The last few months have been a challenging time for cooperative federalism and the Council of Australian Governments.

In December, the premiers of Australia's two most populous states agreed to form an Interstate Reform Partnership, open to other states, to accelerate vital reforms that would otherwise take years to go through the overloaded COAG agenda.

We have seen the Western Australian Premier, Colin Barnett declare he has lost faith in the Commonwealth Government in this regard.

The Queensland Opposition, which will soon go to the polls against a five-term government, has indicated its intention to pursue a greater competitive federalism theme.

Some may argue this trend is due to the recent rise of conservative state governments.

But in a federation that will almost always have a mixture of Coalition and Labor governments, small ‘p’ parties need to be able to work together for national cooperative policy development to work.

Yet we have seen the Commonwealth Government redraft the review of GST payments to the states specifically to penalise states that use one of their few remaining income-generating powers; raising mining royalties, which would jeopardise the mining tax that they did not agree to.
The Prime Minister has threatened to withdraw hundreds of millions of dollars of bonus payments from the states, designed to provide incentives for a range of vital national reforms due to delays often of the Commonwealth’s making, and disagreement by new governments with one or two of those reforms.

These acts of coercive federalism come on the back of the Commonwealth venturing into areas of traditional state control, including:

1. Ordering the financially-starved states to freeze mining royalties without even trying to reach a national agreement,
2. Using a blunt instrument to reform gambling simply to form government (and now of course has reneged on that),
3. And, making an agreement over coal seam gas regulation - another area of state responsibility - to get its anti-state mining tax into place.

This approach, dismissing Australia’s nature as a Federation, has further undermined cooperative federalism and alienated the states and territories at a time when productivity-enhancing reforms require goodwill and cooperation between all states and territories.

I point out the current lack of trust in federal financial relations, and some examples of the Commonwealth railroading the states for political reasons, not to politicise the issue, but to highlight the potential for our federation to be a source of strength, or weakness, depending on the political will, patience and conviction of different governments.

Understanding the nature of our federation helps us understand the causes of commonwealth-state tensions, and appreciating how these tensions can impede national reforms helps us understand the importance of cooperation and respect between levels of government.

And in this dynamic resides the role of the Commonwealth Parliament in the age of COAG; the importance of the make-up of parliament in influencing Commonwealth approaches to policies that impinge on state rights; and the growing supremacy of executive federalism in influencing the legislative and oversight role ordinarily performed by the Commonwealth Parliament.
Australia as a Federation

Much of the public discussion of Australia's nature as a federation has been in relation to the “blame game”; whether state or Commonwealth governments are to blame for problems with service delivery.

Most of these complaints are about one level of government or the other not spending enough; it is seldom asked which level of government is responsible for that area, and why.

Constituents in fact don’t care at all; they just want their problems fixed.

Australia is a federation of states, a consequence of its colonial history involving a small number of geographically dispersed, independent colonies seeing the need to form a single nation, but preserve their own form of government, and reflected in the Commonwealth Government's powers being limited, rather than plenary as the states' are.

Australia is a federation for historical reasons, but there is every reason to think that if we were to rewrite our system of government from scratch, we would choose a federation.

As the Council for the Australian Federation argued to a Senate committee last year, federation "enables a geographically large and diverse country such as Australia to maintain national unity and meet the pressures of globalisation while at the same time accommodating regional difference".

In the Australian Federation, the six states have plenary powers; that is they can legislate about any matter of government they wish, though the territories have powers limited to those prescribed by Commonwealth legislation.

The Commonwealth has powers limited to those prescribed by the Constitution, but to the extent that a state has enacted laws that conflict with validly exercised Commonwealth laws, the Commonwealth laws prevail.

This system was designed to ensure that the Commonwealth can only make laws about matters that the states regarded as necessary for national unity, while preserving their own rights.
However, as many of you will be aware, the High Court of Australia has, since Federation, but particularly in recent decades, interpreted the Commonwealth's Constitutional legislative powers more and more broadly.

Appreciating the separation of powers in our Constitution, I will of course not comment on the merits or otherwise of this expanding Commonwealth power base; I will leave that to the qualified and respected justices appointed to that body.

However, in discussing the role of the Commonwealth Parliament in our federation, it is necessary to note the effect that a series of High Court decisions have generally made on federal relations, as greater Commonwealth legislative power can mean less state legislative power, due to our federal structure giving precedence to Commonwealth laws.

The most prominent recent example of this was the 2006 decision in NSW v Commonwealth, which, as I understand it (and I stand to be corrected), ruled that it is the words in the Constitution, rather than the federal structure explicit in it, that should be the starting point for interpretation.

As a result, the Commonwealth was able to legislate over aspects of industrial relations that were otherwise limited under the Constitution, by instead using the Corporations power.

Such an interpretation of the Commonwealth's Constitutional powers gives rise to the potential for the Commonwealth to enter into almost any area of traditional state responsibilities.

This of course has some advantages in terms of national policy priorities; the speed with which uncontroversial policies can be enacted, and the ability to achieve important reforms without requiring universal agreement from other governments.

But this expanded and expanding Commonwealth power comes with a responsibility to remember that we are a federation, in which states should be responsible for policy areas that naturally fit best with them.
The Commonwealth having the legal ability to ignore the concerns of the states does not diminish the vital importance of the Commonwealth Government working with the states, especially in areas that can differ greatly from state to state, and in areas that impinge upon the states’ already limited ability to raise revenue.

