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SENATE

SELECT COMMITTEE ON THE REFORM OF THE AUSTRALIAN FEDERATION

Reference: Relations between federal, state and local governments

THURSDAY, 2 DECEMBER 2010

SYDNEY

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SENATE SELECT COMMITTEE ON

THE REFORM OF THE AUSTRALIAN FEDERATION

Thursday, 2 December 2010

Members: Senator Trood (Chair), Senator Furner (Deputy Chair) and Senators Back, Ludlam, Moore and Ryan

Senators in attendance: Senators Ludlam, Moore, Payne, Ryan and Trood

Participating members: Senators Abetz, Adams, Barnett, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Crossin, Eggleston, Faulkner, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ian Macdonald, McEwen, McGauran, Marshall, Mason, Minchin, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Scullion, Stephens, Sterle, Troeth, Williams and Wortley

Terms of reference for the inquiry:

To inquire into and report on:

(a) 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.

WITNESSES

Committee met at 10.02 am

CHAIR (Senator Trood)—I declare open this first hearing of the Senate Select Committee on the Reform of the Australian Federation, to which the Senate has referred matters for inquiry and report by the last sitting day of May 2011. The committee will inquire into key issues and priorities for the reform of relations between the three levels of government within the Australian federation.

These are public proceedings, although the committee may determine to agree to a request to have evidence heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to the committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness may state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

[10.03 am]

TWOMEY, Professor Anne, Private capacity

CHAIR—Welcome. Thank you for coming and thank you for your submission to the committee. If you would like to make an opening statement, we would be delighted to hear that, and then we will ask you some questions.

Prof. Twomey—Thank you very much. A couple of weeks ago I appeared in the New South Wales parliament to give a talk to the New South Wales Schools State Constitutional Convention, which was looking at exactly the same issue that you are, particularly the distribution of powers between the federal and the state levels. I have to say, by the way, that they were incredibly bright students and asked fantastic questions, so you have quite a high standard to live up to, as I have previously done this with the schools constitutional conventions!

One of the things I spoke to them about is that in looking at the relationship between the Commonwealth and the states, particularly with the distribution of powers, what is really important is the perspective that you come at it from. I suggested to them that one of the best things to do would be to look at what potential benefits the federal system could bring and then try to image a system that maximises those benefits. Often we just look at it from the reverse perspective. We say, "Well, what is annoying about our federal system: too much duplication, therefore let's get rid of it by making everything uniform." That is not necessarily going to end up with the best result.

A better way of doing it is to say, "Okay, there are certain benefits that you can get from the federal system. Let's look at what they are and how we can maximise them so that we improve the way that the federal system works and achieve those benefits." For the benefit of the committee, I wrote a paper with Glenn Withers a couple of years back—I think it was in 2007—for the Council for the Australian Federation in which we looked at the potential benefits of federalism and how to maximise them. Glenn did the economic number-crunching figures, which suggested that you could improve the economy greatly by improving the way our federal system works. I will leave that for the committee to look at.

Very briefly, the benefits that federation gives us are, first of all, the capacity for the customisation of policies to meet local needs, choice and diversity between the states and between jurisdictions and, really importantly, checks on power, so that you do not end up with one jurisdiction, the Commonwealth, with all power. In a federal system power is divided and separated and that is a necessary protection for the individual. Competition is a very important one. There would be constant comparison between the states and that causes a ratcheting up of standards. If you have just one uniform monolithic government it tends to become bloated and inefficient and there are no standards by which you are compared amongst others that force you to improve. Although it is counterintuitive if you assess federations generally you discover that, in terms of public expenditure of money and in terms of public servants, it is the unitary systems of government that end up with more public servants and a greater percentage of expenditure of GDP on the public sector than in federal system, even taking into account state, local and federal employees. If you think about it in terms of monopolies it explains to you why if you have got no competition you become bloated and inefficient and that is what would be likely to happen to our system if we moved to a unitary system. Competition is very important.

In regard to cooperation, there is a need to cooperate to achieve some uniform outcomes, but that in itself is often important. So, rather than just giving a uniform power to the Commonwealth, if you instead have a system where the states and the Commonwealth need to get together to cooperate, it has two benefits. One is that it brings ownership of the proposal much closer to the people, and across the board. For example, when you had all the contentious competition reforms in the 1990s the fact that the states all came on board with that and had to wear the same odium as the Commonwealth actually helped to get more support for that and helped to get it going. Also, you end up with much more measured results if cooperation is required. If you compare Australia with New Zealand you would notice that in New Zealand, particularly with economic reforms, the reforms are far more extreme on both directions than they have ever been in Australia, and Australia, with its more measured performance—because that is required in a federal system where you need the cooperation of others—has in the long term done a lot better than New Zealand because we have not had the same extremes of swing. So cooperation actually has benefits even though it is frustrating at times.

The final point is economic efficiency. In fact, federal systems tend to run a lot more efficiently overall than unitary systems because of competition and the like. Yes, there are problem with duplication but these can be avoided through better allocation of responsibilities and financial resources. Looking at those benefits, it would be preferable for the committee to say, 'Well, these are the good things that can come out of the system. How do we improve upon them and get to a better position by maximising these benefits,' rather than just taking it from a negative viewpoint of saying, 'Here is a problem. Eliminate that problem,' but it might indeed create more problems in the future.

That is all I want to say in my opening statement. My submission pretty well summarises the rest of my views.

CHAIR—Thank you very much. I take it your position is that there is a misalignment of powers between state and federal governments, at least in relation to the capacity they have to raise funds for the support of the powers which are distributed within the Constitution, and that that needs to be addressed in some significant way. I am interested in the part of your submission which talks about the referral of powers. It seems to focus on a constitutional solution to the problem. That might be a legal way of doing it, but do you think that is the only kind of solution to this problem?

Prof. Twomey—The difficulty when it comes to litigation is how the High Court interprets section 51(xxxvii) of the Constitution. 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. Some doubts arose about that in the Thomas and Mowbray case. That was a significant issue in Thomas and Mowbray. The High Court largely ducked it by saying the Commonwealth had power to enact the legislation anyway and they did not need to go into the section 51(xxxvii) problem. But a couple of the judges did, and they raised doubts about the capacity of the states to limit or control their references by saying, for example, 'We give you the power, we refer you the capacity to amend the referred law, but it is subject to our Governor agreeing to the particular amendment.' So some doubts were expressed by the court in relation to that. The reason why it becomes a constitutional issue as opposed to a political issue is that it flows back to the political issue because the states are then reluctant to refer matters if they think that that reference could be abused in some way in the future. 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.

I appreciate that the reason I am looking at the constitutional aspects is that I am a constitutional lawyer and this is obviously going to be something I am far more conscious of. But I think it is quite true from the position of the states that, unless you have a reference provision in the Constitution and you are confident about what it means and what its extent is, you are much more reluctant to get involved in references than you would otherwise be.

CHAIR—Are you aware of any instances where a state has referred powers and they have been taken up and then the state wishes to either withdraw or change the referral and it creates a difficulty between the Commonwealth and the state?

Prof. Twomey—I cannot think of a particular one off the top of my head. I know there was the issue of when the Victorians referred their industrial relations matters to the Commonwealth. It was a Liberal government that did that. But later a Labor government came along and people were asking whether they should revoke the reference and take it back. The Labor government took a nice little political approach and said they could not take it back. Actually, they probably could have taken it back, but they just did not want to get into the political issues involved in doing so. So there was a little bit of controversy around that one in particular. The states have been cautious and concerned about antiterrorism type references. That was the issue that arose in Thomas and Mowbray, because there was an initial reference and later on there was an agreement to amend the laws to take them further. In that case, the states all did agree to those changes, so the agreement was there and it was voluntary. But in the litigation there was a question as to whether they had formally signed off on it. I think the ACT did not agree to it but the requisite number of states did agree to it.

Those circumstances go back to my point about cooperation and moderation. The fact that you had to get each of the states or a sufficient number of the states to agree to those amendments meant that the states did negotiate modifications of those amendments. So the antiterrorism laws were not as potentially extreme as

they might otherwise have been because the Commonwealth had to negotiate with the states. I think that is a good thing in terms of the way the federal system works. In that case, it did go through the voluntary mechanism.

If, however, the Commonwealth had taken the view, 'We can do this anyway and we can just change this law without the states' cooperation and agreement,' (a) the original proposal of the Commonwealth was much more extreme in its terms, so we probably would have ended up with a stronger, more extreme form of antiterrorism laws, and people take different views as to whether that is a good thing or a bad thing. But you would have also had less ownership of that from the states as well. So there would be more dissent in the community as to whether that sort of law is appropriate or not, and that in itself causes difficulties too.

CHAIR—Is there a weight of legal academic opinion as to the situation here, that the referrals can be taken back or can be amended? Is there a body of opinion which comes down in favour of one of either of those positions?

Prof. Twomey—There is very thin High Court authority about it. There is not a clear authority about revocation per se, but the way that governments and parliaments have got around that is by referring for a specific period of time, then the reference terminates automatically unless you take some further action to renew the referral. That is the work-away around it, so it will automatically expire rather than having to rely on a revocation. The difficulty with that though is that you really have to make sure that someone diarises it for 10 years hence, that they actually remember to refer. There was a classic case in Victoria with I think the mutual recognition legislation, where someone actually forgot and the reference terminated accidentally. Victoria went for something like a year before they realised that they were no longer a part of the mutual recognition.

Senator RYAN—So make sure you put your reminder on in Outlook for 2020!

Prof. Twomey—The difficulty with all this is that the public servant who was involved in negotiating the thing has probably left by the time it comes up for renewal. Normally there is not a system in place with some state-wide diary for 10 years in the future to tell you to remember to get the governor to sign something. The problem with it is that you can accidentally muck it up, and it would be preferable to just have this stuff cleared up. I recognise that it involves a referendum and a referendum has great deal of expense attached to it. There is no certainty in the outcome of it and governments have shied away from doing it because it is actually a fairly technical thing and they think that people will just vote against it because they do not understand it and they do not really care.

Having said that, the other side is that most of the referenda that have passed in Australia have been the technical, boring ones, because people can see that there is a reason for them and they have not been for great social reform purposes, which are usually emotionally contentious. If it is just fixing technicalities, I think there are good grounds to say that people are more likely to vote for that. If you frame it in terms of, 'This is an amendment that will help the Commonwealth and the states cooperate,' who is going to complain about that? Most of the complaints are about the Commonwealth and the states not cooperating. Facilitating cooperation is actually a fairly good thing, and on the whole I think you will probably be more likely to get up a referendum on something like that than something more contentious about some social policy issue.

Senator MOORE—One of the things the last couple of governments have done is have a tendency to give grants directly to regional councils. I note that in your submission you are careful about the issue of local governments and the notification of them in the Constitution. In your last paragraph you raise similar caution about the way regional grants could develop and have developed. It has been proven across the board. I would not mind getting a bit more from you about that whole relationship and how we actually bring local government into the mix. My view is that they have become much more demanding, that they have been prepared not to be formally acknowledged for a long time, but there is a change, and they want it now.

Prof. Twomey—Yes, there is. The difficulty in doing that is trying to work out what sort of change local government wants. I was at the local government constitutional convention that was held a couple of years ago and I said to them at the time that the first thing they really need to sort out and get agreement on is what they want. Is it symbolic recognition? Is it something in the Constitution that says that the Commonwealth can fund you directly? Secondly, if so, does that give you any particular advantages over the same Commonwealth funding coming to you through the states? Thirdly, some of them wanted to come directly under Commonwealth legislative power and get out from being under the states, but does that indeed give you any benefits either? There was a fourth one as well but I have momentarily forgotten it. There were four different things that they proposed at the time.

Since then, things have moved on a little bit after the High Court's decision in the Pape case, which you will remember was the one about the $900 bonus that was paid during the global financial crisis. The High Court in the Pape case made clear for the first time that section 81 of the Constitution, which is the one about the Commonwealth being able to appropriate money, is not in itself a head of power to spend that money. It merely allows you to appropriate the money. You need something else in the Constitution to allow you to spend the money. In most cases there will be some other head of power in the Constitution that allows the expenditure, but where you are dealing with things that do not come under Commonwealth legislative powers, like local government, then there are much greater uncertainties as to whether the Commonwealth Constitution actually authorises grants from the Commonwealth directly to local government.

There is no doubt that under the Constitution the Commonwealth can give money to local government through the states under section 96 grants; that is fine. But the 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. My suspicion is that, in terms of their proposal for an amendment to the Constitution, the main things that they would be looking for are, firstly, recognition that they exist, so that they cannot be completely wiped out in a state and, secondly, capacity for the Commonwealth to fund them directly.

I have now remembered the fourth one. The fourth one that they were concerned about was preventing state governments from unilaterally abolishing local councils or amalgamating—you remember all the fuss in Queensland about amalgamation—

Senator MOORE—I do, yes.

Prof. Twomey—and somehow controlling the states or stopping them from doing those sorts of things. 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. They would be concerned if there was a constitutional provision that did that, and you have got to remember that once you put something in the Constitution the chances of getting it out or amending it in the future when circumstances have changed are extremely low. So, before you put anything prescriptive in the Constitution that is going to tie you up for the next 200 years, you have got to be very careful to do it in such a way that allows some flexibility and is not too prescriptive. Going down that sort of route would, I think, fail in a referendum.

I am also dubious about the local government recognition. It is purely symbolic. They tried that. There were two referenda. The one in 1974 was, I think, the money one, and the other, in 1988, was the symbolic recognition. Both failed miserably. If it does not do anything it is likely to fail, but if it does do something, which is the alternative, you have got to be very careful about what it does in terms of future consequences. I am a bit wary about putting either of those sorts of things in the Constitution, particularly seeing that the Commonwealth can adequately fund local government through grants to the states if it chooses to do so.

When I was at the Constitutional Convention I said, 'What's your problem in terms of where the money comes from? If it's coming from the Commonwealth directly, how is that different from coming from the Commonwealth and going through the states?' I asked, 'Do the states skim money off the top?' and there was a huge roar from the crowd saying, 'Yes, they do!' I have no knowledge as to whether they do or do not, and indeed it might be useful for this committee to investigate further as to what evidence there is of that.

If the Commonwealth places conditions on its grants, as it does through section 96, it strikes me as implausible that the state could skim money off the top of the money that was given to local government. Presumably, the conditions would require that that money be given to local governments. So I am not sure whether that was just some kind of a perception felt in local government that somehow, because the money came through the states, they were not getting as much of it as they should have got. It may just be some kind of popular myth. Or it may be that there is some truth in it, and if there is some truth to it then that needs to be addressed. But it can be addressed at that level without a constitutional change. I do not think that constitutional reform in that area, of itself, is absolutely necessary.

But in terms of funding to local government and regional areas, of course that is really important. The difficulty is making sure that the money is being funded for rational purposes, and for reasons of need. The real problem has been that most of those programs that dealt with regional partnerships and all that sort of thing are really just pork-barrelling by both sides of parliament at different stages.

Senator MOORE—There is historical background—

Prof. Twomey—There is a long, long history to it. Frankly, if you have one of those programs, it really needs to be closely and continually audited by the Auditor-General. You need to have very strict rules as to how the money is allocated and it should not be able to be used for marginal seat election programs—

Senator MOORE—Enhancement.

Prof. Twomey—Enhancement!

Senator RYAN—The Commonwealth cannot force the state to accept a section 96 grant, can it?

Prof. Twomey—No.

Senator RYAN—So if the Commonwealth chooses to shovel money through the states to a local government the only way that could be stopped is for the state to say, 'No, I will not accept the grants on the terms that the Commonwealth parliament sets.' Is that correct?

Prof. Twomey—It would be extremely unusual, but yes.

