CONSTITUTIONAL INCONGRUENCE: EXPLAINING THE FAILURE OF THE COUNCIL OF THE AUSTRALIAN FEDERATION

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ABSTRACT
The establishment and rise of the Council of Australian Governments (COAG) is, on balance, a story of the successful development of an executive-based institution for cooperative governance in the Australian federal system. By contrast, the Council of the Australian Federation (CAF), created in 2006 as a forum for interstate co-operation and policy development, has been far less effective. This article explores the reasons behind CAF’s difficulties after a very short-lived initial impact. Integral to this account is the significance of Canadian experience of horizontal intergovernmental relations, which directly inspired the Australian Premiers to found CAF. The numerous indications of political congruence — some temporary, others systemic — between the Canadian and Australian settings obscured a deeper constitutional incongruence between the two jurisdictions and this is fundamental to appreciating CAF’s failure as a transplant. CAF’s ability to operate effectively as a significant institution was inevitably constrained by the parameters of the Australian federal system that its establishment was, in many ways, seeking to transcend.

I INTRODUCTION
The creation of the Council of Australian Governments (COAG) in 1992 was a significant development in Australian intergovernmental relations. COAG was not simply a rebranding of the earlier practice of holding Premiers Conferences to finalise Commonwealth allocations of funding, but instead was founded upon a conscious commitment to ‘cooperative federalism’. Through this forum, the Commonwealth and

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1 For a full account of the dynamics and principles behind the establishment of COAG, see Martin Painter, Collaborative Federalism: Economic Reform in Australia in the 1990s (Cambridge University Press, 1998). For a more recent overview, see Lynsey Blayden, ‘COAG’, (Briefing Paper No 60/2013, Parliamentary Library, Parliament of NSW, 2013).
states, along with territory leaders, would seek to coordinate and harmonise
government activity in pursuit of shared national benefits. While the reality of that ideal
has unsurprisingly waxed and waned as different governments have come and gone
over the last two decades, to the extent that an institution’s performance is measured in
its resilience then COAG has been a success. For although the Commonwealth’s
dominance of COAG, especially its grip on the basic procedural features of the
institution, has attracted ongoing dissatisfaction and calls for reform, 2 it is difficult to
conceive of COAG being abandoned. 3 It has, quite simply, become a secure piece of
Australia’s federal architecture.

It is very hard to make the same claims about the Council for the Australian
Federation (CAF), established more recently in 2006. CAF is the peak body of
subnational intergovernmental relations in Australia, underpinned by an
intergovernmental compact between state Premiers and territory Chief Ministers in
which they agreed to meet at least once a year. 4 At the time of its inauguration, its
founders ‘expressed a desire that the Council should act both as a forum for joint state
and territory action on matters of national significance, and as a strategic body that can
help shape and set the national policy agenda’. 5 This was primarily to be achieved
through two of the five objectives articulated in the CAF agreement, namely that it
would operate:

• to complement the work of the Council of Australian Governments and
facilitate COAG-based agreements with the Commonwealth by working
towards a common position among the states and territories, and;

• to reach, where appropriate, collaborative agreements on cross-jurisdictional
issues where a Commonwealth imprimatur is unnecessary or has not been
forthcoming.

Both those objectives point to a role for CAF as a vehicle for horizontal cooperation.
Clearly, though, the first is about the formation of a united front in dealing with the
Commonwealth while the second is geared toward action taken independently of the
national government.

It has now been over eight years since the inauguration of CAF and concerns over
the institution’s ongoing relevance and effectiveness have prompted some to ask

2 Paul Kildea and Andrew Lynch, ‘Entrenching “Cooperative Federalism”: Is it Time to
3 As recently as April 2013, the then President of the Business Council of Australia, Tony
Shepherd, called for the abolition of COAG: ‘COAG Should Be Scrapped: BCA’ The Australian
(22 April 2013). Shepherd’s stance was not reflected amongst the various recommendations
for the reform of the federation made by the Commission of Audit he chaired for the Abbott
government and which reported on 1 May 2014. The Commission did, however, recommend
the abolition of the COAG Reform Council, which reported on the progress made by
governments towards performance targets made under intergovernmental agreements:
Commonwealth of Australia, Towards Responsible Government: Phase One (Report of the
National Commission of Audit, February 2014).
4 Agreement to Establish the Council for the Australian Federation signed on 13 October 2006 by
New South Wales, Queensland, Victoria, South Australia, Tasmania, Western Australia, the
Northern Territory and the Australian Capital Territory.
5 Council for the Australian Federation, ‘CAF Communiqué’ (13 October 2006, Melbourne).
whether it will survive as a permanent structure within the Australian intergovernmental landscape. 6 Despite the Premiers banding together to voice complaint against the occasional provocation from the Commonwealth, most recently over the latter’s withdrawal of health and education funding in the 2014–15 Federal Budget, there are multiple indicators that the initial aspirations and momentum that was behind CAF as an institutional structure have considerably waned.

Since November 2009, CAF has failed to publicly release communiqués of its meetings and has abandoned its initial efforts to release a biannual ‘report card’ detailing its work and progress. Following an external review of its performance conducted in 2010, its permanent secretariat was downsized and is no longer independently housed but rather rotates between the states. Perhaps most substantively, since 2009 there has been little evidence of new CAF-led subnational collaboration or joint planning and decision-making in any major area of policy. Its objectives have been consolidated from five to just two. The remaining objectives accord with those stated above, but have been more simply expressed as to ‘work toward common understanding of the states’ and territories’ positions in relation to policy issues involving the Commonwealth Government’ and ‘take a leadership role on key national policy issues, including the Federation that are not addressed by the Commonwealth Government’. Of the three which have been abandoned, two may fairly be said to be encapsulated in what remains but the surrender of the goal of the organisation to ‘promote and communicate to the Australian people the benefits of Australia’s federal system in providing a diversity of policy options’ is both significant and, perhaps, telling.9

The little academic attention that has so far been paid to CAF has largely considered its inception and trajectory from the perspective of contemporary politics and the motivations of individual political actors. 10 For example, in her major appraisal of the institution, Jennifer Menzies identified three factors that have emerged to frustrate CAF’s effectiveness: territorial tensions between members, specifically over GST allocation and the realignment of power within the federation due to the rise of the resource-rich states of Queensland and Western Australia; the deadening effects of partisan alignment within the federation; and personality differences and instability of

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7 Agreement to Establish the Council for the Australian Federation signed on 13 October 2006 by New South Wales, Queensland, Victoria, South Australia, Tasmania, Western Australia, the Northern Territory and the Australian Capital Territory.


9 Menzies, ‘The Council for the Australian Federation’, above n 6, 53, 66–9, 70.

membership. While those are undoubtedly matters which have directly impacted on the CAF project, there are also others that require consideration.

In this article, we consider the disappointing performance of CAF as the result of fundamental constitutional features of the Australian polity which determine the nature of intergovernmental relations at the subnational level. In doing so, we offer our analysis as complementing, and also responding to, an earlier treatment by Menzies. In 2010, she suggested that, on the evidence available up to that point, CAF’s establishment was a largely successful example of ‘institutional transfer’ between jurisdictions.

As is well known, and is detailed below, the idea for institutionalising horizontal intergovernmental relations in Australia was directly inspired by the Canadian experience. In 2003, the Canadian Premiers established the Interprovincial Council of the Federation (COF) to perform functions similar to those later invested in CAF. In her paper on policy learning across federal systems, Menzies identified numerous features common to Australia and Canada ‘to demonstrate the congruence of political systems, trends and institutions shared by’ the two countries. That perceived congruence was, as she makes very clear, instrumental to the decision of Australian Premiers to emulate their Canadian counterparts through the establishment of CAF. It also supported an assessment of CAF’s importance and success in its initial years.

Without doubt, and as Menzies has explained in her later work, that congruence has dimmed as the Australian political landscape has altered. This has been to the diminishment of CAF as a federal institution of horizontal collaboration. In this article, we argue that CAF’s demise can, at least in part, be traced to fundamental constitutional differences between the two nations. Once the first flush of enthusiasm after its creation waned, the Australian constitutional landscape was bound to prove inhospitable to this Canadian transplant.

In offering this analysis, we seek to complement that offered by Menzies in her consideration of the impact of shifting politics upon CAF’s standing and functionality. Underlying differences in the social features and political culture between the two countries are extremely significant in any assessment of the relative success of horizontal intergovernmental relations. For example, while the major political parties in Australia are quite closely integrated across the federal and state levels, their

organisation is far more distinct in Canada. Consequently, in the former, partisan considerations at the national level intrude to a far greater extent on efforts at collaborative federalism across the states than occurs in the latter. More specifically, there has been a distinctly different political impulse around the importance of institutionalising and allocating resources to the enhancement of intergovernmental relations.

