The Senate

Select Committee on the Reform of the Australian Federation

Australia's Federation: an agenda for reform

June 2011

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Terms of Reference

On 17 June 2010 the Senate established a Select Committee on the Reform of the Australian Federation. On 29 September 2010, the committee was re-established by the Senate, to:

(a) inquire into and report by the last sitting day of May 2011 on key issues and priorities for the reform of relations between the three levels of government within the Australian federation; and

(b) explore a possible agenda for national reform and to consider ways it can best be implemented in relation to, but not exclusively, the following matters

> (i) the distribution of constitutional powers and responsibilities between the Commonwealth and the states (including territories),
>
> (ii) financial relations between federal, state and local governments,
>
> (iii) possible constitutional amendment, including the recognition of local government,
>
> (iv) processes, including the Council of Australian Governments, and the referral of powers and procedures for enhancing cooperation between the various levels of Australian government, and
>
> (v) strategies for strengthening Australia's regions and the delivery of services through regional development committees and regional grant programs.

The Senate granted an extension of time for reporting until 30 June 2011.

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Abbreviations

ACCI	Australian Chamber of Commerce and Industry
ACLG	Australian Council of Local Government
ALGA	Australian Local Government Association
CAF	Council for the Australian Federation
CGC	Commonwealth Grants Commission
CICS	Canadian Intergovernmental Conference Secretariat
CLA	Civil Liberties Australia
COAG	Council of Australian Governments
The Constitution	The Australian Constitution; *Commonwealth of Australia Constitution Act, 1900*
Engineers' case	*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129
FAGs	Financial Assistance Grants
The Inter-governmental Agreement	Inter-Governmental Agreement Establishing Principles Guiding Inter-Governmental Relations on Local Government Matters
GDP	Gross Domestic Product
GST	Good and Services Tax
HFE	Horizontal Fiscal Equalisation
IGA	Intergovernmental Agreement (on Federal Financial Relations)
IP	Implementation Plans
MLA	Member of the Legislative Assembly
NPs	National Partnerships
NPPs	National Partnerships Payments

OECD	Organisation for Economic Co-operation and Development
The Pape case	*Pape v Commissioner of Taxation* (2009) 238 CLR 1
RDA	Regional Development Australia
RMP	Regional Management Plan
ROCs	Regional Organisations of Councils
SCAG	Standing Committee of Attorneys-General
SPPs	Specific Purpose Payments
VFI	Vertical Fiscal Imbalance
Work Choices case	*New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1.

Recommendations

Recommendation 1

2.29 The committee recommends that the tendency towards greater centralisation within the Australian federation resulting from High Court decisions be among the matters referred for inquiry to the Joint Standing Committee proposed in Recommendation 17 of this report. In the event that the proposed committee is not established, it encourages more extensive academic research to be undertaken on the subject with a view to formulating policy proposals that might be referred to a constitutional convention for possible constitutional change.

Recommendation 2

2.55 The committee recommends that proposed intergovernmental agreements between the Commonwealth and state and territory governments be referred for consideration and review to the Joint Standing Committee proposed in Recommendation 17 of this report.

Recommendation 3

2.56 The committee recommends that exposure drafts of legislation intended as the foundation for a referral of power to the Commonwealth be made available for examination by parliamentary committees, including, as appropriate, the Joint Standing Committee proposed in Recommendation 17 of this report and the Senate Standing Committee for the Scrutiny of Bills, prior to their adoption.

Recommendation 4

2.57 The committee recommends that the Joint Standing Committee proposed in Recommendation 17 of this report, inquire into the consequences and uncertainties created as a result of the decisions in *Re Wakim* and *R v Hughes*.

Recommendation 5

3.53 The committee recommends that COAG be strengthened through institutionalisation to ensure the Council's effective continuing operation and ability to promote improved mechanisms for managing federal state relations. The principles of transparency and joint ownership should be central to this institutionalisation.

Recommendation 6

3.54 The committee recommends that agendas for COAG meetings be developed jointly by Commonwealth and State and Territory governments, that they be made publicly available before meetings, and that the timing, chairing and hosting of COAG meetings similarly be shared.

Recommendation 7

3.55 The committee recommends that outcomes of COAG meetings be published in a more transparent manner than is currently the case with the communiqués.

Recommendation 8

3.56 The committee recommends that the states and territories establish a stronger foundation for the Council for Australia's Federation by providing additional funding, formalising Council processes and ensuring that it meets more regularly than is currently the case.

Recommendation 9

4.47 The committee recommends that the Joint Standing Committee proposed in Recommendation 17 of this report inquire into the need for adjustments to the IGA on Federal Financial Relations and to the level and structure of taxation in Australia to provide the states certainty regarding revenue raising and their capacity to meet their responsibilities. In considering this issue, the committee should inquire into any related matters that the committee determines are appropriate, including the roles of the state and federal governments, and seek advice from the Productivity Commission, the COAG Reform Council and the Commonwealth Grants Commission as required.

Recommendation 10

5.26 The committee recommends that the recently announced review into the distribution of revenue from the Goods and Services Tax give particular attention to the issue of incentives and disincentives to states and territories to maximise their revenue.

Recommendation 11

5.34 The Committee recommends that the Joint Standing Committee proposed in Recommendation 17 of this report be asked to inquire into the extent of and need for reform of the arrangements for horizontal equalisation that currently exists between local government shires and municipalities across Australia.

Recommendation 12

6.67 The committee recommends that the issues of funding and constitutional recognition of local government be among the matters proposed for inquiry by the Joint Standing Committee proposed in Recommendation 17 of this report.

Recommendation 13

6.68 Pending the outcome of this inquiry, the committee recommends that mechanisms other than constitutional amendment, perhaps by way of agreement through COAG, be explored to place Commonwealth funding of local government on a more reliable long term foundation.

Recommendation 14

7.44 The committee recommends that the each state give consideration to strengthening existing regional governance frameworks to improve the delivery of essential services and take into account the needs of local government. In particular, it encourages state governments to review the boundaries of regions created for the administration and delivery of state services such as health and education to ensure their closer alignment with each other.

Recommendation 15

7.45 The committee recommends that the Commonwealth Government review the Regional Development Australia program after three years operation, to ensure the program effectively contributes to the long-term sustainability of Australia's regions.

Recommendation 16

8.31 The committee recommends that propositions for change to the Constitution be referred for consideration to a constitutional convention and that responsibility for the agenda and organisation of the convention be the responsibility of a newly institutionalised COAG.

Recommendation 17

8.41 The committee recommends the establishment of a Joint Standing Committee of the federal parliament to be administered by the senate and with a senator as its chair. The committee should have a mandate to conduct its own inquiries and be assigned a range of oversight responsibilities that would enable it to assume a significant and integral role in helping to manage Australia's modern federation. This should include the responsibility to provide regular oversight of COAG.

Recommendation 18

8.42 The committee recommends that the Senate Foreign Affairs, Defence and Trade References Committee undertake an inquiry into the merits of Professor Uhr's proposal that Australia sponsors an ongoing regional dialogue among elected representatives and parliamentary bodies in the Asia Pacific on the political management of decentralised and devolved national governance.

Recommendation 19

8.54 The committee recommends that funding be made available by the federal, state and territory governments for the establishment within an Australian university of a centre for the study and dissemination of ideas relating to federalism and Australia's federal system of government.

Recommendation 20

8.55 While the committee acknowledges the important work done by organisations such as the Museum of Australian Democracy and the Parliamentary Education Office in improving Australians' knowledge and understanding of Australian federalism, the committee nevertheless considers there is a need to promote a deeper understanding of federalism in the wider post-school community. The committee recommends that enhanced funding be made available by the federal, state and territory governments to appropriate institutions to promote this deeper understanding.

Recommendation 21

8.56 The committee recommends that the Australian Research Council identify Australian federalism as a priority area for research funding.

Chapter 1

Overview of Australian federalism

Introduction

1.1 On 17 June 2010, the Senate established the Select Committee on the Reform of the Australian Federation. The committee's terms of reference required it to inquire into key issues and priorities for the reform of relations between the three levels of government within the Australian federation with a view to developing an agenda for national reform. The initial reporting date was set as the last sitting day of May 2011, but the Senate granted an extension of time until 20 June 2011. The committee was granted a further extension of time until 30 June 2011.

Conduct of the inquiry

1.2 The committee advertised the inquiry on its website and in *The Australian*, and invited submissions from interested organisations and individuals. The committee received 48 submissions, as listed in Appendix 1. Public hearings were held in Sydney on 2 December 2010, Brisbane on 1 February 2011, Perth on 9 March 2011 and Canberra on 5 May 2011. A list of witnesses who gave evidence at the public hearings is in Appendix 2.

1.3 The committee thanks the organisations and individuals that made written submissions, and those who gave evidence at the public hearings.

Notes on references

1.4 References to submissions in this report are to individual submissions received by the committee and published on the committee's website.[1] References to the committee Hansards are to the official Hansard transcripts.[2]

The federal model

1.5 Australia has a robust system of government that has served it well. For a hundred and ten years the country has enjoyed relative stability, prosperity and democracy, and avoided revolution, coups or civil war.

1.6 Fundamental to Australia's constitution and governance is its federal structure. Over twenty countries around the world, representing over a billion citizens, are federations. It is a system of government that recognises historical and geographical

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1 Submissions for the inquiry can be accessed at http://www.aph.gov.au/Senate/committee/reffed_ctte/reffed/submissions.htm

2 Transcripts of the committee's public hearings for the inquiry can be accessed at http://www.aph.gov.au/Senate/committee/reffed_ctte/reffed/hearings/index.htm

differences, such as the dispersed colonies that occupied the Australian continent in the nineteenth century. At the same time, however, Australian federalism ensures unity within that diversity, and creates a nation for the continent.

1.7 Federations unite disparate states through focusing on common interests and mutual goals. In the words of Edmund Barton, federation is a 'union of the states which we believe will do so much to promote interchange and community of interests between citizens of the whole Commonwealth.'[3]

1.8 Delegates at the 1898 Australasian Federal Conference considered that the then draft Constitution drew on a range of models to create a new form of federalism uniquely suited to a union of Australian colonies. In explaining the new model of federalism, Sir Richard Barker commented:

> There have been three types of government struggling for mastery all though our deliberations. There has been, first, the type of what I call true federation; there has been the type of federation imagined by some of my honourable friends from Victoria; and there has been the British type of government. Those three types are to a very considerable extent inconsistent with each other. But in the work which we have completed traces will be found of every one of them...
>
> I believe, sincerely and truly, that the Bill which we have framed is a machine that will work most smoothly.[4]

1.9 Australia's federal system is a scheme of federation, not amalgamation.[5] Australia's constitution establishes a federal system of government in which power is not centralised but divided between various levels of government. There are three levels of government within Australia's federal structure, namely, commonwealth, state/territory, and local. Of these, the Commonwealth Government and the state and territory governments are recognised in the Commonwealth of Australia Constitution Act (the Constitution).

1.10 Section 1 of the Constitution establishes a federal Parliament to exercise 'the legislative power of the Commonwealth.' Sections 51 and 52 of the Constitution

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3 Sir Edmund Barton, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, pp 2471, http://www.nla.gov.au/guides/federation/resources/conventions1890s.html (accessed 31 May 2011).

4 Sir Richard Barker, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, pp 2481 – 2482, http://www.nla.gov.au/guides/federation/resources/conventions1890s.html (accessed 31 May 2011).

5 Sir Richard Barker, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, p. 2482.

define the scope of the Commonwealth's legislative power, listing the matters with respect to which the Commonwealth may legislate. Notably, the list includes matters referred to the Commonwealth by the states, matters relating to external affairs, and matters relating to corporations. The Commonwealth also has implied power over matters incidental to the matters listed in sections 51 and 52. The Commonwealth's powers are expressly defined and, therefore, expressly limited. In this way, as Dr Zimmermann and Mrs Finlay noted, the Constitution constrains the role and authority of the Commonwealth government.[6]

1.11 Chapter V of the Constitution recognises, and therefore legitimises, state constitutions, state parliaments and state laws. In contrast to the Commonwealth, the power of state governments is plenary, being unlimited save where state law contradicts validly made Commonwealth law.[7] That state autonomy was intended to be a key feature of the Australian federation is evident in the deliberations of the 1898 Australasian Federal Conference:

> [We are] dealing with matters on behalf of independent and self-reliant states. And we have dealt with those matters on which the interest of the states clashed, we have harmonized the interests of several states where they differed, and we have provided a Constitution sufficient to provide for the fullest and the most self-reliant government of a free people. We have created an instrument of partnership between us which, I believe, secures the independence of the several states, will provide for the joint control of certain matters, at the same time as it also leaves free and complete self-government on all matters not committed to the central authority.[8]

1.12 The Constitution distinguishes between the role of the Commonwealth and the role of the States. The founders of Australian federation envisaged a Commonwealth government responsible for matters of national importance and state governments responsible for matters of local significance. As Holder goes on to say:

> And this, it seems to me, is what we should have done — to provide that national questions should be federalised, and that local questions should be left to local self-government. And it is this, it seems to me, that we have done; and thus we have done what we ought to have done and what our constituents expected of us.[9]

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6 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, pp 8–9.

7 *Commonwealth of Australian Constitution Act*, s. 109.

8 Mr Holder, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, p. 2496, http://www.nla.gov.au/guides/federation/resources/conventions1890s.html (accessed 31 May 2011).

9 Mr Holder, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, p. 2496.

1.13 In evidence to the committee, Dr and Mrs Finlay argued that:

> [t]he drafters of the Constitution thus wished to reserve to the people of each State the right to decide by themselves on the most relevant issues through their own state legislatures.[10]

1.14 In contrast to the state governments, territories are not automatically autonomous, self-governing members of the federal system. Section 122 of the Constitution confers on the Commonwealth government the responsibility, and the right, to make laws for the government of Commonwealth territories.[11] The Australian Capital Territory, the Northern Territory and Norfolk Island are self-governing. However, while self-governing, the authority of territory governments is limited rather than plenary.

1.15 As the Northern Territory Statehood Steering Committee noted, territory self-government is granted through Commonwealth legislation.[12] The legislation expressly limits the authority of territory governments. The level of restriction differs between the self-governing territories. The Northern Territory Legislative Assembly is the least restricted, being prohibited from legislating with respect to the acquisition of property, other than on just terms, and euthanasia.[13]

1.16 In contrast, the powers of the Australian Capital Territory's Legislative Assembly are more circumscribed. The Legislative Assembly may not make laws regarding the acquisition of property, otherwise than on just terms, the provision by the Australian Federal Police of police services in relation to the territory, the raising or maintaining of any naval, military or air force, coining of money, classification of materials for the purposes of censorship, and euthanasia.[14]

1.17 Jeffery Harwood and others have argued that, as creatures of Commonwealth law, territory governments are 'both fully revocable and subordinate.'[15] This was a view shared by the Northern Territory Statehood Steering Committee:

> Limited self-government was granted to the Northern Territory from July 1 1978 by an ordinary law of the Commonwealth Parliament subject to

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10 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 9.

11 There are nine territories, namely, the Australian Capital Territory, the Northern Territory, Christmas Island, Jervis Bay, Cocos (Keeling) Island, Ashmore and Cartier Islands, Coral Sea Islands, the Australian Antarctic Territory, Heard and McDonald Islands, Norfolk Island, and the Indian Ocean Territories, as listed in: Department of Regional Australia, Regional Development and Local Government, 'Territories of Australia', http://www.regional.gov.au/territories/ (accessed 31 May 2011).

12 Northern Territory Statehood Steering Committee, *Submission 12*, p. 4.

13 *Northern Territory (Self-Government) Act 1978*, s. 50 – 50A.

14 *Australian Capital Territory (Self-Government) Act 1988*, s. 23.

15 Jeffrey Harwood, John Phillimore & Alan Fenna, 'Federal implications of Northern Territory statehood', *The Australian journal of public administration*, vol. 69, no. 1, p. 35.

> change or repeal at any moment. Since then, the *Self Government Act* has been changed on numerous occasions.[16]

1.18 Commenting on the Northern Territory government, Harwood et al. highlighted the circumscribed position of Territory governments within Australia's federal system:

> In constitutional terms, the status of the territories vis-a-vis the Commonwealth is essentially the same as that of local governments vis-a-vis their respective state government.[17]

1.19 Local Government is not mentioned in, and therefore is not given recognition by, the Constitution. On this point, the Hon Christian Porter MLA, Western Australian Attorney-General, submitted that 'Australia's federal system of government...is a relationship between two, not three, levels of government.'[18] Local governments, also known as local councils, are established through state legislation, and are therefore responsible to state governments. [19]

The strengths of federation

Common Themes

1.20 Delegates at the 1898 Australasian Federation Conference, who were tasked with developing a system of government to unite the Australian colonies, considered that a federal system of government would bring innumerable benefits. As a South Australian delegate, Mr Holder, declared: 'I can conceive of no class of persons which will not benefit from the incoming of this federation.'[20] The extent of the expectations for the intended federal system are evident in the statement of another South Australian delegate, Mr Symon:

> No man can say that, even burdened with disunion, Australia will not have great prosperity. No man can say that every state upon the continent will not share it. But, in my opinion, all that prosperity will be as nothing to the prosperity that will come from union. It will be a union with strong foundations set deep in justice, a union which will endure from age to age, a bulwark against aggression and a perpetual security for the peace, freedom,

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16 Northern Territory Statehood Steering Committee, *Submission 12*, p. 4.

17 Jeffrey Harwood, John Phillimore & Alan Fenna, 'Federal implications of Northern Territory statehood', *The Australian journal of public administration*, vol. 69, no. 1, p. 35.

18 Christian Porter, MLA, Attorney-General, Western Australia Government, *Submission 44*, p. 3.

19 *Constitution Act 1902* (NSW)*; Constitution Act 1975* (Vic); *Constitution of Queensland 2001* (Qld); *Constitution Act 1934* (SA); *Constitution Act 1899* (WA); *Constitution Act 1934* (Tas).

20 Mr Holder, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, p. 2497, http://www.nla.gov.au/guides/federation/resources/conventions1890s.html (accessed 31 May 2011).

> and progress of the people of Australia, giving to them and to their children and to their children's children through all generations the priceless heritage of a happy and united land.[21]

1.21 Reflecting on over a century of Australian federation, Wanna et al. have concluded that '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.'[22] The Council of the Australian Federation shared this view, arguing that federation 'enables a geographically large and diverse country such as Australia to maintain national unity and meet the pressures of globalisation while at the same time accommodating regional difference.'[23]

1.22 Dr Zimmermann and Mrs Finlay also submitted that a federal system is an appropriate form of government in an increasingly global society, commenting that:

> some of the largest and most internationally competitive economies in the world are federations. A federal system is clearly not itself an impediment to economic success in a globalised world, or to the delivery of competitive and efficient services. [24]

1.23 On this point, Dr Anne Twomey and Dr Glenn Withers have noted that internationally federation is promoted as a strong and viable model of government:

> In the rest of the world, the prevailing trend is towards decentralisation and federalism. Indeed, federalism is regarded as one of the best governmental systems for dealing with the twin pressures produced by globalisation – the upward pressure to deal with some matters at the supra-national level and the downwards pressure to bring government closer to the people.[25]

1.24 Several submissions drew the committee's attention to the benefits of a federal system.[26] The following advantages listed by CAF are indicative of the those benefits:

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21 Mr Symon, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, p. 2509, http://www.nla.gov.au/guides/federation/resources/conventions1890s.html (accessed 31 May 2011).

22 Professor John Wanna, Professor John Phillimore, Professor Alan Fenna with Dr Jeffrey Harwood, *Common cause: Strengthening Australia's cooperative federalism*. Final report to the Council for the Australian Federation, p. 6.

23 CAF, *Submission 38*, p. 3.

24 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 37.

25 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 8.

26 For example, ACCI, *Submission 10*, p. 2; CAF, *Submission 38*, p. 2 & Attachment A, Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, p. 8; Pearce Division Liberal Party of Australia, *Submission 14*, p. 1.

> Australia's federal structure provides for a number of significant benefits that in fact outweigh [the] perceived costs:
>
> - The customisation of policies to meet local needs
> - Incentives to innovate and experiment in policy and service delivery
> - Supporting choice and diversity
> - Competition and comparison that supports continuous improvement
> - Greater scrutiny of national policies as a result of the need to achieve cooperation
> - Protection for the individual by checking the concentration of power.
>
> Importantly, the benefits of federalism do not preclude the development of national approaches to common problems. In addition, the federal structure allows for new ideas to be pioneered by one jurisdiction and, if successful, to be adopted by others.[27]

Customisation of policies to meet local needs

1.25 CAF submitted that the consideration of the roles and responsibilities of the levels of government in the Australian federation should include 'the principle of subsidiarity'.[28] According to CAF, the principle 'holds that the most effective and efficient allocation of roles is achieved where policy and service delivery responsibilities rest with the lowest sphere of government practicable.'[29] The principle is concerned with 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.

1.26 The principle is notable within the European context. The principle informs the activity of the European Union, with the terms of the Treaty on the European Union directing that, other than in matters within its exclusive competence, the Union will act 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States...but can rather...be better achieved at Union level.'[30]

1.27 In relation to the Australian Federation, CAF argued that:

> [t]his principle is especially important in Australia's federal system, as we increasingly move towards a system of concurrent federalism – where

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27 CAF, *Submission 38*, p. 2 & Attachment A, Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, p. 8.

28 CAF, *Submission 38*, p. 3.

29 CAF, *Submission 38*, p. 3.

30 Article 5, *Treaty of the European Union*, Consolidated version, C 115/18, 9 May 2008, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF (accesssed 28 June 2011).

> multiple levels of government will have a role to play in key areas, such as health and education.[31]

1.28 State and territory governments, it is argued, are in the best position to make decisions about the types of services and regulations that suit their communities. As Twomey and Withers have concluded:

> Federalism accommodates the vast differences across Australia by allowing policies that affect local communities to be tailored to meet the needs of those communities by people who live there and understand those needs.[32]

1.29 This view was reflected in evidence put to the committee. The Northern Territory Statehood Steering Committee for example, noted that:

> Federalism works and works well when it is allowed to promote regional and local solutions for local and regional problems and allows policy innovation to flourish within a unified but diverse structure.[33]

1.30 Dr Zimmermann also noted the potential benefits of local decision-making to social governance:

> [A]t federal level you might have more people dissatisfied with a federal law because you are actually taking into account the view of the nation as a whole. Certainly, if you think about the local level you can actually satisfy the will of a group that is located in a certain area of the Territory far more than having their view counted in a territory such as a country as a whole. So an advantage of federalism is to make more people more content with the kind of laws they have.[34]

1.31 The capacity for local decision making is one of the principles that underpins the Australian Local Government Association's advocacy for recognition of local government in the Constitution.

> The fact that it is elected by the community and responsible for a broad range of services in a clearly defined geographic area means that local government is well placed to understand and meet local needs and respond to those needs in ways that are most appropriate to local conditions.[35]

1.32 Ascribing responsibility to the appropriate level of government, however, does tend to assume a world where the appropriate level of decision-making is clear cut and unambiguous. This is not necessarily the case. Professor Galligan argues that

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31 CAF, *Submission 38*, p. 3.

32 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, p. 10.

33 Northern Territory Statehood Steering Committee, *Submission 12*, p. 7.

34 Dr Augusto Zimmermann, *Committee Hansard*, 9 March 2011, p. 61.

35 The Australian Local Government Association, *Submission 24*, p. 6.

there are two dominant modes for conceptualising federalism and intergovernmental relations: coordinate and competitive. He holds that:

> [C]oordinate – separate and distinct roles and responsibilities – is not the paradigm of Australian federalism, nor do I think it could be of any sophisticated modern federal system...The Commonwealth and states share roles and responsibilities within most major policy areas: that is a fact of life, and occurs for good reasons of governance matching policy and political needs.[36]

Competition, innovation, choice and diversity

1.33 Federalism also encourages innovation, competition, choice and diversity. A federal structure improves policy development and innovation by facilitating the exchange of ideas across jurisdictions working on similar policy problems. Wanna et al. see this as a product of horizontal cooperation across jurisdictions at the same level.[37] Galligan submitted that the innovation comes through the inevitable competition that occurs between citizens of different governments wanting or seeing better programs and demanding the same from their own government.[38] According to Galligan, '[c]ompetitive federalism is much more potent and important for understanding how federalism works and the processes for its reform, and is the preferred paradigm for economists.'[39]

1.34 The broad thrust of Professor Galligan's position is supported by Walsh who sounds a cautionary note against cooperative federalism when he argues that:

> [c]ooperative federalism also can be dangerous because, if it succeeds in establishing itself as the way that governments organise their interrelationships, it would free governments and their bureaucracies from the forces of political competition, enabling them to behave, in effect, like cartels in the private sector.[40]

1.35 However, Walsh does go on to note that there is a risk of overstating the case for regarding competition in inter-jurisdictional relationships as resulting in 'efficient' rather than 'wasteful' outcomes.'[41] His central point is that:

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36 Professor Brian Galligan, *Submission 46,* p. 13.

37 Professor John Wanna et al., *Common cause: Strengthening Australia's cooperative federalism*. Final report to the Council for the Australian Federation, May 2009, p. 14.

38 Professor Brian Galligan, *Submission 46,* p. 13.

39 Professor Brian Galligan, *Submission 46,* p. 13.

40 Professor Cliff Walsh, 'Competitive Federalism—or Welfare Enhancing?' in Productivity Commission, *Productive reform in a Federal System*, Roundtable Proceedings, 28 October 2005 (2006), p. 83.

41 Professor Cliff Walsh, 'Competitive Federalism—or Welfare Enhancing?' in Productivity Commission, *Productive reform in a Federal System*, Roundtable Proceedings, 28 October 2005 (2006), p. 84.

> [m]any outcomes of federal relationships that are seen as indicators or sources of inefficiency may, in fact, be *desirable* outcomes of political competition — which, as we see around us, is capable of resulting in mutually beneficial cooperation.[42]

1.36 Linked to the notions of innovation and competition is the idea of choice and diversity. Twomey and Withers state that:

> Federalism gives people greater choices. People can, and often do, choose to support a government of one political party at the State level and another at the Commonwealth level, because they prefer different approaches to different policy issues.[43]

1.37 This choice and diversity extends to diversity in institutions as federalism requires the development of multiple capital cities, each with its own range of public institutions.

1.38 It was put to the committee that diversity should not be regarded as a weakness but rather a key strength of federalism. Mrs Finlay cautioned against viewing jurisdictional differences as a flaw in the federal system:

> And there is a real underlying perception that any disagreement, different policies or lack of unification between the states is a problem, when in actual fact it is one of the benefits of federalism...there are clear benefits to allowing the states to do things a little bit differently, to reflect the fact that people in different parts of the country have different needs. It is complicated, and there are some disadvantages to it, but, in my view, on balance the benefits clearly outweigh the disadvantages. The idea of competitive federalism can really be a driver to achieving greater results rather than simply being a delaying or a destructive type of disunity.[44]

Cooperation – greater scrutiny of national polices

1.39 Where matters cross jurisdictional boundaries, a federal system requires inter-jurisdictional cooperation. Dr Zimmermann and Mrs Finlay argued that such cooperation can benefit the federal system as it 'should...result in better decision-making by building a heightened level of debate and scrutiny into the system.'[45] The view that joint endeavour leads to more informed policy is evident in the position of Twomey and Withers:

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42 Professor Cliff Walsh, 'Competitive Federalism—or Welfare Enhancing?' in Productivity Commission, *Productive reform in a Federal System*, Roundtable Proceedings, 28 October 2005 (2006), p. 84.

43 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, p. 9.

44 Mrs Lorraine Finlay, *Committee Hansard*, 9 March 2011, p. 60.

45 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 36.

> The involvement of more than one government means that a proposal will receive a great deal more scrutiny than if it were the work of one government alone. Problems with implementing the proposal in different parts of the country are more likely to be identified. Where there is conflict between governments on the nature and detail of the proposal, there is more likely to be a public debate, as different governments are forced to put their positions and justify them in the public domain. While this has the disadvantage of sometimes slowing down reform, the need for co-operation has the corresponding advantage of ensuring that reform, when implemented, is better considered and more moderate in its nature.[46]

1.40 It has, however, been asserted that cooperation may be linked to increased centralism. Speaking as part of the Senate Occasional Lecture series, Professor Geoff Gallop has argued that what may begin 'as an inspiration for a "national" solution involving all levels of government...more often than not finishes up as a Commonwealth controlled program'.[47] In evidence to the committee, Dr Twomey reported similar concerns:

> I am told by former colleagues in various states that the Commonwealth is back to its old tricks and basically says, 'You just do what we say or else.' So the veneer of cooperation over the top has not actually been so much reflected in reality underneath[48]

Protection for the individual

1.41 Perhaps the most fundamental democratic benefit of a federal system is that it provides protection for individuals by dividing power across a range of players. Speaking of the Constitution, in 2006 Justice Kirby of the High Court underlined this benefit stating that:

> [t]his Court and the Australian Commonwealth need to rediscover the federal character of the Constitution. It is a feature that tends to protect liberty and to restrain the over-concentration of power which modern government, global forces, technology, and now the modern corporation, tend to encourage. In this sense, the federal balance has the potential to be an important restraint on the deployment of power[49]

1.42 The tendency of federal structures to disperse power is supported by international comparisons.

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46 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, p. 15.

47 Professor Geoff Gallop, 'How healthy is Australian Federalism?', *Senate Occasional Lecture*, 25 February 2011, http://www.aph.gov.au/senate/pubs/occa_lect/transcripts/250211/index.htm (accessed 14 June 2011).

48 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 10.

49 *NSW v Commonwealth* (2006) 81 ALJR 34, per Kirby J (dissenting) at [558], as quoted in Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, p. 8.

> There is also evidence that federations fare better in terms of governmental integrity than do unitary states. Transparency International survey data supports this view, with OECD federations having a 5.4 per cent higher integrity rating on average than OECD unitary states. Under federalism, power is more dispersed and is more open to scrutiny and to comparison by other jurisdictions.[50]

1.43 It was put to the committee that the distribution of power is a key and deliberate feature in the design of the Constitution. The Pearce Division of the Liberal Party stated that '[i]t was the specific intention of the framers of the Constitution that no level of government would become overly powerful, or indeed all powerful.'[51] FamilyVoice Australia put forward a similar view, stating that:

> Federalism is one of several aspects of the Australian polity that avoids the concentration of power because of the inherent tendency of power to corrupt. Other aspects of the polity giving effect to this notion include the separation of the executive, legislative and judicial powers; bicameral legislatures and regular elections.[52]

1.44 The importance of a federal structure as a barrier to centralised power was underlined by the submission from the Western Australian Attorney-General Commenting on the effect of High Court decisions such as the *Engineers Case*, the *Tasmanian Dams Case* and the *Work Choices Case* to widen the scope of Commonwealth legislative powers, it argued that such a tendency:

> is inappropriate firstly because this centralisation of power is not warranted by the Constitution's text and structure. Secondly, it is inappropriate because it destroys the benefits of federalism. These benefits, in stark contrast to centralised power, include diversity, limitations on power and dispersal of power. It is important to note that in a country as geographically large as Australia, this latter benefit enables both localised exercise of power by political decision-makers and the corresponding direct responsibility and accountability to the people who elected them.[53]

Evolution of the Australian federation and its limitations

1.45 While the Australian model of federalism has the capacity to deliver significant benefits, a recurring theme across the evidence presented to the committee was the potential for Australia's federation to be strengthened and its effectiveness improved. For example, the Gilbert and Tobin Centre of Public Law stated that '[t]he

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50 Dr Anne Twomey & Dr GlennWithers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, p. 8.

51 Pearce Division Liberal Party of Australia, *Submission 14*, p. 1.

52 FamilyVoice Australia, *Submission 8*, p. 1.

53 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 2.

federal system, while having many strengths, is not working as well as it should be.'[54] Rethink Australia commented:

> The Australian Constitution is noted for its comprehensive and generally robust Commonwealth/State provisions, however, there is considerable room for improvement.[55]

1.45 On this theme Professor Williams submitted that Australia's federal system, rather than meeting its potential, is currently dysfunctional. According to Professor Williams, this stems from the system's failure to adapt to address issues that have arisen as the federation has evolved.

> Australia's Federation is internationally regarded as one of the most dysfunctional, and there are a few reasons for that. One is that it is so old and has undergone so little change. If you look at most of the federations around the world, they have been created in recent decades and have learnt from many of our lessons. They have a better division of powers, they deal with financial matters more effectively and they deal with democratic accountability more effectively. So they have learnt from our mistakes and we have then failed to learn from our own mistakes and make those changes...Other systems that are old, like Germany, have gone through major changes. We are simply an old, intransigent system that should be a Federation but simply works nowhere near as well as it should.[56]

1.46 Three of the most significant areas of concern raised during the inquiry are fiscal and policy centralisation; enduring vertical fiscal imbalance; and the marginalisation of local and regional governance. Other issues that place limitations on Australian federalism are the high degree of shared responsibility for policy issues across all levels of government and the difficulty of changing the constitution.

Fiscal and policy centralisation

1.47 Despite the intention behind Australia's federal structure to disperse power, there has been a clear trend towards fiscal and policy centralisation over the last century. A wide range of submitters were critical of this centralising trend, including individuals, a local council and state governments. [57]

1.48 The Tasmanian government was critical of 'opportunistic federalism or "aspirational nationalism"', arguing that it undermines the federation and is 'counterproductive to efforts of the Commonwealth and state and territory governments to work together on challenges facing the nation'. It singled out the

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54 Gilbert and Tobin Centre of Public Law, Faculty of Law, University of New South Wales, *Submission 7*, p. 1.