Senator RYAN—From what you have just said I think you could change the old saying and say instead: do not stand between a local councillor and a bucket of money. I want to head down the Pape path, because it is not the easiest series of judgments to read. There is no clear landing that I have been able to come on. What limitations do you think Pape has placed on the so-called 'alleged nationhood power' that has traditionally, as I understand it, allowed the Commonwealth to appropriate and spend moneys on things that are not associated with the head of power in 51?

Prof. Twomey—That is a very interesting question, and if the committee is interested I have written a long and detailed article about it that has just been published in the *Melbourne University Law Review.*

Senator RYAN—I would be very interested in that.

Prof. Twomey—I am happy to send you a PDF of it. It is in the latest edition of the *Melbourne University Law Review* and looks specifically at the nationhood power and what potential limits are on that power. The short answer is that it is just not clear from Pape. Pape tells us that where there is an emergency—which in this case was regarded as a financial emergency—and the view has been taken that the states do not have the capacity to deal with an emergency, then the Commonwealth may use some kind of a nationhood power—although they never actually use the word in their judgment—and, through its executive power supplemented by the incidental legislative power, may expend money for that purpose.

But it only goes that far. It does not tell us what the rest of the scope of the power might be. There is just emptiness there; there is nothing in the judgment that answers the question. But it certainly lends some doubt to some of the Commonwealth's funding.

Having said that, the Commonwealth government has taken a fairly robust view. It has not changed, to my knowledge, any of its practices in funding things that have a dubious constitutional basis for their funding. The Commonwealth has just gone ahead continuing to fund anything that it wants on the basis that probably it is fairly unlikely for anybody else to challenge it and, if they do, they will deal with it then. So we are waiting to see—

Senator RYAN—Recipients of money do not often challenge it—that is the Commonwealth's assumption?

Prof. Twomey—That is exactly the point—Mr Pape was most unusual in challenging the fact that he was receiving money from the Commonwealth. Most people would not. There are significant issues of the standing in terms of people being able to challenge these sorts of things. On that basis, I think the Commonwealth is relying on the fact that it is fairly unlikely that these sorts of things would be brought. For example, if someone were to challenge the funding of the Australian Institute of Sport, they would probably be hounded out of the country as being un-Australian. So (a) it is fairly unlikely that anyone would have the standing to, and (b) if you were an athlete who was receiving money or training from the Institute of Sport and you then challenged the constitutional validity of it, that in itself would seem a rather peculiar thing to do.

Senator RYAN—Yet again it seems that the Commonwealth has a nice little arrangement of rules to help it sustain its activity. In terms of the overlap that we are seeing, which has grown quite drastically even in the last 20 years, it is fair to describe that as mainly a growth of Commonwealth power rather than the states growing into areas of Commonwealth responsibility, isn't it?

Prof. Twomey—Yes, that would be correct.

Senator RYAN—I cannot think of an area where the states have grown into a Commonwealth area of responsibility; it seems to have all been the other way. So if people were looking at ways in which we could try and get more vertical separation—which, as you outline in your submission, is not always possible anyway, and different theories of federalism have different views on that—the most effective and efficient way to do it would be for the Commonwealth to go back to its core activities, wouldn't it?

Prof. Twomey—Yes, that would be helpful. The difficulty, of course, is the money. As was pointed out by the chair earlier, you have got to match responsibilities with the capacity to pay for them. Until you sort out the federal financial relations, you cannot really deal with separating out in any sensible way the responsibilities either. Ideally—and of course this never works in any federation, but ideally—you would want a system where each level of government is responsible for raising the money that they need to spend upon their responsibilities and functions. This never totally works in any system, and part of the reason for that is efficiency in raising money. It is not efficient to have states and the Commonwealth taxing differently, with different sets of exemptions, rebates, conditions and all the rest of it on, say, income tax. There are also difficulties with circumstances where the taxable property or events can move across state borders. It would be silly, for example, for something to be taxed in New South Wales when someone can just move the taxable property across the border into Queensland and therefore not be taxed. It is just not efficient; it does not work. For those reasons, with federations often there is a fair amount of what is called vertical fiscal imbalance, with the federal area collecting more of the tax and the—

Senator RYAN—But none of them are quite like Australia, are they?

Prof. Twomey—No. Australia is at the extreme end of vertical fiscal imbalance, and that does suggest to us that we need to do something about that. You can do it through changing your tax system , but in doing so you have to be careful not to make it more inefficient. As I said, there are efficiencies in one uniform set of tax rules for income tax or whatever. So there are difficulties in doing that. The second way of changing it is changing the way that the tax revenue is distributed. The difficulty we have is that the Commonwealth always takes the view that any money that it has collected is its money and it is only ever going to pay it out as a favour to the states, rather than thinking of the money as the taxpayers' money.

You could just change your point of view and say, 'All this tax money collected is the revenue for the people of Australia and here are the various responsibilities and functions that the people of Australia need to be sustained by that money, so how do we distribute that money to adequately match those responsibilities?' rather than thinking, 'This is my bucket and I'm not giving any money out of it unless I get some sort of political return for it.' So it is partly psychological, the way you deal with the money and think about it, but it would be more helpful if you had more sensible rules for distributing that money to match the responsibilities that need to be funded.

Senator RYAN—I remember in 1997 when the High Court struck down the state franchise fees—it was my final year at uni so it is while ago, but I remember reading about it—that our High Court was described by some commentators as having a particularly broad view of section 90 and the term 'excise' as basically, in layman's terms, being any tax between production and sale. Is it fair to describe that as a broad view of the term 'excise' compared to in comparable nations that might have similar—

Prof. Twomey—Yes, certainly, the High Court took a very broad approach there and could have chosen to have taken a narrower approach that would have given the states more capacity to tax in relation to goods—

Senator RYAN—And that could have been tax based on sales, VAT style taxes and things, couldn't it?

Prof. Twomey—Yes. The states, in the Ha case, which is the case to which you are referring, argued for a return to a very early view of the meaning of 'excise' in a case called Peterswald v Bartley; and, if that approach had been taken up, it would have given the states a greater capacity to tax certain sorts of areas and goods. Having said that, the actual business franchise fee system that had been established was extremely dubious and probably deserved to be struck down. But it would have been preferable if the court had instead reinterpreted the meaning of 'excise' to take the narrower view, which it initially took. The High Court initially, in its early years—

Senator RYAN—And which other countries take, I understand.

Prof. Twomey—Yes, although I could not tell you off the top of my head any details about how other countries operate. Really, in the end, you have got to look at this in the context of the whole of the Constitution and how it is drafted, and the other provisions that relate to things like not only 'excise' being taxes on goods but Customs taxes and all the rest of it. If you look at the arguments that were made in the Ha case, there was a

quite cogent and reasonable argument that the states ran that the High Court could have adopted but chose not to.

Senator RYAN—It was a very good dissent, I recall. I will hand back now to the chair.

CHAIR—Senator Ludlam.

Senator LUDLAM—Is there any precedent for the Australian government asking for an opinion from the High Court in this kind of murky area, or do we have to wait for a case to wander along and settle the question once and for all?

Prof. Twomey—The High Court decided fairly early on in the piece that it did not have the capacity to issue advisory opinions—unlike the Supreme Court of Canada, which can do so. Again, that is a separation of powers sort of issue; the High Court has taken the view that it cannot do that. So, yes, you do have to wait for a case to come along to resolve some of these uncertainties. And, even when a case does come along that raises the uncertainties, frequently the approach of the High Court is to duck it by deciding through statutory interpretation or some other way that it does not need to deal with it. The court has always taken the view that if it does not need to get into particular issues because it can resolve them through simpler means then it just will not go there. That is a reasonable approach for the High Court to take, but it is very frustrating for people who would like to have certain issues resolved.

Senator LUDLAM—This is not at the periphery; this is at the centre of how the federation works, and we kind of have this gap there that everybody is walking around. So there is no possibility of resolving that, really?

Prof. Twomey—No.

Senator LUDLAM—That is interesting. So we are not going to see a referendum proposal come forward to settle the question, at least not in this term of government, because we have the other stuff going on. What is your advice on how to somehow at least streamline the referral issue in the meantime—because it could be a very long time before that is put to a referendum, if ever?

Prof. Twomey—Yes, I think you are right. We have got around these problems for a long time. The other big problem, the Wakeham problem, which was about cross-vesting, we have mostly worked around. The problem is that the workarounds that we use are not particularly efficient. It would be preferable to have these things improved, but if we cannot improve them, if we cannot clarify them, we just have to work around them as best we can. For example, as I mentioned with the revocation thing, because we are not sure whether a reference can be revoked, we give a reference for a set period and allow it to elapse, unless it is extended. So there are usually ways of getting around it, but they do not work as cleanly and efficiently as they could. It would be nice, for example, if your Constitution was a car and you could take it in and tune it up and get it fixed. Our Constitution as a car—you cannot fix it at all in those sorts of ways, so really then you are just dealing with the mechanics; you bodgie it up, basically.

Senator LUDLAM—Yes, except that one day we might find that the car does not exist and that the whole set-up is unconstitutional and has been for years and years. Do people lie awake at night wondering about that, or do we manage?

Prof. Twomey—Usually we manage! The High Court is fairly reluctant to ever bring down the edifice to that extent. As I tell my students, there is no point in going to the High Court and arguing that because of the Treaty of Versailles we became independent there and therefore all laws that have been enacted since 1917—particularly the tax laws!—are invalid.

Senator LUDLAM—Yes, I get those emails too.

Senator RYAN—At least I know the answer. We are not going to respond to that correspondence now!

Prof. Twomey—The answer is: even if it were true—and it is actually not—that there was some fatal mistake made 50 years ago that meant that every election since was invalid, the High Court would not hold it invalid. So, as a matter of practice, that is never going to happen, and I do advise my students not to support those sorts of cases. Occasionally the High Court will make findings that cause significant financial problems, and the Ha case was one of those. The states were reasonably well alerted to the fact that there was a big problem there because the High Court gave notice that they were going to hand down their judgment in two months time or something. When they give you a long period of notice that they are handing down their judgment, you know it is a subtle warning to you to say, 'Right, you'd better go and talk to the Commonwealth and fix things up so you're ready to deal with this once the judgment comes down.' Occasionally they give

you hints to help you to fix things up, but they are not going to bring down the whole edifice of federation. But they can, from time to time, cause fairly significant problems.

Senator LUDLAM—I want to ask you about governance, because you have addressed it, and bounce some proposals out of some of the other submissions off you. Should there be a COAG act or should there be some kind of statutory underpinning to this thing that has just evolved over time?

Prof. Twomey—Yes, I think that would be a good idea. The reason is that COAG and its roles and responsibilities tend to wax and wane according to the views of whoever happens to be the Prime Minister of the day. The biggest issues are about control over the agenda. My understanding is that at the moment the Commonwealth and the Prime Minister control the agenda and what gets on. I know that the states have had some frustrations about this on previous occasions. My particular knowledge is not so much with COAG but with what was the Treaties Council, which tends to run—whenever it holds meetings, which is not very often—with COAG. The states at various times had wanted certain things put on that agenda and it was just refused. The fact that the states do not have any capacity to put something on the agenda without the Commonwealth's imprimatur is a problem, so you need to have some sort of legislation that ensures that parties can put matters on the agenda and ensures that meetings are held at least twice a year or something or other to make sure that a Prime Minister cannot unilaterally shut it down by just not holding meetings, and it would be helpful to have some kind of independent secretariat as well. CAF, for example, the Council for the Australian Federation, operates quite well with a proper secretariat which has contributions to it from the various jurisdictions. It would be helpful for COAG to do so too.

Senator LUDLAM—To specifically get it out of PM&C?

Prof. Twomey—It could still be connected to PM&C, but it would be helpful if it were less of a Commonwealth body and more a body that had its constituency in all the jurisdictions.

Senator LUDLAM—Okay. Coming from a minority party as I do, and having never been able to attend a COAG meeting, I find the COAG processes utterly opaque and impenetrable.

Senator PAYNE—You are not alone there either!

Senator LUDLAM—Good. I am glad that it is not just a thing for me. The Gilbert + Tobin Centre of Public Law have put some quite specific recommendations around COAG reform which I presume have been rattling around for a while. One of them is improving democratic accountability and transparency. Do you have any favourite things that you would like to come out of the process like that?

Prof. Twomey—That is true. I think things have improved in terms of transparency in more recent times. The website is much better. There is much greater access now to agreements. Previously it was virtually impossible to find any copies of intergovernmental agreements at all, and there was no central database where they were all placed. That is improving. It could be better. It would be a good idea for the purposes of transparency to have some kind of register—and I think Cheryl Saunders at the University of Melbourne has been pushing this for some time—where all intergovernmental agreements are placed, as with treaties and the like but a separate one for intergovernmental agreements, so that people can see what has been agreed on their behalf. Frequently, unless the agreement is attached to a piece of legislation or something, you cannot find it at all. So that sort of transparency I think would be extremely useful.

Senator LUDLAM—How about something a little more profound, such as the fact that it is really just a place for the executive to get together and then tell the parliament what they have got to do afterwards, which to me seems a little backwards, but that is a bit more than just putting items on websites, isn't it?

Prof. Twomey—Yes, that is more difficult. I understand the issues from the democratic deficit point of view, but it is virtually impossible to get seven parliaments together to negotiate something, so you do need your executive to negotiate these sorts of agreements. It is not going to work otherwise. So, from a practical point of view, it is always going to be necessary for executives to be the ones that enter into these agreements. And it is true that that does have a huge impact on parliaments because parliaments know that if they then do not pass this uniform legislation that has been agreed amongst all the jurisdictions they are going to face all sorts of problems, and it really puts a lot of pressure on parliaments and, in effect, takes away some of their discretion. I do appreciate and understand that, but, to the extent that cooperation is important, to the extent that intergovernmental and uniform or cooperative schemes of legislation are in many cases important, that is in the end a price you have to wear. There is not a terribly practical way of allowing parliaments to come in and negotiate and fiddle with all these sorts of things separately once the agreement has been reached.

Senator LUDLAM—There must be some kind of halfway step though. I think the terrorism case was a really good example. What was your favourite question that your students asked you that we have not asked?

Senator MOORE—And how do we match up to them?

Prof. Twomey—How do you match up? I am just trying to remember now. I just remember at the time being impressed by how very bright they were and how they latched on to the issues quite significantly. I will tell you the one thing that did quite engage them, and that was the issue about national curriculum. These were New South Wales school students, and they were particularly concerned that the New South Wales curriculum might be dumbed down to meet a national standard. They were actually very defensive and protective of their curriculum, which I thought was really interesting, because as students one might normally think that they would be critical of what they were being forced to learn, perhaps against their will, but actually the students in the South Wales were very concerned that the standard of the curriculum would be lowered if it went to a national curriculum. I thought that was quite interesting.

CHAIR—It could be raised.

Prof. Twomey—Possibly, but that was their concern.

Senator LUDLAM—That is interesting. Thanks very much.

Senator PAYNE—You said in response to Senator Ludlam's question in relation to things around COAG that there has been some improvement. You cited the website. But, over and above perhaps the decorative aspects, what about the substantive aspects in terms of the operation of the current COAG—the actual outcomes perhaps since 2008 and the revamped cooperative federalism?

Prof. Twomey—It is very hard to judge. There has been a lot of sound and movement, but it is really hard to know whether what is coming out the end is working or not.

Senator PAYNE—If anything.

