

COAG, THE CONSTITUTION AND STATE ACCOUNTABILITY

3rd Annual Intergovernmental Relations Conference
National Convention Centre, Canberra
17 August 2011

Paul Kildea* and Andrew Lynch**

This paper is not to be cited without the authors' permission. A more detailed exposition of its arguments, and full citations, can be found in Paul Kildea and Andrew Lynch, 'Entrenching "Cooperative Federalism": Is it Time to Formalise COAG's Place in the Australian Federation?' (2011) 39 *Federal Law Review* 103.

Although concerns about the relationship between intergovernmental executive federalism on the one hand and our constitutional system of responsible government and parliamentary supremacy on the other have existed for quite some time, stretching back in a serious form to at least the 1980s, the rapid evolution of the Council of Australian Governments under Prime Minister Rudd and the ambitious agenda of the 2008 IGA on Federal Financial Relations reached by that body, have steadily raised the pitch of these concerns. In 2011 it is fair to say they may finally have reached a crescendo, for in recent months it has become apparent that the constitutional perspective on COAG – both as to its proper role and how it may be made to comport with transparent and accountable parliamentary governance – is no longer a 'sideline' but goes to the very heart of its future viability.

* Research Fellow and Director, Federalism Project, Gilbert + Tobin Centre of Public Law, UNSW.

** Director, Gilbert + Tobin Centre of Public Law and Associate Professor, Faculty of Law, UNSW.

That may seem a fairly dramatic statement with which to commence this discussion, but I shall shortly draw upon the signature developments and opinions expressed so far this year which all reflect upon the need for reform of COAG along these lines. In doing so, I want to try and give some more detailed explanation as to where these sentiments, which are typically expressed very succinctly, are coming from and to delve a little deeper into the underlying constitutional dimensions. The second half of our paper considers *how* a greater degree of convergence between COAG and our constitutional arrangements might be achieved, highlighting both the strengths and risks of the various options in this regard.

What we should make clear is our essential framing proposition – one we doubt is controversial in present company. This is that in order to deal with what the Prime Minister in February called ‘our enduring constitutional reality’,¹ that being the federal system, COAG or something very much like it, must surely be a part of the landscape from here on. While the suggestion made in July by the new Premier of New South Wales that some states could effectively break away from and undermine COAG is noteworthy as a barometer of how well, or not, the Council is travelling, it seems difficult to envisage such a schism actually occurring – or, if it happened, that some replacement body constructed on basically similar lines would not quickly rise from the ashes of COAG.²

¹ Julia Gillard, ‘Four Themes for a Better COAG’, *The Australian Financial Review*, 8 February 2011.

² Rosanne Barrett and John Ferguson, ‘O’Farrell Warns of Breakaway Rival to COAG’, *The Australian*, 8 July 2011.

This seems to have been the message Terry Moran, Secretary of the Department of Prime Minister and Cabinet, was keen to press home in his widely-reported June address on ‘the challenges of federalism’.³ Perhaps unsurprisingly, he urged the States to be patient and hold to the course of the 2008 IGA. In doing so, he was dismissive of what he called ‘musings’ about the creation of a ‘new grand bargain between the Commonwealth and the States’, effectively signalling that this is but a mirage. Instead, the GST and IGA reforms *are*, even with their imperfections, both the reality and future of federal reform. We accept that as a starting position from which the necessary enhancements to the integration of COAG with our Westminster system of governance can proceed.