But even while acknowledging the importance of these broader matters, in this paper we seek to highlight that a fundamental reason that political vicissitudes have weighed heavily on CAF’s success is because emulation of the Canadian model occurred with insufficient regard to the distinctive constitutional features that inform and shape Australian federalism. Political considerations are not themselves solely determinative of the success of an intergovernmental institution but must be understood against this context. As Nicole Bolleyer has stated:

the developmental potential of such an institution, once set up, still remains subject to system-specific pressures and is therefore restricted. As a consequence, long-term pressures inside governments — shaping the overall level of institutional development in a system — are more decisive for the final role an institution will be able to play in a federal system than the body’s initial characteristics.

Ironically, CAF’s ability to deliver against its bold statement of Canadian-inspired objectives was inevitably constrained by the parameters of the Australian federal system that its establishment was, in many ways, seeking to transcend. To the extent that the Canadian experience guided CAF’s creation, the numerous indications of political congruence — some temporary, others systemic — obscured a deeper constitutional incongruence between the two jurisdictions.

In the following analysis, we begin by outlining the recent performance of CAF relative to its Canadian counterpart. We then examine the root causes of CAF’s deficiencies, beyond that which can be explained by politics and personalities. Ultimately, we ask: is it possible that CAF might be better aligned with the constitutional setting within which it operates, improving its ongoing relevance within the Australian federal system?


18 Luc Turgeon and Jennifer Wallner have recently argued that, in addition to structural considerations, the strength, longevity and ideological coherence of the political attitudes towards centralisation in Australia, particularly within the Australian Labor Party, may be contrasted with the Canadian political scene, where no major party has held a specific ideology towards federalism. This, according to Turgeon and Wallner, at least in part explains the greater drive towards centralisation in the former. ‘Adaptability and Change in Federations: Centralization, Political Parties, and Taxation Authority in Australia and Canada’ in Grace Skogstad et al (eds), The Global Promise of Federation (University of Toronto Press, 2013) 188.

II ASSESSING THE PERFORMANCE OF CAF

A Policy Effectiveness

For the purpose of evaluation, the work of CAF may be divided into two broad categories. The first concerns matters of significant national importance that have largely been ignored by the Commonwealth. Assessed against its initial objectives of demonstrating innovation and leadership on policy and constructively engaging with the Commonwealth on matters of national interest,\(^\text{20}\) CAF enjoyed some early success, most significantly in the areas of climate change and federalism. The second category focuses upon matters that have been the subject of harmonisation agreements between the states on cross-jurisdictional sub-national issues.\(^\text{21}\) CAF has demonstrated that at least when the latter are in uncontested areas of policy, it can operate as a vehicle for the achievement of horizontal cooperation. However, as will be examined in this section, the overall effect of CAF’s relatively modest agenda has been to weaken its institutional structure to the point where its purpose and continued relevance are now in doubt.

Subnational cooperation in climate change policy actually pre-dated the establishment of CAF. In 2006, the states and territories were a driving force behind the design of a viable emissions trading scheme by the National Emissions Trading Taskforce, which had been established in 2004.\(^\text{22}\) However, at its second meeting in February 2007, CAF placed climate change firmly on the intergovernmental agenda. The Premiers and Chief Ministers signed a ‘Declaration on Climate Change’ outlining agreed principles and action items such as the creation of a national summit to begin the implementation of an emissions trading scheme and the development of a national mandatory energy efficiency system.\(^\text{23}\) At their next meeting held in April 2007, the leaders committed to introducing their own national emissions trading scheme if the Commonwealth did not agree to establishing one.\(^\text{24}\) It has been suggested that this unified subnational position — which could only be achieved by negotiation with the reticent and resource-dependent states of Queensland and Western Australia — was ‘the great success of CAF’s first 18 months’.\(^\text{25}\) As a result of the agreement, CAF jointly commissioned Professor Ross Garnaut to review the economic impacts of climate change and make suggestions for long-term policy development.\(^\text{26}\)

After Labor’s election to the federal government in November 2007, however, the impetus behind subnational coordination on climate change began to fall away. There were some notable initiatives in 2008, including the release of a stocktake of ‘best practice’ policy programs undertaken in each of the states and territories\(^\text{27}\) and the

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\(^{20}\) Agreement to Establish the Council for the Australian Federation signed on 13 October 2006 by New South Wales, Queensland, Victoria, South Australia, Tasmania, Western Australia, the Northern Territory and the Australian Capital Territory.

\(^{21}\) Ibid.


\(^{23}\) Council for the Australian Federation, ‘CAF Communiqué’ (9 February 2007, Sydney).

\(^{24}\) Council for the Australian Federation, ‘CAF Communiqué’ (12 April 2007, Canberra).

\(^{25}\) Tiernan, above n 10, 128.


\(^{27}\) Council for the Australian Federation, ‘CAF Communiqué’ (12 September 2008, Melbourne).
commissioning of a further report by Access Economics to assess the economic implications of a proposed Carbon Pollution Reduction Scheme.  

However, CAF’s last major initiative in the area took place in early 2009 when it hosted a roundtable of business leaders to consider adaptations that would be required to accommodate climate change.  

The climate change agenda was thereafter largely transferred to the federal sphere. For example, the Garnaut review, which had been jointly commissioned by CAF with the then federal opposition leader Kevin Rudd, was taken under the auspices of the Commonwealth and ultimately released by it in 2008.  

In a flurry of new initiatives, Rudd also expressed commitment to his pre-election promise of introducing a national carbon emissions trading scheme and proposed the expansion of the Mandatory Renewable Energy Target as well as funding of up to $650 million for the development and commercialisation of renewable energy sources. Critically, the new Prime Minister committed to ‘overriding existing individual state schemes’ with a national approach.

The result of CAF’s ambitions for the rehabilitation of Australian federalism has followed a similar trajectory. Very early on, CAF identified the promotion and reform of the Australian federal system as a key goal for the institution. As an action item, CAF committed to commissioning a series of papers designed to examine the state of Australian federalism and advance arguments in favour of a decentralised, federal governance system over a unitary one. Four papers were released between 2007 and 2011 focusing on: (1) the social and economic benefits of a federal system; (2) reforming the national education system; (3) improving systems and institutions of cooperative federalism; and (4) understanding intergovernmental cooperation at the sub-ministerial level (thus excluding COAG, CAF, Ministerial Councils and their working groups).

However, CAF’s agenda was ultimately subsumed into a national one initially led by the Commonwealth Parliament. On 17 June 2010, the Senate established a select committee to examine ‘key issues and priorities for the reform of relations between the three levels of government within the Australian federation’ and ‘explore a possible national agenda for reform’. CAF itself made a submission to the Committee in which it stressed the need for clarifying the roles and responsibilities of the different levels of

30 Ibid.
32 Ibid.
33 Council for the Australian Federation, ‘CAF Communiqué’ (12 April 2007, Canberra).
34 Anne Twomey and Glen Withers, ‘Australia’s Federal Future’ (Report for the Council for the Australian Federation, Federalist Paper 1, April 2007).
36 Wanna et al, above n 22.
38 Senate Select Committee on the Reform of the Australian Federation, Parliament of Australia, Australia’s Federation: An Agenda for Reform (2011) v.
government and the institutionalisation of COAG through an intergovernmental agreement. The Committee released its final report in June 2011 making 21 different recommendations for the reform of the Australian federal system, including greater institutionalisation of both COAG and CAF. Little follow up work was conducted by the Commonwealth Parliament and the Labor government’s approach to federal reform became erratic. After the significant achievement of the 2008 Intergovernmental Agreement on Federal Financial Relations, reforming efforts veered in focus from the systemic to specific policy areas. In 2010, Kevin Rudd redrew arrangements for health and hospital funding between the Commonwealth and states, while in 2013, Julia Gillard struck deals with most states, one by one, on new school funding.

After coming to power in late 2013, the Coalition government announced a National Commission of Audit into the activities of the Commonwealth government with a particular emphasis on assessing the ‘split of roles and responsibilities between and within Commonwealth government and State and Territory governments’. The Commission’s report was released in May 2014 with some bold recommendations for the reinvigoration of Australian federalism. These included tax reform to alleviate both vertical and horizontal fiscal imbalance, the reduction of tied grants to the states and that a ‘comprehensive review of the roles and responsibilities between the Commonwealth and state governments be undertaken’. The latter was to be informed by the principle of subsidiarity, the importance of ensuring that each level of government is sovereign in its own sphere and minimal duplication between the Commonwealth and the states. Echoing this, the government justified its withdrawal in the 2014 Budget from the respective funding agreements reached by Rudd and Gillard with the states and territories by emphasising that each level of government should be ‘sovereign in its own sphere’. At the same time, and as part of a broad range of cost-savings under the federal budget, the COAG Reform Council, a body supported by all the governments of Australia and which measured their relative performance in meeting the goals of intergovernmental agreements, was extinguished.

