not, ultimately, be effective in addressing COAG's weaknesses. Alongside its dubious prospects for enhancing accountability, entrenchment may not, in a practical sense, remedy COAG's tendency towards centralism nor its reliance on inter-jurisdictional goodwill. Even the permanence that it brings may have little impact on its day-to-day operation. On this point, we need look no further than the example of the Inter-State Commission. Section 101 of the Constitution states that 'there shall be an Inter-State Commission' to serve as an impartial body with respect to matters of trade and commerce within the federation. Section 101 also provides that the Commission is to perform both adjudicative and administrative functions, and that the specific nature of these functions was to be specified by Parliament. On paper, therefore, the Inter-State Commission was set to play a major role in the federation; indeed, following its creation in 1913, it was given a wide brief including the power to adjudicate disputes over railway rates and other matters of trade and commerce, and the power to investigate and report on prices, wages, profits, immigration, tariffs and other important matters.[86] However, just two years into its existence, the High Court ruled that the Commission's adjudicative functions amounted to an invalid exercise of judicial power, thus 'stultifying' its potentially significant role and, in the view of one commentator, 'reducing it... to a permanent commission of inquiry'.[87] With the exception of a brief revival in the 1980s, when it served as an investigatory body that advised the federal government on interstate transport, the Commission has otherwise remained dormant.[88]

The fate of the Inter-State Commission serves as a reminder that constitutional status does not necessarily translate into relevance or effectiveness. Putting aside the prospect of an unexpected High Court intervention, the story of the Commission reminds us that the practical operation and influence of an entrenched institution

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86 Michael Coper, 'The Second Coming of the Fourth Arm: The Role and Functions of the Inter-State Commission' (1989) 63 *Australian Law Journal* 731, 734.

87 Andrew Bell, 'Inter-State Commission' in Tony Blackshield, Michael Coper, and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001), 353, 354.

88 But see Anne Twomey, 'Reforming Australia's Federal System' (2008) 36(1) *Federal Law Review* 57, 76 for an argument for its contemporary revival.

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depends on a range of factors that have nothing to do with the constitutional text. These include its level of funding, the extent of secretariat support, and also a perception by governments as to its utility. Practical factors like these played their part in the fate of the 'second coming' of the Commission, when it operated as a purely investigatory body. As Coper observed towards the end of the Commission's life:[89]

> [A]ny body such as the Commission, even if it has a constitutional foundation, is ultimately dependent for its effective operation on an appropriate allocation of resources to it by the Federal Parliament and, to an extent, on the benevolent disposition of the moguls of Finance and other Federal departments that shape government policy.

There is no reason to think that an entrenched COAG would be any different. For all the benefits that constitutional status would bring, it could not, in the end, guarantee its continued relevance in the federal system. Depending on the surrounding factors and circumstances, a 'constitutionalised' COAG could find itself in the invidious position of being permanent, but also peripheral.

Substantial risks, then, would be involved in entrenching COAG and its governance arrangements. To go down this path would also be out of step with the approach of Canada which, given its inheritance of Westminster institutions and its federal structure, provides a useful comparative perspective.

While it is difficult to draw direct comparisons with other federations, some useful comparative perspectives can be gained by looking at how other federal constitutions accommodate intergovernmental institutions. The Canadian approach is worth particular attention, given its common inheritance of Westminster institutions. The rough equivalent of COAG in the Canadian federal system is the First Ministers' Conference (FMC). Like COAG, it has no constitutional or statutory status, and has existed in this form since its inception in the early twentieth century.[90] Several commentators have called for the FMC to be given constitutional status, but to no avail.[91] Instead, it remains 'weakly institutionalized'.[92]

However, neither the example of Canadian intergovernmental relations nor the various risks we have identified need warn Australia off the project of formal recognition altogether. In our view, statutory recognition of COAG presents itself as a

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89 Coper, above n 86, 738.

90 For a history of First Minsters' Conferences, see Martin Papillon and Richard Simeon, 'The Weakest Link? First Ministers' Conferences in Canadian Intergovernmental Relations' in J. Peter Meekison, Hamish Telford and Harvey Lazar (eds), *Canada: The State of the Federation 2002 – Reconsidering the Institutions of Canadian Federalism* (McGill-Queens University Press 2002) 113, 116-25.

91 David Cameron and Richard Simeon, 'Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism' (2002) 32(2) *Publius* 49, 62.

92 Richard Simeon and Amy Nugent point to several shortcomings it the operation of the FMC that resonate in the Australian context: 'FMCs are called at the discretion of the prime minister, according to the PM's political needs. There is no regular schedule of meetings. Nor are there any voting procedures or binding decisions:' Richard Simeon and Amy Nugent, 'Parliamentary Canada and Intergovernmental Canada: Exploring the Tensions' in Herman Bakvis and Grace Skogstad (eds), *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Oxford University Press, 2nd ed, 2008) 89, 97.