Prof. Twomey—And I agree that that is hard to tell. From my point of view, the improvements are that I can actually see the agreements that they are reaching, and that helps, whereas previously that was very difficult to see and assess. My concern is partly cultural: regardless of how much you change by coming in and saying, 'We're going to be all cooperative,' the same bureaucrats, the same people, are in place who are running all these things and then the same attitudes come out at the end. 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, I am told—although, when I ask my former colleagues, 'Has it improved things; in outcomes, is it better?' the answer is: 'Yes and no. Some things are much better and some things are not.'

My long-term concern is about the national partnership payments. Previously, the problem was that you had specific-purpose payments but they had lots of conditions upon them. The states had huge administrative burdens placed upon them to justify every cent that was spent, and it was all corralled into particular areas, so some got overfunded and some got underfunded, and it was a complete fiasco.

The Rudd reforms were supposed to get rid of that to make five or six specific-purpose agreements so you could move money around anywhere within that. You could use it for the areas that most needed it so long as you met certain outcomes. That was a much more sensible way of dealing with things so that you got rid of the problem of some bits being overfunded, some bits being underfunded, bits of budget being tied up here that could not be used there and all the rest of it.

That was a great reform idea, but what has happened is that the Commonwealth has come in through the back door with these national partnership payments, which are very prescriptive again. My bet, for what it is worth, is that these national partnership payments, which are very prescriptive and are there to meet Commonwealth aims, will end up expanding, the specific purpose payments that have got rid of the prescriptive conditions but are just reliant on outcomes will shrink and we will end up exactly where we were before we started. Basically, they have put the Trojan Horse in there, even though they reformed the system, so that we can end up precisely where we started from. That is my long-term concern. It has not been borne out yet, but one suspects that, given the culture has not changed, that is where it is heading.

Senator PAYNE—In relation to items around the agenda, in April we saw that we were heading towards a COAG meeting of the normal variety, the only COAG meeting that has been held in 2010. It had a range of items that were due to be dealt with on its agenda. There are stakeholders all over the nation—people with academic interests like your own and people with commercial interests who are trying to do business across

the states and territories—who expected a particular range of items to be on the agenda, only to find that the entire thing was given over to one item, and that was the national health and hospitals reform. Do you envisage a COAG act, if that is what it were to be called, such as that that Senator Ludlam suggested or that you have canvassed, would deal with political exigencies of that nature, with the whims of, as you put it, the prime ministers of the day and, therefore, I assume, the daily views of the prime ministers of the day?

Prof. Twomey—Obviously you cannot control any of those sorts of things through legislation; all you can do is give other parties involved in COAG, the states, the capacity to put things on the agenda. If the Commonwealth only wants to deal with one subject, you would have at least some capacity for others to say, 'There are other equally important things that we need to deal with as well.' Being able to open that up would be helpful. Having said that, it might well be that all the states agree that we should on this particular occasion focus on the one thing—and if that is the case so be it. If you had an agenda that was not completely controlled by the Commonwealth, you would at least be able to discuss other matters. Having said that, if the Commonwealth does not want to cooperate, you are not going to achieve much on those other matters, but a forum for debate where you could at least put something on the agenda might encourage movement in those areas in a way that might not happen if the Commonwealth could avoid it being on the agenda. It might improve things.

Senator PAYNE—What is your view of the current role of the COAG Reform Council and its reporting processes? Mr McClintock made some more comments today in relation to the current environment, but I am interested in your perspective on that.

Prof. Twomey—To be very honest, I have not read their recent reports; I have been a bit busy doing other things. The only material that I have read is their early reports, where they had not had enough time to get down into the nitty-gritty. In principle, I think they are a fantastic idea. I think it is really good to have someone making those assessments. Particularly when you consider what I said earlier about competition between the states, you need someone like the COAG Reform Council to, apart from anything, collect all the information so that you can make assessments as to how each state is going and whether they are achieving particular outcomes and do so in a relatively objective manner. So, in principle, I am encouraged by their existence. I think their purpose and their role are very important, but I cannot say that I have actually read their very recent material to make an assessment as to how well they are going, I am afraid.

Senator PAYNE—Do you think there should also be in principle some mechanism to give their reports some teeth? It seems that in a number of cases they tend to disappear into the ether, and they are actually quite comprehensive and detailed reports. A couple of the most recent ones have commented on the dearth of data available for them to be able to make assessments of the inadequacy of setting levels of accountability at the state and territory level and so on. How would we go about giving that process some teeth to require the states and territories—and it is because of the nature of the work that the states and territories are largely doing in this regard—to be more accountable?

Prof. Twomey—That is a really good question. There is actually a provision in the Constitution that gives the Commonwealth legislative power in relation to the census and statistics. It is section 51(xi)—and we would not normally set that on our exams because it would be rather cruel!

Senator PAYNE—But it has given you an idea!

Prof. Twomey—The Commonwealth does have the capacity to legislate in relation to statistics, the collection of data and those sorts of things. So, if you did want to legislate to require states to provide information in order to be able to measure these sorts outcomes, I think there is capacity to do so—and that sort of thing is very important to be able to make those assessments. The other side of it which you have to be conscious of as well is that, if you are a hospital or whatever and you spend your entire time providing statistical information and never get to serve your patients, that in itself is problematic as well. So, although it is important to collect information, it needs to be done in an efficient way so that you do not end up with one hospital having to send out 15 different sets of data according to 15 different sets of criteria. That would tie up everybody in red tape and drive everybody bonkers, and it is utterly inefficient. So, while on the one hand I am supportive of the need to get the information and make the comparisons and assessments, it has to be done in a well analysed and sensible way to minimise the burden on the people who have to provide the information so that they are not tied up in red tape forever.

CHAIR—Thank you very much for your evidence today; it has been very helpful to the committee.

Proceedings suspended from 10.57 am to 11.14 am

KILDEA, Mr Paul, Director, Federalism Project, Gilbert + Tobin Centre of Public Law, University of New South Wales

WILLIAMS, Professor George, Private capacity

CHAIR—Welcome. I invite you to make an opening statement and then we will ask you some questions.

Prof. Williams—I will just make a few brief comments, as will my colleague. Thank you, firstly, for the opportunity to talk to the committee on what is obviously a topic of great importance to Australia today. Our starting point in our research and work on federalism is that we do regard federalism as an appropriate and necessary form of good governance in Australia, so we are supporters of having a good and effective federal system. However, we also recognise that the current system is dysfunctional and has some major problems attached to it. The evidence has been piling up over many years. If you simply look at the economic costs, for example, the latest data from the Business Council suggests that the problems in our federal system cost about three per cent of GDP each year—about $1 in every $10 of taxpayers' money ends up being wasted because of the inefficiencies and problems within the system. So we recognise a strong economic case for reform and, beyond that, there is a strong case relating to the difficulties of achieving optimal policy outcomes and the fact that many policies simply cannot be progressed because the federal system prevents that from being done appropriately. In our submission we focus on cooperative federalism, but within our project we are looking at a much wider variety of issues such as water reform, health reform and other matters. I will hand over to Paul Kildea, who will make a couple of points about the COAG aspects of our solution.

Mr Kildea—We suggest that a good starting point for enhancing cooperative federalism is to reform the way that COAG operates. We propose that this could be done in three main areas. The first is with respect to legal status. Currently COAG's legal status is somewhat tenuous, as it has been established only by agreement. We suggest that legislation should be passed to give COAG statutory recognition, which would give it a more secure place in the federal framework and be more in keeping with its influential role. The second area is with respect to COAG's governance arrangements. We propose a number of reforms here, with the aim of making COAG a more genuinely collaborative body. We suggest that an intergovernmental agreement on COAG be negotiated that establishes regular meetings that give states more input into meeting agendas and also establishes an independent secretariat. The third area is democratic accountability and transparency. COAG currently suffers from a democratic deficit in its operation. We would suggest that this could be remedied through a number of measures. There should be a requirement that all intergovernmental agreements be tabled in the respective federal, state and territory parliaments, there should be greater scope for parliamentary committees to scrutinise agreements and there should also be a complete register of intergovernmental agreements published online. We suggest that these reforms would bring real benefits to cooperative federalism. An additional advantage is that they would be relatively easy to achieve, requiring only the passage of legislation or the formation of intergovernmental agreements.

Prof. Williams—I would like to finish off with a couple of other specific points for reform. We suggest in our submission that a referendum should be looked at in the area of fixing a known problem when it comes to cooperative federalism—that is, High Court decisions that prevent effective federal-state cooperation. In my view, that reform should be put at the same time as the coming referendums on local government and Indigenous recognition. I suggest that because I believe that a reform of this kind might actually enhance the prospects of success. This is dealing with a specific practical problem about operation, and Australians in the past have shown themselves more willing to vote for a change of this kind than any other type of reform to the Constitution. My view is that if you do not twin Indigenous recognition with some practical changes as well, there are some dangers as to whether people will support it.

I note that a change dealing with cooperative federalism is something that has been supported from Attorney-General Daryl Williams through to the current Attorney Robert McClelland. It has had bipartisan support for more than a decade. There was a unanimous recommendation from the House of Representatives Standing Committee on Legal and Constitutional Affairs for it to go to a referendum. The Business Council of Australia has supported it and, indeed, a range of other groups have supported it. It is a known fix that is required. It would also go very well with a fix required in the local government area, where there is again a High Court identified problem that does need to be remedied.

The final point is about process. We focus on specific changes but we also recognise that this area of federalism is enormous, it is difficult and it is far beyond what any one parliamentary committee can properly tackle. Our view is that perhaps the most important suggestions that this committee can make would be

practical and effective suggestions for ongoing processes to properly engage public debate and lead to a genuine process of reform that would transcend the parliament itself. Our federal system was created by an open democratic process and it is not likely it can be changed without a similar open democratic process. We put on the table a convention to deal with federalism. It was the model that worked in the 1890s, and it has been the most successful model for constitutional reform in the years since then. In the 1970s and early eighties Malcolm Fraser in particular was especially effective in using convention changes to lead to three changes in the 1977 referendum.

I also note that a convention of this kind is something that has been supported by the Business Council. It ties in strongly to comments made by Tony Abbott in his *Battlelines* book about the need to reform the federal system and on the public policy challenges, and also to comments that Kevin Rudd and the states themselves have made. There are other processes we could talk about, but I believe that unless we actually get a process to tackle this problem—which is larger than parliament—in the end we will end up going through a series of parliamentary committees without actually doing the work that is required to achieve reform.

CHAIR—Thank you very much, and thank you for coming along this morning. You say that the Federation is not working well, and I think you use the word 'dysfunctional'. This is not specifically addressed in your submission, but I would like to know whether you could give us a perspective on whether or not the Australian Federation is particularly dysfunctional. This is a common observation about the nature of the Australian Federation, but I suspect it is a common observation about many federations. I am just wondering whether or not you think ours is particularly dysfunctional. Are there particular difficulties that are unique to our Federation which are not true of the Swiss, Canadian, US, German or any other federations? You might like to think about that.

Prof. Williams—Yes, 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.

Another problem that is recognised in Australia is that we are seen as the most centralised form of federation when it comes to federal financial matters. We transcend the United States, Canada and other countries. That means that we have a system that is designed for the states to run the show but the money lies with the Commonwealth, and that lies at the heart of many of our problems in hospitals, education and other areas, where there is a mismatch between responsibility and money. That is to some extent ameliorated by policy and High Court decisions, but it means we are working within a system that was never designed for what we have at the moment. Our system is often studied for these reasons—you can learn a lot from it—and people also learn from it about failures to reform. 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.

CHAIR—Is it the assumption from your contribution to this debate that this dysfunctionality can in fact be effectively repaired so that we can bring the Federation into closer alignment with those which work more effectively elsewhere?

Prof. Williams—I do not think there is any doubt about that as a question of design. It is quite possible to say, 'Here we are and here's where we want to get to.' You can deal with things like some of the financial inequalities but also deal with just the mismatch of responsibilities. It is not so much whether we can envisage a better system; that is actually not the hard part. A lot of research has been done over several decades to say, 'Here would be a better system.' The problem has been one of a lack of political will to achieve that, a lack of a good process to achieve that and a lack of capacity to look beyond a three-year cycle, because we would really be saying that you need a much longer period to reform these things. There needs to be a long, multistep process that involves all of the major parties within parliament, and that has been beyond our system to this point. So the answer is: yes, it can be done. The question is: do we have the capacity as a nation to achieve much-needed reforms?

CHAIR—I am struck in your submission by the fact that you seem to be saying that quite a lot can be done through a political process through COAG and changes to the COAG arrangements, and only towards the end is there mention of a need for constitutional reform. It strikes me as slightly unusual, because many constitutional lawyers begin from the point that you have to reform the Constitution, but you seem to be taking

the view that we could do a lot to reach the point where you think we should be by this process of COAG reform or at least some other political changes, and we only necessarily have to reach the constitutional amendment stage for very narrow and specific issues which are problems. Is that a fair interpretation of your position?

Prof. Williams—It is a fair interpretation. We take a very pragmatic approach to this area, and it is certainly informed also by a lot of study of failed processes, where often it has been overly ambitious—for good reason. There is a lot that needs to be done, but too much being attempted usually amounts to failure in this area.

We also recognise that much of our federation is not in the Constitution anyway. It is a matter of informal arrangements between governments; it deals with bureaucratic agreements and the like and intergovernmental agreements. If you focused in on those then you can do an enormous amount. We think that should be the starting point because we think that if you want to reform federalism you have go to start with things that can be done to demonstrate success to build momentum for further reforms. It is also why I put on the table the relatively modest change about cooperative federalism fixing those High Court decisions. They are by no means the most important things you could pick but they are the ones most likely to be supported because they do have broad party support and because they fix an identifiable problem.

If we get through these things, and this is where a convention could be useful, I think we should be looking at wider possibilities. Unless we do that, ultimately we will not be able to deal with some of the problems in the Murray-Darling and other areas, which at their heart go to a series of constitutional problems. We say let's take things in stages and if we demonstrate some success then perhaps there will be the capacity to address some of those other things, at least in the medium term.

Mr Kildea—To add to what George has said there, the work that we do in the short-term to improve cooperative mechanisms will also pay dividends later on if we do undertake the more fundamental reform, because whether it is our current federal system, or a new improved reformed system in the future, there will always be overlapping responsibilities and there will always be the need for collaboration between the federal and state governments. So if we can improve the mechanisms for cooperation that is going to help out, both in the short term and later on.

Senator MOORE—I am very interested in your concept of the convention, historically speaking, in terms of raising knowledge and engagement and all those things. But I am troubled in terms of the way that in your paper you quite reasonably put forward that COAG would be the one that would determine the agenda and how it would operate. That paragraph comes two pages after all the reasons that COAG is not actually being effective in that at the moment. Is there any other mechanism? Because it is going to be a political decision if this happens or not. There is also the danger in such a process of being politically vulnerable, because if you determine to have such an event and you get the numbers through to have it, people who are opposed to it, and this could be on any side, would then make the statements about waste of money, it being a talkfest and all that kind of stuff. I am interested in that whole thing. It might well be that you might want to answer that out of session—think about it and get back to us.

Prof. Williams—I can give you an answer on that now if you would like.

Senator MOORE—That would be good. The other question will be out of session so could I get it on notice. One of my particular interests is the whole issue of local government and how it operates. I know that your group has done work on that and if we could have that sent to us it would useful. I am looking for any papers or things you have written on it. While you have not focused on it in this submission, because you cannot cover everything, I know that you have looked at it, and I would like to have that sent to the secretariat.

Prof. Williams—I am very happy to do that. On the convention model, the recognition of the primary role of COAG to some extent depends upon some of the other reforms.

Senator MOORE—Absolutely.

Prof. Williams—If you did fix some of the accountability and other transparency problems it could well be the appropriate body, as we suggested. But there are a number of other alternatives. You could set up a steering committee that might include people from business, the community, unions and all sorts of groups. It might help to determine the agenda, and of course it would include political leaders as well. That has been used in other forums.