COAG in 2011 – Recognition of a Need for Change

The lead-up to Julia Gillard’s first meeting of COAG since becoming Prime Minister saw significant statements on its future made by her, Paul McClintock, Chairman of the COAG Reform Council and the then heir-presumptive to the Premiership of New South Wales, Barry O’Farrell. Of these three, the Prime Minister’s focus was perhaps the most pragmatic, rather than procedural or structural, in tone. Writing in the *Australian Financial Review*, she was clearly concerned by the fact that her predecessor had ‘frantically overworked’ the institution and so argued for a ‘more rational and streamlined focus’ and ‘a clear and manageable reform agenda’. In terms of our focus on public law misgivings

³ Terry Moran, ‘The Challenges of Federalism’ (Speech delivered to the Eidos Institute, Brisbane, 8 June 2011).

about the way in which COAG has tended to operate, the Prime Minister's stance that COAG needed to leave more control with the various Ministerial Councils rather than overseeing and resolving every single issue itself was an important one. COAG has played its part in the creep towards a presidential style of Australian politics by underscoring the focus on first ministers. Gillard's call for greater devolution, even if just amongst other actors in the executive branch at the Commonwealth and States level, is a welcome reassertion of ministerial government.⁴

Paul McClintock and Barry O'Farrell both adopted a more principled approach to the problems underlying COAG's performance.⁵ The former asserted that COAG and the federal cabinet were the 'two most important executive governance structures' in Australian public life, and then in the same breath highlighted the Council's lack of a constitutional basis. Clearly this deficiency has not impeded Cabinet, but then it has its origins in our unwritten constitutional practice. COAG, by contrast, has very rapidly, 'turned itself from an occasional summit meeting to a key governance institution'. McClintock was not, to be clear, advocating constitutional incorporation for COAG, but he did warn that 'the implications of this change [towards being a governance body] now need to be understood and

⁴ Julia Gillard, 'Four Themes for a Better COAG', *The Australian Financial Review*, 8 February 2011.

⁵ Paul McClintock, 'Renewing the Mandate: COAG and Its Reform Agenda in 2011' (Speech delivered at the Committee for Economic Development of Australia, Sydney, 9 February 2011); Barry O'Farrell, 'Injecting Competition and Collaboration into COAG' (Speech delivered at the National Press Club, Canberra, 9 February 2011).

addressed'. As to what that might involve, he and O'Farrell were largely on the same page in focussing on the regularities of the body's operation.

The uncertain legal status of COAG is most clearly reflected in the fact that, almost twenty years after its formation, its basic structure and processes remain undefined and largely subject to Prime Ministerial discretion. In practice, this means that COAG relies substantially on inter-jurisdictional goodwill for its effectiveness, and remains vulnerable to being ignored altogether by the Commonwealth. It is the Prime Minister who determines the frequency and timing of meetings. During Kevin Rudd's tenure, COAG met roughly four times a year, reflecting his commitment to the COAG process. For most of its existence, however, meetings have been far less frequent. From 1992-2007, COAG met, on average, once a year, and many of these meetings lasted only a few hours. While Rudd convened a COAG meeting within a month of coming to power, his successor did not do so until six months after securing minority government after the 2010 election. And, just to highlight the fragile position of this 'key governance institution', in the campaign that preceded that election the Opposition Leader Tony Abbott had announced that he favoured reducing the number of annual meetings from four to two.

The Commonwealth's control of the timing of meetings is also significant, because this allows it to consult the States at a time that suits its own policy timetable, irrespective of the interests of the States. This was particularly apparent with Rudd's selective and staggered release of policy details to the States on his complex health and hospital reforms over the weeks before he

sought a firm commitment from them at COAG. More recently, the postponement of COAG by Prime Minister Gillard in July until later this week was attacked by some States as motivated by avoiding discussing the carbon tax with them.

This highlights another feature of COAG - the Prime Minister's control of the meeting agenda. Although input from the States on possible agenda items is invited, the PM alone settles the final agenda for each meeting and need do no more than consider suggestions from the States. In practice, this means that COAG invariably addresses matters of interest to the national government. While this is perhaps inevitable given COAG's focus on policy of national concern, it is surely regrettable that sometimes the Commonwealth will only finalise the COAG agenda just days before the meeting, thus giving the States minimal time to prepare. There may also be something to be said in favour of loosening the extent of the Commonwealth's control over COAG through the occupancy by the Prime Minister of the chairpersons' role for all meetings, and the location of the Council's secretariat within the Department of the Prime Minister and Cabinet.

