

# COMMON CAUSE: STRENGTHENING AUSTRALIA'S COOPERATIVE FEDERALISM

FINAL REPORT TO THE COUNCIL FOR THE AUSTRALIAN FEDERATION  
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PROFESSOR JOHN WANNA  
AUSTRALIA AND NEW ZEALAND SCHOOL OF GOVERNMENT  
PROFESSOR JOHN PHILLIMORE, PROFESSOR ALAN FENNA WITH DR JEFFREY HARWOOD  
JOHN CURTIN INSTITUTE OF PUBLIC POLICY, CURTIN UNIVERSITY OF TECHNOLOGY



Council for the Australian  
Federation

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# EXECUTIVE SUMMARY

All Australian governments – federal, state and local – share a responsibility to make our federal system work effectively for the benefit of all Australians.

Over the coming decades, Australia will face significant social, economic and environmental challenges. Meeting these challenges will require collaboration between governments to deliver national solutions that are sustainable over the long term. It will also require agreement on a substantive national reform agenda aimed at deepening the economic benefits gained from the market-inspired and microeconomic reforms of the 1980s and 1990s, extending these reforms to include a focus on human capital and adopting new reforms in critical environmental areas such as water and climate change.

Over the last 18 months, there has been a resurgence of interest in taking collaborative national action across a range of policy fronts. Australian governments at all levels have committed to work together to achieve shared goals and improved outcomes. There appears to be a shared commitment to move away from the negative 'blame game' politics that has hampered good policymaking in the past. In place of rivalry, there appears to be a growing awareness that real policy outcomes are enhanced most effectively when governments work together to achieve common objectives.

At the 20 December 2007 Council of Australian Governments (COAG) meeting, all Australian governments committed to an ambitious and wide-ranging national reform agenda. One of the most important decisions at the December 2007 COAG meeting was the agreement to reform Commonwealth-State funding arrangements.

The new Intergovernmental Agreement on Federal Financial Relations, agreed in November 2008, shifts the focus of the Commonwealth-State funding relationship from inputs and processes to the achievement of mutually agreed outcomes. The framework established by the new agreement allows States and Territories greater flexibility in how they deliver services and manage their budgets. The framework also provides incentives for States and Territories to invest in reform, thereby encouraging innovation and healthy policy competition. The result should be improved government performance and better services for the Australian community.



The collaboration taking place through COAG demonstrates the importance of the States and Territories in delivering high quality public services across Australia and shows great promise for the future. This is complemented by State and Territory action through the Council for the Australian Federation (CAF). Through CAF, State and Territory governments have initiated significant reform and championed new, positive thinking about the prospects for cooperative federalism in Australia.

In April 2007, CAF released *Australia's Federal Future* by Anne Twomey and Glen Withers. This paper dispelled many common misconceptions about federalism. The authors drew on international comparisons and political and economic analysis to identify a range of benefits that flow from federal systems, including:

- checks and balances on power in order to protect the individual and social groups;
- more competitive, efficient, innovative and responsive governments; and
- increased economic growth and higher GDP per capita.

Twomey and Withers concluded that the essential debate should not be about whether federalism works, but how we can make it work better.

The current receptiveness to cooperative federalism provides Australia's governments with the chance to take action to improve the functioning of the Australian Federation. *Common cause: Strengthening Australia's cooperative federalism* takes this window of opportunity to build on the work of Twomey and Withers and propose a framework for practical reform that should make federalism work more effectively.

Productive intergovernmental cooperation is central to improved national policy performance. Accordingly, the options for reform outlined in this paper are directed at enhancing the functioning of the federation with a view to improving outcomes for all Australians. These options provide a broad platform for taking further action to improve the operations and effectiveness of the Australian Federation.

This paper argues that effective federalism requires an architecture of cooperation consisting of three interrelated components:

1. Principles to guide cooperative federalism
2. Supporting legal and institutional arrangements
3. Appropriate cultural practices and attitudes.

The relationship between these three elements and the overall objective of the paper is summarised in the accompanying diagram.

The three components of cooperative federalism examined in this paper point to several areas that could be the focus of change and where further reforms have the potential to achieve significant improvements in the effectiveness of the Australian Federation. Options for reform include:

- development of a strategic forward agenda by CAF to facilitate horizontal cooperation, share policy innovation and identify opportunities for harmonisation;
- formalisation of COAG and its operation through an intergovernmental agreement that articulates principles to guide cooperation;
- clarification of the relationship between COAG and Ministerial Councils, with the latter undertaking greater community engagement;
- establishment of innovative and purpose-built institutions where reform needs require them;
- ongoing review of federal financial relations.

- Consideration of constitutional reform to:
  - facilitate cooperative legislative schemes;
  - provide a role for the States and Territories in appointing High Court judges; and
  - give States and Territories the opportunity to initiate referenda
- Development of cultural practices that support the best of federalism.

A new era of cooperative federalism has begun in Australia. This era offers an ideal and rare opportunity to make lasting improvements in the functioning of our federal system in a way that delivers greater efficiencies and better services. Australian governments should seize the moment and take advantage of this mood for change, uniting in the common cause of building a modern cooperative federation that can deliver effective national responses to national challenges and generate substantial benefits for all Australians.

All Australian governments – federal, state and local – share a responsibility to make our federal system work effectively for the benefit of all Australians.

COMPONENTS OF COOPERATIVE FEDERALISM			
	PRINCIPLES	LEGAL AND INSTITUTIONAL ARRANGEMENTS	CULTURAL PRACTICES
KEY COMMITMENTS	<p>A commitment to supporting the best practice principles of:</p> <ul style="list-style-type: none"> <li>• Subsidiarity – proximity of government to the community</li> <li>• Alignment of responsibilities – the allocation of roles and responsibilities to the level of government with the corresponding geographical scale</li> <li>• Cooperation – engagement and cooperation between the levels of government, including the comity principle</li> </ul>	<p>A commitment to developing new inter-jurisdictional institutions and an improved cooperative federalism architecture:</p> <ul style="list-style-type: none"> <li>• Legal mechanisms to facilitate cooperation – including referral of powers, ‘mirror’ legislation and complementary legislation to harmonise laws</li> <li>• Institutional and administrative arrangements to facilitate horizontal cooperation (between States and Territories) and vertical cooperation (between States, Territories and the Commonwealth)</li> </ul>	<p>A commitment to improving processes and realigning organisational cultures to improve cooperative federalism:</p> <ul style="list-style-type: none"> <li>• Removing barriers to cooperation – including allegiances, loyalties and ‘silo’ mentalities of State and Territory-based jurisdictions, agencies and professions</li> <li>• Responding nationally – ‘joining up’ systems and programs to tackle complex and cross-sectoral problems, improve integrated service delivery and set common goals and objectives</li> </ul>

	PRINCIPLES	LEGAL AND INSTITUTIONAL ARRANGEMENTS	CULTURAL PRACTICES
AREAS FOR REFORM		<ul style="list-style-type: none"> <li>• CAF should develop a forward agenda to facilitate horizontal cooperation, including identifying opportunities to harmonise laws and to share policy innovation and best practice initiatives</li> <li>• COAG and its operations should be formalised through an Intergovernmental Agreement</li> <li>• The relationship between COAG and Ministerial Councils should be clarified, with the latter undertaking greater community engagement</li> <li>• Governments should give consideration to establishing innovative, purpose-built bodies where required to drive reforms</li> <li>• The five year review of the IGA on Federal Financial Relations should consider how to provide better and more transparent resource deployment within the Federation</li> <li>• The Commonwealth should work with the States and Territories to consider and propose constitutional reform to promote cooperative federalism, including facilitating cooperative legislative schemes, providing a role for the States and Territories in appointing High Court judges and giving States and Territories the opportunity to initiate referenda</li> </ul>	<ul style="list-style-type: none"> <li>• State and Territory governments should explore various ways to develop and sustain cooperative and collaborative cultural practices</li> <li>• CAF should consider undertaking a project to identify current successful collaborative cultural practices and to develop best-practice models and/or guidelines for such practices</li> </ul>

#### BENEFITS OF REFORM

Checking the concentration of power at any level of government

Providing greater choice and flexibility for citizens, provide greater diversity of policy provisions and allow greater customisation of policy to suit local needs

Allowing greater scope for innovation in implementation strategies and delivery systems

Encouraging competition between jurisdictions in the provision of quality services and policy provisions

Enhancing creativity and innovation among governments and policy delivery networks.

# I. A NEW ERA BEGINS

A promising new era of cooperative federalism has begun in Australia. Governments at all levels have committed to work together to achieve shared goals and improved outcomes. This mood for change and climate of cooperation offers an excellent opportunity to make lasting improvements in the functioning of our federal system in a way that delivers greater efficiencies and better services. Australian governments should seize this moment.

## I.1 A mood for change

After its election in 2007, the new Commonwealth government committed to renew federalism by working cooperatively and collaboratively with all Australian jurisdictions. For their part, the States and Territories have committed to working in partnership with the Commonwealth and with each other as equal jurisdictions. Importantly, this new constellation of political interests recognises the importance of intergovernmental cooperation in delivering quality public services across this vast country.

Across Australia, there is widespread recognition of the need to improve the way our federal system functions. This recognition comes not only from governments but from business groups, the community sector and the wider community. They, and others, rightly insist that Australia needs to harness the benefits of the federal system more effectively – not for its own sake, but to ensure the country's future prosperity and well-being.