55 Rethink Australia, *Submission 9*, p. 2.

56 Professor George Williams, *Committee Hansard*, 2 December 2011, p. 13.

57 Naracoorte Lucindale Council, *Submission 5*; Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*.

federal government's unilateral announcement of its intention to take over a Tasmanian Hospital as an example of actions that work against a smoothly operating federation.[58]

1.49 The submission from the Western Australian Attorney-General highlighted the impact of this centralising trend on the distribution of judicial powers across the Australian federation.

> Of course, the Commonwealth Constitution also effects a federal division of executive and judicial powers. Again, the distribution of these powers between the Commonwealth and the States has increasingly moved away from the balanced federal division towards greater Commonwealth power. In the executive sphere this is obvious from the control which the Prime Minister and Commonwealth Ministers exercise in Ministerial meetings, as well as resulting intergovernmental arrangements...
>
> In the judicial field, the same tendency is obvious, especially since the creation in 1976 of the federal court, of increased federal jurisdiction, which combined with accrued or associated jurisdiction, has meant that the role and importance of State courts exercising State (and federal) jurisdiction has correspondingly diminished.[59]

1.50 As chapter three will explore further, Dr Zimmermann and Mrs Finlay argued that the beginnings of this centralising trend are evident in decisions of the High Court from 1906.[60] It was then, they argued, that the High Court began to adopt a more centralist reading of the Constitution. Dr Zimmermann and Mrs Finlay submitted that the centralising tendency, evident in such cases as the *Engineers Case* and most recently the *Work Choices Case*, has affected financial relations between the Commonwealth and the States. It was argued that through cases such as *Victoria v Commonwealth (Second Uniform Tax Case*) and *Paton v Milk Board (Vic)*, the High Court has limited the states' capacity to generate income, while permitting the Commonwealth to provide conditional financial grants to the states and thereby exercise authority over matters not expressly granted to the Commonwealth in the Constitution.[61] Dr Zimmermann and Mrs Finlay conclude that 'all the advantages of federalism sought by the Australian founders have actually diminished over time, in no small part due to the actions of the High Court of Australia.'[62]

1.51 The policy centralisation represented by the increasing activity of the Council of Australian Governments (COAG) and other ministerial councils has also become a source of criticism. Increased coordination of government policy is often supported,

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58 Tasmanian government, *Submission 40*, pp 3–4.

59 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 2.

60 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 14.

61 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, pp 26–30.

62 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 31.

but in COAG and ministerial councils, many have argued it is done without transparency. Civil Liberties Australia made the argument in very strong terms:

> CLA believes that the growth and out-of-the-limelight development of COAG, SCAG (Standing Committee of Attorneys-General) and the 41 other Ministerial Councils has been the most detrimental development to Australian democracy since federation. We have been writing, speaking and lobbying parliamentarians on our opinion on this topic for more than two years.
>
> What Executive government – that is, the elite-with-the-elite of the ruling political party federally, and in each State/Territory – sees as 'efficiency' of the COAG, SCAG and Ministerial Council process is in fact a way of denying parliamentarians their traditional role.
>
> COAG, SCAG and Ministerial Councils are emasculating the power of parliaments, and the proper role and responsibility of parliamentarians, particularly backbenchers from all parties.[63]

Vertical fiscal imbalance

1.52 Another concern about the Australian model of federalism is the strong mismatch between the revenue raising capacity of governments and their expenditure. Such discrepancies in revenue raising and expenditure between state and national levels of government are referred to as vertical fiscal imbalance (VFI). VFI is a systemic feature of federations: in Shah's major study of federal systems, all countries showed national governments raising more revenue than they expended (though Spain and India came close to being vertically fiscally neutral). However, Australia has one of the most severe vertical fiscal imbalances. With Australia's imbalance measured at 18.7 percent of total revenue in 2006, only Belgium, Spain and South Africa were in the same league.[64]

1.53 The result of this vertical fiscal imbalance is a 'breakdown in accountability for cost-effective service delivery as different levels of government seek to attribute poor service delivery to each other's failings.'[65] This is discussed in more detail in chapter four of the report.

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63 Civil Liberties Australia, *Submission 22*, pp 3–4.

64 Anwar Shah (ed.) , 'Introduction, Principles of Fiscal Federalism' in Anwar Shah (ed), *The Practice of Fiscal Federalism: Comparative Perspectives* (Vol IV), 2007, London: McGill-Queen's University Press; IMF Yearbooks; Australian Government, Budget Paper No. 3, 2007–08, GST revenue to the States, http://www.budget.gov.au/2007-08/bp3/html/bp3_main-03.htm (accessed 22 Sep 2010).

65 Business Council of Australia, *Modernising the Australian federation, A discussion paper*, 2006, p. 11, http://www.bca.com.au/Content/101346.aspx (accessed 1 June 2011).

Local government – bit player or key player?

1.54 The role of local government in the Australian federation is another area of concern. The Australian colonies have had local government structures in some cases as far back as the 1840s. Despite this, recognition of its role – and the money to match – has been uneven. In particular, the highly variable funding situation is widely conceded, such as by the House of Representatives Standing Committee on Economic, Finance and Public Administration in 2003,[66] and by the Productivity Commission in 2008.[67]

1.55 In almost no other federation is local government such a minor player in government finances as a whole. Only India and Malaysia have local government funded at the same proportion of GDP as in Australia (around five or six percent). Data from Shah indicate that amongst OECD federations Australia stands alone, with local government in other countries receiving at least twice the amount of GDP as in Australia.[68] The role of local government in the Australian federation is explored in more detail in chapter six of the report.

A time for review

1.56 A common theme across the submissions is that it is timely to review and reform some of the structures of Australia's federation. Professor A J Brown's research project studying Australian citizens' attitudes to federalism found that:

> a substantial majority of Australian adults (up to 86 per cent) believe that the current system does not work well, either in general or in terms of key desirable attributes, or that a federal system is undesirable in principle… This perception increases rather than decreases with respondents' level of direct experience with the operations of government.[69]

1.57 More broadly across all layers of government, there has been increased interest in collaboration to tackle cross-jurisdictional and cross-governmental policy issues. Writing in 2009, Professor Wanna et al. said:

> [t]here 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

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66 House of Representatives Standing Committee on Economics, Finance and Public Administration, *Rates and taxes: A fair share for responsible local government,* October, 2003, Chapter 6, http://www.aph.gov.au/house/committee/efpa/localgovt/report/fullreport.pdf (accessed 1 June 2011).

67 Productivity Commission, *Assessing local government revenue raising capacity*, April 2008. http://www.pc.gov.au/projects/study/localgovernment/docs/finalreport, (accessed 1 June 2011).

68 Anwar Shah (ed.) , 'Introduction, Principles of Fiscal Federalism' in Anwar Shah (ed), *The Practice of Fiscal Federalism: Comparative Perspectives* (Vol IV), 2007, London: McGill-Queen's University Press, p. 5.

69 Professor A. J. Brown, 'Thinking Big: Public opinion and options for reform of Australia's federal system', *Public Policy*, Vol. 4, No. 1, pp 33, 36.

> outcomes are enhanced most effectively when governments work together to achieve common objectives.[70]

1.58 The 2020 Summit's final report in 2008 included as one of its themes 'creating a modern federation':

> 9.4 Reinvigorate the federation to enhance Australian democracy and make it work for all Australians by reviewing the roles, responsibilities, functions, structures and financial arrangements at all levels of governance (including courts and the non-profit sector) by 2020.
>
> A three-stage process was proposed with:
>
> - an expert commission to propose a new mix of responsibilities
> - a convention of the people, informed by the commission and by a process of deliberative democracy
> - implementation by intergovernmental cooperation or referendum.
>
> 9.5 Drive effective intergovernmental collaboration by establishing a national cooperation commission to register, monitor and resolve disputes concerning intergovernmental agreements.
>
> 9.6 Engage the Australian community in the development of an ambitious long-term national strategic plan that delivers results.[71]

1.59 Support for reform was also reflected throughout the evidence presented to the committee. For example, the Tasmanian Government contended:

> It is now more important than ever that we revitalise it [Australia's federal system] so that Australia can fully realise the democratic, social and economic benefits that a well functioning federal system can bring.[72]

1.60 Similarly, CAF submitted that there is a 'growing consensus across politics, business and the community of the need for a clarification of the roles in the federal system.'[73]

1.61 A number of court cases have given impetus to the calls for change. Local government has been particularly concerned by the effects of *Pape v Commissioner of Taxation*[74] (the Pape case) in 2009.[75] Others have criticised the centralising tendency,

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70 Professor John Wanna, Professor John Phillimore, Professor Alan Fenna with Dr Jeffrey Harwood, *Common cause: Strengthening Australia's cooperative federalism*. Final report to the Council for the Australian Federation, May 2009, p 2.

71 Australia 2020 Summit Final Report, 2008, p. 308, http://www.australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf (accessed 28 June 2011)

72 Tasmanian Government, *Submission 40*, p. 2.

73 CAF, *Submission 38*, p. 3.

74 *Pape v Commissioner of Taxation* (2009) 257 ALR1.

75 ALGA, *Submission 24*, p. 13.

and seemingly limitless reach of the corporations power, implicit in the Work Choices legislation and the 2006 High Court case against it,[76] which was lost by the states.[77]

Committee view

1.62 The committee considers that federalism is the right model for dealing with issues relating to Australia's population, culture and economic development. However, this model needs renewal. The Australian federation should be dynamic, and open to carefully considered reform. A willingness to reform will ensure that the principles of federation remain central to governance structures and process. It will also ensure that we reap the benefits of federalism for communities, while not allowing outdated governance arrangements to prevent those benefits being delivered.

1.63 As has been outlined above, and as will be explored in further detail, participants in the inquiry identified a number of areas for reform, and also provided insights on what processes might be used to implement change. In the 110 years since its inception, federalism in Australia has come under growing pressure. Increasingly complex policy issues, an entrenched imbalance between the Commonwealth, the states and the territories in their capacity to raise revenue, and a high degree of overlapping responsibilities has presented challenges for all levels of government to work together effectively. The willingness to cooperate across the three levels of government has waxed and waned in response to political and financial pressures. At times there has been a strong tendency for Commonwealth governments to invoke the need for "cooperative federalism" when often it is less a reflection of a desire for cooperation, than a determination to assume greater Commonwealth control. Perhaps not surprisingly, this has created tensions in federal state relations and been a factor in undermining the power and authority of the states and territories to be true partners in the federation.

1.64 The Senate has asked the committee to 'explore a possible agenda for national reform' on a limited range of issues, and not to determine what the outcome in any area necessarily should be. While the committee is conscious of other constitutional debates taking place at the present time, including discussions of Australia becoming a republic, amending the preamble and recognition of Australia's indigenous people, such matters are not within the inquiry's terms of reference and are therefore debates for another time.

1.65 The report will explore and outline a reform agenda to build and formalise the institutions that support the Australian model of federalism. It is the committee's belief that the agenda for national reform should aim squarely at building and formalising an 'architecture of cooperation'[78] and in so doing preserve the benefits of federalism.

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76 *New South Wales v Commonwealth* (2006) HCA 52.

77 Dr Augusto Zimmermannn and Mrs Lorraine Finlay, *Submission 17*, p. 22.

78 Professor John Wanna, Professor John Phillimore, Professor Alan Fenna and Dr Jeffrey Harwood, *Common cause: Strengthening Australia's cooperative federalism*, p. 3.

1.66 The following chapters outline the most important areas in which changes could be made to help maintain the effectiveness of Australia's federal system. Chapter 2 looks at the institutions of Australia's intergovernmental relations, and in particular COAG. Chapter 3 examines constitutional questions. This primarily concerns cooperative legislative schemes and the referral of powers, but also incorporates a broader discussion about the distribution of powers in the federation.

1.67 Australia's vertical fiscal arrangements, including the vertical fiscal imbalance, are considered in Chapter 4. Chapter 5 looks at horizontal fiscal equalisation. Chapter 6 discusses the role and funding of local government. Effective regional governance and service delivery are taken up in Chapter 7. The final chapter discusses mechanisms for advancing the agenda of federal reform, other than those already recommended in previous chapters.

Chapter 2

Constitutional questions

2.1 The founding fathers regarded a federation as the most appropriate form of government for Australia and, over time, this has provided a very sound foundation for the development of the nation's prosperity and security. However, Australia's experience has been that managing relations between the different levels of government in a federation has proved very demanding politically, economically and constitutionally. Over 110 years of federation, there has been a tendency towards the centralisation of power in the hands of the federal government. As a result, the Commonwealth now has responsibility for a range of areas not envisaged by the original drafters of the constitution: education is a particularly potent example of this. This tendency, together with the demands of managing the increasingly complex interplay of policy between the different levels of government, has resulted in the development of an intricate set of schemes and arrangements to promote cooperation in efficient delivery of policy.

2.2 This chapter will examine the way federal state relations has been affected by the tendency towards greater centralisation and consider the various cooperative legislative schemes and referrals of powers which have been developed as a way of managing relations between the different levels of government. The constitutional issues relating to local government are considered in Chapter 6.

Constitutional interpretation and centralisation of federal power

2.3 As the debates during the 1898 Australasian Federal Convention make clear the framers of the Constitution envisaged a High Court that would be 'the guardian of the expressions of the people' to 'guarantee the preservation of the Constitution until the electors themselves choose to change it.'[1] This view was reiterated by Alfred Deakin during the debates for the Judiciary Bill. For Deakin, the High Court existed to 'protect the Constitution against assaults.'[2] However, Deakin envisaged that this role would be accomplished through forward-looking rather than static interpretation of the Constitution:

> I would say that our written Constitution, large and elastic as it is, is necessarily limited by the ideas and circumstances which obtained in the year 1900....But the nation, lives, grows and expands. Its circumstances change, its need alter, and its problems present themselves with new faces.

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1 Sir Edmund Barton, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, pp 2470 – 2471, http://www.nla.gov.au/guides/federation/resources/conventions1890s.html (accessed 31 May 2011).

2 Alfred Deakin, 18 March 1902, *House of Representatives Hansard*, p. 4.

> The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary of the High Court of Australia...It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.3

2.4 This view of the role of the High Court is reflected in the Court's decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[4] (the Engineers' Case). The High Court held that the Constitution is to be interpreted according to the plain meaning of its provisions:

> It is therefore, in the circumstances, the manifest duty of this Court to turn its earnest attention to the provisions of the Constitution itself. That instrument is the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament, and it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed.[5]

2.5 The case signalled a departure from the view that the Constitution should be interpreted as reserving power for the States over matters for which the Commonwealth has constitutional responsibility. Dr Zimmermann and Mrs Finlay submitted that the case brought an end to a mode of constitutional interpretation that gives credence to the federal nature of the system of government which the Constitution established:

> [I]n the *Engineers' Case*, in 1920, Isaacs J successfully introduced a new method of interpretation whereby no areas of law were assumed to be reserved to the States. Thus the fact that Australia was constituted to be a federation was allowed to play "no significant part in determining the meaning and scope of the various powers conferred by s 51 of the Constitution".[6]

2.6 Dr Zimmermann and Mrs Finlay further argued that the approach to Constitutional interpretation required by the *Engineers' Case* is inappropriate, as it overlooks the implied federalism of the Constitution:

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3 Alfred Deakin, 18 March 1902, *House of Representatives Hansard*, p. 4.

4 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

5 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, per Knox CJ, Isaacs, Rich and Starke JJ, at para. 142.

6 Dr Zimmermann and Mrs Finlay, *Submission 17*, p. 14; citing H Gibbs, 'The Decline of Federalism?' (1994) 18 *University of Queensland Law Journal* 1, 2–3.

> I have no doubt that the Constitution is a federal compact, which means that there is a distribution of power and the fact that the Commonwealth government is only mentioned in the Constitution in terms of the powers which have been granted to the central government for the purpose of protecting state rights. I believe that the original interpretation of the High Court, the one that was exploded, as some constitutionalists say, by the engineers case, is actually the right approach for a federal document...My interpretation is that we should read that as a state reserved power, which means that the states would only lose the powers which have been explicitly allocated to the central level of government.[7]

2.7 Brown was also critical of the High Court's approach to Constitutional interpretation, stating:

> [Y]ou get a High Court like in the Work Choices decision where you have a majority of judges who just say, 'We are not going to discuss the federal balance. It has no content for us.' In interpreting a federal constitution that is an amazingly incredible indictment on an institution.[8]

2.8 The recent debate over the new funding arrangements for health is an example of creeping centralisation, but most dramatic has been the change in the Commonwealth's role in relation to education. The Commonwealth had little involvement in education until 1940 when the demands of WWII saw it fund an expansion of vocational and higher education under the defence power in the constitution.[9] Subsequently in 1942, the High Court granted a monopoly of income taxation powers to the Commonwealth and, over time, the Commonwealth began to 'fund universities from 1958, non-university higher education from 1965, secondary education from 1973, and technical and further education from 1975.'[10] This was achieved under section 96 of the Constitution - Financial assistance to States.

2.9 Twomey and Withers have stated that 'the cause of centralism has been advanced by High Court decisions'.[11] Similarly, several submissions argued that, through its interpretation of the Constitution, the High Court, rather than being the 'guardian of federalism', has undermined the federal balance of power as intended by

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7 Dr Augusto Zimmermann, *Committee Hansard*, 9 March 2011, p. 50.

8 Professor A. J. Brown, *Committee Hansard*, 1 February 2011, p. 40.

9 Dr Gavin Moodie, *Increased Commonwealth control over Australian vocational education: implications of the High Court's Work Choices decision* http://www.avetra.org.au/documents/56-Moodie.pdf , p. 3.

10 Dr Gavin Moodie, *Increased Commonwealth control over Australian vocational education: implications of the High Court's Work Choices decision* http://www.avetra.org.au/documents/56-Moodie.pdf , p. 3.

11 Anne Twomey & Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, p. 28.

the framers of the Constitution.[12] The Pearce Division of the Liberal Party from Western Australia stated:

> Over the past century there has been a gradual expansion of Commonwealth powers, which has been made possible by the expansive approach to constitutional interpretation adopted by the majority of High Court justices.[13]

2.10 The view that the High Court has promoted centralisation of power at the Commonwealth level was shared by other submitters. Western Australian Attorney-General, the Hon Christian Porter MLA, submitted:

> [i]n my view, this expansion, which has principally been occasioned by High Court decisions such as the Engineers Case, Tasmanian Dams Case and the Work Choices Case, has inappropriately widened the scope and reach of Commonwealth legislative powers, and in conjunction with s 109, curtailed State legislative powers. This is inappropriate, firstly, because this centralisation of power is not warranted by the Constitution's text and structure. Secondly, it is inappropriate because it destroys the benefits of federalism.[14]

2.11 The extent of the concern that constitutional interpretation has distorted the federal balance of power was expressed by the Northern Territory Statehood Steering Committee, which reported:

> The Secretary of the Commonwealth Attorney Generals Department, Mr Roger Wilkins...wrote in October 2007: Currently the roles and responsibilities of federal and state levels of government are unclear...in a series of decisions the High Court has removed any real restrictions or limits on Commonwealth power.[15]

2.12 In considering the role of the High Court in redefining the balance of power in the federal system, submitters drew the committee's attention to the High Court's interpretation of the external affairs power and the corporations power.

2.13 FamilyVoice Australia submitted that 'the external affairs power can now effectively be used as a peg for the Commonwealth to legislate on matters for which it would otherwise not have any power to legislate.' For FamilyVoice Australia, this capacity to further centralise power 'undermines the original distribution of powers

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12 For example, FamilyVoice Australia, *Submission 8*, p. 2; Pearce Division Liberal Party of Australia, *Submission 14*, p. 2; Dr Zimmermann and Mrs Finlay, *Submission 17*, pp 12–17.

13 Pearce Division Liberal Party of Australia, *Submission 14*, p. 2.

14 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 2.

15 Northern Territory Statehood Steering Committee, *Submission 12*, p. 7, citing Australian Review of Public Affairs University of Sydney, www.australinreview.net/digest/2007/election/wilkins.html 10 October 2007.

between the Commonwealth and the States.' [16] Similar concerns were raised by the Western Australian Attorney-General,[17] and by Dr Zimmermann, who stated:

> Certainly the most dangerous head of power, in my opinion, is external affairs because the combination of external affairs together with inconsistency can destroy the Australian Federation...Unless you can find a way to determine what the Commonwealth can do when it engages international relations, anything can go...I think the combination of external affairs with inconsistency can render the whole Australian system otiose or ineffective, or perhaps even to destroy it.[18]

2.14 Regarding the corporations power, the committee's attention was drawn to the *Work Choices Case*[19]. Dr Zimmermann and Mrs Finlay explained that the case provides authority for the principle that a 'head of power does not have to be read narrowly so as to avoid it actually breaching the explicit limitations of another head of power'. Dr Zimmermann and Mrs Finlay submitted that through the *Work Choices Case* the corporations power has been broadly interpreted so as to reduce the role of the States within Australia's federation:

> The result in Work Choices represented the continuation of how the High Court has approached the Constitution since the Engineers' Case, in 1920. It confirms the centralist method adopted by the High Court, which has given the Commonwealth the potential to further regulate many areas of law that have always been within State control.[20]

2.15 Dr Zimmermann and Mrs Finlay reported that the approach to Constitutional interpretation in the *Work Choices Case* was criticised by the dissenting justices as contributing to 'destabilising the federal nature of the Australian Constitution' and having 'the potential to reduce the States to "mere façades of authority possessing Parliaments and courts but little else"'.[21]

2.16 FamilyVoice Australia argued that the *Work Choices Case* 'needs to be re-examined to create the possibility for a restoration of federalism.'[22]

2.17 While Professor Galligan acknowledged the centralising impact of the High Court's decisions, he argued that there were ways governments could respond to the challenges they created should they wish to do so:

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16 FamilyVoice Australia, *Submission 8*, p. 2.

17 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 2.

18 Dr Augusto Zimmermann, *Committee Hansard*, 9 March 2011, p. 54.

19 *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1.

20 Dr Zimmermann and Mrs Finlay, *Submission 17*, p. 26.

21 Kirby J and Callinan J, *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, as cited by Dr Zimmerman and Mrs Finlay, *Submission 17*, pp 23–25.

22 FamilyVoice Australia, *Submission 8*, p. 4.

> I think what the High Court has essentially done is deal itself out of the federal adjudication balance of the roles of government for the most part and essentially left it to politics. Just because the High Court gives a very expansive definition of external affairs power or the corporations power does not mean that a Commonwealth government is going to take that up. It really depends on the political opportunity, the political drivers, the political leadership, the mood of the nation at the time and the strength of the states.[23]

2.18 At the same time as the committee heard extensive evidence regarding the centralising effect of the High Court's approach to constitutional interpretation, it also received evidence on possible solutions to the problem. One proposal was for a redistribution of power between the first and second tiers of governments. Twomey, for example, argued:

> It would be worthwhile for an independent body to conduct a broader review of the different functions of government, how they relate to each other and which level of government is most appropriate to exercise these functions.[24]

2.19 On this point, Brown noted that 'there is substantial public support for structural reform and redistribution of power within the system.'[25] Similarly, the Law Council of Australia stated that there is 'growing consensus across politics, business and the community that there needs to be a reallocation of powers in the Australian Federation.'[26]

2.20 Others, however, were more cautious. While supporting the need for reassessment of the roles of each tier of Government, the Hon Christian Porter MLA was hesitant to support reform achieved through Constitutional amendment:

> In my view, all of these aspects (legislative, executive and judicial) of federalism ought to be reassessed and brought back into line with the text, structure and federal spirit of the Commonwealth Constitution. This cannot occur via a constitutional amendment, but is a matter to be accomplished via the ongoing workings and relationships of the Commonwealth and the States. The risk of exacerbating the current undesirable trends might well be accelerated if...there are constitutional amendments which could have (even the unintended) consequences of further eroding our federal system.[27]

2.21 The committee heard suggestions that the High Court's centralising instincts may have been, at least in part, a consequence of the way the Court's Justices are

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23 Professor Brian Galligan, *Proof Committee Hansard*, 5 May 2011, p. 24.

24 Dr Anne Twomey, *Submission 32*, p. 1.

25 Professor A. J. Brown, *Submission 41*, p. 3.

26 Law Council of Australia, *Submission 34*, p. 5.

27 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 2.

selected. While it was acknowledged that changing the selection process might not have a significant impact, at least immediately, on the historical body of judicial interpretation, it could perhaps influence its future direction. Accordingly, it was submitted that a new process for appointing High Court Justices is required. Section 72 of the Constitution directs that the Justices will be appointed by the Governor-General in Council. The process is expanded by the *High Court of Australia Act 1979*, which states:

> [w]here there is a vacancy in an office of Justice, the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorneys-General of the States in relation to the appointment.[28]

2.22 Dr Zimmermann and Mrs Finlay argued that the consultation required under the High Court of Australia Act is 'nothing more than a symbolic gesture' as it does not 'guarantee the States any substantive input into the eventual outcome'. Accordingly, it was submitted that the appointment process promotes a Commonwealth-centred view of the Constitution:

> With all High Court appointments being made by the Commonwealth government it is entirely unsurprising that the High Court has, over time, been broadly sympathetic towards the expansion of Commonwealth powers.[29]

2.23 Dr Zimmermann and Mrs Finlay proposed a new approach to appointment of High Court Justices:

> After considering a range of reform proposals submitted in various forms over the years, it is our view that the most practical proposal is the one originally put forward by the Queensland Government in 1983 to the Australian Constitutional Convention. This proposal has subsequently been endorsed by Professor Gabriel Moens, who described it as follows:
>
> [U]pon a vacancy occurring on the High Court bench, the Commonwealth Attorney-General asks the State Attorneys-General for suggestions of possible appointees. The Commonwealth itself may then submit suggestions of potential appointees to the scrutiny of the State Attorneys-General. From this consultation the Commonwealth would gain a clear idea about which candidates met with State approval or disapproval. High Court vacancies could only be filled with prospective appointees of whom the Commonwealth government approved and of whom three (or more) State governments had expressed positive approval or had not expressed an opinion upon.[30]

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28 *High Court of Australia Act 1979*, s. 6.

29 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, pp 52–53.

30 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, pp 54–55, citing G Moens, "The Role of the States in High Court Appointments", in Upholding the Australian Constitution (Proceedings of The Samuel Griffith Society Conference, vol. 2, 1997).

2.24 The Pearce Division of the Liberal Party also argued for a new appointment process. The proposal went further than that recommended by Dr Zimmermann and Mrs Finlay:

> We suggest that the federal character of the Constitution could only be strengthened by providing for the Justices of the High court to be appointed by State Governments, with only the Chief Justice remaining an appointment for the Federal Government.[31]

Committee view

2.25 The committee accepts that over the last century there has been a strong tendency towards greater centralisation within the Australian federation. The committee notes the strong evidence that this has been a consequence, at least in part, of a succession of High Court decisions that have expanded the federal government's legislative reach. Decisions in recent years that have relied on an expansive interpretation of the Constitution's external and corporations powers have accelerated this process. Were this approach to Constitutional interpretation to continue, the potential for the further expansions of federal power would be considerable. This, in turn, would further undermine the Constitutional balance struck at the time of federation between the states and the federal government.

2.26 The committee sees merit in regular reviews of the way Justices of the High Court are selected. It is not convinced, however, that it is possible to change the selection process in a way that can ensure a better balance between any centralising and non-centralising inclinations of its Justices. Nor is it convinced that it would be desirable to try to do so, particularly if this were to be at the expense of other virtues that might be possessed by nominees.

2.27 The committee acknowledges that views within the Australian community on the desirability or otherwise of a more centralised federal structure are complex and widely divided. It notes that for some Australians centralisation is a desirable trend allowing the nation to better meet the numerous social, economic and political challenges it faces in an increasing complex and globalised world. Others, however, remain to be convinced and see the challenges best being met through a stronger rather than a weaker federal structure.

2.28 The committee does not regard it as necessary, given its terms of reference, to arbitrate between these different perspectives or to reach a conclusion on which is most appropriate for Australia's future. It notes, however, that the tendency towards greater centralisation within the federation is a matter that is having, and is likely to continue to have, a profound effect on the evolution on Australia's constitutional structure. For this reason, the committee is of the view that the matters canvassed in this section of the report should be widely debated among Australians and the issues they raise subject to careful scrutiny within the community.

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31 Pearce Division Liberal Party of Australia, *Submission 14*, p. 3.

Recommendation 5

2.29 The committee recommends that the tendency towards greater centralisation within the Australian federation resulting from High Court decisions be among the matters referred for inquiry to the Joint Standing Committee proposed in Recommendation 17 of this report. In the event that the proposed committee is not established, it encourages more extensive academic research to be undertaken on the subject with a view to formulating policy proposals that might be referred to a constitutional convention for possible constitutional change.

Cooperative legislative schemes and the referring of powers

2.30 As a way of better managing and encouraging a higher degree of cooperation among the state and federal governments and of overcoming some of the evolving consequences of High Court decisions, various schemes and arrangements for policy coordination have emerged between the different levels of government. National uniform legal frameworks, for example, can be an effective way to develop national policy initiatives leading to, among other things, comprehensive regulatory change and the promotion of Australia's international competitiveness. The creation of a national corporations law is a good case in point. As the Gilbert and Tobin Centre of Public Law submitted:

> It is just that in Australia—and this is particular to us, with a relatively small population and a relatively homogenous population—there are some areas where cooperation tends to transcend competition because we recognise there is a need for harmonised laws.[32]

2.31 Professors Andrew Lynch and George Williams have commented that, in relation to Australia's federal system, 'a burgeoning of agreements between the tiers of government, frequently underpinned by legislation, has been a feature of the later decades of the last century.'[33] However, there are constitutional constraints on the operation of cooperative schemes, and the High Court has called into question the legality of aspects of their establishment.

The constitutionality of cooperative schemes

2.32 In *Re Wakim; Ex parte McNally*[34], the High Court overturned over a decade-old system of cross-vesting state and federal jurisdiction in state and federal courts. The system, which reputedly improved court administration across the tiers of

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32 Professor George Williams, Foundation Director, Gilbert and Tobin Centre for Public Law, *Committee Hansard*, 2 December 2010, pp 15–16.

33 Professor Andrew Lynch, Professor George Williams, 'Beyond a federal structure: Is a Constitutional commitment to a federal relationship possible?', *UNSW Law Journal* Volume 31(2) 395 – 434, p. 414.

34 *Re Wakim; Ex parte McNally* (1998) 198 CLR 511.

government,[35] was held to be invalid on the grounds that Chapter III of the Constitution did not permit federal courts to exercise state jurisdiction. Subsequent to this, in *R v Hughes*,[36]the High Court held that the states cannot refer powers and functions of state executives to officers of the Commonwealth unless authority for the Commonwealth to exercise the functions and powers can be found in the Constitution.[37]

2.33 The decisions have limited the potential for cooperation between the federal and the state and territory governments.[38] Lynch and Williams have concluded that 'the High Court revealed (or created) a structural weakness that continues to blight cooperative endeavours by the States and the Commonwealth...'.[39] The problem was set out for the committee by Dr Anne Twomey:

> The provisions in the Constitution that support cooperative federalism need to be reviewed and renewed. At the moment they do not adequately serve our needs. They are quite limited in their scope and the High Court has neither been prepared to interpret them broadly nor to interpret the Constitution as supporting other cooperative measures which the Constitution does not explicitly permit or prohibit. In the words of Justice McHugh, 'co-operative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power.'
>
> One consequence has been that the cooperative cross-vesting scheme, which allowed State jurisdiction to be vested in federal courts to complement the vesting of federal jurisdiction in State courts, was struck down as invalid by the High Court in *Re Wakim; Ex parte McNally*. The ability to use Commonwealth officers to enforce cooperative legislative schemes was left in doubt after the High Court's judgment in *R v Hughes*, as the Commonwealth may not have the necessary legislative power to impose such obligations upon its officers.[40]

2.34 The Gilbert and Tobin Centre for Public Law explained some of the consequences:

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35 Dennis Rose, 'The Bizarre Destruction of Cross-Vesting', in *The High Court at the crossroads: essays in constitutional law*, Stone, A., Williams, G. (eds), Federation Press, Annandale, 2000.

36 *R v Hughes* (2002) 202 CLR 535

37 *R v Hughes* (2002) 202 CLR 535, paragraph 34.

38 Professor Andrew Lynch, Professor George Williams, 'Beyond a federal structure: Is a Constitutional commitment to a federal relationship possible?', *UNSW Law Journal* Volume 31(2) 395 – 434, pp 416 - 417; Associate Professor Anne Twomey, 'Federalism and the use of cooperative mechanisms to improve infrastructure provisions in Australia', *Public Policy* (2007) volume 2(3) 211 – 226, p. 222.

39 Professor Andrew Lynch, Professor George Williams, 'Beyond a federal structure: Is a Constitutional commitment to a federal relationship possible?', *UNSW Law Journal* Volume 31(2) 395 – 434, p. 417.

40 Dr Anne Twomey, *Submission 32*, p. 4.

> This has caused problems in a range of areas, including family law, GST price monitoring by the Australian Competition and Consumer Commission, competition law and in new fields such as the regulation of gene technology. The problems can sometimes be circumvented by a referral of power…or by accepting that matters arising under a harmonised scheme will be heard by the several State courts and regulated by separate enforcement agencies in each State. Both options are second best solutions that can make cooperation politically unachievable or practically worthless. As a result, there exist significant legal obstacles to effective federal-state cooperation, even where there is bipartisan support for cooperation across all jurisdictions to achieve an outcome in the national interest.[41]

Referrals of power – cooperation through centralisation?