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viable third possibility somewhere between constitutional entrenchment and the rather weaker recognition achievable by intergovernmental agreement. In this respect, the South African approach provides a partial example. The *Constitution of the Republic of South Africa* gives express recognition to its central institutions of intergovernmental relations, and leaves the details of their operation to parliament.[93] To this end, section 41(2) requires Parliament to pass laws to create institutions and mechanisms to foster cooperation between the different spheres of government:

> An Act of Parliament must
>
> a. establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
> b. provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

For the reasons given above, we have misgivings about COAG attaining this sort of recognition in the Australian Constitution. However, the actions taken by the South African parliament in giving operation to this constitutional directive may be instructive to Australian legislators. In 2005, the South African parliament passed the *Intergovernmental Relations Framework Act*.[94] Chapter 2 of that Act establishes the primary intergovernmental structures, including the President's Coordinating Council (PCC) and the national intergovernmental forums, which resemble COAG and Ministerial Councils, respectively, in their role and composition. This chapter of the Act sets down specific provisions with respect to the composition, role and meetings of the PCC.[95] For example, it details that, among others, the membership of the Council will include the President and the Premiers of the nine provinces. The President is responsible for convening and chairing the meetings, and also determines the agenda. The role of the PCC is described as being 'a consultative forum for the President', including in relation to the implementation of national policy and legislation, and the coordination and alignment of priorities, objectives and strategies across jurisdictions.

Australian parliaments could act in a similar fashion. Avoiding the constitutional avenue altogether, complementary legislation could be passed by the Commonwealth, States and Territories giving recognition to the existence and role of COAG. Such legislation could also enshrine key features of its operations along the lines outlined above. Membership, decision rules, frequency of meetings and agenda processes could all be detailed in legislation, as could reporting requirements designed to improve accountability and transparency. The flexibility that COAG currently enjoys would be constrained to a degree, but not as substantially as under the constitutional approach. Moreover, while statutory recognition does not accord the imprimatur of popular sovereignty, it would still deliver enhanced democratic legitimacy to COAG by virtue of it being approved by Parliament. It would also give COAG a solid legal footing, even if falling short of the permanence of constitutional entrenchment. In short, the option of statutory recognition of COAG presents itself as a feasible middle-

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93 *The Constitution of the Republic of South Africa 1996* (South Africa) ch 3.

94 The stated object of the Act is to 'provide within the principle of co-operative government set out in Chapter 3 of the Constitution a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation…': Ibid, s 4.

95 *Intergovernmental Relations Framework Act 2005*, (South Africa) ss 6-8.

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ground: less risky and far more feasible than entrenchment, but more muscular than recognition by less formal means.

We acknowledge that, as with the proposal for constitutional entrenchment, the advancement of such statutory reform would face not insignificant challenges. One notable challenge would be the achievement of consensus across all nine jurisdictions with respect to any proposed complementary scheme – not least the Commonwealth, given that such reform would weaken its current dominance of COAG. Another challenge would be working towards some attitudinal or cultural change to support the more collaborative model of COAG envisaged by the suggested reforms. While not seeking to underplay the extent of such challenges, we believe that, given the right circumstances, these and other hurdles would not necessarily be insurmountable. The formation of COAG is instructive in this respect. Despite COAG's potential as a new institutional constraint, the Commonwealth was a willing player in its formation because it recognised it as necessary to pursuing its own policy agenda. This fact reminds us that circumstances do occasionally arise where ambitious cross-jurisdictional reform becomes political feasible.

2 *Constitutional Recognition of Cooperative Federalism*

Statutory reform of the type outlined above would be usefully supplemented by constitutional amendments that make the Constitution better able to promote cooperation between the Commonwealth and the States more generally. While this approach would not directly secure COAG's constitutional footing, it would certainly enhance its position by establishing a more amenable framework for its pursuit of cooperative schemes.

One such alteration would involve amending the Constitution to overcome the difficulties presented by the High Court's decisions in *Re Wakim; Ex parte McNally*[96] and *R v Hughes*.[97] The combined effect of these decisions was to render cooperative legislative schemes vulnerable to fragmentation. In *Wakim*, which involved a challenge to the validity of a cross-vesting scheme under the *Corporations Law*, the Court held that State parliaments could not validly confer State jurisdiction on federal courts. The *Wakim* decision had serious implications for the continuing operation of the *Corporations Law*,[98] but more broadly its impact was to require that matters arising under cooperative legislative schemes be heard by the several State Supreme Courts, rather than the Federal Court as a single, centralised body. In *Hughes*, it was the enforcement aspect of the corporations law scheme that was in question, as a challenge was brought against the ability of the States to confer power on the Commonwealth Director of Public Prosecutions to prosecute breaches of the *Corporations Law*. While the Court upheld the validity of this particular component of the scheme, it found that it is not constitutionally permissible for the States to unilaterally confer executive power on Commonwealth officers – thus endangering the validity of cooperative schemes that seek to place responsibility for their administration in the hands of one body. Taken together, the *Wakim* and *Hughes* decisions virtually guarantee that cooperative legislative schemes, where unsupported

96 (1999) 198 CLR 511.
97 (2000) 202 CLR 535.
98 See George Williams, 'Co-operative Federalism and the Revival of the Corporations Law: *Wakim* and Beyond' (2002) 20 *Company & Securities Law Journal* 160, 163-64.