There appears to be a shared commitment to move away from the negative 'buck passing' of old, and the 'blame game' politics that bedevilled policymaking. In recent times, the preference is for adopting approaches that will improve outcomes for all Australians. In place of rivalry, there appears to be a growing awareness that real policy outcomes are enhanced most effectively when governments work together to achieve common objectives.

In short, there is a mood for change and a desire to make federalism work better.

## BACKGROUND TO THIS PAPER

The Council for the Australian Federation was established in 2006 to support and enhance Australia's federal system by providing an intergovernmental forum for State and Territory leaders in Australia. Each State and Territory Premier or Chief Minister is a member of CAF and the current Chair is the Queensland Premier, Anna Bligh.

The Council commissioned this paper to identify areas of the Australian Federation that are ripe for practical reform in the current context. This report builds on the recommendations of the CAF Federalist Paper, *Australia's Federal Future (2007)* by Anne Twomey and Glenn Withers. In particular, it addresses the paper's recommendation that "improvements [be] made in the arrangements and mechanisms for inter-governmental cooperation".

*Australia's Federal Future* challenged many misconceptions about federalism, providing a much-needed corrective on the importance of federalism to Australia's future.

*Common Cause* aims to further this debate by identifying areas where institutional and cultural reforms could be undertaken to give effect to some of the findings of Twomey and Withers.

The report has been developed based on a mixture of qualitative document analysis; interviews with State and Territory officials regarding their experiences with harmonisation and cooperation; and analysis of relevant initiatives and arrangements of federal systems internationally.

## I.2 An ambitious new agenda

Australia's large land-mass, remote locations, disparate regional areas and localised preferences mean that a federal system of government is suited to the Australian context. However, recent decisions by the Council for the Australian Federation (CAF) and the Council of Australian Governments (COAG) have highlighted the need for further reform to the architecture of our federal system. Both these bodies have committed to delivering an ambitious cooperative federalism agenda

For example, cooperation between the States and Territories was evident in their establishment of the National Emissions Trading Taskforce in 2004, which was influential in shaping

the national debate and subsequent national policy initiatives to reduce greenhouse gas emissions. Similarly, through the formation of CAF, the States and Territories have embarked on significant initiatives to deliver improved community outcomes through harmonisation and 'horizontal' cooperation in important areas such as the national school curriculum. These and other initiatives are discussed in more detail in Chapter 3.

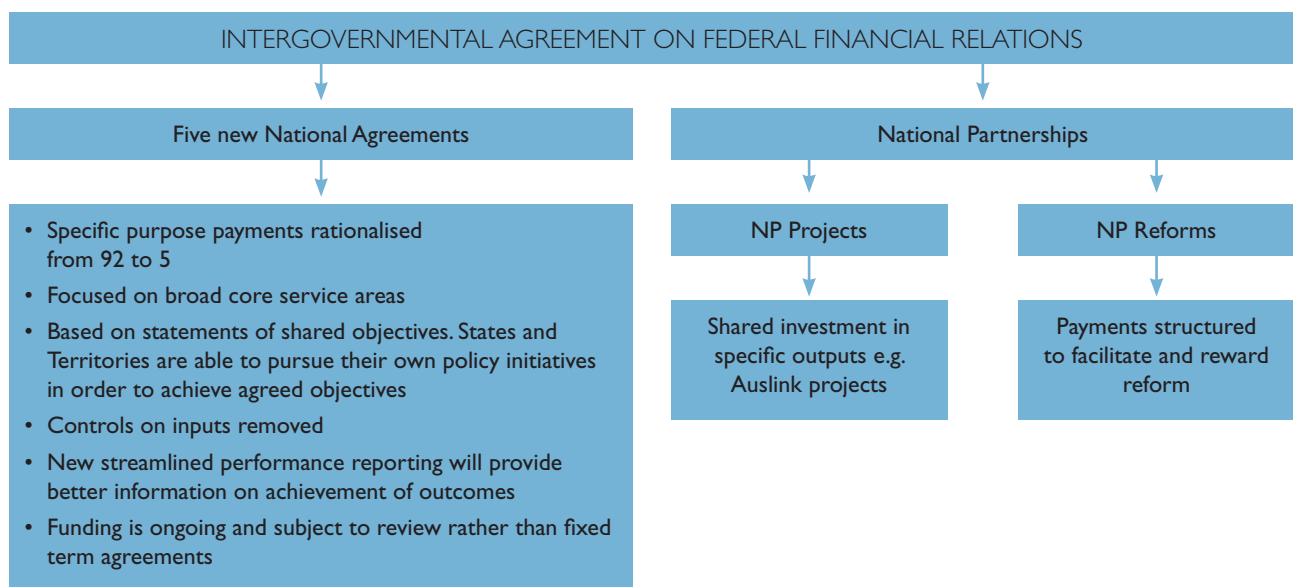
In 2006, COAG's agreement to the National Reform Agenda (NRA) explicitly recognised the need for a new model of cooperation to advance the urgent reforms required to increase national productivity and workforce participation. The NRA centered on competition, continuing the NCP reforms of the 1990s; reform of regulation to reduce unnecessary burdens on business; and reforms related to human capital, improving health, education and workforce participation. This culminated in the 2008 COAG Reform Agenda, which drew upon State and Commonwealth expertise and initiatives in the pursuit of shared goals and programs. The COAG Reform Agenda built upon the NRA by seeking to boost productivity, increase workforce participation and mobility and deliver better services to the community. The reform agenda also contributes to the broader goals of social inclusion, closing the gap on Indigenous disadvantage and environmental sustainability.

The new Commonwealth–State financial framework agreed in November 2008 provides a solid and realistic platform from which improvements can be made in the delivery of services to the Australian public and upon which further reforms can be based to make Australian federalism work better. Figure 1 summarises the most important features of the new financial framework (explored in more detail in Appendix 1).

One of the key features of the new framework is the COAG Reform Council (CRC), which is independent of individual governments. The CRC monitors and publicly reports on the reforms agreed by COAG and assesses whether performance benchmarks have been achieved.

This ambitious new reform agenda represents a significant step forward in cooperative federalism. Nevertheless, there is still considerable room for further improvement and reform to harness the benefits of Australia's federal system.

FIGURE 1: INTERGOVERNMENTAL AGREEMENT ON FEDERAL FINANCIAL RELATIONS



### 1.3 The dynamics of reform

These developments highlight two significant and interrelated reform dynamics operating in Australian public policy today.

The first dynamic is centred on a substantive policy reform agenda aimed at deepening the economic benefits gained from the market-inspired and microeconomic reforms of the 1980s and 1990s, and extending them to include a broader focus on human capital. In addition, important environmental issues relating to water and climate change are now central to national policy discussions at COAG.

The second dynamic is focused on the operations and functioning of the federation itself and exhibits a new commitment to cooperative federalism. As COAG stated in December 2007, a 'new model of cooperation' is in prospect for Australian federalism.<sup>1</sup> The November 2008 federal financial framework is the most obvious and significant expression of this. The fact that much of the agenda for reform of the federal system – as well as the specifics of many of the reforms – emanated from the States and Territories only serves to highlight the benefits of a cooperative federalist approach.

Perhaps the greatest potential of these two current reform dynamics lies in their intersection. The new COAG Reform Agenda recognises that national policy performance cannot be substantially improved without productive intergovernmental cooperation. Effective intergovernmental cooperation requires:

- **Principles to guide cooperative federalism.** Chapter 2 explores three key principles of good federal practice to guide thinking about what each level of government does best – its roles and responsibilities – and how governments work together.
- **Supporting legal and institutional arrangements.** Chapter 3 outlines a number of possible avenues for improving the governance mechanisms of our federal system involving legal, institutional and constitutional change.
- **Appropriate cultural practices and attitudes.** Chapter 4 examines how our organisational cultures can be realigned in order to support cooperative federalism.

Addressing the new set of substantive policy matters facing Australia requires a framework that can harness the benefits of our federal structure. This framework includes principles to guide cooperation between Australian jurisdictions that are then backed by institutional and cultural arrangements. Such a framework will allow governments to better meet the needs of all Australians, now and in the future.

<sup>1</sup> Council of Australian Governments (2007) COAG Communique, 20 December; p. 1

## 2. KEY PRINCIPLES FOR MODERN FEDERAL SYSTEMS

A robust, effective framework for cooperative federalism requires clear guiding principles. While there is no single set of principles that defines federalism, either as an abstract model or as it is practised by the many federal nations worldwide, internationally-recognised principles of good federal design can be adopted to guide reform in Australia.

### 2.1 Guiding principles

Federalism is about maintaining territorial differences within an overarching political system. Its principles reflect this orientation. Federalism seeks to provide the benefits of unity without sacrificing the advantages of local autonomy, community choice and diversity within a nation. It allows different governments to offer different policy mixes or types of services to match local needs and preferences.

As mentioned in Chapter 1, the intersection between the two reform dynamics – substantial policy reform and reforming the institutional structures of federalism – presents the greatest opportunity to improve the operation of Australia's federation. Effectively harnessing this potential will require a shared commitment to the following principles:

- **Subsidiarity:** proximity of government to the community
- **Alignment of responsibilities:** the allocation of roles and responsibilities to the level of government with the corresponding geographical scale (also referred to as the logic of assignment)
- **Cooperation:** engagement and cooperation between the levels of government, including the comity principle.