2.35 The Law Council of Australia noted that there are various approaches to establishing cooperative legislative schemes, including 'model or template legislation; applied legislation; complementary legislation and referral of powers.'[42] Of these, there has been a growing tendency in recent years to rely on referrals of power under s51(xxxvii) of the Constitution, which allows the Commonwealth to exercise authority over matters referred by the states. As the New South Wales Government noted:

> The referral of powers has been the primary mechanism for dealing with Commonwealth-State/Territory issues since the decision of the High Court in *Re: Wakim; Ex parte McNally* in 1999.[43]

2.36 Notwithstanding their growing use, the Council for the Australian Federation submitted that referrals of power are 'not necessarily the best mechanism' to achieve cooperation.[44] Two concerns were raised with the use of referrals of power as a mechanism to further intergovernmental cooperation. First, it was put to the committee that the failure of cross-vesting schemes has contributed to an erosion of state power rather than cooperation between the tiers of government. This view is reflected in the statement of Western Australian Attorney-General, the Hon Christian Porter MLA, that 'the referral of State legislative powers to the Commonwealth Parliament has significantly contributed to the continuing growth and centralisation of Commonwealth power.'[45] The Tasmanian Government concurred noting that:

> [r]eferral of powers should only be utilised as a ‘last resort’ option where there is a clearly demonstrated rationale for national uniformity that can only be addressed by ceding legislative powers to the Commonwealth after all other options have been considered and eliminated. The referral of

41 Gilbert and Tobin Centre of Public Law, *Submission 7*, p. 5.

42 Law Council of Australia, *Submission 34*, p. 6.

43 New South Wales Government, *Submission 39*, p. 9.

44 CAF, *Submission 38*, p. 8

45 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 3.

> powers increases the centralisation and reduces the opportunities to capitalise on the advantages of cooperative federalism.[46]

2.37 A second objection to referrals schemes is that the scope of the power is uncertain; a fact that encourages caution and reluctance to its widespread use. Referrals schemes are created by power being referred by the states to the Commonwealth under s51(xxxvii) through text-based referrals, that is, through the states enacting legislation establishing the scope of the matters to be handed over to the Commonwealth. Examples of text-based referrals include the corporations law and anti-terrorism legislation. Text-based referrals generally include an initial referral of matters based on an agreed text of a bill, and a referral of powers to amend the text of a bill within defined parameters.[47]

2.38 A notable difficulty with a referral of powers scheme, however, is that once a referral has taken place it becomes difficult for a state to then control the Commonwealth's exercise of power over the matters referred. As Twomey argued in her submission to the committee:

> The ability of State Parliaments to refer matters to the Commonwealth under s 51(xxxvii) on the condition that the States retain a say in the amendment of laws enacted pursuant to the reference, was also thrown into doubt by comments made in *Thomas v Mowbray*.[48]

2.39 The Gilbert and Tobin Centre of Public Law agreed with this view, stating that 'while s51(xxxvii) appears to be straightforward, in truth the power suffers from uncertainty in key respects'.[49] Twomey explained that *Thomas v Mowbray*,[50]which concerned the validity of Commonwealth legislation based on referrals of power, has had the effect of removing the states' certainty about the extent and effect of referrals under s51(xxxvii):

> The thing is that how the High Court might deal with it is a random matter. That uncertainty makes the states reluctant to use section 51(xxxvii) because they are not absolutely sure when they refer a matter whether they can revoke it in the future if they need to. In particular, if you refer a matter to the Commonwealth you do not know what control you have in the future over potential amendments to the law that has been made pursuant to that reference.[51]

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46 Tasmanian Government, *Submission 40*, p. 12.

47 Professor Andrew Lynch, 'After a referral: The amendment and termination of Commonwealth laws relying on s 51(xxxvii)', *Sydney Law Review*, vol. 32, p. 375.

48 Dr Anne Twomey, *Submission 32*, p. 4.

49 Gilbert and Tobin Centre of Public Law, *Submission 7*, p. 6.

50 *Thomas v Mowbray* (2007) 233 CLR 307

51 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 3.

2.40 It was further submitted that this uncertainty fuels reluctance on the part of the states to enter into cooperative arrangements through a referrals process. Twomey argued:

> So the states do not have the same level of freedom or willingness to refer matters in circumstances where they cannot be confident as to what the future outcome might be and the extent of their control over how the reference might move on later on.[52]

2.41 A similar view was expressed by the Gilbert and Tobin Centre of Public Law:

> An issue of particular importance is the means by which the States may most effectively constrain the Commonwealth's powers to subsequently amend legislative text that has been referred to it for enactment. States will only be willing to hand over areas to Commonwealth control if they can be confident that sufficient safeguards are in place to prevent over-reaching or misuse of those powers by the national legislature.[53]

2.42 However, in contrast to this view, the Law Council of Australia reported:

> [a]t the Law Council's conference on the future of federalism, the Hon Justice French (as he then was) suggested that referral of powers offered the best solution to the current challenges for the Australian Federation as it provided clear accountability and protections for States and Territories in relation to future changes.[54]

Intergovernmental agreements and the erosion of parliamentary sovereignty

2.43 Another mechanism for establishing greater cooperation between the different levels of government has been though the use of intergovernmental agreements. On occasions these can serve as a catalyst for referrals of power, underpinning text-based referrals[55] or alternatively leading to the enacting of Commonwealth legislation.

2.44 The National Vocational Education and Training Regulator Bills, which were examined by the Senate Legislation Committee on Education, Employment and Workplace Relations during the course of this inquiry, are an example of legislation formed to give effect to an intergovernmental agreement.[56] The National Vocational Education and Training Regulator Bills highlight the potential concerns with this approach to cooperative federalism for the Commonwealth level of government.

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52 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 3.

53 Gilbert and Tobin Centre of Public Law, *Submission 7*, p. 6.

54 Law Council of Australia, *Submission 34*, p. 7.

55 Dr Anne Twomey, 'Federalism and the use of cooperative mechanisms to improve infrastructure provisions in Australia', *Public Policy* (2007) volume 2(3) 211–226, p. 213.

56 National Vocational Education and Training Regulator Bill 2010 [2011]; National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010 [2011]; National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011.

2.45 The Bills relied on a text-based referral of powers from the New South Wales Government, which was in two parts, namely, an initial reference and a continuing reference. The initial reference was made in the terms of the text of the yet to be introduced Commonwealth Bills, which were annexed to the New South Wales Bill. The continuing reference established the parameters under which the text of the legislation could be amended once passed.[57] The committee was advised that for the Commonwealth to be able to rely validly on the referral, the Commonwealth Parliament could not substantially amend the Bill. The decision before the Parliament was merely to pass or not to pass the Bill.[58] In this regard, the role of Parliament was reduced to exercising the powers of veto.

2.46 This approach to cooperative federalism has the unintended consequences of the Commonwealth executive binding the Commonwealth Parliament. This matter was raised in evidence before the committee, and the Gilbert and Tobin Centre of Public Law proposed greater Parliamentary oversight of intergovernmental agreements:

> You could put in place a mechanism, for example, to have automatic referral of intergovernmental agreements to a parliamentary committee. You might have a specially constituted parliamentary committee at the federal level which would consider an intergovernmental agreement and then report on it. I think a direct comparison could perhaps be drawn to the area of international relations where the Commonwealth will not ratify a treaty until it has been subject to the review of the Joint Standing Committee on Treaties. No such mechanism exists currently for intergovernmental agreements which some would say is a little incongruous.[59]

2.47 The issue of text-based referrals of power to implement intergovernmental agreements was also considered by the House of Representatives Standing Committee on Legal and Constitutional Affairs as part of the committee's 2008 inquiry into reforming the Constitution. The committee concluded:

> There are concerns regarding the escalation of intergovernmental agreements and the lack of transparency and oversight applied to these agreements. For this reason the Committee has recommended scrutiny of

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57 Parliament of New South Wales, *Vocational Education and Training (Commonwealth Powers) Bill 201*, http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/369f8ac5a0f6539eca2577e5003ac314?OpenDocument (accessed 1 June 2011).

58 Senate Legislation Committee on Education, Employment and Workplace Relations, 21 March 2011, p. 2.

59 Mr Paul Kildea, Director, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 2 December 2010, p. 18.

intergovernmental agreements by a parliamentary committee, as currently happens with international treaties.[60]

Committee view

2.48 The committee notes that 'referrals of power' schemes have often been a very effective way of encouraging federal/state cooperation on matters of national importance. It recognises that when these referrals take place the states and territories may well desire to retain some control over the future exercise of the powers referred and that they are not always confident of being able to do so. It also notes that the referrals process often lack transparency, leaving significant changes in responsibilities between federal and state governments beyond the reach of the parliaments to scrutinise properly. One of the consequences can be that referrals arrangements are discouraged when they may be the best way to address issues of common concern.

The need for Constitutional change to promote cooperative federalism

2.49 As a way of overcoming the difficulties that have emerged in implementing cooperative schemes for the better management of common issues and problems, the committee heard some evidence that constitutional change would be necessary. This view was expressed by Twomey and the Gilbert and Tobin Centre of Public Law who both argued that if cooperative federalism was to be a natural policy option in the future a constitutional change is necessary.[61] The committee's attention was drawn to the first recommendation in the unanimous 2006 report of the House Standing Committee on Legal and Constitutional Affairs on the Harmonisation of Legal Systems, which includes the following proposals.

- The Australian Government seek bipartisan support for a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court of Australia in the *Re Wakim* and *R v Hughes* decisions at the Standing Committee of Attorneys-General as expeditiously as possible;
- The Australian Government draft this constitutional amendment so as to encompass the broadest possible range of cooperative legislative schemes between the Commonwealth and the States and Territories.[62]

2.50 Twomey contended that Constitutional amendments to promote cooperative federalism might take one of several forms.

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60 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Reforming our Constitution: A roundtable discussion*, June 2008, p. ix.

61 Gilbert and Tobin Centre of Public Law, *Submission 7*, p. 5; Dr Anne Twomey, *Submission 32*, pp 4–5.

62 House Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems within Australia and between Australia and New Zealand*, 2006, Recommendation 1, p. xv.

> There are two main ways these problems could be tackled. First, specific technical amendments could be made to the Constitution to permit cross-vesting, allow the conferral of State functions on Commonwealth officers (where the relevant governments agree) and clarify the application of s51(xxxvii), particularly concerning the capacity to revoke references and the manner in which references (and laws supported by a s 51(xxxvii) reference) may be amended.
>
> Secondly, a broader provision could be inserted in the Constitution to support inter-governmental cooperation. It could, perhaps, be modelled on s 105A of the Constitution and permit the making of agreements between the Commonwealth and the States concerning matters within their legislative, executive and judicial powers. It could confer the power to legislate to give effect to such agreements and deal with how those agreements could be altered or rescinded and the effect that such changes to the agreements would have on existing legislation that implemented them. The machinery for inter-governmental cooperation could also be upgraded, perhaps by clearing the inter-state commission provisions out of the Constitution and creating a new independent body with the role of monitoring the implementation of agreements and adjudicating upon disputes between governments on the operation of inter-governmental agreements. In short, a new architecture supporting cooperative federalism could be created.[63]

2.51 The New South Wales Government also supported constitutional amendment to address the effect of the High Court's decisions:

> The Commonwealth must also be willing to consider the removal of barriers imposed by the Australian Constitution as a means of ensuring the most consistent and cohesive application of law.[64]

2.52 While not calling for Constitutional amendment, the Law Council of Australia submitted that 'any high level process for broader consultation on the challenges posed by social change to the Australian Federation should include examination of the advantages and disadvantages of current co-operative legislative schemes.'[65]

2.53 Of the 44 referenda proposals, only eight have succeeded.[66] In a paper on constitutional reform, 'Processes for reforming Australian federalism', Professor Brian Galligan gave consideration to the frequent calls for amendment of the constitution to address some of the obstacles to greater cooperation between the different levels of Australian government. Professor Galligan argued that while attention is given to referenda, and the role of the High Court, as the means to affect Constitutional change

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63 Dr Anne Twomey, *Submission 32*, pp 4-5.

64 New South Wales Government, *Submission 39*, p. 9.

65 Law Council of Australia, *Submission 34*, p. 7.

66 Australian Electoral Commission, *Referendum dates and results: 1906 – present.*, http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm (accessed 21 June 2011).

'these avenues are not in fact the most promising ones'. According to Professor Galligan 'political and intergovernmental processes...are the likely avenues for change.'[67]

Committee view

2.54 The committee acknowledges the broad support for a review of constitutional barriers to cross-vesting and other cooperative schemes. The committee also considers that there would be merit in exploring whether constitutional amendment is necessary to ensure the distribution of powers between the Commonwealth and the states remains, and continues to remain, appropriate as the Australian nation continues to evolve. Constitutional amendment is a way of addressing some of the existing constitutional impediments which can sometimes serve to frustrate the development of schemes intended to achieve cooperative federalism. In this connection it notes in particular the uncertainties created as a result of the decision in *Re Wakim* and *R v Hughes*. Given the need for change, the committee can see some merit in the first recommendation of the 2006 report of the House Standing Committee on Legal and Constitutional Affairs on the Harmonisation of Legal Systems mentioned earlier in this section. It further notes, however, the poor record of success of efforts to secure change through Constitutional amendment and suggests, in light of Professor Galligan's observations, that reform by other means may have a greater likelihood of success.

Recommendation 6

2.55 The committee recommends that proposed intergovernmental agreements between the Commonwealth and state and territory governments be referred for consideration and review to the Joint Standing Committee proposed in Recommendation 17 of this report.

Recommendation 7

2.56 The committee recommends that exposure drafts of legislation intended as the foundation for a referral of power to the Commonwealth be made available for examination by parliamentary committees, including, as appropriate, the Joint Standing Committee proposed in Recommendation 17 of this report and the Senate Standing Committee for the Scrutiny of Bills, prior to their adoption.

Recommendation 8

2.57 The committee recommends that the Joint Standing Committee proposed in Recommendation 17 of this report, inquire into the consequences and uncertainties created as a result of the decisions in *Re Wakim* and *R v Hughes*.

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67 Professor Brian Galligan, 'Processes for reforming Australian federalism', *UNSW Law Journal* 31(2) (2008), p. 627.

Chapter 3

Intergovernmental relations

3.1 A key issue in Australia's model of federation is its capacity to respond to the jurisdictional difficulties that arise when issues affect the powers and interests of the different levels of government.

3.2 Relationships between federal, state and territory governments have fluctuated over time as indicated by Hollander and Patapan.

> Menzies' emphasis on the individual and his suspicion of 'big government' inclined him towards a federalist position that was articulated in the party's platform. On the other hand, the Menzies government's adherence to federalist principles in practice was patchy. It never considered handing back the income taxing powers it had inherited, and was happy to expand the Commonwealth's role in a range of policy areas such as education and infrastructure. This weak centralism of the 1950s and early 1960s contrasted with Prime Minister Gorton's enthusiasm for a more definite centralist approach in the late 1960s...The Fraser government's New Federalism...explored the potential for reinvigorating Australian federalism. While the plan to hand some taxing powers back to the states was never realised, Fraser did cut back on the use of tied grants that had ballooned under Whitlam.[1]

3.3 More recently, federalism continues to be characterised as suffering from conflict and buck passing between different levels of government. Whilst some aspects of Australian federalism are subject to quite legitimate criticism in this regard, Twomey and Withers emphasise that the extent of cooperation which is achieved every day in the Australian federal system is immense, but that it is 'just not sufficiently newsworthy.'[2] They argue that conflict is not necessarily bad, as it can lead to vigorous debates about, and greater public scrutiny of, policy.

3.4 The issue for Twomey and Withers is the 'poor implementation of federalism in Australia, rather than the existence of the federal system itself.'[3] Co-operative federalism as it currently operates is not always effective because its processes can be

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1 Robyn Hollander, Haig Patapan, *Pragmatic Federalism: Australian Federalism from Hawke to Howard*, Australian Journal of Public Administration, Vol 66, Issue 3, p. 283 September 2007.

2 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 24.

3 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 24.

'bogged down by delay and neglect.' The capacity of the current system for continuing economic reform has been run down which is why 'competition remains important.'[4]

3.5 There are vertical and horizontal mechanisms currently in place which are intended to foster co-operation between levels of government.

Vertical mechanisms

The Council of Australian Governments

3.6 The creation of the Council of Australian Governments (COAG) had its origins in 1990 in a 'new federalism' initiative designed to promote national cooperation in relation to microeconomic reform built on four principles:

> The first recognised Australia's nationhood and the importance of working co-operatively to ensure that national interests are resolved in the interests of Australia as a whole. The second was the subsidiarity principle, that 'responsibilities for regulation and for allocation of public goods and services should be devolved to the maximum extent possible consistent with the national interest, so that government is accessible and accountable to those affected by its decisions'. The third principle concerned structural efficiency and the need for increased flexibility and competitiveness in the Australian economy, and the fourth concerned the accountability of government to the electorate.[5]

3.7 Since its creation in 1992, COAG has been the peak intergovernmental forum in Australia. The Council comprises the Prime Minister, state premiers, territory chief ministers and the president of the Australian Local Government Association (ALGA).[6] Over the years, a wide range of issues has been discussed at COAG, including events such as the Bali bombings and the global financial crisis. All these discussions have highlighted the need for effective intergovernmental operations and they have strengthened the role of COAG.[7]

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4 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 24.

5 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 28.

6 COAG, *About COAG*, http://www.coag.gov.au/about_coag/index.cfm (accessed 26 May 2011).

7 Gareth Griffith, *Managerial federalism: COAG and the states*, (December 2009), NSW Parliamentary Library Research Service Briefing Paper No. 10/09.

3.8 COAG's function is to:

> initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments[8]

3.9 Issues considered by COAG may be drawn from such things as Ministerial Councils, international treaties that impact on States and Territories, or initiatives of one government (particularly the Commonwealth Government) which impact on other governments or require the cooperation of other governments.[9] COAG meets on an as needed basis, and can operate out-of-session via correspondence. The outcomes of COAG meetings are contained in communiqués released at the end of each meeting. Where formal agreements are reached, these may be embodied in Intergovernmental Agreements.[10] (Intergovernmental agreements and the issues they present are discussed in more detail in the next chapter.) The COAG mechanism has been characterised as follows:

> [L]egally and administratively the COAG process involves complex arrangements, founded on intergovernmental agreements, and delivered by new legislative initiatives and bureaucratic structures.[11]

COAG Working Groups

3.10 In December 2007, COAG established seven working groups led by ministers and comprising senior officials. Each of the working groups was charged with developing Commonwealth-State implementation plans for the COAG reform agenda agreed in February 2006. Therefore they reflect that agenda. They were the:

- Working Group on Health and Ageing;
- Working Group on Productivity Agenda: Education, Skills, Training and Early Childhood Development;
- Working Group on Climate Change and Water;
- Infrastructure Working Group;
- Business Regulation and Competition Working Group;
- Housing Working Group; and the
- Working Group on Indigenous Reform.[12]

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8 COAG, *About COAG*, http://www.coag.gov.au/about_coag/index.cfm (accessed 26 May 2011).

9 COAG, *About COAG*, http://www.coag.gov.au/about_coag/index.cfm (accessed 26 May 2011).

10 COAG, *About COAG*, http://www.coag.gov.au/about_coag/index.cfm (accessed 26 May 2011).

11 Gareth Griffith, *Managerial federalism: COAG and the states*, (December 2009), NSW Parliamentary Library Research Service Briefing Paper No. 10/09, p. 16.

3.11 Of these, only the working groups on Business Regulation and Competition, Infrastructure and Indigenous Reform are still operating. The remainder were disbanded when their planning task was completed, and responsibility for monitoring the implementation of those plans now falls to the COAG Reform Council (see below). Of the three operating working groups, the Infrastructure working group is expected to be wound up in the next year or two, the Business Regulation and Competition working group is being reassessed in 2012, and the Indigenous Reform working group is ongoing.[13]

3.12 The most significant of COAG's decisions in 2008 was to implement the new Intergovernmental Agreement on Federal Financial Relations. The new financial framework commenced on 1 January 2009.

COAG Reform Council

3.13 Independent monitoring and reporting of progress against the agreement is undertaken by the COAG Reform Council, established in February 2006. The Council is independent of individual governments. It reports directly to COAG on, amongst other matters, the performance of the Commonwealth and states and territories in fulfilling their obligations relating to the financial framework including Specific Purpose Payments (SPPs) and National Partnership (NP) payments.

3.14 The new financial framework is based on five elements:

> **1. Rationalisation of SPPs**: Under the 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 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...
>
> **3. Funding**: funding under the new SPPs is ongoing, subject to periodic reviews...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.

12 COAG Website, 'Council of Australian Governments Meeting, 20 December 2007', http://www.coag.gov.au/coag_meeting_outcomes/2007-12-20/index.cfm (accessed 26 May 2011).

13 Advice received from the COAG Secretariat in phone discussion, 26 May 2011.

> **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...
>
> **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.
> - Second, National Partnership facilitation payments may be used to assist a State to undertake policy reform in an area of national priority...
> - Third, National Partnership reward payments are provided to those States and Territories which deliver reform progress, as measured by the achievement of performance benchmarks. Achievement of benchmarks is assessed by the independent COAG Reform Council in order to provide transparency and enhance accountability in the performance assessment process.[14]

3.15 The Council has published a number of reports, including its *2010 COAG Reform Council Report: Report to the Council of Australian Governments on the COAG Reform Agenda*[15]; and other reports for individual National Agreements.[16]

Ministerial Councils

3.16 A Ministerial Council is:

> a formal meeting of Ministers of the Crown from more than four jurisdictions, usually including the Commonwealth, the States and Territories of the Australian Federation, which meets on a regular basis.[17]

3.17 The work of Ministerial Councils underpins COAG. There are presently over 40 Ministerial Councils and forums coordinating government activity on specific policy areas. In addition to resolving jurisdictional service delivery and policy issues,

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14 Professor John Wanna, Professor John Phillimore, Professor Alan Fenna, Dr Jeffrey Harwood, *Common Cause: Strengthening Australia's Cooperative Federalism*, Final Report to the Council for the Australian Federation, May 2009, p. 27.

15 COAG Reform Council, *2010 COAG Reform Council Report: Report to the Council of Australian Governments on the COAG Reform Agenda*, http://www.coagreformcouncil.gov.au/reports/progress.cfm (accessed 26 May 2011).

16 The reports are available at: COAG Reform Council, 'Reports', http://www.coagreformcouncil.gov.au/ (accessed 26 May 2011).

17 COAG, *Commonwealth-State Ministerial Councils Compendium (July 2010)*, Foreword, http://www.coag.gov.au/ministerial_councils/docs/compendium.pdf (accessed 1 June 2011).

councils develop policy reforms for consideration by COAG, and oversee the implementation of COAG policy reforms.[18]

3.18 Individual Ministerial Councils make the decision whether to include the Australian Local Government Association, except in cases where ALGA membership is required by statute or agreement.[19] In October 2009, local government was represented on ten Ministerial Councils, though only as a voting member on four. Such facts confirm inconsistencies in the treatment of local government as already noted in respect to funding. [20]

3.19 At its meeting on 13 February 2011, COAG agreed to make significant reforms to the ministerial council system by 30 June 2011.[21] The reforms are intended:

> to focus on strategic national priorities and new ways for COAG and its councils to identify and address issues of national significance.
>
> Under the new system, enduring issues of national significance will be addressed through Standing Councils, while critical and complex issues will be addressed through limited life Select Councils.[22]

Treaties Council

3.20 The Treaties Council was established in 1996 to consider treaties or other sensitive international instruments which may impact on states and territories. The council has published an agreed set of principles and procedures for Commonwealth-State consultation on treaties.[23] The council is comprised of the Prime Minister, premiers and chief ministers and, where appropriate, the foreign minister. The council normally convenes in conjunction with COAG meetings, and has only met once in its own right, in November 1997.[24]

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18 For a full list of Ministerial Councils, including objectives, membership and meeting arrangements, see *Commonwealth-State Ministerial Councils Compendium* (Updated, July 2010), http://www.coag.gov.au/ministerial_councils/docs/compendium.pdf

19 COAG, *Commonwealth-State Ministerial Councils Compendium* (July 2010) p. 3. http://www.coag.gov.au/ministerial_councils/docs/compendium.pdf (accessed 1 June 2011).

20 See Chapter 1, par. 1.53.

21 COAG, *Reform of Ministerial Councils,* http://www.coag.gov.au/ministerial_councils/index.cfm (accessed 26 May 2011).

22 COAG, *COAG Communiqué: 13 Feb 2011, Attachment C – More Effective Ministerial Councils* http://www.coag.gov.au/coag_meeting_outcomes/2011-02-13/index.cfm?CFID=1532&CFTOKEN=88180711 (accessed 26 May 2011).

23 COAG, *Treaties Council,'* http://www.coag.gov.au/about_coag/treaties_council.cfm (accessed 26 May 2011).

24 COAG , *Commonwealth-State Ministerial Councils Compendium* (July 2010), p. 10, http://www.coag.gov.au/ministerial_councils/docs/compendium.pdf (accessed 29 June 2011)

Australian Loan Council

3.21 The Australian Loan Council was established in 1927 to coordinate Commonwealth and state borrowing. All governments submit their estimated borrowing requirements for the coming financial year, and the council ensures that they are 'consistent with sound macroeconomic policy', and that borrowing plans by each government are 'consistent with a sustainable fiscal strategy'.[25] In addition to scrutinising and regulating government borrowing practices, the council is increasingly concerned with improving the transparency and accountability of public finances.[26]

3.22 Membership of the Australian Loan Council is nominally the Prime Minister, premiers and chief ministers, though in practice representation is usually delegated to treasurers.[27]

The Intergovernmental Agreement on local government matters

3.23 A common criticism of Australian Federalism is that local government is not formally recognised in the Australian Constitution. There has been some debate about the extent to which the Commonwealth is able to provide funding directly to local governments under s. 96 of the Constitution, or whether it must make payments via State and Territory governments. As well, it is argued that local governments are being asked by other levels of government to take on greater responsibility for service delivery and regulation, but that these functions are not adequately funded.[28] (Matters relating to local government are discussed in more detail in Chapter 6.)

3.24 In April 2006 the *Inter-Governmental Agreement Establishing Principles Guiding Inter-Governmental Relations on Local Government Matters* was signed by the Commonwealth, State and Territory ministers with responsibility for local government, and the president of the Australian Local Government Association. This agreement attempts to address the concerns of local governments by requiring

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25 COAG, *Commonwealth-State Ministerial Councils Compendium* (July 2010) p. 10. http://www.coag.gov.au/ministerial_councils/docs/compendium.pdf (accessed 29 June 2011)

26 Australian Government Online Directory, http://www.directory.gov.au/index.php , (accessed 26 May 2011).

27 Australian Government Online Directory, http://www.directory.gov.au/index.php , (accessed 26 May 2011).

28 Professor A.J. Brown, *In pursuit of the 'genuine partnership': local government and federal constitutional reform in Australia,* University of New South Wales Law Journal, vol. 3, no. 2, p. 439.

adequate consultation prior to making decisions on service delivery, and by setting standards for financial management and accountability.[29]

The Australian Council of Local Government

3.25 The Australian Council of Local Government (ACLG) was established in September 2008 to ' forge a new cooperative engagement between the Commonwealth and local governments', and give local governments a forum to talk directly with the Commonwealth Government on local government issues.[30]

3.26 The ACLG comprises representatives from local, state and territory levels of government and from the Commonwealth Government. The council has met only twice in its life, most recently on 18 June 2010. The meeting took the form of a community cabinet discussion where a panel of ministers and parliamentary secretaries took questions from the floor.[31] The Australian Local Government Association takes a coordination and leadership role for the ACLG on behalf of local governments.[32]

Other Local-State government forums

3.27 There are a myriad of forums in States and Territories which aim to facilitate cooperation between local and State governments. These are discussed in more detail in Chapter 6 (Local Government) of this report.

Horizontal mechanisms

3.28 While there are a range of mechanisms that promote cooperation within each level of government, the evidence to the committee was that these mechanisms are a relatively underdeveloped aspect of the Australian Federation.

Council for the Australian Federation

3.29 The Council for the Australian Federation (CAF) is 'an institutional forum for state and territory leaders', comprising premiers and chief ministers. The CAF

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29 The Inter-Governmental Agreement Establishing Principles Guiding Inter-Governmental Relations on Local Government Matters can be viewed at http://www.lgpmcouncil.gov.au/publications/files/Booklet_with_parties_signatures.pdf (accessed 26 May 2011).

30 Australian Council of Local Government, *About the ACLG*, http://www.aclg.gov.au/ (accessed 26 May 2011).

31 Australian Council of Local Government, *About the ACLG*, http://www.aclg.gov.au/ (accessed 26 May 2011).

32 Australian Local Government Association, *Australian Council of Local Government Background Fact Sheets*,, http://www.alga.asn.au/policy/ACLG/ (accessed 26 May 2011).

emerged in October 2006 out of the Leaders' Forum, which was the previous forum for meetings of state and territory leaders. [33]

3.30 CAF has its own administrative support structures, and provides regular opportunities for state and territory leaders to discuss issues of mutual interest related to the COAG agenda, but also to inter-jurisdictional issues which may have little or no relevance to the Commonwealth.[34] CAF has met seven times in the three and a half years since its inauguration, most recently in November 2009. The group issues communiqués from each of its meetings which detail the issues discussed and decisions taken by the participants.[35]

The Australian Local Government Association

3.31 The Australian Local Government Association (ALGA) is a federation of 560 Australian local government bodies (including, since 2001, the ACT). ALGA represents the interests of local government to other levels of government through such forums as COAG and Ministerial Councils, and pursues a policy agenda for improving local government practice across a range of areas, including governance, finance, regional development and infrastructure.[36] ALGA was founded in 1947, and has a permanent secretariat based in Canberra. ALGA policies are determined by the ALGA Board, comprising two members from each of its member associations.[37]

Regional Organisations of Councils

3.32 Regional Organisations of Councils (ROCs) are voluntary collaborations between local government bodies which come together on matters of common interest. There are 59 ROCs in Australia. They vary greatly but essentially are voluntary bodies which make a formal commitment to each other to advance their common interests. Chapter 7 will more fully explain their functions.

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33 Gareth Griffith, *Managerial federalism: COAG and the states*, (December 2009), NSW Parliamentary Library Research Service Briefing Paper No. 10/09, pp 4–5.

34 Professor John Wanna, Professor John Phillimore, Professor Alan Fenna with Dr Jeffrey Harwood, *Common cause: Strengthening Australia's cooperative federalism*. Final report to the Council for the Australian Federation, May 2009, p. 13.

35 Council for the Australian Federation, *Meetings*, http://www.caf.gov.au/meetings.aspx (accessed 26 May 2011).

36 Australian Local Government Association, *About ALGA*, http://www.alga.asn.au/about/ (accessed 26 May 2011).

37 Australian Local Government Association, *About ALGA*, http://www.alga.asn.au/about/ (accessed 26 May 2011).

Submitter views on intergovernmental mechanisms

3.33 The establishment of COAG was part of an evolutionary process through which the Commonwealth and state and territory governments could find ways to work together more effectively to address complex policy issues.

3.34 Twomey and Withers endorse the Keating and Wanna view of the COAG process 'as developing a more co-operative institutional relationship.'

> Under the COAG process, there was recognition of the need to facilitate agreement on policy frameworks of joint interest. Not only were the states recognised as significant players whose policy input was crucial, but the Commonwealth also accepted that policy by unilateral decree was ineffective and that it had to work through the states to achieve many of its policy goals.[38]

3.35 COAG has been largely successful in promoting national cooperation amongst governments.[39] The most notable COAG success has been implementing the National Competition Policy, described as a 'landmark achievement in nationally coordinated economic reform.'[40]

3.36 In discussions with the Committee, representatives of the Department of the Prime Minister and Cabinet, where the secretariat for COAG is currently located, indicated how some of the COAG processes functioned. They confirmed that the Prime Minister, as Chair of COAG, determines the timing and agenda of meetings after consultation with states and territories. The officers noted that these and other COAG processes do have the advantage of ensuring 'that COAG's work is inherently connected across the business of government and across the priorities of the Prime Minister in her domestic agenda.' The officer went on to add that:

> The experience of the 20 or 30 years of this brand of federalism we have been under suggests that you have a structure that evolves with the priorities facing COAG, and that works pretty well.[41]

3.37 COAG was described as 'nimble footed':

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38 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 29.

39 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 28.

40 J Pincus, Productivity Commission, *Productive Reform in a Federal System* (Roundtable proceedings, Canberra, 2006), cited in Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 29.

41 Mr Dominic English, First assistant secretary, Department of the Prime Minister and Cabinet, *Committee Hansard*, 5 May 2011, p. 49.

> When we encountered the global financial crisis, at several days notice we brought on a COAG meeting in February of 2009 to consider the Nation Building and Jobs Plan. Then after the London transport bombings in 2005 it was the Victorian government that actually suggested to the then Prime Minister that we should have a COAG meeting to reconsider our counterterrorism arrangements and, again, that was brought on at very short notice.[42]

3.38 Whilst COAG has served an important purpose, many submitters pointed to the need for reform. As Premier of Victoria, John Brumby, spoke enthusiastically of COAG's potential but also pointed out the potential for change:

> COAG is an increasingly important decision-making body that drives the reform process, makes collective decisions and resolves deadlocks. The fact that COAG has ceased the practice of always sitting in Canberra has changed the dynamic. But Australia needs COAG to become an enduring institution that rises above the ebb and flow of governments.[43]

3.39 There are also significant concerns around the way COAG operates. Dr Zimmermann and Mrs Finlay argue that:

> While there have been some significant reforms delivered through COAG, its achievements have been "sporadic and unreliable" and "its effectiveness has waxed and waned depending upon personalities and political events" There is, however, a clear need for better co-operative mechanisms both to deal with areas of shared responsibility in the federal system and to encourage a co-operative form of federalism.[44]

3.40 The Business Council of Australia has criticised COAG for meeting infrequently, for being seen as a creature of the Commonwealth, and for not being more able to "anticipate emerging reform issues, to identify and analyse potential policy responses and to monitor progress in implementing the preferred response."[45]

3.41 This report has already noted concerns such as that of Civil Liberties Australia. The CLA view is supported by comments such as those of the Gilbert and Tobin Centre of Public Law. They argue that:

> [COAG] was established by agreement between the Prime Minister, Premiers and Chief Ministers in 1992 but enjoys legal recognition neither in the Constitution nor by statute...its existence necessarily remains tenuous.