Senator MOORE—A few of those have been set up recently with that model.

Prof. Williams—They have. So if that works. And since the submission was put in I have actually published a book called *People Power: The history and the future of the referendum in Australia*. That sets out an analysis of what has worked in prior referendums and what has not. It says, within the federalism and other contexts, that if you want to win a referendum this is what you need to do. It sets out conventions and other things and identifies what models work. That might be something the committee might find useful in this area, just by way of process.

On local government, I should acknowledge here that I have been an adviser to the Australian Local Government Association for some years now. I have helped them in crafting their reforms and what they would like to see. We have just published a paper quite separately to that in the *Public Law Review* dealing with constitutional recognition of local governments. I will make sure you receive a copy of that.

Senator MOORE—That would be good.

Prof. Williams—It sets out essentially everything you need to know in the area.

Mr Kildea—To add to that, George mentioned a steering committee. I think the 2020 summit may have recommended something similar, a kind of an expert body, that would help in the setting of the agenda before the convention sits.

Senator MOORE—To build engagement.

CHAIR—Are you thinking about a convention that canvasses all of the issues that require attention, or are you taking this in small pieces and trying to focus on some of the most difficult ones.

Prof. Williams—It is a tricky thing with conventions, because if you close down the debate too much then people tend to say, 'Actually, we would like to discuss a range of issues.' I think a convention, particularly at this point in the debate, would leave the opportunity open for a wide discussion, but the convention should be required to come up with a series of particular outcomes and proposals to be addressed now and in the medium and longer term. I think there is room for a national conversation; there are people who want to talk about our hospitals through to our financial relations. I recognise that that is difficult, but I think that there needs to be a broad debate, because, if you do not have that, you cannot make a proper decision about what are the pragmatic issues we should progress now or at least you run the risk of people being anti the process because they feel as if they have never had a fair hearing on those issues.

Mr Kildea—I think that probably necessitates a convention much more like the ones held in the 1890s than the one held in 1998—not over a fortnight but over a series of months or even longer, with breaks in between, so you could have that long discussion ranging over a number of issues.

Prof. Williams—In fact, what I put in the *People Power* book is that really there should be a constitutional convention held every half-generation, every decade. That is the way it should be done, and it should look at particular issues that might be referred to it. That is how other nations now would commonly address some of these issues; they have an institutionalised process to look at their systems of governance—and that is actually one of the answers as to why they are a bit ahead of us: the political cycle has built into it, whoever is in power, a capacity and a requirement to look at these issues. It would not have to be a convention, but there needs to be a process that means these issues cannot simply be ignored in the longer term.

CHAIR—Senator Ryan.

Senator RYAN—Thanks. I want to challenge a couple of, I think, assumptions there, Professor Williams. Firstly, on the whole notion of cooperative federalism, I understand the point you are making, but it is also fair to say that there is a whole other wing of federalism that would view cooperative federalism as somewhat problematic, where it is sort of arch-competitive federalism, even if it is a vertical versus a horizontal notion of competition. It is legitimate to have a view that federalism focused overwhelmingly on cooperation is actually not what some federalists would think of as true federalism, isn't it—that we are meant to have some tension between the two levels of government?

Prof. Williams—Yes, I agree strongly with that. There should be tension, and there should be tension between the states and the Commonwealth and between the states themselves—that is essential. Without that, you lose many of the advantages of a federal system in terms of attempts to experiment with policy, to demonstrate better outcomes, to use public funds more efficiently. That must be part of the process. 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. This is where the Business Council, I think, has particularly made its case effectively. There is not a good reason for having, let us say, multiple systems of OH&S or multiple systems—

Senator RYAN—But the Business Council's view on harmonised laws is like business often is. For example, they like to harmonise if we are heading down Victoria's path; they are in favour of federalism if we are heading down New South Wales's path.

Prof. Williams—That is true. I simply make the point that this should not be uniform; there are just some areas where perhaps the debate reaches a level of maturity that suggests there should be standard terms and conditions. These would be areas that, back in the 1890s, it was thought appropriate to regulate at the state level; 100 years later, it is obvious they should be regulated at the federal level.

Senator RYAN—And this is what I want to challenge. I did enjoy your book, Professor Williams; I read it recently on a flight—

Senator PAYNE—And you will lend it to everybody! Or will we have to go out and get one?

Senator RYAN—I am happy to.

CHAIR—He does not want it lent; he wants it bought!

Senator RYAN—That is a good point!

Prof. Williams—Well, Christmas is coming up; let us put it that way!

Senator RYAN—Professor, you are reasonably scathing about our constitutional arrangements by saying they are out of date, and I would challenge you on that, on the basis that we have had quite radical change since our Constitution was instituted; it is just that none of the changes come via the process which the drafters and the people voted for. The High Court has radically reinterpreted the corporations power, it has had radically wide views of the external affairs power, so that the Commonwealth now has a much greater say in things that were going to be regulated at the state level. Then, on top of all that, you have the great Commonwealth financial might. It is self-constructed—on constructive High Court interpretations. Isn't it fair to say that we have had quite radical change; it is just that none of it has been in the text of the Constitution?

Prof. Williams—Let me make three quick points. You raise good arguments. The first point is that I am certainly not saying we have a rotten system. We have one of the best constitutional systems in the world, despite its problems. In fact, its enduring strengths relate to our democracy and other factors. I would simply say it can be much better than it is, and I think our failure to make improvements is telling, particularly in this area.

The second point is, yes, there have been very radical changes, especially through High Court decision making, but that, I think, is actually part of the problem. I think a constitution requires a greater level of democratic engagement through parliament and other forms of leadership—and there is a democratic deficit there which means that, in particular areas, I do not think the High Court can take us further than they have and there is a need, therefore, for the processes that involve the people to be properly used, and that has not been true for a long time.

The third point is that there has been change in many areas but not in others where it is desperately needed. A good example of that is in water policy, where we are stuck with arrangements which mean that even though we have a national river system that should be, clearly in my view, regulated at the federal level, the system does not provide that and the Constitution cannot provide that. Unless we get back to the text or other forms of cooperative federalism we are stuck with a system that can never adequately meet the needs of what is a national problem.

Senator RYAN—There has not been a democratic deficit. This is where I challenge the thesis of your very good book. The Commonwealth parliament has constantly tried to seize power and the people have constantly said no. The High Court has tried to work its way around this. We have had 44 referenda. They have a failure rate that is truly world-leading, with only eight succeeding, and most of those being of very little significance, except maybe the financial agreement. Isn't it fair to say that there has been democratic engagement but it is just that when it is on something like rivers—there may be people in western New South Wales that would disagree with the view that it should be nationally controlled—the people have constantly had a very firm opinion that has not suited members of the Commonwealth parliament and members of the bench of the High Court.

Prof. Williams—You have a good point. The people have been democratically engaged in rejecting change. I would like to see democratic engagement in achieving change. That is where I think the deficit is.

Senator RYAN—I would like to see democratic engagement that elects me more often than it does but in democratic engagement you get to choose a process; you do not get to choose an outcome. Isn't it the duty of politicians and opinion leaders like yourself not to say, 'Where it has gone is not the direction we would like it to have gone,' but, as you did partly in your book, look upon the measures of success. There is still an assumption that cooperative federalism and greater national authority is somehow the inevitable path which we must go down, despite the fact that at almost every opportunity that people have said no, even when it has been bipartisan.

Prof. Williams—They have; that is true. What we have found is that more often than not that is has been a failure of process. People have been taken for granted. People have been given a veto and have decided to exercise it. This is one of the reasons I support a different type of process, like a convention. If a convention came out and said, 'We do not want to change in these areas,' that should be the result. I respect the process that we have.

This is particularly a fault of the Labor Party. The Labor Party has been diabolically bad in achieving reformed in these areas.

Senator RYAN—One!

Prof. Williams—That is right. There have been 25 proposals and one has succeeded. It has a 96 per cent failure rate. The Labor Party has got it wrong consistently. It has got it wrong, partly because it has put some poor proposals, but often because it has taken people for granted in putting those proposals.

Senator RYAN—An example I might use would be a politician who says, 'I failed to sell my message properly,' rather than saying 'The message is one that people do not want.' It is not an unreasonable assumption to say that while your view is that the process has let down many of these centralising proposals, the evidence is that people just do not want to give Canberra more power.

Prof. Williams—I think that is fair. I am not saying that it is a failure to sell the message; I think it is a failure to listen to people to work out what the message should be, to give them a genuine chance to have a say. We have a Constitution that requires popular involvement. I think that should be taken seriously.

Senator RYAN—That I agree with.

Prof. Williams—That is basically my point. What I say about this area in the book is that unless you take people's views seriously and give them the opportunity to learn, educate and make judgments, you can expect that they will exercise their veto.

Senator RYAN—I have two very quick questions. It is also fair to say, as I said to Professor Twomey previously, that most of this overlap has come through an accretion of Commonwealth activity and power and the Commonwealth moving into spheres of activity that historically have not been theirs, rather than the states going into Commonwealth spheres of activity. Is that a fair characterisation?

Prof. Williams—It certainly is—if only because section 109 of the Constitution prevents the states from going into those areas. There have been two things: the growth of Australia as a nation, as opposed to a collection of six colonies; and, twinned with that national development, the fact that the Commonwealth has taken on responsibilities you would expect a national parliament to exercise.

Senator RYAN—I would hasten to say that you might expect that, but I do not know if the consensus is there. It has primarily been result of the financial might of the Commonwealth.

Prof. Williams—That has been the most important driver, I agree. The most decisive outcome was the Commonwealth's takeover of income tax during World War II, followed by decisions in the eighties and nineties around excise duties.

Senator LUDLAM—Thank you very much for your presentation. Unfortunately, I do not have a copy of your book, so I reckon you should have brought some. I would like to ask you a couple of questions about what has been described so far as the 'democratic deficit within COAG' and you have addressed that a little bit in your submission. I asked Professor Twomey as well—I am not sure whether you were in the room—about how the parliament should be engaged in COAG where these agreements occasionally fall out of the end of the pipe after this rather opaque process of agreement and disagreement within the executives of the states, territories and Commonwealth. I think you put some proposals here. You have said:

- Expanding the scope for individual parliaments to scrutinize IGAs …

What would that look like in practice?

Mr Kildea—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.

In addition to bringing parliament into the process you might also seek to bring the public into the process as well. You could do that by making intergovernmental agreements more easily available on websites and so on at the end of the process but also it would be possible to introduce a process whereby intergovernmental agreements are made available to consider in the drafting stages—publicly available or available to parliaments—so that people could have an input in that way.

Senator LUDLAM—That is a bit more like it. JSCOT has been criticised as receiving the treaty instrument at the end of the pipe after it has been agreed. We just came across this in the last week in parliament with an extradition treaty that the treaties committee strongly disagreed with and that parliamentarians had strong issues with but to re-negotiate it would have taken another couple of years back with the other government. Again, the treaty making power is a Commonwealth power but should such a committee, if it were to be committee process, not be reflected in the states and territories as well?

Mr Kildea—Yes, you could. I have not put a great deal of thought into that but I imagine you could have separate committees at state parliamentary levels—I am not sure about this but the ACT may have had their own committee at their own level—or you could have a cross-jurisdictional committee that was put together at a parliamentary level to consider.

Senator LUDLAM—Is there any precedent in Australian federalism for that? I presume you mean a committee that had parliamentary representation from states and territories.

Mr Kildea—Not that I am aware of.

Senator LUDLAM—There is nothing that would prevent that.

Prof. Williams—It is not surprising because the importance of intergovernmental agreements in COAG is a relatively recent phenomenon. Previously, it never assumed the significance that it currently has.

Senator LUDLAM—Now it has assumed enormous significance and it feels as though we are kind of grasping to get a grip on what work is being done in there.

Prof. Williams—I think the analogy with international agreements is a good one. It is similar with the executive signing on to things, expecting parliament to then implement or make recommendations and in that area it was recognised that it was appropriate that parliament have a role in determining whether it is appropriate for the executive to sign. It is an analogous situation, I think, that applies to any parliament.

Senator LUDLAM—I guess within the treaties committee and debates surrounding that is that committee is trying to work its way upstream so that it is not just getting these things when they fall out of the system. It is a big deal when the treaties committee rejects something and of course it can be overridden. Is there anything else that you want to flesh out in a bit more detail around the democratisation of COAG and what could help?

Mr Kildea—I think, in addition, transparency is a bit of a concern. COAG meetings are behind closed doors. Often at the end of the meeting a fairly brief communique is issued with very few details about the decisions made or the reasons behind the decisions. I think we can all appreciate that there are some benefits to allowing premiers to be able to discuss high-level issues with some degree of privacy—to have a frank discussion about these things—but I think at the moment it is too much in favour of secrecy and not enough in terms of transparency. I think there should be more detailed communiques setting out the decisions in detail and setting out the reasons for decisions. In addition, meeting agendas could be published in advance so that people are aware of what is coming up.

I also want to mention that I went on the COAG website before coming here and it is currently quite difficult to find the intergovernmental agreements. There are about 15 agreements listed under current COAG agreements and if you search around under past meetings you might find some others. I think there really does need to be a central repository there so that if people are interested in finding out what has been agreed they can easily access that.

Senator LUDLAM—That is helpful. We have been speaking specifically about COAG but would it make sense for those transparency measures to be expanded across the scope of the ministerial councils as well?

Mr Kildea—Yes, I think the democratic concerns that apply to COAG also apply to ministerial councils, so I would apply the same.

Prof. Williams—I think that is right. You have obviously got to be cautious, just with the nature of these organisations: some deserve more transparency than others and you would not want to apply the same model uniformly. Some are particularly important and do deserve greater transparency, but I would be just a little cautious in not adding too many bureaucratic layers to some of these where it is not actually providing any benefit.

Senator LUDLAM—Yes, that was Professor Twomey's point as well, that if you are trying to get nine parliaments to agree on these things it is going to make things even slower than they already are. Chair, I might come back with some further questions if there is time.

CHAIR—Yes, I am happy to do that. Senator Payne.

Senator PAYNE—I agree with some of your calls for transparency and have made similar calls myself around transparency and accountability. But I must admit when I contemplate the current state of COAG and then contemplate the addition of tabling IGAs in the parliaments of affected jurisdictions, which is basically all of them, and expanding the scope for parliaments to scrutinise them through the committee process and publishing a register, I think the latter is a neutral process in terms of timeliness but the other two boggle my mind as to what you could actually do to extend the period of the COAG agenda over which items were considered and dealt with. It seems to me that it could operate well. But it is dysfunctional—you are absolutely correct. If you push all of those requirements into the process as well, don't you risk—terribly risk, in fact—a complete stultification of the process? It would just come to a grinding halt, even worse than now—and I know that is hard to imagine.

Prof. Williams—There is merit in that. This is where I think it is a matter of working out what is an appropriate balance that improves the accountability measures, which clearly do need to be improved, but does not undermine the capacity to achieve reforms. Personally, my main focus would be upon improving the way COAG itself works. I can see the need for parliaments to have greater involvement, but it does need to take into account the factors you were saying. I think that if COAG worked more effectively, with greater transparency, and built in some of the things that these parliamentary processes might do then you could say opportunities have been provided as part of the COAG process, as opposed to having then to go to another stage. That might mean that COAG ultimately does need to do things such as actually putting out a greater amount of drafts of things, getting some submissions back, getting feedback, perhaps providing an opportunity even for states or state parliaments to provide feedback over a period of time. That is the way deliberative bodies normally work when they make important national or state based decisions—it is just at the moment COAG is particularly odd in that it does not provide those things. But if it did provide those things better I think that would alleviate, if you like, the call for moving some of these things down to parliament.

