

THE COUNCIL OF AUSTRALIAN GOVERNMENTS: A NEW INSTITUTION OF GOVERNANCE FOR AUSTRALIA'S CONDITIONAL FEDERALISM

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I TOWARDS A CONDITIONAL FEDERATION

Addressing a meeting of the Committee for the Economic Development of Australia ('CEDA'), Lindsay Tanner, the Commonwealth Minister for Finance and Deregulation, declared that '[a]cross Australia there is recognition that our federation is a mess'.¹ He went on to confess that he had once been an advocate of abolishing the States but now thought that this was neither practical nor desirable. Nevertheless, he professed his certainty that a much more centrally directed federation is necessary in a technologically advanced and globalised economy.² The Minister's comments were made in response to outcomes of the Rudd Government's 2020 Summit which saw federalism, and especially ideas for its reform, take centre stage in the deliberations about shaping a long-term strategy for the nation's future. Not surprisingly, federalism preoccupied the Summit's Governance stream, which identified the reinvigoration of the federation as one of its 'five big ideas'.³ However, it had also been identified as a 'priority theme' for the group considering the Future of the Australian Economy,⁴ and featured unexpectedly (and more colourfully) when Tim Fischer, the convenor of Future Directions for Rural Industries and Rural Communities, began his report to a plenary session with the comment 'we almost abolished the

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1 Lindsay Tanner, 'Lunchtime Address to the Centre for the Economic Development Australia' (Speech delivered at the Centre for the Economic Development of Australia, Brisbane, 10 June 2008) <http://www.financeminister.gov.au/speeches/2008/sp_20080610.html> at 2 August 2008. See also Lindsay Tanner, 'Central control, local delivery', *The Australian* (Sydney), 10 June 2008, 12.

2 Tanner, 'Lunchtime Address', above n 1.

3 Commonwealth, *Australia 2020 Summit Final Report* (2008) 350 <http://www.australia2020.gov.au/final_report/index.cfm> at 3 August 2008.

4 Ibid 44.

states'.⁵ Clearly, the existing structures and procedures of federalism were regarded by most of the delegates as problems to be overcome if Australia was to progress economically and socially.

Suggestions for a way forward included a 'clean sheet of paper' review with an expert Commission to lead reform, either in the shape of a new Federation Commission or an expanded version of the Productivity Commission. A new intergovernmental umpire in the shape of a National Cooperation Commission was mooted. Nationwide harmonisation and standardisation of regulation were seen as urgent. Overall, the common theme was the need for a new mix of responsibilities between the Commonwealth, the States and local government, but one in which national objectives and the requirements of the national economy would be paramount.⁶

The outcomes of the Summit reflect the extent to which discussions of Australian federalism have moved from the realm of politics and constitutional law to become focused on its capacity to support a fully national economy and underpin economic prosperity. This development highlights the increased involvement of corporate Australia in debates on the future structure and operation of the federation, in particular through the work of the Business Council of Australia ('BCA').⁷ For the BCA it is clear that '[t]he extent of the problems and dysfunctions of the current system of federal-state relations ... is such that it has become a major barrier to future prosperity. The challenge of reforming federalism has now become an economic imperative'.⁸

There is a common theme emerging in these recent public discussions of federalism. On the one hand, there is recognition of the constitutionally embedded nature of Australian federalism and perhaps even a willingness to accept that it provides an important diffusion of power within the national governmental system, as well as a means of encouraging policy diversity and facilitating regional balance across the continent. On the other hand, there is an assumption that federalism is inherently inefficient. The result is growing support for a modern form of the federation which might be described as 'conditional federalism'. 'Conditional' in the sense that it should be maintained as a system of government so long as it meets the conditions necessary for an efficient national economy; also, because its operation should be regulated by 'conditions' imposed by the central government.

In the case of the 2020 Summit, this led to calls for new constitutional arrangements or the establishment of new extra-constitutional structures or agreements which can re-design the roles and relationships between governments within the federation. However, very real changes in the extra-constitutional machinery of governance which have been developing over the past decade are

5 Ben Doherty, '2020 The Ideas Summit – Outcomes and Flashpoints: Rural Australia', *The Age* (Melbourne), 21 April 2008, 5.

6 Commonwealth, above n 3.

7 Business Council of Australia, *Reshaping Australia's Federation: A New Contract for Federal-State Relations* (2006) <<http://www.bca.com.au/DisplayFile.aspx?FileID=64>> at 3 August 2008.

8 Ibid iv.

moving the federal relationship in the direction that the Summiteers and other reformers believe desirable.

With the exception of a provision to establish an Interstate Commission to deal with matters relating to trade and commerce, the founders of the *Australian Constitution* did not establish formal machinery to deal with the interaction of Commonwealth and State programs. However, the need for extra-constitutional machinery was soon apparent. In the case of government borrowing, it was formalised by way of the establishment of the Australian Loan Council, initially as a voluntary arrangement in 1923 and then as a formal arrangement after the successful referendum in 1928 which enabled the Commonwealth to 'make agreements with the States with respect to the public debt of the states'.⁹ While meetings between the Prime Minister and the Premiers and the Commonwealth and State Ministers predated Federation,¹⁰ they continued to develop in step with the political agenda of the day to become part of the broader structure of governance within the framework of our *Constitution*.