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42 Mr Ron Perry, Assistant secretary, COAG Unit, Department of the Prime Minister and Cabinet, *Committee Hansard*, 5 May 201,1 p. 49.

43 The Hon John Brumby MP, Premier of Victoria, *Does Federalism Work?* (Speech to Australian New Zealand School of Government, 11 September 2008), p. 17, http://epress.anu.edu.au/anzsog/critical/pdf/ch02.pdf (accessed 24 June 2011).

44 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 42.

45 Business Council of Australia, *Modernising the Australian Federation, A Discussion Paper*, June 2006, p. 8.

> Statutory recognition would give COAG a more secure place in the Australian federal framework...[G]iving COAG a statutory basis would instil COAG with a stronger democratic legitimacy.[46]

Committee view

3.42 The committee recognises that the establishment and subsequent evolution of COAG represents a significant step forward in managing the challenges posed by the need for cooperation in Australia's modern federation.

3.43 The committee believes, however, that several reforms and improvements can be made to COAG and the Ministerial Councils which would enhance its efficiency, encourage greater transparency and strengthen COAG's institutional standing. These improvements would focus on three areas: agenda setting, accountability and administration.

3.44 State governments should have an equal stake with the Commonwealth in COAG. This could begin with a formal, transparent intergovernmental agreement to underpin COAG. For some years now stakeholders, including the Business Council of Australia, have been arguing for a stronger institutional structure for COAG.[47] Through CAF, state and territory governments, have argued that there should be an intergovernmental agreement to underpin COAG's operations, and that the agreement should include several principles:

- recognition that COAG is an equal partnership between all spheres of government which should extend to agenda setting within COAG
- set out COAG's vision and objectives, including reform priorities
- have a strong emphasis on joint accountability
- provide flexibility for COAG to adapt and evolve
- make COAG transparent to the community and stakeholders through better communication of its decisions.[48]

3.45 This argument was also put by individual governments, such as NSW, WA and Tasmania. The reform should also extend to ensuring states have an equitable capacity to place items on the agenda.[49]

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46 The Gilbert and Tobin Centre of Public Law, *Submission 7*, p. 2

47 Business Council of Australia, 2006, *Reshaping Australia's federation: A new contract for federal-state relations*, Melbourne, BCA, www.bca.com.au/Content/100802.aspx (accessed 1 June 2011).

48 CAF, *Submission 38*, pp 6–7.

49 NSW Government, *Submission 39*, p. 1; West Australian Government, *Submission 44*, p. 3; Tasmanian government, *Submission 40*, p. 10–11.

3.46 The committee is also of the view that there is a need for greater transparency of COAG processes, particularly in areas such as the public availability of agendas prior to meetings and the publication of meeting schedules. As the Business Council of Australia has noted:

> [a]ccountability can be increased by more frequent meetings of COAG…as well as a Secretariat…which will ensure that there is a continued dialogue and agenda that the participants must address and cannot avoid.
>
> The preparation of agendas for COAG meetings should link the meetings together – creating an ongoing accountability of ideas. The transparency of discussions, agreements and outcomes of COAG – with clearly allocated lines of responsibility – may also increase accountability.[50]

3.47 An equally important reform is the need to locate the administration of COAG on a more independent foundation, placing it at arm's length from the Commonwealth Government. This is currently the case with staffing of the COAG Reform Council, which is 'located in Sydney and jointly funded by the Commonwealth and the States and Territories.'[51]

3.48 Australia's federation would operate more successfully if most states and territories could develop and coordinate their policy positions on a range of issues independently of the Commonwealth. Currently, the institutional architecture necessary to facilitate this objective is almost non-existent.

3.49 Some capacity for coordination exists in the Council for the Australian Federation, which comprises the heads of state and territory governments. In 2009, the Council released an important discussion paper on inter-governmental reforms, *Common cause: Strengthening Australia's cooperative federalism*. The paper proposed three key principles to underpin modern federal systems.

> **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

50 Business Council of Australia, 2006, *Reshaping Australia's federation: A new contract for federal-state relations*, Melbourne, BCA, p. 36, www.bca.com.au/Content/100802.aspx (accessed 1 June 2011).

51 COAG Reform Council, *About us – the secretariat*, http://www.coagreformcouncil.gov.au/about.cfm, (accessed 12 April 2011).

> be drawn. This gives the third principle, that of cooperation, a particular significance...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.[52]

3.50 The paper went on to outline changes to the architecture of cooperative federalism as well as ways to improve supporting collaborative cultural practices. However, the Council was only recently formed, and it seems to have a precarious existence and few resources.

3.51 The committee believes that the interests of closer federal state cooperation would be served if the states and territories were to meet more regularly through a more institutionalised CAF process along the lines of arrangements in place in Canada, through its Canadian Intergovernmental Conference Secretariat.[53] Established in 1973, the CICS is a public sector agency:

> The secretariat being truly intergovernmental in nature, both the federal and provincial governments share in its direction, finance and staffing; thus, making it an impartial agency at the service of 14 governments (federal, provincial and territorial).
>
> In addition to acting as the permanent secretariat of the First Ministers Meetings (FMM), CICS offers its services to other meetings of First Ministers, Ministers and Deputy Ministers both at the federal-provincial-territorial and provincial-territorial levels. The agency is available to any federal, provincial and territorial governments' departments which may be called upon to organize and chair such meetings.[54]

3.52 The committee believes that formalisation of the Council would strengthen cooperation amongst states and territories on policy issues that have little or no federal government dimension, as well as giving states a more formal forum in which to develop policy ideas that may ultimately be brought to COAG.

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52 Professor John Wanna, Professor John Phillimore, Professor Alan Fenna with Dr Jeffrey Harwood, *Common cause: Strengthening Australia's cooperative federalism*. Final report to the Council for the Australian Federation, May 2009, p. 9.

53 Business Council of Australia, 2006, *Reshaping Australia's Federation: A New Contract for Federal-State Relations*, Melbourne, BCA, p. 28, www.bca.com.au/Content/100802.aspx

54 CISC, Our Organisation, http://www.scics.gc.ca/english/view.asp?x=176 (accessed 12 April 2011.

Recommendation 5

3.53 The committee recommends that COAG be strengthened through institutionalisation to ensure the Council's effective continuing operation and ability to promote improved mechanisms for managing federal state relations. The principles of transparency and joint ownership should be central to this institutionalisation.

Recommendation 6

3.54 The committee recommends that agendas for COAG meetings be developed jointly by Commonwealth and State and Territory governments, that they be made publicly available before meetings, and that the timing, chairing and hosting of COAG meetings similarly be shared.

Recommendation 7

3.55 The committee recommends that outcomes of COAG meetings be published in a more transparent manner than is currently the case with the communiqués.

Recommendation 8

3.56 The committee recommends that the states and territories establish a stronger foundation for the Council for Australia's Federation by providing additional funding, formalising Council processes and ensuring that it meets more regularly than is currently the case.

Chapter 4

Vertical fiscal imbalance

4.1 One of the challenges faced by governments in all federations is that over time the financial costs of providing services tend to shift between the different levels of government. Unless financial adjustments are made, the constitutional responsibilities of one level of government can become misaligned with the capacity of that government to raise revenues needed to meet financial demands made upon it. If the misalignment becomes too substantial it can have serious consequences for the way the federation operates, with constitutional balances of power shifting often without formal constitutional reform. This chapter examines this issue in the context of the Australian federation.

4.2 The difference between the shares of revenue collection and of expenditure among various tiers of governments is called the 'vertical fiscal gap' or, in Australia, vertical fiscal imbalance' (VFI). VFI can exist between any two levels of government. In some countries, the VFI is most marked between national and regional governments (for example in Australia, Canada and India) while in others it can also be between national and local governments (for example in Brazil, Germany and the United States). In theory, there could be a VFI in which a lower tier of government collects more revenue than it expends, and transfer funds to a national government. In practice this never occurs. It is always the national government that gathers most revenue, and then transfers it to the state and local levels.

4.3 It is a commonly held belief among political practitioners within federations and academic theorists of government that excessive levels of VFI are undesirable. Among other things it creates inefficiencies, undermines accountability between different tiers of government, reduces fiscal transparency and can result in the misallocation of resources. As a result most federations have developed sometimes highly complex intergovernmental arrangements, involving transfers of large amounts of revenue to one or other tier of government in an effort to remedy the problem. The size and conditionality of the transfers are almost always controversial and lead to significant criticism of the system.

VFI within the Australian federal system

4.4 The Australian federal system is characterised by a significant level of VFI. Twomey and Withers have argued that 'some VFI is not unusual in a federation' but go on to note that 'its extent in Australia is the most extreme of any federation in the industrial world.'[1] Data collated by the Organisation for Economic Co-operation and

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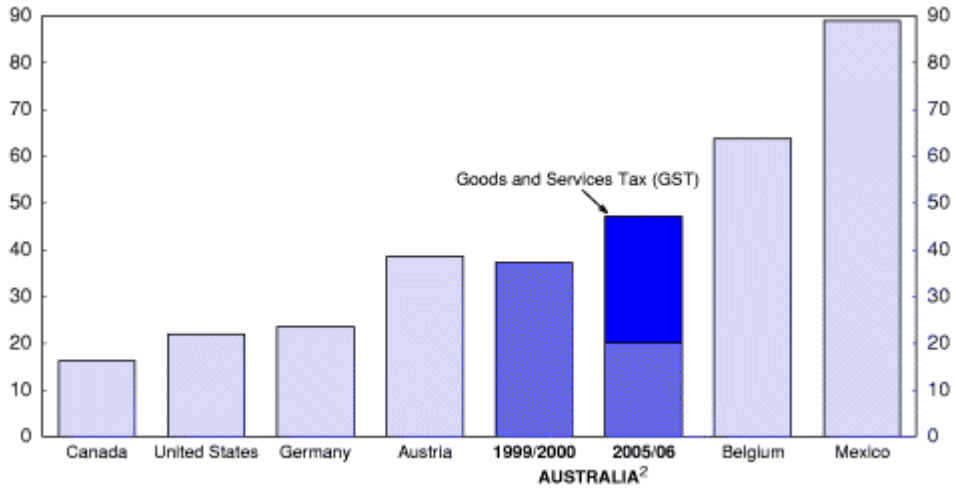
1 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, pp 37–38.

Development (OECD) indicates the degree of VFI within the Australian federal system compared with other federations.

Figure 4.1: The vertical fiscal imbalance: a comparison with other federations in per cent of total sub-national revenue[2]



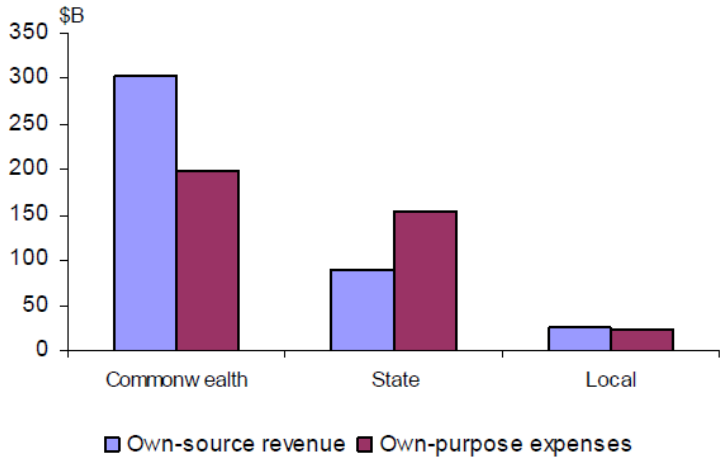
4.5 In considering Australia's VFI, it should also be noted that the extent of the VFI varies depending on the assessment of the Commonwealth's revenue raising capacity. The OECD data notes that Australia's VFI increased with the introduction of the Goods and Services Tax (the GST). This was also noted in evidence to the committee.[3] Australia only has a large VFI if one treats the GST as Commonwealth revenue. Although legally accurate, as all of the revenue is distributed to the states and territories, including the GST when calculating the VFI is a distortion of the fiscal reality. Nevertheless, Australia's VFI is significant and entrenched.

4.6 The chart prepared by CAF demonstrates the disparity in the Australian federal system between revenue raising capacity and expenses across the levels of government.

2 OECD, Economic Survey of Australia 2006: Fiscal relations across levels of government, http://www.oecd.org/document/32/0,3746,en_2649_201185_37149600_1_1_1_1,00.html (accessed 22 June 2011). For all countries other than Australia, the chart is based on 2003 figures. This is the most recent OECD comparative survey of fiscal relations across federal governments.

3 NSW Government, *Submission 39*, Appendix A, p. 2.

Figure 4.2: Commonwealth, state and local government revenue and expenses[4]



1. Multijurisdictional sector (mainly public universities) not shown.
2. Own-source revenue defined as total revenue minus grant revenue; own-purpose expenses defined as total expenses minus grants to other levels of government.

Source: ABS 5512.0 2007-08

4.7 Australia's high level of VFI is not a recent phenomenon; it has been a characteristic of the federation for many decades and has led to the development of an extensive range of mechanisms to try to address the problem.

Managing VFI within the Australian federation

4.8 As the Commonwealth raises more revenue than the states and territories, these mechanisms all involve the Commonwealth transferring funds to the states to assist them to meet their expenditure responsibilities. As explored in chapter five, this is known as 'fiscal equalisation'. The different capacities of the states and territories to raise revenue has meant that their expenditure requirements are taken into account when allocating payments.[5] As Twomey and Withers have noted, while Australia has significant VFI balancing, this is due to the fact that Australia 'also happens to have the highest level of fiscal equalisation.'[6]

4.9 Measures that have been introduced to attempt to improve the fiscal imbalance between the tiers of government include GST distribution, Specific Purpose Payments (SPPs), National Partnership Payments (NPPs) and general revenue assistance.

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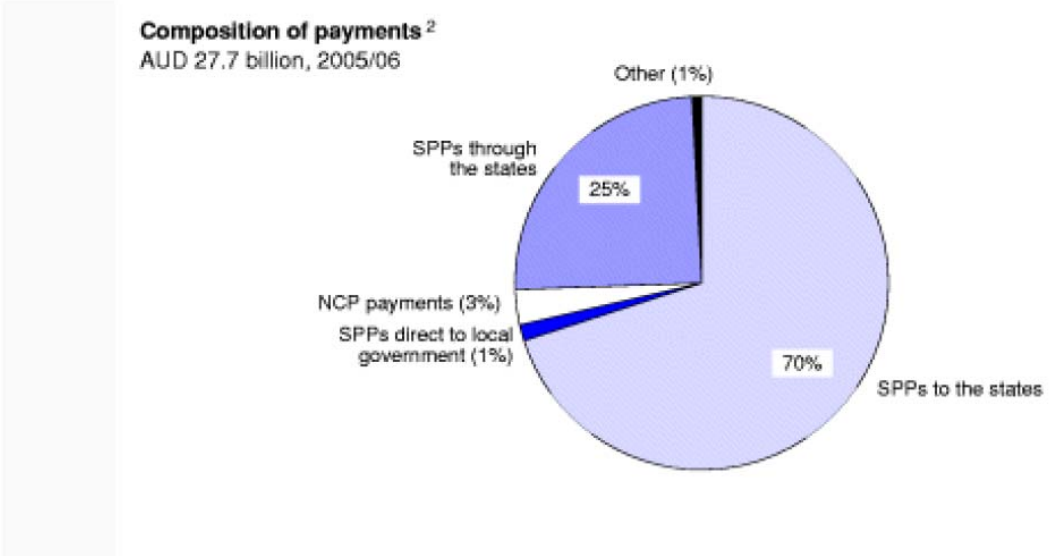
4 Council for the Australian Federation, *Submission to the Commonwealth's Henry Tax Review (Australia's Future Tax System)*, May 2009, p. 3.

5 Commonwealth Grants Commission, *Commonwealth-state financial relations*, http://www.cgc.gov.au/fiscal_equalisation/navigation/1 (accessed 20 May 2011).

6 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, pp 37–38.

4.10 Prior to the IGA on Federal Financial Relations, discussed below, the Commonwealth provided financial assistance to the states and territories primarily in two forms: general revenue assistance – mainly GST revenue[7] and Specific Purpose Payments (SPPs).[8] Data provided by the OECD indicates the measures that existed as of 31 July 2006.

Figure 4.3: Measures to address VFI in Australia as of 31 July 2006[9]



4.11 Commenting on these measures, the OECD concluded that:

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7 The method for the distribution of GST revenue was initially agreed to at a Premiers' Conference on 9 April 2000. At that Conference, the then Prime Minister together with the then Premiers and Chief Ministers of each state and territory agreed to the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*. That agreement was annexed as Schedule 2 to the *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999*. Section 13 of that Act provided for the calculation and distribution of GST revenue among the states and territories pursuant to the Intergovernmental Agreement. Section 13 was repealed by Item 19, Schedule 1 to the *Federal Financial Relations (Consequential Amendments and Transitional Provisions) Act 2009*, which also retitled the earlier Act to become the *A New Tax System (Managing the GST Rate and Base) Act 1999*). Arrangements and calculations for the distribution of GST revenue are now contained in the *Federal Financial Relations Act 2009* which commenced on 1 April 2009.

8 Payments made by the Commonwealth to the states under s 96 of the *Constitution*. Section 96, titled 'Financial assistance to States' provides: 'During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

9 OECD, Economic Survey of Australia 2006: Fiscal relations across levels of government, http://www.oecd.org/document/32/0,3746,en_2649_201185_37149600_1_1_1_1,00.html (accessed 22 June 2011).

> [a] simpler system of inter-governmental transfers involving so-called "specific-purpose payments" would contribute to a clearer specification of spending responsibilities. The specific-purpose payments should become less complex and inflexible. A first step would be to develop an outcome/output performance and reporting framework for each SPP. This is an ambitious task as outcome/output measures of service delivery are difficult to clearly define, measure and enforce in a robust way. Nevertheless, such frameworks could ultimately lead to a move towards the funding of such payments on an outcome/output basis in certain areas.[10]

Intergovernmental agreement on federal financial relations

4.12 On 26 March 2008, COAG agreed to a new microeconomic reform agenda for Australia, 'with a particular focus on health, water, regulatory reform and the broader productivity agenda'.[11] As part of its reform agenda, COAG agreed, on 29 November 2008, to a new framework for Commonwealth-State financial relations, the terms of which were set out in the Intergovernmental Agreement on Federal Financial Relations (the 'IGA on Federal Financial Relations').[12]

4.13 The IGA on Federal Financial Relations recognises that 'the primacy of state and territory responsibility in the delivery of services in these sectors is implicit in the Constitution of the Commonwealth of Australia' but also 'that coordinated action is necessary to address many of the economic and social challenges which confront the Australian community.[13]

4.14 The aim was to:

- Improve the quality and effectiveness of government services by reducing Commonwealth prescriptions on service delivery by the States;
- Provide states with increased flexibility in the way they deliver services to the Australian people;
- Provide a clearer specification of roles and responsibilities of each level of government and an improved focus on accountability for better outcomes and better service delivery;

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10 OECD, Economic Survey of Australia 2006: Fiscal relations across levels of government, http://www.oecd.org/document/32/0,3746,en_2649_201185_37149600_1_1_1_1,00.html (accessed 22 June 2011).

11 COAG, http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/index.cfm (accessed 26 May 2011).

12 COAG, *Intergovernmental Agreement (IGA) on Federal Financial Relations* http://www.coag.gov.au/intergov_agreements/federal_financial_relations/index.cfm (accessed 26 May 2011).

13 COAG, *Intergovernmental Agreement (IGA) on Federal Financial Relations'*, Items 6 and 7, http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_federal_financial_relations.pdf (accessed 26 May 2011).

- Rationalise the number of payments to the states for Specific Purpose Payments (SPPs), reducing the number of such payments from over 90 to five.[14]

4.15 The IGA on Federal Financial Relations, which commenced on 1 January 2009, consolidated and simplified the forms in which the Commonwealth provides payments to the states and territories. By it the Commonwealth could deliver three types of financial support to states and territories:[15]

- Continued provision of 'general revenue assistance, including the on-going provision of GST payments, to be used by the states and territories for any purpose.'[16] It was agreed that the distribution of payments would continue to be made 'in accordance with the principle of horizontal fiscal equalisation.'[17]
- National Specific Purpose Payments (SPPs). The previous arrangements for over 90 SPPs were replaced with five new national SPPs corresponding with the five areas COAG identified as 'key service delivery sectors.'[18] The Commonwealth agreed to increase the total appropriation for SPPs by $7.1 billion over five years. Each SPP is associated with a National Agreement that contains the objectives, outcomes, outputs and performance indicators as well as clarification of roles and responsibilities.[19]

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14 COAG, *Intergovernmental Agreement (IGA) on Federal Financial Relations*, http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_federal_financial_relations.pdf (accessed 26 May 2011).

15 COAG, *Intergovernmental Agreement on Federal Financial Relations* (2009), cl. 19, http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_federal_financial_relations.pdf (accessed 26 May 2011).

16 COAG, *Intergovernmental Agreement on Federal Financial Relations* (2008), cl. 19(a), http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_federal_financial_relations.pdf (accessed 26 May 2011).

17 COAG, *Intergovernmental Agreement on Federal Financial Relations* (2008), cl. 26, http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_federal_financial_relations.pdf (accessed 26 May 2011).

18 The five SPPs are a National Healthcare SPP; a National Schools SPP; a National Skills and Workforce Development SPP; a National Disability Services SPP; and a National Affordable Housing SPP. Each SPP is associated with a specific National Agreement between the Commonwealth and the states and territories which sets out mutually-agreed outcomes and performance benchmarks to be monitored and assessed by the independent COAG Reform Council.

19 As at 1 July 2010, COAG had agreed to six National Agreements: National Healthcare Agreement; National Education Agreement; National Agreement for Skills and Workforce Development; National Disability Agreement; National Affordable Housing Agreement and the National Indigenous Reform Agreement. All are available at COAG, *Intergovernmental Agreement (IGA) on Federal Financial Relations*, http://www.coag.gov.au/intergov_agreements/federal_financial_relations/index.cfm (accessed 26 May 2011).

- A new category of financial support, 'National Partnership' payments. These are designed 'to support the delivery of specified outputs or projects, to facilitate reforms or to reward those jurisdictions that deliver on nationally significant reforms.'[20] These payments fall into three categories: project payments (to support national objectives and help fund the delivery of specific projects); facilitation payments (to help a state lift its standards of service delivery in areas identified as national priorities); and reward payments (incentives to encourage states to undertake reforms and attain performance benchmarks). There has now been agreement to the first wave of these payments.[21]

4.16 COAG agreed that '[a]ll intergovernmental financial transfers other than for Commonwealth own purpose expenses will be subject to the IGA on Federal Financial Relations.'[22]

4.17 Ms Mary Ann O'Loughlin, Executive Councillor and Head of Secretariat, COAG Reform Council, advised that the IGA on Federal Financial Relations is intended to rationalise the previous measures to address Australia's VFI:

> The intergovernmental agreement is a set of significant reforms of Australia's federal financial relations. It governs all the policy and financial relations between the Commonwealth and the states. It set up new financial arrangements, national agreements and national partnerships between the Commonwealth, state and territory governments. The national agreements replaced the more prescriptive tied grant arrangements. The focus of the new agreements is on agreed outcomes and performance indicators, milestones and benchmarks to measure progress.[23]

4.18 The Committee was informed that the IGA on Federal Financial Relations provides for the new funding arrangements to be independently reviewed. The COAG Reform Council is required to 'monitor, assess and publicly report on the performance of governments in implementing nationally agreed reforms.'[24] Ms O'Loughlin advised that:

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20 COAG, *Intergovernmental Agreement on Federal Financial Relations* (2008), cl. 19(c), http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_federal_financial_relations.pdf (accessed 26 May 2011).

21 As at 26 May 2011, COAG had agreed to 16 National Partnership agreements, COAG, *Intergovernmental Agreement (IGA) on Federal Financial Relations*, http://www.coag.gov.au/intergov_agreements/federal_financial_relations/index.cfm (accessed 26 May 2011).

22 COAG, *Intergovernmental Agreement on Federal Financial Relations* (2008), cl. 23, http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_federal_financial_relations.pdf (accessed 26 May 2011).

23 Ms Mary Anne O'Loughlin, Executive Councillor and Head of Secretariat, COAG Reform Council, *Committee Hansard*, 2 December 2010, p. 30.

24 Ms O'Loughlin, COAG Reform Council, *Committee Hansard*, 2 December 2010, p. 30.

> for the six national agreements...council undertakes a comparatives analysis of government's performance against the agreed outcomes, indicators and targets of the national agreements. For reward national partnerships...the council is the independent assessor of whether the predetermined milestones and benchmarks have been achieved before the Commonwealth decides on incentive payments to reward reforms...[25]

4.19 The committee was also advised that the Heads of Treasury Committee is reviewing the National Agreements, National Partnerships and performance framework, with particular reference to the availability of data. The Committee is to report to COAG by the end of 2011.[26]

Federal Financial Relations Act 2009

4.20 The *Federal Financial Relations Act 2009* was enacted to implement the arrangements of the IGA on Federal Financial Relations, including consolidating in one place the arrangements for Commonwealth payments to states and territories.[27] Previous arrangements for the distribution of GST revenue and appropriations for health, infrastructure and offshore petroleum and greenhouse gas storage to the states and territories were repealed.[28] Consistent with its object, the Federal Financial Relations Act made provision for the calculation and distribution of GST revenue, SPPs and National Partnership payments. It took effect on 1 April 2009.[29]

Subsequent amendment to federal financial arrangements: health reform

4.21 In April 2010, COAG – with the exception of WA – reached agreement on the establishment of a National Health and Hospitals Network. It was agreed that:

- From 1 July 2011, the Commonwealth will fund 60% of the efficient price of all public hospital services delivered to public patients, 60% of recurrent expenditure on research and training functions undertaken in public hospitals, 60% of capital expenditure on a 'user cost of capital' basis where possible, and (over time) up to 100% of the efficient price of 'primary health care equivalent' outpatient services provided to the public.
- The Commonwealth will also fund 100% of primary health care (e.g. GP services) and aged care (other than in Victoria).

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25 Ms O'Loughlin, COAG Reform Council, *Committee Hansard*, 2 December 2010, p. 30.

26 Ms O'Loughlin, COAG Reform Council, *Committee Hansard*, 2 December 2010, p. 34.

27 *Federal Financial Relations Act 2009, s. 3.*, http://www.comlaw.gov.au/Details/C2009C00218 (accessed 26 May 2011).

28 *Federal Financial Relations (Consequential Amendments and Transitional Provisions) Act 2009*.

29 *Federal Financial Relations Act 2009*, s. 2. http://www.comlaw.gov.au/Details/C2009C00218 (accessed 26 May 2011).

- The Commonwealth will provide additional $5.4 billion from 1 July 2010 for health reforms and investment
- From 2011-12 the Commonwealth will dedicate a portion of the states' (excluding WA) GST revenue to health.[30]

4.22 It was also agreed to make all necessary amendments to the IGA on Federal Financial Relations and related Commonwealth legislation to reflect the agreement on the National Health and Hospitals Network.[31]

4.23 The effect of this agreement is that from 1 July 2011, significant changes will be made to the Commonwealth's distribution of GST revenue and SPPs amongst the states.

Concerns with the effect of VFI on Australia's federal system

4.24 Evidence to the committee highlights concerns with Australia's VFI. CAF was critical of the extent of Australia's VFI, arguing that an excessive degree of VFI is undesirable as it can:

- weaken government accountability to the public by breaking the nexus between a government’s decisions on the level of service provision and the revenue raised to fund it. For every dollar spent by state governments, less than 60 cents is raised directly for those purposes.
- reduce transparency regarding who is responsible for which government services, allowing governments to avoid responsibility by shifting blame for funding and operational shortfalls to other spheres of government. Health policy has been a prime example where different spheres of government responsibility, for funding, operating and regulating across different areas of the health care system, has resulted in public confusion and opportunity for blame-shifting.
- create inefficiencies, including through bureaucratic overlap, duplication and excess and the cost of administering grants between governments.
- misallocate resources, including the inadequate or inappropriate funding of services.
- slow the responsiveness of governments to the needs of their communities.[32]

30 Australian Government, *2010-11 Budget: Australia's Federal Relations, Budget Paper No. 3,* Commonwealth of Australia, Canberra, 2010, pp 13–14.

31 Australian Government, *2010-11 Budget: Australia's Federal Relations, Budget Paper No. 3,* Commonwealth of Australia, Canberra, 2010, p. 8.

32 CAF, *Submission 38*, p. 5.

4.25 The Australian Chamber of Commerce and Industry was similarly critical of the imbalance between the taxing and spending powers of the Commonwealth and the states, arguing that several problems arise including:

- Weakening of accountability: a separation between the two authorities that raise and spend the revenue (the Commonwealth Government and the State Government) leads to a weakening of accountability and inefficiencies in the delivery of state services as State Governments do not bear the political ill will of raising the taxes to pay for the services.
- Reliance on inefficient taxes: the States are forced to rely on inefficient taxes such as stamp duty and payroll tax in order to raise revenue as their ability to impose more efficient taxes is restricted.
- Limits incentive for states to cut taxes: the taxes that states can impose are inefficient and regressive but their reduced revenue raising capacity gives them very little incentive to reduce taxes.[33]

4.26 This position was echoed by the NSW Business Chamber, which argued that:

> Restrictions on the taxing powers of State and Territory Governments mean that States are unable to take unilateral action to address this issue. These restrictions on State powers mean that State Governments are forced to rely on the few taxing powers they have for significant amounts of revenue, even where it is commonly acknowledged that such taxes are inefficient and volatile. This can hamper the process of State tax reform.[34]

4.27 For the Government of Western Australia, 'the need for a new federal fiscal framework is the most important and pressing element of "the reform of relations" between the Commonwealth and States.'[35] A similar claim was advanced by the Pearce Division of the Liberal Party of Australia:

> The fact that States lack the capacity to raise the funds required to fulfil their spending responsibilities is problematic as it reduces direct government accountability, with State governments not having to make the difficult choices attached to balancing taxation and expenditure.[36]

4.28 Further to this, it was the Pearce Division's belief that:

> Reform of the financial relationship between the Commonwealth and the States is necessary to strengthen the federation by ensuring that the States have financial independence and the capacity to independently raise sufficient revenue to fulfil their constitutional responsibilities.[37]

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33 ACCI, *Submission 10*, p. 5.

34 NSW Business Chamber, *Submission 30*, p. 7.

35 Christian Porter, Attorney-General, Western Australia Government, *Submission 44*, p. 3.

36 Pearce Division Liberal Party of Australia, *Submission 14*, p. 3.

37 Pearce Division Liberal Party of Australia, *Submission 14*, p. 4.

4.29 It was put to the committee that the current mechanisms to address the fiscal imbalance do not provide certainty to the states. Professor Galligan argued that the Commonwealth continues to attempt to control the measures to address VFI through use of 'accustomed carrots and sticks of intergovernmental bargaining.'[38] Referring to the negotiations around national health reforms, the Professor stated that the Commonwealth had proposed allocating one-third of the GST to fund the hospitals network; thereby moving away from the current model of untied grants of GST revenues.[39] On this point Professor John Uhr commented that the VFI arrangements 'seemed to be really cutting right into the whole small c Constitution of the GST.'[40]

4.30 Professor Galligan articulated a view that seemed to summarise the general spread of opinions on VFI given in the evidence to the committee:

> Few perhaps prefer the status quo in Australian fiscal federalism—for federalists it is too centralized, but for centralists it is too complex and variegated from state to state. Prospects for change are not promising, however. The Commonwealth was dealt the superior hand by the constitution, and that superiority was embellished and legitimated by the High Court.[41]

4.31 Evidence before the committee indicates that the objectives of the IGA on Federal Financial Relations may not be being fulfilled as well as was hoped. Several submitters commented that, while the IGA was designed to rationalise the proliferation of Special Purpose Payments, much of the complexity and prescriptiveness of the old system appears to be returning via the 'back door' of increased detail in the new National Agreements and National Partnerships. The Tasmanian government observed:

> It can be argued that only a few of the new NPs and IPs *[Implementation Plans sitting under National Partnership agreements]* fully comply with the new IGA principles. Rather than focusing on outcomes, many agreements remain focussed on inputs – where and how the money is spent but without much regard for what is actually achieved. In some cases, the agreements remain highly prescriptive and continue the practice of Commonwealth micromanagement over state service delivery.
>
> The new framework has not yet fully realised its ambition of reducing the administrative burden on Commonwealth and state departments. The level of oversight and monitoring by the Commonwealth and the reporting requirements placed on states is increasing costs and diverting resources away from service delivery.[42]

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38 Professor Brian Galligan, *Submission 46*, p. 10.