Senator PAYNE—I am sure that is true; there are a lot of things that it could do better. It could have outcomes. That would be revolutionary.

Prof. Williams—This is a question not just of transparency but of achieving effective reform. If you want things to stick and you want premiers and others to recognise they must stick to them, you have actually got to have a process that binds them in more publicly and more effectively and is seen to be a deliberative process that is far more effective than it currently is. Otherwise, if something pops out the end, it is much easier for people of whatever persuasion to say, 'I'm simply not going to stick with that.' That is the difference between a good deliberative process and one that does not work as effectively.

Senator PAYNE—You comment in your paper, and you have commented in a number of articles you have written, on the transparency issues around the agenda, the communiques and so on. Do you think that the COAG Reform Council could play a greater role in that area? What is your observation of the current work of the COAG Reform Council, separately to that?

Prof. Williams—I know Paul Kildea has a little bit to say on this, but I would simply say that I see the reform council as a really good innovation. I think also that its calls reflect the sorts of reforms that are needed around better data and other areas. I think that it is on the money for some of the things that are required. I think also that the COAG Reform Council might be a useful body for looking at how COAG itself needs to be reformed more generally. There is some potential there as well. I simply wish that perhaps more heed was paid

to that body than currently is, because I think there is more work that could be done on the back of what they are suggesting. But I will otherwise pass on to Paul.

Mr Kildea—I just want to perhaps draw a distinction between what you might call financial accountability and democratic accountability. I think the COAG Reform Council has a very good role to play with respect to financial accountability, in that through its performance monitoring it is able to provide some guide as to how the states are spending the money provided to them through Commonwealth grants. I am not sure that, apart from perhaps issuing recommendations, it has much of a role to play in improving concerns that we have spoken about earlier with respect to democratic accountability and transparency. So I just draw that distinction.

Just to reiterate what George said, I think the COAG Reform Council is an excellent initiative. I think it is playing a very good and productive role within the way it is currently resourced. It seems to be having some difficulty in collecting adequate data in a timely fashion, and that is having some impact on its role. It may be that whoever is collecting and providing the data perhaps needs greater resources to ensure that the COAG Reform Council has the data available to ensure that it can do its work.

The other potential improvement, if we are speaking about the COAG Reform Council, is just that, like COAG, it is somewhat weakly institutionalised. So it has been playing a very good role for perhaps about two or three years now, but if in the future a government decided that it was not so helpful or useful then it may disappear, which would be disappointing.

Senator PAYNE—I have one last question on that. We tried to invite the COAG Reform Council to appear before estimates through the Department of the Prime Minister and Cabinet, and they have declined the invitation—and I use the word 'invitation' advisedly—on the grounds that they are a multijurisdictional funded body and that, on that basis, they do not think they should be required to appear before the estimates of the Commonwealth parliament and of the Senate. That is a simplification, but it is essentially the argument. I did a little bit of research to find that organisations like the National Plague Locust Commission which were multijurisdictionally funded managed to come before us, so I was a bit confused by the CRC's lack of interest. Constitutionally, legally, do you have a perspective that you could offer the committee on that?

Prof. Williams—I suppose my first response is that you say they were invited, and I wonder whether it was stronger than that. If they were only invited then perhaps they were able to say no on that occasion, but—

Senator PAYNE—It is difficult for committees, Professor Williams.

Prof. Williams—I know.

Senator MOORE—There is a limited history of having success.

Prof. Williams—Yes, I understand. That is also in part because the upper house has a range of other things it might use in these circumstances but understandably is reluctant to use, and that means that things come down to good manners and things like that—

Senator RYAN—We don't do bills of attainder anymore!

Prof. Williams—No, that is right. You do not tend to jail people, including heads of COAG Reform Councils, anymore. But as a matter of policy a body of that kind clearly should be accountable somewhere—

Senator PAYNE—That was my concern particularly.

Prof. Williams—so if it is not to the Commonwealth there ought to be an answer as to where.

Senator PAYNE—Yes.

Prof. Williams—Yes, my understanding has always been that these multijurisdictional bodies do not or should not find themselves free of the normal accountability through estimates and other processes, reporting and the like, so if it is not there it should be somewhere else.

Senator PAYNE—Interesting. Thank you very much.

Senator TROOD—Is your proposal to give COAG some legislative foundation a proposal that it just have legislative foundation, or are we talking about a separate statutory agency, in your mind? Is it the kind of legislation which would require complementary legislation from the states? That is usually done in relation to the referral of powers, but would your proposal require that? I think you are silent on the question of funding as well and whether you have a view as to whether a COAG council which had legislative foundation would require a contribution from the states, or do you want the Commonwealth to continue to run it, essentially?

Mr Kildea—I suppose, in terms of giving it a statutory foundation, I envisage it happening through complementary legislation being passed by the Commonwealth, states and territories. You would have the option of giving some recognition to COAG, thereby providing it with some sort of legislative security, or you could go further than that and provide statutory foundation through other things such as membership, frequency of meetings, decision rules and so on. So there are a few options there. I do not have a view on funding, but George may have a view.

Prof. Williams—I certainly support the idea of a legislative basis, in part because I think it would help answer some of the questions that Senator Payne has been putting. It should provide appropriate, direct and clear answers, on the public record, on accountability, reporting and the like. It is an important body, it should continue and it should be set up in a way that is consistent with that. On funding, my view is that a cooperative body of this kind should be funded by the states and by the Commonwealth in appropriate proportions. I think it is a wise thing for the states to do that. If they want to be seen as an appropriate player and have some ownership of the body, that needs to be played out through the funding mechanism. Of course, we need to be realistic and recognise that that funding will come from the Commonwealth via grants and will all go back again—but that is the deeper problem with our federal system. They need to have some 'skin in the game', if I can put it that way; I think that is necessary for the body to operate effectively in the longer term.

CHAIR—Do you think that that kind of change would necessarily require to go to a convention before it is introduced?

Prof. Williams—No, I do not think so. We have tried in this submission to focus on practical things that can happen now. There are a number of things where I do not think we should be waiting; we should say that there are existing bodies and that things need to be done. This committee ought to play a leadership role in these areas and identify legislative changes that can occur in the short term, particularly those that have multi-party support. When we are dealing with things like the COAG Reform Council, I think it is appropriate that we seek multi-party support because these are changes for the longer term and that is an appropriate base. The committee should also identify things such as the process for a range of other things that the committee might see as at least requiring a better debate than any committee can give them, and that is where conventions or other processes might form part of recommendations.

Senator LUDLAM—I do not know whether you have had time to review some of the other submissions the committee has received.

Prof. Williams—No.

Senator LUDLAM—We got a good paper from the NSW Business Chamber. They say, for example, that there is very little incentive for the states to go ahead and abolish their taxes, which seem to be fairly widely regarded as inefficient. Do you have a view on how to guide the tax reform side of things? Is that something you have given much thought to?

Prof. Williams—Yes, I have. It is not only that there is no incentive to remove inefficient taxes; there is actually great incentive to introduce inefficient taxes. If you want to identify the rise of gambling taxes, a socially unfortunate form of taxation, you can trace almost exactly the rise of casinos, gambling and other forms of revenue generation to the High Court decision in Ha and Hammond in 1997. The High Court, in one day, deprived the states of about $5 billion in revenue and the states had to turn to something else. And what did they turn to? They turned to gambling taxes and other taxes that would be a good revenue stream. This is what happens in a federation. When you deny states a secure and appropriate form of revenue raising, they will turn to anything else they can find—because, if not that, they are just begging for grants from the Commonwealth, which is not a good long-term solution. So, in my view, if you want to deal with this area, you have to fix the structural reasons that mean they turn to these taxes in the first place and hold on to any tax they can for dear life. That means dealing with what has been the intractable and largest problem of our federal system—the fact that the 1901 financial settlement has simply broken down.

Senator LUDLAM—We have not read anything in the course of this inquiry that would disagree with that at all. So why has it been such a long time coming? If you had to pinpoint the specific barrier, what would it be?

Prof. Williams—It is interesting, isn't it, that the largest problem is so often off the table. I think it is because a lot of the people who work in this area are profoundly depressed about the prospects of parliaments dealing with what has been recognised for decades as the No. 1 problem in this area.

Senator LUDLAM—Perhaps that is how this committee will end up!

Prof. Williams—To be honest, that is what has happened. You can go back to the times of the Chifley and Curtin governments and work your way through and you will find academics and others talking about the problem. It just gets worse with each iteration. We did have a good reform with the federal financial agreement in 2009. That was a major, and probably the best, reform we have had for decades in the area but it still just touched the surface of what is a larger set of problems. That is also why I think, in the end, you need a convention or other process to open it up. You need business and other groups more heavily involved in the debate. In the end it is such a large problem that no government has been really keen to deal with it.

Of course, in many ways, it suits the Commonwealth. Control over the purse strings is something it jealously guards. That has an enormous economic and social cost but the Commonwealth, for understandable reasons, has never been particularly keen to fix a problem that works to its advantage.

Senator LUDLAM—I think you have probably nailed it there.

CHAIR—Just before we finish, could you take on notice this point: in the submission of the New South Wales government on page 51 there are some observations about intergovernmental agreements in which it cites the fact that it is concerned about the fact that they are legally binding, that they—

Prof. Williams—That they are not legally binding?

CHAIR—The argument seems to be that the intergovernmental agreements seek to be legally binding, and that is not something that the New South Wales government sees as agreeable. The New South Wales government also has some observations about contractual obligations being undertaken. I would be grateful if you would take on notice those observations and if you could give the committee a reaction to those them—as to their accuracy and whether or not they are matters about which we should be concerned.

Thank you very much for coming and giving us the benefit of your insights this morning. It has been very helpful to the committee.

[12.02 pm]

GREEN, Mr Micah Andrew, Economist, New South Wales Business Chamber

ORTON, Mr Paul, Director, Policy and Advocacy, New South Wales Business Chamber

CHAIR—I welcome the New South Wales Business Chamber to the table. Thank you for coming this afternoon.

Mr Orton—Thank you very much for the invitation to come here today. We certainly welcomed the opportunity to put in a written submission. Just by way of introduction, the New South Wales Business Chamber is the largest business representative organisation in New South Wales. We are affiliated with about 120 local chambers of commerce around the state. In total we would have relationships with about 30,000 businesses right around the state. We are part of the Australian Chamber of Commerce and Industry, which nationally represents around 350,000 businesses. We certainly welcome the decision to conduct the enquiry. It is something we have been paying attention to for some years—probably not at the level of depth that we would like to—because we see a well-functioning federation as an integral part of a well-functioning business community. Where things are not working properly there are impacts on broader communities, certainly businesses. We are concerned about productivity growth slowing in Australia. We feel there are opportunities to improve productivity growth by improving the way in which government operates. The interaction between the three levels of government is integral to that.

In the lead-up to the New South Wales state election, part of our policy agenda, one of its four platforms, has been what we call 'Reforming government'. One of our 10 Big Ideas to Grow NSW has been to do some things along the lines that other submitters have suggested to the inquiry. Indeed, they are ones that we would like to expand on a little bit more.

Last year we ran a symposium on the topic 'Who does what and why? Better service delivery through redefined federal and state roles'. Two of the key speakers were Professor Peter Shergold, a distinguished former federal public servant, and Professor Neil Warren of the University of New South Wales, an expert on federal-state financial relations. We will certainly send to the committee a link to both the presentations that were delivered—by at least one of those speakers—and the summary of the contributions that they made to the debate.

In our submission to this inquiry we have focused on the elements that we perceive to be of particular relevance to the business community. They relate to the question that we posed at our symposium, on the distribution of administrative responsibilities between, as a minimum, the top two levels of government and, consequentially, the financial relationships between federal and state governments. Professor Shergold summed up the issue pretty well in his presentation at that symposium when he said:

> The main challenge facing Federal-state relations is the high level of duplication of rules, regulations, funding and regulations. This arises because when national standards are set, the states still fail to leave the policy area. This leaves the Federal and state governments imposing costs on businesses and the broader community.

That gives rise to a concern that we have, the significant vertical fiscal imbalance where there is a distinct mismatch between revenue-raising capacity and service delivery responsibility. It invariably leads—and I guess we have already heard all this—to blame shifting. That really limits the incentive at each level of government to improve what they do. So we do strongly support the positive efforts that COAG have made to address the issues, but we do note that reform is far from complete. We would like to see issues tackled in other areas, like education. Certainly health has already been approached, and that is one on which more work is to be done. As for education and health, when you look at the amount of expenditure on both those areas at the federal and state levels, you see they are the two big areas where there are overlapping responsibilities. We do believe that the burden of work that COAG has on its plate might be too big. Maybe we do need to look at some way in which to come back to that essential question: who should do what—and why?—and how should it be funded? Perhaps COAG is not quite the right body to do that.

States unilaterally cannot address vertical fiscal imbalances. As we have already heard from previous evidence, they are heavily reliant on inefficient taxes in their current funding mix. So while the Henry review does recommend abolishing some of those taxes, there really is not a lot of incentive for the states in their own right to get on with the job. So it does require extensive cooperation between the two levels of government. What we would need to see is a medium-term plan between the levels of government to get rid of those state

so-called nuisance taxes. The tax summit scheduled for some time next year might be one way of progressing that.

We also have some concerns about horizontal fiscal equalisation and the operation of the Commonwealth Grants Commission—and we can talk about that a bit more perhaps in questions. We think perhaps the Productivity Commission should have a look at the way in which horizontal fiscal equalisation works. It is a very complex process, much more complex than those of any other jurisdictions around the globe, and arguably it does not really deliver timely and good results. I guess we would like to see some greater harmonisation. We strongly support COAG's efforts through the national partnership agreement to deliver a seamless national economy but progress seems to be slipping and it is a heck of a long list.

Finally, in looking at the interaction of levels of government and the potential for economies of scale, we think one relatively minor way of dealing with that could be to perhaps merge tax collection agencies between the state and federal governments. We will leave it there and we are happy to take any questions.

CHAIR—Could I begin by asking you have you tried or are you aware of any research which tries to quantify the cost to Australian business of what you see as this dysfunctional relationship.

Mr Orton—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?

Mr Green—Yes.

Senator RYAN—There were other reports from the Council for the Australian Federation that do tend to outline the benefits of this competitive tension, so I would hasten to add the committee should not take the Business Council's report on this somehow as gospel. I take your comments about horizontal fiscal equalisation. You raised some very good points there. As I understand it a state that chooses not to levy a tax or cut a tax whether it is a nuisance tax or in Western Australia's case where it does not have poker machines like Victoria and New South Wales, actually has a penalty under the HFE arrangements through the Commonwealth Grants Commission. The ability of states to rationalise their own taxes is effectively limited by the operation of the Commonwealth Grants Commission isn't it at the moment?

Mr Orton—Correct, and not only that but there is no mechanism through the HFE arrangements to actually ensure that the states spend the funds for the purposes for which the commission takes into account the standard of service delivery.

Senator RYAN—No, because these replace the old general purpose grants so they are not meant to be tied grants. In fact one of the inefficiencies that people allege about our system are the conditions that the states had to comply with to make sure they had the reporting and other arrangements for section 96 tied grants.

Mr Orton—Yes but one of the arguments for getting an increased allocation is that service standards are lesser in a particular jurisdiction and that might well be taken into account in the Grants Commission's decisions.

Senator RYAN—Technically they cost more to deliver, I think, rather the service being lesser.

Mr Orton—Correct, but there is no mechanism to ensure that that grant when it comes actually gets spent in that direction.