This paper argues that the Council of Australian Governments ('COAG'), which developed from the Special Premier's Conferences in the early 1990s,¹¹ has brought depth and strength to the extra-constitutional machinery of federalism. Further, it suggests that COAG is particularly significant for the governance of the Australian federation because it has simultaneously reinforced cooperation between the Commonwealth and the States, while at the same time embedding the conditional nature of the federal relationship.

The conjunction of a new Commonwealth Labor Government facing Labor administrations in all of the States and Territories has brought new prominence to COAG and given it new authority in its role of 'driving a new wave of economic and social reform through cooperative federalism'.¹² In the current political circumstances its role in the governance of the federation is perhaps taken for granted. However, despite his initial reluctance to engage with COAG, former Prime Minister John Howard had a significant role in shaping this new system of governance. Howard's unexpected embrace of COAG set the ground for its central role under the incumbent Prime Minister Kevin Rudd; this has seen it become a key coordinating and agenda-setting institution in relations between the Commonwealth and the States, and thus a key institution of federalism.

Part II of the paper begins with a discussion of federal governance under John Howard. Then, using material from recent research, Parts III and IV examine why COAG came to suit John Howard's agenda as well as the needs of the States. Part V draws attention to the growing network of working parties and committees of officials operating across State borders that are growing around the COAG meetings, which might be characterised as a 'nascent bureaucracy of

9 Cheryl Saunders, 'Government Borrowing in Australia' (1989) 17 *Melbourne University Law Review*, 187, 193.

10 Campbell Sharman, 'Executive Federalism' in Brian Galligan, Owen Hughes and Cliff Walsh (eds), *Intergovernmental Relations and Public Policy* (1991) 23, 26.

11 Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (1998) 43–4.

12 Commonwealth, *Budget Paper No 3: Australia's Federal Relations 2008–09*, 11.

the federation'.¹³ The paper concludes by noting that COAG, which began as a means for encouraging cooperative federalism, has in fact become a vehicle for what might be described as cooperative centralism and one which has played a part in entrenching executive federalism. In this respect, it is suggested that federalists may have to accept that while federalism will remain as the basis for national governance, it will increasingly be played out in a conditional federation regulated from the national level.

II THE GOVERNANCE OF FEDERALISM UNDER HOWARD

The Howard Government inherited a set of Commonwealth–State relations best described as ‘regulatory federalism’, the origins of which date principally from the Keating Labor Government of 1993–96. In a regulatory federation, the States resemble ‘regulated agencies operating with varying degrees of collaboration or friction within Commonwealth-dominated clusters of regulatory regimes’ that in effect impose national conditional regulations.¹⁴ In some arenas, these regimes operate via the familiar route of Specific Purposes Payments (‘SPPs’) from the Commonwealth government. For other arenas, they operate in the form of national cross-governmental regulatory systems that have been, or are in the process of being, created, and which draw on both Commonwealth and State powers across a gamut of activities: energy, water, transport, companies and securities regulation, food standards, vocational education and training standards, professional accreditation and recognition, to name a few.¹⁵

However, while the Howard Government may have inherited these arrangements, they were also significantly enhanced and strengthened during his four terms of office. Seen through the prism of the 2007 election year, and a campaign that sought to highlight the ‘failings’ of State Labor governments, John Howard’s enthusiasm for centralism and disdain of the States might well be taken for granted.

In any event, while the Howard Liberal–National Coalition faced entrenched Labor governments in every State and Territory after 2002, this intergovernmental partisan balance can only be a partial explanation for the notable centralist shift. A deeper explanation also needs to take seriously Prime Minister Howard’s understanding of and commitment to a new conceptualisation of conservative nationalism.¹⁶

In April 2005, six months into his fourth term, Howard evidently thought it timely to set out the parameters of this new conceptualisation through an

13 Interview with anonymous senior Commonwealth official (Canberra, 9 February 2007).

14 Andrew Parkin and Geoff Anderson, ‘The Howard Government, Regulatory Federalism and the Transformation of Commonwealth–State Relations’ (2007) 42 *Australian Journal of Political Science* 295, 296. See also Andrew Parkin and Geoff Anderson, ‘Reconfiguring the Federation?’ in Chris Aulich and Roger Wettenhall (eds), *Howard’s Fourth Government: Australian Commonwealth Administration 2004–2007* (2008) 95, 106–7.