All these ideas about formalising COAG as a truly co-operative federal institution are ones that might be expected to get a warm reception from State governments. Just by way of example, in his February speech, Barry O'Farrell called either for regular scheduled meetings or the right for a majority of States to convene a meeting, as well as add agenda items. But interestingly, since then, support for a 'stronger institutional structure' for COAG has been forthcoming from the Commonwealth political arena in the recommendations of a bipartisan

Senate Select Committee report titled *Reform of the Australian Federation*.⁶ The report came down on 30 June and doubtless many of you are very familiar with its contents. It certainly makes for interesting reading and does not balk at making some quite achievable and useful recommendations with the potential to enhance Australian federalism.

In Rec 5 the Committee said COAG should 'be strengthened through institutionalisation to ensure its effective continuing operation and ability to promote improved mechanisms for managing federal state relations' adding that 'principles of transparency and joint ownership should be central to this institutionalisation'. In this spirit, Rec 6 was that: 'agendas for COAG meetings be developed jointly by Commonwealth and State and Territory governments, that they be made publicly available before meetings, and that the timing, chairing and hosting of COAG meetings similarly be shared.'

Understanding why a committee of Commonwealth parliamentarians would add their voices to calls such as this becomes a lot clearer when one examines the rest of the Committee's final report – and indeed doing so takes us much deeper into the constitutional issues of parliamentary oversight and accountability. Essentially, it is on these matters that the Commonwealth legislature finds itself in good company with the States, champing against the domination of COAG by the Commonwealth executive. Although united against this common foe, the

⁶ Senate Select Committee on the Reform of the Australian Federation, *Australia's Federation: An Agenda For Reform*, Parliament of Australia, June 2011.

emphasis is, however, slightly different depending on which perspective is adopted. The States don't like the coercive federalism all too frequently practiced by the Commonwealth under the guise of 'co-operation' at COAG, while legislatures at both levels of the federation focus more on the body as a vehicle for the burgeoning of 'executive federalism' which drastically diminishes their role.

In 2006, Roger Wilkins remarked that COAG 'sidesteps, more or less completely, any sort of democratic scrutiny'.⁷ Misgivings about COAG's 'democratic deficit' stem, in part, from the fact that it permits members of the executive to commit their governments to positions which may or may not have been endorsed by parliament. While many such commitments will require legislative implementation and so will eventually come before the respective parliaments, this form of accountability is frequently too limited and belated to have any real effect. The first opportunity for parliamentary scrutiny is most likely not until an intergovernmental agreement is presented to parliament in the form of template legislation that has already been agreed to by heads of government. In respect of the oversight able to be performed by the Commonwealth Parliament, even more constraining is when that legislation is the product of a text-based referral of power from the States under s 51(xxxvii) of the Constitution. A quite stunning example of these problems was offered in March of this year when the Senate's Committee on Education, Employment and Workplace Relations found itself effectively unable to recommend changes to bills establishing a National

⁷ Roger Wilkins, 'A New Era in Commonwealth-State Relations?' (April 2006) *Public Administration Today* 8, 12.

Vocational Education and Training Regulator since any Commonwealth amendment of the Bill, leading to variance from the State referral, would put its validity in jeopardy. The Committee's umbrage at this restriction on its capacity to provide meaningful and constructive review of the proposed law was compounded by the fact that the Commonwealth was relying upon referring legislation passed by only one state (NSW) and in the absence of a concluded IGA. Two states in particular, Victoria and Western Australia mounted strong opposition to the Commonwealth bill, and yet the purportedly 'national' scheme has been created regardless. Of this particular episode the recent Select Committee report surmised 'the role of Parliament was reduced to exercising the powers of veto'.

All Parliaments, of course, retain the capacity to amend or reject legislation that is part of a co-operative scheme but as Gareth Griffith has noted, 'it is fair to say that for practical purposes their powers are constrained'.⁸ State Opposition parties, for example, might feel hamstrung in their ability to criticise a COAG agreement where a given agreement has received the endorsement of another jurisdiction in which that same party holds government. In any event, an Opposition's critique will necessarily be diluted by the fact that responsibility for a COAG decision cannot be sheeted home to any one government, but instead resides with the composite body itself.