Senator RYAN—The one thing that I do have a concern with is the recommendation you outlined in No. 6 with respect to tax regulation and harmonisation. If we put the inability of the states to rationalise their tax basis to one side, we understand there are Commonwealth Grants Commission implications there, doesn't harmonisation in the end lead to a serious lack of competitive tension? If every state has the same regulations then surely that means that you lose one of the competitive federalist elements of our constitutional arrangements do you not?

Mr Orton—I think we should make clear that we are not opposed to competitive federalism, in fact, it does have a lot going for it. There is always tension though between achieving that and wasting resources in doing

things that could be done where there are potential economies of scale to be gained in administering them. At the heart of the harmonisation principle is: why not have one set of standards but leave it perhaps to the different jurisdictions to administer them and implement them and rely on some competitive federalism benefits coming from that?

Senator RYAN—Without the power over different levels of taxation, and without the power over different levels of regulation, the ability for variance and, therefore, competitive tension is actually drastically reduced, is it not? It could be an issue of headcount—how many people you employ to enforce it. The example I would use is occupational health and safety. Presumably, the NSW Business Chamber would be in favour of harmonisation of occupational health and safety if it were along Victorian lines but probably would not be in favour of it if it were along New South Wales lines.

Mr Orton—Correct.

Senator RYAN—So you see the point I am attempting to illustrate here, which is that harmonisation is of absolutely no benefit if it goes in a direction that prevents competitive tension and further policy development. It is a very subjective assessment.

Mr Orton—Harmonisation is no good if it harmonises to the worst possible set of standards. The point is that harmonisation, in and of itself, is not a goal; it is about harmonising at a standard that delivers benefits to the community as a whole. That is why we would support the Victorian OHS rules—because they deliver better outcomes for the community, including the business community.

Senator RYAN—I think they do as well—

Senator MOORE—Others do not.

Senator RYAN—But there are others that disagree. To use the example of health: we have had casemix funding and local hospital boards in Victoria for a long time. Casemix came in in 1994-95. If there had been any move to harmonise over the last 10 or 15 years, it could just as easily have been to move away from that model of healthcare funding. Victoria was in many ways the odd man out for many years. We maintained local health boards—we did not go to a regionalisation model—and we had activity based funding. New South Wales still does not have both of those things. New South Wales is one-third of the country in most measures—its population, its representation in parliament and its economy—and it does have a significant impact upon the direction of harmonisation matters. The point I am making is that it is very subjective to say we should harmonise in favour of the best. We are in politics and on different sides of the table because we all have a different view on what is best. Is not it better to try to set up a system whereby there is competitive tension so that businesses in Victoria do not have the OHS hassles that businesses in New South Wales have? With harmonisation we could just as easily end up with New South Wales laws.

Mr Orton—I suspect we would have harmonisation where the potential benefits justify any diminution in competitive federalism and the impacts of competition. I do not think it is one size fits all across the board. It is a case of looking at individual areas of regulatory and service delivery activity and working on a solution that has the most potential to deliver good outcomes.

Senator RYAN—Finally, another example you mentioned which is currently the subject of public debate is education. I was a victim of Joan Kirner's education system in Victoria, where we used to look upon the New South Wales HSC as being somewhat more rigorous. I understand that the New South Wales government and opposition and parent groups are concerned about the national curriculum dragging New South Wales down to the average for the rest of the nation. But I am not an expert, so I will make no assessment. New South Wales is the largest state and has a reasonably good public reputation for its Higher School Certificate curriculum. New South Wales accounts for one-third of the country. It has a Labor government and there is a Labor government federally. Yet everyone seems to worry about this one-third of the country being dragged down by a harmonisation process. I put it to you that harmonisation is itself a problem.

Mr Orton—I would not agree with that at all. The tenth of our 10 big ideas is to review the New South Wales HSC because it could be doing a better job in delivering outcomes both for higher education stream students and those who will probably go into the vocational education stream. Again, I really think it is a case of trading off harmonisation and competitive federalism benefits on a case-by-case basis. No-one would advocate harmonisation with regimes that demonstrably do not work or those that do not work in particular geographical areas. I think that should be part of the process of agreeing whether or not harmonisation is appropriate.

Senator LUDLAM—Thank you very much for coming here and for your submission. The Henry tax review probably should have been the catalyst for this conversation to get underway properly. But the most significant reform that the government advanced flowing from Henry was bitterly fought by the mining industry and nearly capsized the whole show—and the rest of them have by and large been set aside. Do you have any great hopes for the tax summit next year? Some of your proposals here are quite ambitious; they are sensible and they go to what other people have been saying for years and years. But where is the appetite to actually do it?

Mr Orton—Have we got hope? Yes, we have. I guess we are not of the depressed school of some others mentioned.

Senator LUDLAM—The committee is trying to decide where it sits in that spectrum at the moment.

Mr Orton—Yes. Sure, a lot of work is required to get outcomes, but I think we have to have our expectations set appropriately. Big initiatives like those that Henry recommends have a time scale of 20 years. This is going to take a long period of time. It is more a case of approaching those things that can be dealt with quickly and setting in place a process to get to the long-term reforms in a way that is going to deliver a result. Micah, you might have more views on that.

Mr Green—I second those comments. I am optimistic about the merits of the tax summit next year. Provided people can come to with it with open minds and with a pretty broad agenda rather than just looking narrowly at a couple of issues, while it is very difficult to get any outcomes out of that process in the short term, I think even increasing the public debate around the issue would be a big step forward. So I think it is good in that regard.

Senator LUDLAM—What do you think would be the best that could come from it? As yet, I do not think the general public have a very clear idea of what it is or how their views will be represented. Have you folk been invited to put in pre-submissions? Do you have any idea of what kind of structural reform it is going to take?

Mr Orton—I do not think it has developed sufficiently to answer those questions, but when the opportunity is there we certainly will be participating.

Senator LUDLAM—At reference No. 37 of your submission you reference a paper by Warren that I have only just got hold of. It caught my eye partly because it is fairly recent. In his paper Warren talks about a question I put to a previous witness about the disincentive for state governments to undertake any significant tax reform while all these other pressures are on them from the federal side. Are you able to go a little bit into what he finds in that paper and pull out some of the important aspects that are in there?

Mr Orton—Micah, I might hand over to you on that one.

Mr Green—We might have to take that on notice.

Senator LUDLAM—I will just read the paper, but I thought there might be. It kind of jumped out because it looks like it goes directly to the issues that we are confronting here.

Mr Orton—We have certainly hit on the horizontal fiscal equalisation barrier to being more efficient, because it has a definite disincentive for state governments to do that. That is probably the key one. I know that the professor has done a lot of work on the whole horizontal fiscal equalisation, so I suspect that might be the key issue that he was referring to. I guess that does then lead to states continuing to rely on their inefficient tax bases.

Senator LUDLAM—The New South Wales government submission just says, 'Stuff it. Why don't we just give South Australia, Tasmania and the Northern Territory more money and then divide GST revenues at least equally amongst the states that are left?' Would you folk go that far?

Mr Orton—That is the direction in which we would head, but our key recommendation is that this is an incredibly complex issue. We need to look at how it has worked over a period of time. We would really like the Productivity Commission to have a close look at it prior to coming to a really definitive view. But that was certainly an option that came to mind; there is no doubt about it.

Senator LUDLAM—It would make it much simpler. You have handballed quite a lot of stuff to the Productivity Commission in your different recommendations.

Mr Orton—I know. We are giving them a lot to do, but the reality is that these are complex areas that do need thorough analysis, certainly much more than we have the capacity to do. I guess we are relying on its expertise.

Senator MOORE—I noticed that also in terms of the number of recommendations that go to the PC. Do you envisage one large reference with subgroups because it is all in the same area or separate referrals? Do you have any preference there?

Mr Green—I suspect we would probably see them as separate referrals. Each one is on quite an independent issue.

Senator MOORE—Under the same grouping, though. I was thinking that in looking at that, but you actually see it as independent referrals with a similar reporting date?

Mr Green—Yes. That is how I would see it. If the Productivity Commission, however, felt that it could manage it more effectively through a single review, and if the government and the PC felt that was a more appropriate process, I think we would think that is fine too.

Mr Green—That is how I would see it. However, if the Productivity Commission felt that it could manage it more effectively through a single review, and if the government and the PC felt that was a more appropriate process, I think we would think that is fine too.

Senator MOORE—Is that what you are thinking when you put the recommendation?

Mr Green—Yes.

Senator PAYNE—I find your submission slightly counterintuitive in relation to some of the observations it makes in relation to COAG and the recommendations that you make. I would like to get some clarity about that if I may. In relation to the operation of COAG and the system of the federation per se, you refer in the material preceding recommendation 1 to your concerns about whether the COAG process—I do not know whether a process can have the political will—has 'the political will and momentum necessary to continue making inroads into clarifying responsibilities between the state and federal governments'. But then in your recommendations 5 and 6 your advocate the continued use of COAG to work in areas where, by and large, it has produced very little in the past three years. Could you clarify for me the nature of recommendation 1? Are you suggesting that there be two bodies COAG and 'COAG light', operating in parallel? How would that possibly address any of the concerns around COAG? That is my first question?

Mr Orton—There do seem to be decisions required at two levels. The first deals with the question we posed earlier: who should do what and how should it be funded, as between the different levels of government? The second is: how do you put into effect whatever decision is made at the former level? From what we can see COAG does not seem to be a good forum to deal with the question of who should do what and how it should be funded. It seems to be more about getting the states together to agree on the seamless national economy reforms—and there are a large number of them. What does not seem to be dealt with is the bigger question, which is probably much more a heads of government question than a ministerial council question. That is a distinction that we would like to make.

Senator PAYNE—I am not sure I am persuaded by that.

Mr Orton—That was the rationale in suggesting that perhaps a prime minister-premiers forum might be a way to try to accelerate that kind of discussion.

Senator PAYNE—Doesn't it run the risk of falling into exactly the same trap?

Mr Orton—I guess potentially it does. The issue might be—

Senator PAYNE—Nothing can be done without an immense bureaucracy behind it. That is patently obvious.

Mr Orton—True, but maybe some explicit decisions that do not have the benefit of bureaucratic intervention at heads of government level might attempt to get a bit more clarity about directions.

Senator PAYNE—Have you read, *Yes Minister*, Mr Orton? How likely do you think that is?

Mr Orton—It might be worth a go.

Senator PAYNE—Notwithstanding your concerns about COAG, which prompt you to say that we should perhaps have a 'COAG light' parallel activity, why do you then come to recommendations 5 and 6, where you

even use the word 'accelerate' in the same sentence as the noun 'COAG', which I find remarkably ironic? How do you come to that point?

Mr Orton—I guess it is horses for courses. You suggested that nothing gets done without some bureaucratic intervention. At some stage somebody has to do the work in putting into effect broader decisions to, for example, reduce regulatory burden.

Senator PAYNE—Is the chamber concerned about what does not come out of COAG at the moment?

Mr Orton—Certainly it is slow progress. I guess its incredibly lengthy and detailed set of agendas do give rise to concern. It is somewhat difficult for people who are not necessarily engaged in the process on a day-to-day basis to determine what the priorities are, short-, medium- and long-term, and to evaluate progress under those priorities.

CHAIR—I have a couple of questions on your observations about amalgamating Sydney councils. Coming from Queensland, I reserve any judgment about the virtues of that and whether or not it can be done, but I am interested in this point that you make:

Strong regional councils with properly compensated and resourced elected representatives can improve decision making.

That is in relation to councils, but it is not clear to me how the resourcing of councils might change as a result of the amalgamation. I am interested in whether or not you see or believe that one of the consequences of amalgamation might be that they would have a greater claim on the Commonwealth purse or some sort of capacity to expand their rate base. It is the funding or resourcing issue that I am interested in here.

Mr Orton—I guess we have not put a lot of thought into the funding issue. It is more about economies of scale that come from larger councils: combining back offices, plant and equipment, and resources. Also, the potential benefit in looking at economic development opportunities is more likely to occur within a larger local government grouping which better corresponds with economic areas of activity. Local government borders do not necessarily tend to mirror those of broad areas of economic activity. I guess the third point is that, from a planning perspective, dealing with planning issues and, I guess, integrating, for example, transport and land use activities are probably more likely the larger the body.

In terms of funding, a larger body is probably more likely to be better able to discharge its accountability and is also more likely to be more efficient simply because the reality is that there is a shortage of skilled local government managers. Frankly, there are not enough to go around across the number of local government bodies. Our observation is that bigger bodies would make better use of the skills that are there.

CHAIR—There may be some efficiencies that can be gained from amalgamation, but don't they still face the same kind of chronic problem of an absence of a rate base or funding base that all of the councils, perhaps, across the country face at the moment?

Mr Orton—They do, but it is probably worse in New South Wales, where rate pegging creates quite a distinct barrier to that, although there are so many exemptions from it that perhaps it is pegging in name only. That is something that should be looked at, in concert with improving the capacity of local government to manage effectively and efficiently.

CHAIR—Is there any sympathy for this amalgamation argument in the community in New South Wales?

Mr Orton—There does seem to be in, certainly, the business community. We recognise that there are different issues in and out of metropolitan areas. We have done most of the thinking about the greater Sydney metropolitan area. Again, that is probably not a 'one size fits all' solution across the whole state. The sheer size of some of the potential regional and local government bodies suggests that a slightly different approach would be needed. Given that local governments are major employers in big parts of the non-metropolitan areas of the state, there are certainly community issues to be dealt with.

CHAIR—You have not embraced the Brisbane solution.

Mr Orton—No, in Sydney we have gone for 10 or 11 rather than one, I think. But certainly Brisbane was a model.

CHAIR—But you do not favour that.

Mr Orton—No, there are some well-functioning—

CHAIR—Is that because it is politically impossible or is there some business case for not embracing the citywide council?

Mr Orton—I guess we were paying attention to an existing Sydney Metropolitan Strategy, which effectively had boundaries that corresponded to those that we have suggested.

CHAIR—Gentlemen, thank you for coming this afternoon. We very much appreciate your submission and the evidence you have given; they have helped the committee a great deal. Thank you very much.

Proceedings suspended from 12.34 pm to 1.37 pm

O'LOUGHLIN, Ms Mary Ann, Executive Councillor and Head of Secretariat, COAG Reform Council

CHAIR—Thank you, Ms O'Loughlin, for coming back to the committee to provide us with some evidence on the public record. We very much appreciate you making yourself available. I remind members of the committee that the Senate has resolved that departmental officers shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions to a superior officer or to a minister. This resolution prohibits only asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Ms O'Loughlin, we would like to hear from if you would care to make an opening set of remarks. Then we will ask some questions.

Ms O'Loughlin—Thank you. I just have a few comments to make, explaining the role of the COAG Reform Council, which I hope are helpful for senators. The COAG Reform Council was first established in July 2006 and COAG, the Council of Australian Governments, agreed to establish the independent advisory council. There are six members of the council, who were first appointed in 2007. The chairman, currently Paul McClintock AO, is appointed by the Commonwealth. The deputy chairman, currently Dr Geoff Gallop, is appointed by the states and territories. Four members are agreed to by COAG. At least one member has to have regional and remote experience, and that member is currently Peter Corish.

The initial role of the council was to report annually to COAG on seven streams of business regulation and competition reform under the then National Reform Agenda. The role of the council expanded significantly when COAG agreed to the Intergovernmental Agreement on Federal Financial Relations in December 2008. 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.