15 Parkin and Anderson, ‘Regulatory Federalism’, above n 14, 304–08.

16 *Ibid.*, 308–10.

historical and philosophical interpretation of Australian federalism. 'I am', he said, 'first and last, an Australian nationalist', somebody who has 'never been one to genuflect uncritically at the altar of States' rights'. Howard conceded that 'the federal structure of our nation will remain', as some form of federalism is an entrenched Australian reality, but also implied that entrenchment seemed to be its principal claim to legitimacy, and 'if we had our time again, we might have organised ourselves differently'.¹⁷

This argument was to become a familiar one. For example, in July 2007 Howard explained his decision to proceed with an imposed Commonwealth regime on the Murray–Darling Basin in the following manner:

You'll only solve this problem if you effectively obliterate the state borders. This is something that transcends the parochial interests of the states. ... I mean, we are [a] nation, we are not a collection of states and the Australian people are tired, sick and tired of state parochialism on issues like this.¹⁸

A month later, Howard took the argument a step further. 'Aspirational nationalism' was his proclaimed goal, he maintained, and a re-elected fifth-term Howard Government would be 'applying this spirit to the governance of the Federation'. While this would sometimes involve leaving policy areas entirely to the States, and sometimes would involve cooperative federalism, it would also on other occasions 'require the Commonwealth bypassing the states altogether and dealing directly with local communities'.¹⁹

This articulation of 'aspirational nationalism' served at the time as a justification for the provocative intervention by the Commonwealth into Tasmania's health system to ensure that Devonport's Mersey Hospital (in the marginal electorate of Braddon) remained open. To dismiss it as an expedient piece of rhetoric for short-term political purposes would, however, overlook its resonance with the kind of Commonwealth-led reconfigured federation that had been emerging during John Howard's decade in Prime Ministerial office. The 'nationalism element' of the 2007 speech was not new; this had been foreshadowed in the 2005 version (and elsewhere). Rather, it was the complementary endorsement of 'localism' that was new; the commitment to 'town and team, neighbourhood and network'. Alongside 'nationalism', Howard argued that 'localism' is one of the 'two powerful trends in Australian society today'. There was apparently not much room for the middling level of the States in this world of 'nationalism' and 'localism': 'the old rigid state monopoly

17 John Howard, 'Reflections on Australian Federalism' (Speech delivered at the Menzies Research Centre, Melbourne, 11 April 2005) <http://www.mrcld.org.au/research/economic-reports/australian_federalism_final.pdf> at 3 August 2008.

18 John Howard, *Press Conference, Commonwealth Parliamentary Offices, Perth, 24 July 2007* (2007) Parliament of Australia <<http://pandora.nla.gov.au/pan/10052/20080118-1528/pm.gov.au/media/Interview/2007/Interview24458.html>> at 3 August 2008.

19 John Howard, 'Australia Rising to a Better Future' (Speech delivered at the Millennium Forum, Sydney, 20 August 2007) <<http://pandora.nla.gov.au/pan/10052/20080118-1528/pm.gov.au/media/Speech/2007/Speech24507.html>> at 3 August 2008.

models for health, education, employment and welfare services have become increasingly obsolete'.²⁰

A transformative engagement with Commonwealth–State relations has been among the Howard Government's most significant but least expected activities. Prognosticators looking ahead in March 1996 might well have predicted that a long-surviving Howard Government would leave a significant impression in a number of policy domains: industrial relations, taxation, foreign relations, trade, privatisation and some other well-signalled interests. But a realignment of Commonwealth–State relations was not an obvious future focus.²¹

Equally surprising was the role of COAG in negotiating a great number of these transformative changes. COAG began its existence as an instrument of 'cooperative federalism' but under Prime Minister John Howard became more a vehicle for 'cooperative centralism'. COAG was not high on John Howard's agenda when he took office in 1996. Looking back at the first two terms of the Coalition Government, Galligan and Wright²² observed that 'the Howard Liberal coalition elected in 1996 has been unconcerned with federalism, showing little interest in (and giving no leadership to) COAG'.²³ COAG was not John Howard's creation and it appeared that he had no great commitment to its continuing success or faith in its capacity to deliver significant intergovernmental cooperation. For example, the introduction of uniform gun laws in 1996, which Painter²⁴ describes as the 'most dramatic case of intergovernmental cooperation for some time', saw COAG 'relegated to the role of a bystander', a consequence of the 'personal style and preference' of Prime Minister Howard.²⁵

III COAG RETURNS TO CENTRE STAGE

By the end of the Howard decade COAG meetings were no longer the realm of bystanders; rather, they were being described by the media as 'love-ins', with State Premiers privately conceding that they were enjoying the best political relationship with Canberra in a century.²⁶ This fulsome praise has much to do with the politics of a Liberal National Coalition at the Commonwealth level co-existing with eight State and Territory Labor Governments.²⁷ However, of greater importance was the imperative of economic management in a rapidly developing federation and the need to fashion a national response to the threat of terrorism.

The economic pressures of globalisation, which necessitated a more competitive Australian economy, had been a significant feature of Australian

20 Ibid.

21 Parkin and Anderson, 'Regulatory Federalism', above n 14.

22 Brian Galligan and John S F Wright, 'Australian Federalism: A Prospective Assessment' (2002) 32 *Publius: The Journal of Federalism* 147–66.