The only pattern across these various, sometimes revisionary, developments in federalism is that the states and territories have been essentially cast in a reactive role. Since shortly after the election of the Rudd government in 2007, CAF, as an institution, can hardly be said to have been working in partnership with the Commonwealth on federal reform.

Writing in 2009, Keddie and Smith observed that CAF’s initiatives in the areas of climate change and federalism had been successful in creating an ‘alternative national policy agenda’. Indeed, the transfer of these issues from the subnational to federal

39 Council of the Australian Federation, Submission No 38 to Senate Select Committee on the Reform of the Australian Federation, Australia’s Federation: An Agenda for Reform, 9 September 2010.
40 Senate Select Committee on the Reform of the Australian Federation, above n 38.
43 Keddie and Smith, above n 6, 74.
sphere might be seen as the most compelling confirmation of CAF’s success in its objective of constructively engaging with the Commonwealth on matters of national importance. However, there was a sense that in this process the states received ‘limited credit or reward for the policy initiatives undertaken’ and rather than becoming collaborative partners with the federal government, were largely left on the sidelines.

Perhaps more damningly, neither climate change nor federalism was effectively advanced after its assumption at the Commonwealth level. The Labor governments of first Rudd and then Julia Gillard suffered significant political damage over their response to climate change, with the ultimate result that one of the central commitments of the new Coalition government was the ‘scrapping’ of the carbon tax and its replacement by so-called ‘direct action’. While reform of the federation proved less politically controversial, the early promise of the 2008 Intergovernmental Agreement on Federal Financial Relations was soon undermined by a fresh proliferation of Commonwealth specific purpose payments. Later efforts to manage rising state costs in respect of health and education failed to address underlying systemic features and the withdrawal by the Abbott government from those commitments gave rise to an especially acrimonious period in Commonwealth-state relations.

The Coalition government’s much-anticipated white paper on federal reform may present the opportunity for real development. The first issues paper released as part of that process in September 2014 reveals a focus on ‘limiting Commonwealth policies and funding to core national interest matters’ and reducing overlap by reaching agreement about the ‘distinct and mutually exclusive responsibilities’ of governments. The terms of reference certainly align with the states’ long-held hopes for structural reform, but whether the fact of their shared aspirations will result in collective engagement with the process through CAF as an institutional structure must remain to be seen.

In the meantime, it is undeniable that secure, lasting or even coherent reform initiatives have not yet emerged as a result of the Commonwealth’s attention in either area after the early work done by CAF. These experiences may well explain why in recent times CAF has been reluctant to commit to an ongoing policy agenda that embraces contentious policy areas. For example, even after cracks in the Rudd government’s approach to climate change started to become apparent and the introduction of a national emissions trading scheme failed, climate change did not reappear on CAF’s agenda as a matter for renewed subnational consideration. There are two possible explanations for this: first, that the states felt that their investment in contentious issues had not paid them the political return necessary to justify committing further resources and, second, that the gradual ascent of Liberal/National governments to power in the majority of states between 2008 and 2013 politically destabilised subnational unity in contentious policy areas. On either account, CAF has

44 Menzies, ‘The Council for the Australian Federation’, above n 6, 60.
45 At the time of writing, the former has been accomplished, while the second is pending.
48 See Painter, above n 1, 42–3.
49 Jones, above n 31, 17.
50 Menzies, ‘The Council for the Australian Federation’, above n 6, 60.
been exposed as an institution whose effectiveness in achieving an alternative national policy agenda largely depends on the wavering political will of its participants and the off-chance that at any particular time they will share ideological sympathies.

The apparent truth of that observation has not, however, stymied CAF in achieving some success in meeting its other objective of pursuing subnational regulatory harmonisation. Over time it has been effective in facilitating agreements between Premiers and Chief Ministers in a range of areas, including occupational licences,\(^51\) product safety regulation,\(^52\) vehicle safety standards,\(^53\) vehicle and drivers’ licensing\(^54\) and settling the date of the ANZAC Day public holiday.\(^55\) However, there are two important caveats to be made. First, an examination of the CAF communiques shows that in almost every case First Ministers only agreed to explore the option of harmonisation rather than actually reach a firm commitment on harmonisation. This is perhaps symptomatic of the conference meeting format proving incompatible with reaching final agreements that rely on detail and expertise. Second, all of these matters are relatively minor and uncontentious. The list does not include big ticket policy items where harmonisation may require states to compromise some of their interests in the process of reaching a negotiated outcome. Indeed, whether many of these items should have been elevated to the level of Premiers and Chief Ministers in conference is questionable. They appear to be matters better suited to the working groups of Ministerial Councils or even discussions between the relevant officials in each state and territory.

B Institutional Fortunes

There is one aspect of Australia’s constitutional design that indirectly encourages horizontal collaboration — the threat of Commonwealth domination. After the demise of state-only Premiers’ Conferences in 1928, the first meeting not involving the Commonwealth was held in Adelaide in November 1991. In addition to wanting to redress vertical fiscal imbalance,\(^56\) the states were beginning to feel exasperated at the manner in which the Commonwealth was treating them, and were particularly frustrated with the divide and conquer strategies being employed to play them against one another. The states complained that Australian Loan Council meetings and Commonwealth-led Premiers’ Conferences ‘were becoming confined to fundamental, but narrow, discussions of intergovernmental financial relations in an environment of self-interest and conflict, rather than of cooperation’.\(^57\) Although the rhetoric of cooperation and collaboration was being employed to couch the Adelaide meeting in more euphoric ideas of ‘working together to serve the national interest’,\(^58\) in reality the states were attempting to unite against the Commonwealth in order to politically redress

\(^{52}\) Council for the Australian Federation, ‘CAF Communiqué’ (12 April 2007, Canberra).
\(^{54}\) Ibid.
\(^{55}\) Council for the Australian Federation, ‘CAF Communiqué’ (12 September 2008, Melbourne).
\(^{56}\) Menzies, ‘The Council for the Australian Federation’, above n 6, 56.
\(^{58}\) Ibid.
the balance of power that had been steadily swinging away from them.\textsuperscript{59}

The Adelaide meeting of 1991 did not immediately lead to any permanent institutionalisation of horizontal collaboration, even though meetings of Premiers and Chief Ministers continued in the lead-up to the final agreement on the National Competition Policy in 1995. There are some indications that this was due to an appreciation that subnational collaboration was ineffectual against Commonwealth domination. As Victorian Premier Jeff Kennett observed in 1994, ‘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’.\textsuperscript{60} But perhaps the more critical explanation was the absence of sufficient political will to turn subnational frustration into an institutionalised mechanism for dealing with it. However, that changed in the 2000s. While the ‘dominance’ of intergovernmental relations by the Commonwealth continued, by 2005 it also coincided with a highly unusual electoral phenomenon: a Liberal Commonwealth government and six Labor state governments.

Adding further fuel to the fire was the Howard government’s agenda of expansion into traditional areas of state responsibility.\textsuperscript{61} From the perspective of the Premiers, ‘there was a concerted effort to disempower the states through direct and conditional funding, and through expressing an ideological preference for national approaches over diverse policy perspectives’.\textsuperscript{62} The clearest embodiment of the latter was the Howard government’s enactment of the \textit{Work Choices} industrial relations system using its unanticipated control of the Senate after the 2004 election. The new scheme, supported by the Commonwealth’s power to make laws with respect to corporations, largely supplanted over a century’s operation of state industrial relations law. What is more, the High Court’s validation of the Commonwealth’s legislation confirmed that the corporations power furnished the national government with the means to intrude into many areas of state control hitherto believed to be out of the former’s reach.\textsuperscript{63} State Premiers reacted with dismay to their defeat in the High Court, with some calling urgently for a constitutional convention.\textsuperscript{64} In such a climate, it was an entirely rational response to establish an institution that would act as a ‘counterbalance to the centralising power of the federal government’.\textsuperscript{65}

Nonetheless, attempting to address dysfunctional vertical interaction through horizontal collaboration faced obvious challenges. It was also arguably a highly flawed basis on which to establish a new institution, at least from the perspective of its ongoing relevance. This is because this dysfunction is often overridden by party politics and typically, although not always, surfaces in the public consciousness only when it parallels partisan divisions between the two levels of government. This became readily

\begin{thebibliography}{9}
\bibitem{59} Tiernan, above n 10, 131.
\bibitem{60} Painter, above n 1, 85.
\bibitem{61} Tiernan, above n 10, 124, 129.
\bibitem{62} Menzies, ‘The Council for the Australian Federation’, above n 6, 58.
\bibitem{64} Stewart and Williams, above n 63, 174.
\bibitem{65} Menzies, ‘The Council for the Australian Federation’, above n 6, 64.
\end{thebibliography}
apparent once the political winds changed after the election of Kevin Rudd in November 2007. Rudd’s revitalised ‘cooperative federalism’ left CAF with little to do but support the work of COAG, to which the substantive items of the CAF agenda had now been transferred. 66 The political tensions which gave rise to the creation of CAF had disappeared, leaving nothing much to sustain it. At the same time, as Work Choices itself had made so clear, the space in which horizontal cooperation could occur free of any Commonwealth involvement had further contracted, ensuring that the CAF agenda for independent action was destined to be a thin one.