The role of the COAG Reform Council under the intergovernmental agreement is to monitor, assess and publicly report on the performance of governments in implementing nationally agreed reforms. We do this for the six national agreements, which are in the areas of health care, education, skills and workforce development, disability services, affordable housing and Indigenous reform. The council undertakes a comparative analysis of government's performance against the agreed outcomes, indicators and targets of the national agreements. For reward national partnerships—that is, national partnerships between the Commonwealth and the states and territories under which the Commonwealth makes reward or incentive payments—in health and education, 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. For the national partnership on a seamless national economy, the council annually reports here on progress against all of the 36 milestones and advises on achievements of key milestones for the 27 deregulation priorities before reward payments are made. The water management partnerships are bilateral agreements between the Commonwealth and the Murray-Darling Basin states—that is, New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory. The council reviews water reforms and priority projects.

The COAG Reform Council also reports to COAG on monitoring the aggregate pace of activity in progressing COAG's agreed reform agenda and other matters that are referred by COAG. In this instance may I particularly mention that in December last year we were referred the Review of Capital City Strategic Planning Systems' consistency with a set of nine national criteria. We report to COAG on that at the end of 2011.

I will close my opening comments but, of course, I am happy to give any further explanation of them.

CHAIR—Thank you. Can I begin by asking you about your funding. Could you explain the basis upon which that comes to you.

Ms O'Loughlin—Certainly. We are funded by all governments. We are funded 50 per cent by the Commonwealth and 50 per cent by the states and territories on a per capita population basis.

CHAIR—Is there an escalator figure in relation to the amount by which you receive additional funding each year or not?

Ms O'Loughlin—The addition of funding is dependent on if we get additional references. We get additional references that the council considers part and parcel of our regular work, if I can put it like that. I will give you an example. Under reward national partnerships we received an additional reward national partnership last year on essential vaccines. The council did not go back and seek additional funding to cover that because that was something the council considered the secretariat and the council could do under their usual funding. But when we received the reference on the capital city strategic planning systems it was quite a significant new addition to work, and in that respect we went back and sought additional funding from the Commonwealth and the states and territories for just the period—it only lasts for a two-year period—to cover that reference.

CHAIR—Is the funding you receive reflected in a formal agreement between the states and the Commonwealth? Do you have a protocol that applies to the funding arrangements?

Ms O'Loughlin—Yes, they are in COAG communiques, agreements and various documentation which we have put together and given to COAG. These are on our website in a document that we call our charter. The charter includes all of the references which are in various COAG documents, the communique or agreements about our role, our funding, our membership—all of those sorts of institutional arrangements are set out in the charter. But, yes, it is in an agreement that they will fund fifty-fifty.

CHAIR—Is that subject to revision or is that an established and set arrangement or distribution of responsibilities for a period of time?

Ms O'Loughlin—It is for a period of time. It is a COAG agreement which could be subject to revision if COAG decided to revise it at any time, to be honest.

CHAIR—Is it limited?

Ms O'Loughlin—It is over a five-year period.

Senator LUDLAM—I was going to use the cities example as a bit of a case study, since that is relatively recent. Can you talk us through how that particular referral originated. Did that come from the reform council or from the minister?

Ms O'Loughlin—All our references come from COAG, so we are, if you like, a creature of COAG. We are set up by COAG. We report directly to COAG. COAG gives us our references. In the cities area it comes from the communique of the December meeting in 2009. There are a number of references, including appendices to that communique, that set out the referral to us to review the cities area.

Senator LUDLAM—You say you are halfway through that. I have been doing a little bit of snooping, and I can only find one webpage. How is it intended that people interact with that? This is a really important reference and it is a good one, but how do people plug into it?

Ms O'Loughlin—The cities reference goes till the end of next year. I should mention here that for the cities reference the council was given an expert advisory panel.

Senator LUDLAM—Yes. I think I found them.

Ms O'Loughlin—The expert advisory panel is chaired by Brian Howe, and the deputy chair is Lucy Turnbull. That panel advises the council, which then reports to COAG. A very important part of the process, to step back a bit, is that when COAG gives us a reference it varies in the detail of how to do that reference. Some of the references are quite detailed and prescriptive, if you like. I will mention here that the Intergovernmental Agreement on Federal Financial Relations, in schedule C, sets out quite a fair bit of detail with associated agreements on how we are to assess a report to COAG on the national agreements. For the cities reference it does not have as much detail—and nor do some of our other references. What we do in that instance is a draft framework on how we think we will approach that reference, and then we consult with the jurisdictions. So we get agreement with the jurisdictions to an approach where there are a lot of processes or steps that are not given to us by COAG.

For the cities reference we went to jurisdictions earlier this year with a work plan. What has been agreed under that work plan is that the first step is that they will provide to us contextual material on each of the cities, because they are so varied. So they gave us their existing planning documentation, sociodemocratic and economic information about all the different cities. It was up to them what they wanted to give us. So we got a lot of information from them. Then what we agreed with each of them—and we sent this out for consultation—was that we would put together a template on the nine national criteria which went to what sort of information the council would be interested to know and that would show us their response to those nine

national criteria. So we had a template and a draft. We consulted with the jurisdictions and made changes. We sent that template out to jurisdictions with three months to report to us. The three months ends at the end of December, when they will give us back a lot of information against the template.

In the meantime, these past couple of months we have undertaken site visits. This has been with the expert panel and members of the secretariat. We have gone to each of the capital cities. We have been in their hands in that we have said to them, 'We're coming to your town. What meetings do you want us to set up? Who do you want us to talk to?' In addition, we would have a day where we met with key interest groups like the Property Council, environmental groups and social groups, depending on the city. We have finished that process just this week. That will also feed into our interim reports.

What happens next is that early next year we draft a set of interim reports for each capital city. Using the contextual information, the site visits and the information they provide in their template responses, we do a draft, as I said. It goes through the panel, then to the council. It then goes out to the jurisdictions for a formal one-month consultation period where we say to them, 'This is what we have put together. We'll probably have gaps that we would like you to fill in where we did not get all the information. Did we get it right?' They then come back to us and we have a final of that interim report.

In the lead-up to the final report that goes to COAG, that interim report says, 'The council's view about the consistency with the nine criteria is A, B, C, D, E, F,' depending on the different cities. As well, the jurisdictions then get a chance to say, 'On this criteria, where the council thinks there is more work to be done, the city agrees. Furthermore, we have already undertaken that in July next year we are going to have a review.' Or they might say, 'Our documentation comes out in February next year, which will just miss our time frame. We're on to it and we're doing this.' So they get a chance, in other words, to update the information and put in their plans in response, if they wish, to the interim report. We then put all that together and do a final report.

Senator LUDLAM—To COAG. Chair, are you okay for me to dwell here a bit longer?

CHAIR—Yes.

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. When you say the jurisdictions, do you mean the lord mayors of the cities? Apart from Brisbane, I guess, they do not speak for the vast majority of the city.

Ms O'Loughlin—No, they do not. When we say 'jurisdiction' in the COAG Reform Council context we are always talking about the states, the territories and the Commonwealth, because that is who we are established by and who we report to. You are right: in the capital cities context we have consulted with the local government in every capital city. And you are right again: who that consultation is with varies enormously. We have also consulted with the peak body, the Council of Capital City Lord Mayors. But it is a consultation and our reports go to our jurisdictions of the Commonwealth and the states and territories.

Senator LUDLAM—I think you mentioned local environmental NGOs before, or you said something along those lines. Did you just notify them, or is there a whole page worth of calls for submissions that I have missed?

Ms O'Loughlin—No, there is not a submission process for this. The important thing in this is to refer back to where I said that we agree a process with the jurisdictions. In reference to this, something that we need to agree with them is what they are comfortable with, happy with and will agree to, basically. In this instance, it

was a process of meeting with the state and territory governments and the peak interest groups during the site visits, but it was not on a call-for-submissions basis.

Senator LUDLAM—I would like to come back to this at the end, if I may, chair, but in case I do not get another go: there is no apparent reason why what looks to me like a really good process should be completely invisible. Like I said, there is one webpage on this. Maybe you can take back to the folk you work with the idea putting some of this material into the public domain as soon as you can. There is a lot of really good sustainable cities expertise in the country, and I suspect I am not the only one who is unaware of exactly what this process is for.

Ms O'Loughlin—Certainly I will take that back, Senator, and will put forward your suggestion.

Senator LUDLAM—That would be appreciated, thank you.

CHAIR—Was the expert panel that was struck for the purpose of this cities inquiry given to you by COAG?

Ms O'Loughlin—Yes. COAG agreed the panel members, and so they decide the membership.

CHAIR—At what point was it decided that an expert panel was required? Did that come to you with a reference?

Ms O'Loughlin—It did. 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.

CHAIR—I am just trying to get some sense of the speed with which this process took place.

Ms O'Loughlin—Yes, indeed. I cannot remember is the honest answer, and if I guess at it I am fearful that I would get it wrong. May I come back to you with that?

CHAIR—Yes.

Senator PAYNE—Ms O'Loughlin, can you indicate to the committee why you are able to appear in front of this committee but not in front of an estimates committee of the Senate?

Ms O'Loughlin—We are able to appear in front of the estimates committee. Not the last estimates but at the estimates before, we were asked. Talking to my chairman, Paul McClintock, he suggested that I approach the Senate estimates committee and say, 'If it is that the senators on the estimates committee want more information about the COAG Reform Council, that could be provided in a briefing,' and that would be his preference, given that we are independent of individual governments and report to COAG. Although, we are funded by all the governments. It is an unusual relationship with governments. That was the context in which I went back to the committee and I put forward my chairman's suggestion that we have a briefing. At the time, I thought it was accepted that that was what we would do. We have tried since then to set up a briefing with you through your office—

Senator PAYNE—It is actually not about me, Ms O'Loughlin; it is about the Senate estimates committee process. It is about the Senate Finance and Public Administration Committee, which is a standing committee of the Senate.

Ms O'Loughlin—It is. I am just trying to explain how it happened that we took this approach. In the context of saying, 'If it is an understanding of an unusual body, then the chairman would be happy to come and give a briefing,' and we understood at the time that that was accepted.

Senator PAYNE—It is about accountability, actually. It is about the sorts of questions that Senator Ludlam has just had the opportunity to ask you but other senators have not had an opportunity to ask you. It is about multijurisdictionally funded bodies, which is not an attractive term of phrase, which are prepared to and do appear in front of Senate committees for the estimates process for the purposes of being accountable. I am afraid that I am at a loss to understand why the COAG Reform Council was not included in that, or does not see itself as being included in that.

Ms O'Loughlin—All I am saying is that I do not think we did not see ourselves as being included. The chairman thought that, if what was wanted was a background briefing, that was what he was offering.

Senator PAYNE—But that is not the case. That is not a public process. It is not accountable process. It does not allow the Senate to ask questions in relation to the work of the council, or to the funding of the

council, for that matter. The process of discussing the funding of the council through the members of the Department of the Prime Minister and Cabinet—who have, I think, in good faith, endeavoured to address questions—does not really give the sort of information about even the issues that Senator Ludlam has pursued with you today.

Ms O'Loughlin—It was an approach that the chairman took in an understanding that, perhaps, was not a full or correct understanding, or indeed something in this situation where it has come up again—as I say, I am appearing before this committee and I would appear before the Senate estimates committee. He offered a briefing as the chairman. As you know, he is not someone who would appear before Senate estimates but I would. As the chairman was offering a briefing, he could not go to Senate estimates hearings but I can and I will.

Senator PAYNE—In one of the recent reports of the council—forgive me, I have not read as many of them as you have, I am sure, but I have read quite a number of them in recent times—there were some quite startling observations made in relation to the difficulties of obtaining data and the timeliness of that data. I remember one in particular which related to health data being seven years old and how hard it is for you in terms of the assessment of the national partnership agreements and how they are operating to respond constructively from the council's perspective. What sort of response do you get from the jurisdictions when you make those observations? Are they responsive to the council's reports?

Ms O'Loughlin—The council reports go to COAG. The recommendations we made in the first two reports that COAG has considered, on the national agreements—in all our national agreements reports it would be fair to say that we have talked about data issues. The first two were on education and on skills and workforce development. Those recommendations were accepted by COAG. COAG has also agreed to a process that will consider all those data issues. The Heads of Treasury Committee, which is called HOTS—

Senator PAYNE—They wish!

Ms O'Loughlin—has been asked to do a review of the national agreements and national partnerships and the performance reporting framework, particularly on the indicator and availability of data, and to report to COAG by the end of this year. They are doing that. Our recommendations have gone to that committee and we have also had consultations with the committee on their recommendations.

Senator PAYNE—I am not sure I am following that time line. When do you expect some sort of response from them?

Ms O'Loughlin—They will give the report to COAG at the end of the year, and then it is over to COAG.

Senator PAYNE—That is reassuring! At the end of this calendar year?

Ms O'Loughlin—Yes.

Senator PAYNE—One observation I would make, which I think was provided to us by one of our earlier witnesses today, is about the power of the Commonwealth under the Constitution, section 51(xi), in relation to census and statistics. I must admit I am sure my attention was drawn to it at law school but not recently, until today. Perhaps the Commonwealth might want to exercise their power in that regard to obtain more up-to-date statistics, one does not know. Ms O'Loughlin, it is possibly not immediately within your purview but a couple of the submissions that the committee has received go specifically to COAG and its operation and they talk about perhaps formalising its legal status statutorily. Has the council considered that in any of its operation?

Ms O'Loughlin—The council does not have a view on the status of COAG. The view of the council would be that those are issues for COAG to determine.

Senator PAYNE—Thank you. I understand. I thought I would just check that with you.

CHAIR—You have not asked for a reference on that issue? You have not seen the need for advice as to whether that is something that you should consider?

Ms O'Loughlin—No.

CHAIR—In any of the reports you have done have you made any recommendations about the need for the partnerships that have been signed for there to be a change of the mechanism which would allow you to do your work more effectively—in other words, with a view to the need to audit these programs, there would be an improvement in the nature of the agreements that are signed between the states and the Commonwealth which would permit you to provide the kind of oversight which the council is requiring? Or do you think those

arrangements—the partnerships agreements and the various agreements you are looking at—are adequate in that respect?

Ms O'Loughlin—We have a reference in the Intergovernmental Agreement on Federal Financial Arrangements that says that the council may advise COAG on ways to improve the performance reporting framework. We take that reference as meaning—and probably going to some of the issues you are considering here—is the intent of COAG being well serviced by the agreements in front of us? So using that reference we do make recommendations on a number of issues, some of which Senator Payne has already mentioned today. That is where we have gone to the issues around the data in saying that we are an annual accountability body on the performance of governments and we have a set of performance indicators given to us and a set of data given to us in most instances. If we feel that data—and Senator Payne gave a good example—is not timely enough, not robust enough and in some cases not comparable enough, we do say that using that reference.

We also use that reference more broadly. Some of our recommendations go to whether we think conceptually the agreements are robust enough for the purpose for which they have been given. An example here would be that COAG has set an outcome that all children attend and benefit from schooling. That is an outcome that we can understand what would be in COAG's mind more or less and then we look at the set of indicators and the data we have to support reporting against that outcome. If we do not feel that by just using what has been given to us—the indicators and the data—really does help COAG know if there is progress being made towards that outcome, we also say that. Because what we take as COAG's intent is progress performance of governments towards outcomes.

This is under the national agreement space whereas the very major difference with these agreements in the service sectors they cover is that they are outcomes agreements, so they are not prescriptive about what has to happen; they are prescriptive, if you like, about where we should be heading, what we should be attaining. If we feel that we cannot tell COAG and the governments of this country if we are making progress towards that outcome, that is when we say conceptually we think the agreement is not robust enough.

Senator MOORE—I want to clarify a couple of things, because I am struggling a little bit in terms of the process. You talked to Senator Ludlam about the cities project and how it all worked. I found that very useful and will be interested to read the *Hansard* and see how that goes. In that answer I thought you said that when something is referred to you, you then work out how you are going to do it. Is one of those steps working out the data models you will need?