23 Ibid 153.

24 Painter, above n 11, 190.

25 Ibid 190.

26 Australian Broadcasting Corporation, 'State Leaders Praise COAG Cooperation as a Success', *PM*, 14 July 2006 <<http://www.abc.net.au/pm/content/2006/s1687251.htm>> at 3 August 2008.

27 This aspect of COAG's return to prominence is discussed below.

politics since the float of the Australian dollar in 1983. Such pressures had certainly not diminished by the time the Howard Government came to power. Globalisation poses a special challenge for federal systems of government.²⁸ For example, during the latter part of the 1970s and 1980s the States took advantage of the globalisation of finance, directly accessing foreign capital markets and circumventing the national borrowing strategies agreed to at the Loan Council.²⁹ Discussing the development of COAG as the major institution for Commonwealth–State relations, Galligan and Wright argue that ‘[t]he pressures of globalisation on the Australian marketplace necessitated greater efficiency in government service delivery and hence better relations between the state and the Commonwealth governments in coordinating policy’.³⁰ The policy which the Commonwealth wished to pursue was one of eliminating the constraints to greater efficiencies in existing markets and the extension of markets to areas of the economy that were regulated or dominated by monopoly government enterprises. However, Australia’s federal structure and regulatory environment raised additional challenges to the efficient and unfettered operation of markets, particularly the array of constitutional constraints and State-based regulations which restricted competition, and the proliferation of special competition policy exemptions for particular industries and occupations.³¹

The States had to be part of the reform process, as former Prime Minister Hawke recognised in his 1991 Ministerial Statement to the Parliament, entitled ‘Building a Competitive Australia’:

But there are many areas of the Australian economy today that are immune from that Act: some Commonwealth enterprises, State public sector businesses, and significant areas of the private sector, including the professions. This patchwork coverage reflects historical and constitutional factors, not economic efficiencies; it is another important instance of the way we operate as six economies, rather than one.³²

While the Commonwealth did not initially embrace the States, COAG came to be ‘representative of a Commonwealth attempt to collaborate with the states’,³³ and ultimately was the means to cooperatively advance the competition policy agenda, in particular National Competition Policy (‘NCP’).³⁴ However, by the third term of the Howard Government social or human capital had become a

28 John M Kline, ‘Australian Federalism Confronts Globalisation: A New Challenge at the Centenary’ (2002) 61 *Australian Journal of Public Administration* 27, 27.

29 Ibid 28.

30 Galligan and Wright, above, n 22, 153.

31 Commonwealth, *National Competition Policy: Overview and Assessment* (1994) <<http://parlinfoweb.aph.gov.au/piweb/Repository1/Library/PrsPub/IBL1013.pdf>> at 3 August 2008.

32 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 1991, 1761 (Robert Hawke, Prime Minister) cited in John Kain, Indra Kuppuru and Rowena Billing, *Australia’s National Competition Policy: Its Evolution and Operation* (2001) Australian Parliamentary Library <http://www.aph.gov.au/library/intguide/econ/ncp_ebrief.htm> at 3 August 2008.

33 Galligan and Wright, above n 22, 153.

34 Council of Australian Governments, *Communiqué*, 11 April 1995 <http://www.coag.gov.au/coag_meeting_outcomes/1995-04-11/index.cfm#competition> at 3 August 2008.

more mainstream concept in public policy and, in particular, discussions of economic policy and strategies for economic growth. As NCP drew to a close, there was acceptance that the quality of Australia's human capital would drive the next wave of productivity improvement. In 2006 COAG agreed to a new National Reform Agenda which merged human capital and regulation as priority areas for reform alongside competition.

The debate leading to this initiative derived in part from the discussion of the problems of an ageing population, which found expression in the Intergenerational Report released by the Commonwealth Government as part of the 2002–03 Budget papers.³⁵ In political terms the focus was on means to improve participation and productivity. For example, in 2002, Federal Treasurer Peter Costello expounded what he called the 'law of the 3 Ps', or the factors that contribute to GDP growth: population (in particular, the working age population), participation and productivity. According to Treasurer Costello, the Intergenerational Report 'provides a useful framework for thinking strategically about the medium to long term challenges to continued good economic performance'.³⁶

The obvious need to engage the States, particularly in regard to health, education and training ensured that COAG would play a role. And so the Communiqué following COAG's meeting in February 2006 announced 'an ambitious partnership' of all governments to 'achieve the level and breadth of progress our nation needs'.³⁷

The importance of engaging with the States was clear from interviews with Commonwealth officials. Interestingly, the Treasurer's 'law of the 3 Ps' had become part of the narrative:

[The] aging of the population and the implications of that has caused people to focus down on the three P's. We can't do much about the population but we can possibly do something about productivity, we can do something about participation. [This led] to the development of the so called National Reform Agenda ... and of course prior to that there was inter generational report ...*the Commonwealth needed to get together with states and territories, we needed to revitalize the productivity agenda and we needed to do something on the human capital side* to improve the participation [and] offset some of the other effects of ageing.³⁸

The Commonwealth also needed to ensure that it was not left behind by the States. The determination of the states to take the initiative is highlighted by the initiative taken by the Victorian government and former Victorian Premier Steve

35 Commonwealth, *Budget Paper No 5: Intergenerational Report 2002–03*

<<http://www.budget.gov.au/2002-03/bp5/html/index.html>> at 3 August 2008.