39 Professor Brian Galligan, *Committee Hansard*, 5 May 2011, p. 29.

40 Professor John Uhr, *Committee Hansard*, 5 May 2011, p. 33.

41 Professor Brian Galligan, *Submission 47*, p. 12.

42 Tasmanian Government, *Submission 40*, p. 7.

4.32 Dr Anne Twomey's assessment was more blunt:

> [T]he new system of national partnership payments appears to be a backdoor way for the Commonwealth to interfere again in areas of State policy through the placement of conditions on payments. As time goes by, it is likely that specific purpose payments will shrink, national partnership payments will increase and we will be back to where we started with precisely the same problems in terms of excessive administration costs, duplication, waste and blame-shifting.[43]

4.33 The Tasmanian government was also critical of the level of VFI in Australia, but it did note that it was potentially 'more efficient for a national government to raise certain revenues...compliance with a national tax regime can be more efficient for businesses that operate in more than one jurisdiction.'[44]

Options for reform

4.34 The reform of fiscal federalism is a particularly complex area of governance, admitting of few easy solutions. The position put by the Business Council of Australia summarises the situation well:

> Ideally, each Government should raise the funds necessary to fulfil its responsibilities. It is questionable, however, whether Australia's revenue raising system could be so radically adjusted given how far the pendulum has swung in favour of the Commonwealth. Without adjustments, however, it is likely that the States will become increasingly the service deliverers of the Commonwealth's policy agenda.[45]

4.35 At their heart, all negotiations around fiscal reform appear to suffer from the structural disadvantage by which states and local government are always placed in an inferior bargaining position. Most options for reform presented in submissions attempted to address the structural disadvantage through a clearer reallocation of roles and responsibilities across the different layers of government as well as providing states and territories with a greater share of revenue over time to support their functions. Such an approach assumes that it is actually possible to achieve a list of separate and distinct roles.

4.36 Whilst there is a growing number of people and organisations calling for a reallocation of roles between the federal and state and territory governments, it is less clear that any consensus could be achieved on reallocating those roles. This is

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43 Dr Anne Twomey, *Submission 32*, p. 3.

44 Tasmanian Government, *Submission 40*, p. 5.

45 Business Council of Australia, *Modernising the Australian federation, A discussion paper*, 2006, p. 12, http://www.bca.com.au/Content/101346.aspx (accessed 1 June 2011).

especially so in Australia which has 'a relatively high and increasing degree of shared functions between different levels of government.'[46]

4.37 Twomey and Withers propose a two-tier method for dealing with reallocation.

> There are two ways of dealing with a reallocation of functions. The first is the higher level 'clean lines approach, in which defined subjects of jurisdiction are allocated to each level of government. For example, the Commonwealth Government's National Commission of Audit suggested that States be responsible for preschool, primary and secondary education, with Commonwealth funding of secondary education being through untied grants. The Commission suggested that the Commonwealth take full responsibility for vocational education and training and higher education.
>
> Not all areas of government are susceptible to 'clean lines' divisions. There will always be a need for areas of shared responsibility. This means that a second approach needs to be taken to reallocation – not in relation to responsibilities, but in relation to allocating roles in managing those shared responsibilities. Better mechanisms for co-operation are also needed to avoid 'border issues', to ensure the coordination of government services and to avoid cost-shifting.[47]

4.38 In their evidence, Twomey and Withers suggest that this reallocation could be achieved through constitutional reform, but it was not essential. Referred legislation could be an option.

4.39 Another model for reallocating roles was suggested in the submission from the Northern Territory Statehood Steering Committee. It was argued that the current push by the Statehood Committee for statehood represented a key opportunity to raise the allocation of roles between the federal government and the states. The Statehood Committee favours:

> [a] process for clarifying the role through concerted policy action at the Council of Australian Governments level rather than a more abstract 'grand plan'. The principle that government is accessible and accountable to those affected by its decisions should have a key role to play in determining who is responsible for service delivery.[48]

4.40 Not all commentators are as sanguine about the feasibility of reallocating roles. As seen in chapter one, Professor Galligan believes that coordinate federalism is an unsophisticated paradigm, one which is inappropriate for modern Australia. In

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46 Mr N. Warren, 'Summary and key findings' in *Benchmarking Australia's Intergovernmental Fiscal Arrangements, Final Report*, May, 2006, NSW Government, p. xxx.

47 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 47.

48 Northern Territory Statehood Steering Committee, *Submission 12*, p. 7.

reality the Commonwealth and the states or territories inextricably share roles and responsibilities.[49]

4.41 Another option for reforming fiscal federalism, beyond that of reallocating roles between layers of government, would be to consider more holistic reform of the tax structure and tax levels. Twomey and Withers argue that:

> [s]erious tax reform would recognise that Australia overtaxes incomes and undertaxes spending compared to other OECD economies. Our overall tax take is at the lower end of industrial economies as a share of GDP but is strongly biased toward income tax sourcing. Both personal income taxes and corporate income taxes represent higher shares of public revenue in Australia than in most comparable countries.
>
> Reform could extend further to revisiting horizontal fiscal equalisation as well as vertical fiscal imbalance and the structure of taxation. The pursuit of such equalisation in Australia exceeds the pattern in all other comparable federations. As a consequence, it provides greater disincentives for sub-national governments to seek and provide efficient delivery of government services. At a minimum, more transparent and less complex equalisation processes with improved incentives for efficiency could be developed.[50]

4.42 Other options for reform of the institutional arrangements include:

- an expanded *Federal Financial Relations Act 2009* subsuming the existing Commonwealth Grants Commission and acting as a framework 'for Commonwealth grants of financial assistance to the States, and for the indexation of those grants' as well as defining the parameters for agreements;[51]
- a formal tax-sharing agreement between the Commonwealth and States, based on proportion of Commonwealth tax revenue; and/or
- states setting their own income taxes (though still collected by the ATO); and
- both the Commonwealth and states setting income taxes, to help boost the proportion of revenue that is gathered directly by the states.[52]

Committee view

4.43 The committee notes that, by comparison with all other federations, Australia has a high level of VFI. Over time, the VFI has severely undermined the capacity of

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49 Professor Galligan, *Submission 46*, p. 13.

50 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 49.

51 Professor A.J. Brown, *Submission 41*, p. 9.

52 Mr Bryan Pape, *Submission 20*, p. 1.

the states and territories to raise the revenue necessary to undertake their assigned constitutional responsibilities. The committee also notes that over many decades successive federal and states governments have developed an extensive range of mechanisms to address the problem. These mechanisms have certainly helped to manage Australia's high level of VFI but the problem continues to be one of the most controversial in federal-state relations.

4.44 The committee endorses the recent reforms to Special Purpose Payments, reducing their total number from more than 90 to just five. However, the committee notes the strong concerns expressed in evidence for the inquiry that the new arrangements under the IGA on Federal Financial Relations are not sufficiently meeting the objectives of reducing Commonwealth prescriptiveness and increasing state flexibility regarding service delivery. The committee cautions that the new arrangements must not become a new means for the Commonwealth to attach overly prescriptive conditions on the payments, and draws attention to the view of the OECD that measures to address VFI should avoid complexity and inflexible arrangements.

4.45 While existing mechanisms have improved fiscal arrangements, ultimately, however, they do not address the underlying fiscal imbalance itself. The committee notes that as VFI is addressed through Commonwealth grants, states are largely dependent on Commonwealth actions and policies. The committee notes, by way of illustration, the Commonwealth's consideration of withholding portions of the GST to fund national health reforms. This illustrates the potential uncertainty for the states that can arise where states are to a significant degree dependent on funding from the first tier of government.

4.46 A number of suggestions were put forward to address fiscal imbalance. These included reallocating roles between the first and second tier of Government. The committee considers that without radically reducing the states' responsibilities, it is unclear that adjusting the role of the Commonwealth and state governments would, on its own, address imbalances in revenue raising. Other proposals included holistic reform of taxation structures and levels. The recently announced review of GST distribution begins to address the issue around equalisation referred to above. But clearly a broader debate needs to occur in relation to taxation. The vertical fiscal imbalance in the Australia federal system needs to be redressed. On the basis of the material presented to the committee, the committee sees merit in a comprehensive assessment of the IGA on Federal Financial Relation and taxation levels and structures, to determine if measures can be taken to provide the states certainty regarding their revenue raising and their capacity to meeting their responsibilities. As noted, broader debate is required. The committee considers that the matter should be referred to the Senate Committee which Recommendation XX of this report will propose be created. The committee should draw on expert advice, for example from the Productivity Commission, the COAG Reform Council and the Commonwealth Grants Commission as required.

Recommendation 9

4.47 The committee recommends that the Joint Standing Committee proposed in Recommendation 17 of this report inquire into the need for adjustments to the IGA on Federal Financial Relations and to the level and structure of taxation in Australia to provide the states certainty regarding revenue raising and their capacity to meet their responsibilities. In considering this issue, the committee should inquire into any related matters that the committee determines are appropriate, including the roles of the state and federal governments, and seek advice from the Productivity Commission, the COAG Reform Council and the Commonwealth Grants Commission as required.

Chapter 5

Horizontal fiscal equalisation

5.1 Another common problem for federations is the uneven capacity of jurisdictions at the same level of government, such as states or provinces, to provide the same level of services to their communities. Most federations address this problem through some form of Horizontal Fiscal Equalisation (HFE); a form of financial assistance that allows governments to reduce the inequalities in the capacities of sub-national governments arising from the differences in their geography, demography, natural endowments and economies.

5.2 Australia has had mechanisms in place to provide for HFE since the establishment of the Commonwealth Grants Commission in 1933.[1] Its objective is to provide full equalisation in a way that gives each of the six states, the Australian Capital Territory and the Northern Territory the same per capita fiscal capacity to provide services and the associated infrastructure to their residents.[2] According to the Commonwealth Grants Commission (CGC) this means that:

> State governments should receive funding from the goods and services tax revenue such that, if each made the same effort to raise revenue from its own sources and operated at the same level of efficiency, each would have the capacity to provide services at the same standard.[3]

5.3 Currently the funds distributed to achieve HFE are the revenues raised from the Goods and Services Tax (GST). The distribution of GST required to achieve HFE is decided by the Commonwealth Treasurer each year, on the basis of advice provided by the Commonwealth Grants Commission (CGC).[4]

Distribution: Legislation and Commonwealth Grants Commission

5.4 The main point of contention around HFE is the extent to which GST revenue is redistributed among the States and Territories compared with an equal per capita distribution. Under the *Federal Financial Relations Act 2009* and preceding legislation governing distribution of the GST revenue, each state and territory's share is calculated using 'relativities' designed to ensure that each state has the same

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1 John Wilkinson, *Horizontal Fiscal Equalisation*, Briefing Paper No 21/03, NSW Parliamentary Library Research Service, 2003, p. 1.

2 Commonwealth Grants Commission, *Report on GST Revenue Sharing Relativities – 2010 Review*, February 2010, Vol. 1, p. 22.

3 Commonwealth Grants Commission, *Report on GST Revenue Sharing Relativities – 2010 Review*, February 2010, Vol. 1, p. 30.

4 Commonwealth Grants Commission, http://www.cgc.gov.au/fiscal_equalisation/navigation/4 (accessed 20 May 2011).

financial capacity (not necessarily the same total quantum or per capita quantum) to provide services to its residents.[5] There is no obligation on the states to provide the services for which these payments are funded.[6]

5.5 The specific calculation is reached by multiplying each state and territory's 'adjusted state population' by the available pool of GST revenue, and then dividing that product by the sum of the adjusted state populations of all of the states for the payment year. Thus:

$$\frac{\text{Adjusted state population x GST revenue}}{\text{Adjusted total population}}$$

5.6 'Adjusted State population' means the 'estimated population of the State on 31 December in the payment year...multiplied by the GST revenue sharing relativity...for the State for that year.'[7]

5.7 The 'GST revenue sharing relativity' is defined as being that determined in a legislative instrument by the minister after consulting each of the states and territories.[8] In practice, the relevant minister 'almost without exception, accepts the [advice of the Commonwealth Grants Commission] … and the Ministerial Council for Commonwealth-State Financial Relations does not exercise its option to dissent on the CGC's advice...The Commonwealth Treasurer allocates 100% of the GST revenue...between States using CGC relativities.'[9]

5.8 In practice, the relevant Commonwealth minister refers the matter of consulting with the states and territories and determining the appropriate relativities to the Commonwealth Grants Commission (CGC).[10] Consistent with the

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5 *Federal Financial Relations Act 2009*, s. 5. Prior to 2009, the relevant provision was s. 13 of the *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999*. That provision was repealed by Item 19, Schedule 1 to the *Federal Financial Relations (Consequential Amendments and Transitional Provisions) Act 2009*, which also retitled the earlier Act to become the *A New Tax System (Managing the GST Rate and Base) Act 1999*).

6 *Intergovernmental Agreement on Federal Financial Relations* (2008), Item 25, http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/IGA_federal_financial_relations.pdf (accessed 30 June 2010). See also: *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999*, Sched. 2, *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*, Item 7.

7 *Federal Financial Relations Act 2009*, s. 5.

8 *Federal Financial Relations Act 2009*, s. 8. For previous arrangements see s. 9 of the *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999.*

9 Mr N. Warren, 'Reform of the Commonwealth Grants Commission: It's all in the detail', *University of New South Wales Law Journal*, vol. 31 no. 2 (2008), pp 530–552.

10 Under the *Commonwealth Grants Commission Act 1973*, ss 16, 16A, 16AA, the Commonwealth Grants Commission (the CGC) is responsible for inquiring into and reporting on matters relating to grants made to states and territories under s 96 of the Constitution, including matters referred to it by the relevant minister.

intergovernmental agreement (IGA) on Federal Financial Relations and the previous Intergovernmental Agreement on the Reform of Commonwealth-State Financial Arrangements,[11] the CGC calculates relativities using a principle of Horizontal Fiscal Equalisation.

Views on HFE in Australia

5.9 There were a range of views on dealing with the issues presented by horizontal fiscal equalisation. It was generally acknowledged that Australia's level of HFE was high but that this was to be expected given the corresponding high vertical fiscal imbalance.

5.10 Dr Zimmermann and Mrs Finlay argued that:

> [w]hile some level of equalization is broadly accepted as being in the broader national interest and as the price of being a member of the Federation, there does seem to be a point at which the costs outweigh the benefits, the disincentives limiting growth-creating policies and investment begin to negatively affect our future economic prosperity, and where there is a real risk of a growing resentment amongst citizens in the fiscally stronger States that may undermine national unity.[12]

5.11 The link between effective HFE processes and national unity was also raised in the paper by the Business Council of Australia. They note that:

> [a]s the Commonwealth comes increasingly to hold the purse strings, another area of contention between Governments will grow. Australia has a long history of horizontal fiscal equalisation, that is, adjustments in the level of payments to the States to provide additional financial support to those States thought to be in weaker financial positions. As States come to rely more on financial support from the Commonwealth, the level of that support will become an increasingly political issue.[13]

5.12 At the time of writing, there is some evidence to support the theory that HFE can be a focus of political friction. Writing in *The Australian* on 27 May 2011, Henry Ergas, noted that:

> The states' abject financial dependence on the commonwealth causes constant conflicts and inefficiencies, while the redistribution of tax revenues from richer to poorer states has reduced the states' incentive and ability to adjust to changing circumstances.

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11 *A New Tax System (Commonwealth-State Financial Arrangements) Act 1999*, Sched. 2, *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*, Item 8.

12 Dr Augusto Zimmerman and Mrs Lorraine Finlay, *Submission 17*, p. 48.

13 Business Council of Australia, *Modernising the Australian federation, A discussion paper*, 2006, p. 11–12, http://www.bca.com.au/Content/101346.aspx (accessed 1 June 2011).

> It was therefore inevitable that a resource boom, shifting the power balance between states and between the boom states and the commonwealth, would cause trouble.

5.13 He goes on to argue that any reform of Australia's fiscal federalism should be guided by 'two realities':

> First, the policy of systematically redistributing wealth between states was put in place during the Great Depression.
>
> But already by the 1980s, income divergence between states was one-third to one-half lower than it was in the 1930s.
>
> And population mobility and a more flexible economy have since reduced the spread in growth rates between the states by about one percentage point per decade.
>
> This fiscal redistribution has therefore largely lost its purpose. It is now a form of middle-class welfare, in which West Australian miners subsidise Tasmanian greenies and arts festivals in South Australia. And worse, it is positively counterproductive.
>
> Second, while being weaned off fiscal redistribution, the states need more efficient revenue sources of their own.
>
> An increase in the GST, offset by cuts in income taxes and in inefficient state taxes, would be an important step in that direction. Unfortunately, with all GST revenues flowing to the states, raising its rate and widening its base is all pain, no gain from the commonwealth's perspective. [14]

5.14 Suggesting a way forward, the NSW Business Chamber proposed that:

> the Australian Government should ask the Productivity Commission to independently review the way in which the Commonwealth Grants Commission manages the HFE process. In particular, the Productivity Commission could investigate whether the "five pillars" adopted by the CGC are the most appropriate framework within which to manage HFE. The Commission could make recommendations on the models that preserve the principle of HFE but incorporate it into a modern economic context. It is proposed that such a review would be limited to the appropriateness of the distribution formula, and not look at the split of responsibilities between State and Federal Government or other fiscal transfers between the levels of Government (such as NPPs).[15]

Incentives and disincentives

5.15 A key issue that needs to be considered is the issue of incentives embedded in the HFE process for states and territories to maximise their revenue raising.

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14 Ergas, H. 'The fiscal fighting turns feral', *The Australian*, 27 May 2011, http://www.theaustralian.com.au/national-affairs/commentary/the-fiscal-fighting-turns-feral/story-e6frgd0x-1226063672790 (accessed 2 June 2011)

15 NSW Business Chamber, *Submission 30*, p. 9.

5.16 The committee heard that the CGC has no remit to look at whether states and territories should have raised as much revenue as they could. Rather, the CGC aims to give all jurisdictions the same fiscal outcome. This matter was highlighted in an exchange between a member of the committee Senator Chris Back, and the Chair of the CGC, Mr Spasojevic:

> **Senator BACK:** But it is not clear to me where in the guidelines the states and territories should be aiming to act as responsibly and effectively as possible to maximise revenue and contain expenditures.
>
> **Mr Spasojevic:** I think those constraints fall outside the gamut of what the commission is asked to do, in that if we think of the states collectively we are asked to distribute a given amount of money amongst them. We are not asked, for example, to determine what a good state policy or a good state fiscal position is and distribute the GST to somehow make that happen. We just give them all the same fiscal outcome. You may think that the states should have a tighter or lower average outcome. It is beyond the commission to comment on whether that is appropriate or not.[16]

5.17 The NSW government in their submission focused clearly on the way the current HFE system works against increased efficiencies.

> The HFE system is designed to flatten as much as possible the differences between the states. Above average revenues are equalised away and there is no incentive to improve efficiency. There is a disincentive against expanding the revenue base, either through increasing activity in the state or through undertaking additional expenditure to fund economic development, as the increased revenue capacity will result in lower GST revenue.[17]

5.18 A slightly contrary point of view is put by the Tasmanian government. They argue that the policy neutral stance of the CGC is actually a strength of the system.

> Without HFE, there would be much greater disparities in the quality of life of Australians living in different states. The CGC process for determining each state's share of GST revenue is transparent, objective and policy-neutral. It does not compensate states for any economic or financial mismanagement, and states cannot directly affect their share of GST revenue.[18]

5.19 The differing position of the two states probably reflects the position put by NSW that '[t]he consequences of Australia's attempt at total and comprehensive fiscal equalisation are large cross-subsidies paid by the larger to the smaller states.'[19] This position is supported by Twomey and Withers who argue that the extent of HFE

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16 Mr John Spasojevic, Secretary, Commonwealth Grants Commission, *Committee Hansard*, 5 May 2011, p. 19.

17 NSW Government, *Submission 39*, p. 8.

18 Tasmanian Government, *Submission 40*, p. 6.

19 NSW Government, *Submission 39*, p. 10.

'provides greater disincentives for sub-national governments to seek and provide efficient delivery of government services'. They advocate that, '[a]t a minimum, more transparent and less complex equalisation processes with improved incentives for efficiency could be developed.'[20]

Review of GST Distribution 2011

5.20 In 2010, the CGC completed a five-year review of its methodology and the relativities used to formulate each state's share of the GST revenue. As a result, the relativities being used from 2010-11 differ significantly for those used for 2009-10, a change which contributes to the extent to which there have been changes in the per capita redistribution of GST.

5.21 In the report of the review, the CGC recognised the complexity and shifting nature of the landscape against which the GST is distributed:

> This review recognises that the equalisation landscape has been radically transformed. At the time of the 2004 Review, the two most populous States — New South Wales and Victoria — had above average fiscal capacities and together shared the cost of equalisation, while other States' capacities were below average, and the Northern Territory well below average. Now the two most populous States lie close to average and the two faster growing States — Queensland and Western Australia — have seen their fiscal capacities strengthen relative to the other States at unprecedented rates and to historically high levels. These four now share the cost of equalisation. The other four States — South Australia, Tasmania, the ACT and the Northern Territory — remain below average, with the Northern Territory still well below average.
>
> Achieving equalisation in this environment, which sees the strong and growing revenue capacities of Western Australia and Queensland effectively shared with other States, requires a clearer recognition that this level of, and growth in, revenue capacity also increases the need for those States to spend to build the infrastructure required and acquire other assets in keeping with their population growth. Both have to be adequately recognised at the same time for equalisation to be achieved.[21]

5.22 On 30 March 2011, the Australian Government commissioned a review of the distribution of revenue from the GST to the states and territories. This is due to provide a final report by September 2012.

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20 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 49.

21 Commonwealth Grants Commission, *Report on GST Revenue Sharing Relativities – 2010 Review*, February 2010, Vol. 1, p. 1.

5.23 The Terms of Reference of the review acknowledge that Australia is facing a number of long term trends that are driving pronounced and challenging structural change in the economy, as well as ongoing challenges in tackling the entrenched disadvantage of many Australians, especially indigenous Australians.[22] It will consider, as part of its objectives and scope:

> whether the distribution of the GST and the current form of horizontal fiscal equalisation will ensure that Australia is best placed to respond to these challenges and public confidence in the financial relationships within the Australian Federation is maintained.[23]

Committee view

5.24 The Committee recognises that a mechanism to implement HFE is a long standing feature of Australian federal-state relations and that it is widely regarded as an essential component in managing Australia's national economy. While long standing, the committee notes that HFE has been a highly controversial element in federal-state relations and that this has generated widespread debate over the need for reform. Given the intense nature of this debate, the committee acknowledges that making improvements to the current fiscal settings is neither easy nor likely to happen in the short term.

5.25 The committee notes, however, the Gillard Government's recently announced review of the distribution of revenue from the Goods and Services Tax to the States and Territories. The committee regards the review as an important step in addressing many of the controversies that currently surround the administration of the HFE arrangements in Australia. It considers however, that the value of the review could be increased if its scope were expanded to include an examination of the incentives for states and territories to increase their revenue raising.

Recommendation 10

5.26 The committee recommends that the recently announced review into the distribution of revenue from the Goods and Services Tax give particular attention to the issue of incentives and disincentives to states and territories to maximise their revenue.

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22 *Terms of Reference, Review of the GST Distribution*, Commonwealth Grants Commission, http://www.cgc.gov.au/__data/assets/file/0015/21930/GST_Distribution_Review_Terms_of_Reference.pdf (accessed 23 May 2011).

23 *Terms of Reference, Review of the GST Distribution*, Commonwealth Grants Commission, http://www.cgc.gov.au/__data/assets/file/0015/21930/GST_Distribution_Review_Terms_of_Reference.pdf (accessed 23 May 2011).

Financial Assistance Grants – Local Government

5.27 A second, less high profile, HFE problem concerns the distribution of Financial Assistance Grants (FAGs) among local governments. Mandurah City Council explained what it sees as an inequity in the system for distributing general purpose grant moneys to local governments:

> Under the current distribution model, the General Purpose grant component is apportioned by the Commonwealth Grants Commission to State and Territory Grants Commissions on a per capita basis i.e. based on the population of each State and Territory. However, when the intra-State distribution occurs, these grants are then apportioned to Local Governments based on the principles of full horizontal equalisation and the minimum grant.
>
> As a result of the existing Commonwealth-State-Local distribution method, outer metropolitan and inner regional Councils in populous States such as NSW and Victoria automatically receive significantly larger grants – up to five times the grant received by similar sized WA Councils - regardless of their actual need.[24]

5.28 As an example, Mandurah compared the grant outcomes for three regional cities of similar size: Shepparton, Coffs Harbour and Mandurah. Despite their similar nature and populations, Mandurah's grant in 2006-07 was around $1 million, while the other two received closer to $5 million each.[25]

5.29 It was suggested that the CGC take on an expanded role in undertaking national horizontal fiscal equalisation amongst councils, rather than merely amongst states:

> [t]he Commonwealth Grants Commission should introduce a 'national distribution' model, providing General Purpose grants directly from the Commonwealth to Local Governments (bypassing the States), based on their relative 'need' (horizontal equalisation), rather than their State's population. If the Australian and State Governments are serious about achieving an equitable national distribution of funds to all Local Governments, then it is only fair that each Council should be assessed against all other Australian Councils when competing for FAGs funding, rather than against only those Councils in their state.[26]

5.30 This would clearly represent a radical reshaping of local government finance. Other submitters, including the Australian Local Government Association (ALGA), did not address this issue. The committee expects that, as ALGA represents all councils, including those that would stand to lose from such a restructuring, it would not be in a position to reach a policy position on the proposal. The committee

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24 Mandurah City Council, *Submission 35*, p. 6.

25 Mandurah City Council, *Submission 35*, p. 6.

26 Mandurah City Council, *Submission 35*, p. 6.

recognises the issue that concerns Mandurah City Council, and agrees that it is an issue that could be considered in more detail by an inquiry directed specifically at the funding of local government. It notes that ALGA and Mandurah City Council are both advocating such an inquiry.

5.31 The issue of the suitability of the current approach to general purpose grants for local government was highlighted in an earlier 2008 Productivity Commission report, *Assessing Local Government Revenue Raising Capacity*. The Productivity Commission received submissions from a number of participants who questioned the appropriateness of the existing arrangements for distributing Commonwealth general purpose grants. While the Productivity Commission noted that the appropriateness of the current distribution of financial assistance grants was beyond the scope of their terms of reference, they did go on to note that '[t]o the extent that full equalisation remains a policy objective of the Australian Government there is a case for more work in this area.'[27]

Committee View

5.32 The committee recognises the concerns raised in submissions about the absence of equalisation at the local government level and notes the various suggestions for reform. Most of the proposed changes would have significant impact on the funding received by local government, creating winning and losing shires and municipalities in the process.

5.33 Nevertheless, the committee is of the view that the conclusion reached by the Productivity Commission, and the position advocated by ALGA amongst others has merit and that the issue requires closer investigation. Other matters relating to local government are considered in chapter 6.

Recommendation 11

5.34 The Committee recommends that the Joint Standing Committee proposed in Recommendation 17 of this report be asked to inquire into the extent of and need for reform of the arrangements for horizontal equalisation that currently exists between local government shires and municipalities across Australia.

27 Productivity Commission, *Assessing Local Government Revenue Raising Capacity*, 2008, p. 94.

Chapter 6

Local government

6.1 Australia's local governments provide an increasing range of services beyond the 'roads, rates and rubbish' functions with which they are traditionally associated. Yet despite their significant responsibilities and close relationship with citizens at the level of suburb, town, city and region, local governments in Australia are relatively poorly funded, lack constitutional recognition, and are vulnerable to cost shifting.

6.2 This chapter examines funding levels for local government, particularly Commonwealth funding, and the constitutional issues relevant to funding and to recognition of local government.

The funding of local government

6.3 According to the Australian Local Government Association (ALGA), while local governments receive funding from the Commonwealth and state/territory governments, the third tier of government raises approximately 80% of its revenue.[1] Local governments' revenue raising powers are derived from state and territory legislation. Local government may raise resources through rates and charges on property, user fees, fines and other penalties, developer contributions and charges, and through accumulating interest on financial accounts. Rates are the only form of tax that local governments may impose.[2] In 2007–08, rates earned local government $10 116 million, which constituted 2.9 per cent of taxes raised across the levels of government.[3]

6.4 It is apparent that, far from having autonomy regarding its role and responsibilities, local government's functions may be imposed by the other levels of government within Australia's federation. Local government revenue raising can serve to make up any shortfall between Commonwealth and state/territory funding and the cost of service delivery. Mr Mark Newman, Chief Executive Officer, Mandurah City Council advised:

> Our Grants Commission funding is around about three per cent of our total operational revenue and we might get another two or three per cent from capital revenues. So we are very focused on revenues from either rates or service charges. In fact, I would have to say in the City of Mandurah we have made significant effort in recognising the operational shortfall in funding and that our own resources were the only way to go. We have had

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1 ALGA, *Submission 24*, p. 9.

2 ALGA, *Submission 24*, p. 9.

3 Department of Infrastructure, Transport, Regional Development and Local Government, *Local Government National Report, 2007-08*, 2010, p. 11.

> significant rate increases over the last 10 years, which probably sees us as one of the most highly rated councils in the state.[4]

6.5 The ALGA stated that local governments' capacity to meet funding shortfalls, and thereby to ensure sufficient resources to meet responsibilities adequately, is constrained. The Association advised that the state government may restrict local governments' ability to impose rates to generate revenue. Limitations include imposing a cap on the rates that may be levied, exempting areas of land from rate levies and requiring concessions for certain persons such as pensioners. The ALGA also submitted that the utility of rates as a source of funding is being limited through demands for local government to provide an increasing range of services:

> [R]ates were originally expected to support services related to property, primarily roads and rubbish. Yet they are increasingly being called upon as a source of funds from which local government is expected to meet the costs of much more expensive and non property-based services, like human and welfare services.[5]

Funding from State and Territory governments

6.6 With the exception of the ACT Government, which combines the functions of both local and territory government,[6] the states and the Northern Territory governments provide funding to local government. Figures released by the former Department of Infrastructure, Transport, Regional Development and Local Government in 2010 relating to the 2006-07 financial year indicate that grants can be made for a variety of purposes.

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4 Mr Mark Newman, Chief Executive Officer, Mandurah City Council, *Committee Hansard*, 9 March 2011, p. 27.

5 ALGA, *Submission 24*, p. 10.

6 Geoffrey Lindell, 'Lessons to be learned from the Australian Capital Territory self-government model', in *Peace, order and good government : state, constitutional and parliamentary reform*, Macintyre, C., Williams, J., (eds), Wakefield Press, Kent Town, 2003, p. 47.

Figure 6. 1 State and territory grants to local governments, by purpose, 2006-07[7]

Purpose	NSW	Vic.[a]	Qld	WA	SA	Tas.	NT	Total
	$m	$m	$m	$m	$m	$m	$m	$m
Agriculture, forestry, fishing and hunting	-	2	1	1	1	-	-	4
Education	5	26	1	1	-	-	-	32
Fuel and energy	-	-	-	-	3	-	-	4
General public services	23	15	63	7	1	-	26	136
Health	6	7	3	2	2	2	3	25
Housing and community amenity	105	39	201	10	12	4	24	395
Mining, manufacturing and construction	1	-	6	-	-	-	2	9
Public order and safety	34	3	38	13	-	-	3	90
Recreation and culture	50	77	85	25	19	6	7	268
Social security and welfare	67	342	25	31	15	1	2	483
Transport and communications	215	243	244	153	53	32	9	950
Other economic affairs	2	10	18	2	2	-	4	37
Other purposes	457	297	201	124	91	29	2	1 202
Total	**967**	**1 060**	**886**	**368**	**199**	**74**	**82**	**3 637**

6.7 The ALGA stated that state grants predominantly 'represent reimbursements for concessions mandated by them on the sector or contract payments for the maintenance of state government-owned roads.'[8]

Funding from the Commonwealth government

6.8 In addition to state funds, local government receives financial assistance from the Commonwealth. Professor Brown submitted that the current system of Commonwealth funding for local government commenced with the Whitlam Government's introduction of 'a system of local government funding via grants to the states'. According to Brown, the grants were introduced as part of a commitment to 'building its [local government's] role as a fundamental element of Australia's national system of governance, alongside the role of the States'.[9] Since 1974-75, the

7 Department of Infrastructure, Transport, Regional Development and Local Government, *Local Government National Report, 2007-08*, 2010, p. 19.

8 ALGA, *Submission 24*, p. 11.

9 Professor A. J. Brown, *Submission 41*, Attachment 7, pp 440 – 443.

Commonwealth has provided approximately $35 billion in grants to local government.[10]

6.9 Currently, local government funding is provided in the form of Financial Assistance Grants (FAGs) under the *Local Government (Financial Assistance) Act 1995*. In establishing the FAG scheme, the Commonwealth intended to 'increase the transparency and accountability of the allocation of funds by the states and territories to local governing bodies', and to 'achieve equitable levels of services by local governing bodies'.[11] In doing so, the Commonwealth's objective was to improve the operation of local government through improving:

- the capacity of local government bodies to provide their residents with an equitable level of services;
- the certainty of funding for local government bodies;
- the efficiency and effectiveness of local governing bodies; and
- the provision by local governing bodies of services to Aboriginal and Torres Strait Islander communities.[12]

6.10 FAGs are an example of centralisation; that is, the national government determining budgetary entitlements of the other government over matters not expressly stated in sections 51 or 52 of the Constitution. In sections 9 and 12 of the *Local Government (Financial Assistance) Act*, the Commonwealth has declared that the state and territory governments are entitled to Commonwealth assistance to fund local government. In providing the funding, however, the national government places conditions on the states regarding the use of the funding. While the grants are made to the state and territory governments, the Commonwealth does not provide the states and territories with discretion to determine their use. As noted by the former Department of Infrastructure, Transport, Regional Development and Local Government, FAGs 'are paid to the states and territories on the condition that they are passed on to local government.' In contrast, when the grants are passed on by the states and territories they are untied for local government, giving local government discretion to spend the money to meet locally identified priorities.[13]

6.11 Additional Commonwealth funding is provided to local governments through the Roads to Recovery Program, the Regional and Local Community Infrastructure Program and the Black Spot Program. Grants provided as part of the Roads to Recovery program and the Regional and Local Community Infrastructure Program are

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10 Department of Regional Australia, Regional Development and Local Government, 'Financial Assistance Grants to Local Government', http://www.regional.gov.au/local/assistance/index.aspx, (accessed 27 May 2011).

11 *Local Government (Financial Assistance) Act 1995*, ss. 3(4).

12 *Local Government (Financial Assistance) Act 1995*, s. 3.