⁸ Gareth Griffith, 'Managerial Federalism – COAG and the States', (Briefing Paper No 10/09, Parliamentary Library Research Service, Parliament of NSW, 2009) 17.

These latter considerations are ones that are not easily remedied and may just be inevitable aspects to intergovernmental co-operation. However, the Select Committee was clearly of the view that parliaments should at least be apprised of developments in this regard much earlier than they have been to date. To that end, its pivotal recommendation was the establishment of a new Joint Standing Committee to 'assume a significant and integral role in helping to manage Australia's modern federation' through a range of oversight responsibilities, including COAG. In other specific recommendations, the Committee called for 'proposed intergovernmental agreements between the Commonwealth and state and territory governments to be referred for consideration and review to this Joint Standing Committee'. Additionally, in the wake of the Vocational Training Bills incident, Recommendation 3 was for:

'exposure drafts of legislation intended as the foundation for a referral of power to the Commonwealth be made available for examination by parliamentary committees, including, as appropriate, the [new] Joint Standing Committee and the Senate Standing Committee for the Scrutiny of Bills, prior to their adoption.'

These steps would also help to address the deeper reaches of the 'democratic deficit' that exists by virtue of COAG's capacity to significantly avoid the scrutiny of both the public and non-government organisations. The sidelining of parliament diminishes it as an access point for both citizens and organisations to contribute to the policy process. Additionally, the sheer complexity of COAG, and intergovernmental relations in general, diminishes the ability of ordinary members of the public to hold their governments to account. It is not simply that unhappy

citizens, when faced with the composite nature of COAG, may be uncertain as to where to direct their criticism. It is also that the role and operation of COAG is so complex that it is difficult for ordinary citizens to understand, and governments have done little to explain it – a point Paul McClintock made in February when he criticised Commonwealth and State Ministers for not doing enough to ‘promote the new agenda and the new governance approach’. This situation is exacerbated by the fact that COAG’s operation is rarely transparent: for instance, its deliberations occur behind closed doors, and its decisions are announced in a press release or communiqué with few details – a point also seized upon by the Senate Committee which called for improvements in this regard.

How to Better Secure an Enhanced COAG

1. *Sub-constitutional/IGA*

I have spoken so far about the emerging consensus that COAG is in need of a variety of reforms in order not simply to operate more effectively as a truly co-operative federal institution, but also simply as an instrument of governance that is consistent with Westminster constitutionalism. It is apparent that much of that reform is achievable within the intergovernmental framework, without resorting to formal constitutional change. While not able to imbue it with the security of constitutional status, a special intergovernmental agreement (IGA) on COAG is one possible course and has been strongly favoured by the States and Territories through CAF. This might be an end in itself or, alternatively, an incremental step on the way to constitutional change in the future.

In addition to obvious operational matters such as the timing and agendas for meetings, some of the concerns regarding accountability and transparency might also be addressed by intergovernmental agreement, albeit requiring legislative implementation in each jurisdiction. Such an agreement might set down guidelines for enhancing the degree of State parliamentary scrutiny of all other IGAs made at COAG. Depending on how prescriptive the parties wanted to be, the underlying Agreement could require merely that IGAs be tabled in those parliaments, or it might also necessitate that all COAG decisions be considered by parliamentary committees as a matter of course. Dedicated parliamentary committees might be established, as the Select Committee has recommended in respect of the Commonwealth parliament.

While such changes by intergovernmental agreement would amount to a substantial improvement this is only so far as parties honour the enshrined obligations and arrangements. COAG's legal status would remain tenuous. Protected only by agreement, it would still be vulnerable to being ignored. An IGA, moreover, could not deliver the strong democratic legitimacy that comes with constitutional entrenchment. It would constitute an arrangement negotiated between leaders of jurisdictions, but would lack the requisite connection with citizens that is associated with responsible government and that an influential body like COAG arguably requires.