36 Peter Costello, 'The Paths to Increasing Australian Prosperity' (Speech delivered at the Australian Financial Review Luncheon, Sydney, 7 August 2002)

<<http://www.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2002/004.htm&pageID=005&min=phc&Year=2002&DocType=1>> at 3 August 2008.

37 Council of Australian Governments, *Communiqué, 10 February 2006: Human Capital* (2006) COAG <http://www.coag.gov.au/coag_meeting_outcomes/2006-02-10/index.cfm> at 3 August 2008.

38 Interview with Peter Costello, Commonwealth Treasurer (Canberra, 1 August 2007) (emphasis added).

Bracks to facilitate agreement at COAG to a 'third wave' of reform.³⁹ The Victorian proposal also dealt with tax reform and increased spending on infrastructure, but at the centre of what Premier Bracks described as the 'new economy' were improvements in literacy, numeracy and a greater emphasis of preventative medicine. The Victorian efforts led to the Report of the COAG National Reform Initiative Working Group, appropriately titled 'Human Capital Reform', which entrenched the view of human capital as a key component in a new national reform agenda to enhance productivity and participation. The priority areas were identified as health, education and training, and work incentives.⁴⁰ This put State government responsibilities firmly at the centre of what the Prime Minister described as a 'mammoth' reform agenda.⁴¹

The importance of a third and later a fourth term government being seen to be engaged on reform should not be underestimated. The first two terms of the Howard Government had been marked by a major redesign of the tax system through the introduction of a broad based consumption tax and the continuation of micro economic reform. However, as the Government matured it was more likely that a reform agenda would intersect with the responsibilities of the States.

This point was made in one interview with a senior Commonwealth official who reflected on the changes in intergovernmental relations over the decade of the Howard Government:

[Given] the time this government has been in power, that more and more of the immediate things they wanted to do have been achieved and then so what's left to be done, and the longer the ministers have been there the more frustrated they become it seems to me about the division of responsibilities in our federation... as a government gets older and gets wiser [the] more the ministers can see what needs to be done and in the federation such as Australia the only way you're going to change things is to work with states and territories.⁴²

It may have taken some time for the Howard Government to recognise that it needed to engage with the States to achieve economic and social reform. However, the constitutional necessity of joint action was far more obvious when Australia needed to respond to the growing threat of international terrorism.

The terrorist attack on New York and the Pentagon on 11 September 2001, the Bali bombings in 2002 and 2005, and the London transport system bombings in July 2005 dramatically changed attitudes in Australia to the prevention of terrorism. All governments recognised that a national strategy was an essential basis for an effective response. In legislative terms this meant that the

39 Victoria, *A Third Wave of National Reform: A New National Reform Initiative for COAG: The proposals of the Victorian Premier* (2005)

<[http://www.dpc.vic.gov.au/CA256D800027B102/Lookup/A_Third_Wave_of_National_Reform_OVERVIEW/\\$file/A%20Third%20Wave%20of%20National%20Reform%20-%20Overview.pdf](http://www.dpc.vic.gov.au/CA256D800027B102/Lookup/A_Third_Wave_of_National_Reform_OVERVIEW/$file/A%20Third%20Wave%20of%20National%20Reform%20-%20Overview.pdf)> at 3 August 2008. See also Paul Austin, 'Bracks Urges Radical National Reform' *The Age* (Melbourne) 15 August 2005, 1.

40 Council of Australian Governments, *Report of the COAG National Reform Initiative Working Group* (2006).

41 Steve Lewis, 'PM Seals Historic Pact with Premiers' *The Australian* (Sydney), 15 July 2006, 1.

42 Interview with Peter Costello, above n 38.

Commonwealth needed the States and, to some extent, the States could flex some political muscle.