Subsidiarity provides the fundamental rationale of federalism; however, it is less informative about how functions should be arranged between the levels of government in a federal system. The logic of assignment of responsibilities provides the basis for arranging functions, however, in the modern world there are few policy areas where clear lines of division can be drawn. This gives the third principle, that of cooperation, a particular significance. While each of these principles is explored below, the reality is that modern conditions of overlapping responsibility increasingly place a premium on effective engagement and cooperation between national and sub-national levels of government in federal systems. This need for engagement and cooperation has received the least attention to date and is the ripest for change in the current

climate of Australian intergovernmental relations. The principle of cooperation provides the basis for the institutional and constitutional reforms discussed in Chapter 3 and is central to the improvement of collaborative practices discussed in Chapter 4.

### 2.2 Subsidiarity and the notion of local responsiveness

The subsidiarity principle is a well documented driver of effective federations, the benefits of which were explored in some detail in the previous CAF paper *Australia's Federal Future*.

The principle of subsidiarity is intrinsic to the efficient and effective allocation of responsibilities in a federal system. It is a means of ensuring that decision-making remains close to citizens and enables the system to be judged for whether it remains responsive to the needs of citizens.<sup>2</sup>

Traditionally, the very reason for federalism was to allow local communities to shape policies to meet their own local preferences. In economic terms, this allows for greater allocative efficiency because non-standard or differentiated provision is better calibrated across the country. In social terms, it means communities can choose the mixture of goods and services and the types of regulation that they prefer.

State and Territory governments, being closer to their communities, are best placed to represent those communities when engaging with the national level government and in consultations over national policy frameworks. The closer the proximity of government to the community, the more authentic the notion of representative democracy becomes.

Subsidiarity encourages retention of control at the sub-national level unless there are clear reasons to do otherwise. For instance, federal systems typically leave responsibility for schooling to the sub-national jurisdiction (State or even local governments), which allows both greater diversity of experience and more direct accountability. There are also a number of policy areas where there is no consensus on what constitutes the best approach to a given problem. In these cases, Gary Banks of the Productivity Commission has argued that we are collectively better off if alternative approaches are allowed to 'compete' against each other. Banks argues that to maximise the benefits from federalism, we need to allow diversity to flourish, but we also need to ensure that we have good data for assessing results.<sup>3</sup>

<sup>2</sup> Observation 28, "Federalism and the role of the states: comparisons and recommendations", Federal-State Relations Committee, Parliament of Victoria. Available online: <http://www.parliament.vic.gov.au/fsrc/report3/body/chapter6.htm>

<sup>3</sup> Gary Banks (2005) 'Comparing school systems across Australia', Address to the ANZSOG Conference 'Schooling in the 21st Century: Unlocking Human Potential', 29-29 September, Sydney. Available online at: [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0007/7657/cs20050928.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0007/7657/cs20050928.pdf)

The Commonwealth and the States and Territories could harness this potential by considering methods of collaboration that facilitate citizen assessment of the way their respective governments are serving them. An example can be found in the EU's 'Open Method of Co-ordination'. The open method rests on mechanisms such as guidelines and indicators, benchmarking and sharing of best practices. The method works in specific stages. First, the Council of Ministers agrees on very broad policy goals. Secondly, Member States then transpose these into national and regional policies. Thirdly, specific benchmarks and indicators to measure best practice are agreed upon. Finally, results are monitored and evaluated. The EU's application of the open method of coordination has resulted in new or strengthened networks of national policy makers, synthesis of a detailed evidence base on national policies in selected areas and peer-review/mutual learning around this evidence base. In some instances, specific recommendations to either Member States or the community have been made or concrete deliverables in the form of policy guidelines or handbooks produced.<sup>4</sup>

Subsidiarity provides a powerful rationale for federalism and the retention of significant policy making and service delivery functions by the constituent units of a federation. However, it tells us less about which kinds of functions should be executed by those jurisdictions. For that, it is necessary to look closer at the theory of assignment of responsibilities.

## 2.3 The alignment of responsibilities with jurisdictional boundaries

COAG has agreed to consider the roles and responsibilities for funding and service delivery between governments over the coming year. In undertaking this work, COAG aims to "deliver more integrated and responsive services for individuals and families, to clarify accountabilities between governments and to improve performance of service systems".<sup>5</sup> This work recognises that the operation of the federation could be improved through better planned decisions about the allocation of roles and responsibilities. The logic of assignment principle can be used by governments to guide decision-making in this regard.

The alignment of responsibilities principle holds that responsibility for undertaking a particular government activity should lie with the level of government whose boundaries the geographical scope of that activity most closely approximates.<sup>6</sup>

This is because the effects of a particular policy, law or service which extend beyond the boundaries of the jurisdiction exercising authority are unlikely to be taken into account by the responsible government. The effects of the activity that extend beyond the jurisdiction of the government involved are called 'spillovers'. Undesirable ('negative') spillovers need to be curtailed and desirable ('positive') spillovers encouraged.

The most obvious spillovers in Australia are physical in nature and negative in effect – for example, pollution controls and transport infrastructure. However, spillovers may also be economic or regulatory in nature. Some regulations, such as those that impose barriers to mobility or the operation of national businesses, are a source of negative spillovers for the country as a whole. The national scope of business makes a 'seamless national economy' an important aim of modern federalism. Divergent State and Territory regulation in areas such as occupational health and safety are creating negative economic spillovers while providing little useful or appreciated policy diversity. Recognising this, all Australian governments have agreed to a schedule to reduce such irregularities.

'Factor mobility' is another reason for the alignment of responsibilities with jurisdictional boundaries. Jurisdictions with policies that potentially impose burdens on business, investors, or high earning individuals may well be subject to 'exit threats' meaning that these highly mobile actors will move to a jurisdiction with more preferential regulatory settings. Such threats, implicit or otherwise, limit the decisions that the member governments of a federation can make about how they regulate. This is widely regarded as being one of the main reasons why so much taxing power in federations has ended up in the hands of central governments.<sup>7</sup>

Applying the principle of the alignment of responsibilities with jurisdictional boundaries would support extensive regulatory harmonisation to remove the barriers to trade imposed by inconsistent State and Territory regulation. However, Australia should not seek consistency for consistency's sake: federations should harmonise where there are demonstrable economic benefits, not simply for the sake of removing minor inconveniences, as the costs may outweigh the benefits.

Similarly, economies of scale are highly relevant to the undertaking of alignment of responsibilities. Often it will make sense to have one regulator. For instance, in relation to food standards, little would be gained from having a diversity of standards across Australia and having eight different offices

<sup>4</sup> "Application of the open method of coordination in favour of the Barcelona research investment objective: The Second Cycle", European Union Scientific and Technical Research Committee, Brussels, 5 September 2006. Available online: <http://register.consilium.europa.eu/pdf/en/06/st01/st01206.en06.pdf>

<sup>5</sup> Council of Australian Governments (2008) *COAG Communique*, 29 November, p. 4

<sup>6</sup> Albert Breton (1965) 'A Theory of Government Grants', *Canadian Journal of Economics and Political Science* 31:2; Mancur Olson (1969) 'The Principle of "Fiscal Equivalence": the division of responsibilities between different levels of government', *American Economic Review* 59:2

<sup>7</sup> See Alan Fenna (2008) 'Commonwealth Fiscal Power and Australian Federalism', *University of New South Wales Law Journal* 31:2.

undertaking the same scientific evidence-based risk analysis would be highly inefficient.

Accordingly, the alignment of responsibilities principle holds that the presumption in favour of diversity may give way to uniformity where:

- there are extensive policy spillovers;
- mobility of certain actors has an adverse impact on policy choices; or
- there are significant economies of scale.

COAG's recent focus on reforming the funding of essential public services relative to responsibilities has made some progress toward improving the alignment of responsibilities with jurisdictional boundaries.<sup>8</sup>

Considerable scope for improvement exists; however, the reality is that modern conditions make a clean division of roles and responsibilities extremely difficult, if not impossible. Many government functions with an impact that once was merely local now have much wider impacts, making a much more coordinated or national approach necessary.<sup>9</sup> Modern federalism involves a high level of engagement between levels of government to achieve effective economic integration and policy coordination.

## 2.4 Engagement and collaboration between levels of government

There are many international examples of how federal systems engender cooperation that are instructive in the Australian context.

Federalism works best when each level of government conducts itself in a way that respects the others' place in the system and the others' responsibilities. In Germany, this principle has been officially recognised by the Federal Constitutional Court as the 'comity' principle (*Bundestreue*).<sup>10</sup> The federal comity principle requires governments in Germany to take the legitimate concerns and interests of other governments into account in their decision-making, to negotiate in good faith and to engage in cooperation. In the German system, a greater share of policy

making occurs at the national level, but in return, the States have both greater input into that decision making and a greater role in its implementation.

Elaborating on this philosophy, the new South African constitution includes a direct comity clause headed 'cooperative government'. This requires each sphere of government to 'respect the constitutional status, institutions, powers and functions of government in other spheres; not assume any power or function except those conferred on them ... exercise their powers ... in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and cooperate with one another in mutual trust and good faith....'<sup>11</sup>

Implementation of something like the federal comity principle in Australia requires a combination of administrative and cultural changes to enhance the relationship between levels of government. The Australian federation was designed on the assumption that the levels of government would operate with a high degree of independence (called 'coordinate federalism') and thus made little provision for integration of policy making and implementation between the Commonwealth and the States. Adaptations have been made over time, with the emergence of COAG being the most salient example; however, further improvements could be pursued to enhance and ensure enduring engagement and cooperation. In the past, stakeholders have expressed dissatisfaction with the level of cooperation between governments and have called for deeper and more durable engagement.