13 Department of Infrastructure, Transport, Regional Development and Local Government, *Local Government National Report, 2007-08*, p. 24.

transferred directly from the Commonwealth to local governments.[14] Under the Roads to Recovery Program, for 2009-10 to 2013-14, $1.75 billion will be distributed to local governments, and also to state and territory governments in areas not under the jurisdiction of local governments.[15] A further source of funding exists in the form of the Regional and Local Community Infrastructure Program announced in November 2008. Since its commencement, over $1 billion has been granted to local governments to assist with construction, major renovation or refurbishment of assets including gardens, art spaces, swimming pools, sports stadiums, walkways, tourist information centres, playgroup facilities and senior citizen centres amongst others.[16]

Concerns with Commonwealth and state/territory funding for local governments

6.12 Evidence to the committee highlighted two concerns with the Commonwealth and the state and territory local government funding arrangements. First, submissions questioned whether the funding is adequate for local governments to fulfil their responsibilities. Second, submissions questioned the constitutionality of Commonwealth grants to local government.

Responsibilities versus resources

6.13 Evidence before the committee highlighted the extensive and indeed ever expanding responsibilities of local governments across a broad range of matters. The ALGA reported that local government:

- maintains over 80 per cent of the nation's road network;
- provides, operates and maintains a vast range of community infrastructure;
- plans communities, keeps them clean, safe and healthy;
- cares for the environment through waste management, natural resource management,
- administers community education and local environmental programs;

14 Department of Infrastructure and Transport, 'Roads to Recovery funding conditions', http://www.nationbuildingprogram.gov.au/funding/r2r/r2r_funding_conditions.aspx/, (accessed 31 May 2011); Department of Regional Australia, Regional Development and Local Government, Guidelines: Regional and Local Community Infrastructure Program Round 3 – 2010/11 – $100 Million, 2010, p. 1.

15 Department of Infrastructure and Transport, 'Roads to Recovery funding allocations 2009–2014', http://www.nationbuildingprogram.gov.au/funding/r2r/ (accessed 31 May 2011).

16 The Department of Regional Australia, Regional Development and Local Government website, *Regional and Local Community Infrastructure Guidelines* http://www.regional.gov.au/local/cip/files/RLCIP_Round3_100m_Guidelines_26Oct2010.pdf (accessed 22 June 2011).

- provides an array of regulatory services often on behalf of other levels of government, for example, environmental health and food inspection services;
- promotes regional development, tourism and economic and social advancement;
- supports emergency services activities; and
- provides an increasing array of human services, from services for the young and the elderly (such as Home and Community Care) to the promotion of public health and public safety).[17]

6.14 The former Department of Infrastructure, Transport, Regional Development and Local Government has characterised the role of local government in a similar way. The responsibilities of local government were characterised as:

- administration (of aerodromes, quarries, cemeteries, parking stations and street parking
- building (inspection, licensing, certification and enforcement)
- community services (child care, aged care and accommodation, refuge facilities, meals on wheels, counselling and welfare)
- cultural/education (libraries, art galleries and museums)
- engineering (public works designs, construction and maintenance of roads, bridges, footpaths, drainage, cleaning, waste collection and management)
- health (water sampling, food sampling, immunisation, toilets, noise control, meat inspection and animal control)
- planning and development approval
- recreation (gold courses, swimming pools, sports courts, recreation centres, halls, kiosks, camping grounds and caravan parks)
- water and sewerage (in some states)
- other (abattoirs, sale-yards, markets and group purchasing schemes).[18]

6.15 These reflect a trend over recent decades in which there has been a considerable expansion of the role of local government. The ALGA attributed the expansion of local government responsibilities to two primary causes. First, increased community expectations due to demographic changes, changing settlement patterns, for example, 'sea and tree changers', and differing economic conditions. Second, a realignment of responsibilities of the three levels of government in the Australian federation, with 'other levels of government' transferring functions to local

17 ALGA, *Submission 24*, p. 7.

18 Department of Infrastructure, Transport, Regional Development and Local Government, *Local Government National Report, 2007-08,* 2010, p. 37.

government.[19] As local governments are established by state and territory legislation, the states and territories can determine the scope of local governments' responsibilities. As the ALGA stated, a shift in local government responsibilities can occur when 'another level of government has raised the requirements associated with the services being delivered by local government, or has changed the operating environment in which local government services are delivered.'[20]

6.16 It was put to the committee that the expansion of local government responsibilities has not been combined with a correlative growth in local government funding. It was argued that Australia's federal structure facilitates cost-shifting to local government. For example, the ALGA stated that '[o]ne of the things that characterises local government and its relationship with state governments has been a tradition of cost shifting.'[21] The Association further submitted that '[o]n many occasions in the past, devolution of responsibilities to local government has simply been caused by another sphere of government engaging in responsibility and/or cost shifting.'[22]

6.17 Professor Brown also noted that transfer of responsibility may not be 'fully funded', and submitted that 'the functional and financial position of Australian local government has also remained weak by international standards.'[23]

6.18 The Gold Coast City Council submitted that the current funding model requires review:

> The sustained growth of the Gold Coast, and many other areas of Australia, has clearly shown that the current mix of Commonwealth funding, State funding, grants through State Local Government Grants Commissions, developer contributions and rates and charges is no longer providing outcomes for cities that will enable them to contribute to national efficiency and productivity objectives.[24]

6.19 The Council also stated that Australia's state and territory governments fail to collaborate effectively to ensure local government receives adequate funding:

> At the broader level there appears to be no effective coordination between the Commonwealth and the States in relation to the drivers of population growth (natural increase and migration) and the policies and expenditure flows to systematically identify and meet the needs of the population. The gap between the community's legitimate demands for infrastructure and

19 ALGA, *Submission 24*, p. 8.

20 ALGA, *Submission 24*, p. 8.

21 Mr Adrian Beresford-Wylie, Chief Executive Officer, ALGA, *Committee Hansard*, 5 May 2011, p. 8.

22 ALGA, *Submission 24*, p. 8.

23 Professor A. J. Brown, *Submission 41*, Attachment 7, pp 438 - 439.

24 Gold Coast City Council, *Submission 36*, p. 5.

> services and the supply to meet those demands at the local level is even greater for rapidly growing areas like Gold Coast City.[25]

6.20 Professor Brown submitted that the discrepancy between local government resources and responsibilities necessitates 'a better target for the overall share of responsibility and resources that we believe local government should be carrying.'[26] The ALGA also argued that the gap between responsibility and resources requires increased allocation of funds to local government from national and state governments.[27]

The constitutional basis for Commonwealth funding of local government

6.21 Evidence was presented to the committee arguing that the Commonwealth's constitutional authority to fund local government rested on two heads of power. First, Section 96 of the Constitution, which allows the Commonwealth to provide financial assistance to the States 'on such terms and conditions as the Parliament this fit.'[28] FAGs are an example of such funding. As the Hon Christian Porter MLA, Western Australian Attorney-General, noted, section 96 grants cannot go directly to local government as the section 'requires Commonwealth funds to be provided only to the States before going to third parties.'[29] This power is reinforced by the provisions of Section 81 of the Constitution which permits the Commonwealth to authorise the expenditure of monies from the Consolidated Revenue Funds 'for the purposes of the Commonwealth.'

6.22 It was noted in evidence before the committee that funding schemes under which money is transferred directly by the Commonwealth, such as the Roads to Recovery Program, may be made on the basis of section 81.[30] It was put to the committee that the constitutionality of the arrangements is in doubt following the High Court of Australia's decision in *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009).[31]

6.23 *Pape v Commissioner of Taxation* (the Pape case) concerned the Commonwealth's power to provide taxpayers with one-off payments from the

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25 Gold Coast City Council, *Submission 36*, p. 5.

26 Professor A.J. Brown, *Submission 41*, p. 10.

27 ALGA, *Submission 24*, p. 23.

28 *Commonwealth of Australia Constitution Act*, s. 96.

29 Western Australian Government, *Submission 44*, p. 4.

30 Australian Local Government Association, *Submission 24*, p. 13; Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 5.

31 Australian Local Government Association, *Submission* 24, p. 13; Family Voice Australia, *Submission 8*, p. 6; Gold Coast City Council, *Submission 36*, p. 7.; Regional Development Australia Sunshine Coast Inc., *Submission 15*, p. 4; Western Australian Local Government Association, *Submission 33*, p. 5.

Consolidated Revenue Fund. While upholding the payments, the High Court rejected the view that the Commonwealth has broad powers to authorise this type of expenditure. Section 83 of the Constitution prevents monies from being spent unless authorised under a valid law of the Commonwealth. A Commonwealth law is invalid if outside the scope of the Commonwealth's constitutional authority. The High Court held that section 81 is not a substantive head of power; funds may be appropriated only for matters for which the Commonwealth has authority under the Constitution:

> The provisions of ss 81 and 83 do not confer a substantive 'spending power' upon the Commonwealth Parliament. They provide for parliamentary control of public moneys and their expenditure. The relevant power to expend public monies, being limited by s 81 'for the purposes of the Commonwealth', must be found elsewhere in the Constitution or statutes made under it.[32]

6.24 Commentators have considered the implications of the Pape decision for the Commonwealth's capacity to fund local governments.[33] Professor George Williams has argued that, given the structure of Australia's federation as established by the Constitution, the decision casts doubt on Commonwealth/local government funding arrangements:

> There is no express or implied provision in the Constitution that grants the Commonwealth responsibility over local government. The consequence is that the Commonwealth has no general power to directly fund local government bodies or activities under section 81 of the Constitution. This reflects the fact that the Constitution was drafted and structured with a view to local government being the primary responsibility of the States and not the Commonwealth.[34]

6.25 Professor Williams concluded that it cannot be assumed that Commonwealth grants to local government are constitutional. Rather, each proposal for

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32 *Pape v Commissioner of Taxation* (2009) 238 CLR 1, para 8 per French CJ.

33 Bligh Grant, Brian Dollery, 'Constitutionalism, Federalism and Reform? *Pape v Commissioner of Taxation & Anor* – A conversation with Bryan Pape, *Public Policy*, Volume 5, 1 (2010), pp 53 – 63; Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth constitution', (2010) 21 PLR 164, p p 185 – 186; George Williams, *Advice re* Pape v Commissioner of Taxation *and direct federal funding of local* government: opinion, 12 August 2009, Part C, www.councilreferendum.com.au/.../PAPE/ALGA_Advice_GeorgeWilliams_ 130809.doc (accessed 20 April 2011).

34 Dr George Williams, *Advice re* Pape v Commissioner of Taxation *and direct federal funding of local government: opinion*, para 27, www.councilreferendum.com.au/.../PAPE/ALGA_Advice_GeorgeWilliams_ 130809.doc (accessed 20 April 2011).

Commonwealth funding for local government should be assessed to determine whether the funding falls within a head of power.[35]

6.26 This view was shared by other witnesses giving evidence to the committee. Dr Twomey, for example, submitted that the Pape case 'lends some doubt over some of the Commonwealth's funding.' She contended that the case has the following effect.

> [T]he practice, which has been increasing of late, of funding local government directly is not supported by section 96 of the Constitution and is not supported by section 81 of the Constitution. The only way you can find anything in the Constitution to potentially support it is some kind of nationhood power implied from the Constitution and drawn from a combination of the executive power and the legislative incidental power. That in itself is a little bit dodgy—well, probably a lot dodgy!—so local governments are particularly worried now about the direct grants that they get.[36]

6.27 Similarly, the ALGA submitted that as a result of the Pape case 'there must be doubts about the validity of the Roads to Recovery program which relied on a broad interpretation of Section 81.'[37] Mr Bryan Pape himself has argued that the decision casts doubt on the validity of the Regional Partnerships Program, the *Roads to Recovery Act 2000* and the *Australian Sports Commission Act 1989*.[38] The Western Australian Local Government Association concurs with these views, stating: 'the doubt created by Pape is anathema to the concept of an effective 21st century Australian democracy.'[39]

6.28 These views on the effect of the Pape case were not necessarily shared by all who presented evidence to the committee. The Council for the Australian Federation (CAF) submitted that the consequences of the case for Commonwealth funding of local government 'should not be overstated.'[40] The Hon Christian Porter MLA argued that 'the Pape case does not have obvious detrimental implications for funding of Local Government.'[41] It was noted that payments under section 81 of the Constitution are but one mechanism through which the Commonwealth may fund local

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35 Dr George Williams, *Advice re* Pape v Commissioner of Taxation *and direct federal funding of local government: opinion*, para 28, www.councilreferendum.com.au/.../PAPE/ALGA_Advice_GeorgeWilliams_ 130809.doc (accessed 20 April 2011).

36 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, pp 5–6.

37 Australian Local Government Association, *Submission 24*, p. 13.

38 Bligh Grant, Brian Dollery, 'Constitutionalism, Federalism and Reform? *Pape v Commissioner of Taxation & Anor* – A conversation with Bryan Pape, *Public Policy*, Volume 5, 1 (2010), p. 55.

39 Western Australian Local Government Association, *Submission 33*, p. 5.

40 Council for the Australian Federation, *Submission 38*, p. 6.

41 Western Australian Government, *Submission 44*, Appendix 1, p. 4.

governments. Mr Porter argued that the case leaves unchallenged the Commonwealth's ability to provide funding under section 96 of the Constitution.[42] Similarly, CAF stated:

> [T]he Commonwealth continues to be able (at a minimum) to expend federal funds wherever it has a specific legislative power, or provide funding to (or through) the States.[43]

6.29 This view was consistent with the view taken by representatives of the Australian Government. Officers from the Department of the Prime Minister and Cabinet advised that following the Pape case the constitutionality of payments to local governments was reviewed, and it was determined that current payments to local government could continue.[44] The Department concluded:

> Taking into account the implications of the Pape decision, the Commonwealth remains able to make grants under its general powers in the Constitution as well as make payments to the states for purposes relevant to their responsibilities, which do include local government currently.[45]

6.30 The committee was informed that this conclusion was reached following advice from the Commonwealth Attorney-General 'that we should continue with current arrangements unless a demonstrated need arises to change them.'[46]

Committee view

6.31 There is evident and reasonable concern among local government bodies and others about the current and continuing validity of funding arrangements. The committee heard considerable evidence of cost shifting towards local government as the responsibilities of local government expand, as well as the critical role local government plays in the provision of community services. Based on the evidence submitted to the committee, however, it is not entirely clear that the constitutionality of direct payments from the Commonwealth to local government is in doubt.

6.32 The Treasury and the Department of the Prime Minister and Cabinet reviewed the constitutionality of Commonwealth payments in the wake of the Pape case and, based on advice from the Attorney-General, found that payments could continue. A similar position was reached by the Western Australian Government and the Council for the Australian Federation.

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42 Western Australian Government, *Submission 44*, Appendix 1, p. 4.

43 Council for the Australian Federation, *Submission 38*, p. 6.

44 Mr Dominic English, First Assistant Secretary, Department of the Prime Minister and Cabinet, *Committee Hansard*, 5 May 2011, p. 42; Mr Ronald Perry, Assistant Secretary, Department of Prime Minister and Cabinet, *Committee Hansard*, 5 May 2011, p. 43;

45 Mr Dominic English, First assistant secretary, Department of the Prime Minister and Cabinet, *Committee Hansard*, 5 May 2011, p. 42.

46 Mr Dominic English, , First assistant secretary, Department of the Prime Minister and Cabinet, *Committee Hansard*, 5 May 2011, p. 42.

6.33 The committee believes that until Commonwealth payments to local government authorities are shown definitely not to be constitutional, and given the poor record of referenda in relation to local government, that mechanisms other than constitutional amendment, such as through COAG, should be explored in an attempt to put local government authorities at ease regarding funding.

6.34 The committee understands that certainty of funding is only one element of the push for local government recognition in the constitution. Discussion of the other issues around constitutional recognition occurs later in this chapter.

Constitutional recognition

History of local government referenda

6.35 The Australian people have twice been asked to consider amending the Constitution to recognise local government and on both occasions it has rejected the proposal. On the first occasion in 1974 the *Constitutional Alteration (Local Government Bodies) Act 1974* proposed to 'enable the Commonwealth to borrow money for, and to grant financial assistance to, local government bodies.' The referendum considered the proposed following additions to the Constitution.

- New subsection 51(ivA) to provide that the Commonwealth may make laws for the borrowing of money by the Commonwealth for local government bodies.
- New section 96A to provide that the Parliament may grant financial assistance to any local government body on such terms and conditions as the Parliament thinks fit.

6.36 Professor Brown stated that the referendum would have served 'both a symbolic and a substantive (functional and financial) purpose.'[47] The second reading debates indicate that the intention behind the amendment was to strengthen the role of local government as a member of Australia's federal system of government:

> We want to extend the role of local government. We do not want to restrict it but to make it even more powerful. If local government gets funds through the Grants Commission, which will be an equalising grant, and can get unrestricted access to carry out some of its major responsibilities then of course it will be a much more viable organisation.[48]

6.37 The referendum did not succeed, with only 46.85 per cent of voters and one state, New South Wales, approving the proposal.[49] Arguments against the referendum

47 Professor A. J. Brown, *Submission 41*, Attachment 7, p. 441.

48 Senator Gietzelt, *Senate Hansard*, 13 March 1974, p. 286.

49 Australian Electoral Commission, 'Referendum Dates and Results 1906 – Present', http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm (accessed 31 May 2011).

included that the amendments were unnecessary and would grant the Commonwealth direct control over local government.[50] According to Professor Brown, the 'No' campaign characterised the proposal as a 'centralist' measure'.[51]

6.38 The second referendum, in 1988, proposed to include in the Constitution a new section 119A. The proposed section was in the following terms:

> Each State shall provide for the establishment and continuance of a system of government, with local government bodies elected in accordance with laws of a State and empowered to administer, and make by-laws for, their respective areas in accordance with the laws of the State.[52]

6.39 Again, the referendum was not passed, receiving only 33.62 per cent of votes. The proposal did not receive a majority of votes in any state.[53] The 'No' campaign challenged the proposal on the basis that the amendment would be of little practical effect. The amendment was also opposed on the grounds that it would lead to greater centralisation of power.[54] Professor Brown characterised the referendum as being largely symbolic, stating that '[d]emonstrably, whereas the recognition proposal of 1974 has at least some substantive merit to accompany its symbolism, the 1988 proposal had very little.'[55]

The case for Constitutional recognition

6.40 Several submissions to this enquiry pressed the case for a Constitutional amendment to recognise local government. Broadly, two reasons were put forward, namely, to ensure local government's effectiveness and to secure local government's existence.

6.41 It was submitted that constitutional recognition of local government is required to ensure that local government receives adequate funding, and therefore remains an effective part of Australia's federal system. The ALGA stated that the decision in the Pape case 'strongly supports the need for constitutional reform.'[56]

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50 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 168.

51 Professor A. J. Brown, 'In pursuit of the "Genuine Partnership" ', *UNSW Law Journal.* Vol. 31. No. 2, p. 441. Presented as Attachment 7 to *Submission, 41*.

52 Professor A. J. Brown, 'In pursuit of the "Genuine Partnership" ', *UNSW Law Journal.* Vol. 31. No. 2, p. 446. Presented as Attachment 7 to *Submission, 41*.

53 Australian Electoral Commission, 'Referendum Dates and Results 1906 – Present', http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm (accessed 31 May 2011).

54 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 169.

55 Professor A. J. Brown, 'In pursuit of the "Genuine Partnership" ', *UNSW Law Journal.* Vol. 31. No. 2, p. 447. Presented as Attachment 7 to *Submission, 41*.

56 Australian Local Government Association, *Submission* 24, p. 13.

Similarly, Naracoorte Lucindale Council and Regional Development Australia Sunshine Coast Inc submitted that constitutional recognition is required to guarantee Commonwealth funding of local government.[57] Councillor Blumel, on behalf of that RDA, argued that direct funding would increase economic and administrative efficiency:

> I think it is primarily about the financial capacity of the federal government to directly fund local government. Why it is so important is to do with efficiency. If everything has to go through COAG, be funded through the state and then the state's agenda put over—sometimes in terms of their implementation policy—all of that takes time. But a federal government being directly responsive to strong local governments, recognised local governments, takes the middleman out; it brings our federal capital closer to the people. I want to see our federal parliamentarians being relevant in advocating for our needs directly to the federal government.[58]

6.42 The second argument for constitutional recognition of local government is to secure, in the words of Williams and McGarrity, local governments' 'existence and status.'[59] McGarrity and Williams argued that while state and territory constitutions ensure the 'continued existence of a "system" of local government...local government is otherwise given little or no protection'.[60] McGarrity and Williams concluded that, without Constitutional status, 'recognition of local governments in State Constitutions is likely always to be subject to repeal by a subsequent ordinary statute of the State Parliament.'[61]

6.43 Similar views were expressed in other evidence to the committee. Dr Twomey stated that local governments are seeking Constitutional recognition as a means to prevent state governments from 'unilaterally abolishing' or amalgamating local governments.[62]

6.44 The Australian Local Government Association is actively pushing for constitutional recognition for local government, arguing that non-recognition jeopardises funding.

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57 Naracoorte Lucindale Council, *Submission 5*, p. 1; Regional Development Australia Sunshine Coast Inc, *Submission 15*, p. 4.

58 Councillor Debbie Blumel, Chair, Regional Development Australia Sunshine Coast, *Committee Hansard*, 1 February 2011, p. 20.

59 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 164.

60 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 166.

61 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 168.

62 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 5.

> Because local government is not recognised under the Constitution, there are significant legal doubts about the extent to which the Commonwealth can constitutionally provide financial support directly to local government.[63]

6.45 Regional Development Australia Sunshine Coast Inc. submitted that Constitutional recognition assures the legitimacy of local government:

> In the hypothetical scenario of local government taking a particular view and the state government taking an alternative view, how might those different models play out in actual decision making?...If the federal government recognises local government in its Constitution, then I think there is a legitimacy there. They would soon set up mechanisms and processes to give meaning to that recognition, and you would soon see some processes and mechanisms which give more direct effect to giving the local councils voice.[64]

6.46 There was, however, a lack of consensus about the form constitutional recognition could take. The ALGA, despite being committed to constitutional reform, recognises the obstacles that exist to achieving constitutional change and has considered other options.

> In the absence of referenda to bring about sensible and necessary constitutional change, it appears that the High Court is the only mechanism by which change can be promoted. This leaves local government, and the Federal system more generally, in a precarious position that does not necessarily reflect the modern Australian democracy.[65]

6.47 Professor Galligan argues that reform to Australian federation is less likely to occur through amendments to the constitution.

> The most promising avenues for reforming Australian federalism are political rather than constitutional ones. This is contrary to the approach of constitutional lawyers and others who, when they perceive a problem with Australian federalism, reach for the Constitution and set about devising constitutional remedies. Constitutional change is an unlikely vehicle for federal change, however, and in any case most of what needs reforming can be done via sub-constitutional politics.[66]

6.48 Professor Galligan comes to the conclusion that while referenda and judicial review by the High Court are able to effect constitutional change, they are 'unlikely avenues for practical reform.'[67]

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63 ALGA, *Submission 24*, p14.

64 Councillor Blumel, Regional Development Australia Sunshine Coast, *Committee Hansard*, 1 February 2011, pp 22–23.

65 ALGA, *Submission 24*, p14.

66 Professor Brian Galligan, *Submission 46*, p. 3.

67 Professor Brian Galligan, *Submission 46*, p. 5.

Obstacles in the path of Constitutional recognition

6.49 The evidence highlighted four primary concerns with amending the Constitution to include reference to local government. These are the extent of popular support for the proposal; the potential for unintended consequences for Constitutional interpretation; whether an amendment is necessary to secure the proponents objectives; and the merits of symbolic, as opposed to substantive, recognition.

Popular support

6.50 The ALGA is very conscious of the size of the task of seeking to amend the constitution. It advocates the use of a comprehensive education program, the establishment of a Referendum Panel, and a national civics campaign to engage voters ahead of any referendum.[68] Based on the research it has undertaken, the ALGA believes that 'the end of 2012 or 2013 offer the best options for a referendum to include local government in the Constitution.'[69]

6.51 This is in contrast to views in other submissions which highlighted concerns that there may not be sufficient support for Constitutional recognition of local government unless it is part of a broader approach. Based on the administration and analysis of a major national public opinion survey, Professor Brown is of the opinion that:

> First, far more than simply symbolic constitutional recognition of local government is needed if any change is to prove either worthwhile or electorally viable. Second, given the complex interrelationship of these issues, the process for determining the scope of any constitutional alteration needs to occur within a wider process of governance reform, rather than simply focusing on recognition of local government. Getting the overall picture right is likely to be a vital prerequisite for advancing any specific constitutional reforms relating to local government.[70]

6.52 Dr Anne Twomey, in evidence presented at the December hearing of the committee, commented: 'I think if you bring up that sort of referendum you will have a lot of contention because people do not want bad local governments entrenched.'[71]

Unintended consequences for Constitutional interpretation

6.53 A second concern in relation to recognition of local government in the constitution is the possibility of unintended consequences. Dr Twomey argues that 'anything prescriptive in nature concerning local government funding or the way in

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68 ALGA, *Submission 24*, p. 17.

69 ALGA, *Submission 24*, p. 15.

70 Professor A. J. Brown, *Submission 41*, Attachment 7, p. 436.

71 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 5.

which local governments can be established or abolished may become more of a problem than a benefit in the future when circumstances change.'[72]

6.54 A similar concern was echoed by the Western Australia Attorney General. In the Western Australian Government submission, he noted that, '[t]here are several reasons why elevating local government into a constitutionally entrenched position in the Commonwealth Constitution would adversely affect the nature of Australia's federal system of government.'[73] Chief amongst these were that:

> The recognition by the Commonwealth Constitution of local governments would weaken or detract from the federal structure of the Constitution and federalism generally. In my view, that would be regrettable especially because the federal structure of the Commonwealth Constitution is one of the means of limiting an expansion of centralism.[74]

6.55 However, such concerns were not shared by all who presented evidence to the inquiry. Professor Brown submitted:

> Actually ensuring that constitutionally the current federal system works with recognition of all three levels does provide the key reason for recognising local government in the Constitution. It just simply is not good enough from an organisational point of view to simply continue to preserve the idea that this is a system based on the Commonwealth raising money and redistributing a lot of that money to the states and that everything else will then look after itself. The system obviously does not work like that currently, should not work like that and will never work like that.[75]

Is Constitutional recognition necessary?

6.56 It was put to the committee that Constitutional amendment to include reference to local government is not necessary to secure local government's part of Australia's federal system. Family Voice Australia submitted that '[t]here is no obvious reason for recognition of local government in Australia.'[76] It is a view with which the Tasmanian Government concurred.

> The role of local government is well entrenched under Tasmanian legislation. Part IVA of the Tasmanian *Constitution Act 1934* protects the existence of local government and prevents the boundaries of local government areas being altered without a review by the Local Government Board.[77]

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72 Dr Anne Twomey, *Submission 32*, p. 4.

73 Western Australian Government, *Submission 44*, p. 3.

74 Western Australian Government, *Submission 44*, p. 7.

75 Professor A. J. Brown, *Committee Hansard*, 1 February 2011, p. 45.

76 Family Voice Australia, *Submission 8*, p. 6.

77 Tasmanian Government, *Submission 40*, p. 9.

6.57 The Tasmanian Government went on to outline how local government is already acknowledged at the national level within the federation by way of:

- the Intergovernmental Agreement on cost shifting (2006);
- representation of local government on COAG by the Australian Local Government Association (ALGA);
- ALGA's membership of eight Ministerial Councils and observer status on a further five; and
- the Commonwealth parliamentary resolution on recognition of local government (2006).[78]

6.58 Additionally, as outlined above, the argument that constitutional amendment is required to secure Commonwealth funding is inconclusive. It has also to be determined whether constitutional amendment is the best means of securing Commonwealth funding, if indeed the Commonwealth's ability to fund local government is in doubt. Professor Williams and Nicola McGarrity, Directors of the Terrorism and Law Project, Gilbert and Tobin Centre of Public Law, have concluded that there are three options available to the Commonwealth to address the issue:

> In order to gain a secure constitutional foothold for its direct local government funding programs, it may be necessary for the Commonwealth to adopt one of three options in the future. The first option is to funnel these programs through the States under s 96... The second option is to limit the subject matters in relation to which it gives funding to those over which the Commonwealth has a legislative or executive power in the Commonwealth Constitution. The final option is the amendment of the Commonwealth Constitution by either of the methods described above to give the Commonwealth the power to make direct grants of financial assistance to local government.[79]

Symbolic recognition

6.59 Several submissions queried the value of symbolic recognition of local government in the Constitution. Dr Anne Twomey stated that:

> it remains unclear as to what it is intended to achieve. If it is purely symbolic – effectively a pat on the head to make local government feel important and appreciated – it would be a waste of money and effort.[80]

6.60 The Gold Coast City Council expressed a similar view. 'A constitutional change to recognise local government without correspondingly addressing financial reform would be an empty gesture.[81]

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78 Tasmanian Government, *Submission 40,* p. 9.

79 Nicola McGarrity and George Williams, 'Recognition of local government in the Commonwealth Constitution', (2010) 21 PLR 164, p. 186.

80 Dr Anne Twomey, *Submission 32*, p. 4.

Committee view

6.61 The committee is aware of the desire of local government to be recognised in the constitution. Local government is crucial to the delivery of services in the community. The committee recognises that the services local government provides are changing and expanding and that the current federal fiscal arrangements leave it vulnerable to cost shifting by the states.

6.62 As noted earlier, however, the committee believes that Commonwealth funding to local government is not as precarious as some have suggested. Until such time as it becomes clear that constitutional amendment is the only way of providing funding certainty to local government, the committee believes that plans to change the constitution to recognise local government run considerable risk of failure.

6.63 The committee also believes that the issue of funding for local government cannot be looked at in isolation. It is actually the product of broader issues around the vertical fiscal imbalance experienced by the Australian federation. If states had a greater capacity to raise revenue in line with their responsibilities, the incentive for states to cost shift towards the local government sector would be reduced.

6.64 Despite the ALGA's carefully considered plans for a referendum on the issue of recognition of local government, it seems likely that a short term ad hoc constitutional amendment would not be successful. The committee believes that Professor Brown's assessment is probably correct when, reflecting on his recent research, he says 'a base, bare majority level of support for the principle of federal constitutional recognition exists, but stands ready to evaporate – as it has done previously – under even mild political contestation or pressure.'[82]

6.65 He goes on to argue that:

> If constitutional reform on the subject of local government is pursued as an ad hoc measure, without being seen as part of a reform plan that addresses the perceptions of citizens who support reform but do not currently value local government, then any attempted alteration is clearly much more likely to fail.[83]

6.66 While the committee acknowledges that recognition of local government in the Constitution has some strong advocates, the greatest likelihood of success of such an amendment lies in a 'hasten slowly'[84] approach that places such an amendment in the broader context of a coherent plan for overall constitutional reform.

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81 Gold Coast City Council, *Submission 36*, p. 7.

82 Professor A. J. Brown, *Submission 41*, Attachment 7, p. 464.

83 Professor A. J. Brown, *Submission 41*, Attachment 7, p. 464.

84 Professor A.J. Brown, *Submission 41*, Attachment 7, p. 466.

Recommendation 12

6.67 The committee recommends that the issues of funding and constitutional recognition of local government be among the matters proposed for inquiry by the Joint Standing Committee proposed in Recommendation 17 of this report.

Recommendation 13

6.68 Pending the outcome of this inquiry, the committee recommends that mechanisms other than constitutional amendment, perhaps by way of agreement through COAG, be explored to place Commonwealth funding of local government on a more reliable long term foundation.

Chapter 7

Regional governance and service delivery

7.1 There is growing emphasis on supporting regional communities to respond to local issues that cut across local government boundaries and the variety of new structures and arrangements that attempt to do this. This chapter examines the debate about the extent to which these regional developments reshape Australian federalism and the extent to which they should be recognised as institutions in the Australian federation.

A role for regions

7.2 Several submissions advocated that regional governance is a fundamental part of Australia's federal system. Professor Brown argued that 'regional development agencies are now seen as a vital link in the matrix of institutions needed for more participative, entrepreneurial and collaborative styles of development.'[1] Accordingly, Professor Brown considered regionalism to be central to a discussion about Australian federalism:

> While there are now various models for what an ideal federal system might look like, they are all predicated on strengthening local and regional governance, and including those levels in our thinking about the share of responsibilities that needs to be devolved rather than centralised.[2]

7.3 Similarly, the Tasmanian Government noted that:

> [t]here is growing recognition that our federal system needs to provide regional communities – rural and urban – with greater capacity for developing and implementing their own solutions to local problems. In Australia, this reflects diversity of regional circumstances and issues and the difficulties faced by central government in responding effectively to regional needs.
>
> There are new structures and arrangements emerging to address regional service requirements.
>
> Tasmania already has regional structures for the provision of its health, education, community services and police services that allow delivery to be more flexible and responsive to local needs, while maintaining the equity and efficiency benefits of a state-wide system.
>
> At the same time, local government is looking to regional arrangements to drive economic development and efficiencies in service delivery.[3]

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1 Professor A. J. Brown, *Submission 41*, Attachment 12, p. 12.