The loss of momentum suffered by CAF seems to have had a lasting impact on the institution even as political fortunes have altered. The federal landscape changed once again in the 2010–12 period. Not only did the party solidarity of Australian governments break down, but the states began to rail, even Labor ones when it came to the hospital funding negotiations, against the heavy-handed centralism underneath the veneer of Rudd’s ‘cooperative federalism’ rhetoric. 67 However, there was no corresponding reinvigoration of CAF’s agenda.

So far, and similarly, there is no sign that the more recent conflict between the Commonwealth and states in the wake of the Coalition government’s 2014 Budget will precipitate a strengthening of CAF either. The acrimony between the Abbott government and the Premiers over the former’s withdrawal of around $80 million in health and education funding illustrated that jurisdictional interests can certainly trump party allegiances. The Liberal National Party Premier of Queensland, Campbell Newman, was arguably the most vociferous in his condemnation. Newman was the Chair of CAF at the time and while the Premiers organised an urgent meeting to confer about the Commonwealth’s actions, none of this appeared to happen within an institutional frame. Neither Newman nor any of the other leaders even referred to themselves as acting through CAF. That is hardly surprising given that the public is more likely to appreciate the dispute as one in which simply ‘the states’ are being left in the lurch. In any case, as was clear at its establishment, CAF cannot be justified merely as a collective oppositional voice box for the states and territories. To be a meaningful piece of Australia’s federal architecture it requires a more positive and less reactive role than that. The question is whether it can lay claim to enough constitutional space for such a role.

The implications of these shortcomings for the longevity of CAF are clear; without the capacity to build high-profile policy successes in truly contentious areas that require negotiation and compromise, over time the institution is likely to decline in both significance and credibility. Further, it is likely to remain highly susceptible to changing political winds with very little capacity to reflexively influence its participants and thereby build a long-term and sustainable agenda. It is no surprise therefore that the Senate Select Committee on the Reform of the Australian Federation described CAF as

66 Ibid 64–5.
an ‘underdeveloped’ mechanism of horizontal interaction that needs a ‘stronger foundation’.

III COF: A COMPARISON

Contrasting CAF’s fortunes with those of the Canadian organisation which inspired its creation, the Council of the Federation (COF), is instructive. The two bodies share a high level of commonality yet the Canadian original has been rather more effective as an intergovernmental institution. COF was born out of a desire to institutionalise what had been a collection of ad hoc first ministers’ meetings and a more formal meeting held once each year since 1960 known as the Annual Premiers’ Conference. Although there had been recommendations for a formalised institution as far back as 1956, the first solid proposal was put forward by Quebec in 2001. This proposal suggested that COF take the form of an intergovernmental executive body whose members would include the Prime Minister and the first ministers of each of the provinces and territories. It was proposed that the institution would have a formal procedure for decision-making, oscillating between a regional veto format, qualified majorities and unanimous consent, depending on the particular context of the decision at hand.

Although the 2001 proposal did not succeed in gaining acceptance, a new proposal was offered by Quebec to the Annual Premiers’ Conference in July 2003. This time, the institutionalisation of COF was agreed between the Premiers and formed the first stage in a five-point plan ‘to revitalize the Canadian Federation and to build a new era of constructive and cooperative federalism.’ The institution was to be constituted by the 13 Premiers of the provinces and territories, but the Prime Minister was excluded. COF would be supported by a permanent secretariat. It would also host meetings between the provinces and the territories at least twice a year, and would be governed by the same decision-making framework as the Annual Premiers’ Conference: unanimous consent. Hueglin described the establishment of COF as signalling ‘a new form of collaborative federalism, which aims at policy-oriented and pragmatic political accommodation that goes beyond what is provided by the traditional constitutional

68 Senate Select Committee on the Reform of the Australian Federation, above n 38, 46.
69 Ibid 53.
70 Recently rebranded as the ‘Canadian Premiers’.
73 Ibid 2.
74 Ibid 3.
75 Ibid.
framework and its division of powers’. 77

In the years following its formal establishment, COF achieved a number of collaborative successes. These have ranged from the release of joint governmental reports and policy plans containing comprehensive recommendations for reform, such as the ‘Shared Vision for Canada’s Energy Future’ report of 2007, 78 through to the creation of specific charters providing a policy framework in regulating key areas of intergovernmental cooperation, such as the Water Charter of 2010.79 COF’s greatest success, however, has arguably been in the area of domestic trade liberalisation. 80

The initial breakthrough in internal trade preceded the establishment of COF. From 1992 to 1994, following the failure of more formal attempts to achieve reform by way of constitutional amendment, the Canadian first ministers committed their governments to the negotiation of an intergovernmental agreement on trade. While the federal government was involved in that process, its role was limited to acting as a ‘neutral facilitator to resolve differences among the provinces’, 81 rather than as a dominant and self-interested negotiating party and this peculiar federal-provincial dynamic was said to be ‘key to achieving results’. 82 Ultimately, a national Agreement on Internal Trade (‘AIT’) was concluded by 18 July 1994 and came into effect on 1 July 1995. Although the negotiation of the AIT was mostly a constructive exercise and the outcome was hailed by some as a significant achievement, 83 the divergent regional interests of the provinces meant that certain critical matters were left unaddressed. In the period after the agreement came into effect, political will to drive further reform efforts began to wane further and this added to the general sense of fatigue in the area that hampered both implementation of the AIT and its renegotiation. 84

Almost a decade after the AIT was initially concluded, and into the ensuing malaise, entered the brand-new institution COF. Commitment by the Premiers to a reform agenda began early in the life of the institution with the establishment of a working plan in February 2004 setting down short-term and long-term policy objectives and expected completion dates. 85 Periodic progress reports documenting milestones and

77 Thomas O Hueglin, ‘Canada’ in Katy Le Roy and Cheryl Saunders (eds), Legislative, Executive, and Judicial Governance in Federal Countries (McGill-Queen’s University Press, 2006) 102, 127.


82 Ibid 153, 171.

83 Ibid 172.

84 The extension to the procurement chapter to the MASH (municipalities, academic, schools and health) sectors appears to have been a notable exception, but was an agreement to which British Columbia did not agree: ibid.

achievements were compiled and by August 2007 a five-point plan towards reforming the AIT had been endorsed by all 13 Premiers. In July 2008, COF announced that a new dispute resolution mechanism for the AIT had been negotiated. In January 2009, it further announced that the Premiers had approved modifications to the AIT that would allow for full labour mobility between the provinces and by August 2009 a new ‘Agriculture Chapter’ had been agreed for the AIT with the intention of promoting free trade in that sector.

Despite its significant and substantive policy successes, particularly when compared to the relatively weak agenda of CAF, COF has not been entirely free from criticism. For example, commentators have noted the failure at COF to agree on a common solution to Canada’s relatively small but not insubstantial vertical fiscal imbalance. This hesitation to completely abandon competition in favour of collaboration is perhaps best illustrated by the design of the institution itself. Rather than adopting a strong-form institutionalisation by accepting decisions by majority, COF has agreed to function by consensus. Unanimity unquestionably makes progress not just slow, but sometimes very difficult to achieve on major issues about which the provinces may hold a spectrum of diverse opinions. Ultimately this means that, as in Australia, the central government ‘can easily destroy provincial common fronts’.