Cooperation needs to be based on reciprocal relations, with each level of government working together. This is the principle enshrined in the Canadian 'Social Union Framework' signed between the various governments of Canada in 1999.<sup>12</sup> This example is discussed further in Chapter 3 (section 3.1.2). A commitment to effective engagement and cooperation between the levels of government should be formally articulated by all Australian governments (also discussed further in Chapter 3).

<sup>8</sup> The Intergovernmental Agreement on Federal Financial Relations (Schedule E) recognises the role of the Commonwealth Government in funding reforms in areas of state or territory responsibility where reforms would have 'spillover' benefits.

<sup>9</sup> Alan Fenna (2007) 'The Malaise of Federalism: comparative reflections on Commonwealth-State relations', *Australian Journal of Public Administration* 66:3

<sup>10</sup> Grounded in Article 20(1) of the Fundamental Law, declaring that 'The Federal Republic of Germany is a democratic and social federal state'

<sup>11</sup> Section 41(1) of the Constitution of the Republic of South Africa

<sup>12</sup> A *Framework to Improve the Social Union for Canadians*. For example, the framework commits the Government of Canada not to introduce any new national programs 'without the agreement of a majority of provincial governments'.

## 2.5 Applying the principles

The interplay between the three principles outlined above is a constantly oscillating dynamic rather than a static rule-book. These principles suggest a balance between competing federal imperatives: the imperative to address national needs versus local needs; the imperative to work toward greater harmonisation versus greater diversity and choice and the imperative of jurisdictions to cooperate versus to compete.

Governments should consider these principles in future determinations of roles and responsibilities. In some cases, this may involve determining a degree of exclusivity and separation of responsibilities; in other instances of shared responsibilities, it may involve determining which level of government should take primary responsibility (lead jurisdiction roles); in still other areas, it may result in decisions to retain shared responsibilities but with clearer functional roles.

Modern realities mean that there will be many areas where two or three levels of government have a legitimate role to play. Complex policy areas will often require 'joined up' solutions requiring cooperation between several levels of government and various non-government actors. In these areas, the focus should be how actors within a system can work together to create 'seamless' service systems. This reality demonstrates the important inter-relationship between the three principles.

Inherent in the three principles are a number of interwoven concepts and policy objectives that would also support effective engagement and cooperation between levels of government and provide a basis for the cultural change explored in chapter 4:

- A focus on outcomes and effective services for the community
- The potential for efficiency gains and/or efficiency dividends
- An effort to improve the culture of cooperation (effective cooperation requires ongoing commitment and sustained attention)
- Acknowledging the diversity and respect for the distinctiveness of Australian jurisdictions
- The need for leadership and strategic directions to guide policy options
- The need for services to be delivered in person or tailored to local circumstances
- The need for transparency, clear standards, high performance and informative reporting against declared outcomes and objectives
- The need for clear lines of responsibility and public accountability
- The need to build effective partnerships reflecting shared interests.

These three principles can be used as a guide for developing reforms that will drive more productive intergovernmental cooperation to improve service delivery; however, institutions and mechanisms to facilitate cooperative federalism are necessary for their practical implementation. The legal, constitutional and institutional reforms that could give effect to these principles are explored in the following chapter.

### 3. IMPROVING THE ARCHITECTURE OF COOPERATIVE FEDERALISM

Australia has a rich tradition of pragmatic arrangements enabling governments to work together horizontally and vertically. These arrangements, sometimes called the ‘gossamer strands’ that tie the federation together, have broadened and deepened over the years.<sup>13</sup> There is scope to reform this ‘architecture’ of legal, institutional and administrative mechanisms to sustain and advance cooperative federalism.

#### 3.1 Institutional and administrative cooperation

Intergovernmental cooperation in Australia occurs both horizontally and vertically through a range of mechanisms. In practice, many of these mechanisms work in tandem and are inter-dependent.

##### 3.1.1 Horizontal cooperation

The States and Territories have worked hard in recent years to deliver positive community outcomes and lead community and policy debate through horizontal cooperation in several policy areas of national significance. For example:

- States and Territories were instrumental in shaping the national debate on emissions trading through the establishment of a National Emissions Trading Taskforce in 2004. This initiative pre-dated the creation of CAF, but was catalytic in spurring States and Territories to cooperate horizontally. Subsequently, CAF engaged Professor Ross Garnaut to review the impacts of climate change on the economy and to recommend policies and policy frameworks, which culminated in the publication of the Garnaut Report and the Commonwealth Government’s Carbon Pollution Reduction Scheme initiative.
- In 2003, all jurisdictions except Queensland signed an Inter-State Investment Cooperation Agreement aimed at eliminating ‘bidding wars’ between governments for business investment.
- The States took the lead to establish the Australia and New Zealand School of Government (ANZSOG) in 2002–03, preparing a business plan, scoping the teaching model and customising the curriculum before the national government joined the initiative.
- All State and Territory governments, along with the government of New Zealand, formed the Australian–New Zealand Biotech Alliance in 2004 to promote collaborative research and development and business development in biotechnology.

An important milestone in cooperative federalism occurred in October 2006 with the establishment of the Council for the Australian Federation (CAF), consisting of the Premiers and Chief Ministers of the States and Territories.

The need for such a body had been identified on a number of occasions,<sup>14</sup> and similar institutions exist in Canada (Council of the Federation) and the USA (National Governors Association). While the Leaders Forums set up during the early 1990s were influential, they were dominated by the agenda of the Special Premiers’ Conferences (later COAG), had no formal bureaucratic support, and eventually became restricted to relatively brief tactical meetings between leaders immediately prior to COAG meetings.<sup>15</sup> By contrast, CAF provides a regular opportunity for State and Territory leaders to discuss matters related not only to COAG but, just as importantly, to horizontal, cross-jurisdictional issues in which the Commonwealth may have a minor role or even no role. Such issues can have a significant impact on the lives of many Australian individuals, families and businesses. CAF also provides a public platform to communicate broader issues of public interest, including discussion about Australia’s federal system.

Reducing and harmonising regulation has been a particular priority recently for States and Territories and has been pursued through COAG and CAF in areas not requiring Commonwealth involvement.<sup>16</sup> For example, through CAF, States and Territories have:

- agreed on common dates for daylight saving periods in five jurisdictions and agreed on harmonised arrangements for the provision of the ANZAC Day public holiday across Australia;
- commenced an examination of national standards to ease the introduction of electric and low emission vehicles; and

<sup>13</sup> John Warhurst (1983) ‘Central Agencies, Intergovernmental Managers and Australian Federal-State Relations’. ANU: Canberra

<sup>14</sup> John Bannon (1992) ‘Cooperative Federalism: Good Policy and Good Government’, Federalism Research Centre, ANU: Canberra; Wayne Goss (1995) ‘Restoring the Balance: the future of the Australian federation’, Federalism Research

Centre, ANU: Canberra; Federal–State Relations Committee (Victoria) (1998) ‘Australian Federalism and the Role of the States’, Parliament of Victoria, Melbourne

<sup>15</sup> Anne Tiernan (2008) ‘The Council for the Australian Federation: a new structure of Australian federalism’, *Australian Journal of Public Administration* 67:2

<sup>16</sup> Harmonisation of regulations has been going on for some time in Australia. For example, a National Food Authority replaced State-based systems in 1991 – the culmination of a long process of engagement between industry, the States and the Commonwealth. Harmonisation took a substantial step forward with the implementation of National Competition Policy (NCP) in the mid-1990s as a continuation of that positive-sum ‘new federalism’.

- established a working group to identify ways to ease the regulatory burden on the not-for-profit sector.

CAF has also been instrumental in several initiatives that have been ultimately finalised through the COAG Business, Competition and Regulation Working Group. These include:

- Signing an Intergovernmental Agreement committing to harmonise key areas of workers compensation and occupational health and safety, as well as reducing the regulatory burden by providing employers with easy access to streamlined information on legislative and other matters related to workers compensation
- Signing a ministerial declaration to remove impediments to the movement of skilled workers across borders through the mutual recognition of 22 occupational licenses in six priority trades areas
- Harmonising payroll tax systems (excluding tax rates and thresholds) in NSW, Victoria, Tasmania and the ACT.

CAF has also played a key role in the move towards a national school curriculum – a good example of horizontal cooperation aimed at harmonisation. CAF's policy recommendations detailed in its paper *The Future of Australian Schooling* (2007) helped to shape the Melbourne Declaration on Educational Goals for Young Australians. Made by all Australian Education Ministers, the Declaration sets the direction for Australian schooling for the next 10 years. *The Future of Australian Schooling* report provided the basis for the extensive consultation that led to the development of the Declaration. The outcomes framework articulated by the report is also reflected in the new National Education Agreement agreed by COAG in 2008.

There is no doubt that horizontal cooperation has enhanced Australian federalism and that the establishment of CAF is a positive signal that such cooperation will be ongoing. The challenge now is to strike an appropriate balance between promoting harmonisation by removing unnecessary 'nuisance' differences and maintaining the virtues of locally-tailored policies and practices. Leadership from CAF will be important in achieving this balance, as well as ensuring State and Territory views are heard in the national debate.

As outlined in the Twomey and Withers paper, another strength of federalism is the opportunity to experiment and innovate. States and Territories provide a laboratory in which ideas can be tested on a smaller scale before being implemented across the country. CAF recently published on its website a policy exchange entitled *Climate Change: Best Practices by State and Territory Governments in Australia*. The document was compiled by

State and Territory jurisdictions on behalf of CAF to showcase current best practice initiatives. It was designed to promote collaboration and information sharing across jurisdictions.