2 Professor A. J. Brown, *Submission 41*, Attachment 13, p. 11.

3 Tasmanian Government, *Submission 40*, p. 13.

7.4 The NSW Government stated that '[i]t is important to strengthen Australia's regions and protect their sustainability, particularly for remote regions.' They also recommended that '[s]trategies to strengthen Australia's regions should foster collaborative arrangements and encourage long term approaches to planning and service delivery.'[4]

7.5 However, a contrary view was also put to the committee. Professor Galligan argued that:

> [r]egionalism is significant because, as A J Brown shows, it is out there, alive and well. I agree, but in my view regionalism adds to the richness and complexity of identity, governance and policy communities in Australia, but is a sub-federal matter and likely to remain within the interstices of the federal system.[5]

Historical perspectives – the development of the role of regions in Australia's federal system

7.6 It is clear from the Constitution that the founding founders anticipated the need to make changes to the Australian federation. As Professor Brown submitted, Chapter 6 of the Constitution includes express provisions contemplating 'structural or territorial change – in particular, decentralisation of the colonial-era structures through further territorial subdivision and the admission of new states.'[6]

7.7 As reflected in the two major formal constitutional reviews of the 20th century, the years subsequent to Federation have seen an ebb and flow in movements promoting regionalism and the establishment of new states. The two reviews achieved:

> [b]ipartisan consensus that the provisions [of the Constitution] should be adjusted so as to make it easier for new regions to be recognised and admitted to the federation. The first of these, the Peden Royal Commission on the Constitution (1927-1929) recommended unanimously to this effect, even as it voted only narrowly – by four members to three – to retain a federal system rather than abolish it in favour of a unitary one. A similar recommendation was reached by the federal parliamentary constitutional review committee of 1958, notwithstanding that at the time, the Labor members of that committee subscribed to a party platform which advocated total abolition of the States.[7]

7.8 At various times commentators have suggested that state boundaries be redrawn to reflect the dispersed population and large geographic distances. Commenting on the various proposals for reform, Twomey and Withers note that 'the

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4 NSW Government, *Submission 39*, p. 10.

5 Professor Brian Galligan, *Submission 46*, p. 15.

6 Professor A. J. Brown, *Submission 41*, Attachment 11, p. 19.

7 Professor A. J. Brown, *Submission 41*, Attachment 11, p. 21.

number of regions suggested for Australia range from 25, to 30-50, to 51' depending on the person making the argument.[8]

7.9 Broadly speaking though, the push to realign Australia's federation to reflect sub-federal regional areas has been patchy. Professor Brown characterised it as a past of 'lost opportunities', arguing that:

> [n]ot only have varying levels of popular disaffection with the spatial structure of federalism always been with us, but we have not been very proficient at realising when the different solutions being proposed by different groups, in fact relate to similar if not identical problems.[9]

7.10 Whilst clearly important, regionalism has remained an informal part of the structure of Australian federalism. However, it is an informal part to which the Commonwealth has resolved to provide financial assistance. For example, in 1974 the Commonwealth enacted the *Urban and Regional Development (Financial Assistance) Act 1974* authorising the Commonwealth to provide financial assistance to the States for the purpose of, among other matters, regional improvement.[10] More recently, as explored below, the Commonwealth allocated payments to regional governance authorities as part of the Regional Development Australia initiative.

A role for regions – more recent developments

7.11 The intersection of regionalism and Australian federalism has received an increased focus in recent years. Professor Brown situated the debate in terms of a paradox; that is, despite, or perhaps because of, Australian federalism being 'probably more centralised in its politics, finances and operations than many unitary, non-federal systems of government', regionalism and regional governance:

> has become an unavoidable question for all existing levels of government, as they become progressively more collaborative and as the Commonwealth increasingly enters policy spheres that require action and implementation 'on the ground.'[11]

7.12 The nature of regional governance is multi-faceted. Writing in 2005, Professor Brown noted that:

> [r]egional governance is the combination of institutions, processes and relationships that govern economic, social and environmental decision-making at the regional scale. Since the mid-1990s, Australia has seen an explosion of regional governance arrangements, much of it seeking enhanced participation from chambers of commerce, industry organisations,

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8 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 44.

9 Professor A. J. Brown, *Submission 41*, Attachment 11, p. 21.

10 *Urban and Regional Development (Financial Assistance) Act 1974*, s. 5.

11 Professor A. J. Brown, *Submission 41*, Attachment 11, p. 16.

> professional groups, unions, community organisations of all shapes and sizes (including Aboriginal and Islander ones), individual businesses and citizens, who have now rejoined local, state and federal governments as major policy actors.[12]

7.13 According to Professor Brown, the regional governance framework has developed into a 'tapestry...made up of a diversity of intersecting institutions providing mechanisms for participation'. Among this 'tapestry' are:

> (1) elected local governments (councils);
>
> (2) voluntary Regional Organisations of Councils (ROCs);
>
> (3) the traditional regional operations of state and federal agencies,
>
> (4) local/regional economic development agencies, often involving state and federal officials;
>
> (5) local/regional natural resource management bodies, likewise;
>
> (6) other portfolio-specific state and federal regional bodies e.g. Area Health boards;
>
> (7) other cross-portfolio quasi-governmental bodies, especially Aboriginal and Islander councils, corporations and service organisations;
>
> (8) whole-of-government (WOG) initiatives in a region, such as Regional Managers Forums, operated by both state and federal governments as internal government initiatives;
>
> (9) community-based WOG consultative mechanisms by state and federal governments, such as federal Area Consultative Councils, and;
>
> (10) political representations by individual politicians (local, state and federal).[13]

The Regional Development Australia initiative

7.14 Most recently, the 'tapestry' of regional governance institutions has been added to by the establishment of the Regional Development Australia (RDA) program. RDA is a Commonwealth Government initiative that is designed to bring together all levels of government to support the growth and development of Australia's regions.[14] The network of committees has been established throughout Australia to:

> provide a strategic framework for economic growth in each region. The key functions that underpin the role of the national network of RDA committees are:

- support informed regional planning;

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12 Professor A. J. Brown, *Submission 41*, Attachment 12, p. 3.

13 Professor A. J. Brown, *Submission 41*, Attachment 12, p. 3.

14 Regional Development Australia, http://www.rda.gov.au/FAQ.aspx, (accessed 31 May 2011).

- consult and engage with the community on economic, social and environmental issues, solutions and priorities;
- liaise with governments and local communities about government programs, services, grants and initiatives for regional development; and
- contribute to business growth plans and investment strategies, environmental solutions and social inclusion strategies in their region.

The network provides input to Australian, state, territory and local governments on regional development issues and priorities; promotes regions to secure sustainable long term jobs; promotes investment and regional prosperity; and raises awareness of programs and services available to regional communities.[15]

7.15 One of the distinctive features of RDA committees is that they are genuinely joint Commonwealth and State initiatives:

> Appointments to committees are made by the:
>
> • Minister for Regional Australia, Regional Development and Local Government;
>
> • In most jurisdictions, the state or territory government minister responsible for regional development; and
>
> • In some jurisdictions the local government association.[16]

7.16 Alignment of the Commonwealth government and state or territory regional development organisations varies in each jurisdiction. State and territory regional development organisations in New South Wales, Victoria, Queensland, South Australia and the ACT have joined with RDA committees. State and territory regional development organisations in Western Australia, Tasmania and the Northern Territory remain as parallel networks, though working closely with RDA committees.[17]

7.17 This different approach to engaging with RDAs is reflected in the cautiously supportive approach of state and territory governments to the RDA initiative. CAF commented that:

> [t]he recent establishment of Regional Development Australia committees is a case in point. Where these committees are established and operate with the involvement and cooperation of both Commonwealth and State and Territory spheres of government, the network is more likely to lead to closer alignment and integration of regional development activities for the benefit of Australia's regions...[18]

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15 Regional Development Australia, http://www.rda.gov.au/FAQ.aspx, (accessed 31 May 2011).

16 Regional Development Australia http://www.rda.gov.au/about/index.aspx, (accessed 31 May 2011).

17 Regional Development Australia, http://www.rda.gov.au/FAQ.aspx, (accessed 31 May 2011).

18 CAF, *Submission 38*, p. 8.

7.18 Another emerging regional institution is the national network of Natural Resource Management. The National Natural Resource Management Regions' Working Group provided evidence of their role in working between different levels of government:

> We work closely with the Minister for Environment Protection, Heritage and the Arts and the Minister Agriculture, Fisheries and Forestry and State and Territory governments in implementing natural resource management programs. In our local regions we also work with Local governments and regional communities to combine investments from multiple sources so that they produce the best returns in terms of improved land, water and biodiversity outcomes.[19]

Concerns with the RDA initiative

7.19 Whilst regional development agencies see a key role for themselves in promoting and supporting the needs of their regions, opinion differs on the strengths and weaknesses of the current RDA framework.

7.20 RDA Barwon South West believes that 'Regional Development Australia is a good model and Regional Development Australia committees have great potential to facilitate collaborative activity across local, state and Australian governments,' but for the RDAs to be as effective as possible 'they require more open access to Australian government guidance and advice.'[20] They go on to suggest that an agency dedicated to supporting the RDA network be established.

7.21 RDA Wide Bay Burnett, speaking on behalf of three other RDA groups, argued that improvements could be made to funding arrangements, mechanisms designed to empower regions and regional consultation in national policy development.[21]

7.22 The Gold Coast City Council is less enthusiastic about the 'existing "one size fits all" Regional Development Australia model,'[22] arguing that the current arrangements are more suited to 'smaller councils and those without the capacity to commit significant resources to economic development and where a number of Councils need to band together to generate the necessary momentum.'[23]

7.23 RDA Wheatbelt WA echoed the Gold Coast City Council position, stating that 'Australia is a vast continent with drastically varying environments and because of

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19 National Natural Resource Management Regions' Working Group, *Submission 29*, p. 1.

20 RDA Barwon South West, *Submission 4*, p. 1.

21 RDA Wide Bay Burnett, *Submission 13*, p. 2.

22 Gold Coast City Council, *Submission 36*, p. 7.

23 Gold Coast City Council, *Submission 36*, p. 8.

this a “one size fits all” will never be appropriate. RDA Wheatbelt WA commented further that whilst the RDA network is a good idea it is not adequately supported.[24]

7.24 RDA Brisbane was keen to remind the committee that metropolitan areas constituted 'regions'. The term 'regional Australia' has, since the mid-1990s, become synonymous with 'rural and remote regions, that is, all regions outside the capital cities.'[25] RDA Brisbane noted that:

> [w]e therefore consider it important that metropolitan regions – while having a different range and complexity of issues to rural and remote regions – are not omitted in government strategies to strengthen regions; and further, that metropolitan regions should have access to regional grant programs for community based social, economic and environmental projects, which can be facilitated by the RDA committees.[26]

7.25 RDA Sunshine Coast believed regional development committees offered enormous potential to address complex issues but also felt it was important to distinguish between:

> [r]egional development committees' role in helping bring whole of Government approaches to building high-impact regional development strategy; and
>
> Regional development committees' role in the actual delivery of services and the provision of grants essential to strategy implementation.[27]

7.26 However, these concerns about the resourcing and role of RDAs was not universally shared. RDA Peel felt that concerns they raised in their original submission about the effective use of the RDA network had been alleviated through the '[o]utcome of the 2010 Federal election with a renewed focus on regional Australia.'[28] CAF commented that:

> Regional Development Australia is beginning to transition from a development phase to the implementation of regional plans. Once this is underway, we will be in a better position to further consider other options for delivery of services in Australian regions.[29]

7.27 More generally, whilst acknowledging the importance of the three tiers of government working together effectively and of the importance of regional collaboration in achieving that outcome, Dr Anne Twomey, confining herself to comments on regional grant programs, suggested that:

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24 RDA Wheatbelt WA, *Submission 26*, p. 2.

25 Professor A.J. Brown, *Submission 41,* Attachment 11, p. 16.

26 RDA Brisbane, *Submission 19*, p. 2.

27 RDA Sunshine Coast, *Submission 15*, p. 5.

28 RDA Peel, *Supplementary Submission*, p. 1.

29 CAF, *Submission 38*, p. 8.

> [w]hile support for rural and regional Australia is important, great care should be taken with regard to introducing regional grant programs. Too often these become simply means for government to indulge in pre-election pork-barrelling. Any scheme, if it were to exist, should be strictly scrutinised and subject to close over-sight by the Auditor-General.[30]

Local government and regionalism

7.28 Another structure that has emerged under the umbrella of the ALGA is regional organisations of councils (ROCs).

> ROCs are 'partnerships' between groups of local government entities that agree to collaborate on matters of common interest. They are diverse in size, structure and mandate, but all satisfy the criteria that members:

- join voluntarily
- demonstrate their commitment in the form of financial and/or in kind contributions
- have agreed to a constitution or some other formal set of objectives
- recognise a range of common issues and interests
- nominate representatives to the ROC's executive board.[31]

7.29 ROCs vary in size and capacity but most engage in the following activities:

- research - underpinned by the advantage of taking a regional perspective on the many issues and developments which cross local boundaries;
- regional strategies integrating economic, social, environmental and cultural development;
- resource sharing is an integral part of a ROC's operation;
- advocacy - promoting and protecting their regions;
- brokering or facilitating the development and implementation of programs of central governments.[32]

7.30 In addition, in the Northern Territory, legislation requires shire councils to identify and implement Local Government Regional Management Plans (RMPs) as a way of responding to the needs of residents in scattered communities sharing different cultural backgrounds and languages and economic needs.[33]

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30 Dr Anne Twomey, *Submission 32*, p. 5.

31 Australian Local Government Association http://www.alga.asn.au/links/regionalOrgs_removed.php#a1 (accessed 31 May 2011)

32 Australian Local Government Association http://www.alga.asn.au/links/regionalOrgs_removed.php#a1 (accessed 31 May 2011)

33 Australian Local Government Association, *Submission 24*, p. 21.

> As with many co-operative strategies struck by local councils, the RMPs are predicated on the philosophy that joining with like councils will help strengthen the ability of councils in a region to administer services and develop service delivery improvements, lobby and influence government policy, negotiate major projects with public agencies and private interests for the achievement of regional development outcomes, and build capacity supports in new and emerging policy areas.[34]

7.31 The ALGA identifies the benefits of the RMP in the Central Australian Region as:

- The potential to have a strong Central Australian voice on the Territory and national stage advocating for infrastructure and other improvements that will lead to a stronger region
- The potential to put in place regional, shire and community plans that are driven and monitored using shared technology.
- Joint procurement arrangements (possibly through LGANT) to the local government National Procurement Network have the potential to reduce the high costs of delivering services.
- A regional approach to community safety, including Night Patrols, could greatly enhance safety for residents, visitors and tourists in the region.
- Opportunities to establish other regional models of service delivery, from waste management policies and practices to youth, sport and recreation program delivery models.
- Joint approaches to networking, training, and professional support.

7.32 A further structure identified by the ALGA that supports regional delivery of services are the Remote Service Delivery arrangements for Indigenous communities 'which involve all three levels of government joining together to achieve a national outcome – closing the gap.'[35]

Regional government - the radical alternative

7.33 As part of the argument for stronger regional institutions, there are occasionally suggestions that states and territories should be abolished and the federal map redrawn to reflect new regional groupings.

7.34 There has been a succession of new state movements in Australia in the previous century and more recently. The New England region of NSW has pursued a push for statehood in the past. A local referendum in 1967 asked whether people were

34 Australian Local Government Association, *Submission 24*, p. 22.

35 Australian Local Government Association, *Submission 24*, p. 22.

in favour of the establishment of a new State in north-east NSW. This issue was decided in the negative.[36]

7.35 There is also continuing discussion about whether North Queensland should become a new state in response to a perceived south-east Queensland bias of successive Queensland state governments.

7.36 The Northern Territory Statehood Steering Committee is currently running a sustained and organised campaign to change the Northern Territory to a state. Their submission to this inquiry argued strongly that in becoming a state, Territorians would be able to 'develop our own systems of governance which suit us and the place we live. Recognising the important and vibrant Aboriginal culture of this place...' and that it would allow the Northern Territory 'to be a partner in the existing Australian Federation.'[37]

7.37 It would be fair to say, however, that most proposals to redraw federal boundaries currently have uneven support and this, coupled with the difficulty of changing the constitution, means that these proposals remain something of a radical approach to regionalism.

7.38 Twomey and Withers provide the strongest argument against consideration of such a radical approach:

> If State and local governments were to be abolished in favour of a two-tiered system of central and regional governments, the result would be a shift in power and control further away from the people. For example, the people of Tamworth and Narrabri could find that decisions about their local libraries, parks and sporting facilities would be made by a regional body in Armidale, rather than by people who are part of their local community. Decisions about schools and hospitals would be made by the central government in Canberra, as it would not be feasible to run 30 to 50 education or health systems.
>
> The benefits of federalism, such as competition and innovation, would be harder to achieve because of the smaller population bases of most regions. Transaction costs would be higher in servicing a small population and it is unlikely that there would be a bureaucracy of sufficient size and depth to produce innovative policy.
>
> The ability of a region to influence the Commonwealth Government, or obtain representation in the Cabinet or in any national institution, would be limited. The composition of the Senate would be skewed, with presumably

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36 Electoral Commission of NSW website http://www.elections.nsw.gov.au/results/referendums_and_polls/state/29_april_1967 (accessed 24 June 2011)

37 Northern Territory Statehood Steering Committee, *Submission 12*, p. 8.

> no more than one or two Senators being elected for each region, effectively removing the representation of small parties.[38]

7.39 A more measured suggestion comes from Professors Podger and Brown.

> While the idea of new state governments was supported by a number of participants, there was widespread support for early action to rationalise and strengthen the current, ad hoc and messy approach to regionalism, including reconsidering the importance of place management in the planning and delivery of all government services, particularly environmental and human services.
>
> In consultation with local and regional communities, State governments should more clearly define regions that are useful for most planning processes, while Commonwealth agencies should work more closely within such regional planning frameworks, and local governments should collaborate on this basis also.[39]

Committee view

7.40 Evidence before the committee indicates that regional governance is primarily an intra-jurisdictional matter below the level of national and state governance. Australian regionalism, while potentially an important element of governance, is not a formal part of the structure of the federation.

7.41 It is evident that there are efficiencies and improvements in service delivery to be gained where efforts are coordinated across regional boundaries. The committee notes with approval the measures taken by jurisdictions to implement regional structures to guide service delivery and economic development. The evidence provided by the Tasmanian government provides one example of a model of regional coordination. The committee encourages all states to consider ways to improve regional governance for essential services including police and education. The committee also notes the relevance of regional coordination and program management to local government. The efficiencies of scale to be gained through regional governance may assist local government in addressing revenue challenges.

7.42 While regional governance is a sub-federal issue, the committee strongly endorses the view that all tiers of government need to work together effectively to meet the range of needs across Australia's diverse regions. Mechanisms such as the RDA framework can be important in facilitating that cooperation. The committee expects to see the framework evolve and develop as it responds to concerns by individual RDA groups that it needs to be more responsive to regional variation, have better access to federal government, and receive adequate funding to allow it to

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38 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 44.

39 Professor A. J. Brown, *Submission 41*, Attachment 5, p. 39.

perform as effectively as possible. The committee considers that the RDA program should be reviewed to ensure that the program is meeting its objectives of promoting sustainability and economic growth in Australia's regions.

7.43 The committee does not consider the proposal to redraw the boundaries of Australia's federal map around regional groupings to be a practical response to the current issues facing Australian federalism. Nevertheless, it endorses the Northern Territory's bid for statehood and recognises that one way in which regionalism could be given expression in the future is through the use of the New States provision in Chapter VI of the Constitution.

Recommendation 14

7.44 The committee recommends that the each state give consideration to strengthening existing regional governance frameworks to improve the delivery of essential services and take into account the needs of local government. In particular, it encourages state governments to review the boundaries of regions created for the administration and delivery of state services such as health and education to ensure their closer alignment with each other.

Recommendation 15

7.45 The committee recommends that the Commonwealth Government review the Regional Development Australia program after three years operation, to ensure the program effectively contributes to the long-term sustainability of Australia's regions.

Chapter 8

Reforming the federation

8.1 As noted in chapter one of this report, this inquiry was established to 'explore a possible agenda for national reform' on a limited range of issues. It was not established to determine what the outcome of any change should be.

8.2 Even so the committee's work has proceeded on the basis that Australia's system of federal government is the most appropriate for a country of its geographic, political, economic and social character and has overall the support of the Australian community. As noted earlier in the report, however, over time the foundations of the federation have been eroding causing among other things cost-shifting between the different levels of government, an increasing concentration of political and economic power in the hands of the federal government and growing ambiguity over the constitutional roles and responsibilities of national, state and local governments.

8.3 During the enquiry, the committee heard considerable evidence that this process of evolution was less the result of well considered policy decisions than the ineluctable consequence of a series of rather ad hoc responses to pressures for change. The consequences of this, as Dr Zimmermann and Mrs Finlay noted in their evidence to the committee, are that:

> [t]he continual expansion of Commonwealth powers has resulted in a Federation far removed from that originally envisaged by the framers. Along the way, many of the advantages of federalism have either been lost, or are not being realised to their full extent.[1]

8.4 Many of the submissions to the enquiry noted that the pressures on the structures and processes of the federation had become especially apparent over the last decade or so. As a consequence steps to restore the federation to health are becoming increasingly urgent. Writing in 2006, the Business Council of Australia commented that 'no significant [economic] reform is possible without effective cooperation between the federal and state governments' and that 'reform of our federal system must be part of that agenda.'[2] This urgency is, if anything, more acute today. The committee looks forward to this report contributing to this process.

8.5 While the previous chapters of the report have attempted to identify the key issues for change on an agenda for reform, in this concluding chapter the committee explores several ideas and suggestions as to how this agenda might be advanced with particular attention to the forums most appropriate to the task.

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1 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 58.

2 Business Council of Australia, *Reshaping Australia's Federation: A new contract for federal-state relations*, 2006, p. 3.

An architecture supporting cooperation and competition

8.6 When approaching the challenge of reform, the committee believes that the objective should be to build and formalise, in the words of Wanna et al., an 'architecture of cooperation' to preserve the benefits of cooperative federalism. While offering its broad support for the ideal of cooperation between the different levels of Australia's federal system of government, it notes, once again, that 'cooperative federalism' can often be a mantra for the Commonwealth assuming more power in a field not previously part of its constitutional authority. Federations need to be responsive to changing circumstances, but institutionalising greater power in Canberra is only one possible response to this challenge. The committee recognises that one of the benefits of federalism can be the competitive tension federalism introduces into policy making and service delivery. This competitive tension is both horizontal (between states) and occasionally vertical (between the states and commonwealth, for example in those areas where there is overlap in responsibility). Accordingly, the committee sees considerable merit in the retaining and strengthening of these competitive tensions. This is particularly true of those tensions generated at Commonwealth level through the exercise of its distributive funding powers.

8.7 Professor Galligan clearly articulates this relationship between cooperative and competitive models of federalism.

> Competition and cooperation are complementary dynamics in Australian intergovernmental politics and public policy. Besides explaining the fiscal federalism and how it has developed in Australia, these two modes capture the dynamics of political federalism and intergovernmental relations.[3]

8.8 Noting the benefits that follow from some federal competition, the essential operating model for Australian federalism, however, is cooperative federalism. This approach commanded widespread support in many of the submissions to the enquiry. For Wanna et al., this 'architecture' consists of three broad and interrelated elements:

1. Principles to guide cooperative federalism
2. Supporting legal and institutional arrangements
3. Appropriate cultural practices and attitudes.[4]

8.9 The Business Council of Australia has approached the reform agenda in a more functional way emphasizing a process of change consisting of the following steps:

- Step 1 recognises that the challenges Australia will face in the coming years and decades cannot be met without collaboration among our

3 Professor Brian Galligan, *Submission 46*, p. 14.

4 Professor John Wanna, Professor John Phillimore, Professor Alan Fenna with Dr Jeffrey Harwood, *Common cause: Strengthening Australia's cooperative federalism*. Final report to the Council for the Australian Federation, May 2009, p. 3.

Governments. A first step towards a better functioning Federation might therefore be to ensure there is an effective vehicle for that collaboration.

- Step 2 then focuses on using those collaborative institutions to redefine the relationship between the Commonwealth and the States and to ensure responsibilities and functions are allocated appropriately. Effectively, this means re-invigorating and adapting the framework under which the two tiers of Government operate.
- Step 3 then suggests using this redefined framework to rationalise Government policy development and service delivery to ensure the Federation operates effectively and efficiently.[5]

8.10 In yet another approach, Dr Zimmerman and Mrs Finlay focus on reform through the prism of the issues and methods. Accordingly they argue change should address:

a) The distribution of constitutional powers and responsibilities;

b) processes for enhancing cooperation between the various levels of Australian government;

c) financial relations between Federal and State governments; and

d) possible constitutional amendments.[6]

8.11 When considering the most appropriate pathway to reform, the committee accepts the general conclusion of Professor Galligan, among others, that not all the changes necessary to restore health to the federation require constitutional amendment. Indeed, as many others have pointed out, proposals for constitutional amendment have a poor record of success in Australia with only eight of 44 referenda passing in a 110 years of federation. There are no doubt many reasons for this level of failure, but the committee sees merit in Professor Galligan's view that 'Australia's poor referendum record is in fact a record of poor referendums.'[7]

8.12 The committee is also of the opinion that Australia has not been well served by the inclination of governments to approach reform in a rather haphazard way, a tendency exemplified by the long periods of time between constitutional referenda and the periodic creation, and then dismantling, of constitutional conventions. The committee believes that the maintenance of the federal compact in Australia requires a more continuous program of review, one that makes use of existing (or newly created) institutions, that can manage a process of change in an orderly way and that is responsive to the constant challenges confronting federal state relations.

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5 Business Council of Australia, *Modernising the Australian federation, A discussion paper*, 2006, p. 11, http://www.bca.com.au/Content/101346.aspx (accessed 1 June 2011).

6 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 38.

7 Professor Brian Galligan, *Submission 46*, p. 6.

8.13 Having regard to these imperatives, the committee considers that reform is more likely to meet the needs of the federation if it is conducted in accordance with three broad principles. First, a commitment to regular but evolutionary change directed towards the maintenance of the federal compact. Second, a recognition of the need to pursue change in more creative ways, using institutions, mechanisms and processes that encourage collaboration between the different levels of government and encourage a commitment to sustainability, transparency, accountability and democracy. Third, an acknowledgement of the value and importance to Australia of sustaining a high level of public knowledge and understanding of federal state relations together with a significant level of academic research and teaching expertise within the tertiary sector. [8]

Implementing the principles of reform

Principle one: a commitment to regular, orderly change

8.14 The committee recognises that some significant reforms have taken place in federal state relations in recent years. Among the most notable have been the creation of the COAG Reform Council, the restructuring of Specific Purpose Payments and the process recently commenced, of reviewing the formula for horizontal fiscal equalisation. While the committee welcomes these developments as reflective of a desire to modernise some of the key management processes of the federation, it notes that given that they are very recent reforms and in one case yet to be completed, it is not possible to assess their long term significance.

8.15 At the same time, however, the committee considers that a pattern of change characterised by sudden bursts of reform energy followed by relatively long periods when little or no change occurs is neither an effective, responsible nor desirable approach to the management of federal state relations. Aside from the political and bureaucratic pressures created by this approach to reform, it is not obvious that it necessarily picks up all the issues that may be in need of attention, such as the consequences of periodic High Court decisions.

8.16 The committee believes that in a mature federation such as Australia's, it should be possible to formulate and implement a more orderly and rational method of reform. It notes that while no federal system has fully perfected the challenge of managing change, there are several examples of countries that have recently managed significant reshaping of their federal systems. Twomey and Withers believe this is most evident in Europe and provided the following examples:

> In Germany, a federation, major constitutional reforms, described by the Bavarian Premier as the 'mother of all reforms', took effect on 1 September 2006. The Bundesrat (the upper house of the federal parliament), which is comprised of representatives of the States (Länder), has had its veto over

8 Professor A. J. Brown, *Submission 41*, Attachment 1, p. 46.

> legislation reduced in exchange for sole responsibility for certain matters, such as education, being transferred to the Länder.
>
> In Spain, a de facto federation, health care and social services spending has been devolved upon Autonomous Communities, along with increased tax powers. Negotiations continue around giving greater powers to the Autonomous Communities.
>
> In Switzerland, a federation, the distribution of powers was clarified by constitutional amendment in 2000 and further reforms were ratified by the Swiss people and Cantons in a referendum in November 2004. These reforms included the reallocation of some powers (such as responsibility for people with disabilities being transferred to the Cantons) and a new formula of fiscal equalisation between the Cantons.[9]

8.17 Federations, like all forms of government, are shaped in large measure by their unique constitutional history, institutional structures and their political culture. None is perfect and applying an overseas model to Australia's own unique federal system is unlikely to be successful. Nevertheless the institutionalisation of a pattern of governance that enables Australia's federal and state governments to respond to the need for change in an orderly, collaborative and timely way is an objective the committee considers to be strongly in the nation's interest.

8.18 As noted earlier in this report, the committee recognises that Australia has some of the mechanisms in place to respond to this challenge. For example, COAG and the processes that surround it are significant in this respect. But as the committee noted in its discussion, COAG has some significant deficiencies in its structure and processes. These need to be addressed if COAG is to be reflective of the values of sustainability, transparency, accountability and democracy mentioned above. To this end the committee reiterates recommendation 5 in chapter three of the report proposing that COAG be reformed.

Principle two: a more creative approach to change

8.19 In addition to the need to develop more regular and orderly habits of reform, Australia needs to develop a more creative approach to change, one that employs better mechanisms to both evaluate and implement reform proposals. The committee is of the view that for this to become a reality Australians need to re-evaluate the way they think about constitutional change.

8.20 As we have seen, constitutional amendment is not easy in Australia. For this reason Australians often see it as a mechanism of last resort. This attitude stems at least in part from problems with our constitutional architecture and the evolution of our political culture. The committee believes it would be immensely helpful to

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9 Dr Anne Twomey & Dr Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, April, 2007, p. 7.

managing the challenges of a complex federation if Australians were able to develop both less distaste for, and a more sophisticated approach to, constitutional innovation.

8.21 At one level, this might enable sound constitutional reform to take place more readily. At another it might help to discourage a state of mind that tends to equate real and lasting change whether in the area of federal state relations, or in relation to some other matter, as dependant on constitutional amendment. This state of mind appears to underpin, at least in part the strong desire of some to have local government recognised in the constitution.

8.22 The committee acknowledges that on occasions governments may have little option but to seek a constitutional amendment if serious reform is to be possible. The often invoked means of responding to this need is through some form of constitutional convention.

Constitutional convention

8.23 In this regard, the committee notes the suggestion in a 2008 report of the House Standing Committee on Legal and Constitutional Affairs' calling for the creation of a regular constitutional convention.

8.24 A convention was also one of the recommendations from the 2020 Summit (in 2008) relating to the reform of the Australian Federation. It was proposed that there be 'A convention of the people, informed by the Commission [of experts looking at the mix of Commonwealth, State and Territory responsibilities] and by a process of deliberative democracy.'[10]

8.25 The importance of a constitutional convention was reinforced by the Gilbert and Tobin Centre of Public Law in its submission to the committee:

> Conventions are an accepted way of debating changes to Australia's Constitution and system of government. A Convention on the Australian Federation would signal serious intent to deal with major questions concerning the future shape of our federal system. It would also do so in a way that brought together a range of voices, and focused media and popular attention on the reform agenda. Importantly, it would also have the potential to produce momentum for reform.[11]

8.26 The Centre went on to propose a model that uses COAG as the central coordinating organisation.

> It would be important for this Convention to have a clear and specific agenda. COAG will be the most effective body for framing the agenda, determining which issues can best be resolved at the Convention and which

10 *Australia 2020, Final Report: The future of Australian governance.* p. 308. http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.pdf , (accessed 27 June 2011).

11 Gilbert and Tobin Centre of Public Law, *Submission 7*, p. 6.

> are best left for resolution in other forums. The types of matters that should be placed on the Convention agenda should include many of the matters listed in this inquiry's terms of reference, including the division of roles and responsibilities, fiscal relations, and the position of local government. COAG should also determine the rules of the Convention, its composition and all other matters connected with its operation.
>
> The idea of a Convention of the Australian Federation has widespread support. It has been championed by a broad section of interests, including the Council for Australian Federation, the Victorian and West Australian Governments, and the Business Council of Australia.[12]

8.27 The Law Council of Australia endorsed this position,[13] while Rethink Australia proposed 'citizen deliberations' as a process 'where public policy, legislation and changes to the Constitution can be meaningfully proposed and discussed by the wider community.'[14]

Committee View

8.28 It is the committee's view that regular constitutional conventions would form an important element of more robust processes and institutions necessary to ensure Australia's Federation is able to respond to changes in society. Currently, mechanisms to effect changes to the Federation and to the constitution are developed on an ad hoc basis. Regular conventions with appropriate resourcing at an interval of about every ten years would help to provide a regular timetable against which constitutional change could be considered.

8.29 The committee sees merit in the Gilbert and Tobin model for organising a constitutional convention, but believes that for this to be an effective process COAG would be required to have the responsibility for planning and organising the convention once a decade to be written into its mandate. If the requirement for regular meetings were not included in the mandate, the committee expresses caution in assigning COAG the sole responsibility for deciding whether a convention should take place. The committee considers that progress towards a convention should not be able to be frustrated by a COAG process that may not support it.

8.30 The committee believes that this matter requires further evaluation alongside the desirability of permitting governments, other than the Commonwealth, to raise issues for consideration at referenda.

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12 Gilbert and Tobin Centre of Public Law, *Submission 7*, p. 6.

13 The Law Council of Australia, *Submission 34*, p. 11.

14 Rethink Australia, *Submission 9*, p. 7.

Recommendation 16

8.31 The committee recommends that propositions for change to the Constitution be referred for consideration to a constitutional convention and that responsibility for the agenda and organisation of the convention be the responsibility of a newly institutionalised COAG.

