

THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF
LAW

7 April 2011

Committee Secretary
Joint Committee of Public Accounts and Audit
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Inquiry into National Funding Agreements

Thank you for the invitation to make a submission to the Committee's inquiry into National Funding Agreements. We are making this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

Our submission focuses on the fourth issue listed under the Committee's terms of reference, namely the adequacy of parliamentary scrutiny of funding agreements. In the first part of our submission we argue that existing arrangements for parliamentary scrutiny of national funding agreements are inadequate. In the second part, we suggest three reform proposals that would effectively address these shortcomings:

1. That a complete register of funding agreements be publicly available;
2. That all funding agreements be tabled in parliaments of affected jurisdictions; and
3. Reference of funding agreements to joint parliamentary committees for review and report.

However, more broadly, we welcome the Committee's decision to inquire into the other listed matters. In particular, we note concerns expressed by others that the proliferation of the more prescriptive National Partnership Payments has increased Commonwealth influence at the expense of State flexibility, contrary to the spirit of the National Agreements.¹ We also draw the Committee's attention to the view that enhancing transparency in federal financial relations requires greater clarity in the

¹ Geoff Anderson, 'Whither the Federation? Federalism under Rudd' (2010) 5(1) *Public Policy* 1, 13-14; Anne Twomey, Submission to the Select Committee on the Reform of the Australian Federation (29 August 2010), 3.

roles and responsibilities of different levels of government, and the relationships between them.²

Inadequate parliamentary scrutiny of funding agreements

As noted in the Inquiry's terms of reference, funding agreements – like all intergovernmental agreements (IGAs) – are typically negotiated at an executive-to-executive level, and usually through the Council of Australian Governments (COAG). The advantage of this approach is that it enables negotiations to proceed expeditiously. The downside, however, is that it permits members of the executive to commit their respective governments to positions that may not have received parliamentary endorsement. Inevitably, the executive-driven approach to making funding agreements tends to sideline the role of parliaments and undermines democratic accountability. The resulting 'democratic deficit' is not restricted to matters of funding, but is instead part of broader accountability problems that exist with respect to intergovernmental relations in Australia. These broader concerns extend to the operation of COAG, and the processes for the making of IGAs.

Generally, parliaments will have little or no scrutiny role with respect to funding agreements negotiated at the executive level. Where a funding agreement does not require legislative implementation, it will not be subject to any parliamentary scrutiny. Even where legislative implementation is necessary, parliamentary scrutiny will often occur too late in the process to have any real effect, in large part because the details of the agreement are presented to legislatures as a *fait accompli*.

The scrutiny role of parliaments is also undermined by the lack of transparency that is characteristic of intergovernmental relations generally, and COAG in particular. For example, COAG's deliberations occur behind closed doors, and its decisions are announced in press releases or communiqués, which give scant details of the decision-making process. Little effort is made to provide parliaments or the public with detailed information about meeting outcomes or the reasoning behind them. Given the inter-jurisdictional nature of COAG, these practices cannot be adequately defended through attempts to analogise it with Westminster cabinet government.

We welcome the contribution that the COAG Reform Council has made in recent years with respect to enhancing the public accountability of governments for their performance against agreed objectives in funding agreements. However, the Council is not designed to monitor the *democratic* accountability of the respective governments for the commitments they undertake and with which we are concerned. Questions of democratic accountability stand separate from issues of government performance, and are instead grounded in the capacity of the system to provide for parliamentary scrutiny.

The sidelining of parliaments in the making of funding agreements is highly problematic and warrants serious attention. By weakening the accountability of the executive to the legislature, it further diminishes the practice of responsible government which is one of the bedrock principles of our Westminster system of parliamentary democracy. Marginalising parliaments also carries the risk that valuable perspectives will not be heard, and that potential improvements will therefore not be fed into the process. It also fosters a situation in which the negotiation of funding

² See Neil Warren, *Fiscal Federalism Transparency and State Leadership on Reform*, paper presented for the 4th Annual ANZSOG Public Leadership Workshop (Hobart, 25-26 November 2010).

agreements becomes closed and unaccountable, potentially alienating citizens from the decision-making process and undermining public trust in governments.

Improving parliamentary scrutiny of funding agreements

We suggest three reforms for improving the existing arrangements for parliamentary scrutiny of funding agreements.

1. That a complete register of funding agreements be publicly available

The publication of a complete register of funding agreements would be an important step towards improving transparency and accountability. Given that many funding agreements are already available online, it would mostly be a matter of consolidating this material in the one place, and updating it as necessary. All such agreements could be uploaded as a specific database on the AustLII (Australian Legal Information Institute) website, similar to the ‘Australian Treaties Library’ currently hosted on that site with the co-operation of the Commonwealth Department of Foreign Affairs and Trade.

2. That all funding agreements be tabled in the parliaments of affected jurisdictions

Funding agreements should be tabled in the parliaments of all affected jurisdictions. This would go some way to remedying the current situation in which far-reaching funding negotiations can take place without any parliamentary oversight. It would also ensure that members of parliament in each jurisdiction receive official notification each time a funding agreement has been negotiated at the executive level.

3. Reference of funding agreements to joint parliamentary committees for review and report

More substantively, individual legislatures should institute the practice of referring funding agreements to joint parliamentary committees for review and report. Ideally, this should take place *before* first ministers meet at COAG with the intention of reaching a final agreement. Draft agreements could be made available in advance of meetings, giving parliamentary committees in each jurisdiction sufficient time to scrutinise them and, where appropriate, recommend amendments. Such committees might also accept public submissions as part of their deliberative processes.

It might be objected that the involvement of parliamentary committees will slow the process down, thus undermining the efficiency of executive-to-executive negotiations. However, this need not be the case if draft agreements are made available to parliaments in advance of COAG meetings. If anything the ability of first ministers to reach firm and final decisions at those gatherings would be enhanced by a more thorough and inclusive consideration of the issues at the State level in advance. In any case, we would challenge the idea that considerations of efficiency should always trump matters of democratic accountability – instead, a balance must be struck between the two. Giving parliamentary committees a scrutiny role with respect to funding agreements would help provide a better balance between these two factors: it would enhance accountability, while at the same time preserving the capacity of intergovernmental processes to provide expeditious and effective outcomes.

We note that our three reform proposals are in line with the recommendations of previous parliamentary inquiries. The 2006 Inquiry into the Harmonisation of Legal

Systems, undertaken by the House Standing Committee on Legal and Constitutional Affairs recommended that:

Recommendation 26

The Committee recommends that the Australian Government raise, at the Council of Australian Governments or other appropriate forum:

- The circulation of draft intergovernmental agreements for public scrutiny and comment;
- The parliamentary scrutiny of draft intergovernmental agreements; and
- The augmentation of the COAG register of intergovernmental agreements so as to include all agreements requiring legislative implementation

With a view to the implementation of these reforms throughout the jurisdictions.

In 2009, the Committee reiterated its concerns about COAG's democratic accountability in its Inquiry into Constitutional Reform. It recommended that:

Recommendation 1

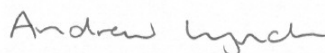
The Committee recommends that the Australian Government introduce the requirement for intergovernmental agreements to be automatically referred to a parliamentary committee for scrutiny and report to the Parliament.

In essence, the proposals we make above simply echo those which the parliamentary committee system has already identified as sound enhancements to the conduct of intergovernmental relations in the federal system more generally.

Yours sincerely,



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Director, Federalism Project



Dr Andrew Lynch
Centre Director



Mr Robert Woods
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