Successful horizontal cooperation is not only about harmonisation. It also improves policy development and innovation by facilitating the exchange of ideas and 'what works best' by jurisdictions working on similar policy problems. It can also play an important secondary role by providing a regular forum for States and Territories to share, collaborate and cooperate. This forum of equals leads to the further development of collaborative cultures throughout States and Territories. This key theme is explored in more detail in Chapter 4.

## OPTIONS FOR REFORM

The Council for the Australian Federation should develop a strategic forward agenda to facilitate horizontal cooperation. This agenda should identify opportunities for harmonisation of laws, as well as opportunities to share policy innovation and best practice initiatives. This will help to embed improvements in collaborative culture throughout States and Territories.

### 3.1.2 Vertical cooperation

In areas where cooperative federalism cannot be achieved by the States and Territories alone, COAG is a key intergovernmental institution for Commonwealth–State vertical cooperation. In 2008, COAG committed to an ambitious reform agenda facilitated by a more cooperative approach to intergovernmental relations. Appendix I highlights COAG's recent achievements.

Central to these new reforms is the new Intergovernmental Agreement on Federal Financial Relations. This new financial framework aims to improve accountability through simpler, standardised and more transparent public performance reporting for all jurisdictions, underpinned by clearer roles and responsibilities. Schedule E of the Agreement sets out principles to guide areas in which the Commonwealth may provide support for national reform or service delivery improvements through National Partnerships. In this manner, the Intergovernmental Agreement on Federal Financial Relations goes some way towards articulating how governments interact with one another with regard to implementation, reporting and monitoring.

However, there is still an absence of guidance as to how governments work with each other in the negotiation phase. At present, COAG is an administrative entity of the Commonwealth. The Commonwealth is able to command, defer or cancel meetings, set agendas and prioritise policy issues. If COAG is to represent a genuine partnership between the States and Territories and the Commonwealth, measures must be put in place to give it a more multi-lateral and collaborative character. To be more effective, governments need to be equal partners, particularly in their ability to set agendas and prioritise policy issues.

### **Formalising COAG's governance arrangements**

Canada has introduced a Framework to Improve the Social Union for Canadians, negotiated and agreed between the federal and provincial governments in 1999. The Framework commits both levels of government to protocols of collaboration over any Canada-wide policy or financing initiatives. The Framework covers the policy fields of health and health care, education and social assistance. It also includes provisions for the Government of Canada to provide prior warning about funding changes (one year minimum). The Framework also enshrines principles of subsidiarity: in circumstances where the Federal Government and any six provinces can agree on policy objectives or new programs, they can proceed with each province working out the details and criteria of its own program. This provides a way of receiving federal funds for provincial-initiated programs in a spirit of cooperative federalism.

The establishment of an intergovernmental agreement that commits all Australian governments to a set of governing protocols, such as the Canadian Framework, would provide a clear and agreed foundation for more effective cooperation.

To enable COAG to perform to its maximum potential, it would be advisable to set down some rules.<sup>17</sup> An intergovernmental agreement could specify COAG's governance arrangements, rules of engagement and meeting protocols, and could be preceded by a statement committing the parties to the principles of cooperative federalism. The new Intergovernmental Agreement on Federal Financial Relations could be included in the legislation or agreement formally establishing COAG.

The formalisation of COAG's governance arrangements also

provides an opportunity to clarify COAG's strategic role. It should be clarified that COAG's principal role is focused on strategic medium- to long-term policy directions. COAG is uniquely placed to consider such strategic issues and then leave the details of implementation and administration to other intergovernmental bodies or participating governments. COAG should collectively determine the allocation of roles and responsibilities as these decisions require the leadership of First Ministers. An intergovernmental agreement could also set out COAG's oversight of and policy relationship with Ministerial Councils.

Other governance and procedural rules could further enhance the value of COAG. For example, States and Territories should have a role in setting COAG's agenda. This would allow States and Territories a greater opportunity to pursue issues of State and Territory importance through COAG where Commonwealth engagement is necessary.

COAG's effectiveness would also be improved by the establishment of an independent secretariat and administrative support staff reporting to the COAG members as a whole, similar to the arrangements for CAF. This would certainly be required if the responsibility for chairing COAG meetings was rotated between the Commonwealth and the States and Territories. Currently, the COAG Secretariat is located within the Department of Prime Minister and Cabinet.

### **Performance reporting**

As intergovernmental relations and institutions deepen and expand, several functions need to be performed on an ongoing basis in order to improve cooperation, promote transparency and yardstick competition.

The COAG Reform Council (CRC) has an important role in this regard. It has been tasked under the Intergovernmental Agreement on Federal Financial Relations to:

- compile and publish performance information for all jurisdictions against the outcomes and performance benchmarks contained in the National Agreements and some National Partnership Agreements;
- independently assess whether predetermined performance benchmarks have been achieved before an incentive payment to reward nationally significant reforms under National Partnerships is made; and
- monitor the aggregate pace of activity in progressing COAG's agreed reform agenda.

<sup>17</sup> Similar proposals for COAG have been made by the Victorian Premier. See John Brumby (2008) 'Making Federalism Work' Keynote address to ANZSOG Annual Conference, Melbourne, 11 September; to be published in John Wanna (ed.) (2009) *Critical Reflections on Australian Public Policy*, ANU E-Press, Canberra; [http://www.premier.vic.gov.au/index.php?option=com\\_mymedia&Itemid=51&lang=en&media\\_id=324&task=text](http://www.premier.vic.gov.au/index.php?option=com_mymedia&Itemid=51&lang=en&media_id=324&task=text)

Although the role of the CRC has already been established by the new Intergovernmental Agreement on Federal Financial Relations, reiterating its role and functions in an Intergovernmental Agreement would give the CRC greater institutional durability. As with COAG, the institutional basis of the CRC is currently informal. Its long-term effectiveness would benefit from the certainty provided by having its governance, roles and functions articulated in an intergovernmental agreement. In this regard, COAG should review the CRC with a view to giving it a permanent and formal institutional basis.

### OPTIONS FOR REFORM

COAG, as Australia's peak intergovernmental forum, should have its own Intergovernmental Agreement (IGA). The IGA should:

- Articulate principles to guide the functioning of cooperative federalism in Australia (such as those identified in Chapter 2)
- Propose cooperative protocols to govern the conduct and prosecution of intergovernmental relations
- Outline governance arrangements regarding COAG's oversight of and policy relationship with Ministerial Councils
- Specify COAG's operations, including meeting frequency, agenda-setting and chairmanship
- Establish an independent secretariat
- Formalise the COAG Reform Council's role and functions.

### Ministerial Councils

Ministerial Councils are another key intergovernmental institution. Consisting of ministers and supporting officials, these councils facilitate inter-jurisdictional cooperation in specific policy sectors. They operate under guidelines and protocols established by COAG. At its meeting in April 2009, COAG agreed to review Ministerial Councils (to be completed by November 2009); this provides an opportunity to re-assess how these bodies operate and interface with COAG in order to further promote cooperative federalism.

Intergovernmental efficiencies could be achieved by strengthening and streamlining the linkages between COAG and Ministerial Councils. COAG should remain focused on matters of strategic importance, tasking Ministerial Councils to complement this work by dealing with issues of policy-detail, implementation of COAG agreements and other policy sector concerns.

Ministerial Councils or their sub-committees could also be opened up to include representatives of stakeholders and end-users being present at the meetings and engaged in deliberative processes. Ministerial Councils are important, influential and high-level forums capable of weighing stakeholder views, making decisions accordingly and feeding relevant stakeholder input to COAG processes. Adopting more open and inclusive processes would incorporate a 'community cabinet' aspect into the business of Ministerial Councils, with stakeholders representing wider community interests. Such involvement would assist governments with cultural change issues and reinforce collaborative cultures.

Generally, Australian governments should take the opportunity to directly incorporate other participants into the intergovernmental policy processes, such as industry and community representatives. This would give effect to the principle of subsidiarity through encouraging local input, engagement and participation in decision-making.

COAG would need to forge stronger, more cooperative relationships with other Ministerial Councils in order to facilitate this 'top down/bottom up' approach to policy development.

### OPTIONS FOR REFORM

COAG and Ministerial Councils should consider clarifying their respective responsibilities and streamlining their linkages in order to improve their efficiency. In particular, Ministerial Councils should undertake increased stakeholder engagement where appropriate.

### Other Institutions for national reform

One of the key challenges for governments working together has been the limitations of the architecture of government in facilitating collaboration. The establishment of functional institutions is one such challenge. Examples of intergovernmental institutions include bodies such as Ministerial Councils and the recent COAG Working Groups that operate without legislative basis. Other bodies, established to facilitate national reform have been creatures of statute, such as the Australian National Training Authority (ANTA). The structure, powers and functions of these bodies may be more suited to some purposes than others. ANTA is an example of an institution that was designed and established to drive reform in a particular sector.

The key lessons to be drawn from the ANTA example are:

- **Funding** – Sufficient financial resources need to be made available to support the implementation of major reforms. Key to ANTA's success was its power to direct and approve funding.
- **Policy reform agenda** – Federal bodies established to drive reform need to have a clearly defined policy agenda.
- **Cooperative design** – Federal bodies need to be designed to facilitate cooperation (discussed further in Chapter 4). In the ANTA case, having non-government leadership was important in mediating Commonwealth and State and Territory interests to achieve shared objectives for sector reform.