Interviews with the Prime Minister, when he announced a special COAG meeting on Counter-Terrorism, demonstrate the way in which proposed anti-terrorism legislation tapped into a latent willingness to engage with the States through the COAG process. Howard stated, 'I want to go into the meeting in a cooperative spirit ... I will bring total goodwill and a total spirit of cooperation to the meeting'.⁴³

The result was a special meeting of COAG which 'noted the importance of a consistent and co-ordinated response by Commonwealth, State, Territory and local government at the onset of any national emergency'.⁴⁴ It also set up National Emergency Protocols, to ensure 'consistent and co-ordinated response by Commonwealth, State, Territory and local government'. Most significantly,

State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days and stop, question and search powers in areas such as transport hubs and places of mass gatherings.⁴⁵

The Prime Minister later invoked the *Constitution* to defend himself against suggestions that the Commonwealth was not moving quickly enough to implement the results of the agreement at COAG:

[W]e cannot pass this legislation credibly without the support of the states, because we do not have the constitutional power. And that's why I approached the states ... in this country we have a written *Constitution* that gives particular powers to the Federal Government and the residue of the powers stay with the states; that's the way the *Constitution* works. And in some of these areas, particularly in the area of preventive detention, there's no constitutional power for us at a Commonwealth level acting unilaterally to detain somebody effectively for more than 48 hours. So if you're going to retain them for 14 days you need the states involved ... I haven't ever put a deadline. When you need the support of the states, and when you know that you can't fully do it from a legal point of view without the support of the states, you don't set that line.⁴⁶

In the face of this constitutional reality the Prime Minister became an ardent federalist, a position that was perhaps at odds with his later exposition of 'aspirational nationalism'.⁴⁷ However, the key point is that it was to COAG that the Prime Minister turned when he needed a vehicle for bringing about the cooperation he believed he needed, and for gaining agreement on nationally consistent laws (which also gave more power to the Commonwealth). In this respect, by being the means of developing new collaborative arrangements,

43 John Howard, 'Transcript of Press Conference', Parliament House, Canberra, 5 August 2005 <<http://pandora.nla.gov.au/pan/10052/20080118-1528/pm.gov.au/media/Interview/2005/Interview1495.html>> at 3 August 2008.

44 Council of Australian Governments, *Communiqué*, 27 September 2005 <http://www.coag.gov.au/coag_meeting_outcomes/2005-09-27/index.cfm> at 3 August 2008.

45 Ibid.

46 Laurie Oakes, Interview with John Howard, Prime Minister of Australia (Sydney, 30 October 2005) <http://sunday.ninemsn.com.au/sunday/political_transcripts/article_1901.asp> at 3 August 2008.

47 Howard, above n 19.

COAG under John Howard has overseen the creation of new regulatory regimes that provide for national governance across a range of domains in which the States previously took the lead.⁴⁸

IV THE USEFULNESS OF COAG

While John Howard came to realise that major policy issues required the cooperation of the States and that COAG meetings were an appropriate and effective means to gain that cooperation, there were a number of other factors stemming from the political environment of the Howard years that gave impetus to the move of COAG back to centre stage.

The implementation of the new Goods and Services Tax ('GST') from July 2000 radically changed the fiscal relationship between the Commonwealth and the States by channelling all of the GST revenues to the States. This arrangement was not part of the original policy rationale for the 'new tax system'. The Howard Government's case for tax reform was based mainly on a claimed need for a re-balancing between indirect consumption taxes and direct income taxes.⁴⁹ Using the GST to replace unconditional Commonwealth grants to the States was a masterly piece of policy design.

It also abolished the need for Premiers' Conferences, 'tossing what had seemed to be an entrenched annual political ritual – Premiers waiting in turn to express outrage, for the benefit of back-home TV coverage, at the Commonwealth's wicked parsimony – into the dustbin of history'.⁵⁰ The result is that the end of heads of government meetings exclusively focused on revenue sharing has created 'space' for a focus on policy issues. As a senior Commonwealth public servant put it, the removal of the financial debate has 'taken a lot of noise out of the system'.⁵¹ It has not, of course, removed the opportunity for State leaders to make use of a national forum and the presence of the national press gallery to put forward a political view. However, the major role of Premiers' Conferences was essentially a political one.⁵² The broader and more formal agenda of COAG has meant that heads of government must match their political commentary on issues of concern with a focus on agreement and decisions. Evidence of the changed status of COAG is also found in the importance with which its meetings are regarded by peak business groups such as the BCA, and the potential those groups see for it to become a key institution for reforming Commonwealth–State relations.⁵³

48 Parkin and Anderson, 'Reconfiguring the Federation?', above n 14, 107. See also Andrew Parkin, 'COAG' in Brian Galligan and Winsome Roberts (eds) *The Oxford Companion to Australian Politics* (2007) 108–9.

49 Alan Fenna, 'Tax Policy' in Andrew Parkin, John Summers, Dennis Woodward (eds), *Government, Politics, Power and Policy in Australia* (2006) 439, 450.

50 Parkin and Anderson, 'The Howard Government', above n 14, 298.

51 Interview with Peter Costello, Commonwealth Treasurer (Canberra, 1 August 2007).

52 Sharman, above n 10.

53 Business Council of Australia, above n 7. The BCA set out detailed recommendations for the reform of federalism which centred on an enhanced role and greater authority for COAG.