Obviously, the suggestion that more sophisticated means are used to determine an institutional position than simple unanimity opens up an array of issues about provincial sovereignty and the confluence of legal and political controls. These matters are ones beyond the scope of the present inquiry. But in any case, since the requirement

86 Council of the Federation, ‘Communiqué’ (28 July 2006, St John’s).
91 Herman Bakvis, Gerald Baier and Douglas Brown, Contested Federalism: Certainty and Ambiguity in the Canadian Federation (Oxford University Press, 2009); Richard Simeon, Federal-Provincial Diplomacy: The Making of Recent Policy in Canada (University of Toronto Press, 2006) 326.
93 ‘In federal systems compose [sic] of power-concentrating governments such as Canada, the collective problem-solving capacity is likely to be limited … governments refuse restrictions on their autonomy, whether they come from a neighbouring or the federal government’: Bolleyer, above n 19, 338.
94 Leclair, above n 92, 55.
of consensus is common to both CAF and COF, decision-making processes cannot account for the differences in standing and performance of the two bodies in their respective federations. Even despite criticisms about how internal governance may have inhibited COF and stalled its progress in some areas, it has still demonstrated a regularity and prominence as an institution of horizontal intergovernmental collaboration that far outstrips that of its Australian counterpart.

**IV CONSTITUTIONAL FEATURES THAT INFORM AND SHAPE INTERGOVERNMENTAL RELATIONS**

In the following section, we conduct a comparative analysis of the constitutional features that contribute to shaping horizontal intergovernmental relations in Australia and Canada. In doing so, we attempt to explain why CAF has been relatively ineffective in Australia despite being a replica of the Canadian equivalent. As demonstrated in the previous section, the latter has exhibited a far greater likelihood of becoming institutionally embedded as a permanent feature of the Canadian intergovernmental landscape. Given that many of the political factors identified as undermining CAF may be presumed to be ones that have similarly borne, to some degree, upon COF, what accounts for the success of the latter in carving out a niche as a relevant institution in Canadian federalism?

It is important to bear in mind that the present state of neither CAF nor COF is the culmination of a clearly defined or linear trend. Rather, there is a rich and complex interplay of factors — including political dynamics and a certain degree of institutional path dependency — which have had more than a negligible influence on the ultimate expression of the institutional structures considered. Yet the underlying constitutional fault lines are themselves also worth considering. It is these features that form the topography of this scene, sometimes cracking to form large structural crevasses within which the vagaries of politics and institutionalism dominate and at other times shaping those very forces into relatively predictable patterns and outcomes.

**A Division of Powers**

The allocation of powers within each federal system has been described as the ‘most important design difference’ between Canadian and Australian constitutional systems. In Canada each tier of government is allocated a substantial body of exclusive power. The clear demarcation between the powers of the two levels of government stems from the presence of Quebec and the conditions it set on its involvement in the move to federation in the 1860s. Consequently, the intention of the Canadian drafters

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96 For example, it has been argued that the rise of subnational federal cooperation through COF can be directly attributed to the deficiencies and irregularity of the First Ministers’ Meeting (FMM): David Cameron and Richard Simeon, ‘Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism’ (2002) 32(2) *Publius* 49.


98 For a contrast between Australia’s concurrency and Canada’s ‘original coordinate design’, see ibid 77–84, 104–5.

99 Simeon and Papillon, above n 16, 98.
was to establish a federal state ‘in which all fields of responsibility are precisely defined and properly allocated’.  

This in turn has meant that in Canada ‘the central government has relatively little opportunity to legislate specific conditions and funding formulae for programs to be delivered by the provinces’.  

The regional autonomy that flows from this more coordinate system lessens the need for vertical intergovernmental negotiation as a mechanism for jurisdictional conflict resolution, unless the matter falls within the few areas of formal shared power. Of course, the increasing complexities and pressures of the welfare state and globalisation mean that, inevitably, federal–provincial relations are necessary to ensure the flexibility required in modern government — hence the rise of executive federalism as a general phenomenon. Yet, on a relative scale, constitutional power-sharing as an underlying driver for vertical relations in Canada is less pronounced than in Australia.

The Australian framers deliberately rejected the Canadian model’s express allocation of provincial powers, with Sir Samuel Griffith explaining that an enumeration of state legislative powers ‘would have been to begin with, unscientific, and, in the second place, it would have been impossible’. The framers viewed this particular aspect of Canadian federalism, understandably but ultimately erroneously, as Taylor has argued, as having a strong centralising effect. On the other hand, an underlying desire to establish a federation in which the tiers of government functioned, according to A V Dicey’s description, as ‘co-ordinate and independent authorities’, seems to have been one that the Australian framers shared with their Canadian counterparts. Geoffrey Sawer said of the framers that ‘the co-ordinate attitude was the one most consistent with their general objectives — to transfer specific responsibilities and the means of carrying them out’ to the national government.

But as K C Wheare observed in his seminal mid-twentieth century study, ‘[c]oordinate federalism, as an ideal type, makes theoretical demands which have never been

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102 Such as agriculture, immigration, pensions and natural resources.
103 Brown, Market Rules, above n 81, 104.
met by any system, even in principle’. So much is perhaps no more true than of the federal system created under the Australian Constitution. Nicholas Aroney and many others have shown through detailed examination of the Convention Debates and the surrounding historical record, that the Australian case was not, a few exceptions aside, a true transfer in the sense of an abdication by the colonial legislatures, but instead the adoption of a concurrent sharing of power. Almost all powers of the new Commonwealth legislature were to be held concurrently with those of the states. Brian Galligan forcefully emphasised this in his ‘critical rebuttal of the co-ordinate view’ of the Australian federation — both as a matter of design and a presumed standard against which contributions to the contemporary debate about federal reform took their measure. He went so far as to insist that ‘there is no basis for claiming that the Australian Constitution has, or ever was intended to have, a coordinate design’.

Galligan’s claim about the framers’ intention is hard to reconcile with contextual evidence of the time, and indeed some scholars have pointed to the Constitution’s lack of provision of any formal intergovernmental machinery as further evidence of an intention to create a coordinate federal system. But in key respects the ultimate design of the Constitution shows that the framers fell well short of coordinacy, which remained an elusive ideal. Sawer recognised this, but focused upon features other than the division of legislative powers. By contrast, Aroney identifies that as the essential departure point:

the framers of the Australian Constitution provided for the distribution of legislative, executive and judicial power in a way not fully concordant with Dicey’s conception of ‘coordinate’ federalism. The most apparent way in which this occurred was through the conferral upon the Commonwealth of mostly concurrent legislative powers and the reservation, as it were, of all powers not conferred to the constituent states.

While this still left the states free to enjoy the use of legislative power beyond that enumerated in s 51 of the Constitution or not otherwise denied to them by later provisions, it obviously ensured that the use of most aspects of Commonwealth power would impact upon, either potentially or in fact, state interests or activity. Canada’s provinces expressly share legislative jurisdiction with Ottawa in relation to just 6% of constitutional powers (primarily agriculture, immigration and pensions). When overlap in jurisdiction derived from different heads of legislative power is taken into account,

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114 Ibid 199 (emphasis added).
115 Wanna et al, above n 22, 11.
116 Sawer said ‘the Australian Constitution from the beginning contained even more explicit departures from the pure theory of co-ordinate federalism than did the American’: Sawer, above n 108, 70.
This figure rises to 46%. By comparison, in Australia concurrency extends to approximately 70% of all policy areas.\textsuperscript{118}

It is thus concurrency which is the defining characteristic of the \textit{Australian Constitution} rather than any implicit coordinacy resulting from residual powers being left to the states. On the contrary: the decision to reject the Canadian model and not expressly articulate any areas of state legislative responsibility — which Greg Taylor has called the drafters’ ‘greatest mistake’\textsuperscript{119} — rendered these vulnerable to the expansion of the concurrent powers listed in s 51.

The potential for conflict generated by the concurrency of so much legislative power was contemplated by the Australian framers — hence the inclusion of the tiebreaker provision in s 109. But the paramount nature of Commonwealth legislation is not always politically expedient or legally straightforward. It is for this reason that it has been observed that concurrency requires ‘an adequate system of intergovernmental arrangements and procedures for coordinating policy action’.\textsuperscript{120} This observation, although undoubtedly correct, can be refined further. As Thomas Hueglin and Alan Fenna have observed, because divisions of power frequently necessitate coordination between different levels of government in order to resolve conflict ‘intergovernmental relations primarily take place \textit{vertically}’.\textsuperscript{121} In sum, the greater the concurrency, the higher the potential for conflict and the more the emphasis is placed on institutions of vertical relations to act as a release for the resulting pressure.