The broader lesson for governments is that they must be flexible and prepared to invest in innovative, purpose-built institutions where the need arises. The structure and governance of COAG and Ministerial Councils may not always be the most effective way of achieving reform. This is evident in the ANTA example where industry leadership was an important factor to achieving sector reform.

The establishment of the COAG Working Groups is another example of the success of purpose-built bodies or institutions. The Working Groups were set up with a clear mandate to undertake policy development and reform in the delivery of the COAG Reform Agenda.

Going forward, major policy reforms could be pursued through specially established bodies that are purpose-driven, purpose-designed and time-limited.

### CASE STUDY: AUSTRALIAN NATIONAL TRAINING AUTHORITY (ANTA)

Established by the *Australian National Training and Authority Act 1992* (Cth), ANTA was a statutory authority given the mission of establishing a consistent national Vocational Education and Training (VET) system. The States and Territories formally recognised the national leadership role of ANTA through their own legislation, which established their own VET systems as the 'State Training Agency' under the ANTA agreement.

ANTA was a tri-partite body consisting of the Commonwealth, the States and Territories and industry. Recognising the importance of orientating reform to industry needs, the ANTA board consisted entirely of industry advocates. In formal terms, ANTA reported to the Commonwealth minister; however, in practice, it reported to a Ministerial Council of Commonwealth, State and Territory ministers.

ANTA was a successful catalyst for change because there was a clear and articulated need for major reform. ANTA benefited from a strong sense of commitment among the various government and industry players, building a 'wow' factor around the initiative. As a new agency, ANTA fostered a sense of excitement supported by innovation and a 'can-do' culture, especially in the early years. As a policy body without direct responsibility for implementation, ANTA had to work at developing relationships with its partners responsible for implementation. It could not assume a command-and-control position over the sector and had no 'big stick'. It had to work at initiating, coordinating and mediating between different jurisdictions and institutional agendas.

ANTA achieved considerable progress in developing and overseeing a national training system. The framework was devised and implemented generally in accordance with the original charter.

### OPTIONS FOR REFORM

Governments should be prepared to invest in innovative, purpose-built institutions or bodies where circumstances suggest that the COAG or Ministerial Council structure is not the best means for progressing reform proposals.

### 3.2 Legal mechanisms to facilitate cooperation

The realities of Australian federalism mean that the COAG, CAF, Ministerial Councils and other multi-jurisdictional institutions need effective legal mechanisms to implement cooperative reform.

However, it should be noted that many forms of horizontal and vertical cooperation do not require formal legal mechanisms to be effective. For example, the Melbourne Declaration on Educational Goals for Young Australians establishes a high level policy framework and commits all Australian governments to working towards shared goals. The Declaration, which effectively sets the broad direction for Australian schooling over the next decade, is based on mutually agreed aspirations and does not require any formal mechanisms to proceed.

Where legal mechanisms are necessary to facilitate cooperation, options range from achieving loose consistency through State and Territory cooperation to complete centralisation via referral of powers to the Commonwealth. Table 1 lists several legal mechanisms that can be used to promote greater consistency and cooperation, while still enabling all participating governments to have input on aspects of policy decision-making and discretion.<sup>17</sup> Each of these options has a place in our modern federation.

At the devolved end of the spectrum, 'mirror' legislative schemes allow States and Territories some discretion for variability. Mirror or model legislation involves each State and Territory passing separately a law that is enacted in similar terms to other jurisdictions. Model legislation may include core and non-core provisions. These sorts of legislative schemes are most suited to cases in which less than total harmonisation is desirable to enable some flexibility in local responses without imposing disproportionate costs on those participating in the system.

A good example of where mirror legislative schemes can be effective is in the regulation of criminal and civil offences and court procedures. In the interests of equality, it makes sense for all jurisdictions to have reasonably similar legislative provisions so that all Australian citizens are held to the same standards. However, some jurisdictional diversity can be tolerated because these differences do not impose costs for those involved in the system. This is because offences are never prosecuted in more than one jurisdiction – hence, there are limited 'spillovers'.

An alternative path is to implement a 'complementary applied laws' scheme (sometimes referred to as 'uniform legislation').<sup>19</sup> This method involves one jurisdiction, 'the host', enacting legislation to establish the scheme. Other jurisdictions then pass legislation giving that law force in their jurisdictions. The advantage of this method is that jurisdictions cannot make unilateral changes to the legislation as amendments must be passed in the host jurisdiction.

Such legislative approaches enable the States and Territories to achieve harmonisation by working together. Through effective cooperation, States and Territories are able to maintain an active policy role as well as direct responsibility for the administration of these statutes. These approaches link the principle of subsidiarity to notions of consistency and harmony.

For this reason, multi-lateral approaches to harmonisation are preferable to unilateral Commonwealth action in areas not conferred on the Commonwealth Parliament by the Constitution. Multi-lateral legislative approaches are more in keeping with the comity principle discussed in Chapter 2 and overcome negative regulatory 'spillovers' without sacrificing the subsidiarity principle.

However, there are limitations to such schemes. One key limitation is lack of an effective system for the conferral or 'cross-vesting' of jurisdiction with regard to the cooperative scheme in a single court system. This means that while States and Territories may have identical statutory provisions, the interpretation of those provisions by State and Territory courts (who are not bound to follow the decisions of the courts of another State or Territory) may result in divergent application of the legislation. For this reason, uniform national legislation may be preferred due to its effectiveness in achieving total harmonisation, interpreted by a single (federal) court system.

In the 1999 case of *Re Wakim; Ex parte McNally*, the High Court of Australia held that legislation that purports to confer State jurisdiction on a federal court is unconstitutional and therefore invalid. Accordingly, constitutional reform would be required to institute an effective cross-vesting system.<sup>20</sup>

<sup>18</sup> The contents of Table 1 summarise much of the analysis contained in Anne Twomey (2007) 'Federalism and the Use of Cooperative Mechanisms to Improve Infrastructure Provision in Australia', *Public Policy* 2:3

<sup>19</sup> Parliamentary Counsel's Committee (2008) *Protocol on Drafting National Uniform Legislation*, Third Edition, p.2, available at: <http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf>

<sup>20</sup> *Re Wakim; Ex parte McNally* (1999) 163 ALR 270

Amendments to the Constitution would ensure that multi-lateral approaches to harmonisation could be just as effective as unilateral ones, while maintaining respect for State and Territory autonomy. Amendments might include:

- establishing an effective cross-vesting system in which State jurisdiction can be vested in federal courts, with the agreement of both the Commonwealth and the States concerned; and
- permitting one level of government to confer powers and obligations on the officers of another level of government, if both governments agree, so that a single body could enforce cooperative schemes.

## OPTIONS FOR REFORM

The Commonwealth should work with the States and Territories to consider and propose constitutional changes in order to facilitate multi-jurisdictional co-operative legislative schemes such as complementary applied laws schemes.

TABLE 1: SUMMARY OF LEGAL MECHANISMS

MECHANISM	DESCRIPTION	RATIONALE	EXAMPLES	STRENGTHS	WEAKNESSES
Referral of Powers	Entails States referring 'matters' to the Commonwealth under s.51 (xxxvii), which may then legislate in regard to the matter	There is a need for uniform legislation and administration in areas that do not fall within the jurisdiction of the Commonwealth <sup>21</sup>	<i>Commonwealth Powers (Family Law) Act 1986 (SA); Terrorism (Commonwealth Powers) Act 2003 (Vic); Trans-Tasman Mutual Recognition (South Australia) Act 1999 (SA); Commonwealth Powers (Industrial Relations) Act 1996 (Vic); Corporations (Commonwealth Power) Act 2001 (Tas)</i>	Avoids the need for a referendum; States can set or influence the terms of the referral; a State can impose criteria that limits or terminates the referral at a given time	Unclear whether the powers can be made conditional, amended or revoked
Complementary Applied Laws	Established by one jurisdiction enacting a law and that law then being adopted by other parliaments	There is a need for uniformity in statutes and subordinate legislation, and usually a single administrative portal implementing uniform administrative rules/decisions	<i>Consumer Credit (Queensland) Act 1994 (Qld); Food Standards Australia New Zealand Act 1991 (Cth)</i>	Complete consistency across the nation, but based upon a spirit of cooperation	States may find themselves excluded from an area of legislative responsibility
Mirror Legislation	Involves a model law being developed, with each State parliament then enacting it, but being able to make variations to meet local circumstances	A variant on complementary applied laws but allows some discretion for variability	Crimes at Sea Acts, Crown Proceedings Acts, Defamation Acts, Uniform Evidence Legislation.	Allows for greater harmonisation, yet still allows for the States to implement their own versions and to amend their component of the legislation	States may undermine the effectiveness of a federal legislative solution; uniformity may be undermined if parliaments amend the legislation too much
Framework Laws	Commonwealth establishes its own set of procedures but winds back their application if State procedures are deemed to be adequate replacements	Applies a national standard but reduces administrative burdens and compliance costs by enabling parties to only deal with one level of government	<i>Native Title Act 1993 (Cth); Environmental Protection and Biodiversity Conservation Act 1999 (Cth); Water Act 2007 (Cth); Part IIIA of the Trade Practices Act 1974 (Cth).</i>	Utilises State approval processes and regulatory regimes, and is integrated with existing State laws and practices. Eliminates duplication and red-tape	No explicit constitutional mandate  Commonwealth retains policy supremacy

<sup>21</sup> Cheryl Saunders (2002) 'Collaborative Federalism', *Australian Journal of Public Administration* 61:2, p. 71

### 3.3 Longer term options

This chapter has concentrated on examining the institutions and mechanisms that can promote cooperative federalism. It does not seek to look in detail at two areas that have traditionally dominated discussion on federalism reform – fiscal federalism and constitutional reform. This is partly due to the difficulty of achieving reform in these areas and partly because they have been the subject of much discussion and debate already. However, this section briefly discusses some limited possibilities for financial and constitutional reform from the perspective of promoting cooperative federalism in the longer term, noting that they require more extensive national debate and consideration.