As the character of the meetings of heads of government within the federation changed, the political character of federalism moved into uncharted territory following the election of the Rann Government in South Australia in February 2002. This result meant that the Federal Coalition faced eight Labor State and Territory governments. While it might have been thought that this would lead to disagreement and stand-offs between the two levels of government, it in fact led to very public displays of mutual admiration and the characterisation of COAG meetings as 'love-ins'.⁵⁴ The COAG meeting coincided with what was seen as a move by Treasurer Peter Costello to position himself to challenge John Howard. It was clearly useful for the States to align themselves with the Prime Minister and perhaps accentuate their political opponent's problems. Equally, there were advantages for the Prime Minister. More generally, COAG provides Premiers and the Prime Minister alike with the opportunity to practice bi-partisan statesmanship. This was politically beneficial. Labor Premiers gained an advantage over their State Liberal opponents by sharing the limelight with the Commonwealth Liberal Prime Minister. Similarly, the Prime Minister was quick to use his agreements with the Premiers against the then Opposition Leader Kim Beazley.

Above all, COAG proved to be a useful political forum. Its role suggests that the forms and language of international relations, in particular the role of 'the summit', is a useful metaphor to explain the growing importance of its meetings within Australian politics. And the term 'summit' is a standard description of COAG meetings by the media and also often used by leaders of all jurisdictions when they seek to elevate the importance of particular issues at COAG meetings.⁵⁵

Summits by their very nature involve rites of leadership and their key element is executive participation to bring about diplomacy at the highest level.⁵⁶ Just as international summits have a powerful domestic political role for their participants, the federalism summit, which it is suggested COAG has come to represent, is politically useful for its members, in particular because it provides legitimacy for problematic decisions and actions.

Both levels of government have found that decisions made in the summit-like atmosphere of COAG can provide cover for decisions that otherwise might cause political problems if adopted unilaterally. Interviews with State officials highlighted this usefulness:

54 Australian Broadcasting Corporation, above n 26.

55 Geoff Anderson, 'The Council of Australian Governments and the politics of summitry' (Paper presented at the Public Policy Network Conference, Adelaide, 1–2 February 2007) <<http://www.soecsi.flinders.edu.au/fippm/ppnsummerconference2007/>> at 4 August 2008.

56 John Kirton, 'Explaining G8 Effectiveness: A Concert of Vulnerable Equals in Globalizing World' (Paper presented at the Annual Convention of the International Studies Association 17–20 March 2004) 7 <www.g8.utoronto.ca/scholar/kirton2004/kirton_isa_040304.pdf> at 4 August 2008.

[I]n a way they could argue that on one hand they were being forced into a decision but on the other hand if they didn't take any part they would be left out completely. So the COAG discussions, the national discussions were used as a mechanism to drive through decisions that were difficult in each individual State ... COAG provides the cover of other jurisdictions.⁵⁷

The usefulness also extends to the media who are naturally attracted to the sound and fury of 'political summits'. They provide colour, immediacy and content, textually and pictorially, for news broadcasts. COAG has also been packaged as a media friendly event, particularly through the device of a 'Communiqué'. Analysis of media references to COAG shows a significant increase in the attention paid to COAG meetings and deliberations after 2002. In major metropolitan newspapers the references to COAG increased more than seven-fold between 2001 and 2006.⁵⁸ Interestingly, the use of the term 'summit' in the context of reports concerning COAG shows a similar sharp increase.⁵⁹ The former Premiers' Conferences had sound and fury; however, the expansion of the agenda of COAG meetings well beyond fiscal issues has made them much more newsworthy. It is not unrealistic to say that for the media they have come to embody federalism.

V COAG AT THE CENTRE: ENTRENCHING EXECUTIVE FEDERALISM

Sharman characterises executive federalism as 'the channelling of intergovernmental relations into transactions controlled by elected and appointed officials of the executive branch'.⁶⁰ He then argues that the combination of a federal division of powers and a parliamentary system in which the Executive is dominant has given rise to a particular form of executive federalism which, in Australia, 'integrates all of the agencies of each government into a single hierarchy with the executive at its apex'.⁶¹ Underneath the media glare that surrounded its meetings, COAG developed a system of working parties and committees of officials that created new bureaucratic networks across State borders encompassing both central and line agencies at both levels of government. One official, describing the widespread locations for the work being undertaken and the large number of people involved, referred to it as the development of a 'nascent bureaucracy of the federation'⁶² feeding information through the chief executives of first ministers departments (known as the Senior Officers Meeting ('SOM')) to the formal COAG meetings. In many respects this is not unlike a process through which a central agency develops policy proposals for a Cabinet. In this sense COAG has entrenched executive federalism while

57 Interviews with anonymous State officials (Sydney, 29 May 2007 and Adelaide, 29 August 2007).

58 Anderson, above n 55.

59 Ibid.

60 Sharman, above n 10, 25. In setting out this description of executive federalism, Sharman cites D V Smiley, *The Federal Condition in Canada* (1987).

61 Ibid.

62 Interview, above n 13.

also playing the part of the executive at its apex. However, the greater resources of the Commonwealth and its dominant role in setting the agenda for COAG meetings has inevitably meant that the bureaucracy supporting COAG would take its lead from the centre. This suggests that the form of executive federalism that COAG has fostered is one which has supported greater centralisation within the federation.