This tendency towards vertical intergovernmental cooperation is further exacerbated by the existence in Australia of other constitutional features that demand interaction and negotiation between the Commonwealth and the states. These include the reference power in s 51(xxxvii), the power to legislate at the ‘request or concurrence’ of the states in accordance with s 51(xxxviii), the subsequently added provision for intergovernmental agreements to be made with respect to state debts in s 105A, and the power of the Commonwealth to make conditional financial grants to the states in s 96.\textsuperscript{122} While vertical intergovernmental machinery may be necessary to negotiate outcomes in these contexts, as well as situations of conflict, there are no analogies that might inherently give rise to the need for equivalent horizontal intergovernmental processes, which are often relegated to feeding into the more dominant vertical dynamics. It is for this reason that institutions of horizontal collaboration are most invigorated when political circumstances compel a coordinated subnational front against a powerful central government, and become limp when those circumstances evaporate.

\section*{B Fiscal Centralisation}

The significance cannot be overlooked of the Commonwealth’s financial domination in

\begin{itemize}
\item Taylor, above n 106, 98. See also Irving, above n 111, 63–7.
\item Galligan, \textit{A Federal Republic}, above n 112, 201.
\item Thomas Hueglin and Alana Fenna, \textit{Comparative Federalism: A Systematic Inquiry} (Broadview Press, 2006) 218 (emphasis added).
\end{itemize}
the federation and its willingness to use this to intrude into areas which the framers would have thought they had safely left exclusively to the states. The Commonwealth’s capture of much of the Australian tax base, and the failure of the states before the High Court to successfully defend the former’s incursions or secure a more accommodating interpretation of the prohibition on their levying of excise, is a well-known story which does not require recounting here. But it must be acknowledged that the growth of Commonwealth power which followed its acquiring a position of fiscal dominance has only exacerbated the concurrency issue. The constitutional provisions which facilitated this development — namely the power to make conditional grants to the states under s 96 and, until recently, broad-based Commonwealth executive spending — have enabled the Commonwealth to exercise authority and, in some cases, regulate on many subjects beyond those expressly granted to it by s 51. This de facto concurrency only increases the need for a deliberative institution that facilitates vertical intergovernmental interaction in order to deal with the inevitable overlap and potential conflict between levels of government.

By contrast, the Canadian provinces are far less reliant on federal funding than the Australian states. In Canada, direct sources of taxation — personal, corporate and sales — and indirect taxes over natural resources are available to both levels of government. As a consequence, the provinces are largely self-sufficient and federal funding transfers only account for somewhere between 13–20% of provincial expenditure. By contrast, in Australia the federal government collects 80% of government revenue and federal transfers to the states account for approximately 49% of state expenditure. That is a staggering difference, in terms of the success of subnational governments to sustain an autonomous institutional structure within the federation.

These features act in concert to ensure that the Canadian provinces enjoy far more independence than their Australian counterparts from forces of centralisation and federal government coercion in critical policy areas. A greater number of key policy areas such as health, education and social services fall within the legislative ambit of the provincial governments with the federal government often lacking the fiscal power to intervene. This leads to two broad outcomes. First, there is relatively little uniform

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123 For a recent overview, see Brian Galligan, ‘Fiscal Federalism: Then and Now’ in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives (Cambridge University Press, 2012) 320.
125 As a consequence of the High Court’s decisions in Williams v Commonwealth (2012) 248 CLR 156 (‘Williams No 1’) and Williams v Commonwealth (2014) 252 CLR 416 (‘Williams No 2’), Commonwealth executive spending will — in most cases — be limited to matters in relation to which Parliament has provided legislative authority for the expenditure.
128 Parker, above n 126, 154.
regulation dictated by the federal government.\textsuperscript{129} This is reflected in the fact that ‘Canada is unique among federations in that almost all (about 94 per cent) of its intergovernmental transfers take the form of block payments’ without any conditions attached.\textsuperscript{130} Second, there is a strongly ingrained view that ‘“[n]ational” policies and standards in these areas, therefore, are matters for provinces to decide together’\textsuperscript{131} in the absence of central government.

Thus, there is strong incentive for sub-national collaboration and coordination on matters that in Australia might by sheer necessity require elevation to the ‘national’ level. Conversely, the strength and independence of the Canadian provinces in their areas of jurisdiction engenders in the federal government a suspicion that high-profile institutions of vertical collaboration ‘provide a platform for political attacks on Ottawa’ and ‘elevate premiers from provincial politicians to national decision-makers.’\textsuperscript{132} But ironically, a sparing approach to the calling of First Minister’s Meetings only increases the importance of horizontal cooperation where there is a truly national consideration.

C Trade Liberalisation

The very idea of federalism presupposes that the states will act in their own self-interest and actively compete with each other on policy settings. Prior to federation, intercolonial barriers to trade in Australia were common.\textsuperscript{133} On the other hand, negotiations led the colonies to discriminate in favour of each other ‘even at the disadvantage of the other parts of the Empire’.\textsuperscript{134} And thus, the colonies cycled between phases of bilateral collaboration and competition. At federation, the framers were wary that this kind of internal competition might threaten the overall exercise of nationhood.\textsuperscript{135} They thus entrenched into the Constitution a broad and enigmatically worded guarantee in s 92’s assurance that interstate trade was to be ‘absolutely free’. Section 92 largely achieved its purpose\textsuperscript{136} and since federation internal trade within Australia has been relatively free, leaving little need for further harmonisation on the matter.\textsuperscript{137}

In Canada too, there is an equivalent of the s 92 guarantee: the internal free-trade

\begin{itemize}
    \item Robin Boadway, ‘Fiscal Federalism in Canada’ in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), \textit{The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives} (Cambridge University Press, 2012) 305.
    \item Brown, ‘Fiscal Federalism’, above n 101, 69.
    \item Cameron and Simeon, above n 96, 55.
    \item Ibid 62.
    \item John Quick and Robert Garran, \textit{The Annotated Constitution of the Australian Commonwealth} (Federation Press, 1901) 80.
    \item \textit{Betfair v Western Australia} (2008) 234 CLR 418, 458 [29] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).
    \item The operation of s 92 of the \textit{Australian Constitution} has also been aided by other provisions that have promoted free internal trade, including s 90, which gives the Commonwealth exclusive domain over customs and excise; s 117, which guarantees interstate residents freedom from discrimination; and s 99, which prohibits the Commonwealth from giving any state a preference, including by taxation.
    \item It has, however, been apparent since the very first High Court litigation on s 92 in \textit{Fox v Robbins} (1909) 8 CLR 115, and throughout the extensive body of case law on the provision, that the states have exhibited a tendency to revert to a competitive mode. This tendency has of course been curbed by the threat of judicial review on s 92 grounds.
\end{itemize}
provision contained in s 121 of the Constitution Act 1867 which prohibits the use of explicit interprovincial trade barriers. In stark contrast to the Australian position, however, the breadth of the operation of the Canadian provision is circumscribed by the coordinate grant of provincial legislative powers in s 92 of the Constitution Act 1867.138 The Canadian Supreme Court has also interpreted the free trade provision narrowly, holding that it only refers to subnational tariffs and customs rather than other types of trade barriers even if they are of a protectionist kind.139 At the same time, judicial interpretation of s 91.2 of the Constitution Act has limited the federal government’s capacity to override internal trade barriers140 and consequently ‘Ottawa has neither the power nor the legitimacy to define and enforce the Canadian economic union on its own’.141 Thus, the constitutional power of the provinces to raise trade barriers continues largely unhindered and there is a self-interested incentive to revert to a competitive mode. This has resulted in regulatory arbitrage between the provinces142 and has led some commentators to observe that ‘there are more barriers to the movement of goods and people across provincial boundaries in Canada than there are across national boundaries in the EU’.143

Ironically, by permitting internal trade competition, the Canadian constitutional design bequeathed the institutions of subnational coordination in Canada an inherent and substantive reform agenda that extended its ambit beyond merely reacting to central government provocations. Trade liberalisation ideas have widely gained traction as beneficial to domestic as well as international trade and economic growth and the provinces have not been ignorant of this fact.144 Ultimately, the drive for internal trade reform has been an intergovernmental initiative of the provinces themselves and the establishment of COF marked ‘a critical juncture’145 in that development. The decision of the Premiers to adopt trade liberalisation as a central matter for consideration gave COF a pure subnational agenda of common interest entirely divorced from any need to build a galvanised bargaining position against the federal government.