Ms O'Loughlin—It differs according to what has been referred to us. The cities reference is in a communique with an attachment. The national agreements which I have been talking about, where we have been talking about the data, not only are referred to generically in the Intergovernmental Agreement on Federal Financial Relations but also all have their own individual agreement. So in that case there is a lot of guidance about what to do. In the case of the national agreements not only are the outcomes determined by COAG but COAG also agrees the set of performance indicators and the data or the measures that support that indicator.

Senator MOORE—That is before the reference.

Ms O'Loughlin—That is before the reference. When we get the reference we say, 'To report against this outcome COAG has agreed,' for example, 'three performance indicators and a set of data supporting those three performance indicators.' Having received that —this is in relation to what I was saying more recently—we still have, under the reference of advising COAG on ways to improve the performance reporting framework, an opportunity to say, 'We think,' or 'We don't think' or 'We think we could improve,' or 'The performance indicator here isn't robust enough,' or 'The data isn't timely enough,' or 'It's not comparable.' So although they have given us the set of data and performance measures, we can still comment on them and suggest that in some instances we think we need better—and we do.

Senator MOORE—Hopefully, that would be early in the process so that as your review goes on you will be able to—

Ms O'Loughlin—That is right. We did that in all our baseline reports.

Senator MOORE—So, for instance in the National Indigenous Reform Agreement, which is one that you have been working on over a period of time, the data sets that you require to do that would have been agreed.

Ms O'Loughlin—They would have; yes.

Senator MOORE—It is just that when I think back to Productivity Commission reports—in my mind I compare, to an extent, your work with theirs—we have seen a couple, particularly in the Indigenous health

area, where the data has been completely non-comparable and we have had blanks in some whole areas. So you are attempting to not have that happen by setting it up early.

Ms O'Loughlin—That is right. It is interesting. All the data is collated by the Steering Committee for the Review of Government Services Provision. The secretariat for that is in the Productivity Commission. It is collated by that steering committee for the national agreements and they send it to us. The importance of that is that it is cross-jurisdictional body. Going to the comparability of the data, they also give us a statement of the data quality associated with all the data they give us. So they will say, for example, 'Here's the data but it is not robust enough to do Indigenous comparisons across jurisdictions.'

Senator MOORE—Unfortunately, that is a given. In terms of the process around interaction with other organisations such as the Productivity Commission, is that set out?

Ms O'Loughlin—Sometimes it is. For the Steering Committee for the Review of Government Services Provision, it is.

Senator MOORE—Is that on the web site?

Ms O'Loughlin—This is all set out in the agreements. The agreements are all on the COAG website but we have links to them as well. There are other agencies that are very important to us and they are mentioned in the Intergovernmental Agreement on Federal Financial Relations. We certainly have close relationships with them on that. The best example I can give is the Australian Bureau of Statistics and also the Institute of Health and Welfare, because they are data providers and we need their advice when we do our analysis.

Senator MOORE—The funding that would be required to use them, in any of the work that you are doing, would be part of the arrangement for your funding basis.

Ms O'Loughlin—It is.

Senator MOORE—We work with the Institute of Health and Welfare a lot in the health and ageing portfolio and their funding is very much dependent on project. So it would be linked in their annual report by work for the COAG reform council.

Ms O'Loughlin—Indeed. We have memorandums with them for advice, for quality assurance.

Senator MOORE—I just want to follow up on the question of Senate estimates, because it is important. I am a regular attendee at the finance and public administration hearings and I just want to clarify how many times you have been invited to Senate estimates. I use the term advisedly.

Ms O'Loughlin—Two times.

Senator MOORE—You have been invited twice. Has that been in writing or by phone?

Ms O'Loughlin—It has been through emails and we have also been contacted by phone by the secretary for the committee.

Senator MOORE—Are you aware that there is still a lack of agreement about the process? You were in conversation; what is your understanding of the position?

Ms O'Loughlin—My understanding of the position now from last Senate estimates, because of the questions that were put on notice, is that the senators did not feel that the offer of a briefing from the chairman was adequate, if I can put it in that regard, and therefore, I think quite rightly, they are requesting our attendance. Next time, if we are asked, the secretariat will attend.

Senator MOORE—Sure, and that is a regular process. I just wanted to make it clear for myself that, in terms of the current process, there has been an interchange. At the end of the last process it was clear that the Senate committee was unhappy. Your dealings have been with the Senate secretariat for Finance and Public Admin and you are waiting for further advice. Is that right?

Ms O'Loughlin—Yes. We did get a question on notice, which we have respond to, and I think that gives us a sense of the Senate's desires.

Senator MOORE—Thank you.

Senator PAYNE—I assume, Ms O'Loughlin, that response has been passed on to the committee; nevertheless, thank you for responding.

Senator LUDLAM—Could we just take it as read that Finance and Public Admin will see you in February?

Ms O'Loughlin—Subject to invitation.

Senator LUDLAM—It might be a bit cheeky to issue an invitation on their behalf, but we can at least create the expectation that we will see you there. I have a question about the name COAG Reform Council. I have learnt a lot about you in recent times, and thanks for providing the material in the earlier briefing to the committee. It might be assumed from the name that part of your task is to consider reform of COAG itself, but that does not really seem to be the case, does it? You are predominantly concerned with the reform of the Federation and the portfolios that you are considering?

Ms O'Loughlin—Yes. We are a council for COAG. We are the reform council for the COAG reform agenda, is a better way to put it.

Senator LUDLAM—So who does the thinking on the reform of the institution of COAG?

CHAIR—Us, perhaps.

Senator LUDLAM—Which is another way of saying nobody until recently.

Senator PAYNE—I have been doing lots of thinking, Senator Ludlam!

Senator MOORE—Self-evaluation!

Senator PAYNE—It's not going well then!

Senator LUDLAM—I will let you speak, Ms O'Loughlin.

Ms O'Loughlin—It is not an issue for us. COAG is, if you like, owned, created, run by first ministers. So the work for COAG and how they define their agenda and the agreements they make are COAG decisions, first ministers' decisions.

Senator LUDLAM—It is internal, okay. Thank you, that is helpful. I want to come back and humbug you just a little bit more on the city stuff because I feel information starved on it and this is the first opportunity I have had. Can you tell us who is the lead author, if there is such a thing, on the report that you are producing on cities?

Ms O'Loughlin—It is a COAG Reform Council report. Although the council is advised by the expert panel, the report that goes to COAG is a COAG Reform Council report.

Senator LUDLAM—Will it have a lead author?

Ms O'Loughlin—The council members; all of them will sign off on it.

Senator LUDLAM—How many FTEs does the council employ?

Ms O'Loughlin—We have at the moment an establishment of 36. Six of those, though, are for the cities agenda so they are short term, for two years. Our ongoing establishment is 30.

Senator LUDLAM—You have six FTEs, short-termers, working on the cities piece in particular, but there will not be a lead author as such, it will be a collective effort?

Ms O'Loughlin—We do draft reports to the council—that is the secretariat's job. They go via the expert panel to the council and it is the council who determines whether those are the reports that are their reports. They add to them, they minus from them, so they are the council members' reports.

Senator LUDLAM—When COAG sees it, will it be seeing it for the first time or will there be a process whereby COAG itself or the relevant ministers or first ministers get to see a draft of the report and potentially make changes to it?

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.

Senator LUDLAM—I might just put that request to you formally because I was probably a little bit offhand before. I would also like any information at all that you can provide us with about the meeting cycle or any of those issues. Are you getting formal or informal input from the Major Cities Unit?

Ms O'Loughlin—It is not formal in the sense that they do not make submissions. It is informal in the sense that we meet with them every now and again. A few weeks ago there was a delegation from the United States, for example, across a number of different areas we were working on, and the cities unit hosted a number of people who would be interested in hearing them. So we come together on events like that, where people are talking about those issues. But it is not a formal arrangement. It is just people who know a lot about the same issues getting together.

Senator LUDLAM—I guess it is a relatively small community. So the Major Cities Unit has not been tasked with providing any research or inputting any of their expertise? They have been doing some quite valuable work in exactly the same space.

Ms O'Loughlin—They are a Commonwealth agency, so they would do that for the Commonwealth. The COAG Reform Council—

Senator LUDLAM—Hold on. These are the same cities that we are talking about. They are not different cities.

The **Ms O'Loughlin**—It is not like they work to us or we work to them. We work to COAG and they work to the Commonwealth, the minister—which is not to say that we do not read their work. Their work naturally influences the Commonwealth and, as one of our jurisdictions, we engage with the Commonwealth on these issues.

Senator LUDLAM—I guess that is a fair answer.

Senator PAYNE—The Australian Local Government Association is represented on COAG. Do you have a local government representative or someone with that background on the council?

Ms O'Loughlin—No.

Senator PAYNE—So, when you are doing this cities review or report, how do you engage with local government?

Ms O'Loughlin—The expert panel has a person with local government expertise—Jude Munro, former CEO of Brisbane City Council. In addition, when we have done our site visits, we have engaged always with the local governments.

Senator LUDLAM—I am trying to work out how accessible this process is. Maybe that was why I was asking who the lead author is, because I am trying to get a grip on who is actually working on it. If I were to ask them for a briefing, for example, would I get one?

Ms O'Loughlin—Yes.

Senator LUDLAM—The cities people?

Ms O'Loughlin—Yes.

Senator LUDLAM—Can I ask you that now?

Ms O'Loughlin—Yes.

Senator LUDLAM—Thank you. That is excellent. I might leave it there, but I note that when this process is finalised at the end of next year you are going to come up with benchmarks against which to assess funding. Is that the eventual—

Ms O'Loughlin—No.

Senator LUDLAM—I read that somewhere—that infrastructure funding will eventually be allocated at least according to some of the benchmarks that you folk are setting. You would hope so, anyway.

Ms O'Loughlin—What we have been asked to do is assess the capital cities' strategic planning systems for consistency against a set of nine national criteria. That is our role, so we will assess the strategic planning systems for consistency against criteria. The Commonwealth has said that it will use our report to inform it for infrastructure funding, but we do not set the benchmarks. They are not benchmarks; they are criteria, which are quite different. Criteria are something like integration across capital cities planning, while benchmarks might be associated with travel time or environmental standards. So we do not report against benchmarks but rather against consistency with criteria.

Senator LUDLAM—Because it is a feature of some of these national agreements that benchmarks are set and then there are reward payments or different ways of incentivising or whatever the opposite of incentivising is.

Ms O'Loughlin—That is quite true. It is important because the cities report does not have incentive or reward funding directly linked to it like some of the other agreements do. We have a set of six national partnerships in health and education, and the Seamless National Economy national partnership. Those seven in the agreements that COAG signs off on have an agreed set of benchmarks, milestones and targets, depending on the agreement. The Commonwealth has agreed that, with reward funding associated with those, it is our role is to say to COAG whether the jurisdictions have met those predetermined milestones or targets. The Commonwealth has a direct link to that and the agreements give you the exact amount of money that is available. The cities reference does not have that direct link to reward funding.

Senator LUDLAM—I have got the sense—and maybe I did not read it; maybe I just made it up—that by the end of this process the Commonwealth might be in a position to do just that.

Ms O'Loughlin—That is true. In the communique the Commonwealth says that, after we have given our report, they will use those reports and, in light of what our findings are, consider infrastructure funding. It is not a definitive agreement that says, 'Here's a benchmark or a target or a milestone—

Senator LUDLAM—Hospital waiting times or something.

Ms O'Loughlin—yes, indeed—and there is X million dollars associated with it.' All the governments have signed those agreements. The cities is a different reference.

Senator LUDLAM—This is my last question, because I do not know if this is only of interest to me: is it too late to amend the criteria or would that make a mess? You have left energy out, which I think is probably quite important for urban planning.

Ms O'Loughlin—To amend the criteria you would have to go back to COAG. They are COAG criteria.

Senator LUDLAM—That is a no; I am going to take that as a no. You have left energy out. There are greenhouses here; oil vulnerability is not. I would have thought in urban planning that was a bit of a lapse.

Senator PAYNE—Does that mean COAG has left energy out?

Senator LUDLAM—Sorry: not you; you have got this reference.

Senator PAYNE—COAG has left energy out, which is interesting I think, Senator Ludlam.

Senator LUDLAM—Yes, and you are not allowed to say anything in response to that but presumably it is not an exhaustive or exclusive list of things you can consider. I really hope not because if you have left energy out of a two-year—maybe one of the consequences of having it completely behind dark glass that nobody can see in is that things might get left out.

Ms O'Loughlin—There are two other references in the cities which we have not spoken about. What we have been talking about so far is consistency with a set of nine national criteria, which are spelt out in the communique. The two other references are the COAG Reform Council advises COAG on best practice in capital city strategic planning systems and continuous improvement in capital cities strategic planning systems. They are very wide references and, in that regard, the panel and the council just this month are considering how to put a process in place for those two references. They may be processes that are also interesting for this committee and you, Senator, to follow up.

Senator LUDLAM—And relevant. I will take you up on that offer of a briefing that I asked for, and maybe if you can just tug at their sleeves and ask whether energy is going to be in here. I feel like I am persistently asking about this in committee and I have spoken to Mr Deegan in estimates hearings and so on, but we seem to be completely unprepared for oil vulnerability. This review—and this is why I have been pursuing it a fair bit today—is a really good place to address that, but it is not in there. I will leave that with you.

CHAIR—We have wandered far from the topic.

Senator LUDLAM—No. Cities are part of the Commonwealth, but they get left out.

Senator MOORE—In talking to our committee you have explained the role of the reform group. Is that part of your job? Is there interest in it, in terms of whether people want you or your group to explain who you are and what you do? Do you get requests for that? Can you tell us a bit about that?

Ms O'Loughlin—Yes. This is something that our chairman is very diligent and keen about: we are a public accountability body. All our reports are on our website and we are often asked to speak at conferences or seminars or to interest groups. We do quite a bit of that. We are very keen that interest groups are interested in us. At the moment the business interest groups seem to have the greatest interest. I think that is because the COAG agenda on competition regulatory reform has been very long. The seamless national economy agreement comes on top of other reform agreements, so there are very aware and well-educated interest groups. We get a lot of interest in our reports from business groups and our chairman speaks to the Business Council of Australia, CIDA and many other groups. We are very keen that other interest areas get engaged as well. We try very hard to reach out. We accept invitations. We speak at quite a number of events. We have now done our baseline reports. It would be fair to say that our baseline reports are perhaps not the most accessible, and nor are they the most riveting reading, to be frank. But now that we have the baseline reports—because you need to establish them—we hope that our second report and our subsequent-year report, particularly in the area of national agreements, will be much more interesting. As we report on change over time, the reform agenda becomes much more interesting for us. The second year is perhaps a little bit too early, because you only have two data points, but once you get to three data points, let alone four or five data points, and you are reporting on performance of governments—not just comparing each other, such as New South Wales versus Victoria, but New South Wales versus New South Wales and their performance over time—the council becomes very interested in the change over time. We also think a wider proportion of people would be interested in following it.

CHAIR—Thank you very much for coming along this afternoon. We have detained you for longer than we anticipated, so thank you for your patience. I do not think you provided a submission to the committee. You might care to take the briefing material that you gave us on the last occasion and perhaps turn it into a submission so that we can put it on the public website.

Ms O'Loughlin—Certainly.

CHAIR—That would be fine. We would be happy to take it as it is but, if you want to clean it up or do anything you think is appropriate, that would be helpful.

Ms O'Loughlin—We will do that. Thank you very much. We will set certainly put some text around it and make it more accessible.

CHAIR—And, again, thank you for coming.

Ms O'Loughlin—Thank you very much.

Committee adjourned at 2.34 pm