COAG has also given impetus to executive federalism by providing a rationale for a much more powerful role of central agencies in policy development across all levels of government. In part this reflects the primacy of a 'whole of government' approach to policy issues. Under the Howard Government the Commonwealth had a preference for central agencies to take the lead and used the COAG SOMs to drive a single and centrally coordinated response from the States. More fundamentally, the Commonwealth also believed that progress towards reform is harder at the functional level. There was a view from the central agencies in Canberra that State bureaucrats' sole reason for existence was to stop change that affected their area of responsibility or their powers.⁶³ These attitudes found institutional expression in the subordination of the role of Ministerial Councils.⁶⁴ However, the move to put limits on the role of Ministerial Councils was equally an initiative of the States and driven by central agencies, particularly State Treasuries who objected to their line agencies concluding financial deals with their Commonwealth counterparts that left the States with ongoing financial commitments.⁶⁵ There were, however, advantages for the central agencies of the States. As a Commonwealth official conceded, 'COAG has really given central agencies in the States a sort of an entree into policy making at the national level that was formerly denied to them'.⁶⁶

The COAG arrangements have in turn had an impact on the way the States have structured their agencies. Davis⁶⁷ has described the moves to upgrade federal and State coordination capacity as resulting in the realisation that to be an effective player in State-federal negotiations, State governments needed more sophisticated internal coordination skills. This process began with the Greiner Government in New South Wales; it then occurred in Queensland under the Goss Administration and was followed by the Bracks Government in Victoria. Most recently South Australia, following advice by a Government Reform Commission headed by Wayne Goss, has gone down the same path. In announcing the revamp of his Department, Premier Mike Rann made it clear that coordination across the whole of government was a key objective: a 'powerful

63 Ibid.

64 Linda Courtenay Botterill, 'Managing Intergovernmental Relations in Australia: The Case of Agricultural Policy Cooperation' (2007) 66 *Australian Journal of Public Administration* 186, 186.

65 Interview, above n 13.

66 Ibid.

67 Glyn Davis, 'Carving Out Policy Space for State Government in Federation: The Role of Coordination' (1998) 28 *Publius: The Journal of Federalism* 147, 147.

and influential Cabinet Office was essential to perhaps the single most important goal in 2006 – and that is the achievement of “whole of government” results’.⁶⁸

VI FROM HOWARD TO RUDD

The first Budget of the Rudd Labor Government confirmed the central role of COAG in ‘driving a new wave of economic and social reform through cooperative federalism’.⁶⁹ Commonwealth and State Treasurers would now attend more regular COAG meetings, with four meetings planned for 2008. Commonwealth Ministers have already convened and chaired working parties of Commonwealth and State officials – note, *officials* and not other Ministers – to develop a work agenda of economic and social reforms which essentially mirror the election commitments of the new Commonwealth Government.⁷⁰ Sub-groups of Commonwealth and State officials are working on specific issues referred to them from the working parties and meetings of the heads of the Commonwealth; State and Territory Treasuries (known as ‘HOT’ for ‘Head of Treasuries’) have joined the SOM as coordinating mechanisms for the bureaucratic efforts which support COAG meetings.

Kevin Rudd has in effect formalised what John Howard grudgingly recognised: that significant reform has to involve action by the States. The policy areas covered by the COAG Working Groups make this clear: health and ageing, the productivity agenda of education, skills, training and early childhood, climate change and water, infrastructure, business regulation, housing and reform of Indigenous affairs, and service delivery by the States and Territories. However, the new structures and arrangements that the new Prime Minister has put in place also serve to reinforce the dominance of the Commonwealth in the new cooperative approach.

The elevation of COAG to a central role reflects the new Government’s rhetoric of cooperative federalism; the underlying process, however, remains cooperative in the sense of implementing national objectives and the power of the central government to set those objectives is undiminished. The regulatory federalism inherent in the conditions that are applied to SPPs is being made more flexible but no less rigorous and certainly does not imply any sense of devolution.

‘If you change a government you change the country’ is an aphorism that has gained bipartisan acceptance. Clearly, though, there is little change to the centrality of COAG in regulating the policy agendas and program delivery performance of the States. COAG certainly has become an institution for national governance, but it is likely to play out this role in a conditional federation regulated from the national level. The cooperative centralism that was the effect

68 Premier Mike Rann, ‘Announcement of Government Reform Commission Measures’ (Speech delivered to the Institute of Public Administration Australia, 7 December 2007).

69 Commonwealth, above n 12, 11.

70 Ibid 12.

of the COAG process under John Howard is unlikely to diminish under Kevin Rudd. If indeed the new Government's cooperative rhetoric results in a more centralist course, it will be one of the ironies of Australian political history that its capacity to do so was enhanced by the nominally conservative Howard Government that preceded it.⁷¹

71 Parkin and Anderson, 'Reconfiguring the Federation?', above n 14, 110.