In the result, COF was bequeathed a cooperative program of real relevance to Canada and for which the Premiers were the appropriate driving force. As was observed by one Canadian official, the provinces were not simply ‘pursuing this to try to keep the federal government out.’146 The institution was said to have ‘rejuvenated’ internal trade policy, spurring significant reforms in 2006147 and 2009.148

139 Berdahl, above n 80.
140 Ibid 280–1.
141 Cameron and Simeon, above n 96, 56.
142 Eugene Beaulieu, Jim Gaisford and Jim Higginson, Interprovincial Trade Barriers in Canada: How Far Have We Come? Where Should We Go? (Van Horne Institute, 2003) 5.
143 Courchene, above n 138, 12.
144 Berdahl, above n 80, 284–5.
145 Ibid 284.
146 Ibid 287.
147 The Trade, Investment and Labour Mobility Agreement was signed by British Columbia and Alberta.
148 An enforceable dispute resolution mechanism was introduced into the Agreement on Internal
By contrast, CAF has had no such inherent agenda. Its harmonisation programs have been limited to the relatively routine and uncontroversial policy areas described in Part I of this article and substantive areas of reform have required Commonwealth intervention. The introduction of the National Competition Policy in 1995 offers a high profile example. While state Premiers at the time were not in principle opposed to uniform competition policy, ‘they had strong political reasons to want to control its pace and direction’,149 and also adapt it to the industry conditions prevalent in their state. A number of Premiers and Chief Ministers’ meetings were held in the lead up to COAG meetings in 1994 to discuss the states’ respective positions. The overall outcome of these meetings was to commit only to further consultations and thus further delay.150 On the other hand, Commonwealth intervention through the COAG process ultimately drove the states to reach a compromise position, both amongst themselves and ultimately with the Commonwealth.151 The resulting national framework was one in which the states found that they had ‘subordinated their legislative “sovereignty” to a collaborative process’.152 It was an outcome that would likely have been impossible in the absence of a Commonwealth-led joint action.

D The Senate

The idea of nationhood embodied in the Australian Constitution — indeed, the very realisation of the goals of federation — has further muted the need for horizontal cooperation and collaboration. One of the primary drivers behind federation was the desire to create uniformity among the colonies. In the half-century leading up to 1901, the extensive intercolonial consultations that took place were concerned with establishing uniform legislation and administration on matters of common interest.153 In fact, the initial suggestion from the colony of New South Wales was to eschew nation-building altogether and simply create a General Assembly that would ‘secure uniform legislation on a few matters of common interest’.154 Ultimately, however, as interdependence emerged as an undeniable trend in the latter part of the 19th century, the creation of a new national government was the ‘method’ that gained traction to enable ‘the several Australian colonies to cooperate with each other in the enactment of such laws as may be necessary for regulating the interests common to those possessions collectively’.155 Where expedient, generating uniformity was to be the role of the new national government which would regulate common interests ‘in some uniform manner and by some single authority’ for the ‘welfare of them all’.156

As Martin Painter has explained, joint intergovernmental action with Commonwealth involvement is more feasible than in its absence since it is only the national government that can ‘tailor the pay-off rules’ to incentivise the reaching of an

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149 Painter, above n 1, 82.
150 Ibid 84–5.
151 Ibid 86–7.
152 Ibid 89.
154 Quick and Garran, above n 133, 91.
155 Ibid.
156 Ibid.
agreement. Indeed, in the Commonwealth’s absence, the states only have cause to reach agreement on the infrequent occasions when all of their common interests align. By contrast, ‘the federal government clearly has a special status in that its territory and powers overlap those of all other governments’. Having united to create a national government, the states have ensured that matters of national importance will not be ones addressed exclusively through horizontal cooperation.

The swiftness with which the structural impact of this constitutional design was felt is illustrated by the mid-twentieth century history of the Premiers’ Conferences offered by Rufus Davis. In 1901, according to Davis, the Conferences ‘reflected above all one thing — the desire of the states to assert, exercise and retain the initiative in the field of interstate cooperative action’. The states set the timing of the conference, its agenda and its procedure, and the Commonwealth was relegated to ‘invitee’ status when the states deemed it necessary to consider its views. The states’ early indifference to the Commonwealth can be attributed to the fact that the transfer of powers to the centre had little immediate effect on their constitutional and administrative functions. However, the steady accumulation of power to the centre, as the Commonwealth’s legislative powers increasingly became the focal point of growth in post-war governmental activity, dramatically reshaped intergovernmental relations. The last state-only conference was held in 1928 and was limited to considering ‘relatively minor items of inter-state interest’. The major issues, which now almost always required Commonwealth-state interaction, were transferred to Commonwealth-led deliberative conferences. These ‘new’ Premiers’ Conferences had the same name but they reflected the unmistakable trend towards ‘extensive inter-governmental cooperation and coordination under the impetus and leadership of the Commonwealth’. Davis concluded correctly that the Commonwealth has been and will continue to be the leading force in Australian intergovernmental relations.

Obviously, the diminishment of the scope for national matters to be addressed through intergovernmental cooperation at the sub-national level is destined to be the result, and is indeed largely the point, of any successful attempt at federation. But the effect may not be equally pronounced across all federations depending on the way in which the powers of the respective tiers are allocated. As noted earlier, the failure of the Australian Constitution to insulate any matters of state legislative responsibility from Commonwealth interference by express allocation has meant that ever-enlarging conceptions of what amounts to an issue of national importance have steadily eroded the policy areas in which the states are left to their own devices. The expansive effect of national consciousness operates not merely as a matter of changing political or public

157 Painter, above n 1, 95.
158 Ibid.
160 Ibid.
161 Ibid 222.
162 Ibid 215.
163 Ibid 212.
understanding, but has been recognised as having an interpretative significance in respect of the Constitution.164

Intergovernmental collaboration is thus always highly likely to attract Commonwealth intervention whenever a matter begins to take on ‘national dimensions’.165 As Chief Justice Robert French has observed extra--curially, ‘every topic which is treated as national becomes, potentially, a matter which somewhere along the line, it can be argued, is best dealt with by a national government’.166 A mechanism for this kind of elevation to the national level was provided for by the framers of the Constitution: it is well known that the Australian upper house was intended to represent at a national level the interests of the newly formed states. Equal representation and (almost) equal powers were to form the hallmarks of this federal design. The former would ensure that regional representation would remain unaffected by majoritarian populism and the latter would ensure that the states could, of their own accord, originate legislation they felt was needed at a national level.

As a matter of practical reality, however, the Australian Senate swiftly succumbed to the forces of party politics and executive government. Almost since its inception, it has failed to operate in practice as a ‘States’ House’. In that sense, it has been unsuccessful as a means by which the ‘diverse interests of the federal polity’ are brought ‘directly into national political institutions’.167 Admittedly, there are some structural features of the Senate, such as the influence of state party executives on the endorsement of Senate candidates and the equal numbers of Senators from smaller states, which might from time to time assist in the airing of regional grievances within the upper chamber. Yet, even taken collectively, these features have failed to make state interests paramount considerations in the workings of the Senate. This has left a significant institutional gap — and one that has seemingly been filled by COAG, and before it, the Premiers’ Conferences.168

By contrast, since its inception, regional representation has not formed part of the Canadian parliamentary structure. This is reflected in two basic ways: first, members are not elected to the Canadian Senate but appointed by the government of the day, and, second, appointment to the Senate occurs using a formula that substantially favours the larger eastern provinces.169 The former is almost certainly the greater of the two factors in the consensus view that ‘federal legislative institutions are poorly equipped to

165 Painter, above n 1, 96.
167 Sayers and Banfield, above n 17, 186.
169 For a short history of the allocation of seats by province, see Hueglin and Fenna, above n 121, 190–2.
accommodate the regions’\textsuperscript{170} and that the Canadian Senate remains ‘an oddity among classical federations’\textsuperscript{171} Despite radical reform efforts from certain quarters, there has been insufficient majoritarian support for change.\textsuperscript{172}

This design creates both similarity and difference with the Australia position. On the one hand, it explains Canada’s resort to intergovernmental ‘diplomacy’ as a way to overcome the deficiencies of the Senate. As has been observed, the ‘coordination of national and regional interests can be achieved solely through intergovernmental relations’,\textsuperscript{173} a structural feature also known as ‘interstate federalism’.\textsuperscript{174} In this sense, there is commonality with the Australian system, at least in practical operation. Both can be contrasted with the German model, which exhibits signs of \textit{intragovernmental} federalism. There, the subnational \textit{Lander} governments directly appoint representatives to the German upper house and are therefore directly involved in the creation of national legislation.