Nonetheless, pursuing these sorts of reforms through intergovernmental agreement might be seen as an interim step towards stronger, constitutional

change. We turn now to consider the various merits and risks that might flow from such an approach.

2 *Constitutional recognition of COAG*

Constitutional recognition could take one of two forms: first, the addition of a provision that merely recognises the existence of COAG as an institution of federal governance; and secondly, the insertion of a provision that, in addition to recognising COAG's existence, also specifies its core governance arrangements. While both approaches would deliver significant benefits, their effectiveness in addressing COAG's shortcomings is uncertain, and they would entail not inconsiderable risks. In light of these reasons, upon which I will expand, our view is that it is desirable to forego constitutional change and provide recognition to COAG via statutory means instead.

First though, the positive case: one can readily identify several benefits to giving COAG a firm constitutional foundation. First, it would be a more permanent legal footing than could be achieved otherwise, and would decisively remove the uncertainty that currently attaches to its legal status. It would no longer be vulnerable to dissolution but would instead exist as a permanent fixture of governance within the Australian federation. Second, the conferral of constitutional status would enhance COAG's standing. Appearance in the text of the Constitution would confirm it as an organ of central importance in the federation. Entrenchment would not only secure permanence, but would also signal COAG's relevance to good governance in Australia and possibly improve

its status as an independent body. A COAG that enjoyed constitutional status could more successfully lay claim to being neither a creature of the Commonwealth nor the States; certainly, its existence would not be vulnerable to unilateral action by either sphere of government. Thirdly, the successful referendum process required to bring about constitutional recognition would secure COAG a popular legitimacy that it presently lacks, and enhance its democratic credentials considerably. Fourthly, and following on from the last point, the entrenchment of COAG in the Constitution would open up possibilities for improved citizen knowledge of it. Lastly, the entrenchment of COAG would arguably bring Australia's constitutional arrangements into alignment with both the practice of intergovernmental relations in recent decades, as well as the institutional realities of a federal system defined by a concurrent sharing of responsibilities.

It would also be possible to take the additional step of recognising COAG's governance arrangements in the Constitution. This might be bare recognition, providing that those arrangements are to be specified in legislation, thus leaving the details to Parliament. Or, alternatively, an argument can be made for entrenching some of COAG's core rules and procedures, such as the composition of its membership, and its basic rules of decision-making. While such matters have remained stable over COAG's existence, entrenchment would protect them against future alteration arising from political expediency. Beyond these basic matters, it would also be possible to articulate procedures aimed at improving the democratic accountability of the body. The constitutional text could

specify, for example, that all COAG decisions and agreements be reported to all interested parliaments or that they be brought to the attention of a specially constituted parliamentary committees.

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

A second risk associated with entrenching COAG is that it would enhance the power of the executive, with uncertain effects. Given the importance of responsible government in the Australian constitutional system, great caution would need to be taken in conferring constitutional status on such an executive-based body. Without the incorporation of specific procedures enabling

parliamentary oversight, there would be potential for constitutional recognition of COAG to enhance the already considerable position of the executive in Australia's system of government. While I mooted above the possibility of inserting into the Constitution, procedures aimed at improving COAG's democratic accountability, it is important to recognise that entrenchment would seem to carry both risk and promise when it comes to preserving responsible government.

A third danger lies in the fact that constitutional recognition may not, ultimately, be effective in addressing COAG's weaknesses. Alongside its dubious prospects for enhancing accountability, entrenchment may not, in a practical sense, remedy COAG's tendency towards centralism nor its essential reliance on inter-jurisdictional goodwill. Even the permanence that it brings may have little impact on its day-to-day operation. On this point, we need look no further than the example of the Inter-State Commission. Section 101 of the Australian Constitution states that 'there shall be an Inter-State Commission' to serve as an impartial body with respect to matters of trade and commerce within the federation. Section 101 also provides that the Commission is to perform both adjudicative and administrative functions, and that the specific nature of these functions was to be specified by Parliament. On paper, therefore, the Inter-State Commission was set to play a major role in the federation; however, just two years after its creation in 1913, the High Court ruled that the Commission's adjudicative functions amounted to an invalid exercise of judicial power. With the exception of a brief revival in the 1980s, when it served as an investigatory body

that advised the federal government on interstate transport, the Commission has otherwise remained dormant.