#### 3.3.1 Financial certainty

Given the extent of vertical fiscal imbalance that exists in Australia, the transfer of funding from the Commonwealth to the States and Territories to help meet service delivery and other needs is an important issue that has an impact on cooperative federalism.

The new financial framework agreed in November 2008 has the potential to reduce unproductive disputes through streamlining and reforming the administration of specific purpose payments.

In essence, while the Commonwealth continues to raise the lion's share of revenues within the Federation and the States and Territories remain responsible for the lion's share of service delivery, States and Territories will seek more certainty over resource allocations. Consideration should be given to future guarantees of proportions of revenue as occurs in some other federations. This might include allocations or sharing of a specific Commonwealth revenue stream or tax base, and a review of how the current per capita distribution of SPP funding is operating. Providing mechanisms to ensure guaranteed funding sources will free jurisdictions at both levels to concentrate on effective service delivery and national policy agenda setting.

#### OPTIONS FOR REFORM

When the Ministerial Council for Federal Financial Relations undertakes its five yearly review of the funding adequacy under the Intergovernmental Agreement on Federal Financial Relations, consideration should be given to providing better and more transparent resource deployments within the Federation, including a review of funding formulas and consideration of a more substantial guaranteed revenue stream or tax base.

#### 3.3.2 Constitutional change

Historical experience suggests that constitutional change in Australia is extremely difficult to achieve. However, there are two key constitutional issues impinging directly on the workings of Australian federalism that, in principle, could receive greater State and Territory input without the need for recourse to a referendum, and which would show that the spirit of cooperative federalism is active and strong. These issues are the appointment of High Court judges and the proposing of constitutional change.

The High Court is the final arbiter on questions of federalism within Australia, yet its membership is decided solely by the executive government of the Commonwealth. The Commonwealth Government has expressed an interest in making the judicial appointment process more transparent and accountable. The Senate Legal and Constitutional Affairs Committee current inquiry into Australia's judicial system specifically includes the procedure for appointment and method of termination of judges. The reporting date for this inquiry is 17 August 2009.

#### OPTIONS FOR REFORM

COAG should review the key federal aspects of the Commonwealth Constitution, including appointments to the High Court.

Constitutional change sits under the referendum provisions in section 128 of the constitution. The Commonwealth is exclusively empowered to propose changes to the constitution, with States and Territories excluded from the process. States and Territories should be consulted and be given the opportunity to put up proposals for consideration by the voters in a referendum. Such processes could be agreed through formal protocols.

### OPTIONS FOR REFORM

States and Territories should have the opportunity to initiate Constitutional amendment processes. This could involve:

- Holding State and Territory indicative referendums on issues of national importance
- The Commonwealth agreeing, perhaps through COAG, to submit to referendum State and Territory proposals for reform of Australia's federal constitutional arrangements
- Altering section 128 to allow a majority of States to initiate constitutional referendums.

This chapter has noted several ways in which legal, institutional, fiscal, and constitutional mechanisms can support productive cooperation within our federal system. These mechanisms are one important element of an architecture that will improve the functioning of the Federation and, in turn, generate improved outcomes and services for all Australians.

## 4. CULTURAL PRACTICES FOR COOPERATIVE FEDERALISM

Effective cooperative federalism requires ongoing commitment to improving collaborative cultural practices across all jurisdictions. It also requires giving sustained attention to improving relationships between jurisdictions and within federal institutions. Improving the quality of these relationships requires an understanding of the areas in which cultural practices could be improved and possible strategies for cultural renewal.

### 4.1 Current cultural practices

It is important to recognise that the existing cultures of governance can be strengths and weaknesses simultaneously. The strengths associated with dedicated organisational cultures can provide an administrative focus for an agency's direct responsibilities, clarify policy carriage and offer clear lines of accountability for nominated responsibilities. The weaknesses can include an agency-centric insularity, a lack of innovation and experimentation, and an absence of incentives to work cooperatively with other bodies.

Cultural practices could be one of the most difficult aspects of Australia's federal relations to reform. It cuts across existing organisational structures, their incentive systems and the career trajectories of public officials. Fostering collaborative cultural practices requires skills and techniques in public administration that are not always nurtured by existing organisations.

A realignment of organisational cultures to improve cooperative federalism could focus on:

- Committing to develop cooperative philosophies of policy making and delivery to improve the outcomes for the community
- Recognising the inherent shared responsibilities and mutual inter-dependence involved in achieving those desired outcomes
- Developing a preparedness to step back from some of the 'old norms' of public administration such as 'unilateral decision-making', 'claims of exclusive policy ownership or carriage', 'command and control' logics and 'we know best' mindsets.

### 4.2 Barriers to cooperation

Although collaborative cultural practices are being applied in many pockets of government, some institutional barriers inhibit wide-spread moves towards a more cooperative style of governance. These barriers, or codes of insularity, occur principally within three interrelated dimensions of administration:

#### **Jurisdictional allegiance and loyalty**

Most actual policy-making and delivery operations are authorised and initiated within a single jurisdiction – even if ideas, policy requirements and resources may be derived from other levels of jurisdiction. Administrative and delivery cultures remain framed within the jurisdictional environment and its processes and procedures. There are a few notable exceptions of truly inter-jurisdictional agencies such as the Great Barrier Reef Marine Park Authority or Food Standards Australia and New Zealand. Jurisdictional allegiance and loyalties tend to foster unnecessary insularity and lead to the compartmentalisation of policy issues or their implementation. This goes to the heart of Chapter 3: the need for truly cooperative inter-jurisdictional institutions.

#### **Agency-based perspectives and vantage points**

Most organisational cultures and administrative incentive structures remain risk averse. Silos and silo-mentalities can adversely affect collaborative engagement. The institutional walls that serve to protect the organisation and provide defensible structures for officials carrying out administrative duties within a single entity can impede cooperative partnerships. All forms of cooperation require different types of commitments and skills. All instances of collaboration involve hard work and dedication to establish and maintain. These requirements place additional burdens and responsibilities on the participating actors (government or non-government).

### Profession-based values, codes of practice and regulatory behaviours

Professions also work from internalised value systems that tend to proliferate professionally sanctioned norms and codes, which in many cases limit the practices or behaviours of service deliverers. The manifestation of such values and codes is often found in restrictive work or 'work to rule' practices enforced by professional entities and associations. Professions may not be antagonistic to cooperative interaction but their training and professional policies may limit meaningful sharing of responsibilities. Many professions also guard their own notions of individual practice and responsibility. In some cases, professional behaviours may limit information sharing and cooperative policy development with external stakeholders.

## 4.3 Building cooperative cultures

These barriers must be overcome, as cultural change is critical to excellence in government performance, particularly in a federal system, and to addressing complex and cross-sectoral policy problems.

For example, homelessness is one such problem that cannot be neatly disentangled to discrete State and Commonwealth roles. Homelessness has a number of contributing factors, including access to welfare payments (Commonwealth responsibility), education and training opportunities (State responsibility), health services (State responsibility) and crisis accommodation (States and community sector responsibility). These problems need genuine and effective inter-jurisdictional cooperation in order to 'join up' systems and ensure people do not fall through the gap between where Commonwealth services end and State services begin – and vice-versa. The role that local government and the community sector also play in these areas means cooperation is an involved and multi-dimensional task.

As Prime Minister Tony Blair argued in the UK, often the major areas of policy failure are the things that fall between existing policy programs. Blair argued for the need for 'joined up government', meaning resource-based incentives for multiple agencies to cooperate to solve community problems and improve integrated service delivery. The UK's model was enhanced by the requirements for joint-bidding for resources in which agencies were required to collaborate in policy design and make joint submissions to government for funding. Australia has used variants of this previously (such as with Landcare or national heritage programs) but such schemes have been used relatively infrequently.

Cooperative cultures require behavioural changes in areas where practices can be improved, but they also require the reorientation of public administration to encourage broad-based change. The most significant changes required are those that:

- Build relations based on trust, not on commercial or contractual logics (which are premised on distrust, caution and even scepticism) or on commanded directives from one actor. The 2008 reforms to the federal financial relations framework is a positive move in this direction (see Appendix 1)
- Explore ways to identify and embrace common goals and objectives – building shared perceptions of problems using a 'top down/bottom up' approach. In the COAG context, this would mean COAG can set the strategic direction, whilst Ministerial Councils provide the policy detail and act as facilitators of community input
- Develop policy solutions closer to the community through community involvement and engagement
- Establish new organisational skills and cultures – elevating the techniques of collaboration, working with other sectors, anticipation, diplomacy and relation-building
- Develop and promote collaborative career cultures and progression plans to broaden workplace capacities and profiles – highlighting the benefits of diverse experiences, working in different sectors, arranged staff secondments and sabbatical attachments, the development of multi-agency skills and networks
- Develop joint and supportive reporting and review systems which enhance policy goals rather than adopt a 'gotcha' mentality. For example, the public reporting of government performance through the COAG Reform Council has a role to play in sharing best practice
- Reconsider accountability requirements and risk assessments. Many cooperative ventures will require some relaxation of strict accountability requirements and some appreciation by parliaments (and the media) that these endeavours will be complex and multi-faceted and perhaps even 'messy'. Agencies will remain reluctant to cooperate if they feel they are exposed in terms of formal accountabilities.