On the other hand, when combined with the underlying regional differences and relatively pronounced cultural diversity present in Canada, the ‘federal deficit’\textsuperscript{175} resulting from the design of the Canadian upper chamber produces an outcome relatively unknown in Australia. It leads to claims by provincial premiers that they are the only ‘legitimate voice of their constituents’\textsuperscript{176} The inability of the country’s central institutions to adequately represent this regional diversity sustains ‘popular support for the assertion of provincial power’.\textsuperscript{177} Thomas Hueglin and Alan Fenna have noted that since ‘the appointed Canadian Senate is neither democratically nor regionally accountable, provinces are less willing to accept that the national government speaks for the country as a whole’.\textsuperscript{178} Similarly, Richard Simeon and Amy Nugent have observed: When power is concentrated in the hands of a government that has little or no representation from important regions of the country, those regions are likely to feel excluded and marginalized. And this effect is exacerbated by the inability of the appointed Senate to give effective voice to smaller provinces or those not adequately represented in

\begin{footnotes}
\item[170] Hueglin, above n 77, 102–3, 128.
\item[171] Ibid 102.
\item[172] Hueglin and Fenna, above n 121, 222.
\item[173] Ibid.
\item[174] Hueglin, above n 77, 102, 125 (emphasis added). The features of the Canadian Senate also head the reasons why others classify Canada as essentially ‘an interstate federation’: see Bakvis, Baier and Brown, above n 91; Simeon, above n 91, 12. Hueglin ponders whether Senate reform would ‘reduce the need for intergovernmental bargaining at the executive level’, but voices scepticism based upon the partisanship of the Australian Senate on the one hand, and the regionalism of the United States Senate. But he does acknowledge that perhaps ‘these two pressures would cut across and neutralize one another’, enabling a reformed Canadian Senate to supplant existing mechanisms of intergovernmental relations: 109.
\item[176] Leclair, above n 92, 52. See also, Brown, \textit{Market Rules}, above n 81, 106.
\item[178] Hueglin and Fenna, above n 121, 220.
\end{footnotes}
the cabinet.179

In Canada, this strong regionalism — which is particularly driven by Quebec180 — coupled with a comparatively higher degree of coordinate provincial power and less financial dependence, means that forces of decentralisation oscillate with those of centralisation. While the process is dynamic and shifting, the provinces are more predisposed towards collaboration — sometimes in regional blocs — to achieve mutual outcomes even in the absence of the national government. This explains why in Canada the primary institution by which the needs of interstate federalism are met is not the equivalent of Australia’s COAG, the First Ministers’ Meeting (FMM), but rather the purely horizontal institution of COF.181

By contrast, Australia exhibits relative linguistic and cultural homogeneity, resulting in little regional resistance against forces of centralisation.182 On the one hand, this means that the Senate’s failure as a parliamentary mechanism for intergovernmental diplomacy has not become a significant concern. On the other hand, it also means that vertical coordination at the behest of an increasingly powerful national government has become the predominant mode of intergovernmentalism. Since the differences between the states are likely to be overshadowed by their differences collectively with the Commonwealth, the primary conflicts requiring diplomatic attention in Australia arise ‘between an overall states position and the Commonwealth position, largely on jurisdictional and fiscal terms’.183

V CONCLUSION: IS THERE A PLACE FOR CAF IN AUSTRALIAN FEDERALISM?

It has been noted that ‘the aim, in most countries, is to organise [intergovernmental relations] to facilitate cooperation and coordination while also reconciling the federal need for balancing equity and diversity’.184 If this analysis is correct, and has been embodied in the Australian Constitution in the ways discussed in this article, then it is perhaps fair to observe that the current structure and design of CAF leans too far in the direction of promoting cooperation without addressing the need to support its counterpart, competition, at the same time. This accords with Brown’s assessment of

179 Simeon and Nugent, above n 175.
181 This assertion correlates with the meeting patterns of COF and FMM. In the period 2003 to 2013, while COF met 32 times, the FMM was convened by the federal government just six times: Council of the Federation, Meetings and Events (4–5 December 2003 to 27 October 2013) <http://www.councilofthefederation.ca/en/meetings-and-events>; Canadian Intergovernmental Conference Secretariat, Conferences (January 2003 to December 2013) <http://www.scics.gc.ca/english/conferences.asp?x=1>. Note, however, this count does not include FMMs held in conjunction with Aboriginal Leaders. These circumstances undoubtedly reflect the weakness of the FMM as an institution of Canadian federalism: see Bakvis, Baier and Brown, above n 91, 105-8.
182 Erk and Koning, above n 180, 365.
183 Brown, Market Rules, above n 81, 200.
Australia’s federal character generally, as one in which characteristics of cooperation, veering towards rationalisation of responsibilities through unilateral or unified decision-making, tend to be embraced over competition. Painter cautions that cooperative federalism is ‘a slippery concept’, while sharing in Brown’s view that managerialism may render its processes more intensely fused or, in his terminology, ‘collaborative’.

In any case, the idea of ‘cooperative federalism’ as some kind of mid-point on a spectrum between competition at one end and a rationalist or managerialist approach at the other still involves considerably downplaying the role of competition and diversity in a federal system. This is due primarily to its focus on the vertical plane of intergovernmental relations where competition between the tiers offers little benefit. Thus, in the context of American federalism, it has been noted that ‘[i]t would appear, based on practical experience as much as on economic theory, that vertical competition is more likely to be harmful than not’. By contrast, there has been almost universal praise for the benefits to be attained from vertical cooperation: ‘As federal policies change and states and local governments are more limited to their own resources for providing services, vertical cooperation within a state is more important than before’. However, on the horizontal plane, constitutional design designates a negligible role for cooperation as an end in itself and is divorced from the more pivotal question of vertical intergovernmentalism. On the other hand, competition has always been a feature of intercolonial and interstate relations. While active promotion of horizontal competition without regard to the risk that it could lead to a regulatory or economic ‘race to the bottom’ would be hazardous, mechanisms might be devised for the constructive support of subnational competition such that policy diversity, innovation and transfer of knowledge are maximised. As has also been suggested in the Canadian context, ‘a multilateral surveillance mechanism that leads member states to exchange the best practices and to learn from one another’ would be an example.

Relevantly, the COAG Reform Council was already performing this surveillance function in a limited range of areas. Its ambit was to collect comparative datasets relating to the implementation of Commonwealth-state intergovernmental agreements. In the 2014 Commonwealth Budget, the government announced the abolishment of the COAG Reform Council. Although the National Commission of Audit had recommended this step, it did also say that those reporting functions should be assumed by the Productivity Commission. But when the COAG Reform Council closed its doors on 30 June 2014,

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185 Brown, Market Rules, above n 81, 67, 103 and 262–3.
186 Painter, above n 1, 23–5. In the Canadian context, see also Herman Bakvis and Grace Skogstad, ‘Canadian Federalism: Performance, Effectiveness, and Legitimacy’ in Herman Bakvis and Grace Skogstad (eds), Canadian Federalism: Performance, Effectiveness, and Legitimacy (Oxford University Press, 2nd ed, 2008) 3, 9–10
189 Ibid 10.
190 Leclair, above n 92, 57.
there was no announcement at all from the Federal government as to who would continue its work. That is very regrettable — for if anything, additional investment was needed in order to extend this reporting ambit to include areas of activity determined by the states and territories without Commonwealth incentives or input.

There are ways in which the institution of COAG could be changed so as to strengthen not simply its own objectives — but also those presently claimed by CAF. By introducing much-needed reforms to COAG processes, such as allowing the states to initiate agenda items and decide the timing of meetings, the vertical dysfunction that has contributed to state frustration with COAG could begin to be addressed on the plane on which it actually exists.\textsuperscript{192} Further, the work of ongoing subnational policy development could be transferred to a strengthened COAG Secretariat with the powers and resources to respond to both Commonwealth-state and state-only intergovernmental initiatives. In this way, the CAF project could simply be subsumed by enhancements to COAG itself.

Doing so would not prohibit, of course, the states and territories from meeting before COAG in CAF-style first ministers’ meetings and develop common platforms if and when appropriate. The policy-support necessary to inform such meetings already exists in the myriad of Ministerial Councils and their working groups. However, it would ameliorate the pressure to develop institutional justifications for such meetings and unnecessarily commit resources to their ongoing occurrence when political circumstances are not favourable.

Ultimately, to record the failure of CAF is not to be dismissive of horizontal intergovernmental relations in the Australian federation — it is simply to question its constitutional importance. Doing so has direct implications for the necessity of a body such as CAF. However, we end with a tentative observation that the current political debate triggered by the National Commission of Audit report, and now signalled by the expansive terms of reference for the Commonwealth’s White Paper on Reform of the Federation,\textsuperscript{193} holds out the prospect of some more substantial reframing or devolution of powers and responsibilities back to the states. Just what will come of these discussions, it is far too early to predict. But if major reform leads to the alteration of the constitutional landscape then there is just a chance that the congruence that was perceived but actually lacking between Australia and Canada, and which gave rise to the creation of CAF, may yet come into sharper view.

\textsuperscript{192} Kildea and Lynch, above n 2.