A federation committee

8.32 While the committee notes that conventions have a well established place in Australia's processes for constitutional reform, it also notes considerable evidence to the inquiry highlighting the possibilities for change without the need for a constitutional amendment. Professor Brian Galligan is very clear on this point. He argues that:

> The most promising avenues for reforming Australian federalism are political rather than constitutional ones. This is contrary to the approach of constitutional lawyers and others who, when they perceive a problem with Australian federalism, reach for the Constitution and set about devising constitutional remedies. Constitutional change is an unlikely vehicle for federal change, however, and in any case most of what needs reforming can be done via sub-constitutional politics.[15]

8.33 The committee considers that one of the challenges to undertaking timely and successful reforms in the area of federal state relations is the absence of a credible, well established pathway for ensuring that proposals for change receive considered evaluation. COAG could assume this role, but the infrequency of its meetings, its dependency on government bureaucracies for support (even after reform), its primary role as a body to implement change and the potential conflicts of interest that may arise as federal, state and local governments evaluate proposals for reform, all raise doubts as to its appropriateness.

8.34 During the enquiry the committee was presented with a proposal to assist in addressing this problem. As part of a continuing and reinvigorated approach to managing the challenges of federation it was suggested that a new parliamentary committee be established. The committee would be designed to be an integral part of the processes of governance in federal state relations.

8.35 The most developed articulation of this proposal came from Professor John Uhr. He suggested a senate standing committee with responsibility for the state of the Australian federation. Its status as a senate committee would recognise the chamber's unique constitutional, though underdeveloped, role as a states' house. Professor Uhr suggested the committee might have three key responsibilities. It would:

> [h]ave a watching brief to report regularly on the constitutional and institutional development of Australian federalism, particularly the

15 Professor Brian Galligan, *Submission 46*, p. 3.

> changing balance of powers and responsibilities shared by the Commonwealth, the States and the Territories...
>
> [be required] to hold an annual inquiry into COAG. The annual COAG inquiry could contribute much-needed parliamentary oversight and accountability to Australia's most prominent example of governmental power-sharing...[and]
>
> given Australia's role as an outstanding federal democracy in the Asia-Pacific region, the proposed standing committee could sponsor an ongoing regional dialogue among elected representatives and parliamentary bodies on the political management of decentralised and devolved national governance.[16]

8.36 Dr Zimmermann and Mrs Finlay similarly proposed the establishment of a Senate standing committee to examine the state of Australian federalism, arguing that it was an appropriate function for the 'states house'.[17]

Committee View

8.37 The committee considers that the establishment of a new parliamentary committee has the potential to be a valuable and significant addition to the institutional architecture now required to manage Australia's modern federation. While the committee understands the logic of establishing the new committee as a senate committee, it considers that the likely remit and burden of work of the committee requires that it be supported by both houses of the parliament. It also believes that for the committee to have the status and credibility necessary to succeed in its role, it should be established as a joint standing committee of the parliament, though one supported administratively by the senate and with a senator serving as its chair.

8.38 The proposed committee could be established under a standing order that allowed it to undertake a range of responsibilities including to:

- report periodically on the activities of COAG;
- take references from either house of parliament on matters related to the management of federalism;
- examine legislation relating to federal state relations, including proposed referrals of power discussed in chapter 3 of this report;
- evaluate the constitutionality and desirability of any cooperative schemes for the delivery of policy between the Commonwealth and the states; and

16 Professor John Uhr, *Submission 47*, pp 1–2.

17 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, p. 41.

- explore the necessity for proposals for constitutional amendment involving the distribution of powers between the Commonwealth and the states.

8.39 The committee envisages that the new parliamentary committee might commence its work by looking at several of the matters raised in earlier chapters of this report, including proposals to make COAG processes more transparent, consideration of proposed intergovernmental agreements, and the implications of the decisions in *Re Wakim* and *R v Hughes* for cooperation between the federal and the state and territory governments.

8.40 While the committee recognised there could be considerable value in Australia playing a role in promoting a dialogue on devolved democracy among the countries of the Asia-Pacific region, it is concerned that such a role might be a distraction from the conduct of the committee's core responsibilities. It suggests that the Senate Foreign Affairs, Defence and Trade References Committee might undertake a short enquiry into the merits of this proposal and the way it could be carried forward.

Recommendation 17

8.41 The committee recommends the establishment of a Joint Standing Committee of the federal parliament to be administered by the senate and with a senator as its chair. The committee should have a mandate to conduct its own inquiries and be assigned a range of oversight responsibilities that would enable it to assume a significant and integral role in helping to manage Australia's modern federation. This should include the responsibility to provide regular oversight of COAG.

Recommendation 18

8.42 The committee recommends that the Senate Foreign Affairs, Defence and Trade References Committee undertake an inquiry into the merits of Professor Uhr's proposal that Australia sponsors an ongoing regional dialogue among elected representatives and parliamentary bodies in the Asia Pacific on the political management of decentralised and devolved national governance.[18]

Principle three: promoting knowledge and understanding of Australia's federal system of government

8.43 The committee received considerable evidence during the inquiry that the challenges of managing Australia's federal system of government were not well understood within the Australian community.

8.44 The committee notes that there is considerable work done in primary and secondary schools in providing school children with an introductory understanding of issues around Australia's federation and the Australian constitution. Organisations

18 Professor John Uhr, *Submission 47*, pp 1–2.

such as the Museum for Australian Democracy, the Parliamentary Education Office in Parliament House and the Australian Electoral Commission have developed extensive resources relating to federalism and provide onsite school education programs. Australia's federation is also a component of the history strand looking at key figures and events that led to Australia's Federation including British and American influences on Australia's system of law and government. Federalism is also considered as part of civics and citizenship education courses.

8.45 In contrast, opportunities for improving understanding of federal issues in the post-school population are much more limited. This is despite several parliamentary inquiries into the topic. As Professor Brown pointed out, this committee has been traversing well trodden ground. He placed this inquiry in an historical context:

> The Committee's work follows in the footsteps of reviews of the functioning of the Federation such as undertaken by the Peden Royal Commission on the Constitution (1927-1929) and the Parliamentary Joint Committee on Constitutional Review (1956-1959)...along with the work of the Australian Constitutional Convention (1973-1985).[19]

8.46 More recent inquiries include those by the House of Representatives Legal and Constitutional Affairs Committee, namely: *A Time for Change: Yes/No?* (2010), *Reforming our Constitution* (2008) and *Harmonisation of legal systems within Australian and between Australia and New Zealand* (2006).

8.47 A recurring theme across these inquiries is the necessity to engage the Australian public more effectively in debate around the nature of Australia's federation. The 2008 report referred to above held that:

> We need to inspire Australians to engage with the Constitution – to recognise its importance as the founding document for our nation, to seek reforms so it is a relevant document that reflects our current nation, and to debate how it might shape our nation into the next century.[20]

8.48 Former Senator Andrew Murray, responding to the Australian Government's September 2009 Electoral Reform Green Paper, *Strengthening Australia's Democracy*, saw community engagement in terms of a 'dialogue with the people'. He argued that:

> A holistic approach is needed. It is difficult to improve the economic or the social entirely without also improving political governance. That means reassessing the constitution, the separation of powers, a republic, whether the federation should stay and if it should in what form, and the powers states and the commonwealth should each have. It means reassessing how power is acquired and restrained, who has power over what, how money is raised and spent, and by whom.

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19 Professor A. J. Brown, *Submission 41*, p. 5.

20 House of Representatives Legal and Constitutional Affairs Committee, *Reforming our Constitution* (2008), p. *x.*

> To achieve lasting reform, anticipate a ten year struggle as for the original Constitution, to allow time for dialogue with the people.
>
> To ensure momentum what is needed is a standing elected constitutional convention, serviced by a permanent secretariat, and with a budget to allow for full engagement and dialogue. This could be supplemented by a university based institute for constitutional change, producing discussion papers and fostering public awareness and debate. This is serious business and needs a serious approach.[21]

8.49 With respect to the challenge of generating a deeper knowledge and understanding of the importance of the Constitution, some submitters focused on targeted education campaigns around specific referendum proposals. The preferred model for the Australian Local Government Association, for example, is

> an education campaign which is aimed primarily at informing voters in advance of a referendum vote...[including] a national program run by the Australian Electoral Commission which focuses on the role of the Constitution, the mechanism by which it can be changed and the role of individual voters. This should be designed as a factual campaign involving pamphlets and television and radio advertisements. It should be approved by Parliament and the Auditor-General to ensure its acceptance as legitimate public advertising.[22]

8.50 As well as hearing evidence that there was a need for Australians to be better educated about their federal system of government, the committee was informed of the limited attention being given to high quality university research on the subject. While Australia has a strong tradition of academic research in the field of systems of government and many distinguished individuals working on various aspects of the subject, several of whom appeared before the enquiry, this expertise is spread unevenly across the country.

8.51 The Committee heard evidence that there is currently no university based research and/or teaching centre concentrating on the academic study of Australian federalism. Australia lacks any institution of sufficient size and capacity to undertake high level academic research into the nature and challenges of Australian federalism. The committee was surprised and disturbed to learn of this deficiency in Australia's intellectual capital.

8.52 This was not always the case. The inquiry was told that until relatively recently, the Australian National University's Federalism Research Centre played an important role in raising awareness of issues related to the Australian federation. This research centre, became defunct when its funding was discontinued A subsequent

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21 Mr Andrew Murray, response to the Australian Government's September 2009 Electoral Reform Green Paper, *Strengthening Australia's Democracy*, p. 10. Available as additional information http://www.aph.gov.au/Senate/committee/reffed_ctte/reffed/submissions.htm

22 Australian Local Government Association, *Submission 24*, p. 17.

proposal for the establishment of a research centre under the Centre of Excellence scheme sponsored by a group collaborating with Professor Brown was not funded.

Committee view

8.53 The committee considers the absence of a centre dedicated to research and/or teaching of federalism is a serious deficiency in the nation's capacity to comprehend fully the increasingly complex challenges of managing a modern federal system of government. An institution within a public university and perhaps jointly funded by the Commonwealth, states and territories is necessary to provide an important academic adjunct to Australia's federal system of government. In his submission Professor Brown offered one possible model for such an institution.[23]

Recommendation 19

8.54 The committee recommends that funding be made available by the federal, state and territory governments for the establishment within an Australian university of a centre for the study and dissemination of ideas relating to federalism and Australia's federal system of government.

Recommendation 20

8.55 While the committee acknowledges the important work done by organisations such as the Museum of Australian Democracy and the Parliamentary Education Office in improving Australians' knowledge and understanding of Australian federalism, the committee nevertheless considers there is a need to promote a deeper understanding of federalism in the wider post-school community. The committee recommends that enhanced funding be made available by the federal, state and territory governments to appropriate institutions to promote this deeper understanding.

Recommendation 21

8.56 The committee recommends that the Australian Research Council identify Australian federalism as a priority area for research funding.

In Conclusion

8.57 By way of general conclusion, the committee considers that there is a pressing need for Australia to pay far greater attention to ways in which it manages its federal system of government. It believes there is particular need to recognise that the processes and structures used to undertake reform within the federation is in several material ways outmoded and unresponsive to the needs of modern Australia. Three of the recommendations in this chapter, namely those proposing the conduct of regular constitutional conventions, the establishment of a standing committee of the federal parliament, and the rebuilding of Australia's academic research capacity in the area of

23 Professor A. J. Brown, *Submission 41*, Attachment 6.

federalism, would all make, if implemented, a major contribution, to maintaining the health of the Australian federation and to further developing a considered agenda for its orderly reform.

Senator Russell Trood

Chair

Appendix 1

Submissions

1 Andrew Oliver
2 Regional Development Australia Peel Inc
3 Don Auchterlonie
4 Regional Development Australia Barwon South West Committee
5 Naracoorte Lucindale Council
6 Terence Holmes
7 Gilbert and Tobin Centre of Public Law and UNSW Faculty of Law
8 FamilyVoice Australia
9 Rethink Australia
10 Australian Chamber of Commerce and Industry
11 Glenelg Hopkins Catchment Management Authority
12 Northern Territory Statehood Steering Committee
13 Regional Development Australia Wide Bay Burnett Inc.
14 Pearce Division Liberal Party of Australia
15 Regional Development Australia Sunshine Coast
16 Gabriel Donleavy
17 Dr Augusto Zimmermann and Mrs Lorraine Finlay
18 Fiona Smith
19 Regional Development Australia (RDA) Brisbane Inc
20 Bryan Pape
21 Deakin University
22 Civil Liberties Australia
23 Doug Holmes
24 Australian Local Government Association
25 Anthony Dowling
26 Regional Development Australia Wheatbelt Inc
27 Australian Monarchist League
28 Alison Walpole
29 National Natural Resource Management Regions' Working Group
30 NSW Business Chamber
31 Local Government Association of SA
32 Associate Professor Anne Twomey, Sydney University
33 WA Local Government Association
34 Law Council of Australia
35 City of Mandurah
36 Gold Coast City Council
37 Council for the National Interest WA Committee
38 Council for the Australian Federation (CAF)
39 NSW Government
40 Tasmanian Government

41 A J Brown, Griffith University
42 Robyn Tan
43 Anthony Hassell, Pearce Division of the Liberal Party
44 Christian Porter MLA, Western Australia Government
45 Chrissy Sharp
46 Professor Brian Galligan, University of Melbourne
47 Professor John Uhr, ANU
48 James McDonald

Appendix 2
Public Hearings

Thursday, 2 December 2010 - Sydney

Associate Professor Anne Twomey, University of Sydney

Gilbert and Tobin Centre of Public Law

Professor George Williams, Foundation Director

Mr Paul Kildea, Director, Federalism Project

NSW Business Chamber

Mr Paul Orton, Director of Policy and Advocacy

Mr Micah Green, Economist

COAG Reform Council

Ms Mary Ann O'Loughlin, Executive Councillor and Head of Secretariat

Tuesday, 1 February 2011 - Brisbane

Regional Development Australia (RDA) Brisbane Inc

Ms Margaret Blade, Executive Officer,

Regional Development Australia Sunshine Coast

Councillor Debbie Blumel, Chair,

Professor Alexander Brown, Griffith University

Regional Development Wide Bay Burnett Inc

Mr Paul Massingham, Executive Officer

Northern Territory Constitutional Convention Committee

The Hon Jane Aagaard, MLA Speaker of the Legislative Assembly, Chair of the Standing Committee on Legal and Constitutional Affairs, Chair of the Northern Territory Constitutional Convention Committee and former Chair of the Statehood Steering Committee

Ms Kezia Purick**,** MLA Shadow Minister for Statehood, member of the Standing Committee on Legal and Constitutional Affairs and of the Northern Territory Constitutional Convention Committee

Mr Michael Tatham, Member Constitutional Convention Committee

Wednesday, 9 March 2011 - Perth

Western Australian Local Government Association

Mr Wayne Scheggia, Deputy Chief Executive Officer

Mr Andrew Murray

Mandurah City Council

Mr Mark Newman, Chief Executive Officer

Regional Development Australia Wheatbelt

Mrs Rebekah Burges, Executive Officer

Dr Augusto Zimmerman and Ms Lorraine Finlay

Dr Harry Phillips

Pearce Division of the Liberal Party

Mr Rod Henderson, Immediate Past President

Mr Tony Hassell, Member

Thursday, 5 May 2011 - Canberra

Australian Local Government Association

Mr Adrian Beresford-Wylie, Chief Executive Officer

Commonwealth Grants Commission

Mr Dermot Doherty, Assistant Secretary

Mr Janko Spasojevic, Secretary

Professor Brian Galligan

Professor John Uhr

Department of the Prime Minister and Cabinet

Mr Ronald Perry, Assistant Secretary COAG Unit

Mr Dominic English, First Assistant Secretary

The Treasury

Ms Mandy Fitzpatrick, Manager, Commonwealth State Relations Division

Ms Sue Vroombout, General Manager, Commonwealth State Relations Division

Appendix 3
Answers to questions on notice

COAG Reform Council

Public Hearing 2 December 2010

Question 1: Names of expert advisory panel

Hansard, p. 33

Ms O'Loughlin—... The December 2009 communique of COAG mentions that they will establish an expert advisory panel for the council.

CHAIR—How soon after you received the reference did you get the names for the council?

Ms O'Loughlin—I would have to take that question on notice.

Response

The names of the panel were released in an announcement by the former Prime Minister on 17 June 2010.

Question 2: Circulation of the draft report

Hansard, p 38

Ms O'Loughlin—All our processes have formal consultation processes built into them. All our reports to COAG have at least one, sometimes more, consultation drafts, as we call them, that we circulate formally to the jurisdictions for a month. We are required to do that under the intergovernmental agreement. So those drafts are in the governments' hands, if I can put it like that.

Senator LUDLAM—When would you expect—I will not tie you down to this—the first of those consultation drafts to go to COAG for this one?

Ms O'Loughlin—I will get back to you with the exact month. It is somewhere around August next year. It might be September.

Senator LUDLAM—I might ask you to take that on notice and table for the committee as much of the work as you are able to.

Ms O'Loughlin—Yes.

Response

The consultation draft of the final report—the one that will go to COAG—will go to governments on 18 October 2011 for one month of consultation.

Question 3: Publication on website

Senator LUDLAM—The reason I am is partly that this is all invisible on the website, so this is useful information on what sounds like a really good process. City governance has fallen through the cracks because I guess local governments are too little, the state government is too big and the federal government—at least for the last

significant period—has not really involved itself in city policy until recently. Before I start fishing around for individual bits and pieces, can you tell us why none of this activity is on your website. Where is the work plan? Where are the interim reports? Where is your meeting schedule?

Ms O'Loughlin—The interim reports are not done yet. They are interim just to jurisdictions, in the sense that we want to make sure we are getting it right. So we would not make those public. All the reports to COAG are public. So the interim reports will just go back to the jurisdictions and we will say, 'Can you help us here? There'll be some gaps.' But all our reports to COAG, the final reports, are on our website. I will take a step back in terms of the work plan. That was between the council and the jurisdictions. But, having said that, I am happy to go back and consult with the jurisdictions and ask them if they would be happy for us to put that information on the website.

Senator LUDLAM—Great. I would be greatly appreciative if you could do that.

Response

The COAG Reform Council will include on its website the key steps in its workplan under the capital city strategic planning systems reference. An invitation to contact the secretariat will also be included on the cities page on the council's website.

NSW Business Chamber

Public Hearing 2 December 2010

Question: Report on dysfunctionality:

Hansard, p. 24

We do quote in our submission a work that the Business Council of Australia have done on the topic. I think the number there was $9 billion, but Micah might have some more detail.

Mr Green—I believe that is correct. That report is a few years old now as well but that certainly is the estimate we refer to in our submission. I am not aware of anything having been done more recently than that to try to estimate the costs.

CHAIR—Would that figure now have increased?

Mr Orton—I doubt that it has gone down.

Senator MOORE—Would you mind just checking when that work was done?

Response

Following up from today's Senate Hearing, one of the Senators asked me if I knew the date of publication of some Business Council of Australia data we referred to on page 5 of our submission (at footnote 12). The date of the publication was October 2006, and a full copy of the publication can be found here:
http://www.bca.com.au/DisplayFile.aspx?FileID=64

(Micah Green, NSW Business Chamber)

Western Australian Local Government Association

Public Hearing 9 March 2011

Question: Advertising by WALGA

Hansard, p. 11

Senator MOORE—Is it possible to get a synopsis of that advertising campaign for the committee: the background, how long it has been going, what the messages are, and any feedback you have or any review you have had on success? I think that would be really interesting to see how that process operates.

Response

The following information is provided in response to the Committee's request for details of our local government promotional campaign:

The WALGA local government sector promotional campaigns have been operating since 2005. The association has spent in excess of $2,000,000 during this period in developing the campaign creative, buying media placement and conducting the underlying research program. The result has been a continual increase in awareness of the facilities and services provided by local government and recognition of the association.

The sector promotional campaigns were initiated in 2005 with the three objectives which remain pertinent 2011:

1. Improve the perception of Local Government in WA
2. Raise the profile of WALGA
3. Redress the skills shortage facing the sector

A comprehensive community research program (qualitative focus groups tested in a quantitative state wide survey) was undertaken to identify critical factors.

The initial research demonstrated that trust was the overwhelming contributing variable to community satisfaction with local government in WA.

The 2005 campaign creative was designed to leverage the drivers of trust (calculus, knowledge and identification) in the context of amplifying the career opportunities in local government.

Initial ad tracking of the initial campaign demonstrated a 45% increase in awareness of services provided by local government; a 35% increase in consideration in local government as an employment option.

Subsequent campaigns have built on these achievements with additional creative developed to build on awareness of local government facilities and services as a value for money proposition; highlight professional career opportunities; participation in the local government election process; and to oppose legislative changes at a state level.

In 2007 the WALGA sector promotional campaign and associated research was awarded a National Marketing Award by the Australian Marketing Institute in the category of consumer insight. The WALGA campaign achieved this in a field of

finalists which included Tourism Australia, Telstra, ANZ Bank, Stockland and Ericsson.

The campaign currently under development intends to leverage the TVC creative into a digital application to enhance the opportunity for community realisation of personal value for money in local government services and facilities and to assist the sector in the management and engagement of communities.

Department of the Prime Minister and Cabinet

Public Hearing 5 May 2011

Question 1: COAG Protocols

Hansard, p. 39

CHAIR: Is there a COAG operating manual of some kind or a list of protocols? In whose corporate memory is COAG located?

Mr English: I am very pleased you asked, because we have recently re-issued the COAG protocols, which I am sure we can provide.

Response

The COAG Protocols are attached. (pp 134–142)

Australian Government

Department of the Prime Minister and Cabinet

PROTOCOLS FOR COUNCIL OF AUSTRALIAN GOVERNMENTS AND SENIOR OFFICIALS MEETINGS

FEBRUARY 2011

Revision History

Version	Release Date	Consultation	Authorisation
1.0	February 2011	COAG Senior Officials	Rebecca Cross (Acting Deputy Secretary)

This document is intended to provide guidance on expectations that apply to Council of Australian Government (COAG) and Senior Officials meetings. These protocols are not intended to replace specific scheduling discussions relating to any particular COAG or Senior Officials meeting.

1. Date and Location of COAG Meetings and Senior Officials Meetings/Videoconferences

A proposed date and location of COAG meetings will be determined by the Prime Minister. The Commonwealth, in consultation with other COAG members, will finalise the date and location of the meeting.

By preference, Senior Officials will, meet on an as needed basis to support COAG members in their work. Where possible, these meetings will be conducted via videoconferencing to minimise the imposition on participants. There will be at least one videoconference and/or meeting prior to each COAG meeting.

If possible, the final Senior Officials meeting/videoconference prior to a COAG meeting will be held at least 10 to 12 days before a COAG meeting. This will best assist the briefing processes for COAG members.

2. Agendas for COAG Meetings and Senior Officials Meetings/Videoconferences

A draft agenda for COAG meetings will be prepared by the Commonwealth and circulated to other COAG members at the Officials-level as soon as possible. The Commonwealth will seek to consult with jurisdictions in the preparation of the COAG agenda early in its development.

The draft agenda may also be considered at the final Senior Officials meeting/videoconference prior to the COAG meeting.

A draft agenda for Senior Officials meetings/videoconferences will be prepared by the Commonwealth and circulated to other COAG members for comment prior to the meeting. A final agenda will then be provided by the Commonwealth to other COAG members.

The agenda for the final Senior Officials meeting/videoconference before a COAG meeting will usually be based on the proposed agenda for the COAG meeting.

States, Territories and the Australian Local Government Association (ALGA) will have an opportunity to propose items for both COAG and Senior Officials meetings.

The following criteria will be used to determine whether an issue should be included on the COAG agenda:

a. where there is an intersection of jurisdictional responsibilities and is an issue of national significance;

b. where the issue is considered of strategic importance to the three levels of government;

c. where resolution of an issue requires a leaders-level process given the political, fiscal or policy complexity of the issue;

d. where accountability is required for the work of Ministerial Councils and other COAG-appointed intergovernmental fora; and

e. where there is strong need to drive a number of current COAG activities to successful conclusion so that, among other things, service delivery improvements flow to the Australian community.

To ensure that COAG agendas are focussed on issues of the most strategic importance, the following structure for agendas will apply.

I. Implementation, Performance and Accountability

This section of the agenda will address progress reports on implementation and delivery and response to COAG Council Reform reports, to ensure COAG follows through on the decisions and commitments it makes.

II. Themes of Strategic Importance

Items in this section of the agenda will be structured by the five themes to ensure COAG's ongoing and continued focus on issues of national significance. The five themes are:

- a long-term strategy for participation, addressing social and economic issues such as skills development and early childhood development;
- a national economy driven by our competitive advantages, addressing the microeconomic reform agenda, further regulatory and competition reforms, taxation and federal financial relations, infrastructure investment and use of new digital technologies to drive productivity;
- a sustainable and liveable Australia, addressing issues such as housing supply and affordability, sustainable population, climate change and energy efficiency measures, and water reform;
- better health services and a more sustainable health system for Australians; and
- Closing the Gap on Indigenous disadvantage.

III. Items for Special Consideration

This section of the agenda will include items with the need for focussed discussion and thorough consideration by COAG to ensure current COAG priorities and activities are driven to successful conclusions.

It is intended that activities over the next 12-18 months under each of these themes will be prioritised for COAG.

3. Papers for COAG Meetings and Senior Officials Meetings/Videoconferences

Agencies preparing agenda papers and other documents for COAG meetings will, where possible, be required to provide documents to the COAG Unit in the Department of the Prime Minister and Cabinet (PM&C) at least three weeks prior to the date of a COAG

meeting. Also, where possible, the Commonwealth will provide other COAG members with the papers at least two weeks prior to the date of a COAG meeting.

Where possible, COAG members will have two days to provide comments on the papers before they are considered final.

Where relevant, agenda papers for a COAG meeting will be the same as those provided for a Senior Officials meeting/videoconference. All papers for COAG and Senior Officials' meetings will be prepared in the format at Attachment A.

4. Status of COAG and Senior Officials Documents

Documents prepared for COAG and Senior Officials are COAG-in-confidence, unless otherwise agreed by COAG or Senior Officials. Documents should be tightly held and only distributed on a strict need to know basis.

Where there is an expectation that a document prepared for COAG or Senior Officials will be made public, all COAG members should be advised early in the preparation of the document. If a COAG member receives a request for a document to be made public (either through a Freedom of Information request, a request from a Royal Commission or some other avenue), all members of COAG will be consulted regarding release of the document.

5. COAG Meeting Communiqués

The preparation of the communiqué, to be released at the conclusion of a COAG meeting, is a joint activity between all COAG members. COAG meeting communiqués will be as short as practicable, compelling and written in action-oriented plain English that will resonate with the Australian community. Matters of detail may be better addressed through the record of meeting.

A draft communiqué will be prepared by PM&C and provided to the States, Territories and ALGA as soon as possible in the lead-up to the COAG meeting. A communiqué drafting session to which representatives of all COAG members are invited may be organised by PM&C in the week leading up to the COAG meeting.

The day before a COAG meeting a COAG communiqué drafting session will be held to prepare the draft communiqué for COAG's consideration at the time of the meeting. Representatives of all COAG members will be invited to participate in this session which will be organised by PM&C.

At the conclusion of a COAG meeting, representatives of all COAG members are to clear the communiqué before it is released publicly. This may involve an Officials drafting session to finalise the communiqué.

PM&C will be responsible for placing the communiqué on the COAG website and making available copies to COAG members.

6. Records for COAG Meetings and Senior Officials Meetings/Videoconferences

A draft record of a COAG meeting, based on the agenda paper recommendations, will be prepared by PM&C prior to the meeting. The draft will be provided to State and Territory notetakers for the meeting.

After the COAG meeting a draft record will be prepared by the Commonwealth notetakers and then settled with the State and Territory notetakers. Once finalised the record will be provided to all COAG members.

A draft record of a Senior Officials meeting/videoconference will be prepared by the PM&C notetakers after the meeting. It will then be provided to the other participants for comment. Once comments have been received and the record finalised the record will be provided to the States, Territories and ALGA. The record for a Senior Officials meeting/videoconference will usually be adopted at the next Senior Officials meeting/videoconference.

Records for both COAG meetings and Senior Officials meetings/videoconferences should be finalised and provided to participants desirably within three weeks of the end of the meeting.

7. Handling National Partnership and Intergovernmental Agreements

National Partnership Agreements or Intergovernmental Agreements are brought before COAG for signature either at meetings or out-of-session. If agreements are to be signed at COAG meetings they must have the agreement of all the Parties (that is, all the COAG members required to sign the agreement) prior to the meeting. Obtaining such agreement will be coordinated by PM&C.

PM&C will bring a copy of all the agreements to be signed to the COAG meeting, and will coordinate the signature process. After the meeting, once all the signatures have been obtained, PM&C will retain the original signature page, and will provide copies of the agreement and the signature page to all jurisdictions. PM&C will also provide, where applicable, a copy of the signed agreement to the Commonwealth Department of the Treasury for publication on the federal financial relations website (www.federalfinancialrelations.gov.au).

ATTACHMENT A

PROPOSED AGENDA PAPER TEMPLATE

COAG (Month Year) X(x)

Council of Australian Governments Meeting, dd Month Year

AGENDA PAPER: TITLE
The cover sheet is not to exceed one page.

Purpose	**FOR AGREEMENT/FOR INFORMATION** To seek consideration of [outline the proposal/problem to be resolved]. This section should not exceed two or three lines.
Key Outcomes	1. This section must provide a brief description of the outcomes to be achieved through the proposals contained in the agenda paper. 2. Each paragraph should not exceed two or three lines.
Author	Name of Ministerial Council, Senior Officials Group or government

RECOMMENDATIONS

That Council of Australian Governments (COAG) agree:

1. ***[for example]*** to the new arrangements on X; and
2. ***[for example]*** that the report on Y be released publically following the COAG meeting.

Drafting instructions:

- Recommendations should be written in a form that requires minimal rewriting for inclusion in a communiqué.
- Recommendations for noting are not generally expected.
- Where work is being referred to a Ministerial Council or other body, the recommendation should provide clarity about whether the other forum can finalise the work or whether a report-back to COAG is required.

SUPPORTING ANALYSIS

Key Issues for COAG

1. This section should be written in a clear, summary form that enables First Ministers to understand the proposal [or the outcomes from a report or other information]. The first paragraph must clearly describe what is being proposed or provided and the problem that is being addressed.

2. In the case of a proposal, agenda papers should refer to significant impacts, including regulatory impacts, particularly where these have strong bearing on the merits of a proposal.

Sub-heading to Structure Case

3. Optional sub-headings and sub-paragraphs are encouraged to be used to assist in structuring the case for the proposal and better informing First Ministers.

    a. ...

        i. ...

Key Implementation Issues

4. This section should outline the necessary steps to achieve the intended outcomes and include when benefits will flow to citizens or stakeholders. Information should be included on how the proposal will be implemented and any risks associated with its implementation.

5. Specific sensitivities should be outlined in this section including stakeholder reactions, risks and relevant mitigation strategies. Where there are significant risks or sensitivities, this section provides an opportunity to consolidate advice to COAG on these issues.

Financial Implications

6. In the case of a proposal, the financial implications arising from the proposal must be discussed in this section.

Consultation with External Stakeholders

7. Any proposed announcement strategy, including communication strategies or the release of proposed media releases, should be clearly set out in this section.

8. Describe any consultation that has occurred with stakeholders, including industry and the public.

Style Requirements

1. If you need to change an agenda paper already provided to the COAG Unit, make sure you obtain the latest version from the COAG Unit.
2. In the recommendations, avoid capitalising the first word after agree and note.
3. Names of States and Territories should always appear in full (for example, New South Wales).
4. Refer to States and Territories in descending order of population (that is, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the ACT and the Northern Territory), and then the Australian Local Government Association.
5. The words 'States' and 'Territories' should both have a capital letter.
6. Use 'Commonwealth' or Commonwealth Government' instead of 'Australian Government'.
7. Attachments should be referred to as Attachment A, Attachment B and so on, without bold or underlined text.
8. Pay special attention to the format of dot points. Ensure that dot points follow sentence structure (with lower-case first letters and semi-colons or commas as appropriate), for example:

    - sub-point, including:-
        - x, and
        - y,
    - sub-point; and
    - sub-point.

Question 2: Commonwealth grants to local government

Hansard, p. 42

CHAIR—What view have you taken about the implications of Pape for your capacity to continue to do that?

Mr English—To date the approach we have taken is that current arrangements will continue unless subsequent decisions by the court suggest that a particular activity should not. So at this stage we do not expect that Pape has taken away the ability to make those payments.

CHAIR—Have you sought the Attorney's advice on the subject?

Mr English—That is consistent with the Attorney's advice—that we should continue with current arrangements unless a demonstrated need arises to change them.

CHAIR—Is that advice available publicly?

Mr English—That is probably something we would have to put to government because it was legal advice to the government.

CHAIR—Perhaps you could do that, because we are getting somewhat inconsistent evidence about this matter.

Response

The Government's legal advice about the Pape decision is not publicly available. It would not be appropriate to release the legal advice as doing so may prejudice the Commonwealth's legal interests.

Question 3: Management costs in Building the Education Revolution

Hansard, p. 43

CHAIR—I do not want to raise the whole debate about BER and so on except in so far as the administrative cost is the same across the Commonwealth. I assume it is. In relation to that, for example, could states negotiate different kinds of management costs with the Commonwealth under the BER?

Mr English—I would have to go back and check my facts on that. Whether the rate was the same across jurisdictions, I cannot recall.

CHAIR—There is a constitutional provision of course against differential grants to states. I am wondering whether it applies to these kinds of management fees et cetera.

Mr English—I should take that on notice.

CHAIR—Would you do that, Mr English? I suppose the question is: have states negotiated different management fees in relation to BER and on what basis have they actually done that?

Response

As per clause D10.(f) of the National Partnership Agreement on the nation Building and Jobs Plan: Building Prosperity for the Future and Supporting Jobs Now, the Commonwealth provided funding to states and territories and Block Grant Authorities of 1.5 per cent of the total funding to cover administrative costs associated with running the application process, all associated administration and reporting to the Commonwealth. Jurisdictions were not able to negotiate different rates.