## 4.4 Towards cooperative practice

Translating these changes into practice could involve:

- Joint jurisdictional taskforces and project groups with multi-jurisdictional representation
- Active programs of secondment and official exchange programs across governments for mutual learning and relationship building
- Joint management reviews of inter-dependent policy areas (such as the project management reviews undertaken by the 'Gateway Review' methods)<sup>22</sup> involving executive oversight with experienced managers
- Invitations to network actors and community representatives to join and participate in working groups for stipulated periods (perhaps with officials going to work in policy networks for similar periods)
- Greater encouragement of lateral recruitment and more diversified career planning, perhaps involving placements in the private sector, third sector, NGOs and other locations. This effort can be assisted by programs of sabbatical leave spent attached to other jurisdictions or delivery agents
- More formal recognition of cooperative experience and involvement in career promotion criteria in the public services.

These changes focus on bringing the strength of difference and shared perspectives to the table in order to build the capacity for governments to think and lead together. The new Intergovernmental Agreement on Federal Financial Relations provides a framework in which State and Commonwealth Governments can pursue mutually agreed objectives. Indeed, the 2008 COAG process saw an increase in cooperation and information sharing between jurisdictions in the collaborative development of the policy frameworks for the new National Agreements and National Partnerships. Building stronger collaborative cultures will allow governments to fully harness the potential of the framework they have established.

### OPTIONS FOR REFORM

State and Territory governments should explore various ways to develop and sustain cooperative and collaborative cultural practices in the delivery of community outcomes.

To 'kick start' this process, the Council for the Australian Federation should consider undertaking a project to identify current successful collaborative cultural practices and to develop best-practice models and/or guidelines for such practices in Australia.

<sup>22</sup> The Commonwealth has introduced the Gateway Review Process to improve the on-time and on-budget delivery of major projects. See: <http://www.finance.gov.au/gateway/index.html>

## 5. CONCLUSION

*Common Cause: Strengthening Australia's cooperative federalism* has built on the earlier work of Twomey and Withers by exploring how Australian jurisdictions can enhance policy delivery through improving engagement and cooperation. This report does not seek the perfection of federalism for its own sake or to satisfy some arcane principles in federalist theory; rather, it seeks to provide a framework for improving the workings of Australian federalism to generate and sustain substantial future benefits for the Australian community. The premise of this report is that substantive policy reform should occur hand in hand with the functional reform of the federal system in order to deliver real outcomes for Australians.

To frame our arguments, we adopted a three-part architecture consisting of the principles of good federal design, suggestions for improving the governance arrangements within Australia, and broad proposals to improve the cultural alignment within the networks of policy delivery. The improvement of policy outcomes rests on these three interrelated elements of improved federal functioning, as shown below.



The paper identified three main principles that underpin the cultural and institutional, legal and financial changes put forward. These are:

- Subsidiarity and the proximity of government to the community
- The alignment of responsibilities with jurisdictional boundaries as far as practicable
- Engagement and cooperation between governments.

Of these, cooperation between governments is undoubtedly the most important in the current Australian context. The options for reform put forward by this paper reflect its importance:

- Development of a strategic forward agenda by CAF to facilitate horizontal cooperation, share policy innovation and identify opportunities for harmonisation
- Formalisation of COAG and its operation through an intergovernmental agreement that articulates principles to guide cooperation
- Clarification of the relationship between COAG and Ministerial Councils, with the latter undertaking greater community engagement
- Establishment of innovative and purpose-built institutions where reform needs require them
- Ongoing review of federal financial relations
- Consideration of constitutional reform to:
  - facilitate cooperative legislative schemes;
  - provide a role for the States and Territories in appointing High Court judges; and
  - give States and Territories the opportunity to initiate referenda
- Development of cultural practices that support the best of federalism.

Undertaking these reforms should release the benefits of the Australian Federation. These benefits would:

- Check the concentration of power at any level of government
- Provide greater choice and flexibility for citizens, provide greater diversity of policy provisions and allow greater customisation of policy to suit local needs
- Allow greater scope for innovation in implementation strategies and delivery systems
- Encourage competition between jurisdictions in the provision of quality services and policy provisions
- Enhance creativity and innovation among governments and policy delivery networks.

To achieve these benefits, Australian governments need to commit to a new era of cooperative federalism and embed genuine collaboration across all stages of the policy process. The community expects no less.

# APPENDIX I: RECENT COAG REFORMS

The new COAG Reform Agenda recognises that substantially improved policy performance cannot occur without productive intergovernmental cooperation.

As a starting point, COAG has deepened and extended its own role. At its meeting in December 2007, COAG committed to meet an unprecedented four times in 2008.<sup>23</sup> It also expanded those attending to include Treasurers, thereby consolidating its place within the policy-setting process of each government.

Also in December 2007, COAG established seven working groups. The groups were charged with developing strategic policy directions and outcomes frameworks contained in the new agreements.

The most significant of COAG's decisions in 2008 was to implement the new Intergovernmental Agreement on Federal Financial Relations.<sup>24</sup> In committing to the new Intergovernmental Agreement, governments recognised that a new framework for Commonwealth–State engagement was necessary in order to achieve significant and durable reforms. The new financial framework commenced on 1 January 2009. While COAG will oversee all aspects of the new agreements, independent monitoring and reporting of progress will be undertaken by the COAG Reform Council.

This financial framework is based on five key elements:

**1. Rationalisation of SPPs:** specific purpose payments (SPPs) have long been a major source of inefficiency and inflexibility in Australian federalism. Under the new reform plan, the 90 or more current SPPs have been rationalised into five new SPPs supported by new national agreements in the areas of health; schools; skills; disabilities services; and affordable housing.

**2. Greater flexibility:** the Commonwealth has committed to removing the prescriptive conditions contained in SPPs which inhibited State and Territory service delivery and priority setting. The States and Territories now have greater flexibility to direct resources to areas they believe will produce the best results. The focus has shifted from inputs to the achievement of outcomes. Mutually agreed statements of objectives are contained in the National Agreement accompanying each SPP. These set out what governments expect to achieve, as well as clarifying roles and responsibilities of each level of government. Performance indicators, benchmarks and policy and reform directions are also contained in the National Agreements.

**3. Funding:** funding under the new SPPs is ongoing, subject to periodic reviews. The Commonwealth guaranteed that no jurisdiction will be worse off in funding terms than they would

be under current arrangements. In a significant departure, the SPP agreements and new National Partnership (NP) payments have been negotiated (and funding provided) as a single package and paid directly to the Treasury Departments of each jurisdiction (rather than to line agencies). This should reduce administrative costs and aims to encourage line agencies to focus on service delivery and policy development rather than on securing funding.

**4. Accountability:** performance accountability is the bedrock of the new framework, granting the States and Territories greater flexibility in policy and spending decisions, in return for open scrutiny of their performance. This is expected to drive good performance and innovation through the highlighting of outstanding examples of government services. The COAG Reform Council (CRC),<sup>25</sup> which came into existence in 2007,<sup>26</sup> has been given a substantial role in this regard. The CRC will provide independent assessments of how jurisdictions are progressing against agreed performance benchmarks in the various policy areas. The CRC will report to COAG and publish its findings publicly.

**5. National Partnership Payments:** a new form of payment, NPs are now available to States and Territories, over and above existing funding through SPPs, to support specific projects and to facilitate and reward reform. The NPs are of three types:

- First, some existing payments for specific purposes will become National Partnership project payments to support the delivery of specific projects — such as the Commonwealth's financial contribution to the States through AusLink.
- Second, National Partnership facilitation payments may be used to assist a State to undertake policy reform in an area of national priority. This recognises that the benefits of reforms initiated in the States and Territories are often shared by the Commonwealth.
- Third, National Partnership reward payments will be provided to those States and Territories which deliver reform progress, as measured by the achievement of performance benchmarks. Achievement of benchmarks will be assessed by the independent COAG Reform Council in order to provide transparency and enhance accountability in the performance assessment process. Reward payments provide an incentive for States and Territories to take the initiative in investing in future reform.

Chart 1 illustrates how the new financial framework fits together.

<sup>23</sup> Council of Australian Governments (2007) *COAG Communique*, 20 December

<sup>24</sup> Council of Australian Governments (2008) *COAG Communique*, 29 November

<sup>25</sup> Council of Australian Governments (2006) *COAG Communique*, 10 February

<sup>26</sup> Council of Australian Governments (2007) *COAG Communique*, 13 April

CHART 1: THE NEW FINANCIAL FRAMEWORK

Type of Payment	Purpose of Payment					Source of Funding
National Partnership Payments	Project	Facilitation		Reward		General Revenue & COAG Reform Fund
Specific Purpose Payments	Health	Schools	Disabilities Services	Affordable Housing	Skills	General Revenue
General Purpose Payments	General revenue assistance provided to compensate the States and Territories for their exclusion from major tax bases and to be spent at their discretion. <sup>27</sup>					GST

<sup>27</sup> Distribution of these payments among States and Territories from GST collections is made in accordance with recommendations from the Commonwealth Grants Commission (i.e. horizontal fiscal equalisation)