The fate of the Inter-State Commission serves as a reminder that constitutional status does not necessarily translate into relevance or effectiveness. Putting aside the prospect of an unexpected High Court intervention, the story of the Commission reminds us that the practical operation and influence of an entrenched institution depends on a range of factors that have nothing to do with the constitutional text. These include its level of funding, the extent of secretariat support, and also a perception by governments as to its utility. Practical factors like these played their part in the fate of the 'second coming' of the Commission, when it operated as a purely investigatory body.

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

3 *Statutory recognition – the middle way*

In light of the risks involved in constitutional entrenchment, statutory recognition of COAG presents itself as a viable third possibility somewhere between constitutional approach and the rather weaker recognition achievable by intergovernmental agreement alone. Avoiding the constitutional avenue altogether, complementary legislation could be passed by the Commonwealth,

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

In published work elsewhere, we have also argued that statutory reform of this type would be usefully supplemented by constitutional amendments that better promote cooperation between the Commonwealth and the States. While this approach would not directly secure COAG's *constitutional* footing, it would certainly enhance its position by establishing a more amenable framework for its pursuit of cooperative schemes.

Two possible alterations to the Constitution present themselves. The first would involve amending the Constitution to overcome the difficulties presented by the High Court's decisions in *Re Wakim; Ex parte McNally* and *R v Hughes*. These

decisions prevent the States from conferring, respectively, jurisdiction on federal courts and executive power on federal officers, such as the Commonwealth Director of Public Prosecutions. They virtually guarantee that cooperative legislative schemes, where unsupported by a referral of powers, will eventually splinter with respect to judicial and executive enforcement.

The second, and broader step, would be to provide constitutional recognition of the principle of cooperative federalism through explicit reference to it in the constitutional text. The purpose of this amendment would be to establish Commonwealth-State cooperation as a positive objective of the Constitution, thus giving the High Court the ability to draw on it as a decisive interpretive principle where appropriate – ensuring that ‘cooperative federalism’ is not dismissed in future as a mere ‘political slogan’. There are precedents for this in other Constitution, for example that of South Africa.

Unlike the constitutional changes mooted earlier, which risk constraining COAG’s freedom to act, these amendments would likely only enhance COAG’s function within the federation. The improvements would be indirect and less far-reaching, but would be significant nonetheless.

Conclusion

The rapid development of COAG is an example that political entities may evolve to a point where the prospect of constitutional convergence is something that requires careful consideration. The more significant the role played by

intergovernmental institutions, the less satisfactory it is that they enjoy only a precarious legal status. A marked disparity between the way in which power and responsibility is formally divided across the federation and the reality of intergovernmental practice is obviously undesirable. More worrying still is the diminished scope of parliamentary oversight and accountability to the people through their representatives to which informal executive-based arrangements may give rise. As we sought to show, these underlying concerns are starting to make themselves felt in the public statements by key players on the future operation and success of COAG, even though they may be more typically expressed as concerns about the ambition of its agenda after the 2008 IGA or the Commonwealth dominance of its processes.

Clearly, attending to the status and operation of COAG itself is becoming an important priority. But our consideration of the means available to do this, suggest that it may be less important to attempt entrenchment of any particular institutional structure than it is to better articulate in the Constitution the federal principles that underpin and sustain such bodies. Not only does the latter course preserve flexibility and ensure the dynamism of intergovernmental mechanisms, but it also has the benefit of popular democratic endorsement of specified federal values which may be used in judicial interpretation of the Constitution in determining the powers of respective governments and resolving disputes between them.