Federation and Policy Making

Policy is always the most effective and least controversial when the different parties cooperate; this has been one of the benefits of a federal system, where reforms often require the agreement of state governments of a different political persuasion to the Commonwealth Government.

The difficulties caused by expanding Commonwealth legislative power tend to arise when either the Commonwealth Government is in such a strong position as to not be concerned about states’ rights (or is simply too frustrated by intransigent states), or when the Commonwealth Government is so weak that it spends all its political capital negotiating agreements internally, leaving few options but to force a compromised policy on the states.

The latter problem is one of the features of the current minority government that has led to fractures in Commonwealth-state relations, and to fractures in the progression of the great work quietly done between jurisdictions during the normal course of government.

The Gillard Government was formed after the 2010 election by negotiations with individual independent members of parliament, and is held together on a day-to-day basis by those individuals.

From the beginning, the Prime Minister needed to agree to implement several policies that affected the states, and to use the Commonwealth’s legislative and executive power to force these policies on those states in order to retain government.

The effect of the Commonwealth ramming through policies that should be enacted by working with the states is more than a mere irritant; it results in a lack of trust which jeopardises important economic reforms.
While it is important for all jurisdictions to work together to solve problems, it is understandable that some state governments would look to exclude the Commonwealth when they are so marginalised through the COAG process and through Commonwealth unilateral actions.

This has led to questions about the future role of COAG, putting in jeopardy those positive, mutually agreeable policies that COAG has on its agenda.

One of the most damaging periods for the progress of national reform was the Rudd Government’s dictating of terms around health and hospital reform.

Mr Rudd’s approach to health reform, an area of state responsibility, not only alienated the states, but dominated so much of COAG’s time that real, non-controversial reforms fell by the wayside.

But while the current Prime Minister has talked about unclogging the COAG agenda and cooperating with the states, she has placed herself in a political situation that results in any demand of a single federal independent member being forced upon the rest of the nation.

That is not to say that the independents are to blame, they are seeking what they consider to be the best outcome for their electorate and for Australia.

But a good government should be able to unify the states and a good government would not have already isolated states to the point where these additional assaults on their sovereignty are enough to threaten cooperative federalism and national reforms.

There will be times where national leadership requires the Commonwealth to bring the states along with it, or unilaterally legislate if the grounds are strong enough.

A good government, and a good Commonwealth Parliament, uses such measures as a last resort and prefers to communicate with and convince the states; not to shoot first and ask questions later.
Effect of Executive Federalism on Parliamentary Scrutiny

A different matter from the impact of the Commonwealth Parliament on federal policy-making is the impact of federal policy-making on the Commonwealth Parliament.

Attention has increasingly been raised to the issue of executive federalism negatively affecting the Commonwealth Parliament’s role, through the committee system, of properly scrutinizing legislation to be approved by parliament.

Last year the Senate’s Education, Employment and Workplace Relations Legislation Committee examined a bill to establish a national vocational education and training regulator.

As the bill covered matters of state responsibility, a referral of Constitutional power was needed to allow the Commonwealth to pass legislation that would apply to states.

The NSW Parliament passed a law referring that state’s constitutional power to the Commonwealth, for the purposes of establishing the VET regulator.

However, as a state, understandably, would only want to refer its constitutional powers in a considered, limited manner, NSW provided that the powers were only referred to the extent that the Commonwealth act is in substantially the same terms as the referring legislation.

The Government then advised the committee that any amendments to the legislation other than editorial could jeopardise the power on which the act is based, that referred from NSW.

As a result, the Senate Committee, an important check in the Commonwealth Parliament’s legislative powers, was unable to recommend any amendments to the act without jeopardising a national scheme.

The Committee therefore included in its recommendations that, “in future, exposure drafts of legislation be made available for examination by parliamentary committees prior to their adoption as text-based referrals of power by state legislatures, thereby assisting committees to recommend amendments to the bills, if necessary, without threatening the viability of the referral of powers”.

7
This recommendation was then echoed in last year’s Report from the Senate Select Committee on Reform of the Australian Federation chaired by Senator Russell Trood.

Highlighting the problems with parliamentary oversight under this system, the Gilbert and Tobin Centre, which has been kind enough to invite me to speak today, submitted that a solution could be a mechanism to automatically refer intergovernmental agreements to a parliamentary committee; similar to treaty ratification, which cannot take place until that treaty has been subject to a review.

The Senate Committee ultimately recommended that intergovernmental agreements be referred for consideration and review to a joint standing committee (the establishment of which is included in the committee’s recommendations); and for exposure drafts of legislation that will form the foundation of a referral of power to the Commonwealth to undergo the same scrutiny.

There must be balance between the Commonwealth Government’s ability to negotiate significant national reforms with the states, and the ability for the Commonwealth Parliament to scrutinize and recommend amendments to Commonwealth legislation; and I do not intend to suggest today what that balance should be.

But this problem does indicate some of the tensions within the federal system caused by constitutional interpretations that have complicated and narrowed the ways in which the Commonwealth and the States can give effect to uniform national schemes, and it is a problem to which Senate committees will surely continue to turn their attention.

I could make a lot of observations about the damage being wrought on COAG, overwhelmingly from the acts of the Commonwealth.

The agenda is “in the hands of the Prime Minister” as we have seen, to the detriment of good governance.

Many of these issues are in prospect for us, as we continue the course of policy development.