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by a referral of powers, will eventually splinter with respect to judicial and executive enforcement. While this is an undesirable state of affairs from the point of view of cooperative federalism, it is one that could be remedied easily through a constitutional amendment that permitted States to empower federal courts to determine matters arising under State law, and to empower federal agencies to administer State law.[99] A referendum question with the aim of overcoming the uncertainties and limitations of these two High Court decisions has been mooted by both government and commentators over the last decade.[100]

A second step towards providing constitutional recognition of the principle of cooperative federalism would be to make explicit reference to it in the constitutional text, such as occurs in the South African Constitution.[101] Such an amendment would complement the specific reforms outlined above with a more general statement of objects and principles that could be used as an aid to judicial interpretation. It would be desirable for this constitutional recognition of cooperative federalism to be expressed in terms broad enough to support or facilitate the work or COAG and Ministerial Councils, without being overly prescriptive. Lynch and Williams suggest that such a statement could provide recognition of a number of features of cooperative federal relations, including the practice of cooperation between the Commonwealth and the States to achieve joint objects, and also of the various means of collaboration across jurisdictions, such as intergovernmental agreements, joint administration of laws and programs, and common judicial and other enforcement.[102] The purpose of this amendment would be to establish Commonwealth-State cooperation as a positive objective of the Constitution, thus giving the Court the ability to draw on it as a decisive interpretive principle where appropriate. [103]

Such amendments would not, in themselves, give COAG a more permanent legal status, reduce centralism or improve democratic accountability. However, they would nonetheless strengthen the position of COAG in the constitutional firmament. The amendments regarding cross-vesting of jurisdiction and the sharing of executive power would enliven and enhance COAG's effectiveness. It would allow COAG to operate as a forum in which parties could negotiate and commit to cooperative legislative schemes with certainty, without needing to resort to the virtual surrender by States of their constitutional powers via referral under s 51(xxxvii). The second and more ambitious amendment, aimed at entrenching the principle of cooperative federalism, would serve to enhance the integrity of legislative schemes negotiated through COAG. It would ensure that, where such schemes were challenged, courts could consider the value of inter-jurisdictional collaboration as an aid to

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99 Lynch and Williams, above n 18, 424.

100 Cheryl Saunders, 'Collaborative Federalism' (2002) 61(2) *Australian Journal of Public Administration* 69; Wanna et al, above n 7; Lynch and Williams, above n 18.

101 Lynch and Williams, above n 18, 431.

102 Lynch and Williams, above n 18, 432. Other possibilities discussed include recognition of intergovernmental forums, of the autonomy of each level of government, of the existence and role of local government, and the need for respect between the tiers of government.

103 In *Wakim*, McHugh J said that 'cooperative federalism' was but a political slogan: (1999) 198 CLR 511, 557. The present Chief Justice of Australia has been explicit in his rejection of that limited view and has highlighted existing provisions in the Constitution that indicate a cooperative dimension: Justice Robert French, 'Cooperative Federalism: A Constitutional Reality or a Political Slogan?' (2005) 32(2) *Brief* 6. However, these stop far short of the express amendment contemplated by Lynch and Williams, above n 18.

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interpretation. More broadly, the very fact that the Constitution enshrined cooperative endeavour as an important federal principle would support and sustain the other work that COAG performs in furthering collaboration between governments, outside of legislative schemes. As Lynch and Williams write in support of these amendments, '[i]n recognising the capacity of Commonwealth and State government to work cooperatively and the autonomy of each to pursue their goals and fulfil responsibilities, an amendment of this sort provides the means for a reinvigoration of the political power which underpins executive and legislative government'.[104]

In our view, proceeding down this path would not carry any significant risks for COAG. Unlike the constitutional changes mooted in the preceding section, which would arguably constrain COAG's freedom to act, these amendments would likely only enhance COAG's function within the federation. The improvements would be indirect and less far-reaching, but would be significant nonetheless.

VI CONCLUSION

Almost twenty years since its establishment, there are strong arguments for giving COAG a firmer legal foundation. Its importance in federal governance certainly warrants it, and it would present an opportunity to address some of its shortcomings. While constitutional entrenchment of COAG is a viable possibility, and one that would serve to correct the near absence of intergovernmental machinery in the constitutional text, we are of the view that statutory recognition is a more desirable alternative. It would remove lingering uncertainty surrounding COAG's legal status, and would imbue it with stronger democratic legitimacy. Many of the practices and procedures that give rise to concerns about COAG's operation could also be addressed through ordinary legislation. Importantly, statutory change would also avoid some of the risks involved in constitutional entrenchment, such as rigidity and enhanced executive powers. Structural reform of this nature would be strengthened further if it were accompanied by constitutional amendments effecting recognition of cooperative federalism, both as a general principle and through the removal of specific barriers to cross-vesting schemes. Taken together, these two approaches represent a feasible way forward for giving COAG a more formal place in our constitutional framework.

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[104] Lynch and Williams, above n 18, 434.

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